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GOVERNMENT INTERVENTION AND SUBURBAN SPRAWL

The Case for Market Urbanism

Michael Lewyn

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My parents: Bert and Esther Lewyn

Preface

The purpose of this preface is to explain why I came to write this book, and in doing so to give readers a sneak preview of what the book is about. I first became interested in the question of suburban sprawl in the mid-1990s, when I was a law firm associate in a then-declining city.

In those days, the conventional wisdom seemed to be that sprawl was a creature of the free market, and that if you supported limited government, you should support sprawl. But as I read more, I discovered a more complicated reality. The same environmentalists who were fighting suburban development were *also* fighting government agencies that wanted to widen roads that facilitated such development. Moreover, one reason suburbs were more attractive than cities were because government-run schools were more attractive in suburbs than in cities—another example of government loading the dice in favor of suburbia.

Moreover, it seemed to me that the ultimate goals of the anti-sprawl movement were somewhat libertarian. I grew up in 1970s Atlanta, when downtown was in rapid decline, and owning a car seemed mandatory for a normal life. So it seemed to me that reversing these trends created freedom—the freedom to live in someplace non-suburban and the freedom to live without a car.

In 2006, I moved to a teaching job in Jacksonville, Florida, a growing city where nearly everyone I knew drove to work and other destinations. So I began to think about not just *where* Americans develop land, but *how* they develop—that is, why is it that so many streets are uncomfortable or unsafe for pedestrians? As a result, my more recent scholarship focused less on the growth of suburbia than on government regulations that

discourage walking—for example, street design guidelines that favor wide streets designed for fast traffic, and zoning regulations that force pedestrians to walk through seas of parking in order to reach shops and apartments.

In this book I hope to elaborate on both themes—that is, to show how both the growth of suburbia *and* the automobile-dependent nature of suburban development are the result of government spending and regulation rather than of the free market. In addition, I will suggest some market-oriented solutions (or, as the subtitle says, "market urbanism") to the negative side effects of sprawl—by which I mean, solutions that make government less intrusive (or at least no more intrusive).

Having said that, I want to mention what this book is *not* about: nonmarket solutions to sprawl—that is, anti-sprawl policies that involve bigger or more intrusive government, such as land-use regulations limiting suburban development or massive upgrades to public transit. It seems to me that the merits of such policies have been amply debated by other commentators, and that I have little to add to those debates.

Acknowledgments

Many, many people deserve credit for the ideas contained in this book. To start off with, I would like to thank people who made me interested in the issue of sprawl in the first place, including:

- My parents, Bert and Esther Lewyn, who by moving to the most unwalkable part of an unwalkable city, made me hungry for alternatives, and who then sent me to college and law school in more walkable places where I learned that there was a better way of organizing cities;
- Josh Silver and Benjamin Ross, both of whom led transit advocacy groups in Washington, D.C., and its suburbs, which in turn led me into the world of transportation planning;
- My colleagues in the Northeast Ohio Sierra Club's Urban Sprawl Committee, especially Bradley Flamm and Lee Batdorff, for helping me to understand sprawl in the context of a rapidly declining city, and for encouraging me to explore that city; and
- Blake Reeves of blessed memory, who helped me create a similar group in Buffalo.

I would also like to thank a variety of people who deepened my understanding of these issues in more recent years, including (but not limited to)

- Sally Flocks of Atlanta's Pedestrians Educating Drivers on Safety (PEDS), who introduced me to the world of pedestrian advocacy;
- Lenore Skenazy, who introduced me to the issue of criminalizing walking;

– Law school deans who nurtured me and supported my research in a variety of ways, including Deans Robert D'Agostino, Peter Goplerud, Patricia Salkin, and Lawrence Raful;
– The founders of the Market Urbanism blog (marketurbanism.com) for creating a community of kindred spirits; and
– The proprietors of the Planetizen (planetizen.com) blog, for encouraging me to think about topics that were not quite "legal" enough for a law review article.
– All of my critics over the years, for forcing me to think more carefully about the issues discussed in this book.
– David Schleicher, Krishan Madan, and David Welton, for their helpful comments.

Finally, I would like to thank Judd Schechtman for suggesting that my work be turned into a book, and suggesting Palgrave as the publisher.

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Introduction

Some commentators argue that suburban sprawl is a natural result of the free market, and thus cannot be altered without massive government regulation. The purpose of this book is to criticize these assumptions: in particular, to show that sprawl is at least partially a consequence of government spending and regulation, and that some anti-sprawl policies can make government smaller and/or less intrusive.

Chapter 1 of this book explains the concept of sprawl: it defines sprawl as development that is suburban (i.e., far from a region's historic core) and/or forces people to depend on automobiles. Chapter 1 also explains the negative consequences of sprawl from a variety of standpoints. Chapters 2 and 3 explain how government policies support the movement of population from cities and suburbs, and suggest market-oriented reforms that might make cities more popular. Chapter 4 explains how government land-use policies made suburbia automobile-dependent, and proposes market-oriented reforms to those policies. Chapter 5 explains how the justice system discourages walking, and proposes pro-pedestrian reforms. Chapter 6 summarizes market-oriented solutions discussed in earlier chapters.

CHAPTER 1

What Is Sprawl And Why Should We Care About It?

Abstract This chapter defines sprawl as development that (1) occurs in suburbs or at the fringe of a city, and/or (2) is oriented towards cars to the extent that car ownership is a necessity for most households. In addition, the chapter explains why sprawl is controversial; because people in sprawling areas must drive to most destinations, they generate pollution. Sprawl also harms public health by increasing automobile fatalities and reducing opportunities for people to exercise. In addition, sprawl reduces human liberty by making car ownership mandatory for a normal life, and is socially inequitable because the nondrivers immobilized by sprawl tend to be low income.

Keywords Sprawl · Environment · Social justice · Suburb · Automobiles

The purpose of this chapter is to explain to the reader (1) what I mean when I talk about sprawl, and (2) the negative side effects of sprawl.

1 What Is Sprawl?

Oliver Gillham's book *The Limitless City* lists seven definitions of sprawl (each from a different organization):

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* "low-density, residential development beyond a city's limits."[1]
* "the transitional period between rural and urban land use."[2]
* "low-density, single-use development on the urban fringe that is almost totally dependent on private automobiles for transportation."[3]
* "dispersed, low-density development that is generally located at the fringe of an existing settlement.... [and] is characterized by segregated land uses and dominated by the automobile."[4]
* "development [that] eats up farms, meadows and forests, turning them into strip malls and subdivisions that serve cars better than people."[5]

Most of these definitions seem to combine two separate elements of sprawl:

* *Where* American metropolitan areas grow—that is, real estate development that turns rural areas into suburbs, as opposed to "infill" development that adds people and jobs to existing older neighborhoods.
* *How* American cities and suburbs grow—development that is oriented toward automobiles rather than public transit, bicyclists, or pedestrians.

Thus, sprawl is development that (1) occurs in suburbs or at the fringe of a city, and/or (2) is oriented toward cars to the extent that car ownership is a necessity for most households.[6] These two elements go together quite

[1] OLIVER GILLHAM, THE LIMITLESS CITY 4 (2002) (definition by Heritage Foundation).

[2] *Id.* (definition by Reason Public Policy Institute)

[3] *Id.* (definition by Massachusetts Office of Environmental Affairs).

[4] *Id.* (definition by National Trust for Historic Preservation).

[5] *Id.* I have omitted two definitions listed by Gillham- the US Environmental Protection Agency's definition of sprawl as "unplanned, ad hoc" growth, *id.*, and the Sierra Club's description of sprawl as "scattered development that increases traffic, saps local resources, and destroys open space." *Id.* The first definition seems purely procedural (focusing on the lack of "planning" rather than on the landscape produced by sprawl) and the second seems more like a critique of sprawl than a definition.

[6] Cf. Central Towers v. Borough of Fort Lee, 160 N.J. Super. 546, 550–51, 390 A. 2d 677, 680 (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"); Matt Fellowes, *Making Markets an Asset For the Poor*, 1 HARV. L. & POLICY REV. 433, 434 (2007) ("urban sprawl . . . made owning a car more of a necessity").

often—but not always. For example, a pedestrian-friendly downtown of an outer suburb may be sprawl in the first sense but not the second. On the other hand, a six-lane urban street with 50-mile-per-hour traffic may be sprawl in the second sense (because it is uncomfortable for pedestrians to cross) but may not be sprawl in the first sense because of its location. Because these two elements of sprawl are in fact quite different, I have chosen to devote separate chapters to each.

2 What's Wrong With Sprawl?

Some commentators treat sprawl as popular and/or innocuous. Many use the term "American Dream" to describe sprawl, implying that to be against sprawl is to be somehow un-American.[7] Even anti-sprawl organizations such as the Sierra Club use such defeatist language. One Sierra Club webpage begins as follows, "Since the end of World War II, the American Dream has been defined as a house in the suburbs."[8] And indeed, sprawl does have some advantages. If a region's population is thinly spread across suburbia, more people can live on more land than in a more compact city. And if streets are wide and sidewalks are narrow, drivers can go from one destination to another at interstate-like speeds. So what's not to like?

[7] I ran a Google search for webpages that use the term "sprawl" and "American Dream" together, and found 249,000 hits.

[8] SIERRA CLUB, *Sprawl: The Dark Side of the American Dream*, http://vault.sierraclub.org/sprawl/report98/report.asp I note in passing that the equation of sprawl with the "American Dream" is *not* an accurate description of public opinion. In fact, most Americans define the "American Dream" as material success generally, not suburban home ownership in particular. One survey showed that 44 percent of respondents defined the term as "giving your kids a better life", 22 percent defined the term as "a successful business/career", and 13 percent more defined the term as "doing better than your parents." CBS NEWS, *60 Minutes/Vanity Fair Poll: The American Dream*, http://www.cbsnews.com/news/60-minutesvanity-fair-poll-the-american-dream/ Only 10 percent stated that the term meant "owning a home." *Id*. Presumably, only some of those 10 percent would define the "American Dream" more narrowly as "owning a home in a suburb where one has to drive to get to work or shopping." Thus, this survey suggests that very few Americans in fact consider sprawl to be the "American Dream."

Suburban sprawl creates negative side effects from four perspectives: (1) an environmentalist perspective, (2) a progressive/social equity perspective, (3) a public health perspective, and even (4) a conservative/libertarian perspective. Each shall be addressed in turn.

2.1 The Environmentalist Perspective

The primary environmentalist argument against sprawl is that as Americans have moved to automobile-dependent suburbs, vehicle travel has exploded,[9] leading to increased levels of pollution.[10] By contrast, if Americans can reach a wide variety of destinations without driving, they will create less automobile-related pollution than would otherwise be the case. According to one study sponsored by the Urban Land Institute, more compact, walkable development could reduce vehicle miles traveled by 20–40 percent, which in turn would reduce total transportation-related carbon dioxide emissions by 7–10 percent by 2050.[11]

Similarly, a study by Harvard economist Edward Glaeser and University of California at Los Angeles (UCLA) economist Matthew Kahn found that the most transit-oriented places emitted fewer greenhouse gases than other large metropolitan regions. In particular, New York City, the metropolitan area with the highest use of public transit,[12] had the lowest level of

[9] *See* US Environmental Protection Agency, *Our Built and Natural Environments: A Technical Review of the Interactions Among Land Use, Transportation, and Environmental Quality* 26 (2d ed. 2013), http://www2.epa.gov/sites/production/files/2014-03/documents/our-built-and-natural-environments.pdf ("While the population roughly doubled between 1950 and 2011 . . . vehicle travel during this same period increased nearly sixfold") ("Built and Natural")

[10] *Id.* at 67 (noting that transportation-related American greenhouse gas emissions increased by 19 percent between 1990 and 2010).

[11] Reid Ewing et. al., *Growing Cooler: The Evidence on Urban Development and Climate Change*, http://www.smartgrowthamerica.org/documents/growingcoolerCH1.pdf

[12] *See* Wendell Cox, *Major Metropolitan Commuting Trends: 2000–2010, available at* http://www.newgeography.com/content/002500-major-metropolitan-commuting-trends-2000-2010

automobile-related carbon dioxide emissions among 66 regions surveyed.[13] The five other regions where over 10 percent of commuters used public transit (Washington, Chicago, Boston, Philadelphia, and San Francisco)[14] had emissions levels higher than those of New York, but lower than the national median.[15] By contrast, among the six regions surveyed where 1 percent or fewer of commuters used public transit,[16] all had automobile-related carbon dioxide emissions higher than the national median.[17]

Moreover, cities consistently created less carbon dioxide than suburbs: in every single one of the 66 cities surveyed, transportation-related carbon dioxide emissions (including both emissions from automobiles *and* emissions from transit) were higher in suburbs than in cities. For example, in New York, the city's per-household transportation emissions were 3,783 pounds fewer than those of the suburbs.[18]

Environmental benefits from walkable development are not limited to greenhouse gases. One study by several scholars found that if vehicle miles

[13] *See* Edward L. Glaeser and Matthew Kahn, *The Greenness of Cities*, http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/taubman/working_papers/glaeser_08_greencities.pdf. Even when public transit-related carbon dioxide emissions are added to this figure, New York's per-household emissions level of 24,467 was below the national median for driving-related emissions alone (26,744)

[14] *See* Cox, *supra*.

[15] *See* Glaeser & Kahn, *supra*, at 41. The most-polluting region of the five, Washington, emitted 25,918 pounds of automobile-related carbon dioxide per household; 28 of the 66 metropolitan areas created less pollution. *Id*.

[16] *See* Cox, *supra* (listing Memphis, Raleigh, Birmingham, Nashville, Oklahoma City, and Indianapolis as regions with transit shares of 1 percent or lower). Cox's tables also mention that only 1 percent of Jacksonville commuters used transit to get to work. *Id*. However, Glaeser and Kahn did not include emissions date for that region.

[17] *See* Glaeser and Kahn, *supra*, at 41. The lowest-emission region of this group, Memphis, produced more automobile-related emissions (28,440 pounds of carbon dioxide per household) than all but 16 of the 66 areas surveyed. The other five were Raleigh (29,922), Indianapolis (29,222), Birmingham (30,041), Nashville (30,495), and Oklahoma City (28,953). Glaeser and Kahn did not include statistics for Jacksonville, a seventh major metropolitan area where only 1 percent of commuters used transit to get to work. *See* Cox, *supra*.

[18] *See* Glaeser and Kahn, *supra*, at 44.

traveled in the 11 largest Midwestern regions decreased by 10 percent, the resulting decline in particulate matter[19] pollution would lead to 525 fewer pollution-related deaths and an even larger reduction in the number of hospital admissions, thus creating a societal savings of over $4.2 billion per year.[20] Another study found that the least compact American regions have 60 percent more high-ozone days than the most compact regions.[21]

It could be argued that because the most urban places (such as downtowns) tend to suffer from the highest levels of traffic congestion, urban places create more pollution than sprawling places.[22] But if this was true, the most compact places would have higher automobile-related greenhouse gas emissions than more sprawling cities, which (as noted above) appears not to be the case. Moreover, sprawl makes even urban places more polluted, to the extent that suburbanites drive into the city and create pollution.

It could also be argued that increased fuel efficiency will make these problems irrelevant in the future. This argument lacks merit for three reasons. First, average fuel economy has not always increased over time; between 1990 and 2004, average fuel economy actually declined because of the increased popularity of gas-guzzling light trucks.[23] Second, even cleaner cars still emit toxic levels of pollution. Today's average automobile is far cleaner than the car of 40 years ago, because cars emit less carbon monoxide, nitrous oxide, particulate mobile, and volatile organic compounds than they did in 1970.[24] Even so, about

[19] See American Trucking Associations, Inc. v. EPA, 283 F.3d 355, 359 (D.C. Cir. 2002) (particulate matter is "all solid particles and liquid droplets found in air" and is "associated with a range of adverse health effects such as coughing, shortness of breath, aggravation of existing respiratory conditions like asthma and chronic bronchitis, increased susceptibility to respiratory infections and heightened risk of premature death").

[20] *See* Maggie L. Grabow et. al., *Air Quality and Exercise-Related Health Benefits from Reduced Car Travel in the Midwestern United States*, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3261937/

[21] *See* Built and Natural, *supra*, at 90–93 (noting study, but adding that within regions, high-ozone areas sometimes more compact due to proximity to polluting industry).

[22] *See* GILLHAM, *supra*, at 114–15.

[23] *See* Built and Natural, *supra*, at 67.

[24] *Id*. at 57, 61 (describing these and other pollutants in more detail).

half of Americans live in counties with substandard air quality.[25] As a result, at least 130,000 Americans per year die prematurely due to ground-level ozone and particulate matter.[26] Third, infrastructure designed to accommodate cars also creates pollution. For example, parking lot construction and maintenance creates almost as much particulate matter emissions as cars themselves.[27]

Sprawl creates a variety of environmental harms unrelated to air pollution. For example, as farmland and forests are turned into suburbia, wetlands are destroyed to create suburban houses and businesses. The USA (excluding Alaska and Hawaii) lost 458,000 acres of wetlands per year during the 1950s and 1960s, 290,000 per year during the 1970s and 1980s, and 58,550 per year during the 1980s and 1990s.[28] Suburbanization causes 51 percent of wetland losses in the USA.[29] Wetlands mitigate flooding and remove pollutants from the water; thus, filling in wetlands may increase flooding and water pollution.[30] Because wetlands include 50 percent of the animals and 33 percent of the plant species listed as endangered or threatened by the US government,[31] wetland destruction endangers these species by reducing wildlife habitat.

In addition, sprawl may affect water quality. Rain falling on undeveloped land is usually absorbed into the ground.[32] By contrast, parking lots and roadways are "impervious"—that is, rain falling on such surfaces

[25] *Id.* at 59 (half of Americans live in counties that failed to meet government air quality standards).

[26] *Id.* at 60 (estimating 130,000 to 340,000 premature deaths).

[27] *See* Built and Natural, *supra*, at 58 (one "study that computed the lifecycle emissions of sulfur dioxide and PM10 for cars showed that adding parking lot construction and maintenance to the calculations raises emissions by as much as 24 percent and 89 percent"). Similarly, the construction of a mile of road "produces the equivalent of the annual carbon emissions of 20 U.S. households." *Id.*

[28] *Id.* at 36.

[29] *See* GILLHAM, *supra*, at 90.

[30] *See* Built and Natural, *supra*, at 36.

[31] *See* GILLHAM, *supra*, at 90.

[32] *Id.*

does not stay on the ground.[33] Instead, the rain runs off into rivers and streams—and when that happens, the rain carries oil, grease and rubbish from impervious surfaces into those waters.[34] This "runoff pollution" reduces water quality by increasing bacterial contamination of water and other forms of pollution.[35] A one-inch rainstorm on a meadow creates 218 cubic feet of runoff, while the same amount of runoff on a one-acre impervious surface creates 3450 cubic feet of runoff.[36] It logically follows that by increasing the number of parking lots, roads, and other impervious surfaces in a region, suburbanization increases the amount of runoff.

By contrast, if development is limited to existing urban spaces, impervious surface is limited to those spaces as well, which means less region-wide runoff. A subdivision developed at eight units per acre produces less than one-third as much runoff as a similar number of homes developed at one house per acre, [37] because the first set of homes affects less space and thus places impervious surfaces on less land. For example, a neighborhood with 50 residents or employees per acre requires 130 square feet of road

[33] *Id.* at 115 (describing runoff as "rainfall or snowmelt moving over and through the ground [that] can carry pollutants").

[34] *See* Douglas A. Mittenberger, *Development on the Banks of the Letort Spring Run: What Can Be Done to Save Pennsylvania's Waterways from Post Construction Stormwater Runoff*? 11 PENN ST. ENVTL. L. REV. 127, 127 (2002).

[35] *Id.* at 128 ("Studies of pollution in urban stormwater runoff, conducted by the United States Environmental Protection Agency (EPA) and others, have consistently identified stormwater runoff as one of the nation's largest remaining sources of water impairment."), 130 ("untreated stormwater runoff transports 40 to 80 percent of nutrient pollution into receiving waters, and bacterial contamination may be 10 to 100 percent greater in concentration than acceptable safe drinking water levels").

[36] *Id.* at 129.

[37] *See* Michael Byrne, *Greening Runoff: The Unsolved Nonpoint Source Pollution Problem, and Green Buildings as a Solution*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 145, 170 (2008) ("For a high-density development pattern of eight houses per acre, each house was estimated to produce 4950 cubic feet of runoff per year." while a "density of one house per acre would produce 18,700 cubic feet per year of runoff per unit").

per resident or employee, while one with five per acre requires 423 square feet of road per person.[38]

2.2 *The Progressive/Social Equity Perspective*

Progressives tend to believe that government should mitigate, rather than exacerbating, inequality. However, suburban sprawl increases such inequality in two ways.

First, suburbs often lack adequate public transit; as a result, nondrivers who live or work in suburbia cannot reach most jobs and other civic amenities. Even in the transit-friendly New York City region,[39] the average commuter can reach only 37 percent of metro area jobs by transit within 90 minutes, and only 22 percent of suburban jobs.[40] In more car-dependent regions, the situation is worse. For example, in Jacksonville, Florida, only 26 percent of urban jobs, and 7 percent of suburban jobs, are reachable by transit within 90 minutes.[41] This means that people too young, too poor, or too disabled to drive are virtually shut out of the labor market. For example, the overwhelming majority of welfare recipients owns no car, and thus are especially likely to suffer from inadequate public transit.[42]

Second, where cities and suburbs are in separate municipalities, the poor may suffer from higher taxes and reduced levels of government services. In a pre-suburban world, urbanites of all social classes shared the same tax base, parks, libraries and transportation systems—and this is still true in regions where cities have been able to annex large chunks of suburbia. But often, a

[38] *See* Smart Growth America, *The Fiscal Implications of Development Patterns: Roads in New Jersey* 3, http://www.smartgrowthamerica.org/documents/fiscal-implications-roads-in-new-jersey.pdf

[39] *See Cox, supra* (New York City has highest level of transit ridership in the USA).

[40] Brookings Institution, *New York-Northern New Jersey-Long Island-NY-NJ-PA, Missed Opportunity: Transit and Jobs in Metropolitan America*, http://www.brookings.edu/~/media/Series/jobs-and-transit/NewYorkNY.PDF

[41] Brookings Institution, *Jacksonville, FL Metro Area*, http://www.brookings.edu/~/media/Series/jobs-and-transit/JacksonvilleFL.PDF

[42] *See* Nicole Stele Garnett, *The Road from Welfare to Work: Informal Transportation and the Urban Poor*, 38 HARV. J. ON LEGIS. 173, 183 n. 61 (2001) (citing estimates ranging from 6 percent to 45 percent).

central city is a small and impoverished part of a large region. For example, Detroit's per capita income is only 52 percent of that of its suburbs.[43] Even relatively affluent cities like New York and Washington have lower median incomes than their average suburb.[44]

Poverty rates also tend to be much higher in cities. For example, 36 percent of Detroit residents have poverty-level incomes, as opposed to 11 percent of suburbanites.[45] Although Detroit is an extreme case, the national urban poverty rate is nearly twice that of suburbia.[46]

And where a city is poor, it has a smaller tax base, which means it must choose some mix of reduced public service and higher taxes. So as a result, central cities tend to have higher taxes than their suburbs.[47] The poorest municipalities suffer the most: for example, Detroit's property tax base per resident is less than one-third that of the average suburb,[48] and its property tax rate is 70 percent higher.[49] As a result of Detroit's weak tax base, public services suffer: its transit system, for example, is infamous for buses that break down, forcing riders to wait for hours.[50]

It could be argued that these harms are outweighed by the benefit of cheaper housing, because as more suburban land is opened up for development, housing supply increases, thus lowering regionwide housing

[43] *See* DAVID K. HAMILTON, GOVERNING METROPOLITAN AREAS: GROWTH AND CHANGE IN A NETWORKED AGE 59 (2014).

[44] *Id.* at 60 (city income 78 percent of suburban income in New York, and 82 percent in Washington).

[45] *See* GEORGE GALSTER, DRIVING DETROIT: THE QUEST FOR RESPECT IN THE MOTOR CITY 61 (2014).

[46] *See* ELIZABETH KNEEBONE AND ALAN BERUBE, CONFRONTING SUBURBAN POVERTY IN AMERICA 35 (2013).

[47] *See* Roy Bahl et. al., *Central City-Suburban Fiscal Disparities*, 20 PUB. FIN. Q. 420, 425 (1992) (taxes per capita 1.25 times higher in central cities than in suburbs).

[48] *See* GALSTER, *supra*, at 235.

[49] *See* GALSTER, *supra*, at 235 (Detroit's "property tax rate of $68 per thousand dollars of assessed property value was $28 higher than the metro-wide median", implying that median was $40).

[50] LEWIS D. SOLOMON, DETROIT: THREE PATHWAYS TO REVITALIZATION 34 (2014) (riders "often wait hours for overcrowded buses that break down too often").

Table 1.1 Transportation costs for most and least car-dependent cities

	Percent of commuters driving to work[51]	*Household transportation costs as percentage of income*[52]
Most car-dependent large cities		
Fort Worth	92.3	22
Indianapolis	92.0	23
Jacksonville	91.6	23
Memphis	90.9	25
Nashville	90.8	23
Least car-dependent large cities		
New York	28.7	9
Washington	43.1	10
Boston	44.7	11
San Francisco	46.4	11
Philadelphia	59.8	14

prices. [53] However, this argument overlooks the impact of transportation costs on low-income households. As noted above,[54] sprawling places by definition are places where automobiles are mandatory for a normal life. Automobiles impose significant costs on households—not just the cost of purchasing the vehicle (which a household can partially avoid by purchasing used vehicles) but also the costs of gasoline, insurance, and maintenance. These costs can outweigh the benefits of cheaper housing. Table 1.1 compares household transportation costs for the five least car-dependent cities to similar costs for the five most car-dependent cities.

Similarly, within metropolitan regions, suburbs are often more expensive than housing costs might suggest due to the cost of car ownership.

[51] Data are from The Transport Politic, *Transit Mode Share Trends Looking Steady; Rail Appears to Encourage Non-Automobile Commutes*, http://www.thetransportpolitic.com/2010/10/13/transit-mode-share-trends-looking-steady-rail-appears-to-encourage-non-automobile-commutes/ ("Mode Share").

[52] Data are from the Center for Neighborhood Technology, *H & T Fact Sheet*, http://htaindex.cnt.org/fact-sheets/. For information on each city, place the city's name in the search engine.

[53] *See, e.g.* Matthew Kahn, *Does Sprawl Reduce the Black/White Housing Consumption Gap*? 12 HOUSING POLICY DEBATE 77, 84 (2001).

[54] See Chapter I-1 *supra*.

Table 1.2 compares urban cities and counties to suburban counties in several regions.[55]

Table 1.2 shows that cities have lower transportation costs than suburbs, at least for a household spending the median amount of money on cars and housing—and even within the pool of suburbs, the most car-dependent suburbs are more costly than suburbs with better public transit.

Indeed, if this were not the case poor people would generally live in suburbs, because the cost of car ownership would be outweighed by the benefit of cheaper housing. But in fact, cities tend to have higher poverty rates than suburbs, and even the median incomes of relatively prosperous cities like New York lag behind those of their suburbs.[56]

Moreover, the argument that sprawl creates affordability may create a self-fulfilling prophecy; policies designed to open up rural land for suburban development may reduce the supply of urban housing, thus making more suburban development necessary to keep housing costs down. For example, suppose a city razes 20,000 homes in order to build a highway to suburbia.[57] Other things being equal, the city has just reduced its own housing supply, thus raising rather than lowering urban housing costs. To make up for the lost housing units, the city (or the private sector) must build new housing somewhere—and once the highway has been built, suburbia is the logical place.

The above discussion assumes that housing costs are in fact higher in cities: something that is certainly true in high-cost central cities like New York and San Francisco, but is not true everywhere. In population-losing cities such as St. Louis and Buffalo, housing is often cheaper

[55] *Id. See also* URBAN LAND INSTITUTE, BELTWAY BURDEN: THE COMBINED COST OF HOUSING AND TRANSPORTATION IN THE GREATER WASHINGTON DC METROPOLITAN AREA 4–5, http://uli.org/wp-content/uploads/ULI-Documents/BeltwayBurdenDC_FINAL_COMP.pdf (listing housing and transportation costs for a wide variety of Washington suburbs; median Loudoun County household spent over $46,000 annually on housing and transportation combined, while residents of District of Columbia spent under $30,000 per household).

[56] *See supra* note 44 and accompanying text.

[57] *See infra* Chapter 2-1.2 (such policies common in 1960s).

Table 1.2 Transportation costs in cities and suburbs

	Percentage of workers using public transit	*Household transportation costs as percentage of income*
New York City vs. its suburbs		
Manhattan	64	5
Kings County (Brooklyn)	60	9
Queens County	47	11
Westchester County	14	18
Suffolk County	4	21
Atlanta vs. its suburbs		
Atlanta downtown	25	14
Atlanta city (total)	14	18
DeKalb County	8	21
Cobb County	4	23
Cherokee County	1	25
Philadelphia vs. its suburbs		
Philadelphia (downtown only)	57	9
Philadelphia (total)	30	14
Delaware County	13	18
Montgomery County	6	20
Chester County	3	22
Portland, OR vs. its suburbs		
Portland (downtown)	25	13
Portland (total)	12	19
Washington County	5	21
Yamhill County	1	24
Washington and its suburbs		
Washington, DC (downtown)	46	7
Washington, DC	31	10
Arlington, VA	24	11
Montgomery County, MD	10	14
Fairfax County, VA	8	14
Loudon County, VA	4	16

in cities than in suburbs.[58] In such places, suburban sprawl causes the central city to be cheaper, but also causes the central city to decay. Admittedly, these central cities have lower housing costs than high-cost cities—but their residents suffer from the intangible cost of neighborhood decay, and the more tangible costs that come from needing a car to commute to often-suburban jobs. For example, city residents in both Buffalo and St. Louis pay 19 percent of their incomes for transportation,[59] nearly twice as much as residents of healthier cities such as San Francisco and New York.[60]

2.3 The Public Health Perspective

American suburbs are often highly uncomfortable for pedestrians. For example, many suburbs have streets so wide that they cannot be safely and comfortably crossed,[61] or are so spread out that housing is rarely within walking distance of shopping.[62] In addition, these suburbs frequently have minimal public transit,[63] so even suburbanites who can walk to neighborhood amenities might not be able to reach other neighborhoods without a car. These realities may explain why "almost three-quarters of Americans feel they have no choice but to drive as much as they do."[64] The automobile dependence of sprawl has two negative health impacts: a higher risk of diseases related to lack of exercise, and a higher risk of death from car crashes.

[58] For example, in Buffalo housing costs are only 20 percent of regional household income- lower than in suburbs such as Tonawanda (23 percent), Cheektowaga (25 percent), Orchard Park (33 percent) and Clarence (31 percent). Similarly, in St. Louis, housing costs are 21 percent of income, substantially lower than in suburban St. Louis County (31 percent) *See* H&T Fact Sheet, *supra*.

[59] *Id*.

[60] *See* Table 1.2 *supra*

[61] *See infra* Chapter 4-4 (discussing issue in more detail).

[62] *See infra* Chapter 4-2 (discussing issue in more detail).

[63] *See supra* notes 39–41 and accompanying text (suburban jobs less reachable by public transit).

[64] NATIONAL ACADEMY OF SCIENCES, PHYSICAL ACTIVITY: MOVING TOWARDS OBESITY SOLUTIONS: WORKSHOP SUMMARY 81 (2015) ("Physical") (describing Smart Growth America survey).

2.3.1 *Sprawl = Less Walking = Worse Health*

The Surgeon General has advised that persons who engage in 150 minutes of moderate-intensity activity (such as walking) per week reduce their risk of obesity and other weight-related problems.[65] If people cannot easily walk to most destinations they will obviously engage in less physical activity, all else being equal.[66] So it should not be surprising that people in less walkable areas are more likely to be obese and to suffer from diabetes and other obesity-related diseases.[67] For example, one study by three Arizona State University scholars created a "walkability index" (measuring the distance of churches, schools, and entertainment from neighborhoods studied)[68]and found that a "1 percent increase in the walkability index of a neighborhood is associated with a 50 percent reduction in the likelihood that it will belong to a high disease as opposed to a low disease cluster for obesity . . . 49 percent lower likelihood for

[65] *See* US DEPARTMENT OF HEALTH AND HUMAN SERVICES, STEP IT UP! THE SURGEON GENERAL'S CALL TO ACTION TO PROMOTE WALKING AND WALKABLE COMMUNITIES 1 (recommending that adults get 150 minutes per week of physical activity, and describing walking as "an excellent way for most people to increase their physical activity."), http://www.surgeongeneral.gov/library/calls/walking-and-walkable-communities/call-to-action-walking-and-walkable-communites.pdf ("Surgeon General").

[66] *See* Physical, *supra*, at 93 (citing study showing that "people who live in 'walkable' neighborhoods are active 5 to 7 more minutes every day than those who do not live in such neighborhoods . . . [this] amounts to about 50 minutes or 2 miles of additional walking weekly").

[67] *See, e.g.*, Vanessa Russell-Evans & Carl S. Hacker, *Expanding Waistlines and Expanding Cities: How the Adoption of Smart Growth Statutes can Help Build Healthier and More Active Communities*, 29 VA. ENVTL. L.J. 63, 75–88 (2011); Falk Muller-Riemenschneider et. al., Neighborhood Walkability and Cardiometabolic Risk Factors in Australian Adults, 13 BMC PUB. HEALTH 755 (2013), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3844350/; Vasudha Lathey et. al., *The Impact of Subregional Variations in Urban Sprawl on the Prevalence of Obesity and Related Morbidity*, 29 J. PLANNING EDUCATION & RESEARCH 127, 137, 139–41 (2009) http://jpe.sagepub.com/content/29/2/127.full.pdf+html (finding that "walkability . . . is the strongest predictor of disease prevalence" and citing numerous other studies).

[68] *Id*. at 132.

diabetes, 39 percent lower likelihood for hypertension, and 40 percent lower likelihood for heart disease."[69]

It could be argued that even if city residents are less obese than suburbanites, this is because of self-selection: people who do not like to exercise move to the suburbs. But this argument seems implausible to me, because people move to suburbs for a wide range of reasons: for example, their jobs might be in the suburbs, they might prefer suburban schools, or they may live in a metro area where all but a few expensive city neighborhoods are crime-ridden. A related claim is that suburbs tend to be more popular among older people and/or families who lack the time to exercise. But in fact, neighborhoods with large numbers of older people are not significantly more likely than other neighborhoods to have high obesity levels.[70]

It could also be argued that cultural habits such as questionable diets are more important than exercise in causing obesity and diabetes.[71] But one factor does not exclude the other: just because factor A is more important than factor B does not mean that factor B is not also worth addressing.

2.3.2 Death by Vehicle

Sprawling, automobile-dependent cities tend to have more automobile-related deaths. Car-dependent places are more dangerous for drivers because driving is like a lottery: just as a gambler who enters a lottery five times is more likely to win a prize than one who enters twice, a motorist who drives twice a day is more likely to be harmed in a crash than one who drives twice a week or twice a month. The automobile-oriented USA has

[69] *Id.* at 134.

[70] *Id.* at 133–34 (although neighborhoods with older populations tend to be at high risk for chronic diseases, this effect is "least important for obesity, which has a high prevalence rate among younger people also.")

[71] Undoubtedly, poverty tends to correlate with obesity. *Cf.* Community Commons, *DC Obesity Rate by Ward*, http://maps.communitycommons.org/viewer/?action=open_map&id=8526 (parts of Washington with highest unemployment rates also tended to have highest levels of obesity). However, walkable urban areas tend to suffer from less obesity when one controls for poverty rates. *See* Michael Lewyn, *Even Controlling for Poverty, Urban Places are Thinner than Suburbs*, at http://www.planetizen.com/node/66606 (citing examples).

Table 1.3 Car-dependent metropolitan areas[72] and car crash rates

	Percentage of commuters driving to work[73]	*Car crash deaths per 100,000 people*[74]
Most car-dependent regions		
Riverside	93.1	10.6
Detroit	92.5	7.5
Dallas	91.5	9.8
Kansas City	91.3	10.6
St. Louis	91.2	10.6
Least car-dependent regions		
New York	57.4	5.1
San Francisco	72.0	5.6
Boston	76.5	5.0
Washington	76.7	7.5
Chicago	79.7	5.9

traffic fatality rates far above those of European nations where cars are less dominant,[75] and within the USA, the most car-dependent places have the highest death rates. Table 1.3 compares death rates from the most car-dependent metropolitan areas with those in the least car-dependent metro areas.

Clearly, the most car-dependent regions have the most traffic deaths: the safest of the five most car-oriented metropolitan areas (Detroit) has 7.5 traffic deaths per 100,000 residents, a level equalled by only one of the five least car-dependent regions (Washington). The other four car-dependent regions had between 9.8 deaths and 10.8 deaths per 100,000 residents, far above the level of *any* of the least car-dependent regions.

[72] This table, unlike Table 1.1, focuses on metropolitan areas rather than cities, because fatality-related data is easier to find for regions than for cities. *Cf.* Scott R. Kegler et. al., *Motor Vehicle Crash Deaths in Metropolitan Areas—United States*, 2009, MORBIDITY & MORTALITY WKLY. REPORT, July 20, 2012, at 523. http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6128a2.htm (containing data for all major metropolitan areas but not for all cities).

[73] *See* Mode Share, *supra* (containing data).

[74] See Kegler, *supra*, at 524–26.

[75] See JEFF SPECK, WALKABLE CITY: HOW DOWNTOWN CAN SAVE AMERICA ONE STEP AT A TIME 45 (2012).

Table 1.4 Pedestrian deaths and car-dependent regions

	Percentage of commuters driving to work[76]	*Pedestrian deaths per 100,000 people*[77]
Most car-dependent regions		
Riverside	93.1	1.8
Detroit	92.5	1.5
Dallas	91.5	1.3
Kansas City	91.3	1.1
St. Louis	91.2	1.2
Least car-dependent regions		
New York	57.4	1.8
San Francisco	72.0	1.3
Boston	76.5	1.0
Washington	76.7	1.4
Chicago	79.7	1.0

To the extent data are available for regional central cities, this pattern persists: the central cities of the car-dependent regions listed above had between 8 and 12.6 traffic deaths per 100,000 people,[78] while the central cities of the less car-dependent regions had between 3.9 and 6.0 traffic deaths per 100,000 people.[79] In sum, it seems clear that the more you drive, the more risk you assume.

This risk is not limited to drivers. Table 1.4 compares pedestrian death rates in car-dependent regions to death rates in places where transportation options are more plentiful.

At first glance, Table 1.4 implies that there is little difference between the least car-oriented and the most car-oriented regions. But in a place with more nondrivers, people obviously walk more than in a city where nearly

[76] *See* Mode Share, *supra* (containing data).

[77] *See* SMART GROWTH AMERICA AND NATIONAL COMPLETE STREETS COALITION, DANGEROUS BY DESIGN 2014. at 4–5, http://www.smartgrowthamerica.org/documents/dangerous-by-design-2014/dangerous-by-design-2014.pdf ("Dangerous").

[78] *Id*. Similarly, the car-dependent cities listed in Table 1.1 *supra*. all had unusually high car crash death rates, ranging from 8.8 per 100,000 (Fort Worth) to 17.4 per 100,000 (Memphis). *Id*.

[79] *Id*. However, no data were available for the city of Boston.

Table 1.5 Car-dependent regions and pedestrian danger

Most car-dependent regions[80]	*Pedestrian Danger Index*[81]
Riverside	102.1
Detroit	111.6
Dallas	107.5
Kansas City	85.7
St. Louis	69.7
Least car-dependent regions	
New York	28.4
San Francisco	31.4
Boston	18.6
Washington	44.0
Chicago	32.9

everyone drives to work—so if these two types of regions were equally safe, one would expect the more walkable areas to have *higher* death rates. The fact that their death rates are equal suggests that the car-oriented regions have higher per-pedestrian death rates.

In fact, Smart Growth America has created a "Pedestrian Danger Index" to account for this distinction. The "Pedestrian Danger Index" divides the pedestrian death rate per 100,000 by the percentage of commuters walking to work, thus controlling for the higher number of pedestrians in the most walkable regions. Table 1.5 shows the results.

When one controls for pedestrian activity (as measured by the number of pedestrian commuters), it seems that the car-dependent regions are far more dangerous for pedestrians. The least dangerous of the five most car-dependent regions, St. Louis, had a "Pedestrian Danger Index" of 69—more than 50 percent higher than the *most* dangerous of the least sprawling regions.

In sum, suburban sprawl endangers public health in two ways: by decreasing exercise, and by increasing car traffic and the dangers resulting therefrom.

[80] *See* Table 1.4, *supra* (defining most and least car-dependent regions)

[81] *See* Dangerous, *supra*, at 4–5.

2.4 The Libertarian/Conservative Perspective

Generally, conservatives and libertarians have been critical of attempts to limit sprawl, at least partially because of fears that anti-sprawl laws might limit landowners' freedom to develop rural and suburban land.[82] But even if such growth control policies are misguided, conservatives and libertarians should support more market-oriented means of limiting sprawl. Sprawl threatens two conservative values: consumer choice and limited government.

2.4.1 Sprawl vs. Consumer Choice

Conservatives and libertarians prefer free markets to government regulation, because markets, unlike even the most democratic public decision-making, provide unanimity without conformity.[83] While political decision-making imposes the desires of a majority upon everyone, markets allow every person to satisfy his or her own individual preferences.

But sprawl, like centralized government planning, creates conformity. In the most car-dependent cities and regions, nearly all residents of a sprawling region must use an automobile to reach jobs and other destinations. This is the case for two reasons. First, as noted above, many jobs (especially suburban jobs) are not accessible by public transit from most residences.[84] The mismatch between public transit and jobs is in large part a result of government planning: for example, government builds highways that make

[82] *See, e.g.* BENJAMIN ROSS, DEAD END: SUBURBAN SPRAWL AND THE REBIRTH OF AMERICAN URBANISM 144–46 (2014) (describing conservatives' opposition to anti-sprawl growth controls, and criticizing their failure to attack pro-sprawl zoning with equal vigor); Zoe Prebble, *Anti-Sprawl Initiatives: How Complete is the Convergence of Environmental, Desegregationist, and Fair Housing Interests?*, 30 BUFF. PUB. INT. L.J. 197, 211–12 (2011–12) ("Efforts to combat sprawl are often met with protest, with claims of infringement of property rights . . . conservatives are often skeptical of anti-sprawl policies"); Robert Cervero, *Growing Smart by Linking Transportation and Urban Development*, 19 VA. ENVTL. L.J. 357, 359 (2000) ("Libertarians argue that [sprawl] supports the lifestyle preferences of the middle class").

[83] *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 14–15, 23 (1982 ed.) (using phrase).

[84] *See supra* notes 39–41 and accompanying text.

suburban development convenient,[85] but often does not build significant public transit to the suburbs created by those highways.

Second, sprawl also prevents walking from being a practical alternative to driving in many places—again because of government intervention. American street design often makes walking uncomfortable and even dangerous, because state and local governments build commercial streets that are often too wide to be safely crossed on foot.[86] And these wide streets encourage high-speed vehicle travel that is dangerous for pedestrians: a collision with a car going 40 miles an hour is far more likely to be fatal than a collision with a car going 20 miles per hour.[87] In addition, many workplaces and stores are kept far from sidewalks by driveways and parking lots—again due to government regulation, which often requires businesses to be set back far from streets and to build huge parking lots.[88] As a result, any pedestrian who succeeds in crossing the wide streets of suburbia must waste additional time walking through a parking lot.

Thus, government spending and regulation vigorously encourages Americans to drive to most destinations: public transit is convenient to few jobs, and government designs neighborhoods in ways that exclude nondrivers.

2.4.2 *Sprawl Makes Government More Expensive*

Generally, conservatives favor a leaner government than do progressives. But sprawl makes government more expensive and intrusive in several ways.

[85] *See infra* Chapter. 2-1 (describing growth of government highway spending in twentieth century).

[86] *See* ROSS, *supra*, at 86 (suburbs strung together by "wide highways that no one walks"); *infra* Chapter 4-4.1 (explaining in more detail why suburbs unwalkable).

[87] *See* Bob Previdi, *Make Philly safer for bicyclists, pedestrian*s, PHILADELPHIA INQUIRER, JUNE 26, 2015, http://www.philly.com/philly/blogs/thinktank/Make-Philly-safer-for-bicyclists-pedestrians.html (adding that this is true for cyclists as well as pedestrians). In this book, I have not distinguished between the needs of pedestrians and bicyclists, since most anti-pedestrian policies discussed in this book also harm bicyclists. In a place with lots of high-speed traffic and extremely low population density, bicycling is more inconvenient (because destinations are far apart) and dangerous (because high-speed vehicles create a high risk of death to bicyclists just as they create a high risk of death to pedestrians).

[88] *See infra* Chapter 4-3.

First, by tying employment to car ownership, sprawl makes Americans more dependent on government assistance. As noted above, the poorest Americans often cannot afford to purchase and maintain automobiles.[89] Where cars are necessary to reach most jobs, these Americans are less employable and thus more likely to become dependent on government for subsistence.

Second, sprawl is likely to lead to higher taxes in urban centers. As noted above, central cities usually have a disproportionate share of regional poverty,[90] thus causing them to have weaker tax bases, which leads, other things being equal, to higher taxes. In turn, tax increases drive out middle-class voters who are likely to be fiscal conservatives, thus causing city governments to be dominated by pro-tax liberals,[91] thus leading to additional taxes.

Third, sprawl ultimately creates similar problems in suburbia. As a suburb (or, for that matter, a city with undeveloped land) grows, it builds roads and other infrastructure for its population. At first, this infrastructure is supported by tax revenue from new suburban residents and the businesses who serve them. But at some point, the suburb will run out of undeveloped land. At that point, the suburb must pay for the maintenance of all that aging infrastructure—but without the tax revenues caused by new growth, its costs grow while its revenue remains stagnant, causing higher tax rates.[92] If sprawl continues unabated, new development spreads into adjacent jurisdictions, leaving the suburb helpless to avoid the same vicious cycle as the central city. By contrast, if sprawl stops and the suburb builds more densely (i.e., places more taxpaying businesses on its existing land) the tax base can grow again.

Admittedly, infrastructure must be repaired in compact cities as well. However, sprawl is more expensive because it consumes more land. Each additional mile of sprawl means longer roads and longer water and sewer pipes, and thus more government spending on these amenities. According

[89] *See supra* note 42 and accompanying text.

[90] *See supra* notes 45–49 and accompanying text.

[91] *Cf.* Michael Lewyn, *Suburban Sprawl: Not Just An Environmental Issue*, 84 MARQ. L. REV. 301, 354–55 (2000) (describing decline in urban support for Republicans over recent decades) ("Sprawl Environmental").

[92] *See* Charles Marohn, *The Small Town Ponzi Scheme*, http://www.strongtowns.org/journal/2009/2/3/the-small-town-ponzi-scheme.html (setting forth argument in more detail, but mostly in the context of isolated small towns).

to Robert Burchell of Rutgers University, more compact growth patterns would reduce road spending by 12–26 percent over a five-year period, and water/sewer spending by just over 6 percent.[93]

Finally, if (as I have suggested above) [94] car ownership is effectively mandatory for most Americans because of government policies, the cost of car ownership is effectively a government-imposed tax for those who might prefer to avoid such costs. The average American household spends almost $8500 per year on car-related expenses, including purchases, fuel, maintenance, and insurance.[95] This "tax" is especially burdensome for lower-income households; households earning less than $12,000 per year spend 36 percent of their income on transportation, as opposed to 14 percent for higher-income households.[96]

None of this means that conservatives and libertarians should support the most intrusive anti-sprawl policies (such as land use regulations prohibiting suburban development). But it does mean that they should support more market-oriented anti-sprawl policies, such as those discussed in upcoming chapters.

[93] *See* RAY TOMALTY AND ALLAN MALLACH, AMERICA'S URBAN FUTURE: LESSONS FROM NORTH OF THE BORDER 19 (2016).

[94] *See supra* notes 84–88 and accompanying text.

[95] *See* PROQUEST, STATISTICAL ABSTRACT OF THE UNITED STATES 2016, Table 706, at http://statabs.proquest.com/sa/index.html ("2016 ABSTRACT") (average household spends just over $9073 per year on transportation; because $581 per year spent on public transit, average household's car-related expenses total $8492).

[96] *See* Katherine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797, 1822 (2007).

CHAPTER 2

Sprawl As Where We Grow: Or, How Government Spreads Suburbia

Abstract Defenders of suburbanization argues that it is a result of consumer choice, and that what the market has put together, government should not tear asunder. But in fact, sprawl is a result of a variety of government policies, such as highway spending that facilitated suburban commuting, school residency requirements that force city residents into poverty-packed public schools while creating homogenously affluent suburban schools, and federal housing policies that favored suburbanites over city residents. This chapter also suggests a variety of market-oriented, anti-sprawl reforms, such as reducing government highway spending and allowing urban parents to opt out of urban public schools.

Keywords Highways · School Desegregation · Vouchers · Public Housing

Between 1900 and 1950, every American city with over 500,000 people gained population.[1] But in the late twentieth century, the rise of sprawl transformed American cities. Of the 18 American cities that had over

[1] *See* SARAH JANSSEN, ED., THE WORLD ALMANAC AND BOOK OF FACTS 2016, at 614 (1950 data), 623–45 (2010 data) (2016).

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500,000 people in 1950, all but four lost population between 1950 and 2010.[2] St. Louis has lost nearly two-thirds of its 1950 population, and Detroit, Cleveland, Pittsburgh, and Buffalo lost more than half.[3] Even among cities that have gained population, some have done so only by annexing newly developed areas that would be considered suburbs in other cities.[4] As cities became smaller, they became poorer. In 1950, most cities had about the same median income as their suburbs.[5] By contrast, by 2010 the urban poverty rate was twice that of suburbia,[6] and even fast-growing cities like Houston have more poverty than their suburbs.[7]

Why have central cities become less desirable than suburbs? State and federal policy has encouraged suburbanization through transportation, education, and housing policy.[8]

[2] The four exceptions were New York, Los Angeles, Houston, and San Francisco. *Id*. Two of these four (New York and San Francisco) lost population for decades but bounced back after 1980. *Id*. One of the other two (Houston) gained population only because it annexed vast amounts of territory after 1950. *See* ALAN BERUBE ET. AL., REDEFINING URBAN AND SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000 at 61–62 (2006). I note, however, that there has been a modest reversal of sprawl over the past decade or so: of the 14 population-losers, 3 (Boston, Philadelphia, and Washington) gained population between 2000 and 2010. *See* JANSSEN, *supra*, at 614, 623–45.

[3] *Id*. at 614.

[4] *See* Nathaniel Baum-Snow, *Did Highways Cause Suburbanization*? 122 QUARTERLY J. ECON. 775, 777 (2007) (although large American central cities gained population between 1950 and 1990, they lost 17 percent of their population if post-1950 annexations are excluded).

[5] *See* DAVID RUSK, CITIES WITHOUT SUBURBS: A CENSUS 2010 PERSPECTIVE 47 (2013).

[6] *See supra* Chapter 2-1, 2, 3 and accompanying text.

[7] RUSK, *supra*, at 49 (city of Houston had poverty rate almost 50 percent higher than its suburbs).

[8] I note that these are not the only policy areas in which government policy is relevant to sprawl; however, they seem to me to areas where governmental favoritism toward suburbs has been most blatant and most important. It could be argued, for example, that the tax code favors suburbia in a variety of ways—for example, by not taxing gasoline enough to account for the harmful environmental effects of automobile traffic. But since it is impossible for a tax code to be truly neutral, I am not sure it makes sense to say that the tax code favors sprawl.

1 Transportation: Sprawl-Generating Highways

At the dawn of the twentieth century, state and local governments began to build new roads, often subsidized through taxes levied on the public as a whole, such as local property taxes.[9] By contrast, streetcar systems were then private and unsubsidized.[10] In fact, government crippled streetcar systems by not allowing streetcar fares to rise with inflation.[11]

In the 1920s, most states adopted motor fuel taxes, and earmarked the revenue from these taxes to fund highway construction.[12] By 1927, one-third of state assistance to local government was for highway construction.[13] In 1921, the federal government also began to support highway building, by enacting a Federal Highway Act that designated 200,000 miles of road as eligible for federal matching funds.[14] By 1950, government was funneling $4.6 billion into highways while spending almost nothing on transit.[15] In 1958, the federal government encouraged additional construction through the Interstate Highway Act,[16] which created the 41,000-mile Interstate Highway System.[17] Under the act, the federal government paid 90 percent of highway construction costs, while states only paid 10 percent.[18] By contrast, the federal government did not begin to support public

[9] *See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 163 (1985).

[10] *See* Alewine v. City Council of Augusta, 699 F.2d 1060, 1068 (11th Cir. 1983) (until about 1960, most public transit systems privately owned).

[11] *See* PAUL WEYRICH & WILLIAM S. LIND, CONSERVATIVES AND PUBLIC TRANSIT: IS IT TIME FOR A NEW LOOK? 10 (1996).

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

[13] *Id.*

[14] *See* Sprawl Environmental, *supra*, at 313.

[15] *See* WEYRICH & LIND, *supra*, at 10.

[16] Interstate Highway Act, Pub. L. No. 85–767, 72 Stat. 885 (1958).

[17] *See* JAMES HOWARD KUNSTLER, THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE 106–07 (1993).

[18] *See* Movement Against Destruction v. Volpe, 361 F. Supp. 1360, 1367 (D. Md. 1973); JOHN NORQUIST THE WEALTH OF CITIES 153 (1998).

transit until 1965.[19] Today, the federal government alone spends $45 billion per year on highways,[20] while state and local governments spend roughly $120 billion.[21]

Highway spending has promoted sprawl in two ways: by making suburban life more convenient, and by destroying urban neighborhoods.

1.1 How Highways Made Suburbs More Popular

Highways have accelerated suburbanization by making it easier for people to live far away from urban jobs: a 20-mile commute will, other things being equal, take less time on a modern expressway than on a two-lane dirt road (or even a two-lane paved road). Nathaniel Baum-Snow of Brown University has calculated that, after controlling for region size and income, each new highway reduces central city population to fall by about 18 percent,[22] and that had the interstate highway system not been built, American central city population would have grown by 8 percent (rather than declining by 17 percent).[23]

Consumer surveys also suggest that highways affect housing choices. A 2013 survey by the National Association of Realtors asked Americans which factors were most important in deciding where to live. Out of 19 factors listed, "easy access to the highway" was fourth: 67 percent said that

[19] *See* Office of Management and Budget, *Fiscal Year 2016 Historical Tables: Budget of the United States Government*, Table 9.6, at https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/hist.pdf ("Tables").

[20] *Id*. By contrast, the federal government spends $17 billion per year on transit and intercity railroads combined. *Id*. Similarly, state and local governments spend more than twice as much on roads as on public transit. *See* Congressional Budget Office, *Public Spending on Transportation and Water Infrastructure, 1956 to 2014*, at 8 (highway spending at all levels of government is $165 billion, while transit spending is $65 billion), at https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49910-Infrastructure.pdf ("Infrastructure").

[21] *Id*. (total government highway spending is $165 billion; thus, if federal government spends $40 billion per year, state and local spending is $125 billion).

[22] *See* Baum-Snow, *supra*, at 776.

[23] *Id*.

this factor was either "very important" or "somewhat important."[24] Thus, highways clearly make suburbs more attractive to commuters.

Moreover, the location of highways predicts the location of suburbs.[25] For example, after Austin, Texas, built a north–south highway (I-35) in the 1950s, most late twentieth-century development occurred along the highway, rather than in an east–west direction.[26]

1.2 Highways vs. Cities

By contrast, highways made cities less attractive by destroying city neighborhoods. During the 1950s and 1960s, millions of dwellings were destroyed to make room for highways and other "urban renewal" schemes[27]—mostly in low-income and African-American urban neighborhoods.[28] For example, nearly 20 percent of Baltimore's African-Americans were displaced to make room for I-95 and I-83,[29] and 19,000 Cleveland residents were displaced to make room for downtown freeways.[30]

Such displacement made cities less desirable and more depopulated in three ways. First, in the short run, poor African-Americans displaced by highways flooded nearby neighborhoods, creating "white flight" from the latter

[24] National Association of Realtors and American Strategies, *National Community Preference Survey October 2013*, Slide 35, at http://www.realtor.org/sites/default/files/reports/2013/2013-community-preference-analysis-slides.pdf. *See also* Sprawl Environmental, *supra*, at 321 (citing similar 1999 survey).

[25] *See* Baum-Snow, *supra*, at 11 (suburbs and newer city neighborhoods "near highways built between 1970 and 1990 had faster population growth than other areas.")

[26] *Id.* at 10.

[27] *See* BERNADETTE HANLON ET. AL., CITIES AND SUBURBS: NEW METROPOLITAN REALITIES IN THE UNITED STATES 40–42 (2010) (330,000 housing units demolished to make room for highway construction; in addition, two million people were displaced to make room for federally funded public housing).

[28] *Id.* at 40.

[29] *See* Lee R. Epstein, *Where Yards Are Wide: Have Land Use Planning and Law Gone Astray?* 21 WM. & MARY ENVTL. L. & POL'Y REV. 345, 370 (1997). *See also* HANLON ET. AL., *supra*, at 42 (citing numerous other examples).

[30] *See* Sprawl Environmental, *supra*, at 316.

neighborhoods. For example, in Cincinnati the construction of I-75 displaced African-American residents of the city's west end, who then moved to nearby Mount Auburn, which shifted from 84 percent white in 1960 to 74 percent black in 1970.[31] Second, neighborhoods bisected by highways became less desirable. For example, Claiborne Avenue, the main street of Treme (a New Orleans neighborhood) had a 6100-foot-long median before the construction of I-10—but after I-10 bisected the neighborhood, the avenue's median had become a strip of dirt overshadowed by the highway,[32] and the neighborhood quickly declined.[33] Third, highways consume urban land, and thus reduce the supply of land available for housing and businesses even in more desirable areas.

1.3 Counterarguments

It could be argued that highways did not cause sprawl because suburbanization was already well under way by the time the interstate highways were built in the 1960s.[34] This argument lacks merit, for two reasons. First, government at all levels had supported highway construction long before the interstate highways were built; [35] thus, pre-1960 suburbanization does not preclude a relationship between highways and sprawl. Second, cities declined far more rapidly after 1958 (when the Interstate Act was passed) than in earlier decades. Table 2.1 compares pre- and post-Interstate population data for the 18 American cities with over 500,000 people in 1950.

As Table 2.1 shows, large cities lost population most rapidly in the decades after the 1958 passage of the Interstate Act.

Ronald Utt of the Heritage Foundation has suggested that highways did not cause urban decline because "[u]ntil the 1970s, federally funded highways

[31] *Id.*

[32] *See* Beverly H. Wright, *New Orleans Neighborhoods Under Siege*, in JUST TRANSPORTATION 121, 132–34 (Robert D. Bullard and Glenn S. Johnston eds., 1997)

[33] *Id.* at 134–36. To examine Claiborne in its current condition, go to Google Street View, http://maps.google.com, and examine any place between 1248 N. Claiborne Avenue and 964 N. Claiborne.

[34] *See* Sprawl Environmental, *supra*, at 309 (describing argument) (citation omitted).

[35] *See supra* notes 12–15 and accompanying text.

Table 2.1 Pre-Interstate vs. post-Interstate population gains and losses among 18 largest 1950 cities[36]

	Number losing population	*Number losing over 10 percent of population*
1930–50	0	0
1950–60	13	2
1960–70	15	6
1970–80	16	14
1980–90	13	5
1990–2000	11	3

served largely to connect distant metropolitan areas . . . highways often terminated miles from a city's borders."[37] But in fact, by 1976, 86 percent of all urban interstate routes were open to traffic.[38] For example, Cincinnati's I-75 was largely built by 1963,[39] Miami completed its expressways by 1968,[40] and St. Louis's major expressways were completed by 1969.[41] Thus, it appears that urban interstates were often completed in the 1960s and 1970s—precisely

[36] *See* WORLD ALMANAC AND BOOK OF FACTS 1976 at 210 (George E. Delury, ed. 1975); WORLD ALMANAC AND BOOK OF FACTS 2000 at 390 (Robert Famighetti, ed., 1999); JANSSEN, *supra*, at 614. Having said that, highways was of course not the only factor causing urban decline in the 1960s and 1970s. *See infra*. Chapter 4-2.2 (discussing failure of school desegregation during that period); JEFFREY S. ADLER, AFRICAN-AMERICAN MAYORS: RACE, POLITICS AND THE AMERICAN CITY 9 (2001) (crime increased during this period, especially in cities).

[37] Ronald D. Utt, *What To Do About the Cities*, at http://www.heritage.org/research/reports/1998/09/what-to-do-about-the-cities

[38] *See* Bernard J. Frieden, Lynne B. Sagalin, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 48 (1991) (also noting that "monthly displacement figures [fell] by 79 percent between 1969 and 1976.")

[39] *See* Cincinnati Transit, *Interstate 75*, at http://www.cincinnati-transit.net/I-75.html (I-75 construction in Ohio "stretched from 1941 to 1963")

[40] *See* Mark H. Rose and Raymond A. Mohl, INTERSTATE: HIGHWAY POLITICS AND POLICY SINCE 1939 at 121 (2012)

[41] *See* NextSTL, *The Life and Death of the American Urban Interstate as Told by St. Louis's I-755*, http://nextstl.com/2015/05/the-life-and-death-of-the-american-urban-interstate-as-told-by-st-louis-i-755

when cities declined most rapidly. By contrast, in later decades, cities stabilized or at least declined more slowly. Moreover, even Utt admits (in the same paper quoted above) that "highways further undermined the cities by making it more convenient for suburban commuters while diminishing the quality of urban life and disrupting transportation patterns within the city."[42]

It could also be argued that state and federal investment in public transit somehow cancels out the impact of highway spending.[43] This argument lacks merit, because the federal government has actually discouraged transit use in two ways. First, highway spending itself reduces transit use. When highways open up suburbs for development and transit does not expand into those suburbs, transit ridership is effectively reduced as people move from transit-heavy cities to car-dependent suburbs. Politicians have used this fact to justify reduced public transit service. In 1995, US Rep. Nick Smith justified transit spending cuts on the ground that "now the jobs are outside of the cities. The main reasons for mass transit for tax dollar subsidies [aren't] there anymore."[44] Thus, sprawl-generating highways place transit users in a vicious cycle: highways create highway-dependent suburbs, causing reduced transit ridership, which in turn is used to justify reduced transit, which in turn causes ridership to decline even more.

Second, the federal government has burdened transit agencies with unfunded mandates that reduce the positive impact of federal transit subsidies. For example, the Americans with Disabilities Act requires transit systems to provide paratransit service to disabled individuals who are unable to use traditional buses and trains without assistance.[45] This requirement alone costs transit providers $4 billion annually,[46] or roughly one-fourth of federal transit spending.[47] Other costly federal mandates include federally

[42] Utt, *supra*.

[43] *See supra* note 20 (noting level of transit spending).

[44] Michael Lewyn, *Campaign of Sabotage: Big Government's War Against Public Transportation*, 26 COLUM. ENVTL. L. 259, 275 (2001) (citation omitted) ("Sabotage").

[45] 42 U.S.C. sec. 12143©(1).

[46] Amalgamated Transit Union, Testimony, Senate Banking, Housing and Urban Affairs Committee, *MAP-21 Reauthorization: The Federal Role and Current Challenges to Public Transportation*, Mar. 6, 2014.

[47] *See supra* note 20 (federal government spends $17 billion on transit and intercity rail combined).

mandated wage rates for transit construction, limitations on transit systems' ability to import steel and iron to build buses and trains, and limitations on charter and school bus service that might compete with the private sector.[48]

And as will be shown below, a wide variety of federal policies unrelated to transportation encourages Americans to move to suburbs,[49] thus reducing transit use because suburbs tend to have less public transit than cities.

1.4 Solutions

Given that government at all levels has spread sprawl through highway funding, what is the alternative? Government could demolish some urban highways,[50] or mitigate the ill effects of sprawl on nondrivers by upgrading public transit systems.[51] However, these policies would be at least somewhat costly.[52] A more libertarian, taxpayer-friendly remedy would be for states and cities to go and sin no more: to stop building limited-access highways in urban and suburban areas, and to stop widening existing roads in still-developing suburbs.[53] Such a "paving moratorium" would not eliminate existing sprawl, but would at least prevent government from using roads to create new sprawl. For example, a state's transportation funding bill could prohibit local governments from using state funds to widen roads within metropolitan areas.[54] If a state reduced its

[48] *See* Sabotage, *supra*, at 276–77 (describing these requirements in detail).

[49] *See* Chapter 2-2, 3 *infra*.

[50] *See* Rose, *supra*, at 177–90.

[51] *See* GILLHAM, *supra*, at 201–10.

[52] With at least one exception: if a highway is so physically inadequate that it must be either demolished or rebuilt, demolition might be no more expensive than rebuilding the highway. *See* Marc Melnick, *New Avenues for Special Assessment Financing*, 25 URB. LAW. 539, 549–550 (1993) (when San Francisco government deciding whether to remove or rebuild damaged highway, "Either [alternative] made equal financial sense.")

[53] Some exceptions to this policy might be appropriate where a widened road might have sprawl-mitigating benefits: for example, if a two-lane street has no sidewalks, pedestrians would benefit if the road was widened to include sidewalks.

[54] Similarly, a federal transportation bill could be amended to prohibit federal funds from being used for such purposes.

transportation budget[55] to reflect budget savings from this policy, taxpayers could save tens of billions of dollars.[56]

One argument for road expansion is that new roads reduce traffic congestion. Even if this claim is sometimes correct,[57] it is least persuasive as applied to highways that facilitate sprawl: if a freeway induces people to move to suburb X, more people will move to X, thus making X's roads more congested. And if suburb X is more automobile dependent than other parts of the region, X's new residents will drive more miles throughout their metropolitan area, thus spreading congestion to other suburbs and neighborhoods. If jobs follow residents to suburb X,[58] some X

[55] Alternatively, tax revenues could be used in ways that mitigate automobile dependence: for example, by expanding public transit or by building sidewalks or bike lanes.

[56] Two-thirds of state road spending is on new roads. See Smart Growth America, *Adopt a "fix-it-first" approach*, at http://www.smartgrowthamerica.org/guides/smart-growth-at-the-state-and-local-level/transportation/adopt-a-fix-it-first-approach/. State and local governments spend $125 billion on roads and highways, so if all road expansion was phased out, taxpayers could save roughly $80 billion. *See supra* note 20. However, road expansion in truly rural areas, however wasteful, is not particularly relevant to sprawl; thus, the overall taxpayer savings would be somewhat less.

[57] Expert commentary on this issue is divided. *See* Sprawl Environmental, *supra*, at 369–70 (citing examples of regions that increased road space, yet suffered increases in congestion comparable to those of less pro-sprawl regions); Gilles Duranton and Matthew A. Turner, *The Fundamental Law of Road Congestion*, at http://www.nber.org/papers/w15376 (highways increase vehicle use and thus fail to reduce congestion); *but see* Baruch Feigenbaum, *Reducing Congestion in Denver: A New Approach to Increasing Mobility* 37–38, at http://reason.org/files/reducing_congestion_denver.pdf (arguing that congestion increased more slowly in some regions that built more highways). However, even Feigenbaum admits that "[e]xperience suggests that new general lane capacity quickly fills up in growing metro areas, with previous congestion levels reasserting themselves two to five years after the non-priced capacity improvement project is completed . . . [as a result] adding non-priced lanes [that is, highway lanes financed by general gas tax revenues, as opposed to toll roads] is not the best solution to any urban area's transportation problems." *Id.* at 38–39. Moreover, even if a road reduces congestion to some extent, the congestion-reduction benefits might not be worth the road's cost (such as the social costs of sprawl discussed in Chapter 1).

[58] *Cf.* GILLHAM, *supra*, at 39–41 (describing migration of jobs to suburbia in late twentieth century).

residents may have shorter commutes—but urbanites and residents of other suburbs will commute to X, thus congesting X's roads still further and causing congestion in other areas on the way to work.

It could also be argued that new highways reduce housing costs by opening new suburbs up for development, thereby increasing housing supply. But as noted above,[59] sprawl imposes significant transportation costs on commuters: because suburbanites usually drive to work, their gains from cheaper housing might be canceled out by their transportation costs. And in the most car-dominated metropolitan areas and suburbs, this choice between convenience and cheaper housing is almost as involuntary as a tax: a car is so necessary for a normal life that even urban commuters must live an essentially suburban lifestyle.

It could further be argued that highways are not subsidized by government, because they are financed by fuel taxes and thus pay for themselves. But in fact, roads are often financed through other taxes. Since 1947, government spending on roads has exceeded revenue from gasoline taxes and similar user fees by $600 billion.[60] Today, user fees only pay for 51 percent of highway costs.[61]

More importantly, even if overall fuel tax revenue equalled the amount of highway spending, the highway finance system would be so full of cross-subsidies that there would be no reason to believe that any particular group of motorists paid for the roads they drive on. For example, the federal gasoline tax is assessed against all gasoline used by all drivers, even drivers who do not heavily use interstate highways. Thus, drivers who use local roads are being taxed to pay for the interstate system.[62] During the early decades of the interstate system, this policy almost certainly subsidized sprawl: suburbanites were using interstate highways to commute home, while the gasoline taxes that financed these highways was at least partially paid for by urban motorists who used local urban streets. A more

[59] *See* Tables 1.1 and 1.2 *supra*.

[60] *See* Tony Dutsik and Benjamin Davis, *Do Roads Pay for Themselves? Setting the Record Straight on Transportation Funding* 17 at http://www.frontiergroup.org/sites/default/files/reports/Do-Roads-Pay-for-Themselves_-wUS.pdf

[61] *Id*. Admittedly, some gasoline tax revenue goes to services other than highways. But even if every penny of user fees was spent on highways, user fees would account for than two-thirds of national highway spending. *Id*.

[62] *Id*. at 16.

market-oriented policy, by contrast, would have tolled individual roads: people who drove on highway X would pay for highway X.

2 The School Gap: Why City Schools Are Worse than Suburban Schools, And How Federal Policy Exacerbated the Problem

One reason for the popularity of suburbia is the bad reputation of urban public schools. Even in cities with prosperous urban neighborhoods, families often move to the suburbs when their children reach school age, because suburban public schools have better reputations than urban schools.[63]

Would urban schools be equally disreputable if schools were not run by government? Probably not. Elementary and secondary schools are a service just like universities or restaurants—and the latter are as likely to be excellent in cities as in suburbs. For example, prestigious universities such as Yale, the University of Pennsylvania, and Columbia are in urban neighborhoods. So if K-12 schools were merely subsidized by government rather than being run by government, prestigious K-12 schools, like prestigious universities, might be spread throughout a metropolitan region. So why are elementary and secondary public schools different?

2.1 No Bad Schools, Only Bad Students

It could be argued that urban schools are bad because urban schools are underfunded.[64] But where suburban school districts are of comparable size to their big-city counterparts, urban school districts actually spend more than suburban districts.[65] Table 2.2 compares suburban districts with over 50,000 students with their urban counterparts.

Table 2.2 reveals a consistent pattern: every single urban school district listed above spends more per pupil than the majority of their suburban

[63] *See* Utt, *supra* (describing problem).

[64] *See, e.g.*, Wayne Batchis, *Urban Sprawl and the Constitution: Educational Inequality As An Impetus to Low-Density Living*, 42 URB. LAW. 95, 102 (2010) ("inadequate funding of America's urban public schools [is] a potent disincentive" for urban life).

[65] I focus on larger districts because of the difficulties of data collection where suburbia is divided into dozens of small districts. Also, it is not clear to me whether a district of one or two schools is comparable to a district with dozens of schools.

Table 2.2 City vs. suburban spending per pupil[66]

Atlanta metro area	*Spending*	*Percentage of students who are low-income*[67]
Atlanta	12,994	75.3
Fulton County	9638	45.2
Gwinnett County	9270	55.7
DeKalb County	8847	71.4
Cobb County	8651	45.4
Dallas/Fort Worth metro area		
Dallas	8609	88.9
Fort Worth	8641	77.0
Plano	8374	27.3
Garland	8135	61.0
Arlington	7793	68.3
Baltimore metro area		
Baltimore	15,564	84.1
Howard County	15,358	17.9
Baltimore County	13,338	46.0
Anne Arundel County	13,167	30.2
Denver metro area		
Denver	10,564	71.4
Jefferson County	8685	33.7
Douglas County	8182	11.5
Houston metro area		
Houston	8451	79.7
Fort Bend	7691	38.5
Katy	8240	30.0
Washington, D.C., metro area		
Washington	18,485	53.8
Fairfax County	13,710	26.5
Montgomery County	15,181	33.1
Prince George's County	13,994	59.9
Prince William County	10,216	37.6
Loudoun County	12,485	17.2

[66] *See* Educational Finance Branch, US Census Bureau, *Public Education Finances: 2014*, at 8 (statistics for District of Columbia), 25–26 (other statistics), at http://census.gov/content/dam/Census/library/publications/2016/econ/g14-aspef.pdf ("2014 Finances").

[67] *See* National Center for Education Statistics, *Digest of Education Statistics, Table 215.10*, at https://nces.ed.gov/programs/digest/d14/tables/dt14_215.10.asp?current=yes ("Table 215.10")

counterparts. Nevertheless, every urban district listed above is dominated by low-income students to a greater extent than most of its suburban neighbors.

Even where urban school districts outspend suburban districts by unusually wide margins, they fail to attract affluent families. In Kansas City, Missouri, court-ordered spending caused the city schools to spend three times as much as some suburban school districts during the 1980s.[68] Nevertheless, city test scores failed to improve significantly,[69] and the city schools continued to lose white and middle-class families.[70] Today, 89.4 percent of Kansas City students are poor enough to be eligible for subsidized meals[71]—a percentage higher than most big-city school districts.[72]

On the other hand, students in low-income areas may cost more to educate, because it might be harder to learn if one's parents are financially stressed.[73] Thus, it might be the case that if city schools outspent suburbs by (for example) a 10–1 margin, disadvantages arising from family background might be appreciably narrowed. Since this strategy has never been tried and does not seem politically feasible to me, I express no opinion about its likely success or failure. However, it does seem clear that where urban schools spend only slightly more than suburban schools, they are not attractive to middle-class parents.

It could also be argued that urban school districts are disreputable merely because school districts are incompetently run, and thus that better

[68] *See* Missouri v. Jenkins, 515 U.S. 70, 74–79, 99 (1995) (describing history of desegregation litigation that led to increased spending; also noting that Kansas City schools spent between $7665 and $9412 per pupil, while suburbs spend between $2854 and $5956 per pupil).

[69] *See* Molly G. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1352–53 (2004).

[70] *See* Michael Lewyn, *The Law of Sprawl: A Road Map*, 25 QUINNIPIAC L. REV. 147, 167 n. 26 (2006) ("Law of Sprawl").

[71] *See* Missouri Department of Elementary and Secondary Education, *District Demographic Data*, at http://mcds.dese.mo.gov/guidedinquiry/District%20and%20Building%20Student%20Indicators/District%20Demographic%20Data.aspx (2014 data; percentage has risen from 79 percent in 2006).

[72] *See* Table 2.3 *infra*.

[73] *See* Erika K. Wilson, *Gentrification and Urban Public Schools: The Interest Divergence Dilemma*, 118 W. VA. L. REV. 677, 699 (2015) ("poor students tend to have more social and academic needs due to the effects of concentrated poverty"); *infra* notes 172–75 and accompanying text (discussing disadvantages of lower-class students in more detail).

school boards or better mayors would solve the problem of urban schools. But if school maladministration was the major cause of the school gap, urban schools would perform poorly regardless of their student makeup. In fact, urban schools that can screen out low achievers perform as well as suburban schools. For example, according to US News and World Report, nine of the 10 best high schools in New York State are within the city of New York.[74] All but one of these urban schools are "exam schools" that screen out low-achieving students.[75]

As a general rule, even urban schools perform well as long as their student bodies are relatively affluent. For example, one study of Buffalo's public schools showed a strong correlation between the share of a school's student body living in poverty and its results on standardized mathematics tests.[76]

[74] *See* US News & World Report, *Best High Schools in New York*, http://www.usnews.com/education/best-high-schools/new-york (listing best schools as Lehman High School of American Studies, High School for Dual Language and Asian Studies, Queens High School for the Sciences, Brooklyn Latin, Bacclaureate School for Global Education, Staten Island Technical High School, Bronx High School of Science, Townsend Harris High School, one suburban school, and the High School for Math, Science and Engineering).

[75] *See* CHESTER E. FINN AND JESSICA A. HOCKETT, EXAM SCHOOLS: INSIDE AMERICA'S MOST SELECTIVE PUBLIC SCHOOLS 211–13 (2012) (all but one of the nationally ranked New York City schools mentioned in prior footnote listed as exam schools).

[76] *See* Gary Orfield et. al., *Better Choices for Buffalo's Students: Expanding and Reforming the Criteria Schools System* 21, http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/better-choices-for-buffalos-students-expanding-reforming-the-criteria-schools-system/BPS_UCLACRP_052315_v8_combined.pdf. *See also* James Traub, *What No School Can Do*, New York Times, Jan. 16, 2000, at http://www.nytimes.com/2000/01/16/magazine/what-no-school-can-do.html?pagewanted=all (in New York City, schools:

> that performed poorly, like those that performed well, scored almost exactly as the socioeconomic status of the children in them would have predicted. You could have predicted the fourth-grade test scores of all but one of the city's 32 districts merely by knowing the percentage of students in a given district who qualified for a free lunch. Only a few dozen of the city's 675 elementary schools scored well despite high poverty rates. In other words, good schools aren't doing that much good, and bad schools aren't doing that much harm.)

Similarly, pupils in Chicago's 15 best urban schools (as measured by standardized test scores) were, on average, 20 percent low income, while the average Chicago school's pupils are 85 percent low income.[77] Schools dominated by low-income students tend to have poor reputations, because children raised in lower-class households tend to be less intellectually stimulated at home, and thus are less prepared for school.[78] As a result, students from lower-class households tend to achieve less even when they are in the same school as students from upper-class households.[79]

If urban schools with well-heeled or high-achieving students have high test scores, it follows that urban schools have bad reputations primarily because they have more disadvantaged students than suburban schools. Thus, urban schools' ability to attract middle-class parents is limited by a vicious circle: their social diversity leads to low test scores and a bad reputation,[80] which scares off middle-class parents, which ensures a low-income student body, which insures that these schools continue to have poor students and poor reputations.

2.2 The Root of the Problem

So why are urban schools so dominated by low-income students? The answer is embedded in government regulations governing public education. State and local laws often require that to attend a public school in district X,

[77] *See* Daniel Hertz, *Gentrification's Impact on Neighborhood Schools' Success*, Nov. 5, 2013, at http://www.chicago-bureau.org/op-ed-gentrifications-impact-on-neighborhood-schools-success (referring to neighborhood schools in which more than 25 percent of students achieved a standardized test score that "exceeds standards" and is thus on track for college). *Id.*

[78] *See* Sprawl Environmental, *supra*, at 324 (quoting statements by numerous social scientists that the quality of schooling accounts for less than half of the variation in students' academic performance).

[79] *Id.* at 324–25 (citing examples).

[80] And sometimes school discipline problems as well. Rightly or wrongly, many middle-class parents associate poverty-stricken urban schools with high levels of violence and disruptiveness. *Cf.* Michelle Parthum, *Using Litigation to Address Violence in Urban Public Schools*, 88 WASH. U. L. REV. 1021, 1023 (2011) (discussing "everyday violence of inner-city schools").

a student must typically live in district X.[81] Even the most prosperous central cities generally have more poor people than many of their suburbs.[82] If, as suggested above, poverty-packed schools usually have worse reputations than schools full of middle-income students, most urban schools will therefore have worse reputations than most suburban schools.

But neighborhood poverty alone does not explain why entire urban school districts have been tarred with bad reputations. If a school's student body always reflected its immediate neighborhood, schools in affluent parts of a city would have "good" schools (by which I mean, schools that had high test scores, and were therefore perceived by parents as desirable) even if most city schools were undesirable. However, this is only the case where such schools draw their student body from affluent neighborhoods.[83] Because urban school attendance zones sometimes draw from a larger, more socially diverse geographic area, even schools in affluent urban areas may scare off middle-class parents.[84] So even if attendance zones had never been consciously gerrymandered to increase diversity, many affluent urban neighborhoods would be in diverse school zones, causing them to be less attractive to affluent parents.

In the late twentieth century, the federal courts exacerbated this problem through their often-futile efforts to desegregate urban public schools. In the 1954 decision of *Brown v. Board of Education*,[85] the Supreme Court prohibited government-mandated segregation of local schools. White parents were not eager, however, to send their children to desegregated schools—partially (I suspect) because of irrational racism, and partially because the middle-class parents of 50 years ago, like today's middle-class parents, might

[81] Cf. Martinez v. Bynum, 461 U.S. 321 (1983) (upholding such residency requirements).

[82] *See* Michael Lewyn, *How Real is Gentrification?* 43 REAL EST. L.J. 344, 346 (2014) (citing examples) ("Gentrification"); *supra* notes 6–8 and accompanying text (pointing out that cities generally poorer than suburbs).

[83] *See* Hertz, *supra* (citing example).

[84] My own life presents an example. From grades K-5, I attended Jackson Elementary, a highly-reputed Atlanta neighborhood school with very few low-income children. But for middle school, my address put me in the attendance zone for Sutton, a school which drew not only from Jackson's rich neighborhood but from poorer areas as well. So after I left fifth grade, my parents placed me in a private school to avoid Sutton.

[85] 347 U.S. 483 (1954).

have wanted to avoid schools filled with disadvantaged children.[86] So "white flight" from integrated urban schools began. In Washington, D.C., for example, white enrollment in city schools declined by half between 1954 and 1963.[87] These whites generally moved to suburbs;[88] suburban public schools were often heavily white, and thus were not affected by *Brown*.

But *Brown*, standing alone, did not affect all urban schools. Although the Court had outlawed explicit segregation by race, it had not yet addressed the constitutionality of facially neutral policies that tended to place white students in mostly-white schools. Urban school boards took advantage of this loophole by gerrymandering the boundaries of school attendance zones.[89] For example, in Kansas City, Missouri, the school board frequently shifted white areas from attendance zones full of majority-black schools to nearby zones full of predominantly white schools.[90] The school district also placed new schools in areas which were all white or all black.[91] So in the late 1950s and early 1960s, whites in the most integrated neighborhoods were still subject

[86] In 1959, 56 percent of blacks lived below the poverty level, more than three times the white poverty level of 18 percent. See United States Department of Commerce, *Poverty in the United States: 1959 to 1968*, at 1, at https://www.census.gov/hhes/www/poverty/publications/p60-68a.pdf. By contrast, today about 26 percent of blacks have poverty-level incomes, just over twice the white poverty level of 12.7 percent. *See* JANSSEN, *supra*, at 48. Thus, the income gap between blacks and whites was even larger than it is today.

[87] *See* RAYMOND WOLTERS, THE BURDEN OF BROWN 16 (1992) (enrollment declined from just over 40,000 students to just under 19,000 students). Although other forces such as highways contributed to suburbanization, enrollment declined especially rapidly in the years after Brown. For example, between 1951 and 1954, white enrollment declined by about 10 percent (from 45,682 to 40,927 students), but between 1954 and 1957, white enrollment declined by over 20 percent (from 40,927 students to 31,626 students).

[88] *Id*. at 292 ("almost all of the white flight was to suburban public schools.")

[89] *See* MAXWELL L.STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISIONMAKING 25 (2002). For example, in Washington, 12 of the 13 elementary schools west of Rock Creek Park were 85 percent white. *See* WOLTERS, *supra*, at 30.

[90] *See* KEVIN FOX GOTHAM, RACE, REAL ESTATE AND UNEVEN DEVELOPMENT 104–05 (2d ed. 2015).

[91] *Id*, at 107.

to desegregation, but other urban whites could still send their children to almost all-white schools. As a result, school-related white flight was more tempting in cities' more diverse areas than in other urban neighborhoods.

The federal courts sought to dismantle these anti-integration policies. In the 1968 case of *Green v. County School Board of New Kent County*,[92] the Court outlawed a "freedom of choice" plan which permitted each pupil to choose their school, holding that lower courts must "assess the effectiveness of a proposed plan in achieving desegregation."[93] This language suggested that school districts could not adopt facially neutral schemes that failed to advance desegregation, such as the sort of gerrymandering discussed above.[94]

And in the 1971 case of *Swann v. Charlotte-Mecklenburg Board of Education*,[95] the Court clarified its view, suggesting that evidence of segregation included "building new schools in the areas of white suburban expansion farthest from Negro population centers."[96] The Court added that lower courts could remedy such pro-segregation policies by altering attendance boundaries or busing students across a city in order to achieve racial integration.[97] So after *Swann*, *any* school district that had designed attendance zones to keep white children in majority-white schools could avoid additional litigation only by making its schools more racially balanced.[98] Because most urban school districts had at some point in time enacted such policies,[99] this category included most urban school districts.

[92] 391 U.S. 430 (1968).

[93] *Id.* at 439.

[94] A few years later, the Court explicitly held as much, ruling that structuring attendance zones in order to preserve majority-white schools was unconstitutional. *See* Keyes v. School District No. 1, 413 U.S. 189 (1973).

[95] 402 U.S. 1 (1971).

[96] *Id.* at 21.

[97] *Id.* at 27–29.

[98] *See* STEARNS, *supra*, at 26.

[99] *See* Myron Orfield, *Milliken, Meredith and Metropolitan Segregation*, 62 U.C.L.A. L. REV. 364, 379 (2015) (southern school districts required racial segregation, while in northern school districts "widespread discriminatory practices . . . including racially gerrymandered attendance boundaries, optional attendance zones that allowed whites to avoid racially diverse schools, and school construction and expansion decisions made in locations that prevented student integration from occurring")

The courts' new emphasis on racial balance meant that even in the most affluent neighborhoods, urban whites could not send their children to racially and socially homogenous schools. As a result, "white flight" from urban schools continued. By 1973, many urban school districts were already majority black.[100] Ultimately, racial integration became impossible in some urban school systems: for example, if a school system was 90 percent black, nearly every school in the system would be overwhelmingly black.

The courts could have responded with "metropolitan desegregation": that is, forcing suburban schools as well as city schools to be racially balanced, thus reducing white parents' incentives to move to suburbia. But in the 1974 case of *Milliken v. Bradley*,[101] the Supreme Court rejected this remedy, holding that as long as a suburb had not segregated its own schools, it had committed no constitutional violation and thus was not required to participate in school desegregation.[102] As a practical matter, this meant that if a suburb had no (or almost no) black children and thus had never sought to segregate them, it was not required to maintain racially balanced schools.

So after *Milliken*, urban parents were faced with a choice: they could stay in urban schools as those schools continued to become blacker (and thus, given the high rates of poverty among urban blacks, poorer), or they could move their children to overwhelmingly white suburbs that were not subject to constant judicial interference. Not surprisingly, most white parents chose the latter option. For example, in Boston, site of an especially controversial busing plan, the city's juvenile white population declined by more than half during the 1970s alone—despite the fact that the city's single adult white population declined by only 3 percent.[103] Similarly, in the dozen years after

[100] *Id.* at 390 (noting that decline of white enrollment already widespread); 400 (Detroit schools 72 percent black); WOLTERS, *supra*, at 16 (Washington, D.C., schools already 95 percent black); ADRIENNE D. DIXON AND CELIA K. ROUSSEAU, CRITICAL RACE THEORY AND EDUCATION: ALL GOD'S CHILDREN GOT A SONG 118 (2014) (only 33 percent of Memphis students white).

[101] 418 U.S. 717 (1974).

[102] *Id.* at 745 (finding no constitutional violations by school districts in Detroit suburbs). *Cf.* Orfield, *supra*, at 406–16 (criticizing decision).

[103] *See* Sprawl Environmental, *supra*, at 328. Thus, it seems unlikely that white flight was unrelated to public schools.

the federal courts required Washington, D.C., to integrate all of its schools, Washington's white public school population declined by 70 percent, while the single adult white population decreased by only 6 percent.[104] Eventually, many black middle-class parents followed suit,[105] causing urban schools to be dominated by low-income racial minorities. In some places, racial segregation actually increased during the age of so-called desegregation: in the northeast, the percentage of blacks in majority-white schools actually declined between 1968 and 1980.[106]

In the 1990s, the Supreme Court dismantled many desegregation orders issued by lower courts, holding that the urban school districts involved had done as much as possible to desegregate their schools.[107] In fact, the Court now holds that where no desegregation order is in effect, the Constitution may *prohibit* school districts from considering a school's racial balance when assigning students.[108] This means that school districts may not gerrymander school boundaries either to promote or to prevent racial balance. But the damage to cities has been done: urban school districts are stuck with high poverty rates and bad reputations, and have difficulty attracting middle-class parents.

It could be argued that the rise of gentrification is making urban public schools attractive to middle-class parents again, and that the anti-urban policies of the late twentieth century are no longer relevant.[109] But as

[104] *Id.*

[105] *See* Orfield, *supra*, at 432 (describing suburbanization among nonwhites).

[106] *Id.* at 422 (noting decline from 33 percent to 20 percent). However, this percentage increased modestly in the South and Midwest. *Id.* Orfield explains that the South has more countywide school districts, which means that whites would have to travel significantly further to find a suburban district to flee to. *Id.* at 421.

[107] *Id.* at 420.

[108] *See* Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 732 (2007) (plurality opinion) ("racial balancing is not permitted"). I note, however, that the reach of this decision is unclear. A four-justice plurality flatly rejected the consideration of racial balance, while Justice Kennedy's concurrence is less clear. *Id.* at 782, 787–89 (Kennedy, J. concurring). (desegregation plan at issue not "narrowly tailored to achieve its own ends" and thus unconstitutional; however, schools may adopt race-conscious measures in order to achieve a diverse student body).

[109] *See* Wilson, *supra*, at 699 ("While urban schools in most gentrifying areas are still undoubtedly predominately minority and poor, an increasing number of

Table 2.3 Race and class in urban[110] school districts for selected[111] older cities[112]

	Percentage of students who are low-income (i.e., eligible for subsidized school lunch)	*Percent white non-Hispanic*
New York	66.1	15.0
Chicago	84.9	9.2
Philadelphia	85.5	14.3
San Francisco	57.5	10.8
Detroit	81.0	2.6
Washington	53.8	11.5
Boston	71.7	13.2
Baltimore	84.1	8.0
Milwaukee	82.3	13.9
Minneapolis	65.7	36.4
Cleveland	Not available	14.8
St. Louis	68.4	9.9
Pittsburgh	69.4	33.6
Cincinnati	65.3	26.8
Buffalo	74.9	22.2

Table 2.3 shows, large urban school districts continue to have miniscule white enrollments and high levels of low-income students.

In sum, parents seek suburban schools because urban public schools have bad reputations. Urban schools have bad reputations because they are dominated by children from disadvantaged backgrounds, who are as a result less prepared for school. These schools are poverty-packed partially because of the structure of state attendance zone laws (which ensure that a city's schools must

young middle-class white residents with children are deciding to give the urban public schools a chance").

[110] By "urban" I mean school districts limited to a major city, as opposed to suburban districts or countywide districts which include both a city and its suburbs (such as Los Angeles United, which includes some suburbs as well as the city of Los Angeles).

[111] In particular, this table includes cities with available relevant data that (1) are "low elasticity" cities (that is, stuck within their 1950 boundaries) and (2) had over 500,000 people in 1950. See RUSK, *supra*, at 74–75; JANSSEN, *supra*, at 614 (listing cities' 1950 population). I focus on these cities because elastic cities are often in less dire shape: a city that can annex hundreds of square miles may, by taking over its suburbs, make "white flight" inconvenient.

[112] *See* Table 215.10, *supra*.

be at least as diverse as their juvenile population) and because of the federal courts' school desegregation rulings (which prevented cities from creating separate zones for their affluent neighborhoods). Thus, state government and the federal courts are both responsible for the low status of urban schools.

2.3 No Perfect Solutions

There may be no easy way to make poverty-packed schools more popular.[113] However, urban life could become more popular if government expanded parental choice by breaking the link between residence and schooling, so that city residents would not be limited to urban neighborhood public schools. If you have your health insurance subsidized by government through Medicare or Medicaid, you are not limited to attending the doctors or hospitals closest to your home. So why should schooling be any different?[114]

[113] With one highly unlibertarian exception: government could solve the "school-generated sprawl" problem through policies that *reduce* choice by eliminating parents' right to choose among demographically different school districts. If a state or region wished to make every school demographically identical, it could abolish suburban school districts, place every school in the region in one giant school district, and assign students to schools in a way that ensured that every single school had the same socio-economic makeup. Because I have chosen to focus on more market-oriented policies in this book, the wisdom of such a policy is beyond the scope of my inquiry. However, it does seem to me that such a system would reduce parents' incentives to move to suburbs, but might massively increase school transportation budgets. And in the absence of land use regulations that prevented developers from building suburbs outside the school district, parents might move even further into suburbia to escape the district.

[114] Admittedly, one significant difference exists between medicine and education: because most patients only occasionally seek medical attention, there is no reason why a patient must commit to seeing the same doctor or hospital every day. By contrast, children attend school every day for half a year; as a result, a school needs to know in advance how many children to plan for. Otherwise, schools would be overwhelmed if the number of pupils suddenly increased from week to week. Thus, schools need to know their student body near the start of an academic year. However, current residency requirements are not necessary to achieve this goal. If students throughout a city or region were allowed to choose schools a few months before the first day of classes, schools would know the size of their student body a few months in advance and could govern themselves accordingly.

American states and cities have experimented with several policies designed to increase school choice, including (1) voucher systems that include private schools; (2) voucher-like "open enrollment" systems that do not affect private schools, but allow urban students to attend suburban public schools; (3) charter schools, and (4) exam schools. Each of these techniques may reduce sprawl—but only if properly designed. All would be market-oriented in the sense of expanding parental choice, though some might drain taxpayer resources.

2.3.1 Universal Vouchers

The most market-oriented anti-sprawl education policy is some form of a voucher system. Under the purest form of a voucher system, parents who choose to avoid public schools would be "given a voucher, a piece of paper redeemable for a designated sum of money if, and only if, it is used to pay the cost of schooling your child at an approved school."[115] If vouchers were extended to private schools, parents would arguably have little reason to avoid city neighborhoods: they could stay in the city, and attend private schools for the same amount of money that they would spend on public schools (i.e., zero).

But as long as a voucher system supported both private schools and existing public schools, two practical difficulties might make the system either less effective or more costly. First, some private schools are more expensive than public schools. Even in the largest school systems, public schools spend roughly $12,000 per pupil[116]—roughly comparable to the average private school tuition.[117] However, many private schools are far more expensive. The average nonreligious private school costs $17,000 per year,[118] and some charge as much as $20,000–30,000 tuition.[119]

[115] MILTON FRIEDMAN, FREE TO CHOOSE 161 (1980).

[116] *See* 2016 ABSTRACT, *supra*, Table 260 ($12,013 per pupil in school systems with over 50,000 students, as opposed to $7–10,000 in smaller school districts), Table 266 (large urban school districts mostly spend between $8000 and $14,000 per pupil, with a few exceptions).

[117] *See* Private School Review, *Average Private School Tuition Cost* (2015–16), at http://www.privateschoolreview.com/tuition-stats/private-school-cost-by-state

[118] *See* Derek W. Black, *Civil Rights, Charter Schools, and Lessons to Be Learned*, 64 FLA. L. REV. 1723, 1773 n. 291 (2012).

[119] *See, e.g.* Atlanta Jewish Academy, *Tuition & Financial Assistance*, at http://www.atljewishacademy.org/index.php/financial-information (high school tuition

It logically follows that if vouchers covered the entire cost of private school tuition, educational costs to taxpayers would increase.

On the other hand, if vouchers merely covered the cost of the average public school, they might only cover half (or less than half) of some private schools' tuition—arguably not enough to discourage most parents from choosing suburban public schools.[120] But even so, such a partial discount would still do something to encourage parents to stay in cities, and would thus improve upon the status quo.[121]

A second difficulty is that even a limited voucher system might increase municipal costs, because government's public school expenses would not decrease as fast as its private school expenses would increase. Imagine a voucher system in which the money follows the child—that is, if each voucher is $10,000, and a school loses a child to a private school, that school loses $10,000. Some of the public schools' costs are presumably fixed, such as the costs of buildings and maintenance.[122] So if a public

just over $22,000); Nichols School, *Tuition*, at http://www.nicholsschool.org/page.cfm?p=520 (similar tuition at secular private school in Buffalo); Jack M. Barrack Hebrew Academy, *Tuition & Fees For The 2016–17 School Year*, at https://www.jbha.org/admissions/tuition-and-fees.php (high school tuition just over $30,000). *But cf.* Terry M. Moe, *Beyond the Free Market: The Structure of School Choice*, 2008 B.Y.U. L. REV. 557, 572 (2008) (Milwaukee vouchers of $6000 per child "enough to pay for tuition at virtually all private schools in that city").

[120] I note that voucher systems actually in existence are targeted toward the poor or to special-needs students. *Id.* at 569–70 (citing examples); Sprawl Environmental, *supra*, at 372 n. 515 (citing other examples). However, these programs are irrelevant to the purpose of this chapter, which is to discuss programs that might encourage middle-class families to stay in cities.

[121] My discussion assumes, of course, that parents of children at more expensive schools would be able to add vouchers onto their school tuition. Some commentators oppose such "add-ons," because they wish to prevent more affluent parents from buying their way into more expensive schools. *See* Moe, *supra*, at 573. This argument might make sense in the context of a voucher program designed to help poor people escape failing urban schools. But a prohibition on "add-ons" makes no sense in the context of an anti-sprawl program, since a major purpose of the program is to encourage affluent parents to stay in cities. Or to put the question another way: is it really better for affluent parents to buy their way into suburbs than to buy their way into urban private schools? To which I answer: of course not.

[122] *Id.* at 579.

school that spends $8000 per pupil loses 10 pupils under a voucher system, its costs will decrease by less than $80,000.

A voucher system that fails to account for this difficulty might starve student-losing public schools, thus harming families who prefer those schools. If this outcome is undesirable, a pro-voucher city has two choices: to keep public school spending constant (thus increasing overall education spending), or to fund private schools at some level below the average per pupil expenditure, in order to reduce fiscal harm to the least popular public schools.[123] Under the latter scenario, parents would be able to save less private school tuition than would otherwise be the case, thus reducing the anti-sprawl impact of vouchers.

2.3.2 Public Schools Only

As noted above, a voucher program that includes private schools would either be more costly than the status quo, or would be somewhat limited: more costly if it funded all private school tuition, or more limited if it only partially funded the tuition of more expensive schools.

By contrast, a school choice program limited to public schools would avoid these fiscal problems: the state could simply forbid public school districts from discriminating on the basis of residence. If a school district wanted to avoid radical increases in enrollment, it would have to use a lottery to decide which students were admitted. This plan might discourage sprawl by making prestigious suburban schools available to urban parents. And if both students from affluent families *and* students from poor families entered these suburban schools, the class differences between urban and suburban schools might be erased in the long run. So such an open enrollment program might actually be more egalitarian than the status quo.

[123] *Id.* It could be argued that government should allow student-losing schools to deteriorate or go out of business. But this policy would create its own problems: assuming that most children continued to attend school near their homes, and that schools dominated by lower-income families continued to be unpopular, the least popular schools might be in lower-income neighborhoods— so if those schools closed, the neediest children would have no schools nearby.

But this plan may be even more politically infeasible than universal vouchers, for two reasons. First, it would require a considerable investment (either public or private) in transportation, since students in search of prestigious schools might wish to go all over a metropolitan area. Either government will have to buy many more school buses, or parents will have to spend a lot more time transporting their children to faraway schools. Second, suburbanites will be unwilling to pay property taxes for schools that other people's children will attend[124]; thus, states might have to assume more responsibility for school financing.

I note that most states have in fact enacted "open enrollment" plans allowing some interdistrict transfers.[125] However, these policies are essentially toothless. In 30 states, school districts are not compelled to participate.[126] Thus, suburban school districts need not accept urban students. Even in the remaining states, state laws contain loopholes that give suburbs ample discretion to reject urban students.[127] For example, New Mexico's statute provides: "Local school boards may admit school-age persons who do not live within the school district to the public schools within the school district when there are sufficient school *accommodations* to provide for them."[128] So suburban school districts can easily exclude urbanites by claiming insufficient "accommodations."[129] Moreover, open enrollment statutes do not grant students the right to be transported across district lines, which means that students will not be able to attend an out-of-district school unless parents transport them.[130] Thus, existing open enrollment laws do not make

[124] *See* Aaron Y. Tang, *Privileges and Immunities, Public Education, and the Case for Public School Choice*, 79 GEO. WASH. L. REV. 1103, 1134–35 (2011). For example, suburban school districts refused to accept students under Cleveland's voucher program; apparently, they did not want urban children even if the state paid their expenses. *See* Simmons-Harris, 536 U.S. at 747 ("None of the public schools in districts adjacent to Cleveland have elected to participate.")

[125] *See* Tang, *supra*, at 1113("forty-two states have enacted policies authorizing some form of interdistrict open enrollment").

[126] *Id*. at 1114.

[127] *Id*.

[128] N.M. STAT. ANN. 22–12-5(A) (emphasis added).

[129] *See* Tang, *supra*, at 1115 (budgetary considerations are major motive for districts' refusal to allow interdistrict transfers).

[130] *Id*. at 1119.

it particularly easy for urban students to attend suburban schools, and therefore do not eliminate the pro-sprawl bias of education law.

2.3.3 Charter Schools

Since the first charter school opened in 1991, 42 states have authorized charter schools.[131] A charter school is a hybrid between a private and a public school. Charters are publicly financed to some extent[132] and do not charge tuition,[133] but often receive less public money than traditional public schools.[134] These schools are governed by their trustees rather than by public officials, and are exempt from most personnel rules governing public schools,[135] as well as state laws governing student discipline.[136]

In theory, charter schools, like private schools financed by vouchers, could provide a palatable alternative to urban public schools, causing middle-class parents to shun suburban public schools.[137] But in fact, the majority of charter school students are low income.[138] Similarly, charter

[131] *See* Preston C. Green III., et.al., *The Legal Status of Charter Schools in State Statutory Law*, 10 U. MASS. L. REV. 240, 243 (2014).

[132] *Id.* at 261–63 (discussing litigation over charter schools' use of public funds).

[133] *See* Wendy Parker, *From the Failure of Desegregation to the Failure of Choice*, 40 WASH. U. J.L. & POL'Y 117, 125 (2012).

[134] *See* Noelle Quam, *Big Philanthropy's Unrestrained Influence on Public Education: A Call for Change*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 601, 621 (2015) ("On average, charter schools receive sixty-one percent of the funding that their district counterparts receive.")

[135] *See* Green et. al., *supra*, at 243.

[136] *Id.* at 265–67. *See also* Kaylee Niemasik, *Teen Pregnancy in Charter Schools: Pregnancy Discrimination Challenges Under The Equal Protection Clause and Title IX*, 22 MICH. J. GENDER & L. 55, 60–61 (2015).

[137] It could also be argued that competition from charter schools forces public schools to improve in order to retain students. *Id.* at 60. Because this book is about sprawl rather than education policy, the wisdom of that argument is beyond the scope of the book.

[138] *Id.* (54 percent of charter school pupils low-income). Similarly, only 39 percent of charter school students are white, as opposed to 56 percent of students in traditional public schools. *See* Parker, *supra*, at 138 n. 100.

schools often have academic achievement levels roughly comparable to those of nearby public schools.[139]

Why have charter schools often failed to attract middle-class parents? States generally do not allow charters to choose their students. Instead, state laws generally provide that when a charter cannot accommodate all interested families, it must either follow a "first come first served" admissions policy, or use a lottery to choose its students.[140] From a purely egalitarian perspective, this policy seemingly makes sense, because it prevents charters from becoming enclaves dominated by the privileged.

But from a "sprawl control" perspective, this policy is less helpful. If charters are not selective, they will have student bodies that resemble traditional urban public schools (as is in fact the case).[141] It logically follows that if parents do not wish to send their children to poverty-packed urban public schools, they will also not wish to send their children to poverty-packed urban charter schools.

One possible alternative is state legislation allowing charters to be as academically selective as private schools or urban "exam schools."[142] If this was the case, charter schools might look like urban private schools: less selective schools might continue to be dominated by the disadvantaged, but the most selective schools would attract middle-class parents who wished to stay in the city but avoid typical urban public schools.

But unlike suburban public schools and urban private schools, selective charter schools are rare. Thus, there is no way of knowing to what extent people will create such schools in response to legislation permitting them. And if existing charter schools convert to selective charters, charter slots for weaker students might disappear, thus reducing choices for such students. If this was the case, selective charter schools could actually reduce some parents' educational choices.

[139] *Id.* at 150.

[140] *Id.* at 125.

[141] In fact, charter schools are more heavily nonwhite than, and may be even more racially segregated than, traditional urban public schools. *Id.* at 138 n. 100 (only 39 percent of charter school students white, as opposed to 56 percent of traditional public school students), 140–42.

[142] *See supra* notes 74–75 and accompanying text (describing exam schools).

2.3.4 *Exam Schools*

As noted above, some urban school districts have academically selective "exam schools" that achieve results better than those of most suburban schools.[143] Why are these schools inadequate to attract most middle-class parents to cities?

Most cities' exam school systems are insufficient to meet potential demand, for two reasons. First, most exam schools are limited to high school. For example, St. Louis's only exam school is a high school, as are seven of Chicago's eight exam schools, and all of the exam schools in Baltimore, Washington, Detroit, and Cleveland.[144] Almost no exam school begins in the early grades; of the over 200 exam schools listed in one book about the subject, only six begin before fourth grade.[145] But by the time their children reach high school age (or even middle school age), many middle-class parents have already moved to suburbia. So for exam schools to attract middle-class parents, they should begin in the early grades.

Second, there are not enough exam schools to meet potential middle-class demand, even in cities with lots of exam schools. For example, St. Louis has just over 7000 people enrolled in its high schools,[146] but its lone exam school, Metro High School,[147] has only 335 students.[148] Similarly, Buffalo's City Honors (that city's lone exam school, which begins in fifth grade)[149] has just over 1000 students,[150] about 6 percent

[143] *See supra* notes 74–75 and accompanying text.

[144] *See* FINN AND HOCKETT, *supra*, at 205–14.

[145] *Id.* at 205–15.

[146] *See* Missouri Department of Elementary and Secondary Education, *St. Louis City*, at http://mcds.dese.mo.gov/guidedinquiry/District%20and%20School%20Information/Missouri%20School%20Directory.aspx?rp:DistrictCode=115115 ("Missouri Department") (go to "St. Louis City," then "Missouri School Directory").

[147] *See* FINN AND HOCKETT, *supra*, at 209.

[148] *See* Missouri Department, *supra* (go to "St. Louis City-Summary Reports," then to "School District Report Card- Building" then find Metro High).

[149] *See* FINN AND HOCKETT, *supra*, at 211.

[150] *See* data.nysed.gov, City Honors Sch-F Masten Park Enrollment, 2014–15, at https://data.nysed.gov/enrollment.php?year=2015&instid=800000052908

of the city's 5–12 enrollment.[151] In these school districts, students who are not among the top 5 percent must attend the less prestigious traditional public schools. A family deciding whether to reside in a city might be able to guess with reasonable certainty whether their children will be among the top 50 percent of district children, but might not be able to guess whether their children will be among the top 5 percent. It logically follows that a school district wishing to lure parents away from suburban schools should probably have enough exam schools to accommodate a much higher number of children—perhaps the top quarter or top third. A region might wish to have multiple levels of exam schools—some for the top 5 percent, some for the top 10 percent, and so on.

However, creating new schools might be more expensive than allowing the formation of charter schools. Charter schools are only partially publicly financed,[152] while a new exam school would be completely publicly financed, and thus a bigger drain on governmental resources. To avoid increasing overall education spending, a school system might be tempted to reduce spending on the remaining non-exam schools. Because the latter schools would contain the hardest-to-educate students, reducing spending on such schools might be inequitable and even counterproductive in the long run (assuming arguendo that reduced school spending in fact led to reduced life opportunities for the non-exam school students).

2.3.5 Equity as a Counterargument

It could be argued that all of these proposals could increase social segregation, because if urban middle-class parents are allowed to choose selective schools full of high achievers (whether they be private, public, or charter) these schools might be almost entirely middle or upper class.[153] If this was

[151] *See* data.nysed.gov, *Buffalo City School District Enrollment*, 2014–15 at https://data.nysed.gov/enrollment.php?year=2015&instid=800000052968 (total enrollment 18,764).

[152] *See supra* note 132 and accompanying text.

[153] I note, however, that this is *not* currently true of exam schools. *See* FINN AND HOCKETT, *supra*, at 32 (students in exam schools generally about as likely to be eligible for subsidized lunches as all public high school students), 33–34 (52 percent of Chicago exam school students, 51 percent of Philadelphia exam school students, 46 percent of Washington, D.C., exam schools students, and 41 percent of Boston exam school students eligible).

the case, children from lower-income households might be stuck in hyper-segregated, homogenously poor schools. But this concern accurately describes the status quo: children from low-income households are stuck in troubled schools in cities and low-income suburbs, and most other children attend middle-class suburban schools. Unless the state or federal government forces affluent families out of suburban schools, segregation by social class is inevitable: our only choice is whether to continue the current system of separate municipalities for poor families and better-off families (which combines school segregation *and* residential segregation), or whether to allow affluent parents to attend the middle-class schools they crave *without* moving to suburbs. Even if the latter system causes the same amount of school segregation as the status quo, neighborhoods would be less segregated, because some parents unwilling to send their children to diverse schools might be willing to live in diverse neighborhoods.

It could also be argued that if school boards hired the right teachers or created the right curriculum, middle-class households would choose even the most socially diverse schools over suburbia. One way of testing this theory is to examine the most successful charter schools. If better teachers could bring the middle class back to urban schools, the best urban charters would have achieved this goal. But in fact, this has not occurred. For example, the film "Waiting for Superman" describes Locke High School and KIPP LA Prep School in Los Angeles as unusually successful charter schools.[154] But in both schools, over 90 percent of students are still poor enough to be eligible for government-subsidized lunches.[155]

[154] *See* Diane Ravitch, The Success of Charter Schools is A Myth, in MARGARET HAERENS AND LYNN M. ZOTT, CHARTER SCHOOLS: OPPOSING VIEWPOINTS 34, 38, 45 (2012).

[155] *See* Great Schools, *KIPP Los Angeles College Preparatory School*, at http://www.greatschools.org/california/los-angeles/12371-KIPP-Los-Angeles-College-Preparatory-School/details/#Students (93 percent of students eligible for reduced-price lunches); Great Schools, *Alain Leroy Locke College Prep Academy*, at http://www.greatschools.org/california/los-angeles/24830-Alain-Leroy-Locke-College-Prep-Academy/details/#Students (91 percent). I note that these schools also have test scores well below those of prestigious suburban schools- a fact suggesting the difficulty of overcoming the problems caused by a poor home environment. *See* California Assessment of Student Performance and Progress, *2015 Test Results for English Language Arts/Literacy and Mathematics*, at http://caaspp.cde.ca.gov/sb2015/Search (13 percent of KIPP students and 3 percent of Locke students reached highest

A related argument is that if schools spent more on social services, urban schools would improve enough to become attractive to middle-class parents. For example, one commentator writes that Cincinnati has improved test scores through adding "health care, counseling, adult education, and cultural events . . . [in] community learning centers."[156] In other words, more spending yields better results, which in turn brings middle-class people into the school system.

It may be true that Cincinnati's schools have improved modestly in recent years: although the state of Ohio's "Report Card" for that school district is dominated by Ds and Fs, some test scores have improved.[157] Nevertheless, any argument based on Cincinnati's alleged success fails for several reasons. First, as noted above, there is little correlation between a school district's spending level and its prestige: urban school districts that spend more than their suburbs nevertheless fail to attract middle-class students.[158] Second, the claim overlooks the nationwide failure of social spending to prevent middle-class flight from urban schools: during the late twentieth century, government spending on education and other social services increased massively[159]—yet middle-class flight continued to occur.[160] Third, the use of Cincinnati's improvement to support increased social spending rests on a slender factual basis: between 2012

"Standard Exceeded" score in reading, as opposed to 36 percent in suburban Beverly Vista Elementary School and 31 percent in suburban Beverly Hills High).

[156] Wilson, *supra*, at 731.

[157] Ohio School Report Cards, *Cincinnati City School District, 2014–15*, at http://reportcard.education.ohio.gov/Pages/District-Report.aspx?DistrictIRN=043752 (giving the Cincinnati school district an F for graduation rates, achievement indicators met, and closing racial gaps, but giving the district an A on "value added"- that is, yearly progress for grades 4–8).

[158] *See supra* notes 65–72 and accompanying text (showing weak correlation between school district schools' ability to attract affluent).

[159] *See* National Center for Education Statistics, *Digest of Education Statistics, Table 164*, at https://nces.ed.gov/programs/digest/d95/dtab164.asp (spending per pupil tripled in constant dollars between 1959 and 1990); AXEL R. SCHAFER, PIETY AND PUBLIC FUNDING: EVANGELICALS AND THE STATE IN MODERN AMERICA 42–44 (2012) (describing increases in other social service spending).

[160] It could be argued that without such spending increases, urban schools would be even worse. But even if this was so, it seems clear that this benefit was inadequate to prevent middle-class parents from preferring suburban schools.

and 2015, education spending in Cincinnati actually *decreased* from $14,719 per pupil to $13,626 per pupil.[161] And between 2007 and 2015, Cincinnati spending increased but by less than the statewide average. Cincinnati spending increased from $12,021 per pupil to $13,626 per pupil (a 16 percent increase), while in the average Ohio school district, spending increased from $9343 per pupil to $10,973 per pupil (a 17 percent increase).[162] Fourth, Cincinnati was not especially successful in attracting middle-class students: the percentage of low-income students decreased between 2008 and 2014, but only from 67.8[163] to 65.3 percent.[164]

In sum, it seems unlikely that school reform or additional spending, standing alone, will make urban schools more attractive to middle-class students.

2.3.6 The School Problem in Summation

Every conceivable school assignment policy involves trade-offs between cost, urbanism, choice, and equity. The current system discourages urban life, provides limited choices, and is highly inequitable (insofar as it limits educational opportunities for urban students); however, it may be less costly than some alternatives.

A voucher system that paid all students' private school tuition would maximize parental choice and maximize parental ability to escape troubled urban schools, but would be highly costly. A system that paid a fixed amount regardless of a school's tuition would be cheaper, but would do less to discourage sprawl, because under that system, many private schools would continue to be more expensive than suburban public schools.

A "public schools only" voucher system would be highly egalitarian in that even students who would not gain admission to academically selective schools

[161] See Ohio Deparment of Education, Center for School Finance, *District Profile Reports (Cupp Report)* at http://education.ohio.gov/Topics/Finance-and-Funding/School-Payment-Reports/District-Profile-Reports (data for FY 2012 and 2015). For data on an individual year, click the links on the page for a specific year. Then to find data on a specific school district, go to the links in the middle of the yearly report.

[162] *Id.* (data for FY 2006 and FY 2015).

[163] *See* National Center for Education Statistics, *Digest of Education Statistics, Digest of Education Statistics, Table 94*, at https://nces.ed.gov/programs/digest/d10/tables/dt10_094.asp (2008 data)

[164] *See* Table 2.3 *supra*.

would be eligible for the program. In addition, such an open enrollment system would increase parental choice, and might effectively enable parents of all social classes to escape troubled schools. However, spending on transportation costs might increase public spending if the government funded more buses to suburbia and private spending on cars otherwise.

By contrast, there is no obvious reason why selective charter schools would be more costly than the status quo. However, their impact on urban life is less predictable. If Americans created selective urban charter schools in large numbers, such schools might successfully compete with suburban public schools. However, there is no way of knowing whether this will in fact occur. And if existing charter schools turn into selective schools, choice might be impaired for students who would be unable to attend such schools.

The creation of more exam schools would avoid this problem; a city that built new exam schools would by definition be creating more choices for parents—choices that would cater to high achievers and thus make urban schools more appealing for middle-class parents. So urbanism and choice favor this policy. On the other hand, any educational expansion creates a difficult trade-off between cost and equity: new schools would be costly, unless financed on the backs of existing schools.

In sum, there are a wide variety of school reforms that would make urban life more palatable to middle-class parents—but no reform is cost free.

3 Housing Policy

In the mid-twentieth century, the federal government encouraged sprawl by (1) supporting mortgages in suburbs but not in cities, and (2) by building housing projects for the poor in cities rather than suburbs. These policies encouraged the middle class to move to suburbs, while encouraging the poor to stay in cities.

3.1 Subsidizing Suburbia

Since 1934, the Federal Housing Administration (FHA) has insured home mortgages against default.[165] These guarantees made mortgage lending less risky for banks, which in turn enabled lower down payments from

[165] *See* Gary Klein and Shennan Kavanaugh, *Causes of the Subprime Foreclosure Crisis and the Availability of Class Action Responses*, 2 N.E.L.J. 137, 179 n. 234 (2010).

homebuyers. Before the growth of FHA insurance, homebuyers typically made down payments of at least a third of the value of a house. Afterwards, 10 percent down payments became the norm.[166]

However, the FHA insured mortgages only in areas that it defined as "low risk."[167] FHA guidelines defined "low-risk" areas as those that were all white, dominated by newer houses, and thinly populated—in other words, suburbs or suburb-like city neighborhoods.[168] Moreover, FHA subsidized the purchase of newer homes to a much greater extent than repairs of older homes, thus favoring the newest, most suburban neighborhoods over other areas.[169]

As a result of these biases, FHA loan guarantees were generally targeted toward suburbia. For example, between 1934 and 1960, the residents of suburban St. Louis County received $794 per person in home mortgage assistance from FHA, while residents of St. Louis city received only $87. Similarly, residents of Washington, D.C., received only $87 per person from FHA, less than one-eighth the $730 received by residents of suburban Fairfax County.[170] By making the purchase of suburban homes easier while doing little to assist urban homeowners, FHA obviously encouraged sprawl.

The FHA long ago ended these policies.[171] But by encouraging middle- and upper-class homeowners to leave urban cores, FHA began the process of shifting affluent homebuyers from cities to suburbs. Because affluent people tend to prefer places where other affluent people live, the effects of FHA policies may continue to affect current housing patterns.[172]

[166] *See* JACKSON, *supra* note, at 204 (explaining in detail how FHA insurance worked).

[167] *Id.* at 207.

[168] *Id.* at 207–08.

[169] *See* JACKSON, *supra*, at 206.

[170] *See* GILLHAM, *supra*, at 135.

[171] *Cf.* Sprawl Environmental, *supra*, at 307 (in 1960s, FHA actually erred in the other direction, subsidizing low-income homeowners in cities; however, some homeowners so generously financed that they bought homes they could not afford to maintain).

[172] It could also be argued that the tax deduction for mortgage interest encouraged sprawl by making owning houses more lucrative. *See* GILLHAM, *supra*, at 130. However, this deduction aided homeowners in cities as well as suburbs, and even before the growth of condominiums, the majority of housing units were owner-occupied in some big cities. *See, e.g.* US Department of Commerce, *Housing Census:*

Moreover, FHA still favors suburbia to some extent. FHA continues to insure single-family developments, but rarely insures condominiums (which are more likely to be in dense urban cores). Until 2012, a condominium project received FHA insurance only if 90 percent of its units were owner occupied (rather than being renter occupied).[173] In addition, condo projects were recertified by FHA every two years—a paperwork-heavy project that takes about six months.[174] As a result of these policies, only 10 percent of condominium projects were federally insured, which meant that down payments and interest rates for condos were higher than for single-family houses.[175] These policies have been significantly reformed in recent years; today, a condominium project receives FHA insurance as long as 50 percent of its units are owner occupied[176]: a more lenient rule, but one which still discourages the construction and purchase of condominiums (in addition to encouraging condominiums to restrict rental units, thus reducing rental housing supply). The FHA should completely eliminate discrimination against condominiums, and should be equally willing to insure condos and houses.

A traditional argument for FHA's anti-condo policies was that condo buyers were poorer than buyers of houses, and thus were riskier credit prospects.[177] But in fact, condo buyers are less likely to default on loans than are purchasers of other real estate.[178] The recertification process may be necessary to ensure that a condominium association is complying with FHA rules, but can be made less frequent; the National Association of

1950 at 49–16 (city of Detroit had just over 267,000 owner-occupied housing units in 1950, and just over 233,000 renter-occupied units), 107–31-32 (city of Philadelphia had 322,000 owner-occupied units, and just over 251,000 renter-occupied units) at http://www.census.gov/prod/www/decennial.html.

[173] *See* Scott Beyer, *The Federal Housing Administration Encourages Sprawl Over Density*, at http://marketurbanism.com/2016/04/11/the-federal-housing-administration-encourages-sprawl-over-density/

[174] *See* Community Associations Institute et. al., *Comments re Docket No. FR-5687-N-25* at 3 (July 30, 2013) ("Comments")

[175] *See* Beyer, *supra*.

[176] *Id.*

[177] *Id.*

[178] *See* Comments, *supra*, at 3 (default rates for condo projects under 1 percent, as opposed to 8 percent for all FHA-insured mortgages).

Realtors and National Association of Home Builders recommend that recertification occur every five years.[179]

3.2 Sticking the Poor in Cities

The federal Housing Act of 1937 funded local housing authorities in order to provide housing for the poor.[180] The Housing Act provided that any city desiring public housing had to create a municipal housing agency—thus ensuring that suburbs that did not want public housing could avoid doing so by refusing to create such an agency.[181] In addition, public housing legislation required agencies to eliminate one unit of substandard housing for every unit of public housing created—thus ensuring that areas without substandard housing could not have any public housing.[182] Because a newly developed suburb presumably was less likely to have substandard housing than a 100-year old city, this portion of the law also tended to place public housing in urban cores.

In recent decades, public housing has been dominated by the poorest of the poor. By the 1990s, the law required that 60 percent of public housing residents have incomes below 30 percent of their metropolitan area's median income.[183] In the 1960s and 1970s, the federal courts limited housing authorities' rights to terminate tenants for antisocial conduct, by requiring extensive due process protections before eviction and by prohibiting the eviction of tenants with criminal records.[184] The combination of concentrated poverty and high tolerance for antisocial behavior caused public housing complexes to become exceptionally crime-ridden,[185]

[179] *Id.* at 2 (proposal), 4 (listing groups endorsing proposal).

[180] Public Housing Act of 1937, Pub. L. No. 75–412, 50 Stat. 888.

[181] *See* JACKSON, *supra*, at 225.

[182] *Id.* at 226–27.

[183] *See* Sprawl Environmental, *supra*, at 308–09.

[184] *Id.* at 309.

[185] *See* Robin Minter Smyers, *High Noon in Public Housing: The Showdown between Due Process Rights and Good Management Practices in the War on Drugs and Crime*, 30 URB. LAW. 573, 606–08 (1998). I note, however, that these rules have been watered down: today, a public housing authority may evict a tenant if anyone in their household

which in turn may have made the blocks near public housing unattractive to middle-class urbanites.[186]

In recent years, the federal government has reformed public housing programs in two significant respects. First of all, the number of public housing units has been reduced from 1.4 million to 1.12 million, as public housing authorities have demolished deteriorating units.[187] Second, the remaining public housing units are more mixed income than in the 1990s: while at that time, the law required that 60 percent of renters have incomes less than 30 percent of that regional median,[188] today only 40 percent must be that poor.[189] Tenants displaced by the demolition of public housing have utilized federal housing vouchers to move to privately owned housing; nearly half of voucher holders now live in suburbs.[190] Twice as many Americans benefit

engages in drug-related criminal activity. *See* Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002) (upholding policy).

[186] *See* Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1307 (1995) (noting unusually high poverty rates near public housing). In addition, public housing harmed urban life by reducing the stock of urban houses and businesses: just as urban houses and businesses were demolished to build highways, they were demolished to build public housing. *See* JACKSON, *supra*, at 227.

[187] *See* Smyers, *supra* (1.4 million tenants in 1998); Center for Budget and Policy Priorities, *Policy Basics: Introduction to Public Housing*, at http://www.cbpp.org/research/policy-basics-introduction-to-public-housing (1.12 million units in 1998; 280,000 units removed from program due to deterioration) ("Introduction"). About 10 percent of the demolished units were replaced by mixed-income housing developments. *See* Anne Marie Smetak, *Private Funding, Public Housing: The Devil is in the Details*, 21 VA. J. SOCIAL POLICY & LAW 1, 26 (2015).

[188] *See* Sprawl Environmental, *supra*, at 308–09.

[189] *See* 42 U.S.C. 1437n(a)(2).

[190] See Smetak, *supra*, at 19–20 (describing voucher program, as well as low-income housing tax credits designed to encourage the construction of low-income housing); Kenya Covington et. al., *The Suburbanization of Housing Choice Voucher Recipients*, at http://www.brookings.edu/research/papers/2011/10/11-housing-suburbs-covington-freeman-stoll. It is unclear, however, whether these people are better off for having switched addresses. A national study of former public housing residents who received housing vouchers showed a 34 percent decline in average neighborhood poverty rate; however, almost half of voucher users still live in high-poverty areas. *See* Danya E. Keene and Arline T. Geronimus, "*Weathering*" *Hope*

from these vouchers as live in traditional public housing.[191] As a result of these trends, public housing is less urban and less dominated by extreme poverty than it was a few decades ago, which means that fewer neighborhoods are undesirable as a result of proximity to public housing.

4 Counterarguments

The above discussion shows how state and federal policies have contributed to sprawl. It could be argued, however, that these pro-sprawl policies were less significant than other factors unrelated to state and federal policy, such as municipal incompetence and a worldwide trend toward sprawl.

4.1 Blaming the Cities

It could be argued that people moved to suburbia to flee the incompetence of urban governments—not just bad schools, but other forms of municipal incompetence, overtaxation and corruption.[192] To quote one caption in a Heritage Foundation policy paper: "Cities Must Save Themselves."[193] This argument has several flaws.

First, the argument may confuse cause and effect. As pointed out above, in the late twentieth century, government highways and housing subsidies encouraged the middle class to move to suburbs, public housing policies concentrated the poor in cities, and state and federal education policies made urban schools undesirable to the middle class. If all of these policies caused the city to become poorer, they caused cities to have a weaker tax base, which in turn affected the quality of municipal services, which in turn might have contributed to a

VI: The Importance of Evaluating the Population Health Impact of Public Housing Demolition and Displacement, at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3126923/ (noting improvements, but also noting possible negative effects from loss of social networks).

[191] *See* John J. Infranca, *Housing Resource Bundles: Distributive Justice and Federal Low-Income Housing Policy*, 49 U. RICH. L. REV. 1071, 1080 (2015).

[192] *See* Sprawl Environmental, *supra*, at 335 nn. 258–59 (citing numerous sources).

[193] Utt, *supra*.

widespread perception of governmental incompetence.[194] Moreover, middle-class flight from cities reduced the talent pool of potential elected officials, thus increasing the likelihood of inadequate mayors and councilors. In other words, sprawl may actually cause (as well as being caused by) bad urban government.

Second, this theory requires one to believe certain implausible generalizations. Because most older cities began to lose people at the same time (the 1950s and 1960s), this argument requires one to believe that city governments everywhere became incompetent at the exact same time—except those that were able to annex large amounts of suburban land,[195] which mysteriously kept their ability to govern successfully. And because inner-ring suburbs of declining cities have generally lost population as well,[196] one would also have to believe that these suburbs' leaders mysteriously lost their ability to govern successfully.

Third, the theory is essentially unverifiable, because there is no objective way of measuring the competence of a city's government. A city's success in retaining people and jobs is not a measurement of the efficiency of local government because, as noted above, a city may gain population merely because it was more successful in annexing suburbs than other cities, or because it had fewer sprawl-generating highways.[197]

[194] *See Bahl et. al., supra* at 425 (cities tend to have higher taxes than suburbs).

[195] *See supra* note 4 and accompanying text (noting growth of such cities).

[196] *See* Sprawl Environmental, *supra* at 340 (citing examples).

[197] Some commentators have even argued that anti-urban policies are offset by "policies that favor central cities, such as downtown renewal, subsidized stadia placed in central cities, and heavily subsidized downtown-focused rail transit systems." Peter Gordon and Harry Richardson, *Critiquing Sprawl's Critics* 5 at http://object.cato.org/sites/cato.org/files/pubs/pdf/pa365.pdf. But as noted above, "urban renewal" actually harmed central cities by destroying urban neighborhoods. *See supra* notes 27–33 and accompanying text. Sports stadia open a few times a year are of no obvious benefit to central cities; if anything, they consume land that could be used by everyday uses. The pro-urban effects of public transit subsidies have been canceled out by the costs of federal unfunded mandates directed agianst transit systems, as well as by other policies discussed above. *See also supra* notes 43–48 (explaining why transit spending has not done much to discourage sprawl).

Table 2.4 Population of largest Western European cities (in millions)[198]

	1950	*2000*	*2014*
London	8.34	7.10	8.47[199]
Berlin	3.33	3.38	3.42
Paris	2.85	2.12	2.24
Hamburg	1.60	1.71	1.75
Vienna	1.62	1.6	1.74
Madrid	1.61	2.88	3.16
Milan	1.26	1.27	1.32
Barcelona	1.28	1.50	1.60
Birmingham	1.11	0.98	1.09
Glasgow	1.09	0.58	0.60

4.2 The Inevitability Theory

It could be argued that European suburbanization means that sprawl is an inevitable result of affluence.[200] This argument lacks merit for two reasons.

First, it is not the case that European cities lost population to the same extent as American cities. As Table 2.4 shows, five of Western Europe's 10 largest cities gained population between 1950 and 2000, and every

[198] Because the European Union includes dozens of nations, I have chosen to limit this table to cities with over 1 million people in 1950, and to round population upwards to the nearest ten thousand. 1950 and 2000 figures are from B.R. MITCHELL, INTERNATIONAL HISTORICAL STATISTICS, EUROPE 1750–2005 at 75–77 (6th ed. 2007). More recent figures are from Eurostat, *Population on 1 January by age groups and sex—cities and greater cities*, at *http://ec.europa.eu/eurostat/web/cities/data/database*. However, Paris figures are for 1999 (instead of 2000) and 2012 (instead of 2014) and Vienna figures are from 2013 (instead of 2014).

[199] I note that population for Inner London, the city's oldest area, followed a similar pattern, declining from 4.4 million in 1939 to 2.5 million in 1988, and rebounding to 3.2 million in 2011. *See* Greater London Authority, *Population by Borough 1939 to 2039*, at http://data.london.gov.uk/dataset/population-change-1939-2015/resource/6fb637cf-d3c1-4456-a561-85cd995c020f#

[200] *See* Gordon and Richardson, *supra* ("suburban land-use patterns are evolving in Western Europe and Canada, where policies (most of them strongly favoring compact development) are very different").

single one of the five population-losing cities (London, Paris, Vienna, Birmingham, and Glasgow) rebounded to some extent during the 2000s. By contrast, of the 14 largest older American cities that lost population between 1950 and 2000, only three gained population between the 2000 and 2010 censuses.[201]

What about smaller cities? Three Spanish academics created a dataset including 579 cities in 29 European nations.[202] These cities grew by 22.6 percent between 1961 and 2011—more slowly than their suburbs, but far more rapidly than many American cities.[203] Thus, it appears that Western European cities may have suburbanized less rapidly than American cities,[204] and that their central cities have revived more consistently than those of the USA.

Second, to the extent that European cities have suburbanized, this suburbanization, like American suburbanization, may have arisen from public policy rather than from postwar affluence. Like American governments, European governments built many highways in the late twentieth century. In 1960, the 28 nations now in the

[201] *See supra* note 2 (Boston, Washington and Philadelphia gained population). Census estimates suggest that some other cities gained population between 2010 and 2014. *See, e.g.* JANSSEN, *supra*, at 635, 645 (Census estimates suggest that Minneapolis and Milwaukee gained thousands of inhabitants between 2010 and 2014). However, mid-decade Census estimates have not been particularly reliable in the past. *See* Aaron Renn, *Rethinking Urban Dynamics: Lessons from the Census*, at http://www.newgeography.com/content/002202-rethinking-urban-dynamics-lessons-census (estimates overestimated population of Atlanta and Detroit by over 20 percent). Thus, I do not consider such estimates to be particularly reliable compared to the once-a-decade Census.

[202] *See* Miquel-Angel Garcia-Lopez, Ilias Pasidis, and Elisabet Viladecans-Marsal, *Express Delivery to the Suburbs: The Effects of Transportation in Europe's Heterogeneous Cities*, Introduction, at file:///C:/Users/mel139/Downloads/SSRN-id2733557.pdf. This paper unfortunately includes no pagination. I have tried to list paper sections and table numbers, so that readers will be able to find the portions of the paper being referenced.

[203] *Id.*, Table 1. *Compare supra* notes 2–3 and accompanying text.

[204] I must add one significant qualification to this data: I am not sure to what extent European cities have grown by annexing suburbs. Some European cities, like many American cities, may have concealed the extent of suburbanization by annexing suburbs.

European Union had 259 kilometers of highways; in 2010, they had 67,779 kilometers.[205] During that period, these nations reduced their railway network by 72,000 kilometers.[206] And in Europe, as in the USA, highways spurred suburban growth: the Spanish study found that each highway route reduced central city population by 4 percent.[207] Thus, it appears that in Europe, as in the USA, highways have reduced central city populations.

In sum, Europe has not sprawled in the same way and to the same extent as the USA. And where European cities have lost population, their suburbanization can be traced to pro-sprawl highway policy.

[205] *See* Garcia-Lopez et. al., *supra*, at Table 3.

[206] *Id*. (noting decline from 297,942 kilometers to 225,333). *See also* Michael Lewyn, *Sprawl in Europe and America*, 46 SAN DIEGO L. REV. 85, 102 (2009) (listing statistics for several nations) ("Sprawl Europe").

[207] *See* Garcia-Lopez et. al., *supra*, Abstract.

CHAPTER 3

Sprawl As Where We Grow, Part 2: How Government Prices Americans Out Of Cities

Abstract The chapter explains how government regulation prices Americans out of the most desirable cities, causing some households who prefer city living to choose cheaper suburbs. The chapter goes on to suggest zoning reforms that would reduce urban housing costs.

Keywords NIMBY · Housing Prices · Housing Costs · Rent · Rezoning

The last chapter focused on why American cities became less desirable in the late twentieth century. However, a few cities now suffer from a very different problem: as they have recovered, their most desirable neighborhoods have become so expensive that some people feel priced out of cities and instead chosen suburbia.

Population-losing cities tend to be cheaper than their suburban neighbors. For example, the median gross rent in St. Louis is $720, almost 30 percent lower than the $985 median rent in University City (a suburb bordering that city).[1] But in more prosperous cities, there is not enough housing to go around. For example, in San Francisco, the rental vacancy rate

[1] *See* City Data, www.city-data.com. For City Data facts on an individual city, county, zip code or neighborhood, go to the main City Data page and enter the place name or zip code on the website's individual search engine.

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is only 2.1 percent, and in New York it is 2.5 percent.[2] Low vacancy rates mean high rents: in New York, for instance, the median rent rose by 12 percent between 2006 and 2013, while incomes have remained stagnant.[3] 30 percent of New York households are severely rent burdened[4] (which means that they pay more than half their income for rent and utilities).[5] By contrast, the rental vacancy rate in suburban Long Island is 5.2 percent, more than twice that of New York.[6] In Manhattan (the region's urban core) the market is especially overheated; the vacancy rate is about 1 percent,[7] and in 2015 the median one-bedroom apartment rented for over $3200, roughly twice the comparable rent in Long Island.[8] For-sale housing is also expensive: the median house or condo in Manhattan costs $846,000, more than 11 times the median household income.[9] Some households adapt to these high costs by choosing smaller houses

[2] *See* Sean Caperis et. al., *Renting in America's Largest Cities* 8, at http://furmancenter.org/files/CapOneNYUFurmanCenter__NationalRentalLandscape_MAY2015.pdf

[3] *Id*. at 37. Similarly, in San Francisco inflation-adjusted rents grew by 8.4 percent, twice the rate at which median renter income increased. *Id*. at 41.

[4] *Id*. at 37.

[5] *Id*. at 14.

[6] See US Department of Housing and Urban Development, *Comprehensive Housing Market Analysis: Long Island, New York*, at https://www.huduser.gov/publications/pdf/longislandny_comp_12.pdf ("Long Island Housing").

[7] Jennifer Gould Kell, *There are no apartments to rent in Manhattan*, N.Y. Post, June 10, 2015, 10:38 PM, at http://nypost.com/2015/06/10/its-basically-impossible-to-find-a-rental-in-manhattan/

[8] See Streeteasy, *Quarterly Market Report*, Q3 2015 at 17, http://cdn2.blogmedia.zillowstatic.com/streeteasy/2/2015Q3_StreetEasy-Market-Reports_MN-BK-5355fe.pdf ("Streeteasy Market"); Long Island Housing, *supra*, at 8–12 (average rent is $1375 for one-bedroom in Suffolk County, $1475 in Nassau County). By contrast, the median one-bedroom apartment in Brooklyn rents for $2200. *See* Streeteasy Market, *supra* at 17. I note that even Long Island's rents are nearly twice those of depressed cities such as St. Louis. See Rent Jungle, *Average Rent Trends and Market Strength by City*, at https://www.rentjungle.com/rentdata/ (average one bedroom apartment in Detroit rents for $758, in St. Louis for $740, in Cleveland for $713).

[9] *See* City Data, *supra*.

and apartments than they otherwise might, or by moving to cheaper city neighborhoods. However, others settle for suburbia. Thus, low vacancy rates and high housing costs contribute to sprawl.[10]

In addition, high housing costs in big cities harm the American economy as a whole. Some of the most expensive cities are also among the most economically productive—[11] but if people avoid these cities due to high housing costs, the resulting misallocation of labor limits national economic growth. A recent study by economists from the University of Chicago and the University of California found that if land use regulations in New York and Northern California had been reduced to the regulation level of the median city, overall US output would have increased by 9.5 percent between 1964 and 2009 (or roughly $1.4 trillion)[12] even if the supply of land was held constant.[13]

The law of supply and demand means that when the supply of something (in this case, housing) is scarce and demand is high, costs will rise. So if enough new housing was built in city neighborhoods, costs would

[10] It might be argued that my concern over high housing costs is inconsistent with my suggestion above that when transportation costs are included, cities are no more expensive than suburbs. *See supra* Tables 1.1, 1.2 and accompanying text. But the two ideas can be squared by consideration of the variety of individual preferences. For someone willing to live in the average city neighborhood, a city may be cheaper than its suburbs. But some households may only be willing to live in the "best" (richest, safest, and/or most expensive) city neighborhoods. If these households are priced out of the best city neighborhoods, they will move to suburbia rather than choosing a less expensive urban neighborhood.

[11] *See* Chang Tai-Hsieh and Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth?* 3, 21–22, at http://faculty.chicagobooth.edu/chang-tai.hsieh/research/growth.pdf (noting that wage gaps between expensive cities and rest of the USA imply differences in working productivity, and adding that if housing costs had been lower, more people would have moved to productive cities and driven wages down).

[12] In 2014, U.S. GDP was $14.5 trillion. *Id.* at 25.

[13] *Id.* at 34. Because an expanding region might use more land or use land more productivity, this is probably an understatement. *Id.* at 25 (estimating 13.5 percent, or $1.95 trillion, increase). *Cf.* Alex Sarabia, *All Growth Is Local: Housing Supply and the Economics of Mobility*, at http://chicagopolicyreview.org/2016/02/02/all-growth-is-local-housing-supply-and-the-economics-of-mobility/ (summarizing study in non-technical language).

eventually stop going up, and fewer people would be priced out of cities. So why is not there enough new housing?

1 The Problem: Zoning and NIMBYism

What prevents housing supply from rising to meet demand? One obstacle is zoning. Throughout the USA, zoning codes limit not only the use of every parcel of land, but also the density of housing development—that is, the number of houses and apartments that can be built on a parcel of land. Even in compact cities such as New York, density caps limit the construction of housing units.[14] Government also limits housing supply less directly. For example, most cities require landowners to supply off-street parking for tenants, thus reducing the amount of land that is available for housing.[15] Government often requires houses and apartments to be set back from the street,[16] thus taking even more land that could be used for housing.

If a landowner wishes to build more housing than is currently allowed by the local zoning code, it must petition the city for a rezoning—that is, a change in the zoning ordinance to allow more housing units.[17] When the landowner files such a petition, the city must typically inform nearby property owners of the petition's existence.[18] These neighbors often take

[14] *See generally* PlanningNYC, The Zoning Resolution, Article II, sec. 23–20 at http://www1.nyc.gov/site/planning/zoning/access-text.page ("NYC Zoning") (listing regulations for individual districts).

[15] *See* DONALD C. SHOUP, THE HIGH COST OF FREE PARKING 25. 143–44 (2005) (noting that parking requirements virtually universal, and explaining how they reduce urban density).

[16] *See* Chad Emerson, *Making Main Street Legal Again: The Smartcode Solution to Sprawl* 71 MO. L. REV. 637, 645 n. 36, (2006) (Under conventional American zoning codes, "front setbacks must be either a 25-foot grass yard or a paved parking lot.") (citation omitted).

[17] *See* WILLIAM A. FISCHEL, ZONING RULES: THE ECONOMICS OF LAND USE REGULATION 43–44 (2015) (explaining rezoning process) ("Zoning Rules").

[18] *See* Stewart E. Sterk, *Structural Obstacles to Settlement of Land Use Disputes*, 91 B.U.L. REV. 227, 238 (2011) ("Before a municipal body may effect any kind of zoning change . . . neighboring landowners must generally receive notice of the proposed change" followed by public hearings.).

a "Not In My Back Yard" (NIMBY) position against additional housing,[19] because neighbors of a development are likely to suffer from alleged negative externalities caused by the development but might not benefit from the development's positive effects (such as increased housing supply and lower housing prices).[20] If enough NIMBYs object to development, city governments tend to defer to such opposition in order to win NIMBY votes.[21]

One might think that a city struggling with high rents would curb NIMBY influence in order to increase housing supply. But some of the most expensive cities have extraordinary zoning restrictions. For example, New York City has created neighborhood review boards which have the right to comment upon new development proposals, thus making the NIMBY voice an official part of city government.[22] New York has also created other obstacles to development: for example, while in other cities a city council or mayor might ultimately decide the fate of a rezoning petition, in New York a borough president also has the right to review a rezoning, thus creating yet another avenue for NIMBYs to lobby to block new housing.[23] Finally, the city bureaucracy on its own can propose

[19] *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES 230 (2005) ("Homevoter").

[20] For example, NIMBYs may claim that new development increases traffic, threatens neighborhood character, or affects property values. *See* Michael Lewyn, *Against the Neighborhood Veto*, 44 REAL ESTATE L.J. 82, 86–95 (2015) (criticizing these and other justifications for NIMBYism, on the grounds that restrictive zoning merely shifts such externalities to other neighborhoods or are outweighed by social harms caused by a restricted housing supply) ("Veto").

[21] *Cf.* David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1709–1711 (2013) (city councilors tend to oppose development in their own districts because NIMBYs within district vocally oppose housing, and system of "councilmanic courtesy" encourages rest of council to defer to a councilor's decisions about zoning in his or her own district).

[22] Sheila R. Foster and Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2033 n. 119 (2007) (describing boards, and noting that they may comment on all zoning actions).

[23] *See* John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 100 (2014).

downzoning a neighborhood, which means that the zoning code permits even less new housing than in the past.[24] Between 2003 and 2007 alone, the city downzoned about 40,000 parcels of land.[25]

Similarly, San Francisco, a city even more expensive than New York,[26] has unusually restrictive zoning policies. While most cities allow development that does not violate zoning, San Francisco has "discretionary review"—which means that even if development otherwise conforms to the zoning code, the city bureaucracy can alter or veto the development based on its conception of the public interest.[27] San Francisco also prohibits most buildings of more than two stories outside downtown, and requires voter approval for tall buildings near the downtown waterfront.[28]

And in Los Angeles, zoning has also become far more restrictive over time, constricting housing supply. In 1960, the city was zoned to support 10 million people—that is, if every zone contained the maximum number of housing units allowed, the city could house 10 million people (four times its population at the time).[29] By contrast, today the city is zoned for roughly its current population, which means that almost any

[24] *See* Zoning Rules, *supra*, at 35–36 (explaining downzoning).

[25] *See* Furman Center for Real Estate and Development Policy, *How Have Recent Rezonings Affected the City's Ability to Grow?* 8, at http://furmancenter.org/files/publications/Rezonings_Furman_Center_Policy_Brief_March_2010.pdf (188,000 lots rezoned; 23 percent of these were downzoned). I notice that on balance, the city upzoned slightly more land than it downzoned. However, some of the alleged upzonings added parking requirements that can reduce a site's potential for new housing just as easily as a direct density restriction. *Id.* at 15.

[26] *See* Caperis et. al., *supra*, at 10.

[27] *See* City and County of San Francisco, Planning Department, *Permit FAQ & Glossary*, at http://www.sf-planning.org/index.aspx?page=2754.

[28] *See Map of building height ordinances in SF*, at http://imgur.com/Tn7CSTX; John Wildermuth and John Cote, *S.F. Voters OK Prop. B on waterfront development*, San Francisco Chronicle, June 4, 2014, at *http://www.sfgate.com/bayarea/article/S-F-voters-OK-Prop-B-on-waterfr ont-development-5526983.php.*

[29] *See* Greg Morris, *The Homeowner Revolution: Democracy, Land Use and the Los Angeles Slow-Growth Movement, 1965–92*, at 3, at http://escholarship.org/uc/item/6k64g20f#page-1.

new construction will require a rezoning.[30] Not surprisingly, Los Angeles rents now rival those of New York and San Francisco.[31]

2 Cause and Effect

As a matter of common sense, it might seem obvious that new housing would hold rents and housing prices down, and that anti-density zoning therefore raises housing costs. This proposition is supported by the gap between construction costs and housing costs in expensive cities. In the most expensive markets such as Manhattan, housing costs per square foot are triple construction costs.[32] By contrast, in most metropolitan areas, housing costs are only slightly above construction costs, indicating that competition prevents developers from passing the costs of regulation to consumers.[33] Construction costs are only 19 percent higher in New York than in Chicago,[34] yet the median New York-area house is more than twice as expensive as the median Chicago-area house.[35]

This gap, standing alone, does not show that housing price gaps between cities and regions are due to zoning. For example, unusually high demand might cause housing prices to exceed construction costs. But if demand alone

[30] *Id.*

[31] *See* Caperis et. al., *supra*, at 10 (Los Angeles median rent is $1182, only slightly below New York City median rent of $1228).

[32] *See* Edward L. Glaeser, Joseph Gyourko, and Raven Saks, *Why is Manhattan So Expensive? Regulation and the Rise in Housing Prices* 4, http://www.nber.org/papers/w10124.pdf. It could be argued that land costs are an independent factor justifying high housing costs. This argument lacks merit because a landowner can always reduce per-unit housing costs by building more housing units on the same tract of land. *Id.* at 5 (in the absence of regulation, "builders always can add an extra floor if that would be profitable. Thus, to understand the marginal physical cost of building a new apartment we do not need to consider land purchase or preparation costs, as these are fixed costs which do not influence the marginal cost of building up.")

[33] *Id.* at 6.

[34] *Id.* at 16.

[35] *See* City Data, *supra* (comparing purchase prices); *See* National Association of Home Builders, Housing Opportunity Index, at http://www.nahb.org/en/research/housing-economics/housing-indexes/housing-opportunity-index.aspx (listing housing costs for most metropolitan areas) ("HOI").

explained high housing costs in expensive cities, developers would build more housing in order to benefit from increased demand. In Manhattan, this was the case in the 1950s and 1960s: increases in housing prices were followed by new construction.[36] Between 1955 and 1964, the city permitted 11,000 new housing units per year in Manhattan.[37] But in the 1980s and 1990s, this correlation disappeared: evidence that some other factor (such as regulation) prevented housing supply from responding to higher prices.[38] Between 1980 and 1999 permit grants averaged only 3120 per year.[39]

3 Supply and Demand Denialism

Despite the evidence discussed above, many commentators deny that the law of supply and demand is relevant to high-priced cities. For example, a *New York Times* article quoted one activist as follows, "Increasing the supply is not going to increase the number of affordable units; that is a complete and utter fallacy."[40] After quoting Ross, the *Times* did not bother to supply a contrasting perspective—presumably because its reporter believed that this statement was so true as to be incontestable.[41]

Supply-and-demand deniers argue that economic laws are irrelevant to housing costs, because (1) new supply is mostly quite expensive and thus does nothing to make housing more affordable, (2) demand for urban housing in high-cost cities is so overwhelming that new supply can never keep rents down, and (3) new housing actually creates demand and thus increases housing prices. Each of these arguments will be addressed in turn.

[36] *See* Glaeser et. al., *supra*, at 23.

[37] *See* Kim-Mai Cutler, *How Burrowing Owls Lead to Vomiting Anarchists* (Or SF's Housing Crisis Explained), http://techcrunch.com/2014/04/14/sf-housing/

[38] *See* Glaeser et. al., *supra*, at 23.

[39] *Id*. at 50; *see also*, Zoning Rules, *supra* at 297 (noting nationwide trend of more restrictive zoning in recent decades).

[40] Sheila Dewan, *In Many Cities, Rent is Rising Out of Reach of Middle Class*, New York Times, Apr. 14, 2014, at http://www.nytimes.com/2014/04/15/business/more-renters-find-30-affordability-ratio-unattainable.html. *See also* Cutler, *supra* (citing numerous commentators with similar views).

[41] In fairness, the activists may have intended the term "affordable housing" to mean "government- or nonprofit-subsidized housing for the poor" (a usage common in urban planning circles) rather than to mean lower rents for all.

3.1 Do Landlords Only Build for the Rich?

It could be argued that because new housing tends to be more expensive than older housing, it only benefits the wealthiest residents of a city.[42] This argument overlooks the role of "filtering"—that is, the impact of new housing upon the cost of older housing. When there is enough new housing to accommodate the demand of affluent customers, the demand for some older buildings declines (because some well-off people now prefer the newer buildings, and are unwilling to settle for the older ones). As a result, the price of such older housing stagnates or even declines, which makes that housing affordable to people of lesser means.[43] So in a free market, expensive new housing for the affluent means cheaper housing for everyone else.

But when zoning restricts housing supply, filtering fails to occur. In this situation, there is not enough new housing to satisfy all the affluent renters, so this group bids up not only the prices of the newest buildings,

[42] Dewan, *supra* ("as long as there are plenty of upper-income renters looking for apartments, there is little incentive to build anything other than expensive units"). A related argument is that places with lots of new construction tend to have higher rents. *See* Tom Lehman et. al., *Why Rents Rise*, in JOHN INGRAM GILDERBLOOM, ED., INVISIBLE CITY: POVERTY, HOUSING AND NEW URBANISM 47, 59, 63 (2008) (regression analysis shows positive correlation between "% rental created 1995–2000" and higher rents, and speculating that this is because of "the pressure to recapture the cost of construction"). But even the authors of the Lehman essay admit that zoning "rules [that] can limit the amount of housing built in a city... are likely to cause rents to increase." *Id.* at 50. Moreover, an alternative explanation may exist for correlations between new housing and higher rents: if landowners can get higher rents for property, they might be more eager to invest in rental housing.

[43] *See* Daniel Meyler, *Is Growth Share Working for New Jersey?* 13 N.Y.U. J. LEGIS. & PUB. POL'Y 219, 230–31 (2010) (explaining concept). I note that in low-demand, declining areas, filtering may work too well: the market price of housing may be so low that the market rent is lower than the price of maintaining an apartment, causing widespread abandonment of housing by landlords. *Cf.* David Reiss, *Housing Abandonment and New York City's Response*, 22 N.Y.U. REV. L. & SOC. CHANGE 783, 786–87 (1991) (under certain circumstances, abandonment may be cheaper than renting to low-income tenants). It logically follows that even in the least expensive cities, government subsidies may be necessary to provide housing for the very poorest renters.

but the prices of older buildings as well, causing those buildings to become more expensive.

Moreover, even new apartments are limited by the law of supply and demand. If new apartments were always reserved for the rich, new apartments would be equally expensive everywhere. But in fact, new apartments are far more expensive in high-cost cities. For example, new one-bedroom apartments (i.e., apartments built in 2014 or 2015) in San Francisco rent at between $2100 and $4000, while equally new *two-bedroom* apartments in Kansas City, Missouri, rent for between $1200 and $1500.[44] Thus, expanded supply might bring down the price not only of older apartments but of newer units as well.

3.2 Unlimited Demand?

It has been argued that the law of supply and demand does not apply to expensive cities, because in those places, demand for housing is virtually unlimited.[45] If this argument made sense, the fastest-growing cities would have the highest housing prices, since population growth increases demand for housing. But in fact this is not the case. Table 3.1 compares the most expensive metropolitan areas with the fastest-growing regions.

Table 3.1 shows that the most expensive regions all gained population—but not at a particularly rapid pace. In fact, all of the expensive regions grew *less* rapidly than the USA as a whole; the national population grew by

[44] This information is based on easily replicated searches at Zillow.com. I note that the newest one-bedroom unit I found for rent in Kansas City, built in 2008, also rented for $1200, perhaps because it was in the heart of downtown Kansas City and thus more valuable.

[45] *See, e.g.*, Tim Redmond, *Editor's Notes*, San Francisco Bay Guardian Online, Feb. 21, 2012, http://www.sfbg.com/2012/02/21/editors-notes ("in a city that has limited space and nearly unlimited demand . . . There's no way to build enough new affordable rental housing, or housing that middle-class families can buy, to keep up with the demand.") A related argument is that housing supply is being soaked up by wealthy foreigners who do not live in the units, but merely use them as places to hoard capital. However, even in high-cost New York City, only 1554 units cost over $5 million and were purchased by absentee owners- a tiny part of the region's housing supply. *See* Dana Rubenstein, *Could De Blasio do a pied-a-terre tax?* at http://www.capitalnewyork.com/article/city-hall/2014/09/8552990/could-de-blasio-do-pied-%C3%A0-terre-tax

Table 3.1 Most expensive regions vs. fastest growing regions

	Median house prices (in thousands)[46]	*Population percentage growth, 2000–14*[47]
Most expensive major[48] metropolitan areas		
San Francisco	1025	11.4
Honolulu	500	13.2
San Jose	763	12.5
New York	500	6.1
Los Angeles	500	7.3
Fastest growing major metropolitan areas		
Raleigh	247	55.9
Austin	261	55.5
Las Vegas	208	50.4
McAllen	121	45.9
Orlando	179	41.2

13.3 percent between 2000 and 2014,[49] more rapidly than even the fastest-growing of the high-cost regions (Honolulu). By this measurement, it appears that housing demand in the most expensive regions might actually be *lower* than demand in the cheaper high-growth regions.

But population growth alone is not the most appropriate measurement of housing demand. Because high-cost cities have more wealth than other cities, their inhabitants can bid up the price of housing to higher levels. If the wealth of the high-cost regions was sufficient to explain their higher housing costs, those regions would be far wealthier than the low-cost cities.

[46] *See* National Association of Home Builders, *Housing Opportunity Index*, at http://www.nahb.org/en/research/housing-economics/housing-indexes/housing-opportunity-index.aspx (fourth quarter 2015 data) ("Complete Listing by Affordability Rank" table). I note that the NAHB categorizes Oakland as a separate metropolitan area; if this was the case, Oakland would be among the five most expensive regions. However, this listing may be inaccurate. See JANSSEN, *supra*, at 613 (listing San Francisco and Oakland as part of same region).

[47] *Id.* (population statistics).

[48] By "major" I mean metropolitan areas with over 800,000 people. *Id.* (listing areas).

[49] *Id.* at 605.

Table 3.2 Regional income growth, 2000–12 (income in billons, housing costs in thousands)[50]

	2000 income	*2012 income*	*Growth percentage*
High-cost regions			
San Francisco	203.6	312.1	53.4
Honolulu	27.1	47.9	76.7
San Jose	93.8	132.8	41.5
New York	758.1	1246.3	64.9
Los Angeles	392.7	635.8	61.9
High-growth regions			
Raleigh	27.7	53.3	92.1
Austin	41.5	84.2	102.8
Las Vegas	42.1	75.9	80.2
McAllen		Not available	
Orlando	46.2	83.8	81.3

Table 3.2 compares income growth in the highest-cost regions to income growth in the fast-growing regions.

On balance, personal income actually grew *faster* in the high-growth regions than in the high-cost regions. In the high-growth regions, personal income grew by over 80 percent—a figure matched by *none* of the high-cost regions. Thus, regional demand for goods and services (presumably including real estate) grew faster in the lower-cost, higher-growth regions. Yet as noted above, housing prices are far lower in the high-growth group: a factor suggesting that supply is as important as demand in determining housing costs.[51]

[50] *See* 2016 ABSTRACT, *supra*, at Table 703.

[51] It could be argued that the absolute level of housing prices is less important than the rate of price growth. Here, the pattern is less clear, because median home prices actually decreased in one high-cost region (Honolulu) between 2000 and 2012, and only increased by 2 percent (from $410,000 to $420,000) in another (San Jose). *See* National Association of Home Builders, *The NAHB/Wells Fargo Housing Opportunity Index: Complete History by Metropolitan Area (1991-Current)*, Mar. 27, 2013 at http://web.archive.org/web/20130527113827/http://www.nahb.org/reference_list.aspx?sectionID=135. On the other hand, home prices doubled in New York (from $195,000 to $400,000), and increased by over 50 percent in Los Angeles (from $194,000 to $295,000). By contrast, in

It could also be argued that if housing costs were lower, the demand for housing in high-cost cities *would* be unlimited. But this argument is just as plausible in low-cost markets: if we assume that demand for $200,000 houses in San Jose would be unlimited if such houses existed, why would it not be equally true that demand for $50,000 houses in Raleigh would be unlimited if such houses existed?

Moreover, there is some evidence that even in expensive areas, new housing cuts costs. For example, in Brooklyn, New York, the median asking rent is $2600,[52] far higher than suburban rents.[53] Yet as Table 3.3 shows, even in Brooklyn, a spike in construction can hold down rents.

In Brooklyn, inventory rose dramatically, and by an odd coincidence rents stayed the same or declined. In Manhattan, inventory grew but much more slowly: not surprisingly, rents increased. Thus, the Brooklyn/

Table 3.3 Brooklyn vs. Manhattan[54]

	Rental inventory growth, 2014–15	*Asking rent growth, 2014–15*
Studio apartments, Brooklyn	27.1	–5.1 percent
Studio apartments, Manhattan	5.2	6.5
One-bedroom apartments, Brooklyn	39.3	0.0 percent
One-bedroom apartments, Manhattan	8.2	10.7
Two-bedroom apartments, Brooklyn	54.5	–1.9 percent
Two-bedroom apartments, Manhattan	15.1	9.7

none of the high-growth markets listed above did prices increase over 25 percent. Id. (Raleigh median price increased from $159,000 to $194,000, Austin median from $150,000 to $184,000, Orlando from $112,000 to $115,000; Las Vegas median decreased, and no data available for McAllen).

[52] *See* Streeteasy Market, *supra*, at 17 (data for third quarter of 2015).

[53] *See supra* note 8 and accompanying text.

[54] *See* Streeteasy Market, *supra*, at 9 (Manhattan data), 17 (Brooklyn data).

Manhattan experience suggests that even in a red-hot rental market, construction affects rents. Similarly, rents have started to slow down in some other cities. In late 2015, rents in downtown Seattle and nearby suburban downtowns declined by $59 per month, after rising per years.[55] Why? Perhaps, because vacancy rates increased.[56]

3.3 Induced Demand and Housing Costs

Another variation of the "unlimited demand" argument is the "induced demand" theory: the idea that new housing, by making an area more desirable, causes gentrification, which in turn causes higher housing costs. For example, imagine the neighborhood of Slumville, full of decaying apartments renting for $500 per month. A developer builds a well-maintained new building, which rents for $2000. Because the new tenants have more disposable income, new shops and other amenities arise to serve them, which in turn makes Slumville more desirable to affluent renters. In turn, the increased demand for Slumville causes even the least valuable dwellings to become dramatically more expensive.[57]

Within a neighborhood, this theory may sometimes be persuasive. But on a citywide basis, demand is not unlimited, because a city has only so many affluent residents at one time. For example, suppose that Slumville is in a city with 1000 people and two neighborhoods: Slumville and Richville. If 100 people suddenly move from Richville to Slumville because of the new apartments, suddenly Richville will have 100 vacant apartments. As a result, Richville landlords will have to lower rents in order to retain residents or bring in new ones.

In a city where NIMBYism creates an artificial housing shortage, rents may never actually decline—but even in a high-rent city, rent in rapidly gentrifying neighborhoods may rise more rapidly than in other

[55] *See* Marc Stiles, *New report finds "alarming deterioration" of Seattle apartment market*", Puget Sound Bus. Journal, Dec. 22, 2015, at http://www.bizjournals.com/seattle/morning_call/2015/12/report-finds-alarming-deterioration-of-seattle.html

[56] *Id.*

[57] *Cf.* Chinatown Staff and Workers Ass'n v. City of New York, 502 N.E. 2d 176 (1986) (plaintiffs argued that introducing new housing in neighborhood would lead to displacement of existing residents).

neighborhoods. For example, between 2000 and 2012, rents rose by 76.1 percent in Greenpoint/Wiliamsburg (one of New York's most rapidly gentrifying neighborhoods)[58] but increased by only 7.3 percent in the Upper East Side.[59] And as noted above, rents may be stabilizing even in New York.[60]

In sum, zoning reduces housing supply, which, other things being equal, increases housing costs. The more expensive the city, the more likely it is that some people cannot afford city neighborhoods that they prefer. And where this is the case, some of those people will choose suburbia over a cheaper city neighborhood.

4 Solutions and Counterarguments

Given that zoning-induced limits to housing supply make city living less attractive, what alternative is there to the status quo? To answer the question, I return to the roots of zoning. A common argument for zoning is that it protects homeowners and apartment dwellers from the pollution and noise caused by large-scale industrial and commercial activity[61]; thus, it makes sense for zoning to restrict nonresidential land uses.

But this argument does not justify restrictions on housing density, especially in already-residential areas (or even in areas with nonpolluting commercial land uses such as offices). It therefore seems to me that the social harms arising from high housing costs are so great that in the most expensive cities, new housing ought to be allowed everywhere, without

[58] *See* Scott M. Stringer, *The Growing Gap: New York's Housing Affordability Challenge* 16, http://comptroller.nyc.gov/wp-content/uploads/documents/Growing_Gap.pdf (adding that number of households with incomes over $100,000 more than doubled in this area).

[59] *Id.* at 17.

[60] *See supra* note 54 and accompanying text.

[61] *See* JESSE DUKEMINIER ET. AL., PROPERTY 967 (8th ed. 2014) (zoning came about because common law was unable to control harms caused by industrialization such as "factories belching smoke from soft coal, and foul odors"). Of course, this is not the only argument for zoning; however, it seems to me that because this argument relates directly to health and safety, it is the strongest possible argument for zoning. Other arguments for zoning, as will be shown below, are much weaker and should not outweigh the public interest in housing affordability.

any density limits. However, it is not in the interest of an individual city's homeowners to deregulate zoning, since its homeowners benefit from housing shortages: the fewer housing vacancies there are, the higher the price of their houses and condominiums. Thus, state legislatures will have to intervene.

4.1 A Proposal

Accordingly, I propose that state legislatures should enact something like the following statute: unusually expensive large cities (e.g., cities with over 200,000 people where the median sale price exceeds three times the median household income),[62] *may no longer regulate the density of housing in areas zoned for any housing at all, nor may they prohibit housing or regulate its density in areas zoned for retail or offices.*[63]

My proposal would be limited to cities because (given the purpose of this book) I focus on rules that lead to suburban sprawl; however, a legislature more broadly concerned with regional housing affordability could extend the rule to a region's suburbs.[64] It would be limited to cities

[62] I use this ratio because numerous authors refer to it as a normal ratio for American housing costs. *See, e.g.* CHRIS MARTENSON, THE CRASH COURSE: THE UNSUSTAINABLE FUTURE OF OUR ECONOMY, ENERGY AND ENVIRONMENT 80 (2011) (suggesting that mid-2000s housing prices were in unsustainable housing bubble, because a "more normal range for housing would be in the range of roughly three times income, while anything over four really begins to stretch things a bit"); RICHARD FLORIDA, THE GREAT RESET: HOW NEW WAYS OF LIVING AND WORKING DRIVE POST-CRASH PROSPERITY 95 (2006).

[63] It may seem unusual for a legislature to create different laws for larger cities; however, such classifications are allowed under at least some state constitutions. *See, e.g.*, COLORADO CONSTITUTION, ART. XIV, SEC. 6 (creating election rules that distinguish between counties with over 70,000 people and smaller counties); Jose R. Legaspi, *Harrisburg School District v. Zogby: The Supreme Court of Pennsylvania Concludes It Cannot Countenance A "Closed Class" Created By The Education Empowerment Act*, 14 WIDENER L.J. 619, 629 (2005) ("laws that classify cities and school districts based on population are permissible" in Pennsylvania).

[64] Because cities and suburbs compete with each other, such a rule would probably be more effective in reducing housing costs. On the other hand, increasing suburban housing supply might increase the attractiveness of suburbia. Thus, such a proposal involves a trade-off between limiting sprawl and reducing housing costs: a

with high housing prices because only those cities have abused their right to zone in a way that makes housing unaffordable to the middle class, and because housing costs are unlikely to generate sprawl in cheaper cities. The rule would require mixed-use zoning only in "retail or office" areas in order to prevent conflicts between industry and pollution-fearing residents of nearby housing.

The benefit of this proposal is obvious: it would prevent government from using zoning to curtail housing supply in expensive places. In particular, it would prevent government from catering to "Not In My Back Yard" (NIMBY) activists who fear new housing in their neighborhoods. If (as I have argued above) limitations on housing supply lead to such high housing prices, zoning deregulation would contain housing prices, which in turn would make cities less expensive and thus more appealing places to live (in addition to reducing the poverty and homelessness arising from rising rents).

4.2 Counterarguments

A variety of arguments could be raised against my proposal. NIMBY activists argue that new development near their homes creates a variety of externalities, including (1) increased traffic, (2) altered neighborhood character, (3) reduced property values, and (4) violating homeowners' reliance interest in the status quo. For the reasons stated below, these arguments are either meritless or outweighed by the social harms caused by sprawl.

4.2.1 Traffic and Infrastructure

A common NIMBY argument against new housing is that adding people to a neighborhood increases traffic congestion[65] or unduly burdens other form of infrastructure such as public transit. But this argument is a "beggar thy neighbor" argument. If new residents cause new traffic,

legislature concerned with the former would be reluctant to attack suburban growth controls, while a legislature concerned with the latter would limit zoning in city and suburb alike.

[65] See, e.g., Watson v. Mayflower Property, 223 So. 2d 368, 374 (Fla. 4th DCA 1969), writ discharged, 233 So. 2d 390 (Fla. 1970) (upholding density limits based on concerns about congestion).

they would add traffic wherever they go. So if restrictive zoning causes 10,000 people to relocate to a suburb instead of to a city, such sprawl does not eliminate the social harm caused by traffic congestion: instead, the harm is merely shifted from city to suburb.

In fact, when NIMBYism limits housing supply in cities, regionwide traffic congestion may actually *increase*. If high rents shift population from walkable cities to automobile-dependent suburbs, the overall amount of societal driving will increase; people who might drive a few thousand miles a year (or not at all) if they lived in the city might be forced to drive tens of thousands of miles per year if they moved to suburbia.[66] More driving means more traffic congestion—and if some of these suburbanites drove to jobs or amenities in the city, they might actually increase congestion in the very city neighborhoods that used zoning to exclude them.

4.2.2 Neighborhood Character

It could be argued that restrictive zoning is necessary to prevent new housing from changing a neighborhood's existing character.[67] But this argument too is another "beggar thy neighbor" argument: if new housing changes neighborhood character, restrictive zoning merely shifts that change to whichever neighborhood or suburb is willing to allow new housing. In fact, if urban zoning causes new housing to shift from a city to an undeveloped suburb, the latter area's character will change far more radically than the character of a more urban site: for example, a 200-home subdivision will change a cornfield more than it would change a neighborhood full of houses and small apartment buildings. Moreover, when urban housing costs increase, this too changes neighborhood character, as people who could have afforded the neighborhood in 1990 cannot afford it today. Thus, "neighborhood character" is an argument against, rather than for, the current zoning regime.

[66] *See Glaeser and Kahn, supra* at 44 (suburbanites drive more than city residents).

[67] *See, e.g.*, Heffernan v. Missoula City Council, 255 P.2d 80, 88, 360 Mont. 207, 214–15 (2011) (city opposed new development based on concern that additional population density "can have a significant negative impact . . . on neighborhood character").

4.2.3 *Property Values*

One original purpose of zoning was to preserve the property values of affluent areas.[68] But in many places, the high cost of housing has become a problem rather than a solution. Between 2000 and 2014, American median household income has increased by 25.4 percent, while rent has increased by more than half.[69] Even in low-cost markets such as Dallas and Chicago, rents as a percentage of income have increased.[70] 26 percent of renters now pay more than half their incomes in rent,[71] including over 70 percent of renters earning under $15,000.[72] As a result, homelessness in expensive cities has risen: for example, in New York the number of families in homeless shelters rose by 27.1 percent between 2005 and 2014, while the poverty rate rose by only 17.5 percent.[73] In Los Angeles, the number of chronically homeless people has risen by 55 percent since 2013.[74] In other words, ever-rising property values have become a source of ever-increasing human misery.

4.2.4 *Reliance*

It could be argued that even if restrictive zoning makes no sense on undeveloped land, residents of existing neighborhoods should have

[68] *See* DUKEMINIER ET. AL., *supra*, at 970 (one reason for birth of zoning was homeowners' desire for "insurance that their major asset would not be devalued").

[69] *See* Krishna Rao, *The Rent is Too Damn High*, at http://www.zillow.com/research/rent-affordability-2013q4-6681/

[70] *Id.*

[71] *See* Joint Center for Housing Studies, *America's Rental Housing: Expanding Options for Diverse and Growing Demand* 40 (defining term "severely burdened"), 42 (26.4 percent of renters "severely burdened").

[72] *Id.* at 28.

[73] *See* Coalition for the Homeless, *State of the Homeless 2015*, at http://www.coalitionforthehomeless.org/state-homeless-2015/

[74] *See* Gale Holland, *L.A. Leads Nation in Chronically Homeless Population*, at http://www.latimes.com/local/california/la-me-homeless-national-numbers-20151120-story.html

veto power over new housing because they purchased houses in reliance on the status quo.[75]

This argument is unpersuasive, for three reasons. First, it rests on a circular chain of logic: cities create zoning rules that freeze existing neighborhood densities, causing neighborhood reliance on those rules, which in turn justifies cities' retention of the very same rules. But if cities abolished the rules, the reliance would end, thus eliminating the justification for the reliance argument.

Second, the argument proves too much. If homeowners rely on a neighborhood's existing environment, that reliance includes not only existing densities but also existing public facilities such as a neighborhood public library. But does that mean cities should never be allowed to close libraries or change library hours? Homeowners might also rely on a neighborhood's existing racial, religious, or social composition. But does that mean that people who differ from a neighborhood's current residents in these respects should never be allowed into the neighborhood? Should homeowners be able to exclude everyone richer or poorer than they are, based on their reliance on the neighborhood's socio-economic status? To state such an argument is to refute it.

Third, public policy that is consistently based on the reliance argument would lead to absurd results. Compact neighborhoods by definition have many residents—residents who can credibly claim that they have relied on the status quo. By contrast, undeveloped parcels of rural and suburban land have far fewer neighbors. So if zoning policy is designed to protect the sensibilities of neighborhoods' existing residents, this means that almost no new housing can be built in urban areas, while lots of new housing should be built in rural areas—in short, sprawl on steroids. For the reasons stated at the start of this book, such sprawl makes Americans poorer and sicker, while increasing global air pollution. These social harms outweigh any conceivable reliance interest justifying the zoning status quo.

4.2.5 What About Local Autonomy?

It could also be argued that the benefits of increased landowner freedom and cheaper housing are outweighed by the public interest in local

[75] *See, e.g.*, Bradley Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 69 (1994) (purchaser of house intends to purchase not only property but "intangible qualities such as neighborhood ambiance, aesthetics, and the physical environment").

autonomy. Local regulation is less of an infringement on human liberty than federal regulation, because people have the right to "vote with their feet"—that is, when they move to a city, they are effectively buying a set of government services and regulations rather than being coerced.[76]

This argument does not justify local overregulation, for three reasons. First, even if anti-development policies reflect the views of a city's residents,[77] such policies reduce freedom for the non-residents who, due to government policies, are priced out of the city. Because these nonresidents are forced out of expensive places by local regulation, they do not really choose their local governments, but instead are shifted to cheaper places by the heavy hand of government.

Second, local misregulation is arguably analogous to externality-creating individual misconduct. If government should be allowed regulate an individual who imposes pollution and other externalities on the community, higher levels of government should similarly be able to regulate a local government that imposes externalities on a region. So if sprawl-inducing regulation creates social harms that extend across municipal lines, higher levels of government have an interest in limiting those regulations. For example, if a central city's overregulation causes more people to live in automobile-dependent suburbs, the city is creating pollution just as if it had built a smelly factory near the city limits. And if such overregulation imposes the financial costs of automobiles upon those unwilling suburbanites,[78] state government should be able to prevent local government from imposing those costs, just as it can prevent a factory from imposing pollution-related costs on its neighbors.

[76] *Cf.* David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1508–09 (2010) (describing theory) ("Law and Economic").

[77] Which is not always the case. Zoning decisions are often low visibility: if a small number of people persuade the city to adopt a policy by attending a sparsely attended meeting, this result might not reflect the opinions of the electorate as a whole. *Cf.* Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp. 2d 857, 867 (E.D. Pa. 2002) (noting "undeniably low visibility of land regulation decisions").

[78] Or upon the region as a whole. *See* Law and Economic, *supra*, at 1512 (suggesting that anti-density regulation imposes economic costs on region as a whole, by reducing "interactions between physically proximate individuals and businesses").

Third, state or federal intervention is socially beneficial when it prevents policies that are rational for each individual municipality or neighborhood, but socially harmful if widely adopted. For example, if pollution extends across municipal lines, it is rational for an individual municipality to allow polluting factories near its city limits, because the town gets the benefits of the factory (such as new jobs, and thus a higher tax base) while the costs of pollution are dispersed throughout the region. But if every municipality does this, everyone suffers the ill effects of pollution. To prevent this problem, state and federal governments regulate pollution rather than trusting local governments to do so.

Similarly, it is rational for an individual municipality or neighborhood to zone out new housing, because a housing shortage increases property values for current landowners. But a widespread housing shortage causes a city and its surrounding region to become a less appealing place to live and work. In such a situation, only a higher level of government can protect cities and towns from themselves.

4.3 Alternatives

The deregulatory proposals discussed above are no doubt so radical as to be politically infeasible. Are there more moderate alternatives that could generate more housing construction?

One alternative is for city planners to propose a "zoning budget" that provides a citywide target for housing growth. The city would limit its own ability to respond to NIMBY pressure by providing for an up-or-down vote on the budget, rather than allowing amendments designed to enact the preferences of individual neighborhoods. Until this citywide target was met, no downzonings (i.e., city-mandated reductions in density) would be allowed.[79] The authors of this idea, Roderick Hills and David Schleicher, have also suggested that cities should also create a "housing impact statement" regarding possible zoning changes, so that planners and politicians would know the extent to which a zoning change increased or decreased housing supply.[80] If cities were forced to publicly

[79] *Id. See* David N. Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1721–23 (2013) (describing idea in more detail) ("Unplanning").

[80] *See* Roderick M. Hills, Jr. and David N. Schleicher, *Balancing The "Zoning Budget"*, 62 CASE W. RES. L. REV. 81, 128–29 (2011).

admit that a zoning change (or a refusal to allow such change) reduced housing supply, urban politicians might be more reluctant to publicly endorse restrictive zoning, and judges might be more reluctant to uphold such policies.[81]

If a city enacted a high budget and fought the temptation to amend that budget in response to neighborhood objections, the results of these policies might be quite positive: the city would allow more new housing, thus holding down housing prices. I suspect, however, that if a city council was enlightened enough to (a) support a high zoning budget, and (b) avoid the temptation to amend the budget in response to neighborhood pressure, it probably would be enlightened enough not to have created a housing shortage in the first place. Having said that, it seems to me that the zoning budget/housing impact assessment package would do no harm, and probably do some good.

An even more attractive alternative might be for a city to bribe NIMBYs into submission. Schleicher has proposed that if a city allows new housing in a neighborhood,[82] some percentage of the property taxes generated by the new development could be given to that neighborhood's homeowners in the form of property tax rebates.[83] Such tax rebates would encourage people to support development near their homes. However, such rebates might not be large enough to discourage neighborhood opposition; fear of the unknown impacts of new housing might outweigh tax benefits that would presumably be distributed among hundreds or thousands of taxpayers.[84] As the author of this proposal admits, even in a city with a strong

[81] *Id.* at 129.

[82] Or community board, in cities where city-appointed boards of neighborhood residents (colloquially known as "community boards") vote on rezonings. Unplanning, *supra*, at 1727.

[83] *Id.* at 1727–28.

[84] Some currently existing policies are roughly similar to these tax rebates. Some cities allow development if a developer is willing to pay "impact fees" designed to compensate for the harmful externalities caused by development. But impact fees have two weaknesses: first, because the courts require the fees to be related to the need for public services caused by development, developers may sometimes be unable to pay the city enough to get political support for development. *Id.* at 1729–30. Second, the costs of impact fees are paid by the developer rather than the city, which means that (if the developer passes these costs onto buyers and

tax rebate program, "cities would still see political conflict over development, and developers would frequently lose."[85] Nevertheless, the tax rebate proposal would also do some good and no obvious harm.

One common motive for NIMBYism is concern that new development might reduce property values. So if housing was a less prominent part of middle-class Americans' investment portfolios, homeowners might be willing to tolerate less aggressive zoning. For example, William Fischel has suggested that the federal government could apply capital gains taxes to all profits from home sales, thus limiting the economic payoff from homeownership.[86] However, this proposal might discourage homeowners from selling their houses, thus actually reducing the for-sale housing supply.

Moreover, the link between homeownership and restrictive zoning is not tremendously strong. For example, New York, San Francisco, and Los Angeles all have unusually low home ownership rates and yet have unusually restrictive zoning.[87] Why? Because NIMBYs are motivated not just by fears about property values, but by less tangible fears about traffic and neighborhood character.[88] It may be that one motivation for such fears is social status: one who thinks of his or her neighborhood as having a unique character may feel that he or she has lost social status if the neighborhood changes.[89] Since these motives can affect renters as well

renters) that such fees may actually *increase* housing prices. A similar alternative is community benefit agreements (CBAs) between developers and potential opponents of a rezoning; under such agreements, developers provide various benefits in exchange for political support for development. *Id*. at 1728–30. However, CBA benefits may be costly for developers, who in turn might pass the cost on to renters and buyers.

[85] *Id*. at 1731.

[86] *See*, Zoning Rules *supra*, at 354–59 (discussing this proposal, as well as other tax-related proposals and encouraging insurance designed to insure homeowners against decreased home prices).

[87] *See* Governing, *Homeownership Statistics for Metro Areas*, at http://www.governing.com/gov-data/other/homeownership-statistics-data-for-metro-areas.html (listing homeownership rates by region); *supra* notes 22–26 and accompanying text (describing zoning in these regions' central cities).

[88] *See* Chapter 3–4.1 *supra*.

[89] *See* Ross, *supra*, at 102 (discussing status as motivation for exclusion).

as owners, it follows that property values are just one of many possible motivations for NIMBYism,[90] and thus that higher taxes on homes might not be a tremendously effective strategy.

Courts could enforce the Constitution's Due Process and Takings Clause more rigorously. The Supreme Court has held that due process forbids zoning rules that are "arbitrary and unreasonable, having no substantial relation to the... general welfare."[91] However, the concept of "unreasonableness" is so vague that it does not give courts much guidance. As a result, courts have been reluctant to limit zoning under this clause.[92]

The Takings Clause requires compensation for overly restrictive government regulations, based on a balancing test that weighs the economic harm to a landowner (including the landowner's investment-backed expectations) against the character of the government action.[93] The meaning of this test is also unclear, and as a result courts have been reluctant to hold that zoning regulations were compensable takings.[94] It is also not clear to me how courts could clarify the takings test to create better results.

[90] *Id.* at 94 (noting infinite variety of anti-development arguments: "There's too much parking or too little. If houses are proposed, offices are what the neighborhood needs; if offices, houses would be better. Property values will go down; we will be priced out of our homes.")

[91] Euclid, 262 U.S. at 395.

[92] *See* Zoning Rules, *supra*, at 93.

[93] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[94] *See*, Zoning Rules, *supra*, at 333–334 (judges deferential to local governments), 345 (explaining difficulty of ascertaining economic losses).

CHAPTER 4

Sprawl As How We Grow, Or How Government Makes Suburbia Sprawling

Abstract Government zoning rules isolate housing from shops, jobs, and public transit, while government-built streets encourage high-speed automobile traffic and thus make walking less safe. As a result, most suburbanites need a car to easily access most destinations. This chapter describes these anti-walkability rules, and goes on to suggests pro-walkability reforms.

Keywords Density · Parking · Street Design · Cul-de-Sacs · Zoning

The first half of this book focuses on *where* metropolitan areas grow: how government encourages people to move from city to suburb. This chapter, by contrast, focuses on *how* they grow: that is, why are suburbs (and newer, suburb-like areas within city boundaries) so automobile-oriented? Why do residents of these places often purchase an automobile for every single family member over the age of 16? Because government regulation loads the suburban deck in favor of vehicle-dependent sprawl. In particular, government creates sprawl through (1) single-use zoning, (2) artificial limits on population density, (3) minimum parking and setback requirements, and (4) street design regulations requiring wide streets and long blocks.

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1 Zoning: The Segregation of Uses

In the absence of government regulation, most people would probably be able to walk to shops or offices: if a landowner placed a group of residences on a plot of land, that landowner (or a nearby competitor) might be tempted to place shops nearby to serve the inhabitants of those houses or apartments. But such a mix of uses is often difficult in the USA, because of zoning codes that artificially separate even the most compatible land uses.

Zoning began in the 1910s, with ordinances in Los Angeles and New York City.[1] In 1924, a committee created by then-Commerce Secretary Herbert Hoover created the Standard State Zoning Enabling Act (SZEA), a model state law that authorized other local governments to enact similar codes.[2] SZEA authorized municipalities to create individual zoning districts, and to regulate the density of population and the appropriate use of structures within each district.[3] States have universally adopted SZEA-like statutes, and cities and suburbs have almost universally adopted zoning.[4] Zoning codes typically prohibit any mixture of commercial and residential uses,[5]segregate apartments from houses,[6] and segregate different types of houses from each other.[7]

1.1 The Problem

The first zoning codes did not significantly discourage walking: even though a shop could not be on the same block as a house or apartment building, most residential zones were small enough that commercial zones

[1] *See* Zoning Rules, *supra*, at 163. In 1916, New York enacted the first "comprehensive" zoning ordinance- that is, one governing an entire city. *Id.* at 188. However, Los Angeles experimented with the creation of exclusive residential districts before the 1916 enactment of New York's ordinance. *Id.* at 187–88.

[2] *Id.* at 136–37.

[3] *Id.* at 138 (containing text of SZEA).

[4] *Id.* at 34.

[5] *Id.* at 29.

[6] *Id.* at 168 (suggesting that buses allowed the growth of apartment houses in suburbs, thus motivating towns to adopt zoning in order to keep them out).

[7] *See infra* Chapter 4-2 (discussing density restrictions).

were still within walking distance of housing.[8] This is still the case in many urban neighborhoods. For example, in New York City's Upper West Side, most residential zones are only a block or two wide, which means that no one has to walk more than a couple of blocks to shopping.[9]

But in more suburban areas, residential zones may extend for miles. For example, Jacksonville, Florida has one residential zone at the city's edge that is six miles wide.[10] If you live in the middle of a six-mile-wide residential zone, obviously the nearest shop of any sort will be miles away. Few people living in these housing-only monocultures will be able or willing to walk two or three miles to the nearest shop or job. Thus, use-based zoning sometimes means that very few people can walk to a neighborhood grocer or other amenities.

How extensive is this level of land use segregation? One measure of such segregation is the website Walkscore.com, which uses a place's distance to bars, restaurants, grocers, parks, schools, and entertainment to measure that place's walkability. According to this website, the average American city with over 200,000 people has a Walkscore of only 47 (out of a possible 100).[11] According to Walkscore, a neighborhood or address with such a low score is "Car Dependent" (which means that most errands require a car).[12] And most suburbs are even less walkable. Atlanta's

[8] *See* EMILY TALEN, CITY RULES: HOW REGULATIONS AFFECT URBAN FORM 104–05 (2012).

[9] *See* New York City Planning Commission, *Zoning Map 5-D*, at http://www1.nyc.gov/assets/planning/download/pdf/zoning/zoning-maps/map5d.pdf I note, however, that even relatively fine-grained zoning has a modest negative impact on walkability if it prohibits housing above apartments.

[10] *See* Michael Lewyn, *The (Somewhat) False Hope of Comprehensive Planning*, 37 UNIVERSITY OF HAWAI'I LAW REVIEW 39, 53 (2015) ("False Hope of Comprehensive Planning"). In fact, some suburbs have no commercial zones at all. *See, e.g.*, BOROUGH OF FOX CHAPEL, PA., CODE, SEC. 21, at http://ecode360.com/15015492; CODIFIED ORDINANCES OF HUNTING VALLEY, OHIO, CODE, SEC. 1155.02, at http://whdrane.conwaygreene.com/NXT/gateway.dll?f=templates&fn=default.htm&vid=whdrane:OHHuntingvalley (stores not listed as among allowable uses).

[11] *See* Walkscore, *Cities and Neighborhoods*, at https://www.walkscore.com/cities-and-neighborhoods/.

[12] See Walkscore, *Pomona Park*, at https://www.walkscore.com/GA/Atlanta/Pomona_Park (describing Atlanta neighborhood with a Walkscore of 47).

citywide Walkscore is a roughly average 46, and most of its suburbs have Walkscores in the 20–30 range—which means that almost all errands require a car.[13] And these levels are suburb-wide averages: the Walkscore website lists available rentals for each suburb, some of which have single-digit Walkscores.

Thus, it appears that in many neighborhoods, zoning segregates activities so extensively that housing is not within walking distance of shops and jobs. To the extent that this is this case, zoning makes Americans more dependent on cars to reach such destinations.

1.2 Solutions

Where zoning is fine grained (i.e., where each individual zone is only a few blocks wide), zoning does not tremendously reduce walkability, because houses are already relatively close to shops; in such areas, no major reforms are necessary.

Having said that, some minor reforms would be useful. First, there is no reason not to combine multifamily housing with retail or office uses. The Supreme Court has justified separation of uses on the ground that homeowners need to be protected from the traffic and noise caused by shops and apartment buildings.[14] But apartments already tend to be more dense and heavily trafficked than blocks full of single-family homes. Thus, to "protect" apartment dwellers from shops and other amenities is to subject them to the worst of both worlds: whatever congestion results from compact development without the convenience and walkability of such development. Thus, cities should merge multifamily and nonpolluting

[13] I reached this result as follows: I found a list of representative Atlanta suburbs on a real estate website, and then found the citywide Walkscores for these suburbs. See NestAtlanta, *Metro Atlanta Suburbs*, at http://www.atlhomesearch.com/atlantametro/ (listing the following suburbs: Alpharetta, Canton, Cumming, Duluth, Dunwoody, Johns Creek, Kennesaw, Marietta, Roswell, Sandy Springs, Avondale Estates, Decatur, Lawrenceville, Snellville, McDonough, Tucker, Woodstock, and Stockbridge, as well as several suburbs for which I could not find a town-wide Walkscore); Walkscore, at www.walkscore.com. Of these 18 suburbs, 10 had Walkscores in the 20–30 range, and three more had Walkscores between 10 and 20.

[14] See Euclid v. Ambler Realty, 272 U.S. 365 (1926).

commercial uses (such as shops and offices) into one "Multifamily/Commercial" category. At a minimum, cities should allow apartments above shops and offices, a venerable housing form that still exists in the most walkable cities.[15]

Large single-family zones, however, tend to be less walkable, because a pedestrian might have to walk miles from houses to shops. These housing-only monocultures can be changed through deregulation—but only modestly, if government continues to honor homeowners' perceived desire to avoid more intense land use. The SmartCode, a walkability-oriented model land use code,[16] has created a suburb-like zone called the "T3" zone. In this zone, the dominant land use is single-family housing,[17] and apartments are prohibited.[18] But the SmartCode allows one retail shop for every 300 housing units in this zone; the shop may occupy only one story, and must be either a "neighborhood store, or food service seating not more than 20."[19] So if the SmartCode was applied to a typical suburban subdivision, it would not allow large-scale retail, but would allow a shop every half a mile or so.[20] Applying this SmartCode provision to most

[15] In addition, federal lending agencies should stop discriminating against such mixed-use housing. Currently, these agencies insure mortgages for purely residential buildings, but will only support multifamily projects if commercial floor space or income is limited to 15 to 25 percent of such projects, effectively disallowing mixed-use buildings of less than five stories. *See* Regional Plan Association, *Unintended Consequences of Housing Finance* 4–5, at https://www.cnu.org/sites/default/files/RPA-The-Unintended-Consequences-of-Housing-Finance.pdf. Instead, these caps should be raised significantly, so that a two- or three-story building with retail on the ground floor can receive the same kind of federal support as a house or a high-rise. *Id.* at 7 (proposing nonresidential limit be raised to 35 percent so that three-story mixed-use buildings could receive federal support).

[16] *See* Center for Applied Transect Studies, SmartCode Version 9.2, at http://transect.org/codes.html ("SmartCode")

[17] *Id.*, Table 1.

[18] *Id.*, Table 10 (only two dwellings per lot allowed in T3 zone).

[19] *Id.*

[20] I calculate as follows: four houses per acre is a fairly normal American density. *See* Albert N. Benshoff, *Out of Focus: The Fuzzy Line Between Regulatory "Takings" and Valid Zoning Related "Exactions" in North Carolina and*

single-family zones would not encourage visitors from outside the neighborhood, and thus not create significant traffic or congestion. Yet at the same time, this reform would give suburbanites something to walk to, and thus reduce the negative effects of sprawl.

2 Density Restrictions

In addition to keeping shops away from houses, zoning also limits population density—that is, the number of houses or apartments that can be placed on a given amount of land. This has been the case since the dawn of zoning: SZEA explicitly authorizes towns to restrict "the height, number of stories, and size of buildings . . . [and] the density of population."[21] In the 1930s, the Federal Housing Administration (FHA) also limited density by insuring single-family homes only if they sat on at least 6000 square feet (or one-seventh of an acre) of land.[22]

Over time, zoning has generally become even more restrictive.[23] An 0.4-acre minimum lot size is fairly typical.[24] Many places require even

Federal Jurisprudence, 16 CAMPBELL L. REV. 33, 340 (1994) ("typical urban North Carolina 'single family residential' zoning district allows a maximum density of approximately four dwelling units per acre"); DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 229 (2010) (in 1960s, one-fourth of an acre typical minimum lot size); Gerritt Knapp et. al., *Zoning as a Barrier to Multifamily Housing Development* 17 at https://www.huduser.gov/Publications/pdf/zoning_MultifmlyDev.pdf (in regions surveyed, ratio between zoned residential acres and number of households ranged between 0.15 and 0.49). There are 640 acres (and thus 2560 houses) in a square mile, which means just over eight shops under the SmartCode (2560/300). Since a square mile would equal a mile on each of four sides, this means two shops per mile.

[21] Zoning Rules, *supra*, at 138 (citation omitted).

[22] *See* Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 264–65 n. 81 (2006) (citation omitted) ("New Urbanist Zoning").

[23] *See* Zoning Rules, *supra*, at 262 (in one set of Boston suburbs studied, "projections of population based on 1950s zoning in all cases were far higher than has come to pass").

[24] *See supra* note 20. I note that multifamily housing is also subject to density controls. For example, one Atlanta suburb allows only 14 apartments per acre in its "medium density" zone, and restricts density through a four-story height limit in

bigger lots; for example, some suburban zoning codes require that houses sit on two or more acres.[25] Some cities have open space restrictions that also effectively mandate minimum lot sizes: for example, Houston, Texas requires developers to provide at least 200 square feet of unspecified "open space" per apartment.[26]

2.1 The High Price of Low Density

Residents of many low-density areas must use automobiles to reach almost any conceivable destination, for two reasons. First, in such thinly populated places, very few people can walk to shops and other destinations. For example, suppose that a grocery store is in a neighborhood with only five homes or apartments per block. If most people will walk no more than five blocks to the store, that means that only 25 households in any direction will walk to the store. By contrast, if the same store is surrounded by 30 dwellings per block, 150 households in each direction can walk to the store.[27]

Second, low density also means low public transit ridership, for the same reason: if very few people live within walking distance of a bus or train stop, very few people will take the bus or train to work. Generally, public transit use is minimal in places with fewer than seven houses per acre.[28] At a minimum, densities of seven to 15 units per acre are required for economically efficient regular bus service.[29] Densities of at least

its high-density zone. *See* JOHNS CREEK, GA., CODE OF ORDINANCES, SECS. 7.3.3 (H) and 7.4.3 (A) (available at municode.com)

[25] *See* Zoning Rules, *supra*, at 264, 294 (citing examples).

[26] *See* CITY OF HOUSTON, CODE OF ORDINANCES, SEC. 42–236 (200 feet for efficiency apartments, more for larger apartments).

[27] Similarly, low-density zoning reduces bicycling: low-density zoning increases the number of people who live far from a store, and because bicycles are slower than cars, people who live miles from the store will probably drive to the store rather than bike.

[28] *See* ANTHONY DOWNS, STILL STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION 210 (2005).

[29] *Id. See also* PATRICK M. CONDON, SEVEN RULES FOR SUSTAINABLE COMMUNITIES: DESIGN STRATEGIES FOR THE POST CARBON WORLD 74 (2012) ("Ten units per acre is the accepted figure at which buses can be economically supplied at short headways").

20 units per acre are sufficient to support streetcars.[30] By contrast, in places with over 60 units per acre, most trips are made by public transit (assuming adequate transit service).[31]

Moreover, low density reduces political support for public transit: transit critics may argue that a place's low density makes transit improvements impractical, because few people will ride new buses or trains.[32] But in a car-dominated suburb, any new development will lead to more cars and more traffic congestion, because any new residents will drive to most destinations. As a result, residents of such suburbs will oppose new development,[33] thus ensuring continued low density, thus ensuring that public transit continues to be impractical. Thus, low-density zoning creates a vicious circle: low density forces people to drive, which means that new development means more vehicle traffic, which ensures continued political support for low-density zoning, which in turn forces nearly everyone to drive to most places.

And as noted above, density restrictions in the urban core limit the number of people who can live in cities,[34] thus forcing people to move to automobile-dependent suburbs. Suburbs tend to be more automobile oriented than cities: they tend to have less public transit[35] and lower densities.[36] Thus, restrictions on urban density shift population to automobile-dependent suburbs.

[30] *Id.*

[31] *See* SHARON FEIGON ET. AL., TRAVEL MATTERS: MITIGATING CLIMATE CHANGE WITH SUSTAINABLE SURFACE TRANSPORTATION 18 (2003).

[32] *See* Michael Lewyn, *How Overregulation Creates Sprawl (Even In A City Without Zoning)*, 50 WAYNE L. REV. 1171, 1180 n. 56 (2004) (citing numerous examples) ("Overregulation Sprawl").

[33] *See* FISCHEL, *supra*, at 271–72 (congestion a common argument for restrictive zoning). On the other hand, NIMBYism is hardly limited to car-dominated cities. *Cf. supra* notes 22–25 and accompanying text (discussing restrictive zoning in New York City).

[34] *See* Chapter 3 *supra*.

[35] *See supra* Chapter 1-2.1 and 2.2.

[36] *See* PETER NEWMAN AND JEFFREY KENWORTHY, SUSTAINABILITY AND CITIES: OVERCOMING AUTOMOBILE DEPENDENCE 98–99 (1999) (comparing city and suburban densities).

2.2 *Anti-density Counterarguments*

A traditional argument for anti-density regulation is that more compact development leads to traffic congestion and thus to pollution.[37] But if this argument was true, traffic congestion and its negative side effects would have decreased as low-density suburbia grew. This was of course not the case: between 1982 and 2015, the amount of fuel wasted due to American traffic congestion grew sixfold.[38] Moreover, congestion increased not only in growing regions, but in rapidly decentralizing areas. For example:

*Detroit lost over 40 percent of its central city population between 1980 and 2014[39]—yet the amount of fuel per auto commuter lost to regional traffic congestion nearly doubled.[40]

*Similarly, St. Louis lost 30 percent of its central city population between 1980 and 2014,[41] but the amount of fuel lost per driver quadrupled.[42]

*Similarly, Buffalo lost about a quarter of its central city population between 1980 and 2014[43]—yet its congestion-related wasted fuel per

[37] *Cf.* GILLHAM, *supra*, at 114 (discussing claim that low-density suburbs have less congestion and pollution than urban cores).

[38] *See* David Schrank et. al., *2015 Urban Mobility Scorecard* 2, at http://d2dtl5nnlpfr0r.cloudfront.net/tti.tamu.edu/documents/mobility-scorecard-2015.pdf. The only period during which fuel loss due to congestion decreased was between 2006 and 2009, presumably due to the American economic downturn during that period.

[39] *See* JANNSEN, *supra*, at 614 (decrease from over 1.2 million in 1980 to just under 700,000).

[40] *See* Texas Transportation Institute, *Performance Measure Summary- Detroit MI*, at http://d2dtl5nnlpfr0r.cloudfront.net/tti.tamu.edu/documents/ums/congestion-data/detroit.pdf (fuel losses per auto commuter increased from 14 in 1982 to 25 in 2014).

[41] *See* JANNSEN, *supra*, at 614 (decrease from over 450,000 million in 1980 to just over 317,000).

[42] *See* Texas Transportation Institute, *Performance Measure Summary- St. Louis, MO* at http://d2dtl5nnlpfr0r.cloudfront.net/tti.tamu.edu/documents/ums/congestion-data/st-louis.pdf (fuel losses increased from five gallons per driver in 1982 to 21 in 2014).

[43] *See* JANNSEN, *supra*, at 614 (decrease from just over 357,000 in 1980 to just over 258,000).

driver also quadrupled.[44] Pittsburgh experienced similar population losses,[45] and experienced identical increases in congestion-related waste.[46]

And if density led to congestion and pollution, central cities (especially dense central cities) would be more polluting than sprawling suburbs. But as noted above,[47] suburbs emit more transportation-related greenhouse gases than cities,[48] and the most car-dependent cities emit more such gases than the most transit-oriented, walkable cities.[49] Thus, it seems likely that density deregulation would actually reduce pollution—at least in places where it would lead to densities that support walking and transit use.

A more libertarian argument is that density leads to increased reliance on government: people who live closer together think of themselves as part of a collective, while people who live in semirural surroundings think of themselves as rugged individualists.

While this argument may accurately describe the mentality of some voters, it does not describe factual reality. Suburbanites are just as dependent on government as urbanites: they drive on government-provided roads, and the prestige of their communities depends on the prestige of government-provided schools.

Moreover, if this alleged libertarian psychology significantly affected the growth of government, government would have gotten smaller as society suburbanized—especially in the late twentieth century, when cities declined

[44] *See* Texas Transportation Institute, *Performance Measure Summary- Buffalo, NY* at http://d2dtl5nnlpfr0r.cloudfront.net/tti.tamu.edu/documents/ums/congestion-data/buffalo.pdf (fuel losses increased from five gallons per driver in 1982 to 21 in 2014).

[45] *See* JANNSEN, *supra*, at 614 (decrease from just over 423,000 in 1980 to just over 305,000).

[46] *See* Texas Transportation Institute, *Performance Measure Summary- Pittsburgh, PA* at http://d2dtl5nnlpfr0r.cloudfront.net/tti.tamu.edu/documents/ums/congestion-data/pittsburgh.pdf (fuel losses increased from five gallons per driver in 1982 to 21 in 2014).

[47] *See* Chapter 1-2.1 *supra*.

[48] *See* Glaeser and Kahn, *supra*, at 44 (suburbs generated more transportation-related emissions in every single region surveyed, and generated more overall emissions in all but two of 50-plus regions surveyed).

[49] *See* Chapter 1-2.1 *supra*.

most rapidly. Older cities declined most rapidly in the 1960s and 1970s[50]—but in those decades, federal outlays increased from 17.2 percent of gross national product (GNP) to 21.1 percent.[51] State and local spending also increased (though somewhat more slowly, from 8.4 percent of GNP product to 9.5 percent).[52] At the dawn of the suburban era in 1950, government at all levels consumed 22.4 percent of GNP; in 2014, that number was 31.7 percent.[53]

2.3 Solutions

In Chapter 3, I suggested eliminating density restrictions in the most expensive cities. But if we are interested in creating walkable neighborhoods as well as making housing more affordable, Americans must reform zoning in all of metropolitan America, not just in the most expensive cities. Density deregulation would both increase the number of walkable neighborhoods and enhance the freedom of landowners.

The most aggressive possible reform would be a state law saying: "No municipality can discriminate against housing on the basis of density. For example, municipalities may not establish minimum lot sizes, minimum open space sizes, or minimum house sizes for any dwelling unit, nor may they discriminate between single-family or multi-family housing." Such a rule would allow all types of housing in residential zones,[54] and thus enable landowners to create more walkable, transit-oriented places. Such a statute would not force density upon landowners: a landowner who wanted to

[50] *See* Table 2.1 *supra*.

[51] *See* Tables, *supra*, at Table 14.3. Since then, there has been no clear pattern: federal spending increased slightly to 21.2 percent of national product in 1990, declined in the 1990s, rose again in the 2000s to a post-World War II high of 24.4 percent in 2009, and then declined to 20.3 percent in 2014. *Id.*

[52] *Id.* Unlike federal spending, state and local spending continued to increase, and comprised 11.4 percent of the economy in 2014. *Id.*

[53] *Id.*

[54] I note that this rule would not prevent municipalities from excluding housing from industrial or environmentally sensitive areas (or even, for that matter, from other commercial zones). Instead, the rule would say to local government: you can create residential zones, but if you do you have to allow higher densities as well as lower densities.

build a subdivision with big houses on big lots would still be *allowed* to do so, but would no longer *compelled* to do so by local zoning law.

However, such a broad rule would actually create more suburban sprawl. For example, the total elimination of density regulation would make it easier for developers to turn a rural area with one house every 10 acres into a subdivision with one house per acre. Such a subdivision would not increase regional walkability, because an area with one house per acre will still be highly unwalkable.[55] And if the subdivision is located at the fringe of a region, people who move to such subdivisions may be leaving more compact, walkable urban cores. In other words, the total elimination of density regulation would reduce sprawl in the "*how* we grow" sense of sprawl but might increase sprawl in the "*where* we grow" sense, by allowing the creation of more suburbs. Such a proposal would be an excellent idea from a free market perspective, but a questionable idea from an anti-sprawl perspective.

A law reconciling both interests would allow increased density in already developed areas, but not in undeveloped rural areas or environmentally sensitive areas. For example, a law could begin with the broad anti-regulation principle enunciated above, but add something like: "However, municipalities are allowed to establish zones with minimum lot sizes of five or more acres."[56] This exception would allow the creation of truly rural zones, so that government could prevent sprawl from spreading into the countryside. But this version of the law would still deregulate density in urban and suburban areas. Moreover, this law would not mandate high density: developers could still create lower-density subdivisions if they pleased, but would not be required to do so by government.[57]

It could be argued that my proposal also goes too far, in a number of ways. First, it could be argued that because places with 15–60 dwelling units per acre

[55] *See supra* notes 28–31 and accompanying text (significantly higher densities required for public transit service).

[56] Alternatively, state governments could establish urban growth boundaries limiting development in outer suburbs, and deregulate density within those boundaries. *See* GILLHAM, *supra*, at 217–19 (discussing growth boundary concept).

[57] In addition, developers would still be allowed to create restrictive covenants with buyers, prohibiting the latter from increasing density by subdividing their properties.

are compact enough to support public transit,[58] there is no reason to allow higher densities. A state adopting this view might enact a "minimum maximum density" law, allowing density regulations only if they do not mandate densities lower than (for example) 60 dwelling units per acre. Under this rule, a city could mandate a minimum lot size of one-sixtieth of an acre, but could not mandate larger minimum lot sizes except in rural areas. This rule would certainly be preferable to the status quo. However, I would prefer less regulation, because even densities above 60 units per acre have some positive environmental impact. One study found that if buses or trains ran every three minutes, the average household in a neighborhood with 50 units per acre would drive just over 10,000 miles yearly, while the same household in a neighborhood with 500 units per acre would drive just under 6000 miles.[59] This correlation between density and driving was strong even in places with minimal public transit: for example, the study found that in a place with buses once an hour, the 50-unit-per-acre households averaged over 12,000 vehicle miles per year, while the 500-unit households averaged just over 7000.[60]

Second, it could be argued that true deregulation would lead to a city of skyscrapers, which in turn would impair street life as people stayed in their buildings or offices rather than interacting with people at street level.[61] However, low-rise buildings of three to five stories can coexist with densities as high as 175 dwelling units per acre.[62] So even assuming that skyscrapers are terrible, current density restrictions are not necessary to prevent them.[63]

[58] *See supra* notes 28–31 and accompanying text (suggesting that significant transit use likely in neighborhoods with 15 units per acre, and that most commuters might use transit at densities above 60 units per acre).

[59] *See* John Holtzclaw, *Using Residential Patterns and Transit to Decrease Auto Dependence and Costs* 39, at https://www.nrdc.org/sites/default/files/sma_09121401a.pdf. Households in areas with 100 housing units per acre averaged 8630 vehicle miles. *Id.*

[60] *Id.* Similarly, households in areas with 100 units per acre were in between these extremes, averaging 10,837 miles. *Id.*

[61] *See* SPECK, *supra*, at 218–20 (discussing and criticizing argument).

[62] *See* WITOLD RYBCZYNSKI, CITY LIFE 165 (2013) (citing numerous examples).

[63] I assume for the sake of argument that my proposal would not prevent cities from enacting modest height restrictions consistent with transit-supportive densities.

Third, it could be argued that many suburban areas are unsuited to higher density due to their lack of public transit and/or unwalkable street design. A jurisdiction that adopted this view might limit density deregulation to areas served by public transit, or that were not bisected by high-speed streets. However, density regulation based on this argument forces suburbs into a vicious circle: they are zoned for densities that force their residents to drive everywhere, thus making public transit uneconomical, thus justifying continued low density, thus causing the car-dependent status quo to continue. The better view is that if a neighborhood has a transit-supportive density, public transit will eventually come to that neighborhood, and pedestrian traffic will create a demand for more walkable streets.[64]

3 Parking and Setbacks

As automobiles became more common, municipalities began to require commercial landowners to provide off-street parking for tenants and visitors. In 1946, only 17 percent of cities had enacted such regulations—but by 1951, 71 percent of cities had done so.[65] Today, such minimum parking requirements are virtually universal.[66]

These regulations sometimes force landowners to provide *more* space for parking than for their intended land uses. For example, most cities require office buildings to provide four parking spaces per 1000 square feet of office space.[67] Because four parking spaces may take up as much as 1200 square feet of land (or 300 square feet per space),[68] this means that cities force commercial landlords to provide more space for parking than for offices. Parking regulations are only slightly less strict for residential landlords: often, a landlord must provide more than one parking space for

[64] *Cf.* Nico Larco, *Walking to the Strip Mall: Retrofitting Informal Pedestrian Paths in* EMILY TALEN, ED., RETROFITTING SPRAWL: ADDRESSING SEVENTY YEARS OF FAILED URBAN FORM 157 (2015) (showing how pedestrians create informal paths in absence of sidewalks).

[65] *See* DONALD C. SHOUP, THE HIGH COST OF FREE PARKING 22 (2005).

[66] *Id.* at 25.

[67] *Id.* at 31.

[68] *Id.*

each tenant. For example, Houston, Texas, requires landlords to provide 1.25 parking spaces for each efficiency apartment, and 1.33 parking spaces for each one bedroom unit.[69] If, as suggested above, one parking space consumes 300 square feet of land, a landlord must provide 400 square feet for each 800 square foot one-bedroom[70] unit, or about one-third of its property.

In theory, landlords could comply with minimum parking requirements by placing parking behind buildings. However, a second set of regulations encourages them to place parking in front of buildings instead. Municipal codes often require commercial buildings to be set back far from sidewalks; for example, one Arizona suburb requires most commercial and multifamily buildings to be 100 feet from the street.[71] Landowners may either place parking in this "setback zone" (thus complying with two regulations at once) or can just place something decorative such as a lawn in that zone. But a landowner who chooses the latter must waste space building parking elsewhere: either behind a building (which means that it cannot use that space for revenue-generating uses) or underground (where parking is more expensive than aboveground).[72] Thus, the most economically rational course for most landowners is to place parking in the setback zone—which means that many buildings will be surrounded by parking lots.

3.1 The High Cost of Government-Mandated Parking

This combination of policies makes American cities and suburbs more automobile-oriented in a variety of ways. First, the combination of setbacks and minimum parking requirements forces pedestrians to walk through surface parking lots in order to reach most destinations from a street or sidewalk. These parking lots create an environment that is boring

[69] *See* CITY OF HOUSTON, CODE OF ORDINANCES, SEC. 26–492 ("HOUSTON CODE") (available at municode.com)

[70] Based on a brief review of Houston apartment listings at Craigslist.org, 800 square feet seems to be roughly the regional median size for one-bedroom apartments.

[71] *See* TALEN, *supra*, at 172. *But cf* Emerson, *supra*, at 645 n. 36 (suggesting that typical setback 25 feet).

[72] *See* SPECK, *supra*, at 116–17.

and unpleasant for pedestrians; when I walk through a street full of buildings I feel enclosed, but when I walk through a street full of parking lots, I feel like I am walking through a vast empty space.[73] Moreover, surface parking lots make pedestrian commutes slightly longer (because of the extra time spent going from sidewalks through parking lots to destinations) and more dangerous (because pedestrians have to dodge cars while walking through the parking lots).

Second, minimum parking requirements reduce density, because every bit of land used for surface parking cannot be used for housing. For example, in 1961 Oakland imposed minimum parking requirements upon apartments, and within just three years the number of apartments per acre in Oakland had declined by 30 percent.[74] As noted above, density and walkability are intimately intertwined: a low-density place is usually one dominated by automobiles, while a medium- or high-density place will be more convenient for pedestrians and transit users.[75]

Third, minimum parking requirements also facilitate sprawl in less direct ways. Because these rules increase the supply of parking, they make parking less expensive. To the extent that cheap or free parking is caused by government-imposed minimum parking requirements,[76] it is a creature of government regulation. Who pays the cost of underpriced parking spaces? At first, the owners of land with parking lots—for example, a commercial landlord who owns a strip mall. But this cost might be passed on to tenants in higher rents, who in turn might pass it on to customers (even customers who did not drive to the strip mall). Thus, the costs of minimum parking requirements are paid by all of society, but

[73] *Id.* at 213–15 (discussing examples).

[74] *See* SHOUP, *supra*, at 144. I note that Oakland's requirements are more lenient than those of some cities today; Oakland only required one parking space per dwelling unit. *Id.* at 143; *supra* note 466 and accompanying text (citing example of more stringent regulation).

[75] *See* Chapter 4-1 *supra*.

[76] I suspect that many landlords would try to attract customers by providing free parking even in the absence of minimum parking requirements. On the other hand, other landowners might prefer to build additional revenue-producing property such as shops or apartments if they were not legally required to build parking. If the supply of parking was smaller, even landowners who chose to build parking lots might be tempted to gain additional revenue by charging for parking.

benefit only drivers.[77] And because these rules make parking cheaper, they make driving cheaper, which in turn encourages people to live in automobile-dependent places rather than walkable places.

Finally, government-imposed free parking makes redevelopment of walkable places more difficult. As noted above, minimum parking requirements often reduce density,[78] which means they reduce the amount of housing (or for that matter, shops or jobs) that can be created on a tract of land. Such restrictions are most onerous in dense, walkable areas. In a thinly populated suburb where no building is within a short walk of any other building, unused land may be relatively abundant, so a landowner can comply with minimum parking requirements simply by purchasing a little extra land and building a parking lot on that land. But in a more compact area, a landowner may be surrounded by other buildings, and thus may be unable to cheaply comply with minimum parking requirements. For example, in the case of *Milburn Courtyard Assocs. v. Planning Bd. of Twp. of Milburn*,[79] an entrepreneur proposed to establish a restaurant in a suburban downtown.[80] The site at issue contained only one parking spot, but the city's minimum parking regulations required the landowner to build 12 parking spots[81]—something that it could not have done without purchasing and destroying nearby buildings.[82] A New Jersey court reversed the city's decision to allow the restaurant to be built without a zoning variance.[83] Thus (assuming no variance was granted),[84] the would-be restaurateur would have had to purchase enough land for a dozen parking spots—a task that would have

[77] *Cf.* SPECK, *supra*, at 118 (subsidy to drivers caused by minimum parking requirements is somewhere between $127 and $374 billion).

[78] *See supra* notes 74–75 and accompanying text.

[79] 2006 WL 1,413,698 (N.J. Super.)

[80] *Id.* at *1–2.

[81] *Id.* at *2.

[82] *Id.* at *4.

[83] *Id.* at *15.

[84] Variances can be difficult to obtain; some courts are likely to deny variance requests when a landowner's hardship is "self-created." T*Use*, 65 SYR. L. REV. 971, 986 (2015). Some courts hold that hardship is "self-created" whenever a landowner purchases property after a zoning law's enactment. *Id.*

been more difficult in a downtown area than in a more suburban area with more undeveloped land.

In sum, minimum parking requirements and setback requirements combine to make suburbs unwalkable in a variety of ways: by encouraging landowners to place parking lots between sidewalks and other destinations, by reducing density, by discouraging development in walkable areas, and by subsidizing driving.

3.2 Solutions

The solution to these problems seems rather obvious to me: abolish minimum parking requirements, and allow the market to govern these matters. In addition, setbacks could be limited to single-family homes, so that customers and employees of businesses and multifamily dwellings would not have to walk through parking lots in order to reach their destinations.

Parking and setback deregulation would both enhance landowner freedom and make cities and suburbs more walkable by freeing up urban land for development and increasing population density. And because not every store or office would be surrounded by parking, more businesses would be in front of sidewalks, thus creating more welcoming environments for pedestrians. Parking deregulation would not eliminate parking; landlords who wanted to build parking lots would still have the right to do so.[85]

One traditional justification for minimum parking requirements is that they are necessary to prevent motorists from "cruising"[86]—that is, "moving slowly around block after block seeking a place to park . . . clog[ging] the streets, air and ears of our citizens."[87] But by

[85] I note in passing that although no city has abolished such regulations citywide, some cities have abolished minimum parking requirements for their downtowns, without any obvious ill effects. *See* Michael Lewyn, *What Would Coase Do? (About Parking Regulation)*, 22 FORDHAM ENVTL. L. REV. 89, 112–13 (2010) (citing numerous examples, and noting that these cities have experienced downtown population growth).

[86] RICHARD W. WILLSON, PARKING MANAGEMENT FOR SMART GROWTH 11 (2015) (using term).

[87] Stroud v. City of Aspen, 532 P.2d 720, 723 (Colo. 1975).

artificially increasing the supply of parking, government reduces the market price of parking, thus making driving cheaper, thus increasing driving, which in turn increases congestion. Thus, minimum parking requirements are counterproductive.

Even if minimum parking requirements on balance reduced cruising-related congestion, other remedies might avoid the harmful side effects of minimum parking requirements. For example:

*Cities could raise the price of on-street parking, thus deterring some auto trips and ensuring that drivers would always have some parking spaces available and would accordingly be less likely to cruise.[88] Such a market pricing system would reduce cruising-related traffic congestion without creating the social harms discussed above.

*Some cities allow landowners to avoid minimum parking requirements by paying "in lieu of parking" fees. Under this system, landowners would pay government to build parking garages instead of building the parking themselves.[89] As a result, parking would still be ample (thus reducing cruising) but would be in centralized locations rather than in front of every shop, thus eliminating the degradation of the pedestrian environment caused by large surface parking lots. However, in-lieu fees, like minimum parking requirements, artificially increase the supply of parking and thus subsidize driving.

A second argument for minimum parking requirements is that they prevent "spillover parking."[90] Spillover parking occurs when a business's customers cannot find parking spots in front of the business, and instead park on nearby neighborhood streets. But spillover parking is a problem only in areas that are already somewhat walkable; in the most sprawling suburbs, few residences are within walking distance of businesses. Even in more walkable areas, spillover parking can be mitigated without minimum parking requirements: under the "in lieu of parking" fee system discussed above, government could build enough garages to reduce spillover parking without degrading the pedestrian environment.[91] Another alternative is for cities to sell parking permits to neighborhood residents, and to fine

[88] *See* SHOUP, *supra*, at 296–303 (discussing idea in detail).

[89] *See* WILLSON, *supra*, at 23.

[90] *Id*. at 170 (using term).

[91] *See supra* note 73 and accompanying text.

motorists who park without permits on the neighborhood's residential streets.[92]

Government justifies setback requirements on the ground that they provide "light [and] air and provide a sense of privacy."[93] This argument may make sense as applied to single-family homes. But a pedestrian trudging through a strip mall hardly feels "a sense of privacy", nor does he or she receive beneficial "light and air" from dodging cars on his or her way to the shops. Thus, setback requirements in commercial and multifamily areas are simply irrational.

4 Street Design

Government street design regulations tend to make suburbs unwalkable by encouraging wide streets, long blocks, and dead-end streets.

4.1 Supersized Streets

In the early twentieth century, streets were relatively narrow.[94] But as automobiles became more common, government demanded wider streets in order to help motorists drive more rapidly.[95] In the 1950s, the American Association of State Highway and Transportation Officials (AASHTO) recommended that major streets have six to eight 12-foot lanes,[96] and some municipalities followed this recommendation. For example, in Tuscon, Arizona, major "collector" streets must be 90–120 feet wide, and "arterial" streets (the most heavily traveled streets other

[92] *Cf.* County of Arlington v. Richards, 434 U.S. 5 (1977) (upholding such a system).

[93] False Hope of Comprehensive Planning, *supra*, at 56 n. 132 (quoting Seattle, Wa. comprehensive plan) (citation omitted).

[94] *See* TALEN, *supra*, at 131 (citing example).

[95] See Stephen H. Burrington, *Restoring the Rule of Law and Respect for Communities in Transportation*, 5 N.Y.U. ENVTL. L.J. 691, 701 *(1996)* (traffic engineers build wide streets out of "solicitude towards fast traffic").

[96] *See* New Urbanist Zoning, *supra*, at 265.

than limited-access highways) must be six lanes and 150 feet wide.[97] In addition, minor streets have become wider as well: for example, the FHA recommended residential streets with 24 feet of pavement in 1936,[98] while 1950s local regulations often mandated 36–40 foot streets.[99] Municipalities have also subtly widened streets by expanding curb radii—that is, by curving intersections to allow cars to turn corners without slowing down.[100] For example, 1920s streets often ended blocks at right angles, while some modern suburbs require 30–50 foot radii.[101]

Huge streets erode pedestrian comfort and safety: the wider the street, the longer it takes for pedestrians to cross the street. And the more seconds pedestrians spend crossing a street, the more seconds they spend being exposed to automobile traffic.

But wide streets also endanger walkers less directly, by encouraging motorists to drive more rapidly. High-speed auto traffic increases the likelihood of serious walker/driver collisions,[102] for three reasons. First, the fastest drivers have the narrowest field of vision, and are thus least likely to notice pedestrians or other road users: a motorist driving 30 miles an hour has a 150-degree field, while one driving 60 miles per hour has only a 50-degree field.[103] Second, the fastest drivers, even if they notice a pedestrian, are unlikely to be able to stop in time to avoid a crash. A motorist who is driving 20 miles per hour will be able to stop 40 feet after seeing a pedestrian, while one who is driving 40 miles per

[97] *See* TALEN, *supra*, at 162.

[98] See Michael Southworth and Eran Ben-Joseph, *Street Standards and the Shaping of Suburbia*, 61 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 65, 74 (1995), at http://web.mit.edu/ebj/www/doc/JAPAv61n1.pdf

[99] *Id.* at 77 (citing homebuilders' publication criticizing local insistence on such street widths).

[100] *See* TALEN, *supra*, at 164, 274.

[101] *Id.* at 168–69.

[102] As well as other types of collisions. See Table 1.3 *supra* (most car-dependent places have highest death rates from collisions of all types); Peter Swift, *Residential Street Typology and Injury Accident Frequency*, at www.sierraclub.org/sprawl/articles/narrow.asp (in one community studied, "a typical 36 foot wide residential street has 1.21 [accidents per mile per year] as opposed to 0.32 for a 24 foot wide street").

[103] *See* Burrington, *supra*, at 704 n. 50.

hour will not be able to stop until after he or she has driven 120 more feet.[104] Third, should a crash occur, the fastest drivers are more likely to kill a pedestrian than slower drivers. A pedestrian has a 5 percent chance of death if he or she is hit by a car traveling 20 miles per hour, and a 90 percent chance of death if he or she is hit by a car traveling 40 miles per hour.[105]

Wide streets also have negative consequences unrelated to safety: every inch of land devoted to streets is land that could be devoted to housing or commerce.[106] Thus, six- and eight-lane streets reduce density, and thereby reduce the number of people who can walk to shops, jobs, and public transit.[107] Thus, it appears that street design regulations discourage walking, both by artificially spreading out the population and by encouraging dangerously fast vehicle traffic.

This problem is easily solved in the context of new streets: government simply should build (and allow developers to build) narrower streets. By doing so, government would not only increase pedestrian safety, but would also enhance property rights by taking and regulating less private land than would otherwise be the case.

But how narrow is too narrow? The SmartCode provides a possible template for street reform. The SmartCode lists a variety of street configurations; however, no SmartCode street has more than four lanes of traffic.[108] The National Association of City Transportation Officials (NACTO), a coalition of city transportation departments,[109] suggests

[104] *See* JOEY LEDFORD, SPEEDING CARS TERRIFY NEIGHBORHOODS, ATL. J. AND CONST., AUG. 27, 1997, at B, 1997 WLNR 3,173,969 ("At 20 mph, it takes you 20 feet to react [to a pedestrian or vehicle in the street] and another 20 feet to stop. At 40 mph, it's 40 feet to think and another 80 feet to stop.").

[105] *Id.*

[106] *See* New Urbanist Zoning, *supra*, at 286 n. 291 (each 10 feet of street width reduces housing supply by 3–4 percent) (citation omitted).

[107] *See* Chapter 4-2 (explaining negative side effects of density caps).

[108] *See* SmartCode, *supra*, at Table 3B.

[109] *See* National Association of City Transportation Officials, *About NACTO*, at http://nacto.org/about/

that each travel lane be narrowed to 10 feet (as opposed to the 12 feet width common in urban America.)[110] Typically, automobile speeds increase by roughly three miles per hour for every added foot of lane width.[111]

It could be argued that narrower streets might lead to more traffic congestion. But as noted above, wide streets increase danger to pedestrians, which in turn increases vehicle use—a result likely to increase rather than decreasing congestion.

It could also be argued that wide streets are necessary to allow fire trucks to respond to emergencies. Fire codes often require streets to be at least 20 feet wide (excluding parking).[112] Because traffic lanes are usually 10–12 feet,[113] this requirement allows two-lane streets (or three-lane streets with off-street parking), and thus does not demand the kind of huge streets that are common in American suburbs. At most, fire codes require residential streets that are somewhat larger than ideal. Moreover, fire trucks can in fact function in environments with narrower streets. When Portland, Oregon, allowed 18-foot streets, that city's Fire Department acknowledged that it could serve those streets as long as the streets were part of a grid, so that firefighters could use a variety of streets in order to reach a given destination.[114]

However, retrofitting existing streets is more difficult. When a street is too wide for pedestrians to cross safely, the only alternative to the status quo is to artificially narrow road space by creating something else on the road—for example, by widening a sidewalk, or by placing a median in the middle of the street to give pedestrians a temporary refuge from vehicle

[110] *See* National Association of City Transportation Officials, *Lane Width*, at http://nacto.org/publication/urban-street-design-guide/street-design-elements/lane-width/

[111] *Id.* ("When lane widths are 1 m (3.3 ft) greater, speeds are predicted to be 15 km/h (9.4 m) faster.") (citation omitted).

[112] *See* Ryan Snyder et. al., *Best Practices: Emergency Access in Healthy Streets* 4, at http://nacto.org/wp-content/uploads/2015/04/Best-Practices-Emergency-Access-in-Healthy-Streets.pdf

[113] *See* SmartCode, *supra*, at Table 3B.

[114] *See* MICHAEL SOUTHWORTH AND ERAN BEN-JOSEPH, STREETS AND THE SHAPING OF TOWNS AND CITIES 143 (2003).

traffic.[115] These options will presumably cost the public money, although they may also increase public safety by slowing down traffic.

4.2 Long Blocks

In the 1920s, most urban blocks were no more than 200–600 feet long.[116] But in the 1930s, the FHA mortgage insurance program required subdivisions to have longer blocks in order to get federal mortgage insurance.[117] Since then, modern suburbs have tended to require long blocks.[118] For example, Jacksonville, Florida, allows only four intersections per mile (or one every 1320 feet) on major streets.[119]

Short blocks make walking more comfortable, for two reasons. First, a street with short blocks has many intersections, which means that pedestrians have many opportunities to cross the street.[120] Second, smaller blocks also mean pedestrians can reach their destinations in more ways, creating a more interesting pedestrian environment.[121] For example, if I am walking on long block A that runs from point B to point C without any interruptions, and I want to reach side street D that is near point C, my

[115] *See* National Association of City Transportation Officials, *Curb Extensions*, at http://nacto.org/publication/urban-street-design-guide/street-design-elements/curb-extensions/ (suggesting numerous techniques for extending sidewalks and calming traffic). For an excellent example of a median that makes a street more pedestrian-friendly, go to

[116] *See* TALEN, *supra*, at 49.

[117] *See* New Urbanist Zoning, *supra*, at 264 n. 80 (residential streets required to be 600–1000 feet long) (citation omitted).

[118] *See* TALEN, *supra*, at 49. ("[R]ules for block sizes were significantly smaller in the early decades of the twentieth century.").

[119] *See* JACKSONVILLE, FLA., ORDINANCE CODE, sec. 654.115(a). *See also* New Urbanist Zoning, *supra*, at 287–88 (citing other examples).

[120] *See* Oregon Department of Transportation, *Main Street . . . when a highway runs through it: A Handbook for Oregon Communities* 35, at http://www.oregon.gov/lcd/tgm/docs/mainstreet.pdf

[121] *Cf.* Katherine A. Woodard, *Form Over Use: Form-Based Codes and the Challenges of Existing Development*, 88 NOTRE DAME L. REV. 2627, 2638 (2013) (a street network with small blocks "provid[es] both pedestrians and drivers with varying choices to get to their destinations").

only option is to walk to C and backtrack. By contrast, if block A intersects with several other streets, I can use one of those streets to reach street D. Thus, regulations requiring long blocks tend to discourage walking.

It could be argued that long blocks are necessary to keep traffic moving, because each additional block means an additional intersection, and each intersection forces cars to slow down in order to accommodate both pedestrians crossing the street and other motorists making left and right turns. This argument is not entirely persuasive, for two reasons. First, as noted above, faster traffic means more dead and injured pedestrians.[122] Second, minimizing the number of intersections concentrates left- and right-turning vehicles on a few intersections, which means that traffic on those streets must stop for a longer period of time to accommodate the higher number of turns per intersection. For example, on a street with 10 intersections per mile and 20 turning vehicles per mile, there might be two vehicles per intersection making a turn. But on a street with four intersections per mile and the same amount of traffic, there will be five vehicles per intersection, creating a longer delay on each block. Thus, long blocks merely redistribute, rather than eliminating, delay.

One remedy to the "long block" problem is for cities to could amend street design regulations to allow the 200–600 foot blocks common in the 1920s.[123] Although this step would be highly beneficial for pedestrians, it may be difficult, if not impossible, to shorten blocks in existing streets without significant public expenditure on the creation of new streets, or facilities (such as public parks) that connect parallel blocks. Thus, long blocks may be one feature of modern suburbia that is not easily retrofitted.

4.3 Cul-de-Sacs

In addition to requiring low densities and long blocks,[124] the FHA mortgage insurance program rejected the weblike "grid pattern" that dominated pre-1930s housing.[125] Instead, an FHA manual favored dead-end (or "cul-de-sac") streets, stating that "[c]ul-de-sacs are the most attractive

[122] *See supra* notes 102–105 and accompanying text.

[123] *See supra* note 116 and accompanying text.

[124] *See supra* notes 22, 117 and accompanying text.

[125] *See* Southworth and Eran Ben-Joseph, *supra*, at 74.

layout for family dwellings."[126] As a result, today's local regulations often encourage dead-end residential streets. For example, the Huntsville, Alabama, code states: "Local streets shall be laid out to . . . require the minimum number of streets necessary to provide convenient and safe access to property. A grid system of street layout is discouraged."[127]

The spread of dead-end streets means that suburban streets are often disconnected from each other; by definition, a dead-end street is not connected to other nearby residential streets. As a result, many suburbanites cannot easily walk from one residential street to another. For example, two houses in Orlando share a backyard, but a resident of either house who wanted to walk to the front of the other house would have to walk seven miles.[128] By contrast, if the residents of these houses lived on a weblike "grid" of streets (or a "fused grid" which limits automobile access like a cul-de-sac but allows pedestrians to reach nearby streets on narrow, pedestrian-only pathways),[129] they could reach each other in a few minutes. And in a neighborhood dominated by cul-de-sacs, vehicle traffic is forced onto nonresidential streets that connect to other neighborhoods, thus making walking less pleasant and increasing traffic congestion on those streets.

The obvious remedy for this problem is for municipalities to allow (and maybe even encourage)[130] grid streets or fused grid streets in new subdivisions. States might even encourage grids, by being more willing to

[126] *Id.* However, FHA also allowed curvilinear streets that did not create dead-ends. *Id.* at 75 (showing various designs that FHA considered "good" and "bad").

[127] HUNSTVILLE, ALA. CODE OF ORDINANCES, App. B., Sec. 4.5(2C).

[128] *See* Angie Schmitt, *Sprawl Madness: Two Houses Share Backyard, Separated by 7 Miles of Roads*, at http://usa.streetsblog.org/2013/02/28/sprawl-madness-two-houses-share-backyard-separated-by-7-miles-of-roads/

[129] *See* DAVID HUTTON, DEAD END COULD BE IN SIGHT FOR CUL-DE-SACS, SASKATOON STAR-PHOENIX, Apr. 7, 2012, at A3 (describing "fused grid").

[130] It seems to me that government regulation may be appropriate in a "tragedy of the commons" situation- that is, when a policy that makes sense for one landowner may not make sense if widely adopted. The growth of residential cul-de-sacs is such a situation. If I am the only person on my block with a cul-de-sac, I get the benefits of quiet seclusion, but can still reach other destinations easily. But if everyone lives on cul-de-sacs, neighbors become inaccessible, and vehicle traffic on the neighborhood's main streets become snarled because all drivers are forced to go on that main street to reach destinations outside that neighborhood.

maintain grid streets. For example, Virginia has always maintained and plowed even the smallest streets but for some years chose not to do so for new cul-de-sacs.[131]

It could be argued that cul-de-sacs actually protect pedestrians by shielding residential streets from traffic. This argument would be persuasive if the proliferation of cul-de-sacs did not degrade the safety of nonresidential streets. But it seems unlikely that this is the case. Where all residential streets are dead-end, people cannot reach shops and jobs without congesting nonresidential streets. And where a nonresidential street has lots of traffic, there is more political pressure to widen the street to handle the traffic; even the relatively pedestrian-oriented SmartCode posits that the most congested streets should be the widest, suggesting that a street with 32,000 vehicles per day should have four travel lanes, while streets with less than 20,000 vehicles per day should have only two lanes.[132] In turn, places dominated by wider streets are less attractive to pedestrians, and generate more pedestrian fatalities.[133]

This chain of causation might explain why towns dominated by cul-de-sacs actually have *more* traffic deaths: a study of dozens of California small towns and suburbs found that the cities with the highest intersection densities (i.e., the fewest dead-end streets) were actually the most safe. In particular, the study found: "increasing intersection density from 144 to 225 intersections per square mile would result in a 15.6% reduction in total crashes, a 20.9% reduction in severe injury crashes, and a 42.5% reduction in fatal crashes . . . The results are even more striking when increasing intersection density to 324 intersections per square mile, where expected crash counts dropped 31.5%, 40.7%, and 70.7% for the three severity levels,

[131] *See* Eric Weiss, *New Virginia Rules Target Cul-de-Sacs*, Washington Post, Mar. 22, 2009, at http://www.washingtonpost.com/wp-dyn/content/article/2009/03/21/AR2009032102248.html. However, this rule was watered down in 2011. *See* David Alpert, *Virginia turns back towards the 1950s by weakening road connection standards, neglecting populated areas*, at http://greatergreaterwashington.org/post/12527/virginia-turns-back-toward-the-1950s-by-weakening-road-connection-standards-neglecting-populated-/

[132] *See* SmartCode, *supra*, Table 3B.

[133] *See supra* Chapter 4-4.1.

respectively."[134] So even if an individual street might be safer as a cul-de-sac, the street system as a whole is more dangerous when most residential streets are cul-de-sacs.

It could also be argued that cul-de-sac streets reduce crime, because they "minimize the number of escape routes open to criminals."[135] For example, in Dayton's low-income Five Oaks neighborhood, the city reduced crime by gating off some streets.[136] But the streets of Five Oaks are not true cul-de-sacs. Most of the neighborhood is still a street grid that looks like any other gridded neighborhood.[137] Moreover, the Five Oaks experiment, unlike most suburban cul-de-sacs, only limited vehicular traffic: pedestrians were free to use the streets as before.[138] Finally, Oscar Newman, the architect of the Five Oaks experiment, admitted that "[c]ul-de-sac configurations should not be too large, for they take residents too far out of their way and produce too much of their own internal traffic."[139] Thus, even Newman would have opposed the creation of suburban neighborhoods where cul-de-sacs are so extensive as to force nearly all traffic to major streets.

And even if a cul-de-sac in a sea of gridded streets has less crime than other streets, a city dominated by cul-de-sacs is not necessarily so safe; criminals may seek to avoid a cul-de-sac that is the only such street in its neighborhood, but might be more willing to approach such streets where they are more common. This proposition is testable: if cul-de-sacs would tend to reduce any type of crime, they would reduce

[134] Wesley Earl Marshall and Norman W. Garrick, *Does Street Network Design Affect Traffic Safety?* at http://www.sciencedirect.com/science/article/pii/S0001457510003179

[135] RANDALL O'TOOLE, THE BEST LAID PLANS 145 (2008).

[136] *Id.* at 146.

[137] I verified this by examining the neighborhood on Google Street View, at maps.google.com

[138] *See* Oscar Newman, *Creating Defensible Space* 41, at https://www.huduser.gov/publications/pdf/defch2.pdf ("It is important to explain, again and again, that the gates will only restrict vehicular traffic: Pedestrians will be able to freely walk everywhere they did before")

[139] *Id.* at 44.

burglaries[140] (since burglaries are especially likely to occur in residential areas).[141] Table 4.1 compares burglary rates in the 24 cities listed in the abovementioned California study.[142]

The correlation between low intersection density (that is to say, more dead-ends and fewer gridded streets) and high burglary rates is nonexistent: in fact, the nine "cul-de-sac" cities had a mean burglary rate of 655 burglaries per 100,000 residents, higher than the intermediate group (582) or the grid group (447, despite Berkeley's high burglary rate). Similarly, the median burglary rate among the cul-de-sac cities was 555, higher than the comparable figure for the intermediate cities (499) and the grid cities (below 400).

If the cul-de-sac cities were generally more dangerous than the intermediate cities, it could be argued that this group had more burglaries because they had more crime generally. But in fact, this was not the case. Of the nine cul-de-sac cities, four had robbery rates between 100–200 per 100,000 people, and five had under 100 robberies. The 11 intermediate cities were roughly comparable: five had robbery rates over 100 per 100,000

[140] *Cf.* James E. Guffey, *Burglary and Cul-De-Sacs: comparing burglary on cul-de-sacs with non-cul-de-sac streets*, at http://www.aabri.com/SA2014Manuscripts/SA14006.pdf (arguing that burglaries less common on cul-de-sac streets, but noting that scholarly literature divided on issue). I note that the Guffey study is not tremendously persuasive. Guffey claims, for example, that cul-de-sacs comprised 11 percent of Los Angeles streets but were the site of only 1 percent of all burglaries. However, the first half of this claim is based on nothing other than his view that 11 percent is midway between the number of cul-de-sacs in San Diego (18 percent) and Sacramento (4 percent). *Id.* Moreover, 11 percent of the streets is not the same as 11 percent of the housing units; if cul-de-sac streets had fewer houses, they may have comprised less than 11 percent of the houses.

[141] *See* Federal Bureau of Investigation, *Crime in the United States, 2014: Burglary*, at https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/burglary (73.2 percent of all burglaries were of residential properties). By contrast, only 16.8 percent of robberies were at residences. Federal Bureau of Investigation, *Crime in the United States, 2014: Robbery* at https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/robbery.

[142] *See* Marshall and Garrick, *supra* (listing cities).

Table 4.1 Burglary in interconnected California cities vs. cul-de-sac cities

	Intersections per square mile[143]	*Burglary ratesper 100,000 people*[144]
Grid cities: cities with over 200 intersections per square mile		
Berkeley	371	791
Alameda	287	306
La Habra	224	245
San Mateo	206	398
Intermediate cities: cities with 100–200 intersections per square mile		
Cupertino	189	434
Santa Cruz	180	662
Santa Barbara	144	499
Davis	142	417
Morgan Hill	126	286
Turlock	126	731
Rialto	123	597
Palo Alto	121	382
Antioch	109	1216
Madera	107	743
San Luis Obispo	100	441
Cul-de-sac cities: under 100 intersections per square mile		
Carlsbad	96	294
Danville	90	247
Chico	85	545
Redding	81	877
Temecula	73	605
W. Sacramento	71	548
Victorville	67	1428
Perris	60	555
Apple Valley	53	803

[143] Data available in the "Environmental Characteristics" section of the H&T Fact Sheet, *supra*.

[144] I calculated burglary rates from burglary data and population numbers available at Federal Bureau of Investigation, *Crime in the United States, 2014: Table 8, Offenses Known to Law Enforcement by State By City*, at https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-8/Table_8_Offenses_Known_to_Law_Enforcement_by_State_by_City_2014.xls/view ("2014 Table 8").

Table 4.2 Intersection density and burglaries in murder capitals

	Intersections per square mile[145]	*Burglaries per 100,000 residents*[146]
Baltimore	369	1110
St. Louis	330	1321
Pittsburgh	329	692
Newark	223	621
Detroit	222	1340
Buffalo	196	1206
New Orleans	143	893
Cincinnati	143	1619
Birmingham	134	1767
Baton Rouge	133	1208
Atlanta	121	1203
Little Rock	109	1547
Jackson, MS	98	1712

residents (including one, Antioch, with over 200) and six had lower robbery rates.[147]

What about larger, more dangerous cities? Table 4.2 controls for cities' general dangerousness by focusing on American murder capitals: cities with over 100,000 people that had between 20 and 50 murders per 100,000 residents in 2014.

The more interconnected cities tended to have *lower* burglary rates: of the four cities with over 1500 burglaries per 100,000 people, all had below-median rates of street connectivity (i.e., more cul-de-sacs). By contrast, the three cities with burglary rates below 1000 per 100,000 (Newark, New Orleans, and Pittsburgh) had average to above-average street connectivity—that is, more of a traditional street grid.

So if large-scale use of cul-de-sacs reduces walkability and traffic safety, what should be done? At a minimum, cities should not make cul-de-sacs

[145] Data available in the "Environmental Characteristics" section of the H&T Fact Sheet, *supra*.

[146] *See* 2014 Table 8, *supra*.

[147] *Id*. The four most heavily gridded cities were more diverse: three were very safe (with robbery rates below 100 per 100,000 people) and Berkeley was the second most dangerous city studied (with 223 robberies per 100,000). *Id*.

the default choice. Instead, they should allow (and perhaps even encourage) interconnected streets. On the other hand, there is no reason to believe that a small number of dead-end streets have harmful results.

5 Do Americans Really Want To Walk Anywhere?

It could be argued that the policies discussed above have little effect upon suburbanites' behavior, and that even if zoning codes were more pedestrian friendly, almost all Americans would prefer to live in low-density, automobile-oriented environments.

However, a significant amount of data suggest that many, if not most, Americans would like to live in a more pedestrian-friendly environment. For example:

*A survey by the National Association of Realtors found that almost half (47 percent) of respondents preferred an urban or mixed-use suburban community to residence-only suburbs, small towns and rural areas.[148] In particular, 19 percent preferred urban neighborhoods, 28 percent preferred mixed-use suburbs, 18 percent preferred small towns, 22 percent preferred rural areas, and only *12 percent* preferred residence-dominated suburbs (i.e., conventional sprawl development).[149]

*Another survey by Pew Research Center found that respondents were evenly divided between conventional suburbia and neighborhoods "where the houses are smaller and closer to each other, but schools, stores and restaurants are within walking distance."[150]

*Developers seem to believe that these surveys reflect consumer demand. One 2001 survey of developers, conducted by the Urban Land Institute,

[148] *See* Julia Koschinsky and Emily Talen, *From Sprawl to Walkable: How Far is That?* in EMILY TALEN, ED., RETROFITTING SPRAWL: ADDRESSING SEVENTY YEARS OF FAILED URBAN FORM 11, 12 (2015).

[149] *Id.* It seems to me that the authors' interpretation actually understates the support for walkable communities, because a small town can be mixed-use or walkable. Thus, some of the 18 percent who wanted to live in a small town may have preferred the kind of small town where houses are within walking distance of shops. *Cf.* Dave Alden, *Merry Bedford Falls Christmas*, Petaluma Patch, Dec. 24, 2012, at http://patch.com/california/petaluma/bp–merry-bedford-falls-christmas (discussing small town in movie "It's A Wonderful Life" as an example of a walkable small town).

[150] *See* Koschinsky and Talen, *supra*, at 12.

revealed that 85.4 percent of developers believed that the supply of alternatives to conventional low-density suburban development was insufficient to meet market demand, and 78.2 percent identified government regulation as a significant barrier to such development.[151] By contrast, only 26.3 percent listed lack of consumer demand as a significant barrier.[152]

It could also be argued that the experience of Houston suggests that automobile-dependent development would be the dominant form of development even in the absence of government regulation. Even though Houston is the only major American city without a zoning code,[153] 88.4 percent of Houstonians drive to work—more than in the majority of big cities.[154]

But even though Houston has no statutes specifically mandating separation of uses, it has many of the other sprawl-generating regulations discussed above, including minimum lot size requirements that limit population density,[155] setback requirements,[156] minimum parking requirements,[157] and street design rules requiring wide streets.[158] So in Houston, as in other cities, government regulation mandates sprawl.

[151] *See* JONATHAN LEVINE, ZONED OUT: REGULATION, MARKETS AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND USE 128–29 (2006).

[152] *Id.* at 129.

[153] *See* GILLHAM, *supra*, at 17.

[154] *See* Mode Share, *supra* (of 29 largest cities, 17 have lower automobile mode shares than Houston).

[155] See HOUSTON CODE, *supra*, at SEC. 42–181 (minimum lot sizes for single-family houses), 42–185 (minimum lot widths), 42–236 (reducing multifamily density by requiring "open space" for multifamily developments). I note that these requirements were once far stricter than they are today; much of Houston's housing was built under the earlier, more sprawl-producing rules. *See* Overregulation Sprawl, *supra*, at 1178–80 (describing pre-1998 rules and their effects).

[156] *See* HOUSTON CODE, *supra*, 42–150(d).

[157] *Id.,* 26–492 (listing parking requirements for a wide range of uses), 42–234 (special parking rules for apartments).

[158] *Id.,* 42–122 (major streets shall normally be 100 feet wide). In addition, Houston subsidizes separation of uses by allowing the city attorney to sue to enforce private restrictive covenants; these covenants do not exist in every neighborhood, but where they exist, they often encourage separation of land uses. *See* Overregulation Sprawl, *supra*, at 1190–91.

I note that in recent years Houston has liberalized some of these regulations. In 1998, the city amended its zoning regulations to allow townhouses, and reduced the minimum lot size for houses from 5000 to 3500 square feet in the city's urban core.[159] In 2013, the city again amended its ordinances to eliminate minimum parking requirements downtown,[160] and to extend the 3500-foot rule throughout the city.[161] As the city's code has changed to facilitate compact development, urban life has become more popular. For example, the population of midtown Houston (one of the city's more urban neighborhoods) has tripled since 1990.[162] More broadly, Houston's population inside Highway 610 (the city's "inner loop" highway roughly six miles from downtown) has increased somewhat in recent decades, after declining in the 1970s.[163]

[159] *Id.* at 1178, 1181–82.

[160] *See* HOUSTON CODE, *supra*, sec. 42–101; City of Houston, *An Ordinance Amending Chapters 10 and 42 of the Code of Ordinances, Houston, Texas, Relating to Subdivision and Development, Containing Findings and Other Provisoins Relating to the Foregoing Subject; Providing for Severability; Containing a Savings Clause; and Declaring an Emergency*, 45, at http://www.houstontx.gov/planning/DevelopRegs/docs_pdfs/chapter_42_redline_03_18_2013.pdf ("2013 Ordinance")

[161] *Id.* at 87; HOUSTON CODE, *supra*, sec. 42–181(a)(2).

[162] *See* Erin Mulvaney, *Critics complain Midtown development is one-sided*, Houston Chronicle, June 6, 2016, at http://houstonmidtown.com/wp-content/uploads/2016/06/Chron-6.6.16-Midtown-Article.pdf

[163] *See* City of Houston, *Interesting facts you didn't know about the land inside Houston's Loop 610*, at http://www.houstontx.gov/planning/Demographics/Loop610Website/population.html ("inside the loop" population about 400,000 in 1980, and was just over 440,000 in 2010).

CHAPTER 5

Making Walking A Crime

Abstract Police, prosecutors, and government child protection agencies limit Americans' ability to walk in two ways. First, anti-jaywalking laws slow down pedestrians by instructing that they can only cross certain parts of a street; this chapter shows that these laws are rooted in special-interest politics rather than concern for public safety, and criticizes the justifications for such laws. Second, child protection agencies and police have sometimes interpreted vague laws prohibiting "child neglect" to mean that children must be supervised by their parents at all times, and thus may not walk alone. This chapter criticizes the safety justifications for those laws, and suggests a model state law to protect child pedestrians and their parents.

Keywords Jaywalking · Crosswalks · Free-Range Children · Child Neglect · Child Pedestrians

State intervention against pedestrians is not limited to regulation directly affecting the built environment; more punitive legal rules also deter walking, in two respects. First, state and city laws against something often referred to as "jaywalking" limit pedestrians' ability to cross streets. As a result of these laws, police can fine (and even arrest)

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pedestrians.[1] Second, bureaucrats and police sometimes interpret vague laws against "child neglect" as if they were legal requirements that preteen children may never walk on their own. Each of these issues will be addressed in turn.

1 JAYWALKING

Until the 1920s, streets were not just for cars, but for walkers as well; children routinely played in streets.[2] But in the 1920s, fast-moving cars began to threaten this status quo. During that decade, over 150,000 pedestrians were killed by automobiles.[3] At first, public officials were sometimes willing to blame drivers for collisions with walkers. For example, some states responded with lower speed limits,[4] and many American police chiefs even favored laws requiring automobile manufacturers to limit vehicle speed through speed governors.[5]

Rather than tolerating such measures, the auto industry and its allies sought to drive pedestrians off the streets. For example, Charles M. Hayes, President of the Chicago Motor Club (a local chapter of the American Automobile Association, which promoted automobile ownership),[6] wrote

[1] In addition, a walker who sues a driver for negligence in an action arising out of a collision is more likely to be held contributorily negligent if she was jaywalking at the time. *See, e.g.*, Leonard v. Irwin, 280 A.D.2d 935 (A.D. 4th Dept. 2001). But because most states have comparative negligence systems (allowing a plaintiff's negligence to be weighed against that of a defendant, rather than barring recovery) this practice often merely reduces a plaintiff's recovery rather than eliminating liability. *See* Coleman v. Soccer Association of Columbia, 432 Md. 679, 712, 69 A.3d 1149, 1168 (Md. App. 2013) (all but four states have adopted comparative negligence).

[2] *See* Peter D. Norton, *Street Rivals: Jaywalking and the Creation of the Motor Age Street*, 48 TECHNOLOGY AND CULTURE 331, 331–32 (2007), https://muse.jhu.edu/journals/technology_and_culture/v048/48.2norton.pdf.

[3] *Id.* at 332 n. 6 ("over 210,000 Americans were killed in traffic accidents" and three-fourths of them were walkers).

[4] *Id.*

[5] *Id.* at 339.

[6] *See* CITY OF CHICAGO, LANDMARK DESIGNATION REPORT: CHICAGO MOTOR CLUB BUILDING 3, 11, http://www.cityofchicago.org/dam/city/depts/zlup/Historic_Preservation/Publications/Chicago_Motor_Club_Bldg.pdf (describing Hayes and Motor Club).

that bad publicity over traffic deaths might lead to "almost unbearable restrictions upon automobiles,"[7] and that the auto lobby should prevent such restrictions by arguing that "streets are made for vehicles to run upon."[8] Similarly, one car dealer wrote that "[t]he streets are for vehicle traffic, the sidewalks for pedestrians."[9]

As part of this propaganda campaign, the automobile lobby used the term "jaywalker."[10] The term "jay" originally meant "a country hayseed out of place in the city."[11] Thus, a jaywalker was a pedestrian out of place in the city, one oblivious to the dangers of motor traffic.[12] Automobile lobbyists and lobbyist-influenced "safety groups" used this term to stigmatize walkers. For example:

- In 1920, self-styled safety advocates dragged San Francisco pedestrians into mock courtrooms to lecture them on the perils of jaywalking.[13]
- In Los Angeles, an automobile club posted signs warning that "jaywalking" was prohibited, even though at the time this term was not in the city's traffic code.[14]
- In 1923 the Chicago Motor Club bought space in the *Chicago Tribune* for advertisements claiming that pedestrians caused 90 percent of auto collisions.[15] The National Automobile Chamber of Commerce, another industry group,[16] created a "accident news service" designed to show that most accidents were caused by careless pedestrians.[17]

Ultimately, government followed suit. In Los Angeles, the automobile club created a coalition called the Los Angeles Traffic Commission, which

[7] *See* Norton, *supra*, at 340.
[8] *Id.* (citation omitted).
[9] *Id.* at 343 (citation omitted).
[10] *Id.* at 343–45.
[11] *Id.* at 342.
[12] *Id.*
[13] *Id.* at 345.
[14] *Id.* at 350.
[15] *Id.* at 356.
[16] *Id.* at 354 (describing organization).
[17] *Id.* at 356.

drafted a model traffic ordinance that included anti-jaywalking provisions.[18] The city council passed the ordinance in 1925,[19] and other cities quickly enacted similar laws.[20]

Today, jaywalking is almost universally prohibited in the USA.[21] Jaywalking may be governed by state law[22] or by municipal ordinance.[23] These laws generally require pedestrians to obey traffic lights (such as "Walk/Don't Walk" signs)[24] and to use crosswalks when crossing streets[25] rather than

[18] *Id.* at 350–52.

[19] *Id.* at 351.

[20] *Id.* at 357–58.

[21] *See* Philip M. Nichols, *Are Facilitating Payments Legal?* 54 VA. J. INT'L L. 127, 140 (2013) ("Most states and municipalities prohibit jaywalking"). I note that jaywalking is not technically a crime in every jurisdiction. *See* State v. Tyler, 7 P.3d 624, 628, 168 Or. App. 600, 605 (2000) (in Oregon, jaywalking is a "violation" rather than a "crime" and thus not subject to imprisonment). *But see* State v. Barton, 2007 WL 1,429,625 (Ohio Ct. App. 2 Dist.) (jaywalking a misdemeanor).

[22] *See infra* notes 24–25 (citing examples).

[23] *See infra* note 32 (citing examples).

[24] *See, e.g.*, FLA. STAT. ANN. § 316.130 (1) (Thomson/Reuters 2014) (a "pedestrian shall obey the instructions of any official traffic control device specifically applicable to the pedestrian"); 625 ILL. COMP. STAT. § 5/11-1001 (similarly worded) (Matthew Bender 2008); OR. REV. STAT. § 814.010 (State of Oregon, 2013) (pedestrians may generally cross streets where they are facing traffic control devices with green lights, but not when they are facing traffic control devices with yellow or red lights); Alliance v. Bush, No. 2007CA00309, 2008 WL 2,878,321 at *3 (Ohio Ct. App. July 21, 2008) (citing Alliance, Ohio traffic ordinance providing that no pedestrian or driver "shall disobey the instructions of any traffic control device").

[25] *See, e.g.*, 75 PA. CONS. ST. ANN. § 3543(c) (Thomson/West 2006) ("Between adjacent intersections in urban districts at which traffic-control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk."); CAL. VEH. CODE § 21,955 (West 2000) ("Between adjacent intersections controlled by traffic control signal devices or by police officers, pedestrians shall not cross the roadway at any place except in a crosswalk."); State v. Shorts, No. 11CA009965, 2011 WL 6016525, at *7 (Ohio Ct. App. Dec. 5, 2011) (citing Akron, Ohio ordinance providing that "Between adjacent intersections at which traffic control signals are in operation, pedestrians shall not cross at any place except marked crosswalk[s].") (citation omitted). A more moderate version of this statute provides that pedestrians crossing outside crosswalks shall yield the right of way to vehicles. *See, e.g.*, 625 ILL. COMP. STAT. § 5/11-1003(a) (Matthew Bender 2008); CODE OF GA. ANN. 40-6-92(a) and (c) (Thomson/West 2008)

crossing in the middle of a block.[26] In Los Angeles, walkers are ticketed even when flashing "countdown clocks" list the number of seconds left before a light change and thus suggest that there is still time to cross the street.[27] Jaywalkers can be fined hundreds of dollars,[28] and are sometimes arrested[29] and even jailed.[30] Penalties for jaywalking are sometimes set by state governments[31] and sometimes set by city ordinance.[32]

(where adjacent intersections not signalized, a pedestrian outside a crosswalk need only "yield the right of way to all vehicles upon the roadway unless he has already, and under safe conditions, entered the roadway"; however, "Between adjacent intersections at which traffic-control signals are in operation, pedestrians shall not cross at any place except in a marked crosswalk.").

[26] *See* Jones v. Cont'l Elec. Co., 182 A.2d 168, 170 (N.J. Super. Ct. App. Div. 1962) ("crossing in the middle of the block [is] jaywalking").

[27] *See* Adrian Glick Cudler, *Los Angeles Might Finally Do Something About the Dumbest Jaywalking Tickets*, CURBED (May 5, 2015), http://la.curbed.com/archives/2015/05/los_angeles_might_finally_do_something_about_the_dumbest_jaywalking_tickets.php. *Cf.* Jon Hilkevitch, *More Pedestrians to be Put on Clock, Chicago Tribune*, Mar. 20, 2006, http://articles.chicagotribune.com/2006-03-20/news/0603200209_1_countdown-signals-intersections-walk (describing "countdown clock" concept).

[28] *See* Cudler, *supra* (Los Angeles tickets cost between $190 and $250); Joe Linton, *Interview with Luke Klipp of Jaydancing*, STREETSBLOG (June 16, 2015), http://la.streetsblog.org/2015/06/16/interview-with-luke-klipp-of-jaydancing (in same city, parking tickets only $70).

[29] *See* Wayne Logan, *After The Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J.L. & PUB. POL'Y 319, 338 (2015) (citing case upholding warrantless arrest for jaywalking).

[30] Dave Huddleston, *Jailed for Jaywalking: Pedestrian crime lands some behind bars*, WSB-TV (Nov. 3, 2015, 3:14 PM), http://www.wsbtv.com/news/news/local/jailed-jaywalking-pedestrian-crime-lands-some-behi/nhygy.

[31] *See, e.g.*, Judicial Council of California, *Uniform Bail and Penalty Schedules* 16, http://www.courts.ca.gov/documents/Final-2012-JC-BAIL.pdf (listing fines for various pedestrian offenses; for example, $194 fine for violation of "Don't Walk" sign); N.J.S.A. 39:4-36 (setting forth $200 fine for variety of offenses, including a pedestrian's failure to yield to automobiles when former not in crosswalk); H.R.S. § 291C-73(d) ($100 fine for various violations of traffic code by pedestrians, including crossing outside crosswalk).

[32] *See* Arizona Bikelaw, *Jaywalking in Arizona*, http://azbikelaw.org/blog/jaywalking-in-arizona/ ("In Arizona, cities are authorized to enact their own

In fact, jaywalking can even lead to more serious charges. In 2010, Raquel Nelson of Cobb County, Georgia, watched as her son was killed by a hit-and-run driver.[33] Because the nearest crosswalk was half a mile away, Nelson and her children had crossed in midblock.[34] Rather than merely ticketing her for jaywalking, the county government chose to prosecute Nelson for her child's death; the Georgia Court of Appeals upheld this decision.[35]

1.1 The Problem

To what extent does jaywalking liability increase societal automobile dependence? I have found no relevant data. However, it seems logical to me that where jaywalking laws are aggressively enforced, the threat of being ticketed or arrested might discourage walking. Moreover, it also seems to me that if these laws encourage pedestrians to go out of their way to reach a crosswalk or traffic light, such laws slow down pedestrian commutes and thus discourage walking less directly.

1.2 But What about Safety?

It could be argued that jaywalking laws actually make walking safer, because the safest place to cross the street is at an intersection with traffic lights. This argument overlooks the fact that traffic lights only protect a walker from vehicles heading straight at him or her, not from vehicles

pedestrian regulations"); KIERA HAY, COMMITTEE KILLS JAYWALKING ORDINANCE, ALBUQUERQUE J., Jan. 23, 2013, http://www.abqjournal.com/162568/north/committee-kills-jaywalking-ordinance.html (describing city council's rejection of proposal to increase jaywalking fines).

[33] *See* MARCUS K. GARNER, THE ATLANTA JOURNAL-CONSTITUTION, JAYWALKING MOM'S APPEAL DENIED (Sept. 7, 2012, 8:28 AM), http://www.ajc.com/news/news/local/jaywalking-moms-appeal-denied/nR5Sq/.

[34] *Id.*

[35] *See* State v. Nelson, 731 S.E.2d 770 (Ga. Ct. App. 2012) (upholding lower court's decision to grant trial rather than dismissing charges). Ultimately, the county reversed itself and dropped the charges, settling for a $200 fine. *See Jaywalking mom avoids retrial for son's death*, 11 ATLANTA (June 13, 2013, 11:59 AM), http://www.11alive.com/story/news/crime/2014/03/05/1938418/.

making left and right turns. For example, suppose walker A is at an intersection, and traffic lights give A the right-of-way. Assuming that no one is violating the law, the lights protect A from a motorist driving through the intersection and colliding with A head-on.

However, the lights do not protect A from a motorist turning left or right from a nearby intersection; that motorist may be allowed by the law to turn right on a red light, or may be turning either left or right on a green light. So at a four-way intersection, A not only has to pay attention to the light but also has to pay attention to motorists turning from two other directions.[36] By contrast, if A crosses midblock where there is no light, A need not worry about turning motorists, but instead only has to worry about traffic coming directly at him or her. So where oncoming traffic is light, jaywalking may be safer than following the law.

It could be argued that instead of crossing at signalized intersections, walkers should use marked crosswalks. But some experts suggest that in the absence of traffic lights, crosswalks are so widely ignored by drivers that they give pedestrians a false sense of security rather than actually preventing accidents.[37] As a result, the Federal Highway Administration discourages crosswalks on high-speed roads.[38]

Thus, the relationship between jaywalking laws and safety is questionable: neither traffic lights nor marked crosswalks consistently protect pedestrians from errant drivers. In fact, jaywalking laws may *reduce* pedestrian safety in two more ways. First, to the extent that jaywalking laws discourage walking, they reduce pedestrian safety because of the "safety in numbers" phenomenon. A recent study of automobile/walker collisions in Minneapolis found that "intersections characterized by greater daily

[36] *Cf.* Tom Vanderbilt, *When Pedestrians Get Mixed Signals*, N.Y. TIMES, Feb. 2, 2014, http://mobile.nytimes.com/2014/02/02/opinion/sunday/when-pedestrians-get-mixed-signals.html ("the times we came closest to being hit by cars were when we had the 'Walk' signal and a driver attempted to make a turn.").

[37] *Crosswalks*, WASH. STATE. DEP'T OF TRANSP., http://www.wsdot.wa.gov/Operations/Traffic/crosswalks.htm (making argument, and pointing out that unmarked intersections have fewer pedestrian/vehicle collisions).

[38] *See* Federal Highway Administration, *2009 Manual on Uniform Traffic Control Devices*, Ch. 3B.18, Standard 9, http://mutcd.fhwa.dot.gov/htm/2009r1r2/part3/part3b.htm (discouraging crosswalks on streets where speed limit is over 40 miles per hour, and number of vehicles exceeds specified amounts).

levels of pedestrian activity show lower per-pedestrian crash rates than less-active intersections."[39] This may be because on streets with a high number of walkers, motorists drive more cautiously.[40]

Second, to the extent that drivers expect walkers to obey anti-jaywalking laws, these laws may lead drivers to discount the likelihood of encountering a pedestrian, and prompt them to be less vigilant as a result. If this is the case, the law may cause a vicious cycle: fewer walkers means less driver vigilance, less driver vigilance means more crashes, and more crashes mean fewer walkers still.

It could be argued that even if many crashes do occur at intersections, jaywalking is on balance more dangerous because the majority of pedestrian/car collisions occur outside crosswalks.[41] But this argument is not completely persuasive: some of these collisions occur not in places where a walker is jaywalking, but on streets where he or she is far from a crosswalk, and thus cannot easily conform to anti-jaywalking laws.[42]

1.3 The Solution: Legalize Jaywalking

If jaywalking laws harm pedestrians without enhancing safety, the most logical solution is simply to eliminate them. Jaywalking is not a legal offense in the UK.[43] Nevertheless, pedestrians actually face a *lower* risk of death from car

[39] Brendan Murphy, David Levinson & Andrew Owen, *Estimating the "Safety in Numbers" Effect With Estimated Pedestrian Activity*, http://nexus.umn.edu/Papers/SafetyInNumbers.pdf.

[40] *Id.* at 14. *See also* Peter L. Jacobsen, *Safety in numbers: more walkers and bicyclists, safer walking and bicycling*, http://injuryprevention.bmj.com/content/9/3/205.full (reaching similar conclusions, but comparing cities rather than intersections within individual city).

[41] *See* US Department of Transportation, *Traffic Safety Facts 2013 Data 2*, http://www-nrd.nhtsa.dot.gov/Pubs/812124.pdf (only 20 percent of pedestrian deaths at intersections) ("Safety Facts"); Tom Vanderbilt, *In Defense of Jaywalking*, SLATE (Nov. 2, 2009), http://www.slate.com/articles/life/transport/2009/11/in_defense_of_jaywalking.html (citing claims that most pedestrians injured or killed by cars are jaywalkers).

[42] *Id.* ("[L]ess than 20 percent of fatalities occurred where a pedestrian was crossing outside an easily available crosswalk.").

[43] *What Every Brit Should Know About Jaywalking*, BBC NEWS (Jan. 12, 2007), http://news.bbc.co.uk/2/hi/6251431.stm.

crashes in the UK than in the USA. In 2013, 398 British pedestrians were killed by motor vehicles,[44] or (given the UK's population of just over 63 million people)[45] roughly 0.6 per 100,000 residents. By contrast, in that year the USA had 1.5 pedestrian fatalities per 100,000 people[46]—a fairly typical rate for the USA.[47] This gap *understates* the difference between the USA and the UK; British citizens take more than twice as many trips on foot as Americans, which means they have more opportunities to become victims of vehicle/pedestrian collisions.[48] Thus, British pedestrians are far safer than American pedestrians[49] despite the absence of jaywalking laws.

Similarly, in Massachusetts the fine for jaywalking is only $1.[50] The pedestrian fatality rate is 1 per 100,000 people,[51] one-third below the

[44] *Facts on Pedestrian Casualties* 2, DEPARTMENT OF TRANSPORT (June 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438072/pedestrian-casualties-2013-data.pdf.

[45] *See* Worldometers, *U.K. Population*, http://www.worldometers.info/world-population/uk-population.

[46] *See* Safety Facts, *supra*, at 5.

[47] *Id.* at 1 (every year between 2004 and 2013, there were between 4300 and 5000 pedestrian deaths in the USA).

[48] *See* Michael Lewyn, *Sprawl in Europe and America*, 46 SAN DIEGO L. REV. 85, 91 (2009) (17 percent of British trips are on foot or through some other method that is not an automobile, mass transit or bicycle, as opposed to 7 percent of Americans). On the other hand, the higher number of British pedestrians may itself be a cause of Britain's lower death rates. *See supra* notes 39–40 and accompanying text (discussing "safety in numbers" theory).

[49] On the other hand, this is hardly an "other things being equal" comparison. *Cf. Lesson 23: International Approaches to Bicycle and Pedestrian Facility Design*, FEDERAL HIGHWAY ADMINISTRATION UNIVERSITY COURSE ON BICYCLE AND PEDESTRIAN TRANSPORTATION, http://www.fhwa.dot.gov/publications/research/safety/pedbike/05085/chapt23.cfm (describing numerous practices that make European nations, including Britain, more pedestrian-friendly than the United States). However, I am not arguing that the absence of jaywalking laws causes Britain's better safety record, merely that Britain's lack of jaywalking laws is not harmful enough to *prevent* Britain from being safer.

[50] *See* Eric Randall, *Why Wouldn't You Jaywalk in Boston?* BOSTON DAILY, July 23, 2014, http://www.bostonmagazine.com/news/blog/2014/07/23/wouldnt-jaywalk-boston/, *citing* MASS. GEN. L. 90-18A.

[51] *See* Safety Facts, *supra*, at 8.

USA average. And while most American cities have higher pedestrian fatality rates than the national average, Boston's pedestrian fatality rate is only 1.08 per 100,000 people, about the same as the Massachusetts average and well below the national average.[52]

Because many states have enacted anti-jaywalking laws,[53] it may be difficult for local governments to completely legalize jaywalking. However, state jaywalking laws do not always establish penalties for jaywalking—so in states where jaywalking penalties are a matter of local option,[54] a local government can, by municipal ordinance, limit jaywalking fines to $1 or some other nominal amount.

2 The War on Child Pedestrians (and Their Parents)

In the 1960s, about half of American children walked to school.[55] By contrast, in 2009, only 13 percent did so.[56] The majority of American children are now driven to school (up from under 20 percent in 1969).[57] A variety of causes underlie this trend, including increased societal automobile dependence[58] and a general trend toward overprotective parenting.[59]

[52] *Id.* at 9.

[53] *See supra* notes 24–25 and accompanying text (citing examples).

[54] *See supra* note 32 (citing examples).

[55] *See* Edward H. Ziegler, *American Cities and Sustainable Development in the Age of Global Terrorism: Some Thoughts on Fortress America and the Potential for Defensive Dispersal II*, 30 WM. & MARY ENVTL. L. & POL'Y 95, 111 n.73 (2005).

[56] *See* SRTS Guide, *The Decline of Walking and Bicycling*, http://guide.saferoutesinfo.org/introduction/the_decline_of_walking_and_bicycling.cfm.

[57] *See* NATIONAL ACADEMY OF SCIENCES, PHYSICAL ACTIVITY: MOVING TOWARDS OBESITY SOLUTIONS: WORKSHOP SUMMARY 97 (2015).

[58] *See* Craig N. Oren, *Getting Commuters out of Their Cars: What Went Wrong?* 17 STAN. ENVTL. L.J. 141, 160–64 (1991) (auto travel almost doubled between 1965 and 1990 while public transit use declined); Brian McKenzie, *Modes Less Traveled: Bicycling and Walking to Work in the United States: 2008–12*, https://www.census.gov/prod/2014pubs/acs-25.pdf (percentage of Americans walking to work decreased by half between 1980 and present).

[59] Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1231–41 (2011) (describing "over-parenting" trend; for example, today's parents more likely

2.1 The Problem

As child pedestrians have become more unusual, police officers, prosecutors, and child protection agencies have begun to see such behavior as abnormal and even illegal. For example:

- Debra Harrell of North Augusta, South Carolina spent 17 days in jail because she let her nine-year-old daughter play at a park while she was working.[60]
- Nicole Gainey of Port St. Lucie, Florida, was arrested and charged with child neglect because her seven-year-old was playing unsupervised at a nearby playground.[61]
- Ashley Richardson of Winter Haven, Florida, was jailed when she allowed her four children, ages six to eight, to play at a park.[62]
- In Ohio, a father allowed his six-year-old daughter to walk three blocks to a post office; they had walked together many times before.[63] Police took the child into their custody, initially refusing to return her to her father.[64] The state child protective services (CPS) agency advised police to return the child, but served the father with a complaint alleging child neglect, and sought to take the child from her parents.[65] Another Ohio father was arrested for child endangerment

to use technology to monitor children and confront teachers over children's academic problems); David Pimentel, *Criminal Child Neglect and the "Free Range Kid": Is Overprotective Parenting the New Standard of Care?* 2012 UTAH L. REV. 947, 953 (noting that preteen children once allowed to baby-sit, but that this is far less common today) ("Criminal Child Neglect").

[60] *See* David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 260 (2015) ("Bogeyman").

[61] *Id.*

[62] *Id.*

[63] *Id.* at 262.

[64] *Id.*

[65] *Id. See also* Scott Shackford, *Ohio CPS Wants to Snatch Kid Away from Family that Has Taught Her Self-Sufficiency*, REASON, HIT & RUN BLOG (Apr. 3, 2013), http://reason.com/blog/2013/04/03/ohio-cps-wants-to-snatch-kid-away-from-f.

and lost his job after the child walked to a store without the father's knowledge or consent.[66]

- In Silver Spring, Maryland, Danielle and Alexander Meitiv allowed their 10- and 6-year-old children to walk one mile home from a playground, after the children had previously paired up for shorter walks.[67] The children were held by police and CPS for five hours.[68] CPS employees later threatened to remove the children if the parents did not sign a CPS-drafted "safety plan,"[69] and attempted to frighten the children by telling them that "bad guys" were "waiting to grab you."[70]

In some of these cases, the state ultimately dropped charges against parents.[71] Nevertheless, the mere possibility of arrest and/or CPS harassment may exert a chilling effect upon parents, discouraging them from allowing children to walk anywhere.[72]

[66] *See* Tom McKee, *Jeffrey Williamson: Dad arrested after son, 8, skips church to play*, WCPO CINCINNATI (July 2, 2014), http://www.wcpo.com/news/local-news/warren-county/blanchester/jeffrey-williamson-dad-arrested-after-son-8-skips-church-to-play.

[67] *See* Bogeyman, *supra*, at 263; Peter Gray, *Meet Danielle Meitiv, Fighting for Her Kids' Rights*, PSYCHOLOGY TODAY (Apr. 11, 2015), https://www.psychologytoday.com/blog/freedom-learn/201504/meet-danielle-meitiv-fighting-her-kids-rights.

[68] *See* Donna St. George, *Maryland's "Free Range Parents" Cleared of Neglect in One Case*, WASH. POST, May 26, 2015, http://www.washingtonpost.com/local/education/marylands-free-range-parents-cleared-of-neglect-in-one-case/2015/05/25/deb30e12-0093-11e5-805c-c3f407e5a9e9_story.html.

[69] *See* Bogeyman, *supra*, at 263.

[70] *Id.*

[71] *See* Donna St. George, *"Free Range" parents are cleared in second case after kids walked alone*, WASH. POST, June 22, 2015 (charges dropped in 2015 against Meitivs); Donna St. George & Brigid Schulte, *"Free-Range" Flap in Maryland Fans Flames of National Debate on Parenting*, WASH. POST NEWS SERVICE (Apr. 18, 2015) (charges dropped against Nicole Gainey) (available on WESTLAW but no WLNR number listed).

[72] Bogeyman, *supra*, at 265 (parents' "risk management decisions must incorporate the risk that the state will intervene").

2.2 *But What about Safety?*

Just as government restricts jaywalking in order to protect pedestrians from themselves, government seeks to prevent children from walking because (in the words of one journalist) "the world is a more dangerous place than it was generations ago when children were allowed to run freely."[73] For example, some police officers and bureaucrats have sought to prosecute parents for allowing their children to walk because of a hypothetical risk of children being abducted or otherwise victimized by criminals.[74] This argument lacks merit for two reasons. First, this risk is small and declining. Second, this risk, to the extent it exists, may be outweighed by the harms (both to the public and to nonwalking children themselves) that may arise when children are forbidden to walk.

2.2.1 *Minimal Risk*

After increasing in the 1960s and 1970s, violent crime has significantly decreased in recent decades. The national murder rate decreased from its all-time high of 10.2 homicides per 100,000 Americans in 1980 to 4.5 homicides per 100,000 in 2014—a rate lower than in 1960.[75] In particular, crimes against children are especially rare. Violent crime against children decreased by 77 percent between 1994 and 2010.[76] Murders arising out of abductions by strangers are especially infrequent; a parent

[73] Tierney Sneed, *What's Behind the Arrests of Mothers For Leaving Their Children Unattended?* US NEWS & WORLD REPORT (July 13, 2014), WLNR 21,073,851 (describing, but not endorsing, comment).

[74] *Id. See also* Bogeyman, *supra*, at 258 (police officer justified decision to arrest parent by asking "is that safe for the child?"), 263 (while trying to build a case against parents who allowed their children to walk outside, CPS workers raised threat of kidnapping).

[75] *See* Disaster Center, *United States Crime Rates 1960–2014*, at http://www.disastercenter.com/crime/uscrime.htm

[76] *See* Jessica Culverhouse, *Parks: A Place for Play*, PARKS & RECREATION (Oct. 1, 2014), at 52, 2014 WLNR 32,847,481. It could be argued that parental refusal to allow children outside is responsible for this decrease, and thus should be mandated by law. But this claim is a "heads I win tails you lose" argument: that is, if crimes against children decrease, partisans of the status quo will claim victory, while if crimes were increasing, they would argue that the dangers of the modern world require children to be kept inside.

who wanted his child abducted would have to leave the child outside, unattended, for 500,000 years before it would be likely to happen.[77] More generally, children are safer than ever in a wide variety of respects: child mortality rates from all causes have fallen by nearly half since the early 1990s, and reports of missing children are down nearly 40 percent.[78]

2.2.2 Countervailing Risks: Or, Why It Is Dangerous for Children NOT to Walk

2.2.2.1 Risks of harm to the public

As noted above, automobiles generate crash-related injuries and a wide variety of pollutants, leading to significant health care costs of various types.[79] Just as jaywalking laws may increase these costs by increasing driving, public health is also impaired when parents drive their children to places where earlier generations of children might have walked.

On a more intangible level, government intrusion into parents' right to allow children to walk raises constitutional questions. In 1925, the Supreme Court wrote that government may not enact legislation that "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children"[80] because children are not "the mere creature of the State."[81] More recently, the Supreme Court emphasized that due process includes the "fundamental right of parents to make decisions concerning the care, custody and control of their children."[82]

Although these principles do not prohibit states from enacting child neglect laws,[83] the Court's statements do suggest that courts and bureaucrats should give parents ample discretion to decide how to rear their children, rather than

[77] Criminal Child Neglect, *supra*, at 960.

[78] *See* Christopher Ingram, *There's never been a safer time to be a kid in America*, WONKBLOG, (Apr. 14, 2015), http://www.washingtonpost.com/news/wonkblog/wp/2015/04/14/theres-never-been-a-safer-time-to-be-a-kid-in-america/.

[79] *See supra* Ch. 1-2.3 and accompanying text.

[80] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

[81] *Id.* at 535.

[82] Troxel v. Grandville, 530 U.S. 57, 66 (2000).

[83] *See In re* Neglected Child, 130 Vt. 525, 530–32, 296 A.2d 250, 253–54 (1972) (Pierce does not bar states from enforcing child neglect laws because of importance of state interest in preventing such neglect).

forcing all parents to do what the average police officer would think best.[84] When an Arkansas parent was arrested because her child walked to school, a police officer stated "if you wouldn't want your child doing it, you probably don't need some other child doing it."[85] The officer's suggestion that all children must conform to his conception of "your child" seems inconsistent with the Court's emphasis on parental discretion.

2.2.2.2 Risks of harm to children

Children themselves suffer from not being able to walk alone, for several reasons. First, if children are not allowed to walk unless their parents are present, they will obviously walk less. One recent study of Toronto children showed that children who were allowed to go places by themselves were 20 percent more physically active than other children.[86] Other things being equal, less exercise means worse health.[87] So American children's failure to walk may have contributed to health problems related to lack of exercise; in the last 30 years, obesity rates have nearly tripled among teenagers and quadrupled among younger children.[88] Between the late

[84] It could even be argued that government decisions to the contrary are unconstitutional. *See* Ilya Somin, *How the Constitution protects "free range" parents*, VOLOKH CONSPIRACY (Apr. 16, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/16/how-the-constitution-protects-free-range-parents/. Although states clearly have a right to regulate child neglect, any unreasonable government decision violates the Due Process Clause. *See* Neglected Child, 130 Vt. at 531, 296 A.2d at 254 (state child neglect law valid because it established "reasonable standards."). So if a prosecutor decided that "child neglect" included allowing a 10-year old to walk to school, and if a court thought the prosecutor's decision was unreasonable, prosecuting the 10-year-old's parents would violate due process. However, I have found no case law on point.

[85] Bogeyman, *supra*, at 258.

[86] *See Unsupervised outings help children be more active*, RYERSON UNIVERSITY (Jan. 22, 2015), http://www.ryerson.ca/news/news/Research_News/20150122-unsupervised-outings-help-children-be-more-active.html.

[87] *See Surgeon General, supra*.

[88] *See* Catherine Malina & John M. Balbus, *Environmental Interventions to Help Address the Obesity and Asthma Epidemics in Children*, 17 DUKE ENVTL. L. & POL'Y F. 193, 194 (2007) (obesity rates "have nearly tripled among children ages two to five and twelve to nineteen years" and "more than quadrupled among children ages six to eleven years.").

1970s and the late 1990s, the total days of health care devoted to school-aged children with obesity-related illnesses doubled, and the proportion of hospital costs dedicated to these patients nearly quadrupled.[89]

Second, parents who drive their children expose them to the risk of injury and death from car crashes. An American child is 50 times more likely to die from a car crash than from an abduction by a stranger.[90] On the other hand, it could be argued that even if children are not at much risk from crime, child pedestrians are at enormous risk from traffic. But this argument is a self-fulfilling prophecy: the more that parents drive their children, the more auto traffic they create, thus increasing the very risk that they might use to justify driving.

Third, it is not even clear that unsupervised children are at greater risk of criminal victimization than heavily supervised children, because children may risk victimization by being with parents as well as by being alone. Most American violent crimes are committed against adults; only 4.6 percent of violent victimizations involve children under 12.[91] And as a matter of common sense, this should not be surprising—many violent crimes, especially violent crimes between strangers, often involve robberies,[92] and adults carry more money than children and thus are more inviting targets for such crimes. Should a child be with a parent who is being victimized, the child might be injured or killed, or at least emotionally traumatized.[93] In other words, if even

[89] *Id.*

[90] *See* Criminal Child Neglect, *supra*, at 987; *see also* NHTSA, *Occupant Protection*, http://www-nrd.nhtsa.dot.gov/Pubs/812153.pdf (noting 214 deaths of occupants aged 4 or younger, 199 deaths of occupants aged 4–7, and 225 of occupants aged 8–12).

[91] *Victimization Data Categorized by Age and Type of Crime*, US DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS (Nov. 2014), http://www.ovc.gov/pubs/NIBRS/victimizationdata.html.

[92] *See* Erika Harrell, *Violent Crimes Committed by Strangers, 1993–2010*, vol. 2, at 10, http://www.bjs.gov/content/pub/pdf/vvcs9310.pdf (majority of robberies committed by persons unknown to victim, while only one-fourth of rapes and 42 percent of assaults involved strangers; 19.3 percent of "stranger homicides" arose out of robberies).

[93] *Cf. Ex parte* Giles, 632 So. 2d 577 (Ala. 1993) (robber murdered parents and children); Gonzalez v. State, 136 So. 2d 1125, 1152–53 (Fla. 2014) (prosecutor allowed to mention that children present while parents murdered).

the tiniest risk of criminal victimization justifies forcing a child to be in the company of adults at all times, one might also argue that similar risks could justify forcing the child to avoid adults at all times—obviously an absurd result.

Finally, a child seized from her family by CPS is put at additional risk. Today, a child is 2322 times as likely to be taken from a family by CPS as to be abducted by a non-state kidnapper.[94] In 2008, 267,000 children were removed from their homes as a result of a CPS investigation, and no parental misconduct was found in one-third of these cases.[95] Children removed from families may suffer emotional damage from being torn from their parents and being placed in foster care with strangers.[96] Moreover, the foster care system itself is dangerous, because children in foster care are more likely to be abused or to die from abuse than other children.[97] Even where CPS and criminal investigations do not lead to the ultimate penalty of family breakup, the investigation itself may be traumatic for parent and child alike.[98]

In sum, keeping children locked up in their parents' homes and cars itself creates safety risks by contributing to health problems arising from inactivity, deaths and injuries from car crashes, and perhaps even criminal victimizations. And where children are removed from their parents for failure to conform to this policy, they incur the risks of emotional trauma and abuse in foster care.

2.3 Reforming the Law

The most significant statute governing CPS activities is the federal Child Abuse Prevention and Treatment Act (CAPTA).[99] CAPTA provides funding to states to fight child abuse and neglect.[100] Currently, the statute defines "child abuse and neglect" as acts or failures to act that cause harm to a child or present "an imminent risk of serious harm."[101]

[94] *See* Bogeyman, *supra*, at 266 n.172.

[95] *Id*. at 266.

[96] *Id*. at 274.

[97] *Id*.

[98] *Id*. at 275.

[99] *Id*. at 242 (CAPTA is perhaps "the most significant of these legislative actions" related to child welfare).

[100] *Id*.

[101] Pub. L. No. 111–320, § 142(a) (2010); *see also* Bogeyman, *supra*, at 270 (citing similar state laws).

This standard is so vague that it gives police and CPS employees virtually unlimited discretion.[102] A CPS employee could hear about children walking to school, imagine the possibility of "imminent" harm, and spring into action. Moreover, the "imminent harm" standard fails to distinguish significant risks such as car crashes or obesity from "one in a million" risks such as abduction.

State criminal child neglect laws are even less clear than CAPTA. For example, Michigan law criminalizes any activity that places "a child at an unreasonable risk . . . by failure . . . to intervene to eliminate that risk when that person is able to do so."[103] Because anything that a parent does exposes a child to some risk, juries have significant discretion to decide that a risk is "unreasonable." A prosecutor and jury could decide that allowing a child to walk to school creates an "unreasonable risk" of the child being victimized by criminals, or could just as easily decide that driving the child to school creates an "unreasonable risk" of the child being attacked by carjackers or injured in a car crash.

If (as suggested above) vague tests oriented toward reasonableness are inadequate to protect parents from prosecutors and bureaucrats, the most effective way to protect parents and children will be a bright-line test. Such a bright-line test is now part of federal law: in 2015, Congress passed the Every Student Succeeds Act, which states in relevant part:

> nothing in this Act shall authorize the Secretary to, or shall be construed to (1) prohibit a child from traveling to and from school on foot or by car, bus, or bike when the parents of the child have given permission; or (2) expose parents to civil or criminal charges for allowing their child to responsibly and safely travel to and from school by a means the parents believe is age appropriate.[104]

This law, by its terms, is not likely to eliminate the criminalization of walking because it only limits the federal government, and only privileges

[102] *Id.* at 245.

[103] MICH. COMP. LAWS SERV. § 722.622(j)(ii) (Thomson/Reuters 2011). *See also* Criminal Child Neglect, *supra*, at 975–76 (citing other examples).

[104] P.L. 114–95, sec. 8034. *See also* The White House, White House Report: The Every Student Succeeds Act, https://www.whitehouse.gov/the-press-office/2015/12/10/white-house-report-every-student-succeeds-act (noting that President signed bill).

walking to school (as opposed to walking to other destinations); however, state governments can pass legislation with similar language.

For example, a state law could state that:

> no state or local government entity shall (1) prohibit a child old enough to attend kindergarten from traveling on foot or by bus or bike when the parents of the child have given permission; or (2) expose parents to civil or criminal charges for allowing their child to do so when the parents believe that such travel is age appropriate.

This sort of statute is not unprecedented. For example, Oregon law provides that the crime of child neglect applies to inadequate supervision only when the child is younger than 10.[105] However, children younger than 10 are certainly intelligent enough to walk to school; some of the most highly publicized incidents of government harassment of unsupervised children have involved children ages six to 10.[106] Thus, it seems reasonable that the law should protect parents of any child young enough to attend school.

Admittedly, a bright-line rule fails to protect the least mature children (and less mature parents) from themselves. But if no law can reach the right outcome for every single family, it seems to me that states should err on the state of trusting the discretion of parents (who presumably know more about their children, and have more of an interest in protecting their children, than a police officer, prosecutor, or juror).

[105] OR. REV. STAT. § 163.545(1) (State of Oregon 2013). This law does not mean that anyone leaving a nine-year old alone is automatically guilty of child neglect; rather, it provides that the law is violated if "with criminal negligence, the [parent or guardian] leaves the child unattended . . . for such period of time as may be likely to endanger the health or welfare of the child."

[106] *See supra* notes 60–70 and accompanying text.

CHAPTER 6

Market Urbanism: Pro-Market Solutions To Anti-Market Sprawl

Abstract This chapter summarizes the market-oriented reforms proposed in earlier chapters. The chapter proposes making cities more attractive by reducing highway spending, increasing parents' educational options, and deregulating urban zoning. The chapter also proposes that government make cities and suburbs more pedestrian-friendly by eliminating minimum parking and setback requirements, allowing narrower streets, abolishing anti-jaywalking laws, and allowing children to walk to school and other destinations.

Keywords Roads · Parental Choice · Single-Use Zoning · Wide Streets

At the start of this book, I promised to discuss anti-sprawl strategies that make government less expensive or less intrusive. I have done so throughout this book; this chapter is merely a summary. In particular, I propose:

*Reductions in government highway spending. In particular, government should stop building city-to-suburb highways, and should stop widening existing roads in still-developing suburbs. Limits on sprawl-generating highway spending would not eliminate existing sprawl, but would at least make it harder for government to create new sprawl.

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*Policies designed to increase parental choice in education, so that families could live in cities while avoiding urban public schools with poor reputations. Such policies could take the form of traditional voucher systems that allow urban families to attend private schools at lower cost, open enrollment policies that allow urban children to attend suburban schools, or expansion of charter and exam schools so that parents might have better options within urban public school systems. All of these policies would make government less intrusive, in the sense that parents would be able to choose the right schools for their children without feeling forced to move to suburbs with prestigious public schools. However, some of these policies might increase education budgets.

*State legislation that partially revokes zoning enabling acts. In particular, I propose that in the most expensive large cities, states should prohibit cities from limiting residential density, and should prohibit zoning laws that exclude any form of housing from areas already zoned for housing or nonpolluting commercial uses. This reform would both make government less intrusive (by allowing more private housing construction) and reduce housing costs.

*Even where housing is not unusually expensive, state governments should limit density regulation in order to allow the creation of more walkable neighborhoods. If this was the case, developers would be free to build neighborhoods compact enough to support walking, bicycling and public transit. In general, states should prohibit density regulation with certain exceptions (such as rural or environmentally sensitive areas).

*Single-use zoning need not be completely eliminated, because small single-use residential zones can still be within walking distance of commerce. However, multifamily housing should generally be allowed in nonindustrial zones, and small-scale retail (such as corner stores and very small restaurants) should generally be allowed in residential zones. In other words, landowners should be free to mix housing and commerce to a greater extent than is currently the case.

*Minimum parking requirements and setback requirements should be abolished. Abolition of these rules would give landowners more freedom to decide what to do with their land, reduce housing costs by allowing landowners to build more housing with less parking, make cities more

compact and thus more walkable, and enable pedestrians to reach their destinations without having to cross a sea of parking.

*Government generally should not build or mandate streets wider than four lanes, or longer than 600 feet; similarly, government should not favor cul-de-sacs. Wide streets make walking dangerous by enabling fast traffic; cul-de-sacs and long blocks make walking uncomfortable by forcing pedestrians into a few major streets rather than giving them a wide variety of travel options.

*Laws against jaywalking should be eliminated. Such laws make walking unpleasant and unsafe—unpleasant because these laws force pedestrians to worry about the risks of legal liability whenever they cross the street, and unsafe because midblock crossings are sometimes safer than crossing at lights or crosswalks.

*States should save families from frivolous child neglect prosecutions by explicitly allowing school-age children to walk on their own. Currently, some local police and bureaucrats interpret vague "child neglect" statues as a command that children may never be allowed more than a few feet from their parents. Such behavior reduces parents' freedom to bring up their children as they see fit, impairs child health by forcing children into inactivity, and increases other social harms (such as car crashes and vehicle pollution) related to automobile-dependent development.

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