PRICE-EXCLUSIONARY ZONING: A SOCIAL ANALYSIS

THOMAS F. BERGIN

I. INTRODUCTION

During recent years, the law reviews have been giving much attention to the question whether suburban communities should be permitted to use land-use restraints to maintain their populations at preferred levels. Scarcely a major review has failed to contribute its piece, and a few have contributed two or more. The recency of this attention is hardly remarkable, for the flight of the middle-income and upper-income families from the cities to the suburbs which began at some point to prompt protective moves by the communities to which they were fleeing. Once those moves were taken, it was simply a matter of time before the conflicts between the suburban "ins" and the urban "outs" would move onto the traditional American battleground — the courtroom. Once it

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1. Price-Exclusionary Zoning: A Social Analysis

By Thomas F. Bergin

This article discusses the question of whether suburban communities should be permitted to use land-use restraints to maintain their populations at preferred levels. Scarcely a major review has failed to contribute its piece, and a few have contributed two or more. The recency of this attention is hardly remarkable, for the flight of the middle-income and upper-income families from the cities to the suburbs which began at some point to prompt protective moves by the communities to which they were fleeing. Once those moves were taken, it was simply a matter of time before the conflicts between the suburban "ins" and the urban "outs" would move onto the traditional American battleground — the courtroom.

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2. The author wishes to express his thanks to Mr. David Barton for his help with the economic analysis in this article. If errors in the economics still remain, it is not because Mr. Barton failed to point them out; it is only because the author stupidly ignored his advice.


4. Of the pieces listed in note 1 supra, three were contributed by The Yale Law Journal, two by Stanford Law Review, and, if symposia count for more than one, five by Syracuse Law Review. The Syracuse Law Review symposium also includes an excellent bibliography.
arrived there, it would inevitably become live copy for the reviewers.

Nor should it be viewed as particularly remarkable that the writers have been almost unanimously deploring the protective measures adopted by communities in the path of the urban steamroller. The mood in American law schools these past decades has been extraordinarily reformative, and it has not been strange that the writers have viewed the protective measures as selfish and socially irresponsible. The flight itself had been bad enough, for it had not only weakened the cities economically, but also converted some of them into racial ghettos. But it was outrageous insult, added to already great injury, when the white suburbanites proceeded to lock the doors to their lily-white havens by enacting land-use ordinances which seemed to have the plain effect of pricing suburban living far beyond the reach of the city poor. No wonder the writers quickly branded large-lot zoning ordinances and other price-increasing land-use controls as "snob" or "Ivy League" zoning; no wonder they quickly labelled the enacting communities "white enclaves," "sanctuaries for the rich," and "gilded ghettos." If the prose got a bit choleric at times, at least it was more forthright than that good gray law review style which had writers of an earlier generation sounding as though they had been programmed.

But if there has been nothing remarkable about the unanimity with which the writers have been deploring the selfishness of suburban political majorities, it is at least close to remarkable that they have also been strongly urging, with barely a voice raised in dissent, that price-increasing land-use ordinances either be overridden by the courts or be barred by state legislatures. This is not to suggest that powerful appeal dismissed, 44 U.S. 919 (1953); Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 395 (1965); Board of County Supervisors of Fairfax County v. Carper, 200 Va. 653, 107 S.E2d 390 (1959). Although writers have been strongly urging that price-increasing land-use regulations, though non-discriminatory on their face, may deny equal protection to racial minorities and indigents, the United States Supreme Court has yet to accept that position clearly even respecting racial minorities. See note 31 infra.

4 See note 5 infra. The ascription of selfishness and evilness of purpose to suburbanites is common in the law review pieces. The sense one gets, on reading the pieces, is that the striking down of "snob" zoning laws would be as much justified by the injury it would do to the rich as by the benefit it would produce for the poor. One of the chief points to be made in this article is that the striking down of price-increasing land-use regulations will likely, unless accompanied by affirmative action to enable low-income persons to buy into suburbia, produce more benefits for the non-poor than the poor.

5 Such debate as one finds in the law review pieces is not about whether price-increasing land-use ordinances should be struck down, but rather about who is to do the striking down. The only dissent which the author has found to the proposition that the ordinances should be struck down appears in Commentary, 23 ALA. L. Rev. 187 (1970). Implied dissents may, of course, be found in pieces supporting aesthetic zoning, open-space zoning, and regulations to protect the environment.
ments cannot be made for that position; it is only to suggest that powerful arguments can be made the other way. One hesitates to suggest that essays which claim, however unjustifiably, to speak on behalf of the poor enjoy a special immunity from academic criticism; but more plausible explanations of the absence of dissenting arguments on this issue are difficult to find. If this explanation is, in fact, the correct one, neither the rich nor the poor may take much comfort from it.

It will, of course, immediately occur to readers of this essay that there is a significant difference between judicial overriding of local land-use choices and proscription of them by state legislation. Since local governments derive their power to regulate land-use from state enabling legislation, it is clear that state legislatures can take that power from them or limit its use. Courts, on the other hand, can override local land-use choices only by interpreting state enabling statutes or, in proper cases, by determining that the enabling statutes or ordinances enacted pursuant to them are unconstitutional. Whether there are, in fact, sound constitutional grounds upon which courts may override local land-use choices is, of course, a matter of much interest to lawyers. It is not surprising, therefore, that a number of the recent essays have sought to devise constitutional theories to support judicial overriding of price-increasing land-use regulations. It is probably fair to say that the most persuasive theory thus far advanced is that land-use ordinances which operate to impair substantially the upward social mobility of poor persons may, if not justified by compelling public necessity, be properly regarded as violating equal protection guarantees. According to this theory, land-use ordinances which, though ostensibly directed at traditional police-power goals, result in de facto discrimination against the poor ought to be as constitutionally "suspect" as ordinances which result in de facto discrimination against racial and religious minorities. Hence, they should be subject to the same "active" equal protection review.6

An alternative constitutional theory, yet to be carefully explored in the literature, is that local land owners may be thought to be speak-

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6 The term "de facto discrimination" as used in the paragraph in the text, is a bit awkward because it ordinarily connotes discrimination which is not compelled or legitimized by law. It is used in this paragraph to denote exclusion of racial or economic groups brought about by laws which are non-discriminatory on their face. The term "de facto classification," as used in the following paragraph in the text, is similarly used. For pieces recommending an equal-protection approach to price-increasing ordinances, see, e.g., Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 STAN. L. REV. 767 (1969); Note, Exclusionary Zoning and Equal Protection, 84 HARV. L. REV. 1645 (1971); Note, The Equal Protection Clause and Exclusionary Zoning after Valietera and Dandridge, 81 YALE L.J. 61 (1971).
ing not only for themselves but also for prospective bidders for their land when they assert that large-lot zoning ordinances and other profit-decreasing land-use regulations effect an uncompensated taking of their property. Under this theory, state and federal just compensation clauses are viewed as intended to restrain governmental interference with efficiency-maximizing private allocation of resources. If the courts can be persuaded that the injustice of an uncompensated taking lies in its potential misallocative effects, i.e., the denial to society as a whole of optimum use of its resources, injury to prospective buyers of land may be advanced as a ground upon which local land-use ordinances may be declared unconstitutional. Although this theory may have the merit of escaping the thorny issue whether de facto classification by economic status should be as constitutionally suspect as de facto classification by race or religion, it has the pronounced disadvantage of having to overcome some four decades of judicial presuming, at least in the federal courts, that non-discriminatory economic regulations are valid. 7

Although the contriving of legal theories under which land-use ordinances may be struck down by courts is a perfectly legitimate exercise for legal academics, there are, of course, risks associated with the exercise. Not the least of those risks is the possibility that discovery of a satisfactory theory will induce some courts to believe that social benefits will necessarily flow from its use. This is hardly to suggest that the contriving of legal theory should be deferred until social criteria for its invocation are found; it is only to suggest that sound legal theory, if based on a misperception of social reality, can produce more harm than good.

Once the focus is shifted from the question of who can lawfully override local land-use choices to the question whether such overriding makes social sense, it makes little difference whether the overriding authority is a court or a state legislature. That issue may become important later, but the only issue that matters now is whether the overriding is wise. 8 As readers of this essay have already likely inferred, this

7 Compare Ferguson v. Skrupa, 372 U.S. 726 (1963) with Griswold v. Connecticut, 381 U.S. 479 (1965). The question whether an economic “regulation” may effect a “taking” of property has been receiving much recent attention in the law reviews. In the author’s view, the most intellectually satisfying analysis appears in Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165 (1967). Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964), and Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971), are also useful. Although it is difficult to contrive a textual constitutional argument that just compensation clauses are intended to restrain economically inefficient use of resources by government, it is plain that they will tend to have that effect because even governments are sometimes restrained by price.

8 Not in the sense of embodying eternal truth, but rather in the sense of reflecting
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The writer will take the position that the social case for overriding price-increasing land-use ordinances has not yet been made. More than that, he will argue that the overriding of such ordinances, either by the courts in ex post facto review or by the state legislatures' reducing local land-use control, will not only seriously imperil desirable local autonomy, but also accomplish very little of benefit for the urban poor.

A final word of introduction: It is worth calling the reader's attention immediately to the fact that this essay will be directed solely against the use of negative restraints upon local land-use choices, i.e., restraints which operate to strike down or bar price-increasing land-use regulations. It is the writer's view that the case for persuading, or even perhaps compelling, suburban communities to accept their fair share of the social cost of poverty by taking positive steps to encourage entry of poor persons is a far stronger one. Although this will seem paradoxical at this point, the reader is invited to withhold judgment until the arguments are made.

II. EFFECT OF OVERRIDING ON LOCAL DECISIONAL AUTONOMY

Writers who have been proposing that price-increasing land-use controls should be overridden by the courts or state legislatures have not been unaware of the threat which such overriding would pose to local decisional autonomy. Recognizing that a substantial amount of local control of local affairs has always been viewed in this country as desirable, and recognizing further that "participational politics" has in fact become something of a battle cry of the urban poor, they have devoted substantial intellectual effort to demonstrating that price-increasing land-use ordinances can be generically distinguished from other, and presumably more desirable, local enactments. The aim of this effort has been to persuade courts and state legislatures that overriding some local choices can be principled, i.e., based on reasons which cannot be advanced to justify more far-reaching assaults upon local government.

Two interesting theme-ideas have come out of this effort. One idea, which we shall be calling the efficiency theme-idea, is that suburban political majorities, if composed of homeowners, will naturally tend to zone undeveloped land owned by others into suboptimum or inefficient use. The reason why this occurs is that the homeowners are simply not restrained by price. Not only do they not lose money when informed collective preference. The thesis to be developed in this article is that the consequences which would follow from overriding or barring of price-increasing local ordinances would not be preferred by most of the writers who have been arguing precisely that action.

This theme-idea is thoroughly developed in Note, Large Lot Zoning, 78 YALE L.J. 1418 (1969).
they fix, for example, high-acreage zoning minima; they actually gain money, for the fixing of the high-acreage minima will, up to a point, increase the market values of their homes. Since social benefits cannot be said to flow from inefficient use of economic resources, and since inefficiency-producing land-use ordinances represent a small and identifiable subset of local collective choices, the overriding of inefficient land-use regulations will not severely undermine local decisional autonomy.

The second theme-idea, which we shall be calling the social mobility theme-idea, posits that local ordinances which price upwards resources essential for the upward social mobility of poor persons ought to be viewed as invidious as ordinances which operate to deny to members of racial and religious minority groups access to public facilities and services. Since ordinances which impair substantially the upward social mobility of poor persons may properly be regarded as denying poor persons the equal protection of the laws, they should be struck down by the courts or proscribed by the state legislatures. Although the mere economic efficiency of such ordinances should not protect them from attack, communities should be permitted to enact ordinances which, though hurtful to the poor, are intended to advance a public purpose important enough to outweigh the harm caused to the poor. Since the proscribing of official acts which violate equal protection guarantees can hardly be said to imperil legitimate local autonomy, the social mobility theme-idea cannot be viewed as a major assault upon local government.

A. The Efficiency Theme-Idea

Now that we have a rough idea of what the two theme-ideas are, we may examine more carefully the hypothesis that economic efficiency criteria can be used to select for overriding a small enough subset of local collective choices to leave local decisional autonomy relatively unimpaired. For our purposes in this discussion, we can simply assume that all price-increasing suburban ordinances will hurt the urban poor. Later on we will question that assumption, but it does not hurt us here.

To put the efficiency theme-idea in slightly more technical language, it asserts that in any community in which homeowners are in the majority and owners of undeveloped land in the minority, the majority will tend to zone the undeveloped land in such a way that marginal gains will be less than marginal losses. If a change in a com-

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10 This theme-idea is developed in the pieces listed in note 6 supra.
11 The word "marginal," as used by economists, commonly means "additional" or
munity, e.g., the adoption of a zoning law, produces marginal losses in excess of marginal gains, we may characterize it as inefficient. By that we simply mean that it would be at least conceptually possible for the losers to pay the gainers enough to persuade them to forego some of their gain. Although it is often impossible to say, after a change has occurred, whether the losers could pay the gainers enough to induce them to forego some of their gain, we can, in the case of land-use regulations, get a pretty good reading of the wealth changes effected by comparing property values before and after adoption of the regulations. Should it be the case that a regulation reduced aggregate property values in the community, we could be quite certain that the losers lost more than the gainers gained. In making the comparison, we should have to take care to look at marginal changes in values rather than gross changes, for inefficiencies may be hidden where gross gains exceed gross losses; but that is a matter we can look at more carefully when we get to a concrete example later on.

If this efficiency theme-idea is not yet clear, it will be made so momentarily; but it may be useful first to dispose of an objection to the theme-idea which may already be in some readers' minds. That objection may be that we are heading towards a raw utilitarian analysis of local political decision-making. If we are to conclude that regulations are "bad" when marginal gains are lower than marginal losses, do we not also conclude that regulations are "good" when marginal gains ex-
ceed marginal losses? If we do, are we not accepting the ugly idea that a political majority may impose losses on others whenever the majority gains more than the minority loses? The answer, of course, is that we are taking no such position; for the moral assertion that the majority should ordinarily not inflict large losses to produce small gains hardly entails the assertion that the majority may always morally inflict small losses to produce large gains.

As a matter of fact, we do not even mean to say that it is always immoral for a majority to inflict losses in excess of its own gains, for that would imply that a majority composed of slaves could not morally overthrow their masters if the gains to the slaves were smaller than the losses suffered by the masters.

Even if we were inclined to test local enactments by raw utilitarian criteria, we should have ample grounds for distrusting our measuring techniques because it is plain that wealth changes effected by political majoritarian acts do not necessarily reflect accurately change in human satisfaction. Thus, a political change which produced a marginal net decrease in property values might very well have produced a marginal net gain in aggregate subjective satisfaction. The only reason why we adopt an economic efficiency approach to local enactments here is that we are assuming that poor persons will be in the loser group. In sum, the reader is invited to give his assent only to the proposition that economically inefficient ordinances which hurt the poor are to be selected for overriding.

Now, to make the efficiency theme-idea unassailably clear, we will use a concrete example. We assume the existence of an imaginary suburban community consisting of 20 farmers who own developable tracts of land and 100 homeowners who own and occupy single-family residences on one-acre lots. The homeowners are very happy with the existing state of affairs in the community. Property taxes are low; the streets are relatively free of traffic; the schools are good; and the recreational facilities are superb and uncrowded. Moreover, it so happens that all of the homeowners’ houses look out upon adjacent farm land. This

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18 If losers were compensated to their own satisfaction, i.e., up to the point where they would voluntarily have accepted the change, we should be able to say that aggregate satisfaction, as the losers and gainers judged it, moved upwards unambiguously, but we should not be able to say that the dollar values of the compensation received or the gains to the majority precisely reflected changes in the subjective satisfactions of all the parties. Having observed A voluntarily trading with B, we may say, assuming each knew what he was doing, that each party moved to a preferred position, but since we cannot crawl inside A’s and B’s minds, we cannot tell how much satisfaction each got from the trade. When losers are not compensated, as is usually the case when a law is enacted, we cannot even say with certainty that a net gain in aggregate satisfaction has resulted.
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gives to each of the homeowners a glorious sense of spaciousness, a feeling that he owns a large estate. Unfortunately for the homeowners, this state of affairs cannot long last, for the population now threatens to increase at a ferocious rate. In a word, the time has come for the homeowners to teach the farmers something about the democratic process. They are about to adopt a zoning law.

To make our arithmetic easy we assume our community is of minuscule size. Its total land area is 400 acres, 100 of which are owned and occupied by the homeowners and 300 of which are in undeveloped farm land. It happens to be the case that farmers find it most profitable to sell their land in one-acre units to purchasers who propose to build single-family residences. The current market price for a one-acre parcel is $5,000.

A town meeting is called, and before the farmers have a chance to blink their eyes the homeowners have adopted a zoning ordinance which not only confines the use of the undeveloped land to agricultural or single-family residence use, but also fixes a five-acre minimum lot size for residential use. The farmers are absolutely outraged by the action of the homeowners. It is clear they will take the matter to court on the theory that the ordinance is palpably beyond the reach of the police power. Failing that, they will argue that it effects an uncompensated taking of their property. But there are some troublesome figures they will have to deal with, for it is unmistakable that the ordinance has increased the aggregate market value of the homeowners' property more than it has decreased the aggregate market value of the farmers' property. What has happened is that each of the homeowners' residences has moved up in market value by $2,000, making an aggregate increase of $200,000. Under the new zoning law, five-acre parcels will sell for $22,500, i.e., at an average price of $4,500 per acre. Thus, the farmers' loss is $500 per acre. Their aggregate loss is $150,000. The ordinance has obviously produced an efficiency gain of $50,000. It will take a lot of doing to persuade a court that due process requires communities to forego such patent increases in the general welfare.

As usually proves to be the case, however, the farmers in this community are not exactly naive when it comes to arithmetic. Going back over the figures, it occurs to them to wonder what changes in market values would have occurred had a four-acre minimum been picked instead of a five-acre one. Consulting some knowledgeable appraisers, they discover that four-acre parcels would sell for $19,000 — only $3,500 less than the $22,500 price five-acre parcels will bring. Why should this be? The only possible answer is that prospective buyers of five-acre par-

cels simply do not value that fifth acre—the *marginal* acre—as much as they value the fourth. This is just an example of operation of that old familiar law of economics and common sense which declares that the more one has of a particular good, land or what have you, the less one values yet another unit of that good.\(^\text{14}\) In any event, it is clear that if land were saleable in four-acre parcels, *i.e.*, at an average price of $4,750 per acre, the farmers’ total loss would be only $75,000. The addition of the fifth acre to the minimum literally doubled the farmers’ loss.

But how did addition of the fifth acre affect the homeowners? Again, the knowledgeable appraisers give us our answer. It increased the market value of each homeowner’s property by exactly $100. The aggregate increase was, therefore, $10,000. The explanation for this is precisely the same as the explanation of the whopping loss caused to the farmers by addition of the fifth acre. If we can think of the zoning minimum as having moved up incrementally from, say, one acre to two acres to three acres, and so on, we can see that each incremental increase gave to the homeowners *more of the same good*—protection of their well-being. Although they had not reached the point of surfeit at the four-acre level, they simply did not value very high the addition of that fifth unit of protection—the *marginal* unit. What is very plain to see is that the homeowners, to get $10,000 of additional protection, inflicted a marginal loss of $75,000 on the farmers. Moreover, it is quite possible, though we will not go through the figures to prove it, that the move from the three-acre level to the four-acre level also produced an efficiency loss.\(^\text{16}\)

For our purposes, it is enough to observe that adoption

\(^{14}\) It is somewhat more complicated than that, for the zoning law introduced an artificial constraint by barring sale of lots smaller than five acres. The only case in which adoption of, say, a five-acre minimum would not result in a decrease in the *average per-acre* price would be the unlikely one in which everyone happened to want to buy five-acre lots or larger. Once we make the assumption that some people would prefer to buy lots smaller than five acres, we can expect that establishment of a five-acre minimum will reduce the average per-acre price. The proof of this is not complicated, but it will perhaps suffice for our purposes to offer an intuitive “proof” in the form of a question to the reader. What would happen to the average per-ounce price of whisky if a law were passed requiring whisky to be sold only in five-gallon drums? The *average per-ounce* price would drop because to buy a one-ounce shot, one would have to buy 639 extras which one would likely not value as much as the first.

\(^{16}\) By constructing out of wholecloth Aggregate Marginal Gain figures and Aggregate Marginal Loss figures consistent with our model, we can see where trading between the farmers and homeowners would have gone had trading been possible:

<table>
<thead>
<tr>
<th>Zoning Minimum</th>
<th>Aggregate Marginal Gain to Homeowners</th>
<th>Aggregate Marginal Loss to Farmers</th>
</tr>
</thead>
<tbody>
<tr>
<td>One-acre</td>
<td>$100,000</td>
<td>Zero</td>
</tr>
<tr>
<td>Two-acre</td>
<td>45,000</td>
<td>7,500</td>
</tr>
<tr>
<td>Three-acre</td>
<td>30,000</td>
<td>22,500</td>
</tr>
<tr>
<td>Four-acre</td>
<td>15,000</td>
<td>45,000</td>
</tr>
<tr>
<td>Five-acre</td>
<td>10,000</td>
<td>75,000</td>
</tr>
</tbody>
</table>
of the five-acre minimum produced an efficiency loss of $65,000. The farmers' case for overriding the ordinance now looks a good deal stronger.

We have yet to explain, of course, the economic and political dynamics which brought about this absurd result. Part of the explanation is very simple. When the homeowners moved from each minimum-acreage level to the next higher one, they were not restrained by price. Had they been required to compensate the farmers for the losses they imposed upon them, it is clear they would not have gone past the four-acre level. In fact, they would have stopped at the point where the marginal gain to them was just about equal to the amount they would have had to pay to get it. But since their gains were costless, they went merrily on their way. Why did they stop at the five-acre level? It is hard to say. Possibly because a lawyer in their group warned them that a larger minimum would tax due process to the breaking point.

But there is a matter yet to be explained. Since the farmers must have known that the move from the four-acre level to the five-acre level would hurt them more than it would help the homeowners, why didn't the farmers offer the homeowners enough money to induce them to stay at the four-acre level? Since the farmers lost $75,000 by the move and the homeowners gained only $10,000, there was obviously plenty of room for mutually advantageous trade. As a matter of fact, the farmers might very well have won the day by paying substantially less than $10,000. Assuming that all the farmers opposed the five-acre minimum and all the homeowners supported it, it would have taken a shift of only 41 homeowner-votes to defeat it. Competition among the homeowners to sell their votes would surely have kept the per-vote price within, say, the $100-to-$150 range.

Up to and including the three-acre minimum, the farmers could not have paid enough to compensate all the homeowners enough to persuade them to refrain. But they would have been able to pay all the homeowners enough to dissuade them from going to the four-acre level, for the shift from three acres to four acres caused a marginal loss to the farmers of $45,000 while giving the homeowners a marginal gain of only $15,000. Both sides would have regarded themselves as better off if the farmers had paid the homeowners, say, $30,000 to stay at the three-acre level.

16 By consulting the chart in note 15 supra, the reader will see that had the homeowners had to compensate all the farmers for the marginal losses imposed upon them, they would have stopped at the three-acre level, because from that point on the homeowners would have had to pay out more in compensation than they would have gotten in gains. The allocative result—i.e., the fixing of the minimum at three acres—would have been the same (assuming all parties had to be paid for their losses) no matter whether the farmers had to pay the homeowners to get them to desist, or the homeowners had to pay the farmers for the right to increase the minimum. (We are assuming away fractional acreage minima.) For a superb analysis of this important point, see Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960).

17 If we assume away all inhibitions to trade, it seems likely that a payment of $4,100 to the 41 voters would not have been enough, because the 59 non-selling homeowners would
Here again, we must guess at the answer; but it is not difficult to identify factors which likely inhibited the striking of a bargain. In the first place, many people feel uncomfortable about buying and selling political votes. They simply regard it as morally wrong. It violates the rules of the game. In the second place, the farmers might well have simply miscalculated the preparedness of the homeowners to go as far as they did. It is also possible that if the zoning minimum actually did move up incrementally, some of the farmers might have thought that the best thing to do was to give the homeowners enough rope to hang themselves. Why pay to keep them at the four-acre level when there is a good chance, if they go to five, a court will cut them back to two?

Even if we assume away these factors, it is quite possible a bargain would not have been struck in any event. The fact is that each of the farmers might rationally have thought that his fellow farmers would do the buying. Why volunteer to chip in on the bid when there is a good chance of getting the benefit of the deal without paying a nickel? This tendency to "free-ride" other peoples' purchases does not exist when the good being purchased is a private good, i.e., a good the benefits of which can be denied to non-payers. But when the good being purchased is of the sort that non-payers can enjoy, a so-called public good, this tendency can actually thwart the striking of bargains which would be of advantage to everyone. Since four-acre zoning would be viewed by the farmers, at least as compared to five-acre zoning, as a public good, there is a good chance that the efforts of the individual farmers to jockey themselves into non-paying positions actually prevented them from making an advantageous deal. It hardly needs men-

be able to bid up to $5,900 to keep the treasonous 41 homeowners on their side. Once we get rid of the assumption that the farmers must pay all the homeowners to get them to desist, we find untrustworthy our conclusion, in notes 15 and 16 supra, that the zoning minimum, if produced by trade, would rest at three acres. It is probable that it would stop at two acres, for the farmers would be able to pay as much as $22,500 to keep it there. That amount would more than compensate 41 homeowners for their "loss" in not going to three acres, and the 59 other homeowners could bid no more than $17,700 to keep their 41 homeowner-friends in line.

The term "private good" is not interchangeable with the term "private property," for one may have private property, in the lawyer's sense of the term, in a good with some "public good" characteristics. A, for example, may have legal title to a mountain, but he cannot, except at a prohibitive cost, bar people from taking pleasure from looking at it. Nor does the term "private good" necessarily imply ownership by a private person or firm, for government owns thousands and thousands of private goods, e.g., typewriters, desks, buildings, plots of land, etc.

The classic example of a "public good" is, of course, the lighthouse. Once the light is turned on, all boats can use it whether they pay or not. National defense is also a public good, for the protection afforded by the army and navy cannot be denied to non-payers. Although there are good reasons for having a volunteer army, the pay of the volunteers will likely be on the low side if we wait for volunteers to pay the wages, buy the tanks, and so on.
tioning, of course, that bargaining between groups, as distinguished from bargaining between individuals, can be expensive even if free-rider effects are assumed away.\textsuperscript{20} Although the figures in our model do not suggest that bargaining costs would have consumed the potential benefits which would have accrued to both sides if a bargain had been struck, there can be no doubt that bargaining costs can have precisely that effect in many situations.

To summarize briefly the essential points of the efficiency theme-idea, there is a pronounced tendency of suburban homeowner-majorities to treat developable land \textit{owned by others} as something of a free good. If it is to their advantage to zone it into low-value use,\textsuperscript{21} the price system will not automatically restrain them. This comes about not only because people regard it as wrong to buy and sell votes, but also because prospective bidders in the loser group, where the good to be purchased is a public good, will try to free-ride. Bargaining costs may also thwart the striking of mutually advantageous trade. The chief argument to be made from all of this is that it can hardly be viewed as a massive assault on local decisional autonomy to propose that courts or state legislatures intervene in local decision-making in that narrow range of cases where irrational and inefficient choices are the inevitable product of forces beyond the local communities' control.

\textbf{B. The Efficiency Theme-Idea Rebutted}

The contentions to be made in rebuttal to the efficiency theme-idea are these: (a) the theme-idea does not carve out a subset of local collective choices which may safely be overridden without impairing local decisional autonomy; it merely identifies a tendency towards inefficiency which inheres in almost all majoritarian political decision-making; (b) since there are plainly more inhibitions to efficient decision-making operating in large communities than there are in small ones, there is little reason to suppose that state-level decisions will be more efficient than local decisions; (c) even if the state legislatures or the courts were to adopt the firm rule that local enactments must, to be valid, be efficient, it would be impossible in the vast majority of cases to determine whether a particular local enactment was, or was not, efficient. More-

\textsuperscript{20} "Bargaining costs" or "transactions costs" as they are more commonly termed, simply refer to costs incurred in negotiating a deal, performing it, enforcing it, and so on. A simple example might be this. $A$ has a book which he would willingly sell for $9.00$ net. $B$ would pay no more than $10.00$ for it. If it costs more than $1.00$ for $A$ and $B$ to get in touch with one another, the deal will not be made. A more significant example of bargaining costs is the costs associated with sales of real property.

\textsuperscript{21} The term "low-value use" here means a use which the free market values less than an alternative use.
over, the broad exposure of local enactments to ex post facto efficiency appraisal would not only encourage a flood of costly attacks upon local enactments, but also substantially discourage desirable reliance on the validity of local law. In sum, the net effect of efficiency appraising of local enactments might well be to reduce efficiency.

Contention (a) scarcely needs explanation or elaboration, for the example of the farmers and the homeowners nicely illustrates the only point that needs making. That point is simply that political majorities if unrestrained by price, will tend to move past the point where marginal gain to the majority is equal to marginal social cost.\textsuperscript{22} The universality of this tendency is so well known that it hardly requires illustration. Change the homeowners in the model into golfers and the farmers into tennis players, and we shall not be stunned to discover that “too much” money is being spent on the public golf courses and “too little” on the public tennis courts. Change the golfers into parents of school-age children and the tennis players into single persons and childless couples, and we will likely discover that “too much” money is being spent on the public schools. Reverse the positions, and we now expect to find “too little” money being spent on the public schools. Make the majority car drivers and the minority pedestrians, and we shall likely find that “too much” money is being spent on the streets and “too little” on the sidewalks.

The “too much” and “too little” in our examples refer, of course, to divergences from efficient allocation. Majorities get “too much” because they can tax the minority to pay part of the bill; minorities get “too little” because the money they would have liked to have spent for their own preferred consumption is used to buy things the majorities want. It is quite as simple as that. What is plain is that these divergences do not occur only in a narrow range of cases. There is a tendency for them to occur in every case where the cost of benefits to the majority can be wholly or partly imposed upon the minority. Since it is difficult to think of a single majority choice which would not permit the thrusting of some costs upon the minority, it is simply preposterous to propose that efficiency criteria can be used to select, for overriding, a small enough subset of local choices to leave local decisional autonomy unimpaired.

\textsuperscript{22} See notes 11, 15, 16 & 17 \textit{supra} and note 29 \textit{infra} and accompanying text. “Social cost” refers to the total cost which society pays for the use of economic goods. In our previous discussion of the farmer-homeowner model, we assumed that the reduction in the market value of the farmers’ property represented the social cost of the benefits which the homeowners got. Later on we will question whether visible market-value changes accurately reflect all dollar valuations of resource use.
Although one could end the rebuttal with that, it is worth noting that the efficiency theme-idea could more effectively be used as an argument against state-level decision-making. Contention (b) may be read to assert that, given the tendency of political majorities to overreach by putting economic goods to marginally inefficient use, such overreaching is likely to be less egregious in small communities than in large ones.\textsuperscript{23}

Consider once again the factors which were assumed to have played a role in keeping the farmers and the homeowners in the model from striking an efficiency-producing bargain. The important ones were reluctance to buy and sell votes, miscalculation on the part of the farmers of the homeowners' intentions, the free-rider problem, and possible high bargaining costs. Another factor, not mentioned earlier, must have been either ignorance on the part of the homeowners of the harm they were doing to the farmers or insensitivity to that harm.

The point to be made here is that all of the factors listed are less likely to inhibit efficient decision-making in small communities than in large ones. To take first the reluctance to buy and sell votes, it must be said, sadly or gladly, that it is highly unlikely the farmers in the model would have really sat upon their hands as the homeowners merrily pushed the zoning minimum up to five acres. This is not to suggest that the farmers would have pulled out their wallets in the voting hall; it is only to suggest that, given advance warning of the homeowners' intentions and a degree of awareness of the injury the five-acre minimum would do to them, the farmers would not likely have been reluctant to engage in some pre-vote negotiation with the homeowners to pull some of their votes around. The point is that in small communities opportunities for pre-vote dealing are very real. Since the cost of identifying voters in the opposition are relatively small, and since there are relatively few votes to turn around, the cost of \textit{refraining} from buying and selling votes — the cost of being moral, if you insist — is relatively high. Moreover since local-issue voting quite literally touches the voters "where they live," it is quite understandable that pre-vote deals on such important matters as zoning minima tend to be viewed simply as part of the political dialogue rather than as conspiracies against the

\textsuperscript{23} Much of the analysis that follows in the text regarding the efficiency of small communities will be based upon M. Olson, Jr., \textit{The Logic of Collective Action} (1965). Readers wishing to explore generally differences between private-market decision-making and political decision-making will find rewarding J. Buchanan and G. Tullock, \textit{The Calculus of Consent} (1962) and R. Dahl and C. Lindblom, \textit{Politics, Economics, and Welfare} (1953). By saying that much of the analysis that follows will be based upon Olson's \textit{The Logic of Collective Action}, the writer does not mean to imply that Olson would support the views to be presented.
public interest. To put the whole point very plainly, when the price of morality is high, less of it is "consumed."  

It is just about as absurd to suppose that the farmers in the model could have miscalculated the readiness of the homeowners to go to five-acre zoning. In small communities, dramatic decisions like the adopting of a five-acre zoning minimum are not sprung suddenly upon the people. They go through long periods of gestation during which informal and formal debate goes on. Public hearings are held; the local newspaper brims with articles and editorials about the forthcoming decision; protest meetings are held; radio campaigns for and against the proposals are waged; letters are written to the editor; the telephone circuits are overloaded with political debate. By the time the decision is ready to be put to vote, the issues involved have been so fully aired that surprise is simply impossible. By way of comparison, how many citizens are fully aware of the doings of their state legislature? How often does one vote directly on a state-level issue? How often does one travel to the state capital to attend legislative hearings on proposed state measures? The questions answer themselves.

But what about the free-rider problem and the problem of inter-group bargaining costs? Here again, it is plain that the smaller the bargaining groups the greater the likelihood that trade will in fact go on. It is well known that the free-rider problem is more significant in large groups than in small. To the extent that the problem is the result of ignorance about the willingness of others in the group to pay the full cost of a public good, it is obvious that such ignorance will be less in small groups than in large. Here again, cost plays an important role. The smaller the group, the more likely some of the prospective gainers will take it upon themselves to organize the group into an effective bidding aggregate. The reason, of course, is that organizational costs are less likely to exceed the prospective gains to the organizers. Once prospective gainers do take it upon themselves to organize the group, the likelihood of members remaining ignorant of the need for their contribution to the bid is lessened. It is also the case that social pressures to be loyal to the group are likely to be greater in small groups than in large ones. This comes about because contacts among group members are more likely to be direct and personal. Thus, the moral cost of being identified as a shirker moves upwards. It scarcely needs saying, of course, that bargaining costs, both within groups and

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24 Given our starting assumption that inefficient land-use regulations will hurt the urban poor, one comes close to saying that it would have been immoral for the farmers not to buy votes from the homeowners.

25 See note 23 supra.
between groups, are functionally related to the size of the bargaining groups. The smaller the groups, the lower the bargaining costs.

Even were we to assume that bargaining between the farmers and the homeowners in the model could not have gone on, there is reason to suppose that the homeowners would not actually have gone as far as they did. Political majorities in small communities are more likely than those in large ones to be sensitive to the harm they do to the political minorities. This comes about not only because it is more difficult to gore one's neighbor's ox than the ox of a stranger, but also because one is more likely to know in a small community that oxen are going to be gored. The reason, quite plainly, is that one will be told by the owners of the oxen. The more information one has about the harm one's vote will do to others, particularly if those others include one's neighbors, the greater will be the restraining influence of one's conscience. Moreover, since individual votes are more likely to affect the results in small-community decision-making processes than they are, say, in state-wide elections, the restraining influence of one's conscience is likely to be that much stronger.

The net of all these points made under contention (b) is that it is very likely that the results which occurred in the farmer-homeowner model would not have occurred in a real-world small community. To find some hint that this is true, one has merely to look around for small communities with five-acre-or-larger zoning minima. The fact is there are very few of them. What one may also discover, as one looks around, is that some proposals to shift local zoning control to the state level may well be grounded in the expectation that state-level decision-making will in fact be more inefficient than local decision-making. One thinks, for example, of proposals in seaboard states that the state legislatures zone the wetlands to prevent owners from filling and developing them. The reason commonly given is that the "local communities will not act." But if one suggests to proponents of state-level wetlands zoning that it might make sense to take by eminent domain conservation easements in the wetlands, the standard reply is that it would cost too much. So much for efficiency on the conservation front.

Contention (c) goes centrally to the question whether practical procedures exist for appraising the economic efficiency of local enactments. For our purposes here, we simply assume that a state legislature or, though surely less likely, a court has adopted a firm and clear rule that local enactments must, to be valid, be efficient. Contention (c) simply asserts that even if such procedures existed, the exposure of local enactments to ex post facto efficiency testing would cost so much
that adoption of the rule might very well result in less efficiency than more.

If we may return once again to our farmer-homeowner model, we may note one curious element in it which we neglected to analyze the first time around. That element is the fact that the farmers were able to get the figures showing a $65,000 efficiency loss by merely consulting some "knowledgeable appraisers." One could have gathered from the model that the measuring of aggregate gains and losses at the margin is one of those simple things that appraisers do all the time. Give an appraiser a hypothetical zoning ordinance, say, one fixing a four-acre minimum lot size, and by late afternoon the figures will be ready. Not just rough-and-ready gross figures either; marginal figures.

It requires, of course, hardly a moment's reflection to conclude that the knowledgeable appraisers in the model must have been absolute miracle men. Even for them to have been able to give a moderately useful estimate of the gross change in aggregate market values which a shift from no zoning to five-acre zoning would produce, they would have had to do an extraordinary amount of sleuthing. To get the starting aggregate market values, they would certainly have had to give the properties at least a cursory inspection. They would then have had to estimate through some kind of occult process how much the pre-zoning market values reflected expectations that a zoning law would, or would not be, adopted. On top of that, they would have had to be able to generate sufficiently accurate demand curves to predict within a useful range the new equilibrium prices that would follow upon adoption of five-acre zoning.26 In doing that, they would have had to separate the zoning impact from other influences operating in the market such as changes in the income and tastes of prospective bidders, changes in the zoning laws of other communities in the area, changes in the prices of other goods, and so on. In a word, they would have had to use techniques which, quite bluntly, have yet to be invented.

It is worth noting that even if the knowledgeable appraisers had been able to measure in advance the gross changes that a move from no zoning to five-acre zoning would produce, the zoning law would have, by hypothesis, passed efficiency testing; for the gross figures showed an efficiency gain of $50,000! In order to discover that hidden efficiency loss of $65,000, they would have had to use procedures known only to God and, of course, a few academic model builders.

26 "Equilibrium prices" are those which equate the quantity supplied with the quantity demanded.
That such procedures cannot be the stuff of judicial or legislative second-guessing of local enactments is obvious.

But let us make the preposterous assumption that appraisers can do what the appraisers in the model did. Can we now be sure that our proposed rule, that local ordinances must be efficient to be valid, will increase the efficiency of local decision-making? The answer, of course, is that we cannot because it is obvious that the procedures we should have to use to determine whether local enactments complied with the rule would, themselves, be extraordinarily costly. The costs of reviewing local enactments would not be confined simply to out-of-exchequer payments made to appraisers or to the review administrators; they would also include time-lag costs, i.e., the costs of opportunities foregone pending determination of the validity of enactments. Since, by hypothesis, persons would not be able safely to rely upon the validity of any local ordinance until it had passed efficiency testing, rational readjusting to ordinances would have to be delayed until the testing was complete. It takes no special insight to see that such delays might prove to be very costly indeed.

Query, though, whether a state legislature might not prescribe in advance objective standards which local ordinances would be required to meet in order to be valid? An example might be the fixing by the state legislature of an outer limit to zoning acreage minima, say, two acres. To permit a degree of flexibility, the state legislature might set up administrative procedures which local communities could use to show that higher minima would in fact be efficient. Communities making such a showing would be permitted to adopt the higher minima.27

The first thing we may note about the proposal is that if it rests exclusively on the notion that local enactments ought to be economically efficient, it may properly be regarded as unprincipled or ad hoc. Since there is no reason for supposing that local zoning choices are more inefficient than other local choices which contemplate the thrusting of costs on political minorities, why not fix standards for other local

27 A proposal similar to this one is contained in Note, Large Lot Zoning, 74 YALE L.J. 1418, 1438-41 (1969). The contention made there is that if a "zoning review board" were created with power to grant dispensations from the state-fixed zoning limit, the state legislature would be less hesitant to fix a low limit. The Note does not attempt to meet the objections, following in the text here, that the gains of review might be lower than the out-of-exchequer and time-lag costs, that efficiency measurements may often be impossible, and that small communities are more likely to be efficient than large ones. Nor does the Note, in this writer's view, justify the selection of only lot-size minima for state-level control. All of that notwithstanding, the Note is the most rigorous piece treating the subject of large-lot zoning in the literature.
choices? The reader is reminded at this point that we were examining the efficiency theme-idea to determine whether it intellectually isolates a small enough subset of local choices to leave local decisional autonomy relatively unthreatened. Unless we can find a ground other than economic efficiency on which to rest this proposal, we might as well face the fact that acceptance of it will entail our accepting, at least in principle, state-level supervision of much local decision-making.

A second point to make about the proposal is that there is little reason to suppose that local communities are in fact making egregiously inefficient zoning choices. Nor is there much reason to suppose state legislatures will make more efficient choices. Were a state legislature to pick a generously large lot-size minimum, it might well induce some local majorities to adopt larger minima than they would have adopted otherwise on the theory, perhaps, that “state policy” supports it. If it picked a small lot-size minimum, it would undoubtedly bar some communities from achieving more efficient resource use. This would likely be the case even were there administrative procedures through which to obtain an exception to the state-fixed minimum because, as we have seen, the costs of proving even gross efficiencies are likely to be high. Marginal efficiencies would in many cases not be measurable at all.

The net of all this is that the fixing by state legislatures of lot-size limits is difficult to justify on efficiency grounds. Putting aside the objection that selection of zoning laws for state-level restriction would be ad hoc, and hence, a threat to local decisional autonomy, it is extremely difficult to think of rational procedures which could be used to select the lot-size minimum to be fixed. Half-acre zoning may be inefficient in one community and ten-acre zoning may be efficient in another. One comes preciously close to saying that selections of a “right” lot-size standard would be just about impossible.

A final point to be made about the efficiency theme-idea is that it would necessarily be biased in favor of resource-use choices backed up by effective demand.28 If we may return one last time to the farmer-homeowner model, we may note that the inefficiency of the shift from four-acre to five-acre zoning was determined by measuring only the responses of prospective purchasers of lots and residences. Left out of the figures, simply because they were uncountable, were the unexpressed bids, the latent or ambient demand, of non-buyers.29 Non-

28 “Effective demand,” as the term is used here, means demand actually reflected in market bids.
29 “Latent demand” or “ambient demand” denotes demand which is not actually reflected in market bids. Bargaining costs, the free-rider problem, and uncertainty about
buyers might have included tourists who found the five-acre limit made the community a more attractive place to drive through on a Sunday afternoon, ecology-minded outsiders who might have regarded the five-acre minimum as protective of important life processes, outsiders who, by reason of the five-acre minimum, found the community more willing to let them use community recreational resources, downstream water users who might have found the five-acre minimum protected both the quality and amount of water available to them, and so on.

Although it would be improper to suggest that latent demand would in all cases tend to support large lot-size minima, it is at least plausible to argue that current concern about the loss of green space around urban centers justifies our assuming that latent demand would at least be tilted in favor of large zoning minima. It is also plausible to believe that the residents of communities will be better able than outsiders to get at least a feel for the intensity of latent demand and to compare it with effective demand. If this feel would amount to no more than guessing in the dark, the least that may be said is that guessing at the Olympian state level is hardly likely to be better.

C. The Social Mobility Theme-Idea

Since we have travelled some distance since the first presentation of this theme-idea, it will be useful to restate it briefly. What it asserts is that resources which are indispensably necessary for the upward mobility of the poor can be distinguished from resources which are not. From the fact that this distinction can be made, it follows that local ordinances which truly hurt the poor can be selected for review and possible overriding without seriously undermining local decisional autonomy. The only ordinances to be struck down will be those which substantially impair the upward mobility of the poor by pushing the price of an indispensably necessary resource above that price which the free unregulated market would ordain. Even those ordinances will not be struck down if the enacting communities show they were enacted to advance a public interest so important as to outweigh the harm caused to the poor. The point is that ordinances which sub-

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property rights will tend to keep demand from being effective. The fact that demand remains latent or ambient does not mean that it is trivial, for the demand for clean air, unpolluted water, national defense, and other public goods is largely of this sort. A point made later in the text is that such demand as poor persons can express for land and housing in the suburbs will be effective demand, and hence visible to small-community decision makers. Why? Because effective demand means profits to sellers of land and housing. They will speak loud and clear “in support of the poor.” See note 59 infra, and accompanying text.
stantially impair the upward mobility of the poor will be presumed to be bad until the enacting communities justify their enactment.

Although writers who have advanced this social mobility theme-idea have focused their attention on its possible use in equal protection cases, we shall not so confine it here.\(^{29}\) We shall, as we did with the efficiency theme-idea, simply ask the question whether it makes sense as a social prescription. For our purposes, it will not matter whether a court or a state legislature uses the theme-idea to override or bar a local enactment. Moreover, since we will be concentrating our attention in this section on the impact of this theme-idea on local decisional autonomy, we may continue to assume for our discussion here that the poor will in fact be hurt by price-increasing local ordinances. Our task is to find out whether the theme-idea provides us with the intellectual tools with which to distinguish substantial hurts from insubstantial ones. If it does not provide us with such tools, it is obvious that local decisional autonomy will be much imperiled because there are very few local ordinances which do not price some resources upwards.

Arguments in support of the theme-idea can be developed. We take as a starting point a strong public preference that poor persons be afforded opportunities, at least within their budget restraints, to acquire those goods and services which will aid them to lift themselves out of their economic condition. Although this preference can be amply justified on moral grounds alone, it is plain that increases in the productivity of poor persons will help us all both by increasing the total supply of useful goods and services and by decreasing direct and indirect social costs associated with poverty.

We may also take as given that official acts of any community may have price effects which are injurious to the poor. When a community adopts and enforces a building code, it may effectively price some poor persons out of the housing market. When it compels a manufacturer to reduce its polluting of air or water, the result may be that poor persons have to pay higher prices for the goods which that manufacturer produces. When it imposes a sales tax on food, some poor persons may have to reduce their consumption. When it zones out multiple dwellings, some low-income persons may be unable to find housing at an acceptable price.

Finally, we may take it as given that there are positive advantages to poor persons in being able to reside in suburban communities. It is

\(^{29}\) This is not, of course, inappropriate, since state legislatures are not free to disregard federal and state constitutional commands.
very plain that many employers of unskilled workers have in recent years been moving from the city centers to the suburbs either to find space within which to expand their plants or to be closer to their white-collar executives. Unless low-income workers can follow the employers to the suburbs at a cost within their budget restraints, those workers will simply have to add their names to the already overcrowded welfare roles in the cities. It is also very plain that schools in the suburbs are generally of higher quality than those in the central cities. If the children of the poor are barred entry into those schools, there is substantially less likelihood that they will be able to break out of the dreary cycle of poverty in which the cities now lock them.

It is also the case that the very concentration of poor persons in the central cities increases substantially the social cost of poverty. It does this not merely by increasing the social coefficient of friction, plainly evidenced by such urban phenomena as high crime and drug-use rates, but also by intensifying the psychology of despair associated with living with and among only the poor in a physical environment of unrelieved ugliness. This bunching of the poor in the central cities not only increases the pain of poverty which the poor feel themselves, but also increases immeasurably the costs which the non-poor must pay to provide even minimum social services to the poor. Were it possible for even some of the poor to escape from the central cities to the suburbs, the aggregate social cost of poverty, to the poor and non-poor alike, would undoubtedly be substantially reduced both in the short run and the long run.

From all of these plain facts, we can at least draw the conclusion that suburban ordinances which operate to limit the locational choices of low income persons, which literally lock the poor in the central cities, can do immeasurable harm not only to the city poor themselves but also the non-poor in the cities who now find themselves saddled with a disproportionately large share of the social cost of poverty. Even non-poor outside the central cities are hurt by such ordinances not only because their state and federal taxes are heavier because of the high cost of urban poverty, but also because the low productivity of the urban poor denies them useful goods and services.

It must be conceded, of course, that suburban communities must be entitled to retain substantial control of their own affairs, for there are positive benefits associated with local political autonomy. Yet, it is unacceptable that suburban communities be permitted to adopt, for frivolous and selfish reasons, regulations which literally imprison poor persons in the cities and also thrust upon others the largest share of
the social cost of urban poverty. To put the point more plainly, no suburban community has the right to use the police power solely for the purpose of making itself into an island of privilege in a sea of despair. The burden of urban poverty is a national burden which must be borne by all of the nation’s citizens.

It will be argued, of course, that any striking down of any suburban ordinances will gravely threaten all suburban political autonomy; but the argument is without merit. Although it may be the case that most suburban police-power enactments increase the cost of some suburban resources, it requires no special wisdom to see that the pricing upwards of some resources will have devastating effects upon the social mobility of poor persons, while the pricing upwards of other resources will have little or no such effect. Nor does it take training in the arcane arts to see that some so-called police-power enactments are plainly intended to make the rich better off at the expense of the poor. One thinks immediately of building codes which bar the use of inexpensive, though perfectly serviceable, building materials, or of ordinances which bar trailer camps or multiple dwellings. That such ordinances serve any purpose other than keeping low-income families out is fanciful beyond belief. Even if such ordinances could be shown to be economically efficient, i.e., productive of marginal net increases in aggregate community property values, we should not hesitate to strike them down because the use of official collective power to separate income classes is as noxious as the use of official collective power to separate racial or religious groups. It hardly needs mentioning, of course, that the economic efficiency of ordinances which discriminate against persons on racial or religious grounds will not save them from equal protection attack.

To be sure, it is difficult to devise mathematically precise formulae to distinguish between suburban ordinances which go "too far" in separating income classes; yet, it is not at all difficult to fashion a testing principle with which to distinguish between ordinances which do inexcusably great harm to the poor and those which do not. Such a testing principle might consist of two questions. The first question would be this: Does this ordinance so substantially price upwards the cost of residing in the enacting community as to impair substantially the upward mobility of poor persons? The second question would be this: If this ordinance does have the effect of substantially impairing the upward social mobility of poor persons, does it advance a public interest of such a compelling nature as to outweigh the injury which it does to poor persons? In order for an ordinance to be struck down,
it would have to fail both parts of the test. A "yes" answer to the first question would simply shift the burden of proof to the enacting community. Only if the enacting community failed to show that "yes" is the correct answer to the second question would an ordinance be struck down.

There is, of course, nothing novel about the test, for the procedure contemplated is essentially that used by courts to test the constitutionality of official acts which are attacked on the ground that, though ostensibly aimed at legitimate police-power purposes, they deny equal protection to racial and religious minorities. Nor is there any guarantee that use of the testing principle will not result in the overriding of some local choices which deserve to stand. But that may be said of almost any legal principle. The relevant question is not whether the testing principle can produce bad results if misapplied; it is, rather, whether it is likely to do substantially more good than harm. It is submitted that the proposed testing principle cannot help but produce more good than harm.

D. The Social Mobility Theme-Idea Rebutted

Although the reader is probably tired of being reminded that our attention in Part II is intended to be directed solely at the impact of the two theme-ideas upon local decisional autonomy, it is particularly important that we mention the matter again here because our rebuttal to the efficiency theme-idea rather violated the rules by going beyond the local-autonomy issue. It was convenient for us to do so in that case, for, given our starting assumption that inefficient measures hurt the poor, we could go wholly to the merits of the efficiency theme-idea by showing that small communities tend to be more efficient than large ones. In this case, we cannot do that because there is no reason

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81 See Loving v. Virginia, 388 U.S. 1 (1967). In point of fact, the United States Supreme Court has yet to declare unambiguously that de facto racial discrimination resulting from police-power enactments which are non-discriminatory on their face always calls for "active review" of the sort contemplated in the proposed test. It may be that such review will be confined to cases in which the discrimination touches a "fundamental interest" such as the right to vote. For a thorough analysis of this question, see Developments in the Law — Equal Protection, 82 HARV. L. REV. 1065 (1969). Writers seeking to extend the concept of "suspect classification" to include classification according to economic class have not been heartened by the Supreme Court's recent decisions in Dandridge v. Williams, 397 U.S. 471 (1970), and James v. Valtierra, 402 U.S. 137 (1971). Dandridge upheld a Maryland statute which fixed a maximum limit to family aid regardless of the number of children in the family. Valtierra found constitutional, on equal protection review, a California constitutional requirement that a referendum be held before public housing could be built in a community. But the writers have not given up hope. See Note, Exclusionary Zoning and Equal Protection, 84 HARV. L. REV. 1645 (1971); Note, The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge, 81 YALE L.J. 61 (1971).
to suppose that small communities naturally tend to be more solicitous for outsider poor persons than large ones. Thus, here we cannot kill two birds with one stone. In Part III we will seriously question whether substantial benefits will, in fact, flow to the urban poor if price-increasing suburban enactments are overridden or barred; but in this section we will stay strictly with the local-autonomy issue.

The single contention to be made here is that the social mobility theme-idea does, in fact, substantially imperil local decisional autonomy because it does not contain sufficiently objective operative indices by which to determine (a) who "the poor" are; (b) what resources are necessary for the upward social mobility of the poor; (c) when price increases substantially impair the upward social mobility of the poor; (d) how many poor persons will have to be absorbed by communities; and (e) what price-increasing majoritarian preferences may be justified by compelling public necessity.

In asserting that the social mobility theme-idea does not contain operative indices by which to determine who "the poor" are, we mean nothing quite as academically precious as that old bromide that a pauper in America is as well off as a potentate in an underdeveloped country. Our assertion goes very tightly to the purpose which the theme-idea is offered to serve. That purpose, we take it, is to keep reasonably open the economic routes through which persons at various wealth and income levels may move to higher wealth and income levels. If that is, in fact, the purpose of the theme-idea, then it is extraordinarily difficult to see how the theme-idea could rationally or morally be confined to any particular wealth or income class.

To take a very simple example, let us imagine that land prices and rental rates in a particular suburban community are beyond the reach of urban families whose annual incomes are lower than, say, $8,000. A zoning law is now proposed which will push land prices and rental rates in the community beyond the reach of urban families with incomes less than $12,000 per year. It is plain that the zoning law will not block entry into the community of those whom we commonly think of as "the poor," for they are already priced out by operation of the free-market price system. Yet, it is also clear that adoption of the zoning law will effectively make the community something of a middle-to-upper-income preserve by blocking some upward social mobility of an identifiable income class.

82 It is, of course, the case that definitions of "the poor" change with changing economic conditions. See Woodard, Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State, 72 YALE L.J. 286, 294-95 & n.15 (1962).
Our temptation, perhaps, is simply to dismiss the problem as academic game-playing. After all, it is only the truly urban poor we are concerned about. Yet, we ought to hesitate because if we allow the community to adopt the ordinance, we shall clearly be accepting a number of principles that are difficult to rationalize. One of those principles would be that there is a point where the right to further upward social mobility simply no longer exists. A second principle we would be accepting is that enactments which operate to segregate some economic classes, e.g., middle-income from upper-income, are perfectly acceptable. A third principle we would be accepting, perhaps the most difficult to rationalize, is that the wealthiest communities, *i.e.*, those whose free-market land prices are highest, need never fear that their zoning laws will be upset. We might also observe that freeing the wealthiest communities to zone out middle-income families might very well reduce the opportunities for low-income families to move out of the central city because there might be fewer housing opportunities for them if the middle-income families were locked into their present locations.

The point to be made from these observations is not that these troubling principles cannot be rationalized by any conceivable intellectual gymnastics; the point to be made is that if they are not rationalized, the social mobility theme-idea simply does not isolate a small subset of local choices which may safely be overridden without seriously undermining local decisional autonomy. This does not mean, of course, that a state legislature or even a court could not make an ad hoc choice simply to strike down only those ordinances which bar entry of families in a specified income class; it means only that such a choice would fail to meet the test of being reasonably principled. No community could, if such a choice were made, be reasonably assured that price-increasing laws barring entry of other income classes would not later be struck down by new ad hoc choices.

Although we have not canvassed all the difficulties which would be encountered in attempts to give reasonably rigorous content to the term “the poor,” we had best move along to the equally troublesome problem of determining what resources are necessary for the upward mobility of poor persons. Here again, our aim is to determine whether

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33 If upward social mobility is to be the theme, will “the poor” include hard-core unemployables? The aged poor? The temporarily unemployed white graduate engineer? Is it desirable that the rural poor be included? More important, will the extension of equal protection guarantees to “the poor” diffuse or dilute protection now afforded to racial minorities? Specifically, if the suburbs are to be opened to white poor, how many black poor will get through the doors? See note 45 infra.
the social mobility theme idea contains, either explicitly or implicitly, operative indices by which to identify such resources. Since it is extraordinarily difficult to think of any official act of a community which would not increase the prices of some resources, failure of the social mobility theme idea to identify those necessary for the upward social mobility of the poor would mean that local decisional autonomy would be much threatened.

What is plain upon inspection is that the words "necessary for the upward social mobility of poor persons" do not, by themselves, identify a small class of resources. Putting aside the already-discussed problem of determining who "the poor" are, we may say that, whoever they are, they require an extraordinarily large number of resources even to stay at the survival level. If they are to be able to improve their condition, they will require even more because to the classic list of food, shelter, and clothing (already a formidable list when one counts the resources which go into their production) would have to be added such essentials as educational opportunities for children, technical training for unskilled adults, transportation to and from jobs, at least minimal recreational opportunities, medicines and health-care services, and so on.

The point that barely needs mentioning is that the categorizing of these essentials under such labels as "educational opportunities" or "transportation" tends to hide the fact that their provision entails the use of a formidable number of different resources. Thus, local enactments or other official local acts which had the effect of pricing upwards any of the resource components which went into the production of any of the essentials would, at least in theory, be vulnerable to attack on the ground that they priced out the poor. The suggestion that land prices are the only prices that substantially affect the social mobility of poor persons must plainly be viewed as fatuous.

It will be useful to remind the reader at this point that the social mobility theme idea, at least as it has been advanced in the reviews, does not contemplate the imposition of affirmative duties upon sub-
urban communities to subsidize provision to the poor of food, shelter, clothing, and other essentials. It contemplates only the proscribing of enactments which push upwards the prices which the poor will have to pay for essential resources. Thus, it will not be an answer, for so long as we are evaluating only the social mobility theme-idea itself, to say that the list of necessary resources which the poor will have to buy for themselves is really quite a small one. Once we accept the proposition, as the social mobility theme-idea invites us to, that the poor are to pay their own way, we must recognize that the list is hopelessly large.\(^{35}\)

There is another problem with identifying resources necessary for the upward social mobility of poor persons that deserves brief discussion. Let us assume for a moment that land prices are the only prices that concern us. In a particular community, land prices are currently such that poor persons can enter. A zoning law is now enacted which has the effect of pricing out the poor. Our question is whether the social mobility theme-idea interdicts its enforcement. In this case, we feed into the mix the fact that poor persons will continue to have opportunities to improve their condition by moving to other communities.

Does the social mobility theme-idea require that the law be struck down? There are, of course, arguments to be made on both sides. The chief argument in support of the zoning law is that it does not deprive the poor of a necessary resource. The chief argument the other way is that if this law is upheld, other communities will likely adopt similar laws. Here again, the point is not that there exist no intellectual techniques for picking one argument over the other; the point is that the social mobility theme-idea does not clearly point one way or the other. Make the enacting community a classic upper-income bedroom community, \textit{i.e.}, one with few or no job opportunities for the poor, and we lean towards the view that denial to the poor of opportunities merely to reside in the community is not the denial of a resource necessary for their upward social mobility. Add some job opportunities, and we begin to tilt the other way. To say that effective and confident local law-making cannot go on in conditions of such uncertainty is to say only the obvious.

The problem of determining \textit{when} law-produced price increases impair substantially the upward social mobility of poor persons is partly illustrated in the preceding paragraph. But the problem also in-

\(^{35}\) Even if we assume that the poor will be fully subsidized, will not price-increasing laws still remain vulnerable to attack on the ground that they price upwards costs to the subsidizers? Why should government or private charities have to pay higher prices?
volves time elements. Does the social mobility theme-idea contemplate the striking down of enactments which become price-exclusionary long after their enactment? Again, the theme-idea itself does not inform us. The answer, it must be supposed, is that we must wait to find out what the courts and state legislatures do. In the meantime, we had better not adjust our affairs to existing enactments.

Of at least equal moment is the question how far communities must go to satisfy the requirements of the social mobility theme-idea. Does the theme-idea contemplate that communities may close their doors to additional poor persons by price-increasing enactments once they have accepted a "fair share" of them? The arguments again go both ways. Again, we must wait to find out what the courts and state legislatures will do.

The final unanswered question on our list is what majoritarian preferences are to be thought justified by compelling public purpose. Here, we assume that a particular enactment does substantially impair the upward social mobility of poor persons, and we ask whether it may be sustained anyway. A simple illustration comes quickly to mind. A factory in a community happens to be the chief employer of the community's low-income citizens. It also happens to be the only significant polluter of the community's air. Although the pollutants the factory emits are not a major health hazard, it is provable that the marginal savings in cost which it enjoys by using the air as a dumping ground for its pollutants are lower than the marginal discomfort-costs which the pollutants thrust upon the community's citizens. Although it will be efficient for the community to compel marginal abatement of the pollution, the result will be that most of the factory's low-income employees will have to be laid off. They will have to move elsewhere to find work. Legal question: Does the social mobility theme-idea bar the community from compelling the abatement of the pollution? Answer: We have not the remotest idea.

Our difficulty here is that the social mobility theme-idea does not provide us with the intellectual tools with which to evaluate the social importance of reducing the air pollution. If we use economic efficiency criteria, we find ourselves saying that poor people can be denied upward...
social mobility if rich people are sufficiently annoyed by air pollution. But if we do not use economic efficiency criteria, we find ourselves saying that poor people have the right to require resources to be kept in suboptimum use. It is again time to throw our hands in the air.

The more one thinks about this compelling-public-purpose notion, the more one becomes perplexed about its meaning. If we consider for a moment what makes free-market prices what they are, we are compelled to recognize that they can often be the result of private tastes and preferences which can only be described as frivolous. Yet, it does not occur to proponents of the social mobility theme-idea to propose that private consumption, if it results in the pricing upwards of resources necessary for the upward social mobility of the poor, must be justified by compelling private necessity. The answer they would give, of course, is that private consumption is not state action. But that answer really answers a riddle with a riddle, for it does not explain why the actions of government (traditionally thought of as an agent of the people) are more odious than the actions of the people themselves. The point is not a trivial one in the context of our discussion, for if the social mobility theme-idea is, in fact, to be confined to official collective action, then it is likely to operate in a discriminatory way. Large communities will come within its prohibitions, but some small ones may not. The reason is that the free-rider problem forces large communities to use political collective action to acquire such public goods as unpolluted air. In small communities, very small ones at least, the free-rider problem may be insignificant enough to permit the acquisition of public goods through private consensual trade.38

The essential points of this part of our rebuttal to the social mobility theme-idea have now been made. To pull them all together in a single sentence, we may say that the theme-idea would imperil local decisional autonomy not only by reducing it absolutely, but also, by reason of the extensibility of the principle underlying it, by injecting into local decisional processes substantial uncertainty about the validity of many price-affecting actions.

A final point and we are done. We observed in the opening paragraph of this rebuttal that there is little reason to suppose that small communities naturally tend to be more solicitous for outsider poor persons than large ones. Yet, it may be said that the greater tendency

38 See note 19 supra and also text discussion following note 23 supra. It is plain, of course, that many suburban communities do not need either zoning laws or private land-use restrictions to keep out the non-rich, for the residents simply choose to use up the land in gigantic estates. They simply outbid the non-rich.
towards decisional efficiency in small communities tends to assure outsider poor persons that their effective demand for scarce community resources will at least be counted in the political decisional process. Since "the poor," however we may define them, rarely will constitute a political majority in state-level decision-making processes, proposals to undercut local decisional autonomy "for the sake of the poor" seem, to put it gently, a bit mischievous.

III. IMPACT OF PRICE-EXCLUSIONARY ZONING ON THE URBAN POOR

The chief aim of Part II of this essay was to demonstrate that neither the efficiency theme-idea nor the social mobility theme-idea successfully isolates a small and identifiable subset of local choices which may be overridden or proscribed without substantially undermining local decisional autonomy. The thrust of the argument in Part II was that efforts to confine the range of applicability of the theme-ideas would likely lead to ad hoc preempting of local decisional power by courts or state legislatures. This would result, we argued, because the principles underlying both theme-ideas do not yield to principled limitation.

It is now time to recognize that many persons might reasonably regard the preservation of local decisional autonomy as too costly if it entails standing idly by as suburban political majorities use the police power to do grievous harm to the urban poor. If we wait for the legal theoreticians to devise satisfactory principles with which to limit interference by the courts or state legislature in local affairs, we may well discover that the injury we have prevented is less serious than the injury we have allowed.

Two contentions will be made here. The first is that the striking down or proscribing of suburban price-exclusionary zoning laws will likely not yield benefits to the urban poor in excess of the harm caused to local decisional autonomy. The second contention is that affirmative state and federal legislative action to bring about some dispersal of the

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39 See note 28 supra. See also text discussion following note 23 supra. The point, made earlier, is that effective demand means counted demand. In small communities, the voices of land owners who would make a profit from selling land to low-income persons will more likely be heard and paid attention to by the majority.

40 Query, for example, whether the Supreme Court should have waited for the fashioning of a "neutral principle" before declaring in Shelley v. Kraemer, 334 U.S. 1 (1948), that state enforcement of private racial restrictions constitutes forbidden "state action"? Assuming the decision was ad hoc or unprincipled, on what ground could one assert that the harm from making the decision exceeded the harm that would have followed had it not been made? See A. BICKEL, THE LEAST DANGEROUS BRANCH 49-65 (1962); H. WECHSLER, TOWARD NEUTRAL PRINCIPLES OF CONSTITUTIONAL LAW, in H. WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961).
Turning to the first contention, we may observe that there are two kinds of harm to the urban poor which the striking down of price-exclusionary suburban zoning laws might be expected to reduce. One kind is psychological, the kind of harm one suffers when official action appears to legitimize private prejudice. When the law declares that blacks are inferior to whites, it not only liberates and encourages white bigotry, but also fosters black self-hatred. When the law discriminates against women, it not only increases male chauvinism, but also encourages women to adopt disparaging self-images. These consequences are not difficult to understand, for we are taught from childhood to respect the law and to obey it. Since it is our parents who produce in us the "set" to respect and obey the law, the law speaks to us with special authority even when it speaks in the voice of the bigot.

Were it the case, then, that suburban land-use ordinances give official voice to private prejudice against the poor, we should have good reason to strike them down. But it is strongly arguable they do nothing of the sort. To make that argument we should not have to rely solely on the innocent appearance of the words of the ordinances; we should also be able to rely on inspection of our consciences, for surely it will be the rare man or women who regards as stigmatizing the condition of having no money. In a country in which it is a political advantage to have been born poor and in which the common boast of the successful businessman is that he was once poor, it is difficult to equate the assertion that Jones is poor with the assertion that Jones is inferior or even different from us.

We may hear it said that some of the poor are lazy or that some of them cheat on welfare, but that is far different from saying that the poor are lazy or that the poor cheat on welfare. In this country, poverty is hateful, but the poor are not. To ascribe to suburbanites hatred of the poor, qua poor, is to suggest either that those who move to the suburbs are moral defectives before they go or that they become such when they get there. In either case, the ascription is not merely absurd, it is, itself, a good example of prejudice.

It would be equally absurd, of course, to suppose that suburban majorities never adopt laws to keep the poor out. What suburbanites know, as we all know, is that entry of poor persons into communities, at least in substantial numbers, not only increases out-of-pocket social-service costs, but also decreases community amenity. To say that it is morally reprehensible for suburbanites to dislike these consequences
is simply silly. The most we can say is that acting upon that dislike is immoral. But that is far from saying that suburbanites are prejudiced against the poor. The zoning out of trailers and multiple dwellings from suburban communities may be morally despicable if it does economic injury to poor persons, but dislike of the look of trailers and multiple dwellings is something less than proof positive of prejudice.

If the case is to be made for striking down suburban zoning ordinances, it will have to be made on the ground that the ordinances do positive economic harm to the urban poor by closing them off from opportunities to improve their condition. The argument we will make here is that purely negative restraints upon suburban zoning practices, i.e., restraints which merely forbid the enforcement of price-increasing land-use ordinances, are at least as likely to hurt the urban poor as to help them.

Our fundamental hypothesis, already alluded to in Part II, is that price-increasing suburban land-use regulations are not keeping out the urban poor; they are keeping out urban families in the lower-middle and middle-income classes. To put the same point somewhat differently, the striking down of price-increasing suburban land-use ordinances is more likely to accelerate the flight from the cities of lower-middle-income and middle-income families than the flight of the lowest income families. Moreover, since it will commonly be the case that the fleeing families will be white, the result will be further ghettoization of the cities. To the extent that blacks will be able to flee at all, they will likely be the very persons whose loss the urban black communities will least be able to stand.

Now, what will the striking down of, say, a price-increasing suburban large-lot zoning ordinance do? A common result will be to increase the average per-unit price of the affected land while decreasing the price of moving to suburbia. We saw this process in reverse in our farmer-homeowner model. Before the five-acre minimum was adopted, one-acre lots sold for $5,000. The five-acre minimum pushed the average per-acre price down to $4,500 while pushing the price of buying a "residence lot" up from $5,000 to $22,500. In characterizing large-lot zoning ordinances as "price-increasing," we obviously refer to the price of a "residence lot," not to the average per-acre price.41

Now the point, almost too obvious to make, is that the free-market price of moving into suburbia is not at all likely to be within the budget restraints of urban families who may meaningfully be described as "poor." "Poor families," as the term is commonly used, means fami-

41 See note 14 supra, and accompanying text.
lies who literally do not know where the next good meal is coming from. To poor families of that sort, the reduction to the free-market level of the price of moving to suburbia will be about as helpful as a modest reduction in the price of Cadillacs. Even if we abandon those poor to the cities and move to the next higher income level, call it the "low-income" level, we will still be talking nonsense if we talk earnestly about their buying into suburbia at free-market prices because living in suburbia is simply not a low-income family's good.

To make matters worse, it is not unlikely that the free-market price of suburban land would move upward if "poor" or "low-income" families were provided with the wherewithal to enter the market. This might come about not only because their own bids would thicken the market, but also because their bidding might scare into the market suburban residents fearful of increases in social service costs and loss of community amenity. It is a plain, if ugly, fact of life that it is often "rational" for upper-income persons to bid more for land when they are competing with low-income bidders than when they are competing with upper-income bidders—not moral; rational. No wonder the land owner who can get an auction going between those wishing to buy to build a low-income housing project and those opposing it can expect to become a wealthy man overnight.

To return to our theme, if we are right in believing that "poor" and "low-income" families will not be able to buy their way into suburbia at free-market prices, unless, of course, their incomes are increased by subsidy, then it follows that the mere striking down of suburban price-increasing land-use ordinances may, in fact, hurt poor and low-income families in the cities by encouraging the flight from the cities of some productive lower-middle-income and middle-income residents. This might, of course, produce a temporary reduction of housing costs in the cities and possibly, though less likely, some job vacancies for low-income workers to fill. However, in the long run, the exodus would likely merely further erode the cities' economies.

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42 The addition of the new demand would, technically, shift the aggregate demand curve to the right. Less technically, the more money chasing after scarce resources, the higher the price.

43 It is "rational" because the proximity of low-cost housing to high-cost housing will reduce the market value of the high-cost housing. If it is immoral to bid against poor persons buying land, is it less immoral to bid against them for food, clothing, and other essentials? In point of fact, it is difficult to think of any bids by upper-income persons which do not draw away resources which the poor could have used. Nonetheless, many readers will likely share the writer's intuitive sense that outbidding the poor in land markets in order to preserve property values is more offensive than bidding away from them other goods.

44 It is well known that many of the urban poor get their housing through the process
It needs to be mentioned also that the striking down of price-increasing suburban land-use ordinances may increase the ghettoization of the cities. This effect would be most pronounced if, as we have supposed, free-market land prices in the suburbs were in the reach only of families in the lower-middle or higher income ranges because a majority of those families would likely be white. But the effect might be significant even if suburban land prices fell to levels within the reach of low-income families, for it is simply easier for white families to move to white suburbs than it is for black families to move there. Moreover, if moving to the suburbs to improve one’s economic condition may be taken as evidence of drive and ambition, the blacks who do go may be precisely the kind of people the urban black communities will sorely miss. The point is obviously a debatable one, but the fear of some blacks that the political power of urban blacks will be weakened by geographic dispersal cannot be dismissed out of hand.

To summarize the arguments we have made in support of our first contention in Part III, we may say that it is highly unlikely that the striking down of price-increasing land-use ordinances will reduce the price of entry into suburbia far enough to put it in reach of “poor” or “low-income” urban families. The more likely result will be that it will accelerate the flight of higher-income families, thereby further eroding the cities’ economies. Short-run benefits to the urban poor in the form of lower housing costs and increased job opportunities will likely be overcome by long-run losses. Finally, it is likely that ghettoization of the cities will be increased. The net of these points is that if justification for the undercutting of local decisional authority is to be found, it will not likely be found in benefits flowing to the urban poor.

The arguments in support of our second contention, that

known as “filtering,” i.e., the sale by city-fleeing middle-income and upper-income families of their housing to entrepreneurs who convert it, by using partitions and other devices, to low-income multiple dwellings. But if the fleeing families are not replaced by other middle-income and upper-income families, the gains to the poor from better housing may well be wiped away as the cities’ ability to provide essential services decreases. See J. ROTHENBERG, ECONOMIC EVALUATION OF URBAN RENEWAL 88-89, passim (1967).

Black families may pay a heavier psychological cost not only because they may feel that they are entering a hostile environment, but also because they may feel that they are being disloyal to blacks left behind in the cities. Their out-of-pocket costs may also be higher because of increased bidding by resistant whites or by more blatant finagling with the suburban land market. It is nothing less than remarkable that writers who have been urging the overriding of price-increasing suburban land-use ordinances have given little or no attention to the effect it would have on the racial composition of the cities. Concern seems to be directed solely at the racial composition of the suburbs. See, e.g., Note, Large Lot Zoning, 78 YALE L.J. 1418, 1431 (1969). The argument being advanced in this article is that the striking down of such ordinances will likely bring more whites to the suburbs. Put another way, poor whites are likely to get more “equal protection” than poor blacks.
active action will be more beneficial to the urban poor and less hazardous to local decisional autonomy, have already been impliedly made. This writer does accept the argument (made in section C of Part II) that if substantial numbers of the urban poor can be persuaded to move to smaller communities, the social cost of poverty will be much reduced. Since this desirable dispersal of the urban poor will not automatically follow upon the mere striking down of price-increasing suburban land-use ordinances, it seems plain that the dispersal will have to be accomplished through subsidy.

This will entail, among other things, governmental acquisition of land for housing in the communities to which the urban poor are to move. While there is no reason why government should be insensitive to the costs which entry of poor persons will thrust upon the communities they enter, there is also no reason why government must defer to local land-use preferences. If necessary, those preferences can be preempted by exercise of the power of eminent domain. Since the taking of land for public use or purpose does not rest on any new principle which could be regarded as substantially undermining local decisional autonomy, it may be viewed as preferable to procedures which threaten wholesale overriding of local choices.46

A second advantage to affirmative dispersal programs is that they would be selective. Since eligibility for subsidy would, presumably, be limited to persons with specified income and employability characteristics, we should not expect to find the programs operating in a catch-as-catch-can manner. It needs to be said, of course, that dispersal programs may result in some dilution of the political power of urban minority groups. But it is at least arguable that some dispersal of the urban poor will, in the long run, reduce the need for political groupings along racial and ethnic lines. Such, at least, has long been our national faith.

46 It cannot be seriously doubted that the federal and state governments can take land by exercise of the power of eminent domain and put it to uses inconsistent with local zoning laws. See Note, Government Immunity from Local Zoning Ordinances, 84 HARV. L. REV. 869 (1971). The important point is that the taking of property to provide housing for the poor would not wipe out zoning ordinances with a wide brush, for only land selected for taking would be affected.