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### How City Hall Causes Sprawl - A Case Study (Book Review)

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# Books Reviewed

*How City Hall Causes Sprawl: A Case Study*—A Review Essay by Michael Lewyn\* of ATLANTA: RACE, CLASS AND URBAN EXPANSION by Larry Keating: Temple University Press, 2001, Pp. 248. \$69.50 (cloth), \$22.95 (paper)

## INTRODUCTION: SEGREGATION AND POLLUTION IN SPRAWL CITY

Journalists and scholars have repeatedly termed Atlanta “sprawl’s poster child,”<sup>1</sup> because the inequality,<sup>2</sup> urban decay,<sup>3</sup> and air pollution<sup>4</sup> commonly associated with suburban sprawl<sup>5</sup> have reached extreme forms in Atlanta. For example:

- While Atlanta’s suburbs have grown explosively, the city of Atlanta has actually *lost* population in recent decades.

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\* Associate Professor, John Marshall Law School. B.A., Wesleyan University; J.D., University of Pennsylvania Law School. I would like to thank Sally Flocks, Demetra Pappas, and Susan Rutherford for their helpful comments. Any errors of fact or logic are, of course, mine alone.

1. Robert D. Bullard et al. *The Costs and Consequences of Suburban Sprawl: The Case of Metro Atlanta*, 17 GA. ST. U. L. REV. 935, 942 (2001) (terming metropolitan Atlanta “The Sprawl Poster Child”); Arthur C. Nelson, *New Kid in Town: the Georgia Regional Transportation Authority and its Role in Managing Growth in Metropolitan Georgia*, 35 WAKE FOREST L. REV. 625, 626 (2000) (“Metropolitan Atlanta has become the ‘poster child’ for urban sprawl”); Brad Smith, *Housing Study Criticizes Movement to Limit Sprawl*, TAMPA TRIB., July 8, 2001, at 1; cf. George Galster et al., *Wrestling Sprawl To The Ground: Defining and Measuring an Elusive Concept*, 12 HOUSING POL’Y DEBATE 681, 706 (2001) (using numerous quantitative measurements to show that Atlanta is in fact more “sprawling” than other metropolitan areas).

2. LARRY KEATING, ATLANTA: RACE, CLASS AND URBAN EXPANSION 34 (2001) (asserting that the “suburbanization of jobs aggravated black unemployment”); Michael Lewyn, *Suburban Sprawl: Not Just An Environmental Issue*, 84 MARQ. L. REV. 301, 364–65 (2000) (asserting that growth of auto-dominant suburbs increases welfare dependency among carless poor).

3. Lewyn, *supra* note 2, at 301 (noting that “[s]ome central cities have been devastated by sprawl”).

4. Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1373–74 (2000) (sprawl causes air pollution and congestion by increasing car use and thus emissions of pollutants from cars).

5. See William W. Buzbee, *Sprawl’s Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 510 (2000) (defining sprawl as a “dispersed, low-density, metropolitan area form, where the metropolitan area’s growth occurs principally on the urban periphery . . . Sprawling urban forms typically are car dependent and include dispersed single family homes and substantial distances between residential, business and retail areas”).

Metropolitan Atlanta's population grew by over 80% between 1980 and 2000,<sup>6</sup> but the city of Atlanta is actually less populated than it was in 1980,<sup>7</sup> and it has lost over half its 1960 white population.<sup>8</sup> The city's depopulation has been accompanied by poverty: while only 6.7% of the region's households earn less than \$10,000 per year,<sup>9</sup> 17% of city households do so.<sup>10</sup>

- As jobs have followed people to suburbia, Atlanta's central business district has stagnated while its suburban employment centers have grown. In 1966, downtown Atlanta contained more than two-thirds of public, corporate and private office space in the Atlanta region.<sup>11</sup> By 1997, just 13.3% of regional private office space was located in downtown Atlanta.<sup>12</sup> The predominantly white<sup>13</sup> northern suburbs contain all but one of the region's suburban office submarkets, 65.9% of regional research-and-development office space, and 52% of regional employment.<sup>14</sup> In recent decades, much of downtown Atlanta has been virtually empty at night:<sup>15</sup> in the words of travel

6. U.S. CENSUS BUREAU, U.S. COMMERCE DEP'T., STATISTICAL ABSTRACT OF THE UNITED STATES 31 (121st ed. 2001.), <http://www.census.gov/prod/www/statistical-abstract-01.html> [hereinafter 2001 ABSTRACT] (area had just over 2.2 million residents in 1980 approximately over 4.1 million in 2000).

7. *Id.* at 35 (city had 495,000 residents in 1970, 425,000 in 1980, and 416,000 in 2000). However, the latter figure is an improvement over the city's 1990 nadir of 394,000 residents. *Id.*

8. The city of Atlanta had just over 300,000 white residents in 1960, and only 138,400 whites in 2000. *See* Bureau of the Census, U.S. Census of Population and Housing: 1960 at 14 (1962) (city of Atlanta included 266,186 whites in Fulton County and 34,449 in DeKalb County, for total of 300,635); 2001 ABSTRACT, *supra* note 7, at 38 (2000 statistics). Since 1970, blacks have begun to move to Atlanta's suburbs as well. *See* Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 860 CORNELL L. REV. 729, 741-42 (2001) (in 1990, 64% of Atlanta-area blacks lived in suburbs, as opposed to 25% in 1970).

9. U.S. CENSUS BUREAU, U.S. COMMERCE DEP'T., CENSUS 2000 DEMOGRAPHIC PROFILES, ATLANTA, GA MSA, 3, at <http://censtats.census.gov/data/GA/390130520.pdf> [hereinafter METRO PROFILE].

10. U.S. CENSUS BUREAU, U.S. COMMERCE DEP'T., CENSUS 2000 DEMOGRAPHIC PROFILES, ATLANTA, GA, 3, at <http://censtats.census.gov/data/GA/1601304000.pdf> [hereinafter CITY PROFILE].

11. *See* KEATING, *supra* note 2, at 15.

12. *Id.* The rest of the city suffered from sprawl too: in 1980, 40% of the region's jobs were within the city of Atlanta—but in 1997, less than 20% of the region's jobs were located within the city limits. *See* Bullard et al. *supra* note 1, at 945.

13. *See* Perspective, *The Dynamics of Change*, ATLANTA J. CONST., Sept. 19, 1993, at G3 (northern suburbs contain 18% of region's black population and 70% of whites, while southern suburbs contain only 28% of whites and 43% of blacks).

14. *See* KEATING, *supra* note 2, at 24.

15. *Id.* at 89, 109. Downtown Atlanta rebounded to some extent in the 1990s. For example, downtown's residential population increased by over 20% during the 1990s, to a still-anemic 0.6% of regional population. *See* Rebecca R. Sohmer & Robert E. Lang, *Downtown Rebound*,

writer Arthur Frommer, "a graveyard, a scene of death and desolation, a nullity."<sup>16</sup>

- The dominance of suburbia has, in turn, increased automobile dependency, because suburban office buildings are often spaced so far apart that walking between them (or between the office buildings and any other form of land use) is extremely difficult.<sup>17</sup> For example, one suburban commercial district, the Roswell/Alpharetta submarket, spreads less than a fifth as much office space as is contained in Atlanta's central business district over a linear distance seven times as great.<sup>18</sup>
- The suburban job market is inaccessible to the predominantly African-American, non-driving poor of the inner city. Because Atlanta-area jobs have moved to suburbs,<sup>19</sup> where public transit is minimal,<sup>20</sup> they are virtually inaccessible to non-drivers. Thirty-nine percent of all black households in Atlanta do not have access to cars,<sup>21</sup> and in 2000, only 34% of the region's jobs were within a one-hour public transit ride of low-income urban neighborhoods.<sup>22</sup> Income inequality between white and black neighborhoods has exploded: in 1950, the median family income for predominantly white census tracts was just over twice the figure for black census tracts, while the white census tract/black census tract income ratio had increased to 5.28 in 1990.<sup>23</sup>
- Atlantans drive further distances than most other Americans, causing pollution that substantially endangers public health. In

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FANNIE MAE FOUNDATION CENSUS NOTE, 5-6 (2001), <http://www.brookings.edu/dybdocroot/es/urban/census/downtownrebound.pdf>.

16. FREDERICK ALLEN, ATLANTA RISING 231 (1996).

17. See KEATING, *supra* note 2, at 21.

18. See KEATING, *supra* note 2, at 22. Residential densities are also extremely low in suburban Atlanta. See Wendell Cox, *Demographia: U.S. Urbanized Areas*, at <http://www.demographia.com/dm-uas.htm> (last visited Dec. 20, 2002) (suburban Atlanta has only 1754 people per square mile, 36.2% below U.S. metropolitan area average). Atlanta's low density makes jobs less accessible to nondrivers because as residences and businesses "are spread farther apart, fewer people can walk short distances to bus and train stops." Michael Lewyn, *Campaign of Sabotage: Big Government's War Against Public Transportation*, 26 COLUM. J. ENVTL. L. 259, 285 (2001).

19. See Bullard et al., *supra* note 1 at 945 (less than 20% of region's jobs in city of Atlanta).

20. See KEATING, *supra* note 2, at 8 ("Adequate public transportation does not extend to the northern suburbs, so many poor blacks who do not own cars find it difficult to reach jobs in these outlying districts"); Lewyn, *supra* note 2, at 348 (noting that as of 2000, Gwinnett County, an Atlanta suburb with over half a million residents, had no public transit whatsoever).

21. See KEATING, *supra* note 2, at 8.

22. Wendell Cox, *A Common-Sense Approach to Transportation in the Atlanta Region* Ch. 2, at <http://www.gppf.org/pubs/projects/transportation/transportation.htm> (last updated April 11, 2002).

23. See KEATING, *supra* note 2, at 39.

2000, the average Atlantan drove 33.8 miles per day, about 50% more than the national average for residents of large metropolitan areas.<sup>24</sup> Atlanta's auto dependency has contributed to the region's air pollution. In both 2000 and 2001, Greater Atlanta had higher levels of ozone (a pollutant partially caused by automobile fumes)<sup>25</sup> than all but five other American metropolitan areas.<sup>26</sup> Between 1998 and 2000, metropolitan Atlanta's most polluted county experienced 86 days on which ozone levels were at levels unhealthy for groups especially sensitive to pollution<sup>27</sup> (such as "children, the elderly, and those with chronic lung disease"<sup>28</sup>), and 31 days on which the air was unhealthy for the community as a whole.<sup>29</sup>

Some commentators have blamed suburban sprawl on decisions made by federal and state governments,<sup>30</sup> while others assert that sprawl merely expresses consumer preferences.<sup>31</sup> But in *Atlanta: Race, Class and*

24. FED. HIGHWAY ADMIN., U.S. DEP'T. OF TRANSP. HIGHWAY STATISTICS Table HM-72 (2000), at <http://www.fhwa.dot.gov/ohim/hs00/hm72r2.htm> (last visited Dec. 20, 2002) (national average for metro areas over 500,000 persons was 22.8 miles per day). Only three large metropolitan areas (Houston, Nashville, and Birmingham) had more vehicle miles traveled per person than Atlanta. *Id.*

25. See Bullard et al. *supra* note 1, at 971 n.192 (ozone caused by volatile organic compounds and nitrogen oxide, common components of car exhaust).

26. See AMERICAN LUNG ASSOCIATION, STATE OF THE AIR 2002 REPORT 7 (2002), <http://www.lungusa.org/air2001> [hereinafter STATE OF THE AIR] (metropolitan Atlanta had the sixth worst ozone air pollution in America in both 2002 and 2001).

27. *Id.* Tables 4, 5 (labeling such days "Orange" days).

28. *Id.* at 1. Ozone causes asthma attacks and other respiratory illnesses in children, *id.* at 19, and increases the susceptibility of the elderly to influenza, pneumonia, and other infections. *Id.* at 20. Atlanta's air quality improvements during the 1996 Olympics suggest that Atlanta's high ozone levels are closely related to auto use: during the 1996 Summer Olympics, motor vehicle use declined, transit use increased, and emergency room visits by children for asthma dropped by more than forty percent. See Oliver A. Pollard, *Smart Growth & Sustainable Transportation: Can We Get There From Here?*, 29 FORDHAM URB. L.J. 1529, 1556 (2002).

29. STATE OF THE AIR, *supra* note 26, Tables 4, 5 (labeling such days "Red" and "Purple" days). "Red" days are "unhealthy" for the general public, and "Purple" days are "very unhealthy." *Id.* at 20. In 1998–2000, Fulton County had 22 "Red" days and 9 "Purple" days. *Id.* at 8–9.

30. See, e.g., Kevin J. Klesh, *Urban Sprawl: Can The "Transportation Equity" Movement And Federal Transportation Policy Break Down Barriers To Regional Solutions?*, 7 ENVTL. LAW. 649, 656 (2001) (federal General Accounting Office has "highlighted" federal policies causing sprawl, including highway-oriented transportation policies); Lewyn, *supra* note 2, at 305–29 (discussing pro-sprawl federal policies, but also emphasizing state pro-sprawl policies; for example, state education laws encouraged middle-class families to move to suburbs by requiring children to attend school in locality of residence).

31. See, e.g., Mark S. Davies, *Understanding Sprawl: Lessons from Architecture for Legal Scholars*, 99 MICH. L. REV. 1520, 1525–26 (2001) (reviewing ANDRES DUANY ET AL., SUBURBAN NATION, THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (2000)) ("the desire to live in a [suburban] home has overcome the well-known disadvantages caused by sprawl's reliance on the car"); Michael J. Stewart, *Growth and Its Implications: An Evaluation of Tennessee's Growth Management Plan*, 67 TENN. L. REV. 983, 994 (2000)

*Urban Expansion*, Larry Keating, a professor of city planning at the Georgia Institute of Technology,<sup>32</sup> focuses on a third factor: municipal incompetence. This essay generally endorses Keating's view that local governments have contributed to Atlanta's problems,<sup>33</sup> but suggests that Keating has insufficiently described the relationship between zoning laws and Atlanta's sprawl, and has failed to fully discuss some effects of this sprawl, such as crime and inferior public education.

I.  
ATLANTA'S REIGN OF ERROR

Keating focuses his analysis on the city of Atlanta's highway policies, on ill-conceived mass transit and zoning policies, and on the city's imprudent urban renewal policies.

A. *The Highway Fiasco*

Throughout America, state and federal governments have accelerated suburban sprawl by building highways in rural areas and suburbs.<sup>34</sup> Highways facilitate access to suburban and rural land, thus making such land more appealing to developers and prospective residents.<sup>35</sup> As Keating points out, Atlanta politicians have been just as enthusiastic about sprawl-creating highways as their state and federal counterparts. As early as 1946, consultants hired by Atlanta's business leaders issued a report that urged the area's local governments to finance

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("defenders of sprawl assert that sprawl is a result of people's preferences: Suburban sprawl exists because Americans want to live in these types of developments.").

32. Walter F. Roche, Jr., *Federal Program Has Caused Angst Amid Hope*, BALT. SUN, Sept. 24, 2001, at 4A (describing Keating's credentials, and quoting his views on public housing); David Goldberg, *Boom & Doom*, ATLANTA J. CONST., Jan. 20, 2002 at F1 (describing Keating's credentials, and quoting his views on THE CITY IN MIND, by James Howard Kunstler).

33. This is not to deny, however, that state and federal government policies have also contributed to suburban sprawl and urban decline. See Lewyn, *supra* note 2, at 305-29 (focusing on state and federal pro-sprawl policies, including massive highway spending, educational policies that contributed to urban schools' unpopularity with middle-class families, and housing policies that encouraged sprawl); ALLEN, *supra* note 16, at 143-44 (suggesting that city's compliance with federal desegregation requirements spurred white flight from city of Atlanta); KEATING, *supra* note 2, at 195-96 (describing Georgia Department of Transportation as "the single entity with the most far-reaching power and influence" over Georgia development, because "its constant expansions of the region's highway system disperse new development and . . . largely determine where that development will occur.")

34. See *supra* note 33, *infra* note 35.

35. See Mann, *supra* note 4, at 1378 n.185 (federal General Accounting Office admits that "interstate highways improved access to developable land on the edge of metropolitan areas, supporting [suburban] sprawl development"); Klesh, *supra* note 30, at 656 (quoting GENERAL ACCOUNTING OFFICE, Rep. No. GAO/RCED -99 -87, COMMUNITY DEVELOPMENT: EXTENT OF FEDERAL INFLUENCE ON "URBAN SPRAWL" IS UNCLEAR 10 (1999).) ("experts and much of the research agree that federal spending by the Department of Transportation and for the Interstate Highway System . . . supported the expansion of metropolitan areas by increasing access to suburban locations").

a network of expressways radiating outward from downtown Atlanta to its suburbs.<sup>36</sup> Business leaders believed that the highways would make downtown Atlanta more prosperous by facilitating access to downtown from the suburbs and from the city's outskirts.<sup>37</sup> With the support of Atlanta politicians including Mayor William Hartsfield, the highways opened in the late 1950s.<sup>38</sup>

As early as the 1960s, this first generation of expressways facilitated massive "white flight"<sup>39</sup> to suburbia: the city lost over 60,000 whites between 1960 and 1970.<sup>40</sup> Emigrants to suburbia also followed the expressways, moving up I-75 (one of the city's north-south expressways) and I-85 (the other north-south expressway)<sup>41</sup> to Cobb, DeKalb and Gwinnett Counties.<sup>42</sup> Keating points out that, additionally, at this time the city lost industrial jobs to suburban areas along the expressways.<sup>43</sup>

In 1961 Hartsfield retired<sup>44</sup> and was replaced by Ivan Allen Jr., a prominent member of Atlanta's downtown business elite.<sup>45</sup> Before starting his campaign for mayor, Allen pledged that continued highway construction would be one of the city's major redevelopment objectives.<sup>46</sup> As promised, I-285 (known to most Atlantans as "the Perimeter"), a

36. See KEATING, *supra* note 2, at 91; CLARENCE N. STONE, *REGIME POLITICS: GOVERNING ATLANTA, 1946-88* 32-33 (University Press of Kansas 1989).

37. See KEATING, *supra* note 2, at 91 (transportation plan intended "to improve access to the city's central business district"); STONE, *supra* note 36, at 32 (to "preserve the central business district as a hub of economic activity . . . business leaders concluded, it would be necessary to link downtown with the suburbs by means of expressways").

38. See ALLEN, *supra* note 16, at 32-33, 69.

39. I use the term "white flight" because in the 1960s Atlantans who moved to suburbia were in fact disproportionately white. See Stone, *supra* note 36, at 77 (city lost whites during 1960s); ALLEN, *supra* note 16, at 163 (city gained blacks while losing whites during 1960s). But in recent decades, blacks have followed suit. See Cashin, *supra* note 8, at 741-42.

40. See STONE, *supra* note 36, at 77 (statistics re loss of whites); cf. Kelly Simmons & Dan Chapman, *Sentenced to Commute*, ATLANTA J. CONST., July 5, 2000 at D1 ("shopping centers and commuters followed new roads, particularly the interstates, starting in the 1950s"). Because the city of Atlanta was so heavily black by 1970, additional annexations were politically impossible: white suburbanites successfully fought any proposals to annex additional suburbs to the city. See ALLEN, *supra* note 16, at 147 (in 1966, voters in Sandy Springs, an unincorporated suburb, rejected annexation by Atlanta by 3-1 margin).

41. See *supra* note 38.

42. See ALLEN, *supra* note 16, at 199 (migrants followed I-75 to Cobb County, and I-85 to other two counties). Although metropolitan Atlanta contains twenty counties, the majority of the region's residents live in these three counties and in Fulton County (which contains the city of Atlanta and numerous suburbs). See 2001 ABSTRACT, *supra* note 6, at 896 (listing county populations); *infra* note 73 (just under half of Fulton County population within city of Atlanta).

43. See KEATING, *supra* note 2, at 23 (construction of highways during 1950s and 1960s accelerated dispersal of industry to suburbs, causing "serious decline in the market for industrial space in and around the downtown area").

44. Alfred R. Light, *Bush v. Gore- Georgia Lived it Before: Pickrick and the Warren Court*, 18 GA. ST. U. L. REV. 449, 467-68 (2001) (discussing 1961 Atlanta mayoral election).

45. See KEATING, *supra* note 2, at 69. Before Allen was mayor, he was president of the Atlanta Chamber of Commerce. *Id.* at 88.

46. *Id.* at 88.

highway encircling the city, opened in 1969.<sup>47</sup> Like Atlanta's first generation of expressways, I-285 dispersed Atlantans to suburbia.<sup>48</sup> By 1995, almost 38 million square feet of office space had sprung up on and beyond the Perimeter, more than twice the amount remaining in downtown Atlanta.<sup>49</sup> Three of metropolitan Atlanta's major commercial districts are along the Perimeter.<sup>50</sup>

By the 1980s, expressway-generated sprawl had eviscerated Atlanta's core. Between 1970 and 1980, the city of Atlanta lost 70,000 people,<sup>51</sup> as both people and jobs moved to the suburbs along I-75, I-85 and I-285.<sup>52</sup> In addition to luring the middle class to suburbia, the expressways had turned downtown Atlanta into a wasteland of parking lots and off-ramps. According to one estimate, 50% of downtown land was engulfed by a tidal wave of expressways, streets and parking, and "hundreds of acres were consumed by interchanges" on the fringes of downtown.<sup>53</sup>

Despite these emerging problems, city politicians refused to change course. Keating describes how, in the 1980s, business interests in Buckhead (a commercial district six miles north of downtown and within the city limits)<sup>54</sup> lobbied for Georgia 400,<sup>55</sup> an expressway that would link Buckhead with a suburban highway of the same name<sup>56</sup> and with I-285.<sup>57</sup> Just as Atlanta's downtown elite had once believed that highways would facilitate downtown commerce by making downtown more accessible

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47. Jim Auchmutey, *The Perimeter at 25 Years: The Road We Love to Hate*, ATLANTA J. CONST., May 9, 1995, at E1. Plans for I-285 were first unveiled in the mid-1950s. See ALLEN, *supra* note 16, at 69.

48. See David Beasley, *Northlake/I-285 Area Has Matured Gracefully*, ATLANTA J. CONST., Nov. 17, 1997, at E10, (describing one suburban office submarket as follows: "A new perimeter highway opened in 1969, transforming the LaVista Road intersection from sleepy suburbia to major retail center"); Hannah Kamenetsky, *Trying to Save Clogged "Strip": Architect Must Please Residents and Retailers with Revitalization Plan*, ATLANTA J. CONST., July 24, 1994, at G1 (suburban Sandy Springs "was woods and farmhouses until the 1960s, when I-285 opened it up to commercial development").

49. See Auchmutey, *supra* note 47.

50. See KEATING, *supra* note 2, at 14, 18-19 (describing districts).

51. See STONE, *supra* note 36, at 250.

52. See ALLEN, *supra* note 16, at 199.

53. See STONE, *supra* note 36, at 82 (citation omitted).

54. See KEATING, *supra* note 2, at 19-20 (describing Buckhead), 14 (map showing Buckhead's location vis-a-vis downtown and suburbs).

55. Although the Buckhead expressway was built to link Buckhead with a suburban road known as Georgia 400, the extension of this highway through Buckhead was sometimes colloquially referred to as "Georgia 400 extension." See, e.g., STONE, *supra* note 36, at 123 (using term); KEATING, *supra* note 2, at 85 (highway would in fact link Buckhead with Georgia 400). Before the new highway was built, Georgia 400 ended at I-285 and did not extend into the city of Atlanta. See Stone, *supra* note 37, at 124 (Georgia 400 "connect[ed] the Buckhead area with the perimeter highway to the north").

56. See STONE, *supra* note 37, at 124.

57. See STONE, *supra* note 36, at 124 (noting that Georgia 400 would link Buckhead with I-285, and predicting that highway would stimulate development in northern suburbs).



from Atlanta's suburbs,<sup>58</sup> Buckhead businesspeople believed that highways would aid Buckhead's commerce by making Buckhead more accessible to suburbanites.<sup>59</sup> Some business leaders also admitted that such "highways to the suburbs made them less dependent on an increasingly black city-workforce."<sup>60</sup> Nevertheless, the Atlanta City Council approved the highway in 1989,<sup>61</sup> and the Georgia 400 extension opened in 1993.<sup>62</sup>

Keating asserts that, like earlier highways, the Georgia 400 extension appears to have created a new generation of sprawl: the Roswell/Alpharetta suburban office submarket, built entirely during the 1990s, now encompasses more than 9 million square feet of office space along 10 miles of Georgia 400.<sup>63</sup> Suburbs served by Georgia 400 experienced enormous residential growth as well: between 1990 and 2000, Roswell's population increased by nearly 60%, and Alpharetta's population nearly tripled,<sup>64</sup> while the city of Atlanta's population increased by just 5%,<sup>65</sup> only partially reversing the city's losses in the 1970s and 1980s.<sup>66</sup>

For over 50 years, Atlanta's politicians, with business support, followed the same strategy: build road after road after road to link city and suburb.<sup>67</sup> Keating points out that instead of encouraging suburbanites to work in the city, these roads encouraged urbanites to move their businesses and families to the suburbs, turning Atlanta into (in the words

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58. *Id.* at 32.

59. *See* STONE, *supra* note 36, at 124 (report by Georgia Power Company asserted that highway would link Buckhead with northern suburbs).

60. *Id.* at 122 (admission "off the record").

61. Jim Newton, *City Vote Clears Way for Work on Georgia 400: Opponents of Extension Vow to Continue Battle in Court*, ATLANTA J. CONST., May 16, 1989, at A01. *Cf.* KEATING, *supra* note 2, at 85 (noting that City Council approval required for highway to open).

62. Mike Morris, "Essential" Traffic Corridor was 41 Years in the Making, ATLANTA J. CONST., July 2, 1993, at F5.

63. *See* KEATING, *supra* note 2, at 19; *see also* Tony Wilbert, *UPS Unit Joins Corporate Exodus to Alpharetta*, ATLANTA J. CONST., Feb. 14, 2001, at E1 (because of "easy access to Georgia 400", a "string of companies [moved] to Alpharetta from areas such as Buckhead" because executives "moved their offices close[r] to their homes").

64. WILLIAM A. MCGEVERAN JR., ED., THE WORLD ALMANAC AND BOOK OF FACTS 2002 at 397 (Roswell grew from 47,986 people to 79,334; Alpharetta grew from 13,002 people to 34,854).

65. *See* 2001 ABSTRACT, *supra* note 6, at 35 (city population increased from 394,000 to 416,000 during 1990s).

66. *Id.* (city's 2000 population was lower than its pre-1980s population).

67. *See* STONE, *supra* note 36, at 133 ("the city's governing coalition has used public authority to connect the central business district with a growing and spreading hinterland"). Georgia's state government followed similar policies. *See* KEATING, *supra* note 2, at 196 (Department of Transportation responded to traffic congestion with "constant expansions of the region's highway system").

of one local newspaper columnist) “the incredible shrinking city”<sup>68</sup> with a “largely vacant”<sup>69</sup> downtown. The highways also reduced transit ridership and increased Atlantans’ dependence on automobiles, by encouraging Atlantans to move to suburbs with minimal or nonexistent public transit.<sup>70</sup>

### B. *The Transit and Zoning Debacles*

Keating next discusses the ways in which Atlanta’s local government leaders’ development of a mass transit system and related zoning regulations further contributed to sprawl. Although Atlanta’s business and political leaders favored highways, they also sought to expand public transit. As early as 1954, a regional planning commission suggested that the city would need an expanded public transit system “within a few years.”<sup>71</sup> In 1960, Ivan Allen, who was president of the Atlanta Chamber of Commerce at that time, announced that a rapid transit system would be part of his redevelopment program.<sup>72</sup> In 1961, a regional planning commission recommended a fixed-rail system that would connect the city with five suburban counties (Fulton,<sup>73</sup> DeKalb,<sup>74</sup> Cobb, Gwinnett, and Clayton).<sup>75</sup> Two counties (Fulton and DeKalb Counties) approved construction in a 1971 referendum,<sup>76</sup> and construction of the rail system began shortly thereafter.<sup>77</sup>

The Metropolitan Atlanta Rapid Transit Authority (“MARTA”) has been only a qualified success. On the positive side, transit plays a significant role in downtown commuting: 28.6% of downtown work trips involve public transit.<sup>78</sup> But service to Atlanta’s suburbs has been a

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68. Dick Williams, *Other Voices: Part-Time Pay For Full-Time Government*, ATLANTA J. CONST., May 4, 1996, at A10.

69. KEATING, *supra* note 2, at 109. See *supra* notes 17–20 and accompanying text (describing weakness of downtown Atlanta as commercial center and after-dark destination)

70. See *supra* notes 20–22 and accompanying text (discussing absence of public transit in Atlanta suburbs).

71. See KEATING, *supra* note 2, at 115 (citation omitted). At that time, Atlanta had bus service provided by a private company, but no intracity rail service. *Id.* at 218 n. 3.

72. *Id.* at 88.

73. Fulton County is both urban and suburban. About 381,000 of the county’s 816,000 residents live in the city of Atlanta, and the rest live in surrounding suburbs. See MCGEVERAN, *supra* note 64, at 425 (Fulton County had just over 816,000 residents in 2000, and Atlanta is its county seat); 2001 ABSTRACT, *supra* note 6, at 35 (city of Atlanta had 416,000 residents in 2000); Stacy Shelton & Julie B. Hairston, *City Folks Want Either Out or In Taxes spur cry to bolt Atlanta or link to Fulton*, June 3, 2001, at F1 (35,000 City of Atlanta live in DeKalb County rather than in Fulton County).

74. Shelton & Julie B. Hairston, *supra* note 74 (35,000 City of Atlanta live in DeKalb County); McGeveran, *supra* note 65, at 425 (DeKalb County has just over 665,000 residents).

75. See KEATING, *supra* note 2, at 115.

76. *Id.* at 127.

77. *Id.* at 113.

78. See Cox, *supra* note 22, at Ch. 1.

tougher nut to crack. Of the five suburban counties that were originally slated for MARTA service (Fulton, DeKalb, Cobb, Gwinnett and Clayton), three (Cobb, Gwinnett, and Clayton) refused MARTA service,<sup>79</sup> and until 2001 two of the five (Clayton and Gwinnett) still had no public transit whatsoever.<sup>80</sup> Not surprisingly, only 4% of commuters in the Atlanta region use public transit to get to work.<sup>81</sup> In other words, MARTA adequately serves downtown Atlanta but is of little value in most of Atlanta's suburbs.

Keating suggests that rapid rail was doomed to fail because of Atlanta's low population density.<sup>82</sup> He reasons: "only where there are significant concentrations of both residences and jobs does a rail system attract enough riders to justify the initial investment . . . Atlanta, having experienced most of its growth during the automobile era, is a low-density city with widely dispersed residences and jobs."<sup>83</sup> Although MARTA planners were aware of this problem, they argued that Atlanta and its suburbs could *create* density (and thus increase rail ridership) by using zoning regulations to encourage development within walking distance of its stations and rail lines.<sup>84</sup> Shortly after the passage of the

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79. See KEATING, *supra* note 2, at 115 (describing system first proposed by regional planning commission), 118, 128 (Gwinnett, Clayton and Cobb Counties rejected MARTA service); see also Sheryll D. Cashin, Survey, *City Making: Building Communities Without Building Walls*, by Gerald E. Frug, 98 MICH. L. REV. 1704, 1722 (2000) ("the predominantly white outer counties long opposed expansion of MARTA, Atlanta's rail transport system, because of their fear of a connection to the predominantly black central city"); Orlyn O. Lockard, III, *Solving the "Tragedy": Transportation, Pollution and Regionalism in Atlanta*, 19 VA. ENVTL. L.J. 161, 179-80 (2000) ("MARTA has not been extended from Fulton and DeKalb, counties with large minority populations, into other counties . . . It has been repeatedly argued that suburban residents' desires to prevent minority residents from the urban core from gaining access to the suburban counties are to blame for the lack of a coherent, regional transportation planning system in Atlanta").

80. Cobb County began to operate a separate bus system in 1989, and Gwinnett and Clayton's bus systems (which are also separate from MARTA) opened in 2001. See Staff, *County's Transit System Rolls Today*, ATLANTA J. CONST., Nov. 5, 2001 at JJ1 (noting that Cobb County's system had opened 12 years earlier, Clayton County's system was a month old, and that Gwinnett launched system on day of story). The suburban bus systems are quite small: for example, Clayton County's system began with two bus routes, and Gwinnett County's with only three—despite the fact that Clayton County has over 200,000 inhabitants and Gwinnett over half a million. See McGeeveran, *supra* note 64, at 425 (population figures); Joey Ledford, *Piece By Piece, Regional Transit Becomes a Reality*, ATLANTA J. CONST., October 28, 2001 at E5 (noting number of routes).

81. Kelly Simmons, *Census Finds Metro Area In A Jam*, ATLANTA J. CONST., Nov. 21, 2001, at A1 (citing Census Bureau estimate that 4% of metro Atlanta commuters use public transit).

82. See KEATING, *supra* note 2, at 123; see also STONE, *supra* note 36, at 101 (population density lower in Atlanta than in most other cities with intracity rail); 2001 ABSTRACT, *supra* note 6, at 35-37 (Atlanta had only 3161 people per square mile in 2000, less than majority of cities with over 400,000 people); Cox, *supra* note 18 (Atlanta suburbs also less densely populated than those of other cities).

83. KEATING, *supra* note 2, at 123.

84. *Id.* at 124.

1971 referendum authorizing rail service, the city hired consultants to rewrite the city's zoning ordinance to shift high-density development to areas immediately surrounding rail stations.<sup>85</sup> But Atlanta's business community (which, ironically, had supported creation of the rail system),<sup>86</sup> sabotaged that system by mounting an intensive campaign to defeat the proposed zoning changes, eventually persuading the City Council to pass a watered-down ordinance which permitted high-density development in areas far from rail stations.<sup>87</sup> As a result of these anti-transit zoning policies, the rail system has not attracted as much compact development around stations as it could have. Because fewer people live or work within walking distance of MARTA stations than would have been the case had zoning codes been more favorable, ridership is lower than it could have been, which, in turn, means that Atlanta continues to be an automobile-oriented city.<sup>88</sup>

Keating describes the way in which this pattern was repeated in Atlanta's northern suburbs. In the late 1980s, MARTA directors decided to extend its rail service into the northern suburbs, especially the commercial district in the north-central section of I-285.<sup>89</sup> Charles Loudermilk, chairman of the MARTA Board of Directors, endorsed the new rail line on the ground that "we need to get the unemployed people in the city's core out to where the jobs are"<sup>90</sup>—an argument that would have made sense had suburban jobs been concentrated near rail stations. However, suburban municipalities made the same mistake that the city of Atlanta made a few years earlier: they were willing to throw taxpayers' money at a rail line, but were unwilling to concentrate commerce or housing along the rail corridors.<sup>91</sup> As a result, suburban MARTA stations are miles away from most office buildings.<sup>92</sup> Thus, MARTA's ability to bring city residents to suburban jobs is quite limited.<sup>93</sup>

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85. *Id.* at 129.

86. *Id.* at 125 (MARTA's initial financing scheme drafted by biracial group of business leaders); *see also* STONE, *supra* note 36, at 101 ("Atlanta's business elite remained centrally involved in promoting MARTA").

87. *See* KEATING, *supra* note 2, at 114, 129.

88. *Id.* at 129–30; *see also* David Pendered, *MARTA Aims to Help Shape Development*, ATLANTA J. CONST., Oct. 19, 1998 at E1 (study underwritten by Georgia State University showed that "MARTA had no significant impact in the 1980s on the way the Atlanta region had grown... developers chose to build in areas close to highways the state Department of Transportation widened").

89. *See* KEATING, *supra* note 2, at 131.

90. *Id.* at 133.

91. *Id.* at 132.

92. *Id.* at 22.

93. *See supra* note 22 and accompanying text (most suburban jobs inaccessible to transit-dependent city poor).

### C. *The Redevelopment Fiasco(s)*

The Atlanta city government has repeatedly sought to revitalize the city through a variety of "redevelopment" schemes, including expressways, a civic center, and a convention center. These projects have failed to stem downtown's long-term decline,<sup>94</sup> and, as Keating points out, have in fact been counterproductive, spurring white flight from the city of Atlanta while failing to revitalize the city's central business district.

#### 1. *Destruction of Urban Neighborhoods*

Some of Atlanta's redevelopment projects have been highly disruptive to neighborhoods surrounding downtown Atlanta, particularly impacting low-income, minority communities. For example, when consultants hired at the behest of Atlanta business leaders planned the first Atlanta-area expressways in the 1940s, they could have minimized highway-related neighborhood destruction by routing the highways through industrial districts.<sup>95</sup> Instead, they proposed that the city raze portions of several low-income, mostly African-American, neighborhoods.<sup>96</sup> For example, the city's north-south expressway cut through the middle of Auburn Avenue, historically the city's major black commercial district.<sup>97</sup> According to Keating, business leaders wished to "remove as many poor blacks from the downtown area as possible . . . [and] create a buffer between the [central business district] and the remaining portions of those neighborhoods."<sup>98</sup> After the first expressways were built, the city used federal "urban renewal"<sup>99</sup> funds to clear land for redevelopment on both sides of the city's north-south expressway.<sup>100</sup> The combination of highway construction and urban

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94. See *supra* notes 11–12, 15–16 and accompanying text. But cf. Sohmer & Lang, *supra* note 15, at 5–6 (noting that downtown regained population in 1990s).

95. See KEATING, *supra* note 2, at 91.

96. *Id.* at 91–92.

97. *Id.* at 92.

98. *Id.* at 91; see also Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post-Shaw Era*, 49 VAND. L. REV. 227, 294 n. 217 (1996) ("In Atlanta, urban policy planners used highway design and construction to regulate black mobility and residential patterns").

99. See STONE, *supra* note 36, at 38 (defining "urban renewal" as "federal financial assistance for locally planned and executed redevelopment projects" under which land was often acquired by cities through eminent domain and sold to developers); cf. Lewyn, *supra* note 2, at 310–11 (describing history of federal urban renewal program). Although urban renewal was a nationwide program, *id.*, Atlanta displaced residents more readily than (for example) the city of Baltimore. See STONE, *supra* note 36, at 162, 176.

100. See KEATING, *supra* note 2, at 92. The city has two north-south expressways (I-75 and I-85) but near downtown they merge into one highway. *Id.* at 90.

renewal eliminated half of one low-income white neighborhood and portions of several poor black neighborhoods.<sup>101</sup>

Similarly, in the early 1960s, the city spent \$9 million<sup>102</sup> to raze Buttermilk Bottoms (a low-income neighborhood northeast of downtown)<sup>103</sup> in order to build a civic center.<sup>104</sup>

A further example of this racially-motivated destruction of neighborhoods was a late 1960's initiative to make Atlanta a major destination for conventions. Downtown business leaders persuaded the state government to subsidize a convention center<sup>105</sup> on the western edge of downtown.<sup>106</sup> In order to isolate conventioners from low-income blacks, the city destroyed low-income neighborhoods surrounding the site of the convention center.<sup>107</sup> Indeed, Atlanta politicians may have been too successful at isolating conventioners: Keating points out that because the convention center is at the western edge of downtown Atlanta, conventioners do not find it tremendously convenient to walk from the center to the heart of the central business district, thus making downtown Atlanta even more vacant than it would otherwise be.<sup>108</sup>

## 2. *How Urban Renewal Caused "White Flight"*

Atlanta's urban renewal and expressway programs displaced about 67,000-75,000 people<sup>109</sup> in about 20,000 households,<sup>110</sup> which is over 20% of the city's 1950 population<sup>111</sup> and includes more than half the city's black population.<sup>112</sup> Yet the city's housing authority only built 4,762

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101. *Id.* at 92.

102. *See* ALLEN, *supra* note 16, at 131 (in 1963 Atlanta voters approved bond referendum allocating \$9 million for new civic center).

103. *See* KEATING, *supra* note 2, at 103-05.

104. *Id.* at 104.

105. *Id.* at 107.

106. *Id.* at 109.

107. *Id.* at 108. Even outside downtown, the city sometimes sought to move blacks away from white areas. *Id.* at 44-45, 46-48 (describing numerous examples of elimination of black neighborhoods by city and county governments).

108. *Id.* at 109.

109. *See* KEATING, *supra* note 2, at 93 (estimating that 68,000 Atlantans were displaced by highways and urban renewal); *see also* Stone, *supra* note 36, at 202 (estimating 67,000 Atlantans displaced); ALLEN, *supra* note 16, at 162 ("By one calculation, some 75,000 black Atlantans had been swept out of their homes").

110. *See* KEATING, *supra* note 2, at 93 (estimating that between 19,000 and 22,000 households displaced).

111. *See* STONE, *supra* note 36, at 250 (city had 331,000 residents in 1950).

112. About 95% of the people displaced by redevelopment and highways, or at least 63,000 people, were black. *See* KEATING, *supra* note 2, at 93. In 1950, 121,295 Atlantans were black. Bureau of the Census, Census of Population: 1950, Characteristics of the Population: Part 11, Georgia at 11-64 (1952) (city had 54,905 black males, and 66,380 black females). Thus, at least 51.9% of Atlanta's blacks (63,000 of 121,295) were displaced by urban renewal – and perhaps over 60% if one accepts Allen's higher estimate of the number of blacks displaced. ALLEN, *supra* note 16, at 162 (75,000 black Atlantans displaced).

potential replacement housing units. Thus, between 14,000 and 17,000 households were forced to move but did not receive replacement housing.<sup>113</sup> Instead of moving to housing projects on the city's fringes, Keating observes, displaced low-income blacks quickly moved into other areas near downtown,<sup>114</sup> spurring "white flight" from those neighborhoods.<sup>115</sup> In the words of former city planning director Leon Eplan: "A neighborhood was redeveloped and its residents moved to an adjoining neighborhood and then *those* people moved to the next . . . . All social organization was destroyed."<sup>116</sup>

By the 1970s, after decades of "redevelopment" designed to displace blacks from downtown Atlanta and nearby neighborhoods, downtown Atlanta was nevertheless ringed by black neighborhoods.<sup>117</sup> The same pattern exists today: according to the 2000 Census, the neighborhoods closest to Atlanta's central business district are three-quarters black<sup>118</sup> and are generally low-income.<sup>119</sup> The city's program of ethnic cleansing was thus as fruitless as it was racist. Indeed, the city's policies appear to have spurred white flight to suburbia by displacing low-income blacks, and thus encouraging them to move into then-white neighborhoods.

## II. UNADDRESSED ISSUES

Although Keating has correctly identified some of the major causes of Atlanta's sprawl-induced decline, he neglected to discuss other important factors. Most importantly, although Keating emphasizes that Atlanta and its suburbs did not effectively use their zoning codes to increase transit ridership, he could have devoted more attention to the municipal zoning codes that actually *reduced* transit ridership by lowering

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113. See KEATING, *supra* note 2, at 93.

114. *Id.* at 104 (Mayor Allen knew that after Buttermilk Bottoms was razed, its "displaced black families would be seeking housing in nearby white neighborhoods"); ALLEN, *supra* note 16, at 93 (blacks moved into white neighborhoods because "[u]rban renewal was wiping out slums and displacing thousands of families without providing replacement homes" and "[n]ew highways were cutting through parts of existing black neighborhoods").

115. ALLEN, *supra* note 16, at 199 (noting Atlanta whites' desire to move away from blacks); see also Stone, *supra* note 37, at 41 ("Nonaffluent whites on the southside and, as displacement mounted, on the eastside paid the main social costs of rapid racial turnover"). In fact, Mayor Hartsfield appointed a "housing coordinator" to regulate which neighborhoods would stay white and which would undergo a "conversion to black." ALLEN, *supra* note 16, at 92.

116. See STONE, *supra* note 36, at 86-87 (emphasis in original).

117. See ALLEN, *supra* note 16, at 198 ("Blacks now lived to the west, south and east of downtown Atlanta, as if holding the central business district in a cupped hand.").

118. See Sohmer & Lang, *supra* note 15, at 8.

119. Carrie Teegardin, *Poor Areas Rich in Tickets*, ATLANTA J. CONST., July 18, 1993 at D1 (30303 is downtown zip code); See Haines & Company, Criss Cross Haines 2001 Directory: Atlanta, Georgia City at 1 (zip code 30303 has third lowest household income, and second highest percentage of households earning under \$10,000, among 25 Atlanta zip codes); *id.* at 675, 787-89 (same zip code includes many of state's governmental offices and law firms);

population densities. Keating does mention that rather than trusting the free market, some Atlanta suburbs have used their zoning codes to dictate low density. For example, Cobb County prohibits apartments with over 12 units per acre, even though garden apartments in other areas typically have densities as high as 20 units per acre.<sup>120</sup> Similar zoning restrictions increase the size of single-family homes. Even within the city of Atlanta, zoning laws require homes in some areas to be on two acres of land.<sup>121</sup> Fulton County has established a minimum lot size of two acres for portions of the county, and Cobb County has followed suit.<sup>122</sup> Such restrictions appear to have limited the supply of small-lot housing: the average lot size of a single family home in metro Atlanta is 0.78 acres, more than three times that of Dallas, Houston, Phoenix or Tampa.<sup>123</sup>

Keating points out that such zoning restrictions raise the cost of housing and thus enforce racial and class segregation by keeping inexpensive housing out of affluent neighborhoods,<sup>124</sup> but he fails to point out that Atlanta-area zoning laws, by reducing density, also reduce the number of people who live near streets served by bus and rail stops, which in turn reduces transit ridership.<sup>125</sup> Such restrictions are not limited to neighborhoods with minimal transit service. For example, the area near MARTA's Indian Creek rail station in DeKalb County is zoned solely for single-family homes.<sup>126</sup> Similarly, Sandy Springs, an unincorporated area bordering Atlanta,<sup>127</sup> has three MARTA rail

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120. See KEATING, *supra* note 2, at 52. Other municipalities require that individual apartments be unusually large. *Id.* at 51 (some suburban cities prohibit apartments with under 1000 square feet).

121. H.M. Cauley, *Neighborhood of the Week*, ATLANTA J. CONST., March 2, 1997, at H8, ("two-acre zoning" common in Buckhead); H.M. Cauley, *New Home Communities: Close-in Communities Command Top Dollar*, ATLANTA J. CONST., February 23, 1997 at H26 ("30327 area of Buckhead north of West Paces Ferry Road . . . [is] a neighborhood where two-acre zoning can support high-priced homes.").

122. See KEATING, *supra* note 2, at 52. In fact, some Atlanta-area counties have 3- and 5-acre minimum lot sizes. *Id.*

123. Arthur C. Nelson, *Exclusionary Practices and Urban Sprawl in Metropolitan Atlanta*, 17 GA. ST. U. L. REV. 1087, 1089 (2001).

124. See KEATING, *supra* note 2, at 51-53 (suggesting that racial and economic exclusion is, in fact, the purpose of low-density zoning). Because Atlanta-area blacks are poorer than whites, *id.* at 37-40, zoning laws that exclude low-income renters and buyers disproportionately affect blacks. See Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS'N 125142 (2000) (surveying localities in 25 largest U.S. metropolitan areas and finding that "low-density-only zoning, which restricts residential densities to fewer than eight dwelling units per acre, consistently reduced rental housing; this, in turn, limited the number of Black and Hispanic residents"); Nelson, *supra* note 114, at 1096.

125. Nelson, *supra* note 124, at 1095 ("low density housing is normally associated with greater dependency on the automobile"); see also Lewyn, *supra* note 18, at 285 (same).

126. John McCosh, *Atlanta Building a New Approach*, ATLANTA J. CONST., May 15, 2000, at E1 (making point, and noting that "[p]lanners point to the area surrounding this station as falling far short of its development potential").

127. See Allen, *supra* note 16, at 147 (describing Sandy Springs as an "unincorporated white enclave just north of Atlanta").



stations<sup>128</sup> – yet Fulton County policy generally bans new apartments in Sandy Springs.<sup>129</sup> Even office space near MARTA stations can be controversial. For example, in 2001 a developer asked Fulton County to rezone land across the street from a Sandy Springs MARTA station for offices and retail space. In response to anti-density complaints from nearby homeowners, the county ordered the developer to reduce the amount of office space involved by two-thirds.<sup>130</sup> Keating's analysis of Atlanta local government's failed policies would have been strengthened by a discussion of how these anti-density policies further exacerbated the effects of sprawl.

Furthermore, because Keating focuses on a few key issues, he gives relatively short shrift to urban problems that are less obviously related to redevelopment policy, such as Atlanta's "disturbingly high crime rate"<sup>131</sup> and its "inferior public school system."<sup>132</sup> These problems, however, have been at least partially caused by the blunders discussed above. By encouraging middle-class flight to suburbia, the city's highway and urban renewal policies caused the city of Atlanta to become poorer than its suburban neighbors.<sup>133</sup> Low-income cities and neighborhoods tend to have more street crime.<sup>134</sup> Such areas also have less prestigious schools, because children from low-income households tend to be less prepared for school and thus less likely to achieve academically.<sup>135</sup> Moreover, low-income cities also have smaller tax bases, which may affect their

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128. See Committee for Sandy Springs, *Sandy Springs – Our Future City*, <http://www.sandysprings.net/city.html> (last visited Dec. 20, 2002); Tony Wilbert, *Mass Transit Draws IRS to Sandy Springs*, ATLANTA J. CONST., May 31, 2001 at G1.

129. See Cheryl Crabb, "Smart Growth" Plans Near MARTA Stations Draw Opposition, ATLANTA J. CONST., August 19, 1999, at JH1.

130. See Tinah Saunders, *Plan For Towers at North Springs Still in Dispute*, ATLANTA J. CONST., July 5, 2001 at JH1 (developer originally proposed "850,000 square feet of space"); Sandy Eckstein, *Sandy Springs Project OK'ed*, ATLANTA J. CONST., August 2, 2001 at F3 (county approved "210,000 square feet of office space; 56,000 square feet of retail"). Cf. McCosh, *supra* note 126 (other transit-oriented developments have inspired opposition from neighbors).

131. KEATING, *supra* note 2, at 210.

132. *Id.*

133. See *supra* notes 9–10 and accompanying text.

134. See Lewyn, *supra* note 2, at 339 n.283.

135. See *Reed v. Rhodes*, 1 F. Supp. 2d 705, 738 (N.D. Ohio 1998) ("children reared in lower socioeconomic status [households] tend to be less prepared for school which ultimately impacts on the child's achievements"); Lewyn, *supra* note 2, at 322–25 (discussing relationship between poverty and "bad schools" in more detail). Atlanta's school-related white flight has also been caused by factors beyond the control of local government, such as the federal courts' desegregation orders. See Michael Lewyn, *The Courts v. The Cities*, 25 URB. LAW 453 (1993) (describing Supreme Court desegregation doctrine); ALLEN, *supra* note 16, at 143–44 (describing white flight that resulted from Atlanta school desegregation plan; for example, one school had 470 white children on the last Friday of January 1965, and after school board announced that school would be integrated, only 7 white children present on following Monday).

educational systems.<sup>136</sup> So by encouraging middle-class migration to suburbia, Atlanta's mistakes also led to high crime and inferior schools.

#### CONCLUSION

All too often, cities have been viewed as helpless victims of sprawl or as obsolete institutions unable to withstand market forces. Keating shows that in metropolitan Atlanta, local governments' own decisions contributed to auto-dependent suburban sprawl, through municipal support for sprawl-creating highways, ineffective public transit and zoning policies, and redevelopment policies that destabilized urban neighborhoods and spurred migration to suburbia. It has been argued that "[g]overnment had tried to control the pattern of development in metropolitan Atlanta, and for the most part, it had failed."<sup>137</sup> In fact, Atlanta-area governments have tried to control the pattern of development, by mandating anti-density, anti-transit land use rules—and have in fact *succeeded* in dictating that pattern of development.

Although Keating does not set out a comprehensive reform agenda, his book nevertheless gives guidance to the next generation of municipal leaders, both in Atlanta and in other cities wishing to avoid Atlanta's problems. If Atlantans dislike the status quo, they must reverse course: they must fight sprawl-producing highways, allow (or even encourage) developers to concentrate residences and jobs in areas served by public transit, and avoid civic projects that disrupt and displace urban communities.

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136. See Lewyn, *supra* note 2, at 336 n.260 (citations omitted).

137. ALLEN, *supra* note 16, at 224.



## Books Reviewed

WATER BOUNDARIES: DEMYSTIFYING LAND BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS by Bruce Flushman, New York: John Wiley & Sons, Inc., 2002. Pp 389. First Edition. \$100.00 (cloth).

Mr. Flushman's impressively comprehensive book, *Water Boundaries* is the first to focus on California's water boundaries and related title issues, and it does the job admirably. Flushman does indeed "demystify" the arcane history and interpretation of this complex subject, and his sense of humor is evident throughout the book. Nonetheless, this book is probably too technical to serve as a primer; the subject matter may be too complex for a reader without a real property or land surveying background. And although *Water Boundaries* is the first comprehensive source on the subject, much of the information it contains can be found elsewhere: in out-of-print volumes such as Aaron L. Shalowitz's *Shore and Sea Boundaries*,<sup>1</sup> in sources not generally available to the public such as title company manuals, and in a voluminous, twisting and contradictory body of caselaw. Flushman should be congratulated for his Herculean efforts in locating and compiling all of this information and for the more impressive feat of presenting it in such a cohesive and engaging manner.

Flushman lays the necessary groundwork for his complicated subject with helpful introductory chapters on land title basics, choice of law, and the basic legal principles defining boundary movement. The first of those chapters, "The Basics of Land Title," reviews the history of the United States' acquisition of the public domain and discusses the sources of base title in California real property: grants from the United States, grants from the State, and grants from Mexico or Spain. Grants from the United States took many forms, but perhaps the most problematic were the grants to the states under the Arkansas Swamp Lands Act.<sup>2</sup> Much trouble has resulted from the nebulous nature of these grants; even today, it is not always clear where "swamp lands" end and where tidelands begin. As

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1. AARON L. SHALOWITZ, *SHORE AND SEA BOUNDARIES* (1962). The text of volumes 1 and 2 has been made available in pdf format by the U.S. Coast Survey at <http://chartmaker.ncd.noaa.gov/hsd/shallow.htm>. (last visited February 20, 2002).

2. Act of September 28, 9 Stat. 519 (1850) (codified as amended 43 U.S.C. § 982 et seq. (1986)).

Flushman explains, this is troublesome because tidelands, but not swamplands, are part of the State's sovereign lands.

The State's sovereign lands are lands which were or are submerged or below the ordinary high water mark.<sup>3</sup> They passed to California upon its assumption of statehood and are burdened by a public trust, which places limits on the State's ability to sell these lands. Some of the major water boundary questions emerge at this point: which land is restricted and which is not; can the State sell land that it is charged to keep in a public trust and what happens if this land is inadvertantly sold to a private party.

To help the reader navigate these shoals, the second chapter, "What is Choice-of-Law," explains the choice of law issues involved in water boundaries. Boundary law is usually determined by the law of the state where the property sits. However, this is not necessarily the case where title or boundary disputes arise between states, between the federal government and a state, or between landowners of property in different states, or where the property was once in one state and now is in another. Since property law is generally a "winner take all" proposition, being stuck with an unexpected rule can result in losing a "winning" case, as the book illustrates by discussing the Humboldt Spit case.<sup>4</sup> The author, with some frustration, tells this saga of a dispute involving artificial accretion around a Humboldt County lighthouse. Although previous cases held that state law applied to such disputes, the Supreme Court found that because the dispute was on the open sea coast, there was a dominant federal interest involved in international relations.<sup>5</sup> Although it seems improbable that ownership of a small amount of accreted land in Humboldt County would have an international impact, this was the Court's basis for applying federal law, which holds that artificially accreted land belongs to the upland owner, not the owner of tidelands.<sup>6</sup>

Building on the previous chapters, the third chapter, "Basic Legal Principles Defining Boundary Movement," carefully explains the basic legal doctrines in all their labyrinthine glory. Rivers and other bodies of water have often been chosen for boundaries over the years because they provide long lasting and obvious landmarks. Unfortunately, in their natural state, water bodies move, resulting in a boundary which also moves, *most of the time*. Flushman walks the reader through the basic

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3. A term of art, which is often the waterward extent of private lands.

4. California, ex rel. State Lands Comm'n v. United States, 457 U.S. 273 (1982).

5. *Id.* at 283.

6. California law says artificially caused accretion does not belong to the upland owner, here, the United States; this case held that the terms of the Submerged Lands Act 43 U.S.C. §1301, 1313 prevented accretion from becoming state property. BRUCE FLUSHMAN, WATER BOUNDARIES: DEMYSTIFYING LAND BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS 268-9 (2002).

water boundary principles, while warning that the concepts discussed may be difficult for some readers to envision. This statement is certainly true, and although the book does a good job with its descriptions of the ordinary high water mark, meander lines, erosion, accretion and avulsion, a reader who has trouble with this section might wish to read the water boundaries chapters in Curtis Brown's *Boundary Control and Legal Principles*<sup>7</sup> for background.

The remainder of the book focuses on the various processes of property boundary determination on the open ocean coast, in estuarine areas, on tidal rivers, and on navigable rivers and lakes. In each of these sections, the book discusses the types of evidence required to put on a successful case, the controlling legal doctrines, and the technical methods used to re-create historical conditions.

Chapter Four, "Property Boundary Determination Along the Open Ocean Coast," explains how the ordinary high water mark has become technically equivalent to the mean high water line, a line based on tidal elevation measurements. In its most technical section, it explains why and how tidal measurements are averaged over an 18.6 year interval in order to determine the elevation of mean high water. The chapter also discusses the many different physical processes, natural and artificial, which may affect property boundaries on the open coast, including artificial erosion, great storms, and artificial filling.

Chapter Five "Property Boundary Determination in Estuarine Areas," covers boundary determination in these economically and environmentally valuable lands. Some of the earliest cases in our country's legal history were fought over the title and boundaries of estuarine lands.<sup>8</sup> Not surprisingly, Flushman tells us that both the boundary determination and title issues are "confusing and difficult"<sup>9</sup> due to the physical nature of tidal marshes, and the difficulties flowing from the swamp lands<sup>10</sup> grants. The book then explains the historic techniques for segregating tidelands from swamp lands and the resulting legal effects, and it also discusses the legal effects of changes to the tidal marsh regime such as the dams, levees and drains so commonly found in California's salt marshes. Such artificial activities may change the location of the water without changing the location of the boundary.<sup>11</sup> This dilemma

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7. CURTIS BROWN, *BOUNDARY CONTROL AND LEGAL PRINCIPLES* (4th Ed. 1995).

8. See, e.g., *Pollard v. Hagan*, 44 U.S. 212 (1845) (deciding a dispute on Mobile Bay); *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842) (deciding a dispute on Raritan Bay).

9. FLUSHMAN, *supra* note 6, at 147.

10. The terms salt marsh, swamp land, marsh were historically indiscriminately used to mean both tidelands, those covered and uncovered daily by the tide and other higher lands that are marshy in character. FLUSHMAN, *supra* note 6, at 19, 147 n.23, 150-51.

11. For example, if Farmer Black owns a parcel bounded by a navigable tidal stream and then he constructs an artificial structure that causes the stream to change position, his boundary

gives significance to the chapter's discussion of the use of historic U.S. Coast Survey maps and U.S. Coast & Geodetic Survey maps are often utilized to determine the location of historic water boundaries based their last natural position.

Chapter Six, "Property Boundary Determination Along and In Tidal River Regimes," details an actual title and boundary case. The Delta Meadows case<sup>12</sup> involved a dispute between the State of California and Southern Pacific Railroad over whether a strip of railroad right-of-way in the Delta was subject to a public trust easement. The case illustrates how the evidence from surveys, title research, historic maps, flow modeling, soil typing, plant ecology and historic research is used to determine a water boundary and how to present the evidence in court. It also illustrates the high cost of litigating water boundary dispute cases: this case involved extensive research, expert testimony, and eight weeks of trial time.

The last two chapters discuss boundary determination on nontidal navigable rivers and lakes. First, Chapter Seven, "Property Boundary Determination Along Navigable, Nontidal Rivers and Stream Regimes," explains that the State owns only those nontidal waters that were navigable at the date of statehood and that nontidal waters that were not navigable at statehood belong to private parties.<sup>13</sup> Further, in nontidal waters, California has statutorily ceded ownership to the lands above the ordinary low water mark.<sup>14</sup> Unlike the ordinary high water mark, the ordinary low water mark is not based on a physical phenomena, thus locating the low water mark is similar to a snipe hunt, with opinions and theories about the snipe being more prevalent than the snipe itself. This chapter conveys, once again, a sense of the large stakes and relative unpredictability in this field of law. The modern decisions have been pragmatic, flexible and fact-dependent, and may signal an openness to creative solutions, but attorneys are advised to limit uncertainty by understanding the physical processes at work and retaining expert help early in the dispute resolution process.

The final chapter, "Property Boundary Determination Along Navigable Lakes," includes a section on recession, the process by which the waters of a lake gradually and naturally recede, leaving dry land

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may not move, but may instead become fixed in the position it was in before construction of the artificial structure.

12. FLUSHMAN, *supra* note 6, at 190 (citing State of California, ex rel. Public Works Bd. v. Southern Pacific Transportation Company, Sacramento Superior Court No. 277312 (1983)).

13. The book then explains the federal and state tests for navigability. The federal test establishes navigability for title purposes—resulting in state ownership. California's more lenient test determines the extent of the public navigation easement over privately held water bodies. *Id.* at 237–39.

14. Although these lands remain subject to the public trust. FLUSHMAN, *supra* note 6, at 272 n.169.

exposed. An early Mono Lake decision <sup>15</sup> illustrates the difference between the California and the Federal rules on reliction and highlights the importance of choice of law issues. The state owned the bed of Mono Lake, a navigable lake, and the United States was the owner of the adjacent uplands. Mono Lake's waters had receded (which is another story) and normally California law would control, allotting relict lands to the owner of the lakebed, but federal law was found to control, which gives relict lands to the upland owner, because the United States was the upland owner.

Water boundary law is like the Bermuda Triangle, full of hidden danger, and strewn with the wrecks of under prepared litigants. Luckily, this book's conceptual framework and painstaking detail provide a guide and a caution, enabling the reader to properly prepare for the voyage. In addition to its discussions of trial preparation, its detailed footnotes are helpful for research purposes in a field where cases can be difficult to unearth due to their age and/or unique terminology. Another important contribution is the book's elucidation of the causes of some of the conflicts in the case law: the choice of law issues and the highly technical, fact specific nature of the cases. This volume has had input and editing from some of California's most experienced water boundary litigators and surveyors, and their contributions are evident throughout.

*Water Boundaries* does share a significant flaw with many recent texts: its illustrations are much too small, too few and poorly reproduced. This book would be greatly improved if its illustrations were as clear and useful as those in James A. Simpson's *River & Lake Boundaries*.<sup>16</sup> Illustrations are very helpful in presenting boundary principles and discussing cases; often a concept that seems confusing in the text can be readily understood with the assistance of an illustration. While this is a deficiency, it should not stop anyone from purchasing this book.

On the whole, *Water Boundaries* is clear and enjoyable to read, and it touches on all of the significant issues in water boundary determination and makes a great addition to the literature on the subject.

*Shasta Greene, P.L.S.*

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15. City of Los Angeles v. Aitken, 10 Cal. App.2d 460 (1935).

16. JAMES A. SIMPSON, RIVER & LAKE BOUNDARIES (1994).





## Books Reviewed

REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS?, Edited by Cary Coglianese and Jennifer Nash. RFF Press, 2001. Pp. 256. \$60 (cloth), \$22.95 (paper).

### INTRODUCTION

Over the course of the past decade or so, there has been an unmistakable trend in many areas of regulation to move away from command-and-control regulation involving micro-level scrutiny and rigid process-based standards. Changes in environmental regulation have followed this general pattern. There seem to be two noteworthy causes of this trend. The first is that traditional regulation imposes unwanted obligations on businesses. From a business' perspective, these obligations can be onerous and an impediment to business as usual. With active resistance and a paucity of regulatory enforcement, compliance is difficult to secure. It is thought that a system involving more voluntary, or at least more flexible, measures would induce heightened compliance because a firm would feel greater ownership over environmental policies and less resentment towards regulatory goals. A second cause of the trend is the realization that firms simply know more about their operations than the government could ever know. Because of this informational asymmetry, businesses can often find lower cost solutions to problems. Rigid regulatory procedures do not allow sufficient room for this innovation. Currently, both the regulatory goals and the means to achieve those goals originate outside the firm. This "regulation from the outside" produces poorer results at greater expense.

The most prominent example of the trend away from traditional regulation has been the transformation of emission trading from an intellectual curiosity to a viable public policy. A less well-known example of this trend is a growing interest in environmental management systems ("EMS"). An EMS is a comprehensive plan, created and adopted by a firm, that sets out how the firm intends to deal with environmental issues.<sup>1</sup> Rather than make environmental protection merely another

burdensome procedure with which to comply, EMSs force managers to internalize environmental considerations in their core business decisions. A firm with an EMS would not simply design a manufacturing process and then leave it up to an environmental compliance officer to find a way to mitigate the environmental effects. Instead, an EMS could lead to a manufacturing process that results in a profitable use for waste products. A good example can be taken from a lumber mill.<sup>2</sup> In the course of processing lumber, a mill creates woodchips, sawdust, and the like. The natural disposal mechanism may be to simply throw out these waste products, which in turn increases the strain on overburdened landfills. However, a firm with an EMS might take the waste products and use them to create marketable particleboard or pressed lumber products. This is the sort of win-win situation that EMSs can create.

EMSs seem to address the two major drawbacks of traditional regulation. EMSs lead managers to integrate environmental protection into their fundamental business decisions. This more easily allows comprehensive solutions rather than costly fixes that focus on a single factor. Additionally, because these practices are adopted voluntarily and are generated internally, firms can take ownership of them. This sense of ownership can increase the level of compliance with environmental programs. EMSs can also serve as a way for senior management to signal to employees that the firm's environmental commitment is not simply a façade. They can serve as an impetus to change a firm's institutional culture. For these reasons an EMS can be termed "regulation from the inside."<sup>3</sup>

*Regulating from the Inside: Can Environmental Management Systems Achieve Policy Goals* collects the first round of scholarship on EMSs. This collection consists of papers from a spectrum of environmental researchers, and is edited by Cary Coglianese and Jennifer Nash. Coglianese is Associate Professor of Public Policy at Harvard's John F. Kennedy School of Government and chairs the school's Regulatory Policy Program. Nash, who has published widely on corporate environmental practices, directs the Kennedy School's Regulatory Policy Program. The primary goal of the book is to both provide a preliminary assessment of how EMSs have worked in practice and consider what public policy responses can harness the potential EMSs may hold. A secondary goal is to generate a research agenda for refining this preliminary research. While this collection might have benefited from a

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1. For a good description of what an EMS is see *REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS?* 1-4 (Cary Coglianese & Jennifer Nash eds., 2001).

2. See *id.* at 3.

3. For a general description of the benefits of EMSs see *id.* at 10-12.

slightly stronger editorial hand, it substantially achieves its goals and concludes that the efficacy of EMSs is somewhat limited.

#### I.

##### SUMMARY OF REGULATING FROM THE INSIDE

The book is divided into two main parts. Part I is devoted to analyzing whether EMSs actually improve environmental results. Part II proceeds from the foundational assumption that EMSs do hold some value, and evaluates what public policies can be used to harness that potential.

##### *A. Introduction of Regulating from the Inside*

The book's introductory chapter frames the open issues and elucidates four major themes. The first theme is that not all EMSs are the same. Some systems are generated internally and adopted voluntarily by a firm. Other EMS standards are created by external bodies, such as a trade association or a standards organization, and are adopted by an entire industry as part of a regime of self-regulation. And more generally, among EMSs, the actual standards, their stringency, and the precision with which they are measured can vary widely from firm to firm. Indeed, the whole concept of an EMS can be, at times, rather amorphous. A second open issue is whether the sort of win-win opportunities described above are, in reality, that common. There is disagreement over how much of this "low-hanging fruit" is really out there. Presumably, a rational profit-maximizing firm would have already adopted a more profitable measure, irrespective of environmental considerations. A third concern surrounding EMSs is that they can simply serve as a smokescreen to deflect regulatory scrutiny and sway public opinion.

The final question is most central to the book: why do firms make environmental improvements? This question of causation is important because to adopt an EMS, a firm is typically already somewhat committed to the environment. The presumed success of an EMS might simply be a proxy for the environmental results that naturally occur when a firm is environmentally conscious. If this is the case, then the policy debate on EMSs would simply center on how to make high-performing firms even better. EMSs would seem to be irrelevant for low-performing firms. This would be problematic since it is likely that the greatest benefits to the environment will accrue from focusing on the lowest performing firms. The outcome of the causation question may thus render EMSs a triviality in environmental policy.

*B. Part I: Do EMSs Actually Improve Environmental Results?*

Part I contains four chapters. Chapter 2 is written by a team of researchers from the Environmental Law Institute and the University of North Carolina at Chapel Hill.<sup>4</sup> This chapter is devoted to studying whether EMSs have produced win-win opportunities. To answer this question, the researchers created a national database of EMS-adopting firms. They found that many EMSs were not financially self-sufficient. Nevertheless, most of the managers at these facilities still thought the exercise was worthwhile. This enthusiasm was driven by the realization that an EMS aided in regulatory compliance. The problem with this is that EMSs narrowly focused on regulatory compliance might forestall the sort of comprehensive, innovative solutions that EMSs are meant to spur. The authors flag this as a major issue for subsequent study.

Chapter 3 focuses on the factors that affect whether an EMS will lead to better environmental results.<sup>5</sup> Editor Jennifer Nash and John Ehrenfeld, Senior Research Associate at MIT's Center for Technology, Policy and Industrial Development, contribute this chapter. Nash and Ehrenfeld explore the impact a firm's culture has on the success of an EMS. In particular, a firm's commitment to the environment and its reasons for adopting an EMS can largely determine the impact EMS adoption will have on that firm's environmental performance. The authors find that firms that view environmental protection as being relatively unimportant view the utility of an EMS as largely a public relations tool. On the other hand, firms that believe in strong environmental responsibility use EMSs as a way of improving upon their already strong environmental performance. The authors conclude that environmental commitment can drastically alter the effect of an EMS on performance.

Chapter 4 is written by Richard Florida, the H. John Heinz III Professor of Economic Development at Carnegie Mellon University's Heinz School of Public Policy and Management, and Derek Davison, a research associate at the Heinz School.<sup>6</sup> This chapter focuses on two questions. The first is what sort of firms adopt EMSs. The second is whether facilities that have EMSs and other advanced environmental management practices pose fewer environmental risks to the surrounding communities and whether these plants are better at involving community

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4. Richard N.L. Andrews, et al., *Environmental Management Systems: History, Theory, and Implementation Research*, in *REGULATING FROM THE INSIDE*, *supra* note 1, at 31.

5. Jennifer Nash & John R. Ehrenfeld, *Factors that Shape EMS Outcomes in Firms*, in *REGULATING FROM THE INSIDE*, *supra* note 1, at 61.

6. Richard Florida & Derek Davison, *Why Do Firms Adopt Advanced Environmental Practices (and Do They Make a Difference)?*, in *REGULATING FROM THE INSIDE*, *supra* note 1, at 82.

stakeholders on environmental issues. Regarding the first question, Florida and Davison find that firms adopting EMSs tend to be larger companies. This suggests that EMSs are not costless. A firm needs a certain pool of resources upon which to draw if it is to adopt a meaningful EMS. Corroborating what was found in Chapter 2, Florida and Davison also find that regulatory compliance drives EMS adoption more than any other factor. The impetus for the second question is studies showing that advanced management systems lead to interrelated practices of better teamwork and information sharing. The authors conclude that these effects are manifested in an EMS-adopting plant's relations with the outside community, and that plants with an EMS are better at involving surrounding communities in the decision-making process.

Chapter 5, contributed by Theodore Panayotou, considers the implications EMSs hold for the global economy.<sup>7</sup> Panayotou is the Director of the Natural Resources and Environment Program at the Kennedy School of Government's Center for International Development. One important aspect of EMSs is that they merely set out a structure through which environmental goals can be pursued. A firm's environmental commitment, regulatory pressure, or a combination of both factors, dictate what goals the EMS is being used to pursue. This innate flexibility makes EMSs appropriate for multinational firms. It becomes quite expensive for firms to create totally different environmental monitoring systems for each country in which they operate. The benefit of an EMS is that it provides a systematic internal language about how the firm can deal with environmental issues in many countries. This makes it cheaper and easier for multinational firms to comply with diverse environmental regulations.

Panayotou argues that EMSs may also hold particular value for firms based, and exclusively operating, in the developing world. Again, their flexibility is of prime importance. No single set of environmental standards can be used across all countries when the costs of compliance may severely limit the economic competitiveness of developing countries. But the flexibility of EMSs allows greater environmental performance while not unduly burdening the countries that can least afford to protect the environment. A strong EMS gives the firm a target to shoot for. As the firm's ability to comply with costlier measures increases, so too will its targets.

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7. Theodore Panayotou, *Environmental Management Systems and the Global Economy*, in REGULATING FROM THE INSIDE, *supra* note 1, at 105.

C. *Part II: The Role of EMSs in Environmental Policy*

Interestingly, Chapter 6, written by William Moomaw, Professor of International Environmental Policy at Tuft University's Fletcher School of Law and Diplomacy, concludes that the notion of an EMS is too narrow to be of use.<sup>8</sup> Moomaw finds that environmental problems are really the result of a mismatch between the natural world and how people choose to meet their needs. EMSs are not designed to address the underlying social values that create this mismatch, but only to rectify the results. Moomaw argues that policymakers should instead consider "sustainability management systems."<sup>9</sup>

These sustainability management systems actually do not seem to have strong characteristics systems at all. The case studies Moomaw cites with praise involve companies that implemented policies on an *ad hoc* basis. For example, the Oserian Development Company is a Dutch-owned firm operating in Kenya that grows flowers to sell on the international market. Oserian provides housing and childcare for its employees. It uses drip irrigation, even though it is free to draw extensively on water from a nearby lake, and it makes extensive use of composting, rather than using chemical fertilizers. At every step, these policies were driven by concern for the total impact the facility had on the surrounding area. By considering all of these external factors, and not merely environmental factors, Oserian was able to truly create social value for the surrounding communities. Moomaw argues that such a holistic approach is needed to address the problems of which environmental degradation is merely a symptom. What is somewhat unclear is how such a holistic approach could be replicated throughout the far reaches of a major international corporation.

Shelley Metzenbaum, Senior Research Scholar at the University of Maryland's School of Public Affairs, contributes Chapter 7.<sup>10</sup> She considers how the broader use of EMSs might influence the role played by environmental regulators. As mentioned above, there has been a trend towards performance-based regulation and regulation based on mandatory information disclosure in recent years. EMSs fit into this trend in two ways. First, regulators could redefine their mission to focus on overseeing firms' compliance with their EMSs through mandatory information disclosure. Firms could use independent, third-party auditors to validate compliance with their EMSs. Regulators would then rely on the auditor's report to evaluate whether the firm met its obligations. This

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8. William R. Moomaw, *Expanding the Concept of Environmental Management Systems to Meet Multiple Social Goals*, in *REGULATING FROM THE INSIDE*, *supra* note 1, at 126.

9. *Id.*

10. Shelley H. Metzenbaum, *Information, Environmental Performance, and Environmental Management Systems*, in *REGULATING FROM THE INSIDE*, *supra* note 1, at 146.

more open environment would also make it easier to disclose environmental performance to the public. This disclosure could have an important impact on business, serving as a powerful deterrent to environmental abuses. While this new regulatory paradigm does have potential, Metzenbaum concludes that this potential is limited because current EMS standards neither call for disclosure of environmental performance nor include performance metrics. Perhaps for these reasons, Metzenbaum notes that this approach could never completely supplant more traditional kinds of regulation.

Chapter 8, written by editor Cary Coglianese, begins by revisiting some of the subject matter from Part I.<sup>11</sup> He notes that EMSs do have beneficial effects. Factors outside a management system, however, are far more important in predicting a facility's environmental performance. For this reason, public policies should not fixate on EMSs in an overly-aggressive manner. Coglianese concludes that the role for government action with respect to EMSs should be limited to encouraging their adoption.

Two general routes can be pursued in accomplishing this goal. The government can take action to lower the cost of EMSs or it can increase the benefits from using one. Some of the ways that government can lower the implementation costs for EMSs are to offer: general education on the benefits of EMSs, technical assistance in creating an EMS, or subsidies or tax credits for adopting an EMS. To raise the benefits of EMS adoption, regulators can offer: public recognition/praise to EMS adopters, forbearance from regulatory enforcement, and regulatory flexibility. For various reasons, Coglianese is not very optimistic about any of these options. For example, general educational efforts are feasible but probably would not accomplish all that much. The largest firms probably have regulatory staff who already are generally aware of EMSs. And smaller firms, even if informed of the value of an EMS, still might not have the resources needed to effectively implement an EMS. Publicly recognizing and praising firms that adopt EMSs would be a cheap way for regulators to encourage adoption of EMSs. However, Coglianese argues that such recognition is not a very strong stimulus. Also, its efficacy diminishes the more it is used. If all firms are praised, then such praise no longer serves as a mark of distinction. Coglianese does, however, single out a few of these options as holding some promise and as worthy of further consideration. Among these promising options are providing technical assistance and enforcement forbearance.

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11. Cary Coglianese, *Policies to Promote Systematic Environmental Management*, in *REGULATING FROM THE INSIDE*, *supra* note 1, at 181.



The final chapter of Part II, Chapter 9, is written by Jerry Speir.<sup>12</sup> Speir directs Tulane Law School's Institute for Environmental Law and Policy. This chapter focuses on what role EMSs can play in tiered regulatory regimes, in which high-performing firms enjoy reduced regulatory burdens and greater flexibility. Key to a successful tiered regime is the determination of which firms deserve this preferential treatment. Speir considers whether the presence of an EMS is a sufficient criterion upon which to make this distinction by reviewing 11 states that have developed some sort of tiered regime. Most of these states placed firms who had registered with a particular standards organization's EMS standards in a preferred regulatory tier. The problem in using this form of EMS as a criterion for preferential treatment is that it is possible to have a certified EMS and yet still be a poor environmental performer. All the EMS would do is set out a plan for future performance. Even more problematic is that the EMS itself does not ensure that the firm ever will achieve good environmental results. Recognizing these problems, many states have added additional requirements beyond simply adopting an EMS. But as these requirements increase, EMSs begin to look more like traditional regulation. Additionally, once high-and low-tier firms are differentiated, the level of preferential treatment a high-tier firm receives must be determined through political processes.

#### *D. Conclusion of Regulating from the Inside*

Coglianesse and Nash finally conclude that EMSs hold limited potential. They are neither a necessary nor a sufficient requirement for a firm to achieve high environmental results. This is because an EMS is merely a tool. As with any tool, the success of the results achieved depends largely on how the tool is used. How a firm chooses to use this tool is largely driven by its commitment to environmental performance. For a firm committed to the environment, an EMS can be a useful way of operationalizing that commitment and clearly communicating it throughout the organization. On the other hand, an EMS in the hands of an uncommitted firm means little. Since government cannot create sincere commitment, the editors conclude that the role public policy plays in promoting EMSs should accordingly be limited.

### III.

#### ANALYSIS AND CRITICISM OF REGULATING FROM THE INSIDE

While the concluding chapter clearly spells out the editors' main views on EMSs, this perspective is not always evident throughout the interior chapters of the book. This is driven by the most prominent

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12. Jerry Speir, *EMSs and Tiered Regulation: Getting the Deal Right*, in REGULATING FROM THE INSIDE, *supra* note 1, at 198.

stylistic aspect of the book: it is a collection of 10 papers organized around a central topic, rather than an integrated book. The only noticeable drawbacks of *Regulating from the Inside* stem from this stylistic choice.

The first problem with this approach is that there is excessive repetition at the beginning of the chapters. For example, the introductory chapter successfully presents the concept of an EMS. Yet many interior chapters also begin with an extended treatment of the theory of an EMS. This distracting repetition is particularly troublesome in Part I. Each chapter purports to come up with a different theme about EMSs and explore that theme. In reality, however, each chapter seems to involve the author's explanation of the EMS concept, followed by her evaluation of the actual impact of EMSs. This repetition is problematic because the very concept of an EMS is rather amorphous. Hearing it described in so many different ways becomes confusing, particularly for readers not previously familiar with EMSs. This confusion makes it difficult to critically process and analyze the author's particular argument.

The fact that each chapter stands on its own reflects a potential problem with the structure of the book. One begins to question the value of the Part I/Part II structure that is superimposed on the various chapters. A related problem with the structure is that it may lead the reader to believe that there is a greater degree of commonality among the articles than there might actually be. To refresh, Part I was meant to address the topic of whether EMSs work; Part II was meant to discuss what public policies might promote EMSs. Sometimes, though, the particular chapters do not fit entirely within this division. For example, Moomaw, in Chapter 6 of Part II, first concludes that EMSs are basically a misguided concept. This conclusion may have been more appropriate in Part I. To add confusion, Moomaw's purported policy prescriptions—that firms create “sustainability management systems”—can hardly be called a public policy at all. All of his examples deal with a firm's voluntary adoption of socially responsible practices.

Another drawback of the editors' stylistic choice is that the major issues are not always clearly accentuated in the interior chapters. One of the goals of this book is to identify policy proposals that might potentially promote more widespread use of EMSs. But when the main thematic issues—such as the diversity of EMSs, whether win-win opportunities really exist, “greenwashing,” and causation—are obscured within the articles, it is difficult to fully evaluate the policy proposals. A good example of this is the causation issue. The editors explain this theme in the introduction and in their own chapters. Elsewhere, however, this issue is not always identified. It is unsurprising that individual authors, working in isolation, did not explicitly highlight the connection of their work to one of the book's overriding themes. Yet readers might have benefited

from an introduction to these chapters in which the editors drew attention to the underlying causation theme. This way, those who are new to EMSs could still have some of the overall themes fresh in their mind as they read the various chapters.

A related critique of *Regulating from the Inside* is that there is not much interplay or dialogue among the various chapters. The book would have been strengthened by inclusion of authors' reactions to each other's arguments. This makes it difficult to interpret conflict among the chapters. For example, this reviewer finds Coglianese's policy prescriptions to make the most sense. But accepting this account as persuasive effectively denies the viability of the more sweeping policies Metzenbaum and Speir consider in their respective chapters. Comment on the relationship of the author's various theories would have been helpful here. Perhaps the fact that the editors are themselves authors and prominent theorists on the subject, who may well be part of that conflict, explains this unfortunate absence.

Of course, all of these criticisms must be viewed in light of whatever practical exigencies dictated the format of the book. If its goal was to provide timely commentary on a current public policy issue, the chosen format may well have been the most practical. If this is the case, the above-mentioned issues may have been unavoidable trade-offs. This probably explains why the editors chose to edit with such a seemingly light touch. A stronger format that more forcefully reflected the editors' own views would have muted alternative arguments, thus spurring less debate and discussion on EMSs. Given the goal of the book, the authors may have been constrained by a need to present the range of views on EMSs in the voices of those who hold them. On the positive side, this structure gives the reader more room to reach her own conclusions.

In giving a final appraisal of *Regulating From The Inside*, it is most appropriate to judge the book in light of its goals. It was intended to present some of the preliminary research on EMSs and discuss the potential role of public policy in furthering whatever potential EMSs do hold. This much the book certainly did. While the format chosen by the editors created trade-offs, the manifestation of these trade-offs, while distracting, did not prevent the editors from accomplishing their goals. *Regulating from the Inside* successfully provides a preliminary look at the promise and limitations of EMSs.

David Zlotlow