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2007

## YOU CAN HAVE IT ALL: LESS SPRAWL AND PROPERTY RIGHTS TOO

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### Recommended Citation

80 Temp. L. Rev. 1093 (2007)

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Citation: 80 Temp. L. Rev. 1093 2007

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# YOU CAN HAVE IT ALL: LESS SPRAWL AND PROPERTY RIGHTS TOO

Michael Lewyn\*

## I. INTRODUCTION

In recent decades, the dominant form of American real estate development has been “sprawl”:<sup>1</sup> automobile-oriented development, usually in suburban areas far from traditional urban cores.<sup>2</sup> Much of the public debate over sprawl involves two competing visions of land use policy: the antisprawl “smart growth” vision and the libertarian “property rights” vision.

Smart growth advocates contend that sprawl has imposed a wide variety of social and environmental costs on Americans, such as pollution from increased auto emissions, loss of rural open space to suburban development, decay of older neighborhoods, and reduced economic opportunities for nondrivers.<sup>3</sup> Smart growth advocates generally favor the creation of more pedestrian-friendly streets and neighborhoods, as well as redevelopment of cities and older suburbs.<sup>4</sup> Some smart growth advocates also favor reducing sprawl through extensive regulations limiting suburban development.<sup>5</sup>

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1. See, e.g., J. Celeste Sakowicz, *Urban Sprawl: Florida's and Maryland's Approaches*, 19 J. LAND USE & ENVT'L L. 377, 382 (2004) (describing sprawl as “dominate [sic] growth pattern for nearly all metropolitan areas in the United States,” and pointing out that sixty percent of metropolitan-area populations now live in suburbs).

2. See OLIVER GILLHAM, *THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE* 4 (2002) (listing numerous definitions of sprawl); William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 510 (2000) (stating that sprawl areas are usually dependent on cars); James Perkett, Note, *Fees “In Lieu Of” Land Dedication: Protecting the Public from the Burdens Imposed by the Actions of a Few*, 9 GREAT PLAINS NAT. RESOURCES J. 82, 82 (2004) (“A central characteristic of urban sprawl is the outward movement of people away from the central city, and into the surrounding suburbs and rural areas.”); Sakowicz, *supra* note 1, at 382 (describing growth of suburbia as evidence of sprawl's dominance).

3. See Jeremy R. Meredith, Note, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 453-66 (2003) (arguing that sprawl leads to decline of older neighborhoods, as people and jobs move from cities and older suburbs to newer suburbs; reduced job opportunities for people without cars; destruction of natural habitats, as rural areas are turned into suburbs; and increased air pollution, water pollution, and energy consumption due to increased automobile travel).

4. See Anthony Downs, *What Does ‘Smart Growth’ Really Mean?*, PLANNING, Apr. 1, 2001, at 20, 23 (contending that most smart growth supporters endorse these goals).

5. *Id.* at 21 (noting that such measures “provoke wide disagreement” among different types of

By contrast, "property rights" advocates argue that, in a free society, property rights should trump public interests justifying land use regulation and accordingly assert that government should do nothing to discourage landowners from building houses and businesses in automobile-dependent suburbs.<sup>6</sup> Property rights theorists (who tend to be conservatives and libertarians) sometimes assert that sprawl is an expression of consumer preference<sup>7</sup> and thus should be beyond the reach of government regulation.<sup>8</sup>

The purpose of this Article is to show that the aims of smart growth and property rights advocates are at least partially reconcilable, because the smart growth movement's goals can be furthered through legal reforms that would reduce government regulation. So even if smart growth advocates and property rights advocates must agree to disagree about government regulations designed to limit sprawl, these apparent opponents can find common ground on a wide variety of land use-related issues.

Today, government regulations encourage sprawl in a variety of ways. Zoning, street design, and parking regulations discourage landowners from placing housing within walking distance of shops and jobs, force landowners to surround their buildings with parking lots, and mandate the construction of streets and highways that are too wide to be crossed comfortably on foot.<sup>9</sup> If government reduced or eliminated these regulatory burdens, property owners would have more extensive rights, and American cities and suburbs would be more comfortable places for nonautomotive commuters. Such deregulation would further both the deregulatory goals of property rights advocates and the

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smart growth supporters). Indeed, some commentators define the "smart growth" movement primarily as a movement to control suburban development. See, e.g., Clint Bolick, *Subverting the American Dream: Government Dictated "Smart Growth" Is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859, 860 (2000) (contending that smart growth agenda involves "coercion"); Stephen D. Villavaso & Johanna Lundgren, *Model Comprehensive Planning Legislation for Louisiana*, 49 LOY. L. REV. 917, 924 (2003) (referring to smart growth as "movement for greater control of urban development"). But see Chris J. Williams, Comment, *Do Smart Growth Policies Invite Regulatory Takings Challenges? A Survey of Smart Growth and Regulatory Takings in the Southeastern United States*, 55 ALA. L. REV. 895, 900-03 (2004) (discussing use of term "smart growth" to support wide variety of policies, including incentives and regulations).

6. See GILLHAM, *supra* note 2, at 75 (noting that conservative and libertarian policy institutions "support free-market solutions [and] individual property rights" and tend to oppose government regulation of land use).

7. *Id.* (observing that conservatives and libertarians often assert that "suburbanization and automobile dominance are the result of free-market choices"); see also Bolick, *supra* note 5, at 859 (pointing to growth of suburbs as evidence of citizens' conscious trade-off of commuting time and convenience in exchange for safety and larger, cheaper homes); Rose A. Kob, *Riding the Momentum of Smart Growth: The Promise of Eco-Development and Environmental Democracy*, 14 TUL. ENVTL. L.J. 139, 149 (2000) ("[C]onservative scholars and commentators have begun to speak out in defense of sprawl. . . . These critics oppose any smart growth plan that tries to change people's behavior as an infringement of their property rights and freedom.").

8. See Bolick, *supra* note 5, at 859 (suggesting that government regulation of suburban growth "would make most Americans recoil [because] homeownership is a cornerstone of the American Dream, and private property rights are its essential foundation").

9. See *infra* Part III.C for a discussion of how current government regulations encourage sprawl.

antisprawl goals of the smart growth movement.

Part II of this Article briefly outlines the history of sprawl, the smart growth movement, and the property rights backlash against that movement. Part III demonstrates how American land-use regulation promotes sprawl and proposes an agenda of legal reforms that enhances both property rights and smart growth, including both radical reforms designed to minimize government regulation and compromises that reflect the policy concerns justifying existing regulations. Finally, Part IV suggests that current regulations may frustrate consumer preferences for more pedestrian-friendly development.

## II. BACKGROUND: FROM SPRAWL TO SMART GROWTH

### A. *The Spread of Sprawl*

Commentators have often used the term “sprawl” to describe one of two separate but interrelated phenomena: the movement of people and jobs from city to suburb, and the low-density, automobile-dependent nature of those suburbs.<sup>10</sup> Both forms of sprawl accelerated in the second half of the twentieth century.

As late as the 1940s,<sup>11</sup> most American cities were booming. At the end of World War II, seventy percent of metropolitan Americans lived in central cities,<sup>12</sup> and most American cities were gaining, rather than losing, population.<sup>13</sup> Public transit use was at an all-time high.<sup>14</sup>

But during the last half of the twentieth century, population steadily shifted from city to suburb, as highways opened up suburbs for development, federal mortgage programs subsidized suburban homes, and public housing projects concentrated the poor in urban neighborhoods.<sup>15</sup> Twelve of the twenty largest

10. See *supra* note 2 for numerous definitions of sprawl focusing on one or both of these issues.

11. Suburban expansion began long before the 1950s. See Edward H. Ziegler, *Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape*, 11 VA. J. SOC. POL’Y & L. 26, 46-47 (2003) (noting that “mass movement” to suburbs began as early as 1920s, and describing 1920s case law upholding suburban zoning regulations). Nevertheless, suburbanization did not lead to either automobile dependence or the decline of central cities until the second half of the twentieth century. See U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1952, at 18-21 (73d ed. 1952) [hereinafter 1952 ABSTRACT] (demonstrating that, of eighteen American cities with population over 500,000 in 1950, all but four gained population during 1930s, and all but one gained population during 1940s); Robert Cervero, *Surviving in the Suburbs: Transit’s Ultimate Challenge* 1 (Univ. of Cal. Transp. Ctr., Working Paper No. 169, 1993), available at <http://www.uctc.net/papers/169.pdf> (noting that transit ridership peaked in 1946).

12. DAVID RUSK, *CITIES WITHOUT SUBURBS* 5 (1993).

13. See *supra* note 11 and accompanying text for a discussion of how large cities generally gained population in the 1930s and 1940s.

14. Cervero, *supra* note 11, at 1; see also Urban Transport Fact Book, US Urban Public Transport Per Capita Ridership from 1920, <http://www.publicpurpose.com/utut1920.htm> (last visited Sep. 1, 2008) (showing that, for five-year intervals between 1920 and 2002, ridership per capita was highest in 1945).

15. See Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV.

cities in America lost population during the late twentieth century,<sup>16</sup> and the cities that managed to grow did so by annexing neighboring suburbs rather than by redeveloping older areas.<sup>17</sup>

These suburbs were typically far less compact than existing cities, in part because of a network of government regulations that shaped twentieth-century American development. In the 1920s, the federal Department of Commerce drafted a model Standard Zoning Enabling Act ("SZEa"), which every state adopted in some form.<sup>18</sup> The SZEa grants cities the power to restrict building size and height, the size of yards and other open spaces, the density of population, and the location and use of buildings.<sup>19</sup> The SZEa declared that such legislation would be designed "to prevent the overcrowding of land [and] to avoid undue concentration of population"<sup>20</sup>—in other words, to make American cities, towns, and suburbs less compact. Since then, municipal zoning regulations have reduced density by setting forth minimum lot sizes for houses<sup>21</sup> and by forcing landowners to place parking lots on land that could have been used for houses and businesses.<sup>22</sup>

301, 304-28 (2000) (discussing these and other causes of migration to suburbs). See *infra* notes 198-234 and accompanying text for a discussion of the relationship between road building and sprawl. In this Article, I have focused on road building rather than federal mortgage and public housing policies, because the latter programs have been significantly reformed and no longer have a strong anti-urban bias. See *id.* at 306-07 (describing reforms in federal mortgage policy and their unintended consequences); Sean Zielenbach, *Catalyzing Community Development: HOPE VI and Neighborhood Revitalization*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 40, 44, 48-54 (2003) (finding that, because of 1990s reforms, urban public housing is now less dominated by poor than in prior decades, causing surrounding neighborhoods to improve).

16. See GILLHAM, *supra* note 2, at 139 (stating that only "eight of the nation's top twenty cities . . . grew in population between 1950 and 1998").

17. *Id.* at 140, 141 tbl.8.6 (showing that, of top twenty most populated U.S. cities, the only cities that increased population between 1950 and 1998 were those that annexed neighboring land).

18. See David B. Zucco, Note, *Super-Sized with Fries: Regulating Religious Land Use in the Era of Megachurches*, 88 MINN. L. REV. 416, 420 (2003) (describing SZEa and pointing out that every state has used it in drafting zoning laws).

19. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 1, at 4-5 (Dep't of Commerce 1926), available at <http://myapa.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>; see also Robert J. Sitkowski & Brian W. Ohm, *Form-Based Land Development Regulations*, 38 URB. LAW. 163, 166-67 (2006) (listing types of land-use regulations permitted by SZEa, including building size, use, and location; lot coverage; open spaces; and population density).

20. DEP'T OF COMMERCE, *supra* note 19, § 3, at 6.

21. See *Agins v. City of Tiburon*, 447 U.S. 255, 261-62 (1980) (upholding regulation allowing landowner to build only one house per acre of land); Terry J. Tondro, *Sprawl and Its Enemies: An Introductory Discussion of Two Cities' Efforts to Control Sprawl*, 34 CONN. L. REV. 511, 517 (2002) (noting that minimum lot-size regulations have generally become more restrictive in recent years).

22. See *Gorrie v. Fox*, 274 U.S. 603, 608-10 (1927) (upholding ordinance requiring building to be set back from street, ensuring that land facing street could not be used for housing or commerce and, therefore, would be more likely to be used for parking lots); *Stroud v. City of Aspen*, 532 P.2d 720, 723 (Colo. 1975) (upholding minimum parking requirement); DONALD C. SHOUP, THE HIGH COST OF FREE PARKING 22, 25 (2005) (noting that minimum parking requirements first became widespread in late 1940s, and observing that today they are so common as to be one of "three basic sets of regulations" that are virtually universal). See *infra* notes 120-22 and accompanying text for a discussion of the density-reducing results of such regulations in Los Angeles.

Residents of low-density areas tend to be highly dependent on automobiles, because in a low-density area very few people live within walking distance of bus stops, train stations, or jobs.<sup>23</sup> Indeed, the design of these places harms nondrivers even in respects not directly related to density. For example, traffic engineers have built wider streets in recent decades,<sup>24</sup> thus causing traffic to become faster and more dangerous to pedestrians.<sup>25</sup> In turn, the movement of Americans from compact cities to automobile-oriented suburbs affected commuting patterns; in the middle and late twentieth century, automobile use rose<sup>26</sup> and transit ridership plummeted.<sup>27</sup> Because of these developments, America became far less pleasant for nondrivers during the second half of the twentieth century.

### B. *The Development of the Smart Growth Reaction Against Sprawl*

In the 1960s and 1970s, the "growth management" movement sought to limit suburban development in order to protect suburbs from being overwhelmed by population growth and related demands for public services<sup>28</sup>

23. See Robert H. Freilich, *The Land-Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 URB. LAW. 547, 552 & n.18 (1998) (describing how commuters generally will not walk more than quarter mile to transit station, and thus "residential densities of at least 7-15 dwelling units per acre are needed in order to encourage the utilization of public transit"); Chad Lamer, *Why Government Policies Encourage Urban Sprawl and the Alternatives Offered by New Urbanism*, 13 KAN. J.L. & PUB. POL'Y 391, 396 (2004) (positing that most "sprawl" development has five or fewer housing units per acre, and recognizing that, in such low-density areas, automobiles are necessary to satisfy daily needs).

24. See MICHAEL SOUTHWORTH & ERAN BEN-JOSEPH, *REGULATED STREETS: THE EVOLUTION OF STANDARDS FOR SUBURBAN RESIDENTIAL STREETS* 45-46, 75, 78 (1993) (observing that in 1950s, Institute of Transportation Engineers ("ITE"), an association of traffic engineers, recommended twenty-six-foot-wide residential streets, while most recent guidelines recommend thirty-six-foot-wide streets, and pointing out that local governments often rely on ITE guidelines); Michael Manville & Donald Shoup, *Parking, People, and Cities*, 131 J. URB. PLAN. & DEV. 233, 237 (2005) (noting that older neighborhoods had nine-foot-wide lanes while new developments use eleven- and twelve-foot-wide lanes).

25. Stephen H. Burrington, *Restoring the Rule of Law and Respect for Communities in Transportation*, 5 N.Y.U. ENVTL. L.J. 691, 700, 704 (1996) (describing wide streets as more dangerous for pedestrians because they encourage faster vehicle traffic); Oliver A. Pollard, III, *Smart Growth and Sustainable Transportation: Can We Get There from Here?*, 29 FORDHAM URB. L.J. 1529, 1534 (2002) (noting that street-design standards often "mandate the construction of unnecessarily wide roads with high speed limits").

26. See Craig Bradley, *The Rule of Law in an Unruly Age*, 71 IND. L.J. 949, 954 n.37 (1996) (stating that vehicle miles traveled per year more than quadrupled between 1950 and 1991, from 458 billion miles to 2.2 trillion miles).

27. See Urban Transport Fact Book, *supra* note 14 (indicating that transit boardings decreased from over 23 billion in 1945 to 7.2 billion in 1975, and observing that, while ridership has increased since 1975, it is still far below World War II-era highs).

28. See *Golden v. Planning Bd. of Ramapo*, 285 N.E.2d 291, 302-03 (N.Y. 1972) (upholding zoning laws passed in 1969 that sought to bar "premature subdivision" by disfavoring development in areas without adequate sewers, drainage, parks, roads, or firehouses); Daniel R. Mandelker, *Managing Space to Manage Growth*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 801, 803-04 (1999) (emphasizing that purpose of growth management is to "time development so that local governments can budget

and to protect rural "open space" in suburbs.<sup>29</sup> These efforts to limit suburban development had little effect on sprawl for two reasons. First, growth management programs sometimes were focused on "protecting" suburbs from additional development rather than on making suburbs more pedestrian friendly or on redeveloping central cities.<sup>30</sup> Second, such restrictions, when enacted by local governments, were generally ineffective in controlling regionwide sprawl, because if one suburban government limited development within its boundaries, developers would shift to other nearby suburbs.<sup>31</sup>

A new antisprawl movement arose in the 1990s,<sup>32</sup> led by environmentalists concerned about air pollution, water pollution, and the loss of natural resources to suburban development.<sup>33</sup> In addition to making arguments commonly used to justify earlier growth management policies,<sup>34</sup> sprawl critics asserted that sprawl:

- increases pollution, energy use, global warming, and traffic congestion by increasing driving;<sup>35</sup>

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and plan for needed services and facilities," and observing that, in absence of growth management, growing areas may be too overwhelmed by population growth to "provide facilities and services when new development needs them").

29. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 261 & n.8 (1980) (upholding ordinance limiting development of San Francisco suburb on ground that statute advanced "legitimate governmental goals" of protecting suburb from "unnecessary conversion of open space land to strictly urban uses" and resulting adverse impacts such as "destruction of scenic beauty" and "disturbance of the ecology and environment" (quoting Tiburon, Cal., Ordinance No. 124 N.S. § 1(c) (June 28, 1973))), *overruled by* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* 133 (2005) (stating that, as early as 1960, sprawl critics asserted that suburbs were running out of open space); cf. Robert L. Asher, Comment, *Solving the Problem by Making It Worse: Land-Use Takings Jurisprudence After Hamilton Bank, Lutheran Church, and California Coastal*, 59 U. COLO. L. REV. 105, 111 (1988) (noting that *Agins* involved development controls in affluent San Francisco suburb).

30. See *supra* notes 28-29 and accompanying text for a discussion of the purposes of growth management.

31. See Paul Boudreaux, *The Three Levels of Ownership: Rethinking Our Restrictive Homebuilding Laws*, 37 URB. LAW. 385, 396 (2005) (discussing how growth management in suburbs close to Washington, D.C., causes development to "leapfrog" to suburbs more distant from core city (emphasis omitted)); Sakowicz, *supra* note 1, at 395 (indicating that controlling growth within political boundaries may create sprawl in neighboring areas, thereby spreading sprawl regionally).

32. See Williams, *supra* note 5, at 895 (observing that sprawl and smart growth movement did not enter political discourse until 1990s, at which point voters and politicians began to endorse antisprawl and growth management initiatives).

33. See Meredith, *supra* note 3, at 463-66 (describing environmentalists as "outspoken critics of sprawl," and outlining environmental harms caused by sprawl).

34. See *infra* note 42 and accompanying text for a discussion of recent smart growth measures focused on protection of open space. See Nick Rosenberg, Comment, *Development Impact Fees: Is Limited Cost Internalization Actually Smart Growth?*, 30 B.C. ENVTL. AFF. L. REV. 641, 646 (2003) (criticizing sprawl on ground that it leads to increased public spending on new sewers, roads, and other infrastructure). See *supra* notes 28-29 and accompanying text for a discussion of how governments enacted earlier growth management policies in order to preserve open space and to protect suburbs from being overwhelmed by the cost of new infrastructure.

35. See GILLHAM, *supra* note 2, at 75-76, 93-122 (exploring sprawl's effects on transportation and energy consumption, and noting that increase in driving congestion contributes to air pollution and global warming); Roberta F. Mann, *Tax Incentives for Historic Preservation: An Antidote to Sprawl?*, 8



- reduces individual freedom by immobilizing Americans too young, old, or disabled to drive;<sup>36</sup> and
- impairs public health, because people get less exercise in communities where walking is difficult.<sup>37</sup>

In the 1990s, sprawl critics began to formulate an alternative to sprawl: “smart growth.”<sup>38</sup> Smart growth advocates generally define this admittedly vague term as the opposite of sprawl: more compact, transit-accessible, pedestrian-oriented development, preferably within cities and older suburbs already served by infrastructure.<sup>39</sup> Dozens of states have passed some sort of smart growth-related legislation.<sup>40</sup>

Nevertheless, the phrase “smart growth” encompasses a wide variety of policies. The most regulation-minded states have significantly limited suburban development; for example, Oregon requires cities and their inner suburbs to be surrounded by “urban growth boundaries” and prohibits large-scale residential and commercial development outside those boundaries.<sup>41</sup> On the other hand, many states have enacted less coercive measures such as purchasing rural farmland and forests (thus “protecting” such land from development),<sup>42</sup> increasing government support for public transit,<sup>43</sup> and subsidizing development

WIDENER L. SYMP. J. 207, 211 (2002) (“Because sprawl is automobile-dependent, car emissions increase. Congestion caused by sprawl leads to even higher emissions. The greenhouse gases produced by car emissions contribute to global warming.” (footnotes omitted)); Meredith, *supra* note 3, at 465-66 (describing various ways in which sprawl damages environment).

36. See ANDRES DUANY, ELIZABETH PLATER-ZYBERK & JEFF SPECK, *SUBURBAN NATION* 116, 123 (2000) (asserting that automobile dependence puts elderly nondrivers “out of reach of their physical and social needs” and limits “a child’s personal mobility . . . [to] the edge of the subdivision”).

37. See GILLHAM, *supra* note 2, at 118 (attributing fact that eighty-six percent of travel involves automobile use to suburban environment, which discourages walking).

38. A Westlaw search in the ALLNEWS database for articles using the terms “smart growth” and “sprawl” revealed only twenty-four articles using both terms before 1994—as opposed to 2,560 articles between January 1, 2005 and October 1, 2007.

39. Edward T. Canuel, *Supporting Smart Growth Legislation and Audits: An Analysis of U.S. and Canadian Land Planning Theories and Tools*, 13 MICH. ST. J. INT’L L. 309, 314 (2005); see also Randolph R. Lowell, *Coastal Smart Growth*, 22 PACE ENVTL. L. REV. 231, 235 (2005) (listing Environmental Protection Agency’s generally accepted smart growth principles, including pedestrian-friendly neighborhoods, development in existing communities, and multiple transportation choices); Downs, *supra* note 4, at 21-23 (describing fourteen elements used in defining smart growth).

40. See generally Ed Bolen et al., *Smart Growth: A Review of Programs State by State*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 145 (2002) (describing states’ smart growth programs).

41. See Mandelker, *supra* note 28, at 805, 807-11 (providing that growth boundaries “establish a boundary line beyond which new development cannot occur,” and describing Oregon system in detail). The Oregon system was enacted in the 1970s but is nevertheless more restrictive than other states’ more recent growth management programs. See Michael Lewyn, *Sprawl, Growth Boundaries and the Rehnquist Court*, 2002 UTAH L. REV. 1, 4-8 & n.14 (comparing Oregon system with similar programs in other jurisdictions and describing history of Oregon system).

42. See Bolen et al., *supra* note 40, at 150, 152, 154-55, 157, 159, 161, 174, 181-82, 196, 200, 203-04, 209, 223-24 (describing open space preservation programs in Arizona, Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, and Virginia).

43. *Id.* at 154-55, 176, 212, 219 (discussing government support for public transit in Connecticut, Maryland, Rhode Island, and Utah).

in older, already-developed neighborhoods (as opposed to newer suburbs).<sup>44</sup> Although it is hard to determine how successful these policies have been, most large cities gained population during the 1990s,<sup>45</sup> and public transit ridership has risen in recent years.<sup>46</sup>

### C. *The Property Rights Backlash*

The most restrictive smart growth policies (such as Oregon's urban growth boundaries) have led to a backlash against smart growth generally, based in large part on libertarian concerns over property rights.<sup>47</sup> For example, Clint Bolick, cofounder of the Institute for Justice, a libertarian public interest law firm,<sup>48</sup> has asserted that Oregon's growth boundaries are evidence that "the ideology of smart growth is profoundly paternalistic."<sup>49</sup> According to Bolick, growth boundaries coerce Oregonians to "live in more crowded cities, smaller houses, and more congested neighborhoods."<sup>50</sup> Bolick has written that "the core of any effective smart-growth agenda is coercion—substituting free individual choice with government edicts."<sup>51</sup>

Indeed, some commentators equate all land-use regulation with smart growth. For example, the conservative Heritage Foundation<sup>52</sup> recently issued a

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44. *Id.* at 153, 166, 168, 185, 187, 196, 201, 222 (listing development programs in Colorado, Kentucky, Maine, Missouri, Nebraska, New Jersey, North Dakota, and Vermont).

45. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, at 34-35 tbl.31 (2006) [hereinafter 2007 ABSTRACT] (indicating that most major cities gained population in 1990s and early 2000s, including some that had lost population during 1980s).

46. *Id.* at 697 tbl.1093 (showing that transit ridership rose from 7.7 billion in 1995 to 9.5 billion in 2004); see also Press Release, American Public Transit Association, Americans Take More than 10 Billion Trips on Public Transportation for the First Time in Almost Fifty Years (Mar. 12, 2007), available at [http://apta.com/media/releases/070312\\_ten\\_billion.cfm](http://apta.com/media/releases/070312_ten_billion.cfm) (reporting that transit ridership rose to 10.1 billion in 2006).

47. See Canuel, *supra* note 39, at 324 n.88 ("Libertarians criticize Smart Growth, and argue for the deregulation of land development . . ."); Keith Schneider, Op-Ed., *Follow the Money to Antisprawl Jibes*, S. FLA. SUN-SENTINEL, Dec. 8, 2003, at 27A (asserting that libertarian think tanks equate smart growth with big government).

48. Editorial, *The Bradley Prizes*, WASH. TIMES, Apr. 12, 2006, at A18.

49. Bolick, *supra* note 5, at 867.

50. *Id.* at 864 (quoting Sam Staley, *The Price of Urban Growth Controls*, SAN DIEGO UNION-TRIB., Aug. 9, 1998, at G-3) (observing that growth boundaries diminish development of suburban housing by discouraging growth outside boundaries). Bolick also raises a variety of utilitarian and constitutional arguments against such policies. See *id.* at 864, 867-72 (asserting that growth boundaries increase housing prices by restricting housing supply, and suggesting that such restrictions may violate Takings Clause of Fifth Amendment). These arguments are beyond the scope of this Article. *But cf.* Lewyn, *supra* note 41, at 22-49 (addressing practical effects of Oregon growth boundaries); Mandelker, *supra* note 28, at 819-22 (discussing constitutional concerns).

51. Bolick, *supra* note 5, at 860; see also Steven J. Eagle, *Environmental Amenities, Private Property, and Public Policy*, 44 NAT. RESOURCES J. 425, 443 (2004) (describing smart growth as part of "trend toward the collectivization of development").

52. See Kevin E. Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 MICH. J. INT'L L. 141, 151 n.33 (2004) (identifying Heritage Foundation as conservative think tank promoting free enterprise, small government, traditional values, and national security).

paper blaming increased housing costs on “the growing practice in many communities of increasing the regulations governing land use in ways that limit its supply for the construction of houses and apartments.”<sup>53</sup> The article is subtitled “Smart Growth Abuses Are Creating a ‘Rent Belt’ of High-Cost Areas,”<sup>54</sup> thus implying that *all* restrictive land-use regulations constitute “Smart Growth.”

In sum, public commentary on smart growth is sometimes based on an “either/or” dichotomy: either one is for smart growth and more regulation or one is for sprawl and property rights. But this dichotomy is a false one. In fact, the deregulatory policies discussed below promote both smart growth and property rights.

### III. THE LIBERTARIAN SMART GROWTH AGENDA

#### A. *Why Have a Smart Growth Agenda at All?*

The case for smart growth is based in large part on environmental concerns; people who live in automobile-dependent areas by definition must drive more than other Americans, which means that they create more pollution, are more likely to affect global warming, create more traffic congestion, and consume more open space than if they lived in walkable cities.<sup>55</sup>

Even if Americans could design a nonpolluting car, reduce traffic congestion, and avoid developing environmentally sensitive land, a case for smart growth remains. As a practical matter, sprawl has made car ownership “a virtual necessity for most Americans.”<sup>56</sup> Almost half of Americans have no public transit at all near their homes,<sup>57</sup> and even Americans whose homes are served by public transit often work in places without transit service.<sup>58</sup> Further, where transit service exists, Americans cannot comfortably walk or bike to many bus and train stops, jobs, and shops, because many streets are so wide and so

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53. Wendell Cox & Ronald D. Utt, *Housing Affordability: Smart Growth Abuses Are Creating a ‘Rent Belt’ of High-Cost Areas*, BACKGROUND, Jan. 22, 2007, at 3, available at [http://www.heritage.org/Research/SmartGrowth/upload/bg\\_1999.pdf](http://www.heritage.org/Research/SmartGrowth/upload/bg_1999.pdf).

54. *Id.* at 3-5. Ironically, the authors criticize some of the pro-sprawl regulations criticized in this Article. *Id.* (criticizing minimum lot-size requirements that reduce population density). See *infra* Part III.C.1.a and accompanying text for a discussion of such criticism.

55. See *supra* note 33 and accompanying text for a summary of environmental objections to sprawl. See also Lewyn, *supra* note 15, at 303, 346-65 (listing variety of concerns about sprawl); Meredith, *supra* note 3, at 463-66 (same). Because the case against sprawl has been so exhaustively discussed elsewhere, this Article does not seek to list every conceivable antisprawl argument. Instead, this Article focuses below on issues of most interest to persons concerned about individual liberty and property rights.

56. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

57. See Lewyn, *supra* note 15, at 348 (noting that only 54.4% of American households live near public transportation).

58. *Id.* (observing that even in Boston area, region with above-average transit service, most entry-level employers are over half of one mile from bus stops).

dominated by fast traffic that merely crossing the street can be dangerous.<sup>59</sup> So in the most sprawling cities and suburbs, sprawl actually deprives us of one of the most basic human freedoms of all—the freedom of physical movement on foot.

For the average affluent, healthy commuter, the necessity of driving is a costly inconvenience. In 2004, the average American household spent \$7,360 on automobile-related expenses.<sup>60</sup> In addition to the financial cost of driving, middle-class drivers may suffer adverse health-related consequences as a result of automobile dependence. If commuters can walk to a bus or train stop, or bike to work, exercise is built into their day. In contrast, automobile-dependent commuters must undertake special efforts to engage in any exercise beyond walking to and from a parking lot.<sup>61</sup>

The impact of automobile-dependent development is most serious for Americans who are too poor, too old, or too disabled to drive. To the extent jobs are located in places inaccessible by bus, train, or foot, these Americans are shut out of the labor force.<sup>62</sup> And the expenses of compulsory auto ownership function as a huge tax on the working poor: the typical low-income driver spends twenty-one percent of his or her income on transportation.<sup>63</sup>

If, as suggested below,<sup>64</sup> Americans are virtually forced to drive by the effects of government regulation, such regulation limits Americans' physical freedom (by making alternatives to driving impractical) and their financial freedom (by requiring them to spend money on cars). To the extent government regulation causes sprawl, the smart growth movement and the property rights

59. See Bruce S. Appleyard, *Planning Safe Routes to School*, PLANNING, May 2003, at 34, 34 ("Forty percent of parents polled in a 1999 national survey by the Centers for Disease Control cited traffic danger as a major barrier to allowing children to walk to school. And in 9,000 'walkability' audits conducted across the country, the National Safe Kids Campaign found that nearly 60 percent of parents and children encountered at least one serious hazard on their way to school."); see also MICHELLE ERNST, SURFACE TRANSPORTATION POLICY PROJECT, MEAN STREETS 2004: HOW FAR HAVE WE COME? 7 (2004), available at [http://www.transact.org/library/reports\\_html/ms2004/pdf/Final\\_Mean\\_Streets\\_2004\\_4.pdf](http://www.transact.org/library/reports_html/ms2004/pdf/Final_Mean_Streets_2004_4.pdf) (positing that, in newer developments, "wide, high-speed arterial streets offer few sidewalks or crosswalks"); James A. Kushner, *Urban Planning and the American Family*, 36 STETSON L. REV. 67, 70 (2006) (asserting that sprawl makes walking and biking dangerous because many trips require pedestrians and bikers to cross wide arterial highways).

60. See 2007 ABSTRACT, *supra* note 45, at 443 tbl.667 (showing cost of vehicles, gasoline, vehicle maintenance, and insurance, but not including depreciation).

61. See *supra* note 37 and accompanying text for a discussion of the view that sprawl may facilitate obesity by reducing exercise.

62. Cf. Seth J. Elin, *Curb Cuts Under Title II of the Americans with Disabilities Act: Are They Bringing Justice or Bankruptcy to Our Municipalities?*, 28 URB. LAW. 293, 297 (1996) (noting that twenty-eight percent of disabled Americans blamed unemployment among disabled persons on inadequate transportation). See *supra* notes 59-61 and accompanying text for a discussion of the inaccessibility of many jobs to public transit.

63. See BUREAU OF TRANSP. STATISTICS, U.S. DEP'T OF TRANSP., TRANSPORTATION STATISTICS ANNUAL REPORT 66 (2003), available at [http://www.bts.gov/publications/transportation\\_statistics\\_annual\\_report/2003/html/chapter\\_02/](http://www.bts.gov/publications/transportation_statistics_annual_report/2003/html/chapter_02/) (observing that half of working poor using own vehicle spent one-fifth of income or more on commuting).

64. See *infra* Part III.C for a discussion of how government regulations discourage walking, biking, and public transit use.

movement should be natural allies in fighting such regulation.

### B. *Why a Libertarian Smart Growth Agenda?*

Of course, most Americans are not doctrinaire libertarians.<sup>65</sup> Nevertheless, the smart growth movement would benefit both intellectually and politically by borrowing from the property rights vision of land use reform.

As noted above, the intellectual attacks on the smart growth movement have in large part been based on libertarian concerns about property rights. Some smart growth critics assert that sprawl is what the market prefers and that smart growth thus requires command-and-control government regulation.<sup>66</sup> But if the smart growth movement's objectives can be met by *reducing* government power, such arguments evaporate; if deregulation actually reduces sprawl, then smart growth is what consumers prefer in the absence of government control.<sup>67</sup>

As a practical, political matter, the smart growth movement would benefit from the support (or at least the neutrality) of the property rights movement. In recent years, numerous states have passed land-use reforms inspired by the property rights movement. For example, in Oregon and Arizona, voters passed property rights initiatives that guarantee property owners the right to compensation whenever government regulations reduce property values.<sup>68</sup> And the property rights movement has encountered even more success in limiting government's power to take property through eminent domain:<sup>69</sup> over the past

65. See Dave Leip's Atlas of U.S. Presidential Elections, 2004 Presidential General Election Results, <http://uselectionatlas.org/RESULTS/national.php?year=2004> (last visited Aug. 1, 2008) (showing that, in 2004 presidential election, Libertarian Party candidate received about one-third of one percent of national popular vote).

66. See *supra* notes 47, 49-51 and accompanying text for a discussion of criticism of smart growth's alleged governmental paternalism.

67. It could be argued that libertarians should never support any policy that facilitates public transit, because public transit undermines individual autonomy by making people dependent on government. But in fact, automobile dependence makes people equally dependent on government: to have a car, you must go to government for a driver's license, purchase auto insurance at a level dictated by government, drive on government-built roads, and follow government-dictated traffic safety rules. Some of these requirements have become more onerous over time: under the REAL ID Act recently passed by Congress, a citizen cannot get a driver's license without presenting "documentary proof of (a) her full legal name and date of birth, (b) her Social Security number (or the fact that she is not eligible for one), (c) the address of her principal residence, and (d) her citizenship." Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 661 (2007) (citing REAL ID Act of 2005, 49 U.S.C.A. § 30301 (West Supp. 2006)).

68. See Hannah Jacobs, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1520, 1525-26 (2006) (focusing on 2006 Arizona measure and describing more modest measures passed by several state legislatures); Kelly Michelle Kelley, *Restoring Property Rights in Washington: Regulatory Takings Compensation Inspired by Oregon's Measure 37*, 30 SEATTLE U. L. REV. 287, 301-02 (2006) (describing 2004 Oregon measure); Nancy Kubasek, *From the Environment*, 35 REAL ESTATE L.J. 611, 614-15, 617-26 (2007) (discussing property rights movement's role in these "regulatory takings" measures).

69. The federal Constitution allows government to take property as long as it compensates the owner and the taking is justified by a public purpose. *Kelo v. City of New London*, 545 U.S. 469, 478 (2005). Nevertheless, states are free to restrict government's powers to a greater extent by requiring

two years, thirty-four states have limited the eminent domain power in various ways.<sup>70</sup> Because property rights rhetoric is politically potent, the smart growth movement will be more effective in the political arena if it can invoke freedom and property rights as arguments for more pedestrian-friendly development, rather than relying solely on environmentalist and communitarian arguments.

### C. *What Sort of Agenda?*

A neighborhood's automobile dependence (or lack thereof) depends in large part on three factors: density, diversity, and design.<sup>71</sup> *Density* makes walking, biking, and transit ridership easier, because in a densely populated area, more people will live within walking or biking distance of jobs, shops, and bus or train stops than in a more thinly populated area.<sup>72</sup> Neighborhoods with a *diverse* grouping of land uses are more pedestrian and bicyclist friendly, because where housing, shops, and jobs are mixed together, residents can quickly walk or bike from one to the other.<sup>73</sup> Where streets are *designed* to be safe and comfortable for pedestrians, more people will walk to jobs, shops, and transit stops. By contrast, where neighborhoods are designed solely to carry high-speed automobile traffic, walking will be uncomfortable and thus rare.<sup>74</sup>

Today, government regulations discourage walking, bicycling, and transit use by requiring low density, discouraging mixed use, and encouraging antipedestrian street design.<sup>75</sup> It logically follows that Americans can make their cities and suburbs more pedestrian and bicyclist friendly by reducing, rather than increasing, such government regulation. Thus, smart growth advocates and property rights activists can join in promoting:

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something more than a "public purpose" for a taking. See Tom Condon, *Kelo's Legacy: A Win for Property Rights Movement*, HARTFORD COURANT, May 20, 2007, at C4 (noting that thirty-four states have limited eminent domain).

70. Condon, *supra* note 69 (asserting that property rights movement inspired these reforms).

71. See Robert Cervero, *Growing Smart by Linking Transportation and Urban Development*, 19 VA. ENVTL. L.J. 357, 364-65 (2000) (observing that smart growth development embodies principles of density, diversity, and design).

72. See Judy S. Davis & Samuel Seskin, *Impacts of Urban Form on Travel Behavior*, 29 URB. LAW. 215, 224-27 (1997) ("[A] 10 percent increase in [commuter rail] station area residential densities boosts light rail boardings by 5.9 percent on average and commuter rail boardings by 2.5 percent on average. . . . [A] doubling of residential densities (persons per residential acre) correlates with a decrease of 20 percent to 30 percent in vehicle miles traveled per capita.").

73. See Cervero, *supra* note 71, at 365 (observing that, when grocery stores are located in commuters' neighborhood, nonmotorized commuting increases by seventeen percentage points).

74. See TRANSP. RESEARCH BD., TCRP REPORT 95, LAND USE AND SITE DESIGN: TRAVELER RESPONSE TO TRANSPORTATION SYSTEM CHANGES 15-4, 15-9 to 15-12 (2003), available at [http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp\\_rpt\\_95c15.pdf](http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rpt_95c15.pdf) (claiming that, in pedestrian-oriented "Traditional Neighborhood Development[s]," residents are more likely to walk to a wide variety of destinations); Jeffrey Tumlin & Adam Millard-Ball, *How to Make Transit-Oriented Development Work*, PLANNING, May 2003, at 14, 19 (observing that, in many Washington, D.C., suburbs, street design makes walking difficult).

75. See *infra* notes 76-89, 124-31, 144-62, 184-203 and accompanying text for a discussion of the effects of government regulation.

- more compact development, by allowing the market rather than bureaucrats to determine population density;
- more diverse land uses, by reforming government zoning regulations that artificially separate housing from shops and jobs; and
- more pedestrian-friendly design, by reforming regulations that require the creation of wide, high-speed streets surrounded by parking lots (as opposed to narrower, more pedestrian-friendly streets).

Each set of legal reforms will be addressed in turn.

### 1. Density: End Government's War on Compact Development

If a retail-dominated street intersects with a nearby street containing many homes or apartments, hundreds of people can conveniently walk to shops. But if zoning regulations strictly limit the number of dwellings that can be built at the intersecting block, far fewer people can walk to those shops. Thus, regulations that limit density also limit walkability<sup>76</sup>—and American zoning codes limit both.

#### a. *The Problem*

American land-use regulation consistently has sought to limit population density,<sup>77</sup> often through regulations requiring homes and apartments to consume large amounts of land.<sup>78</sup> These regulations are not limited to small towns and suburbs; for example, even in the city of Atlanta, the zoning code requires houses in some neighborhoods to consume at least two acres of land.<sup>79</sup> Even multifamily housing may be subject to strict density limits; municipalities may limit the number of apartments or condominiums that can be built on an acre<sup>80</sup>

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76. The analysis applies to biking as well; because biking is slower than driving, a neighborhood in which shops and jobs are close to residences is more "bikable" than one where shops and jobs are miles away from residences. Cf. William Hill Hub, *Know Your Numbers When It Comes to Blood Pressure*, JUPITER COURIER, May 20, 2007, at A9 (observing that moderate bicycle speed is ten miles per hour or less).

77. See Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253, 253 (2002) (observing that "hallmarks of American land use law" include "reducing population density and dispersing residents over wider areas").

78. See WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 9.18, at 597-98 (3d ed. 2000) (noting that most zoning ordinances control density through minimum lot-size requirements and similar regulations and that these rules have generally been upheld by courts). This Article's analysis applies not just to regulations explicitly limiting the number of dwellings per acre but also to less direct forms of antidensity regulation, such as limitations on the height of buildings and "floor area ratios" and "open space ratio[s]" that require parts of a lot to be used for areas other than buildings. *Id.* at 598. Because all of these regulations have similar effects, I shall not address each type of regulation separately.

79. See ATLANTA, GA., CODE OF ORDINANCES, pt. 16, ch. 3, § 16-03.002(2) (2007), available at <http://www.municode.com/Resources/gateway.asp?pid=10376&sid=10> (providing that, in one of city's zones, development allowed only "at a density of not more than one dwelling unit per two acres").

80. See, e.g., HUNTSVILLE, ALA., CODE OF ORDINANCES, app. A, ch. I, arts. 14.2.3(1), 15.2.3(1) (2007) available at <http://www.municode.com/Resources/gateway.asp?pid=12962&sid=1> (requiring minimum lot areas of 2000 and 3000 square feet per multifamily unit in various zones); SUGAR LAND, TEX., DEV. CODE, ch. 2, art. II, pt. 9, § 2-117 (2007), available at <http://www.municode.com/>

or directly prohibit high- and midrise apartments.<sup>81</sup>

Such antidensity regulations create automobile-dependent development by reducing both transit use and walking. As a general rule, a neighborhood must have at least seven to fifteen dwelling units per acre to support significant transit ridership,<sup>82</sup> because only compact neighborhoods have large numbers of people living within walking distance of a bus or train stop. In areas with lower density, very few people will live within a short walk of a bus or train stop, and transit ridership will therefore be low.<sup>83</sup> When an area's transit ridership is low, transit systems cannot afford to provide service to that area.<sup>84</sup> Thus, antidensity regulations effectively reduce transit service.

Similarly, low-density areas are less comfortable for pedestrians than neighborhoods that are more compact. For example, imagine two neighborhoods near a grocery store: one with 100 residences per acre and another with one house per acre. Because there are 640 acres in a square mile,<sup>85</sup> 64,000 (640 x 100) households in the more compact neighborhood will live within a one-mile (or about thirty-minute)<sup>86</sup> walk of the store, and 16,000 households will live within a quarter-mile (or about 7.5-minute) walk of the store.<sup>87</sup> By contrast, in the more thinly populated area, only 640 households will live within a one-mile walk of the store, and only 160 will live within a quarter-mile walk of the store. Thus, more

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Resources/gateway.asp?pid=13286&sid=4 (requiring 2178 square feet of lot area per multifamily dwelling unit). Because an acre contains 43,560 square feet, these regulations prohibit construction of more than twenty or so units per acre. See Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 1905 (1985) (defining an acre). By contrast, prosperous urban neighborhoods sometimes have 100 to 200 dwelling units per acre. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 211 (6th prtg. 1961) (observing that neighborhood vitality increases when there are more than 100 residential units per acre); Ruth Eckdish Knack, *Dense, Denser, Denser Still*, PLANNING, Aug. 2002, at 4, 6 (noting that New York's Upper East Side, one of city's "most prestigious residential districts," has "roughly 200 units per acre").

81. See, e.g., HUNTSVILLE CODE, app. A, ch. 1, arts. 14.2.3(8), 15.2.3(8) (limiting apartment height to two or three stories in some zones), SUGAR LAND CODE ch. 2, art. II, pt. 9, § 2-117(c) (prohibiting multifamily dwellings with three or more stories).

82. See Freilich, *supra* note 23, at 552 n.18 (noting that many studies have shown seven to fifteen units per acre to be minimum number necessary to encourage use of public transportation).

83. See *id.* at 552 (citing studies showing that commuters are unlikely to walk more than quarter mile to bus stop or transit station); see also Davis & Seskin, *supra* note 72, at 221-27 (quantifying connection between density and transit ridership).

84. Cf. Ron Scherer, *N.Y. Aside, Big Problems in US Mass Transit*, CHRISTIAN SCI. MONITOR, Dec. 18, 2002, at 2, 2 (noting that during 2001-02 recession, reduced transit system ridership led to reduced transit system revenue, which led to service cutbacks and fare increases).

85. Leff, *supra* note 80, at 1905.

86. See Editorial, *A Christmas Gift for Mr. Paterakis*, BALTIMORE SUN, Dec. 14, 1997, at 2F (noting that it takes thirty minutes to walk a mile).

87. Numerous commentators have suggested that most Americans consider a quarter mile to be "walking distance" and will rarely walk greater distances. See, e.g., Andres Duany & Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 FORDHAM URB. L.J. 1445, 1447 (2002) (commenting that, in neighborhoods organized around "mobility pattern of the pedestrian," most residents will live within quarter mile of stores and schools); Freilich, *supra* note 23, at 552 (pointing to studies showing that, for transit ridership to be common, "a development must be located so that residents are not required to walk a distance of greater than a quarter mile to a transit station").



people can comfortably walk to stores in the more compact neighborhood.<sup>88</sup>

In sum, Americans can comfortably walk to shops, jobs, and public transit only in reasonably compact areas.<sup>89</sup> Therefore, by making neighborhoods less compact, antidensity zoning makes those neighborhoods less walkable.

One could argue that even if antidensity regulation created sprawl in suburbia, no harm would come from limiting density in already-walkable central city neighborhoods. But such regulation creates sprawl in another respect: by affecting the location of development. If urban bureaucrats limit the number of dwellings that can be built in a city, the city's housing stock may be insufficient to house the region's population—in which case population shifts to whichever suburb is most willing to house new residents.<sup>90</sup> Thus, antidensity regulation accelerates both the automobile dependence of suburbs and the movement of population from cities to those suburbs.

*b. Solutions*

*i. The Case for Deregulation*

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The boldest, most libertarian solution to the ills of antidensity regulation is to eliminate all (or nearly all)<sup>91</sup> such regulation, either at the local level or through state legislation. Because local governments' power to zone is dependent on grants of authority from state government,<sup>92</sup> state governments could amend their zoning enabling acts to provide that local governments' zoning power<sup>93</sup> simply does not include the power to discriminate among land

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88. See Jon Gertner, *Playing SimCity—For Real*, N.Y. TIMES (Real Estate Magazine), Mar. 18, 2007, at 82 (quoting urban planner positing that grocery store requires 5000 to 7000 homes nearby); Knack, *supra* note 80, at 9 (quoting former redevelopment official as saying that “you need a certain amount of density at a certain household income within a certain radius to support a grocery store”).

89. That is not to say that density, standing alone, is sufficient to create a highly walkable community. Ideally, a walkable community is not just compact and of mixed use but also has streets that are safe and comfortable for pedestrians. See *infra* Part III.C.1.b.iii for a discussion of how high density might not automatically lead to walkability if street design and parking policies favor driving over walking and Part III.C.3 for a discussion of how current street design and parking policies tend to frustrate walkability and for a discussion of reform proposals.

90. See Bernard H. Siegan, *Conserving and Developing the Land*, 27 SAN DIEGO L. REV. 279, 294 (1990) (arguing that overregulation of urban development will push development to outlying areas to avoid political resistance).

91. Presumably, any statute limiting antidensity regulation would have to include certain exceptions; for example, government might wish to limit development in environmentally sensitive areas. See STOEBUCK & WHITMAN, *supra* note 78, § 9.18, at 599 (pointing out that regulations limiting density are sometimes justified by environmental concerns such as assuring safe on-site sewage disposal in areas without public sewers).

92. See *supra* notes 18-20 and accompanying text for a discussion of zoning enabling acts. See also STOEBUCK & WHITMAN, *supra* note 78, § 9.13, at 584 (noting that specific state zoning enabling act is required, because general local police power does not include power to zone land).

93. State governments could also amend their zoning enabling acts to limit the ability of local governments to reject subdivision applications based on density. STOEBUCK & WHITMAN, *supra* note 78, § 9.30, at 659-60 (pointing out that where land is subdivided into multiple lots for future

uses on the basis of density.<sup>94</sup> Under such a statute, local governments would no longer be allowed to set minimum sizes for houses or apartments.

From both a property rights perspective and a smart growth perspective, density deregulation would be highly desirable. Because higher density, other factors being equal, increases the number of destinations that one can reach on foot, elimination of density restrictions would make American neighborhoods more walkable. Moreover, elimination of antidensity restrictions would dramatically enhance landowners' rights: a landowner could place as many or as few dwelling units on that land as she desired (rather than being constrained by bureaucratic regulation). A common libertarian argument against smart growth-oriented regulation is that such regulation "forces" people to live in more dense neighborhoods.<sup>95</sup> If higher density is achieved through deregulation rather than regulation, however, this claim falls apart; people who want low density can purchase houses on larger lots, and people who are willing to accept higher density can choose to live in more compact, walkable neighborhoods. Deregulation can allow Americans to get what they want without forcing their choices onto others—in short, "unanimity without conformity."<sup>96</sup>

Admittedly, the advantages of density deregulation are less obvious from a smart growth perspective than from a libertarian perspective. One could argue that smart growth requires more, not less, regulation of density in rural and suburban areas<sup>97</sup> in order to prevent development from sprawling into those areas.<sup>98</sup> In the absence of regionwide urban growth boundaries,<sup>99</sup> however,

development, local governments have power to disapprove subdivisions even if no explicit regulation has been violated).

94. Indeed, statewide deregulation might be more prudent than relying on local governments to deregulate density, because local governments have a strong political incentive to keep housing scarce in order to keep local home prices high. See Audrey G. McFarlane, *Redevelopment and the Four Dimensions of Class in Land Use*, 22 J.L. & POL. 33, 39-40 (2006) (arguing that high cost of houses on large lots provides greater tax revenue to local governments).

95. See Lewyn, *supra* note 41, at 48-49 (quoting claim that Oregon's urban growth boundary forces people to "be crowded together, living on small lots").

96. Cf. Stephen Chapman, Editorial, *Bush Hears Taxpayers*, TULSA WORLD, Mar. 28, 1990, at 12A (pointing out that "unanimity without conformity" is primary virtue of free market (quoting Milton Friedman)).

97. Additionally, a few jurisdictions have sought to mandate *minimum* densities in urban areas. See Mandelker, *supra* note 28, at 817 (noting that proposed Portland, Oregon, regulations require "average minimum residential density of ten dwelling units to the acre and a diversity of housing stock" in some areas). But see Rachel D. Jaffe, Comment, *Stopping Sprawl in Lancaster County, Pennsylvania: Making the Case for Mandatory Urban Growth Boundaries*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 143, 169 (2005) (noting that, in 2002, Oregon voters passed ballot measure prohibiting such requirements within existing neighborhoods). Obviously, smart growth advocates and libertarians are likely to disagree as to this issue; smart growth advocates might support such regulations as necessary to encourage compact, pedestrian-friendly development while principled libertarians would oppose any regulation as an infringement on landowners' property rights. Cf. JONATHAN LEVINE, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE 111 (2006) ("Requiring high-density development where only low-density is economically supportable would be expected to lead to no development at all, since investors would seek development opportunities elsewhere.").

98. See STOEBUCK & WHITMAN, *supra* note 78, § 9.18, at 598-99 (stating that courts uphold

density restrictions have simply failed to limit sprawl: if one suburb caps density in order to limit development, developers may move even further into the countryside to build in a more permissive jurisdiction.<sup>100</sup> So in the absence of effective growth boundaries, complete density deregulation may actually reduce, rather than increase, sprawl.

Nevertheless, the smart growth argument for density regulation contains the seeds of a possible compromise. Where growth boundaries and similar regulations are already in effect, density deregulation could be used to mitigate their severity: a state or regional government could allow unlimited density inside a growth boundary or (more narrowly still) within the city limits of a regional core city. This compromise would certainly allow more government regulation than libertarians would like—but it would nevertheless be less intrusive than the status quo. In any event, property rights advocates and smart growth advocates should be able to agree that government should allow unlimited density in urban areas—for example, in regional core cities where smart growth advocates seek to concentrate development.

## ii. Density and Congestion

It could be argued that low-density zoning is necessary to prevent the traffic congestion and resulting pollution that come from packing more people (and thus more cars) into a neighborhood.<sup>101</sup> Nevertheless, regionwide low density may *increase* congestion by increasing driving: residents of low-density areas drive more than residents of high-density areas,<sup>102</sup> thus at least partially offsetting the alleged benefits of lower density. Table 1 below exhibits data on

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maximum-density regulations to preserve open space and control growth); Mandelker, *supra* note 28, at 824 (“[G]rowth management programs may have to rely on large lot, single-family residential zoning . . . . Large lot zoning can be an effective restriction on [suburban] development when it zones densities so low that they discourage development . . .”).

99. The wisdom of such boundaries is, of course, another issue likely to divide smart growth advocates from libertarians and is thus largely beyond the scope of this Article. *Cf.* Lewyn, *supra* note 41, at 17-51 (discussing legal and policy debate over Oregon’s growth boundaries).

100. *See* Downs, *supra* note 4, at 21-22 (“To work well, outward growth limits must involve the entire region, not just individual localities acting separately. Separate limits adopted by individual localities will just spread sprawl farther. And state laws must prohibit most new development outside the growth boundary or developers will leapfrog over it.”).

101. *See, e.g.,* City of Bellevue v. E. Bellevue Cmty. Council, 983 P.2d 602, 608 (Wash. 1999) (upholding city determination that lower density would relieve traffic problems); GILLHAM, *supra* note 2, at 114 (citing claims that suburbs have less traffic congestion and air pollution than dense urban areas).

102. *See supra* notes 82-90 and accompanying text for a discussion of why antidensity regulations encourage automobile dependence. For example, according to the 2000 U.S. Census, over one-fourth of central city residents used public transit to get to work in six cities: Boston, Chicago, New York, Philadelphia, San Francisco, and Washington. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003, at 700 (2004) [hereinafter 2003 ABSTRACT]. All six cities have over 9000 residents per square mile. Tbl.1, *infra*. By contrast, in low-density cities such as Phoenix, Houston, and Dallas, fewer than ten percent of commuters used public transit. 2003 ABSTRACT, *supra*, at 700; tbl.1, *infra* (showing that all three cities have fewer than 4000 residents per square mile).

commuting habits, population density, and traffic congestion for the fourteen metropolitan areas with over three million people.<sup>103</sup>

TABLE 1 CONGESTION AND COMMUTING IN AMERICAN URBANIZED AREAS			
	Hours lost per traveler due to traffic congestion <sup>104</sup>	Annual public transit trips per person <sup>105</sup>	Population per square mile <sup>106</sup> (Region/City) <sup>107</sup>
Los Angeles	72	53.1	5488/8198
San Francisco	60	100.9	3260/15,936
Washington	60	107.9	3267/9015
Atlanta	60	35.9	1367/3182
Dallas	58	18.4	1933/3534
Houston	56	25.0	1990/3474
Detroit	54	11.8	2816/6486
Miami	50	29.8	3173/10,633
Phoenix	48	18.3	2831/2986
Boston	46	98.6	1819/11,760

103. See DAVID SCHRANK & TIM LOMAX, THE 2007 URBAN MOBILITY REPORT 32-33 tbl.1 (2007), available at [http://tti.tamu.edu/documents/mobility\\_report\\_2007\\_wappx.pdf](http://tti.tamu.edu/documents/mobility_report_2007_wappx.pdf) (listing these fourteen regions as "Very Large" urban areas with over three million people).

104. *Id.* I note that the fourteen largest regions are not the fourteen most congested regions; some smaller regions are more congested than some of the fourteen largest. For example, thirty-two regions are more congested than Philadelphia, the least congested region mentioned above. *Id.*

105. Transit data for individual regions is available online and can be found in two ways. First, one can read a spreadsheet listing data for all "urbanized areas." Texas Transportation Institute, Congestion Data for Your City, [http://mobility.tamu.edu/ums/congestion\\_data/](http://mobility.tamu.edu/ums/congestion_data/) (last visited Aug. 1, 2008) [hereinafter Congestion Data]. Second, one can go to the same site, click on the links for "Western U.S. Cities," "Central U.S. Cities," or "Eastern U.S. cities," and then click on links for individual regions. *Id.* To calculate the number of transit trips per individual, divide the total number of passenger trips (item O on the spreadsheet) by the regional population (item E on the spreadsheet). *Id.*

106. *Id.* Regional population per square mile is item H on the large spreadsheet and is also available in tables of data for individual regions. *Id.*; accord WORLD ALMANAC EDUCATION GROUP, THE WORLD ALMANAC AND BOOK OF FACTS 2006, at 416-25 (2006) (listing densities for individual cities).

107. Table 1 lists densities for both regional cores and central cities, because it may be that the density of a core city matters more than the density of a suburb. If city and suburb alike have medium-to-low densities, both may be equally automobile dependent. But where the city is quite compact, transit ridership may be high regardless of suburban densities. See *supra* note 102 for a discussion of the correlation between central city density and central city transit ridership. See *supra* notes 104-06 and accompanying Table 1 for an illustration of the interaction between transit ridership, city density, and regional density. Transit ridership is below average in Los Angeles, where the core city is only slightly more dense than the region as a whole; by contrast, transit ridership is high in regions where the core city is much more dense than the region as a whole, such as New York and Boston.

**TABLE 1 (CONTINUED)**  
**CONGESTION AND COMMUTING IN AMERICAN URBANIZED AREAS**

	<b>Hours lost per traveler due to traffic congestion</b>	<b>Annual public transit trips per person</b>	<b>Population per square mile (Region/City)</b>
Chicago	46	74.2	2907/12,604
New York	46	195.9	3719/26,720
Seattle	45	53.2	2385/6811
Philadelphia	38	66.6	2325/10,882
Average for large regions	50	63.5	2803/9444

If low-density sprawl played a major role in reducing traffic congestion, low-density, automobile dependent regions (such as Atlanta and Dallas, the first and third least dense regions listed above) would have the lowest levels of congestion. Instead, Atlanta and Dallas have above-average levels of congestion (ranking second and fifth among the fourteen large metropolitan areas). If low-density sprawl reduced congestion, New York City (the region with the most compact urban core and the second most densely populated region) would have unbearable congestion—yet in fact, metropolitan New York has less traffic congestion than all but two of America's fourteen largest urbanized areas.<sup>108</sup>

### iii. What About Los Angeles?

Concededly, Los Angeles (the most densely populated region) does have more traffic congestion than any other American region.<sup>109</sup> Despite its high regional density,<sup>110</sup> however, Los Angeles is more automobile dependent than the average large region<sup>111</sup>—possibly because even within that region's core city, local government has counteracted the pro-pedestrian effects of density by enacting street design and parking regulations that discourage nonautomotive

108. See *supra* notes 104-07 and accompanying Table 1 for data showing that, among very large urban areas, only Seattle and Philadelphia have a lower annual delay per traveler than New York.

109. See *supra* notes 104-07 and accompanying Table 1 for data showing that Los Angeles ranks first in hours lost due to traffic congestion.

110. I note, however, that the core city of Los Angeles is not tremendously dense—another factor that may contribute to automobile dependence. See *supra* Table 1 for data showing that population density in Los Angeles is lower than average when compared to other very large urban areas. See *supra* notes 82-84 and accompanying text for a description of the relationship between density and transit use.

111. See *supra* notes 104-07, 109 and accompanying Table 1 for data showing that Los Angeles's per capita transit ridership is lower than average for the fourteen largest regions. See also 2003 ABSTRACT, *supra* note 102, at 700 (demonstrating that only 10.2% of Los Angeles residents used public transit to get to work in 2002, as opposed to majority of New Yorkers and 25% to 50% of city residents in Boston, Chicago, and several other cities).

transportation.

As a general matter, Los Angeles streets are wider (and thus less comfortable for pedestrians)<sup>112</sup> than streets in most other American cities. Los Angeles's major surface streets are typically six to eight lanes wide,<sup>113</sup> about twice the width of the average major American street.<sup>114</sup> Similarly, the average residential street in Los Angeles is thirty-six feet wide,<sup>115</sup> about thirty percent wider than the American average.<sup>116</sup> And Los Angeles's most densely populated streets are sometimes its widest, because that city's highway dedication law requires that existing streets be widened in front of new multifamily housing.<sup>117</sup> Thus, Los Angeles pedestrians and transit riders are in a no-win situation. If they choose to live in a single-family neighborhood, the neighborhood population density may be too low<sup>118</sup> to make walking or public transit convenient,<sup>119</sup> but if they choose to live in a dense multifamily neighborhood, they have to endanger their lives by crossing a gigantic street in order to reach shops, jobs, or transit service on foot.

Los Angeles has also minimum parking requirements—government regulations that require landowners to supply residents and visitors with parking.<sup>120</sup> These regulations facilitate driving by artificially increasing the supply of parking and discourage walking by encouraging landowners to surround their buildings with parking lots, thus artificially increasing pedestrian commutes.<sup>121</sup> Los Angeles's minimum parking requirements are so strict that most of that city's downtown land is at least partially used for parking: 331 hectares of parking sit on only 408 hectares of land, a parking-to-land ratio more than four times higher than that of New York City and higher than that of any

112. See *infra* notes 188-97 and accompanying text for a discussion of how wide streets reduce pedestrian comfort and safety.

113. Sally Cragin, *L.A. Shines with Many Alternatives to Disneyland*, BOSTON HERALD, Aug. 25, 1996, at 67.

114. See TODD LITMAN, TRANSPORTATION LAND VALUATION: EVALUATING POLICIES AND PRACTICES THAT AFFECT THE AMOUNT OF LAND DEVOTED TO TRANSPORTATION FACILITIES 4 tbl.1 (2005), <http://vtpi.org/land.pdf> (stating that, in contrast, average American "[p]rincipal [a]rterial" urban street has only 3.4 lanes).

115. Shelby Grad, *Narrower Streets Help Redefine Curb Appeal*, L.A. TIMES, Apr. 6, 1998, at A3.

116. LITMAN, *supra* note 114, at 4 (noting that average "[l]ocal" urban street, narrowest street type listed, is only twenty-eight feet wide). See *infra* notes 204-16 and accompanying text for a discussion of how residential streets could be narrower than twenty-eight feet under certain circumstances.

117. Manville & Shoup, *supra* note 24, at 239.

118. This analysis assumes, of course, that areas dominated by single-family homes are less dense than those dominated by multifamily dwellings, because the latter type of dwelling places multiple households on a plot of land rather than just one. Cf. Jaffe, *supra* note 97, at 165 (equating single-family homes with low density).

119. See *supra* notes 82-89 and accompanying text for a discussion of the relationship between density, walking, and transit.

120. See Pollard, *supra* note 25, at 1534 (describing minimum parking requirements); Martha Groves, *Phantom Parking on the Westside*, L.A. TIMES, Jan. 20, 2007, at B1 (discussing Los Angeles businesses' attempts to evade requirements).

121. See *infra* Part III.C.3.a.i for a discussion of the effects of minimum parking requirements.

large city on Earth.<sup>122</sup> Because Los Angeles's parking and street design regulations artificially increase driving, the example of Los Angeles, standing alone, does not support the claim that compact development equals more congestion.

It may be that, other factors being equal, an increase in density may lead to a slight increase in vehicular congestion. But where increased density leads to increased walking, biking, and transit ridership, increased density may actually reduce traffic congestion.<sup>123</sup> Either way, the relationship between density and congestion, standing alone, is not clear enough to justify the web of government regulation that, by mandating sprawling, low-density neighborhoods, virtually forces Americans into their cars.

## 2. Diversity: Stop Zoning Our Way to Sprawl

### a. *The Problem*

American zoning codes generally mandate separation of every major form of human activity from every other major form of human activity.<sup>124</sup> For example, zoning codes often prohibit landowners from placing houses and apartments next to shops or offices.<sup>125</sup> This system of "single use zoning"<sup>126</sup> increases the likelihood that houses and apartments will not be near offices or shops, which in turn means that "[v]ery few people living in America today can simply walk to the local grocer . . . . Even if you are going to purchase a single item and the store is very close by, it is normally a car trip away."<sup>127</sup> Thus, single-use zoning contributes to automobile-dependent sprawl.

In addition, single-use zoning limits property rights: single-use zoning means that a landowner who wishes to build apartments near a shopping center, or live above his or her own shop, is simply not allowed to do so. It could be argued that

122. Manville & Shoup, *supra* note 24, at 242-43.

123. See generally Brian D. Taylor, *Rethinking Traffic Congestion*, ACCESS, Fall 2002, at 8, 8-17 (proposing alternative ways to examine relationship between population density and congestion).

124. See Briffault, *supra* note 77, at 253 (arguing that American land-use law centers on "the separation of different land uses from each other"); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1091 (1996) (noting that "virtually all" of current zoning laws "mandate the separation of different areas by function").

125. See, e.g., *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 391-95 (1926) (upholding ordinance separating single-family houses from both apartments and commerce); HUNTSVILLE, ALA., CODE OF ORDINANCES, app. A, ch. I, arts. 13.1, 14.1, 15.1, 21.1, 25.1 (2007), available at <http://www.municode.com/Resources/gateway.asp?pid=12962&sid=1>; JACKSONVILLE, FLA., ORDINANCE CODE §§ 313, 656.312 (1990), available at <http://www.municode.com/Resources/gateway.asp?pid=12174&sid=9> (noting that neither houses nor apartments are allowed in "Neighborhood Commercial" zone, "Commercial/Community General" zone, or "Business Park" zone); SUGAR LAND, TEX., DEV. CODE, ch. 2, art. II., pt. 1, §§ 2-51, 2-55 (2007), available at <http://www.municode.com/Resources/gateway.asp?pid=13286&sid=4> (creating "Land Use Matrix" showing that grocery stores, restaurants, and drug stores are not allowed in city's multifamily zone and that dwellings are not permitted in city's office zones).

126. Tondro, *supra* note 21, at 514.

127. *Id.* at 517.

single-use zoning is itself part of a neighborhood's or suburb's "collective property right" to regulate neighborhood character.<sup>128</sup> But this argument proves too much. Just as zoning seeks to further interests broader than those of an individual landowner, nearly every form of government regulation seeks to further the interests of a broader public. So if local zoning protects the "collective property rights" of a neighborhood, regional or statewide land-use regulation protects the "collective property rights" of the region or state. If this theory were consistently applied to all types of government regulation, an environmentalist-dominated state legislature could outlaw suburban development based on a region's "collective property right" in preventing sprawl-induced environmental degradation—hardly a result that expands property rights as conventionally understood.

It could also be argued that because many private restrictive covenants require all buildings in a subdivision to be single-family homes,<sup>129</sup> single-use zoning merely duplicates what homeowners would do on their own if they could organize to enter into such covenants.<sup>130</sup> But this argument, if adopted, would require government to privilege an imaginary contract (the restrictive covenant that policy makers think neighborhood homeowners might create if they could) over a landowner's right to make actual contracts providing for mixed-use development—hardly a libertarian result.<sup>131</sup>

#### b. Solutions

The most libertarian solution to the ills of zoning is for states to simply abolish the SZEAs and its progeny,<sup>132</sup> that is, to eliminate cities' zoning power and to allow landowners the absolute right to place any land use next to any other land use. If this were the case, there would be no government restrictions on placing shops or offices within walking distance of housing. Such a laissez-

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128. See LEVINE, *supra* note 97, at 100-01 (noting that municipal zoning may be seen as collective property right inherent to municipality).

129. See Francesca Ortiz, *Zoning the Voyeur Dorm: Regulating Home-Based Voyeur Web Sites Through Land Use Laws*, 34 U.C. DAVIS L. REV. 929, 997 (2001) ("Covenants restricting parcels in a subdivision to single-family use or residential use are common.").

130. See Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 845 (1999) (noting that zoning "simulate[s] the result that would have been accomplished had the initial landowners but for high transaction costs been able to impose a covenant scheme on surrounding landowners" (quoting A. Dan Tarlock, *Toward a Revised Theory of Zoning*, in LAND USE CONTROLS ANNUAL 141 (Frank S. Bangs, Jr. ed., 1972))).

131. And even if this argument were persuasive in principle, it would only apply to the subjects most commonly covered by restrictive covenants. So if, as an empirical matter, restrictive covenants frequently required exclusion of nonresidential uses from neighborhoods dominated by single-family houses but rarely required segregation between businesses and multifamily housing, then there would be no reason to use zoning to achieve the latter result. See *infra* note 138 and accompanying text for a discussion of the argument that single-use zoning is less defensible where uses other than single-family homes are involved.

132. As noted above, cities and counties can engage in zoning only because states allow them to do so. See *supra* notes 18-20 and accompanying text for a description of the SZEAs.



faire system would minimize regulation while making neighborhoods more walkable.<sup>133</sup>

This solution, however, may be impractical because of the risk that under a pure laissez-faire regime, polluting or dangerous industries might interfere with neighboring landowners' ability to enjoy their property.<sup>134</sup> For example, if Company A built a large, smelly factory next to the homes of A and B, A and B would be unable to comfortably step outside their residences, let alone enjoy the benefits of a walkable neighborhood.<sup>135</sup> This problem, however, could be easily solved if industrial uses (as opposed to less-polluting office or retail uses) were exempted from a general policy of mixed use.<sup>136</sup>

One could argue that even more modest forms of mixed use are not politically feasible, because homeowners will want to protect the serenity of their neighborhoods from the traffic and noise induced by large-scale commerce.<sup>137</sup> But even if homeowners are averse to mixed use, landowners should be allowed to mix commerce with multifamily dwellings.<sup>138</sup> Apartments and condominiums are, by definition, already more heavily trafficked than single-family zones. Thus, to subject apartment-dwellers to single-use zoning provides them with the worst of both worlds: the density of apartment living without the walkability of jobs and shops nearby. Accordingly, multifamily and commercial zones should generally be merged into one "Multifamily/Commerce" zone category, so that landowners will consistently be allowed to mix commerce and multifamily housing.

133. Nevertheless, abolishing zoning, standing alone, will have only a slight impact on land use. Cf. Michael Lewyn, *How Overregulation Creates Sprawl (Even in a City Without Zoning)*, 50 WAYNE L. REV. 1171, 1177-91 (2004) (noting that Houston, Texas, lacks zoning regulations directly restricting land use but is still highly automobile dependent because of other forms of regulation). See *supra* Part III.C.2 and *infra* III.C.3 for a discussion of additional reforms.

134. Of course, nuisance suits could protect landowners from noxious industries. See, e.g., *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 690 (N.C. 1953) (recognizing oil refinery as nuisance). Nevertheless, nuisance law is less useful to landowners than zoning, because it is an after-the-fact remedy; a victimized homeowner must suffer from nearby pollutants until he has obtained damages or an injunction. JESSE DUKEMINIER ET AL., *PROPERTY* 822 (6th ed. 2006).

135. Cf. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 366 n.89 (1990) (suggesting that zoning was instituted in early twentieth century at least partially to prevent conflicts between polluting industry and people residing nearby).

136. In addition, special zones might be appropriate for other noxious land uses such as adult entertainment. Cf. *Renton v. Playtime Theatres*, 475 U.S. 41, 54 (1986) (upholding special zoning for such land uses).

137. Cf. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (asserting that, in zones dominated by single-family housing, "the blessings of quiet seclusion and clean air make the area a sanctuary for people"); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 393 (1926) (justifying single-use zoning on ground that places of business are likely to be "noisy" and thus create "nuisance" in single-family neighborhoods (quoting *State v. City of New Orleans*, 97 So. 440, 444 (La. 1923))).

138. Indeed, some cities have created a few mixed-use zones. See, e.g., JACKSONVILLE, FLA., ORDINANCE CODE § 656.315 (1990), available at <http://www.municode.com/Resources/gateway.asp?pid=12174&sid=9> (allowing mix of uses in city's central business district). Nevertheless, such mixed-use zoning is the exception and not the rule in most of the United States. See Frug, *supra* note 124, at 1091 (noting that single-use zoning is virtually universal).

Even in neighborhoods dominated by single-family homes, there is a middle ground between the single-zone status quo and a pure laissez-faire regime. The SmartCode, a model code that seeks to promote the development of traditional, walkable neighborhoods,<sup>139</sup> creates a zone (entitled the "T3" or "Sub-Urban" zone)<sup>140</sup> in which single-family homes dominate.<sup>141</sup> In that zone, the SmartCode allows shops and offices but only on the first floor of buildings.<sup>142</sup> The SmartCode further limits shops in this zone by allowing only one retail enterprise for every 300 dwelling units, and by providing that restaurants in that zone may only seat twenty people.<sup>143</sup>

In sum, the SmartCode allows shops in single-family areas to the limited extent necessary to give homeowners a chance to walk to small-scale shopping without allowing those neighborhoods to be overwhelmed by the traffic caused by large retail stores or office buildings. Thus, cities that seek to make their single-family zones more walkable may wish to adopt the SmartCode's retail and office provisions.

### 3. Design

Government regulation often ensures that America's streets are designed for cars rather than for people by requiring landowners to (a) surround their buildings with parking lots and (b) give their land to the government to be used to create streets too wide to be comfortably crossed by pedestrians. Each of these issues will be addressed in turn.

#### a. *Let the Market Govern Parking and Setbacks*

##### i. The Problem

Most American cities require landowners to provide customers, visitors, and guests with off-street parking.<sup>144</sup> In fact, government typically forces office buildings and shopping centers to devote more than half of their land to parking.<sup>145</sup> Parking requirements for residential housing can be equally rigid. For

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139. See SMARTCODE ANNOTATED v.8.0, available at [http://www.smartcodecentral.com/docs/3000-00-Clean\\_Smartcode\\_v8.0.pdf](http://www.smartcodecentral.com/docs/3000-00-Clean_Smartcode_v8.0.pdf) (last visited Aug. 1, 2008); Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637, 637-39 (2006) (describing SmartCode, and listing communities that have recently adopted SmartCode).

140. The SmartCode has six major zones, ranging from T1 to T6. SMARTCODE ANNOTATED 81 tbl.1. T1 and T2 are rural zones, and T6 the most intensely urban zone. *Id.*

141. In particular, houses are allowed in the T3 zone, but apartment buildings, office buildings, and most retail buildings are generally barred. *Id.* at 81 tbl.1, 123 tbl.10 (describing T3 as low-density, suburban residential zone).

142. *Id.* at 123 tbl.10.

143. *Id.* at 125 tbl.11.

144. See SHOUP, *supra* note 22, at 22, 25 (noting that minimum parking requirements became common in late 1940s and early 1950s and are now virtually universal).

145. See Roberta F. Mann, *On the Road Again: How Tax Policy Drives Transportation Choice*, 24 VA. TAX REV. 587, 638 n.335 (2005) ("A typical suburban shopping center dedicates 55 to 70% of its

example, the city code of Jacksonville, Florida, requires landowners in one neighborhood to provide 1.75 parking spaces per apartment, even for one-bedroom apartments.<sup>146</sup>

These parking spaces are generally in front of apartments and businesses, thanks to “setback” regulations that force landowners to set their buildings far behind adjacent streets.<sup>147</sup> In theory, a landowner could place something other than parking between buildings and the street—but parking can actually be used by customers and visitors, while other uses such as landscaping are merely decorative. Thus, setback regulations give landowners a strong incentive to place parking lots between their buildings and nearby streets.<sup>148</sup>

By encouraging landowners to surround shops, offices, and apartments with parking lots, minimum parking and setback requirements force pedestrians and bicyclists to travel through those parking lots to reach most destinations. These government-mandated strip malls make walking unpleasant, because when a pedestrian has to walk through yards of parking to reach a building, the pedestrian has less to look at and feels more isolated.<sup>149</sup>

As a practical matter, setback requirements force pedestrians and bicyclists to spend more time commuting by increasing the distance between streets and destinations such as shops and apartments. Indeed, minimum parking requirements may even impair the safety of pedestrians and bicyclists by forcing them to share parking lots with moving cars in order to reach their destinations.<sup>150</sup>

Minimum parking and setback requirements also discourage walking and transit use less directly, by artificially spreading out people and jobs. Where

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total area to parking and driveways. An office park dedicates between 50 and 60% of its total area to parking and driveways.” (citation omitted)); SHOUP, *supra* note 22, at 31 (recognizing that cities typically require office buildings to provide four parking spaces, totaling 1200 square feet, per 1000 square feet of office space).

146. JACKSONVILLE, FLA., ORDINANCE CODE, § 656.604 (1990), available at <http://www.muni.com/Resources/gateway.asp?pid=12174&sid=9>.

147. See STOEBOCK & WHITMAN, *supra* note 78, § 9.18, at 598 (observing that most zoning ordinances include setback regulations); Mike Snyder, *Existing Development Rules Clouding Vision of Pedestrian-Friendly Midtown*, HOUSTON CHRON., Sept. 11, 2006, at A1 (noting that, in Houston, government requires most buildings outside downtown to be twenty-five feet from street).

148. See SHOUP, *supra* note 22, at 107 (recognizing that parking in front of buildings is more convenient for motorists than parking behind buildings).

149. See Douglas G. French, *Cities Without Soul: Standards for Architectural Controls with Growth Management Objectives*, 71 U. DET. MERCY L. REV. 267, 280 (1994) (describing parking lots as “inconvenient and inhospitable to pedestrians” when placed in front of buildings, and observing that, in contrast, “small setbacks and shopfront windows provide more interesting scenery for pedestrians[] and create a feeling of connection between the buildings and the public spaces bordering them”); Snyder, *supra* note 147 (noting that Houston’s twenty-five-foot setback requirement “gives pedestrians little to see except parking lots”).

150. See, e.g., Jason Misner, *Cyclist Killed in Plaza Lot*, BURLINGTON POST.COM, Feb. 26, 2006, available at <http://www.burlingtonpost.com/news/article/46202> (reporting that, after cyclist was killed by car in parking lot, police officer pointed out that “[p]arking lots don’t have all the controls other roadways have” and president of Canada Safety Council “implored drivers and pedestrians to exercise a great deal of caution when in a parking lot”).

government forces landowners to use land for parking, such land cannot be devoted to housing or businesses, and fewer people and jobs can be placed on a given parcel of land. For example, in 1961, Oakland, California, began to require one parking space per apartment<sup>151</sup>—a rule less intrusive than many cities' current regulations.<sup>152</sup> Within just three years, the number of apartments per acre fell by thirty percent.<sup>153</sup> Such government-mandated low density effectively forces Americans into their cars, because if each office or apartment building consumes large amounts of land, fewer buildings can be placed within a short walk of shops, jobs, or public transit.<sup>154</sup> And because minimum parking requirements, like other antidensity regulations, limit the amount of housing and commerce that can be placed in central cities, those regulations also play some role in shifting population from city to suburb.<sup>155</sup>

In addition to deterring walking, biking, and transit ridership, minimum parking requirements artificially subsidize driving. Most American parking is free to motorists, because minimum parking requirements create a glut of parking and thus drive the market price of parking down.<sup>156</sup> In reality, such "free" parking is paid for by landowners, who build parking lots and pass the cost of construction on to society as a whole by charging higher prices to customers or by charging higher prices to business tenants (who in turn pass the costs on to their customers).<sup>157</sup> The average parking space costs landowners

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151. SHOUP, *supra* note 22, at 143.

152. See, e.g., HUNTSVILLE, ALA., CODE OF ORDINANCES, app. A, ch. I, art. 70.1.3 (2007), available at <http://www.municode.com/Resources/gateway.asp?pid=12962&sid=1> (requiring 1.25 spaces per housing unit); JACKSONVILLE, FLA., ORDINANCE CODE, § 656.604 (1990), available at <http://www.municode.com/Resources/gateway.asp?pid=12174&sid=9> (requiring 1.75 parking spaces per unit for some one-bedroom apartments); SUGAR LAND, TEX., DEV. CODE, ch. 2, art. V., § 2-215(a), available at <http://www.municode.com/Resources/gateway.asp?pid=13286&sid=4> (requiring 1.5 parking spaces per one-bedroom apartment).

153. SHOUP, *supra* note 22, at 144.

154. See *supra* notes 82-89 and accompanying text for a description of the ill effects of antidensity regulation on walkability and transit use.

155. See *supra* note 90 and accompanying text for a discussion of the suggestion that other antidensity restrictions lead to similar results. Minimum parking requirements are most harmful where a landowner seeks to redevelop land by shifting the land from one use to another. For example, suppose a barbershop closes in a city that requires two parking spaces per barbershop and four parking spaces per beauty salon. If a beautician takes over the location, she must create two additional parking spaces. Unless the beautician can bulldoze part of the land to create the additional parking spaces, she must move to another building with more space for parking, even at the cost of allowing the existing building to remain vacant. See SHOUP, *supra* note 22, at 153-54 (explaining disincentive to reinvest in existing buildings when faced with parking space regulations).

156. SHOUP, *supra* note 22, at 1 (noting that ninety-nine percent of parking in United States is free); *id.* at 24 (recognizing that some cities actually require parking to be free). Admittedly, many cities do not explicitly require that parking be free. But if a city requires the construction of large amounts of parking, the parking supply will increase, thus driving the market price down. Cf. George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J.L. & PUB. POL'Y 637, 659 (2003) (explaining law of supply and demand in context of price of legal services and noting that when supply rises, price falls).

157. SHOUP, *supra* note 22, at 2.

roughly \$127 to \$200 per month.<sup>158</sup> Thus, someone who drives every day and parks for free receives a parking subsidy of roughly \$4.00 to \$6.50 per day to park<sup>159</sup>—roughly the daily price of gasoline for many commuters.<sup>160</sup> Accordingly, minimum parking requirements help to create a parking subsidy that is as generous as giving every motorist free gasoline. Obviously, such a subsidy makes driving more attractive than other forms of transportation.

When driving is cheaper, more people drive, and fewer use public transit.<sup>161</sup> When fewer people use public transit, public transit agencies have less fare revenue, which means that they can provide less transit service.<sup>162</sup> Thus, minimum parking requirements indirectly limit public transit service, which in turn makes commuters more dependent on automobiles.

In sum, minimum parking requirements generate sprawl and automobile dependence by forcing pedestrians and bicyclists to travel through parking lots to reach most destinations, by artificially spreading out population and businesses, and by subsidizing driving.

## ii. Solutions

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The most radical solution to the problems caused by minimum parking requirements is the solution that respects property rights the most: cities could abolish minimum parking and setback requirements and allow the market to decide how much space, if any, should be devoted to parking lots and their location. Parking deregulation would certainly enhance landowners' freedoms by giving them the right to decide how much parking to put on their land and would enhance smart growth by making it easier for Americans to reach houses, shops, and jobs on foot or bike.

One traditional justification for minimum parking requirements is that the government must dictate an ample supply of parking in order to prevent cruising, or drivers "moving slowly around block after block seeking a place to park. . . . clog[ging] the streets, air and ears of our citizens."<sup>163</sup> But by artificially increasing

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158. See *id.* at 185-92 (explaining logic behind estimates of parking space costs).

159. These savings result because average monthly parking costs of \$127 divided by thirty-one days per month correspond to a savings of approximately \$4.10 per day, and average monthly parking costs of \$200 divided by thirty-one days per month correspond to savings of approximately \$6.45 per day.

160. At the time this Article was written, gasoline prices were just under \$3 per gallon. See *Travel Update*, SEATTLE TIMES, July 1, 2007, at L2 (noting national average price of gas at \$2.98 per gallon). Thus, the parking subsidy is equivalent to the price of 1.3 to 2.2 gallons of gasoline, about as much as many motorists use on their daily commute. See SHOUP, *supra* note 22, at 213 (noting that average American drives twenty-six miles to and from work in a car getting twenty miles per gallon, therefore using 1.3 gallons of fuel per day).

161. Cf. Elizabeth Douglass, *Drivers Are Burning a Little Less Gasoline*, L.A. TIMES, Jan. 25, 2007, A1 (noting that as gas prices rose in 2005, per-driver mileage reduced by 0.4%, the first decrease since 1980, while transit ridership rose across United States).

162. Cf. Scherer, *supra* note 84, at 2 (recognizing that, when transit ridership decreased during 2001-02 business slowdown, transit revenue decreased, which led to reduced service).

163. See *Stroud v. City of Aspen*, 532 P.2d 720, 723 (Colo. 1975) (en banc) (upholding minimum

the supply of parking, the government reduces the market price of parking, thus increasing the demand for parking, increasing driving, and creating the very congestion it seeks to mitigate. If the government gave drivers free pizza, the demand for pizza would be higher, and eventually drivers would complain about pizza shortages.<sup>164</sup> Why should parking be any different?

Even if the problem of cruising somehow required government intervention, other anticruising policies could be less intrusive and less harmful to the interests of nondrivers than minimum parking requirements. For example, some cities allow landowners to avoid minimum parking requirements by paying a fee to fund public parking facilities.<sup>165</sup> Such "in lieu of parking" fees are less intrusive than minimum parking requirements for two reasons. First, such fees give all landowners more flexibility; they can pay for parking or build it themselves. Second, such fees are especially beneficial to landowners seeking to redevelop in already-developed, "infill" areas, because they can shift land from one use to another without having to bulldoze land to build additional parking.<sup>166</sup>

From a smart growth perspective, parking fees are a lesser evil than minimum parking requirements because if government builds a few large parking lots instead of forcing every single landowner to build smaller parking lots, fewer buildings will be surrounded by parking lots, and pedestrians and bicyclists can safely and comfortably travel to more jobs and shops.<sup>167</sup> Public parking lots also reduce cruising (and traffic congestion generally) by allowing customers to park once and walk to multiple sites, instead of driving to every shop in a neighborhood.<sup>168</sup>

On the other hand, both smart growth advocates and property rights advocates should prefer complete abolition of parking requirements to a parking fee system; a parking fee system still encourages developers to surround their buildings with parking lots, by requiring them to pay a fee in order to avoid doing so. Moreover, landowner-subsidized public parking lots still subsidize driving by forcing landowners to pay for drivers' parking.

A second alternative would be to retain minimum parking requirements but to reduce the amount of parking that landowners must provide, for example, to the amount necessary to handle average demand.<sup>169</sup> Today, city planners often

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parking requirements based on public interest in preventing cruising). Nevertheless, less intrusive alternatives could mitigate this problem without creating the harmful side effects of minimum parking requirements. See *infra* notes 165-79 and accompanying text for a description of the advantages and disadvantages of these solutions.

164. Cf. DUANY ET AL., *supra* note 36, at 94 ("Of course there's never enough parking! If you gave everyone free pizza, would there be enough pizza?"). See *supra* note 156 and accompanying text for an explanation of why minimum parking requirements cause parking to be free.

165. See SHOUP, *supra* note 22, at 229 (describing alternatives to existing parking systems).

166. See *supra* note 155 and accompanying text for a description of the impact of minimum parking fees on redevelopment.

167. See SHOUP, *supra* note 22, at 231 (explaining benefits of "in lieu of parking" fees).

168. *Id.*

169. Such reforms are not to be confused with *maximum* parking requirements that actually limit

base parking regulations on Institute of Transportation Engineers (“ITE”) parking data.<sup>170</sup> ITE engineers survey parking occupancy for various types of development and create a “parking generation rate” that measures the number of drivers who park at various types of enterprises.<sup>171</sup> ITE’s parking generation rates may be flawed in two respects. First, ITE statistics result from data from sites with free parking and minimal or nonexistent public transit.<sup>172</sup> Thus, reliance on ITE data creates a self-fulfilling prophecy: municipalities create parking regulations based on the assumption that everyone will drive to their destination, and those regulations in turn ensure that that assumption materializes by making parking free and walking uncomfortable.<sup>173</sup> Second, ITE data reflect periods when the demand for parking is highest and thus overestimate day-to-day demand.<sup>174</sup> If parking requirements were instead based on routine daily demand, landowners would have more flexibility, and pedestrians would have smaller parking lots to traverse. On the other hand, even modest minimum parking requirements create the evils discussed above, albeit to a lesser extent than more rigid rules.

Another argument for the status quo is that minimum parking requirements prevent “spillover parking”—that is, parking that spills over from businesses without parking lots to nearby businesses and residential streets, thus causing occupants of those streets to be unable to park near their property.<sup>175</sup> Nevertheless, such spillover parking is likely to occur only in environments in which people can comfortably walk from on-street parking spaces to their intended destinations—a situation that is all too rare in most of sprawl-bound America.<sup>176</sup>

Moreover, less intrusive alternatives can limit spillover parking without impairing neighborhood walkability. In residential areas, cities could institute parking permit districts in which parking would be limited to people with

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the amount of parking that landowners may provide. See Adam Millard-Ball, *Putting on Their Parking Caps*, PLANNING, Apr. 2002, at 16, 16 (recognizing that several cities have adopted such “[p]arking [c]aps”). Such regulations present another issue as to which smart growth advocates and libertarians are likely to disagree: smart growth supporters may wish to limit parking in order to discourage driving and thus reduce pollution and the antipedestrian effects of parking lots, while libertarians will value landowners’ property rights over these concerns. See Lewyn, *supra* note 41, at 49-50 (asserting conflict between libertarian interests in limiting government’s environmental restrictions that encroach on landowners’ use of their land).

170. See SHOUP, *supra* note 22, at 26 (noting that planners either rely directly on ITE data or on regulations in nearby cities, which in turn are often based on ITE data).

171. *Id.* at 31-32.

172. *Id.* at 32.

173. See *supra* 145-62 for an explanation of the effects of minimum parking requirements.

174. SHOUP, *supra* note 22, at 81.

175. See Angela Lau, *Hearing on Tap for Proposed Cedros Crossing*, SAN DIEGO UNION-TRIB., Mar. 9, 2007, at NC-1 (observing that residents of San Diego oppose nearby commercial development because it might create “spillover parking on their streets”).

176. See *infra* note 181 and accompanying text for a discussion of how on-street parking is prohibited on many American streets.

permits, usually residents and their guests.<sup>177</sup> Such a system would impose no mandates on private landowners and would thus encourage visitors of nearby shops to walk or use public transit to reach those destinations.<sup>178</sup> In commercial areas, the use of “in lieu of parking” fees to pay for public parking might limit spillover parking by allowing shoppers to park in one public garage rather than having to drive around a neighborhood searching for parking spaces.<sup>179</sup>

One could argue that abolition of minimum parking requirements is futile, because landowners will always want to build parking spaces for every single customer.<sup>180</sup> If this were true, there of course would be no harm in abolishing minimum parking requirements. Once landowners are free to experiment, some will undoubtedly retain large parking lots—but others might discover that the customers gained through additional development on a site are more numerous than the customers lost through allegedly inadequate parking.

Another argument for the status quo is that, because most drivers will park on the streets if off-street parking is unavailable, the success of parking deregulation depends on the public sector no longer giving away “free” curbside parking. In fact, free curbside parking is anything but universal; on many American streets, on-street parking is forbidden.<sup>181</sup> Thus, one cannot plausibly argue that most motorists will park on the street in the absence of minimum parking requirements. Even if on-street parking were universal, its presence would be an argument *against* minimum parking requirements: if there were enough on-street parking to house every motorist’s vehicle, there would be no reason at all for the government to force landowners to install their own parking in order to prevent alleged parking shortages.

Moreover, all of the arguments defending minimum parking requirements suffer from a conceptual flaw—they are based on the assumption that if free-market parking creates externalities (that is, costs imposed by one actor on another),<sup>182</sup> government regulation is the best solution to those externalities. But parking regulation itself causes externalities. These externalities include the costs of congestion and pollution caused by individuals who drive more than they otherwise would and the costs spread to all of society by landowners who are

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177. See *County Bd. of Arlington County v. Richards*, 434 U.S. 5, 7 (1977) (upholding parking permit system against equal protection challenge).

178. *Id.* at 7 (reasoning that concerns about spillover parking as well as public interest in encouraging reliance on carpools and mass transit justify parking permit system).

179. See *supra* notes 165-68 and accompanying text for a discussion of “in lieu of parking” fees.

180. It is by no means clear that this is in fact the case. Cf. Lisa Sadders, *Accommodating Everyone*, DAILY NEWS (Los Angeles), Apr. 25, 2005, at N1 (quoting statement by Assistant Bureau Chief of Los Angeles building department that “[p]eople are always going to put in the *minimum number of parking spaces* required because if you put in more, that uses up valuable square footage that could be used for occupancy” (emphasis added)).

181. See Lewyn, *supra* note 15, at 334-35 (citing examples of municipal hostility to on-street parking); Bob Shaw, *Revising a Vision*, ST. PAUL PIONEER PRESS, July 31, 2005, at 1A (noting that on-street parking is limited in most suburbs).

182. See DUKEMINIER, *supra* note 134, at 42 (recognizing that externalities exist when one person “makes a decision about how to use resources without taking full account of the effects of the decision” because “some of the costs [of the decision] fall on others”).



compelled to build parking for their visitors and customers and then charge the general public higher prices and rents in order to cover the costs of such parking. These externalities may outweigh those caused by cruising and spillover parking.

In the absence of parking requirements, setback requirements make no sense: if bureaucrats bar landowners from placing apartments or commercial buildings in front of streets, a landowner's only alternative to building parking lots is to place some sort of decoration or landscaping on the land. Perhaps such decoration could be aesthetically appealing—but a neighborhood where pedestrians can easily walk to shops and other destinations may be more so.<sup>183</sup> Thus, a libertarian smart growth agenda should also include the elimination of setback requirements.

## *b. Make the Streets Skinnier*

### *i. The Problem*

American local governments often require the construction of wide, high-speed streets.<sup>184</sup> For example, in Jacksonville, Florida, the city's comprehensive plan mandates that "[m]ajor arterial[s]" (the largest major streets other than limited-access highways) be at least 150 feet wide,<sup>185</sup> which means that such streets may have as many as ten lanes.<sup>186</sup> A second category of streets, "[m]inor

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183. See French, *supra* note 149, at 280 (claiming that destinations that are close to street, rather than being set back behind yards of parking, are more aesthetically appealing to pedestrians). One could also argue that setbacks protect public access to light and air, but this argument makes sense only in the context of skyscrapers that may create long shadows. See Lewyn, *supra* note 133, at 1203-04 (pointing out that such concerns can be resolved through skyscraper-specific regulation). In view of the dangers of skin cancer from sun exposure, the shadows caused by tall buildings may actually be a public amenity rather than a problem to be regulated out of existence. See Jacqueline A. Olexy, *Aging in Today's Environment: Is It a Healthy Proposition?*, 14 PENN. ST. ENVTL. L. REV. 131, 133 n.17 (2005) (observing that elevated sun exposure increases risk of skin cancer); Sarah van Wezel & Jay Jensen, *Soaking up the Sun*, PARKS & RECREATION, June 1, 2007, at 39 (noting that shade provides shelter from heat and protects against skin cancer).

184. See Burrington, *supra* note 25, at 696 (noting that government seeks to speed traffic flow through "plans to build new streets and roads and to widen, straighten, and flatten existing ones").

185. JACKSONVILLE, FLA., ORDINANCE CODE, §§ 654.113, 654.106(II)(6) (1990), available at <http://www.municode.com/Resources/gateway.asp?pid=12174&sid=9>; CITY OF JACKSONVILLE, 2010 COMPREHENSIVE PLAN, TRANSPORTATION ELEMENT, § 3.2.2, at 50-51 (2007), available at <http://www.coj.net/Departments/default.htm> (follow "Current Planning" hyperlink under "Planning and Development" heading; then follow "2010 Comprehensive Plan" hyperlink; then follow "Transportation Plan" hyperlink).

186. The city's Comprehensive Plan provides that traffic lanes will be sixteen feet wide on outside lanes and twelve feet wide for other lanes. CITY OF JACKSONVILLE, 2010 COMPREHENSIVE PLAN, TRANSPORTATION ELEMENT, § 3.1.3, at 48-49. Thus, a ten-lane street might take up 128 feet of pavement (32 feet for two outside lanes and 96 feet for eight 12-foot interior lanes), allowing 22 feet of right-of-way for sidewalks and landscaping. Cf. Michael Southworth & Eran Ben-Joseph, *Street Standards and the Shaping of Suburbia*, 61 J. AM. PLAN. ASS'N, Winter 1995, at 65, 73-76 (recalling that, in 1930s, Federal Housing Administration recommended that streets reserve sixteen feet for plants and utilities, in addition to land for pavements and sidewalks, and noting that many municipalities adopted these FHA standards).

arterial[s],” must be 120 feet wide, and even “[c]ollector” streets designed to interconnect residential and commercial areas must be seventy to eighty feet wide.<sup>187</sup>

Such wide streets discourage walking, and even bicycling, in a variety of ways:

- A wide street is unpleasant for pedestrians and bicyclists, because a wide roadway takes longer to cross than a narrower street.<sup>188</sup>
- Wide streets may also be more dangerous for pedestrians and bicyclists—both because a longer commute “increase[s] the time the pedestrian is exposed to traffic”<sup>189</sup> and because wide streets may encourage speeding.<sup>190</sup> Fast traffic may increase the number of accidents, because a motorist driving thirty miles per hour has a field of vision spanning about 150 degrees,<sup>191</sup> while a motorist driving sixty miles per hour has a 50-degree field of vision.<sup>192</sup> Fast traffic may also increase the severity of accidents: the probability of a pedestrian being killed by an automobile is only 3.5% where the auto is traveling fifteen miles per hour,<sup>193</sup> but that probability increases to 37% if the auto is traveling thirty-one miles per hour,<sup>194</sup> and further increases to 83% if the auto is traveling forty-four miles per hour.<sup>195</sup>
- Wide streets deprive pedestrians of a feeling of enclosure—that is, the feeling of being in an outdoor room rather than a desert.<sup>196</sup> A

187. JACKSONVILLE CODE § 654.113; CITY OF JACKSONVILLE, 2010 COMPREHENSIVE PLAN, TRANSPORTATION ELEMENT, § 3.2.2, at 50-51; *see also* JACKSONVILLE CODE, § 654.106(II)(1) (defining “[c]ollector” streets). Although Jacksonville’s supersized streets may be an extreme example, other big cities have streets wide enough to be unpleasant for pedestrians. *See* HUNTSVILLE, ALA., CODE OF ORDINANCES, App. B, art. 4.5(5) (2007), *available at* <http://www.municode.com/Resources/gateway.asp?pid=12962&sid=1> (noting arterial streets must have 120-foot right of way); HOUSTON, TEX., CODE OF ORDINANCES, § 42-122 (1985) (providing that major thoroughfares must typically have 100-foot right of way), *available at* <http://www.municode.com/Resources/gateway.asp?pid=10123&sid=43>. *See* Cragin, *supra* note 113, at 67, which notes that major streets in Los Angeles are six to eight lanes wide. Compare *infra* notes 204-07 and accompanying text for examples of narrower, more pedestrian-friendly streets.

188. *See* Donavan v. Jones, 658 So. 2d 755, 765 (La. Ct. App. 1995) (noting that, according to expert testimony, wider streets take more time to cross).

189. *Id.*

190. *See* Burrington, *supra* note 25, at 701 (noting that governments often widen roads to speed up traffic).

191. *Id.* at 704 n.50.

192. *Id.* Because a motorist’s reduced field of vision may apply to other automobiles as well as to pedestrians, wide streets may also increase multiple-driver crashes. *See* Peter Swift et al., Residential Street Typology and Injury Accident Frequency 5-8 (Summer 2006), <http://massengale.typepad.com/venustas/files/SwiftSafetyStudy.pdf> (surveying 20,000 accident reports in one Colorado city, and concluding that auto accidents of all types are more common on wider streets).

193. Burrington, *supra* note 25, at 704.

194. *Id.*

195. *Id.*

196. *See* DUANY ET AL., *supra* note 36, at 75 (noting that narrow street feels more “like a room” and provides sense of enclosure).

pedestrian walking through an overly wide street may therefore feel engulfed, alone, and helpless.

- Wide streets reduce population density (and thus walkability) by taking land for roads that could otherwise be used to build housing.<sup>197</sup>

In addition, even limited-access highways, which by definition need not be walkable, encourage sprawl in other respects. When the government builds or widens a highway leading to a suburb, the highway facilitates commuting to and from that suburb, thus causing people and jobs to move to that suburb from cities and older suburbs.<sup>198</sup> If (as is often the case) the suburb has minimal public transit,<sup>199</sup> the suburb's road-driven growth increases societal automobile dependence by reducing opportunities for nondrivers, who cannot reach the jobs that have moved to the suburb.

The impact of wide streets on sprawl may be obvious, but their impact on property rights may not be so obvious to the casual observer. Streets are often public property,<sup>200</sup> and therefore street design may involve a government's use of its own property rather than an individual's use of her own property. But government takes these streets and roads from private ownership through eminent domain,<sup>201</sup> so a government that takes 100 feet of right-of-way for a road reduces private ownership to a greater extent than if that government had taken only 70 feet of right-of-way. Although wide roads may infringe property rights less aggressively than the regulations discussed above, they still reduce private property rights to a slightly greater extent than do narrower streets.

Furthermore, new and widened roads can significantly burden taxpayers. For example, the Intercounty Connector, a highway that may soon be built

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197. See Michele Derus, *Zoning Can Curb Lower-Cost Housing*, MILWAUKEE-J. SENTINEL, Sept. 21, 1997, at D1 (cautioning that each ten feet of required street width reduces housing supply by three to four percent). See *supra* Part III.C.1 for a discussion of the impact of low density on walking and public transit.

198. See GILLHAM, *supra* note 2, at 36, 39-41 (noting that highways made it easier to commute from suburb to city, and describing migration of jobs to suburbs, as businesses followed employees and customers).

199. See Lewyn, *supra* note 15, at 348-49 (discussing lack of public transit in many job-rich suburbs).

200. See *Turner Broad. Co. v. FCC*, 512 U.S. 622, 628 (1994) (equating streets to other public property).

201. See *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 706 (1923) (emphasizing that government has right to use eminent domain to condemn land for roads). The recent controversy over government use of eminent domain to support private economic development activities is beyond the scope of this Article, because roads are public property and thus clearly a legitimate subject of eminent domain even under a restrictive interpretation of the Fifth Amendment. Compare *Kelo v. City of New London*, 125 S. Ct. 2655, 2662-63 (2005) (upholding such takings as long as they are for "public purpose"), with *id.* at 2671, 2673 (O'Connor, J. dissenting) (arguing that use of eminent domain for economic development purposes violated Fifth Amendment's requirement that takings be for "public use," but conceding that use of eminent domain for roads is constitutional because "the sovereign may transfer private property to public ownership"). See *supra* notes 69-70 and accompanying text for a discussion of the property rights movement's support of eminent domain reform.

through the suburbs of Washington, D.C., will cost \$2.4 billion<sup>202</sup>—more than the yearly budget of Washington's entire public transit system.<sup>203</sup> Thus, property rights advocates, like smart growth advocates, have reason to be concerned about the growth of government-owned roads.

## ii. Solutions

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Unlike parking and zoning, policy issues relating to street design are not amenable to "bright line" solutions. New streets have to be wide enough to accommodate drivers, and old streets cannot be cheaply reengineered. Nevertheless, both garden-variety streets and major highways are amenable to reforms that limit government power and reduce sprawl.

Cities can encourage skinnier, more pedestrian-friendly streets by adopting laws resembling the SmartCode's guidelines. The SmartCode gives street builders a variety of options depending on the zone and amount of likely traffic. In the most urban "T6" zone,<sup>204</sup> streets can be as narrow as twenty feet or as wide as eighty feet.<sup>205</sup> These eighty-foot streets only have four lanes of traffic, however, because the guidelines reserve two of those streets' six lanes for on-street parking.<sup>206</sup> In the more residential zones, streets are narrower; in the suburban "T3" zone and the intermediate "T4" zone, no streets have more than two nonparking lanes, and the maximum street width is thirty-six feet (including on-street parking).<sup>207</sup> In sum, the SmartCode essentially requires that the busiest streets have no more than four nonparking lanes and that quieter streets have two nonparking lanes.

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202. Robert Preer, *New Road Could Take the Strain off D.C. Beltway*, BOSTON GLOBE, Aug. 3, 2006, at A3.

203. See WASH. METRO. AREA TRANSIT AUTH., APPROVED FISCAL 2008 ANNUAL BUDGET 13, available at [http://www.wmata.com/about/board\\_gm/FY2008\\_Budget\\_Book\\_final.pdf](http://www.wmata.com/about/board_gm/FY2008_Budget_Book_final.pdf) (last visited Aug. 1, 2008) (stating that transit authority budget for 2008 fiscal year is \$2.2 billion).

204. See SMARTCODE ANNOTATED v.8.0, at 81 tbl.1, available at [http://www.smartcodecentral.com/docs/3000-00-Clean\\_Smartcode\\_v8.0.pdf](http://www.smartcodecentral.com/docs/3000-00-Clean_Smartcode_v8.0.pdf) (last visited Aug. 1, 2008) (describing each SmartCode zone in detail).

205. *Id.* at 87 tbl.3B.

206. *Id.* On-street parking is itself a pro-pedestrian amenity, because parked cars protect pedestrians from traffic by creating a buffer between pedestrians and traffic. See Freilich, *supra* note 23, at 557 (noting that on-street parking can "provide a buffer for pedestrians on the sidewalk"). On the other hand, it is not so clear that on-street parking makes the streets safer for bicyclists due to the risk that a bicyclist could crash into a car door being opened. See John S. Allen, About Car-Door Collisions, On-Street Parking and Bike Lanes, <http://www.bikexpert.com/bikepol/facil/lanes/dooring.htm> (last visited Aug. 1, 2008) (citing various studies about extent of "dooring").

207. SMARTCODE ANNOTATED 87 tbl.3B (permitting thirty-six foot streets in "T4" zone but not "T3" zone).

One could argue that the SmartCode's narrower streets increase traffic congestion. But to argue that high-speed, eight-lane streets are necessary to reduce traffic congestion is to argue that traffic congestion is lowest where streets are so dangerous to cross on foot that driving is virtually mandatory—hardly a logical result.<sup>208</sup> Thus, a city fit for walking, biking, and transit use may actually be less congested than one built solely for driving.

One could argue that wide streets are necessary for fire trucks to reach homes in time to respond to emergencies.<sup>209</sup> Fire safety codes typically call for streets to be at least twenty-feet wide in order to allow standardized fire trucks to reach a street.<sup>210</sup> But today's commercial streets are far wider than twenty feet, as are many of the streets proposed by the SmartCode.<sup>211</sup> Thus, fire safety concerns do not require the six- and eight-lane streets common in American suburbs, nor do they bar the two- and four-lane streets proposed by the SmartCode.

Admittedly, a rigid interpretation of the twenty-foot rule might seem to bar the SmartCode's narrowest streets.<sup>212</sup> Nevertheless, cities have allowed streets narrower than twenty feet without disastrous results. For example, in Portland, Oregon, a city that allows eighteen-foot streets without parking and twenty-four-foot streets with parking,<sup>213</sup> city officials asked the Fire Department to bring fire trucks to its narrower streets in order to test neighborhood fire safety.<sup>214</sup> After an experiment, the Fire Department acknowledged that it could serve those streets as long as the streets were interconnected "grid" streets rather than disconnected cul-de-sacs,<sup>215</sup> thereby enabling firefighters to reach streets in a

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208. I note, however, that I have been unable to find empirical data on this issue, because I have been unable to find data on common street widths in many cities. Certainly, there is not a strong correlation between automobile dependence and traffic congestion. See *supra* notes 104-07 and accompanying Table 1 for a demonstration of how the cities with highest transit ridership, New York and Boston, have below-average levels of congestion, while San Francisco and Washington have above-average levels of both transit ridership and congestion. Thus, it cannot plausibly be argued that automobile-dependent places are always the least congested.

209. See Freilich, *supra* note 23, at 557 n.35 (noting concern that public vehicles may be unable to navigate narrow streets).

210. See Brent Hunsberger, *Narrow Streets Increase Fire Officials' Worries*, OREGONIAN, Sept. 7, 1998, at B2 ("Nationally recognized fire codes call for 20 feet of clear access within 50 yards of a building.").

211. See SMARTCODE ANNOTATED 87 tbl.3B (listing wide range of possible street designs, most of which involve streets wider than twenty feet); LITMAN, *supra* note 114, at 4 (describing conventional American streets).

212. See SMARTCODE ANNOTATED 87 tbl.3B (listing various possible street layouts, including some streets narrower than twenty feet and others that are slightly wider but allow on-street parking, thus effectively reducing street width below twenty feet when parking spaces are actually in use).

213. MICHAEL SOUTHWORTH & ERAN BEN-JOSEPH, *STREETS AND THE SHAPING OF TOWNS AND CITIES* 143 (2003); *Street Width Standards and Research from Around the Country*, at tbl.1, available at <http://www.sierraclub.org/sprawl/articles/narrow.asp> (last visited Aug. 1, 2008).

214. SOUTHWORTH & BEN-JOSEPH, *supra* note 213, at 143.

215. See Dictionary.com, *Grid Definition*, <http://dictionary.reference.com/search?q=grid> (last visited Aug. 1, 2008) (defining and describing "grid" pattern); Dictionary.com, *Cul-de-sac Definition*, <http://dictionary.reference.com/browse/cul-de-sac> (last visited Aug. 1, 2008) (defining "cul-de-sac" as

variety of ways and from a variety of places.<sup>216</sup>

Thus, the solution to the risks of narrower streets is more deregulation rather than less. Cities should freely permit developments with street grids, which are encouraged by the SmartCode<sup>217</sup> but sometimes discouraged or prohibited by existing government regulations.<sup>218</sup> From a smart growth perspective, gridded streets have virtues beyond their contribution to fire safety: grid systems allow pedestrians to reach neighborhood destinations quickly and in a variety of ways, because each street is connected to a variety of other streets. By contrast, cul-de-sac streets generally do not connect with most nearby streets.<sup>219</sup> Thus, residents of a neighborhood dominated by cul-de-sacs cannot visit each other without traveling out of their way to a major street first.<sup>220</sup> Cul-de-sac residents are likely to avoid such time-consuming trips by driving even over short distances, thus contributing to pollution and traffic congestion.<sup>221</sup> And where landowners can freely choose between cul-de-sacs and grids, their property rights are obviously enhanced.

Due to the sprawl-generating effects and expense of freeways and other large streets, government should only build streets that facilitate traffic flow within cities and mature suburbs and should stop widening and building roads in

street closed at one end).

216. SOUTHWORTH & BEN-JOSEPH, *supra* note 213, at 143. Even cul-de-sacs could be served by Portland's fire trucks as long as the cul-de-sacs were under 300 feet long, so that firefighters could carry some equipment from nearby streets. *Id.*; cf. Mike Ramsey, *Neo-Traditional Trend Catches on*, COLUMBIA STATE, Aug. 19, 2002, at A1 ("While the planners and Fire Department officials differ on the width of streets, they like interconnected streets on a grid."). On the other hand, the accessibility of grid streets may also subject homeowners to additional traffic. See HUNTSVILLE, ALA., CODE OF ORDINANCES, App. B, art. 4.5(2)(C) (2007), available at <http://www.municode.com/Resources/gateway.asp?pid=12962&sid=1> (discouraging grids because of concerns about "use by through traffic"). Because home buyers and developers may have legitimate concerns about both fire safety and neighborhood traffic, I recommend that pure grid systems merely be allowed rather than mandated in new developments.

217. Indeed, the SmartCode goes to the opposite extreme, forbidding cul-de-sacs unless they are "[w]arranted by natural site conditions." SMARTCODE ANNOTATED art. 3.6.2(c), at 27.

218. See, e.g., HUNTSVILLE, ALA., CODE OF ORDINANCES, art. 4.5(2)(C), available at <http://www.municode.com/Resources/gateway.asp?pid=12962&sid=1> ("A grid system of street layout is discouraged."); Southworth & Ben-Joseph, *supra* note 186, at 74 (recalling that, in 1930s, Federal Housing Administration required cul-de-sacs for federally subsidized subdivisions, and municipal regulations followed suit).

219. See DUANY ET AL., *supra* note 36, at 23 (describing how congestion may result from street network that includes isolated, single-entry cul-de-sacs).

220. *Id.*; see also Laurence Auerbach, *Connectivity Part 4: Neighborhood Walking*, PEDSHED.NET, Feb. 2, 2007, <http://pedshed.net/?p=71> (discussing research on grid street in great detail, and suggesting that in neighborhoods with grid streets walkers have more choices with regard to route, length, and sights than walkers in cul-de-sacs).

221. Cul-de-sacs also increase congestion by forcing all drivers to use just one or two streets within a residential neighborhood, because smaller cul-de-sac streets do not connect with other streets and are thus useless to drivers. See Francesca Ortiz, *Biodiversity, The City, and Sprawl*, 82 BOSTON U. L. REV. 145, 147 n.10 (2002) (concluding that in areas dominated by cul-de-sacs "traffic is forced to utilize only one or two entrances or exits from the subdivision . . . rather than using several by way of a typical grid design").

undeveloped and still-developing suburbs. The libertarian argument against the latter type of road is simple: roads cost taxpayers billions of dollars.<sup>222</sup> If the government spent less money on freeways, those dollars would go back in taxpayers' pockets, and taxpayers could spend the money as they pleased. The smart growth case against such highways is overwhelming: as explained above, freeways to undeveloped areas artificially encourage people and jobs to move from older cities and suburbs to newer, more automobile-dependent areas.<sup>223</sup>

One could argue that new streets and highways are necessary to reduce traffic congestion. And this argument is plausible under certain circumstances: for example, if a city built a grid of new, interconnected streets in an area that had been dominated by cul-de-sacs, the number of neighborhood residents could remain constant, but those residents would have more ways to reach their destinations, thus reducing the traffic on each individual street.<sup>224</sup> On the other hand, new and widened roads may actually create traffic.<sup>225</sup> Just as the financial price of driving may affect the amount of driving, the time cost of driving may do so as well. So if a new or widened road temporarily makes driving less time-consuming, some people will drive more often or farther.<sup>226</sup>

A freeway that opens up an outer suburb for development (as opposed to roads connecting existing neighborhoods) may be especially likely to induce traffic: if the freeway made it easier for motorists to commute to and from that suburb, more people might move to that suburb, thus making that suburb's roads more congested. As the suburb grows, jobs will move to that suburb,<sup>227</sup> causing residents of other neighborhoods to commute there for work, thus clogging that suburb's roads further.<sup>228</sup>

222. See *supra* notes 202-03 and accompanying text for a discussion of the costs incurred in road building. This is so even if the road is financed by fuel taxes rather than by taxes on nonmotorists, because the fuel taxes are imposed on users of all roads, rather than on users of the road in question. Of course, this concern does not apply to privatized toll roads. See *Public-Private Partnerships: Hearing Before the H. Transportation & Infrastructure Comm.*, 110th Cong. (2007) (statement of Robert W. Poole, Director, Transportation Studies Reason Foundation), available at 2007 WLNR 2914473 (endorsing toll roads). The merits and demerits of such roads are beyond the scope of this Article.

223. See Lewyn, *supra* note 15, at 318-22 (discussing impact of highway construction in greater detail). See *supra* note 198 and accompanying text for discussion of how highway construction causes migration of jobs and people.

224. See Ortiz, *supra* note 221, at 147 n.10 (explaining congestion-creating effects of cul-de-sacs). Nevertheless, I am not recommending a crash road-building program: the effects of such streets on traffic congestion should be balanced against their effects on the property rights of landowners whose land would be taken for such streets and their effects on the welfare of taxpayers who must pay for the construction of these new streets.

225. See Tracey E. George & Chris Guthrie, *Induced Litigation*, 98 NW. U. L. REV. 545, 557-63 (2004) (describing how "induced traffic" results when efforts to reduce congestion on roadway actually leads to more drivers traveling on roadway, raising congestion levels).

226. *Id.* at 557-58.

227. See GILLHAM, *supra* note 2, at 39-41 (describing migration of jobs to suburbs as businesses followed employees and customers); George & Guthrie, *supra* note 225, at 559 (positing that if commuters moved to suburb in response to road improvements businesses may follow).

228. Nevertheless, the empirical data as to the extent of induced traffic is "murky." George &

One could argue that new freeways do not in fact cause migration to suburbia, because people who crave suburban living will seek it out no matter how slow the commute. But survey evidence suggests otherwise.<sup>229</sup> A 2002 survey conducted by the National Association of Realtors and the National Association of Home Builders asked thousands of recent home buyers<sup>230</sup> what amenities “would seriously influence you to move to a new community.”<sup>231</sup> Forty-four percent picked “[h]ighway access”—more than any other amenity listed.<sup>232</sup> Thus, highways do affect where people choose to live, and it logically follows that new highways to automobile-dependent suburbs encourage people to move to those suburbs.

As noted above,<sup>233</sup> the more likely a road is to shift development to a suburb, the more congestion it creates in that suburb. So even if *most* roads reduce traffic,<sup>234</sup> the type of road that is most likely to accelerate sprawl (that is, a road to a still-developing suburb) is less likely than other roads to reduce congestion in the long run. It follows that such “sprawlways” do more harm than good: they provoke more sprawl than other forms of transportation spending and provide less congestion relief.

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Guthrie, *supra* note 225, at 563. Thus, it is unclear whether the new travel caused by *all* new roads (as opposed to the sprawl-producing highways discussed above) is sufficient to increase regionwide traffic congestion. On the other hand, arguably even the traffic congestion reductions resulting from other roads are not worth the costs to the taxpayers—in which case the government should cut road spending far more deeply than suggested above.

229. These surveys are consistent with evidence of the last fifty years. See Lewyn, *supra* note 15, at 320 (detailing how older cities declined most rapidly in decades immediately following construction of interstate highway system).

230. NAT'L ASS'N OF REALTORS, CONSUMERS SURVEY CONDUCTED BY NAR AND NAHB (2002), available at [http://www.realtor.org/smart\\_growth.nsf/docfiles/NAR-NAHBSurvey2002.pdf/\\$FILE/NAR-NAHBSurvey2002.pdf](http://www.realtor.org/smart_growth.nsf/docfiles/NAR-NAHBSurvey2002.pdf/$FILE/NAR-NAHBSurvey2002.pdf) (surveying 2000 households).

231. *Id.*

232. *Id.*

233. See *supra* notes 227-28 and accompanying text for a discussion of the congestion created by suburban development.

234. It is by no means clear that most roads reduce traffic. Robert Bruegmann, author of a recent book defending sprawl, writes that Phoenix, Atlanta, and Houston are “building [their way] out of congestion.” BRUEGMANN, *supra* note 29, at 253 n.25. In fact, congestion (measured by hours lost to congestion per peak-period traveler) has increased in all three regions between 1982 and 2005: from twenty-six hours per traveler to sixty in Atlanta, from thirty-five to forty-eight in Phoenix, and from thirty to fifty-six in Houston. See Congestion Data, *supra* note 105 (displaying hours lost to congestion as item AC on large spreadsheet). Moreover, it is not clear whether, as a general matter, regions that built more roads have experienced smaller increases in congestion. Cf. SURFACE TRANSP. POLICY PROJECT, EASING THE BURDEN: A COMPANION ANALYSIS OF THE TEXAS TRANSPORTATION INSTITUTE'S 2001 URBAN MOBILITY STUDY 3-4 (2001), available at [http://www.transact.org/PDFs/etb\\_report.pdf](http://www.transact.org/PDFs/etb_report.pdf) (asserting that regions that built more roads showed little progress in reducing congestion). But see Reason Foundation, Galvin Project to End Congestion, available at <http://www.reason.org/endcongestion/> (last visited Aug. 1, 2008) (containing variety of studies claiming that additional road construction will end congestion). Nevertheless, a full discussion of the issue is beyond the scope of this Article, because in this Article I criticize only construction of the most sprawl-producing freeways as opposed to all roads.



## VI. DOES REGULATION MATTER?

Critics of smart growth sometimes argue that even though government regulations promote sprawl, these regulations merely mimic the market, because an overwhelming majority of Americans would choose sprawl even in the absence of government regulation.<sup>235</sup> To be sure, there is no way of knowing exactly how much the reforms discussed above would affect development. Nevertheless, there is ample evidence that developers wish to create, and consumers wish to purchase, more compact, pedestrian-friendly development than is currently available.

For example, in 2001, the Urban Land Institute (“ULI”), a developers’ trade association,<sup>236</sup> surveyed developers about the impact of government regulation on “alternatives to conventional, low-density, automobile-oriented suburban development.”<sup>237</sup> Sixty-seven percent of developers surveyed agreed that the supply of “alternative” development was insufficient to meet market demand,<sup>238</sup> and 78.2% of the developers described government regulation as a significant barrier to such development.<sup>239</sup> By contrast, only 26.3% listed inadequate consumer demand as an obstacle to more compact development.<sup>240</sup> The ULI survey also revealed that over 60% of developers in cities and inner suburbs wished to build more compact development than was generally allowed by government regulation.<sup>241</sup>

Some consumer surveys yield similar results. One such study compared consumers in metropolitan Boston and metropolitan Atlanta, asking numerous questions about trade-offs between walkability and sprawl. For example, one survey question asked respondents whether they preferred “a neighborhood with single-family houses on larger lots even if this means that public transit is not available [or] a neighborhood with a good bus and train system, even if this means a neighborhood [where single-family and] multifamily buildings . . . are close together.”<sup>242</sup> The survey then grouped respondents into five categories, ranging from “[v]ery strong auto neighborhood preference” and “[v]ery strong pedestrian neighborhood preference.”<sup>243</sup>

The survey also grouped neighborhoods into five categories, ranging from A (central business district) to E (automobile-oriented, outer suburban).<sup>244</sup> In

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235. See, e.g., BRUEGMANN, *supra* note 29, at 106 (noting that zoning is irrelevant to sprawl because “zoning has changed as necessary to accommodate market realities”).

236. LEVINE, *supra* note 97, at 125.

237. *Id.* at 126.

238. *Id.* at 128.

239. *Id.* at 129.

240. *Id.*

241. LEVINE, *supra* note 97, at 131. In particular, about eighty percent of developers indicated that they would build more compactly in inner suburbs if zoning was less burdensome, and over sixty percent indicated that they would do so in central cities if given the opportunity. *Id.*

242. *Id.* at 160 tbl.8-2.

243. *Id.*

244. *Id.* at 152-53. For pictures illustrating the differences between these neighborhoods and

Boston and its suburbs, forty-five percent of neighborhoods were in the two most auto-oriented categories: middle suburban (category D) and outer suburban (category E).<sup>245</sup> By contrast, eighty-eight percent of Atlanta-area neighborhoods were in categories D and E.<sup>246</sup> If Atlanta consumers strongly preferred this result, their preferences would have matched the mix of neighborhoods available to them: that is, the respondents who wanted pedestrian-oriented neighborhoods would have been able to live in the region's tiny group of pedestrian-oriented neighborhoods to the same extent as Boston residents with similar tastes.

Yet this preference was not reflected. Among the Atlanta residents with the strongest pedestrian orientation (i.e., preferences that were more pedestrian-oriented than ninety percent of the sample), fifty-two percent were marooned in the two most sprawling neighborhood types.<sup>247</sup> By contrast, in Boston, only seventeen percent of respondents strongly preferring pedestrian-friendly neighborhoods lived in the two most sprawling neighborhood clusters<sup>248</sup>—a far smaller percentage.

By contrast, persons with the most auto-oriented preferences had little difficulty finding a suitable neighborhood in either metropolitan area: among the ten percent who most strongly favored auto-oriented neighborhoods, over eighty percent in Boston (and over ninety percent in Atlanta) lived in categories D and E.<sup>249</sup> Thus, it appears that Americans who prefer low-density sprawl get what they want, but that consumers who prefer to live in pedestrian-friendly neighborhoods are unable to do so due to the scarce supply of such neighborhoods.

Similarly, a study of Houston residents asked:

“Would you personally prefer to live in a suburban setting with larger lots and houses and a longer drive to work and most other places, or in a more central urban setting with smaller homes on smaller lots, and be able to take transit or walk to work and other places?”<sup>250</sup>

Fifty-five percent of survey respondents chose the “[c]entral urban setting” and only thirty-seven percent chose the suburban setting.<sup>251</sup> The same survey revealed that seventy-one percent of Houstonians thought it was either “[v]ery” or “[s]omewhat” important to have schools and other services within walking distance of homes.<sup>252</sup> Because Houston is one of America's more automobile-dependent large cities,<sup>253</sup> this survey also indicates significant unmet demand for

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more compact areas, see *id.* at 155-59.

245. LEVINE, *supra* note 97, at 153.

246. *Id.* at 153.

247. *Id.* at 161.

248. *Id.*

249. *Id.*

250. Lewyn, *supra* note 133, at 1194 (quoting Summary of Responses, Blueprint Houston Survey of Registered Voters in the City of Houston: May 2003, available at [www.blueprintheouston.org/documents/blueprint\\_survey\\_results.doc](http://www.blueprintheouston.org/documents/blueprint_survey_results.doc)).

251. *Id.* (quoting Summary of Responses, *supra* note 250).

252. *Id.* (quoting Summary of Responses, *supra* note 250).

253. See *supra* notes 104-07 and accompanying Table 1 for a discussion of how the Houston

pedestrian-friendly neighborhoods.<sup>254</sup>

## V. CONCLUSION

Some commentators believe that smart growth and property rights are at loggerheads—and, to be sure, these theories do lead to differing positions on a few issues (most notably urban growth boundaries and similar antisprawl land use regulations). As to a wide variety of issues, however, smart growth and property rights advocates can find common ground. Both groups have reason to support the abolition of single-use zoning and antidensity regulations that artificially keep housing far from offices and shops, minimum parking and setback requirements that force landowners to build larger parking lots than the free market might dictate, and street design rules that create streets too wide to be safe or comfortable for pedestrians.

An aggressively libertarian smart growth agenda would:

- eliminate use-based zoning;
- eliminate government restrictions on density;
- eliminate minimum parking and setback requirements;
- implement the SmartCode's street design policies, which call for narrower streets in a wide range of environments;
- eliminate government regulations favoring the construction of cul-de-sac streets; and
- reduce government road spending by defunding all highways serving undeveloped suburban areas.

Some of these proposals, however, may be impractical either for political reasons or because complete deregulation might have unwelcome side effects (such as occasionally exposing homeowners to noxious land uses). But even a more modest smart growth agenda could enhance property rights. Without abolishing the current system of zoning, the government could:

- allow unrestricted multifamily development in commercial areas;
- allow small-scale commerce in single-family residential neighborhoods, as proposed by the SmartCode;
- deregulate density in cities and older suburbs where smart growth principles support additional development;
- make minimum parking requirements less restrictive, and allow landowners to avoid such requirements by contributing to a fund that could be used to build public parking;
- control spillover parking through residential parking permit districts, where only residents and their guests could park; and

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region has lower-than-average transit ridership.

254. If fuel prices continue to rise, the demand for such neighborhoods is likely to increase. See Douglass, *supra* note 161 (noting recent increases in gas prices and in public transit ridership, and suggesting that former has caused latter).

- allow narrower streets, at least on commercial streets and residential streets not dominated by cul-de-sacs.

Even a compromise program of legal reform would allow more compact, pedestrian-friendly development and give landowners more freedom from heavy-handed government regulation. Thus, Americans truly can have it all: more pedestrian-friendly development and expanded property rights, too.