The Yale Law Journal

Volume 86, Number 3, January 1977

Suburban Growth Controls: An Economic and Legal Analysis*

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* I would like to acknowledge my debt to Bruce A. Ackerman, Allan Axelrod, Scott H. Bice, William M. Landes, Michael E. Levine, Richard A. Posner, and Larry G. Simon for their vigorous criticism of various drafts of this article. Needless to say, they do not necessarily subscribe to all of it.

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Introduction

Suburban governments are becoming ever more adventuresome in their efforts to control housing development. Some have imposed temporary moratoria on new growth. Others have adopted quotas on residential construction or subjected developers to exotic taxes or charges. Controversy over these devices has pushed a fistful of small towns into the national spotlight: Petaluma, California; Black Jack, Missouri; Ramapo, New York; Mount Laurel, New Jersey.[1]

Because state legislatures have placed few tethers on municipal efforts to limit growth, courts have felt compelled to shoulder the burden of guarding against suburban abuses. The thousands of lawsuits brought by land developers[2] (and on occasion civil rights groups[3]) to challenge growth controls, however, have yet to yield a coherent set of legal doctrines for limiting the range of municipal discretion. As an initial matter, there is no consensus on how courts should deal with challenges to specific suburban strategies like large-lot zoning, the exaction of park land from subdividers, and moratoria on sewer connections. Even the most thoughtful judicial opinions and academic commentaries on these issues have placed insufficient emphasis on their interconnectedness. As a result, a complicated and confusing case law has evolved into a series of irrational pigeonholes. Current ambiguities frustrate both land developers, who are uncertain what they may do, and suburban officials, who are uncertain what they may stop. This article seeks to help remedy the current confusion. Specifically, it employs economic and legal analysis in an attempt to establish a comprehensive set of legal doctrines defining the rights of suburbs, landowners, and housing consumers. It also sets out the remedies that should be available to each group when those rights are violated.

Part I introduces and develops the relationships among the devices local governments use to limit new housing construction. Economic analysis is used to show their potential impact on housing prices and

1. I can offer two hypotheses to explain why urban growth issues are now arousing more political controversy than before. First, the 1970s have been marked by sharply increased concern about environmental conditions generally. Second, the postwar baby boom has reached the household-formation stage. The resulting increase in demand for housing will probably make the 1970s a recordbreaking decade for housing production.

2. From 1972 to 1975, the growth-control program of Fairfax County, Virginia, triggered 231 state court suits. Wash. Post, June 17, 1975, § C, at 1, col. 5.

3. *E.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

the amount of housing built. Part II illustrates how the incidence of the benefits and burdens of growth controls combines with the political structure of suburban municipalities to create a bias against growth. The upshot is that suburban homeowners (if unconstrained) will behave like a profit-maximizing cartel.

The next six Parts invoke economic theory to determine what legal entitlements among local governments, landowners, and housing consumers are most likely to promote efficiency and fairness. Part III initiates this endeavor by applying an analytical scheme created by Calabresi and Melamed to identify the set of legal issues that must be decided to structure a comprehensive law of growth controls. Part IV is mainly devoted to explaining a new approach for deciding when a governmental restriction on the use of private land constitutes a taking of property. Part V introduces economic models of suburban housing markets to explore the legal implications of the possibility that suburbanites may want to monopolize housing supply. The tentative legal conclusions of this Part are refined in Parts VI and VII, which analyze two complicating factors: that urban growth may result in excessive congestion and that current residents of a suburb may suffer fiscal burdens from new development. Part VIII summarizes the comprehensive legal approach that this analysis has generated and shows how it might be grounded in constitutional doctrine.

The last portion of the article is somewhat more conventional. Part IX is a detailed discussion of the law of subdivision exactions and other development charges; Part X, of the law of zoning, quotas, moratoria, and other mandatory restrictions on development. Hypothetical controversies are posed in both Parts to illustrate the recommended approach and to contrast it with the disparate doctrines the courts now employ.

A central conclusion is that the current case law is consistently miscarrying on the issue of remedy. Most courts confronting growth-control controversies apparently assume that they have a choice only between two rather unappealing courses of action. If they defer to restrictive municipal enactments, they must be willing to stomach obvious inequities and misallocations of resources. If they require suburbs to undertake affirmative steps to accommodate unwanted housing, they become embroiled in experiments in social engineering that inevitably involve awesome administrative complexities. The courts are mistaken, however, to think they face this Hobson's choice. This article will suggest that another course of action—the granting of damages to landowners and consumers—is usually the best way to ensure that suburbs do not misuse land-use controls.

I. The Economic Effects of Various Municipal Strategies to Limit Housing Construction

A. *The Panoply of Growth Controls*

Imagine the City of Eden, a predominantly undeveloped suburban municipality situated squarely in the path of metropolitan expansion. If there were no limitations on municipal power,[4] what might Eden officials do to slow, if not stop, the tide of development?

Most obviously, Eden could simply ban forever the construction of new housing units within its boundaries. Local governments in the United States have not been quite this bold, presumably because they have been advised that a permanent development ban would likely be held an unconstitutional taking of undeveloped land. Eden officials therefore can be expected to fall back on more indirect controls. Instead of a ban in perpetuity, they could impose a moratorium on development by delaying consideration of all applications for, say, subdivision map approvals, utility hook-ups, or building permits.[5] A related strategy would be to establish quotas on the number of these approvals. The city of Petaluma, California, for example, has adopted a "periodic quota" that allows developers to construct an average of only 500 new dwelling units each year.[6] The Boulder, Colorado, electorate considered (but rejected) a ceiling of 100,000 on the city's population.[7] Voters in Boca Raton, Florida, have set 40,000 as the maximum number of housing units, ever, for that city.[8] The balance

4. To simplify the scope of the discussion, it will be assumed that states have delegated to local governments plenary authority to control land use. The reach of local authority under enabling acts or home-rule provisions is, of course, often a central issue in land-use cases.

5. Moratoria have become remarkably popular recently. A 1973 survey found that approximately 20% of responding counties and cities had imposed some type of moratorium in the preceding two years. Rivkin, *Growth Control via Sewer Moratoria*, 33 URB. LAND, Mar. 1974, at 10, 12. Concern about overloaded sewerage facilities is reported to have sparked moratoria by about 100 New Jersey localities during 1972-74. N.Y. Times, Oct. 20, 1974, § IV, at 9, col. 1.

6. *See* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 901 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). The 500-unit figure applies only to buildings or subdivisions that have five or more units. Other California municipalities have reportedly followed Petaluma's lead. *See* L.A. Times, Feb. 24, 1976, § 1, at 1, col. 5.

In November 1976 voters in Boulder, Colorado, narrowly approved an initiative measure that established a Petaluma-type quota system for their city. Daily Camera (Boulder), Nov. 21, 1976, at 1, col. 3.

7. A city charter amendment that would have imposed this ceiling was defeated in a referendum. *See* 60 GEO. L.J. 1363, 1363 n.1 (1972).

8. Boca Raton, Fla., No Growth Referendum (Nov. 7, 1972) (codified in BOCA RATON, FLA., CITY CHARTER § 7.05 (1977)). *Cf.* Livermore, Cal., Ordinance 767 (Dec. 13, 1971) (future residential building permits limited to 1,500 total units until new sources of

left to be built must suffice for all time and thus represents a "blanket quota."

Instead of placing numerical restrictions on the supply of housing, Eden might impose burdensome development standards to inhibit housing construction. Many American suburbs employ severe zoning restrictions on mobile homes, apartments, and modest single-family houses. These measures may be supplemented with onerous design specifications in subdivision ordinances and building codes. Eden can also raise the costs of supplying housing by levying development charges. These fees may be made either payable in cash—as in the case of building permit fees, connection charges, or construction taxes —or payable in kind, as when a subdivision approval is conditioned on the dedication of completed tangible improvements.

Rather than raising the costs of supplying housing, Eden might instead choose to limit growth by dampening demand. Thus some suburbs have begun to specify the age[9] and family[10] characteristics of households permitted to reside in various neighborhoods.

Eden's remaining basic alternative for limiting its growth is to acquire the development rights of landowners, either through eminent domain or through arms-length purchases.[11] Municipal acquisition of greenbelts and open-space easements by both these means is not unknown in the United States.[12] It should not be surprising, however,

water become available). A Florida court has held the Boca Raton scheme violative of state and federal guarantees of substantive due process. Bocas Villas Corp. v. Pence, No. 73-106-CA-(L)-01-F (Cir. Ct. of Palm Beach County, Fla., Oct. 1, 1976) (Schotts, J.).

9. *See, e.g.*, Duggan v. County of Cook, 60 Ill. 2d 107, 116, 324 N.E.2d 406, 411 (1975) (condition in special-use permit that families with children can occupy no more than 25% of development's units violated state's public policy); Shepard v. Woodland Township Comm. & Planning Bd., 71 N.J. 230, 364 A.2d 1005 (1976) (sustaining zoning amendment restricting residency to persons aged 52 and over); Taxpayers Ass'n v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016 (1976) (upholding ordinance that limited residency in trailer park to families headed by person aged 52 or older).

10. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (sustaining ordinance barring dwelling occupancy by three or more persons not related by family); City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966) (similar ordinance beyond authority delegated to city); Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 251-54, 281 A.2d 513, 518-20 (1971) (similar ordinance denied substantive due process in violation of [state?] constitution).

11. These two approaches differ only when a landowner subjectively values his land at more than its market value. In an arms-length transaction, he would then insist on a price greater than market value—the usual measure of compensation in eminent domain proceedings.

For discussion of a related technique—the purchase of personal rights to reside—see note 70 *infra*.

12. *See generally* W. WHYTE, THE LAST LANDSCAPE 78-101 (1968); W. WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS (Urban Land Inst. Tech. Bull. No. 36, 1959); Jordahl, *Conservation and Scenic Easements: An Experience Resume*, 39

that the two acquisition devices have proven to be relatively unpopular. Local officials who desire reelection will normally refuse to pay to stop development if they can stop it without expending tax revenues or, better yet, convert the pressures for urban growth into an opportunity for community, or even personal, fundraising.

B. *The Economic Consequences of Growth Controls*

To be able to predict what specific strategies suburbs will pursue and to devise legal doctrines to limit their excesses, one must understand the effects of the various antigrowth devices. This section employs some basic tools of economic analysis to illustrate what specific growth controls can do and to demonstrate how the effects of seemingly unlike devices may be quite similar. Specifically, this section examines the allocational effects of growth controls (their impacts on the price and quantity of housing) and their distributional effects (their impacts on the wealth of different classes of individuals). This economic analysis, together with the political analysis in Part II, lays the foundation for the legal analysis that begins in Part III.

To facilitate this initial discussion, several simplifying assumptions will be made about the Eden housing market. The first deals with the conditions of housing supply. Housing services are derived both from existing units and, to a much lesser extent, from new production.[13] The ensuing analysis postulates, not unrealistically, that both new and used housing are neither perfectly elastically nor perfectly inelastically supplied in Eden and that used housing, because it already exists, is somewhat more inelastically supplied than new housing.[14] Second, on the demand side, it is assumed that consumers do not discriminate between new and used housing units of identical quality

LAND ECON. 343 (1963). The "public use" requirement for exercise of eminent domain powers poses no barrier here. *See, e.g.*, Kamrowski v. State, 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

13. On a national basis, new housing production (measured in dwelling units) equals only 2-3% of the standing stock in a typical year. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 711, 716 (1975) (compare Table Nos. 1212 & 1223).

14. Elasticity of supply is the name given to the quotient derived by dividing the proportionate change in quantity supplied in response to a given price change by the proportionate change in price. The larger the quotient, the greater the elasticity. Muth estimates the long-run elasticity of supply of housing to be 5.5. Muth, *The Demand for Non-Farm Housing*, in THE DEMAND FOR DURABLE GOODS 27, 42-46, 50 (A. Harberger ed. 1960). *See also* de Leeuw & Ekanen, *The Supply of Rental Housing: Reply*, 63 AM. ECON. REV. 437 (1973); Grieson, *The Supply of Rental Housing: Comment*, *id.* at 433.

The supply of used housing, measured in standard house equivalents, *see* p. 393 *infra*, is far from perfectly inelastic because a housing owner can make improvements and alterations and also vary his expenditures on repairs and maintenance.

and thus that one can speak of housing demand in the aggregate. For this initial discussion, the demand for housing in Eden is assumed to be rather elastic, but not perfectly so.[15] (Where housing demand is perfectly elastic—as it may well be in many small suburbs—the economic consequences of growth controls are somewhat simpler. For instance, consumers are then not vulnerable to economic injury. The dynamics of these housing markets are explored in Part V.) Third, the discussion assumes that dwelling units of varying sizes and qualities can be aggregated together and discussed as a single market. This will be done by using Muth's technique for measuring the housing services in any actual dwelling unit by computing its number of "standard house equivalents."[16] Under Muth's system, a shack might count as one-quarter of a standard house equivalent, and a mansion as six. So weighted, they can then be analyzed together. Lastly, it will be assumed initially that a socially optimal[17] package of controls on new housing production was in effect in Eden before the restriction being discussed was imposed. This final simplification permits deferral of consideration of the possible congestion costs and fiscal costs of urban growth to Parts VI and VII.[18]

15. The elasticity of demand is the quotient derived by dividing the proportionate change in quantity demanded in response to a given price change by the proportionate change in price. Muth has placed the national price elasticity of demand for housing at about —1.0. Muth, *supra* note 14, at 49-51. *See* Laidler, *Income Tax Incentives for Owner-Occupied Housing*, in THE TAXATION OF INCOME FROM CAPITAL 50, 51-52 (A. Harberger & M. Bailey eds. 1969) (estimates elasticity to be —1.5).

The amount of housing demanded in a sub-area of the national market would, of course, be more responsive to price. Consumers can avoid a housing price increase in Eden by moving to another suburb; at the national level, they would be forced either to emigrate or to substitute another commodity for housing. Generally, the fewer unique features a municipality has, the greater the elasticity of demand for housing in that municipality. *See* R. MUTH, CITIES AND HOUSING 69 (1969).

16. *See* Muth, *supra* note 14, at 27, 32-33.

17. The most rigorous economists call an outcome "suboptimal" or "inefficient" only when it is Pareto-inferior—*i.e.*, when it would be possible to move to another outcome (perhaps one involving transfer payments) that would make some people better off and no one worse off. In this article, I use the term "efficiency" in a less rigorous but more practical sense. I call inefficient any outcome involving a deadweight loss of consumer or producer surplus (terms defined in note 32 *infra*). I describe as efficient any outcome that increases the amount of surplus generated, regardless of who obtains that surplus. Some changes in policy that I describe as efficient are not Pareto-superior because they would impair the welfare of some individuals. For a lucid discussion of various usages of the term "efficiency," see B. ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW xi-xiv (1975).

18. In addition, I assume throughout the article that there is no private monopoly power over housing supply. Because the housing industry is highly atomized, this assumption is hardly farfetched. On a national basis in 1971, the top 131 firms in on-site housing produced less than 20% of the units. L. GREBLER, LARGE SCALE HOUSING AND REAL

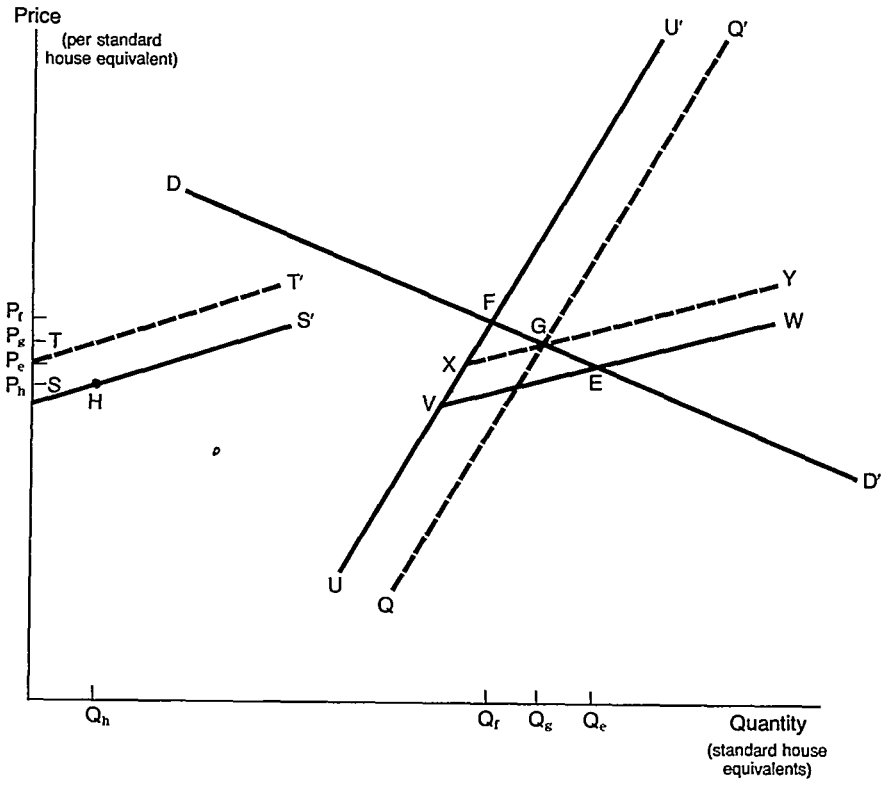
1. *Allocational Effects of Municipal Growth Controls*

If Eden were permitted to outlaw the construction of new housing forever, the price of used housing would rise and the total quantity of housing consumed in Eden would decline. The ban on new housing would, however, increase the quantity of used housing consumed in Eden as more housing owners would upgrade their units as the price of housing rose.[19] A moratorium on new development would

ESTATE FIRMS 26 (1973). Somewhat higher levels of concentration can, of course, be found in specific regional markets. There also appears to be a high degree of competition among landlords. *See* G. PETERSON, A. SOLOMON, H. MADJID & W. APGAR, PROPERTY TAXES, HOUSING AND THE CITIES 17 (1973).

19. These economic consequences, as well as many of the others soon to be narrated, are illustrated in Figure 1. *SS'* represents the supply of new housing in Eden, and *UU'* the supply of used housing. The aggregate supply curve is the horizontal summation of *SS'* and *UU'*, or *UVW*. *DD'* represents the aggregate demand for new and used housing (assumed to be perfect substitutes). *E*, the point at which *UVW* and *DD'* intersect, is the

Figure 1



have the same sorts of effects as a development ban in perpetuity, but the consequences would not be as great, and they would not last as long. Once the moratorium were lifted, unnaturally large bursts of new housing production would, in time, return the market to normal conditions. The magnitude of the moratorium's impact on housing prices and output would be a function of its duration and the number of loopholes available for escaping it.

A permanent ceiling on the number of dwelling units (as in Boca Raton) would actually promote growth as the ceiling was approached. Landowners would rush to build units before it was too late. Once reached, the ceiling would operate like a periodic quota; the quota for a period would equal the number of units demolished during the prior period.[20] The impact of a periodic quota depends on the quota level. If the quota for a specific time period restricts the quantity of new housing below the amount that would normally be supplied during that period, the quota will raise the price of both new and used housing, reduce the total quantity of housing consumed, and slightly boost the quantity of used housing consumed.[21] None of these consequences, however, would be as great as under a development ban.

Development charges often have essentially the same effects as a quota, but development charges are considerably more difficult to analyze. When a landowner makes a payment (cash or in-kind) to a municipality, the economic consequences depend, as an initial matter, on whether his land will receive any incremental municipal services as a result of the payment. For example, suppose Eden required homebuilders to pay for the municipality's costs of undergrounding utility wires in new subdivisions. In that case a homebuilder would be able

equilibrium that has been assumed to be optimal for resource allocation. Q_e, the optimal quantity of housing to be produced, would consist of some new housing, and considerably more used housing, both selling for the common price of P_e per standard house equivalent.

A permanent development ban would make UU' the housing supply curve for the Eden market. The resulting equilibrium would then be F, the intersection of UU' and DD'. As a result, the price of a standard house equivalent in Eden would increase from P_e to P_f. At price P_f, more used housing would be produced than at P_e. The total amount of housing produced and consumed, however, would fall from Q_e to Q_f.

20. By the same token, an achieved ceiling on population operates as a periodic quota based on departures during the prior period. " 'The way people actually should come in here,' said former Boca Raton councilman William Archer, Jr. in a bit of overstatement to make his point, 'would be to watch the obituaries and apply for residency as the older citizens die off.' " Wash. Post, Mar. 17, 1975, § A, at 1, col. 1, and 2, col. 2.

21. Line QQ' in Figure 1, *supra* note 19, represents a quota for the time period in question of magnitude equal to the horizontal distance between lines UU' and QQ'. This quota would produce an equilibrium of G, the intersection of QQ' and DD'. The effects on prices and quantities outlined in the text should be self-evident.

to "pass on" all of this cost in the sales price of his houses *to the extent* that homebuyers preferred to live in a pole-free subdivision. The strength of that homebuyer preference would depend on many factors, including prevailing aesthetic tastes and how undergrounding was furnished and financed in other Eden neighborhoods and in other suburbs. If the value homebuyers placed on their new benefits happened exactly to equal what the homebuilders had paid Eden, the development charges for undergrounding would injure neither homebuilders nor housing consumers.[22] Although one might observe that prices for *actual dwelling units* were higher in new, pole-free subdivisions than in older, cluttered ones, the relative prices per *standard house equivalent* would not have been affected.[23]

Because the housing market in Eden was assumed already to be at a social optimum, however, any development charge imposed by Eden would necessarily raise the costs of housing construction by more than the prospect of additional services would increase the value of that housing to consumers. This disparity is to be expected whenever a suburb places a tax on new development to raise general revenue or makes developers pay for facilities that consumers either do not value highly or can enjoy at no charge in other neighborhoods. Any excess of development charges over consumer benefits is the equivalent of an excise tax on new housing. The principal economic effects are the same as those produced by a construction quota: the price of both new and used housing rises, and new housing production declines more than the production of used housing increases.[24]

The analysis of wasteful development standards is much the same, but not entirely so. Suppose Eden's single-family zoning required lots to contain at least one-half of an acre, and that every homebuyer would bid $3,000 more for a half-acre lot than for a quarter-acre lot—the size favored by Eden developers. The larger lots would nevertheless be less efficient than the smaller ones if each one would cost a developer

22. Because the tastes of homebuyers may vary, the preferences of buyers at the margin would technically determine the effect of development charges on housing prices. To simplify the exposition, I assume that all consumers value undergrounding by the same dollar amount and thus that the demand curve for housing blessed by undergrounding is parallel to the demand curve for housing not similarly outfitted.

23. For a brief discussion of the merits of undergrounding requirements, see note 328 *infra*.

24. If homebuilders in the housing market portrayed in Figure 1, *supra* note 19, were uniformly subject to development charges that exceeded the value of benefits returned, the supply curve for new housing would shift above *SS'*—say to *TT'*. The aggregate supply curve would then be *UXY*, the horizontal summation of *TT'* and *UU'*. Figure 1 has been designed so that the new market equilibrium would be *G*; thus, the effects on price and quantity of this illustrative development charge would be the same as those produced by the quota indicated by *QQ'*.

$5,000 more to produce because of higher land acquisition and improvement costs. To the extent that a developer's costs of meeting Eden's zoning requirements would be counterbalanced by new consumer benefits (here $3,000), the lot-size requirement would not affect the supply of the *standard house equivalents* he produces. The costs of compliance that could not be recouped (here $2,000), however, would increase the cost of supplying standard house equivalents. The economic effects of the $2,000 wasted to meet the large-lot standard are much the same as the effects that would be produced by a development charge of $2,000 per house.[25] But there is one major difference. The spending of $2,000 to meet a wasteful standard is a deadweight loss that benefits no one; if a development charge had been imposed instead, this $2,000 in wealth would have been transferred from housing producers or consumers or both to community residents.

Because residency restrictions influence demand as opposed to supply, they may have somewhat different repercussions. If Eden were to limit occupancy of newly built dwellings to families headed by a person aged 65 or over, under some conditions the price of new housing would fall and the price of used housing would rise.[26] If this occurred, eventually all elderly families would move into the "new" housing only they could occupy, and all used housing would come to be occupied by nonelderly families. The result would be a dual housing market, with the elderly enjoying cheaper housing than the nonelderly.

Municipal antigrowth measures are usually framed in terms of specific housing units, not standard house equivalents. As a result, these measures also affect the *characteristics* of the new dwelling units that are built. This phenomenon may be illustrated by three examples.

25. A wasteful development standard raises the supply curve for new housing by an amount equal to each standard house equivalent's share of the waste. This shift could be illustrated by the movement in Figure 1, *supra* note 19, of *SS'* to *TT'*, the line employed in note 24 *supra* to demonstrate the ramifications of a development charge. It should be emphasized that the discussion in text implicitly assumes that the half-acre requirement does not confer benefits or impose costs on any individuals other than the developers and the people who purchase houses from them.

26. Assume that the curve representing demand for housing by elderly households passes through point *H* on the *SS'* curve in Figure 1, *supra* note 19. The price of new housing would then fall to P_h. The equilibrium price in the used housing market would be determined by the intersection of *UU'* and the demand curve of the nonelderly for housing. Since the demand curve for the nonelderly is below *DD'* (*DD'* is the sum of the elderly and nonelderly demand curves), it is possible that this price would again be P_g, the same price that would have been produced by the quota, development charge, and wasteful development standards that have been illustrated.

Restricting residency in new housing to elderly families has an exclusionary effect only when the elderly demand for housing at the normal market price (P_c) is less than the amount homebuilders would provide at that price in an unrestricted market.

The city of Los Angeles considers new condominium projects to be subdivisions and subjects them to stiff park exactions. New rental buildings are not considered subdivisions and are exempted from these charges. Not surprisingly, a developer considering a high-density condominium near Marina Del Rey, when informed that he would be required to make a park fund contribution of $6,000 per condominium unit, is reported to have decided to market his structure as a rental building.[27]

Los Angeles also serves as an example of the many local governments that employ flat per-unit development charges, rather than levying fees proportional to unit value or some other proxy for standard house equivalents. It imposes a dwelling unit construction tax of $200 per unit regardless of unit quality[28] and in addition levies a flat fee of $348 on all new single-family homes to finance off-site sewerage facilities.[29] Although easy to assess, flat per-unit taxes have an inherent misallocative effect. They may encourage homebuilders to upgrade the quality of new housing units in order to reduce the tax as a percentage of sales price. Flat per-unit charges thus may discourage production of units at the bottom end of the new housing market[30] and are more likely to be regressive than are charges keyed to unit value.[31]

As a last example, the Petaluma and Boca Raton quotas are based on actual housing units, not standardized ones. If the producers' surplus[32] garnered by a homebuilder increases with the number of

27. Interview with Skip Marvick, Administrative Assistant, Los Angeles Department of Recreation and Parks, in Los Angeles (June 27, 1974). For more on Los Angeles's systems for raising funds for parks, see notes 221 & 282 *infra*.

28. L.A., CAL. CODE § 21.10.3 (1976).

29. *Id.* §§ 64.11.3, .19.1. These facilities include treatment plants and trunk lines.

30. As a result, a $200-per-unit tax like the one in Los Angeles may raise the average price of new housing units actually constructed by more than $200. (The increase in price per standard house equivalent, however, could possibly exceed $200 only for units consisting of less than one standard house equivalent.) This result is not inevitable. It may be that there are distinct submarkets for housing units of different qualities. If the demand for housing in higher-quality submarkets is substantially more elastic than in lower-quality housing submarkets, the flat per-unit charge may not induce homebuilders to shift to units of higher quality.

31. Since flat per-unit taxes discourage production of new, modestly priced housing, more of that market has to be satisfied out of the used housing stock. Because owners of large, high quality, used units will face more competition from new suppliers, they will be tempted to respond by splitting their units into several lower quality ones. If these conversions are inhibited by local housing or zoning codes, flat fees will fall somewhat more harshly on low-income and middle-income housing consumers than on rich ones.

32. This surplus, a form of "economic rent," is the amount by which the market price for a good exceeds its owner's next most valued use for that good. Graphically it is represented by the region that is both above the supply curve and below the equilibrium price. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 226-27 (1972). Consumers' surplus is the amount consumers would be willing to pay for a product less what they actually have to pay at the prevailing market price. It is represented by the area below the demand curve but above the equilibrium price. *See* E. MISHAN, COST-BENEFIT ANALYSIS 31-33 (1972).

standard house equivalents he produces, these quotas will also induce the upgrading of the average quality of new production.[33]

2. *Distributional Effects of Municipal Growth Controls*

Who is affected (for good or ill) by the movements in prices and quantities brought about by growth controls? Most courts and legal scholars have assumed that the costs of, say, excessive subdivision exactions are completely "passed on" to housing consumers.[34] This presupposes either perfect inelasticity of demand or perfect elasticity of supply. Since neither is a realistic possibility (in either the short or long run), complete "passing on" is actually the least likely outcome.[35] In many cases, in fact, one would expect the entire burden of exclu-

33. To make their quota systems effective, Petaluma and Boca Raton must monitor conversions in the existing stock to prevent owners of large older structures from splitting up their units to satisfy the demand for modestly priced housing.

34. For judicial opinions expressly assuming that developer costs are completely "passed on" to consumers, see, *e.g.*, Deerfield Estates, Inc. v. Township of E. Brunswick, 60 N.J. 115, 131-32, 286 A.2d 498, 507 (1972); Crownhill Homes, Inc. v. City of San Antonio, 433 S.W.2d 448, 453 (Tex. Civ. App. 1968). For similar assumptions in the academic literature, see, *e.g.*, O. BROWDER, R. CUNNINGHAM & J. JULIN, BASIC PROPERTY LAW 1222-23 (2d ed. 1973); F. MICHELMAN & T. SANDALOW, GOVERNMENT IN URBAN AREAS 513 n.4 (1970) (assumes property taxes on apartments may be completely passed on to tenants); Doebele, *Improved State Enabling Legislation for the Nineteen-Sixties: New Proposals for the State of New Mexico*, 2 NAT. RESOURCES J. 321, 339-40 (1962); Feldman, *The Constitutionality of Subdivision Exactions for Educational Purposes*, 76 DICK. L. REV. 651, 658-59 (1972); Platt & Moloney-Merkle, *Municipal Improvisation: Open Space Exactions in the Land of* Pioneer Trust, 5 URB. LAW. 706, 717 (1973); Reps & Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405, 409 (1963). The leading article on municipal fiscal discrimination against outsiders, Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Subdivision Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964), implies complete passing on in the text (*id.* at 1121, 1133-34) but adds qualifications in the footnotes (*id.* at 1133 nn.60 & 61).

Some authors, of course, have recognized the possibility that development charges might be at least partly borne by landowners or others. For an exceptionally sophisticated treatment of incidence issues, see Note, *Equalization of Municipal Services: The Economics of* Serrano *and* Shaw, 82 YALE L.J. 89 (1972). Several other efforts to apply formal economic analysis have oversimplified the problem and thus produced potentially misleading answers. One study assumed the supply of land for residences to be wholly inelastic in the relevant price range and therefore concluded that development charges are always entirely borne by landowners. Adelstein & Edelson, *Subdivision Exactions and Congestion Externalities*, 5 J. LEGAL STUD. 147, 160-61 & n.37 (1976). Another author also adopted the dubious assumption of a vertical supply curve but nevertheless concluded that developers can usually pass on the cost of park exactions because the availability of parks will shift up the demand curve. Note, *Subdivision Land Dedication: Objectives and Objections*, 27 STAN. L. REV. 419, 421-30 (1975). No such shift would occur, however, if, for example, the municipality had a prior policy of providing free parks in all neighborhoods. The preexisting demand curve would then reflect consumers' expectations that they would receive park services.

35. Figure 1, *supra* note 19, illustrates that the portion of a development charge that is not completely offset by new consumer benefits is not automatically passed on to consumers. A charge that raised the supply curve from *SS'* to *TT'* would only increase housing prices from P_c to P_g, a shorter vertical distance.

sionary policies to be borne by housing suppliers.[36] The incidence of excessive growth controls is a complex matter, and essentially depends on the elasticities of supply and demand in the housing market in question.

a. *Effects on Owners of Existing Housing: The Homeowner Becomes Monopolist*

Antigrowth measures have one premier class of beneficiaries: those who already own residential structures in the municipality doing the excluding. If consumer demand for residency in a suburb is not completely elastic, its housing owners can employ growth controls to cartelize housing supply. Current landlords obviously have an interest in barring the entry of competitors. Upon reflection, one can see that suburban homeowners also should be tempted to exert monopoly power. The owner-occupant of a single-family house at some point will sell or rent his house to a third party. The owner-occupant's gains from that transfer will be increased if construction of new housing units is limited, since the price of all used housing will be raised. The more unique a suburb (*i.e.*, the more sloped its demand curve), the more lucrative the monopoly possibilities for its homeowners.

Existing housing owners can obtain other benefits as well. As we have seen, exclusionary devices increase the quantity of used housing supplied. Since only existing owners can supply more used housing, they benefit in addition from any producers' surplus arising from that increment to the used housing stock. They may share these gains, of course, with owners of inelastically supplied factors employed to upgrade used housing—for example, architectural firms or building contractors who specialize in remodeling.

When a suburb has close substitutes, its current housing owners will not be particularly successful in using antigrowth measures to raise the market value of their buildings. Consumers will respond to exclusionary practices not by bidding up home values but by settling elsewhere. In these communities (and all others as well), there is still one policy strongly in the self-interest of owners of existing structures: development charges. These charges permit existing homeowners to share in the producers' surplus of land developers. It does not matter whether the revenue raised in this fashion is devoted to increasing municipal services or to reducing other municipal taxes; either way, current housing owners are the prime beneficiaries.

36. *See* p. 425 *infra*.

The last possible benefit of exclusionary measures to current residents is likely to evoke more sympathy. Residents may genuinely prefer that their municipality remain the way it is rather than grow rapidly. If old-timers feel that new development is destroying the desirable features of their community, they are in effect reducing their subjective valuations ("reservation prices") for their houses. Curbing growth enables them to prevent their surplus over market value from being eroded.

b. *Effects on Suppliers of New Housing*

The burdens of antigrowth policies are borne by the owners of factors employed to produce new housing and by housing consumers generally. The loss on the producers' side is divided among owners of production factors that are not perfectly elastically supplied. If a construction worker employed in Eden can switch to equally remunerative employment elsewhere, he can completely avoid the effects of Eden's antigrowth programs. By contrast, homebuilders or civil engineers who have unusually intimate political connections in Eden might lose some producers' surplus if the suburb switched from a prodevelopment to an antidevelopment stance.

Land is usually the most inelastically supplied factor in housing production because it is the only factor that is completely immobile. An owner of vacant land will be unable to escape serious losses from antigrowth ordinances in the common situation where his tract is much more valuable for residential development than, for example, for agricultural, commercial, or industrial use.[37] The costs of exclusion borne by housing suppliers are thus likely to be felt largely by landowners—especially farmers, speculators, homebuilders, and others who own large tracts of undeveloped or underdeveloped real estate.[38]

37. Some of these alternative uses may also be barred by local zoning codes.

At and beyond the urban fringe, the price of land suitable for housing development cannot rise much above the price of land for agricultural use. Landowners in urbanized areas thus have more to lose from exclusionary policies than their rural counterparts. *Cf.* R. MUTH, *supra* note 15, at 86 (supply elasticity of land for housing greater at urban fringe than near center).

38. The many empirical studies of the incidence of property taxes generally support the theory that changes in municipal fiscal policy are largely capitalized into the value of existing property. Everything else being equal, higher property taxes tend to result in lower land values; increased municipal services levels tend to be capitalized positively. *See, e.g.*, Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. POLITICAL ECON. 957 (1969); Sabella, *The Effects of Property Taxes and Local Public Expenditures on the Sales Prices of Residential Dwellings*, 42 APPRAISAL J. 114 (1974); Smith, *Property Tax Capitalization in San Francisco*, 23 NAT'L TAX J. 177 (1970). *Cf.* A. KING, PROPERTY TAXES, AMENITIES, AND RESIDENTIAL LAND VALUES 96-102 (1973) (absent highly visible tax

c. *Effects on Housing Consumers*

If demand for housing in Eden is not perfectly elastic, that suburb's exclusionary devices will raise the price of both new and used housing.[39] These price increases will reduce the surplus—*i.e.*, impair the welfare—of four distinct groups of housing consumers. The two groups worst affected (in dollar terms) will be: (1) current tenants who like Eden too much to want to move out (as they will have to pay higher rents when they renew their leases); and (2) all households that move into Eden in the future. These two groups will suffer a loss in surplus equal to the full housing price increase. The two remaining groups will lose less surplus. They will consist of: (1) tenants who subsequently leave the municipality because their rents go up; and (2) potential immigrants to Eden who have decided not to buy or rent there simply because of the price increase caused by the antigrowth policies. Much of the literature on exclusionary zoning assumes that growth controls principally injure the last group—the housing consumers whose entry is "barred." In fact, those who enter despite the barriers suffer a larger monetary loss.[40]

3. *Extraterritorial Effects of Municipal Growth Controls*

The discussion thus far has ignored the impacts Eden's growth controls might have on housing markets outside the suburb.[41] Antigrowth

changes, "evidence of capitalization is ambiguous"); Heinberg & Oates, *The Incidence of Differential Property Taxes on Urban Housing: A Comment and Some Further Evidence*, 23 NAT'L TAX J. 92 (1970) (study suggesting that differentials in local property-tax rates on owner-occupied housing are capitalized). *But see* Stull, *Community Environment, Zoning, and the Market Value of Single-Family Homes*, 18 J.L. & ECON. 535 (1975).

The best effort so far to investigate the impact of local land use policies on housing prices is L. SAGALYN & G. STERNLIEB, ZONING AND HOUSING COSTS (1973).

39. Residency restrictions may lower the price of housing for the group of favored consumers. *See* p. 397 *supra*. This article is primarily concerned with controls on physical improvements to land and thus ignores residency restrictions in this and most subsequent discussions.

40. The text identifies only the chief beneficiaries and losers from exclusionary policies. Others may also be affected. Local employers may have to pay higher wages if a municipality has impaired the growth of the local work force. Retailers may experience fewer sales for the same reason. The added costs of these merchants may be passed on in part to suppliers of the factors that they use—for example, to owners of industrial parks and shopping centers—or to their consumers. (Where people can easily commute among many suburbs to work or shop these sorts of effects should not be great.)

41. Economists refer to the discussion in the text and the graph in Figure 1, *supra* note 19, as a "partial equilibrium analysis," since it examines a single market in isolation from the rest of the economy. Such an isolated focus often fails to reveal the full complexity of the incidence of government regulatory and taxation programs. As Mieszkowski's work on the incidence of the property tax suggests, partial equilibrium analysis tends to be accurate only when used to explain the effects of differentials between the policies of local governments. *See* Mieszkowski, *The Property Tax: An Excise Tax or*

policies that raise housing prices within municipal boundaries make housing in competing jurisdictions relatively more attractive to consumers. As a result, the demand for housing in competing areas is enhanced,[42] raising the price of both new and used housing there. This price increase, however, is tempered to the extent that there is a downward shift in supply costs as owners of factors needed to build new housing flee Eden to its environs.

A municipality's particular appeal to consumers may be a product of its locational advantages in its metropolitan area. In that case the major external beneficiaries of its exclusionary policies would be owners of land and dwellings near its boundaries who could offer similar locational advantages. The outsiders most hurt would be tenants living at those locations since the excluded consumers would bid up their rents. Another municipality's particular appeal may be attributable to its public goods—*e.g.*, an outstanding police force. Its growth controls would primarily increase housing demand in suburbs with similar comparative advantages in providing that public good. Thus, if Scarsdale pulls up its welcome mat, housing owners as far away as Great Neck may be able to join in the rejoicing.

The most important external allocational effect of a suburb's antigrowth policy is an increase in the amount of housing built outside its boundaries; the shifts in both external supply and external demand combine powerfully to produce this result. This analysis therefore supports the common allegation that exclusionary suburbs force population growth onto their less exclusionary neighbors.

a Profits Tax, 1 J. PUB. ECON. 73, 82 (1972). If one local government in a metropolitan area were to adopt a mildly exclusionary policy while all the remaining ones were much more stringent in their growth limitations, the value of vacant land in the easiest-entry jurisdiction would likely be *higher* than it would be if none of these local governments was attempting to control growth at all.

The more comprehensive approach (general equilibrium analysis) is well beyond my limited skills in economics. I leave it to those who are more adroit. There is widespread agreement that it is the more profound and reliable analytical mode. *See generally* A. HARBERGER, TAXATION AND WELFARE (1974). The difference between the two approaches is best illustrated by the literature on the incidence of property taxes. Partial equilibrium analysts tend to treat taxes on land improvements like excise taxes and conclude that they fall largely (some say entirely) on tenants. The general equilibrium analysts believe the component of property taxes on improvements that is common to most jurisdictions falls mainly on owners of capital. *See* H. AARON, WHO PAYS THE PROPERTY TAX 18-55 (1975); R. MUSGRAVE & P. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 412-21 (1973); Ladd, *The Role of the Property Tax: A Reassessment*, in BROAD-BASED TAXES: NEW OPTIONS AND SOURCES 39 (R. Musgrave ed. 1973); Mieszkowski, *supra; Symposium: The Property Tax: Progressive or Regressive?*, in *Papers and Proceedings of the 86th Annual Meeting of the American Economic Association*, 64 AM. ECON. REV., May 1974, at 212-35.

42. *Cf.* R. MUTH, *supra* note 15, at 67-69 (illustrating effect of shifts in demand in one location on demand and price in another location).

II. Homeowners v. Landowners: The Politics of Growth Controls

Designing legal rules to control the actions of suburbs is difficult unless one knows how suburbs tend to behave. Part I's theory of municipal housing markets therefore needs to be supplemented with a theory of municipal politics. This Part presents two polar models of the suburban political process and suggests the land-use policies one would expect under each.[43]

Both models rest on a general theorem that an individual's political behavior is motivated by self-interest. A first corollary is that a voter always votes for the candidate who favors policies that will most enrich the voter. A second corollary is that officeholders are power-maximizers (not profit-maximizers) exclusively concerned with winning reelection.[44] Under both models, the attitudes of both voters and elected officials toward growth policies are determined by the distributional effects of those policies. Part I has shown that the primary beneficiaries of exclusion are owners of existing housing units.[45] These homeowners and landlords share the revenue from development charges, and (where a suburb has unique characteristics) can also obtain monopoly profits by curbing the entry of competing housing sellers. A central feature of local politics is that all homeowners (and some landlords) are residents and thus generally eligible to vote in local elections.

The costs of antigrowth measures principally fall, in contrast, on persons who lack the local franchise. Potential immigrants not only do not have the vote in practice but may be constitutionally barred from ever getting it.[46] When owners of undeveloped land are nonresidents, they too are usually not permitted to vote.[47] Of course, some costs are

43. The discussion in this Part assumes there are no legal constraints on a municipality's choice of policies.

44. For more elaborate models of the political process based on similar assumptions, see, *e.g.*, A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); R. MUSGRAVE & P. MUSGRAVE, *supra* note 41, at 92-98; Davis & Haines, *A Political Approach to a Theory of Public Expenditure: The Case of Municipalities*, 19 NAT'L TAX J. 259 (1966). *See generally* J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962).

45. *See* pp. 400-01 *supra*.

46. The "one-person, one-vote" principle might well be construed to preclude local governments from enfranchising nonresidents in general elections. *See* Avery v. Midland County, 390 U.S. 474 (1968) (electoral power in units of general local government must be allocated in proportion to resident population). *Cf.* Curtis v. Board of Supervisors, 7 Cal. 3d 942, 963, 501 P.2d 537, 551, 104 Cal. Rptr. 297, 311 (1972) (dictum: "It is open to question whether the state can give nonresidents a vote equivalent to that of residents.")

47. It is clear that nonresident landowners have no constitutional right to vote in local general elections. Reeder v. Board of Supervisors, 269 Md. 261, 305 A.2d 132 (1973). However, a number of cases have sustained city charter provisions that voluntarily extended the franchise to nonresident landowners. Glisson v. Mayor of Savannah Beach, 346 F.2d 135 (5th Cir. 1965); Spahos v. Mayor of Savannah Beach, 207 F. Supp. 688 (S.D. Ga.),

not politically externalized in this way. Residents who rent, who supply factors employed to build housing, or who plan to move up to a better house in town may on balance all suffer from exclusionary policies.

A. *The Majoritarian Model: The Portrait of an Exclusionary Suburb*

A majoritarian model[48] of politics predicts that an individual's influence over governmental decisions is proportionate to his voting strength at general elections. This conception of a pure democracy is at best a bit naive and is apt to be highly inaccurate when applied to large and complex governments. If the majoritarian model reflects reality anywhere, however, it is in small municipalities.

As Madison warned in a famous *Federalist* paper, a small government confronting a single issue is the surest breeding ground for majoritarian oppression.[49] The fewer the voters, the easier it is for a majority to establish a common ground for agreement and to monitor the behavior of elected officials. Likewise, an absence of multiple issues reduces the need for candidates to build coalitions by promising favors to minority interests.

Small municipalities combine the majoritarian building blocks of single issues and few voters. Since local public schools in the United States are usually managed by independently elected school boards, the only major discretionary function left to officials of general-purpose

aff'd per curiam, 371 U.S. 206 (1962). In addition, the allocation of votes to landowners (and only landowners) has been permitted in elections conducted by certain special districts. *E.g.*, Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973) (per curiam); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

48. I have adopted the terms "majoritarian model" and "influence model" from a perceptive essay by Professor Neil Komesar. Komesar, *Housing, Zoning and the Public Interest*, in B. WEISBROD *et al.*, PUBLIC INTEREST LAW: AN ECONOMIC ANALYSIS OF AN INSTITUTIONAL INNOVATION (forthcoming; 1978).

49. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

THE FEDERALIST No. 10, at 53, 60-61 (Mod. Library ed. 1941) (J. Madison).

units of local government is land-use planning. As a result, this issue often dominates municipal election campaigns.[50]

The demography of small municipalities similarly militates in favor of majoritarianism. In the United States, 70% of suburban households live in owner-occupied housing units.[51] These homeowners have a common interest in exclusion.[52] Prodevelopment interests are far outnumbered and can hope to achieve political influence only if the homeowner majority is splintered on land-use issues[53] or poorly organized. Even when outnumbered by renters, homeowners are frequently able to dominate municipal politics. They tend to be wealthier, more sophisticated politically, and less transient. As owners of capital assets, they are concerned about housing values for many years in the future (while tenants are not) and thus have more reason to invest time and energy in local politics. Thus while municipalities seldom discriminate against homeowners, they often, even with large numbers of renters, deny services to tenants[54] or impose higher taxes on rental buildings.[55]

50. *Cf.* O. WILLIAMS *et al.*, SUBURBAN DIFFERENCES AND METROPOLITAN POLICIES 187 (1965) ("[A] perusal of suburban weeklies in the Philadelphia metropolitan area suggests that of all municipal activities, zoning changes command the greatest attention of local residents.")

51. Of the 22.7 million occupied units inside Standard Metropolitan Statistical Areas (SMSAs) and outside central cities, 15.9 million are owner-occupied. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION AND HOUSING: GENERAL DEMOGRAPHIC TRENDS FOR METROPOLITAN AREAS, 1960 TO 1970 at 82 (Ser. PHC (2)-1, 1971).

52. Owners of units in cooperatives and condominiums (and, for that matter, long-term lessees with the right to sublet) all share this interest.

53. Homeowners with different incomes have potentially conflicting interests. As housing units are only slowly moved from one quality level to another, an individual homeowner might seek both to prohibit the construction of new units that would compete with his current dwelling and to encourage additional production in the next higher price range. The latter policy might lower the cost to the homeowner of moving up a notch in the local market. Thus the less homogenous the quality of homeowner housing, the harder it will be for homeowners to agree on the most desirable system of exclusion.

54. To use an earthy example, Denver and Washington, D.C., provide free garbage collection services to single-family residences but deny those services to apartment houses. D. YOUNG, HOW SHALL WE COLLECT THE GARBAGE? 69 (1972). This practice has been held illegal in two New Jersey cases. Teagen Co. v. Borough of Bergenfield, 119 N.J. Super. 212, 290 A.2d 753 (Super. Ct. Law Div. 1972); Boulevard Apartments, Inc. v. Mayor of Lodi, 110 N.J. Super. 406, 265 A.2d 838 (Super. Ct. App. Div. 1970). *But see* Goldstein v. City of Chicago, 504 F.2d 989 (7th Cir. 1974) (denial of city garbage collection services to large multifamily condominium does not violate equal protection); Burner v. Washington, 399 F. Supp. 44, 52-53 (D.D.C. 1975) (refusing to invalidate Washington, D.C.'s discrimination against residential structures with four or more dwelling units in provision of garbage collection services).

55. Suburbs have imposed special occupancy fees on rental units. *See, e.g.*, Boulevard Apartments, Inc. v. Borough of Hasbrouck Heights, 86 N.J. Super. 189, 206 A.2d 372 (Super. Ct. Law Div. 1965), *aff'd*, 90 N.J. Super. 242, 217 A.2d 139 (Super. Ct. App. Div. 1966) (per curiam) (annual fee of $50 per rental unit not authorized by statute requiring licenses for lodging and eating establishments). There is some evidence that apartment buildings are assessed for property taxes at higher fractions of market value than single-family units. *See* H. AARON, *supra* note 41, at 59-61; D. NETZER, ECONOMICS OF

Thus the ideal environment for a homeowner majority to work its "plans of oppression," to use Madison's phrase, is a small suburb of mostly well-to-do homeowners[56] who confront the single issue of urban growth.[57] In such a suburb, the political process is stacked against those who benefit from new housing construction.

B. *The Influence Model: The Conditions for Developer Manipulation*

Under an "influence model" of politics, the strength of an interest group is purely a function of its ability to contribute money, manpower, or other political assets to election campaigns. The most powerful groups are those that can best organize to raise campaign contributions and those whose members have the greatest wealth. Madison's analysis suggests that the influence model becomes increasingly more accurate than the majoritarian model as an electorate increases in size and issues become more numerous. As governmental complexity increases, majority sentiment on any single issue is less likely to prevail; organized minorities become ever more able to engage in logrolling and to take advantage of majority disorganization.[58]

With the possible exception of municipal labor unions, land-devel-

THE PROPERTY TAX 30, 78-79 (1966). The most obvious fiscal discrimination occurs at the state level through substantial homeowner exemptions from the property tax. *See, e.g.*, CAL. CONST. art. 13, § 3(k) ($7,000 of full value of owner-occupied homes exempt, unless dwelling is receiving another real-property exemption).

The disparity in tax treatment is not easily explained as a device for making renters pay the full costs of local services they consume. Since tenant families tend to contain fewer school-age children, apartments are in fact more likely to pay their own way through property taxes than are, say, modest single-family units with many bedrooms. *Cf.* T. MULLER & G. DAWSON, THE FISCAL IMPACT OF RESIDENTIAL AND COMMERCIAL DEVELOPMENT: A CASE STUDY 83 (1972) (showing higher ratio of governmental receipts to governmental expenditures for apartments than for single-family homes); R. MACE & W. WICKER, DO SINGLE-FAMILY HOMES PAY THEIR WAY? 8 (Urb. Land Inst. Research Monograph No. 15, 1968) (expenditures allocated to single-family homes likely to exceed revenues where government relies heavily on property tax and level of state aid is relatively low).

56. If an individual's income is positively correlated with his political sophistication, rich suburbs should be more adroit exclusionists than blue-collar suburbs. In addition, to extend the analysis in note 53 *supra*, residents of a modest suburb have less interest in excluding new housing because they are likely to consider even the bottom end of the new housing market a step upward.

57. An econometrician trying to explain the incidence of exclusionary behavior by suburbs should thus hypothesize that the following variables are positively associated with that behavior: (1) percentage of households in owner-occupied units; (2) median dwelling-unit value; (3) median family income; and (4) rate of metropolitan growth. He should hypothesize as negatively correlated: (1) population; (2) land area; and (3) degree of variance in value of owner-occupied dwelling units.

58. For a contrary view, see Bergin, *Price-Exclusionary Zoning: A Social Analysis*, 47 ST. JOHNS L. REV. 1, 15-17 (1972) (arguing that landowners can bargain more successfully with small governments than with large ones).

opment interests appear to be the largest investors in municipal politics in the United States.[59] Basic economic principles would suggest that this investment is made because it garners a rate of return competitive with alternative investments. Developers may have a comparative advantage in making campaign contributions to candidates for municipal office. Successful homebuilders are relatively well-heeled; highly leveraged ones can borrow against the gains that will flow from political favors. Fear of free-riders need not deter a single developer from individual lobbying; a solo contributor need only ask for an individualized development approval, not a broad program of general benefit to his industry.

Developer influence should be at its greatest in a large,[60] complex, local government whose voting population includes many tenants and whose homeowners represent a wide range of income classes.[61] Most central cities and many of the older suburban counties have these characteristics. Elected officials in these places can be expected to sell zoning favors for relatively low prices (either in bribes or above-board campaign contributions). These officials are in greater need of money for their campaigns and would suffer less severe voter retaliation if the sale were discovered. Zoning graft does seem to be more common in large political units; among smaller municipalities one would expect more graft in the less-elite suburbs, where homeowners tend to be less sophisticated and to have less to gain from exclusion.[62]

59. Thirty-nine percent of the 694 lobbyists who registered between 1967 and 1971 under Los Angeles's pioneering lobbyist registration ordinance indicated "planning, zoning and subdivisions" as an area of interest. "Building and safety" was indicated by 39.8%, "labor relations" by 8.9%. L.A. Times, Oct. 12, 1971, § II, at 1, col. 2, and 8, col. 3.

60. In some large cities land-use decisions are determined by a system of "councilmanic courtesy": all members of the elected governing body informally agree to follow the decision of the member from the district where the land-use problem has arisen. One cannot be certain, a priori, if this system promotes "influence" or "majoritarian" control. On the one hand, it reduces homeowners' organization costs by, in effect, reducing the size of the political unit; on the other hand, it lowers the administrative cost to developers of acquiring influence by limiting the number of political decisionmakers who must be approached.

61. *See* note 53 *supra*.

62. I have maintained an informal file of newspaper clippings on zoning graft incidents between 1970 and 1976. The localities involved in the incidents can be broken down into the following rough categories:

Large local governments: Long Beach, Cal.; Los Angeles, Cal.; San Diego County, Cal.; Santa Barbara County, Cal.; Dade County, Fla.; Chicago, Ill.; Cook County, Ill.; Prince Georges County, Md.; New York City, N.Y.

Working-class suburbs: Carson, Cal.; Cudahy, Cal.; Irwindale, Cal.; Chicago Ridge, Ill.

Middle-class suburbs: Hoffman Estates, Ill.; Wheeling, Ill.; Fort Lee, N.J.

Small cities: Champaign, Ill.

Elite suburbs: None.

This list is by no means a systematic sample. It has been determined by the newspapers I have happened to read and no doubt has been influenced as well by the priorities of public prosecutors and newspaper editors and the capacity of various types of local officials to disguise their deals.

C. *Implications of the Models*

The influence model best fits central cities, and the majoritarian model, elite suburbs. The dichotomy is obviously somewhat artificial. All public officials face the conundrum of whether or not to serve lobbyists who come to call at the expense of unorganized masses of voters. In fact, one should not be startled to discover that the land-use policies of large elite suburbs like Fairfax County, Virginia, and Montgomery County, Maryland, seem to cycle regularly between prodevelopment and antidevelopment phases.[63] These counties control sufficiently large areas to have some monopoly power over housing prices. The well-to-do homeowners who live there have an exclusionary interest that should dominate county politics whenever the majority can stay sufficiently organized to retain control. But successful antigrowth policies in these counties eventually become self-destructive. As housing prices rise, owners of underdeveloped land offer larger and larger sums to candidates who repudiate the exclusionary policies. When they can offer enough, a prodevelopment cycle begins.

The foregoing political analysis has several important implications. Each large metropolitan area is likely to contain some true "tight little islands" that are permanently and steadfastly exclusionary—a Weston, Massachusetts; a Kenilworth, Illinois; or a Rolling Hills, California. 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. As a result, it is highly unlikely that local land-use controls have distorted the allocation of population or activities *among metropolitan areas* in the United States. Where there is strong market pressure for a specific land use, a developer should be able to manipulate some government in the metropolitan area to allow it. Municipal land-use policies may, of course, cause what one might call "micromisallocations" in the location of activities. But for major misallocations to occur, a homeowner majority would have to find a cartel manager with power at the metropolitan, regional, or state level—say a state environmental agency or land-planning commission.[64] Eventually, however, the complexities of state government would tend to make even those agencies more responsive to the better organized interest group—prodevelopment forces.

In sum, homeowner domination of suburban politics will lead to

63. Social choice theorists as far back as Condorcet have suggested that polities dealing with a variety of issues also will be characterized by cyclical majorities. *See* K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 93-96 (2d ed. 1963).

64. This ominous possibility is discussed in greater depth at pp. 434-35 *infra*.

enactment of growth controls and the imposition of development charges. Political domination by developers will lead to a different, but also troublesome, set of political outcomes: for example, graft and the unwarranted subsidization of development. Because this article focuses on the former set of potential abuses, the succeeding analysis usually portrays suburbs as falling within the majoritarian model, *i.e.*, as being governed by officials who act as perfect agents for a homeowner cartel. One should not forget that some suburbs never behave this way and that some may do so only intermittently.

III. A Calabresian Definition of the Legal Issues Posed by Growth Controls

Armed with these theories about how suburban housing markets and municipal political processes work, I now turn to my central objective: devising legal rules to resolve controversies over antigrowth measures. The first task is to establish an agenda for the legal analysis. If one plunges immediately into the current swamp of doctrine, the possible legal approaches quickly become restricted by precedent and obscured by doctrinal complexity. This Part therefore defines the legal questions posed by growth controls in purely functional terms by making use of an analytical scheme developed by Calabresi and Melamed in their seminal article.[65] Their approach has the virtue of keeping remedial issues at center stage, instead of pushed off to the wings.

Calabresi and Melamed distinguish between the use of "property rules" and "liability rules" to protect entitlements.[66] When the owner of an entitlement has the protection of a property rule, he can enjoin interferences with his entitlement. When he is protected solely by a liability rule, he can only collect damages. The distinction between property rules and liability rules is critical in the ensuing analysis. Indeed, a major theme of this article is that the courts' frequent failure to pay close attention to the simple question of how to protect entitlements has led to great confusion in land development law.

One of the parties to all civil litigation over growth controls is obviously the local government imposing the controls.[67] As the prior

65. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

66. *Id.* at 1105-06, 1115-23.

67. Instead of constraining municipal practices through the threat of private litigation, one could of course rely on other forms of control—for example, criminal sanctions against local officials or administrative review of the substance of local ordinances by

analysis has indicated, both suppliers of new housing and housing consumers may be injured by antigrowth measures. The basic legal questions that growth controls pose can thus be identified by arraying the possible rights and remedies of both housing suppliers and housing consumers against local exclusionary measures. The first sections of this Part develop the arrays for these two groups in turn. The last section suggests goals for choosing from the two arrays. This rather abstract discussion lays the groundwork for the substantive analysis in later Parts that strives to identify the appropriate boundaries within which particular remedies should be available.

A. *The Range of Legal Entitlements Between Local Governments and Landowners*

The discussion hereinafter assumes that of the factors employed in new housing production, land is the only one whose value is sufficiently affected by growth controls to make it efficient to provide owners of the factor with entitlements against municipal abuses. This assumption allows the analysis of the issue of the rights of housing suppliers to be boiled down to that of the rights of landowners.[68]

Suppose the Tacky Development Company owns a parcel of land in the suburb of Eden on which it would like to develop a mobile home park. Unsophisticated observers often mistakenly conceive the potential conflict between Tacky and Eden as simply posing a problem on the boundary between what Calabresi and Melamed call the two "property-rule" solutions: either Tacky must have what will be called an "absolute privilege to develop" or the suburb of Eden must have an "absolute right to control." If Tacky challenged a quota, moratorium, or development standard imposed by Eden, a court that succumbed to this misconception would choose either to grant Tacky an injunction against enforcement of part or all of the measure or to deny Tacky all relief.

Liability rules, which are generally more flexible than property rules, broaden considerably the range of possible legal solutions. A liability rule protecting Eden would entitle it to collect damages if Tacky developed its mobile home park. A liability-rule approach implies a means of measuring damages in specific cases. Thus if Eden

designated state agencies. For a pessimistic assessment of the political feasibility of the latter approach, see Ellickson, *Ticket to Thermidor: A Commentary on the Proposed California Coastal Plan*, 49 S. CAL. L. REV. 715, 728-31 (1976); *see also* pp. 473-75 *infra*.

68. One should recall that owners of other inelastically supplied factors may also be injured. *See* p. 401 *supra*. For the proposition that landowners are the chief group that would be negatively affected, see R. MUTH, *supra* note 15, at 57-58.

imposed a development charge—a form of damage payment—of $500 per space on Tacky's mobile home park, even a court that recognized that Eden had a right to impose valid development charges would also have to decide if Eden had charged too much. If it had, the remedy to Tacky consistent with the liability-rule approach would be a refund of the excess charged. Note, however, that refunds would never be available to developers if the municipality had an absolute right to control and voluntarily traded permission to develop in return for cash or the dedication of public facilities. The owner of an entitlement protected by a property rule can sell it for whatever the market will bear. Therefore, the right to levy unlimited development charges presupposes an absolute right to control.

The last of the four legal rules available is a liability rule protecting the landowner. If this rule applied, Eden could impose restrictions on Tacky provided that it compensated Tacky in damages.[69] A suburb voluntarily chooses "compensated controls" of this type when it acquires development rights through eminent domain; it has this rule forced upon it whenever a court decides that a particularly onerous restriction constitutes a taking of property for which compensation must be paid. One of the complexities of the law of land-use controls is that the amount of damages a court may require a municipality to pay a landowner depends in part on the scope of municipal rights both to enact noncompensated controls and to impose development charges. Any such municipal rights limit the landowner's initial bundle of rights and thus influence the amount of compensation he receives when he is further restricted.

In summary, to decide disputes between landowners and municipalities, one must identify three legal boundaries: (1) when a municipality loses property-rule protection and thus is required both to compensate those it regulates and to limit its development charges; (2) when a municipality is no longer entitled to impose any development charges; and (3) when a landowner begins to have an absolute privilege to develop, *i.e.*, the right to enjoin municipal eminent domain actions to acquire his development rights.

B. *The Range of Legal Entitlements Between Local Governments and Housing Consumers*

As noted in Part I, consumers may be injured by growth controls in two different ways. First, local ordinances that dampen development

69. This is not a revolutionary idea. *See, e.g.*, Attorney General v. Williams, 174 Mass. 476, 55 N.E. 77 (1899), *aff'd sub nom.* Williams v. Parker, 188 U.S. 491 (1903) (sustaining building height restriction program involving compensation of affected landowners).

activity may raise housing prices. Second, a suburb may damage a particular subgroup of housing consumers by enacting a residency restriction that forbids those consumers from living in a particular part of town.[70] The scope of this discussion is limited to the first and more frequently encountered phenomenon.

Perhaps surprisingly, given an allocation of legal rights between municipalities and landowners, consideration of consumer rights to housing raises only one additional key legal question: When should consumers be entitled to collect damages from suburbs? There is no good reason to allow consumers to enjoin certain antidevelopment practices, for example, while at the same time landowners are denied

70. Residency restrictions raise fascinating questions about the scope of the freedom of settlement. Restrictions based on race are clearly unconstitutional. Buchanan v. Warley, 245 U.S. 60 (1917). Residency restrictions based on age and family composition have been the subject of considerable litigation. *See* notes 9 & 10 *supra*. The Soviet Union apparently uses ideological classifications to decide who shall have access to a particular housing market, with enforcement provided by means of "internal passports." Thus, as part of his harassment, Alexander Solzhenitsyn was denied permission to move to Moscow, the home of his new wife. N.Y. Times, Aug. 24, 1973, at 1, col. 6. A bill introduced in the 1975 session of the Hawaii legislature would have required immigrants to obtain permits in order to reside in Hawaii. Bosselman, *Growth Management and Constitutional Rights Part II: The States Search For a Growth Policy*, 11 URB. L. ANN. 3, 21 (1976). (The sale of nontransferable residency permits would obviously be a lucrative strategy for the present residents of any unique jurisdiction. *See* note 123 *infra*.)

Courts confronting legal challenges to residency controls generally conceive their choice to be limited to upholding the restriction (*i.e.*, applying a property rule in favor of the municipality) or invalidating it (*i.e.*, applying a property rule in favor of the restricted consumers). Again, liability rules are available. A liability rule protecting consumers would entitle them to collect damages (but only damages) if they were individually barred from entering potentially advantageous housing transactions in a community. A liability rule protecting a suburb would permit it to impose residency charges on "substandard" residents to compensate the suburb for the environmental and fiscal burdens arising from their substandard characteristics.

Retroactive residency restrictions are much harsher than prospective ones. Expulsion is usually regarded as more traumatic than denial of entry because of the costs of relocation and the higher likelihood of a substantial loss in surplus. Coerced exportations are hardly unknown in totalitarian countries (remember Phnom Penh) and have not been beyond the imagination of local government officials in the United States. In April 1974, a city councilman in St. Petersburg, Florida, introduced a proposal to limit the city's population to 235,000, a figure 30,000 below the city's population at the time. Rights to remain in the city were to have been allocated by seniority of residence. C. HAAR, LAND-USE PLANNING 579 (3d ed. 1976). The proposal was not enacted and the councilman was shortly thereafter defeated in his bid for reelection. Wash. Post, Mar. 17, 1975, § A, at 1, col. 1, and 2, col. 3. In 1890 San Francisco ordered its Chinese inhabitants within 60 days either to leave town or to move to a designated district. *See In re* Lee Sing, 43 F. 359 (N.D. Cal. 1890) (striking down ordinance under, *inter alia*, Fourteenth Amendment).

Those with a paternalistic bent might argue that a consumer's freedom of settlement (where recognized) should be inalienable in order to bar a government from buying up residency rights from voluntary sellers. (For discussion of inalienability, see Calabresi & Melamed, *supra* note 65, at 1111-15). Such a rule would have forced Michigan to halt consideration of a proposal to pay welfare recipients $5,000 each to leave the state. *See* L.A. Times, July 13, 1975, § I, at 6, col. 5.

that remedy.[71] In addition, litigation to recover excessive development charges can be more efficiently conducted by developers than by homebuyers, and it is in fact in a homebuyer's interest that a developer have the exclusive right to pursue that remedy.[72]

Landowners are not good intermediaries for protecting housing consumers, however, when the applicable legal rule permits a suburb to control development provided it compensates those it injures. The damages suffered by consumers as a result of an antigrowth ordinance are measured by the drop in consumers' surplus, while damages to landowners by the drop in producers' surplus. To entitle landowners to recover consumer damages resulting from the high prices induced by growth controls would be arbitrarily to enrich landowners at the expense of consumers.

C. *Goals to be Promoted by the Allocation of Legal Rights*

I suggest that the legal doctrines developed to resolve growth control issues be designed to promote three principal goals: efficiency, horizontal equity, and vertical equity.[73] Efficient legal doctrines help ensure that new housing developments and population shifts that are not cost-effective do not occur and those that are cost-effective do occur. Deviations from optimal allocational efficiency in urban development involve "allocative costs."[74] "Administrative costs" (the public and private costs of framing, publicizing, enforcing, and transferring legal entitlements) are also relevant to efficiency. To assess the overall efficiency of various legal solutions, one must add their allocative

71. Although one could imagine entitling consumers, and not landowners, to enjoin, say, a sewer hook-up moratorium, that approach would provide exclusive standing to the group that is least likely to be seriously injured and most likely to be unable to enforce its rights effectively. *See* pp. 425-27, 479-80 *infra*. Thus all property rules that constrain suburban land-use controls should be enforceable by landowners. *But cf.* Warth v. Seldin, 422 U.S. 490, 512-14 (1975) (landowners may not assert rights of third parties to defeat exclusionary zoning). Whether consumers should also have standing to enforce those rules should hinge on the normal considerations that determine standing, *e.g.*, the likelihood that the case will be litigated effectively.

72. *See* pp. 479-80 *infra*.

73. On the issue of whether these goals pay proper respect to concerns for individual liberty, see Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 688 n.21, 740-41, 748-51 (1973) (citing sources) [hereinafter cited as *Alternatives to Zoning*].

74. Under my definition, "allocative costs" are created whenever a change in policy causes a deadweight loss of producers' or consumers' surplus. Rigorous economists would not be comfortable with this definition. *See* note 17 *supra*. The definition is also potentially confusing because administrative costs clearly affect the allocation of resources, and thus those costs could well be regarded as a subset of allocative costs, not as a distinct category. Nevertheless, the distinction clarifies the exposition.

costs to their respective administrative costs. The candidate with the lowest sum is the most efficient.[75]

Equity is not quantifiable and is thus harder to discuss satisfactorily. Horizontal equity requires government to treat like persons alike. The surface simplicity of this proposition is deceptive because "likeness" is always a matter of degree. For example, are a suburb's tenants like its homeowners because both groups are residents, or are they different because their land tenure is different? Are would-be developers of undeveloped land like nearby landowners who developed earlier, or are they different because of the temporal difference? Despite its operational difficulties, I will employ Michelman's test for horizontal equity: requiring a person to bear a loss is not unfair if he should be able to perceive that a general policy of refusing compensation to people in his situation is likely to promote the welfare of people like him in the long run.[76]

Vertical equity is the term employed in the public finance literature to describe the fairness of the distribution of wealth among different income groups. This goal would come sharply into focus, for example, if a wealthy suburb's growth controls restricted the housing opportunities of poorer families. Because interpersonal comparisons of utility are not possible, one can never in fact be sure that transferring wealth from rich to poor (or vice versa) will enhance collective human happiness. As a result, discussions of vertical equity tend to be about as enlightening as debates over the relative merits of following the Cubs or the White Sox. But surely concerns about the general distribution of wealth cannot be wholly ignored.

The fruits of this Part can now be quickly summarized. A comprehensive set of legal rules governing growth controls would answer these questions: (1) what sorts of developments may a local government stop without risk of paying compensation? (2) when are landowners absolutely privileged to proceed with their developments? (3) what development charges may a local government validly impose? (4) when a local government enacts enforceable restrictions for which it must nevertheless pay damages, how much does it owe landowners and housing consumers? The next four Parts attempt to answer these questions in light of the goals of efficiency and horizontal and vertical equity. The suggested answers are summarized at the beginning of Part VIII.

75. For analogous applications of this notion of minimizing a sum of costs, see G. CALABRESI, THE COSTS OF ACCIDENTS 26-31 (student ed. 1970); *Alternatives to Zoning*, *supra* note 73, at 688-90.

76. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1223 (1967).

IV. When Should Landowners or Municipalities Be Protected by Property Rules?

The first task is to develop doctrines to identify cases appropriate for application of either of the two polar approaches: the absolute privilege of a landowner to develop or the absolute right of a suburb to control.

A. *The Meager Scope of a Landowner's Absolute Privilege to Develop*

A landowner protected by a property rule is entitled to prevent a suburb from using eminent domain to acquire his development rights. Under current law the boundary of a landowner's absolute privilege to develop is essentially determined by the "public use" limitation on the exercise of eminent domain. In the usual case, a farmer can defeat a suburb's plan to condemn his cow pasture for a greenbelt program only by showing the acquisition would not be for public use. Given the current state of the law, he has little hope of prevailing on that issue.[77] As a practical matter, a landowner in the United States today is at the mercy of a municipality willing to acquire his land at market value—a sum that may be less than what the landowner would demand in a voluntary exchange.[78]

This diminution of private property rights is defensible because it facilitates efficient municipal growth controls. A suburb's greenbelt acquisition program, for example, would be efficient where the resulting benefits to its residents of open space, protection of "character,"[79] and lower net congestion costs (*e.g.*, less air pollution, less time lost in traffic snarls) would exceed the costs of the program to victimized landowners and housing consumers. If a suburb were entitled to buy up

77. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

78. There is an apparent tension between the lack of constraints on municipal use of eminent domain and the doctrine that public utilities have a "duty" to extend services to developers. (For a recent endorsement of this doctrine, see Note, *The Thirst for Population Control: Water Hookup Moratoria and the Duty to Augment Supply*, 27 HASTINGS L. REV. 753 (1976).) This tension would be removed if a utility could decline to serve a developer provided it compensated him in damages.

Imposing a "duty to serve" on organizations like public utilities and special districts is nevertheless defensible. Municipalities and other general-purpose units of local government are more politically accountable and thus (absent an emergency) should be the only bodies authorized to halt new development. For more on the duty to serve, see note 211 *infra*.

79. Claims by long-term residents of a small community that rapid growth would damage the character of their town are genuine if, as a result of growth, the residents would reduce their subjective valuations of their houses. That loss of surplus is a true welfare loss, albeit one not reflected in market prices.

development rights only from consenting sellers, it might be discouraged from embarking on an efficient growth-control program by the fear that some landowners would decide to hold out for the highest possible price regardless of their valuation of their property. In addition, if eminent domain were to be available to a municipality to acquire sites for, say, recreational facilities, but not for greenbelt areas, difficult factual questions of motive would be introduced into condemnation suits. Lastly, the availability of a collectively established benchmark price (market value), at which both parties know a suburb can force a sale, may reduce the resources devoted to settlement negotiations for land transfers. In brief, the efficiency rationale for granting local governments extensive authority to condemn development rights is to reduce the administrative costs of their implementing efficient growth-control programs.[80]

This curtailment of landowner rights also has some appeal from a distributional standpoint. A rule that makes landowners unable to insist on more than the market value of their land in effect gives priority to the surplus current residents have in the existing character of their town over any personal pleasure a landowner might get from development. In particular, it helps channel the efficiency gains resulting from a growth-control program to local residents and away from landowners who successfully pursue holdout strategies.[81]

An absolute privilege to develop should be recognized, however, when it is needed to prevent municipalities from deliberately using

80. In another article I offered a similar list of justifications for why a landowner generally should not have the protection of a property rule against nuisance activities carried on by neighbors. *See Alternatives to Zoning, supra* note 73, at 742-47. That article argues for the efficiency advantages of liability rules in considerably greater detail.

Authorizing suburbs to exercise the power of eminent domain does pose an allocative risk. The loss in surplus suffered by the condemnees may exceed the efficiency gains obtained by the residents of the suburb. Although the program would then be inefficient, the condemnees probably would not be able to organize to pay the suburb not to enact it. Yet the situation hypothesized is a rare one; those who hold land for development are unlikely to value it subjectively at much above market value.

81. An example may help illustrate these points. Suppose, after valid development charges are taken into account, (1) the market value of certain unused development rights (if traded among developers) would be X, (2) those rights are subjectively valued by their owner at $3X$, and (3) current residents subjectively value the damages resulting from development at that site at $7X$. If a landowner has an absolute privilege to develop (and local political processes work smoothly), the development rights would be sold to the suburb in an arm's length transaction for an amount between $3X$ and $7X$. The landowner would thus be compensated for his surplus and, if he were a skillful bargainer, might also share in the efficiency gains from the program. If eminent domain were permitted, the landowner would receive only X, and local residents would secure all the efficiency gains from the program and also capture some of the landowner's surplus.

eminent domain to exclude racial and ideological minorities.[82] In such situations, the individual liberties of the victims warrant priority over the possible efficiency gains of local residents.[83] By the same token, if a court finds that the application of a development restriction is motivated by racial or ideological discrimination, it should not merely find a taking and thereby entitle those injured to damages (which I propose should be the usual remedy) but should invalidate the restriction.[84] Few occasions will justify this exceptional remedy of an injunction against a municipal program. By and large, a local government willing to compensate those it injures should be given great discretion in shaping its future.

B. *The Ample Scope of a Municipality's Absolute Right to Prohibit Nuisances*

A local government should be entitled, moreover, to prevent a large variety of land uses without paying compensation. Property-rule protection, in short, should be provided much more readily to municipalities than to landowners. The constitutional provision that marks the limit of the absolute right to control is, of course, the "taking" clause. Since no issue in modern property law has been more heavily debated,[85] the discussion here will be kept rather brief.

82. *Compare* Deerfield Park Dist. v. Progress Dev. Corp., 22 Ill. 2d 132, 174 N.E.2d 850 (1961), *judgment on remand aff'd*, 26 Ill. 2d 296, 186 N.E.2d 360 (1962), *cert. denied*, 372 U.S. 968 (1963) (permitting condemnation of site of planned racially integrated housing project) *with* Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (barring city from designating site of a planned low-income housing project as park area).

83. *Cf. Alternatives to Zoning*, *supra* note 73, at 740-41, 748-51 (discussing role of these considerations in private nuisance litigation). Eminent domain actions should also be enjoined if they are procedurally defective, tainted by improper influence, or beyond the delegated powers of the would-be condemnor.

84. *See, e.g.*, Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (mandating issuance of building permits for "turnkey" public housing projects that county had denied because potential tenants would be low-income blacks). Compare the extraordinarily broad holding in United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (plaintiff relying on § 804(a) and § 817 of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3604(a), 3617 (1970 & Supp. V 1975), is granted injunction against zoning ordinance that had racially discriminatory effect, without having to show discriminatory motive). *But see* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977).

On potential ideological discrimination, see, *e.g.*, Farrell v. Township of Teaneck, 126 N.J. Super. 460, 315 A.2d 424 (Super. Ct. Law Div. 1974) and Peltz v. City of S. Euclid, 11 Ohio St. 2d 128, 228 N.E.2d 320 (1967) (invalidating blanket prohibitions on political signs). *See generally* Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN. L. REV. 179 (1975).

85. The leading work is Michelman, *supra* note 76. For a more recent discussion, see Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974).

1. *Suggested Doctrines for Deciding Whether Municipal Land-Use Controls Constitute Takings*

When a landowner challenges a suburban antigrowth measure as a taking, the trial court's first step should be to decide whether or not the land-use activity regulated can be characterized as being less than normally desirable to neighbors—*i.e.*, as being a nuisance.[86] When the challenged ordinance is one that restricts nuisance activities, a landowner should be able to prevail on a taking claim only when he can prove that the ordinance is grossly inefficient—that is, that its costs vastly exceed its benefits.

On the other hand, when a municipal enactment has prohibited a landowner from carrying out a land-use activity that cannot be characterized as a nuisance, his prima facie case for a taking should be much less onerous: merely proof that the restriction has caused a substantial drop in the market value of his land. (As we shall see, this proof is harder than one might think if damages are properly calculated.[87]) Even when a landowner succeeds in showing such a plunge in land value, a local government should be able to defeat his taking claim by successfully invoking Michelman's fairness test as a defense.[88] That defense is established if the municipality proves both: (1) that the challenged restriction on nonnuisance activities is efficient; and (2) that the landowner should be able to recognize that as a taxpayer his own long-term self-interest in avoiding the administrative costs of minor compensatory payments makes it fair to deny him compensation.

Any reader who has dipped into the literature on the taking issue should immediately recognize that the doctrines recommended have their roots in the venerable harm-prevention/benefit-extraction test for takings. That test, whose principal academic supporters have been Freund and Dunham, states that a government need not compensate injuries arising from regulations designed to prevent harms but must make reparations for losses from regulations attempting to extract benefits.[89] This article does not propose that this traditional test be adopted whole but rather that it be given a new twist. Instead of using the harm/benefit (*i.e.*, nuisance/nonnuisance) distinction to

86. The term "nuisance" is used here to describe all subnormal land uses, including those not sufficiently noxious to be deemed "nuisances" under traditional common law doctrine.

87. *See* notes 359 & 360 *infra*.

88. *See* p. 415 *supra*.

89. *See* E. FREUND, THE POLICE POWER 546-47 (1904); Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 663-69 (1958). For criticism of this view, see Michelman, *supra* note 76, at 1196-1201, 1235-45; and Berger, *supra* note 85, at 172-75.

decide a taking claim, the approach advocated would employ it only to vary the prima facie case and defenses to be applied. Thus, a program aimed at preventing harms could still be held to be a taking if it were grossly inefficient, and a program that forced landowners to confer benefits would not result in an award of compensation if the municipality could make out its defense based on Michelman's fairness test.

2. *The Proposed Taking Doctrines Justified*

A legal doctrine that compels a government to compensate those injured by one of its programs can perform two useful functions. First, it can prevent the costs of a public program from being arbitrarily imposed on one group of individuals but not on another, ethically indistinguishable group. Here the function of the doctrine is horizontal equity—treating like people alike. Second, the doctrine may serve the very different purpose of deterring legislatures from enacting inefficient programs.[90] When municipal officials are able to deflect the costs of a public measure to those who lack the right to vote in municipal elections (or who are vastly outnumbered at the polls), a rule requiring compensation, by shifting the costs back to the electoral majority, may help induce these officials to weigh more accurately the costs and benefits of alternative measures. Because the costs of suburban antigrowth measures fall principally on nonvoters and minority factions, the taking doctrine can be a valuable vehicle for achieving efficient land use in the suburbs.[91]

The doctrines just proposed have been designed to promote the goals of both horizontal equity and efficiency. The intuitive appeal of the traditional harm/benefit test for takings springs from its protection of horizontal equity. When a legislature enacts a standard of conduct that forces some individuals to confer benefits, it is holding them to a standard that most other persons are not only not forced to meet but are known to fall below. To use Justice Holmes's phrase, such an enactment produces no "average reciprocity of advantage"

90. Rules that constrain municipal land-use regulations are also likely to enhance vertical equity—*i.e.*, lead to greater equality in the distribution of wealth. Consider this statement by some thoughtful economic analysts of zoning:

> Indeed, we believe that it is quite likely that the aggregate effect of zoning in U.S. cities is to lower the utility of relatively poor apartment dwellers as a class and to increase the utility of relatively affluent single-family dwelling owners as a class.

Ohls, Weisberg & White, *Welfare Effects in Alternative Models of Zoning*, 3 J. URB. ECON. 95, 96 (1976).

91. The taking doctrines proposed in this article have been designed for application to challenges to suburban land-use controls. No opinion is ventured on whether they might also be appropriate in other contexts (*e.g.*, where the political process is less stacked against the victims of the public measure).

among the populace.[92] Unless a legal remedy is provided, one has the Orwellian result that all citizens are equal, but some citizens can impose extra duties of citizenship on others. However, a rule requiring compensation of anyone who is forced to confer benefits would excessively exalt the principle of horizontal equity. Even those chafing under the discriminatorily high standard of conduct have an interest in removing barriers to implementation of efficient government programs. They therefore should appreciate the proposed defense based on Michelman's fairness test, because it is a bow to their own long-term concern that resources be efficiently allocated.

By contrast, when a government program merely requires that all laggards come up to the standards of normal behavior, citizens do share a reciprocity of burdens, and the program does not violate—in fact it promotes—horizontal equity.[93] Yet again the concurrent goal of efficiency requires rejection of a blanket doctrine. A rule that ordinances prohibiting harms can never be held to effect takings would provide no remedy when the nuisance activity prohibited would have been cost-effective—that is, when the benefits to the sponsor of an ongoing or prospective subnormal activity would exceed the resulting nuisance damages to his neighbors. Municipal prohibition of a cost-effective nuisance is particularly likely when the victims of the nuisance can easily outvote those who benefit from it. The most activist solution to this problem would be a doctrine holding that all inefficient local land-use controls constitute takings. That doctrine, however, would do great violence to the general judicial inclination to defer to social and economic legislation. The opposite extreme—a policy of complete judicial deference to antinuisance measures—would ignore the awesome allocational mischief that a suburb dominated by a homeowner majority can work. A rule entitling landowners to recover compensation when antinuisance measures are grossly inefficient enables courts to deter the worst instances of municipal waste.[94]

92. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

93. *Cf.* Michelman, *supra* note 76, at 1235-37 (another attempt to defend the harm/benefit distinction on grounds other than efficiency).

94. In an earlier article, *Alternatives to Zoning*, *supra* note 73, I sharply criticized the current employment of zoning as the mainstay of land-use control. I urged increased reliance on more decentralized systems like private nuisance suits, covenants, and fines. I continue to adhere to those views.

The earlier article dealt essentially with the private-law problem of the allocation of rights among neighboring landowners. This article deals with public-law issues in which government is always a party to the controversy. A careful reader of both articles will note that I concede municipalities considerably greater latitude in stopping nuisances than I allow private nuisance plaintiffs. For example, I argued that, except in rare cases in which his fundamental liberties are threatened, a neighbor who seeks an injunction against a cost-effective nuisance should be granted it only if he is willing to com-

3. *Making the Nuisance/Nonnuisance Distinction Operational*

Even those who have advocated that the distinction between prohibiting harms and exacting benefits be used to decide takings cases have been concerned whether public measures can in fact be classified as doing one thing or the other.[95] In an earlier article I defended the distinction by arguing that empirically derived expectations about normal conduct determine the usage in ordinary language of the adjectives "harmful" and "beneficial."[96] A harmful land-use activity (*i.e.*, a nuisance) is one that falls below the standards normally met by landowners.

In urban areas, residential structures are the predominant land use. Those who build residential structures of normal quality cannot be accused of doing something harmful; they are simply repeating what many others have done. A litmus test for the harm/benefit distinction thus emerges. A municipality should be deemed to be exacting benefits when it imposes development standards—on lot size, floor area, architectural quality, or whatever—in excess of the actual attributes of residential structures of median quality in the area in question. By contrast, restrictions designed (1) to prevent residential uses from falling below median quality, or (2) to prohibit commercial or industrial uses (which are generally subnormal neighbors) should be construed as antinuisance measures.

If one is judging a Webster Groves, Missouri, ordinance that restricts the use of lots in a particular cul-de-sac, should the standard of normal residential use be determined by prevailing uses in that cul-de-sac, in that suburb, or in the entire St. Louis metropolitan area? If the preeminent goal is to protect horizontal equity, the proper focus is on the residential uses within the boundaries of the government whose ordinance is challenged.[97] An aggrieved landowner war-

pensate the nuisance-maker for his resulting losses. *See id.* at 738-48. The taking doctrines advocated in this article would require a suburb that stopped a cost-effective nuisance to make reparations only when the stoppage would result in gross inefficiency, rather than in all cases. The desirability of allowing some legislative discretion is the reason for the difference.

95. Professor Allison Dunham expressed his doubts on this score in a conversation with me in the spring of 1975.

96. *Alternatives to Zoning, supra* note 73, at 728-33.

97. I have argued for a uniform metropolitan-wide rule for identifying nuisances when there is litigation between private landowners. *Id.* at 732. Deference to legislative processes has persuaded me to give local governments greater scope than private landowners to protect hypersensitive land uses (like exclusive neighborhoods).

A consistent metropolitan standard for deciding when ordinances force benefits might well be more efficient than the locality-by-locality approach proposed: separate standards would not have to be worked out for each suburb and landowners would be less concerned about who might annex their lands. In addition, localized determinations of

rants sympathy only if a suburb forces him to build residences of higher quality than those occupied by the suburb's current residents. If an elite suburb is merely trying to maintain its eliteness, those who own undeveloped land there have no claim that the suburb's voters or officials are guilty of a double standard.

The legal doctrines just outlined will be applied to some familiar controversies in Part X; nevertheless, a few brief illustrations may serve as a helpful preview. Suppose the Tacky Development Company would like to build apartments on a tract of land that the suburb of Eden has zoned for single-family units on large lots. Assume also that most Eden residents live in single-family units on considerably smaller lots. The *minimum lot-size requirement* can then be identified as an attempt to compel benefits. Eden is liable for any substantial reduction in Tacky's land value resulting from the excessive lot-size requirement unless it can show that the restriction was efficient and fair. In this example, however, Eden's insistence on *single-family units* should be characterized as an attempt to prohibit nuisances.[98] Tacky would therefore only be able to recover for the drop in value caused by the prohibition on apartments if it could show that that prohibition was

normal land uses make it easier for elite suburbs and suburbs on the urban fringe to dampen the production of new modest-quality housing. These are the costs of allowing a degree of local autonomy.

98. There is considerable evidence that apartments are not good neighbors. One regression analysis found that homeowners will pay a significant premium to live in communities predominantly single-family in character. Stull, *supra* note 38, at 549.

The example in the text oversimplifies the difficulty of identifying normal residential uses. Normality technically should be judged not by the internal quality of a dwelling (*i.e.*, the quality of a dwelling as perceived by its occupants) but rather by its external quality (*i.e.*, its quality as a neighboring use). A dwelling unit's market value is an excellent proxy for internal quality but perhaps not for external quality. Real estate brokers, however, believe that the two types of quality are closely related—*i.e.*, the market value of neighboring homes reflects their value as neighboring uses. Real estate brokers therefore advise homeowners not to "over-improve" houses in modest neighborhoods—an implied assertion that modestly priced houses can be no more than modestly desirable neighbors and therefore the improvements will not be reflected fully in market price. Thus a rough measure of normal residential uses might be the characteristics of housing units of median market value in the suburb in question.

This formula may itself be difficult to apply. Suppose half the units in a populous suburban county are single-family detached, 40% are in multi-family structures, 5% are rental townhouses, and 5% are mobile homes. A good shortcut in this situation would be to estimate median family housing expenditures in the county and then determine what one would get for that amount in the four submarkets. County ordinances that required developers to match the basic characteristics of the units identified in this way should not be construed as extracting benefits. Thus if the county completely barred mobile homes but permitted a landowner to build single-family units, high-quality apartments, or high-quality townhouses, the county could still be viewed as prohibiting nuisances. If the county zoned some areas exclusively for modest-quality single-family units, it would be forcing benefits in this instance but should still survive a taking claim if it shows that the prohibition of high-quality apartments and townhouses in those areas is efficient and fair.

grossly inefficient.[99] What if Tacky aspired to build a warehouse or shopping center in a single-family zone? Although restrictions on nonresidential uses are virtually always properly classified as anti-nuisance measures, a landowner may be able to prove gross inefficiency when industrial uses are forbidden near railroad tracks,[100] when commercial uses are forbidden at major intersections,[101] or when non-conforming businesses are forced to shut down immediately.[102]

The land-use controls of most American suburbs go well beyond prohibiting nuisances. Typical suburban zoning provisions—not to mention moratoria and quotas—compel owners of undeveloped land to comply with development standards far in excess of the standards met by existing residences of median quality.[103] Thus in most actual growth control controversies, a landowner pursuing a taking claim would only have to show that the challenged ordinance substantially decreases his land value in order to shift to the suburb the burden of proving that the restriction is efficient and fair.

V. A First Attempt to Set Limits on Development Charges and to Protect Consumers from Monopoly Housing Prices

The subtler legal issues raised by antigrowth measures are difficult to dissect without resort to economic models of suburban housing markets. I here introduce two simple models and show that the suburban policies predicted by the models are in fact frequently observed. Discussion of the models highlights several potential abuses by

99. For a more detailed discussion of this example, see pp. 493-500 *infra*.

100. *Cf.* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (only portion of tracts abutting railroad tracks had been zoned for industrial use).

101. *Cf.* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976) (city had zoned other corners of intersection for commercial use).

102. *Cf.* Hadachek v. Sebastian, 239 U.S. 394 (1915) (upholding ordinance shutting down brick-making business).

103. Courts recently invoking the harm/benefit test for takings have unfortunately misapplied it. The court in Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369 (D. Md. 1975), rebuffed a taking claim against a five-year moratorium on sewer hook-ups. The moratorium was characterized as an effort to prevent the harm of water pollution. This was inaccurate because all existing homes were still being permitted to emit sanitary sewage. New dwelling units (which presumably would emit no more sewage than existing units) were thus being held to the higher standard of no effluent at all.

The infamous case of Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), held that a rural landowner could be prohibited without compensation from filling in swampy land near a lake. The court quoted Freund's version of the harm/benefit test, *id.* at 16, 201 N.W.2d at 767, and then apparently concluded that any change in the natural character of land could be regarded as a harm. The normal owner of rural Wisconsin land is hardly so passive as to leave it untouched.

suburbs; it thus lays the groundwork for a preliminary attempt to articulate a consumer remedy against homeowner cartels and to resolve the thorniest legal problem of all—setting limits on development charges.

A. *The Case of Perfect Competition Among Uncongested Suburbs*

Los Angeles County has 77 municipalities; the six-county Chicago Standard Metropolitan Statistical Area (SMSA) has 256; even a relatively small SMSA like Columbus, Ohio, includes 43 municipalities.[104] Many of these suburbs—particularly the smaller ones—lack distinctiveness; that is, a consumer can readily duplicate their main attributes in another suburb. Demand for housing in a suburb that has perfect substitutes is perfectly elastic—in other words, the demand curve is horizontal.[105] When a fungible suburb imposes development charges or wasteful development standards on its homebuilders, those homebuilders are unable to pass on any of those costs to housing consumers. Why should a homebuyer pay more when he can purchase an equally good house at the old price in another essentially identical suburb? When suburbs are perfectly competitive, the burden of municipal antigrowth programs falls entirely on producers' surplus—the economic rents of owners of supply factors.

Figure 2 illustrates the housing market in a suburb facing a perfectly elastic demand curve. SS' represents the supply curve for new housing, UU' that for used housing.[106] The following discussion of the market in Figure 2 is based on three assumptions: (1) that the market is free of both net congestion costs and benefits, *i.e.*, that there are no costs or benefits resulting from increased population density in the community; (2) that new development would impose no purely fiscal impacts on the suburb, *i.e.*, that it would neither create new tax burdens nor confer new revenue benefits; and (3) that used housing is perfectly inelastically supplied, *i.e.*, that the UU' curve is vertical.[107] Since posi-

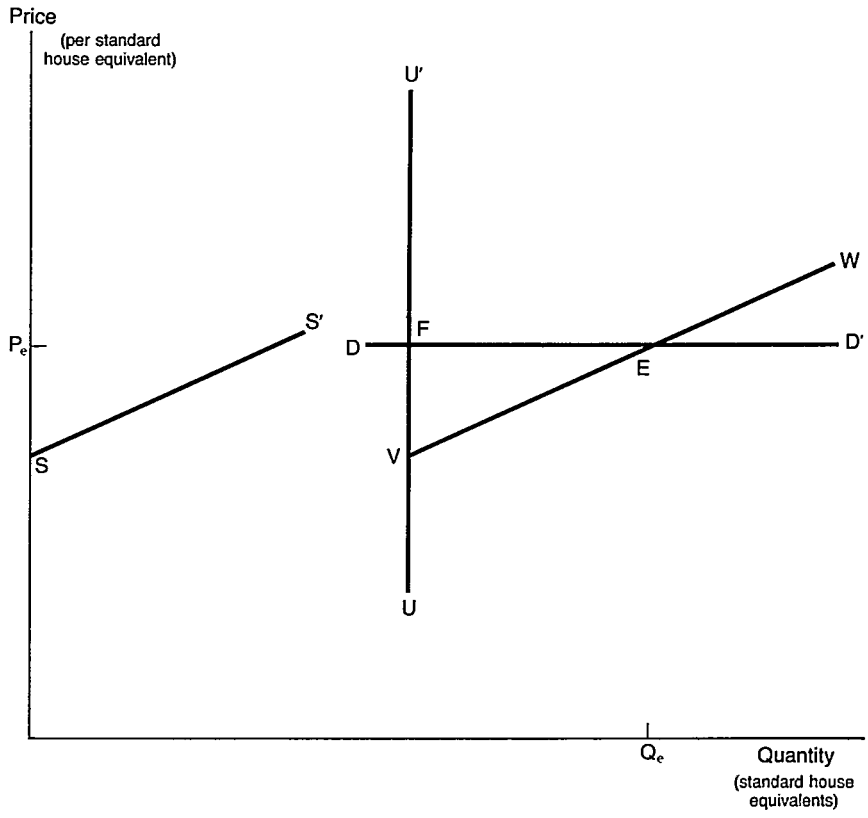
104. 5 BUREAU OF THE CENSUS, 1972 CENSUS OF GOVERNMENTS 38, 60, 114 (1975). The 264 SMSAs that were recognized by the census in 1972 contained a total of 5,467 municipalities and 3,462 townships. *Id.* at 3, 18.

105. One study of housing prices in the Boston area found that consumers perceived most suburbs as having close substitutes. Schnare & Struyk, *Segmentation in Urban Housing Markets*, 3 J. URB. ECON. 146, 164 (1976).

106. Because it is already standing, used housing is assumed to be more inelastically supplied than new housing. For sources discussing the elasticities of supply and demand in housing markets, see notes 14 & 15 *supra*.

107. The supply of used housing is portrayed as being wholly inelastic in order to simplify the geometry of the figures. This shortcut should not affect the validity of the analysis. It does, however, unquestionably impair richness in insight by concealing the

Figure 2



tive or negative externalities[108] from growth are thus assumed not to exist, the intersection of the demand curve (DD') and the aggregate supply curve for new and used housing (UVW) must be the point of optimal resource allocation. This market equilibrium is denominated E. (The next two Parts of this article will allow for the existence of both congestion and fiscal externalities, thus reintroducing the appropriate measure of complexity.)

As already indicated, the central feature of the housing market illustrated in Figure 2 is that the market price of housing must remain at P_e regardless of the suburb's land-use policies. Municipal officials

potential importance of urban renewal, housing code enforcement, and similar local programs that can influence the supply of used housing. For discussion of a market where the used housing supply does respond to price, see pp. 394-97 & notes 19-26 *supra*.

108. Externalities are the effects of an activity on parties other than the individual or individuals engaged in the activity. Their presence may cause inefficiency whenever these third parties would be willing to pay the sponsor of the activity enough to persuade him to modify his behavior but are prevented from doing so by high transactions costs.

thus cannot raise housing prices by restricting construction. In addition, since the present discussion assumes there are no net external costs from growth, city officials would not hear complaints from current residents about crowding or fiscal impacts. The upshot is that homeowners in a suburb like the one pictured in Figure 2 have nothing to gain from stopping development, but much to gain from allowing it. If legal rules permit, their profit-maximizing strategy will be to allow as much development as the market forces will generate and to capture as fully as possible the economic rents of housing suppliers.

These rents are represented by the triangle *FEV* in Figure 2. To capture them in their entirety, the suburb would have to charge each landowner exactly the opportunity cost he would incur if he were forced to shift the prospective use of his land from residential development to his next most valued use of the land. That amount would vary from developer to developer. To maximize income to the homeowner cartel, the suburb would have to vary its development charges and, to allow this price discrimination to work, also prohibit the transfer of development approvals from one site to another. Lastly, wise suburban officials would require that development charges be paid in cash, not through the dedication of tangible lands or facilities. When the developer's cost of supplying a facility exceeds its value to suburban residents, there is a deadweight loss that both parties should want to bargain to eliminate. For example, if it costs Tacky Development $100,000 to dedicate a park site that Eden residents value at only $60,000, both should prefer an $80,000 cash transfer.[109]

The profit-maximizing policy just outlined—the granting of non-

109. Two California cases illustrate both the potential inefficiency of in-kind exactions and the inclination of highway departments to exaggerate the urgency of street improvements.

The famous case of Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949), upheld the conditioning of subdivision map approval on the dedication, *inter alia*, of an 80-foot right-of-way for an internal street the city of Los Angeles thought should be improved to secondary highway standards. Twenty-eight years later, the city is currently providing only a 36-foot pavement in that 80-foot right-of-way. Most of the balance is devoted to two virtually useless (and largely grassless) 17-foot wide parkways between sidewalk and curb.

In Sommers v. City of Los Angeles, 254 Cal. App. 2d 605, 62 Cal. Rptr. 523 (1967), the applicant for a building permit to remodel a gas station was required to dedicate strips along the streets abutting his corner lot to provide land needed to upgrade those streets to their master-planned role as secondary highways. The appellate court concluded "the evidence is ample to establish an immediate need" for this exaction. *Id.* at 616, 62 Cal. Rptr. at 531. Neither street was widened, however, in the seven years following the decision, and the widening does not appear on the city's five-year capital-improvements program ending 1978-1979. Interview with Alfred Liff, Director of the Los Angeles Bureau of Assessments, in Los Angeles (June 27, 1974) (notes on file with *Yale Law Journal*).

transferable development approvals in return for variable cash development charges—closely corresponds to the current practice of many small suburbs in the United States. The typical scenario is as follows. The suburb deliberately imposes excessive development standards—on lot sizes, lot frontages, parking spaces, and the like. The suburb in fact has no interest in promoting the deadweight loss that would result if homebuilders complied with these wasteful standards.[110] The standards are designed, rather, to make strict compliance economically infeasible for developers. This gives the suburb maximum leverage in the subsequent bargaining. The suburb then proceeds to sell waivers of the excessive standards in the form of rezonings or approvals for flexibly designed planned-unit development (PUD) layouts.[111] A developer should be willing to bid up to his loss from an excessive standard to have it removed; how close the sales price of a waiver is to that amount depends on the parties' relative bargaining skills. In any case, both parties gain by negotiating the elimination of the deadweight loss.[112] The zoning amendment process is consistent with this theory of suburbanite profit-maximizing because suburbs price-discriminate when they sell zoning changes (by varying cash and in-kind donations required) and because the development approvals granted are not transferable from site to site.[113]

Another phenomenon that lends empirical credibility to the model is the high incidence of variances to moratoria on growth. As one author has noted, the enactment of a sewer connection moratorium is frequently followed by an *accelerated* pace of sewer connections.[114]

110. As Jan Krasnowiecki has sagaciously observed, to discern a municipality's zoning "plan," one should examine not the grand scheme initially enacted, but rather the pattern of amendments the municipality has approved. Krasnowiecki, *Zoning Litigation—How to Win Without Really Losing*, in INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 1, 3-4 (Sw. Legal Foundation 1976).

111. For a general discussion of PUDs, see *Symposium: Planned Unit Development*, 114 U. PA. L. REV. 3 (1965).

112. George Sternlieb has found that the fastest growing suburbs in New Jersey have had continuously declining per-capita municipal outlays. G. STERNLIEB *et al.*, HOUSING DEVELOPMENT AND MUNICIPAL COSTS 313 (Center for Urb. Pol. Research 1973). This finding might be partly explained by their successful use of land-use controls to exact developer donations.

113. Because devices such as PUDs are essentially post-1960 phenomena, there remains the puzzle of why local governments did not develop a system of variable development charges before that. The most plausible hypothesis is that legal uncertainties about both constitutional constraints and the scope of standard enabling acts slowed the evolution of these techniques.

114. *See* Rivkin, *supra* note 5, at 10. Consider also the following from a report of the County Executive's staff in Montgomery County, Maryland: " 'The results [of the sewer moratorium] have been disappointing. The increase in sewage flows has not tapered off. The residential construction rate has actually increased.' " U.S. COUNCIL ON ENVIRONMENTAL QUALITY, LAND USE 63 (1974).

One hypothesis for explaining this phenomenon is that the agency imposing the moratorium in fact has no interest in slowing growth, but is simply trying to enhance its ability to collect development charges. As an illustration, the city of San Diego recently declared a moratorium on new construction in its Mira Mesa district but then agreed to lift it for four homebuilders who promised to contribute school busing costs and $750 per resident pupil.[115] The price for purchasing a variance often appears explicitly in the text of the moratorium measure. For example, a San Jose initiative barred residential rezonings in areas with crowded schools unless the owner of the land to be rezoned agreed to provide temporary school facilities.[116]

Suburban practices often deviate from the profit-maximizing strategy just outlined. In-kind exactions are still common. When cash charges are levied, they are frequently set at flat rates and not varied from developer to developer. Los Angeles, for example, has its $200-per-dwelling-unit construction tax and off-site sewer charge of $348 per single-family home.[117] The moratorium waiver fee of $750 per pupil established by San Diego is also so inflexible that it may not completely absorb the available producers' surplus. These deviations probably arise from perceived legal constraints. The collection of unequal charges may violate landowners' rights to due process and equal protection. Unequal treatment is rather readily disguised when in-kind exactions are collected (for instance, all park sites differ) but not when cash, the more efficient form of payment, is called for. If a suburb does prefer to receive cash, flat rates may be advantageous both to minimize legal challenges and to avoid the administrative costs of deciding how to vary fees.

A municipality recognized as having an absolute right to control will obviously be free to capture all developer surplus available; that right will give it sufficient leverage for fruitful bargaining. In addition, even when taking doctrines constrain municipal regulations, a suburb may still succeed in exacting all developer surplus so long as the legal ceiling on development charges is high enough—*i.e.*, so long as it exceeds the maximum the suburb would have to charge to capture the economic rent of the landowner most interested in development. In short, in order to prevent suburbs from unfairly seizing the economic rent of developers, one must devise legal doctrines that protect developers *both* from wasteful land-use regulations *and* from excessive

115. HOUSE & HOME, May 1972, at 34.

116. *See* Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1975), *appeal dismissed*, 96 S. Ct. 3184 (1976).

117. *See* p. 398 & notes 28 & 29 *supra*.

development charges. A court that did one but not the other would be acting like Yossarian, who innocently treated the minor wound in Snowden's thigh without noticing the mortal injury under the flak jacket.

But why bother to protect developer surplus at all? A second lesson of the model in Figure 2 is that there is no strong *efficiency* reason to place tethers on the discretion of fungible suburbs.[118] Their growth controls are bluffs—mere bargaining ploys to achieve their true end of fundraising. Under the assumptions of Figure 2, a fungible suburb with complete discretion not only cannot impair the welfare of housing consumers, but also will be led by the self-interest of its homeowners to allow the natural rate of growth. On the other hand, the model hardly suggests that allowing suburban discretion is essential to achieve more efficient land use. Quite the contrary. If there are no externalities from growth (as has thus far been assumed), growth controls cannot possibly enhance efficiency. Where the model in Figure 2 is accurate, legal rules have, by and large, only a distributional impact; they decide who shall enjoy the surplus in land suited for residential development—those who own that land or those who own homes and apartments then existing in the community.[119] That is essentially an issue of horizontal equity.[120]

B. *The Case of Imperfect Competition Among Uncongested Suburbs*

Suburbs without perfect substitutes pose more complicated issues. Demand for housing is apt to be downwardly sloped (not perfectly elastic) in suburbs that have unique topographic or cultural features, that offer unusual public services, or that have special locational advantages. For example, Baltimore County and Prince Georges County, Maryland, are both so large in area that no other suburb can compete perfectly with them. These counties may be able to adopt policies that raise housing prices above competitive levels. When demand is downwardly sloped, the burdens of antigrowth measures no longer fall

118. In this context I am calling an outcome "inefficient" if it would involve a deadweight loss. A wealth transfer from housing suppliers to suburbanites involves no such loss, except for the administrative costs of accomplishing the transfer. This is not a rigorous definition of economic efficiency. Because it impairs the welfare of housing suppliers, the wealth transfer is clearly not a Pareto-superior move. *See* note 17 *supra*.

119. Who benefits from the revenue from development charges depends on how the money is spent. If increased services are provided to resident tenants, those benefits will be capitalized in increased rental payments and thus will accrue to landlords. If some revenues are devoted to reducing taxes on site values, some net benefits could accrue to owners of undeveloped land who would enjoy no producers' surplus from residential development.

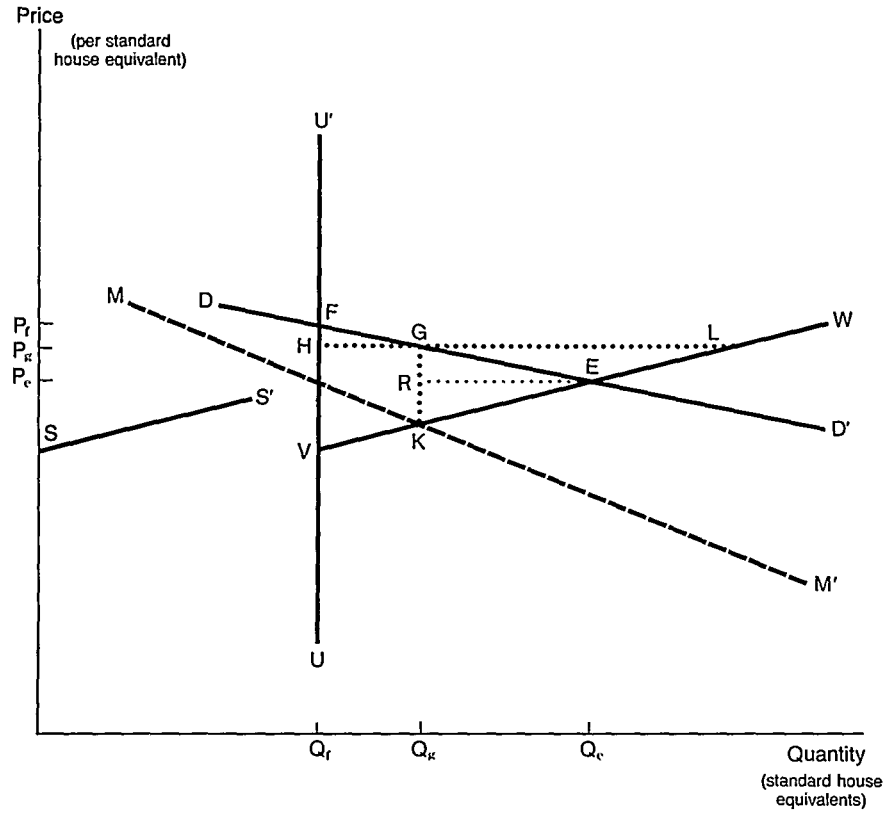
120. *See* pp. 438-40 *infra*.

exclusively on housing suppliers, but are shared by both housing suppliers and housing consumers.

Figure 3 illustrates the housing market in a suburb without perfect substitutes. The figure incorporates the three assumptions underlying Figure 2—chiefly that all economically feasible amounts of new development would impose no congestion or fiscal costs on existing residents. As before, the efficient equilibrium is E, the intersection of the demand curve (DD') and the aggregate supply curve (UVW).

If a unique suburb under the political control of a homeowner cartel were conceded unfettered discretion, it could be expected to behave like any other entrepreneur with monopoly power. The profit-maximizing strategy of any monopolist is to raise price by restricting output. A monopolist's preferred output is established by the intersection between his marginal-revenue curve and his marginal-cost (supply) curve. Below the demand curve in Figure 3 has been drawn the marginal-revenue curve (MM') that traditionally would be associated

Figure 3



with it.[121] The location of the marginal-cost curve is a bit trickier. A homeowner cartel can profit from two basic types of housing transactions in this market: the sale of used housing units (which its members own) and the collection of development charges from suppliers of new units. If a suburb captures all available producers' surplus through variable charges, it, in effect, has commandeered all developers as wholly-owned subsidiaries. The cartel's marginal-cost curve is therefore the aggregate supply curve in the housing market, namely *UVW*. The monopoly equilibrium is consequently *G*, the point on the demand curve directly above *K*, the intersection of the marginal-revenue and marginal-cost curves.[122] The suburb's profit-maximizing strategy in this case is thus (1) to limit new housing construction to the quantity Q_g minus Q_f, and (2) to collect from landowners variable development charges equal to the area of the trapezoid *HGKV*.[123] The simplest way to collect those charges would be to impose quotas, moratoria, and wasteful development standards, and then sell relief from those ordinances for variable prices.[124] One result of such a policy would be that housing prices would rise from P_e to P_g.

This seems to be roughly the strategy adopted by both Petaluma and Ramapo. The Petaluma quota of 500 developer units per year

121. The text uses the standard procedure for finding a monopoly equilibrium. This method is completely accurate only when a monopolist consumes none of his own output. But many members of a homeowner cartel are likely to continue residing in their houses for a number of years after they establish a monopoly housing price. When the monopolist does consume part of his product (as a homeowner cartel does), locating the monopoly equilibrium is more complex. The additional revenues made possible by monopoly pricing are of no benefit to a monopolist to the extent that he consumes part of his output. The profit-maximizing output for such a monopolist should therefore be determined by the intersection of his supply curve and what might be called his "marginal benefits curve," *i.e.*, the marginal revenue curve adjusted to exclude the bogus revenue that is merely a wealth transfer from himself as consumer. This marginal benefits curve is located above the marginal revenue curve. The monopoly equilibrium in Figure 3 is thus technically not at *G* (as the text states), but rather at some point between *G* and *E*.

122. If the marginal-revenue curve had intersected the *UVW* curve between *U* and *V*, rather than between *V* and *W*, the monopoly equilibrium would be *F*. In that case, the suburb would either completely ban development or impose development charges or standards so harsh that no one would build.

Since the supply of used housing is not in fact perfectly inelastic, achieving the monopoly equilibrium may call for programs to demolish part of the used stock (*e.g.*, urban renewal) or to restrict its expansion (*e.g.*, building bulk restrictions, occupancy limitations, or prohibitions on conversions to residential use).

123. A totally unbridled suburb might also try to capture the consumer surplus of entrants by selling them nontransferable residency permits at variable prices. This would shift the marginal-revenue curve and move the monopoly equilibrium toward *E*. For more on residency permits, see note 70 *supra*.

124. For a similar hypothesis that zoning tends to be used to cartelize supply and raise revenue, see White, *The Effect of Zoning on the Size of Metropolitan Areas*, 2 J. URB. ECON. 279 (1975).

apparently restricts new housing production to an amount well below the market equilibrium.[125] Much of the quota allotment is also reserved for multifamily units and subsidized developments—two housing types not likely to compete with the single-family units occupied by 83% of Petaluma households.[126] To the extent that they allow new development, Petaluma homeowners have no reason to let landowners keep any surplus, much less share in the gains from cartelization of the housing supply. They have, therefore, apparently adopted the profit-maximizing strategy of selling quota allotments for variable prices and, to enforce the price discrimination, have prohibited the transfer of those allotments from site to site. Developer payments are basically made through the dedication of facilities. A 17-member Residential Development Evaluation Board applies a point system to assess a developer's application for an allotment. The projects that earn the most points are those that require the lowest local expenditures on street, water, sewer, drainage, fire, and school systems; this approach induces developers to finance those facilities by themselves. A Petaluma subdivider can likewise earn points by providing open space, pathways, bicyclepaths, equestrian trails, schoolrooms, or similar facilities of community-wide benefit.[127]

The highly publicized Ramapo plan[128] also seems to be designed both to slow growth and to exact maximum surplus from those permitted to develop. Ramapo's 18-year staged growth program is certainly partly bluff; the ordinance explicitly states that a developer can purchase variances from the town's timetable by providing major roads, off-site sewer and drainage facilities, park improvements, school sites, and firehouses. Those dedications help build up the "development points" he needs. But the Ramapo plan is apparently not entirely for fundraising. The sales price for variances has been set high enough to reduce the amount of development.[129] Thus the plan has the twin earmarks of the optimal strategy for homeowners in a unique

125. Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 900-02 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). As indicated in note 6 *supra*, the 500-unit figure applies only to buildings or subdivisions that have five or more units. Even so, the Ninth Circuit assumed that the quota would inhibit Petaluma's rate of growth.

126. *Id.* at 900-01.

127. Petaluma, Cal., Resolution No. 6113 N.C.S. (Aug. 21, 1972), *reprinted in* Landman, *No, Mr. Bosselman, the Town of Ramapo Cannot Pass a Law to Bind the Rights of the Whole World: A Reply (Part I)*, 10 TULSA L.J. 169, 193 n.43 (1974).

128. *See* Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 178, *appeal dismissed*, 409 U.S. 1003 (1972) (upholding plan).

129. An attorney for the National Association of Home Builders has asserted that Ramapo's growth rate has slowed by 75% on account of its plan. Wall St. J., Jan. 31, 1975, at 1, col. 1, and 21, col. 5.

suburb—a partial restriction on supply coupled with a means to capture the surplus of the owners of land where development occurs.[130]

A suburb can enhance its monopoly profits by allying itself with similar suburbs to restrict housing construction. For example, the simultaneous takeover of Fairfax, Montgomery, and Prince Georges counties by antidevelopment politicians in the early 1970s may explain in part the astounding increase in Washington, D.C., area housing prices that followed.[131] Voluntary cartel arrangements, however, are notoriously unstable. If a dozen elite suburbs join in curtailing new development, one of them is likely to cheat on the implicit agreement in order to collect the lucrative development charges made possible by the monopoly prices. Moreover, as housing prices rise, landowners have more and more incentive to invest resources in electing pro-development candidates in any given suburb. Voluntary antigrowth cartels thus tend to unravel, dissipating potential monopoly profits.

What the conspiring suburbs need is a cartel manager able to coerce all members to comply with stipulated output restrictions. A higher government is obviously the best candidate to perform this function. For example, a regional body with the authority to enforce a sewer connection moratorium[132] can effectively police the output of new housing within many suburbs. State government is another good cartel manager. Two practiced observers believe that Hawaii's stringent statewide planning controls have been a major factor in causing the phenomenally high housing prices there.[133] The federal government seems

130. A monopolist hardly has an easy time determining how much to restrict output. All price-setters have imperfect knowledge of supply and demand conditions, and are forced to use trial-and-error to approach the monopoly equilibrium. Suburban homeowners face particularly severe problems. Since no homeowner cartel is perfectly homogeneous, conflicts over strategy are inevitable. For example, since moratoria and other short-lived antigrowth devices cause only temporary price increases, they will tend to be favored more by homeowners about to move away than by the deeply rooted. In addition, the benefits of achieving an increase in housing prices may be offset in part by higher property taxes owed larger governmental units that include the suburb.

131. The average sales price of new homes in the Washington metropolitan area jumped 101% between 1968 and 1975, easily the largest increase over that period in any major metropolitan area examined by the Federal Home Loan Bank Board. (The median metropolitan increase was 57%.) Local observers attribute the Washington phenomenon to state and county antigrowth policies and to the generosity of federal government pay scales. Wash. Post, Aug. 3, 1975, § A, at 1, col. 1.

132. *E.g.*, Morshead v. California Regional Water Quality Control Bd., 45 Cal. App. 3d 442, 119 Cal. Rptr. 586 (1975) (sustaining sewer connection moratorium imposed by regional body).

133. F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control 25-27 (1971) (study done for Council on Environmental Quality); Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 Fla. St. U.L. Rev. 234, 246-47 (1973).

Hawaii's unique racial mix and isolated location create an unusually inelastic demand

to be increasingly involved in coordinating antigrowth efforts. On several occasions, for example, the Environmental Protection Agency has deliberately withheld sewerage construction grants in order to induce local officials to stop increases in local sewerage inflows.[134] National growth restrictions are the surest means for boosting housing prices; Sweden, for instance, to the great benefit of its current homeowners, has in effect restricted its production of single-family homes by failing to expand output to meet the rising demand.[135]

C. *Alternative Legal Rules Considered*

When consumer demand is perfectly elastic, as in Figure 2, there is no strong efficiency reason for constraining suburban discretion. This ceases to be true when the demand curve for housing is downwardly sloped. "Public" monopolies are as allocationally mischievous as "private" ones. If the suburb pictured in Figure 3 achieved its monopoly equilibrium of G, a deadweight social loss equal to the triangle

for its housing. Given the opportunities for extraordinary monopoly profits, it should not be surprising that state land-use planning originated there.

The ownership of undeveloped lands in Hawaii is largely concentrated in a few giant estates. *See* F. BOSSELMAN & D. CALLIES, *supra* at 13-15. If there is a cartel behind Hawaii's controls, it may consist of these large landowners, not the owners of existing structures. The estate owners would certainly profit by coordinating their output and by suppressing competition from smaller developers. If they control the state land-planning agency, one would expect the development charges imposed on them by the state agency to be rather small so that they themselves could reap the surplus made possible by monopoly housing prices.

134. L.A. Times, Sept. 21, 1975, § I, at 3, col. 5 (L.A., Cal.); N.Y. Times, Oct. 20, 1974, § IV, at 9, col. 2 (Ocean County, N.J.).

135. The chronic national housing shortage, particularly acute in Stockholm, has led to an emphasis—in the satellite centers as well as elsewhere—on the construction of multi-family industrialized housing. The growing market demand for single-family detached housing has been largely unmet, except through proliferating summer houses.

A. STRONG, PLANNED URBAN ENVIRONMENTS xxiii, xxix (1971).

Regional, state, and national growth restrictions, however, are hard to maintain. As the unit of government becomes larger and more complex, its decisionmakers tend to become more vulnerable to the influence of land-development interests. *See* pp. 407-09 *supra*.

The pattern of state land-use programs seems to support this theory of politics. The state programs with the most antidevelopment teeth have been enacted in relatively small states. *See, e.g.*, HAWAII REV. STAT. §§ 205-1 to 205-15 (1968); ME. REV. STAT. ANN. tit. 12, §§ 683-685C (West Supp. 1975); *id.* tit. 38, §§ 481-488; VT. STAT. ANN. tit. 10, §§ 6001-6091 (1973).

The pattern in the more populous states seems to be different. Florida's program is in some ways prodevelopment. *See* FLA. STAT. ANN. §§ 380.012-.11 (Harrison 1975) (in cases governed by statute, state agency is authorized to review local denials of development approvals). The original California Coastal Zone Conservation Act, after being consistently rejected by the state legislature, was finally enacted by initiative, a process harder for prodevelopment forces to influence. *See* CAL. PUB. RES. CODE §§ 27000-27650 (West Supp. 1975).

KEG would result.[136] That area represents the additional surplus that would accrue to producers and consumers if they were permitted to trade the optimal quantity of housing, Q_e.

1. *Protecting Housing Consumers Against Monopoly Pricing*

The two models just considered provide a strong argument for adopting legal doctrines to protect housing consumers from suburban monopolization efforts. Such doctrines would not only improve resource allocation, but would also prevent the distributive injustice of early arrivals to a municipality enriching themselves at the expense of later arrivals.[137]

A critical lesson of Figure 3 is that suburbs will not necessarily be deterred from inefficient monopolistic practices simply by taking doctrines that entitle landowners to damages. Suppose a municipality that adopted exclusionary policies only had to compensate landowners. If there were many tenants in the suburb, or if most residents planned to sell their houses promptly, a homeowner cartel might nevertheless still want to achieve its monopoly equilibrium (*G* in Figure 3). Restricting production to Q_g would cost the suburb's taxpayers a maximum of *KLG* in payoffs to landowners.[138] That cost might be less than

136. The Coase theorem asserts that if transaction costs are zero, this deadweight loss will be eliminated by market transactions. Those injured by the monopolistic practice would successfully bargain for its elimination. *See* Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). In the case of suburban exclusion, land developers frequently do bargain; by paying *HGKV* in development charges to relieve growth restrictions, they move the suburb from point *F* in Figure 3 to the less socially wasteful *G*. However, housing consumers, the other injured group, are more numerous than developers and less knowledgeable and organized. As a practical matter, they are not able to bargain for abandonment of a cartelization policy.

137. When earlybirds have done something creative, it is efficient to reward them and thereby provide incentives for innovation. This is, of course, the rationale for rewards to finders and for the patent and copyright systems. Early settlement in a suburb, however, is not an activity that will wither away unless specially rewarded. It is more analogous to early establishment of a bridge or ferry at a river crossing. *Cf.* Proprietors of the Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (refusing to protect proprietors of old bridge from competition from new bridge). Granting monopoly power in these contexts does not promote efficiency in either the long or short run.

Current residents might try to defend the horizontal equity of policies that injure newcomers by invoking the widespread acceptance of queues to allocate scarce resources. The rejoinder should be that the policy of allocating wealth by queue is being established in this case by those who know they are first in line.

138. This assumes that landowners whose development rights are condemned are entitled to "project enhanced" value—in this context, the increment in land values created by the monopolization program. *Cf.* United States v. Miller, 317 U.S. 369 (1943) (excludes from condemnee's compensation the increase in land value caused by condemnor's project after its final authorization); Merced Irrigation Dist. v. Woolstenhulme, 4 Cal. 3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971) ("project enhanced" value may be

the present value to cartel members of the monopoly profits resulting from the increase in housing prices from P_e to P_g. By analogy, if John D. Rockefeller had had the power of eminent domain over competing oil companies, he might indeed have found it in his interest to acquire them and shut them down. So might a suburb decide to pursue an expensive green-belt acquisition program in order to extinguish all competing development rights. To assure the attainment of the optimum equilibrium, E, it is thus necessary to entitle consumers either to enjoin monopolization efforts or to collect the damages they suffer from monopoly pricing, namely, at G, damages equal to P_g minus P_e. If only the damages remedy were provided, it would have to be given both to consumers who buy new housing and, more importantly, also to current tenants and future purchasers of services in the used stock of housing.[139] Establishment of either the injunction or the damages remedy for consumers would ensure that monopolization efforts would never be in a suburb's interest. Articulation of such a consumer remedy is the key for preventing enactment of inefficient land-use controls. So long as consumers are provided an effective remedy, it does not matter *from an efficiency standpoint* whether landowners are given any remedy at all.

Which remedy or remedies should consumers have? Despite the great difficulty of measuring them, the exclusive remedy of damages is the best candidate. The uncertainties and inhibiting effects of injunctions have already been summarized.[140] When an exclusionary suburb is fungible (as many are), its policies do not injure consumers.[141] If there are net congestion costs from growth, the efforts of a unique suburb to restrict housing production can promote efficiency.[142] Allowing consumers to obtain injunctions against municipal programs in these situations would be a mistake. If injunctions are to be provided only in the remaining cases in which growth restrictions both are inefficient and injure consumers, desirable suburban land-use ordinances or land acquisitions would be under a pall of uncertainty.

Restricting consumers to the damages remedy thus has the virtue of not impeding a suburb's freedom to control its land uses. The challenge is to make damages a workable remedy as an administrative

considered if it accrues to property prior to time when it was reasonably probable that property would be taken by government). I will later suggest that landowners should not recover this increment. *See* notes 170 & 360 *infra*.

139. In addition, someone should be entitled to recover the damages suffered by the consumers who refuse to buy because of monopoly prices. *See* note 360 *infra*.

140. *See* pp. 416-17 and note 80 *supra*.

141. *See* pp. 425-26 *supra*.

142. *See* pp. 444-45 *infra*.

matter. The problems of measurement involved are intimidating, but certainly not unique; they are exactly those encountered in consumer suits for antitrust damages. As will be explained more fully later, the necessary administrative shortcuts include the use of class actions, the rough approximation of damages, and restraint in actually distributing awards to individual consumers.[143] To prevent wasteful litigation, consumer representatives should be required to bear an initial burden of proving that there has been more than *de minimis* injury. In addition, a suburb should be entitled to invoke Michelman's fairness test[144] as a defense against a consumer complaint. A suburb would thus prevail if it could prove that its growth-control program was efficient and that the long-run self-interest of consumers makes it fair that damages not be awarded.

Consumers suing typical suburbs will not often prevail in these damage actions. In *Warth v. Seldin*[145] the Supreme Court was unquestionably correct in being skeptical of consumer allegations of harms from a suburb's exclusionary policies.[146] The antigrowth measures of most small suburbs do not injure housing consumers. It is, of course, possible that several neighboring suburbs will successfully pursue parallel exclusionary policies that in aggregate do result in monopoly price levels.[147] In that case, consumers pursuing a damages suit should join these suburbs as defendants.

2. *Who Should Reap Developer Surplus?*

As long as consumers are entitled to recover their damages arising from municipal restrictions on housing production, there is no compelling efficiency reason to prohibit a suburb from using growth controls or development charges to capture landowner surplus. In Figure 3, for example, it is not allocatively harmful for the suburb to collect

143. *See* p. 500 *infra.*

144. *See* p. 415 *supra.*

145. 422 U.S. 490 (1975) (low-income consumers living elsewhere lack standing to attack exclusive suburb's land-use policies, at least so long as they have no concrete interest in any particular development project).

146. Many courts have reached the merits in cases of this nature. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 561-63 (1977) (consumer interested in particular project has standing to attack suburb's restriction on that project; no constitutional violation); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972); Allan-Deane Corp. v. Township of Bedminster, 63 N.J. 591, 311 A.2d 177 (1973) (overturning lower-court decision not to permit excluded individuals to intervene in suit by developer challenging suburb's allegedly exclusionary zoning regulations); *cf.* Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (rejecting on merits a consumer attack on exclusionary zoning).

147. As noted, self-interest will tend to break up this conscious parallelism unless a larger government can be found to act as cartel manager. *See* pp. 434-35 *supra.*

development charges from landowners equal to the trapezoid *HGKV*, provided that it thereafter compensates consumers of new housing by an amount equal to Q_g minus Q_f multiplied by the difference between P_g and P_e. There is, however, at least one efficiency consideration that might weakly support immunization of landowner surplus from capture. If suburbs impose variable development charges, the relative administrative costs of this local revenue-raising device will probably exceed the administrative costs of collecting other types of local taxes. But there is a countervailing consideration; although development charges may be administratively expensive, they may be allocatively superior to other local taxes.[148] If the development charges imposed on any landowner do not exceed the surplus that he derives from development, those charges fall entirely on economic rents and thus cause no misallocations; local excise taxes, in contrast, usually curtail consumption of the taxed good and lead to a deadweight efficiency loss.[149] But these allocative advantages of development charges should not be overdramatized. Higher property taxes are in fact the most likely substitute for development-charge revenue; the allocative distortions of the property tax system are now not thought to be particularly great.[150]

Equity is thus the critical consideration. Who has the more just claim—a landowner who would obtain surplus from development or the owners of already existing structures who would like to capture those gains for themselves? For the models now under discussion, horizontal equity definitely cuts in favor of developers. No local government strives to capture through taxes the entire surplus of owners of single-family homes (or other residential properties). That would hardly be politically popular. Development charges, by contrast, are widely used by small suburbs because they cream off the surplus of a particular group of landowners who have little political power.[151] To cast the practice in its worst light, it is as if a suburb adopted Henry George's system of stiff taxes on site values[152] but then decided to apply those taxes only to properties owned by nonvoters. Horizontal equity justifies the adoption of legal doctrines to protect

148. For my somewhat idiosyncratic distinction between administrative and allocative costs, see p. 414 & note 74 *supra*.

149. Economists generally consider narrow excise taxes to be allocatively inferior to broad-based taxes. *See, e.g.*, A. HARBERGER, *supra* note 41, at 25-28, 47-53. They fear that in most markets the elasticities are such that excise taxes affect the quantities consumed.

150. *See* Mieszkowski, *supra* note 41, at 82-90; Ladd, *supra* note 41, at 65, 73, 79.

151. *See* pp. 405-07 *supra*.

152. H. GEORGE, PROGRESS AND POVERTY 328-30, 403-07 (Fiftieth Anniversary ed. 1929).

tiny minorities from politically expedient efforts to seize their surplus. Developers would *not* deserve this legal protection, however, if the element of discrimination against the voteless and vote-poor were not present. Thus if a suburb adopted Henry George's site-value taxation scheme in toto, thereby subjecting resident homeowners themselves to loss of surplus, developers could hardly complain of horizontal unfairness.[153]

The goal of vertical equity probably cuts slightly the other way. Where owners of underdeveloped land are rich and owners of existing structures poor, development charges will tend to equalize the distribution of wealth. But how certain can one be that this is true? Do the farmers and speculators who own undeveloped land tend to be wealthier than those who own homes and apartment buildings in the suburbs? Perhaps so, but one at least would want empirical support for the proposition. Moreover, this is a fight between two relatively privileged classes and consequently not one that should arouse the passions of those most concerned about the distribution of wealth. The goal of horizontal equity—the equal treatment of all landowners —seems paramount. That goal points to the adoption of a legal rule forbidding a suburb's use of charges that fall only on the surplus of owners of undeveloped land.

This Part has thus led to the formulation of two still tentative legal doctrines. The first is that consumers should be entitled to recover damages arising from suburban programs that raise housing prices. The second is that development charges tend to be an unjust system for raising municipal revenue and, therefore, should not be allowed. However, both of these doctrines were fashioned through analysis of models that assumed that suburban growth imposes no net congestion costs or fiscal burdens on existing residents. The next task is to see whether the tentative doctrines remain viable when those simplifying assumptions are abandoned.

153. The issue is when it becomes unfair for a government to tax some economic rents but not others. For an extended analysis concluding that it is fair to tax the surplus of only slum landlords for the benefit of poor tenants, see Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1160-74 (1971).

Some authors have even questioned the justice of Henry George's system of taxing the surplus of all landowners because it leaves other forms of surplus untaxed. *See, e.g.*, R. LIPSEY & P. STEINER, ECONOMICS 384 (4th ed. 1975). This concentration of tax burdens on landowners seems defensible, however, at least when local governments are doing the taxing. If a small jurisdiction tries to tax an owner's surplus in a mobile resource (like labor), the owner can export the resource to evade the tax. Since taxes on surplus are the most efficient taxes, and since the ownership of land is reasonably widely distributed, landowners have no strong claim that local site-value taxes of general application are unjust.

VI. Legal Treatment of the Congestion Costs of Growth

New development threatens to impose three different types of costs on those who already reside in suburbs. The first type, *nuisance costs*, arise when a new housing project is subnormal in quality. Mobile home parks, garden apartments, and federally subsidized tract housing, for example, may be far below prevailing aesthetic quality levels and cause the value of nearby land to fall. As already noted,[154] a suburb should be entitled to forbid the nuisance features of these projects, and, when it does, it should be held liable for a taking only when a developer can prove the antinuisance restriction to be grossly inefficient.[155]

Suburbanites who favor moratoria, quotas, and the like are usually not trying to curb nuisance costs, however. The new housing they would like to inhibit often would be superior in quality to most current housing in their neighborhoods.[156] Arguably, they are instead trying to prevent the *congestion costs* that may arise from growth. Even luxury developments can contribute to air pollution and traffic tie-ups. Congestion costs usually pervade a community; nuisance costs, in contrast, usually impinge only on immediate neighbors.

Fiscal costs are the third type of potential detriments resulting from urban growth. They arise when the incremental costs to municipal taxpayers of servicing a new development exceed the incremental municipal revenues the development would engender. This Part considers how the possible presence of congestion costs should influence the law of suburban growth controls. Fiscal costs will be taken up in the next Part.

A. *The Theoretical Basis for Growth Controls*

Urban economists, led by George Tolley and Harry Richardson, have in the past few years produced a significant literature on the welfare economics of urban growth.[157] The essence of their analysis is easily summarized. The locational decisions of firms and households

154. *See* p. 419 *supra*.

155. This should not be construed as praise for ordinances that ban specified nuisance activities. *See* note 94 *supra*.

156. New housing tends to be located initially at the upper part of the quality spectrum for all housing and then to filter downward as it ages. *See generally* W. GRIGSBY, HOUSING MARKETS AND PUBLIC POLICY 99-110 (1963).

157. *See* H. RICHARDSON, THE ECONOMICS OF URBAN SIZE (1973) (includes wondrously complete bibliography); Tolley, *The Welfare Economics of City Bigness*, 1 J. URB. ECON. 324 (1974); *Symposium: The Agglomeration Process in Urban Growth*, 9 URB. STUD. 263 (1972); *Symposium: Economic Research and National Urban Development Strategies*, *id.* at 3.

can impose both external costs and external benefits on a community. The costs, like air pollution and traffic congestion, tend to be more obvious than the benefits, like contributions to the critical mass necessary to support a wholesale plumbing outlet, daily newspaper, or professional football team. If entrants are free to settle where they want (and, implicitly, no one pays entrants to stay out), entrants will take into account not the marginal costs and benefits they create but only the average costs and benefits inherent in a given city size. If urban growth is characterized by increasing net congestion costs, cities will be too large because the marginal costs created by a new entrant will exceed the average costs that the entrant bears. On the other hand, if there are increasing net congestion benefits from growth, city sizes will be too small because entrants will consider only average, not marginal, benefits.[158]

In his important article, Tolley explicitly assumes that the costs of urban congestion exceed the benefits of that congestion.[159] That assumption leads him inexorably to his conclusion that big cities tend to be too big. But his initial assumption is hardly unassailable. Although the available evidence shows positive correlations between city size and such costs as noise, air pollution, traffic congestion, and length of journey-to-work, these correlations are often weaker than one might suppose.[160] It is not at all clear that large cities are less healthy, more stressful, or more crime-ridden than small ones; those who have tested these plausible hypotheses have had surprising difficulty proving them. There may be diseconomies of scale in providing

158. The famous "case of the two roads" propounded by Pigou and later elaborated by Frank Knight can be used to illustrate this theory. *See* A. PIGOU, THE ECONOMICS OF WELFARE 194 (1st ed. 1920); Knight, *Some Fallacies in the Interpretation of Social Cost*, 38 Q.J. ECON. 582, 589-90 (1924). Two parallel roads connect two cities. One road is wide enough to carry all traffic without congestion; this wide road is so poorly graded, however, that speeds on it can never exceed 25 m.p.h. The second road is an expressway on which vehicles can travel at 70 m.p.h. when there is no congestion; but the expressway is narrow and readily congested by the usual flow of traffic between the cities. Pigou noted that travelers would take the expressway as long as it offered speeds greater than 25 m.p.h. They would consider the average congestion costs on the expressway, because that would affect their own speed, but they would not consider the additional congestion costs they would impose on others. The result would be a clear case of misallocation of resources: speeds on the expressway would fall to 25 m.p.h., and that resource would be completely wasted since travel at 25 m.p.h. was always attainable on the wide, slow road. Now substitute the town of Ramapo for the expressway and New York City for the wide, low-speed road. If the analogy is apt, allowing population to flow to Ramapo will completely waste the advantages of that municipality without producing any improvement in living conditions in New York.

159. *See* Tolley, *supra* note 157, at 334.

160. For compilations of the empirical evidence on the external costs and benefits of urban agglomerations, see H. RICHARDSON, *supra* note 157, at 21-119; and Hoch, *Income and City Size*, 9 URB. STUD. 299, 308-25 (1972).

public services like police, education, and refuse collection,[161] but this is far from certain.[162] In addition, increasing costs of this sort may be simply a function of gross population (as opposed to population density), and thus may be avoided through creation of special districts or through contracting for private services.

The benefits of size are less obvious because (unlike many costs) they do not assault the senses. The per-capita costs of some local public services—water and sewer systems, for example—generally fall as population density rises.[163] Large cities may also provide scale economies in the provision of private services like entertainment and cultural activities. Increased city size tends to enhance production possibilities by giving both entrepreneurs and workers more specialized opportunities. Because more goods are internally traded in large cities, transportation costs for goods and services may fall.

Enactment of growth controls would not necessarily deprive residents of a suburb of these benefits of size. First, many economies of scale are a function of the metropolitan area's population, not of one suburb's population. Second, some growth controls—for example, greenbelt programs—may reduce a suburb's total population but at the same time increase the density of its developed areas; these measures could actually enhance the efficiency of municipal utility systems.

The evidence on the relative costs and benefits of urban growth is still fragmentary. There is consequently no consensus among economists on whether urban areas tend toward overconcentration.[164] For purposes of analysis it is assumed here that the costs of growth may in fact exceed the benefits of growth, and that this is true not only for an entire metropolitan area but also for an individual suburb.[165]

161. *See* W. HIRSCH, URBAN ECONOMIC ANALYSIS 326-34 (1973).

162. *See* H. RICHARDSON, *supra* note 157, at 85-96 (contends most studies examine only correlations between expenditures and size and thus fail to recognize differences in quality of services).

163. *See, e.g.*, Anderson, *Community Improvements and Services Costs*, 99 J. URB. PLAN. & DEV. DIV., PROC. AM. SOC'Y CIV. ENGINEERS, Mar. 1973, at 77; Hufbauer & Severn, *Municipal Costs and Urban Area*, 2 J. URB. ECON. 199 (1975).

164. At least three distinguished observers—Harry Richardson, William Alonso, and Edwin Mills—dispute Tolley's assumption that cities suffer increasing net congestion costs. H. RICHARDSON, *supra* note 157, at 2-3, 17, 122; Mills & deFerranti, *Market Choices and Optimum City Size*, in *Papers and Proceedings of the 83d Annual Meeting of the American Economic Association*, 61 AM. ECON. REV., May 1971, at 340, 341-44; *cf.* Mills, *Welfare Aspects of National Policy Toward City Sizes*, 9 URB. STUD. 117, 123 (1972) (proposals to discourage growth of large cities in U.S. misguided because racial minorities receive better public services in metropolitan central cities than obtainable in rural South, from which they migrated). Other respected urban economists agree with Tolley. *See, e.g.*, Hoch, *supra* note 160, at 307; Thompson, *The National System of Cities as an Object of Public Policy*, 9 URB. STUD. 99, 99-102 (1972).

165. One might suspect that the existence of net congestion costs or benefits could be detected by examining the influence of city size on wage rates. If the disadvantages

B. *Alternative Legal Approaches to the Problem of Congestion*

Figure 4 shows the housing market in a unique suburb that is vulnerable to net congestion costs from growth. The net congestion costs begin to arise at quantity Q_c. They become more serious as more housing is produced, a trend indicated by the increasing divergence between lines *CX* and *CW*. All congestion costs that arise are initially assumed to be internal to the suburb in question; this assumption is relaxed in the last section of this Part. The optimal equilibrium in this market is again designated as *E*; beyond point Q_c the benefits to consumers of another unit of housing no longer exceed the sum of the private and social costs of its production. In all other respects Figure 4 is similar to Figure 3.

1. *The Inefficiency of the Extreme Legal Solutions*

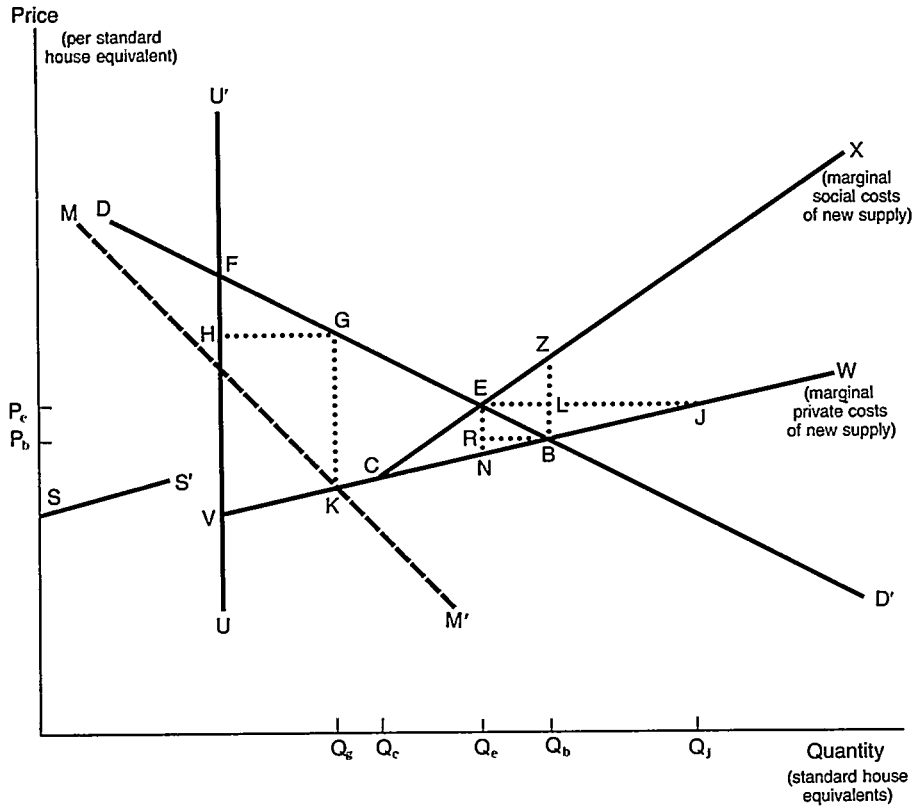
Figure 4 clearly reveals the danger of giving absolute rights to any of the parties to growth-control disputes. If a suburb had an absolute right to control, it would, as before, seek its monopoly equilibrium of

of big-city living outweigh the advantages, one would expect to find higher wages in large cities to compensate workers for the net disamenities. In fact, in all countries and during all historical periods, wages consistently have been higher in large cities than elsewhere, and this remains true even if one adjusts for differences in the make-up of city and non-city populations. *See* H. RICHARDSON, *supra* note 157, at 49-51; Hoch, *supra* note 160, at 310-11.

Tolley's model, however, shows that this wage differential is not solid evidence that there are net congestion costs. He argues that the combined costs of housing and transportation must be higher for households in large cities because higher land rents evolve to ration the relatively scarce central locations. Since workers must receive compensation for this added housing-plus-transport cost (otherwise they would leave for another labor market), the labor costs of producing all personal services and all locally traded goods are higher in large cities than in small cities; these higher labor costs are reflected in higher prices for these goods and services. Thus the increased cost of housing-plus-access in large cities has a general multiplier effect on the local cost of living. Tolley shows that disamenities from net congestion costs or poor climate would also increase wage rates with a multiplier effect. *See* Tolley, *supra* note 157, at 325-31.

In 1967, per-capita income in the New York SMSA was 35% above the United States average. Hoch estimates that only an 8% differential could be accounted for by the composition of New York's population. Hoch, *supra* note 160, at 315. Tolley's theory would indicate that the balance of the differential (27%) would be due to a higher cost of living in New York resulting from the multiplied effects of (1) higher housing-plus-transport costs, and perhaps (2) net congestion costs and (3) disamenities of living in New York unrelated to congestion. The Bureau of Labor Statistics (BLS) consumer price index, however, showed New York prices at that time to be only 9% higher than the national average. *Id.* Tolley would presumably attribute this discrepancy to the fact that the BLS cost-of-living index ignores travel time and other hard-to-measure factors that make big-city living expensive. While it is clear that New York area residents are receiving compensatory wage payments for something, Tolley's theory does not compel the conclusion that their higher wages are made necessary, even in part, by net congestion costs. Higher housing costs or an unappealing climate might be responsible for the entire wage differential.

Figure 4



G.[166] This would result in a deadweight social loss of *GECK*. On the other hand, if the suppliers and consumers of housing could enjoin all antigrowth measures, the result would be a market equilibrium of *B*—the intersection of the demand curve and the private-cost curve.[167] *B* is also suboptimal. The housing units produced between Q_c and Q_b would create net congestion costs of *EZBN*. The gains in producers' and consumers' surplus from that added production is only *EBN*. The difference between the two, *EZB*, is a deadweight social loss.[168]

166. *See* pp. 431-32 *supra*. When external costs are present, it is possible that the monopoly equilibrium will be at or beyond the optimal level of output. Edelson, *Congestion Tolls Under Monopoly*, 61 AM. ECON. REV. 873 (1971).

167. This assumes that fear of holdouts would deter suburbs from trying to buy up consumers' and landowners' rights to enjoin efficient antigrowth programs.

168. In a prior article I argued that market forces would produce a better distribution of population than governmental planning. *Alternatives to Zoning, supra* note 73, at 769-71. If one had no choice but to grant absolute legal rights to one side or the other, I would continue to prefer that the property rule favor consumers and landowners as opposed to the government. My prior article failed to discuss the intermediate legal rules

In short, the optimal amount of housing in Figure 4, Q_e, cannot be achieved unless the law of growth controls relies on liability rules or otherwise places limits on the applicability of property rules.

2. *An Appraisal of the Current Doctrinal Candidates*

Analysis of the somewhat simpler housing market models led to the nomination of the following team of legal rules: (1) a suburb cannot impose development charges; (2) a suburb that enacts growth restrictions must compensate both landowners[169] and consumers for their resulting damages unless it can make out a successful defense based on Michelman's fairness test.

If Petaluma were the suburb illustrated in Figure 4, how would it behave if these legal rules were in effect? To maximize the welfare of current residents, Petaluma officials would promulgate quotas or moratoria on new construction that would limit housing supply to the optimal level, Q_e. This policy would provide benefits of *EZBN* in lower congestion costs.

If fairness dictates that compensation be awarded, Petaluma would pay *RBN* to the landowners the policy prevented from building,[170] and *EBR* to consumers deprived of housing opportunities.[171] These compensatory payments would total *EBN*, considerably less than the suburb's countervailing benefits of *EZBN*. The great appeal of mak-

available and thus oversimplified the legal choices presented by growth controls. For another criticism of my prior position, see Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1028-32 (1975).

169. Since growth controls typically prohibit activities that are not subnormal, landowners would rarely be required to prove that the control is grossly inefficient. *See* p. 424 *supra*.

170. This assumes that injured landowners should not receive compensation for their loss of opportunity to benefit from the price increase resulting from the curtailment of housing production. Not awarding that extra compensation is the efficient rule so long as someone else is entitled to recover for losses suffered by consumers at the margin. *See also* note 138 *supra* & note 360 *infra*. The opposite rule would entitle frustrated landowners to receive *ELBN* in compensation.

This less generous measure of landowner compensation helps assure that only those landowners who would have built in the absence of any antigrowth measure actually receive damage awards. These landowners are those who lie on the supply curve between Q_e and Q_b. If growth restrictions limiting housing to Q_e were to take effect, landowners who lie on the supply curve between Q_b and Q_j might erroneously claim that they are injured by the antigrowth restriction since they could profitably sell housing at price P_e. There is no reason to compensate these landowners. They would not have built had the suburb not controlled growth, because housing prices would have remained at P_b.

171. For simplicity of exposition, the text does not repeat the earlier conclusion that Petaluma tenants and other residents who suffer from the increase in housing prices from P_b to P_e should also have a prima facie claim for compensation. *See* p. 437 *supra*. This possibility should not greatly affect the suburb's incentives. The residential property owners who would largely bear the costs of this compensation would generally perceive these costs as offset by their gains from the higher housing prices.

ing suburbs liable for damages is that the suburb's self-interest would lead it to restrict growth to the optimum point, Q_e, but no further. If it reduced output below Q_e, its marginal liabilities would begin to exceed its marginal benefits.

Since Petaluma could prove that restricting housing production to Q_e is efficient, it would not have to pay damages to anyone if it could make out the balance of the defense based on Michelman's fairness test—namely that both groups of claimants should be able to understand that their long-run self-interest lies in the denial of compensation. As usual, this determination would depend in part on the severity of their damages and on the administrative costs of making compensatory payments.[172] However, if Petaluma restricted growth too much—*i.e.*, to an amount below Q_e—it should always be liable for the damage resulting from the excessive restriction. Since that excess would be inefficient, the Michelman defense would never be available to the suburb.

The introduction of congestion costs into the model thus, if anything, bolsters the viability of the tentative slate of legal rules. They are admirably suited both for enabling a suburb to enact efficient growth restrictions and for discouraging it from going too far.

3. *Other Plausible Legal Approaches*

a. *Development Charges Equal to Marginal Net Congestion Costs*

Economists in the Pigovian tradition are likely to consider congestion taxes imposed on new development to be the obvious solution to the model in Figure 4.[173] If there were no ceiling on these taxes, suburban officials would be tempted to impose a minimum per-unit development charge equal to the vertical distance *GK* in Figure 4, thereby achieving the suburb's monopoly equilibrium of *G*. To prevent this sort of misallocation, those who favor imposition of congestion charges would desire to limit them by law to the net congestion costs caused by the marginal housing unit produced. If this were done, the largest per-unit charge the suburb in Figure 4 would be entitled

172. *See* p. 419 *supra*.

173. For two endorsements of the employment of development charges equal to marginal costs of congestion, see Adelstein & Edelson, *supra* note 34, at 162; Blair, *"Optimum City Size: Some Thoughts on Theory and Policy": Comment*, 51 LAND ECON. 284, 285-86 (1975).

Pigou reports that Alfred Marshall suggested " 'that every person putting up a house in a district that has got as closely populated as is good should be compelled to contribute towards providing free playgrounds.' " A. PIGOU, *supra* note 158, at 168.

to collect is represented by the vertical distance *EN*, the exact amount appropriate for "internalizing" the social cost and achieving Q_e, the optimal output.

The principal difference between congestion charges and the team of rules previously nominated is not allocational but distributional. The prior approach provides for compensation of those damaged by growth controls; the congestion charge approach does not. Horizontal equity is better served by compensation. If congestion results from the achievement of some critical population size, the first household to reside in a suburb contributes as much to the problem as the last to come in. Senior residents contribute as much to smog and highway snarls as do new entrants. The latter are singled out for taxation because of their political weakness, not for any ethically relevant difference in their behavior.[174] Similarly, landowners who develop later rather than earlier would be understandably aggrieved if their surplus were to be singled out for capture.

Some might defend the fairness of a legal rule granting early residents a special distributional preference. Are not late arrivals to crowded elevators and lifeboats regularly sacrificed for the welfare of those already on board? There are several rejoinders. While this may indeed be the custom for elevators and lifeboats, that does not mean the custom is fair; when not limited by law, the early arrivals simply may be ideally situated to use their muscle against latecomers. Second, when congestion arises suddenly and without warning (as in the case of lifeboats and off-peak-hour traffic jams on elevators and highways), paying latecomers to stay out is not likely to be administratively workable. The only conceivable transfer payment in these situations is one paid by entrants. When congestion develops slowly, however, as with housing in suburbs, those already on board have time to organize to make a payment in the other direction. A last consideration is that the horizontal fairness of congestion charges depends in part on who benefits from the revenue. If the proceeds go to a neutral treasury, those who pay the charges may be persuaded that the taxes were designed to promote efficiency and not simply to transfer wealth. When the revenues go into the pockets of senior residents who also contribute to the congestion, the practice is not likely to be perceived as fair.

Although horizontally unfair, congestion charges would be cheaper to administer in some situations than rules requiring suburbs to indemnify injuries from growth controls. For example, fewer payments

174. *See also* note 137 *supra*.

might be involved. But these potential administrative advantages should not be exaggerated. The proposed team of rules would not require compensation whenever an antigrowth program was efficient and the administrative costs of payment were intolerably high. In that case Michelman's defense would be available.

Arming suburbs with the right to impose congestion charges would risk serious allocative harm. The sparse evidence available indicates that a suburb's housing prices usually rise when its vacant land is converted into more subdivisions of single-family homes.[175] Thus one doubts whether most suburbs are in fact threatened by net congestion costs from growth. Equally important, it is also doubtful that net congestion costs are a linear function of the number of housing units (or standard house equivalents)—the relationship indicated in Figure 4. If air pollution and traffic tie-ups are the chief forms of congestion, suburbs should levy their congestion charges on the acquisition of automobiles, not on the construction of new housing.[176]

Since there appears to be no compelling efficiency advantage in having the corrective payment made by new entrants rather than established residents, horizontal equity should be the decisive consideration. The rules nominated earlier would prohibit all development charges—and a fortiori congestion charges—and therefore need not (yet) be amended. If a suburb faces congestion, it will have to pay to prevent it.

b. *Injunctive Relief Against Excessive Growth Restrictions*

The remaining legal alternative that apparently promises to lead to optimally sized suburbs is a limited property rule entitling landowners and consumers to enjoin *inefficient* growth control measures. In Figure 4, for example, this remedy would prevent a suburb from restricting output below Q_e, but would allow its less stringent (efficient) growth restrictions to stand.

If this were the sole remedy available to consumers and landowners, it would inadequately cure prejudgment injuries[177] and would raise horizontal equity concerns: existing residents would be favored over potential residents and landowners who have not yet developed their

175. *See* Stull, *supra* note 38, at 551.

176. *Cf.* H. RICHARDSON, *supra* note 157, at 192 (for abating pollution, taxes on pollutants are generally preferable to policies designed to control city size); Mills, *supra* note 164, at 123 ("I conclude that proposals to discourage the growth of large cities in the United States are misguided. Appropriate public policies should be aimed at the specific reasons for resource misallocation.")

177. *See* pp. 492-93 *infra*.

property.[178] If it were provided in addition to the damage remedies that have been nominated, it could prevent a suburb from enacting an efficient program to protect the special subjective values of its residents from erosion.[179] Because the suburb would be hard-pressed to prove that residents would reduce their reservation prices for their houses if more growth occurred,[180] a court might sometimes invalidate a program as inefficient even though suburban residents in fact would be willing to compensate those injured by it.[181] Thus a limited right to injunctive relief should not be added to the proposed consumer and landowner remedies.

C. *The Relevance of Extraterritorial Congestion Effects*

The discussion has proceeded under the thoroughly implausible assumption that all good and bad congestion effects resulting from a suburb's development are internal to its housing market. Yet it is clear that the exclusionary policies of a suburb force growth on its neighbors.[182] To make local officials consider all the costs of their antigrowth policies, a suburb must be held prima facie liable for all substantial damages its growth controls inflict on consumers and landowners who lie beyond its boundary lines.[183] In addition, to make out the efficiency branch of the Michelman defense, municipal officials should have to prove that a contested antigrowth measure is efficient not from a local perspective, but after all regional costs and benefits are taken into account.[184] Growth controls that are good for Boulder, Colorado, may well be bad for the Denver SMSA.[185]

VII. Legal Treatment of the Fiscal Impact of Growth

Suburbanites hate to pay municipal taxes. Their attitude toward any proposed new development in their town is thus apt to be heavily

178. *See* note 137 & p. 448 *supra.*

179. *See* p. 401 *supra.*

180. *But cf.* Calabresi & Melamed, *supra* note 65, at 1109 n.38 (discussing potential use of self-assessed taxes to smoke out subjective valuations).

181. For identification of other potential disadvantages of injunctions, see pp. 416-17 & note 80 *supra.*

182. *See* p. 403 *supra.*

183. The outside group most likely to be hurt would be tenants living in similar communities. *See* p. 403 *supra.*

184. Spillover effects may, of course, be interstate. Antigrowth programs in Oregon may on balance be efficient for Oregon landowners and consumers but undesirable from a national perspective. A massive migration of Californians northward might improve life in California more than it harms conditions in Oregon.

185. *See* Singell, *Optimum City Size: Some Thoughts on Theory and Policy*, 50 LAND ECON. 207, 212 (1974) (concludes local residents will be apt to restrict city size below regional or national optimum). For criticism of Singell's model, see Blair, *supra* note 173.

influenced by whether the marginal revenues to the suburb arising from that particular development will exceed the suburb's marginal costs of serving it.[186] If service expenditures would be greater than revenues, the new development would impose "fiscal costs" on current residents. Municipal politicians therefore direct their planning staffs to undertake revenue-expenditure analyses[187] of various types of land uses to see which are apt to pay their own way and which are likely to become fiscal parasites.

The fiscal impact of a particular type of development is not exogenously determined. It depends entirely on municipal policies for supplying and financing services. A suburb can skew the net fiscal impact in its favor by denying services to newly developing areas or by subjecting landowners in those areas to special taxes or charges.[188] Suburban officials usually assert that they are simply trying to protect themselves from fiscal costs when they impose utility hook-up charges, park exactions, bedroom taxes, and the like. But there is no reason to think that they would voluntarily stop charging developers at the point where their fees became fiscally inequitable. So long as they can capture more surplus for their homeowners, suburban municipalities

186. One recent visitor to Mount Laurel, New Jersey, came away convinced that that suburb's exclusionary policies were mainly fiscally motivated. *See* Trillin, *U.S. Journal: Mount Laurel, N.J.*, NEW YORKER, Feb. 2, 1976, at 69. However, a more systematic survey found no evidence that fiscal considerations motivate suburbanite efforts to segregate by income class. *See* Branfman, Cohen & Trubeck, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483, 500-02 (1973).

187. For examples of these efforts, see R. MACE & W. WICKER, *supra* note 55; T. MULLER & G. DAWSON, *supra* note 55; James & Windsor, *Fiscal Zoning, Fiscal Reform, and Exclusionary Land Use Controls*, 42 J. AM. INST. PLANNERS 130 (1976); Zelinsky, *The Cities and the Middle Class: Another Look at the Urban Crisis*, 1975 WIS. L. REV. 1081; *cf.* G. STERNLIEB, HOUSING DEVELOPMENT AND MUNICIPAL COSTS (1973) (ambitious study of relationship between housing development and municipal costs).

Revenue-expenditure analysis remains dreadfully primitive. Analysts usually ignore numerous secondary effects of growth on a community. For example, since new residential developments bring in households containing consumers and workers, they often later attract stores and factories, thus perhaps overcoming what might initially appear to be a fiscal deficit. Second, to the extent that new additions to a locality's housing stock produce offsetting removals (or higher vacancies) in other parts of town, expenditures on services elsewhere will decline. Lastly, too little is known about the scale efficiencies of municipal services to take that factor properly into account. *See* pp. 442-43 & notes 161 & 162 *supra*.

188. Where the influence model of politics (*see* pp. 407-08 *supra*) is the more accurate, one would expect developers to obtain fiscal advantages at the expense of existing residents. Yet only a very small number of reported cases show the pattern of "undercharging" of developers that would be consistent with the influence model. *See* Lipford v. Harris, 212 So. 2d 766 (Fla. 1968) (rejecting challenge to use of public funds to build interior streets of subdivision); Morse v. Wise, 37 Wash. 2d 806, 226 P.2d 214 (1951) (upholding sewer finance system that favored new areas of city over old ones); *cf.* Wine v. Boyar, 220 Cal. App. 2d 375, 33 Cal. Rptr. 787 (1963) (rebuffing taxpayer claim that county should not have paid for construction of major highways in subdivision). The paucity of cases may be due in part to free-rider problems that discourage citizen suits to recapture the developer's fiscal profit for the local treasury.

can be expected to pursue what a perceptive economist, Michelle White, has called "fiscal squeeze zoning."[189]

The normal profit-maximizing strategy of a suburb dominated by a homeowner majority is to discourage construction of modest-priced housing suitable for occupancy by families with school-age children[190] and to attract blue-chip fiscal assets like light industrial plants.[191] One should recognize that these particular policies are dictated by two significant constraints on municipal fiscal choices contained in state constitutions: the requirement that children be provided with "free" elementary and secondary education, and the requirement that property taxes be uniformly assessed. These constitutional provisions prohibit alternative fiscal strategies like charging tuition in public schools or imposing heavier property taxes on houses suitable for occupancy by families with many children.[192]

Suburban fiscal-squeeze strategies raise legal issues of enormous practical importance and great theoretical difficulty. To achieve a comprehensive law of growth controls, it is necessary to specify legal limits both on development charges and on the circumstances in which a municipality may deny services. Otherwise, if consumers are not entitled to recover for the damages they suffer from suburban anti-growth measures, municipal fiscal policies could become instruments of housing monopolization efforts.[193] In addition, even when monopoly is not threatened, preventing unjust discrimination among landowners is still an important pursuit.[194]

189. *See* White, *Fiscal Zoning in Fragmented Metropolitan Areas*, in FISCAL ZONING AND LAND USE CONTROLS 31, 31 (E. Mills & W. Oates eds. 1975). The most lucrative strategies for both fungible and unique suburbs are described at pp. 425-35 *supra*.

190. One increasingly encounters ordinances that explicitly prohibit child residents in specified neighborhoods. *See* note 9 *supra*. Developers specializing in building retirement communities learned many years ago that suburbs are more likely to rezone land to permit high-density residential uses if the petitioning landowner agrees to limit occupancy to households without children.

191. In the famous case of Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 162-63, 336 A.2d 713, 719, *appeal dismissed and cert. denied*, 423 U.S. 818 (1975), the township had zoned 29.2% of its land (4,121 acres) for light industrial use; at the time of trial no more than 100 acres were actually occupied by industry.

192. The models in the prior Parts of this article employed Richard Muth's concept of "standard house equivalents" to homogenize housing units of varying quality. While illuminating many aspects of suburban housing policy, Muth's model obscures the fact that suburbanites are indeed concerned about the absolute quality of new housing units —that is, about the number of standard house equivalents per house. The most obvious reasons for this concern are the fiscal considerations discussed in the text, particularly the uniform property tax limitation. Minimum quality standards for housing may also be a crude way to help ensure that new residents have the social status that current residents want them to possess.

193. *See* pp. 436-38 *supra*.

194. Suburbs may try to rationalize development charges as offsetting either the nuisance costs, congestion costs, or fiscal costs arising from new development. *See* p. 441

A suburb's fiscal policies determine both what its constituents pay into the treasury and what services they get in return. Issues of fiscal equity are vastly complicated by the fact that local governments raise revenues in two conceptually distinct ways. The great bulk of a suburb's income is *general revenue* raised from property taxes, sales taxes, and other broad-based sources like subventions from higher governments.[195] A much smaller, but still significant, portion of municipal revenue is raised through *benefits charges* that municipalities collect in exchange for the delivery of specific services. Common forms of benefits charges include special assessments, subdivision exactions, and utility charges.

The courts have adopted quite different views on the fair distribution of services that are "generally" financed compared to those that are "specially" financed by benefits charges. This Part will examine the doctrines of fiscal fairness that are appropriate: first, in a jurisdiction that relies solely on general revenues; then in one that relies entirely on benefits financing; and finally in the real-world case of a municipality that uses a mixture of both.[196]

The preeminent concern in cases of alleged fiscal discrimination should be to ensure horizontal equity among landowners.[197] Landowners, not households, are the proper focus because differentials in

supra. A municipality should be entitled to prohibit nuisances without paying compensation, except where such a prohibition would be grossly inefficient. *See* p. 419 *supra*. As a consequence, it should also be entitled to waive a valid antinuisance restriction in return for whatever the market will bear. But it must be noted that many, if not most, of the new housing projects that are subjected to development charges have no subnormal (nuisance) features. In these cases suburbs cannot justify their charges as legitimate tribute exacted from nuisance-makers.

A suburb should never be permitted to defend its development charges as anticongestion measures. Rather, it should pay to prevent congestion. *See* pp. 448-49 *supra*. This Part attempts to determine when the principles of fiscal equity allow suburbanites to rationalize their development charges simply as revenue-raising devices.

195. About 60% of all local general revenue is derived from property taxes. *See* O. OLDMAN & F. SCHOETTLE, STATE AND LOCAL TAXES AND FINANCE 44-48 (1974). About half of the costs of local public schools are now borne by federal and state government. *Id.* at 946.

196. For an insightful odyssey through these same issues, see F. MICHELMAN & T. SANDALOW, *supra* note 34, at 533-38.

197. The case law is hardly unanimous in its acclaim of the principle of horizontal equity among landowners. The first of a series of reported Massachusetts cases on street watering is the frankest in its rejection:

> We see no reason why the Legislature may not authorize a city to water some of its streets at the public expense, and to assess benefits for the watering of others upon abutters, as it deems best. As a result, some landowners get the benefit of watering streets adjacent to their estate without paying for that special benefit. But perfect equality in the distribution of public burdens is not attainable.

Sears v. Board of Aldermen, 173 Mass. 71, 80, 53 N.E. 138, 140 (1899).

For cases in which the courts have been sympathetic to the goal of horizontal equity, see notes 276-277, 292, 307-308, 317 & 323 *infra*.

service levels and taxes in small municipalities are generally capitalized in land values.[198] Thus if a court orders the upgrading of municipal services in a neighborhood primarily occupied by black families, the bulk of the benefit is likely to redound to landowners in that neighborhood, not to the tenants who live there.[199] Development charges may, of course, also affect both the vertical equity of municipal finance and the efficiency of resource allocation.

A. *Fiscal Equity in a Municipality That Never Uses Benefits Charges*

If the suburb of Eden raised all its revenue through general taxes and subventions from other governments, the two fundamental issues of fiscal fairness would be whether the burdens of its taxes were equitably distributed and whether it dispensed its services in fair shares. Perhaps surprisingly, the law of municipal finance has treated these two issues as entirely independent. When general financing is used, a taxpayer who has paid more than usual is not regarded as having an entitlement to receive extra services. As a result, when a municipality uses general taxes to finance services, it inevitably redistributes income among its citizens. The function of legal rules in this context is not to forbid such redistributions (that would be to ban general financing), but rather to ensure that the beneficiaries and victims of municipal wealth redistribution programs are determined in a horizontally fair manner.

1. *Limitations on General Taxes on Development*

The clauses in state constitutions that require uniform property taxation reflect an important tenet of fiscal fairness—that broad-based taxes must treat both resident and nonresident property owners alike.[200] Absent such a legal constraint, the homeowners who politically dominate a suburb would be tempted to impose discriminatory property taxes on owners of undeveloped land. Suburban officials would also find general taxes on housing construction particularly appealing because the burdens of those taxes fall primarily on landowners and housing consumers who are unlikely to be able to vote.[201]

198. *See* note 38 *supra*.

199. *Cf.* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972) (sustaining claim by "Negro citizens" that town's failure to supply municipal services in black neighborhoods violated equal protection clause).

200. In most states the property-tax base is riddled with dubious exemptions and deductions. For a description of the homeowner's exemption in California, see note 55 *supra*.

201. *See* pp. 399-405 *supra*.

The first doctrine of fiscal equity to be proposed, therefore, is that a general municipal tax that falls entirely or primarily on a politically helpless minority is prima facie[202] unfair. General taxes on land-development activity are thus inherently suspect. Of course, if a local government were to enact a broad-based general tax that attached to many local businesses (including, as it happens, land developers) the element of discrimination against the unenfranchised would be absent. For example, a broad-based sales tax that applied, among other things, to building materials could not be characterized as horizontally inequitable. The case law generally is in accord with these principles. The courts strike down general taxes that impinge solely on new development but usually uphold general taxes when their reach is broader.[203]

2. *The Duty of Municipalities to Provide Equal Services*

When a municipality finances a service from general revenues, it is usually obligated to distribute the benefits of that service in roughly equal shares, irrespective of the general taxes the individual citizen may have paid. Legal doctrines that follow this principle include the municipal "duty to serve" new subdivisions, the state constitutional command that free schools be provided all children, and the holding in the leading case of *Hawkins v. Town of Shaw*[204] that racially correlated disparities in the provision of generally-financed local services violate the federal equal protection clause.[205]

To establish an entitlement to "equal benefits" from generally-financed municipal services, one must resolve two key ambiguities. First, what constituent unit under municipal jurisdiction is to be entitled to an equal share of services? Must distribution be equal per

202. This modifier is necessary because a local government perhaps should be entitled to defend such a tax on efficiency grounds. *See* pp. 463-65 *infra*.

203. *See* pp. 475-76 & notes 276-79 *infra*.

204. 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972).

205. *Cf.* Burner v. Washington, 399 F. Supp. 44 (D.D.C. 1975) (plaintiff's equal protection claims dismissed because of failure to show discrimination in provision of municipal services). In Washington v. Davis, 426 U.S. 229, 244-45 & n.12 (1976), the Supreme Court disapproved *Town of Shaw* to the extent that the latter case implied that proof of discriminatory racial purpose is unnecessary to sustain an equal protection claim.

It is possible to downplay the racial element in *Town of Shaw* and interpret the case as broadly requiring per-capita equality in the distribution of local services. For a powerful economic critique of that interpretation, see Note, *Equalization of Municipal Services: The Economics of* Serrano *and* Shaw, *supra* note 34. *But cf.* Fessler & Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure*, 6 HARV. C.R.-C.L. L. REV. 441, 463-65 (1971) (acceptability of *Shaw*-type claims and proofs should not be restricted "to cases alleging a denial of equal protection predicated on racial discrimination").

capita? Per dwelling unit? Per unit of land value? The proper definition may vary from service to service. One might decide that school services, for instance, have to be provided equally per child,[206] but fire protection services equally per dollar of property value.[207]

The second ambiguity is how the quantum of services a municipality distributes to each constituent unit is to be measured. Here there are two leading choices. One could measure the *inputs* the municipality provides—that is, the expenditures it makes on behalf of a constituent unit.[208] Or one could measure *outputs*—that is, the absolute state (*e.g.*, a water hook-up, a neighborhood free from muggers, a command of geometry) reached by each constituent unit as a result of the municipal program. The case of *Manjares v. Newton*[209] is a wonderful illustration of the difference between these two measures of equality. There a school board had refused to provide free school busing to children living in remote sections of its district, but in lieu thereof had given them (actually their parents) cash payments to help defray transportation costs. The school board obviously thought that *input equality*—in this case, equal expenditures per pupil for busing—was a fair standard. The Supreme Court of California held, however, that the school board's approach violated equal protection. The court implicitly adopted *output equality* as the proper measure of horizontal equality; it ordered that each child be given free transportation to school.

For purposes of this article, the issue may be narrowed to what generally financed services a residential developer should be entitled to receive. First, for most basic municipal services (especially utility

206. *See, e.g.*, Hobson v. Hansen, 269 F. Supp. 401, 436-38, 495-99 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (implicitly endorsing constitutional standard of input equality per pupil in distribution of public school services).

207. *Cf.* Sperry Rand Corp. v. Town of N. Hempstead, 53 Misc. 2d 970, 280 N.Y.S. 2d 600 (Sup. Ct. 1967), *aff'd*, 29 App. Div. 2d 968, 290 N.Y.S.2d 864, *aff'd*, 23 N.Y.2d 666, 242 N.E.2d 745, 295 N.Y.S.2d 490 (1968) (under applicable statute, industrial plant's share of garbage and refuse hauling services from special district should be roughly proportionate to its share of total property taxes paid to district).

208. There are other, more complicated ways of measuring inputs. One could try to measure the market value of the municipal service or perhaps even its subjective value to the recipient. Combinations are also possible—for example, a municipality's expenditures or the market value of its service, whichever is greater. That particular combination would entitle a suburb (rather than the constituent) to the savings resulting from the fact that a constituent may be served at unusually low cost. In some situations, however, such a rule would reduce the incentives of homebuilders to develop in optimal, close-in locations.

Measuring benefits may be quite difficult when several parties gain from a single municipal expenditure. In such cases some handy accounting system (like the "reaches" system described in note 218 *infra*) must be employed. These difficulties are like those of allocating the joint costs of producing several different goods. On that topic see, *e.g.*, Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293 (1970).

209. 64 Cal. 2d 365, 411 P.2d 901, 49 Cal. Rptr. 805 (1966).

services), the unit entitled to an equal share can be defined as a dwelling unit.[210] To prevent discrimination against politically unrepresented landowners, this right to municipal services must attach not only to each existing dwelling unit, but also to each prospective dwelling unit. A municipality should thus have to spend as much per dwelling unit on generally financed services in developing neighborhoods as it does in established neighborhoods.

Second, for present purposes, the appropriate equal-benefits standard is input equality. Unlike the output-equality standard, it permits a local government to reduce the absolute services provided to dwelling units that by reason of location are unusually costly to serve. This creates appropriate incentives against housing construction in remote areas. Suppose Eden financed its entire sewerage system from general revenues. If a homeowner in a far-flung location sought to have a sewer main extended to him, the input-equality standard should be interpreted to limit Eden's duty to offering that homeowner his choice between either (1) accepting, in lieu of actual service, a cash sum equal to Eden's average per-dwelling-unit expenditure on sewerage service, or (2) receiving sewerage service so long as he pays for all service costs exceeding average service costs.[211]

210. A dwelling unit is more accurate than a household because owners of currently unoccupied units should be entitled to receive services. The dwelling-unit approach may sometimes be inferior to a per-capita approach or (especially when services to nonresidential property are in issue) an approach based on property values. *See* notes 206-207 *supra.*

211. The courts traditionally have applied only "property rule" solutions to duty-to-serve cases. They either order the disputed service extended, as the *Manjares* court did, or hold that the extraordinary municipal expense justifies a total denial of service. For examples of the latter approach, see, *e.g.*, City of Greenwood v. Provine, 143 Miss. 42, 108 So. 284 (1926) (sustaining refusals to extend water mains); and Rose v. Plymouth Town, 110 Utah 358, 173 P.2d 285 (1946) (same holding).

The approach suggested in the text would entitle a homeowner to average net benefits, and let him decide which of the two "liability rules" is to be put into play. Giving the homeowner this choice permits him to protect any special subjective pleasures he would gain from the service. *Cf. Alternatives to Zoning, supra* note 73, at 738-48 (in nuisance cases, plaintiffs should have choice between (1) collecting damages and (2) purchasing an injunction against defendant's activity at price equal to objective value of defendant's consequent losses).

It is unlikely that any such consumer surplus is at stake, however, when the landowner seeking service is not an owner-occupant (or vendee) of a completed dwelling unit. To permit general-purpose units of local government to control their rate of growth, unserved landowners who are not owner-occupants should be limited to the remedy of damages against municipalities. All landowners, however, should have the dual choice suggested when the purveyor of services is not a general-purpose unit of government, *e.g.*, when the supplier is a public utility or special district. *See* note 78 *supra.* Finally, all landowner rights to compel services should be suspended during true emergencies.

B. *Fiscal Equity in a Municipality That Relies Exclusively on Benefits Charges*

The foregoing discussion suggests the allocative shortcomings of relying on general taxes to finance municipal services. When municipal officials do not charge for services, they have no clear evidence of how their constituents value public programs. This may lead either to wasteful expenditures or to underfunding. Moreover, the prevailing principles of horizontal equity make some redistribution of wealth inevitable whenever a local government imposes general taxes. If the redistributive effects vary from municipality to municipality, households will spend resources to investigate and exploit the relative fiscal advantages of various communities. These expenses (*e.g.*, the costs of moving to exploit fiscal variations) are, from a social standpoint, deadweight efficiency losses.[212] In addition, local governments are ineffective redistributors of wealth because most of their taxes are too easily avoided. Most commentators therefore recommend that responsibility for redistribution be assumed by the national government.[213]

Benefits charges promise to cure these sorts of inefficiencies created by general taxes and thus tend to be favored by public finance theorists.[214] A priori, there is no reason to prevent a municipality from relying entirely on benefits charges to finance its programs. It would be odd to compel the least appropriate level of government to undertake programs to redistribute wealth. Absent explicit constitutional directives to the contrary (such as those requiring free public education[215]), the permissibility of benefits financing is well established in the case law. The leading case, *Hadnott v. City of Prattville*,[216] while requiring that services financed with general revenues be provided equally to all residents, expressly held that the distribution of specially financed services could be limited to those who paid to receive them. The main function of legal doctrine in a municipality relying ex-

212. There is widespread agreement among economists that fiscal variations can create allocational problems. *See* Buchanan & Goetz, *Efficiency Limits of Fiscal Mobility: An Assessment of the Tiebout Model*, 1 J. PUB. ECON. 25 (1972); White, *supra* note 189.

213. *See* E. MILLS, URBAN ECONOMICS 236 (1972); R. MUSGRAVE & P. MUSGRAVE, *supra* note 41, at 623; Stigler, *The Tenable Range of Functions of Local Government*, in F. MICHELMAN & T. SANDALOW, *supra* note 34, at 91-92.

214. *See generally* PUBLIC PRICES FOR PUBLIC PRODUCTS (S. Mushkin ed. 1972); Vickrey, *General and Specific Financing of Urban Services*, in PUBLIC EXPENDITURE DECISIONS IN THE URBAN COMMUNITY 62 (H. Schaller ed. 1963).

215. Recent cases enforcing this policy include Paulson v. Minidoka County School Dist., 93 Idaho 469, 463 P.2d 935 (1970); and Bond v. Public Schools, 383 Mich. 693, 178 N.W. 2d 484 (1970) (fees for school books violate state constitutional guarantee of free education). *Contra*, Hamer v. Board of Educ., 47 Ill. 2d 480, 265 N.E.2d 616 (1970).

216. 309 F. Supp. 967 (M.D. Ala. 1970).

clusively on benefits charges is not to curb that practice but rather to ensure that charges imposed involuntarily (like some special assessments) are fairly proportioned to benefits.[217]

C. *Fiscal Equity in a Municipality That Uses Revenues from Both General Taxes and Benefits Charges to Finance a Specific Service*

Despite their allocative advantages, voluntary benefits charges are not a feasible system of finance when a municipality provides "public goods" (*e.g.*, ensuring public safety), when the administrative costs of collecting benefits charges exceed the allocative gains of using them (as is often the case for roads), and when a local government avowedly wants to undertake a redistribution of income (*e.g.*, by providing free schools). Most major units of local government therefore employ both general taxes and benefits charges. Moreover, they often finance a specific service from both revenue sources; such a mixed system may well be the most efficient approach when the administrative costs of collecting benefits charges are low for some aspects of, say, sewerage service, but high for others. When mixed financing of this sort occurs, the issue of fiscal equity becomes extremely complex.

To help focus the analysis, suppose Jefferson owns an unimproved lot in a remote valley of the suburb of Eden. Eden would have to spend $5000 to extend a sewer lateral to Jefferson's lot.[218] This $5000 outlay would far exceed the historic $1000 average cost of providing sewer laterals to other dwelling units in Eden. How much should Eden be entitled to charge Jefferson for sewerage service? This humble example raises an issue of extraordinary importance to owners of undeveloped land.

1. *A Proposed General Test for Fiscal Equity When General and Special Financing Are Mixed*

Although no single legal doctrine can possibly decide all controversies raised by municipal fiscal policies, the proposed general test that follows usually succeeds in identifying when landowners have

217. For examples of how courts have wrestled with these issues, see pp. 472-73 & notes 262-265 *infra*.

218. Under the "reaches" system of cost allocation, each lot owner is assigned the proportion of the cost of each reach of pipe that equals his fraction of its subsequent use. This means a lot owner is assessed the entire cost of a pipe that only he uses, and one percent of the cost of a pipe he shares with 99 similar lot owners. For a discussion of this system and of other alternatives for allocating costs, see American-Hawaiian S.S. Co. v. Home Sav. & Loan Ass'n, 38 Cal. App. 3d 73, 78, 112 Cal. Rptr. 897, 900 (1974).

been unfairly burdened by special development charges. Dwelling units (including prospective dwelling units) should be designated as the units entitled to equalization, and equality should be measured by equality of inputs (*i.e.*, municipal expenditures).[219] A landowner's "net benefits" from a municipal service may be defined as: (1) the municipality's expenditures in servicing his land, *less* (2) the benefits charges collected from that landowner for that service. The standard of input equality prima facie entitles each dwelling unit in a municipality to net benefits from a particular service equal to the average net benefits received from that service by all other dwelling units in that municipality. In other words, if a municipality mixes special and general revenues in financing a service, the portion financed by general revenues should presumptively be distributed equally per dwelling unit.[220]

If this formula were applied to Jefferson's case, the sewer charge Eden could impose would depend on how it had furnished and financed sewers in its other neighborhoods. If Eden had consistently financed the construction of sanitary sewer laterals from general revenues, Jefferson would be entitled to $1000 in net sewer benefits—the average received by other Eden households. Since it would cost Eden $5000 to serve him, Eden should therefore be entitled to impose a sewer connection fee of $4000. Jefferson's net benefits would then be $5000 minus $4000, or $1000—the sum that would achieve input equality per dwelling unit.[221] If Eden charged Jefferson more than

219. For the reasons behind these choices, and examples of situations where other choices might be appropriate, see pp. 455-57 & notes 206, 207 & 210 *supra*.

220. A current legal doctrine that appears at least partially aimed at preventing unjust mixtures of general and special financing is the distinction in special assessment law between "local" and "general" improvements. Special assessments are permitted for the former (*e.g.*, minor streets, sewer laterals), but not the latter. *See, e.g.*, Ruel v. Rapid City, 84 S. Dak. 79, 167 N.W.2d 541 (1969) (convention hall is general improvement); Heavens v. King County Rural Library Dist., 66 Wash. 2d 558, 404 P.2d 453 (1965) (library is general improvement). This doctrine prevents the injustice that results when a city provides free libraries in some neighborhoods while employing benefits charges to finance libraries in other neighborhoods.

Unfortunately, the doctrine is at best extremely crude. It does not compel the use of benefits charges for local improvements and therefore does not prevent favoritism. (For possible abuses of this sort, see note 188 *supra*.) Moreover, if a neighborhood is receiving especially generous library services, there is no reason to bar the use of benefits financing to defray the above-average portion of the cost.

221. Los Angeles officials adopted what was essentially an equal net-benefits test to resolve a recent controversy. The owner of a plot of land located at the intersection of Capitol Drive and Myler Street in the San Pedro district wanted to build an industrial plant, a use permitted by the zoning ordinance. The tract was surrounded by middle-income, single-family houses. Their owners beseeched city officials to acquire the land for a park. The area, however, was already relatively well-supplied with parks. To prevent the homeowners from receiving above-average net park benefits, city officials insisted that they pay for the park by means of special assessments. The special assessment

that, he should be entitled to a refund for the excess. On the other hand, if Eden had always used benefits charges to finance sewer laterals, Jefferson would be entitled to no net sewer benefits, and Eden could thus charge him for the entire $5000 construction cost.

2. *Temporal Differences in the Delivery of Services and the Assessment of Charges*

This discussion of fiscal equity thus far has ignored problems of timing. Apparent inequalities may arise, for example, when a municipality serves some dwelling units earlier than others or is erratic about when it imposes its charges. The accepted technique for neutralizing time differentials is to discount all figures to present value. To determine the discounted net benefits received by a dwelling unit, one therefore should (1) compute the present value of the flow of municipal expenditures to provide a service to that unit, and then (2) subtract the present value of all benefits charges imposed on that dwelling unit for that service. In making these calculations one should consider not only what the current owner of the dwelling unit (or prospective dwelling unit) has received and paid, but also what the unit's prior owners received and paid[222] and what future owners will receive and will pay. If the first owner in a long chain of owners happens to be at a net fiscal disadvantage during his tenure, but the property will enjoy a foreseeable offsetting net benefit in the future, the first owner will be compensated when he sells the property because his purchaser will anticipate the future fiscal advantages.

In our hypothetical case, Jefferson wanted to develop his lot many years after other residents in Eden had already received sewerage service. If one takes the present value of net benefits at a common calendar day (*e.g.*, January 1, 1977), the prior conclusion that Jefferson should be entitled to receive $1000 in net sewer benefits would no doubt have to be modified. If Eden had spent $1000 in 1947 to extend

district that was ultimately formed is the only one for parks Los Angeles has created within recent memory. Interview with Alfred Liff, *supra* note 109. *See generally* Volpert, *Creation and Maintenance of Open Spaces in Subdivisions: Another Approach*, 12 U.C.L.A. L. REV. 830, 836-45 (1965) (suggesting that special assessments be used to finance unusual amounts of open space in new developments).

222. If the matter is not expressly dealt with by contract between vendor and purchaser, the courts must decide if claims for refunds from municipalities continue to lie with the prior owner who was overcharged, or are enforceable only by the current owner. Administrative costs should determine the answer. In the case of new subdivisions, it will usually be cheaper to entitle the original subdivider to seek the refund. *See* pp. 479-80 & notes 285 & 286 *infra*. But if the overcharges continued over a long period of time and the property overcharged is a type that changes hands frequently, it may be more efficient to let only the current owner sue. The statute of limitations should, of course, bar suits by either current or prior owners to cure stale injustices.

a sewer lateral to Hamilton's lot, Hamilton would have received more than Jefferson because $1000 in 1947 is worth more than $1000 in 1977. If a common calendar date were to be used for comparing net benefits conferred, a municipality that financed some services partly with general revenues might thus be required by the input equality standard either to spend more for those services in new neighborhoods or to impose lower benefits charges on late-developing landowners.

Horizontal equity hardly requires this result. A landowner (broadly defined to include previous owners) has considerable control over when he develops and thus over when his net benefits begin to accrue. If the service is one that the municipality has traditionally offered, he should have no complaint so long as the municipality treats his dwelling unit the same as it treated other dwelling units when they were at the same stage in their life-cycle.

In comparing the net benefits received from traditional services by different dwelling units, one should therefore discount their particular fiscal histories not to some common calendar date, but to some common event in the housing life-cycle—say, the date on which each dwelling unit was first completed. This approach, of course, gives some absolute advantage to owners of older houses. Hamilton's net sewer benefits would be discounted to 1947, Jefferson's to 1977. If their total net benefits were equalized under this method, Hamilton would in fact be better off. But the important point from the standpoint of horizontal equity is that Jefferson himself could have built in 1947 and thereby could have received the same treatment as Hamilton.

One last refinement is necessary. If a municipality today initiates a new generally-financed service (like free day-care centers), or sharply expands a traditional service (like doubling its park facilities), the approach just suggested would permit it to deliver greater immediate net benefits from those services to older neighborhoods. This follows from the proposition that all dwelling units should receive the same net benefits at similar stages in their life cycles. This sort of favoritism hardly seems justified. The owners of older residential structures might have been paying extra property taxes over the years to finance traditional generally-financed programs (like sewers) but not to fund these new programs. Therefore the net benefits each dwelling unit receives from a service should be discounted to the date the service was initiated in the municipality,[223] or to the date the dwelling unit was first com-

223. In the not uncommon case in which a service has been gradually expanded over a period of years, an administratively convenient middle date could be used.

pleted, whichever is the more recent. As reformulated, the test would require that newly offered day-care services, or expanded park facilities, be provided equally in all existing neighborhoods.

Eden should thus be entitled to collect sewer hook-up charges from Jefferson to the extent necessary to prevent him from receiving net sewer benefits greater than the average received by Eden dwelling units. Each unit's net benefits should be discounted to the date of the unit's completion, or, for pre-sewer structures, to the date when sewerage services were first provided by Eden. In any real controversy the precise calculation of that figure would be horrendously expensive. Voluminous evidence on prior municipal practices would have to be uncovered and synthesized. The applicable discount rates might vary from period to period according to historic differences in the rate of inflation and the real rate of interest. In actual litigation crude approximations and rough justice are the best that can be hoped for. Despite all this, the proposed test can readily flag certain municipal fiscal practices as prima facie unfair. For example, when a municipality that once provided free sewer connections begins imposing hook-up charges in new neighborhoods, the test quickly identifies the new policy as suspect.

D. *When a Municipality Is Justified in Rendering Unequal Net Benefits to Housing Units*

The foregoing discussion has generated two basic doctrines to control municipal practices in raising revenues and furnishing services. First, it is prima facie unfair for a municipality to raise general revenues through taxes focused on land-development activity because those taxes fall predominantly on persons who are, at best, weakly represented in its political processes. Second, if a municipality finances a particular service entirely or partly from general revenues, it is prima facie obligated to provide equal net benefits from that service to each of its current and prospective dwelling units. A unit's net benefits are (1) the sum of all municipal funds spent on providing it the service in question, *less* (2) the sum of all benefits charges for that service collected from the owner of that unit, with all figures discounted to the date of completion of the unit or the date the service was first available in the municipality, whichever is the more recent.

Neither of these two principles should be ironclad. There are other goals besides pure horizontal equality. A municipality should not have to make a refund to a landowner when it can show that its apparent discrimination against him does not violate the Michelman fairness

test.[224] This defense would prevail if the municipality could prove both that the uneven fiscal policy enhances efficiency and that those disadvantaged by the policy should be able to realize that the administrative costs of correcting the fiscal unevenness would be so high that their own long-term self-interest is served by nonequalization.

It is virtually inconceivable that a municipality could prove that a general tax focused only on new development (such as a bedroom construction tax) meets the Michelman fairness test. Because those taxes could easily be extended to existing structures, it is difficult to perceive any economic justification for singling out homebuilders for taxation.

However, the Michelman defense could sometimes justify a municipality's uneven use of benefits charges on landowners. For example, a suburb's most efficient fiscal strategy might be to use benefits charges wherever feasible (in order to approximate market conditions), but not in situations where those charges involve great administrative costs. A landowner who received below-average net benefits as a result of this policy might nevertheless be able to understand why it would be in his long-term self-interest. No landowner should want legal doctrines to compel municipalities either to provide costly services to homeowners who do not value them or to forgo levying user charges entirely because it would be too expensive to equalize perfectly their incidence.

Nevertheless, the efficiency gains promised by municipal imposition of benefits charges on developers are far from easy to prove. Benefits charges are allocatively most advantageous when they are voluntarily paid. Many development charges can hardly be considered voluntary. When a developer pays a sewer connection fee, it does not necessarily indicate he values sewerage service by that amount. If all new houses are required to be hooked into the sewer system, it only indicates that he values sewerage service plus permission to develop by that amount. In most of the leading cases on development charges, one could hardly characterize the charge in question as a good indicator of market demand for the service that was to be financed. In

224. *See* p. 415 *supra*.

A municipality should arguably be entitled to a second defense—the right to set off any above-average net benefits a landowner receives from other services against the below-average net benefits he is receiving from the service at issue. Jefferson's raw deal on sewers might, for example, be counterbalanced by his jackpot in parks.

This defense, however, would greatly complicate litigation over refunds and is probably not worth its administrative costs. If Jefferson is receiving a jackpot in parks, his municipality should be left to its option of subjecting him to special park charges. *See* note 221 *supra*.

addition, when different municipalities pursue different fiscal policies, there are likely to be serious "second best" problems.[225] For example, if Eden were to impose sewer connection charges on developers while neighboring suburbs did not, Eden's seemingly efficient financing policy might actually shift development to even more inefficient locations outside its boundaries. In the extremely imperfect world of municipal finance, it will be difficult for a municipality to prove that a specific set of benefits charges is actually efficient and fair. But the argument here is that the municipality should at least be given a chance to try.

E. *An Application: The Escalation of Subdivision Exactions*

One would expect a suburb dominated by a homeowner majority to escalate its development charges over time in order to enrich its current homeowners. This pattern is in fact what one observes.[226] Street lights, which were once commonly paid for from general funds,[227] are now usually exacted from developers.[228] Exactions for parks, school sites, and firehouses have become much more common.[229] More and more suburbs are attempting to shift the capital costs of community-wide utility facilities entirely to new connectors to those systems.[230] Los Angeles, for example, imposes off-site sewerage charges designed to generate enough revenue to fund the entire local share of its capital budget for those facilities. These charges are imposed exclusively on new subdivisions and new construction, although the benefits from

225. *See generally* Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956); Markovits, *A Basic Structure for Microeconomic Policy Analysis in Our Worse-than-Second-Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics*, 1975 WIS. L. REV. 950.

226. Relatively little empirical work has been done on the use of benefits charges to finance various improvements. The few sources include C. BERGER, LAND OWNERSHIP & USE 857-58 (1968) (excerpting 1952 New York City area survey); R. MACE & W. WICKER, *supra* note 55; and Melli, *Subdivision Control in Wisconsin*, 1953 WIS. L. REV. 389, 437-39.

227. C. BERGER, *supra* note 226, at 858.

228. *See, e.g.*, Los Angeles City Council, Street Improvement Policies (file no. 115,320) (undated) (on file with *Yale Law Journal*). *Cf.* N.Y. TOWN LAW § 277(1) (McKinney's Supp. 1976) (authorizing planning boards to require that street lights be installed by developers); N.J. STAT. ANN. § 40:55-1.21 (West Supp. 1976) (authorizing municipalities to exact street lights from developers); PA. STAT. ANN. tit. 53, § 10503 (Purdon 1972) (authorizing local governments to exact street lights from developers).

229. *See* pp. 486-87 *infra*. Exactions for bicycle paths and traffic control devices are on the horizon. *See, e.g.*, CAL. GOV'T CODE § 66475.1 (West Supp. 1976); L.A., CAL., CODE § 17.02 (1975).

230. One of the most dramatic examples of escalation in charges is reported in Rutan Estates, Inc. v. Town of Belleville, 56 N.J. Super. 330, 152 A.2d 853 (Super. Ct. App. Div. 1959). There, a town inaugurated special assessments for water mains when the owner of the last large vacant tract in the town started development. The assessments were held to be valid.

these community-wide facilities often extend to neighborhoods where little or no development is occurring.[231]

If Jefferson had paid Los Angeles an off-site sewerage facilities charge of $348[232] in order to receive a building permit for his house, he would have a strong claim for a partial refund. His lot would no doubt be destined to receive only normal benefits from community-wide sewerage facilities. But his burdens have been far above the usual. Los Angeles has only been using off-site sewerage charges on new dwelling units for a little over a dozen years, and the charges were much smaller when they were first instituted.[233] Jefferson could therefore easily make out a prima facie case that his net off-site sewer benefits would be substantially below the average for owners of Los Angeles dwelling units.

The $348 charge should nevertheless be upheld if Los Angeles can show that the unevenness in net sewer benefits satisfies the Michelman fairness test. Since these sewerage charges are not paid wholly voluntarily and are not used by many other municipalities in southern California, it would be difficult for the city to show that the financing system promised significant efficiency gains. The second prong of the Michelman defense could also prove sticky. Either of two fiscal reforms would provide Jefferson with net sewer benefits equal to the average for the city: (1) the quashing of the sewer facility charge he paid to the extent that it deprived him of average net sewer benefits; or (2) the appropriate back-charging of owners of dwelling units that are in existence but that were never charged for off-site sewerage facilities.[234]

231. *See* L.A., CAL., CODE §§ 64.11.2-.3 (1976). The city's charge on the recently-completed 62-story United California Bank Building was $321,000. Telephone Interview with Joseph Lauer, Jr., Los Angeles, Cal., Bureau of Engineering (June 26, 1974) (notes on file with *Yale Law Journal*).

232. L.A., CAL., CODE § 64.11.3 (1976) (rate for all new single-family dwellings).

233. Los Angeles apparently first began to levy these charges in the 1950s. *See* Longridge Estates v. City of Los Angeles, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960).

234. Courts have permitted cities to back-charge for earlier improvements. *E.g.*, Phillip Wagner, Inc. v. Leser, 239 U.S. 207, 217 (1915) ("The doctrine established by this case is that a subsequent assessment may be levied because of benefits conferred by the former action of the city in improving in front of the lots assessed."); Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 688, 547 P.2d 1377, 1384-85, 129 Cal. Rptr. 97, 104-05 (1976); O'Malley v. Public Improvement Comm'n, 342 Mass. 624, 627, 174 N.E.2d 668, 670-71 (1961) (assessment of sewerage charges 2½ years after connection is not unreasonable).

There is precedent for a policy of back-charging for sewers in Los Angeles. In its early years the city financed lateral sewers in local streets by floating general revenue bonds secured by general tax revenues. These early laterals are now referred to as "bonded sewers." Later the city adopted the practice of assessing abutting landowners for the costs of laterals. Unless corrective action were taken, this switch in policy would ob-

In light of the availability of the second option—one that would achieve equality while preserving any allocative advantages of using benefits charges for sewerage facilities—Jefferson would have a hard time seeing why the city's policy of charging only new development was fair to him.[235] The principles outlined in this Part would undoubtedly entitle Jefferson to a refund of much of the benefits charge.[236]

Some observers might argue that vertical equity should be the decisive factor in evaluating the legality of development charges. These observers might prohibit a suburb from discriminating against a yeoman lot owner like Jefferson, but nevertheless permit it to charge a corporate octopus like the Tacky Development Company to the hilt. That particular distinction would certainly be wrong-headed. As a practical matter, any entitlements given to an individual lot owner like Jefferson will tend to be capitalized in the value of his lot and thus redound to the benefit of the original subdivider, who is apt to be someone like Tacky. More importantly, development charges are ill-suited to achieve broad redistributions of wealth. No widely shared ethical principle justifies programs to shift wealth from owners of undeveloped land to owners of land already improved with structures.[237] This capricious pattern of redistribution is popular only because its benefits and burdens mesh nicely with who votes and does not vote in municipal elections. In short, the deepness of a developer's pocket should not affect his rights to be free from general taxes on development activity and to receive equal net benefits from municipal services.[238]

VIII. A Comprehensive Legal Approach to Municipal Growth Controls

The legal approach suggested by the above economic analysis must now be summarized and grounded in traditional state constitutional doctrine.

viously be to the fiscal advantage of those who received sewerage service early. Los Angeles's approach has been to impose a special charge of six dollars per front foot on building permit applicants whose land is served by bonded sewers. L.A., CAL., CODE § 64.18 (1976).

235. He would be particularly aggrieved if back charges could be assessed and collected cheaply (*e.g.*, if they could be added to property tax bills).

236. A total refund would be too much because many Los Angeles landowners have already paid these charges and are now barred from recovering them by the statute of limitations.

237. For a fuller discussion, see pp. 439-40 *supra*.

238. *Cf.* note 307 *infra* (citing cases requiring equal treatment of subdividers).

A. *The Proposed Legal Rules*

The last paragraph of Part III posed the four key questions of growth-control law.[239] The intervening discussion has been devoted to constructing answers to each of those questions.

When should landowners be absolutely privileged to proceed with their developments? Almost never. A suburb must be entitled to force restrictions (sometimes cushioned by compensation) on landowners or else it will not be able to implement efficient antigrowth programs. Injunctive relief is appropriate, however, against a municipal program motivated by discrimination against ethnic or ideological minorities.[240]

What kinds of development should a municipality be able to stop without paying compensation to landowners? 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. Most growth controls restrict land uses that are not subnormal. 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.[241]

What development charges should a local government be entitled to impose? Special charges that attach to new housing construction are often horizontally unfair because they redistribute wealth without ethical justification from persons largely unrepresented in the political process to those who are political insiders. Therefore, development charges designed to raise general revenue or to "internalize" the congestion costs of growth should be prohibited.[242] To ensure that new development bears its fair share of the costs of financing the urban infrastructure, however, development 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. In addition, development 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.[243]

239. *See* p. 415 *supra.*
240. *See* pp. 417-18 *supra.*
241. *See* pp. 418-24 *supra.*
242. A suburb, however, should be entitled to waive a valid antinuisance restriction in return for whatever the market will bear. *See* note 194 *supra.*
243. *See* pp. 459-65 *supra.*

When a suburb enacts a restriction that is enforceable but for which it is liable in damages, how much compensation should landowners and housing consumers receive? The measure of damages differs for the two groups. A *landowner's* compensation is determined by how much the restriction reduces the market value of his land. In appraising what the land valuation would be if there were no restriction, one should take into account the valid development charges and uncompensated use restrictions that the suburb might have enacted; otherwise the landowner would receive compensation that would make him better off than his neighbors. *Consumers* should be entitled to recover (usually by class action) any damages they have suffered as a result of a housing price increase attributable to a suburb's policies. But damages should not be granted to consumers whenever the suburb demonstrates that its growth controls are not only efficient but also fair to them.[244]

Taken as a whole, the recommended rules 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.[245] The current case law in many states, by contrast, attaches a presumption of validity to municipal land-use policies and thus rarely puts suburbs to this test.

Those convinced that the proposed legal rules are as fair and efficient as one can devise might nevertheless disagree on how the rules should be put in force. Reform might be left exclusively to legislative bodies, which could enact the principles by statute and perhaps set up a specialized administrative body to enforce them.[246] Experience may prove this to be the only workable approach. The balance of this Part, however, consists of a short brief in support of two propositions: (1) that judges should adopt the suggested principles as a constitutional matter; and (2) that in the usual case, *i.e.*, where the conflict is intrastate, the judicial remedy should be based exclusively on the state constitution.

B. *The Doctrinal Basis for Judicial Intervention*

Most observers who have examined the exclusionary zoning problem have argued that the most promising line of legal attack is to invoke the federal constitutional rights to equal protection and freedom of

244. *See* pp. 436-38 *supra*.
245. For supporting sentiments, see Fessler & Haar, *supra* note 205, at 447-48.
246. For a proposal of this sort, see Note, *Large Lot Zoning*, 78 YALE L.J. 1418, 1437-41 (1969).

travel of the members of the excluded households.[247] The usual remedy for a violation of one of these rights is the invalidation of the offending portions of the municipal code. The present analysis has suggested the general superiority of another remedy—damage awards to landowners and consumers.

Since the taking clause has been the traditional constitutional justification for damage awards against government, it would probably be the most readily accepted doctrinal basis for both landowner and consumer damage suits against suburbs.[248] A landowner who relied on this clause hardly would be plowing new ground; even landowner suits for the refund of excessive subdivision exactions typically have been presented as taking claims. For consumers to invoke the taking clause, however, would be unprecedented. Consumer damage actions against monopolists normally have been based on antitrust statutes rather than on any constitutional provision.[249] Nevertheless there is no doctrinal reason to forbid a consumer from pursuing such a taking claim. It would be ironic in an era of consumer rights if taking clauses were construed as only protecting producers' surplus and not consumers' surplus. (Of course, if a court were reluctant to characterize consumer injuries as takings, it could base the granting of damages on some other substantive constitutional right of housing consumers.[250])

Both the federal and state constitutions provide remedies for takings. The due process clause of the Fourteenth Amendment has been construed to restrict uncompensated takings by state and local governments[251]—the same restriction the Fifth Amendment imposes on the federal government. In addition, 48 state constitutions contain taking

247. *See, e.g.*, Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Comment, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612 (1972); Note, *Freedom of Travel and Exclusionary Land Use Regulations*, 84 YALE L.J. 1564 (1975); Note, *The Equal Protection Clause and Exclusionary Zoning after* Valtierra *and* Dandridge, 81 YALE L.J. 61 (1971); *see generally* M. MANN, THE RIGHT TO HOUSING 90-104 (1976).

248. When suburbs are guilty of de jure discrimination against ethnic and ideological minorities, the doctrinal bases for injunctive relief would be the equal protection clause and the First Amendment respectively (or, preferably, their equivalents in the state constitution).

249. Under traditional interpretations of Parker v. Brown, 317 U.S. 341 (1943), local governments would not be vulnerable to suits based on the federal antitrust laws.

250. Historically the Supreme Court has regarded major federal constitutional rights as being protected by property rules, not by liability rules (to use Calabresi and Melamed's terminology). The seminal decision of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), however, indicates that constitutional clauses other than the taking clause can be used as a basis for damage actions. *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922 (1976).

251. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

clauses, and the remaining two states have established an equivalent principle by judicial decision.[252] When municipal antigrowth policies inflict no significant injuries on out-of-state households or housing suppliers, the basic tenets of federalism suggest that one *not* look to the federal constitution to provide the doctrinal basis for a remedy.[253] Unlike restrictions on freedom of speech and the right to vote, growth controls do not evoke the federal concern for the integrity of state and local political processes.

Professor Howard has suggested[254] that state courts should be able to construe state constitutional provisions more broadly than identical federal provisions where: (1) there is no need for national uniformity in the law; or (2) the Supreme Court has clearly declared a "hands off" attitude over a certain class of disputes; or (3) the states might, in Justice Brandeis's language, "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[255] Growth-control issues fit into all three of Howard's categories. There is no apparent need for legal uniformity among states. The Supreme Court has clearly abandoned the field (as will shortly be demonstrated). And lastly, because the issues are complex and the best legal path far from certain, the testing of a variety of legal approaches would probably be advantageous. Of course, federal constitutional remedies are necessary in situations where antigrowth policies cause important interstate spillovers; for example, federal doctrines would certainly have to be called upon if Oregon or Fairfax County began to exclude in earnest.

Recent decisions of both state and federal courts support the proposition that conflicts over municipal growth controls are fundamentally issues to be handled under state law. The state courts most active in policing local abuses—New Jersey, Pennsylvania, and New York—have not explicitly relied on federal constitutional provisions.[256]

252. For a recent review of the state provisions, see Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1439 n.3 (1974).

253. For a discussion of the potential of state constitutional doctrines, see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973).

254. *See* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 937-40 (1976).

255. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

256. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (relying on state constitution); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975) (relies primarily on state decisional law to develop substantive due process test; unclear whether decision rests on state or federal constitutional provisions);

For its part, the Supreme Court seems to be trying (quite properly in my view) to steer land-use cases out of the federal courts. In recent years it has invoked standing requirements to avoid hearing one case,[257] and, when it has reached the merits, it has consistently rejected constitutional attacks against specific zoning ordinances.[258] Although a few lower federal courts have relied on federal doctrines to invalidate municipal growth controls,[259] most have declined to do so.[260] Indeed, federal judges seem to rely increasingly on the abstention doctrine in order to force complaining landowners to seek relief in state courts.[261]

The evolution of the federal law of special assessments supports the wisdom of not applying federal law to localized growth-control disputes. Special assessments, of course, provide an ideal vehicle for one group of landowners to discriminate against another group. A common abuse, for example, is to make abutting landowners pay for the

National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965) (unclear whether decision rests on state or federal constitutional provisions; opinion relies almost exclusively on state precedents).

257. Warth v. Seldin, 422 U.S. 490 (1975). *But see* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 561-63 (1977).

258. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977) (refusal by local authorities to rezone tract from single family to multifamily); Young v. American Mini Theatres, Inc., 96 S. Ct. 2440 (1976) (ordinance requiring dispersal of "adult" theatres does not violate First or Fourteenth Amendments); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (ordinance prohibiting households of three or more unrelated people); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (ordinance regulating mine excavations); *cf.* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) (city charter provision requiring land-use changes to be ratified by 55% of voters does not violate Fourteenth Amendment).

259. *See* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *rev'd and remanded*, 97 S. Ct. 555 (1977); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (ban on new multifamily dwelling violates §§ 804(a), 817 of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3604(a), 3617 (1970 & Supp. V 1975)).

260. *See, e.g.*, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *rev'g* 375 F. Supp. 574 (N.D. Cal. 1974) (plaintiff relied exclusively on federal constitutional doctrines); Ybarra v. Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (upholding federal constitutional validity of zoning ordinance restricting dwellings to single-family units on one-acre lots); Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972) (rebuffing federal constitutional attack on six-acre minimum lot-size requirements).

261. Sea Ranch Ass'n v. California Coastal Zone Comm'n, 537 F.2d 1058 (9th Cir. 1976); Santa Fe Land Improvement Co. v. City of Chula Vista, 71 F.R.D. 573 (S.D. Cal. 1976); Rancho Palos Verdes Corp. v. City of Laguna Beach, 390 F. Supp. 1004 (C.D. Cal. 1975); Olinger v. City of Palm Springs, 386 F. Supp. 1376 (C.D. Cal. 1975). *Cf.* South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir.), *cert. denied*, 416 U.S. 901 (1974) (due process and equal protection claims by landowner denied rezoning do not raise substantial federal questions). *But see* Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709, 719-20 (D.N.J. 1976); M.J. Brock & Sons, Inc. v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975); Donohoe Constr. Co. v. Maryland-Nat'l Capital Park & Planning Comm'n, 398 F. Supp. 21 (D. Md. 1975).

widening of a major street that will not benefit them. In 1898 the Supreme Court federalized these conflicts by holding in *Norwood v. Baker*[262] that a special assessment substantially in excess of special benefits was, to the extent of the excess, a taking of property in violation of the Fourteenth Amendment. When this holding flooded the federal courts with special assessment cases, the Supreme Court lost no time in undercutting the *Norwood* doctrine.[263] This withdrawal of federal constitutional remedies has left the issues raised by discriminatory special assessments to the state courts. They have since developed a wide variety of doctrinal approaches to the problem.[264] The Supreme Court has not heard a special assessment case in over a generation.[265]

C. *The Propriety of State Judicial Activism*

Legislatures seldom explicitly authorize municipalities to pursue the parochial land-use policies discussed in this article.[266] Most enabling acts that bestow planning and taxing authority are vague and open-ended.[267] Where this is so, the propriety of active judicial scrutiny to prevent discrimination against outsiders is unquestionable. State courts

262. 172 U.S. 269 (1898).

263. *See, e.g.*, French v. Barber Asphalt Paving Co., 181 U.S. 324, 344-45 (1901); Louisville & N.R.R. v. Barber Asphalt Paving Co., 197 U.S. 430, 434 (1905).

264. For a sampling of the differences, see, *e.g.*, Dawson v. Town of Los Altos Hills, 16 Cal. 3d 376, 547 P.2d 1377, 129 Cal. Rptr. 97 (1976) (assessments should stand unless legislature should have known that they were not proportional to benefits or that no benefits would accrue); O'Malley v. Public Improvement Comm'n, 342 Mass. 624, 174 N.E.2d 668 (1961) (assessment cannot be made in excess of special benefits); Fluckey v. City of Plymouth, 358 Mich. 447, 100 N.W.2d 486 (1960) (assessment invalid when abutter receives no benefits); Quality Homes, Inc. v. Village of New Brighton, 289 Minn. 274, 183 N.W.2d 555 (1971) (assessments invalid whenever greater than benefits).

265. The last seems to have been Chesebro v. Los Angeles County Flood Control Dist., 306 U.S. 459 (1939) (landowner not deprived of due process by lack of legislative hearing on question of benefits).

266. It is also rare for state statutes expressly to prohibit obviously discriminatory practices. A conspicuous exception is ARIZ. REV. STAT. § 9-463.01 (West Supp. 1975) (locality can force subdivider to reserve lands for parks, schools, recreational facilities and fire stations, provided it pays for those lands).

267. One example is MO. ANN. STAT. § 89.410(2) (Vernon 1971), which provides in part:

> [Local subdivision] regulations may provide for the dedication, reservation or acquisition of lands and open spaces necessary for public uses indicated on the city plan and for appropriate means of providing for the compensation, including reasonable charges against the subdivision, if any, and over a period of time and in a manner as is in the public interest.

Delegations of general home-rule authority are equally nebulous. For example, WIS. CONST. art. 11, § 3 states, in part:

> Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village.

See generally F. MICHELMAN & T. SANDALOW, *supra* note 34, at 308-10.

have traditionally shown considerable respect for Dillon's Rule, which calls for the strict construction of municipal powers under enabling acts.[268] This judicial approach would have doomed the renowned anti-development ordinances of Ramapo and Walnut Creek, both of which required a stretched interpretation of municipal powers.[269] Most state courts are not reluctant to use statutory interpretation to curb municipal parochialism and indeed prefer that ground to avoid reaching constitutional issues.[270]

Where a judicial decision against a suburb could not be grounded in statutory interpretation, some might argue that the state courts should remain passive and thereby leave the correction of municipal excesses to state legislatures. Neither experience nor political theory, however, justifies the state courts' opting out. Vigorous judicial review of municipal antigrowth measures performs a classic constitutional function. The political processes of small suburbs are systematically biased against the interests of outsiders injured by growth-control measures.[271] Courts have traditionally used constitutional doctrines to stem legislative provincialism. For example, the Supreme Court has invoked a variety of federal constitutional clauses to annul state and local legislation that has discriminated against individuals who reside out of state.[272] The Court has acted spontaneously on its perception of

268. *See* I J. DILLON, MUNICIPAL CORPORATIONS 448-55 (5th ed. 1911).

269. The two programs are discussed at pp. 433-34 *supra* & pp. 483-85 *infra*, respectively. *See also* Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966) (ambiguous state statute interpreted to authorize exactions for parks and schools).

270. *See, e.g.*, Beach v. Planning & Zoning Comm'n, 141 Conn. 79, 103 A.2d 814 (1954) (subdivision map act did not authorize local government to disapprove subdivision on grounds of threatened municipal service overloads and fiscal burdens); Daley Constr. Co. v. Planning Bd., 340 Mass. 149, 163 N.E.2d 27 (1959) (subdivision control law did not permit planning board to disapprove subdivision plan on grounds of town's water shortage); Ridgemont Dev. Co. v. City of East Detroit, 358 Mich. 387, 100 N.W.2d 301 (1960) (park exactions not authorized by statute); West Park Ave., Inc. v. Township of Ocean, 48 N.J. 122, 224 A.2d 1 (1966) (school exactions not authorized by statute).

271. *See* pp. 404-07 *supra*.

272. A recent example is Austin v. New Hampshire, 420 U.S. 656 (1975), holding that a New Hampshire income tax levied exclusively on commuters from another state violates the privileges and immunities clause of Article IV. The Court stated:

> Since nonresidents are not represented in the taxing State's legislative halls, . . . judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution."

Id. at 662. The commerce clause is, of course, the Supreme Court's usual doctrinal peg. *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (local ordinance permitting only local processors to sell pasteurized milk held to violate commerce clause).

These two cases involved de jure discrimination—legislative classifications that expressly singled out outsiders for different treatment. Antigrowth measures, in contrast,

its constitutional role, not as a result of any mandate from Congress. By analogy, the state courts need not await any directive from their legislatures. In the rare event that a state statute explicitly authorized a municipality to carry out a policy in conflict with the rules suggested in this article, state judicial intervention to promote efficiency and horizontal equity would still hardly be unthinkable. Why else do state constitutions contain taking clauses? As the subsequent case analysis will demonstrate, the state courts are increasingly willing to use constitutional doctrines to temper the worst varieties of municipal anti-growth measures.

IX. The Law of Development Charges

The balance of this article will elaborate the recommended legal doctrines, compare them with those that now prevail, and apply them to illustrative problems. This Part discusses the law of development charges; the next Part, the law of development restrictions.

A municipality may subject landowners to cash and in-kind exactions as a condition for any sort of development approval. The most common occasions are those in which a developer needs a zoning change, subdivision map approval, building permit, or utility hook-up. Any legal doctrine designed to protect landowners from fiscal inequities must be capable of preventing suburban excesses of all forms. For example, if a court strictly limits subdivision map approval exactions but refuses to scrutinize utility hook-up charges, a suburb will simply shift its fund-raising efforts to the utility connection stage.[273] What are needed are legal tests that focus on the entire fiscal treatment of a landowner over time.

A. *Taxing Development to Raise General Revenue*

Municipalities should not be permitted to enact general revenue measures that primarily burden the land-development industry. Such taxes may be used to cartelize housing supply and are in any case inequitable because they fall upon landowners and housing consumers who command little voting strength in municipal elections.[274] Since the Supreme Court normally defers to legislatively chosen tax classifi-

involve de facto discrimination against outsiders, a brand usually regarded as somewhat less tainted. *See generally* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976).

273. Thus towns in Illinois have been able to sidestep judicial restrictions on subdivision exactions by imposing their levies at other points. *See* notes 288 & 310 *infra*.

274. *See* pp. 454-55 *supra*.

cations,[275] one may be surprised to learn that most state courts have been active in protecting the homebuilding industry from discriminatory general revenue measures. Indeed, the reported cases unanimously follow the leading New Jersey decision of *Daniels v. Borough of Point Pleasant*[276] in forbidding the use of building permit fees by municipalities to raise general revenues.[277] Perhaps because of this cold reception, relatively few suburbs have dared to enact overt general taxes on residential development. Even the California courts—which are exceeded by none in their insensitivity to the nuances of land-development law—have split on the issue of the validity of overt housing-construction taxes.[278] Of course, if a broadly applicable local tax happens to include land developers within its net, the element of discrimination against political weaklings is absent, and the tax should stand.[279]

275. *See, e.g.*, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359-60 (1973) (rejecting contention that exemption of individual, but not corporate, personal property from ad valorem taxes violates equal protection clause). *But see* Austin v. New Hampshire, 420 U.S. 656 (1975) (invalidating commuter tax). *See generally* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1246 n.129, 1285-86 (1970).

276. 23 N.J. 357, 129 A.2d 265 (1957) (fee revenue would have exceeded borough's costs by 700%).

277. *See* Merrelli v. City of St. Clair Shores, 355 Mich. 575, 96 N.W.2d 144 (1959) (30% of city's general fund revenue had been obtained from fees); Colonial Oaks West, Inc. v. Township of E. Brunswick, 61 N.J. 560, 296 A.2d 653 (1972) (fee revenue would be four times direct costs); Bon Air Estates, Inc. v. Village of Suffern, 32 App. Div. 2d 921, 302 N.Y.S.2d 304 (1969) (presumption of validity overcome if fee revenue three times direct costs); Weber Basin Home Builders Ass'n v. Roy City, 26 Utah 2d 215, 487 P.2d 866 (1971) (city admitted fee was general-revenue measure).

278. *Compare* Newport Bldg. Corp. v. City of Santa Ana, 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (1962) ($50-per-lot "business license fee" on new residential subdivisions violated subdivision map act) *with* Associated Home Builders, Inc. v. City of Newark, 18 Cal. App. 3d 107, 95 Cal. Rptr. 648 (1971) (upholding tax keyed to number of bedrooms in proposed building); *cf.* 45 CAL. OPS. ATT'Y GENERAL 23 (1965) (concludes city may levy tax based on number of bedrooms in new building).

Other California municipalities have begun to exploit the *City of Newark* precedent. *See, e.g.*, SAN JOSE, CAL., CODE §§ 16000-08, 16100-08 (1976) (total tax under these provisions of $330 per new single-family dwelling); Walnut Creek, Cal., Ordinance No. 1142 (July 31, 1972).

279. *See, e.g.*, City of Los Angeles v. Rancho Homes, Inc., 40 Cal. 2d 764, 256 P.2d 305 (1953) (sustaining application of city's general gross-receipts tax to homebuilder).

Similar issues arise when taxes are levied on tenants (who are usually less likely to vote), or on the transfer of land by nonresident landowners. On the former problem, see Boulevard Apartments, Inc. v. Borough of Hasbrouck Heights, 86 N.J. Super. 189, 206 A.2d 372 (Super. Ct. Law Div. 1965), *aff'd*, 90 N.J. Super. 242, 217 A.2d 139 (Super. Ct. App. Div. 1966) (per curiam) (annual fee of $50 per apartment unit, expressly designed to make apartment houses bear "fair share" of municipal costs, violates state statute restricting license fees); notes 54 & 55 *supra*.

On the latter, consider Vermont's new capital gains tax on the sale of land, a program brilliantly designed to discriminate against nonvoters. The tax exempts the first five acres of land transferred so long as it includes, or will include, the principal residence of the transferor or transferee. Most Vermont domiciliaries will thus be exempt, while most out-of-staters who own vacation homes will not. *See* VT. STAT. ANN. tit. 32, § 10002 (Supp.

B. *Benefits Charges on Landowners*

Although only a handful of reported cases touch on the issue of the general taxation of development activity, there are hundreds dealing with utility charges, subdivision exactions, special assessments, and similar municipal efforts to force developers to fund the provision of specific services. These cases are inconsistent and highly unpredictable, however, indicating the want of a coherent analytical foundation. Counsel must often be uncertain how to advise a developer who is threatened by the exaction of a school site or the sharp escalation of water main hook-up charges.

In light of the numbing variety of benefits charges that may be used, it will help to focus the initial discussion on a single problem. Suppose the suburb of Eden exacted an unimproved site for a neighborhood park from the Tacky Development Company in return for approving Tacky's normal residential subdivision. In addition, suppose that Eden, pursuant to a recently enacted ordinance, subsequently conditioned Tacky's building permits on a $200-per-dwelling-unit contribution to finance city-wide park acquisitions. How would this case come out under the doctrines I have proposed,[280] and how would my disposition of it differ from those under the traditional legal tests?

1. *A Detailed Application of the Recommended Approach to Park Exactions*

a. *The Developer's Prima Facie Case*

I have argued that horizontal equity among owners of land suited for residential use is achieved if each existing and prospective dwelling unit would receive the same net benefits over time from municipal services. These net benefits are to be measured by calculating the present value of the flow of service expenditures on a dwelling unit and subtracting the present value of the flow of benefits charges assessed against it. Because this formula provides an integrated assess-

1976); Andrews v. Lathrop, 132 Vt. 256, 315 A.2d 860 (1974) (upholding tax against equal protection and other constitutional challenges).

Vermont legislators have also been unable to resist de jure discrimination against non-Vermonters. A recently enacted property tax credit is only available to those elderly persons who were "domiciled in this state during the entirety of the taxable year." VT. STAT. ANN. tit. 32, § 5967(b)(1) (Supp. 1976).

Because these Vermont taxes discriminate against out-of-staters, they are appropriate targets for attack under the Federal Constitution. *Cf.* Note, *Freedom of Travel and Exclusionary Land Use Regulations, supra* note 247, at 1579-83 (implying that Vermont capital gains tax should be held to violate federal right to freedom of travel).

280. *See* pp. 459-65 *supra.*

ment of all fiscal policies over time, it can be used to test the fairness of benefits charges levied at any stage of the development process. A landowner attacking a benefits charge for a service should have to prove as his prima facie case that his net benefits per dwelling unit from the service would be less than the average for all dwelling units in the city. Thus Tacky would have to show that its per-house net park benefits would be below Eden's mean. In addition, to weed out trivial cases, the plaintiff should have to show that his loss from fiscal discrimination is a substantial one.

Assume in our hypothetical that Eden had always rendered park services equally to resident households. In that case the decisive issue would be how Eden had financed land acquisition for its other parks. If Tacky could show that Eden had always used general revenues to fund those purchases,[281] Tacky could make out a prima facie case that it should be compensated for the land it had been required to dedicate and that Eden should refund the park fund contributions Tacky had made. Since Tacky's homebuyers would receive only average park benefits, the recommended formula would require that their lots be subjected only to Eden's historic average burden of benefits charges for parks—namely, no burden at all. The outcome would change if the evidence showed that Eden had consistently used special assessments, subdivision exactions, and the like to fund the acquisition of park sites. In that case Tacky could only make out a case for the refund of its $200-per-unit park fund contribution; requiring it to dedicate a park site actually would promote horizontal equity. Finally, if Tacky's development, when completed, would be unusually blessed with municipal parks, its prima facie case might fail entirely; the extra burden of the park fund contributions might be entirely offset by special park benefits.[282]

b. *The Municipality's Defenses*

Even if Tacky could prove that its lands would receive below average net park benefits, Eden could reduce its liability to the ex-

281. State and federal grants-in-aid, which are of considerable significance in municipal park-acquisition programs, should be classified as general-revenue financing. *See* p. 453 *supra*.

282. Except for grants-in-aid and an occasional special assessment (*see* note 221 *supra*), Los Angeles currently meets its entire capital budget for parks through interrelated levies on subdividers and on those who construct or improve residential buildings. Interview with Skip Marvick, *supra* note 27. *See* L.A., CAL., CODE § 17.12 (1973) ("little Quimby" park exaction ordinance); *id.* § 21.10 (dwelling unit construction tax). Unless newly built residential communities will receive special park benefits, these recently enacted ordinances are prima facie discriminatory.

tent that it could prove, as a defense, that its policies were consistent with Michelman's fairness test. The suburb first would have to show that its park charges would enhance efficiency. Eden's best evidence on this score would be that such charges make developers consider whether the new development is worth the cost of providing sufficient park facilities—the usual allocational advantage of user fees. This reasoning might conceivably justify Eden's exaction of a specific park site in Tacky's subdivision[283] but could not possibly support the cash levies for city-wide parks. The latter charges are not directly related to the demand for parks created by the new development. To complete the Michelman defense, Eden would also have to show that Tacky should be able to perceive that its treatment in this case fits into an overall policy that is in Tacky's long-term self-interest.[284]

c. *Remedy*

If Tacky's claim were deemed meritorious, the proper remedy would be the quashing of any of Eden's prospective charges that would be excessive and the refund to Tacky of any charges already paid to the extent necessary to achieve fiscal fairness. A homebuilder should be entitled to keep the entire amount of any refund even if he has sold the houses or lots for which he paid the excessive fees. Two recent New Jersey cases unfortunately have confused this issue; they required developers to share their refunds with their homebuyers to the extent that the illegal excess had been passed on in higher housing prices.[285]

283. Because subdivision exactions are not used by some municipalities and, even where used, tend to be involuntarily paid, a suburb may find it difficult to produce evidence that a user fee enhances efficiency. *See* pp. 464-65 *supra*.

284. As a general proposition, Eden should not be entitled to prevail on the theory that Tacky, by "voluntarily" paying the park charges, waived its rights to a refund (or is estopped from asserting those rights). Landowners are at the mercy of local officials during the development process and must agree to illegally imposed exactions to avoid costly delays. Virtually all courts have recognized that development charges are collected under duress, and thus that a developer who pays them should not be held to have relinquished voluntarily his rights to fiscal equality. *See, e.g.*, Newport Bldg. Corp. v. City of Santa Ana, 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (1962); Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960); Ridgemont Dev. Co. v. City of E. Detroit, 358 Mich. 387, 100 N.W.2d 301 (1960); S.S. & O. Corp. v. Township of Bernards Sewerage Auth., 62 N.J. 369, 301 A.2d 738 (1973). *But cf.* Board of Educ. v. Surety Developers, Inc., 24 Ill. App. 3d 638, 321 N.E.2d 99 (1974), *aff'd on other grounds*, 63 Ill. 2d 193, 347 N.E.2d 149 (1975) (otherwise invalid exaction may be enforced if agreed upon in contract with school board). In addition, the running of the statute of limitations must be tolled for the period the developer is under duress, or else the passage of time may enable a suburb to win by force.

285. Colonial Oaks West, Inc. v. Township of E. Brunswick, 61 N.J. 560, 574-75, 296 A.2d 653, 660 (1972), *followed in* S.S. & O. Corp. v. Township of Bernards Sewerage Auth., 62 N.J. 369, 385-86, 301 A.2d 738, 747 (1973). *Cf.* Metro Homes, Inc. v. City of

If both a developer and his customers know that a charge is illegal, it does not matter to them who is entitled to refunds. If developers are entitled to refunds, they will ignore the illegal charges in setting their prices; to the extent that homebuyers are entitled to refunds, they will be willing to pay developers higher housing prices in the first instance. The issue of entitlements to refunds is not a toss-up, however. Administrative cost considerations indicate that developers can enforce rights more cheaply in this instance. Entitling developers to refunds will eliminate three deadweight losses that may result from the New Jersey decisions: (1) the cost to developers, the better-informed of the two parties, of educating homebuyers about their entitlements to refunds; (2) the higher costs homebuyers, compared to a single developer, have in organizing to pursue their claims against the miscreant suburb; and (3) the costs of litigation over refund shares that will arise between homebuyers and developers when entitlements to refunds are not certain.[286]

Measuring the damages resulting from excessive development charges is unquestionably difficult—but hardly more so than in other familiar forms of civil litigation. A court considering Tacky's claim for a refund should not consider every scrap of evidence on Eden's past and prospective policies for furnishing and financing parks. In most suburbs the pattern will be so erratic and the record so incomplete that a court can at best hope to dispense a rough justice. The recommended general formula states that a refund should be awarded to the extent necessary to equalize net benefits per dwelling unit over time. A specific unit's net benefits are discounted to the date the unit was first completed or the date the municipality first provided the service, whichever is more recent. This assures that a landowner's refund never exceeds the amount necessary to make a late-developing landowner as well off as he would have been if the local government had always provided equal current net benefits to dwelling units actually in existence. Suppose that Tacky's subdivision would be slightly better served than usual by municipal parks, and that about one-third of Eden's previous park

Warren, 19 Mich. App. 664, 666-67 n.3, 173 N.W.2d 230, 232 n.3 (1969) (indicating that some Michigan builders, upon being refunded discriminatory sewer-connection fees, had settled with homebuyers who had sued for reimbursement).

286. A developer should, of course, be required to reimburse homebuyers if he contracted to do so or if the consequence of the charge being illegal is that the homebuyers will be validly subjected to previously unexpected assessments. *Cf.* Lloyd E. Clarke, Inc. v. City of Bettendorf, 261 Iowa 1217, 158 N.W.2d 125 (1968) (court, though holding that sewer-connection charges on developer violated statute, nevertheless recognizes that municipality might thereafter levy special assessments against homebuyers for sewer connections).

acquisitions had been financed with benefits charges on landowners who are now barred from seeking refunds by the statute of limitations. A rough-and-ready remedy might then be the refund of Tacky's $200-per-unit park fund contribution and, in addition, a damage award equal to 50% of the value of the park site that Tacky had dedicated.[287] Tacky would then ultimately bear slightly above-average benefits charges for parks, which would be approximately offset by its favorable park benefits. More precise calculations would not be worth their administrative costs.

If anything, courts should err on the high side when calculating damages. Experience in Illinois and New Jersey indicates that suburbs may not be dissuaded from imposing exactions of dubious legality[288] if the only judicial sanction is a refund of the excess charged. Should some developers not seek reimbursement—either out of ignorance or fear that a reputation for litigiousness will hurt them in future dealings with suburbs—an illegal fiscal policy may well be a profitable one for a suburb. In flagrant cases punitive damages should thus be added to the developer's award as a "kicker" to deter intentional suburban misconduct.[289]

2. *The Traditional Tests Criticized*

The state courts at present differ in their handling of developer challenges to benefits charges. There are three basic approaches. The Illinois doctrine associated with *Pioneer Trust & Savings Bank v. Village of Mount Prospect*[290] permits an exaction only if the "need" for

287. Tacky should receive interest on both awards.

288. On the Illinois experience, see Platt & Moloney-Merkle, *supra* note 34, at 715-28 (Chicago suburbs have tried to circumvent *Pioneer Trust* by exacting open space at points in development process other than subdivision map approval). *See also* note 310 *infra*.

At least one local government in New Jersey blatantly disregarded judicial restrictions on municipal exactions. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 167-69, 168 n.6, 336 A.2d 713, 721-22, 722 n.6, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

289. *Cf.* Calabresi & Melamed, *supra* note 65, at 1126 (since thief might not be deterred if only forced to compensate victim, society imposes criminal penalties). Absent statutory provisions to the contrary, most courts unfortunately decline to award punitive damages against municipal corporations. *See* Annot., 19 A.L.R.2d 903 (1951).

Quasi-criminal sanctions against individual municipal employees may provide the necessary deterrence. In a recent case the builder of a Solana Beach, California, condominium obtained an injunction against delaying tactics by San Diego County officials. When a county building inspector subsequently tarried in his inspections, a superior court judge fined him $1,000 for contempt. L.A. Times, July 17, 1974, § II, at 2, col. 7.

290. 22 Ill. 2d 375, 380-81, 176 N.E.2d 799, 802 (1961). Cases following *Pioneer Trust* include State *ex rel.* Noland v. St. Louis County, 478 S.W.2d 363, 367 (Mo. 1972); and McKain v. Toledo City Plan Comm'n, 26 Ohio App. 2d 171, 176-77, 270 N.E.2d 370, 374 (1971). The *Pioneer Trust* formula actually appeared first in Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 453, 167 N.E.2d 230, 233-34 (1960) (Schaefer, J.).

the facility being financed is "specifically and uniquely attributable" to the subdivider's development. This is not a good test. First, the word "uniquely" implies that Tacky's vulnerability to an exaction might turn on the completely irrelevant issue of whether its subdivision alone required a whole neighborhood park. The fact that a subdivision is small and therefore merely contributes to the "need" for a facility is not a sufficient justification for exempting the subdivision from benefits charges; special assessments, for example, have often been employed in such situations. Second, and more fundamentally, the *Pioneer Trust* formula fails to focus the inquiry on the history of a municipality's practices in both rendering and financing services—the two decisive considerations for judging the fairness of benefits charges. If the suburb of Eden has a policy of providing equal park services to its resident households, Tacky's development would unquestionably unleash a perceived "need" for parks. But the creation of "needs" is only one act in the fiscal drama. If Eden has traditionally satisfied park "needs" by spending general revenues, why should Tacky have to pay specially to meet its own park needs when no other landowner ever has? When applied, the *Pioneer Trust* doctrine usually prevents suburbs from collecting cash contributions for city-wide programs; for example, it would invalidate Eden's park charge of $200 per dwelling unit. This result is usually a good one, but it is simply the fortuitous byproduct of an inaccurate doctrine. In other critical situations *Pioneer Trust* provides no protection at all. For example, the doctrine literally would authorize the exaction of fire engines, library books, and teachers' salaries whenever a development is large enough to have created the entire "need" for those expenditures.

The New Jersey Supreme Court is the leading proponent of the second approach. That court allows a subdivider to "be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision."[291]

291. Longridge Builders, Inc. v. Planning Bd., 52 N.J. 348, 350, 245 A.2d 336, 337 (1967) (per curiam), *followed in, e.g.*, Brazer v. Borough of Mountainside, 55 N.J. 456, 465, 262 A.2d 857, 862 (1970); 181 Inc. v. Salem County Planning Bd., 133 N.J. Super. 350, 358, 336 A.2d 501, 505-06 (Super. Ct. Law Div. 1975), *aff'd in relevant part*, 140 N.J. Super. 247, 356 A.2d 34 (Super. Ct. App. Div. 1976).

The most recent New Jersey Supreme Court decision on the subject, Divan Builders, Inc. v. Planning Bd., 66 N.J. 582, 334 A.2d 30 (1975), apparently interpreted this approach as always entitling a local government to require subdividers to pay the amount by which the costs of an off-site improvement *exceed* the special benefits that the improvement confers on them. This leads to the ironic result that the lower the special benefits conferred on subdividers by a suburb's public works, the easier it is for the suburb to shift the costs of those projects to subdividers. The *Divan Builders* opinion is utterly confused; the New Jersey Supreme Court should disapprove it at the first opportunity.

For cases and statutes requiring a "reasonable" relationship between municipal charges

This test properly excises the ill-advised "uniqueness" requirement of *Pioneer Trust* but is otherwise just as blind to the critical relevance of a municipality's historic fiscal policies. The fairness of making Tacky pay for customary park services depends not just on Tacky's "needs" or "benefits," but also on how Eden finances its other parks. The New Jersey Supreme Court itself once recognized this in its superb decision in *West Park Avenue, Inc. v. Township of Ocean*,[292] which struck down a $300-per-lot fee for school construction because "there would be an imbalance if new construction alone were to bear the capital cost of new schools while also being charged [through property taxes] with the capital costs of schools serving other portions of the school district."[293]

The third judicial approach is deference to municipal decisions to use benefits charges. This is the least defensible of the three because it forsakes the judicial responsibilities to chip away at legislatively sanctioned monopolies and to protect political outsiders from discriminatory legislative policies.[294] Judicial deference to development charges peaked in the mid-1960s with a pair of subdivision exaction decisions in New York and Wisconsin.[295] Local governments have lost eight out of the twelve park exaction cases reported since 1966.[296] The best-known case, however—the California Supreme Court's unfortunate *Associated Homebuilders, Inc. v. City of Walnut Creek*[297]—was a

and landowner benefits (or needs), a standard similar to the rational nexus test, see, *e.g.*, Ayres v. City Council, 34 Cal. 2d 31, 42, 207 P.2d 1, 7 (1949); Kessler v. Town of Shelter Island Planning Bd., 40 App. Div. 2d 1005, 1006, 338 N.Y.S.2d 778, 780 (1972); CAL. GOV'T CODE § 65909 (West 1976); *cf.* ALI MODEL LAND DEV. CODE § 2-103(3) (Proposed Official Draft 1975) (allowing exactions for specified improvements "of a quality and quantity no more than reasonably necessary for the proposed development").

292. 48 N.J. 122, 224 A.2d 1 (1966).

293. *Id.* at 126-27, 224 A.2d at 3-4.

294. *See* pp. 473-75 *supra*.

295. Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

296. The eight losses are Home Builders Ass'n v. Riddel, 109 Ariz. 404, 510 P.2d 376 (1973) (construction tax designed to raise park revenues unconstitutional); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 27 Conn. Supp. 74, 230 A.2d 45 (Super. Ct. 1967) (cash exactions for town park development unconstitutional); Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. Dist. Ct. App. 1972) (exaction ordinance for park development beyond charter and overbroad); Venditti-Siravo, Inc. v. City of Hollywood, 39 Fla. Supp. 121 (Cir. Ct. 1973) (fees violate equal protection clause and exceed city's powers); Sanchez v. City of Santa Fe, 82 N.M. 322, 481 P.2d 401 (1971) ("public facilities purchase fund" fees beyond statute); Kessler v. Town of Shelter Island Planning Bd., 40 App. Div. 2d 1005, 338 N.Y.S.2d 778 (1972) (specific exaction improper); East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup. Ct. 1969) (specific exaction confiscatory); and Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970) (exaction ordinance arbitrary on its face).

297. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), *vacating* 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970).

municipal victory.[298] That decision justified municipal collection of cash development charges for parks in part on the "urgent needs"[299] for more parks to curb "the appallingly rapid disappearance of open areas in and around our cities."[300] Even if there were factual support for the court's perception of the value of more recreational areas, which is far from certain,[301] the merits of such a spending program are irrelevant when the homebuilders' complaint goes to the issue of how the parks are to be financed. One might as well let the Commissioner of Internal Revenue argue in a narrow federal tax case that the United States Treasury is short of money.

Despite its essentially deferential tone, even *Walnut Creek* implies that a municipality may choose either to exact a park site or to collect fees in lieu thereof, but not both.[302] The lamentable outcome of the case may be explained in part by the undistinguished performance of the attorneys who represented the homebuilders. Rather than bringing a test case for the refund of a charge paid by an individual developer, they asked instead for declaratory relief for homebuilders as a class. That was a mistake. The fiscal equity accorded any particular landowner depends on the historic treatment of his particular parcel. These cases are therefore often poorly suited for class relief.[303] In addition, the plaintiffs' attorneys neglected to introduce any evidence on Walnut Creek's prior policies for furnishing and financing parks.[304]

298. The other three victories are Norsco Enterprises v. City of Fremont, 54 Cal. App. 3d 488, 126 Cal. Rptr. 659 (1976) (reducing but permitting—under *Walnut Creek*—park fees exacted on conversion of apartment house to condominiums); Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 354 N.E.2d 489 (1976) (declaratory judgment sustaining park exaction ordinance against statutory and constitutional challenges); and Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. Sup. Ct. 1976) (park exaction ordinance constitutional on its face).

299. 4 Cal. 3d at 639, 484 P.2d at 611, 94 Cal. Rptr. at 635.

300. *Id.* at 648, 484 P.2d at 618, 94 Cal. Rptr. at 642.

301. Nonuse of neighborhood parks (the type in controversy in *Walnut Creek*) is apparently an increasingly frequent phenomenon. *See* S. GOLD, URBAN RECREATION PLANNING 101-03 (1973); Dunn, Book Review, 40 J. AM. INST. PLANNERS 59 (1974).

A cost-benefit analysis of small parks in Los Angeles revealed an excess of costs over benefits at reasonable discount rates. W. HIRSCH, THE ECONOMICS OF STATE AND LOCAL GOVERNMENTS 238-40 (1970).

The "need" for parks is usually measured by standards set by the National Recreation and Park Association, an organization no less self-serving than any other professional association. Its standards seem to be adjusted over time to stay ahead of prevailing service levels; this helps local recreation officials in their budgetary battles. For biting criticism of these official standards, see S. GOLD, *supra* at 143-81.

302. *See* 4 Cal. 3d at 640-41 n.6, 484 P.2d at 612 n.6, 94 Cal. Rptr. at 640 n.6.

303. Other cases that homebuilders lost when their attorneys failed to introduce evidence on the fairness of specific exactions include Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 354 N.E.2d 489 (1976); and Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. Sup. Ct. 1976).

304. *Walnut Creek* was tried on a simple set of stipulated facts—essentially just the texts of the ordinances that were being challenged. *See* Associated Home Builders, Inc. v. City of Walnut Creek, 90 Cal. Rptr. 663, 669 (Ct. App. 1970).

The park fees being contested would be fair if new Walnut Creek subdivisions were to receive above-average park benefits or if the city had previously relied principally on special assessments,[305] special park districts, or subdivision exactions to raise revenues for park acquisitions. Because the homebuilders did not introduce evidence to the contrary, they failed to make out a prima facie case for relief.[306]

In sum, all three of the current judicial approaches are ill-suited for unmasking fiscal inequities. Yet, as so often happens in the law, many judges seem able to reach acceptable outcomes despite existing doctrine. Most courts are at least willing to prevent municipal discrimination *among* subdividers,[307] and to bar the exemption of resident homeowners from hook-up charges that developers have to pay.[308] Given the

305. For cases upholding the special assessment of private land to finance park acquisitions, see, *e.g.*, Wilson v. Lambert, 168 U.S. 611 (1898); and Winnetka Park Dist. v. Hopkins, 371 Ill. 46, 20 N.E.2d 58 (1939). *Cf.* State v. City of Topeka, 201 Kan. 729, 443 P.2d 240 (1968) (state lands subject to assessment for local park).

The city of Minneapolis is reported to use the technique frequently. Kitchen & Hendon, *Land Values Adjacent to an Urban Neighborhood Park*, 43 LAND ECON. 357, 358 (1967). Some California cities use special assessments (quite properly) when a neighborhood receives unusually generous park benefits. *See* note 221 *supra*; San Diego Union, June 1, 1974, § B, at 1, col. 1 (one quarter of $5.44 million acquisition cost of 900-acre Tecolete Canyon Park in San Diego to be financed with special assessments).

Income from special assessments for all purposes has declined from 6.7% of total municipal revenue in 1930 to slightly over 1% today. *See* BUREAU OF THE CENSUS, CITY GOVERNMENT FINANCES IN 1970-71, at 5 (1972); O. OLDMAN & F. SCHOETTLE, *supra* note 195, at 413, 415 (excerpting from TAX FOUNDATION, INC., SPECIAL ASSESSMENTS AND SERVICE CHARGES IN MUNICIPAL FINANCE (1970)). This fall-off may be due in part to the increased popularity of subdivision exactions, a form of municipal income the Census has not yet attempted to tabulate.

306. Nevertheless, if the California Supreme Court had concluded that the merits of the suit could be adjudicated in a class action, it might at least have remanded the case to permit the gathering of additional evidence on Walnut Creek's practices in supplying and financing parks. *See* Deerfield Estates, Inc. v. Township of E. Brunswick, 60 N.J. 115, 286 A.2d 498 (1972) (remanding for more evidence on township's financing of water mains).

307. *See, e.g.*, Brown v. City of Joliet, 108 Ill. App. 2d 230, 247 N.E.2d 47 (1969) (no other subdividers had been required to install storm drain trunklines); Divan Builders, Inc. v. Planning Bd., 66 N.J. 582, 334 A.2d 30 (1975) (only two of many benefited landowners would be charged for drainage facility); McKain v. Toledo City Plan Comm'n, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971) (plaintiff had been required to dedicate land for street widening and adjacent subdivider had not).

The most common form of discrimination appears to be charging big subdividers more than small ones. *See, e.g.*, CAL. GOV'T CODE § 66475.1 (West Supp. 1976) (subdividers of at least 200 parcels may be required to dedicate land for bicycle paths); VT. STAT. ANN. tit. 24, § 4417(5) (1975) (authorizing school-site exactions only from subdivisions of more than 100 dwelling units). For a hostile judicial reaction to this pattern, see Johnson v. Reasor, 392 S.W.2d 54 (Ky. 1965) (utility connection fees imposed on subdividers but not on individual lot owners held discriminatory). *Cf.* S.S. & O. Corp. v. Township of Bernards Sewerage Auth., 62 N.J. 369, 301 A.2d 738 (1973) (sewerage authority could not impose higher connection charges on houses in developments than on other comparable dwellings).

308. *See* Beauty Built Constr. Corp. v. City of Warren, 375 Mich. 229, 134 N.W.2d 214 (1965) (this pattern of financing sewers denies equal protection); Strahan v. City of Aurora, 38 Ohio Misc. 37, 311 N.E.2d 876 (C.P. Portage County 1973) (invalidating similar scheme for water hook-ups).

dearth of helpful academic commentary on these issues,[309] one must be thankful that the judicial record is as good as it is.

3. *Development Charges for Facilities Other than Parks*

At first, American municipalities only sought to make developers pay for streets and on-site utilities. Then came parks and schools. In the last few years, charges for more exotic items like firehouses, police cars, and cultural centers have begun to emerge.[310] Developers should generally have little trouble establishing a prima facie case against any benefits charge that is aimed at funding a traditional service that the municipality has historically financed with general revenues.

The exaction of school sites from developers, for example, usually reduces their net benefits from schools to subpar levels. Special assessments for school facilities are unknown in the United States[311] (perhaps because close proximity to a school actually lowers land values[312]). Statutes expressly authorizing school-site exactions without compensation are only of recent vintage.[313] Therefore developers who provide school sites are paying benefits charges of a type that owners of existing structures (and their predecessors) are unlikely to have paid. Despite

309. In their frequently cited article, Heyman and Gilhool argue that suburbs should use "rational cost-accounting procedures" to allocate costs to developers. *See* Heyman & Gilhool, *supra* note 34, at 1141-46. Their system of allowing benefits charges equal to benefits conferred is similar to the New Jersey "rational nexus" test. *See* pp. 482-83 *supra*. Both tests are insensitive to how other landowners have been treated.

The redoubtable Michelman and Sandalow, however, have recognized that consistency across landowners is the critical issue. *See* F. MICHELMAN & T. SANDALOW, *supra* note 34, at 536. Reps and Smith had the glimmer of a good idea when they suggested that exactions should be permissible only for local improvements that could be financed with special assessments. They focused, however, only on municipal power to use special assessments, and not on actual financing practices. Reps & Smith, *supra* note 34, at 407-08.

310. In approving a dense PUD plan, one Illinois town exacted a five-acre school site, $200 per dwelling unit for its cultural center and local hospital, a $20,000 lump sum for its police and fire departments, installation of traffic signals on perimeter roads, and commitments for the maintenance of the tract's interior streets and utility lines. Schaumburg, Ill. Ordinance No. 1030 (Nov. 27, 1973). These exactions may well have been valid in this particular case because the town was apparently agreeing to allow subnormal residential uses. *See* note 194 *supra*.

311. Two leading treatises on municipal law state that schools are not "local improvements" for which special assessments can be levied. E. MCQUILLAN, MUNICIPAL CORPORATIONS § 38.29, at 107 n.7 (3d ed. 1970); C. RHYNE, MUNICIPAL LAW § 29.3, at 718-19 (1957). Both cite two old cases as authority for this proposition: Vanover v. Davis, 27 Ga. 354 (1859); and Commissioners of Pub. Schools v. County Comm'rs, 20 Md. 449 (1864). Neither case in fact supports it.

312. *See, e.g.*, Hendon, *Property Values, Schools, and Park-School Combinations*, 49 LAND ECON. 216 (1973).

313. *See, e.g.*, VT. STAT. ANN. tit. 24, § 4417(5) (1975) (only in subdivisions containing over 100 dwelling units); *cf.* ALI MODEL LAND DEV. CODE § 2-103, note 3, at 46 (Proposed Official Draft 1975) (§ 2-103 should be construed to authorize cash or in-kind exactions "for public facilities such as schools, parks, and fire stations" that are reasonably allocable to subdivider).

their unfairness, school exactions are becoming increasingly popular. Suburbs often condition PUD approvals on the dedication of school sites. The Ramapo Plan awards valuable "development points" to landowners who donate these facilities.[314] In California, where local governments are required by statute to compensate subdividers for reserving school sites,[315] municipalities nevertheless openly sell waivers to building moratoria in return for school contributions.[316] The state courts have usually seen fit to invalidate overt school-exaction programs, although frequently on statutory, not constitutional, grounds.[317]

The fairness of requiring landowners to provide rights-of-way and improvements for streets usually turns on the width of the street. Rights-of-way for local streets historically have been donated free by developers;[318] the grading and paving costs of these streets have also usually been covered through benefits financing—for example, special assessments on abutters.[319] Where this has been the pattern, it is unfair for a municipality *not* to exact improved local streets from subdividers.[320] Primary and secondary highways are another matter. Since

314. *See* Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

315. CAL. GOV'T CODE § 66478 (West Supp. 1976); *cf.* N.J. STAT. ANN. 40:55D-44 (West Supp. 1976) (developer entitled to compensation for actual loss caused by temporary reservation of land for public use).

316. *See, e.g.*, Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974), *appeal dismissed*, 96 S. Ct. 3184 (1976) (San Jose initiative required landowner to promise to provide temporary school facilities to obtain rezoning); HOUSE & HOME, May 1972, at 34 (four homebuilders in San Diego agreed to pay school busing costs and $750 per resident pupil for relief from building moratorium).

317. *See, e.g.*, Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957) (school fees violated subdivision map act); Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); West Park Ave., Inc. v. Township of Ocean, 48 N.J. 122, 224 A.2d 1 (1966); *cf.* OP. N.Y. STATE COMPTROLLER 68-939 (1968) (towns lack authority to exact school sites). *But see* Board of Educ. v. Surety Developers, Inc., 63 Ill. 2d 193, 347 N.E.2d 149 (1975) (*Pioneer Trust* formula does not bar school exaction in this instance); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966) (sustaining exaction of school fees against landowner's statutory and constitutional challenges). *See generally* Feldman, *The Constitutionality of Subdivision Exactions for Educational Purposes*, 76 DICK. L. REV. 651 (1972).

318. Cases upholding the exaction of interior local streets include MacLean v. Planning Bd., 94 N.J. Super. 288, 228 A.2d 85 (Super. Ct. App. Div. 1967); Noble v. Chairman of Township Comm., 91 N.J. Super. 111, 219 A.2d 335 (Super. Ct. App. Div. 1966). *But cf.* Battaglia v. Wayne Township Planning Bd., 98 N.J. Super. 194, 236 A.2d 608 (Super. Ct. App. Div. 1967) (small interior street of no value to building permit applicant could not be exacted).

319. Where exactions are not possible, Los Angeles uses special assessments to finance both right-of-way acquisition and improvement costs of local streets. Los Angeles, Cal., City Council, Street Improvement Policies § IV (Council File No. 115,320) (undated) (on file with *Yale Law Journal*).

320. *Cf.* Lipford v. Harris, 212 So. 2d 766 (Fla. 1968) (challenge to public financing of local streets). *See also* note 188 *supra*.

landowners typically have not paid for them,[321] a subdivider should not be required to donate the right-of-way for a thoroughfare except to the extent that his lands will be unusually well-served by the system of primary and secondary highways. Until a decade ago, the reported cases always sustained municipal exactions for major highways;[322] since then, the landowner has frequently prevailed.[323]

Municipal financing of utility networks has been the single most fertile ground for litigation. In most communities, abutting landowners have traditionally borne the costs of installing house connections and laterals for water and sewerage systems but not the costs of more massive components like treatment plants and trunk lines.[324] Although Los Angeles long adhered to this basic financing pattern, it has lately shifted onto new development the entire municipal share of the capital costs of community-wide sanitary sewerage facilities.[325] This is prima facie inequitable because new neighborhoods will not receive any special sewer benefits.[326] The complexities of financing utility infrastructures seem to intimidate the courts; they generally have been remiss in protecting owners of undeveloped land from discriminatory water and sewer charges.[327]

321. For a thorough historical account of federal grants-in-aid for noninterstate highways, see Schwartz, *Urban Freeways and the Interstate System*, 49 S. CAL. L. REV. 406, 412-18 (1976).

322. *See, e.g.*, Newton v. American Security Co., 201 Ark. 943, 148 S.W.2d 311 (1941); Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949); Krieger v. Planning Comm'n, 224 Md. 320, 167 A.2d 885 (1961); Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928).

323. *See, e.g.*, Mid-Way Cabinet Fixture Mfg. v. County of San Joaquin, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967); Schwing v. City of Baton Rouge, 249 So. 2d 304 (La. App. 1971); State *ex rel.* Noland v. St. Louis County, 478 S.W.2d 363 (Mo. 1972); Princeton Research Lands, Inc. v. Planning Bd., 112 N.J. Super. 467, 271 A.2d 719 (Super. Ct. App. Div. 1970); McKain v. Toledo City Plan Comm'n, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971); Board of Supervisors v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975); *see also* Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. App. 1975) (charge of $200 per new dwelling unit to finance city-wide road and bridge construction program exceeds city's authority).

324. *See generally* R. TABORS, M. SHAPIRO & P. ROGERS, LAND USE AND THE PIPE 89-96 (1976).

325. *See* pp. 465-66 & notes 231 & 232 *supra*. Los Angeles has also done this for parks. *See* note 282 *supra*.

326. *See* pp. 466-67 *supra*.

327. Apparently discriminatory hook-up charges have often been upheld. *See, e.g.*, Western Heights Land Corp. v. City of Fort Collins, 146 Colo. 464, 362 P.2d 155 (1961) (fees would exceed construction costs); Hayes v. City of Albany, 7 Or. App. 277, 490 P.2d 1018 (1971) (upholding greater than tenfold increase in sewer-connection charges). *But see, e.g.*, Strahan v. City of Aurora, 35 Ohio Misc. 37, 311 N.E.2d 876 (C.P. Portage County 1973) (charge would exceed connection costs).

The courts also usually sustain newly adopted development charges imposed to fund off-site improvements to utility systems. *See, e.g.*, Associated Homebuilders v. City of Livermore, 56 Cal. 2d 847, 366 P.2d 448, 17 Cal. Rptr. 5 (1961) ($150 per unit for sanitation fund); City of Dunedin v. Contractors & Builders Ass'n, 312 So. 2d 763 (Fla. Dist. Ct. App. 1975) (total of $700 per unit for off-site water and sewer systems); R & C Robert-

Municipal programs to place electric and telephone cables underground raise especially complicated questions of fiscal equity. The undergrounding process is expensive and perforce painfully slow. As a result, some neighborhoods must inevitably be freed of unsightly poles and wires before others are. Because benefits invariably are unevenly distributed, the horizontally fair way to finance undergrounding programs is by means of benefits charges. Subdividers should thus be compelled to bear undergrounding costs;[328] in established neighborhoods, special assessments should be levied to recoup special benefits.[329] Suppose, however, that a suburb forces developers to pay for undergrounding in new subdivisions, but dips into its general tax revenues to finance the undertaking in established neighborhoods.[330] In that case both subdividers and landowners in established neighborhoods not soon scheduled for undergrounding would be receiving below-average net benefits. To require a suburb to pay fully for undergrounding costs in new developments, however, would give developers a net fiscal advantage. A developer's remedy should therefore at most be reimbursement of his undergrounding costs to the extent necessary to provide him with average net undergrounding benefits.[331]

X. The Law of Development Restrictions: Quotas, Moratoria, and the Regulation of Area, Bulk, and Use

When a court concludes that a development charge has been illegally collected, the remedy is rather simple: a refund. But when a

son, Inc. v. Township of Avon, 28 Mich. App. 305, 184 N.W.2d 261 (1970) ($350-per-unit capital charge). These charges are prima facie unfair in the typical case in which benefits charges had not been used for this purpose before. They are especially unfair where part of the revenue generated will be spent in existing neighborhoods.

As always, the New Jersey courts do not hesitate to correct fiscal inequities in this context. *See, e.g.*, Deerfield Estates, Inc. v. Township of E. Brunswick, 60 N.J. 115, 286 A.2d 498 (1972) (water main finance).

328. Compulsory undergrounding in new developments has generally been upheld. *See, e.g.*, Sansoucy v. Planning Bd., 355 Mass. 647, 246 N.E.2d 811 (1969). The economic rationale for the requirement is that outsiders and passers-by may suffer from the ugliness of overhead wires, and thus that a developer's autonomous design decisions might be suboptimal. For another approach to this problem, see *Alternatives to Zoning*, *supra* note 73, at 776.

329. Undergrounding has been held to be a local improvement. *See, e.g.*, Irish v. Hahn, 208 Cal. 339, 281 P. 385 (1929); Blaine v. Schmitkons, 107 Ohio App. 405, 159 N.E.2d 772 (1958); Annot., 66 A.L.R. 1389 (1930).

330. *Cf.* Citizens for Underground Equality v. City of Seattle, 6 Wash. App. 338, 492 P.2d 1071 (1972) (undergrounding on arterial streets to be paid for out of general revenue; undergrounding in residential neighborhoods to be financed by mixture of general revenue and special assessments).

331. The amount of these average net benefits depends in part on whether landowners in established neighborhoods not soon slated for undergrounding are entitled to any remedy. Because most of those landowners can no doubt vote in municipal elections, that legal issue may be distinguishable from those addressed in this article.

regulation is suspect, the remedial choices multiply. This Part describes the disastrous judicial tradition of prescribing ambiguous and inappropriate remedies in zoning cases, articulates more fully the legal approach recommended, and evaluates recent leading cases on growth restrictions.

A. *The* Nectow *Fallacy: A Critique of Zoning by Judicial Decree*

The most pervasive judicial error in American land-development law is the reluctance to grant the remedy of damages. The deeply rooted misconception that the proper relief is usually the invalidation of part or all of the offending ordinance may be called the "*Nectow* fallacy" after *Nectow v. City of Cambridge*,[332] a Supreme Court decision of a half-century ago. The facts were hardly memorable. A Cambridge, Massachusetts, zoning ordinance barred commercial and industrial uses on Mr. Nectow's property. He contended that this zoning classification was improper and violated his federal constitutional right to due process. The remedy he sought was a mandatory injunction entitling him to a building permit for a commercial or industrial structure. The Supreme Court agreed with his arguments and declared the ordinance unconstitutional. It did not, however, expressly address the question whether Mr. Nectow was to be granted the entitlement he sought (although that was certainly implicit in the Court's opinion).[333]

As one of the few Supreme Court decisions on zoning, *Nectow* has been an influential case. Its impact has been detrimental in three respects. First, by grounding relief on the Federal Constitution, the Supreme Court federalized an issue of landowner rights that it should have left to state courts and state constitutions.[334] Second, the case has been construed to mean that a landowner's standard remedy against overly restrictive zoning should be some form of injunctive relief and not damages. Third, by failing to specify what type of injunctive relief the landowner was to receive, *Nectow* reinforced the judicial tendency toward sloppiness in the specification of remedies in zoning cases.

Courts continue to write opinions that declare a challenged ordinance to be void without going farther to delineate what rights landowners have as a result.[335] An excellent illustration is *Appeal of*

332. 277 U.S. 183 (1928).

333. The *Nectow* site was not actually used for industrial purposes until 1948. *See* 4 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 83.10 (1975).

334. *See* pp. 470-73 *supra*.

335. *See, e.g.*, Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (Super. Ct. Law Div. 1971), *cert. granted*, 62 N.J. 185, 299 A.2d 720 (1973),

Girsh,[336] in which the Pennsylvania Supreme Court held a zoning ordinance invalid for failing to provide for multifamily structures. The township subsequently placed several tracts other than the Girsh property in an apartment district and claimed that it had complied with the decision. The owners of the Girsh property challenged this interpretation and after two years won a clarifying order from the court directing the township to grant the permits the owners would need to build apartments. In the meantime the township had begun making arrangements to condemn the Girsh property for a public park.[337]

A court that wishes to grant injunctive relief in a case like *Nectow* can choose among four varieties of unambiguous decrees. First, it can decide that because the ordinance is void, the landowner is entitled to build any project that complies with the valid municipal controls that remain (*e.g.*, building codes).[338] This is rather Draconian. Why should Cambridge's penalty for zoning too harshly be its complete loss of zoning authority over Mr. Nectow's tract?[339]

A second judicial option is to invalidate the current restriction but at the same time allow Cambridge to enact a new set of restrictions applicable to the Nectow tract; if Mr. Nectow should then object to the new controls, he could again seek judicial review. This relief, however, is insufficient if the municipality refuses to accept the spirit of the original judicial decision. If Cambridge continued to subject Mr. Nectow to unduly stringent controls, albeit controls different from those invalidated, he would eventually have to be given some form of injunctive relief.[340] Therefore, when judges permit a municipality to replace an invalid ordinance, they usually set a deadline for that action and either retain jurisdiction[341] or advise the municipality that it must permit certain uses.[342]

on remand, 128 N.J. Super. 438, 320 A.2d 223 (Super. Ct. Law Div. 1974), *aff'd*, 45 U.S.L.W. 2379 (N.J. Jan. 26, 1977); Molino v. Mayor of Glassboro, 116 N.J. Super. 195, 281 A.2d 401 (Super. Ct. Law Div. 1971); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965); Board of Supervisors v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975).

336. 437 Pa. 237, 263 A.2d 395 (1970).

337. *See* Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029, 1080-82 (1972).

338. *See* ALI MODEL LAND DEV. CODE § 9-113(2) (Proposed Official Draft 1975) (rule or ordinance should be assumed not to include the invalid provision).

339. For similar sentiments, see, *e.g.*, Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 378-79, 167 N.E.2d 406, 411 (1960).

340. *See id.*, 167 N.E.2d at 411; Fiore v. City of Highland Park, 93 Ill. App. 2d 24, 235 N.E.2d 23 (1968), *cert. denied*, 393 U.S. 1084 (1969).

341. *See, e.g.*, PA. STAT. ANN. tit. 53, § 11011(2) (Purdon 1972); Petlin Assocs., Inc. v. Township of Dover, 64 N.J. 327, 316 A.2d 1 (1974) (setting 90-day deadline).

342. *See, e.g.*, Board of Supervisors v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975); City of Richmond v. Randall, 215 Va. 506, 211 S.E.2d 56 (1975).

Third, if Cambridge had denied Mr. Nectow's application for approval of a particular development project, a reviewing court might simply order the city to grant the necessary permits for that specific project.[343] But why should a judge be restricted to a choice between either validating Cambridge's distasteful regulations or clearing the decks for the precise project that had happened to spark Mr. Nectow's imagination?

The fourth form of injunctive relief plunges courts fully into the land-use planning business; they themselves determine a set of controls (uses, heights, setbacks, densities, parking) for the site in question. The New Jersey and Pennsylvania courts, the national pacesetters in the review of municipal zoning, are now doing just that.[344] While one can understand why they have been unenthusiastic about the other forms of specific relief, one also doubts whether courts are the right institutions to be poring over the details of site plans.

Under all four variations the *Nectow* fallacy eventually lures courts into the morass of articulating specific development rights of landowners and mandating their protection. Injunctive relief is plagued by two key shortcomings. First, prospective injunctions do not deter municipal lawlessness because they fail to provide landowners with any remedy for their past suffering. In the *Nectow* case, Cambridge had the benefit of its illegal zoning restriction for the 4-1/2 years between its enactment and the Supreme Court decision; it did not have to compensate Mr. Nectow for any delay in his building activities. If a landowner's remedy is prospective only, what will deter the city of Cambridge from knowingly imposing illegal zoning restrictions that will at least temporarily benefit political insiders? Would not the

343. *See, e.g.*, Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 379, 167 N.E.2d 406, 411 (1960); Daraban v. Township of Redford, 383 Mich. 497, 176 N.W.2d 598 (1970); Superior Uptown, Inc. v. City of Cleveland, 39 Ohio St. 2d 36, 313 N.E.2d 820 (1974); *cf.* ALI MODEL LAND DEV. CODE § 9-113(1) (Proposed Official Draft 1975) (court order itself should be treated as development permit).

Courts have been more willing to order permit approvals than to "rezone" the subject tract themselves; the latter step is usually regarded as an unwarranted assumption of legislative functions. *See, e.g.*, City of Miami Beach v. Weiss, 217 So. 2d 836 (Fla. 1969); Emjay Properties v. Town of Brookhaven, 42 App. Div. 2d 907, 347 N.Y.S.2d 736 (1973); City of El Paso v. McArthur, 473 S.W.2d 322 (Tex. Civ. App. 1971). *But see, e.g.*, City of Louisville v. Kavanaugh, 495 S.W.2d 502 (Ky. 1973). *See generally* Krasnowiecki, *supra* note 110, at 11-20.

344. *See, e.g.*, Pascack Ass'n Ltd. v. Mayor of Washington, 131 N.J. Super. 195, 329 A.2d 89 (Super. Ct. Law Div. 1974) (court adopts its consultant's recommendations on what kinds of apartments the landowner should be permitted to build); Ellick v. Board of Supervisors, 17 Pa. Commw. Ct. 404, 333 A.2d 239 (1975), *followed in, e.g.*, Gorski v. Township of Skippack, 19 Pa. Commw. Ct. 346, 339 A.2d 624 (1975) (court must independently approve specific controls for landowner's property). PA. STAT. ANN. tit. 53, § 11011(2), (3) (Purdon 1972) expressly authorizes this remedy.

contents of the *National Enquirer* become more outrageous if the exclusive remedy in libel cases were merely an injunction against future excesses?

The second shortcoming of injunctive relief is that it overly circumscribes a municipality's future options. If Cambridge is entitled to acquire Mr. Nectow's development rights through eminent domain, as it certainly should be, a court should not issue a decree mandating the city to issue a development permit. The correct prospective remedy is to give the city its option of either repealing the overly intrusive control or paying damages in order to keep it in force.

The appropriate remedy for Mr. Nectow would thus have consisted of two components.[345] He should have been awarded his damages (if any) arising from the past delays. And he should have had the benefit of a decree ordering Cambridge to decide within a short time whether it wanted to lift the excessive zoning restriction or retain it and pay the future losses that Mr. Nectow would suffer. In short, the appropriate landowner remedy in zoning cases is not injunctive relief, as the *Nectow* tradition would have it, but rather an award of interim damages for past delays plus the conditional award of permanent damages.

B. *A Complete Articulation of the Recommended Approach and Its Application to a Typical Case of Exclusionary Zoning*

The proposed doctrinal system for legal attacks on development restrictions will now be illustrated in detail.[346] Suppose the zoning scheme for the suburb of Eden, a municipality five square miles in area, does not provide for the construction of new multifamily structures. Ten percent of Eden's households nevertheless live in apartments tolerated as preexisting nonconforming uses; the other 90% live in single-family residences on lots with a median area of a quarter-acre. The Tacky Development Company owns a 20-acre tract of undeveloped land in the heart of an Eden neighborhood that consists mostly of single-family homes on half-acre lots. Tacky's tract, like all other undeveloped land in the suburb, is zoned for single-family residences on at least half-acre lots.

345. Because Mr. Nectow wanted to build a commercial or industrial structure, either of which would constitute a subnormal use, he should have been required to prove that Cambridge's zoning for his tract was grossly inefficient in order to be entitled to damages. *See* p. 419 *supra*.

346. The following hypothetical is loosely derived from Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

1. *The Rights of Landowners*

Tacky would like to build a modern, high-density garden apartment project on its tract. When it applies for a rezoning to permit that use, however, Eden officials deny the application.

a. *The Landowner's Prima Facie Case*

Eden's ordinances are not tainted by the sort of suspect classifications or motives that might justify an injunction against their enforcement.[347] Therefore Tacky's remedy, if it has one, should be recovery of its damages resulting from Eden's violation of the taking clause of the state constitution.[348]

Because Eden residents would correctly perceive Tacky's apartment project to be a below-normal land use, the suburb's ban on apartments is an antinuisance measure. Therefore, to recover damages for that restriction on use, Tacky would have to meet the requirements of the more onerous of the two taking tests developed in Part IV. Namely, Tacky would have to prove that banning multifamily uses on its tract is a grossly inefficient policy.[349] This would require evidence that the costs of the no-apartment policy far exceed the benefits. Tacky would have a strong case, for example, if the aggregate value of land[350] in the neighborhood[351] (including the value of Tacky's tract) would be much higher if apartments were allowed on Tacky's site.[352] If Tacky's land were buffered from surrounding houses by major highways or commercial areas, and if its locational and topographic features made the site much more attractive to apartment dwellers than to homeowners, Tacky indeed might be able to prove that prohibiting apartments was grossly inefficient. But the probability is small. It is more likely that the welfare gains to Tacky and to housing consumers arising from an apartment project on Tacky's site would not greatly exceed the nuisance costs to the tract's neighbors. In many single-family-home neighborhoods, prohibitions on apartments are a relatively efficient

347. *See* pp. 417-18 *supra.*

348. *See* pp. 469-73 *supra.*

349. *See* p. 419 *supra.*

350. If demand for apartments is perfectly elastic, the increase in land prices should indicate rather accurately the welfare gains from apartment construction. However, if demand is not perfectly elastic, the focus on land values would fail to discern additional consumer surplus that might be generated by new apartments. *See also* Courant, *On the Effect of Fiscal Zoning on Land and Housing Values*, 3 J. URB. ECON. 88 (1976); Ohls, Weisberg & White, *The Effect of Zoning on Land Value*, 1 J. URB. ECON. 428 (1974).

351. This assumes that Tacky's apartments would not impose significant nuisance costs or net congestion costs outside its neighborhood.

352. For discussion of the possibility that some of the increment in land value would be attributable to monopoly prices for apartment sites, see note 360 *infra.*

way (given current nuisance law[353]) to protect neighborhood characteristics that cannot be protected by means of private agreements because of high transactions costs.

Tacky has a better chance against Eden's requirement of half-acre minimum lots. Because most Eden households live on lots smaller than that, this lot-size requirement compels the conferral of benefits. By demonstrating this fact, Tacky would become eligible to use Part IV's less onerous test for a taking. Under that test, a landowner's prima facie case is a showing that the contested restriction has substantially reduced the market value of his land.[354] Tacky's attorneys therefore should call expert witnesses to testify that the half-acre minimum lot-size requirement makes Tacky's particular tract substantially less valuable than it would be if it could be developed at Eden's normal residential density—quarter-acre lots.

b. *The Municipality's Defenses*

Were Tacky to prove that the apartment ban was grossly inefficient, Eden would have no defense against liability for the resulting damages.[355] On the other hand, if Tacky could only make out the prima facie case against the lot-size requirement, the suburb should be entitled to invoke Michelman's fairness test as a defense in that instance.[356] To do so successfully, Eden would first have to prove that half-acre lots would be more efficient in Tacky's neighborhood than quarter-acre lots. That would depend on the site characteristics, on the demand for the two types of housing, and on the effect of houses on quarter-acre lots on the value of nearby houses on half-acre lots. Second, Eden would also have to show that Tacky should be able to understand why the denial of compensation in this case is in the long-term self-interest of the owners of undeveloped land. To help make this twin showing, Eden should argue that all landowners have an interest in permitting municipal controls that promote efficient land use, and that the only reason Tacky's tract would have a higher market value if subdivided into quarter-acre lots is that Tacky's development would be able to exploit the pleasant environment attributable to the larger lots in the neighborhood. Eden should call expert witnesses to testify

353. *Cf. Alternatives to Zoning, supra* note 73, at 761-71 (suggesting appropriate private nuisance remedies would be better than zoning for producing optimal patterns of residential development).

354. *See* p. 419 *supra.*

355. If the control is grossly inefficient, Eden could not possibly make out the efficiency part of the Michelman defense.

356. *See* p. 419 *supra.*

that a landowner who owned all the land in the neighborhood and who was not subject to the restriction at issue would find it most profitable to subdivide Tacky's tract into at least half-acre lots. Observe that the suburb's probability of prevailing on the Michelman defense declines as the aggrieved developer's tract increases in size. Most of the environmental consequences of the development of a large parcel do not go beyond its boundaries.[357] Therefore, if Tacky wanted to carve out quarter-acre lots in the heart of a 1000-acre tract, Eden would be hard put to show that a half-acre minimum lot size requirement there would be both efficient and fair. Because Tacky's site has only 20 acres, however, its subdivision into quarter-acre lots might indeed have significant adverse spillover effects.

c. *The Landowner's Remedy*

Assume Tacky is adjudged to have failed in its attack on the apartment prohibition but to have succeeded in its claim for compensation for the half-acre lot requirement. The first step in measuring damages is to calculate the diminution in the tract's market value that arises from the excessive restriction. Suppose Tacky could show that its 20-acre tract would have a market value of $500,000 if it could be subdivided into quarter-acre lots[358] but has a value of only $300,000 when restricted to half-acre lots. (Both these valuations would automatically reflect the influence of whatever development charges and noncompensatory development restrictions Eden could validly impose.[359]) If housing prices in Eden have not been boosted by the output restrictions imposed by the homeowner cartel,[360] the diminution of

357. Nuisance costs are probably the principal environmental threat posed by new development. These costs are obviously reduced the larger the development tract. Congestion costs are more directly related to a development's total population than to its area; but it is far from clear that suburban growth causes significant net congestion costs. *See* p. 449 & notes 164 & 175 *supra*.

358. I assume that Eden's requirement of quarter-acre lots—for that suburb a subnormal use restriction—is not grossly inefficient for Tacky's tract and therefore that Eden can apply it without risk of liability.

359. A landowner who is the victim of an excessive use restriction should not automatically be entitled to recover the entire difference between the value of his property in its "highest and best use" and its value subject to all existing suburban restrictions. Such an entitlement would give a landowner compensation for the effects of *all* restrictions when in all probability only some of them are excessive when measured by the taking doctrines proposed in Part IV. *Cf.* Costonis, *supra* note 168, at 1049-55 (arguing that landowner is entitled to compensation only to extent denied reasonable beneficial use); Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799, 816-23 (1976) (arguing that reasonable beneficial use simply means adequate return on investment).

360. Measuring landowner damages is considerably more complicated when the market value of land has been enhanced by suburban efforts to curtail housing supply. In such situations landowners should be denied the right to recover for any lost opportunities

$200,000 in the tract's value should be used to help compute both Tacky's damages from delay and its conditional award of future damages.

The calculation of damages caused by delay requires three determinations: (1) the appropriate rate of interest; (2) the length of the delay; and (3) the principal amount on which interest is to be awarded. The court would use the rate of interest conventionally applied in damage actions. The period of delay should commence, at the earliest, on the date the landowner formally protested the restriction at issue by seeking local governmental approval for a more intensive land use. In our example this would be the day on which Tacky had applied for rezoning to a multifamily classification. However, if the trier of fact concluded that Tacky's land was not ripe for a quarter-acre lot subdivision at that time, it should measure the delay period from the date on which Tacky could have proceeded profitably with the development of quarter-acre lots. (Because much suburban land is not ready for profitable development, many landowners currently restricted by large-lot requirements are in fact not suffering any delay damages.) The date of judgment should terminate the delay period.

In calculating a landowner's delay damages, interest should be awarded on the *diminution* in land value caused by the excessive restriction. In our example, this is $200,000, a smaller amount than the full value of the asset if freed from the restriction ($500,000). A policy of awarding interest on just the diminution in value encourages developers to mitigate damages—*i.e.*, to comply with an excessive restriction when that is more efficient than leaving the land undeveloped for the period of litigation.[361] Suppose Tacky could prove that the develop-

to share in benefits flowing from the suburb's output restrictions. This rule not only appeals to one's sense of distributive justice, but also forecloses the possibility that a suburb would pay twice for a single injury. If consumers are entitled to recover all their damages from higher housing prices, as will be suggested, *see* pp. 498-500 *infra*, a rule requiring suburbs to compensate landowners for lost monopoly profits would make a local government pay the actual costs of monopoly two times over. For example, in Figure 3, *supra* p. 431, consumers priced out of the market by suburban policies that raised housing prices to P_g should collect damages equal to the triangle *GER*. If landowners were entitled to compensation for the monopoly profits they would have obtained by selling housing at P_g, landowners on the supply curve between *K* and *E* would collect a trapezoid of compensation that would include *GER*. This double liability might deter suburbs from enacting efficient antigrowth programs. A court should therefore instruct expert witnesses to ignore the effects of government-induced shortages in their appraisals of the value of the land with and without the contested restriction. In Figure 3, this would mean that housing should be assumed to be selling for P_c, not P_g. If a tract is not particularly suited for apartments, the entire increment in market value that would result from its rezoning from single-family to multifamily use might well be entirely attributable to prevailing restrictions on the supply of sites for apartments. This might, for example, have been true in *Girsh*. *See also* notes 138 & 170 *supra*.

361. To provide developers with adequate incentives for mitigation, courts must entitle developers who have complied with an excessive restriction to receive compensa-

ment of its tract into quarter-acre lots had been delayed one year. If the applicable rate of interest were 10%, Tacky should be awarded interim damages of 10% times $200,000, *i.e.*, $20,000. If Tacky had been delayed for five years it would recover the present value of an annuity of $20,000 per year payable over the last five years.

In addition to any interim damage award, Tacky should receive a conditional award of its permanent damages from the half-acre lot requirement. The conditional award in this instance would be $200,000—the diminution in value from $500,000 to $300,000 caused by the excessive requirement. The trial court would order Eden officials to decide within a certain period (say, 60 days) whether to pay that sum or to roll back the lot-area requirement to a quarter-acre. If Eden chose the roll-back, Tacky could still collect its interim damages (if any) for prior delay. If Eden chose to pay to keep the half-acre requirement, the court should decree that Eden had acquired Tacky's future rights to develop its land at a density greater than half-acre lots.[362]

2. *The Rights of Housing Consumers*

Eden's policy of limiting new housing to single-family residences on large lots also might violate the rights of consumers. Their remedy would also be damages.[363]

a. *The Consumers' Prima Facie Case*

If housing prices in Eden are at monopoly levels, the aggrieved consumers would consist of (1) tenants who have been living in Eden, (2) households that have moved to Eden since it began its exclusionary policy, (3) households that have moved out or stayed away because of the monopoly housing prices, and (4) households residing in nearby suburbs that have felt the ripple effects of the price increase.[364] The

tion nonetheless. In doctrinal terms, this means that developers who comply should not necessarily be held to have waived their taking claims. For example, one of Tacky's options should be to subdivide its tract into half-acre lots and to sue Eden for whatever damages it suffered because it was not permitted quarter-acre lots. However, to prevent unnecessary litigation and to give suburban officials an opportunity to repeal contested restrictions, no developer who complies should be entitled to damages unless he had formally sought to have the zoning restriction changed before he complied with it.

362. *Cf.* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated*, 417 F. Supp. 1125 (N.D. Cal. 1976) (because of drastic nature of city's restrictions, city will be granted fee simple absolute and landowner will be compensated accordingly). A suburb might be granted a third option: acquiring the landowner's development rights for a limited period of time only.

363. *See* pp. 436-38, 444-47 *supra*.

364. *See* pp. 402-03 *supra*.

claims of all these parties should be consolidated into a private class action for damages[365]—the usual format for private antitrust litigation.[366] The consumers' complaint should invoke the taking clause of the state constitution.[367]

To make out a prima facie case, attorneys for the consumer class would have to introduce credible evidence that Eden's land-use policies have increased housing prices in its area to the substantial injury of the plaintiff class.[368] An econometrician would be the expert best-equipped to detect prices influenced by monopolistic restrictions. He is apt to fail in Eden's case. If several other suburbs that compete closely with Eden are not pursuing exclusionary policies, it is highly unlikely that a municipality as small as Eden could itself cartelize housing supply. When a suburb has many close substitutes, the burdens of its antigrowth policies generally fall on landowners, not consumers.[369]

b. *The Municipality's Defenses*

Even if the consumers' attorneys could prove that monopoly prices were in effect, Eden might be able to show that its growth controls met Michelman's fairness test.[370] To do so, it would first have to prove that its policies were efficient—as they might be if they prevented serious net congestion costs.[371] It would also have to demonstrate that consumers should be able to recognize that not awarding damages is in their long-term interest. This might be the case if the administrative costs of computing an aggregate damage award were very high.

365. *See generally Developments in the Law—Class Actions*, 89 HARV. L. REV. 1319 (1976). For a review of the more exotic forms of class litigation, see Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 61-66 (1975).

The feasibility of class actions may be at least temporarily limited by onerous notice requirements. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Home Sav. & Loan Ass'n v. Superior Court, 42 Cal. App. 3d 1006, 1012, 117 Cal. Rptr. 485, 488 (1974).

366. Some recent antitrust controversies in which the plaintiff class succeeded in obtaining damages are City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); and West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 548 (1972). The potential complexities of this sort of litigation are demonstrated in Wolfram, *The Antibiotics Class Actions*, 1 AM. B. FOUND. RES. J. 251 (1976). For a critical appraisal, see Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of* Parens Patriae *and A Suggested New Approach*, 85 YALE L.J. 626 (1976).

367. *See* pp. 470-73 *supra*.

368. If the actions of several suburbs have combined to produce monopoly prices, all of them should be joined as defendants. *See* p. 438 *supra*.

369. *See* pp. 425-27 *supra*.

370. *See* pp. 446-47 *supra*.

371. *See* pp. 444-46 *supra*.

c. *The Consumers' Remedy*

If Eden loses, a lump-sum damage award should be calculated for the entire consumer class. The amount of this award must inevitably be a gross approximation. Crude estimates of damages are hardly unprecedented; courts handling antitrust damage actions have long held that the impossibility of precisely measuring damages should not shelter offenders from liability.[372]

Like individual landowners, consumers should be unconditionally awarded their interim damages and conditionally awarded their permanent damages.[373] The former sum would be an estimate of the amount necessary to compensate housing consumers for injuries arising from the suburb's past restrictions on housing output.[374] The municipality could avoid liability for permanent damages by repealing its monopolistic policies prior to a deadline set by the trial court.

The administrative costs of calculating and distributing shares of the aggregate damage award to individual housing consumers would usually be unacceptably high. Most victims of Eden's monopoly housing prices should be able to perceive that their self-interest in efficiently deterring other suburbs from pursuing anticonsumer policies makes it fair for them to be denied small individual recoveries. Any aggregate award to consumers should thus first be used to defray attorneys fees and to compensate households that can prove substantial injury; the balance should escheat to the state.[375]

C. *Applications to Other Current Problems*

The courts that have recently adjudicated challenges to growth controls have followed a quite different course.

1. *Construction Quotas*

In the celebrated case of *Construction Industry Association v. City of Petaluma*,[376] the federal district judge held that Petaluma's plan to

372. *See, e.g.*, Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-66 (1931). For a review of methods for calculating and distributing damages in class actions, see *Developments, supra* note 365, at 1516-36.

373. *See* pp. 492-93 *supra*.

374. Suppose a suburb imposes elite design standards on new housing and the average price of actual new housing units immediately doubles. The damages suffered by consumers who pay the higher price are less than the price increase. They receive countervailing benefits to the extent that they value dwellings that meet the elite standards more than dwellings that do not. *See also* pp. 395-97 *supra*.

375. *Cf.* Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974) (proposal of "fluid recovery" procedure).

376. 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *see* note 6 *supra*.

limit developers' building permits to 500 housing units per year violated the excluded housing consumers' federal constitutional right to freedom of travel. He decreed the quota program and its related measures to be void.

This is a classic illustration of a court succumbing to the *Nectow* fallacy that those aggrieved by land-use measures should be entitled to some form of prospective injunctive relief.[377] That remedy ignores damages suffered in the past, a particularly serious shortcoming in a case like *Petaluma.* Because Justice Douglas stayed the judgment of the district court,[378] the city reaped the full benefits of the quota while the judgment underwent appellate review. In addition, prospective injunctions inevitably place excessive restrictions on a suburb's future options. In *Petaluma* the district judge appointed a master to oversee all future land-use policies of the city. This sort of interference is procedurally expensive and substantively unsound. Certainly the city of Petaluma should be permitted to limit its population growth if it is willing to compensate the landowners and housing consumers injured by that policy.

The district court decision in *Petaluma* was an instance of the wrong court invoking the wrong doctrine to provide the wrong remedy. It is highly improbable that the Petaluma Plan alone has any significant impact on interstate migration.[379] The dispute therefore should have been decided under the taking clause of the state constitution. Since the plaintiff builders' association relied entirely on the Federal Constitution, the Ninth Circuit was justified in reversing the district court and denying all relief.[380] In fact, under my view of the law in this field, there was no substantial federal question, and the city should have been entitled to have the matter dismissed by the district court for want of jurisdiction.[381]

The course of the *Petaluma* litigation would have been quite different under the recommended system. Because construction quotas prohibit normal land uses, a landowner who sought damages in a state court proceeding would only have to show that the program substantially diminished his land value. To recover damages for past delays, he would have to prove that he actually would have built earlier had there been no quota. A class action for compensation for past consumer injuries would likely have succeeded; the Petaluma

377. *See* pp. 490-93 *supra.*
378. 522 F.2d at 902.
379. The district court found that interstate migration would be inhibited if quotas began to proliferate among San Francisco suburbs. 375 F. Supp. at 580-81.
380. 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976).
381. *But see id.* at 903.

Plan appears to be a textbook example of a homeowner cartel aspiring to monopolize housing supply in the face of nonelastic demand.[382] The city could avoid liability for prospective damages by repealing its program. Indeed, it could retain the Plan without any liability at all if it could prove that the quota system were efficient and also fair to both consumers and landowners. Not much chance of that.

2. *Development Moratoria*

When a developer challenges a moratorium on building permits (or on rezonings, subdivision map approvals, utility hook-ups, etc.),[383] most courts succumb to the *Nectow* fallacy that the dispute must be governed by a property rule. They choose between either mandating that the developer be given the go-ahead he seeks or denying him relief altogether.[384] This approach creates the usual twin problems. If a landowner's remedy against a moratorium is prospective only, the municipality wins by force. Development is delayed without compensation for the period of litigation. On the other hand, compelling a municipality to provide services to prospective developers is needlessly intrusive into its affairs.[385]

Municipalities have defeated most of the reported landowner challenges to general development moratoria. They have won both when their announced objective for the slowdown has been to provide a breathing period to prepare master plans[386] and when the rationale has been the current overloading of public facilities.[387] One recent

382. *See* pp. 432-33 *supra.*

383. For sources documenting the remarkable popularity of the moratorium device, see note 5 *supra.*

384. For examples of cases granting mandatory relief, see notes 389 & 390 *infra.* For those denying all relief, see notes 386 & 387 *infra.* Not all courts have succumbed to the *Nectow* fallacy. *See* Charles v. Diamond, 47 App. Div. 2d 426, 366 N.Y.S.2d 921 (1975), *appeal dismissed,* 38 N.Y.2d 852, 345 N.E.2d 600, 382 N.Y.S.2d 57 (1976) (ordering trial on damage claim); Belle Harbor Realty Corp. v. Kerr, 43 App. Div. 2d 727, 728, 350 N.Y.S.2d 698, 701 (1973), *rev'd,* 35 N.Y.2d 507, 323 N.E.2d 697, 364 N.Y.S.2d 160 (1974) (dictum).

385. *See* p. 457 & notes 78 & 211.

386. *See, e.g.,* State v. Superior Court, 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974); Monmouth Lumber Co. v. Ocean Township, 9 N.J. 64, 87 A.2d 9 (1952); Walworth Co. v. City of Elkhorn, 27 Wis. 2d 30, 133 N.W.2d 257 (1965). *But see, e.g.,* Board of Supervisors v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975) (planning moratorium not authorized by statute). *See generally* Annot., 30 A.L.R.3d 1196 (1970).

387. The California courts have been particularly tolerant of this rationale. *See, e.g.,* Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974), *appeal dismissed,* 96 S. Ct. 3184 (1976) (upholding moratorium on rezonings based on overcrowding in schools); Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d Adv. Sh. 512, 128 Cal. Rptr. 485 (1976) (upholding moratorium on water hook-ups attributed to water shortage); Morshead v. California Regional Water Quality Control Bd., 45 Cal. App. 3d 442, 119 Cal. Rptr. 586 (1975) (upholding sewer-connection moratorium to remain in effect until water-quality requirements are met). *But cf.* Associated Home-

decision, *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*,[388] denied a taking claim against a sewer hook-up moratorium (designed to combat water pollution) that had been in effect for five years.

A landowner has been most likely to prevail in cases in which a municipality has made an ad hoc decision to withhold development approval from him because of overloaded facilities. Most courts perceive the potential arbitrariness of these unsystematic decisions and are willing to mandate that an approval be given.[389] A few judges also understandably have refused to permit a municipality to use the municipality's past failures to anticipate demand for public facilities as a justification for blanket denials of development permits.[390] But most courts seem to be unaware that temporary classrooms, portable sewage treatment plants,[391] and other expedients can quickly overcome alleged inadequacies of capital plant.[392]

builders v. City of Livermore, 18 Cal. 3d Adv. Sh. 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) (trial court should sustain moratorium on building permits only if restriction is reasonably related to regional welfare).

388. 400 F. Supp. 1369 (D. Md. 1975).

389. *See, e.g.*, Beach v. Planning & Zoning Comm'n, 141 Conn. 79, 103 A.2d 814 (1954) (town lacked authority to deny subdivision map approval because of impact on schools); Baltimore Planning Comm'n v. Victor Dev. Co., 261 Md. 387, 275 A.2d 478 (1971) (same holding); Daley Constr. Co. v. Planning Bd., 340 Mass. 149, 163 N.E.2d 27 (1959) (water shortage did not justify ad hoc disapproval of subdivision map); *cf.* Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (unfounded allegation of lack of adequate sewers does not justify refusal of building permits where racial discrimination was actual motive). *But see, e.g.*, Pearson Kent Corp. v. Bear, 28 N.Y.2d 396, 271 N.E.2d 218, 322 N.Y.S.2d 247 (1971) (sustaining ad hoc rejection of subdivision map on ground subdivision would aggravate traffic problems).

Many moratoria nominally of general application are similarly arbitrary because they are permeated with variances. For example, thousands of exceptions have been granted to the sewer connection moratorium upheld in *Smoke Rise*. *See* Wash. Post, June 26, 1975, § D, at 1, col. 6. *Cf.* Campana v. Township of Clark, 82 N.J. Super. 392, 197 A.2d 711 (Super. Ct. Law Div. 1964) (upholding 31-month moratorium to develop new plan despite several variances issued by township).

390. *See* Belle Harbor Realty Corp. v. Kerr, 43 App. Div. 2d 727, 350 N.Y.S.2d 698 (1973), *rev'd*, 35 N.Y.2d 507, 323 N.E.2d 697, 364 N.Y.S.2d 160 (1974) (landowner should not suffer from city's failure to provide sewers); *cf.* Maryland-Nat'l Capital Park & Planning Comm'n v. Rosenberg, 269 Md. 520, 307 A.2d 704 (1973) (denial of subdivision approval under general plan to prevent overcrowding of schools was arbitrary on facts of case); Westwood Forest Estates, Inc. v. Village of S. Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969) (prohibition on new apartments to prevent overloading of sewage treatment plant held invalid; dictum hints short moratorium might be approved).

The shortages in facilities that plague a municipality are sometimes the responsibility of school or sanitary districts or other independent units of government. In these cases a municipality that purchases a moratorium might have an action for partial indemnification against any district that negligently allowed the shortage to develop.

391. *See* HOUSE & HOME, June 1973, at 102.

392. If voters have defeated bond issues, a local government often can evade referendum requirements by arranging for lease financing of capital improvements. *See, e.g.*, Dean v. Kuchel, 35 Cal. 2d 444, 218 P.2d 521 (1950); City of La Habra v. Pellerin, 216 Cal. App. 2d 99, 30 Cal. Rptr. 752 (1963).

In general, the courts have been much too tolerant of moratorium measures. Because moratoria usually prevent landowners from pursuing normal land-use activities, they are always suspect from the standpoint of horizontal equity. In addition, many moratoria appear to be inefficient. If the costs of a slowdown were shifted by the courts from landowners and housing consumers with little political power to a suburb's taxpayers generally, probably few suburban officials would choose, for example, to buy time to prepare master plans.[393] If suburbs can delay growth without liability, they may use devices like the Ramapo staged-growth program to help boost housing values to monopoly levels.[394] A moratorium lasting but a few months and aimed at dealing with a true emergency might be defensible under the Michelman fairness test; an 18-year delay (the maximum possible under the Ramapo Plan) clearly is not.[395] The recommended legal approach would entitle a town like Ramapo to determine its rate of growth but also would sensitize it to the full social costs of its policies.[396]

3. *Use Restrictions and Design Requirements*

The lion's share of litigation over suburban growth controls has been directed at municipal ordinances that prohibit the construction of mobile homes, apartments, or modest subdivisions.[397] In this soil the *Nectow* fallacy has long been in full flower. For example, when a

393. The Secretary of Housing and Urban Development is authorized to award federal grants to defray two-thirds of the cost of state and local attempts at comprehensive planning. 40 U.S.C. § 461(a), (c) (Supp. V 1975). One wonders how much municipal master planning would go on in the absence of this support.

394. *See* pp. 433-34 *supra*; Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

395. Consider someone who is entitled to a perpetual annuity consisting of equal yearly payments. If the first annuity payment is pushed back from one year in the future to 18 years in the future, the present value of the annuity is diminished by 61% at a 6% discount rate and by 83% at a 10% discount rate. This is no temporary inconvenience. Nevertheless, the New York Court of Appeals expressly rejected a landowner challenge to the Ramapo ordinance based on the taking clause of the state constitution. 30 N.Y.2d at 380-83, 285 N.E.2d at 303-05, 334 N.Y.S.2d at 154-56.

396. The Ramapo Plan appears principally designed to induce developers to dedicate parks, school sites, firehouses, and similar facilities that most suburbs finance with general revenues. These exaction policies are probably illegal under the equal-net-benefits test. *See* pp. 459-65, 477-89 *supra*. To calculate the damage a landowner suffered from the Ramapo Plan, one should thus ignore any influence these illegal policies have had on land values in his neighborhood.

397. These restrictions may arise not only from zoning provisions, but also from other municipal codes. For example, there is considerable evidence that many municipal design requirements for buildings and subdivisions are not cost-justified. *See, e.g.*, NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 257-63 (1969); J. NEWVILLE, NEW ENGINEERING CONCEPTS IN COMMUNITY DEVELOPMENT (Urban Land Inst. Tech. Bull. No. 59, 1976); L. SAGALYN & G. STERNLIEB, *supra* note 38, at 38-40; Yearwood, *Accepted Controls of Land Subdivision*, 45 J. URB. L. 217, 246-50 (1967).

landowner challenges a suburb's insistence on large lot sizes, most courts refuse to grant damages and either validate the requirement[398] or render some form of prospective mandatory relief. Most judicial decrees in favor of the landowner hold that the municipal ordinance is "void"[399] (whatever that means), approve the development plans proposed by the landowner,[400] or impose judge-made restrictions on the use of the site.[401]

The courts in several states in which exclusionary zoning has been particularly widespread have further aggravated the remedial confusion by decreeing that municipalities must provide (unspecified) locations for a certain variety of land uses. The leading case is *Southern Burlington County NAACP v. Township of Mount Laurel.*[402] There

398. For relatively recent cases sustaining minimum lot-size requirements, see, *e.g.*, Burns v. City of Des Peres, 534 F.2d 103 (8th Cir. 1976) (one-acre minimum); Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972) (principally three-acre and six-acre minimums); Gisler v. County of Madera, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974) (18-acre requirement); Nopro Co. v. Town of Cherry Hills Village, 180 Colo. 217, 504 P.2d 344 (1972) (2½ acres in village center); Barnard v. Zoning Bd., 313 A.2d 741 (Me. 1974) (30,000 sq. ft.); Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969) (two acres); Wilson v. Town of Sherborn, 326 N.E.2d 922 (Mass. App. Ct. 1975) (two acres); Salamar Builders Corp. v. Tuttle, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (1971) (60,000 sq. ft.). Most of these decisions explicitly rejected taking claims asserted by the landowner.

399. *See, e.g.*, Bismark v. Incorporated Village of Bayville, 49 Misc. 2d 604, 267 N.Y.S.2d 1002 (Sup. Ct. 1966) (40,000 sq. ft. minimum invalid); Board of County Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959) (two-acre minimum invalid).

400. *See, e.g.*, Kavanewsky v. Zoning Bd. of Appeals, 160 Conn. 397, 279 A.2d 567 (1971) (zoning ordinance requires town to grant permits for lots smaller than two acres); Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975) (landowner must be permitted to build apartments he had planned for single-family zone).

401. *See, e.g.*, AMG Assocs. v. Township of Springfield, 65 N.J. 101, 319 A.2d 705 (1974); Pascack Ass'n Ltd. v. Mayor of Washington, 131 N.J. Super. 195, 329 A.2d 89 (Super. Ct. Law Div. 1974); *cf., e.g.*, Appeal of Olson, 19 Pa. Commw. Ct. 514, 338 A.2d 748 (1975) (courts should review developers' proposed plans and specifications element by element).

402. 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975). *See generally* Ackerman, *The* Mount Laurel *Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1. *Mount Laurel* is criticized in Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803, 804-19 (1976). The New Jersey Supreme Court elaborated on *Mount Laurel* in Oakwood at Madison, Inc. v. Township of Madison, 45 U.S.L.W. 2379 (N.J. Jan. 26, 1977).

The courts of New York and Pennsylvania also require a suburb's land-use policies, taken as a whole, to meet certain general standards. *See* Berenson v. Town of New Castle, 38 N.Y.2d 102, 110-11, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 681-82 (1975) (constitutionality depends, *inter alia*, on whether consideration is given to regional needs and requirements); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 529-33, 215 A.2d 597, 611-13 (1965) (township cannot stand in way of natural population growth); *cf.* Associated Homebuilders v. City of Livermore, 18 Cal. 3d Adv. Sh. 582, 557 P.2d 473, 497, 135 Cal. Rptr. 41, 65 (1976) (Mosk, J., dissenting: growing suburb must absorb "reasonable share of region's population pressure"). For another critique of these judicial strictures on general municipal growth policies, see Note, *The Inadequacy of Judicial Responses in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760 (1976).

the Supreme Court of New Jersey created a presumption that a local government must make realistically possible the construction of housing for all elements in its regional population. One can find much to admire in the *Mount Laurel* decision. The court properly perceived that state judiciaries must play a role in curbing local parochialism and had the wisdom to rest its decision on the right document—the state constitution. But it clearly bungled the remedy. A suburb should not be prohibited from imposing elite standards for housing construction if it is willing to compensate those injured by the standards. There is little to recommend policies designed to ensure that each neighborhood has a mixture of all housing types (and hence all income groups).[403] The famous Tiebout Hypothesis[404] suggests that differentiation among suburbs enhances consumer satisfaction by making available a wider variety of packages of public goods. The *Mount Laurel* decision needlessly reduces the richness of residential choices available to New Jersey households.

Nor can one be sure that landowners and housing consumers actually won much in *Mount Laurel.* First, because the court did not create sanctions against suburbs that have committed sins in the past, New Jersey municipalities can be expected to invoke every procedural trick to delay enforcement of the decision. Second, and more important, *Mount Laurel* requires only that a municipality's *overall package* of zoning practices comply with the court's standards. Legal requirements of this sort are inherently ill-suited for enforcement by private civil litigation. A suburb burdened by such a requirement is not compelled to satisfy the grievance of any particular landowner or consumer; it merely must satisfy *some* landowners and *some* consumers. As the aftermath of the *Girsh* case illustrates,[405] any suburb that loses a legal attack on the overall contours of its land-use policies will certainly not reward the winning landowner or consumer with smooth sailing for the project in which he happens to be interested. Because the suburb can accommodate regional population pressures by relaxing controls on other sites, it will do just that to deter other troublemakers from initiating litigation. Once the "public interest" groups have won their symbolic victories and have retired from the scene, what payoffs will there be to induce private civil suits?

Experience indicates that this problem will lure the courts ever

403. *But see, e.g.,* A. DOWNS, OPENING UP THE SUBURBS 1-102 (1973) (arguing desirability of mix of households of different income levels).

404. Tiebout, *A Pure Theory of Local Expenditures,* 64 J. POLITICAL ECON. 416, 418 (1956).

405. *See* pp. 490-91 *supra.*

deeper into the mire of injunctive remedies. In order to reward victorious landowners, judges in both New Jersey and Pennsylvania are now framing packages of prospective regulations for specific sites.[406] One fears that the New Jersey courts may soon be hiring planning consultants to draft entirely new zoning ordinances for suburbs that refuse to comply with *Mount Laurel* and appointing masters to oversee their implementation.[407]

D. *The Precedents for Awarding Damages*

The courts need not enter this swamp. The recommended remedy of damages would not only cause fewer allocative disruptions, but might even be cheaper to administer. The township of Mount Laurel would not necessarily be liable to a host of plaintiffs. It is not at all clear that Mount Laurel (or even Mount Laurel and its neighboring suburbs) has injured housing consumers in southern New Jersey.[408] In addition, no landowner in Mount Laurel should recover his damages for delays unless he can prove that his development activity was actually hampered.[409]

There are no judicial precedents for allowing consumers to recover damages from suburbs that have monopolized housing supply. But using the taking clause or some other state constitutional provision as the basis for such a remedy should not be beyond the capacity of a body as inventive as the Supreme Court of New Jersey.[410]

Drafting an opinion to justify a landowner recovery would be somewhat easier.[411] Several courts have recently pierced through the *Nectow*

406. *See* notes 344 & 401 *supra*.

407. One lower court in New Jersey has already ordered 11 municipalities to permit construction of their regional share of low-income and moderate-income housing. Urban League v. Mayor of Carteret, 142 N.J. Super. 11, 359 A.2d 526 (Super. Ct. Ch. Div. 1976). If their compliance is grudging, a yet more drastic remedy will be necessary.

Mount Laurel requires a reviewing court to give a suburb in breach of its regional obligations a chance to correct its policies. If the suburb does not, the opinion implies that additional (but unspecified) sanctions are appropriate. *See* 67 N.J. at 191-92, 336 A.2d at 734. The New Jersey Supreme Court, however, should be given credit for rejecting the even more intrusive remedy ordered by the trial judge in *Mount Laurel*. He had ordered the township to adopt an affirmative plan to provide for low-income and moderate-income housing. *See* 119 N.J. Super. at 178-80, 290 A.2d at 473-74.

408. As it happens, the Philadelphia area is noted for relatively low housing prices.

409. Most of the undeveloped land in the township had been zoned either for industrial use or for lots with a minimum of 20,000 square feet. Because landowners in both types of zones were denied the right to build residential buildings of a quality normal for Mount Laurel, they would have the benefit of the less onerous prima facie case for a taking.

410. *See generally* pp. 470-71 *supra*.

411. Several other commentators have argued for the more frequent use of damages as the landowner's remedy against improper land use restrictions. *See* Badler, *Municipal Zoning Liability in Damages—A New Cause of Action*, 5 URB. LAW. 25 (1973); Berger, *A*

fallacy to recognize that the issue of whether a suburb can control its growth is distinct from the issue of whether it should have to pay to do so. In *Arastra Limited Partnership v. City of Palo Alto*,[412] a landowner prevented from developing by a variety of municipal measures was held to be entitled to recover damages for a taking of property.[413] *Arastra* announced that the landowner's remedy should be permanent damages, unconditionally awarded. This was an error. The court instead should have granted Palo Alto the option of dropping its efforts to compel above-normal residential uses and should have explicitly stated that the landowner was to be compensated for his past delays. There is at least scattered precedent for these more accurate remedies. Several decisions have expressly entitled landowners to proceed with claims to recover for illegal delays in municipal development approvals,[414] and another has recognized that the correct prospective

Policy Analysis of the Taking Problem, 49 N.Y.U. L. REV. 165, 210-11 (1974); Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensible Damage*, 28 STAN. L. REV. 779 (1976). For a vehement expression to the contrary, see Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, *supra* note 252.

412. 401 F. Supp. 962 (N.D. Cal. 1975), *vacated*, 417 F. Supp. 1125 (N.D. Cal. 1976). The *Arastra* decision was vacated pursuant to stipulation. The decision vacated had held that the plaintiff landowner should prevail on its taking claim, but the parties settled prior to trial of the damages phase of the case. Palo Alto agreed to take title to the land in fee simple absolute and the landowner agreed to receipt of a large sum in cash. Because several other suits brought by similarly aggrieved landowners were pending against Palo Alto, city officials were concerned that *Arastra* might determine the liability issue in those other cases by collateral estoppel. As part of the settlement, the city therefore insisted upon and obtained the landowner's agreement to ask the district court to vacate its prior decision. Telephone Interview with John Petrasich, attorney for Arastra Limited Partnership (Mar. 3, 1977).

413. *See also* Sanfilippo v. County of Santa Cruz, 415 F. Supp. 1340 (N.D. Cal. 1976) (denying motion to dismiss landowner's taking claim against ordinance that requires 100 acres per dwelling unit); Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976) (landowners' taking claims against ordinance placing their land in open-space category state cause of action).

The doctrinal confusion has been so complete that several of the most eminent state court judges have sustained landowners' taking claims in zoning cases and then, as a remedy, granted prospective invalidation of the ordinance rather than damages. *See, e.g.*, AMG Assocs. v. Township of Springfield, 65 N.J. 101, 319 A.2d 705 (1974) (court finds zoning provision constitutes taking and then itself tailors less onerous use restriction for property in question) (Hall, J.); Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969) (taking claim one of several grounds relied on to invalidate prohibition on construction of apartments) (Breitel, J.). This mistake is hardly novel. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (defendant need not comply with regulation that would constitute taking of his property) (Holmes, J.).

414. *See* Brault v. Town of Milton, 527 F.2d 730 (2d Cir.), *rev'd en banc*, 527 F.2d 736 (2d Cir. 1975); Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976); Town of Exeter v. Britton, 115 N.H. 209, 337 A.2d 356 (1975); Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 113, 237 A.2d 881, 884 (1968) (statute tying up land for one year should be construed as requiring compensation because legislature knew that failure to compensate would be unconstitutional); Charles v. Diamond, 47 App. Div. 2d 426, 366 N.Y.S.2d 921 (1975), *motion for leave to appeal granted*, 38 N.Y.2d 852, 345

remedy is to let the suburb choose between paying damages and repealing the excessive restriction.[415]

Only one judicial opinion has acknowledged that the proper remedial combination is interim damages for past delays plus a conditional award of permanent damages. That was Justice Clark's dissent in the recent case of *HFH, Ltd. v. Superior Court.*[416] The Supreme Court of California unfortunately used that same case to perpetuate the *Nectow* fallacy. Justice Tobriner, writing for the majority, argued that a landowner's basic remedy against excessive zoning restrictions should be some form of injunctive relief. He characterized an 81% decline in land value as a "mere reduction"[417] and implied that the only hard question would arise "in the event a zoning regulation forbade substantially *all* use of the land in question."[418] *HFH* was a landowner challenge to a prohibition on commercial uses, and its holding should be limited to those facts.[419] Otherwise the broad language of the opinion will be a springboard to both monopoly housing prices and serious inequities among landowners in California. The New Jersey Supreme Court's flawed performance in *Mount Laurel* was sparkling by comparison.

XI. Summary

This article has developed a comprehensive set of constitutional doctrines for resolving civil actions against suburbs that restrict the amount and composition of new housing development. Economic theory indicates that the burdens of suburban antigrowth programs usually fall primarily on landowners, not housing consumers. When

N.E.2d 600, 382 N.Y.S.2d 57 (1976) (sewer moratorium); Belle Harbor Realty Corp. v. Kerr, 43 App. Div. 2d 727, 728, 350 N.Y.S.2d 698, 701 (1973), *rev'd*, 35 N.Y.2d 507, 323 N.E.2d 697, 364 N.Y.S.2d 57 (1976) (dictum).

Most courts, however, have declined to compensate landowners even for delays arising from admittedly invalid zoning provisions. *See, e.g.*, Kramer v. City of Jefferson, 124 S.W.2d 525 (Mo. App. 1939) (error was "governmental act"); Veling v. Borough of Ramsey, 94 N.J. Super. 459, 228 A.2d 873 (Super. Ct. App. Div. 1967) (must avoid "oppressive financial burdens" on municipalities); Superior Uptown, Inc. v. City of Cleveland, 39 Ohio St. 2d 36, 313 N.E.2d 820 (1974) (municipal tort immunity invoked); *see also* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 518-20, 542 P.2d 237, 244-45, 125 Cal. Rptr. 365, 372-73 (1975), *cert. denied*, 425 U.S. 904 (1976).

415. HFH, Ltd. v. Superior Court, 116 Cal. Rptr. 436, 444, (Ct. App. 1974), *vacated*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

416. 15 Cal. 3d 508, 523, 542 P.2d 237, 248, 125 Cal. Rptr. 365, 378 (1975), *cert. denied*, 425 U.S. 904 (1976).

417. *Id.* at 513, 542 P.2d at 240, 125 Cal. Rptr. at 368.

418. *Id.* at 518 n.16, 542 P.2d at 244 n.16, 125 Cal. Rptr. at 372 n.16 (emphasis in original).

419. Because the landowner's grievance in *HFH* was against an antinuisance measure, he should have prevailed only upon proof that the city's prohibition of commercial uses on his tract was grossly inefficient. *See* p. 419 *supra.*

consumers *are* injured, those worst affected (in dollar terms) are not the households that have been excluded (as has usually been thought) but those that actually buy housing at prices inflated by the anti-growth measures. The chief beneficiaries of a suburb's development charges and development restrictions are the individuals who own its existing houses and apartments.

Homeowners can be expected to dominate the politics of small suburbs. Their most profitable strategy is to capture the producers' surplus of owners of vacant land by means of subdivision exactions and other development charges and, when there are no close substitutes for the suburb, to gain monopoly profits by limiting the output of new housing. Homeowner cartelization programs create inequities among landowners and consumers and lead to the usual efficiency losses that arise from monopoly. Homeowner cartels are apt to cause less allocative mischief in metropolitan areas where zoning authority is highly Balkanized than in areas—like Washington, D.C.—where these cartels occasionally can dominate most of the few governments that have land-planning authority. State-wide land-use programs, if captured by exclusionary forces, could create fearsome inefficiencies in real estate markets.

Judicial intervention is justified to prevent municipal antigrowth measures from creating serious inequities and misallocations of resources. It is especially appropriate in the usual situation in which the state legislature has not specifically authorized municipalities to pursue parochial policies. Policing municipal abuses is generally the exclusive task of state courts employing state constitutional doctrine. When local or state antigrowth programs create significant interstate spillovers, however, federal constitutional constraints should be applied.

Land-development law has long been plagued by the *Nectow* fallacy that the appropriate remedy against overly restrictive zoning is prospective invalidation of the ordinance. That approach does not adequately remedy past municipal abuses and may prevent suburbs from carrying out efficient antigrowth programs. The superior judicial approach is to grant a suburban government discretion to enact almost any measure but to restrain its enthusiasm by the threat of potential liability for damages. State courts therefore should use the taking clauses in their state constitutions to entitle landowners and housing consumers who meet specified requirements to recover for damages suffered from antigrowth programs. The specific rules proposed in this article are tailored to minimize the administrative costs of the damages remedy. To give two examples: (1) consumer awards should usually be made only to class representatives and not be actually distributed

to individuals; (2) a suburb should always be relieved of liability if it can meet the burden of proving that its policies are efficient and fair.

The amount of damages to be awarded a landowner on account of an antigrowth restriction is partly a function of the legal rules that limit development charges. To ensure equality of treatment among landowners and households and to prevent revenue measures from being used to cartelize housing supply, suburbs should not be permitted to focus taxes on housing construction either to control congestion or to raise general revenue. Development charges should be tolerated, indeed encouraged, however, to the extent necessary to prevent developers from obtaining above-average net benefits from municipal programs. The recommended doctrines for identifying fiscal inequities among landowners would be superior to the disparate approaches the courts have adopted in cases like *Pioneer Trust* and *Walnut Creek.*

The few judicial opinions worthy of unreserved praise are those—like the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[420] and that of the Ninth Circuit in the *Petaluma* case—in which federal courts have declined to federalize essentially intrastate controversies. In general, the state courts have succumbed to the *Nectow* fallacy that the exclusive remedy in growth-control controversies must be injunctive relief. Having made that mistake, they are left with two undesirable alternatives. The Supreme Court of California, for example, generally has deferred to municipal development controls, apparently in the Pollyannaish view that giving suburbs a free hand at planning will lead to a better urban future. The analysis here suggests that it leads instead to housing monopolies and inequities among landowners and consumers.[421] Activist courts like the Supreme Court of New Jersey at least have recognized these dangers. But they have responded with remedies that will immerse judges in complicated attempts to reshape municipal planning restrictions. One hopes that both camps will soon realize that the damages remedy is the fairest, the most accurate, and, after the smoke clears, the simplest.

420. 97 S. Ct. 555 (1977).

421. Local governments in California have begun to exploit the permissive attitude of their state supreme court. Santa Cruz County has decided to permit no more than one dwelling unit per 100 acres—perhaps a record-breaking density limitation. *See* Sanfilippo v. County of Santa Cruz, 415 F. Supp. 1340, 1342 (N.D. Cal. 1976). One recent decision of the California Supreme Court hints that its members may be about to shed the cloak of complete passivity. Associated Homebuilders v. City of Livermore, 18 Cal. 3d Adv. Sh. 582, 557 P.2d 473, 487-90, 135 Cal. Rptr. 41, 55-58 (1976) (local growth controls must bear reasonable relationship to regional welfare).

The Yale Law Journal

Volume 86, Number 3, January 1977

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