The Constitutionality of Local Zoning*

Suburban control of metropolitan land development is a troubling reminder that the American ideal of representative democracy has not yet been achieved. Suburbs alone regulate the use and development of most vacant land in metropolitan areas,[1] yet this regulation has a pervasive effect upon the lives of people outside the borders of the suburbs. State delegation of control over vacant land use to suburbanites thus conflicts with a basic notion of representative democracy—that the governed should have a voice in the decision-making process.

This denial of representation is all the more serious because identifiable groups are likely to be permanently excluded from participation. Restrictive land use policies purposely exclude those who, if they had access to the ballot box, would vote to change current policies. Small and relatively homogeneous groups, immune from political competition, are thus able to perpetuate their power over other, generally poorer groups in the society.[2]

* The *Law Journal* wishes to express its thanks to Professor David Trubek of the Yale Law School for his assistance in the development of this Note.

1. Any precise definition of the word "suburb" is unnecessary for the purposes of this Note. For a critical look at definitional problems of this nature, see Miner, *The Folk-Urban Continuum*, 17 AM. SOCIOLOGICAL REV. 529 (1952); Wirth, *Urbanism as a Way of Life*, 44 AM. SOCIOLOGICAL REV. 1 (1938). For purposes of this Note, small municipalities abutting the central city which completely share its characteristics are not suburbs.

It is almost tautological to say that it is the suburbs of metropolitan areas which have the most vacant land. In the New York City region, as defined by the Regional Plan Association, only 12.5% of the land at the core, New York City, is vacant, compared to 31.1%, 66.0% and 86.4% in the "Inner," "Intermediate," and "Outer" Ring counties. REGIONAL PLAN ASSOCIATION, SPREAD CITY 42 (1962). Densities vary inversely with the percentage of land that is vacant.

In Connecticut the same pattern holds true. "Less than two per cent of the land in New Haven is undeveloped. Most of that is marsh land. . . ." 1 NAT'L COMM'N ON URBAN PROBLEMS, HEARINGS 118 (1967) (Mayor Richard Lee). In 1966 the Connecticut Development Commission found 6% of New Haven's land, 639 acres, vacant as compared to 65% of the land, 15,570 acres, in Madison, one of New Haven's suburbs. Similarly, 7% of the land in Bridgeport was vacant, as compared to 61% in Greenwich and 56% in Fairfield. In passing, it might be noted that 58% of the vacant land in Fairfield, 42% in Greenwich, and 85% in Madison was zoned for single family residential construction on more than one, but less than two acres. AMERICAN SOCIETY OF PLANNING OFFICIALS, NEW DIRECTIONS IN CONNECTICUT PLANNING 191 (1968) [hereinafter cited as NEW DIRECTIONS]. *See generally*, Niedercorn & Hearle, *Recent Land-Use Trends in 48 Large American Cities*, 40 LAND ECON. 105 (1964).

2. Suburbs tend toward homogeneity in income, occupation, education, and sometimes ethnic group. See E. HOOVER & R. VERNON, ANATOMY OF A METROPOLIS 146-74 (1959); Duncan & Duncan, *Residential Distribution and Occupation Stratification*, 60 AM. J. SOCIOLOGY 493 (1955). *See also* R. WOOD, SUBURBIA 114-25 (1958); Schnore, *The Socio-Economic Status of Cities and Suburbs*, 28 AM. SOCIOLOGICAL REV. 76 (1963). These differences do not disappear with time; rather, the socio-economic character of a suburb appears to maintain itself over long periods. Farley, *Suburban Persistence*, 29 AM. SOCIOLOGICAL REV. 38 (1964). Suburban life-styles may be more a matter of these class

The thesis of this Note is that recent Supreme Court voting rights decisions render this delegation unconstitutional as a deprivation of the rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment.

I.

Basic democratic principles require that men be able to participate in making decisions that intimately affect their lives. The vote has historically symbolized this right to participate, and it remains a necessary tool for groups who seek to influence policy. Because of the symbolic and substantive importance of the right to vote, the Supreme Court has considered carefully the permissible bases of complete exclusion from voting in a given jurisdiction. Restrictions on the franchise have varied through time; qualifications of age, citizenship, lack of criminal record, literacy, and residency are still traditional in most states.[3] The Court has not considered challenges to all of these restrictions. Where voter qualifications have been challenged, however, the Court's guiding principle has been that the state may not deny the vote to persons substantially affected by the outcome of an election and capable of voting intelligently and responsibly in it.

Thus in *Lassiter v. Northampton County Board of Elections*,[4] the Court recognized that "[i]lliterate people may be intelligent voters,"[5] but sustained a literacy requirement for voting on the grounds that

differences than of any inherent locational effects. *See* B. BERGER, WORKING CLASS SUBURB (1960).

Racial exclusion is a characteristic, if not always a purpose, of suburban living. The ratio of the percentage of blacks in suburbs to the percentage of blacks in cities is only .22 in the Northeast and .20 in the North Central U.S., but rises to .60 in the South, reflecting the historic absence of residential barriers there. Brazer, *Economic and Social Disparities Between Central Cities and Their Suburbs*, 43 LAND ECON. 294 (1967). According to the 1967 trial census, the City of New Haven's population is 22% black. Orange, a town of about 10,000, near New Haven, had a black population of 16 in 1967. Indeed, no suburb of New Haven had a black population of over 2% in that year. Hamden, which is about 2% black, is lily-white except for an old section abutting on New Haven. "For many persons . . . a large minimum lot requirement has become the symbol of a community anti-Negro policy." AMERICAN SOCIETY OF PLANNING OFFICIALS, PROBLEMS OF ZONING AND LAND-USE REGULATION 20 (Nat'l Comm'n on Urban Problems, Research Rep. No. 2, 1968). [Hereinafter cited as ASPO.]

3. Thus property ownership was at one time a prerequisite for voting. "[I]t was assumed that power belonged, as a right, to men who . . . had proved their worth by acquiring property and to no others." J. GALBRAITH, THE NEW INDUSTRIAL STATE 52 (1967).

> [I]t was probably accepted . . . that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means. . . .

Harper v. Virginia Bd. of Elections, 383 U.S. 663, 685 (1966) (Harlan, J. dissenting).

4. 360 U.S. 45 (1959).

5. *Id.* at 52.

literacy "has some relation" to intelligent use of the ballot.[6] In *Harper v. Virginia Board of Elections*,[7] on the other hand, the Court invalidated the Virginia poll tax as an "invidious discrimination" against people without means because "[w]ealth . . . is not germane to one's ability to participate intelligently in the electoral process."[8]

In *Carrington v. Rash*,[9] the Court invalidated a Texas statute which prevented persons entering the state as soldiers from acquiring a voting residence in the state during their period of military service. The state claimed in effect that military personnel might not make responsible use of the ballot if under the dominating influence of a commanding officer, and that, as transients without a stake in the future of the area, soldiers might vote against needed bond issues and property taxes. The Court did not deny the state's right to condition the vote upon bona fide residency in a district, but held that soldiers could not be conclusively presumed to be transients. The Court thus implicitly overruled the state's determination that resident soldiers could not make intelligent use of the ballot and/or did not have a sufficient stake to vote responsibly in local elections. To the state's claim that military personnel might vote against needed taxes, the Court responded: " 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[10]

Last term, in *Cipriano v. City of Houma*,[11] the Court invalidated a Louisiana law which gave property owners alone the right to vote in elections called to approve a municipal utility's issuance of revenue bonds. The bonds were to be paid out of receipts from higher rates rather than from property taxes. The state claimed that utility operations directly affected property values, thus giving owners a special interest in the outcome of the election. The Court obviously thought that the only substantial effect was the rate change, which would affect owners and nonowners alike. It unanimously held, therefore, that the statute unconstitutionally excluded "otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those permitted to vote."[12] The Court noted, however, that it reserved decision "whether a State might, in some circumstances, limit the franchise to those 'primarily interested.' "[13]

6. *Id.* at 51.
7. 383 U.S. 663 (1966).
8. *Id.* at 668.
9. 380 U.S. 89 (1965).
10. *Id.* at 94.
11. 395 U.S. 701 (1969).
12. *Id.* at 706.
13. *Id.* at 704 n.5.

Kramer v. Union Free School District,[14] decided the same day as *Cipriano*, at first glance appears to present such a case. The state statute restricted voting in school board elections to resident adult citizens who were also property owners, lessees, or parents of children in district schools. Schools were financed partially through local property taxes set by the school board. Appellant, a 31 year-old bachelor, had no children. He lived with his parents and paid neither rent nor local property taxes. Without accepting petitioner's arguments as to the basis of his interest,[15] the Court held without explanation that Mr. Kramer was "interested in and affected by school board decisions."[16] The state's claim that it might nevertheless restrict the vote to those primarily interested in and directly affected by the outcome of the election, though conceded by the Court, was brushed aside on the ground that appellant was not "substantially less interested or affected than those the statute includes."[17] In holding this distinction among district residents to be without substance, the Court hinted that all residents must be allowed to vote on every issue.[18]

But as Justice Stewart queried in dissent, why draw the line here? A New Jersey commuter may have as great a stake in a New York City election as a resident does, and a 20 year-old college student "may be both better informed and more passionately interested in political affairs than many adults."[19] Therefore, Justice Stewart argued, if this appellant "must be given a decision-making role . . . then it seems to me that any individual who seeks such a role must be given it."[20]

Such a result would of course be absurd; other interests intervene

14. 395 U.S. 621 (1969).

15. Kramer asserted a substantial interest in school board elections based on the effect of property taxes on the price of goods and services in the community and on the general interest of community residents in the quality and structure of public education.

16. 395 U.S. at 632 n.15.

17. *Id.* at 632. The Court reasoned that the statute was both over-inclusive and under-inclusive; it allowed "uninterested" or uninformed people to vote, but did not allow some "interested" and informed people to vote. It compared Mr. Kramer's position with that of "an uninterested unemployed young man who pays no state or federal taxes, but who rents an apartment in the district." *Id.* at 632 n.15. The Court nowhere explained what it meant by "interest," but one is tempted to conclude that some notion
inclusive; it allowed "uninterested" or uninformed people to vote, but did not allow
of psychological effect was accepted. *Compare* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 164-65 (1970).

18. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

395 U.S. at 626-27.

19. *Id.* at 637.

20. *Id.* at 641.

to limit the principle of universal suffrage in all elections. In particular, state interests are served by the convenience and efficiency of local administration of purely local matters.[21]

Although the state legislature could choose to govern all matters within its jurisdiction directly, states have always delegated power over certain local affairs to locally elected bodies. Local decision-making is thought to be more democratic, more responsive to local needs, and ultimately more efficient than centralized governance would be.[22] Local governments, because they have a smaller polity, are better able than larger jurisdictions to encourage directly democratic practices.[23] Local governments with general powers over a given territory also provide a feeling of community.

A significant benefit derived from local responsiveness and flexibility is diversity. Many decisions have primarily local significance, yet must be made by all communities. Giving each community power to order its own consumption choices from the common menu not only encourages innovation and experimentation, but also allows individuals a greater opportunity to satisfy their own preferences. Individuals may and do seek out communities which share their views on schools, parks, recreation, neighborliness, and the "proper" level of public spending. The ability of local governments to satisfy communally idiosyncratic desires thus soothes tensions connected with lifestyle choices which would otherwise surface at the state level, and enables our consensual system of politics to work more smoothly.

So long as local decisions have only local effects, the state's interest

21. This is not to suggest that the state might ignore the right to representation at the local level. At one time the fact that cities are "creatures" of the state was thought to give states unlimited discretion in providing for local representation. However, in Avery v. Midland County, 390 U.S. 474 (1968), the Supreme Court held that, given the importance of local governments in the areal division of powers, the state could not deny equal representation at the local level. Both the *Cipriano* and *Kramer* cases extended this constitutional requirement to special-purpose local units.

22. Ylvisaker, *Some Criteria for a "Proper" Areal Division of Governmental Powers*, in AREA AND POWER 27, 32 (A. Mass. ed., 1969). Ylvisaker does not think local government particularly efficient. *But see* A. DETOQUEVILLE, DEMOCRACY IN AMERICA, Vol. I, ch. V (1835).

23. It is hard to quarrel with a myth. *But see* R. WOOD, *supra* note 2, at 195, 197: [S]uburban municipalities represent the principle of direct popular political participation in a mode theoretically workable under modern circumstances. . . . Each suburbanite is expected to undertake the responsibilities of citizenship on his own initiative and determine the common good by himself. . . . The theory is that he has created a democratic haven in which a consensus of right-thinking men replaces a compromise among partisan-thinking men. . . . If faithfully followed, the theory would demand so much of his time, so great a communion with his neighbors, so high a competence in public affairs, as to be nearly all-consuming. For most suburbanites, the feasible way out is indifference, as revealed by apathy in local elections.

in delegating power to local units does not conflict with the individual's right to participate in making decisions which affect him. The decision to construct a town library is an example of this type of issue. Substantially all resources expended will be raised within the jurisdiction, and the facility will service primarily town residents. Furthermore, one town's decision to build or not to build does not narrow the range of consumption choices open to citizens of other towns. These other towns have powers formally equal to those of the first, and the materials necessary for construction are equally available to them. Outsider interests are therefore likely to be negligible.[24]

Of course an individual may prefer the choice of a neighboring town on one issue. A voter in Town A, for example, may claim to be affected by Town B's decision on the library because he desires a library and Town A has refused to build one. It is not expected that any individual will be happy with all his town's choices, but rather that he be given an equal chance to determine the distribution of town resources among many possible alternative activities. Each town might be viewed as a family faced with the same spending choices and a budget constraint. The virtue of delegating power to local units to make choices among a given set of consumption possibilities is that *more* individual preferences may be satisfied. If an individual is enough out of tune with the majority's priorities in his community, he may be able to find and join a community in which his values are shared.

The state's interest in granting local home rule powers—encouraging

Even in rural areas, dependence on higher levels of government has vitiated claims to local independence. In "Springdale," for example, a "high proportion of the village budget represents subsidies from the state government. . . . [T]he local governing agency finds itself in a position of having surrendered its legal jurisdictions to outside agencies." A. VIDICH & J. BENSMAN, SMALL TOWN IN MASS SOCIETY 113 (1958). *Compare*, on the other hand, ASPO, *supra* note 2, at 9:

> The intense local interest in zoning questions demonstrates that land use is a subject in which citizens are vitally interested and one which fosters citizen participation in government, although that participation is often more emotional than intellectual. As authority over land use is shifted from local to regional control, so does self-determination shift away from the people affected. The importance of local autonomy in land-use control—both as to the problems it creates and the desirability of preserving it—should not be underestimated.

24. Throughout this Note "nonresident" means one who does not live within the corporate limits of a municipality under discussion, but who does live in the same state. Consideration of *interstate* problems, *e.g.*, freedom of travel, is beyond the scope of this Note. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Edwards v. California, 314 U.S. 160 (1941). Regarding interstate residency requirements for voting, *see* Note, *Residence Requirements After Shapiro v. Thompson*, 70 COLUM. L. REV. 134 (1970). *See also* Note, *The Impact and Constitutionality of Voter Residence Requirements as Applied to Certain Intrastate Movers*, 43 IND. L.J. 901 (1968) (arguing the right of intrastate movers to vote in elections where they have the requisite stake and information).

innovation and satisfying lifestyle preferences—thus rests on two assumptions. The first is that locally idiosyncratic behavior can be avoided by individuals who do not "fit in." Should local units be granted the power to exclude individuals they do not want, however, individuals would be unable to choose to join communities which most satisfy their own lifestyle preferences. The promise of diversity would become a straitjacket of local conformity, with change precluded by one group's exclusion of all others.[25]

The second and more important assumption in the argument for delegation is that all communities have resources equally available to them, *i.e.* that they make choices in approximately the same market (although not necessarily with the same budget constraint). Where one town is given more power than others over critical state resources, the justification for local delegation again does not hold. The legislature could not give one locality the power to make all state budgeting decisions.[26] Similarly, where one set of towns has available, through topographical accident, nontransferable (immobile, nonreproducible) resources that others do not, delegation of power to control these resources is questionable.[27] Suppose, for example, that Long Island were accessible to mainland New York at only one point. State delegation of control over access to that point to the municipality in which it falls would be akin to delegation of state budgeting decisions. An upstream town by the same reasoning should not be given power to decide whether to dump sewage in the river heedless of the interests of

25. There is also some reason to think that local exclusion of "undesirables" might be unconstitutional. In Edwards v. California, 314 U.S. 160 (1941), the majority of the Supreme Court, basing its decision on the commerce clause, held that California could not exclude indigents from the state. In so holding the Court declared that a state might not "isolate itself from difficulties common to all [states]." *Id.* at 173. *Compare* Nat'l Land & Inv. Co. v. Kohn, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965), invalidating Easttown's four-acre minimum lot size ordinance and declaring that the township could not "stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live."

In *Edwards* the Court also noted that entry was a prerequisite for those excluded to work for a change in state policies. 314 U.S. at 174. In the local case we are not faced with the context of interstate travel. The Court has declared, however, that a town may not exclude unwanted newcomers because of the way they might vote. Carrington v. Rash, 380 U.S. 89, 94 (1965). In any event, exclusionary practices undermine the justification for delegated powers.

26. Examples of such attempted delegation are obviously lacking. But when the Tennessee legislature attempted to confer general governmental powers on a town over land beyond its city limits, the delegation was held unlawful. Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907). *See infra* note 67.

27. States often remove power from local hands when local governments cannot solve regional problems. Thus, for example, when the cities and towns ringing San Francisco Bay were unable or unwilling to act individually to control filling and dredging of the Bay, the state created a state agency to perform the task. *See* Comment, *San Francisco Bay: Regional Regulation for Its Protection and Development*, 55 CALIF. L. REV. 728 (1967).

towns downstream, since such power is tantamount to eminent domain over a common (nontransferable) resource. Beach communities which would restrict beach access only to municipal residents also fall within this prohibition. Vacant land, also scarce and nontransferable in many regions, constitutes still another such resource.[28]

Consideration of these issues in a voting rights context yields similar conclusions. When one locality is able to exercise power over the citizens of another political unit, by determining how scarce state resources shall be used, the state's delegation of power becomes an enfranchisement as well as a districting decision. The town's decision to dump sewage in the river is one in which individuals in towns downstream are likely to be vitally interested and competently informed. Similarly, suburban control of the use and development of vacant land vitally affects unrepresented outsiders.

II.

As a result of suburban zoning, an amount of land greater than what the market would otherwise demand[29] or what is adequate for health and safety,[30] is required for the production of all types of housing units. Housing which requires a small amount of land per unit generally is either forbidden or sharply restricted in quantity.[31]

The effects of restrictive use regulations are threefold. The first effect of restrictive regulation is on the relative price of land for costly and inexpensive housing. By forbidding or sharply curbing

28. Other such resources obviously exist, *e.g.*, oyster-beds. *See* Brackshaw v. Lankford, 73 Md. 428, 21 A. 66 (1891), *infra* note 66.

29. For a thorough economic analysis *see* Note, *Large Lot Zoning*, 78 YALE L.J. 1418 (1969). On the politics of local zoning boards *see* Makielski, *Zoning: Legal Theory and Political Practice*, 45 J. URBAN L. 1 (1967); R. BABCOCK, THE ZONING GAME (1966). Zoning may be an important political issue, as in the 1964 Hamden, Connecticut, election, where the successful mayoral candidate campaigned on a slogan of "no more apartments."

30. The Connecticut Health Department recommends lot sizes of one acre for land without sanitary sewers. This is the largest lot size requirement for health or safety known to the author. The provision of sanitary sewers is obviously within the town's power. That it chooses not to provide such services may in itself be an exclusionary device. A new Pennsylvania decision explicitly rejects lack of sewers as a justification for large lot zoning. *See In re*: Appeal of Kit-Mar Builders, Inc., No. 218 (Pa. Sup. Ct., Feb. 24, 1970).

31. Almost half the land in the New York City Region in 1960 was zoned for single family development on one acre or more per unit. REGIONAL PLAN ASS'N, *supra* note 1, at 12. The trend in the past decade has been towards increasing restrictions. In fairly sparsely settled suburbs, however, landowners may still have enough power to make "upzoning" a controversial issue. *See* J. Hyman, Large Lot Zoning in Monroe, Connecticut: A Study of Decision Making in a Suburban Town (Senior Studies Paper on file in Yale Law School Library, 1968).

small-lot or apartment house development, these regulations limit the market for the land so regulated, thus reducing its price per unit area for permissible uses and raising the price of the limited supply of land available for other purposes. Let us consider land as a simple commodity, desired for itself alone. A man who wants to buy an acre of land in unregulated Town A must compete with buyers who want quarter-acre lots, half-acre lots, two-acre lots, etc. He must compete for this land not only with buyers who want to erect single family homes, but also with the apartment house developer and possibly with commercial and industrial users. In Town B, zoned entirely for single family development on lots at least one acre in size, the one-acre buyer has little competition. With diminished demand, prices drop.

This simple model requires two qualifications. First, land is not desired for itself, but as a component in a consumer product, "housing."[32] Purchasers want to buy what is called a "building lot," rather than a commodity called "land." This implies that land prices will rise less than proportionately with acreage where regulation excludes bidders for smaller lots from the market, since what is primarily desired is a plot on which one may construct a house. Thus a study of actual sales in Greenwich, Connecticut, found that lots in the four-acre-minimum zone sold for the same amount as lots in the one-acre-minimum zone. Of course, lot prices more often do vary with size, even if not proportionately, and therefore add to the cost of a house.[33]

32. Consumers do not get satisfaction from purchasing so many bricks, so many boards, so much land and so big a septic tank. Rather, they purchase a complex of housing "services" in which land is one necessary factor of production. Consumer utility from this complex "good," similarly, is not simple. One requires housing services to produce various characteristics in some minimum quantity, *e.g.*, heat, spaciousness, privacy, shelter from storms. To produce housing at all, a minimum quantity of certain inputs will be required. Thereafter, to produce any composite level of satisfaction, a number of combinations of inputs might suffice. Thus some land will be needed for any housing unit. Within a given budget constraint, extensive use of land may produce certain desired housing characteristics. As the land becomes more expensive, consumers may substitute other inputs for it, continuing to maximize satisfaction (though the composite level of satisfaction is likely to be less after the land price rise). Similarly, as more land is *required* because of government regulation, the consumer will be less able to allocate resources to other inputs and the composite level of satisfaction achievable is likely to decline. For an elegant theoretical treatment *see* Lancaster, *A New Approach to Consumer Theory*, 74 J. OF POLITICAL ECONOMY 132 (1966).

33. 1958 prices in the Boston area were as follows:

4 acres: $1900	1 acre: $1200
3 acres: $1750	.5 acre: $1000
2 acres: $1550	.25 acre: $750
1.5 acres: $1420	.15 acre: $500

URBAN LAND INSTITUTE, THE EFFECTS OF LARGE LOT SIZE ON RESIDENTIAL DEVELOPMENT 23 (Technical Bull. No. 32, July, 1958). *See also* NEW DIRECTIONS, *supra* note 1, at 207; NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 214 (1969) (prices in Greenwich, Conn., St. Louis County, Mo., and Montgomery County, Md.).

The second qualification to the simple model is that some people may be willing to pay for exclusivity. They will pay more, in other words, for two acres in a two acre zone than in an unregulated or less restrictive area. In an unregulated market, consumers desiring exclusivity must buy their land in competition with other bidders and must in addition pay the transaction costs incident to securing restrictive covenants from their neighbors to guarantee continuing exclusivity. Alternatively, they must acquire a great deal more land, in order to shield themselves from less wealthy neighbors. Regulation eliminates these transaction costs. These consumers are now willing to pay more for the land itself, but less than the previous cost of the land plus transaction costs. They too receive a windfall.

Conversely, buyers who wanted, say, quarter acre lots must look elsewhere. For them the suburb has reduced the total supply of land available. *Ceteris paribus*, the price of land for these other purposes will rise. The magnitude of the price rise will depend on the proportion of available land covered by the restrictive regulations. In this way regulation has subsidized large-lot development at the cost of small-lot and apartment house users, and constitutes a subsidy to the rich paid by the less wealthy.

The second effect of restrictive regulation is to induce some people to buy more land than they otherwise would, thus reducing the absolute supply of land available for other residential development. By reducing the absolute supply of land available in the short run, regulation raises land prices for all users.[34] Consider the couple who wanted to purchase one half acre of land and construct a house. Suppose that, prior to regulation, a half acre cost $2000 and one acre cost $3800. After regulation, half acres are unavailable. Say that one acre lots now cost $2500, reflecting their projected use as building lots, the absence of half-acre purchaser competition, and some premium paid by those hunting exclusivity. The couple now has a choice: spend $500 extra for a lot or forego purchase altogether. Some couples will be priced out of the market by this increase in costs; other couples will purchase the one acre. This inducement to purchase more land than one otherwise would buy reduces the supply of land available to meet remaining demand. This artificially decreased supply tends to raise prices for all land.

Third, in the *long* run, the effect of restrictive regulation on the

34. The argument here is that all prices will rise, but the argument above states that, due to the shift in demand caused by the regulation, prices will rise unevenly.

supply of land available for residential uses, and hence on general price levels for land, may be considered in two ways. One may assume that the supply of land is absolutely inelastic. Insofar as land use patterns are stable, suburban regulation is then tantamount to "using up" or "distributing" a resource whose supply is absolutely limited. Extensive use of land now implies less land available for future development.

The supply of developable land is not, of course, absolutely but only relatively inelastic. The total stock of land is enormous,[35] and "developable" land is slowly "produced" from this stock.[36] Suburban action affects not only the quantity of land consumers must buy, but also the rate at which that land is produced.[37]

The "production" of land for residential development depends on many exogenous and unrelated variables, such as alternative opportunities for investment and the general level of demand for housing. Three important factors are related to the land itself: (1) physical characteristics, (2) location, and (3) available services.[38] These situational factors will affect the supply of land forthcoming at any given price level.[39]

35. Some urbanists predict that we will continue to use up land at an even more rapid rate as our spatial relationships change with different means of communication and transportation. *See, e.g.*, Webber, *The Post-City Age*, 97 DAEDALUS 1091 (1968); Webber, *Order in Diversity: Community without Propinquity*, in CITIES AND SPACE 23 (L. Wingo ed. 1963).

36. Developable land, as used here, is vacant, uncommitted land suitable for residential construction at some density. See M. GAFFNEY, POLICIES AND PRACTICES AFFECTING URBAN LAND COSTS AS AN ELEMENT OF HOUSING COSTS (Study S-324, Institute for Defense Analysis, 1968).

37. The case of fixed supply is thus the limiting case of the low production model. Whatever the model, prices have risen drastically. The value of all urban land has been estimated to have doubled between 1950 and 1965, rising fivefold or more in areas of rapid growth. PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 141 (1969). Analyzing the cause of increases in the cost of lots ready to be built upon in the San Francisco area, Maisel found 52% of increased lot prices due to rising unit costs of raw land alone (with 28% attributable to higher development costs, 20% to larger lot sizes). *Id.* at 140. Another study, reported in NEW DIRECTIONS, *supra* note 1, at 207, found that lot sizes in the Bay Area had increased 15-20% in area but 100-150% in price, while lots in Los Angeles had increased 25% in area and 250% in price. As a result of skyrocketing increases in land prices, land costs as a component of housing unit cost increased from 12% to 20% between 1950 and 1965. A DECENT HOME, *supra*, at 120, 140 [data of FHA § 203 homes]. The current ratio of land to total costs may be more on the order of 25%. A DECENT HOME at 118. Thus in twenty years the relative cost of the land input in housing production has about doubled.

38. *See generally*, Kaiser, *Locational Decision Factors in a Producer Model of Residential Development*, 44 LAND ECON. 351 (1968).

39. *See* M. GAFFNEY, *supra* note 36, at 8-9. Gaffney claims that land prices do not serve to bring land into the market. Being "brought into the market" requires the existence of public works. These public works are not undertaken because of landowner pressure in a given area, and are outside individual control. The "production" of land then becomes a dependent variable, with the decision to undertake infrastructural developments the exogenous variable.

Man has little control over the physical characteristics of raw land. Some locational characteristics may be affected by government, but often only at a level removed from local control, as in the case of highway construction. Installation of city streets giving access to the center of town from hinterland areas, on the other hand, may be a decision subject to substantial municipal control.

Local governments do have a substantial degree of control over which services are available to the potential developer. Among these services, water and sanitary sewers are of primary importance. If a city or town does not provide these services, (1) the land may be developed, but more expensively than might otherwise be possible,[40] through installation of a private sewer system; or (2) the land will be developed, but more extensively than otherwise possible, in order to accommodate septic tanks and/or wells; or (3) the land will not be developed at all.[41]

Insofar as it restricts the production of developable land, either through inaction or the prohibition of private initiative, the town further contributes to rising land prices within and without municipal limits. When a number of suburbs which control production and development of residential land consciously mimic each other in this manner, the price and supply of such land are substantially affected.[42]

The regulation of developable land can be distinguished from other municipal decisions on several grounds. First, land-use regulations affect disinterested outsiders much more than other municipal decisions. Other resources do not generally have as inelastic a supply function as land. Increased demand for teachers can, for example, be met from virtually a nation-wide market, while building lots are neither mobile nor easily produced. In addition, zoning regulations in one town tend to elicit similar efforts to maintain exclusivity from neigh-

40. Sewer systems are prone to economies of scale because of the heavy investment needed in a disposal plant. A growing town might thus find it cheaper in the long run to install a municipal sewer system. Downing, *Extension of Sewer Service at the Rural-Urban Fringe*, 45 LAND ECON. 103 (1969).

41. Orange, Connecticut falls into the latter category. The town has a great deal of level land. It is zoned in one uniform zone: single family development on lots of at least one acre. Land at the western edge has poor drainage, so that even the one acre minimum does not make it possible to develop the land without sewers. The town has refused on several occasions to take such action, and no private sewer system has been built. The land remains vacant.

42. If land were distributed homogeneously among all towns, local regulation of land use would give each citizen some say in how land is to be developed. Local control of zoning ostensibly implies just such a system of decentralized but equitably distributed power. However, development of land at the city core is costly and often unfeasible without government aid, particularly since residential uses must compete with commercial and industrial uses for space in the center city.

boring towns, and therefore produce a correspondingly large shift in the use of land resources. Finally, and probably most important, when suburban towns regulate land use they affect a substantial part of the supply of vacant land. Suburbanites do not control so great a proportion of other resources, and the effect on the market of regulations affecting other resources is therefore not likely to be as great.

Land use regulations also have a greater exclusionary effect than other ordinances. Although theoretically any increase in the cost of living in the town would tend to discourage persons of lesser means from settling there, the increased costs resulting from zoning regulations are likely to be greater than the costs imposed by other municipal activities. The relative importance of zoning as a barrier to entry is underscored by the fact that despite generally higher levels of municipal services, including education, suburban communities often have lower tax rates than adjoining cities.[43]

Thus land use regulations, as used by suburban municipalities, have two extraterritorial effects. First, they affect the price of land outside municipal borders. Second, by prohibiting certain uses and requiring extensive and expensive use of land for other purposes, suburbs exclude people who would otherwise want to buy the land and reside in the town. In addition, the suburbs' virtual monopoly over vacant land and their tendency toward parallel action ensure that land use regulations have a greater impact than regulations concerning any other resource.

III.

Existing law provides two ready responses to challenges to local zoning control on constitutional grounds. The first is that the Supreme Court already considered and approved zoning's extraterritorial effects fifty years ago in *Euclid v. Ambler Realty Co.*;[44] and the second, that grants of similar, directly extraterritorial powers involving annexation and police regulation have been held valid.

A. *The* Euclid *Case*

At the beginning of this century, a number of communities enacted comprehensive zoning ordinances on the authority of their home rule

43. Suburbs do not have free riders; cities do—commuting suburbanites. Suburbs also have fewer needy people and therefore need not provide certain services. Most important, suburbs often have higher assessed valuation of property per resident and thus may tax at a lower rate to get the same result.

See generally, Coons, Cline & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 307 (1969).

44. 272 U.S. 365 (1926).

powers.[45] These efforts were invalidated as *ultra vires* the municipality.[46] In so holding, many courts dealt only with the lack of express state authorization,[47] concluding that the general grant of power to regulate local affairs did not imply a novel power like zoning.[48] Very

45. For examples of home rule powers, *see, e.g.*, CALIF. CONST. art. XI, § 11 (1879):

> Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws.

To similar effect, WASH. CONST. art. XI, § 11; OHIO CONST. art. XVIII, § 3. Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 645, n.9 (1964), lists 28 States with some constitutional provision concerning municipal home rule. Statutory grants may be supplemental to constitutional provisions, *e.g.*, N.C. GEN. STATS. §§ 160-353 to -363 (1964), or may stand alone, *e.g.*, N.Y. MUNICIPAL HOME RULE LAW (Kinney 1969). Sandalow suggests, at 668-71, that home-rule powers be characterized not as constitutional or statutory, a distinction which in practice has little relevance, but rather as broad or narrowly specific grants of power. *See also* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 3.07, at 135 (1968). One might distinguish between 1) the power to draw up a charter specifying the form and structure of local government, 2) authorization to exercise local police powers, and 3) limitations on state authority to intrude in the municipal domain. N. LITTLEFIELD, METROPOLITAN AREA PROBLEMS AND MUNICIPAL HOME RULE 15-21 (1962). It should be noted that home-rule powers determine only the extent of unilateral municipal action, not the bounds within which the state may, as it chooses, delegate powers to the municipalities.

46. Willison v. Cooke, 54 Colo. 320, 130 P. 828 (1914) (grant of general police powers not sufficient); Shad v. Fowler, 90 Fla. 155, 105 So. 733 (1925) (general welfare powers not sufficient to infer zoning power); Downey v. Sioux City, 208 Iowa 1273, 227 N.W. 125 (1929) (exclusion of apartments, not pursuant to comprehensive ordinance specified in enabling act, held void as without authorization); Calvo v. City of New Orleans, 136 La. 480, 67 So. 338 (1915) (power to exclude all business from residential area not conferred by grant of power to regulate businesses detrimental to health); Clements v. McCabe, 210 Mich. 207, 177 N.W. 722 (1920) (power to pass legislation "relating to its municipal concerns" does not confer zoning power); State *ex rel.* Penrose Inv. Co. v. McKelvey, 301 Mo. 1, 256 S.W. 474 (1923) (power to exclude ice manufacturing from industrial area not conferred by grant of power to regulate businesses detrimental to health); City of St. Louis v. Evraiff, 301 Mo. 231, 256 S.W. 489 (1923) (companion case to *McKelvey* re junkyard—same result).

Occasionally a court declared zoning itself to be beyond the scope of the state police power. Fitzhugh v. City of Jackson, 132 Miss. 585, 97 So. 190 (1923). Upon motion for rehearing in the *McKelvey* case, *supra*, the court appeared to hold that the attempted delegation was beyond the state's power because zoning (without compensation) was illegal. 256 S.W. 474, 483-85 (1923).

47. Express authorization is needed because there is no inherent right to local self-government, despite occasional suggestions to the contrary. *See* McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 299 (1916). J. FORDHAM, LOCAL GOVERNMENT LAW 43 (1949). "The city is the creature of the State." Worcester v. Worcester Consolidated Street Ry. Co., 196 U.S. 539, 548-49 (1905). The powers of these "creatures," as stated in Dillon's Rule, are:

> First, those granted in *express words*; second, those *necessarily* or *fairly implied* in or *incident* to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the courts against the corporation. . . .

J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448-50 (5th ed. 1911).

48. While the cases cited in support of this proposition are of early vintage, the proposition remains valid and its impact is noticeable in the later cases involving municipal attempts to zone under general delegations of police power, without support from specific zoning enabling statutes, and in litigation resulting from the use of general police power rather than from authority granted by the zoning enabling acts.

1 R. ANDERSON, *supra* note 45, § 3.10, at 140. Anderson has collected recent cases illustrating his point.

rarely, however, did courts reach the issue of whether the power claimed was local in nature.[49]

Given the courts' *quo warranto* approach, proponents of zoning successfully pushed for the passage of specific enabling acts.[50] Challenges to comprehensive enabling acts were also numerous, but yielded little comment regarding zoning's areal impact.[51]

In *Euclid* itself, the Ambler Realty Co. never directly challenged the state's right to delegate zoning power to the municipality, asserting instead that zoning was invalid whether grounded in implied home-rule powers or in the recently enacted Enabling Act.[52] Since the state

49. *But see* State *ex rel.* Ekern v. City of Milwaukee, 190 Wis. 633, 209 N.W. 860 (1926) (municipal regulation of building heights under home-rule power over "local affairs" sustained). The court held that the height of buildings was of statewide concern, in that health and safety regulations promote the good of the "community at large." Nevertheless, it declared, many matters of statewide concern affected "the people and the state at large somewhat remotely and indirectly, yet at the same time affect the individual municipalities directly and intimately," and can therefore be characterized as "local" for purposes of construing home-rule powers. 209 N.W. at 862.

50. E. BASSETT, ZONING 14-17 (1940); J. METZENBAUM, THE LAW OF ZONING 181-82 (1930). By January, 1926, when the Supreme Court heard the *Euclid* case, 43 states and the United States Congress (for the District of Columbia) had passed such enabling acts. Brief by Bettman as Amicus Curiae at 5, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). There are today zoning enabling acts in all 50 states. *See generally*, R. ANDERSON & B. ROSWIG, PLANNING, ZONING, & SUBDIVISION: A SUMMARY OF STATUTORY LAW IN THE 50 STATES (1966); HOUSING AND HOME FINANCE AGENCY, COMPARATIVE DIGEST OF MUNICIPAL AND COUNTY ZONING ENABLING STATUTES (1953). Where zoning enthusiasts were strong enough, especially when courts were slow to accept zoning, constitutional amendments art. II, § 25; GA. CONST. art. 3, § 7, para. 25; N.J. CONST. art. IV, § 6, para. 2. Louisiana went so far as to delegate the power directly in the constitution. LA. CONST. art. 14, § 29. Since the delegation of power to municipalities is challenged in this paper on federal constitutional grounds, there is no need to distinguish between bare statutory grants and those backed up by state constitutional amendment.

51. Most challenges attacked the substantive power of any government to zone and regulate the use of property even where nuisances or uses detrimental to health were not involved. References to areal impact of a statute are oblique. Thus in Dawley v. Collingwood, 242 Mich. 247, 218 N.W. 766 (1928), the court ruled that a town did not have to amend its charter in order to exercise zoning powers pursuant to an enabling act. In passing, the court said (at 249):

> It is fundamental that the Legislature has power to delegate to cities authority to enact such ordinances as are essential or incident to local governmental functions.

In Maine the State Supreme Court rendered an advisory opinion that the pending enabling act would be valid, declaring:

> The underlying question, then, is whether the Legislature may delegate to the legislative bodies of cities authority to exercise the Police power. Of this we have no doubt.

In re Opinion of the Justices, 124 Me. 501, 128 A. 181, 184-85 (1925) (holding, however, that the enabling act represented merely the delegation of the police power, and expressly declaring that this was not zoning). The enabling act was passed, *Euclid* was then decided, and in York Harbor Village v. Libby, 126 Me. 537, 140 A. 382 (1928) the Maine court upheld zoning under the enabling act. It is not clear how the court would have reacted if the *Euclid* case had not already cleared its way.

52. OHIO GEN. CODE, §§ 4366-1 to -12 (1919) (enabling act); OHIO CONST. art. XVIII, § 3:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

is often granted power to delegate expressly even nonlocal powers, whereas home-rule grants are restricted to local affairs, Ambler's failure to distinguish between the two statutes in attacking the zoning power apparently indicates an assumption that zoning had only local impact.

In what it termed the "main question" of the case, however, Ambler seems to have raised the localness issue directly.[53] Ambler argued that

> a municipality may not, under the guise of the police power, arbitrarily divert property from its appropriate and most economical use . . . . Nor can . . . a municipality resist the operation of economic laws, and remain rural, exclusive and aesthetic, when its land is needed to be otherwise developed by that larger public good and public welfare, which takes into consideration the extent to which the prosperity of the country depends upon the economic development of its business and industrial enterprises. The municipal limits of the Village of Euclid are, after all, arbitrary and accidental political lines . . . . If the Village of Euclid may lawfully prefer to remain rural and restrict the normal industrial and business development of its land, each of the other municipalities, circumadjacent to the City of Cleveland, may pursue a like course. Thus the areas available for the expanding industrial needs of the metropolitan city will be restricted, the value of such land as is left available artificially enhanced and industry driven to less advantageous sites.[54]

The extraterritorial argument is there, but both the realty company and the district court[55] confused it with a laissez-faire challenge of the government's power to channel property uses. The district court's emphasis on Euclid Avenue's "natural" development for industrial and commercial uses[56] and Ambler's phrase, the land's "appropriate and most economical uses," implied that the town might not divert or channel market-dictated development of the land within its borders.

Ambler declared that under either provision the test of validity would be whether or not the village's ordinance

> is a reasonable and real exercise of the police power or an unreasonable and arbitrary exercise of the legitimate powers of local self-government and an inpairment of the rights of property guaranteed to the appellees below by the Constitutions of the United States and Ohio.

Brief for Appellees at 37.

53. *Id.* at 38-44.

54. *Id.* at 42-43.

55. 297 Fed. 307 (N.D. Ohio 1924).

56.
> Euclid avenue has become the great business and commercial street of the metropolitan area of Cleveland, and such, the evidence shows, is its natural, obvious, and ultimate use within and beyond the village of Euclid.

297 Fed. at 309. The court also uses such phrases as "The evidence clearly shows that the normal and reasonably to be expected use and development of plaintiff's land . . ." *Id.*

References to exclusion and regional disaster were made more to illustrate the logical possibilities of regulation than to describe the situation as it existed.

The Supreme Court did not have to reach these issues. Euclid was not excluding industry, the majority noted, for the town had only determined "not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines."[57] Given this limited intervention in the market, the Court saw no reason why the town might not "divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated."[58] Having held that exclusion was not at issue and that the channeling was benign, the Court brushed aside the regional aspects of the case.

> It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.[59]

In its brief, the Village of Euclid also confronted the areal impact of its regulations. The village emphatically distinguished its community-wide regulations from the "block ordinances" previously invalidated in several jurisdictions,[60] on the grounds that block ordinances arbitrarily permit the residents of one district to dictate their neighborhood's future without consideration of the community welfare. The village zoning ordinance, on the other hand, was "a comprehensive plan for . . . the *whole community*,"[61] which distributed the territory "among all the different uses."[62]

The Court implicitly agreed with the village that the municipality, rather than the neighborhood or the region, was the "relevant market" for considering land use regulations. As presented to the Court, Euclid's regulations only distorted market locational preferences within a small area. The regulations would have almost no effect on the amount of land used for various purposes. Zoning would have an obvious impact on individual fortunes within the town, but so long

57. 272 U.S. at 389.
58. *Id.* at 390.
59. *Id.*
60. *Id.* at 74, 111, 126; *see* Eubank v. Richmond, 226 U.S. 137 (1912); Kahn Bros. v. Youngstown, 112 Ohio St. 654, 148 N.E. 842 (1925); Spann v. Dallas, 111 Tex. 350, 235 S.W. 513 (1921).
61. Brief for Appellants at 49 (emphasis in original).
62. *Id.* at 46.

as the intramural decision-making process was fair, no claim of "government without representation" could be sustained.[63] With the issue of extraterritoriality muted and confused, the Court in *Euclid* never dealt with the representational problems created by the extraterritorial impact of local land control policies.[64]

B. *Grants of Extraterritorial Powers*

Grants of extraterritorial powers have long been sustained on the theory that the "number, nature and duration of the powers conferred upon [local governments] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State."[65] The traditional rule is that a state may[66] expressly grant specific non-local powers to local units of government.[67]

63. The Court, having determined that extraterritorial effects of the regulation would be minimal, noted *Euclid's* political autonomy and powers of *local* self-government, emphasizing that the village's governing authorities presumably spoke the will of a majority of the people in the town. 272 U.S. at 389.

64. The Court thus never had to deal with how "general" the "general welfare" must be. The Court was reluctant to depart from a strict nuisance-health-safety rationale. For example, the Court seemed to justify the segregation of apartment houses from detached homes on the ground that apartments are

> a mere parasite constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.

Id. at 394. It felt constrained to add, however, that apartments "monopolize the rays of the sun" and result in increased traffic, thus impairing the safety of the streets. *Id.* The Court's opinion does imply approval of economic segregation, but says nothing at all about economic exclusion. At the end of its animadversion on apartments and their ilk, the Court alludes to "favored localities" in which children have quiet and open spaces in which to play, and implies that communities may attempt to secure these same advantages for their own children through the regulation of residential land use.

65. Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).

66. Massachusetts, Maryland and Washington appear, however, to be rather strict in construing which powers may be delegated by the legislature to local governments. In Opinion of the Justices to the House of Representatives, 328 Mass. 674, 105 N.E.2d 565 (1952), the court held that the state could not grant localities the option of amending their governmental structure, declaring the issue to be of statewide concern. The court said that the only exception to the general non-delegability of legislative powers pertaining to municipalities involved matters of "purely local interest." 328 Mass. at 676. *See also In re* Municipal Suffrage to Women, 160 Mass. 586, 36 N.E. 488 (1894).

The Maryland rule is similar; *see* Norris v. Mayor and City Council of Baltimore, 172 Md. 667, 192 A. 531 (1937); Gaither v. Jackson, 147 Md. 655, 128 A. 769 (1925); Bradshaw v. Lankford, 73 Md. 428, 21 A. 66 (1891). *Bradshaw* is analogous to the case of suburban land controls. There the state delegated authority over oyster-gathering to residents of one county. The court said that the oyster-beds in that county were for the benefit of the whole state, and that one county could not make decisions that affected the whole state. *But see* Cole v. Secretary of State, 249 Md. 425, 240 A.2d 272 (1968), upholding a local option law regarding local court structure. The court distinguished the previous line of cases, saying that a local law is just like a general one, only restricted in territorial application.

The Washington constitution grants powers to local governments within their corporate limits. In Brown v. City of Cle Elum, 145 Wash. 588, 261 P. 112 (1927) the court held that the provision was limiting and that the legislature could not, therefore, delegate to municipalities the right to exercise extraterritorial police powers to ensure the purity of the water supply. No other state appears to have quite so strict a doctrine.

The Kansas Constitution, art. II, § 21, also limits delegation of powers to matters of

These grants have been of four major types, two of which are not relevant here.[68] The extraterritorial powers sometimes granted to municipalities which raise substantial representational issues are annexation and police powers.

1. *Unilateral Annexation Powers*

Since localities are only its creatures, the state is empowered to draw local boundaries,[69] decree annexation or detachment of territory,[70] and set standards for municipal growth, including annexation of incorporated and unincorporated territory. The great majority of annexation statutes give some voice—even if only a remonstrance heard by a court —to the interests of the residents in the area to be annexed.[71] Some legislatures have, however, given municipalities unilateral power to

local legislation. It has been held that the control of soil drifting and the administration of public schools may not be delegated to local governments. State *ex rel.* Perkins v. Hardwick, 144 Kan. 3, 57 P.2d 1231 (1936); State *ex rel.* Donaldson v. Hines, 163 Kan. 300, 182 P.2d 865 (1947).

67. The delegation must be express and specific. A general grant of power over municipal affairs or the like will almost never confer non-local powers. 6 McQUILLIN, MUNICIPAL CORPORATIONS § 24.57 (3rd ed. 1969). The only time a state attempted to give a municipality all governmental powers over a territory outside the city limits, the statute was invalidated. Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907). *See generally*, F. SENGSTOCK, EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA (1962).

68. First, local governments have been given the power to render services to nonresidents. F. SENGSTOCK, *supra* note 67, at 5-44; Sandalow, *supra* note 45, at 697-98. Without this power municipal corporations could not "waste" their members' resources by servicing outsiders. F. SENGSTOCK, *supra* note 67, at 18-19. Second, they have been granted power to acquire land for municipal purposes outside the corporate limits. F. SENGSTOCK, *supra* note 67, at 5-11, 38-44. Acquisition may be by way of purchase or condemnation. *See, e.g.*, City of Scottsdale v. Municipal Court of City of Tempe, 90 Ariz. 393, 368 P.2d 637 (1962). Acquisition of land, even by condemnation, affects residents of the other municipality only insofar as the acquisition by any private landowner might affect them. The ability to disregard another municipality's land-use regulations and to compel sales obviously presents difficult problems of externalities. This is a problem of intergovernmental conflict, however, in which some general rule must be promulgated for dealing with the competing governmental interests at stake.

69. Until the beginning of this century boundary adjustment was often by special act of the legislature. This is still the case in a few jurisdictions. J. BOLLENS & H. SCHMANDT, THE METROPOLIS 402 (1965); R. DIXON & J. KERSTETTER, ADJUSTING MUNICIPAL BOUNDARIES: THE LAW AND PRACTICE IN 48 STATES at v (preliminary draft, 1969).

70. *See generally*, J. BOLLENS & H. SCHMANDT, *supra* note 69, at 400-38; N. LITTLEFIELD, *supra* note 45, at 22-32; F. SENGSTOCK, ANNEXATION: A SOLUTION TO THE METROPOLITAN AREA PROBLEM (1960); R. DIXON & J. KERSTETTER, *supra* note 69; Mandelker, *Municipal Incorporation and Annexation: Recent Legislative Trends*, 21 OHIO ST. L.J. 285 (1960).

71. Research by Dixon and Kerstetter in 1959 turned up 40 states with general laws pertaining to annexation. Of 286 methods of annexation classified, they found only 24 of general applicability which did not provide for some such voice. R. DIXON & J. KERSTETTER, *supra* note 69, at vi, viii.

That a remonstrance has been provided does not guarantee consideration of fringe interests. *See, e.g.*, IND. STATS. ANN. 48-722, 48-729 (Supp. 1969) (court shall approve annexation if area meets specific criteria of urbanness and the municipality has a definite plan to furnish services to the area within three years, *where* one-eighth of the abutting area's borders coincide with the town line; where more than one-fourth so coincide, the only criterion for approval is reasonable need within the near future).

annex unincorporated contiguous territory,[72] paying no heed to the interests of those annexed.[73]

Unilateral annexation power has most often been granted only over unincorporated contiguous land, either owned or completely surrounded by the municipality.[74] Problems of representation here are rather minimal. Residents of unincorporated surrounded land do not constitute a group apart from the economic and social fabric of the city. They benefit directly from its services and are citizens in all but name, vote, and taxes.

In a few states, unilateral annexation power has been granted on a broad scale.[75] In these states, the legislature has clearly favored facilitation of municipal expansion.[76] Since these powers extend only over unincorporated territory, it is difficult to construe such a policy as one favoring the creation of metropolitan government,[77] but such powers

72. Omaha, Neb., is the only jurisdiction found with the unilateral power to annex certain incorporated territory. NEB. REV. STATS. § 14-117 (1954).

73. Unless no benefits whatsover would accrue to the annexed territory from the annexation. Most statutes now make provision for furnishing of services. *See* notes 80-81 *infra*. It is of course irrelevant that those annexed are to be given a vote immediately in the newly constituted polity. The question is whether they are given a voice in the decision to annex their land in the first place.

74. *See, e.g.*, ILL. ANN. STATS. ch. 24 § 7-1-9 (1962) (owned, contiguous, unincorporated, and vacant); MICH. COMP. LAWS ANN. § 117.9 (1967) (as in Ill.); MINN. STATS. ANN. § 414.033, subd. 2 (1969) (owned, contiguous, unincorporated, surrounded); PA. STATS. ANN. § 53-35561 (1970) (owned, contiguous, unincorporated—cities less than 135,000 only); S.C. CODE §§ 47-18.1, 47-22 (1962) (owned, contiguous, unincorporated); WIS. STATS. ANN. § 66.025 (1965) (as in S.C.); WYO. STATS. § 15.1-60 (1965) (as in S.C. but also non-contiguous territory).

75. Missouri, Nebraska, Oklahoma, and Texas seem to have the broadest unilateral powers, with Indiana close behind. Nebraska and Indiana evidence a trend toward granting more unilateral powers. In Indiana, before 1955, one or more persons could appeal to a court to review a proposed annexation. This was then changed to a requirement of a majority of landowners or owners of 75% of the land. R. Dixon & J. KERSTETTER, *supra* note 69, at 119. The court, upon review, was to determine *inter alia* whether the annexation was in the best interests of the area to be annexed. Towns (under 2000 pop.) were given unilateral power to annex contiguous platted lots. Law of 1909, ch. 173, § 1, [1909], IND. STATS. ANN. § 48-706 (repealed 1959). This power of small towns removed in 1959. The 1969 Legislature repealed all annexation laws and enacted new ones. *See* IND. STATS. ANN. §§ 48-722, 48-729 (Supp. 1969). Towns and cities are again on the same footing, but the standards for judicial review have changed so as to omit the interests of those annexed. *See* note 71 *supra*.

Nebraska has perhaps the broadest statute of all. Before 1967, Omaha and Lincoln were given broad unilateral annexation powers. NEB. REV. STATS. §§ 14-117, 15-101 (1954) (no requirement of services or of urban character; only that city may not annex "agricultural lands rural in character"). But cities of 5,000-40,000 were given unilateral power over only subdivided or surrounded land, *id.* at § 16-106, and otherwise needed judicial approval based on benefit to the area to be annexed. Smaller cities and villages always needed such approval. *Id.* at § 17-407. By NEB. SESS. LAWS chs. 64, 74 (1967), however, all these local units were given broad unilateral powers.

76. Broad annexation powers are best used with statutes prohibiting new incorporations within a given distance of existing corporate limits. *See* Mandelker, *supra* note 70; J. BOLLENS & H. SCHMANDT, *supra* note 69, at 423-25 (briefly summarizing extensive 1961 and 1963 legislation).

77. Our largest metropolises, which are most in need of metropolitan government,

may help to create cities large enough to constitute metropolitan entities in and of themselves.

Such statutes create room for abuse. The municipality may wish to annex one gerrymandered strip of property that produces revenue, leaving a similar but poorer area untouched.[78] The municipality may try to annex land which is not yet urban in character, and thus cannot gain by its association with the city, again to increase its revenue base. Once the territory is annexed, no matter how urban in character it may be, the city might not plan to provide it with the same level of services as are furnished elsewhere in the city.

Many states have recognized the possibility that legitimate annexee interests might be ignored, by providing for some judicial or administrative review of municipal initiative.[79] Even the states authorizing unilateral annexation powers require that the municipality furnish adequate services as soon as possible,[80] and often require that other indicators of urban character be evident at the time of annexation.[81] In general, therefore, annexee interests are protected by statute. On this ground unilateral annexation powers are distinguishable from zoning ordinances.

2. *Extraterritorial Police Powers and Land Use Controls*

Extraterritorial police powers were first delegated to localities to deal with problems which extended over political boundaries. Power was granted to control health hazards,[82] the operation of quasi-nui-

have little surrounding unincorporated territory left. Suburbs are generally separate, autonomous governments. Thus the largest annexations of the post-World War II era have come in places like Oklahoma City and Dallas. *See* J. BOLLENS & H. SCHMANDT, *supra* note 69, at 414-18.

78. Fringe resistance "does not always result from the fringe playing the role of the devil and the city the innocent but powerless angel." J. BOLLENS & H. SCHMANDT, *supra* note 69, at 421, discussing these "leap-frog annexations."

79. *See* VA. CODE ANN. § 15.1-1041 (1964). The Virginia system of an impartial, specially convened court to hear the merits of a proposed annexation, balancing the interests of town and county, has often been praised. *See* Bain, *Recent Developments in the Virginia Annexation System*, 46 VA. L. REV. 1023 (1960). For an outdated but representative list, *see* R. DIXON & J. KERSTETTER, *supra* note 69. Alaska, California, Minnesota, Washington, and Wisconsin now have permanent administrative agencies in each county designed to review the fairness of proposed annexations, a system differing in some respects from the Virginia system. For brief comment *see* J. BOLLENS & H. SCHMANDT, *supra* note 69, at 425-27. *See also* N.C. STATS. §§ 160-445, 160-446 (1964) (annexation by unilateral municipal initiative unless 15% of the voters in annexed areas petition for a referendum).

80. The Nebraska legislature, in its expansive 1967 legislation, required that service be rendered "as soon as practicable." NEB. SESS. LAWS ch. 64 (1967). Missouri requires services "within a reasonable time." ANN. MO. STAT. § 71-015 (Supp. 1969), IND. STATS. ANN. §§ 48-722, 48-729 (Supp. 1969) (services within 3 years).

81. *See, e.g.*, IND. STATS. ANN. §§ 48-722, 48-729 (Supp. 1969).

82. City of Coldwater v. Tucker, 36 Mich. 474 (1877) (pollution of city water supply); Harrison v. Mayor and City Council of Baltimore, 1 Gill (Md.) 264 (1843) (quarantine).

sances like slaughterhouses[83] and hog farms,[84] and the regulation of quasi-immoral activities such as the sale of liquor.[85] These grants were validated either on the basis of the state's general power to delegate[86] or on the narrower ground of necessity to protect town health, safety, morals, or welfare.[87]

Just as the law of zoning grew out of the law of nuisance,[88] the sanctioned extraterritorial control of nuisances gradually led to validation of extraterritorial land-use controls.[89] Extraterritorial subdivision controls have been granted to some class of municipalities in more than half the states.[90] Subdivision regulations[91] can increase the cost of housing,[92] and may require the use of more land than otherwise might

Without such a grant of power, municipalities had been held unable to enact such regulations. City of Duluth v. Orr, 115 Minn. 267, 132 N.W. 265 (1911) (right to regulate storage of explosives beyond borders). E. McQuillin, *supra* note 67, at §§ 10.07, 24.57.

83. Chicago Packing and Provision Co. v. City of Chicago, 88 Ill. 221 (1878).

84. State v. Rice, 158 N.C. 635, 74 S.E. 582 (1912).

85. Lutz v. City of Crawfordsville, 109 Ind. 466, 10 N.E. 411 (1886); Town of Gower v. Agee, 128 Mo. App. 427, 107 S.W. 999 (1908).

86. Chicago Packing and Provision Co. v. City of Chicago, 88 Ill. 221 (1878); Lutz v. City of Crawfordsville, 109 Ind. 466, 10 N.E. 411 (1886).

87. State v. Rice, 158 N.C. 635, 74 S.E. 582 (1912); Town of Gower v. Agee, 128 Mo. App. 427, 107 S.W. 999 (1908). Even the *Malone* court, *supra* note 67, admitted that certain police powers could be delegated on an extraterritorial basis.

88. *See* S. Toll, Zoned American (1969).

89. Illinois is perhaps the best example of the case law development in this area. In 1878 the court upheld the extraterritorial regulation of slaughterhouses (in another municipality!), citing only the "creature" theory of state-municipal relations. Chicago Packing and Provision Co. v. City of Chicago, 88 Ill. 221 (1878). Seventy-seven years later, with nothing apparent in between, the court validated extraterritorial control of water pollution affecting the city's water supply, citing *Chicago Packing*. City of West Frankfort v. Fullop, 6 Ill. 2d 609, 129 N.E.2d 682 (1955). A year later, again with no justification besides precedent, the court declared that the legislature could confer any extraterritorial police power (here subdivision control) on a municipality. Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

90. Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development*, 1966 Wash. U.L.Q. 1, 26 n.59 (list of statutes).

91. Subdivision regulations

> arose from the need of the local government to assure a rational pattern of streets as new areas were developed. Controls applied through specification or approval of street and width; water supply, sewerage, drainage, and roadway design and construction; grading plans; and lot size and configuration.

ASPO, *supra* note 2, at 4.

92. Subdivision regulations "allocate costs of public facilities between the subdivider [and thus the ultimate consumer] and local taxpayers." Building the American City, *supra* note 33, at 203.

> Developers are usually required to install or pay for the installation of sewer systems, water, and street light improvements, all of which specifically serve the new tract. More recently, communities have required dedication of land—or payments in lieu thereof—for parks and schools. This device could be a means of getting newcomers to pay their fair share for collective goods that everyone else in the community also pays for; it could also be—and often is—a device for taxing newcomers more than older residents. It has been argued that any fees, payments, or dedications not justified by costs are unconstitutional. Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119 (1964). *See also* Pioneer Trust & Sav. Bk. v. Village of Mt. Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (dedication of land for school); Rosen v. Village of Downers Grove,

be needed. But the exclusionary and extraterritorial effects of subdivision regulations are likely to be much smaller than those of zoning, for resources other than land are usually involved. Nor do subdivision regulations affect which uses of land are permitted or prohibited.[93] And for the developer or homebuyer, subdivision controls are not generally as costly as zoning requirements.[94]

The validity of extraterritorial subdivision regulations has been litigated only twice. Both cases upheld the power. In *Petterson v. City of Naperville*,[95] the Illinois court upheld a grant of subdivision control up to one and one-half miles beyond the corporate limits. Relying on a case which sustained extraterritorial regulation of meat-packing plants, the court ruled that the state may confer special extraterritorial powers whenever a valid exercise of the police power is involved. The court did not discuss specifically the reasonableness of subdivision controls, and the issue of representation was apparently not raised by either party.

A much earlier case, *Prudential Cooperative Realty Co. v. City of Youngstown*,[96] also relied on the precedent of extraterritorial police powers to regulate health hazards,[97] but declared that the power delegated must be reasonable in light of the circumstances. In assessing reasonableness, the court found that the city had a substantial interest in establishing minimum development standards for lands to be an-

19 Ill. 2d 448, 167 N.E.2d 230 (1960) (payment in lieu of dedication); Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957) (fees for approval of subdivision map). Developers nevertheless usually comply with these demands. Given community powers of administrative delay and disapproval on collateral matters, compliance is usually cheaper in the long run. *See* R. BABCOCK, THE ZONING GAME 53 (1966).

Perhaps just as important as actual exactions are the variable and unpredictable costs imposed by administrative delays. These costs cannot be adequately internalized, particularly where homes are pre-sold. Unexpected delays or increased exactions can then result in a loss instead of a profit. One developer in Branford, Connecticut, for example, presold his houses. After construction had started and the homes had been sold, the town amended its subdivision regulations to require asphalt instead of oil and gravel roads. He went bankrupt. The use of special permits, design review boards and the like almost ensure this sort of constant bureaucratic attention to and interference in development —interference that might often be justified for health and safety purposes, but just as often goes beyond the bounds of police power requirements. For a discussion of when such regulations may be unnecessary, *see* Yearwood, *Accepted Controls of Land Subdivision*, 45 J. URBAN LAW 217, 246-50 (1967).

93. City of Carlsbad v. Caviness, 66 N.M. 230, 346 P.2d 310 (1959) (extraterritorial subdivision authority could not be used to prohibit establishment of liquor store).

94. It should be noted that zoning requirements may affect subdivision costs as well, since many utilities are priced by the front foot. Assuming a constant, given set of subdivision regulations, it was estimated in 1958 that total improvement costs on a 6,000 sq. ft. lot came to $1700. A 20,000 sq. ft. lot costs $2000 to improve, a 40,000 sq. ft. lot, $2250, and an 80,000 sq. ft. lot, $2550. URBAN LAND INSTITUTE, *supra* note 33, at 23. Besides utilities, grading and landscaping costs may rise with lot size.

95. 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

96. 118 Ohio St. 204, 160 N.E. 695 (1928).

97. 118 Ohio St. at 210, 160 N.E. at 697.

nexed in the foreseeable future,[98] since the city is responsible for maintaining streets and providing other municipal services. The issue of representation was again not mentioned.

Express extraterritorial zoning powers, because they impinge more heavily on rights connected with ownership of property, have been granted less frequently than extraterritorial subdivision controls.[99] Most states which have granted extraterritorial zoning powers have circumscribed the delegation. In Illinois and Tennessee the power is valid only if the county has not adopted its own zoning regulations.[100] In Kentucky the municipality must first make substantial efforts to secure county cooperation in setting up a jointly administered planning and zoning program, and even then must have county permission to zone beyond its borders.[101] In both North Carolina and Wisconsin, the body which legislates and administers extraterritorial zoning ordinances must be composed half of city residents, half of residents of the non-municipal area.[102] In these instances, the state has provided

98. 118 Ohio St. at 212-13, 106 N.E. at 697-98. The authority here extended three miles beyond corporate limits.

99. *See generally* F. SENGSTOCK, *supra* note 67, at 61-69; Becker, *supra* note 90, at 30-54; Melli & Devoy, *Extraterritorial Planning and Urban Growth*, 1959 WIS. L. REV. 55; Bartelt, *Extraterritorial Zoning: Reflections on Validity*, 32 NOTRE DAME LAW. 367 (1957); Anderson, *The Extraterritorial Powers of Cities*, 10 MINN. L. REV. 475 and 564 (1926).

100. ILL. STAT. ANN. ch. 24, § 11-13-1 (1961); TENN. CODE ANN. § 13-711 (Cumulative Supp. 1969) (superseded by subsequent county zoning, § 13-715). The validity of these statutes has never been at issue in a case.

101. KY. REV. STATS. § 100.117 (1966). The city that has complied with these provisions but has failed to get county support may exercise subdivision control powers up to five miles beyond its borders. § 100.131. The city may also exercise "other" powers, including (presumably) zoning, if the county legislative body so allows. *Id.* The interests of nonresidents of the city are thus protected to some extent by their elected county representatives.

This statutory scheme represents quite a change from prior legislation. Previously, municipalities had the power to zone within their "municipal areas," which were defined as "the surrounding territory which bears relation to the planning and zoning of the city." KY. REV. STATS. § 100.010(6); Smeltzer v. Messer, 311 Ky. 692, 694, 225 S.W.2d 96, 97 (1949); American Sign Corp. v. Fowler, 276 S.W.2d 651, 655 (Ct. App. Ky. 1955). These two cases challenged zoning decisions pursuant to the act, but in both cases the parties won without reaching the validity of the statute.

These two decisions, while not invalidating extraterritorial zoning in Kentucky, gave notice that the state courts would construe the power strictly. The only justification for the power, it was clear, was facilitation of orderly urban development. On the other hand, as dicta in *Smeltzer* made clear:

> [T]he city's action, if sustained, seriously impairs the rights of a person owning property beyond its limits who has no voice in its legislative policies, and who receives no legally recognizable benefit to such property from the city government.

Id. at 696, 225 S.W.2d at 97. Legislation has now partially solved this representational problem by giving the county a larger role to play.

102. N.C. GEN. STATS. § 160-181.2 (1964), *as amended*, (Cumulative Supp. 1969); WIS. STATS. ANN. § 62.23(7a) (1963), *as amended*, (Supp. 1969). The North Carolina statute gives one-mile extraterritorial zoning powers to any town with over 1250 population. But:

> [A]s a prerequisite to the exercise of such powers, the membership of the zoning

for both county and municipal involvement in deciding land uses at the urban fringe. The governed fringe residents thus have a voice, but the municipality may protect itself from the extraterritorial impact of decisions concerning the zoning of suburban land. The interest of the municipality in assuring coherent development is even greater when the costs of this development may be further internalized through annexation. Three of the four cases touching at all on the extraterritorial zoning power rely on some version of this argument.[103]

In a few states, legislatures have granted broad extraterritorial zoning powers to municipalities.[104] In only one case has the constitutionality of such a statute been litigated.[105] In upholding the statute

commission or planning board charged with the preparation of proposed regulations for the one mile area outside of the corporate limits shall be increased to include additional members who shall represent such outside area.

The Wisconsin statute grants powers over a 3 or 1½ mile radius depending on the size of the municipality. The city, on its own initiative (as in N.C.), resolves to exercise the power. After giving the affected area notice (thus enabling its legislative body to adopt whatever interim ordinances it wants), the city may declare a freeze on zoning for up to two years while permanent standards are worked out. A joint board is then appointed, half from the city and half from the town affected, to decide upon the new ordinances. Thus in Wisconsin, the only substantial unilateral power given to the city is the power to declare a "freeze" of the existing zoning map. This power was challenged in Walworth County v. City of Elkhorn, 27 Wis. 2d 30, 133 N.W.2d 257 (1965). In response to the representational claim the court cited legislative history applauding the bill because "'the towns affected will have a substantial voice in the preparation of the ordinance'" and can choose the zoning which will be frozen. *Id.* at 36, 133 N.W.2d at 261. The broad justification for the statute, once the representational claim had been dispensed with, was again orderly growth.

Cf. Cooper v. Leslie Salt Co., 70 Cal. 2d 627, 75 Cal. Rptr. 766, 451 P.2d 406 (1969), where a majority of the California Supreme Court upheld a statutory scheme which denied residents of a special district the vote for a given period of time. The California court, over strenuous objection from three out of the seven justices, held that the disenfranchisement was only temporary, power being transferred to residents from landowners within a specific period of time. Perhaps this is an underlying rationale of the *Walworth* decision.

103. *See* notes 101-102 *supra*. The fourth case, and first chronologically, was City of Raleigh v. Morand, 247 N.C. 363, 100 S.E.2d 870 (1957), *app. dismissed for want of a substantial federal question*, 357 U.S. 343 (1958). The *Morand* court assumed broad state discretion without discussing any particular state interest.

104. ALA. CODE § 37-797 (1958), *as amended* (Supp. 1967) (power 5 miles beyond corporate limits over unincorporated territory; county may zone in such area only if municipality does not); NEB. REV. STATS. §§ 14-117, 15-104, 16-901, 17-413, 17-1001 (1951) (power one mile beyond limits for villages and cities of 1000-5000 pop., two miles for larger cities); OKLA. REV. STATS. § 19-863.2, -.13, -.19 (1962), *as amended* (Supp. 1969) (power five miles beyond limits; limited to cities over 180,000). If extraterritorial zoning by municipalities pursuant to Illinois law is not repealed by subsequent county zoning, powers granted in that state could be substantial. *See* note 100 *supra*.

105. Schlientz v. City of North Platte, 172 Neb. 477, 110 N.W.2d 58 (1961). The power seems assumed to be valid in Alabama. *See* Fleetwood Development Corp. v. City of Vestavia Hills, 282 Ala. 439, 212 So. 2d 693 (1968) (planning & zoning commission had approved requested rezoning of plaintiff's land—outside corporate limits—but city council, in which plaintiff was not represented, disapproved the rezoning; city action held valid). An Oklahoma case, Elias v. City of Tulsa, 408 P.2d 517 (Okla. 1965) invalidated a superseded version of the state statute which had granted the power to cities of 180,000-240,000, there being no reasonable justification for granting the power to Tulsa but not to Oklahoma City. The *Elias* court explicitly refused to consider the general validity of the extraterritorial power.

the court was clearly influenced by the fact that extraterritorial zoning was not a new phenomenon in Nebraska[106] and by the argument that the power was necessary for healthy municipal growth. In answering plaintiff's claim that his lack of representation denied him due process of law, the court held that the means of selecting municipal government officials was completely within the state's discretion. In balancing the interests of local government and democratic participation, the court thus found the latter to be of negligible weight.[107]

The validity of the argument for complete state discretion[108] is, in the light of *Avery v. Midland County*[109] and *Kramer v. Union Free School District*,[110] dubious. The state may no longer claim total freedom in the structuring of local government.[111] The individual's interest in participation is now regarded as substantial, and the state may achieve its goal of orderly urban development by other means. Even if the state's interest in orderly development were accorded more weight, extraterritorial zoning statutes are, in any event, distingushable from the great majority of zoning ordinances. With one exception, extraterritorial zoning statutes extend only over unincorporated areas. Almost all vacant land in metropolitan areas lies within incorporated suburbs, and the rationale of orderly urban development is obviously inapposite.

IV.

Most zoning enabling acts delegate to local governments the power to regulate the use and development only of land within their bound-

106. Omaha and Lincoln had had extraterritorial zoning powers since 1925 and 1929, respectively. 172 Neb. at 492, 110 N.W.2d at 68. The validity of these statutes has apparently never been litigated.

107. *Id.*

108. Municipal corporations are creatures of the legislature:

> . . . There is no doubt but that the Legislature may provide for their officers and officials and the manner of their selection and appointment. . . . [P]ersons [living in the area adjacent to and 1 mile beyond the corporate limits of the city] have neither a constitutional nor inherent right to local self-government. The Legislature may subject them to the jurisdiction of officers for whom they have no voice in the selection. This does not constitute a violation of any constitutional provision.

172 Neb. at 489-90, 100 N.W.2d at 66-67.

109. 390 U.S. 474 (1968) (one man, one vote standard held to apply at local level).

110. 395 U.S. 624 (1969). *See* p. 899 *supra*.

111. The majority of a State—by constitutional provision, by referendum, or through accurately apportioned representatives—can no more place a minority in oversize districts . . . than they can deprive the minority of the ballot altogether. . . . Government—National, State, and local—must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of lawmakers, no matter how large the majority wishing to deprive other citizens of equal treatment or how small the minority who object to their mistreatment.

aries.[112] This delegation of control, unlike extraterritorial zoning powers, is intimately related to the legitimate delegation of power over purely local matters, such as taxes, schools, and industrial development. Because most vacant land lies in suburbs, however, the state's delegation of zoning powers to all local units is in reality a grant of power to suburbanites.[113]

Avery v. Midland County, 390 U.S. 474, 481-82, n.6 (1968). Is there more latitude for state action when statutes not statewide in application are at issue? *Cf.* Moody v. Flowers, 387 U.S. 97 (1967).

112. Zoning enabling acts confine municipal initiative very little. Occasionally, however, courts may devise vague, implicit rules for dealing with excess zeal. Thus large lot zoning has on occasion been invalidated where the minimum required was considerably greater than that of average current development. Spanier v. Town of Huntington, 19 Misc. 2d 979, 188 N.Y.S.2d 381 (Sup. Ct. 1959); Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 355, 382 P.2d 375 (1963); LaSalle National Bank v. City of Highland Park, 27 Ill. 2d 350, 189 N.E.2d 302 (1963).

113. Courts have taken tentative steps toward recognizing outsider interests. Where zoning of land at the boundary of a municipality is inconsistent with surrounding land use in an adjacent municipality, the courts have often decreed that the zoning municipality must consider the land uses in this adjacent area. Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963) (parcel zoned for residential use; surrounding land in adjacent municipality, developed for commercial use; zoning held invalid); Chusud Realty Corp. v. Village of Kensington, 22 App. Div. 2d 895, 255 N.Y.S.2d 411 (Sup. Ct. 1961) Hannifin Corp. v. City of Berwyn, 1 Ill. 2d 28, 115 N.E.2d 315 (1953). For a discussion of other similar cases of this type, *see* Note, *Zoning: Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107, 108-15; Note, *Regional Development and the Courts*, 16 SYRACUSE L. REV. 600 (1965). These cases, whatever their rhetorical accoutrements, do not really make a case for considering *regional* needs. They consider only the direct effect on one parcel of land of development of other adjacent parcels.

Similarly, the few cases which allow nonresidents standing to challenge a municipality's zoning are based on the effect such zoning would have on adjacent nonmunicipal parcels. Roosevelt v. Beau Monde Co., 384 P.2d 96 (Colo. 1963); Hamelin v. Zoning Bd., 19 Conn. Supp. 445, 117 A.2d 86 (1955) (interesting in that of six nonresidents given standing, only one was adjacent landowner); Borough of Leonia v. Borough of Fort Lee, 56 N.J. Super. 135, 151 A.2d 540 (1959); Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954) (should not make "a fetish out of invisible municipal boundary lines," *id.* at 247, 104 A.2d at 446); Koppel v. City of Fairway, 189 Kan. 710, 371 P.2d 113 (1962).

The courts have rarely considered nonmunicipal land uses not contiguous to the zoning municipality. When they have done so, it has generally been to justify the municipality's *exclusion* of some type of land use from its borders. Valley View Village, Inc. v. Proffett, 221 F.2d 412 (6th Cir. 1955) (exclusion of all nonresidential uses justified on basis of municipal determination that surrounding region supplied sufficient nonresidential land for regional needs); Duffcon Concrete Prods., Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949) (exclusion of industry); Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958) (exclusion of apartments); *see also* Note, *Zoning: Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107, 115-17; Note, *Regional Development and the Courts*, 16 SYRACUSE L. REV. 600, 611 (1965); *see also* Wrigley Properties, Inc. v. City of Ladue, 369 S.W.2d 397 (Mo. 1963).

The only cases thus far to invalidate an exclusionary ordinance on the grounds, *inter alia*, that it conflicts with regional needs, are from Pennsylvania. In National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965), the court invalidated a four acre minimum lot size restriction, stressing "the town's responsibility to those who do not yet live in the township but who are part, or may become part, of the population expansion of the suburbs." *Id.* at 532, 215 A.2d at 612. The court concluded that the township could not "stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live." *Id. Cf.* Bilbar Constr. Co. v. Board of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958); Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952). *See also* Note, *Regional Impact of Zoning: A Suggested Approach*, 114 U. PA. L. REV. 1251 (1966).

Because vacant land is an essential, nontransferable resource present in only some communities, this delegation cannot be justified on the same grounds as are other grants of local power. Action by communities which control large amounts of vacant land seriously affects unrepresented nonresidents. Suburban exclusionary practices further undermine the state's interest in delegation, since individual mobility is thereby greatly curtailed and change in land use patterns is stifled. Any change in policy which might be expected to flow from the suburb's internal political process is hampered by the exclusion from the community, through lot size zoning regulations, of citizens who would be likely to work for change. In such situations, where the political structure is immune from internal challenge, courts have even more reason to force a restructuring of the political system.[114] Since the state cannot here assert a compelling interest in delegation, and since individual voting rights are seriously compromised, acts delegating control over vacant land to local political units should be held unconstitutional.

Were this truly a case involving denial or dilution of the franchise, the court could extend the franchise to interested parties. However, the appropriate remedies here are either to provide outsiders access to suburban communities or to enlarge the constituency by drawing new jurisdictional lines. Neither of these remedies could appropriately be ordered by a court. In declaring the present system unconstitutional,

The Pennsylvania Supreme Court followed its *National Land* decision in two recent cases. In *In re* Appeal of Girsh, No. 164 (Pa. Sup. Ct., Feb. 13, 1970), the court invalidated a local ordinance excluding all apartment houses from the town. In *In re* Appeal of Kit-Mar Builders, Inc., No. 218 (Pa. Sup. Ct., Feb. 24, 1970), the court invalidated a two acre lot-minimum as unreasonable, declaring that "an exclusionary purpose or result is not acceptable in Pennsylvania" (at 2). In both cases the court emphasized the property owner's right to use his property as he sees fit, absent sufficient reason for government intervention. To the towns' contention in both cases that population growth would impose increasing costs for municipal services, the court responded that a town may not act to limit population growth and must assume the responsibility for providing new residents with adequate services. Preservation of aesthetic character and fiscal prudence were both rejected as justifications for exclusionary ordinances. The applicability of these decisions to other jurisdictions, given the unusual weight accorded by Pennsylvania courts to property owner interests, is problematic.

114. The Court is faced with

> legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation. . . .

United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). *Cf.* Baker v. Carr, 369 U.S. 186 (1962). *See also* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub. nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

> [T]he poor and . . . racial minorities . . . are not always assured of a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure . . . may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority.

269 F. Supp. at 507-08.

therefore, the court should explain the principles upon which it bases its decision, and enjoin enforcement of existing ordinances after a certain date, thus leaving final resolution of the problem to the legislature.

A number of alternatives might emerge:

1. A system whereby a nonresident could affirm his interest in municipal land-use decisions, thereby acquiring the right to vote in zoning board elections. If the board is, as is often the case, the local general purpose legislative body, such a solution would eliminate the viability of local government. While constitutionally acceptable, it would be administratively unfeasible and inadvisable.

2. Local decision making with metropolitan or regional review. The reviewing agency would be chosen in part by those now unrepresented in the system. Such an agency would judge municipal action in light of regional needs. This solution is politically feasible. It is unlikely to result in substantial change, however, because opportunities for administrative delay are great and because suburbanites are still protected from direct political competition by an administrative buffer.

3. A more drastic alternative would be to remove local zoning powers entirely, vesting all powers of regulation in branches of a state-directed, state-appointed or regionally elected agency. By removing the power of delay from suburban administrators, this solution might result in substantial change, but at the cost of eliminating all local decision making.

4. Finally, the state statute might simultaneously retain local control but also set forth state-wide standards.[115] In Massachusetts, for example, towns are required to dedicate a quota of land and housing units to moderate and low cost housing.[116] This solution is the simplest, leaving substantial power at the local level. Like the metropolitan review solution, however, implementation is administrative rather than political.

What would actually emerge from the legislature is, of course, uncertain. While there is a presumption that land use decisions would be different if "democratically" arrived at, there is no guarantee. State legislatures are increasingly influenced by suburban constituencies and may therefore tend to reinstitute the *status quo*. A voice in the decision making process will serve to raise issues and to permit per-

115. *Cf.* Note, *Large Lot Zoning*, 78 YALE L.J. 1418, 1437-41 (1969).
116. MASS. GEN. LAWS 40B § 2023 (1932), *as amended* (1969).

suasion; it will not necessarily alter outcomes so long as economic separatism is a politically legitimate goal.[117]

117. According to the Pennsylvania Supreme Court, it "decided in *National Land* that a scheme of zoning that has an exclusionary purpose or result is not acceptable in Pennsylvania." *In re* Appeal of Kit-Mar Builders, Inc., No. 218, at 2 (Sup. Ct. Pa., Feb. 24, 1970). *See* National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). The reasoning of these cases, however, is that governmental regulation "may not prevent permanently the reasonable use of private property. . . ." *In re* Appeal of Kit-Mar Builders, Inc., at 5. The Pennsylvania Court's reputation for conservative jurisprudence and concern with property rights had led most persons active in this area to doubt the applicability of these decisions in other jurisdictions.
Recently, however, the Ninth Circuit declared:

> Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing, it may well be, as matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups.

Southern Alameda Spanish Speaking Organization v. City of Union City, No. 25,195 at 8-9 (9th Cir. Mar. 16, 1970).