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Campaign of Sabotage: Big Government's War Against Public Transportation

by Michael Lewyn*

| | |
|--|-----|
| I. Public Transit: Pros and Cons..... | 261 |
| A. The Benefits of Transit..... | 261 |
| B. The Inadequacy of Transit..... | 263 |
| C. The Anti-Transit Story | 266 |
| II. How Government Has Sabotaged Public Transit | 267 |
| A. Highway Policy | 267 |
| 1. How Government Put Highways In The Driver's Seat | 267 |
| 2. Highway Spending and Transit: Recipe for Reduced Ridership..... | 270 |
| a. First, Use Highways To Create Suburbs | 270 |
| b. . . . Then Keep Transit Out Of The Suburbs | 273 |
| B. Unfunded Mandates: How Big Brother Makes Transit Unaffordable..... | 275 |
| 1. The Americans with Disabilities Act..... | 275 |
| 2. Labor Laws that Limit Transit Operators' Ability to Reduce Labor Costs..... | 276 |
| 3. Limitations upon Transit Systems' Use of Parts Manufactured in Foreign Countries..... | 277 |
| 4. Limitations on Charter and School Bus Service in Competition with the Private Sector..... | 277 |
| C. Other Anti-Transit Policies: Or, How To Attack Transit By Attacking Cities..... | 278 |
| 1. Federal Housing Administration Mortgage Insurance..... | 278 |
| 2. Public Housing Policies that have Concentrated Poverty and Crime in Cities | 279 |
| 3. Prestigious Schools for Suburbs and "Bad" Schools for Cities | 281 |
| 4. A Tax Code that Favors Driving and Suburban Life..... | 282 |

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| | |
|--|-----|
| D. How Zoning Makes Suburbs Auto-Dependent | 284 |
| III. Does It Matter? | 285 |
| IV. Conclusion | 287 |

INTRODUCTION

Public transportation¹ helps the carless poor and disabled reach jobs and other opportunities, while reducing traffic congestion and air pollution by keeping cars off the road. Nevertheless, public transit has had limited political support in recent decades. Politicians and bureaucrats have used highways to create auto-oriented suburbs, while often failing to provide public transit to those suburbs. As a result, transit users are second-class citizens in most of America, and many Americans are compelled to pollute the air and congest the highways merely to work, shop, and play.

The political elite's failure to support public transit is based on the view that despite decades of state and federal support, transit ridership has dwindled and will inevitably continue to dwindle because of Americans' love of their automobiles—a claim that in turn is based on the assumption that government has in fact sought to promote public transit. This article criticizes that assumption, and explains that far from promoting public transit, government at all levels has sabotaged transit in a variety of ways: by building highways to suburbs unserved by public transit, by loading down transit systems with unfunded mandates, by using housing, education and tax policy to encourage migration to those suburbs, and by using zoning policy to make suburbs as auto-dependent as possible.

I. PUBLIC TRANSIT: PROS AND CONS

A. The Benefits of Transit

Public transportation benefits the public in at least four significant ways. First, public transit gives mobility to the millions of Americans who do not or cannot drive, including 24 million disabled Americans,²

1. This term "includes all multiple-occupancy vehicle services designed to transport customers on local and regional routes." AMERICAN PUBLIC TRANSIT ASSOCIATION, PUBLIC TRANSPORTATION FACT BOOK 11 (2000) [hereinafter FACT BOOK].

2. See William W. Millar, *Testimony of the American Public Transit Association Before the Labor Health and Human Services, Education and Related Agencies Subcommittee of the House Appropriations Committee*, Feb. 5, 1998, 1998 WL 8991781 (according to the Federal Transit

5.4 million senior citizens,³ and ninety four percent of welfare recipients.⁴ By transporting the poor and the disabled to jobs and other opportunities, America's buses and trains help America meet a variety of social goals, including the Americans with Disabilities Act's goal of "welcom[ing] individuals with disabilities fully into the mainstream of American society"⁵ and the 1996 Welfare Reform Act's⁶ goals of "end[ing] the dependence of needy families on government benefits by promoting job preparation [and] work."⁷

Second, public transportation reduces air pollution. For example, buses emit only 1.54 grams of nitrogen oxide per passenger-mile (as opposed to 2.06 for single-person autos), 3.05 grams of carbon monoxide per passenger-mile (as opposed to 15.06 for single-person autos) and 0.2 grams of hydrocarbons per passenger-mile (as opposed to 2.09 for single-person autos).⁸ Buses are likely to become even cleaner over the next decade or two.⁹ As a result of federal programs and political

Administration, 24 million disabled Americans are dependent on public transit).

3. See Charles T. Dubin, *American Association of Retired Persons Public Policy Statements on the Americans with Disabilities Act*, FED. LAW., Mar.-Apr. 1997 at 28, 29 (5.4 million seniors do not drive). This number is likely to explode over the next few decades, as the number of seniors multiplies. See Robert L. Mullen, *The Americans with Disabilities Act: An Introduction for Lawyers and Judges*, 29 LAND & WATER L. REV. 175, 180 (1994).

4. See Anne Simmons, *A Ride to Work: TEA-21 and PRWDRA*, 18 LAW & INEQ. 243, 260 (2000) (Ninety-four percent of welfare recipients own no automobile).

5. H.R. REP. NO. 101-485(I), (1990) reprinted in 1990 U.S.C.C.A.N. 267, 268.

6. The official title of this statute is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

7. 42 U.S.C. § 601(a)(2) (1998). By bringing low-wage workers to jobs, public transit also facilitates employers' interest in recruiting and retaining those workers. See *What's News*, WALL ST. J., Sept. 19, 2000, at 1 (a transit strike in Los Angeles is "expected to have a major impact on the city's . . . low-wage service industry as thousands of workers can't get to their jobs").

8. FACT BOOK, *supra* note 1, at 116. Hydrocarbons are a cause of smog, and nitrogen oxide may cause respiratory disease. *Id.* at 21. See also CANADIAN URBAN TRANSIT ASSOCIATION, *THE ENVIRONMENTAL CASE FOR PUBLIC TRANSIT* ("[a] single bus, however, can carry as many people as [forty] to [fifty] cars, with emissions per passenger-kilometre close to one quarter the level of cars").

9. See Henry A. Waxman, Gregory S. Wetstone & Phillip S. Barnett, *Cars, Fuels, and Clean Air: A Review of Title II of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1947, 2009 & n.272 (1991) (noting that diesel particulates may cause as many as 860 cancers each year), citing H.R. REP. NO. 490 at 278; Paul Bourgeois, *Roll Model*, FORT WORTH STAR-TELEGRAM, Feb. 1, 2001 at 6, available at 2001 WL 5139811 (compressed natural gas buses produce about a tenth of the pollution emitted by diesel buses). The Clean Air Act of 1990 required that old urban buses in large cities be retrofitted with new pollution controls when their engines are rebuilt or replaced. Waxman, at 2010, citing 42 U.S.C. 7554(d). In addition, the Transportation Equity Act of the 21st Century ("TEA-21"), enacted in 1998, created a "clean fuels formula grant program" which, *inter alia*, assists transit operators in the purchase of buses that use cleaner fuels such as natural gas, electric and fuel-cell technologies, construction of alternative-fuel fueling facilities, and modification of garage facilities to accommodate cleaner-burning fuels. Pub. L. No. 105-178; see 49 U.S.C. § 3008(a); see also U.S. DEPT. OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, TEA-21, FACT SHEET: CLEAN

pressure, cities throughout America are purchasing buses using fuels that pollute less than do diesel buses.¹⁰ A 1996 Federal Transit Administration study reports that if transit users drove cars everywhere, America's air would be afflicted with more than 126 million additional pounds of hydrocarbons and 156 million additional pounds of nitrogen oxide.¹¹

Third, public transit reduces traffic congestion, because every person who is capable of driving but nevertheless chooses to ride public transit takes one automobile (his or her own) off the road. It follows that if public transit didn't exist, some cities would face startling increases in traffic congestion. For example, one study suggests that if New York City and its suburbs eliminated their public transit systems, the number of cars on the road would increase by 47.2% (or 1.9 million more cars).¹² Even more auto-dependent regions obtain some benefit due to public transit: for example, Los Angeles would have 6.2% more traffic without transit.¹³

Fourth, public transportation makes all Americans, even drivers, freer by giving them more flexibility: just as owning a car gives a driver the flexibility to go more places, owning a car and living near bus routes and train stops gives that driver the flexibility to go even more places in more ways.

FUELS FORMULA GRANT PROGRAM, at <http://www.fhwa.dot.gov/tea21/factsheets/cinfuel.htm> (last visited May 21, 2001). Under the clean fuels program, up to \$15 million is available in grants to transit operators in areas with populations of less than one million, and up to \$25 million is available to transit systems in larger metropolitan areas. See Liam A. McCann, *TEA-21: Paving Over Efforts to Stem Urban Sprawl and Reduce America's Dependence on the Automobile*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 857, 865 (1999) (describing the program and noting that up to \$15 million is available).

10. See, e.g., Bourgeois, *supra* note 9 (Fort Worth, Texas' transit system plans to purchase compressed natural gas buses); Shelly Hill, *Columbia S.C. Planning Group Approves Purchase of New Buses*, KNIGHT-RIDDER TRIB. BUSINESS NEWS, Jan. 26, 2001, available at 2001 WL 10115860 (regional planning agency approved the purchase of nineteen cleaner-burning diesel buses and seven that run on compressed natural gas; eighty per cent of the cost is funded by the federal government); Eric Mann, *Radical Social Movements and the Responsibility of Progressive Intellectuals*, 32 LOY. L.A. L. REV. 761, 783-786 (1999) (to settle a lawsuit by bus riders, Los Angeles transit agency agreed to purchase hundreds of compressed natural gas buses).

11. FACT BOOK, *supra* note 1, at 21.

12. COMMUNITY TRANSIT ASSOCIATION OF AMERICA, DOLLARS & SENSE, app. II, available at <http://www.ctaa.org/pubs/dollars/appendixii.shtml> (last visited May 21, 2001).

13. *Id.* See also *What's News*, WALL ST. J., Sept. 20, 2000 at 1 (Los Angeles traffic increased by five percent after transit strike began). But see Jean Love and Wendell Cox, *Policy Analysis: False Dreams and Broken Promises: The Wasteful Federal Investment in Urban Mass Transit*, quoted in 137 CONG. REC. H8199-02 (daily ed. Oct. 23, 1991) (pointing out that where ridership is low, the impact of new transit service on traffic congestion is minor).

B. The Inadequacy of Transit

Despite the benefits of public transit, transit-dependent persons are second-class citizens in much of America.¹⁴ A survey by the U.S. Commerce Department shows that only 54.4% of American households have any public transit at all available to them, and that only 28.8% claim to have satisfactory public transit.¹⁵ Even in metropolitan areas with extensive transit systems, the majority of entry-level jobs are not transit-accessible.¹⁶ For example, more than one-third of all entry-level jobs in the Baltimore region cannot be reached at all without an automobile,¹⁷ the majority of entry-level jobs in metro Atlanta are not within a quarter mile of public transportation,¹⁸ and residents of low-income neighborhoods in Cleveland could access less than half of metro

14. See *Miller v. Anckaitis*, 436 F.2d 115, 120 (3d Cir. 1970) ("For the urban poor, in particular, remoteness from the thriving suburban segment of the industrial economy and a deteriorating public transportation system often make use of an automobile the only practical alternative to welfare.") (subsequent history omitted); *People v. Coutard*, 454 N.Y.S. 2d 639, 642, 115 Misc. 2d 630, 634 (1st Dist. 1982) ("In a suburban county such as ours, the use of an automobile by most of its citizens is often as necessary as placing bread upon their tables."); *Central Towers Co. v. Borough of Fort Lee*, 160 N.J. Super. 546, 550-51, 390 A.2d 677, 680 (N.J. Sup. Ct. Law Div. 1978) ("Automobiles are a necessity and not a luxury in the suburbs where mass transit facilities are not as readily available to residents as they are to city dwellers."); JOHN NORQUIST, *THE WEALTH OF CITIES* 172 (1998) ("As in the rest of the advanced industrial world, driving a car in Canadian cities is a travel choice, not a necessity. Only the U.S. government denies this choice to its citizens."); Charles Belfoure, *Neighborhood Profile: Woodlawn*, BALTIMORE SUN, Feb. 7, 1999 at 1M, available at 1999 WL 5171900 ("the suburban sprawl that started after World War II forced Americans to go everywhere by car").

15. See Paul M. Weyrich and William S. Lind, *Does Transit Work? A Conservative Reappraisal*, at <http://www.apta.com/info/online/weyrich2new.htm> (last visited May 21, 2001). These statistics may actually overestimate Americans' access to public transit, because some Americans who define their neighborhood's public transit as in some sense "satisfactory" may not be able to use it to reach key destinations such as their jobs—for example, "reverse commuters" who live in transit-friendly cities but work in auto-dependent suburbs.

16. See FACT BOOK, *supra* note 1, at 24 (Cleveland, Baltimore and Atlanta transit systems are among the twenty-five largest in America). See also Atlanta Regional Commission, ATLANTA REGION TRANSPORTATION FACT BOOK 2000 at 34 (2000). ("Approximately 48.3% of employment and 28.1% of population [in metro Atlanta] are located within walking distance of transit services.")

17. See Marcia Myers, *Jobs Out of Reach For the Carless*, BALTIMORE SUN, Nov. 16, 1999, at 10, available at 1999 WL 5209857.

18. See Monica Ovi Frazer, *License to Drive: Getting Welfare Recipients from the City to the Jobs*, 7 GEO. J. ON POVERTY & POL'Y 1, 9 (2000). Cf. CONSERVATION LAW FOUNDATION, CITY ROUTES, CITY RIGHTS 20 (1998) (quoting similar statistics for greater Boston). Atlantans know their public transit system is unsatisfactory: a recent survey revealed that only twenty-two percent of metro Atlantans regard their region's public transit system as good or excellent—a percentage that nose-dived to as low as seven percent in some counties. See Jerome Thompson, *Public Transit: Can You Get Around*, ATLANTA J.-CONSTITUTION, July 10, 2000 at G3, available at 2000 WL 5465600.

area jobs even with an eighty minute commute.¹⁹ In smaller cities, a non-driver's life is more desperate still. For example, in Macon, Georgia (a city of 114,000 people),²⁰ sixteen percent of city households²¹ (and fourteen percent of households in the county that includes Macon)²² lack cars, yet city buses only operate until 6:45 PM in the evening on weekdays, Saturday service is limited, and no service is available on Sundays or holidays.²³ Because many entry-level employers require their newest employees to work evening and weekend shifts, Macon's bus schedule virtually shuts carless residents out of the job market.²⁴ Many of Macon's employers are not transit-accessible at all, because they are located on the area's periphery, far from any bus line.²⁵ By building highways, government has encouraged employers to relocate to such areas.²⁶

American public transit is inadequate because transit is funded far less generously than highways: between fiscal year 1992 and 1999, states had more than \$33.8 billion in federal funding available to spend on either highways or public transportation, but spent only 12.5% of that sum on public transit.²⁷ Nearly half of that 12.5% was spent by two states (New York and California)²⁸ and six states (Delaware, Kansas, Mississippi, North Dakota, South Dakota, and Wyoming) used none of their allotted money on mass transit.²⁹ Direct federal support for transit has only occasionally been more generous. Between 1980 and 1998, federal support for state and local public transit declined sharply in real terms,

19. See Frazer, *supra* note 18, at 9.

20. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 48 (119th ed. 1999) [hereinafter 1999 ABSTRACT].

21. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING, POPULATION AND HOUSING CHARACTERISTICS FOR CENSUS TRACTS AND BLOCK NUMBERING AREAS: MACON-WARNER ROBINS, GA MSA at 177 (1993). Cf. Alewine v. City Council of Augusta, Ga., 699 F.2d 1060, 1069 (11th Cir. 1983) ("a small percentage of Macon's population require public transit").

22. See David G. Oedel, *The Legacy of Jim Crow in Macon, Georgia*, in JUST TRANSPORTATION 97, 102 (Robert D. Bullard & Glenn S. Johnson eds. 1997).

23. *Id.*

24. *Id.* at 103.

25. *Id.*

26. *Id.* at 100.

27. See Scott Bowles, *Study Finds States Aren't Hopping onto Mass Transit*, USA TODAY, May 19, 2000 at 4A, available at 2000 WL 5778670.

28. *Id.*

29. *Id.* Total state transit spending is less than one-tenth of state highway spending. See 1999 ABSTRACT, *supra* note 20, at 313 (in 1996, states spent \$5.3 billion on transit and \$79 billion on highways).

increasing by only one-third while the cost of living nearly doubled.³⁰ During the same period, federal highway grants soared by 114%.³¹

As a result of these trends, transit agencies have periodically been forced to either raise fares or reduce service. For example, in 1995, Congress passed a budget reducing operating assistance³² to public transit by over forty percent.³³ As a result, half of all American transit agencies raised fares, cut back service, and/or laid off workers in late 1995 and early 1996.³⁴ Similarly, in the early 1990s thirty-one percent of transit systems took similar steps³⁵ in order to pay costs imposed by the federal Americans with Disabilities Act³⁶ (which requires transit systems to spend \$1.4 billion per year to make transit service accessible to the disabled).³⁷ Transit fares increased by 150% between 1980 and 1998,

30. See 1999 ABSTRACT, *supra* note 20, at 314 (transit aid increased from \$3.12 billion to \$4.22 billion), & 882 (consumer price index doubled). However, transit spending has increased in recent years. See FACT BOOK, *supra* note 1, at 37 (total federal transit spending increased from \$4.0 billion in 1996 to \$5.7 in 2000); Sherie Winston & Tom Ichiowski, *DOT Senate Appropriators Follow TEA-21, AIR-21 Plans*, ENGINEERING NEWS REC., June 19, 2000 at 19 (Senate committee recommends \$6.3 billion for transit for Fiscal Year 2001).

31. See 1999 ABSTRACT, *supra* note 20, at 314 (highway grants to state and local governments increased from \$9.2 billion to \$19.7 billion between 1980 and 1998).

32. Operating assistance subsidizes operating expenses of transit service. See FACT BOOK, *supra* note 1, at 192. "Operating expenses" are day-to-day costs such as labor costs, *id.* at 58, as opposed to "capital expenses" like the construction and purchase of tangible property such as buses and rail stations. *Id.* at 194-95.

33. See FACT BOOK, *supra* note 1, at 56 (operating grant approvals nose-dived from \$763.9 million in 1995 to \$416.7 million in 1996); *Congress Approves \$4.1 Billion For Transit in Fiscal Year '96*, URB. TRANSP. NEWS, Nov. 8, 1995, available at 1995 WL 8354546.

34. See *Fares Up, Service and Employment Down as Transit Budget Cuts Hit Home*, APTA Survey Finds, U.S. NEWswire, May 6, 1996, available at 1996 WL 5621136.

35. See *Costs of Paratransit Service Higher Than Government Admits*, URB. TRANSP. NEWS, May 24, 1995, available at 1995 WL 8354463 (thirty-one percent of transit systems reduced service, increased fares or laid off employees to meet costs of ADA compliance) [hereinafter COSTS OF PARATRANSIT].

36. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12101 (1994)). The ADA's most noteworthy requirements are contained within sections 222 and 223, which respectively require transit systems to make transit vehicles accessible to the disabled, and require transit systems to provide special "paratransit" service for persons unable to use ordinary buses and trains. See 42 U.S.C. §§ 12142-43. Paratransit vehicles operate in response to requests by riders, rather than operating on a fixed route. See *Americans Disabled for Accessible Pub. Transp. v. Skinner*, 881 F.2d 1184, 1186 n. 1 (3d Cir. 1989) (defining "paratransit") [hereinafter ADAPT]; FACT BOOK, *supra* note 1, at 157-58.

37. See Brigid Hynes-Cherin, *Testimony of the American Public Transit Association, Subcommittee on Surface Transportation of the House Committee on Transportation and Infrastructure*, Sep. 26, 1996, 1996 WL 10831544 (\$1.4 billion figure). About three-fourth of the ADA's costs arose from the paratransit requirement of section 223. See Brian Doherty, *Disabilities Act: Source of Unreasonable Accommodations*, SAN DIEGO UNION-TRIB., July 16, 1995 at G1 (ADA's paratransit provisions cost transit agencies \$1.1 billion per year).

while gasoline prices were decreasing.³⁸ As transit agencies raised fares and reduced service, transit ridership declined from 8.9 billion trips in 1989 to 7.7 billion in 1995.³⁹ Conversely, when federal support for transit increased in the late 1990s,⁴⁰ ridership rose to nine billion in 1999—the highest ridership level in forty years.⁴¹

C. The Anti-Transit Story

Why do so many American communities have so little transit service? Pundits and politicians justify the status quo on the ground that, in the words of U.S. Representative Tom DeLay, “mass transit . . . has failed in this country”⁴² because “[p]ublic use of mass transit has fallen by two billion passengers since 1960, despite a taxpayers’ investment of more than \$100 billion during that same period of time.”⁴³ Similarly, one newspaper columnist writes: “[f]or decades we have been bombarded with demands that we get out of our cars and into mass transit Nevertheless, we drive.”⁴⁴ The “story” told by transit critics is a simple one: government spends money on public transit, and most people don’t use it. Thus, public transit is a waste of money.⁴⁵

This article tells a sharply different story: far from encouraging people

38. See 1999 ABSTRACT, *supra* note 20, at 497 (intracity public transit fares increased from sixty-nine percent of 1982-84 level in 1980, to 133% in 1990, to 174% in 1998, while motor fuel prices decreased from ninety-seven percent of 1982-84 level in 1980 to ninety-two percent in 1998).

39. FACT BOOK, *supra* note 1, at 66.

40. *Id.* at 37.

41. See Craig Savoye, *More Americans Trade Car Keys for Bus Passes*, CHRISTIAN SCI. MONITOR, May 17, 2000, at 1, available at 2000 WL 4428179.

42. 137 CONG. REC. H8199-02, 1991 WL 213667 (remarks of Rep. DeLay).

43. *Id.*

44. Jeff Jacoby, *Time to Face the Fact that People Like Sitting in Their Cars*, PROVIDENCE J.-BULL., Nov. 17, 1999 at B7, available at 1999 WL 29041742. See also Jerry Heaster, *Mass Transit: Just the Ticket to Waste Taxes*, KAN. CITY STAR, June 9, 2000, at C1, available at 2000 WL 7734863 (public transit is “a colossal waste of taxpayer dollars” because public transit’s “share of urban passenger miles has shrunk from [thirty] percent in 1945 to [two] percent today . . . even though federal, state and local governments have poured more than \$150 billion into public transit initiatives since the mid-1960s”); Don Corrigan, *A Republican who Refuses to be Pigeonholed*, ST. LOUIS JOURNALISM REV., Oct. 1, 1995 at P1, available at 1995 WL 15067597 (Missouri state legislator Jim Murphy justifies opposition to St. Louis light rail by asserting that “[p]eople chose automobile transportation as the way to travel a long time ago.”).

45. Other anti-transit arguments are also indirectly based upon this “story.” For example, it has been argued that transit does not significantly improve air quality because an individual bus significantly reduces pollution per passenger and traffic congestion only if it has a significant number of riders, and that the small number of transit riders means that “the reduction in traffic congestion reducing from increased transit subsidies is trivial.” Love and Cox, *supra* note 13. These arguments are based upon a self-fulfilling prophecy: reduced transit service inevitably leads to lower ridership, which in turn reduces transit’s impact upon air quality and congestion.

to use buses and trains, government at all levels has inadvertently sabotaged public transit. For nearly a century, governmental transportation, education, housing and tax policies have reduced transit ridership by encouraging Americans to move from transit-friendly cities to suburbs with little or no transit service. It logically follows that if government reverses those policies, transit ridership will continue to increase.

II HOW GOVERNMENT HAS SABOTAGED PUBLIC TRANSIT

Far from fighting a losing war against "America's romance with the automobile,"⁴⁶ government has forced Americans into cars by eliminating non-drivers' access to jobs and community facilities. For most of the 20th century, government has funneled billions of dollars into highway construction.⁴⁷ Highway construction increased driving and reduced transit ridership by encouraging development to shift from older, transit-accessible areas to newer suburbs, most of which are inaccessible except by automobile.⁴⁸ In addition, government at all levels has reduced transit system revenues (and thus transit service) through unfunded mandates;⁴⁹ has adopted education, housing and tax policies that indirectly shifted development to suburbs;⁵⁰ and has enacted zoning laws that made those suburbs as auto-dependent as possible (thereby depressing transit ridership by making it more difficult for suburbanites to use transit).⁵¹

A. Highway Policy

1. How Government Put Highways In The Driver's Seat

Early in the 20th century, the state and federal governments began to build new roads. State and local governments could have levied user fees to force drivers to reimburse local treasuries for the costs of streets,

46. Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders and the Rise and Fall of Agency Discretion*, 74 DENV. U.L. REV. 625, 636 (1997) (using the phrase to explain the growth of auto traffic in national parks).

47. See *infra* notes 52-76 and accompanying text.

48. See *infra* notes 77-101 and accompanying text; *People v. Coutard*, 454 N.Y.S. 2d 639, 642 (1st Dist. 1982) (noting that automobiles are a necessity in most suburbs); *Central Towers Co. v. Borough of Fort Lee*, 160 N.J. Super. 546, 550 (N.J. Sup. Ct. Law Div. 1978) (same).

49. See *infra* notes 102-124 and accompanying text.

50. See *infra* notes 125-163 and accompanying text.

51. See *infra* notes 164-174 and accompanying text.

traffic maintenance, and police services, but instead frequently chose to subsidize drivers by relying on general taxation.⁵² Thus, government essentially taxed the general public (including railroads and transit users) to support drivers.⁵³ By contrast, transit providers were typically private and unsubsidized.⁵⁴ To make matters worse, the government often controlled transit fares and, despite World War I-era inflation, did not allow them to rise.⁵⁵ Because government regulated streetcars while subsidizing drivers, one-third of American streetcar companies were bankrupt by 1919.⁵⁶

Between 1919 and 1929, every state adopted a motor fuel tax and earmarked the revenue to fund highway construction projects.⁵⁷ By 1927, highways were second only to education as recipients of state and local expenditure, and one-third of state assistance to local government was for highway construction.⁵⁸

In 1921, the federal government began to support highway building, by enacting the Federal Road Act⁵⁹ that designated 200,000 miles of road as eligible for federal matching funds, and by creating the Bureau of Public Roads to plan an interstate highway system.⁶⁰ By that date, government at all levels (federal, state, and local) was pouring \$1.4 billion into highways.⁶¹ Adjusted to present dollars, this amounts to \$12.48 billion.⁶² At the same time, most transit systems were privately

52. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 22 (1985); *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 428 (1935) (Motor vehicle-related fees "will not pay for one-half of the annual expenditure in Tennessee for highways. The balance is being paid in part by general property taxes.").

53. See *Walters*, 294 U.S. at 425, 428 (noting that state taxed railroads to support highway construction).

54. See PAUL WEYRICH & WILLIAM S. LIND, *CONSERVATIVES AND MASS TRANSIT: IS IT TIME FOR A NEW LOOK?* 10 (1996); *Alewine v. City Council of Augusta, Ga.*, 699 F.2d 1060, 1068 (11th Cir. 1983) (Until 1960, most transit systems privately owned.).

55. See WEYRICH & LIND, *supra* note 54, at 10.

56. *Id.*

57. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 380 n. 149 (1990).

58. *Id.* By this time, the states were also providing suburbs with sewers and water service. By contrast, the states were less generous to cities because by the 1920s, cities had already built similar facilities for their own citizens. *Id.*

59. 23 U.S.C.A. § 1 (1921). *Cf.* *Kansas v. Smith*, 295 P. 986, 997 (Kan. 1931) (referencing the Road Act, and noting that it required state governments to build highways themselves rather than relying on counties to do so).

60. JACKSON, *supra* note 52, at 167.

61. WEYRICH & LIND, *supra* note 54, at 10.

62. See U.S. DEPARTMENT OF COMMERCE, U.S. CENSUS BUREAU, *BICENTENNIAL EDITION: HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970* (1975); U.S. DEPARTMENT OF COMMERCE, U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED*

owned, received no government assistance, and paid taxes to support the highway system and other government functions.⁶³

During the 1920s and 1930s, government's highway empire continued to grow. By 1940, government spent \$2.7 billion—\$30.95 billion in present dollars⁶⁴—on highways.⁶⁵ By contrast, at that time the total operating costs of all intra-city bus and rail systems (except commuter rail) were \$661 million—mostly private rather than governmental spending.⁶⁶

In the postwar years, government intervention on behalf of highways accelerated. In 1950, government funneled \$4.6 billion—\$30.63 billion in present dollars⁶⁷—into highways, and virtually nothing into transit.⁶⁸ In 1954, President Eisenhower appointed a committee on highways. The committee endorsed a massive highway spending plan that was enacted into law as the Interstate Highway Act,⁶⁹ which created a 41,000 mile Interstate Highway System.⁷⁰ Under the Highway Act, the federal government paid for ninety percent of the system's construction and maintenance costs, states paid ten percent, and municipalities paid nothing.⁷¹ By contrast, the federal government did not begin to subsidize public transit until the 1960s.⁷² In fact, between 1950 and 1970 vehicle miles of transit service declined nationally by thirty-seven percent.⁷³ Today, federal road spending exceeds federal transit spending by a margin of more than four to one.⁷⁴ Moreover, state governments are

STATES 1998 at 489 (118th ed.) (1998) [hereinafter 1998 ABSTRACT].

63. WEYRICH & LIND, *supra* note 54, at 10.

64. See 1998 ABSTRACT, *supra* note 62, at 489.

65. WEYRICH & LIND, *supra* note 54, at 10.

66. *Id.*

67. *Id.*

68. *Id.*

69. See Interstate Highway Act, Pub. L. No. 85-767, 72 Stat. 885 (1958).

70. See JAMES HOWARD KUNTLER, *THE GEOGRAPHY OF NOWHERE*, 106-07 (1993).

71. See *Movement Against Destruction v. Volpe*, 361 F. Supp. 1360, 1367 (D. Md. 1973); NORQUIST, *supra* note 14, at 153.

72. See FACT BOOK, *supra* note 1, at 149 (first "[l]andmark in the evolution of the federal public transportation assistance program . . . [was] [t]he Housing and Urban Development Act of 1961 [which] provided public transportation demonstration funding and mass transportation project loans"); OFFICE OF MANAGEMENT AND BUDGET, *BUDGET OF THE U.S. GOV'T: HISTORICAL TABLES, FISCAL YEAR 1996* (1995) (first federal urban mass transit spending listed in 1962).

73. See NORMAN KRUMHOLZ & JANICE COGGER, *URBAN TRANSPORTATION EQUITY IN CLEVELAND*, in *METROPOLITAN MIDWEST: POLICY PROBLEMS AND PROSPECTS FOR CHANGE* 211 (Barry Checkoway and Carl V. Patton eds. 1985) (noting that in Cleveland, service was reduced while fare almost tripled). Cf. 49 U.S.C. § 5301 (b)(4) (1994) (legislative finding that "in the early 1970's continuing even minimal mass transportation service in urban areas was threatened because maintaining that transportation service was financially burdensome").

74. See Liam A. McCann, *TEA-21: Paving over Efforts to Stem Urban Sprawl and Reduce*

often even more pro-road and anti-transit than the federal government; for example, some states require fuel tax revenues to be spent exclusively on roads,⁷⁵ and others have simply spent as little as possible on transit.⁷⁶

2. Highway Spending and Transit: Recipe for Reduced Ridership

a. First, Use Highways To Create Suburbs . . .

State and federal pro-highway policies have reduced transit ridership by encouraging people and jobs to move from transit-friendly cities to newer suburbs.⁷⁷ At first, highways merely enabled commuters to live farther away from downtown jobs, thus giving commuters easy access to central business districts from once-distant suburbs.⁷⁸ However, where highway-driven residential development came, commercial development inevitably followed, as retail businesses moved to suburbs in order to serve those suburbs' new residents and other businesses followed their employees to suburbia.⁷⁹ As one federal court has pointed out,

America's Dependence on the Automobile, 23 WM. & MARY ENVTL. L. & POL'Y REV. 857, 859 (1999) ("more than eighty percent of the money in TEA-21 [the 1998 transportation funding bill] will go toward highway funding"); see also 1999 ABSTRACT, *supra* note 20, at 636. To the extent government has invested in transit, it has sometimes redistributed money from bus service to more expensive train service rather than expanding riders' transit options. See Peter Gordon & Harry W. Richardson, *Defending Suburban Sprawl*, THE PUBLIC INTEREST, Spring 2000 at 65, 69 (some cities' "bus systems have been cannibalized to pay for rail"); Eric Mann, *Confronting Transit Racism in Los Angeles*, in JUST TRANSPORTATION, *supra* note 22, at 68, 71 (Los Angeles reduced bus mileage by sixteen percent between 1988 and 1997 while building subway).

75. See *State ex. rel. O'Connell*, 452 P.2d 943, 948 (Wash. 1969) (holding that the State is not allowed to spend gasoline tax revenue on public transportation, based on a provision in state constitution requiring such revenue to be spent for highway-related purposes); *Michigan Road Builders Ass'n v. Dep't of Management and Budget*, 495 N.W. 2d 843, 847 (Mich. App. 1992) (under Michigan law, ninety percent of gas and license tax revenue must be used for roads).

76. See Bowles, *supra* note 27 (when states are given federal funds that can be used either for highways or transit, only 12.5% of funds are given to public transit; and six states spent no funds whatsoever on transit).

77. See *infra* notes 85-90 and accompanying text.

78. See Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 N.Y.U. ENVTL. L.J. 156, 159 (1994) ("Highways made land outside cities accessible, which in turn made the land attractive for development."); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 44 (1993) ("In making this transition from urban to suburban life, middle-class whites demanded and got massive federal investments in highway construction that permitted rapid movement to and from central cities by car.").

79. See Gordon and Richardson, *supra* note 74, at 70 ("firms now follow the labor force to the suburbs where their employees live"); Earl Daniels, *Building Boom: Area's Residential, Commercial Growth Spurt*, FLA. TIMES-UNION, Jan. 13, 2000 at E1, available at 2000 WL 6813076 (quoting Jacksonville realtor Barry Goldstein's statement that "[w]e have population growth in the suburban area, and when you have the growth of residential, you have a demand for other services").

"[h]ighways create demand for travel and [suburban] expansion by their very existence."⁸⁰

For example, Washington's Capital Beltway, a sixty-six-mile long highway surrounding the city, was designed to allow East Coast motorists to bypass the city.⁸¹ Instead, the Beltway became a magnet for office and retail centers that sprouted near Beltway exits, such as Tyson's Corner, a satellite downtown in Fairfax County, Virginia.⁸² As suburbs grew more populated in Washington and in other cities, they grew more congested, which caused politicians to build even more suburban roads (ostensibly to relieve congestion) spurring development in even more suburbs.⁸³ In fact, each of the fifty largest metro areas in America added new road capacity in the 1980s and 1990s.⁸⁴

As a consequence of government's road-building sprees,⁸⁵ among

80. Sierra Club, *Ill. Chapter v. U.S. Dep't of Trans.*, 962 F. Supp. 1037, 1043 (N.D. Ill. 1997), citing *Swain v. Brinegar*, 517 F.2d 766, 777 (7th Cir. 1975).

81. See Glen Frankel and Stephen C. Fehr, *As The Economy Grows, the Trees Fall*, WASH. POST, Mar. 23, 1997 at A1, available at 1997 WL 10008870.

82. *Id.* See also JACKSON, *supra* note 52, at 165 (pointing out that many of Detroit's suburbs have risen along major roads).

83. See, e.g., Alan Sipress, *Widen the Roads, Drivers will Come*, WASH. POST, Jan. 4, 1999 at B1, available at 1997 WL 2192116 (discussing Maryland's widening of I-270 near Washington, which spurred suburban development but failed to reduce congestion); Stephen Fehr, *Montgomery's Line of Defense Against the Suburban Invasion*, WASH. POST, Mar. 25, 1997 at A1, available at 1997 WL 10009125 (discussing developers' support for a new highway linking Washington's Maryland suburbs with its Virginia suburbs, ostensibly in order to reduce congestion on Washington's Beltway); Glenn Frankel and Peter Pae, *In Loudoun, Two Worlds Collide*, WASH. POST, Mar. 24, 1997 at A1, available at 1997 WL 10009033 (in Loudoun County, a suburb of Washington, the "four-lane Dulles Greenway, a toll road designed to ease the commute for eastern residents, has opened up the west for further growth"). Loudoun County, like most newer suburbs, has minimal bus service. See Jennifer Lenhart, *A Needed Lift*, WASH. POST, Nov. 8, 1999, at B1, available at 1999 WL 23313620 (describing isolation of elderly non-drivers who moved to Loudoun County to live near adult children).

84. See Surface Transportation Policy Project, *Why Are the Roads So Congested?* available at <http://www.transact.org/Reports/constr99/default.htm> (last visited May 29, 2001) [hereinafter *Roads*]. Frequently, the new and widened highways have been located in the newest, most affluent outer suburbs, thus increasing the inequality in tax bases and services between those suburbs and central cities or less politically favored suburbs. See Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1099 (1996); Myron Orfield, *Talk Radio Called Him a Commie and Put Him on Hold*, MINN. STAR TRIB., May 23, 1995 at 13A (in Minneapolis/St. Paul, "the southern and western outer-ring suburbs have gotten all of the new freeways and sewer systems—billions of dollars in improvements—and therefore virtually all of the region's new tax base").

85. It has been argued that highways do not cause migration to suburbia because "[s]uburbanization was well underway in 1960, when the federal interstate highway program had been in existence for just four years." Ronald Utt, *Cities and Suburbs*, <http://www.heritage.org/issues/chap13.html> (visited May 29, 2001). See also Peter Gordon & Harry W. Richardson, *Critiquing Sprawl's Critics*, *Cato Institute Policy Analysis No. 365* at 6 (Jan. 24, 2000) (a interstate highway program is not a cause of suburban migration because "there was

other factors,⁸⁶ many older American cities suffered enormous population losses by the end of the 20th century.⁸⁷ At the end of World War II, roughly seventy percent of metropolitan Americans lived in central cities.⁸⁸ By 1990, only about forty percent of metropolitan Americans, and only 31.3% of all Americans, lived in central cities.⁸⁹ Jobs, as well as people, have fled to suburbia: today, two-thirds of all new jobs are in suburbs.⁹⁰

Indeed, even organizations generally regarded as supportive of new roads and suburban expansion implicitly concede that highways affect the location of development. For example, in 1999 the National Association of Home Builders (which favors increased road spending)⁹¹

significant suburbanization before 1956"). This argument lacks merit for three reasons. First, the state and federal governments had begun to support highway building long before the interstate highway system was built. See *supra* notes 59-68 and accompanying text. Thus, highway-building may have caused suburban growth before the enactment of interstate highway legislation. Second, other anti-urban government policies (such as the Federal Housing Administration's policy of favoring suburbanites over city-dwellers) had also been in effect for decades before 1960. See *infra* notes 126-131 and accompanying text; Michael E. Lewyn, *The Urban Crisis: Made in Washington*, 4 J. L. & POL'Y 513, 546-49 (1996) (describing FHA policies in more detail). Third, American cities' most stunning setbacks occurred after the creation of the interstate highway program. Of the eighteen American cities that had more than 500,000 people in 1950, every single one gained population between 1930 and 1950. See INFORMATION PLEASE ALMANAC 1955 at 215-18 (Dan Golepaul ed. 1954). By contrast, in the 1950s, thirteen of the cities lost population, but only two lost over ten percent of their population. See THE WORLD ALMANAC AND BOOK OF FACTS 1976 at 210 (George E. DeLury ed. 1975). In the 1960s, fifteen lost population and six lost over ten percent of their population. *Id.* And in the calamitous 1970s, sixteen lost population and fourteen lost over ten percent over their population. See THE WORLD ALMANAC AND BOOK OF FACTS 2000 at 390 (Robert Famighetti ed. 1999). In other words, the redistribution of people from city to suburb snowballed as interstate highways were built during the 1960s and 1970s.

86. See *infra* notes 126-164 and accompanying text (describing other government policies causing middle-class flight to suburbia); Jonathan Simon, *From a Tight Place: Crime, Punishment and American Liberalism*, 17 YALE L. & POL'Y REV. 853, 856 (1999) (noting that urban crime another factor causing middle-class flight to suburbs).

87. See Famighetti, *supra* note 35; WORLD ALMANAC AND BOOK OF FACTS, *supra* note 85, at 390 (for example, St. Louis had lost over sixty percent of its 1950 population, and Buffalo and Cleveland lost over forty percent).

88. See DAVID RUSK, CITIES WITHOUT SUBURBS 5 (2d ed. 1995); F. KAID BENFIELD, ONCE THERE WERE GREENFIELDS 120 (1999).

89. See Shelby D. Green, *The Search For a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69, 73 (1998) (citing 1990 census statistics). Cf. *Dixon v. Hassler*, 412 F. Supp. 1036, 1045 (W.D. Tn. 1976), *aff'd*, 429 U.S. 934 (1976) (by the 1960s, "[m]ost cities in the United States lost population . . . except for gains in the suburban surrounding areas by way of annexation").

90. See Simmons, *supra* note 4, at 259.

91. See National Association of Home Builders, *Policy on Smart Growth*, available at http://www.nahb.com/main_features/smartpolicy.html (last visited May 29, 2001) ("Ensuring that the construction of schools, roads and other infrastructure keeps pace with the anticipated growth in population and economic activity is one of the biggest challenges facing [suburban] communities today.") [hereinafter NAHB POLICY STATEMENT].

conducted a survey that asked respondents what amenities would encourage them to move to a new area; respondents' top choice (endorsed by fifty-five percent of respondents) was "highway access."⁹² If highway access makes a suburb more desirable, it follows that government shifts people and jobs to a suburb by building highways there.

b. . . . Then Keep Transit Out Of The Suburbs

The state and federal governments' highway spending spree might not have eviscerated transit if those governments had served suburban employers and subdivisions with buses and rail lines. Instead, government effectively decreased service for non-drivers while increasing service for drivers: that is, government drove private transit companies out of business by funding competition from highways,⁹³ took over what was left of transit service,⁹⁴ and actually reduced transit service while it was doing so (by thirty-seven percent between 1950 and 1970).⁹⁵

As a result, most of the suburbs created by government highway spending have minimal or nonexistent public transit. For example, the most transit-friendly American metro area is New York City and its suburbs, where transit systems provide fifty percent more service hours per capita than in the second best-served metro area.⁹⁶ Yet even in the New York area, courts have acknowledged that auto ownership is "a necessity and not a luxury in the suburbs where mass transit facilities are

92. See National Association of Home Builders, *Consumer Survey on Growth Issues*, http://www.nahb.com/main_features/smart_survey/summary.htm (last visited May 29, 2001) [hereinafter NAHB GROWTH SURVEY]. Similarly, Gordon and Richardson, in an article entitled "Defending Suburban Sprawl" (which seeks to do exactly that) admit in passing that "[g]ood highways and other communications reversed [the migration of jobs to cities] in the late twentieth century." Gordon & Richardson, *supra* note 74, at 70.

93. See *supra* notes 52-56 and accompanying text (describing government support of highways while streetcars are private and unsubsidized).

94. See *Alewine*, 699 F.2d at 1060 (until 1960, most transit systems privately owned).

95. See KRUMHOLZ & COGGER, *supra* note 73, at 211 (noting thirty-seven percent reduction, and also noting that transit service in Cleveland decreased by 14.9 million vehicle miles between 1960 and 1974). Cf. Larry Sandler, *How Buses Fare*, MILWAUKEE J. SENTINEL, Aug. 21, 1996 at 1, available at 1996 WL 11287815 (Milwaukee-area average daily bus service decreased by twenty-nine percent between 1963 to 1991).

96. See Wendell Cox, U.S. Public Transport Service Hours Ranked by Metropolitan Area: 1998, available at <http://www.publicpurpose.com/ut-us98msa-ranksh.htm> (last visited May 21, 2001) (New York metro area, even broadly defined to include parts of Connecticut, New Jersey, and Pennsylvania, has 2.251 service hours per capita, fifty percent more than second most transit-friendly metro area, San Francisco-Oakland).

not as readily available to residents as they are to city dwellers."⁹⁷ The situation in more auto-oriented metro areas is as bad or even worse: as noted above, the majority of entry-level jobs in metro areas as diverse as Baltimore, Cleveland, and Atlanta are inaccessible to transit-dependent urbanites or nearly so.⁹⁸ In fact, entire suburban counties lack transit service: Atlanta's second largest suburban county, Gwinnett County, which had a population of 522,000 people in 1998, had no public transportation whatsoever.⁹⁹ As a result, news stories throughout America routinely refer to cars as a "necessity."¹⁰⁰

Indeed, even opponents of public transit spending admit that highway-created suburbs are far more auto-dependent than cities. For example, in 1995 U.S. Representative Nick Smith justified transit cutbacks on the

97. Central Towers, 160 N.J. Super. at 550-51, 390 A.2d at 680. See also Coutard, 454 N.Y.S. 2d at 642, 115 Misc. 2d at 634 (in Nassau County, a suburb of New York City, "the use of an automobile by most of its citizens is often as necessary as placing bread upon their tables"); Pamela Mendels and Ronald E. Roel, Mismatch: *When People and Jobs Don't Fit in the Suburbs, It's a Case of Too Much Work for Too Few Hands*, NEWSDAY, Dec. 15, 1988 at 64, available at 1988 WL 3075090 ("the automobile dependence of the suburbs is barring many would-be workers from jobs," because, according to Glenn Yago, director of the Economics Research Bureau at the State University of New York at Stony Brook, "it's almost impossible to reverse commute [from New York City to Long] Island using mass transportation Even commuting within the confines of Nassau and Suffolk Counties remains extremely difficult for workers without cars").

98. See *supra* notes 17-19 and accompanying text; Fern Shen, *Low-Wage Commuters Swim Against Transit Tide*, WASH. POST, Oct. 3, 1990 at D1, available at 1990 WL 2106417 ("fast-growing outlying suburbs [of Washington, D.C.] are still largely inaccessible for inner-city job seekers who don't have cars" and even in inner suburbs, "public transit does not serve workers on late shifts and odd schedules").

99. See Stacy Shelton, *Transit Chief Faces Hurdles in Gwinnett*, ATLANTA CONSTITUTION, Feb. 11, 2000 at C1, available at 2000 WL 5440857 (Gwinnett was the nation's largest county without public transit at start of 2000).

100. See, e.g., Mintz, *supra* note 78, at 159 (after World War II many families "move[d] from densely populated cities, where mass transit functioned effectively to suburbs, where cars were a necessity"); Dale Dempsey, *Prognosis: Do These Good Times Have to End?*, DAYTON DAILY NEWS, July 16, 1998 at 1A, available at 1998 WL 22455635 ("with the rise of suburbs, having two cars is considered a necessity"); Walter H. Combs, *How "Divided Highways" Have Changed and Divided America*, BUFFALO NEWS, Oct. 21, 1997 at B11, available at 1997 WL 6469148 ("with the beginning of the migration to the suburbs, the car had gone from fixture to necessity"); Kay Harvey, *Postwar Couples Now Going for Gold*, SAN DIEGO UNION-TRIB., Apr. 5, 1997 at E3, available at 1997 WL 3125567 (World War II generation "moved much of America to the suburbs, making the automobile a family necessity"); Jim Mueller, *Easy Riders*, CHI. TRIB., May 12, 1996, at 1, available at 1996 WL 2670944 (a motorcycle dealer in Chicago suburbs asserts: "[c]ars are a necessity. In the suburbs you need a car to get around and go about your business"); Editorial, MILWAUKEE J., Apr. 27, 1994 at 10, available at 1994 WL 8263169 ("more and more of the elderly are living in suburbs where having a car is almost a necessity"); Karen Brandon, *Americans Are Sold on Big Garages*, ORLANDO SENTINEL, Sept. 27, 1992 at J1, available at 1992 WL 10632576 (quoting Bernard Beck, Northwestern University associate professor of sociology, as stating that "[m]any ordinary families have three cars, not because of affluence of the family but because a car is a necessary tool for survival in the suburbs. It's to the point where, if you can afford it, everybody needs their own car").

grounds that "[i]nstead of the jobs being in the inner city and the suburbs needing transportation downtown, now the jobs are outside of the cities. The main reasons for mass transit for tax dollar subsidies just [aren't] there anymore."¹⁰¹ In other words, anti-transit politicians seek to grind transit users under the heel of a self-fulfilling prophecy: they have reduced demand for public transit by building highways that shifted jobs to suburbia, and now claim that transit service should be reduced still more because—thanks to their own policies—jobs have moved to suburbia.

In sum, government at all levels has systematically reduced public transit ridership by building highways that made newer suburbs possible, while often failing to create public transit service to those suburbs. But highway spending is merely the tip of government's anti-transit iceberg.

B. Unfunded Mandates: How Big Brother Makes Transit Unaffordable

In recent years, federal road spending has exceeded transit spending by a margin of over four to one.¹⁰² Some commentators suggest that this gap is appropriate or even too narrow, because transit systems receive fifteen to twenty percent of all federal spending even though transit users comprise about five percent of all commuters.¹⁰³ This argument overlooks the fact that federal transit spending is at least partially canceled out by a variety of federal mandates.

1. The Americans with Disabilities Act

The Americans with Disabilities Act requires that transit providers make any newly purchased or leased bus or train "readily accessible to, and usable by individuals with disabilities,"¹⁰⁴ and that transit systems

101. *Mass Transit Takes Huge Cut in GOP House Budget Plan*, (National Public Radio, Morning Edition, May 23, 1995), transcript available at 1995 WL 2958370. See also Wendell Cox, *Sic Transit Light Rail*, WEEKLY STANDARD, July 17, 2000 at 20, available at 2000 WL 11388792 (criticizing the creation of new light rail lines on the ground that "[t]ransit is about downtown . . . [and] [f]or decades the overwhelming majority of new jobs have been created outside downtown").

102. See McCann, *supra* note 9, at 859.

103. See Utt, *supra* note 85 (making argument); Larry Sandler, *Views on Transit Funds Diverge*, MILWAUKEE J.-SENTINEL, Apr. 24, 1995 at B2 (quoting similar views by Wisconsin transit official); 1999 ABSTRACT, *supra* note 20, at 641 (fifty-three percent of all Americans use public transit to get to work).

104. 42 U.S.C. § 12142(a). This provision requires vehicle improvements such as lifts for wheelchairs, H.R. REP. 101-485, pt. 1, at 58 (additional views of John Paul Hammerschmidt and ten other legislators) and non-slip floors for individuals whose disabilities cause balance problems. *Id.* at 27.

provide paratransit service¹⁰⁵ to individuals who, due to their disability, are unable to use traditional buses and trains without assistance,¹⁰⁶ need to travel at a time when buses or trains accessible to the disabled are unavailable,¹⁰⁷ or are unable to travel to a bus or train stop.¹⁰⁸ The ADA alone cost transit providers \$1.4 billion per year in the mid-1990s, about one-third of federal transit spending.¹⁰⁹

2. Labor Laws that Limit Transit Operators' Ability to Reduce Labor Costs

Section 13(c) of the Federal Transit Act,¹¹⁰ a statute enacted to ensure that unionized transit workers did not lose their collective bargaining rights when local governments took over financially beleaguered private bus and rail lines,¹¹¹ in effect mandates "that transit agencies pay six years' wages and benefits to their employees affected by layoffs."¹¹² This statute alone may have cost transit providers \$2-3 billion per year by the mid-1990s,¹¹³ about half of all federal transit spending at that time.¹¹⁴ The federal government also inflates transit systems' labor costs by imposing federally mandated wage rates for federally funded construction.¹¹⁵

105. See ADAPT, 881 F.2d at 1186 n. 1 (defining "paratransit"). Paratransit users are generally served with wheelchair-accessible vans rather than with conventional buses.

106. See 42 U.S.C. § 12143(c)(1)(A)(i).

107. See 42 U.S.C. § 12143(c)(1)(A)(ii).

108. See 42 U.S.C. § 12143(c)(1)(A)(iii).

109. See Hynes-Cherin, *supra* note 37 (ADA cost transit providers \$1.4 billion annually); Doherty, *supra* note 37 (ADA paratransit provisions alone cost transit operators \$1.1 billion annually); FACT BOOK, *supra* note 1, at 37 (federal transit spending ranged between \$3.8 billion and \$4.8 billion between fiscal years 1993 and 1998).

110. See 49 U.S.C. § 5333 (laborers on transit-related construction projects must be paid "wages not less than those prevailing on similar construction in the locality" and transit employees must be protected against diminution of collective bargaining rights or "worsening of their positions related to employment"); see also Greenfield and Montague Transportation Area v. Donovan, 758 F.2d 22, 23 (1st Cir. 1985) (describing statute); John Walters, *Bus-Jacking the Revolution*, POLICY REVIEW, Jan./Feb. 1996 at 8, available at 1996 WL 13529566 (same).

111. See Jon Healey, *Appropriations: House Keeps Labor Protections in Big Defeat for Leadership*, Aug. 1, 1995 CONG. Q. WKLY. REP. 2253, 2254, available at 1995 WL 7448790.

112. Editorial, *Untied*, HOUSTON CHRON., June 29, 1995 at 36, available at 1995 WL 5912413. See also Healey, *supra* note 111 (quoting U.S. Rep. Tom Davis).

113. Walters, *supra* note 110.

114. See FACT BOOK, *supra* note 1, at 37 (federal transit spending ranged between \$3.8 billion and \$4.8 billion between 1993 and 1998).

115. See 49 U.S.C. § 5333(a); North Ga. Bldg. and Trades Constr. Council v. Metro. Atlanta Rapid Transit Auth., 1982 U.S. Dist. LEXIS 9862, *3-4 (N.D. Ga. Aug. 4, 1982) (describing requirement).

3. Limitations upon Transit Systems' Use of Parts Manufactured in Foreign Countries¹¹⁶

The "Buy American" provisions of the Federal Transit Act provide that steel, iron and manufactured goods used in transit projects must be produced in the United States¹¹⁷ unless the Secretary of Transportation chooses to waive this requirement.¹¹⁸ Waivers are allowed if application of the "Buy American" statute is not in the public interest, American-made components are not of satisfactory quality, if the cost of including domestic material will increase the cost of the overall project by over twenty-five percent, or the cost of the American-made components is sixty percent of the cost of the goods at issue.¹¹⁹ Contractors on transit projects must sign "Buy American Certificates" that describe the extent to which their goods are American-made.¹²⁰

4. Limitations on Charter and School Bus Service in Competition with the Private Sector¹²¹

The Federal Transit Act provides that a transit system receiving federal aid may not provide charter bus transportation service outside the urban area in which it provides regularly scheduled mass transportation service if the recipient will thereby "foreclose a private operator from providing intercity charter bus service if the private operator can provide the service."¹²² The same act provides that transit systems receiving federal aid may not "provide schoolbus transportation that exclusively transports students and school personnel in competition with a private operator."¹²³

Every dollar that transit systems spend or forego in order to comply with these federal rules and regulations is a dollar that they cannot use to expand or preserve service. In fact, transit agencies have occasionally reduced service in order to finance compliance with federal mandates:

116. See 49 U.S.C. § 5323(j); *Seal & Co. v. Washington Metro. Area Transit Auth.*, 768 F. Supp. 1150, 1158-60 (E.D. Va. 1991) (describing requirement).

117. 49 U.S.C. § 5323(d)(1).

118. 49 U.S.C. § 5323(j)(2).

119. *Id.*

120. See *Seal & Co.*, *supra* note 116, at 1158-60.

121. See 49 U.S.C. § 5323(d) and (f); *Chicago Transit Authority v. Adams*, 607 F.2d 1284, 1293 (7th Cir. 1979) (discussing protection of school bus companies); *Blue Bird Coach Lines v. Linton*, 48 F. Supp. 2d 47, 49 (D.D.C. 1999) (discussing protection of charter bus companies).

122. 49 U.S.C. 5323(d)(1).

123. 49 U.S.C. 5323(f)(1); see also *Chicago Transit Authority*, 607 F.2d at 1289 (statute prohibiting transit agency from serving students even when they are picked up at "common neighborhood departure and delivery point" rather than multiple bus stops more near their residence).

for example, in the mid-1990s thirty-one percent of American transit agencies reduced service, raised fares or laid off employees in order to pay costs imposed by the Americans with Disabilities Act.¹²⁴

C. Other Anti-Transit Policies: Or, How To Attack Transit By Attacking Cities

Highway spending is hardly the only government expenditure that has reduced transit use or moved jobs away from transit users. Over the past several decades, a wide variety of government policies have indirectly encouraged Americans to move to auto-dependent suburbs.

1. Federal Housing Administration Mortgage Insurance

Since 1934, the Federal Housing Administration (FHA) has insured long-term, low down payment mortgages against default.¹²⁵ By 1986, the federal government backed two-thirds of the single-family mortgages in the United States.¹²⁶ For many years, FHA guaranteed home loans only in "low-risk" areas.¹²⁷ FHA guidelines defined low-risk areas as areas that were thinly populated, dominated by newer homes, and had no African-American or immigrant enclaves nearby—areas that disproportionately tended to be suburban.¹²⁸ In fact, FHA manuals

124. See *Costs of Paratransit*, *supra* note 35. See also Jerry Crimmins, *Pace Expands Van Pool, Service to Disabled*, CHI. TRIB., November 18, 1996 at 1, available at 1996 WL 2728030 (suburban Chicago bus system financed ADA compliance by eliminating eight bus routes). Because the ADA requires transit systems to provide paratransit service comparable to traditional bus service, see 42 U.S.C. § 12143(a)(1), other municipalities have evaded the ADA's paratransit requirements by reducing service for all riders. See, e.g., Marian Lumpkin, "Everybody Loses" in *Bus Cuts*, RICHMOND TIMES-DISPATCH, Sept. 27, 1992 at B1, available at 1992 WL 7716249 (Henrico County, Virginia, reduced evening bus service for all riders because it was not willing to spend \$500,000 to provide evening bus service to paratransit users).

125. See *United States v. City of Parma*, 494 F. Supp. 1049, 1057 (N.D. Ohio 1980), *app. dismissed*, 633 F.2d 218 (6th Cir. 1980); Michael H. Schill and Susan Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1308 (1995).

126. See GERALD E. FRUG, *CITY MAKING* 132-33 (1999).

127. See JACKSON, *supra* note 52, at 207.

128. *Id.* at 207-08. In fact, the overwhelming majority of FHA loans went to suburban home buyers. See MASSEY & DENTON, *supra* note 78 at 54 (describing FHA favoritism towards suburbs in St. Louis, Washington, and New York City metropolitan areas); George Steven Swan, *The Political Economy of American Apartheid: Shaw v. Reno*, 11 T.M. COOLEY L. REV. 1, 21 (1994) (FHA did not insure one mortgage in Camden or Paterson, New Jersey, until 1966). The FHA became less biased against cities in the late 1960s, but by that time the damage had already been done; America's older cities had already skidded into a cycle of decay and decline. See JACKSON, *supra* note 52, at 214-15 (describing more recent FHA policies); WORLD ALMANAC, *supra* note 85, at 210 (older cities had begun to decline in 1950s and 1960s); Massey at 53 (describing long term damage to cities caused by FHA-financed loss of middle class).

specifically taught that the FHA should favor newer, lower-density areas because "crowded neighborhoods lessen desirability [and] older properties in a neighborhood have a tendency to accelerate the transition to lower class occupancy."¹²⁹ Public transit is less feasible in lower-density areas, because as houses and apartments are spread farther apart, fewer people can conveniently walk to bus and train stops.¹³⁰ So by bribing homeowners to move to low-density suburbs, the FHA inadvertently reduced transit ridership by causing population to shift to areas where public transit was inconvenient or inadequate.

2. Public Housing Policies that have Concentrated Poverty and Crime in Cities

Public housing policies, by concentrating poverty and crime in cities, have driven middle-class families out of cities and into auto-oriented suburbs. New Deal-era federal housing legislation provided that any municipality desiring public housing had to either create a municipal housing authority or cooperate with another city's housing authority.¹³¹ Economically homogenous suburbs were able to avoid public housing by refusing to create or cooperate with housing authorities.¹³² Moreover, the federal government's "equivalent elimination requirement" kept public housing out of suburbs by mandating that one unit of substandard housing be eliminated for each unit of public housing built.¹³³ Because most suburbs had little substandard housing, even suburbs that wished to participate in the public housing program were excluded.¹³⁴ As a result

129. See JACKSON, *supra* note 52, at 207.

130. See PIETRO S. NIVOLA, *LAWS OF THE LANDSCAPE* 15-16 (1999) ("The abandonment of public transportation is primarily a consequence of higher per capita incomes and low urban density. The clustered populations and workplaces of European and Japanese cities offer the critical mass needed to maintain comparatively high levels of transit ridership, whereas the decentralized urban conurbations of the United States are more efficiently served by automotive transportation."); Cox, *supra* note 101 (criticizing proposals for new light rail service because in most suburbs and non-downtown areas "densities are far too small to support the extent of transit service that would be necessary to attract non-downtown commuters out of their cars. Simply put, not enough jobs or residences are within walking distances of transit stops.").

131. See *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086, 1091 n. 11 (6th Cir. 1985); JACKSON, *supra* note 52, at 224.

132. See Briffault, *Our Localism: Part I- The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 41 (1990) (in all areas suburban localities sought to exclude public or publicly subsidized housing); *Jaimes*, 758 F.2d at 1096 n. 23, 1097-98 (noting Toledo suburbs' refusal to allow public housing, which caused nearly all public housing units to be in city of Toledo); *United States v. City of Parma*, 661 F.2d 562, 566-67 (6th Cir. 1981) (describing similar obstructionism in Cleveland suburb); JACKSON, *supra* note 52, at 224.

133. See Schill & Wachter, *supra* note 125, at 1293.

134. *Id.*

of these limitations, many suburbs have little or no public housing.¹³⁵

By law, public housing projects are packed with poverty: forty percent of all occupants of existing public housing must earn less than thirty percent of their metro area's median income.¹³⁶ Because homogeneously poor areas tend, other factors being equal, to be more crime-ridden than more affluent areas,¹³⁷ public housing projects are "havens for crime."¹³⁸ Nationally, public housing residents are two and a half times as likely as other Americans to be victimized by gun-related crimes—and some public housing projects are even more horrendous.¹³⁹ For example, Chicago's Robert Taylor Homes housing projects contain only one-half of one percent of that city's population, but account for eleven percent of the city's murders.¹⁴⁰ Similarly, a 1993 study found that the incidence of crime in the Los Angeles housing projects was three times greater than crime rates in surrounding high-crime neighborhoods.¹⁴¹ By concentrating public housing in central cities, the federal government has concentrated poverty and crime in cities, thus accelerating the flight of the middle class and their employers to auto-oriented suburbs,¹⁴² which in turn (as noted above) has reduced the share of people and jobs served

135. See *Evans v. Buchanan*, 393 F. Supp. 428, 435 (D. Del.), *aff'd per curiam*, 423 U.S. 963 (1975) (Wilmington housing authority operated two thousand public housing units in the city but fewer than forty in the suburbs); Robert E. Mendelson and Michael A. Quinn, *Residential Patterns in a Midwestern City: The St. Louis Experience*, in KRUMHOLZ & COGGER, *supra* note 73, at 151, 163 (in 1970, St. Louis had ten thousand units of public housing while suburban St. Louis County, with a larger population, had only fifty).

136. See 42 U.S.C. § 1437n(a). See also Schill & Wachter, *supra* note 125, at 1294-95 n. 43 (claiming the law was even more restrictive in the 1980s).

137. See *Patrolmen's Benevolent Ass'n v. City of New York*, 74 F. Supp.2d 321, 336 (S.D.N.Y. 1999) (equating "high-crime" areas with "low-income" areas) (citation omitted); Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203, 1215 (1995) ("Using least squares regression, I estimate the relationship between crime and poverty to be: Major Crime Rate = 36.55 + .02 (percentage white) + .79 (poverty rate), where the units are census tracts and crime rates are expressed per 1000 inhabitants.").

138. *Rucker v. Davis*, 203 F.3d 627, (9th Cir. 2000). (vacated on other grounds); see also 42 U.S.C. § 11901 (official federal finding that "public and other federally assisted low-income housing in many areas suffers from rampant drug related or violent crime").

139. See Gary Fields, *Gun Risk Double in Public Housing*, USA TODAY, Feb. 17, 2000 at 3A, available at 2000 WL 5769527.

140. See Utt, *supra* note 85; see also *United States v. Thompson*, 1992 U.S. Dist. LEXIS 1420, *1 (N.D. Ill. Feb. 7, 1992) (describing project as "notorious" for crime); Nicholas Lemann, *THE PROMISED LAND* 295 (1991) (describing Robert Taylor Homes as "quite possibly, the worst place in the country in which to raise a family").

141. See Utt, *supra* note 85.

142. See Simon, *supra* note 86, at 856 (noting that crime is a factor in middle-class flight to the suburbs).

by public transit.¹⁴³

3. Prestigious Schools for Suburbs and "Bad" Schools for Cities

Over the past several decades, many American parents have moved to suburbia in order to keep their children out of urban public schools.¹⁴⁴ This problem is in part a consequence of state governments' school assignment policies. In most of America, students are assigned to public schools based on their home addresses:¹⁴⁵ urban students must generally attend school within an urban school district, while suburban children attend suburban schools. Thus, a public school's student body typically reflects the city or neighborhood in which the students reside. Because cities tend to be more socially diverse than suburbs,¹⁴⁶ the average city school will nearly always have more low-income children than the average suburban school. Other factors being equal or nearly so, low-income children are harder to educate and achieve less than middle-income children, because "socioeconomic status (SES) and family background influence a student's achievement in school."¹⁴⁷ This is so because "children reared in low socioeconomic status [households] tend to be less intellectually stimulated and, consequently, tend to be less prepared for school which ultimately impacts on a child's achievements."¹⁴⁸ It follows that schools packed with low-income

143. See *supra* notes 93-101 and accompanying text (discussing inadequacy of public transit in many suburbs).

144. See, e.g., Vicki Been, Comment, *Professor Jerry Frug's the Geography of Community*, 48 STAN. L. REV. 1109, 1110 (1996) ("When I talk to the mothers and fathers of my children's friends about their inevitably impending move to the suburbs, they talk about the higher standard of living they will enjoy there . . . [including] the savings of writing one check for property taxes rather than one for property taxes and another for the private school tuition."); Kristin Kovacic, *New Century, Same Place*, PITTSBURGH POST-GAZETTE, Jan. 1, 2000 at A19, available at 2000 WL 10870714 ("our children were fast approaching school age. The rational response appeared to be moving to a suburban area with a good school district. Many city families we know were starting to move to these [suburbs] for the schools alone.").

145. See KERN ALEXANDER & M. DAVID ALEXANDER, *THE LAW OF SCHOOLS, STUDENTS AND TEACHERS IN A NUTSHELL* 9 (1995) ("most state laws require children to attend school in the district in which the student resides").

146. See BENFIELD, *supra* note 88 at 123 (central cities contain half of America's poor, although they contain only thirty percent of the total population).

147. *Reed v. Rhodes*, 1 F. Supp.2d 705, 738 (N.D. Ohio 1998). In fact, the "quality" of schooling may influence as little as two to three percent of differences in students' educational achievement. See Christopher Jencks, et al., *INEQUALITY* 109, 159 (1972) (differences among elementary schools account for three percent of inequalities in educational achievement, and differences among high schools account for two percent of such inequalities).

148. *Reed*, 1 F. Supp.2d at 739.

children will usually be less prestigious than middle-class schools. Thus, so long as state and local laws require urban children to attend schools packed with low-income children, urban schools will have bad reputations that drive away middle-class parents.

In recent decades, the federal courts have widened the gap between city and suburb in the name of "desegregation:" the courts have often required cities to create racial balance in urban schools,¹⁴⁹ while allowing lily-white suburbs to continue maintaining lily-white schools.¹⁵⁰ These rulings ensured that city schools would be more racially diverse than suburban schools, which in turn meant that because blacks tend to be poorer than whites,¹⁵¹ city schools, even those in affluent areas, would contain more low-income children than suburban schools. This desegregation, in turn has made city schools less prestigious and thus less appealing to middle-class families.¹⁵² As noted above, when middle-class families flee to auto-dominated suburbs, they are more likely to drive to work, and transit ridership plummets.

4. A Tax Code that Favors Driving and Suburban Life

Employers may provide parking to their employees as a tax-free fringe benefit worth up to \$170 a month, while the tax-free ceiling on transit passes is only sixty-five dollars per month.¹⁵³ To a much greater extent than European countries, America taxes income and savings rather than consumption.¹⁵⁴ Thus, the tax code encourages Americans to purchase space-consuming items and the large suburban houses necessary to house those items.¹⁵⁵ Moreover, state and federal fuel taxes are too small to recapture the social costs of driving, such as highway spending not paid

149. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (allowing courts to use racial quotas and disregard neighborhood boundaries in order to integrate city schools).

150. See *Milliken v. Bradley*, 418 U.S. 717 (1974) (refusing to allow federal courts to integrate suburban schools because suburban governments had not explicitly sought to segregate minorities). See Michael Lewyn, *The Courts v. the Cities*, 25 URB. LAW. 453, 457 (1993) (after *Milliken*, many suburbs were not affected by desegregation because "many big-city suburbs have never had any blacks to discriminate against").

151. See 1999 ABSTRACT, *supra* note 20, at 487 (the family poverty rate among blacks is nearly three times that among whites).

152. To make matters worse, widespread "white flight" from city schools has made many cities' public schools as racially segregated as ever. See ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 84 (1994) (fewer than four percent of students in Washington, D.C. public schools are white).

153. See NIVOLA, *supra* note 130, at 25.

154. *Id.* at 25-26.

155. *Id.* at 26.

for by fuel taxes,¹⁵⁶ the costs of auto-induced air pollution, the costs of medical care resulting from auto collisions, the costs of military spending to protect Persian Gulf oil, and the costs of police enforcement of auto-related laws such as traffic and parking laws.¹⁵⁷

These policies have combined to place older cities in a vicious spiral of decay: as middle-class families fled to the suburbs, urban tax bases diminished, causing local government to raise taxes or reduce services, further accelerating middle-class flight, creating additional pressures for tax increases, and so on.¹⁵⁸ As urban neighborhoods emptied out, middle-class families were replaced by poor ones,¹⁵⁹ causing crime to increase,¹⁶⁰ thus accelerating middle-class flight.

In turn, the middle-class exodus from older cities and neighborhoods has reduced transit ridership in two ways. First, as employees and employers fled cities, they relocated to suburbs with minimal public transit, reducing their opportunities to use public transit.¹⁶¹ Second, such reductions in ridership have sometimes pushed public transit into a vicious spiral: reduced ridership was used to justify reductions (or to prevent improvements) in service,¹⁶² which in turn reduced ridership, which decreased transit system revenues, causing additional service reductions and fare increases.¹⁶³

156. See 1999 ABSTRACT, *supra* note 20, at 635 (in 1995, imposts on highway users totaled \$59 billion, while highway spending totaled \$92 billion).

157. See Lewyn, *supra* note 85, at 541-42.

158. See MASSEY & DENTON, *supra* note 78, at 55; Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1574 (1991).

159. See PAUL A. JARGOWSKY, *POVERTY AND PLACE* 50-57, 223-26 (1997) (in the 1970s and 1980s, the number of high-poverty census tracts increased in most American cities; for example, in 1980, Milwaukee had only nine census tracts, where over forty percent of residents had incomes below federal poverty rate, but by 1990, the number had increased to forty-two).

160. See *supra* notes 132-144 and accompanying text (the crime rate is higher in poverty-packed neighborhoods).

161. See *supra* notes 90-92, 96-100 and accompanying text (noting that most suburban jobsites not transit-accessible and that autos necessary in most suburbs).

162. See Editorial, *Continuing Ridership Decline is Everyone's Concern*, PITTSBURGH POST-GAZETTE, Feb. 27, 1994 at D2 (when ridership declines, "operating costs must be reduced, service cut, fares increase or . . . subsidies raised").

163. See *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655, 665 (3d Cir. 1989) ("increases in fares or reductions in the quality or availability of service have the tendency of reducing ridership, and the reduction in ridership in turn diminishes revenue") (Rosenn, J., dissenting); Frank Donze, *Riders Oppose Higher RTA Fares*, NEW ORLEANS TIMES-PICAYUNE, Feb. 20, 1999 at B1, available at 1999 WL 4395511 (quoting rider's suggestion that the New Orleans transit agency is in a "death spiral"); Gary Washburn, *New Roads Won't Ease Traffic Jams*, *Report Says*, CHI. TRIB., April 2, 1992, at 4, available at 1992 WL 4468631 (expressing similar concerns about public transit in Chicago).

D. How Zoning Makes Suburbs Auto-Dependent

While the federal and state governments were driving Americans into suburbs, local governments were (with state and federal support) making those suburbs as auto-dependent as possible through zoning legislation. In the 1920s, the federal Department of Commerce drafted the Standard State Zoning Enabling Act (SZEa).¹⁶⁴ SZEa, which was quickly enacted by the majority of states,¹⁶⁵ granted municipalities power to regulate the location and use of buildings.¹⁶⁶ The SZEa declared that zoning laws would be designed to "prevent the overcrowding of land [and] to avoid undue concentration of population"¹⁶⁷—in other words, to reduce population density. SZEa-inspired zoning ordinances have artificially reduced densities¹⁶⁸ by limiting apartment construction¹⁶⁹ or by forcing all lots in a neighborhood to be of a minimum size.¹⁷⁰ For example, in 1970 more than ninety-nine percent of vacant land in New Jersey was zoned to exclude multifamily housing, and in Connecticut's Fairfield County eighty-nine percent of vacant land was subject to minimum lot requirements of one acre or more.¹⁷¹ Such anti-density

164. See DEPARTMENT OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (1926) (final version), *quoted in full in* DANIEL R. MANDELKER AND ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 146-49 (2d ed. 1985).

165. See *Ex Parte City of Huntsville*, 684 So. 2d 123, 125 (Ala. 1996) (SZEa used as a "model for zoning legislation in the majority of states"); 1 ANDERSON'S AMERICAN LAW OF ZONING, sec. 2.21 at 67-69 (4th ed. 1995) (describing the history of SZEa and pointing out that as early as 1930, thirty-five states had adopted that statute in whole or in part, and that "[a]ll of the states finally adopted zoning enabling legislation and most reflect the thinking of the draftsmen of the Standard Act").

166. See *Chapman v. City of Troy*, 40 So. 2d 1, 8 (Ala. 1941) (SZEa gives cities power to "divide the city into districts, and regulate the erection and use of the buildings in the several districts for trade, industry, residence or other purposes"); Lee R. Epstein, *Where Yards Are Wide: Have Land Use Planning and Law Gone Astray?*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 345, 357-58 (1997).

167. SZEa, sec. 3, *quoted by* Epstein, *supra* note 167, at 379 n. 50.

168. See Paul S. Weiland, *Environment in Context*, 18 UCLA J. ENVTL. L. & POL'Y 131, 138 (1999/2000) ("current zoning practices often forbid high density development and mixed-use development").

169. See, e.g., *Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding ordinance limiting land use to single family homes).

170. See, e.g., *Simone v. Worcester Cty. Inst. for Sav.*, 1995 U.S. App. LEXIS 9081, *6 (1st Cir. April 20, 1995) (Worcester zoning law required a eight thousand square foot lot for a two family home).

171. Briffault, *supra* note 132 at 41. The purpose of such zoning is usually to exclude lower-income persons. See JACKSON, *supra* note 52, at 242 (zoning "served the general purpose of preserving residential class segregation and property values"); James Poradek, *Putting the Use Back in Metropolitan Land-Use Planning: Private Enforcement of Urban Sprawl Control Laws*, 81 MINN. L. REV. 1343, 1343-44 (1997) (describing Minnesota suburb's pattern of using zoning to raise the

zoning reduces transit use because, as noted above,¹⁷² public transit is less feasible in low-density areas: as residences are spread farther apart, fewer people can walk short distances to bus and train stops. By using highway spending to create suburbs while zoning those suburbs to be auto-dependent, government reduced transit providers' revenues in two ways: first, it reduced transit providers' urban ridership, and second, it made it difficult for transit providers to serve suburbanites. By reducing transit providers' revenues, government forced them to cut back service and raise fares,¹⁷³ thus causing ridership losses that caused additional revenue losses.¹⁷⁴

III. DOES IT MATTER?

It could be argued that no matter what government does to encourage transit use, the inherent advantages of autos make any attempt to increase transit patronage futile. Even transit supporters sometimes fall victim to fatalism: one pro-transit commentator complains that "[t]he popularity of the automobile has long been the bane of urban planners who wish to increase transit ridership [because of the public] preference for the convenience and freedom that the automobile represents."¹⁷⁵ The facts prove otherwise. If people have enough transportation options and density is high enough to make transit efficient, most people will use it. For example, seventy-four percent of commuters to New York's central business district use public transit to get to work, as opposed to 1.8% of commuters to Orlando's business district.¹⁷⁶ Surely New Yorkers and Floridians desire "freedom and convenience" equally, but in New York, government evidently does less to make transit inconvenient.¹⁷⁷ Even in

cost of housing and thus exclude low- and moderate-income families). In one Chicago suburb, local officials recently proposed to establish a minimum price of \$325,000 for new single-family homes. See Patricia Richardson, *Elgin Ups the Ante*, CRAIN'S CHICAGO BUSINESS, March 27, 2000 at 3, available at 2000 WL 8128332. However, it is unclear whether this proposal, if enacted, will be legally enforceable. *Id.* (noting that a local fair housing lobby is threatening a lawsuit).

172. See *supra* note 131 and accompanying text.

173. See *supra* notes 27-47 and accompanying text (describing reductions in transit service due to 1990s reductions in federal funding and increases in federal regulation).

174. See *supra* note 164 and accompanying text (describing "death spiral" of revenue losses that caused ridership losses that caused additional revenue losses).

175. McCann, *supra* note 9, at 881.

176. Wendell Cox, *Journey to Work Market Shares: U.S. Central Business Districts: 1990*, available at <http://www.publicpurpose.com/ut-uscbd.htm> (last visited May 21, 2001).

177. Although transit's market share is higher in New York than elsewhere, other business districts also have high ridership: for example, the transit market share is 60.7% in downtown Chicago and 50.3% in downtown San Francisco. *Id.*

suburbia, transit can be an option. For example, in Rosslyn, one of Washington, D.C.'s suburban employment centers,¹⁷⁸ 20.1% of employees use transit to get to work,¹⁷⁹ more than in the central business districts of many major cities.¹⁸⁰ Transit-oriented employment centers such as Rosslyn and Manhattan have survived eighty years of government hostility to public transit: if government stopped sabotaging public transit, these centers might be even more transit-friendly. Government can increase transit use if it stops sabotaging areas already serviced by transit,¹⁸¹ and eliminates zoning laws that make transit inefficient by artificially reducing suburban population density.¹⁸² Even if the state and federal governments do not increase transit funding by one cent, they can increase transit service and give Americans more transportation choices if they take a few actions.

- Stop funding highways and road widenings in suburbs with minimal or nonexistent public transit, because, as noted above, such highways shift development to auto-dominated suburbs.¹⁸³
- Compensate transit systems for unfunded mandates that increase transit systems' costs, or eliminate such mandates altogether.¹⁸⁴
- Break the link between schooling and residence, by allowing urban children to attend prestigious suburban and/or private schools rather than marooning them in urban schools with bad reputations.¹⁸⁵

178. Rosslyn is part of Arlington, Va., a suburb of Washington.

179. Wendell Cox, *US Non-CBD Employment Centers' Share of Metropolitan Employment & Public Transport Market Share: 1990*, available at <http://www.publicpurpose.com/dm-noncbd.htm> (last visited May 29, 2001).

180. *Id.* at 179. The major cities with a lower percentage of transit usage by employees in the central business district are: Atlanta, Buffalo, Charlotte, Cincinnati, Columbus, Dallas, Denver, Detroit, Fort Worth, Hartford, Honolulu, Houston, Indianapolis, Kansas City, Long Beach, Los Angeles, Miami, Milwaukee, New Orleans, Norfolk, Orlando, Phoenix, Providence, Rochester, Sacramento, Salt Lake City, San Antonio, San Diego, San Jose, St. Louis, St. Paul, St. Petersburg, Tacoma, and Tampa.

181. See Lewyn, *supra* note 85, at 530-36, 543-46 (suggesting that cities and older suburbs can be revitalized by reduction of highway spending, revenue-neutral fuel tax increases to capture social costs of driving, and by using education vouchers to allow urban children to attend more prestigious suburban and private schools); Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue Anymore*, 84 MARQUETTE L. REV. 301, 365-82 (proposing a variety of nonstatist solutions to "suburban sprawl").

182. See George W. Liebmann, *The Modernization of Zoning*, 23 URB. LAW. 1, 13-14 (1991) (proposing zoning reforms to allow cities and suburbs to become less auto-dependent).

183. See *supra* notes 80-87 and accompanying text; Lewyn, *supra* note 85, at 543-45.

184. See *supra* notes 102-124 and accompanying text.

185. See *supra* notes 144-152 and accompanying text; Lewyn, *supra* note 85, at 530-36. The question of whether such a "voucher system" should include private schools is beyond the scope of this essay.

- Reform the tax code to favor work and saving over the consumption of fuel and land.¹⁸⁶
- Prohibit local governments from enacting zoning laws—such as minimum home and lot sizes and restrictions on apartment buildings—that artificially reduce density.¹⁸⁷

IV. CONCLUSION

Far from “bombarding [Americans] with demands that we get out of our cars and into mass transit,”¹⁸⁸ government has bombarded Americans with reasons to drive everywhere: highways that make it convenient to relocate to suburbs, zoning laws that make those suburbs as auto-dominated as possible, FHA loans that have bribed Americans to move to those suburbs, school systems that march middle-class families from city to suburb, and public housing projects that scare them away from urban neighborhoods. If we want a society where Americans are free to leave the driving to someone else, we need not drag Americans out of their cars. Rather, all we need to is to consign government's anti-transit policies to the ash heap of history.

186. See *supra* notes 153-163 and accompanying text (describing hidden subsidies to driving); Lewyn, *supra* note 85, at 545-46 (suggesting revenue-neutral tax reforms to force drivers to pay social costs of driving; for example, government could increase fuel taxes and reduce income taxes).

187. See *supra* notes 164-174 and accompanying text; Liebmann, *supra* note 85, at 13-14. The above paragraph is merely a brief summary of actions that the state and federal governments can take in order to reverse their anti-transit policies. Because the purpose of this article is to describe governmental anti-transit policies rather than to discuss cures for suburban sprawl, a full discussion of these issues is beyond the scope of this article.

188. Jacoby, *supra* note 44.

