

Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement

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I. INTRODUCTION

“Sprawl” is the ogre of land use and urban policy at the turn of the new century. While fostering suburbia was once a guiding principle, suburban “sprawl” is now blamed for a spectrum of harms, from environmental disasters such as the depletion of wilderness and the pollution of water, to urban maladies such as the creation of the ethnic underclass and the prostration of city governments.¹ Without too much exaggeration, there would seem to be no greater issue of social policy, even though land use law remains stubbornly a local issue in the first decade of “the suburban century.”²

Many commentators on urban and environmental policy have blamed sprawl on misguided governmental policies, and have proposed techniques for extricating America from the scourge of sprawl. In this Essay, by contrast, I argue that a number of the fundamental reasons for sprawl, such as the automobile-based lifestyle and the residential desire for single-family homeownership, are deeply ingrained aspects of the modern American psyche.³ These causes should give us pause in battling it. Engaging the ogre of sprawl may step on some very sensitive toes. Indeed, any serious effort to battle these causes means challenging some of the most deep-seated American notions about how we want to live.

Finally, a whatever-means-necessary approach to battling sprawl means allowing local jurisdictions to adopt their own antisprawl measures, which are touted as battling “excessive growth” for that jurisdiction. Such uncoordinated restrictions hold the potential for regional protectionism. This may simply shift growth elsewhere and may duplicate many of the various problems of governmental “fragmentation” that metropolitan critics so deplore.⁴ Most disturbingly, some anti-“sprawl” efforts may be pretexts for social and, inevitably, racial exclusion. Ironically, this phenomenon holds eerie parallels to the twentieth-century zoning laws that have been one of the chief causes of sprawl.⁵

Rose Kob provides a welcome contribution to the literature of sprawl, pointing out many of the benefits of democratizing land use

1. I use “sprawl” with quotation marks when I refer to the rhetorical concept, and sprawl without the marks to refer to the land use phenomenon alone.

2. See generally Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 137 (1997).

3. See *id.* at 141.

4. See Paul J. Boudreaux, *E Pluribus Unum Urbs: An Exploration of the Potential Benefits of Metropolitan Government on Efforts to Assist Poor Persons*, 5 VA. J. SOC. POL’Y & L. 471, 491 (1998).

5. See *id.* at 478-79.

decisions.⁶ As the history of land use shows, local government decisionmaking has too often been crafted to serve the desires of affluent citizens alone.⁷ This preferential treatment has been especially galling when it goes beyond the power that affluence buys in the free market, and enlists the coercive power of government to take from the poor and give to the rich.

But the rhetoric of the antisprawl movement needs to answer some tough questions about the causes of sprawl and the alternatives to sprawl before its policy prescriptions should be unleashed, and before they can hope to succeed. On the one hand, efforts to combat sprawl through the redevelopment of the central city avoid much of the criticism inherent in this critique. The revival of the city remains the most exciting, and one of the wisest, phenomena of land use law and policy.

Such “pro-city” efforts, however wise, are not likely to achieve as much success in combating sprawl as are more direct “antisuburb” initiatives. The market pressures in favor of sprawl are simply too great to stop it with enticements from the central city alone. These antisuburban ideas, often called “controlled growth” or “smart growth” solutions, raise most directly the questions posed in this Essay.⁸ Advocates, planners, and politicians would be wise to answer all of the questions posed herein before forging ahead with plans to try to stop the ogre of “sprawl.”

II. A BRIEF HISTORY OF SUBURBAN LAW

“Sprawl” refers to the expansion of the boundaries of a metropolitan area, typically at a rate faster than its population growth, into areas that were rural.⁹ The dominant land use is single-family houses and their spreading lawns, accompanied, at appropriate intervals, by shopping malls and other accouterments of the automobile-based culture.¹⁰ In other words, “sprawl” means the rapid

6. See Rose A. Kob, *Riding the Momentum of Smart Growth: The Promise of Eco-Development and Environmental Democracy*, 14 TUL. ENVTL. L.J. 139 (2000)

7. See Burchell & Shad, *supra* note 2, at 137.

8. See *id.* (discussing evolution of “smart growth initiatives”).

9. See Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 184 (1997) (offering a definition and some attributes of “sprawl”); see also Chesapeake Bay Foundation, *Growth, Sprawl, and the Chesapeake Bay: Facts About Growth and Land Use*, at <http://www.cbf.org/resources/facts/sprawl/htm>.

10. See Boudreaux, *supra* note 4, at 533.

growth of low-density suburbs.¹¹ There is no doubt that sprawl exists. Not only do most Americans live in suburbs, suburban residents greatly outnumber central city residents in nearly every large metropolitan area in the United States.¹²

Understanding of the issue is often clouded, however, by rhetoric.¹³ The deconstructionists tell us that our choice of words influences, at the get-go, how we think about an issue.¹⁴ And so it does with a vengeance when we talk of “sprawl” and its accompanying vocabulary. What we now call the undesirable spread of “sprawl” was seen almost universally, until the latter half of the twentieth century, as the welcome development of a “suburban” lifestyle for the previously huddled masses of the American city.¹⁵ What critics of pro-suburban land use policy call the “fragmentation”¹⁶ of suburban governments might be called a “flowering” or “diversity” by free-market supporters.¹⁷ What was

11. Unlike the traditional use of the term as a verb, land use “sprawl” is more often a noun, meaning either, most commonly, the spread of suburbs, and, less commonly, the suburbs themselves.

12. See Burchell & Shad, *supra* note 2, at 139. These figures grossly underestimate the true numbers of Americans who live in a suburban environment. A “suburban” resident is defined, in census terms, as one who lives within a metropolitan area but outside a central city. While this makes some sense for metropolitan areas with a confined central city, as is the case with most Eastern cities, the distinction ignores the fact that many cities (typically in the West) have “sprawling” boundaries, in which a resident of the San Fernando Valley of Los Angeles or the Galleria District of Houston lives in a quintessential suburban landscape, but who technically lives within the expansive central city boundary. See JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 3-15 (1991) (defining the concept of “edge cities” as those urban areas sprawling outward from the city core but retaining a suburban character). Thus, the number of Americans who live outside of what we typically think of as a “city,” high-density construction with people living very close together, is far lower than typically cited as the “urban” population. See generally DAVID RUSK, *CITIES WITHOUT SUBURBS* (2d ed. 1995) (discussing the ability of some cities to swallow their suburbs).

13. One common critical assessment of sprawl is that it is undesirable because it is “unplanned” or “poorly planned.” See, e.g., Carl Pope, *Solving Sprawl*, 1999 Sierra Club Sprawl Report, at <http://www.sierraclub.org/sprawl/report99/intro.asp>. The question remains whether “planned” communities provide the amenities that critics say are missing from sprawling communities. Journalist Joel Garreau has suggested that “planning” in urban matters, as in many aspects of life, does not necessarily lead to desirable communities. See GARREAU, *supra* note 12, at 228.

14. See, e.g., Stanley Fish, *An Exchange on the Mature Legal Theory*, 37 SAN DIEGO L. REV. 761, 768 (2000) (discussing deconstruction and language in law).

15. See Freilich & Peshoff, *supra* note 9, at 183-84.

16. See, e.g., Burchell & Shad, *supra* note 2, at 141 (discussing “fragmented” metropolises); see also GREGORY A. WEIHER, *THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION* 5, 6 (1991).

17. The camp of urban economist Charles Tiebout argues that the variety of local governments is “efficient” because it provides a spectrum of potential governmental choices to a prospective resident, who acts like a shopper in a supermarket filled with governments. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416-

called a “sanctuary”¹⁸ for suburbanites is now chastised as an unjust “exclusion.”¹⁹ What for some is a suburb to cultivate “family values”²⁰ may be to another a “crabgrass frontier.”²¹

It can be argued that the encouragement of suburbs arose out of the apparently sincere belief that one of the essential roles of government was to place as many citizens as possible in single-family houses, and that these houses should exist in neighborhoods of like houses, without the annoyance of industry, commerce or apartment buildings. The genesis, or at least a suburban-centric sixth day of creation, of the recognition of suburbs as the goal of land use law was *Village of Euclid v. Ambler Realty Co.*, a Supreme Court decision in 1926.²² In this famous case, the Court ruled that the affluent and fairly new suburb outside of Cleveland (in other words, sprawl, Model-T style) had the authority under its police power to zone out undesirable land uses such as industry, in order to ensure the tranquility of the nascent suburban lifestyle for its residents.²³ Emboldened with such zoning power, most suburban jurisdictions adopted zoning laws ensuring that the vast majority of land use outside the central city was legally restricted to single-family houses,

24 (1956). If a resident desires low taxes above all else, he'll choose such a jurisdiction as a place to live. If another resident wants extensive government services, she'll choose another government. If a third resident wants, above all, a large city park, she is free to search through the market for the locality that provides this benefit.

This idea of a free market for governments is undercut when a government seeks to act contrary to the pressures of the free market, which it is doing when it provides services to the poor. See Boudreaux, *supra* note 4, at 504-06 (arguing that efforts to help the poor are by their nature antimarket and thus should not be subject to all the pressures of the market). Whenever government seeks to act contrary to the free market of governments, it is likely to spark a market response by the movement of money, services, and residents away from such “inefficient” regulation. Many suburban residents avoid such high-tax localities, making it difficult for poor jurisdictions to provide services for their poorer citizens. In specific matters such as the control of pollution or the requiring of health benefits for employees, states often have an incentive to offer as little regulation as possible, in order to attract business, which may be (but is not always) more mobile than residents. This latter phenomenon is called the “race to the bottom,” which in turn is used to justify national regulation, that is, replacing the market for government with a monopoly. See Kirsten Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “to the Bottom”?*, 48 HASTINGS L.J. 271, 278 (1997).

18. See *Village of Belle Terre v. Borras*, 416 U.S. 1, 9 (1973). This case is discussed *infra* at p. 176.

19. For a discussion of the issue of “exclusionary zoning,” see generally Bernard K. Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L.J. 577 (1997).

20. See *Village of Belle Terre*, 416 U.S. at 9.

21. See generally KENNETH JACKSON, CRABGRASS FRONTIER 3-11 (1985).

22. 272 U.S. 365 (1926).

23. See *id.* at 387.

often including minimum lot sizes.²⁴ Further government support, in the form of the mortgage-interest tax deduction and highway construction subsidies, added to the boom.²⁵ So the suburbs, while already born, were assured of a healthy and growing adolescence and adulthood in the twentieth century.

Whereas the battles in the days of *Euclid* primarily concerned the unwanted noises and smells of industry, the suburban preference shifted more often to keeping out that other noxious land use, apartments,²⁶ and other residential land uses that were not as ideal as the single-family and single-detached house.²⁷ It is remarkable to recall that it was as recently as 1973 that Justice William Douglas, the famous social liberal, wrote for the United States Supreme Court to uphold the power of local governments to discriminate in favor of single-family occupancy of houses.²⁸ In *Village of Belle Terre v. Borras*, a “village” on Long Island, New York, was sued over an ordinance that prohibited any residential land use other than single-family houses (no apartments, no townhouses, no group houses).²⁹ A group of college students rented a house but soon found themselves subject to village action to terminate their residency.³⁰ Although the district court (and, it should be mentioned, liberal Supreme Court Justices Brennan and Marshall) concluded that the ordinance was unconstitutional, Justice Douglas echoed the *Euclid* thinking that it was perfectly legitimate for suburbs to enforce the preservation of the single-family home suburban ideal, to the exclusion of other residential land uses.³¹ In a remarkable passage, Justice Douglas wrote for the Court:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker* [346 U.S. 26 (1954)]. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.³²

24. See Burchell & Shad, *supra* note 2, at 141; see also JACKSON, *supra* note 21, at 241-43 (discussing zoning and minimum lot sizes).

25. See Burchell & Shad, *supra* note 2, at 140.

26. *Village of Euclid*, 272 U.S. at 394 (referring to apartments as “parasites”).

27. See generally *Village of Belle Terre v. Borras*, 416 U.S. 1 (1973).

28. See *id.* at 9-10.

29. See *id.* at 3-4.

30. See *id.* at 1.

31. See *id.* at 9.

32. *Id.*

The idea that suburbanization was so desirable that government should restrict free-market forces to ensure it was a fundamental article of faith throughout much of the twentieth century.³³ Indeed, the anti-apartment bias remains popular among local governments today, and most suburban jurisdictions vigilantly continue to zone out apartments over the bulk of their land.³⁴

Progressive commentators on land use and urban policy today, however, shake their heads in shame at the pro-suburban law and policy from *Euclid* through *Village of Belle Terre*. Justice Douglas saw discrimination in favor of the single-family house as an enlightened policy of fostering middle-class happiness and providing “sanctuary for people.”³⁵ Today, however, such discrimination is seen as a disastrous social effort to subsidize suburban, middle-class values at the expense of others.³⁶ By fostering suburbanization through “Euclidean” zoning, highway subsidies, government support of mortgages, interest deductions, and a host of other efforts, government has helped create “sprawl.”³⁷ The land use principles behind *Euclid* and *Village of Belle Terre* seem to have been, today’s land use and urban critics charge, a terrible mistake.³⁸

What are the effects of sprawl, according to the critics? First, sprawl harms the environment, by destroying nature, landscapes, natural resources, and open space. It “gobbles up farmland,” with potentially dangerous consequences.³⁹ Second, sprawl undermines the beleaguered central cities. The movement of affluent and middle-class residents, businesses, and industry from the central city exacerbates unemployment, with all of its accompanying social problems, and impoverishes the finances of the central cities, leaving them politically prostrate.⁴⁰ Third, sprawl is bad for the suburban governments themselves, as it places impossible strains on suburban finances that must provide the costly services (new roads, schools,

33. See, e.g., Burchell & Shad, *supra* note 2, at 138-40 (discussing political and sociological encouragement for people to move to the suburbs).

34. See JACKSON, *supra* note 21, at 241-43 (discussing the popularity of restrictive residential zoning).

35. See *Village of Belle Terre*, 416 U.S. at 9.

36. See Ham, *supra* note 19, at 577-79.

37. See JACKSON, *supra* note 21, at 190-91.

38. See generally Ham, *supra* note 19.

39. See D.W. Miller, *Searching for Common Ground in the Debate Over Urban Sprawl*, CHRON. HIGHER EDUC., May 21, 1999, at A15.

40. See generally PAUL KANTOR, *THE DEPENDENT CITY* 172-73 (1988) (arguing that with the loss of wealth and power, cities have become unhappily dependent on attracting industry and business).

sewers, police, etc.) that sprawl hungrily demands.⁴¹ Fourth, sprawl is sensually and aesthetically displeasing, as it replaces the rhythm and excitement of the city with ugly and unfocused landscapes of strip malls, gas stations, and “McMansions.”⁴² Fifth, sprawl is seen as destructive to the sense of community.⁴³ Instead of interacting in the high density of the cities, suburbanites live cocoon-like existences, removed not only from different social classes, but also from their neighbors across the manicured lawns and hedges.⁴⁴ Sprawl is thus exclusionary, both socially and racially.

III. HOLDING THE LINE ON THE CRABGRASS FRONTIER

Criticism of “sprawl” has spread from academic and intellectual circles. Environmental organizations such as the Sierra Club have made the issue a focal point of their agendas.⁴⁵ States such as Maryland and Rhode Island and the metro areas of Portland, Oregon, and the Twin Cities of Minnesota have taken the lead in enacting laws to stop low-density suburban growth at the fringes of the area; they encourage growth, instead, within the boundary of the already-built-up area.⁴⁶

Most significantly, an aversion to “sprawl” has led local jurisdictions across the nation to rethink their “growth” policies, and to consider using local power to limit further development of suburbs.⁴⁷ Because it is accomplished at a jurisdiction-by-jurisdiction level, such efforts typically do not garner headlines in the national “sprawl” debate. Nonetheless, these local land use measures are currently affecting in important ways how Americans live.

It is ironic that local jurisdictions are taking the lead in trying to limit sprawl. Much of the antisprawl rhetoric calls for the removal of land use decisions from “fragmented” localities and the replacement of such power in the hands of metro-wide, or even broader,

41. See Burchell & Shad, *supra* note 2, at 138, 142, 151-52; see also Pope, *supra* note 13.

42. See JAMES HOWARD KUNSTLER, HOME FROM NOWHERE 81-86 (1995).

43. See WILLIAM A. SHUTKIN, THE LAND THAT COULD BE 77 (2000).

44. See Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1081-83 (1996).

45. See Pope, *supra* note 13.

46. See, e.g., Burchell & Shad, *supra* note 2, at 158 (discussing state initiatives); Bruce Katz & Jennifer Bradley, *Divided We Sprawl*, ATLANTIC MONTHLY, Dec. 1999, at 38 (discussing Portland, Oregon); Phillip Langdon, *How Portland Does It*, ATLANTIC MONTHLY, Nov. 1992, at 139.

47. See Burchell & Shad, *supra* note 2, at 158.

authorities.⁴⁸ Such skepticism of local ability to stop sprawl is in many ways justified. Only metro-wide coordination can hope to reverse the flow of resources from the impoverished central city and older suburbs.⁴⁹

Yet the skepticism of a locality-by-locality solution to sprawl should extend beyond the doubt that a metro-wide problem can be achieved at less than a metro-wide level. Allowing localities to follow their own course of development permits them to subvert metro-wide needs. This possibility is especially likely when a locality raises a banner of enacting ordinances for the public good. The Village of Belle Terre convinced Justice Douglas that it was only acting to ensure the quality of life for its middle-class homeowners families, but it did little for those, such as college students, poor persons, and others, who did not fit the mold of the suburban ideal.⁵⁰ Like laws to foster the suburban lifestyle, antisprawl laws hold the potential for social and racial exclusion.

IV. SOME TOUGH QUESTIONS FOR THE ANTISPRAWL MOVEMENT

Because sprawl is perceived to have so many deleterious effects, why not forge ahead with regulation? Why hesitate? True, some antisprawl measures, particularly incentives to bring resources and residents back to the central city and to older, high-density suburbs, do not raise the concerns that this Essay seeks to highlight. Such “carrots” include increased spending on public transportation,⁵¹ better design of urban spaces, and greater flexibility in zoning laws to allow for dynamic, multiple uses in high-density areas.⁵²

Of concern here are the “sticks” of sprawl regulation. Restrictions on development in the outer suburbs impose costs, and it is essential for regulators to assess whether the benefits will match these costs. It is unwise to impose costly regulations if antisprawl efforts will be stymied by factors outside the reach (or the will) of the regulators. Moreover, regulators and citizens should scrutinize antisprawl regulations for the possibility of social and racial exclusion (whether intentional or not). Accordingly, before forging ahead with

48. See Katz & Bradley, *supra* note 46, at 38-39 (discussing the primacy of “metropolitanism,” the making and enforcing decisions at a metro-wide level in combating sprawl).

49. See, e.g., *id.* at 40-41; see also Boudreaux, *supra* note 4, at 530-33 (discussing the benefits of metropolitanism in antipoverty efforts).

50. See Village of Belle Terre v. Borras, 416 U.S. 1, 9 (1973).

51. See Katz & Bradley, *supra* note 46, at 38.

52. See KUNSTLER, *supra* note 42, at 109-49 (discussing potential improvements in zoning and design).

antisprawl initiatives, decisionmakers might consider the following tough questions for the antisprawl movement.

A. *Questions About the Environmental Harms of Sprawl*

1. Why Preserve “Open Space”?

There is no doubt that sprawl gobbles up certain resources, particularly land, in a manner that high-density development does not. This is a truism. But this “use” of land typically does not involve the rape of pristine wilderness: there have been few, if any, cul-de-sac subdivisions carved out of land that was formerly designated under the Wilderness Act of 1964.⁵³ True, in the Western United States, sprawl sometimes occurs on land that was previously not noticeably “used” by humans—land that was formerly desert, brush, or, less often, forest. East of the Mississippi, however, it seems reasonable to assert that most sprawl occurs on land that has already been touched by humans—most often, farmland. This is why the antisprawl movement does not make the argument that sprawl typically destroys wilderness—it does not. Rather, the most commonly-uttered phrase is that sprawl destroys “open space.”⁵⁴

Antisprawl advocates need to articulate why it is so beneficial to preserve “open space” from the developer’s shovel, when such open space consists of farmland or other private property. Under the American system of the right to completely exclude trespassers, most farms do not serve any community, recreational, or social needs of the metro area. While large expanses of farmland sometimes serve as visual pleasures, development of farmlands into housing might indeed offer more opportunities for the creation of *public* open space—parks, public lakes, etc.

Indeed, the desire to preserve “open space” for its own sake, even if it is private open space, raises the question of whether some “open space” advocates use the term as pretty packaging for more parochial desires. Just as Justice Douglas’s reliance on “family values” may now be seen as a misplaced cover for the exclusion of persons who did not fit the middle-class suburban ideal, the appeal to “open space” may, in some instances, serve to hide a locality’s simple

53. See Wilderness Act, 16 U.S.C. § 1133(b) (1964) (requiring protections for federally designated wilderness areas); see also *id.* § 3 (conservation for national parks); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412-13 (1971) (discussing hurdles to highway construction in municipal parks).

54. See, e.g., Pope, *supra* note 13.

desire to keep others out.⁵⁵ This desire for exclusion, especially when it occurs within the rough boundaries of already-built-up urban areas, should be anathema to the goals of the antisprawl movement.

2. Is Housing Sprawl Really Worse for the Environment than Agriculture (Or, Are McMansions Worse than Old McDonald)?

The most recent generation of environmental science has assigned much environmental blame to residential housing patterns. Most notable are the costs of increased automobile use—more air pollution, more vehicles, and more energy consumption.⁵⁶ Because sprawl by definition spreads people out from their destinations, these auto-related harms would appear to be undeniable environmental consequences of sprawl.⁵⁷

But some critics of sprawl go much further. Some have asserted that the land use of a typical suburban development—with its heavy use of asphalt and lawn-grass monoculture—leads to excessive runoff of pollutants into the surface water supply.⁵⁸ But is it clear that such pollutants are worse than what they typically replace, the modern American farm? Most environmental scientists point to agriculture and its attendant use of fertilizers and pesticides as the leading source of water pollution in the United States.⁵⁹ While the comparison of pollution from sprawling suburbs versus pollution from agriculture will no doubt vary from place to place, antisprawl advocates need to explain thoroughly why certain water bodies near metro areas would be served worse by suburban development than by intensive agriculture.

Relatedly, some critics have asserted that because sprawl gobbles up farmland, it threatens America's food production. Is this possible?

55. See *Village of Belle Terre v. Borras*, 416 U.S. 1, 9 (1973).

56. See GARREAU, *supra* note 12, at 125-26.

57. A possible alternative theory could be that, in a fully suburbanized and decentralized society, most everyone might be able to live fairly close to their suburban jobs, thus decreasing the amount of commuting distance traveled, compared with a centralized metropolis. To an extent, this is already happening in the massive Los Angeles area, where the influx of jobs to, say, Orange County allows Orange County residents not to have to travel to the central city. If an Orange County resident is transferred or gets a new job in, say, Santa Monica, on the other side of the metro area, the commuter is likely to move closer to the new job. What this shows, of course, is that the notion of a single "Los Angeles area" is actually false, in terms of home-to-work commuting. See GARREAU, *supra* note 12, at 270-95 (discussing the effects of Southern California sprawl, *inter alia*, Orange County).

58. See Chesapeake Bay Foundation, *supra* note 9 ("Sprawl produces from five to seven times the sediment and phosphorus as a forest and nearly twice as much as sediment and nitrogen as compact development.").

59. See, e.g., ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 545 (1998) (discussing agriculture as the leading source of water pollution).

To be sure, sprawl has pushed out some farming industries—Orange County, California, no longer produces many oranges, as it has been turned over to housing developments.⁶⁰ But is sprawl a threat to food production on more than a *de minimis* scale across the nation?

Leading statistics do not bear out the assertion that the nation's farmland is seriously threatened by sprawl. Despite the explosion of sprawl in the past half-century, the total acreage of land devoted to agriculture in the United States still dwarfs the amount of "developed" land.⁶¹ Moreover, the United States is suffering a shortage neither of farmland nor of farm production. The amount of cropland, for example, has remained close to steady over the past sixty years,⁶² while production of most farm products has increased steadily over the past twenty years.⁶³ While there is no guarantee that past trends will continue, critics of sprawl may need to rely on arguments other than that of threatened farmland.

3. Whose Land Is It, Anyway?

Advocates of land use restrictions to battle sprawl might rejoin: why question local land use laws? Localities have always had nearly unfettered power to regulate land use for their citizens' benefit.⁶⁴ *Euclid* is, for the most part, still good law.⁶⁵ If the good citizens of a particular suburb want to restrict sprawl to preserve their own way of life, should they not be able to?

Critics from both right and left say "no." On the right, property rights advocates raise the banner of the Fifth Amendment's proscription against the taking of property without just compensation, and maintain that property belongs to the *landowner*, not to the

60. See JOHN MCPHEE, ORANGES 9-10 (1968).

61. As of 1992, cropland covered 382.3 million acres of land, while "developed" land accounted for only 92.4 million acres. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999, at 240 (119th ed. 1999).

62. The 382.3 million acres of cropland in 1992 compares with the 399 million acres of cropland that existed in 1940. See *id.*; U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1970, at 590 (91st ed. 1970).

63. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999, at 684 (119th ed. 1999) (showing growth or stability in most categories of farm production since 1980, with the exception of tobacco).

64. See Burchell & Shad, *supra* note 2, at 137.

65. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

government.⁶⁶ Local governments that “go too far” with land regulation should run afoul of the right to private property.⁶⁷

Critics from the left also condemn the notion that local governments hold the exclusive interest in land use regulation. Restrictions on residential development are not only a parochial concern of each locality, but of an entire metro area or an entire state. Under this conception of government, each local jurisdiction holds a moral or a legal responsibility to consider the effects of its action on other communities, especially in matters of class and race. “Fair share” housing laws require that each locality think beyond its own borders, consider a region-wide housing market, and provide a fair share of low-cost housing, despite the objections of the locality’s residents.⁶⁸

The idea that local actions hold wider repercussions is a foundation for activist national government in the modern, post-New Deal era.⁶⁹ It is also a fundamental principle behind natural ecology and activist regulation of the environmental harms—that processes are linked in multifarious ways.⁷⁰ Accordingly, the simple answer of “[t]he local citizens and their government should be able to regulate land the way they see fit,” does not answer fully the question of whose interests are at stake in land use regulation.

B. *Questions About City-Suburb Relations*

One of the most significant effects of the “metropolitanism” movement has been to slow down governmental subsidization of suburbs at the expense of the central city and, sometimes, to shift the balance in the other direction. Instead of spending the bulk of transportation dollars on new highways on the edges of the area, metropolitanism argues for money to increase public transportation in

66. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (restricting government’s ability to proscribe development of land when the proscription takes away the entire value of the property).

67. See *Pa. Coal v. Mahon*, 260 U.S. 393 (1922); *Nolan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

68. See *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975) (setting forth “fair share” principles).

69. See, e.g., Thomas McAfee, *The Federal System as Bill of Rights: Original Misunderstandings, Modern Misreadings*, 43 VILL. L. REV. 17, 154 (1998) (noting mistrust of states as sources of oppression); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1055 (D.C. Cir. 1997) (developing the argument that states will compete with each other, destructively, for lower levels of environmental protection).

70. The famous quotation from John Muir, turn-of-the-last-century environmentalist and founder of the Sierra Club, is “when we try to pick out anything by itself, we find it hitched to everything else in the universe.” JOHN MUIR, *MY FIRST SUMMER IN THE SIERRA* 211 (1911).

the already-built-up areas and to help city residents reach jobs in the suburbs.⁷¹ Instead of zoning laws that starkly segregate land uses, metropolitanism allows for multiple uses to foster friendly and self-sufficient urban spaces.⁷² Instead of discouraging developments on urban “brownfields,” give tax incentives to new job growth in the city.⁷³ Instead of letting affluent suburban jurisdictions dominate state and metro politics, build coalitions of the central city and older suburbs to bring back money and power to the core.⁷⁴

Most of these laudable steps are in the “carrot” category of antisprawl efforts. But what about “sticks”? The two biggest potential sticks raise two of the biggest questions.

1. Will Americans Relinquish the Subsidy of the Single-Family Home?

Talking up the benefits of “density” is all well and good, and so is making cities more livable and more pleasant. But for urban areas to become more “dense,” it is axiomatic that fewer people will get to live in single-family houses with big lawns and a fair space between them and their neighbors. This is what earlier generations called (and folks such as Fannie Mae still call) “the American Dream.” A large majority of Americans still view the suburban environment as their preferred choice of living.⁷⁵ Homeownership is at an all-time high.⁷⁶ Can the antisprawl movement hope to succeed when it runs against this current?

One of the most commonly cited “incentives” to sprawl is the government’s subsidy of home ownership through the mortgage interest and property tax deductions.⁷⁷ Through these deductions, along with support of the mortgage markets, government actively encourages single-family houses and the exchange of small houses for

71. See Katz & Bradley, *supra* note 46, at 38-39.

72. See KUNSTLER, *supra* note 42, at 109-49.

73. See Pope, *supra* note 13.

74. See MYRON ORFIELD, METROPOLITICS 12-14 (1996) (discussing the building of such a coalition in the Twin Cities of Minnesota).

75. See Burchell & Shad, *supra* note 2, at 149.

76. According to the Census Bureau, 67.7% of American households owned their home in the year 2000, the highest percentage on record. See U.S. Census Bureau, *Housing Vacancy and Homeownership Survey*, at <http://www.census.gov/hhes/www/housing/hvs/9300tab4.html> (last visited Nov. 18, 2000). Of course, homeownership is not synonymous with suburbia. Urban condominium owners who live twenty stories above the ground in Chicago are homeowners, while suburban single-family home renters are not.

77. See Freilich & Peshoff, *supra* note 9, at 187.

large ones. Government subsidizes sprawl.⁷⁸ It is conceivable that the removal of these subsidies could be one of the most potent weapons in combating sprawl.

Do we have the stomach for it? Has any political leader in the past half-century stood up for a revocation of the mortgage interest deduction (and garnered any votes in the next election)? It may be that active government intervention to support single-family houses is here to stay. While giving lip service to combating sprawl, it may be that Americans will not consider—in significant enough numbers, in most times, and in most places—any real sacrifices of their ideal of the low-density single-family home community.

If elimination of these subsidies could be a key to combating sprawl, but elimination of the subsidies is off-limits as a matter of debate,⁷⁹ what does this say about America's ability to take sprawl-fighting seriously?

2. Will Americans Accept Restrictions on Automobile Use?

Where there's a suburbanite, there's not only a house, there's also a car, or two or three—or, these days, a truck or van. As many have noted, the essence of the sprawling suburb is the automobile and the massive dependence on the auto for many of life's activities.⁸⁰ Some critics of "sprawl" argue that one of their goals is to break Americans' addiction to automobile travel.⁸¹

While the use of "carrots" to encourage public transportation may be useful, or at least fairly harmless, it is doubtful whether Americans are willing to accept "sticks" against their use of the private internal combustion engine. As with the mortgage-interest deduction, politicians are silent as to changing policies to affirmatively discourage automobile use. In 1991, the United States went to war for the first time in nearly a generation, in large part to

78. See *id.* The sprawl critique is not the only criticism of these subsidies. Both free-market advocates and supporters of the poor might well ask why government tinkers with the market in order to provide a subsidy only to, on the whole, a wealthier class of citizens.

79. See Kathryn Moore, *Partial Privatization of Social Security: Assessing Its Effect on Women, Minorities & Lower-Income Workers*, 65 MO. L. REV. 341, 403 (2000). Such an issue is sometimes called a "third-rail" issue by those who are familiar with central city rail transit. If you touch the third, electrified rail, you die.

80. See Burchell & Shad, *supra* note 2, at 141; GARREAU, *supra* note 12, at 117. After studying American habits, especially in the suburbs, Garreau suggested a "law" that states, "[a]n American will not walk more than 600 feet before getting into her car." *Id.* at 119. Garreau further argues that a primary reason for automobile use is the convenience and time-saving that it generates. *Id.* at 127. Americans also hold an almost visceral dislike of buses, he argues. *Id.* at 130.

81. See Pope, *supra* note 13.

protect low oil and gasoline prices.⁸² In the year 2000, the most environmentally oriented presidential candidate since Theodore Roosevelt responded to a potential rise in gasoline prices by calling for a release of oil supplies from the national petroleum reserve, thereby ensuring that oil and gasoline usage would not be impaired, despite the fact that many environmental economists have for years called for higher gasoline prices.⁸³

As with the American ideal of homeownership, is any antisprawl policy idea that depends on a reduction in automobile use doomed to fail?

C. *Questions About the Financial Costs of Sprawl*

While environmental effects and city-suburb relations are issues of interest for suburban jurisdictions, what truly grabs the attention of local authorities is the assertion that sprawl imposes tremendous financial costs.⁸⁴ With developers expanding the boundaries of the built-up area, once-rural jurisdictions find themselves faced with the enormity of having to provide new roads, sewers, schools, expanded police and fire departments, and a host of other costly government services.⁸⁵ Because these local jurisdictions must, in many instances, duplicate the services that are already provided in the city and in closer-in suburbs, these costs are wasteful. “Smart growth” would foster new development within preexisting boundaries of service districts.⁸⁶

1. Why Can’t Impact Fees Solve the Problem of Fiscal Costs for Local Governments?

One obvious potential solution to the cost problems for local governments is to charge the new development for the governmental costs that it engenders. The land use term is “impact fees.”⁸⁷ The concept is simple: because development costs the suburban government, the development should have to pay for it. The costs are

82. Recall the statement of then-Secretary of State James Baker, that a primary reason for the war was to protect Mideast oil supplies. See Duane Chapman & Neha Khanna, *World Oil: The Growing Case for International Policy*, CONTEMP. ECON. POL’Y 1 (Jan. 1. 2000), 2000 WL 12922248.

83. See Mike Allen, *Gore Urges Use of Oil Reserve*, WASH. POST, Sept. 22, 2000, at A1.

84. See Burchell & Shad, *supra* note 2, at 138.

85. See *id.* (asserting that “cost” is the leading concern with sprawl).

86. See *id.* at 158.

87. See *id.* at 151 (discussing impact fee ideas).

“internalized” by the developer.⁸⁸ If the development cannot pay for itself, considering the total costs that it would impose, it does not go forward. If, on the other hand, the developer and the government can pass much of the costs on to new residents, the residents “internalize” the cost and make their housing choice based on the total social cost of the new development.⁸⁹

If local governments have the political will and the legal authority to impose them, impact fees appear to be a dispositive solution to the financial costs of sprawl for local governments. After all, semi-monopolists usually do not worry about a growth in business, as long as they are able to fully recoup their costs through charges to consumers. We typically have not heard local phone companies and cable television providers complain that they are getting too much new business from sprawl; why shouldn't governments act in the same fashion?⁹⁰

Some commentators have raised the specter that certain impact fees could be considered unconstitutional “takings” of property, in violation of the Fifth Amendment.⁹¹ From my perspective, local governments should have little worry that impact fees might be considered a “taking,” as long as these fees are applied fairly and evenly to all new developers according to a standard procedure. Unconstitutional takings problems arise most often under two problematic scenarios. First, they arise when a local government appears to treat one or a handful of landowners unequally from others, because of expediency or the serendipities of ad hoc land use decisions.⁹² Second, they arise when a government imposes a large burden (especially a prohibition) on one or a few landowners, when such costs would appear to be more equitably borne by the taxpayers at large, through the Fifth Amendment's “just compensation”

88. The idea of forcing complete “internalization” of the costs of an action is a fundamental principle of the economic analysis of costs, and is used to support strict liability in tort and taxes of pollution. See GUIDO CALABRESI, *THE COST OF ACCIDENTS* 103-04, 114-19, 150 (1970) (analyzing different subgoals of “Accident Law” including the theory that general deterrence of accidents “will occur only if all individuals are made to pay the costs of the accidents they ‘cause’ and are able to estimate accurately the risk before an accident occurs,” which can also be accomplished by the taxation of accident-causing activities).

89. See Burchell & Shad, *supra* note 2, at 151.

90. See *id.*

91. See *id.* at 151-52.

92. See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841-42 (1987); see also Paul Boudreaux, *The Quintessential Best Case for ‘Takings’ Compensation*, 34 SAN DIEGO L. REV. 193, 214-18 (1997) (arguing that ad hoc land use decisions that engender a sense of unequal treatment often form the strongest case for an unconstitutional taking).

requirement.⁹³ If done correctly, impact fees do not raise these problems. They may be imposed evenly on all new development, while the class of persons who will ultimately pay for the bulk of the fees—the new residents who will pay somewhat higher housing prices—will coincide fairly well with the group of taxpayers who benefit from the new services. When a government acts like a rational business and charges the users of its services for the costs of these services, the government is unlikely to incur the wrath of a property-rights judge.

So why are “impact fees” not a solution to the fiscal problems of local governments associated with sprawl? A large budget, with large revenues and expenditures, is not necessarily any harder to balance than a small budget. Perhaps the difficulty lies in mustering up the political will or administrative skill to impose them on developers. But if our policy choices are between impact fees or no development at all, any rational developer would choose the former. To the extent that a fiscal problem is a reason to consider limitations on developments, the antisprawl movement needs to explain why impact fees, if done right, would not solve the fiscal problem just as effectively.

2. What Effect Do Antisprawl Laws Have on Housing Costs?

One of the more surprising assertions is that sprawl raises the costs of housing.⁹⁴ To the extent that pro-suburban laws restrict high-density, low-cost housing construction, such as zoning against apartments, restrictive laws undoubtedly do increase the cost of housing. But a corollary of the antisprawl argument appears to be that laws to restrict sprawl would decrease housing costs. Such an argument appears to be deeply flawed. Whenever government restricts by law the supply of a good or service (such as the provision of housing), simple economics suggests that the price of the good or service will rise.⁹⁵ To the extent that a metropolitan area were to place a geographic boundary beyond which no further development were permitted, demand would increase in the limited-supply area inside

93. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014-19 (1992) (holding that the state’s restriction on new construction near the seacoast was an unconstitutional taking).

94. See Freilich & Peshoff, *supra* note 9, at 191.

95. See, e.g., GARREAU, *supra* note 12, at 88 (reporting that suburban development restrictions push cheaper housing and denser housing further out). In the 2000 election, two “high-profile” local antisprawl initiatives were defeated, in part because of opposition from “advocates of affordable housing, who expressed concern that sharp growth limits would drive up housing costs.” *Sprawl on the Ballot*, WASH. POST, Nov. 10, 2000, at A44.

the boundary, thus increasing the costs of such housing. Accordingly, antisprawl laws should be expected, as a general matter, to increase the cost of housing, not to decrease it.

It is true that in areas in which the suburban lifestyle is more popular, people buy bigger houses. Accordingly, the amount that an average household spends on housing may be greater in a suburban-heavy metro area than it would be in an area in which most households live in smaller, lower-cost housing.⁹⁶ But one should not confuse cause and effect. The availability of sprawl does not make any particular housing unit more expensive; rather, expanding suburbanization enables citizens to choose the higher-cost housing options that they would not have under a restricted regime.

Indeed, antisprawl advocates need to take seriously the possibility that restrictions will raise significantly the costs of housing. In many metropolitan areas, sprawl is taking the form of new moderate-cost housing on the outskirts of the region, where land prices are cheap.⁹⁷ Through this phenomenon, many metro regions are beginning to resemble the pattern of European cities such as Paris and London, in which desirable and high-cost urban sectors are often surrounded by poorer suburbs.⁹⁸ By restricting development at the fringes, antisprawl efforts may make low-cost housing even more difficult to obtain for the less affluent. The “stick” of restricting development needs to be accompanied by the “carrot” of greater construction of low-cost housing in the central city and close-in suburbs, in order to avoid adverse consequences to poorer citizens.

D. A Question on the Aesthetics of Sprawl: Is the Antisprawl Movement Elitist? (Or, What's Wrong with Strip Malls?)

One commonly heard complaint about sprawl is that it is ugly.⁹⁹ Endless tracts of look-alike mini-mansions, surrounded by meticulously trimmed lawns, are punctuated only by tacky, auto-oriented strip malls filled with the same impersonal chain stores found in every other strip mall. None of the excitement, spontaneity, and surprises that cities have to offer is found in planned suburbs. One of the most eloquent critics of the appearance of suburban sprawl is James Howard Kunstler, whose book *The Geography of Nowhere* has

96. See Freilich & Peshoff, *supra* note 9, at 191 (appearing to make the argument that sprawl raises housing costs by encouraging the purchase of more expensive suburban housing).

97. See GARREAU, *supra* note 12, at 88.

98. See *id.* at 234.

99. See KUNSTLER, *supra* note 42, at 81-86.

prompted much discussion about how our communities are constructed and how they look.¹⁰⁰

As a policy matter, what are we to make of this aesthetic criticism? Is this critique made by the actual residents of suburbia, as opposed to intellectuals and writers? In short, is this criticism of sprawl elitist, or, at least, just a matter of taste?

To be sure, the aesthetic critics of sprawl do offer some straightforward potential solutions that raise few complaints. A school of urban design called “new urbanism” seeks to improve both the look and the feel of development by employing more old-fashioned urban-oriented design techniques.¹⁰¹ Houses are placed closer together and are separated by picket fences; front porches are built to encourage social interaction; streets are narrow and sidewalks are wide; small, nicely designed stores are permitted on street corners instead of zoned out to strip malls.¹⁰² The notion is to encourage pedestrian movement and to foster the sense of community pride that existed (at least in our memory) in the small but compact towns of the nineteenth century.

Putting aside the difficult questions of whether Americans want to be able to walk to the corner store, or whether they want to say hello to their neighbors on the front porch, aestheticians appear to presuppose that appearance is an important aspect of what makes Americans happy with their community. While such considerations may be important to educated designers and to some intellectuals, are they important for the typical suburbanite? It may be the case that design and attractiveness are of far less significance than practical matters of convenience and cost.¹⁰³ In other words, most suburbanites may not really care that their local shopping center is within walking distance, contains a variety of architectural styles, and is pleasing to the eye. What suburbanites may really care about is whether there is ample parking, whether the store holds a good selection, and how much things cost.¹⁰⁴

100. See JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE* 10-11 (1993).

101. See Burchell & Shad, *supra* note 2, at 152.

102. See *id.* at 152-53.

103. See HAROLD CARTER, *THE STUDY OF URBAN GEOGRAPHY* 82 (4th ed. 1995) (arguing that selection and convenience are more important than appearance of shopping areas); GARREAU, *supra* note 12, at 222 (arguing that builders, not theorists, understand what Americans truly want).

104. Desire for these quotidian conveniences explains the massive popularity of Wal-Mart, despite the disdain of designers, intellectuals, and urban planners. See GARREAU, *supra* note 12, at 222 (discussing the lack of understanding by theorists).

Again, the importance of the question may depend on “carrots” and “sticks.” Suburbanites’ relative indifference to design may be unimportant when regulations are merely carrots, such as the encouragement of a more detailed and pedestrian-friendly design of shopping malls. When, however, antisprawl regulations work as sticks to disrupt housing and consuming preferences, they risk the label of elitism, as well as undermining how Americans want to live.¹⁰⁵

E. Questions About Community and Exclusion

Perhaps the weightiest questions concern the issues of community and exclusion. To be sure, the antisprawl movement maintains that a revival of the central city and high-density living is likely to dissolve some social and racial barriers.¹⁰⁶ This may be true. But dissolution of these barriers will be achieved only if antisprawl laws are done right. Indeed, the experience of *Euclid* and zoning laws favoring the suburban lifestyle have shown that regulations appearing to be in the public interest may actually disserve the public interest. A public interest rationale may serve to mask a local desire for protectionism from lifestyles or persons that do not fit the mold of the majority.

1. Will White Americans Accept Racial Housing Integration?

While American law has placed particular emphasis on efforts to achieve racial integration in education¹⁰⁷ and in employment,¹⁰⁸ achieving racial integration in residential patterns has lagged behind. It is telling to note that while the landmark Civil Rights Act of 1964 outlawed discrimination in employment, public accommodations and restaurants, and programs that receive federal assistance, racial discrimination in housing was not touched.¹⁰⁹ Although the Fair

105. For example, banning large chain stores might encourage more pedestrians and might encourage the development of more local businesses, but at the cost of higher consumer prices and making the average consumer slightly less happy about his or her apparent consumer choices.

106. See Frug, *supra* note 44, at 1089-94 (discussing the goals of new urbanism).

107. During the middle third of the twentieth century, most litigation efforts in the field of racial integration focused on education. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

108. Perhaps the most commonly applied racial rights law is Title VII of the Civil Rights Act of 1964, see 42 U.S.C. §§ 2000e-2000e-17 (1994).

109. See *id.* (employment); §§ 2000a-2000a(o) (public accommodations and restaurants); §§ 2000d-2000d-4a (programs).

Housing Act of 1968¹¹⁰ did outlaw discrimination in the housing industry, American metropolitan areas remain largely segregated by race.¹¹¹ It is notable that segregation has been repeated in the suburbs as African Americans have been moving out of many major cities in large numbers since 1968.¹¹²

Because they appear to discourage interaction among persons of dissimilar backgrounds and classes, suburbs and sprawl have been criticized for fostering segregation.¹¹³ But it is unclear whether laws to encourage higher density living will achieve much success in integrating Americans by race. I have argued that factors of individual racism are market preferences that ensure racial segregation in many geographic areas, regardless of the effectiveness of laws to prohibit discrimination by developers, lenders, and real estate agents.¹¹⁴ Urban centers such as Chicago, Washington, D.C., and Philadelphia remain highly segregated by race, despite the high density of residential housing and the fact that city residents are likely to encounter (if not interact with) persons of other races and classes in going about their employment and other city activities.¹¹⁵ To the extent that fighting sprawl is seen as a potential solution to segregation, it may be an illusion.

2. Do Local Antisprawl Laws Foster Exclusion?

Some of the most contentious litigation in the nation over the past few decades has alleged *exclusionary* zoning, the idea that local land use rules have the effect—intentionally or not, and very often it is plainly intentional—of excluding poor and nonwhite persons.¹¹⁶ The most famous litigation saga was that of Mount Laurel, New Jersey, which fought for years against civil rights advocates who wanted the town, an affluent outer suburb of Philadelphia, to allow low-cost apartment housing.¹¹⁷ The New Jersey courts eventually

110. See *id.* §§ 3601-3631.

111. See DOUGLAS A. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 61 (1993).

112. See Paul Boudreaux, *An Individual Preference Approach to Suburban Racial Segregation*, 27 *FORDHAM L. REV.* 533, 535-39 (1999) (citing census figures).

113. See Frug, *supra* note 44, at 1088-89; JACKSON, *supra* note 21, at 133.

114. See Boudreaux, *supra* note 112, at 534-35.

115. See MASSEY & DENTON, *supra* note 111, at 67-74.

116. Not only are nonwhite persons more likely to be poor, and thus are more likely to seek out low-cost housing, but, as I have shown elsewhere, a correlation between apartment-dwelling and African American residency is likely to be far stronger in the suburbs than it is in an accompanying central city. See Boudreaux, *supra* note 4, at 514.

117. See *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 718-24 (1975); Ronald Smothers, *Ending Battle, Suburb Allows Homes for Poor*, *N.Y. TIMES*, Apr. 12, 1997, at 21.

ordered, and Mount Laurel finally accepted, the principle that each locality must provide for a “fair share” of low-cost housing.¹¹⁸

Locality-by-locality antisprawl measures hold the potential for masking exclusion. This process parallels the exclusion that resulted from “Euclidean” zoning.¹¹⁹ Under the *Euclid/Belle Terre/Mount Laurel* models, a locality adopts strict zoning measures against land uses that are not single-family houses, under the banner of seeking to foster the comforts of the single-family suburban lifestyle. Years later, these laws are criticized because the undesirable uses include things that we find to be important for social justice, such as low-cost housing.¹²⁰ Using this pattern as a lesson, we see that allowing localities to enforce any and all land use restrictions in the name of stopping “sprawl” may permit these localities to enforce exclusion.¹²¹

When suburban localities are permitted to adopt residential land use laws, they hold an incentive to preserve the lifestyle of their current, established residents, regardless of the interests of others. This is the lesson of *Euclid*, *Belle Terre*, and *Mount Laurel*. The banner of “sprawl” can provide a locality with a convenient mask for restrictions on all sorts of “growth,” even when such growth might actually serve the antisprawl efforts, such as through high-density development and in-fill. In addition, the effect of a single jurisdiction’s restriction on growth may be simply to push the pressures for development further out to the far fringes of the metro area.¹²² Finally, a suburban government might use the banner of “sprawl” to restrict growth of a particular kind of housing, even though a mix of housing types, especially apartments and townhouses,

118. See *S. Burlington County NAACP*, 336 A.2d at 732-33 (requiring, as a matter of New Jersey law, certain suburban jurisdictions to take steps to permit migration of a “fair share” of the region’s low-income persons). More than two decades after the litigation began, the township of Mount Laurel finally approved the construction of low-cost housing in 1997. See Smothers, *supra* note 117, at 21.

119. See Ham, *supra* note 19, at 577-79.

120. See Boudreaux, *supra* note 4, at 511-12.

121. For example, some localities have attempted to slow “growth” with the time-tested method of requiring larger minimum lot sizes for residences, an approach that does nothing to retain forests or public spaces, but which excludes less affluent residents. See, e.g., Michael Laris & Maria Gold, *New Plan Would Tighten Rural Home Building*, WASH. POST, Nov. 16, 2000, at V1 (restriction of Loudon County, Va.). Other localities restrict townhouses, in the name of stopping sprawl. See Jackie Spinner, *Growing Anxious About Town Houses: Officials in Charles County Look for Ways to Restrict High-Density Development*, WASH. POST, Jan. 27, 1996, at C3 (restriction of Charles County, Md.). Townhouses are, of course, a type of high-density living, which is the antidote to sprawl. Such restrictions also work to exclude less affluent persons, who cannot afford detached single-family houses, with the accompanying social and racial exclusionary effects that always accompany restrictions on lower-cost housing.

122. See GARREAU, *supra* note 12, at 88 (arguing that inner-suburban restrictions push new high-density development further out).

represents precisely the types of high-density development that, on a region-wide basis, are an antidote to sprawl.¹²³ Just as some critics of applying federalism to social welfare laws argue that states will “race to the bottom” to attract business,¹²⁴ allowing separate localities to follow their own path in combating “sprawl” may result in the adoption of rules that favor the traditional suburban ideal of single-family homes in a low-density setting and a homogenous, exclusionary society.

Perhaps the only means of avoiding the incentive of localities to follow the traditional path is to remove the power to set their own agenda. Such removal engenders arguments that localities are deprived of their sovereignty, and that local residents are deprived of their right to choose how to construct their own communities. The rejoinder to this complaint is, of course, that local land use decisions affect the entire region, and that such decisions should be made at a metro-wide level. It is the old argument in favor of high-level government decisionmaking: widespread problems must be addressed by blanket laws.

It is no surprise, therefore, that the vanguard of successful sprawl-fighting is Portland, Oregon, which has adopted a region-wide approach to land use decisions.¹²⁵ In addition to useful carrots to encourage the vigor of the central city, a single metropolitan service district enforces a fairly strict “growth boundary” that encourages infill, discourages jockeying between separate suburban jurisdictions, and makes development outside the boundary fairly difficult.¹²⁶ As a result, Portland has succeeded in fighting sprawl better than virtually any other American city.¹²⁷ This success raises a final question: are Portland’s restrictions on sprawl, which have raised metropolitan housing prices and have contributed to Portland’s reputation as a city of educated, affluent citizens, many of whom work in the burgeoning high-tech industry, themselves a form of metro-wide exclusion? Is one of the effects of Portland’s effort “not to be like Los Angeles”¹²⁸ that Portland does not offer immigrants, the poor, and people of color the same opportunities that the sprawl of Los Angeles affords?

123. See Spinner, *supra* note 121, at C3; GARREAU, *supra* note 12, at 88 (discussing “snob” zoning).

124. See, e.g., Engel, *supra* note 17, at 271.

125. See Langdon, *supra* note 46, at 134, 139.

126. *Id.* at 139.

127. *Id.*

128. *Id.*

V. CONCLUSION

The battle against sprawl encompasses many exciting ideas for restructuring urban and land use law, particularly in regard to the “carrots” of making central cities and higher-density suburbs more attractive and more livable. Laws and expenditures that bent the free market in favor of outer suburban growth are in some places being abandoned in favor of aiding the older and poorer regions of metro areas.

But not all antisprawl ideas offer such clear benefits. The apparent inability of American politics to explicitly entertain the ideas that automobile use might be discouraged or that single-family, detached homeownership should not be encouraged stands as a sobering roadblock to the success of antisprawl efforts. Finally, the multiplicity of “sticks” that may be used to restrict sprawl should raise questions as to their effectiveness, their fairness, and their potential for exclusion. Before adopting antisprawl initiatives, decisionmakers should answer questions about the potential drawbacks of land use regulation—something that urban land use law has done all too rarely over the past century.