

# Smart Growth and Other Infirmities of Land Use Controls

BERNARD H. SIEGAN\*

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## I. INTRODUCTION

In 1969, when I first began writing about zoning, the world was ideologically a much different place than it is now. Governments then presiding over most of the world's population condemned the protection of private property as both evil and stupid. They extolled government ownership and planning as essential to economic welfare and development. The market, they insisted, was irrational and unfair; experts must control it in the public interest. Communist governments adopted every conceivable law to accomplish this objective but instead achieved economic and

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\* Distinguished Professor of Law, University of San Diego School of Law. He presented the initial draft of this Article at the 2000 Annual Convention of the American Institute of Architects in Philadelphia, Pennsylvania.

political disaster.

Well, things sure have changed. Almost all of the former communist governments have reversed their positions and have ratified constitutions guaranteeing the ownership of private property. In the older capitalist countries, relatively few office holders currently support nationalizing industry; instead, the emphasis is now on privatization, which can only be achieved by limiting government powers.

The great lesson of our time is that the forces of production, conservation, and creativity exist principally in the marketplace and not in government. To be sure, private entrepreneurs act largely in their own self-interest, but probably no more so than government officials, and their endeavors in the economic area are much more beneficial to the public.

The difference between a market economy and a command economy is enormous. In the communist and socialist societies, progress in every sector depends on the competence and skills of a very small group of people appointed by the government. Multiply that number by hundreds or thousands to understand the operation of a free system. The incentives of wealth and fame motivate great numbers of people to innovate and produce services and products that will enlarge the public's welfare and comfort. Those incentives are largely absent in socialist nations. Bureaucrats and planners instead make these decisions, and neither has reason to be beholden to consumers. Consider, for example, the immense difference between the amount and quality of housing in communist and capitalist countries. Government officials and planners simply do not have the incentives for erecting comfortable and innovative developments and structures that private builders and developers have. This is why the communist countries have always suffered housing shortages.

This is also the reason why people in many areas in this country are currently victims of enormous increases in rent. I refer to places like Silicon Valley, where zoning and other government controls have prevented housing supply from satisfying housing demand. This problem is in large measure a product of zoning and does not exist in the absence of land use controls.

In my book, *Property and Freedom*,<sup>1</sup> I compared the housing experience during the 1970s of Harris County, Texas, which was mostly unzoned, with that of Dallas County, Texas, an area which was largely zoned. Houston is located in Harris County, and has never adopted zoning. Harris County's population increased 38% in the ten-year-period from January 1, 1970 to December 31, 1979, and its builders produced enough

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1. BERNARD H. SIEGAN, *PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS AND LAND USE REGULATION* (1997).

housing to satisfy consumer demand without significantly increasing the price of housing.<sup>2</sup> This is a remarkable achievement. Dallas County's population during this period increased only 17%, but housing prices rose substantially.<sup>3</sup> It does not require extraordinary genius to conclude that the elimination or substantial reduction of zoning controls in the Silicon Valley area would allow enough new housing to be erected that would result in considerably lower housing prices.

But, you might say, in the absence of controls, the builders will only build for the rich and not for the poor. Well, there are a limited number of rich people—not enough to satisfy the alleged greed of the marketplace. The technological revolution of recent years should convince us of the benefits of a free market. The prices of new computers are a fraction of what they were ten or fifteen years ago. And for those who cannot afford a new one, the market for used computers offers incredible bargains. For very little money, people can purchase used computers that perform tasks that a few years ago required the use of very expensive machines.

Indeed, building for the rich is advantageous for the poor. First, enlarging supply benefits buyers who are jointly responsible with sellers in clearing a particular market. Once a product reaches the market, it can only be sold to a willing consumer, regardless of the asking price. The more products on the market, the greater the economic powers of buyers to accept or reject an offer of sale. Second, studies show that erecting new housing for middle and higher income buyers benefits those who purchase lower cost used housing. This is because erecting one new house results in one move to it from an existing home and about two moves to other existing units, with each new move likely to improve the housing conditions of each family or person who moves.<sup>4</sup> Many of these moves reach into lower income areas.

The less affluent members of our society are quite aware of the virtues of the free market in housing. I came to this conclusion, in part, as a result of the land use elections held in this country. Consider in this regard, the experience of Houston, Texas—which has never adopted zoning, and whose residents twice voted against it. The strongest opponents of zoning in Houston are the racial minorities and low and moderate-income whites. In Houston's 1993 zoning election, 71% of

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2. *Id.* at 192.

3. *Id.* at 192–97.

4. See JOHN B. LANSING ET AL., *NEW HOMES AND POOR PEOPLE: A STUDY OF CHAINS OF MOVES* 63–66 (1969).

low-income African Americans voted against zoning, as did 59% of Hispanics and 68% of low-income Caucasians. Similar results were tabulated among these groups in the 1962 Houston zoning election. A substantial portion of these groups also voted against the California Coastal initiative in 1972 and the no-growth initiatives in San Diego in 1985 and 1994.<sup>5</sup> Other zoning elections elsewhere in the country confirm that most low-income people reject government land use controls.<sup>6</sup>

It is not difficult to find allies in criticizing zoning. Throughout the country we hear demands to gut existing land use regulations because they are either inadequate, or excessive, or both, and replace them with “smart growth” controls. While it is a popular term without precise definition, smart growth refers to proposals intended to restrict suburban growth and increase city growth. The discussion in this Article will be confined to this form of smart growth, one that is exemplified in Portland, Oregon (discussed more later in Part IV).<sup>7</sup> Its proponents state or imply that zoning, which first arrived in this nation in 1916, is and has been harmful for the nation.<sup>8</sup> Yet, instead of urging elimination of these long existing zoning controls, they propose even stronger land use controls. Regrettably, in their zeal to overcome the past, they advocate a system that is more fitting for an autocracy than for a free society. In a free society, government should not be able to determine where people live. Government should not have power to tell people who want to live in a single-family home in a suburb that they must instead live in a multiple-family building in a city. This form of smart growth deprives people of their fundamental freedom to move and settle where they choose. The Pennsylvania Supreme Court put it this way with respect to such restraints on freedom:

The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning

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5. SIEGAN, *supra* note 1, at 208–09.

6. *Id.* at 182–83, 208–09.

7. My discussion of smart growth does not include the system adopted in Maryland, which state officials there also refer to as smart growth. Maryland’s approach is very different from that of Portland. Professor Staley describes Maryland’s system as “providing incentives for [greater density], encouraging countywide planning, and purchasing vacant land[,] open space and farmland with public funds to prevent private development and preserve open space.” SAMUEL R. STALEY, *Markets, Smart Growth and Limits of Policy in SMARTER GROWTH: MARKET-BASED STRATEGIES FOR LAND-USE PLANNING IN THE 21ST CENTURY* 211 (Randall G. Holcombe & Samuel R. Staley eds., 2001). Although there is no technical or popular meaning for smart growth, I have heard local officials discuss smart growth as a plan intended solely to stop growth in the suburbs.

8. New York City adopted the first zoning law in 1916. *See generally* SEYMOUR I. TOLL, *ZONED AMERICA* 172–87 (1969).

ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid.<sup>9</sup>

In the absence of government edicts, there is enough vacant land available in this country to accommodate both people who want to live in the suburbs and people who prefer living in the cities. Less than 6% of the total land area of this country is developed for urban purposes.<sup>10</sup> As any air traveler can attest, the land in this country is overwhelmingly vacant and unimproved. Most land in this nation is devoted to agriculture, forests, and open space, and urban development poses little threat to curb these uses.

## II. SMART GROWTH

As is evident from the Introduction, the use and development of land in the suburbs is under attack. This attack emanates from a variety of sources. First, environmentalists, suburbanites, and urban planners demand that suburban acreage be restricted to uses other than urban development (that is, for agriculture, forests, and open space). Suburbs are now exposed to the ills of city life, and they demand relief from additional development. Yet, as a New York judge observed many years ago, one who chooses to live in large centers of population:

[C]annot expect the quiet of the country. Congested centers are seldom free from smoke, odors, and other pollution from houses, shops, and factories, and one who moves into such a region cannot hope to find the pure air of the village or outlying districts. A person who prefers the advantages of community life must expect to experience some of the resulting inconveniences.<sup>11</sup>

A second source is the government officials and administrators. They seek more taxes and subsidies for their cities and want to limit competition for these funds from the suburbs. They want to install public transit that will be supported by occupants of high density housing.

Both groups are formidable in American life, but they seriously conflict with at least two equally powerful forces. First, the guarantees of the Constitution protect mobility and ownership, and second, a great many people want to live in the suburbs.

These critics have coalesced under the term "smart growth," which

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9. *Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 612 (Pa. 1965).

10. See SIEGAN, *supra* note 1, at 273 n.10.

11. *Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 40 (1932).

they apply as a term of derision to regulations controlling existing land use. There is no technical or popular definition of smart growth, but it implies that the land use practices that the nation has long followed are dumb. According to the “smart growthers,” not only have the land and other resources been wasted, but the nation’s style of living has also been wrongly directed. I shall devote most of this Article to the form of smart growth adopted in Portland, Oregon, which is currently the subject of most academic and popular commentaries.

The advocates of the form of smart growth that is discussed in this Article seek to establish urban growth boundaries restricting suburban development and promoting growth in the cities. They urge elimination of conventional zoning regulations and opt instead for regulations permitting, or even requiring, traditional neighborhood developments—with clusters of housing erected close to shops, civic services, jobs, transit, schools, and parks.<sup>12</sup> To fulfill its goals, smart growth requires exclusion of people from places where they want to live. By restricting use and development, conventional land use controls, such as zoning, also have an exclusionary effect. But smart growth multiplies that impact enormously. It seeks to exclude great numbers of people from occupying substantial portions of the nation’s land, violating a freedom most cherished in this nation: the right to migrate and settle in places of one’s own choosing. If this idea achieves its objectives, smart growth will exclude great numbers of people from suburban and rural areas, much of which will no longer be available for residential, commercial, and industrial use. Surely in this land of freedom there must be constitutional safeguards against such a horrendous outcome. Fortunately, such protections exist. In the subsequent portions of this Article, I shall explain that smart growth appears to violate the right to travel, privileges and immunities, and equal protection clauses of the Fourteenth Amendment, as well as the takings clause of the Fifth Amendment.<sup>13</sup>

Under prevailing laws, pursuant to which every municipality maintains considerable autonomy, smart growth can only succeed if all municipalities in a region adopt and enforce it. In the absence of such controls, the development excluded by smart growth from one or more localities in the area will likely flourish in the adjoining or nearby unrestricted localities. Since a municipality can only control its own growth, it cannot prevent it in other cities. Thus, to be effective in a particular region, smart growth must apply to all of its municipalities.

Conventional political processes also create serious difficulties for achieving smart growth. This program will have to be executed through

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12. See discussion *infra* Part IV.

13. U.S. CONST. amends. XIV, V.

the conventional planning and political processes that regulate land use. This process is largely controlled by residents of a municipality, which means that under smart growth homeowners will continue to exercise a critical role in regulating land use. Smart growth is supposed to direct growth away from the suburbs into the cities. But existing single-family residents in the cities will hardly welcome high-rises, other high density multiple-family dwellings, and more stores as neighbors. Nor will they be amenable to traffic that accompanies such development. Local residents may not be able to stop the filling in of vacant property, but they clearly have the political power to reduce it. The overall result of exclusionary regulations in the suburbs and political pressures in the cities will be very limited growth, something which many opponents of smart growth contend is the real purpose of the idea. Some commentators put it this way: “[O]ur greatest fear is that smart growth advocates will achieve only half their goal—preserving undeveloped land at the metropolitan fringe—and will not succeed in creating liveable communities at higher densities in existing urban areas.”<sup>14</sup>

In a recent article, Professor Terrence Farris summarized the problems confronting efforts to change the American housing patterns as follows:

The smart growth movement of the 1990s has seen many development and planning associations, state and local governments, and the Clinton administration encourage significant infill development to control sprawl and promote revitalization. Will the 123 million projected increase in population in the next 50 years be attracted to infill development or to outlying growth areas?

A review of 22 major central cities shows that they captured only 5.2 percent of total new metropolitan housing permits over the decade: 2.2 percent of single-family permits and 14.9 percent of multifamily permits. This analysis identifies the practical barriers to urban infill development, including land assembly and infrastructure costs, unwillingness to condemn, municipal social goal and regulatory policies, difficulty of finding developers, complexities of public-private partnerships, excessive risks, resistance from local residents, and stakeholder conflicts and political constraints.<sup>15</sup>

By almost any standard, the problem of infilling the cities is overwhelming. As Anthony Downs explains:

[T]o raise overall density from 3,500 to 7,500 persons a square mile,<sup>16</sup> 47.1

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14. Karen A. Danielsen et al., *Retracting Suburbia: Smart Growth and the Future of Housing*, 10 HOUSING POL’Y DEBATE 513, 528 (1999).

15. J. Terrence Farris, *The Barriers to Using Urban Infill Development to Achieve Smart Growth*, in 12 HOUSING POL’Y DEBATE 1 (2001).

16. “For a sense of scale: in 1990, the city of Atlanta was 2989; Portland 3504; Los Angeles 7426; Washington, D.C., 9884; Boston 11,860; and San Francisco 15,503.”

percent of all housing land would have to be redeveloped with new housing at fifteen units per acre, 24.2 percent at twenty-five units an acre, or 14.0 percent at forty units an acre. Clearly, any substantial increase in the residential density of built-up areas that is to be achieved through redevelopment would require major clearance and rebuilding. This would be a major disruption to existing neighborhoods.<sup>17</sup>

According to writer Gregg Easterbrook, the major beneficiaries of smart growth will be existing suburban homeowners, the NIMBY (not-in-my-backyard) crowd, who seek to exclude newcomers:

[W]hen voters complain about sprawl, what they are really saying is that they want to *preserve* sprawl—at least their own version of it. So voters really do love sprawl after all! They just do not want other people horning in. Many of those actively complaining about traffic and growth really should be called sprawl preservationists because their goal is to pull up the ladders and bar new arrivals from their communities. They seek to keep housing lots large, boulevards uncluttered, and parking slots open. Maybe the best name for them is the “Save Our Sprawl” faction.<sup>18</sup>

For smart growth to succeed, most people must be willing to live in high density city housing and reject low density suburban housing. The smart growth advocates are seeking to impose a life style that many Americans do not prefer. Builders and developers will not erect housing that is unacceptable in the market. That Portland, Oregon has succeeded in this endeavor may have little relevance to the rest of the country. As Easterbrook points out, growth boundaries there “have rendered the high density housing essentially the only new housing stock available, and lots of people are eager to buy into Portland by hook or by crook.”<sup>19</sup> In 1999, the National Association of Home Builders surveyed 2000 randomly selected households nationwide and asked them about their housing preferences:

You have two options: buying a \$150,000 townhouse in an urban setting close to public transportation, work, and shopping or purchasing a larger, detached single-family home in an outlying suburban area with longer distances to work, public transportation, and shopping. Which option would you choose?<sup>20</sup>

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*Id.* at 26 (citing ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 148 (1999)).

17. *Id.*

18. Gregg Easterbrook, *Comment on Karen A. Danielsen, Robert E. Lang, and William Fulton's "Retracting Suburbia: Smart Growth and the Future of Housing,"* 10 HOUSING POL'Y DEBATE 541, 542 (1999).

19. *Id.* at 545. But Portland is not devoid of exclusionary pressures.

In July 1998, the Portland Planning Commission suspended plans to add 7,500 apartments, row houses, and homes in Southwest Portland after residents protested and requested less aggressive housing densities. Voters in suburban Portland attempted to close their doors to compact housing and even recalled a mayor and two council members over dense development and a neighborhood light-rail alignment.

Farris, *supra* note 15, at 23 (citation omitted).

20. See Danielsen et al., *supra* note 14, at 521–22 (citation omitted).



Eighty-three percent of the respondents selected the suburban houses while seventeen percent preferred the city houses. This survey is, of course, not conclusive on the issues, but it at least suggests that the long established pattern of relocation continues to exist in this nation. A 1997 Fannie May survey confirms the results of the builders' study: "70% of Americans prefer to live in suburbs, small towns far from cities, or rural areas."<sup>21</sup>

### III. LEGALITY OF SMART GROWTH

Smart growth raises many constitutional issues. First and foremost, it may violate the right of movement, which American law refers to as the right to travel. The United States Supreme Court has long held that the Constitution guarantees this right of movement and has struck down laws that deter, impede, or penalize settlement into various parts of the nation.<sup>22</sup> Time and again the Supreme Court has held that the right to remove from one place and move to another according to inclination is an attribute of personal liberty.<sup>23</sup> In 1849, in the *Passenger Cases*,<sup>24</sup> the Court declared the following, which it has often reiterated in subsequent years:

For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and trespass through any part of it without interruption, as freely as in our own States.<sup>25</sup>

This right to migrate and settle is accorded constitutional protection as a fundamental right and legal restraints upon it must pass strict scrutiny, the highest level of judicial review.

Statistics reveal that the right to travel is a highly utilized liberty. In the 1950s, 57% of the people living in what government statisticians call Metropolitan Statistical Areas (MSA's) were located in central cities; in 1960, the percentage was 49; in 1970, it was 43; in 1980, it was 40; and

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21. Farris, *supra* note 15, at 7.

22. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 510–11 (1999); *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 638, 642 (1969); *Edwards v. California*, 314 U.S. 160, 177 (1941).

23. *Saenz*, 526 U.S. at 629; *Shapiro*, 394 U.S. at 619.

24. *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

25. *Id.* at 492 (Taney, C.J., dissenting).

in 1990, it was about 37.<sup>26</sup>

People change their residence for a wide variety of reasons. Some of these are jobs, weather, environment, education, family, health, congestion, culture, and government benefits. Many move just for the sake of moving. These are all personal preferences which free societies have long protected. Writing in the mid-1700s, William Blackstone, the great English commentator, asserted that the common law recognized this right. He stated that England secures “the power of locomotion, of changing situations or removing one’s person to whatsoever place one’s own inclinations may direct; without imprisonment or restraint, unless by due course of law.”<sup>27</sup> The Articles of Confederation, which governed relations between the states prior to the ratification of the U.S. Constitution, secured free inhabitants “all the privileges and immunities of free citizens in the several States” and guaranteed the people of each state “free ingress and regress to and from any other state.”<sup>28</sup> The U.S. Supreme Court interprets the Constitution as guaranteeing the right to migrate and settle as a fundamental personal liberty.<sup>29</sup> The right to travel also has a strong relationship to the freedom of expression, according a dissenting member of a community “the option of exiting and relocating in a community whose values he or she finds more compatible.”<sup>30</sup>

The modern U.S. Supreme Court cases protecting the right to travel began with *Edwards v. California*.<sup>31</sup> In 1937, California passed a statute imposing a criminal penalty on anyone bringing nonresident indigents into the state.<sup>32</sup> California insisted that its intention was not to exclude newcomers. Instead, the state claimed its purpose was to protect its residents from the many problems associated with indigency, such as disease, crime, and immorality. In *Edwards*,<sup>33</sup> the U.S. Supreme Court unanimously struck down the statute, with five justices asserting that the law violated the domestic commerce clause of Article I<sup>34</sup> and four basing their opinion on the privileges and immunities clause of the Fourteenth Amendment.<sup>35</sup> No state, said the Court, may “isolate itself from difficulties

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26. Peter Mieszkowski & Edwin S. Miller, *The Causes of Metropolitan Suburbanization*, 7 J. ECON. PERSP. 135–39 (1993), reprinted in ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 2 (2000).

27. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 34 (William Draper Lewis ed., 1897) (1765).

28. U.S. ARTICLES OF CONFEDERATION, art. IV.

29. See *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 619 (1969); *Edwards v. California*, 314 U.S. 160 (1941).

30. See JOHN HART ELY, DEMOCRACY AND DISTRUST 178–79 (1980).

31. *Edwards v. California*, 314 U.S. 160 (1941).

32. *Id.* at 171.

33. *Edwards*, 314 U.S. at 167–68 (brief for appellee).

34. *Edwards*, 314 U.S. at 177.

35. *Edwards*, 314 U.S. at 181 (Douglas, J., concurring), 182 (Jackson, J., concurring).

common to all of them by restraining the transportation of persons and property across its borders.”<sup>36</sup> The Court pointed out that those excluded “are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy.”<sup>37</sup>

In 1969, the U.S. Supreme Court in *Shapiro v. Thompson*,<sup>38</sup> confronted a comparable problem. This case involved laws of Pennsylvania, Connecticut, and the District of Columbia intended to exclude welfare recipients from migrating into their jurisdictions by denying welfare assistance to residents of the state or district who had not resided there for at least one year immediately preceding their applications for such assistance. The one-year waiting period was designed to discourage the influx of poor families in need of assistance. The two states and the district contended that the one-year requirement was justified (1) as an attempt to discourage those indigents who would enter the state solely to obtain larger benefits than they were receiving in the states from which they traveled, (2) as a protective device to preserve the fiscal integrity of public assistance programs, and (3) to implement certain administrative and related governmental objectives.<sup>39</sup> The Court held that these purposes failed to justify infringing on the right to travel.<sup>40</sup> “[I]n moving [to another jurisdiction, the plaintiffs] were exercising a [fundamental] right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.”<sup>41</sup> To be upheld as valid, a regulation limiting the exercise of a fundamental right must be shown to be (1) necessary to achieve a compelling state interest and (2) narrowly drawn to achieve that end.<sup>42</sup>

*Dunn v. Blumstein*<sup>43</sup> concerned a Tennessee law requiring a citizen to be a resident of a state for one year and of the county for three months before he could vote. This restriction affected two fundamental rights, the right to travel and the right to vote, and the U.S. Supreme Court held that neither restraint was shown to be justified by a compelling state

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36. *Id.* at 173.

37. *Id.* at 174.

38. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

39. *Id.* at 627, 629, 633–34.

40. *Id.* at 638.

41. *Id.* at 634.

42. *Id.*; *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

43. 405 U.S. 330 (1972).

interest.<sup>44</sup> The Court explained that the violation of the right to migrate and settle was a sufficient basis for its ruling. It stated that the right to travel had been violated because discrimination had occurred against persons who had recently exercised that right. The plaintiff was a resident of the state and argued that the lengthy county durational requirement did not serve any compelling interest. The Court agreed, stating in its opinion “that the freedom to travel includes the ‘freedom to enter and abide in any State in the Union.’”<sup>45</sup> The state’s interest in preventing voter fraud could be served by a much shorter waiting period.<sup>46</sup>

In *Saenz v. Roe*,<sup>47</sup> the most recent case involving the right to travel, the U.S. Supreme Court struck down a 1992 California statute limiting the maximum welfare benefits available to newly arrived citizens. The law restricted the amount payable to a family that had resided in the state for less than twelve months to the amount payable by the state of the family’s prior residence.<sup>48</sup> The objective was again exclusionary, that is, to deter welfare recipients from settling in California, whose welfare benefits are among the highest in the nation. The Court held that California’s law violated both the fundamental right to travel and the privileges and immunities clause of the Fourteenth Amendment.<sup>49</sup> According to the Court, “since the right to travel embraces the citizen’s right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty.”<sup>50</sup> Moreover, the privileges and immunities clause entitled these newly arrived citizens to the same welfare benefits enjoyed by other citizens.<sup>51</sup> The Court explained this conclusion by quoting from a dissenting opinion in the 1873 *Slaughter-House Cases*:

The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right.<sup>52</sup>

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44. *Id.* at 335, 360.

45. *Id.* at 338 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 285 (1970) (Stewart, J., concurring and dissenting)).

46. *Id.* at 348–49.

47. 526 U.S. 489 (1999).

48. *Id.* at 499–500.

49. *Id.* at 500–04, 510–11.

50. *Id.* at 505.

51. *Id.*

52. *Id.* at 503–04 (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 112–13 (1872) (Bradley, J., dissenting)).

Under California's statute, former residents of Louisiana and Oklahoma would receive \$190 and \$341 per month, respectively, while the full California grant available to longer residents was \$641.<sup>53</sup> The former resident of Colorado was limited to \$280 per month and the full grant would be \$504 if she had not been a recent arrival in California.<sup>54</sup> The differences are not as great as they appear since housing costs were much higher in California, whose rents were then higher than in any other state except Massachusetts. Moreover, in his dissenting opinion Chief Justice Rehnquist pointed out that new California residents were also eligible for homeless assistance, an increase in the food stamp allowance, health care benefits under Medicaid, the full five-year period of welfare payments, and to a full range of employment, training, and the accompanying supporting services.<sup>55</sup>

Under smart growth, many citizens who seek to move to a state that has imposed these restrictions will not be able to build or rent housing in their chosen area, two opportunities that were available to those who settled there earlier. "[O]ur cases," said the *Saenz* Court, "have not identified any acceptable reason for qualifying the protection afforded by the [privileges and immunities] Clause for 'the "citizen of State A who ventures into State B"' to settle there and establish a home."<sup>56</sup> The privileges and immunities clause may accordingly be applied to protect migrants to a state from certain exclusionary regulations, such as being able to reside in the area of one's choice. Once a nonresident citizen becomes a resident of a state, he or she is entitled to the benefits of residency. According to *Saenz*, regulations limiting privileges and immunities are also subject to strict scrutiny.<sup>57</sup> Similar to justifications made for smart growth laws, California asserted its welfare law was based on financial savings for the state, which it said amounted to \$10 million annually.

The very high level of scrutiny accorded the right to travel is evident in the case of *Attorney General of New York v. Soto-Lopez*,<sup>58</sup> decided by the U.S. Supreme Court in 1986. The case involved a New York statute that granted special bonus points for one civil service examination to

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53. *Id.* at 494.

54. *Id.*

55. *Saenz*, 526 U.S. at 520 (Rehnquist, C.J., dissenting).

56. *Id.* at 502.

57. *Id.* at 504.

58. *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 909 (1986).

New York veterans (1) who served in time of war, and (2) were residents of the state when they entered the military service.<sup>59</sup> This law thus awarded these veterans a preference in obtaining civil service employment. Two veterans who met all eligibility requirements except having a New York residence when they entered the army filed suit to have the law declared unconstitutional. The lead opinion in the case held the law to be invalid because it penalized those veterans who had exercised their right to migrate to another state at the time they joined the military.<sup>60</sup> “Such a permanent deprivation of a significant benefit, based only on the fact of nonresidence at a past point in time, clearly operates to penalize appellees for exercising their rights to migrate.”<sup>61</sup> Replying to the argument that the benefits involved were not substantial, the opinion countered that the award of bonus points in just one exam can mean the difference between winning or losing civil service employment.<sup>62</sup> While it is always difficult to compare different kinds of benefits, one may reasonably conclude that smart growth’s exclusionary laws are more harsh than the deprivations sustained by reason of the *Soto Lopez* and *Saenz* regulations.

Proponents of smart growth should consider the constitutional frailty of the concept before they impose it on the people. The foregoing cases indicate that a resident of a state is exercising the right to travel when he leaves that state to settle in a suburb of a smart growth state. The receiving state must protect and not deter or penalize this travel because it is a fundamental right of the U.S. Constitution. Once this person elects to become a permanent resident, the privileges and immunities clause requires that he be treated like other citizens of the state. As a resident of a state, he or she is entitled to the benefits and burdens of residency—the use of the facilities as well as the responsibility of paying for their use.<sup>63</sup> In *Saenz*, the Court interpreted the clause as prohibiting the state from denying the plaintiff welfare benefits that are available to existing residents of the state. A smart growth state cannot exclude him because this would violate his right to travel and cannot deny him benefits after he has settled that other residents receive because this would violate his privileges and immunities rights.

While the cases previously discussed involve solely interstate travel, the right of travel is protected for all who seek to exercise it, whether for interstate or intrastate purposes. Severe development limitations in suburban communities will prevent or deter movement both by those

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59. *Id.* at 900.

60. *Id.* at 909.

61. *Id.*

62. *Id.* at 908.

63. *Saenz v. Roe*, 526 U.S. 489, 504 (1999).

who live in another state as well as by those who live within the same state. Existing residents of a state are no less entitled to exercise these rights than out-of-state residents.<sup>64</sup> Indeed, it could be unfair to deny existing residents this fundamental right while protecting it for out-of-state residents.

Travel is not the only constitutional right which smart growth may violate. In recent years, the U.S. Supreme Court has increased its protection of property rights by way of the takings clause of the Fifth Amendment,<sup>65</sup> which the Fourteenth Amendment applies to the states. The Court now applies an intermediate level of scrutiny to determine the constitutionality of zoning and other land use regulations, as follows: "The application of a [land use ordinance] to particular property effects a taking [under the Fifth Amendment] if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."<sup>66</sup>

To achieve its goals, smart growth must place limits on the use of land both within and outside of a boundary growth line. It must curb or greatly reduce development exterior to the line and lower density requirements within it. Suburban land owners will complain that the government has deprived them of the use of their property while existing city residents will contend that lowering density and other zoning requirements for adjoining land seriously reduces the value of their property. Under the decisions of the U.S. Supreme Court, a smart growth locality will have considerable difficulty proving that such regulations substantially advance a legitimate state interest and do not deny an owner economically viable use of his land. The following Supreme Court decisions explain these rules and the legal problems they impose on a government seeking to restrict the ordinary and benign use of land.

In *Nollan v. California Coastal Commission*,<sup>67</sup> the Supreme Court held that the California Coastal Commission violated the Takings Clause of the Fifth Amendment because the regulation at issue did not advance its alleged purpose.<sup>68</sup> The Commission required the Nollans to grant an

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64. See discussion *infra* Part V (discussing the matter of intrastate movement).

65. U.S. CONST. amend V. The Fifth Amendment provides that: "private property shall not be taken for public use without just compensation." *Id.*

66. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citation omitted).

67. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

68. *Id.* at 837.

easement to the state across the ocean frontage of their beachfront property as a condition for obtaining a permit to rebuild their house.<sup>69</sup> The Court stated that the purpose of the regulation must be a “legitimate state interest” and the regulation must “substantially advance” that interest.<sup>70</sup>

The Commission’s purpose in obtaining the easement was to enhance the public’s “visual access” to the beach which it contended the Nollan’s new house blocked.<sup>71</sup> The Court assumed this purpose was “legitimate.”<sup>72</sup> However, it found the easement did not achieve this purpose; there was no “essential nexus” between the easement and the public’s visual access to the beach.<sup>73</sup>

It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any “psychological barrier” to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans’ new house. We therefore find that the Commission’s imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.<sup>74</sup>

*Dolan v. City of Tigard*,<sup>75</sup> which also involved a determination whether a regulation achieved its purpose, concerned a requirement by the City of Tigard, Oregon that Mrs. Dolan dedicate to the city ten percent of her property for improvement of a storm drain and pedestrian/bike path as conditions for a permit to expand and rebuild her property.<sup>76</sup> The appropriate test to determine whether a taking took place is similar to the test applied in *Nollan*. This case goes one step further than *Nollan* by establishing the requisite degree of connection needed to satisfy the constitutional requirement. As the Court explained, “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”<sup>77</sup>

Applying this test, the Court found that the city failed to establish that the required dedication of property was necessary to establish a storm drain and bicycle path. The decision implies that nothing more than an easement for these purposes was required and not a transfer of

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69. *Id.* at 828.

70. *Id.* at 834.

71. *Id.* at 838.

72. *Id.* at 825.

73. *Id.* at 837.

74. *Id.* at 838–39.

75. 512 U.S. 374 (1994).

76. *Id.* at 380.

77. *Id.* at 391.



ownership to the city.<sup>78</sup>

Another constitutional issue that confronts smart growth is whether a locality's regulations deprive the owner of all economically viable use of his land. In *Lucas v. South Carolina Coastal Council*,<sup>79</sup> the issue was whether South Carolina's Beachfront Management Act violated the takings clause of the Fifth Amendment by prohibiting Lucas from building two houses on lots that he purchased for about one million dollars.<sup>80</sup> Under the Act, Lucas was barred from building any habitable structure on these lots.<sup>81</sup> There was no such prohibition affecting the property when he purchased it.<sup>82</sup> However, the law permitted occupancy in a moveable trailer or tent located on the property and picnicking or swimming on it, and since each lot was large enough to constitute a building site, it might be sold for a substantial sum to an adjoining homeowner (for personal use and as a protection against adverse use in the future) or an investor-speculator. Thus, the owner was not denied all use or all value of his property.<sup>83</sup>

While Lucas was not deprived of all use or value, he was denied his investment-backed expectation to build two houses. Since it was determined that Lucas' building of the two houses did not constitute a nuisance but was merely a legitimate exercise of his property rights, a taking had occurred and Lucas was entitled to just compensation.<sup>84</sup>

All of the foregoing property issues were litigated in a 1999 case which held that a jury could decide these questions and award damages. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,<sup>85</sup> after the city rejected Del Monte Dunes' application to develop its land, Del Monte Dunes brought suit for damages for a constitutional violation under the federal civil rights law.<sup>86</sup> The District Court submitted the case to the jury on Del Monte Dunes' theory that the city effected a regulatory taking or otherwise injured the property by unlawful acts, without paying compensation. The Court instructed the jury to find for Del Monte Dunes if it found either that it had been denied all

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78. *Id.* at 395-96.

79. 505 U.S. 1003 (1992).

80. *Id.* at 1008-09.

81. *Id.*

82. *Id.* at 1008.

83. *Id.* at 1015.

84. *Id.* at 1031-32.

85. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

86. *Id.* at 694.

economically viable use of its property (per *Lucas*) or that the city's decision to reject the final development proposal did not substantially advance a legitimate public purpose (per *Nollan* and *Dolan*).<sup>87</sup> The jury found for Del Monte Dunes and awarded it \$1.45 million in damages.<sup>88</sup> The involvement of a jury tends to expose a municipality to a higher amount of damages than a judge might impose.

The rule that government must not deprive owners of all economically viable use of their property comprehends two guarantees for property rights: first, protection of investment-backed expectations, such as occurred in the *Lucas* case, and second, protection against the deprivation of all commercial value. Smart growth that requires land exterior to the urban growth line to be restricted solely for agricultural use may deprive the owner of economically viable use, mandating either payment of just compensation or elimination of the restriction.

Smart growth seeks to substantially advance, among others, these legitimate state interests: maintaining an adequate agriculture production, maintaining forests and open space, reducing traffic congestion, and reducing air pollution. Statistics cast doubt that smart growth will substantially advance these goals. The Economics and Statistics Administration of the U.S. Census Bureau indicates that as of 1992 less than 6% of the total surface area of the nation was developed.<sup>89</sup> The

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87. *Id.* at 700.

88. *Id.* at 701.

89. See SIEGAN, *supra* note 1, at 273 n.10; U.S. DEPT. OF COMMERCE ET AL., STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 29 (1996). This figure excludes Alaska and the District of Columbia and includes urban and built-up areas in units of ten acres or greater, as well as rural transportation (roads, highways, railroads). Based on these statistics, the following figures explain my estimate that about 6% of the land is developed for urban purposes:

Total surface area	1,940,011 (thousands of acres)
Amount of developed nonfederal land	92,352
Total amount of federal land	407,969
Five percent of federal land (My estimate of amount developed)	20,398
Approximate total developed land	112,750
Percent of developed land	5.8%

SIEGAN, *supra* note 1, at 273 n.10. Alaska contains 385,482,000 acres of total surface area and the District of Columbia contains 39,000 acres. Including the amount of development in these two areas would lower the percentage of total developed land. *Id.*; see also U.S. Dept. of Agriculture, *American Agriculture: Its Capacity to Produce*, FARM INDEX, Dec. 1973, at 8-9. This study shows that in 1969, cities, highways, and airports occupied about 2.5% of the nation's land area. A more recent estimate states that urban areas use about 60 million acres, or 3.1% of the over 1.9 billion acres of land in the continental U.S. (not including Alaska and Hawaii). STEVEN HAYWARD ET AL., LEADING ENVIRONMENTAL INDICATORS 34 (1993). Thomas Frey indicates that in 1974, urbanized areas and urban places, rural roads, railroads, airports, and military and nuclear installations occupied 4.4% of the area of the forty-eight contiguous states. H. THOMAS FREY, U.S. DEPT. OF AGRICULTURE, MAJOR USES OF LAND IN THE UNITED

total acreage of the continental United States is close to two billion acres.<sup>90</sup> Urban and suburban use of land has been growing at about one million acres per year since the end of World War II.<sup>91</sup> On the basis of these figures, urban development presents a small threat to these other uses for a long time in the future.

Consider, in this respect, existing agricultural production. Raw land is but one factor in total agricultural production and, as the Green Revolution has proven, is less important than the application of plant genetics and fertilizers to increase farm output. In the United States, factors other than land together “contribute about three times as much as land to total agricultural production. This being the case, the ‘adequacy’ of land cannot be determined independently of the cost and productivity of the land relative to the costs and productivities of other factors.”<sup>92</sup>

“According to indices of the U.S. Department of Agriculture (USDA), the American agricultural sector was 158 percent more productive at the end of the 1980s than at the beginning of the 1960s.”<sup>93</sup> World commodity prices have fallen from 1980 to 1992, confirming the adequacy of world agricultural markets.<sup>94</sup>

By most measures, the condition of forests in the United States is improving, not deteriorating.

Although large areas of the eastern United States were deforested in the eighteenth and nineteenth centuries, the trend dramatically reversed beginning in the early 1950s. As of 1992, annual timber growth in the United States has exceeded harvest every year since 1952, according to the U.S. Forest Service. By the mid-1990s, the number of wooded acres in the nation was three times what it was in 1920. The results in two northeastern states, New Hampshire and Vermont, are dramatic. New Hampshire is now about 86 percent forested, compared to 50 percent in 1850. In Vermont, the area covered by forest is about 67 percent, up from 35 percent one hundred years ago. . . .

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STATES: 1974 (1979).

90. SIEGAN, *supra* note 1, at 273 n.10.

91. See HAYWARD ET AL., *supra* note 89, at 34 (explaining the amount of land use for urban and suburban purposes discussed in Steven Hayward, *The Suburbanization of America* 9-11 in A GUIDE TO SMART GROWTH (Jane S. Shaw et al. eds., 2000)).

92. JOHN A. CHARLES, CASCADE POLICY INSTITUTE, SUMMARY NO. 1068 BEYOND ZONING: LAND USE CONTROLS IN THE DIGITAL ECONOMY 1 (June 1998) (quoting Pierre R. Crosson, *The Long-Term Adequacy of Agricultural Land in the United States*, in THE CROPLAND CRISIS: MYTH OR REALITY 3 (1982)).

93. *Id.* (quoting DE WIEL ET AL., PACIFIC RESEARCH INSTITUTE FOR PUBLIC POLICY AND THE FRASER INSTITUTE INDEX OF LEADING ENVIRONMENTAL INDICATORS FOR THE U.S. AND CANADA 43 (1997)).

94. *Id.* at 2.

Economist Stephen Moore notes that no current or future shortage of trees is evidenced by the price data on forestry products. Writing in 1992, he stated that over the past decade the real prices of paper and lumber fell by 10 percent and 30 percent respectively. Indexed to wages, 1992 lumber prices were one-third of those in 1950, one-sixth of those in 1900, and roughly one-tenth of prices in 1800. Human resourcefulness—improved forestry technologies and other innovations—has in large measure been responsible for the increase in wood inventory that accounts for the improved affordability of paper and lumber over time.<sup>95</sup>

To determine whether smart growth controls will substantially reduce air pollution and street congestion requires analysis of specific proposals. As the decisions in the previously cited cases reveal, under present takings law the burden is on the government to prove that the regulations substantially reduce these ills. The locality would have to prove that much more benefit has been achieved than merely shifting traffic congestion and air pollution from the suburb to the city. There are many other considerations that would be relevant in the analysis and are beyond the scope of this Article. It is clear, however, that the Court will not approve of limitations on property rights in the absence of strong justifications for such action.

The equal protection clause of the Fourteenth Amendment is another guarantee available to landowners aggrieved by smart growth regulations. In *Village of Willowbrook v. Olech*,<sup>96</sup> as a condition to having access to the Village's water supply, Willowbrook demanded that Olech (a property owner) grant the Village a 33-foot easement.<sup>97</sup> He objected, claiming that the Village only required a 15-foot easement from other property owners seeking access to the water supply. After a three-month delay, the Village relented and agreed to provide Olech water access with only a 15-foot easement.<sup>98</sup> He subsequently sued the Village for violating his rights under the equal protection clause of the Fourteenth Amendment, asserting that the 33-foot easement demand was "irrational and wholly arbitrary."<sup>99</sup>

Rejecting Willowbrook's argument that an equal protection claim could not be brought by a "class of one," the U.S. Supreme Court

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95. SIEGAN, *supra* note 1, at 219 (citations omitted); Stephen Moore, *So Much for "Scarce Resources,"* 1992 PUB. INT. 97, 103. "Moore points out that the most objective method of resolving the question of whether resources are becoming more or less scarce is by examining their price trends. 'Price is the most objective way that economists have of measuring relative scarcity of a good or service.'" SIEGAN, *supra* note 1, at 274 n.27 (quoting Moore, *supra*, at 100). "He concludes that, following a decade of declining prices, [t]oday most natural resources are cheaper in the U.S. than at any time in the last 200 years.'" SIEGAN, *supra* note 1, at 274 n.27 (quoting Moore, *supra*, at 107).

96. *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000).

97. *Id.* at 565.

98. *Id.*

99. *Id.*

unanimously held that one person could establish an equal protection claim on behalf of only one party.<sup>100</sup> “[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”<sup>101</sup>

Justice Steven Breyer concurred in this ruling, but stated that in his opinion the argument did not to apply in run-of-the-mill zoning cases because the plaintiff had alleged that the Village’s demand for the 33-foot easement was motivated by ill will.<sup>102</sup> The Court of Appeals, which had ruled in favor of Olech prior to the Supreme Court’s opinion, also relied in part on this aspect of his complaint.<sup>103</sup> However, the other justices of the Supreme Court did not accept the appeals court theory of “subjective ill will.”<sup>104</sup> The allegations that the Village acted “irrational[ly] and wholly arbitrar[ily],” stated the Supreme Court’s opinion, are sufficient, quite apart from the Village’s subjective motivations, to state a claim for relief under traditional equal protection analysis.<sup>105</sup>

Inasmuch as zoning is very much a matter of line drawing between various land uses, the case opens up this process to heightened judicial scrutiny. As Breyer observes, a rule “that looks only to an intentional difference in treatment and a lack of a rational basis for that different treatment”<sup>106</sup> without relying on “subjective ill will,” might transform many ordinary violations of city or state zoning laws into violations of the Constitution. However, since no other justice agreed with Breyer’s concurrence, the opinion confirms a property owner’s protection against discriminatory state conduct under the equal protection clause of the Constitution.

The most important line under smart growth is the urban growth boundary that separates the area where growth is encouraged from the area where growth is discouraged. In the Portland area, the location of its Urban Growth Boundary (UGB) is entirely subjective and made by a

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100. *Id.* at 564.

101. *Id.* (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)).

102. *Id.* at 565–66 (Breyer J. concurring).

103. *Id.* at 563–64.

104. *Id.* at 565.

105. *Id.*

106. *Id.* (Breyer J., concurring).

seven-person elected board.<sup>107</sup> A study of Portland's UGB reveals that, in 1996, land zoned for single-family housing just inside the UGB was priced at \$120,000 per acre while land outside the boundary was selling for approximately \$18,000 per acre.<sup>108</sup> Moving the line to include more developable land would lower prices within the boundary and raise them on land previously exterior to it. Owners of land outside the boundary are surely entitled to demand constitutional justification for a location that greatly burdens them. The *Olech* case provides property owners a remedy against "irrational and wholly arbitrary" movement of or continued existence of the UGB at its present location.<sup>109</sup>

A primary objective of smart growth is to eliminate or reduce urban sprawl. This goal can be achieved without destroying the right to travel or the right of property. Rescinding regulations prohibiting or restricting development in the cities will prevent a considerable amount of development from being forced into the suburbs. There is a judicial rule that when a legislature seeks to limit a constitutionally protected liberty, it must consider whether a measure less restrictive of liberty exists that could instead be applied to achieve the same result.<sup>110</sup> In other words, is the restriction of the liberty—in the case of smart growth, the rights of travel and property—the only means available to achieve the desired end?<sup>111</sup> If removing regulations on land development in the cities will accomplish the same result as limiting the rights to travel and to use property, restrictions on these liberties should not be imposed.

*Palazzolo v. Rhode Island*<sup>112</sup> raised the question of the rights of a land purchaser to use property for a purpose that the municipality had forbidden prior to his purchase. The U.S. Supreme Court struck down Rhode Island's position that the preacquisition enactment of a land restriction defeats any takings claim based on that restriction.<sup>113</sup> In this case, the state argued that the purchaser was fully aware of the restriction on the property and had no reason to claim harm.<sup>114</sup> The U.S. Supreme Court held that the land owner's claim is not barred by the mere fact that title was acquired after the effective date of the

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107. See Danielsen et al., *supra* note 14, at 527–28 (discussing UGB Strategies); Metro, *Metro Charter*, at <http://www.metro-region.org/glance/charter.html> (last modified June 8, 2001).

108. John A. Charles, *Lessons from the Portland Experience*, in A GUIDE TO SMART Growth 123 (Jane S. Shaw et al. eds., 2000).

109. *Olech*, 528 U.S. at 565.

110. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 492, 507 (1996).

111. See *id.*

112. *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001).

113. *Id.* at 2457.

114. *Id.*

restriction.<sup>115</sup> Palazzolo's takings claim to develop certain wetlands is ripe when the local government continuously rejects applications for such use even if the property is acquired after the regulations forbidding this use were adopted.

Accordingly, there are sufficient constitutional reasons for invalidating major provisions of smart growth legislation. Whether this will occur is always an open question in highly controversial cases—until it actually happens. It is usually very difficult to predict in any pending case how the nine justices of the U.S. Supreme Court will rule. Prior to a judicial decision, the best advice that can be offered lawmakers is to consider such an eventuality in their deliberations and actions.

#### IV. URBAN SPRAWL

There is no technical definition of urban sprawl. It usually describes the spread of housing and commercial and industrial buildings into developing or undeveloped areas. Urban planners apply the term broadly to include recent urban development in suburban and rural areas, which makes many parts of the country eligible for this description. Many small cities or towns began their existence as urban sprawl. Examples exist in almost every area of the country.

Urban sprawl also refers to a leap-frogging pattern of growth where new construction is not erected consecutively to existing development. It is an inevitable consequence of urbanization, and will occur under any system of private or even public ownership, since vacant land next to a development may not be appropriate or desirable for use at a particular time.

The adjoining land may no longer be in demand for housing or other purposes. It may be too expensive or too big or small; sewer and water facilities may be inadequate. It may not be for sale, may be subject to title and legal questions, and may possibly even have unusual topographical or soil conditions. And of course, the zoning may be entirely wrong for a proposed use.

Sprawling development is usually not advantageous to builders. They generally seek to build consecutively because most of their customers, both home buyers and renters, prefer being near existing development. This is borne out by the fact that, in developing sections, land abutting development frequently sells for more than land in more remote sections

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115. *Id.* at 2465.

because the demand for it is greater. At the same time, builders seek to conserve land. To accommodate their purchasers, most of whom do not have or want to spend the extra money required to purchase larger lots, builders will tend in most instances to conserve on the size of vacant lots. As a consequence, their normal practices will operate to conserve land. The most affluent people in the population are exceptions to this generalization; they want large lots, but they are a small part of the housing market.

All of this is in sharp contrast to the impact of current zoning practices, which have been fostered by the “no growth” or “controlled growth” groups, who have for a long period ignored the adverse consequences these laws have on the conservation of the nation’s resources. First of all, until the advent of smart growth planning, most environmental groups urged the passage of low density limitations requiring fewer homes per acre and curtailing development of garden apartments and high-rises. They would demand, for example, a regulation allowing only two houses per acre instead of four or five, which necessarily causes greater housing spread.

Second, by restricting the erection of garden apartments and high-rises, they have forced people who prefer to live in these accommodations to live in homes which occupy substantially more land per residence. A three-story apartment complex containing 250 to 300 units may occupy less than 10 acres. It might require 80 to 100 acres to house the same number of families in homes. In effect, each floor of an apartment building adds to the supply of land.

Third, there is considerable effort to limit the creation of new shopping facilities whose existence lessen the use of the automobile.

Fourth, when certain communities restrict the erection of housing, developers are forced to build in places where they will encounter less resistance, usually the more rural and outlying sections. Thus, imposition of zoning regulations in a city not related to health or safety will lead to considerably more use of land in a county, and the new construction is more distant than ever from shopping and employment.

Smart growthers contend that urban sprawl has eroded the American dream of home ownership. “The suburbs attracted people looking for privacy, home ownership, mobility, lower taxes, and freedom from crime; today suburban residents experience unhealthy air, environmental degradation, intractable traffic congestion, a declining sense of community, and a loss of open space.”<sup>116</sup> One might ask, “How can anyone but a

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116. Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl with Smart Growth?*, 35 WAKE FOREST L. REV. 563, 568 (2000).



fool want to live in such horrible conditions? And raise their children in such an environment?" Obviously, enormous numbers of people are willing and anxious to do so. For many millions of people, it is apparent that the drawbacks of suburban life are by far overcome by its benefits. Because we are all different, one's pleasures may be another's woes. When it comes to decisions about shelter, the U.S. Constitution protects individual choice on the theory that people will best perceive their own interests in this respect, and government should not deter or penalize that choice.

Smart growth regulations affecting both sides of urban growth boundaries impose burdens on the production, supply, and distribution of housing, substantially interfering with the nation's goal of providing more and better housing for the people. As history reveals, there is no better stimulus to supply than the freedom of the marketplace. In the absence of government restrictions, entrepreneurs will seek to obtain profits, recognition, and glory by producing goods and services to satisfy demand. As a result, and notwithstanding numerous regulatory burdens, this nation enjoys an enormous supply of food, clothing, and shelter. Removing large amounts of land from production will harm the nation's housing supply.

Such programs will also injure the economy, which depends on the building industry for jobs and profits. In the absence of extraordinary circumstances that threaten well-being, such an outcome should be avoided. Moreover, according to the Census Bureau this nation will likely increase from 280 million in 2000 to 403 million in 2050, requiring about 60 million new housing units over the existing 115 million housing units.<sup>117</sup> The nation will have to devote more land than ever for urban areas, and smart growth will impede that objective.<sup>118</sup>

The term "smart growth" is associated with the kind of regulations imposed in recent years in the metropolitan area of Portland, Oregon under its Urban Growth Boundary (UGB) program. The residents of the Portland area have elected a regional government called Metro with authority to regulate land use and development in twenty-four adjoining cities and three counties.<sup>119</sup> These regulations deny erection of most new structures beyond the UGB, a line drawn around this area, which is

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117. Farris, *supra* note 15, at 1.

118. Easterbrook, *supra* note 18, at 543.

119. Metro, *Welcome to Metro*, at <http://www.metro-region.org/index.html> (last modified Aug. 23, 2001).

about twenty minutes from downtown Portland. Accordingly, a nonresident who wants to live in Portland is limited to purchasing either an existing home there within or outside of the UGB or a newly built dwelling within the UGB. Despite the enthusiasm of the “smart growthers,” Portland has not solved an inherent flaw of zoning. Smart growth controls are likewise governed by the political planning process, which is highly responsive to the prevailing political pressures. The rights of people who might want to live in Portland are dependent on Portland’s political processes, in which they have no representation.

Planners boast that the Portland metropolitan area achieved its growth objectives by the political magic of consensus.<sup>120</sup> But this consensus does not include persons who are greatly affected by such a decision—those who are being excluded from residing in the city. The powers of a municipality are confined to regulating local interests. They do not have the power to regulate the interests of nonresidents, inasmuch as they did not elect its lawmakers. Since local politicians have little incentive to consider the interests of outsiders, the latter have no opportunity to exert political pressure on a municipality to enact or change land use regulations. Under these circumstances, a basic principle of democratic government—that it governs only those who elect it—is violated. The right to travel of would-be residents of Portland has accordingly been restricted.

Contrary to the usual practices of zoning authorities, Metro seeks to reduce the maximum lot size for a single-family home. Some even advocate reducing total size even further to enable high-rises to be built. Metro bans America’s leading retailers, such as Walmart, Price Club, and Home Depot.<sup>121</sup> Again, unlike prevailing zoning practices, Metro wants owners of commercial properties to reduce parking space and eventually charge for parking. All of these efforts are intended to reduce reliance on the automobile. As of early 2001, only about 2% of city residents ride the light rail, but the figure is expected to increase to 6%. Due in large measure to its building restrictions, housing costs over the years have increased substantially, and Portland is now one of the most expensive cities in the West.

While many Portland residents seem to enjoy a comfortable existence, the same cannot be said for residents of inner-city areas. Between 1990 and 1995, for example, housing prices in inner-city areas—southeast Portland, northeast Portland, and northern Portland—increased by 85%,

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120. *But see* RANDAL O’TOOLE, *THE VANISHING AUTOMOBILE AND OTHER URBAN MYTHS* 190–95 (2001). O’Toole argues that many voters were indifferent or actually hostile to the city’s program. *Id.*

121. *See* Steven Hayward, *Legends of the Sprawl: Liberals Have a New Scapegoat for Their Urban Failures: Suburban Growth*, *POL’Y REV.*, Sept.–Oct. 1998, at 31.

78%, and 103% respectively, while the suburban communities averaged a 45% increase.<sup>122</sup> In large measure, the increase in poorer areas is attributed to gentrification. Inner-city gentrification burdens are born mainly by Portland's poor. When they are displaced by higher income families, poor families have difficulty locating affordable housing on the urban fringe and in suburban areas. Local authorities have sought to impose inclusionary requirements on developers that would require a percentage of conventional housing projects to include low income affordable units. As of this writing, however, these plans have not been adopted.

Portland's decision to place the UGB at a certain location is not costless to housing consumers. Clearly, if there were no UGB, much more land would be available for housing and this change would be reflected in a lower housing price. Or, if the UGB were placed further from downtown, say twenty-five minutes instead of twenty minutes away, there would still be a considerable increase in the supply of housing. The high price of land within the UGB and the resulting limitation on production of housing restrict housing supply.

Accordingly, not only does smart growth curtail the exercise of constitutional rights, as described in Part III, but it also considerably restricts operation of the housing market. In the many environmental controversies continually arising in this nation, societal benefits of decent and affordable housing are often overlooked. Yet housing certainly warrants high environmental priority. After all, one's home is the place where the major part of life is spent. Its characteristics greatly influence the quality of one's life. In recent years, three presidential commissions have asserted that lowering the cost and increasing the availability of housing are major objectives of the nation.<sup>123</sup> Each commission has also been highly critical of localities for imposing unnecessary restraints on the production and supply of housing.

In its report published in 1982, President Reagan's housing commission even urged that governments at various levels consider rescinding local

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122. SAMUEL R. STALEY ET AL., REASON PUBLIC POLICY INSTITUTE, A LINE IN THE LAND: URBAN-GROWTH BOUNDARIES, SMART GROWTH, AND HOUSING AFFORDABILITY: LESSONS FROM PORTLAND 22 (1999).

123. Bernard H. Siegan, *Conserving and Developing the Land*, 27 SAN DIEGO L. REV. 279, 282-86 (1990) (citing PRESIDENT'S COMM'N ON URBAN HOUSING, A DECENT HOME 143 (1969); NAT'L COMM'N ON URBAN PROBLEMS TO THE CONGRESS AND THE PRESIDENT, BUILDING THE AMERICAN CITY 20 (1968); REPORT OF THE COMM'N ON HOUSING, § IV (1982)).

land use regulations that limit production of housing.<sup>124</sup> Land use regulation, this commission concluded, was the problem, not the solution.<sup>125</sup> Deregulation would not only remove the wrongs and abuses, but would better serve the public interest.<sup>126</sup>

There is a tendency to minimize the benefits of housing production with the assumption that it largely helps the more affluent people. This is a wrong assumption because building of homes is rewarding both for the future occupants and also for the many more who, as a result, will be able to move to other housing. If they move, they are doing so to benefit themselves. Voluntary movement of persons from one house to another is known as the “filtering process” in housing.

Filtering in housing occurs when new homes and apartments are constructed and families move into them, vacating their former residences for occupancy by others. The others, in turn, may vacate still other units, and the process continues through a number of sequences. A study of this process in seventeen metropolitan areas, made in the 1960s by the Survey Research Center at the University of Michigan, has shown that on the average, the construction of one new unit makes it possible for a succession of 3.5 moves to occur to different, and more likely better, housing accommodations.<sup>127</sup> New construction thus benefits more people indirectly than it does directly—2.5 moves to existing housing and only one move to new housing.

The filtering concept revolves around the idea that as affluent people move into better housing, they leave behind residences that are then occupied by people of lesser financial means.

The Michigan survey shows that for every 1000 new housing units

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124. *Id.*

125. *Id.*

126. *Id.* at 282. The author of this Article was a member of the Commission, serving as Chairman of the Regulations Committee. According to Reagan’s commission:

[M]any controls relating to use and development of housing should continue. Only municipalities are able to plan and build streets, parks, public buildings, schools, storm and sanitary sewers, and water mains. Municipalities must also secure the public’s vital and pressing interests, which [Reagan’s] commission identified broadly as limited to protecting health and safety, remedying unique environmental problems, preserving historical resources, and protecting investments in existing public infrastructure resources. More specifically, “vital and pressing governmental interest” includes requiring adequate sanitary sewer and water services and flood protection; assuring that topographic conditions will permit safe construction and accommodate septic tank effluents; protecting drinking water aquifers; avoiding nuisance or obnoxious uses; requiring off-street parking; prohibiting residential construction amid industrial development; and avoiding long-term damage to the vitality of historically established neighborhoods.

*Id.* at 82–83.

127. JOHN B. LANSING ET AL., *NEW HOMES AND POOR PEOPLE: A STUDY OF CHAINS OF MOVES* 65–66 (1969).

built, there are over 3500 relocations.<sup>128</sup> Of these 3500 relocations, an average of 333 are by families defined as poor, and 933 are by moderate-income facilities.<sup>129</sup> Thus, more than one-third of all those who move are likely to be in the lower- and moderate-income categories. While most construction occurs in the outer portions of the metropolitan area, these moves extend to older areas near the center of the city.<sup>130</sup> The nation's worst environmental conditions exist in these areas, and conditions will further deteriorate if filtering is reduced. In the United States, the housing subsidy programs have not done much to alleviate these problems, and improvement necessitates greater housing supply in the private market. For the government to elevate the living standards of just 1000 families would require enormous expenditures.<sup>131</sup>

Those of middle income who are ineligible for subsidized housing and who cannot afford new housing are similarly dependent for better housing on the filtering process induced by new construction. "The University of Michigan survey makes it clear that prohibiting new construction seriously harms the groups that are in need of a better housing environment."<sup>132</sup>

Portland's consensus about the virtues of smart growth apparently does not extend to the population of the state. On the Oregon State ballot submitted to the voters on November 7, 2000, there appeared Initiative Measure 7, which required that the state or local government pay a property owner if a law or regulation reduced the value of his property.<sup>133</sup> The measure required that the owner be paid just compensation

128. *Id.* at 66.

129. LANSING ET AL., *supra* note 127, at 41, 68.

130. *Id.* at 19, 20.

131. I am told by builders that in 1989, the cost of construction of a 1000 square-foot, moderately equipped apartment in San Diego was about \$50,000. Accordingly, construction of 1000 new units would cost \$50 million, plus land (which could be priced at \$20,000 to \$40,000 per unit in low- and moderate-income areas). Some localities have sought to provide lower cost housing by requiring developers to set aside portions of their developments (from ten to twenty percent) for this purpose. Among other things, such requirements erode development feasibility, thereby limiting production of housing. For an analysis of such zoning restrictions—usually referred to as "inclusionary zoning"—see Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, in *RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY DECONTROL AND THE PUBLIC INTEREST* 135 (B. Johnson ed., 1982) [hereinafter *RESOLVING THE HOUSING CRISIS*]. Portland has not adopted such legislation.

132. Siegan, *supra* note 123, at 293.

133. *League of Or. Cities v. Oregon*, No. 00C20156, slip op. at 10 (Or. Cir. Ct. Feb. 22, 2001).

equal to the reduction in the fair market value of the property. It applied only prospectively to regulations enforced or applied to the current owner of the property. Despite its devastating impact on smart growth localities and the estimates of huge costs to the state and local governments, the measure was adopted by a vote of 54% to 46%.<sup>134</sup>

Among smart growth's strongest proponents are "new urbanist" planners who seek to replace sprawl with "neighborhoods of housing, parks and schools placed within walking distance of shops, civic services, jobs, and transit—a modern version of the traditional town."<sup>135</sup> New urbanists also urge changing subdivision requirements to authorize such development. In contrast to the prevailing zoning practices, the new urbanists advocate high densities, small lots, and mixed uses. They seek to reduce use of the automobile by replacing it with public transportation. When such planning becomes regulations enforceable by law, these regulations far exceed the force and effect of conventional zoning regulations, which are intended to secure and protect private property. New urbanist designs may be quite acceptable for private developments, but imposing a particular lifestyle is hardly an objective of public land use regulation. As the U.S. Supreme Court made clear in the *Euclid* case, which ruled that zoning was constitutionally valid, the constitutional justification for regulating the use of land is that it will protect and preserve private property.<sup>136</sup> Land use planning and regulation should not be subordinate to highly subjective policies relating to the lifestyle of people—where and how they should live.

Smart growth and new urbanist planning confront inherent problems in serving the public, as follows:

(1) Smart growth is a plan that has attracted considerable national support. However, its permanence and longevity are uncertain. Law professors Ellickson and Been explain that schools of planning theory "have tended to rise and ebb within a period of no more than a decade or so."<sup>137</sup> In the period from 1890 to 1989, it was possible to identify a number of periods in the history of planning, including The City Beautiful (1901–1915), The City Functional (1916–1939), The City Renewable (1937–1964) and The City Enterprising (1980–1989).<sup>138</sup>

Contemporary land use experience illustrates the limited durability of

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134. It was later struck down by an appeals court for technical reasons relating to constitutional amendments. *Id.* at 20–22. The initiative's proponents intend to appeal to the Oregon Supreme Court.

135. Griffith, *supra* note 116, at 568.

136. *Euclid v. Ambler*, 272 U.S. 365 (1926).

137. ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 64 (2d Ed., 2000).

138. *Id.* (citing Peter Hall, *The Turbulent Eight Decades*, 55 J. AM. PLAN. ASS'N 275 (1989)).

land use planning. Until smart growth arrived, land use planners and regulators accorded single-family development the highest priority of any land use. In the *Euclid* case, the U.S. Supreme Court described the many harms that result from mixing single- and multiple-family housing (“very often the apartment house is a mere parasite” in a single-family development),<sup>139</sup> a position planners and regulators have long observed and which the smart growth advocates now decry.

(2) No matter how gifted the creators and planners, a plan represents only the current wisdom of the creators and supporters, who are necessarily limited by their own knowledge and experience. There are always others who possess different knowledge and experience and advocate a different solution. Accordingly, writes John Rahenkamp, “Our long-term projections are grossly out of line every time. The best we can work with is something approximating three to five years. At best we can simulate within brackets.”<sup>140</sup> Economist, Friedrich Hayek, writes that the best means for obtaining a plan or plans is the competition of the marketplace.

There would be no difficulty about efficient control or planning were conditions so simple that a single person or board could effectively survey all the relevant facts. It is only as the factors which have to be taken into account become so numerous that it is impossible to gain a synoptic view of them that decentralization becomes imperative.<sup>141</sup>

In a particular situation, selecting the “best” development plan is very subjective. Different developers will choose different options. A locality that only protects against serious harms (nuisances and uses that are grave threats to person and property) offers the greatest opportunities for providing innovative solutions for housing and other land uses.

(3) Public land use planning means or implies an orderly, rational arrangement of land uses directed by experts in planning. Although this definition raises many questions, it seems to represent what most people think of when they speak or write of planning. The assumption seems to be that there is something precise, measurable, or quantitative about planning, or its standards.

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139. *Euclid*, 272 U.S. at 394.

140. ELLICKSON & BEEN, *supra* note 137, at 77 (citing John Rahenkamp, *Land Use Management: An Alternative to Controls*, in *FUTURE LAND USE* 191-92 (Robert W. Burchell et al. eds. 1975)).

141. *Id.* at 80 (citing FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 36, 48-50 (1944)).

This assumption is exceedingly difficult to substantiate, and few of even its most ardent proponents make the effort. Is there some precise measurement available to determine the “best” use of some or all of the land, of growth and antigrowth proposals, and whether the land is better suited for trees, industry, or the housing of people? Where should the urban growth boundary be located? Should the land be developed with two, eight, or twelve housing units to the acre, or is it better suited for a mobile home park or shopping center or, should it be retained as open space?

By now, after eighty years of zoning experience in the United States, it should be clear that there are respectable, distinguished, and knowledgeable planners who would disagree in many, if not most, instances to any or all of these alternatives. Planning is unquestionably highly subjective, lacking those standards and measurements that are requisites of a scientific discipline.<sup>142</sup>

Planners confront serious problems in evaluating the present and forecasting the future, whether on a micro or a macro level. With respect to zoning, overruling market-based decisions on land use would seem to require adherence to special goals or values, or perhaps experience and understandings that relatively few possess. Zoning experience is replete with instances in which planners classified land either to allow uses unacceptable in the market or to deny uses eagerly sought in the market. Theory and education alone cannot substitute for the actual experience of making practical decisions and suffering their consequences. Few planners have ever been part of the construction or development industry, nor have they been responsible for decisions on the location and development of residential, commercial, or industrial projects. Even if they once had been, their information about prices, materials innovations, trends, and consumer desires and preferences must now necessarily come from secondary or more remote sources, not directly from the “firing line.”

How, then, can planners possibly be as familiar with the location, development, construction, and operation of shopping centers, housing developments, nursing homes, or mobile parks as those who develop, own, and operate them? Owners and their mortgage lenders risk substantial funds on their success. Master planning will inevitably

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142. This author once practiced law in Illinois. In every major zoning case in which the author was involved or of which he had knowledge, each side of the controversy was able to hire a professional planner to testify in support of its position. Some of the cases were basically verbal duels between planners with opposing views. For further discussion about land use planning, see CHARLES M. HAAR & MICHAEL ALLAN WOLF, *LAND-USE PLANNING* 45–87 (4th ed. 1989); BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* 4–9 (1972).



forbid developers to build where they want, and will permit them to build where they do not want.

Constitutional restraints relating to smart growth were discussed in a prior section. The reader is now invited to consider related constitutional concerns that were presented by the land use controls imposed by Petaluma, California to stem urban sprawl.

In 1974, a federal district court in California adjudicated Petaluma's controls and ruled that they violated the right to travel.<sup>143</sup> Among other regulations, the city imposed an "urban extension line" around the city, to serve as a boundary for urban expansion.<sup>144</sup> The Ninth Circuit Court of Appeals reversed this decision on the basis of existing law which then, according to the appeals court, empowered a municipality to control land use for the purpose of preserving its small town character.<sup>145</sup> Since that date, the U.S. Supreme Court has considerably reduced the deference accorded localities in land use matters, and increased protection accorded property rights.<sup>146</sup> The district court's opinion is accordingly worthy of consideration.

Projections made in 1962 on the basis of its growth rate indicated that by 1985, Petaluma's population would be 77,000.<sup>147</sup> In an effort to reduce that number to 55,000, the city in 1971 adopted a series of regulations for the five-year period, which imposed an urban extension line and a maximum ceiling of 2,500 dwelling units for the five-year period.<sup>148</sup> Building permits were to be allotted at the rate of approximately 500 per year during that period.<sup>149</sup> The district court found that the plan would prevent the construction of about one-half to two-thirds of the market demand for housing units in the city.<sup>150</sup> It held that Petaluma, by limiting the number of people who could live there, had restricted the right of citizens to migrate and settle in places of their own choosing.<sup>151</sup> The California opinion relied in large measure on decisions of the Supreme Court of Pennsylvania, which declared unconstitutional

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143. *Constr. Indus. Ass'n of Sonoma County v. Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974).

144. *Id.* at 576.

145. *Constr. Indus. Ass'n of Sonoma County v. Petaluma*, 522 F.2d 897 (9th Cir. 1975).

146. *See discussion supra* Part III.

147. *Constr. Indus. Ass'n of Sonoma County*, 375 F. Supp. at 575.

148. *Id.* at 576.

149. *Id.* at 576-77.

150. *Id.* at 576.

151. *Id.* at 581.

ordinances that establish certain minimum lot sizes or do not permit apartment zoning.<sup>152</sup> The Pennsylvania court ruled such restrictions exclusionary and therefore unconstitutional.<sup>153</sup> It did not refer to the right to travel in these decisions, but the California district court concluded that the underlying rationale of those cases is consistent with this right.

The plaintiffs do not challenge the legitimacy of [Petaluma's] desire to deal with the problems of population growth but contend that the means which they have employed to accomplish their ends fall far short of constitutional validity. In essence, the plaintiffs contend that the questions where a person should live is one within the exclusive realm of that individual's prerogative, not within the decision-making power of any governmental unit. Since Petaluma has assumed the power to make such decisions on the individual's behalf, it is contended that the city has violated the people's right to travel. Considering the facts of the case, we agree.<sup>154</sup>

To support the position that Petaluma had violated the right to travel, the district court cited three Pennsylvania land use decisions, whose reasoning it adopted as its own view of the law under the federal Constitution.<sup>155</sup>

In *National Land & Investment Co. v. Kohn*,<sup>156</sup> the Pennsylvania Supreme Court held that Easttown Township's ordinance that imposed a four-acre minimum lot requirement was unconstitutional under the state's constitution.<sup>157</sup>

The oft repeated . . . limitation upon the exercise of the zoning power requires that zoning ordinances be enacted for the health, safety, morals or general welfare of the community. Such ordinances must bear a substantial relationship to those police power purposes. Regulations adopted pursuant to that power must not be unreasonable, arbitrary or confiscatory.<sup>158</sup>

The court queried whether the township's asserted purposes actually were for the health, safety, morals or general welfare, and if so, whether the township's means actually achieved those purposes."

The township asserted that the purposes of the ordinance were (1) to protect its water supply from sewage and other pollution, (2) to prevent more road congestion, and (3) to preserve the township's historic character, and (4), to preserve the township's rural character. The court found that the township did not face a threat to its water supply since it

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152. *Id.* at 584–86 (citing *Bilbar Constr. v. Bd. of Adjustment*, 141 A.2d 851 (Pa. 1958); *Nat'l Land & Investment Co. v. Kohn*, 215 A.2d 597 (Pa. 1966); *Appeal of Kit-Mac Builders*, 268 A.2d 765).

153. *Id.* at 586 (citing *Nat'l Land & Investment Co.*, 215 A.2d 597, 612 (Pa. 1966)).

154. *Constr. Indus. Ass'n of Sonoma County*, 375 F. Supp. at 581.

155. *Id.* at 584–86.

156. 215 A.2d 597 (Pa. 1965).

157. *Id.* at 615.

158. *Id.* at 607 (citations omitted).

could obtain more of it.<sup>159</sup>

With respect to the second asserted purpose, the court concluded that due to the township's growing population, road congestion could be a problem in the future.<sup>160</sup> However, the zoning ordinance was an improper means to remedy whatever road congestion may take place in the future. The court stated:

Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and cannot be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future – it may not be used as a means to deny the future. The evidence . . . indicates that for the present and the immediate future the road system . . . is adequate to handle the traffic load. It is also quite convincing that the roads will become increasingly inadequate as time goes by and that improvements and additions will eventually have to be made. Zoning provisions may not be used, however, to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.<sup>161</sup>

With respect to the closely related third and fourth purposes, (historic and rural character), the court found that preservation of "historic character" does not rise to the level of "public welfare."<sup>162</sup> "There is no doubt that many residents of this area are highly desirous of keeping it the way it is. . . . These desires, however, do not rise to the level of public welfare. This is purely a matter of private desire which zoning regulations may not be employed to effectuate."<sup>163</sup>

The Pennsylvania Supreme Court in *Appeal of Kit-Mar Builders*<sup>164</sup> held that the township's ordinance imposing minimum lot requirements was unconstitutional. Under the township's ordinance, lots along existing roads and those in the interior must be at least two acres and three acres, respectively.<sup>165</sup> The court concluded the ordinance was unconstitutional because its purpose was to exclude potential residents.<sup>166</sup>

Like the municipality in *National Land & Investment Co.*, the township in *Kit-Mar Builders* asserted that its primary purposes for the ordinance were to prevent a sewerage problem.<sup>167</sup> Without addressing

159. *Nat'l Land & Investment Co.*, 215 A.2d at 608–12.

160. *Id.* at 610.

161. *Id.*

162. *Id.* at 611.

163. *Id.*

164. *Appeal of Kit-Mar Builders, Inc.*, 268 A.2d 765 (Pa. 1970).

165. *Id.* at 765–66.

166. *Id.* at 768 n.6.

167. *Kit-Mar Builders*, 268 P.2d at 767.

the second asserted purpose, the court concluded that there are alternative methods of dealing with sewerage problems.<sup>168</sup> The court reaffirmed *National Land & Investment Co.*, concluding that the township's purpose behind the ordinance was to keep out people, which makes it an impermissible purpose. Further, reaffirming *National Land & Investment Co.*, the court held the township must deal with the problems of population growth, and not insulate itself by zoning out population growth.<sup>169</sup>

In *Appeal of Girsh*, the Pennsylvania Supreme Court held that Nether Providence Township's zoning ordinance, permitting construction of single-family dwellings, was unconstitutional because it did not explicitly provide for apartments.<sup>170</sup> The ordinance allowed single-family dwellings in the relevant area but remained silent with regard to apartments. The court concluded the ordinance's silence was tantamount to an express prohibition of the building of apartments.<sup>171</sup>

The township argued that the ordinance failed to expressly provide for apartments because apartment living brings added road congestion. The court concluded that this purpose was to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise. Reaffirming *National Land & Investment Co.*, the court stated, "Zoning provisions may not be used . . . to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring."<sup>172</sup>

Thus, the court applied the same heightened scrutiny it did in *National Land & Investment Co.*; it independently queried the validity of the purpose and found it impermissible. Also, the court showed the same concern for zoning provisions used by a municipality to shield itself from the inevitable effects (people moving around and looking for new places to live) of population growth.<sup>173</sup>

The district court in *Petaluma* found the reasoning of the Pennsylvania Supreme Court persuasive and sound and held that a zoning ordinance "which has at its purpose the exclusion of additional residents in any degree is not a compelling governmental interest, nor it is one within the public welfare."<sup>174</sup>

*Petaluma* claimed that several compelling state interests existed

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168. *Id.* at 768.

169. *Kit-Mar Builders*, 268 A.2d at 768-69.

170. *Appeal of Girsh*, 263 A.2d 395, 396 (Pa. 1970).

171. *Id.* at 397.

172. *Id.* at 398 (quoting *Nat'l Land & Inv. Co.*, 215 A.2d 597, 610 (Pa. 1965)).

173. *Id.*

174. *Constr. Indus. Ass'n of Sonoma County v Petaluma*, 375 F. Supp. 574, 586 (N.D. Cal. 1994).

supporting its exclusionary growth plan. It asserted that its sewer and water facilities were inadequate to serve an ever increasing population and it was entitled to preserve its character as a small town community. In reply to the sewer and water concerns, the court stated as follows: "Where a municipality purposefully limits the quantity of any particular commodity available, then seeks to justify a population limitation based upon an alleged inadequacy of that commodity, it has not stated a compelling interest which supports the limitation."<sup>175</sup>

With respect to Petaluma's maintaining its small town character, the court quoted from *Edwards v. California*:

It is frequently the case that a State might seek a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."<sup>176</sup>

The Petaluma court, as well as the Pennsylvania cases which it cited, did not distinguish between interstate and intrastate travelers, upholding the right of travel to all who sought to settle in the jurisdiction involved in the litigation.

## V. INTRASTATE TRAVEL

Inasmuch as the right to travel is a fundamental right, this right is violated when government regulations restrict travel from one state to another as well as when a state restricts travel within the state. For a traveler, it makes little difference whether his journey is across the borders of a state or within its borders. The travel cases decided by the U.S. Supreme Court emphasize the fundamental character of this right and do not assert that it exists solely to protect interstate travelers.

The Court has not ruled on the question whether an exclusionary ordinance applicable solely to intrastate travel would violate the right to travel. But it has suggested this outcome. *Memorial Hospital v. Maricopa County*<sup>177</sup> involved a requirement of a one-year residency in a county as a condition to receiving nonemergency hospitalization or medical care at

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175. *Id.* at 583.

176. *Edwards v. California*, 314 U.S. 160, 173-74 (1941) (quoting *Baldwin v. Seelig*, 294 U.S. 523 (1935)).

177. *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250 (1974).

public expense. In invalidating this requirement, the Court observed that an ordinance which discriminated only against intrastate travelers would be internally inconsistent, as intrastate travelers (or longtime residents from neighboring counties) would have greater ties to a community in their own state than interstate travelers or persons from out of state.<sup>178</sup> The Court found that because it penalized the right of intrastate travel it also impinged on the right of interstate travel and that the denial of nonemergency medical care had the possibility of deterring migration.<sup>179</sup>

Two federal circuit courts have protected rights of intrastate travelers. In *Cole v. Housing Authority*,<sup>180</sup> the plaintiffs were residents of Rhode Island and sought admission to a federally assisted public housing project in Newport, a city in that state.<sup>181</sup> One had migrated to Newport from another state and the other from a location within Rhode Island. However, the housing project required two years residency in Newport in order to obtain access to it.<sup>182</sup> The First Circuit Court of Appeals found that *Shapiro's* concept of "travel" for the purpose of the constitutionally protected "right to travel" meant that a person migrating to a particular location with the intention to stay there cannot be treated differently from existing residents. Because plaintiffs intended to stay in Newport, the court found that Newport's housing program violated their right to travel.<sup>183</sup>

The facts and outcome were similar in *King v. New Rochelle Municipal Housing Authority*<sup>184</sup> (decided by the Second Circuit Court of Appeals), which explained that the use of the term "interstate travel" in *Shapiro* reflected the statewide enactments involved in that case.<sup>185</sup> It would be "meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."<sup>186</sup>

## VI. ZONING

Smart growth (as practiced in Portland) is a form of zoning, or land use control, which was first implemented in this country with the passage of the New York Zoning Law of 1916. Almost all municipalities have since adopted zoning. It is said that zoning is accepted—as an essential

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178. *Id.* at 256 n.9.

179. *Id.* at 257.

180. 435 F.2d 807 (1st Cir. 1970).

181. *Id.* at 808.

182. *Id.* at 808–09.

183. *Id.* at 813.

184. 442 F.2d 646 (2d Cir. 1971).

185. *Id.* at 648.

186. *Id.*

requirement of urban life—by the vast majority of American cities. However, while zoning exists almost everywhere, it is invariably found wanting and zoning codes are continually revised; smart growth is the latest and most extreme example. “Consider the history of zoning. Area-wide land use controls arrived in this nation in 1916 in the form of the New York Zoning Resolution, the country’s first zoning ordinance.”<sup>187</sup> Compared to smart growth, the 1916 New York zoning ordinance was merely a ripple on the landscape. “This modest ordinance contained three use districts (residential, commercial and unrestricted), five classes of height districts; and three classes of area districts.”<sup>188</sup> At my last count, New York City had about seventy zoning districts and a host of other controls never contemplated by the framers of its original ordinance. Under current ordinances, the zoning authorities in that city frequently have power to determine building design, building materials, the land plan and even sales prices.<sup>189</sup>

The story is now a familiar one. Small, modest zoning ordinances grow into very complex and complicated ones. The reason is, of course, the change in conditions, techniques and thinking that occurs over the years and is reflected in our laws. But there are two other explanations for the uncontrolled growth of zoning. The first is that zoning has been the story of unrealized expectations. It simply does not work as represented. To date, we have had six or seven different zoning strategies in this country, and new ones (such as smart growth) continue to evolve.<sup>190</sup> Each has been introduced with what has turned out to be greatly inflated rhetoric as to what it would accomplish.

Each zoning strategy, in turn, has for the most part failed to meet the expectations created by that rhetoric. The result, every time, is a new effort at the drawing boards, producing more and new rules and regulations that, experience suggests, are not likely to be more successful than the previous one.

Another reason for the proliferation of zoning regulations is that the process is basically one of resolving differences among various special interest groups in the community. No matter how perfect a zoning plan, it will help some people and hurt others. Soon after passage of the ordinance, the losers, experience shows, start doing those things that will

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187. SIEGAN, *supra* note 1, at 188.

188. *Id.*

189. *Id.* at 189.

190. *See id.*

make them winners. Landowners will seek to rezone their property to increase its value. Homeowners and environmentalists insist that the rules be more stringent and exclusionary, and civic groups will move to make their reforms “in the general public interest.” Boundary lines separating uses, such as the UGB in Portland, become pawns in the struggles between factions. The courts may also affect significant changes. When the location of a boundary line accounts for vast differences in value, the lobbying for position is exceedingly intense.

Consider the reaction to the New York Zoning law of 1916, the nation’s first zoning ordinance, as described by Seymour I. Toll in his book *Zoned American*:

The most unusual thing about the new law was the passionate optimism with which it was received, not only locally, but throughout the nation. This spirit swept far beyond the young planning profession and the business community. McAneny [President of the Board of Aldermen] called the law “the greatest single achievement in city planning in America,” and “the greatest thing New York City . . . has ever done . . .” For *World’s Work* it opened “a new era in urban civilization.” *Outlook* hailed it as “one of the most progressive and forward-looking steps for the protection of its future development that has been made by any American city.” Veiller, the hard bitten, rather cynical reformer, said: “The situation as I see it is the most hopeful one the city planning group has ever had to face. I repeat, we are standing on the edge of a great change in living conditions in America. We are going to revolutionize conditions in a generation . . .”

The intoxicating promise of a long leap along the high road of progress often turns into something else once the details begin to close in. It is one thing to forecast the New Jerusalem, another to lay bricks. The 1916 Report found the golden prospect of a finer urban life riddled with practical, utopia-denying complications.<sup>191</sup>

Proponents of smart growth have also been enthusiastic; the prospects for its success are probably not much greater than those for more conventional zoning restraints. Indeed, it may suffer an untimely constitutional death at the hands of the judiciary. When the U.S. Supreme Court in *Village of Euclid v. Ambler Realty Co.*<sup>192</sup> held zoning to be constitutional in 1926, the reaction from municipal officials and planners was very enthusiastic. Zoning, they said, will save Euclid from being gobbled up by Cleveland. By contrast, the current mayor of Euclid is highly critical of the process, as described in the December 2000 issue of the *ABA Journal*:

Nearly 75 years later, the small town that won the big battle over local zoning power now seeks greater regional cooperation in land use and development policies. Rather than fighting economic encroachment from Cleveland, Euclid, now an inner-ring suburb, has joined the city and nearby

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191. TOLL, *supra* note 8, at 181 (citations omitted).

192. 272 U.S. 365 (1926).



towns to fight sprawl from outer-belt suburbs.<sup>193</sup>

In an ironic twist, Euclid Mayor Paul Oyaski sees the independent zoning authorities of some 60 local governments in Cuyahoga County as adding to the problem.

“Redistributing wealth, property values and population to newer, undeveloped areas, which is the essence of urban sprawl, serves to benefit not the public at large but the real estate developers and speculators and the politicians they support . . . .”

“Who benefits from building new communities, new hospitals, new schools, new infrastructure while abandoning similar facilities near the city?” Oyaski asked. “Communities and neighborhoods are not disposable commodities, to be discarded at will. Rebuilding, renovating, and reinvesting in existing neighborhoods is a better policy.”<sup>194</sup>

The popularity of smart growth among planners reveals the failures of conventional zoning. As has happened many times in the past, the existing zoning system has been found wanting, and the hopes and aspirations of the planning community have now turned to a new Valhalla. The problem is that the planners cannot accept the reality of the private market. They continue to assume that planning and regulation will triumph over freedom. World history, in general, and Houston, in particular, disclose the vacuity of that position.

## VII. THE PRIVATE MARKET HAS THE SMARTEST GROWTH CONTROLS

Development of the United States occurred over the years as cities and towns sprung up either by chance or design over vast and unoccupied territory. Cities were organized initially and those not satisfied settled outside of existing boundaries. A large percentage of this country’s population live in localities created by urban sprawl, that is, in small cities, towns and villages. Living outside of cities has advantages and disadvantages, but until recently it has never been thought to be antisocial. Prior to zoning, normal market forces were largely responsible for urban sprawl. Zoning imposed regulations limiting use, density, area and height, considerably reducing available land, and causing much greater sprawl than existed previous to its imposition.

The United States successfully developed in its early years because of

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193. William C. Smith, *The Brawl Over Sprawl*, A.B.A. J., Dec. 2000, at 48.

194. *Id.*

man's "overwhelming dynamic[,] . . . the lust to own land."<sup>195</sup> "[F]or the first time in human history," writes historian Paul Johnson, "cheap, good land was available to the multitude."<sup>196</sup> The availability of land enabled the colonists to achieve a level of prosperity and contentment not readily available in the countries from which they migrated. The colonists achieved great commercial success because there was little restraint on the use of land.

The story in modern times is far different. While the freedoms of ownership and production have enormously benefited most people in the United States, these freedoms are presently under attack because it is alleged that the land is being wasted, that is, too much of it is being used for urban purposes. There is no land crisis, nor can there be one when no more than six percent of the total land area of the United States is devoted to these uses. What makes the purported crisis very perplexing is that the people who demand reform of land use policies are those most responsible for its excesses. The amount of land used for urban purposes is determined both by the private market and by government regulation. It is inevitable that the ordinary and benign practices of the private market will not always lead to consecutive development. There will invariably be gaps between private developments for the reasons previously stated. It would require a massive coercive effort to change these practices. The theorists of smart growth recognize that the enormous amount of regulation the land use community imposed on the private market is responsible for the problems of land and energy wastage they criticize.

The private market is not devoid of "smart growth" controls. Consider land development in unzoned Houston.<sup>197</sup> No large-lot or snob zoning exists there because the builders and developers determine the size of most building lots, not the planners and politicians. There are very few regulatory curbs limiting density and height of multiple-family housing or of shopping centers and other commercial stores in central or other areas. No laws prohibit erection of buildings containing both residential and commercial uses. Nor does Houston have growth controls, which cause builders to by-pass restricted areas in order to build further out in less restricted areas. No regulations prohibit builders from erecting "new urbanist" traditional town housing near jobs, schools, parks, shops, civil services and transit.

Despite the absence of location controls, most multiple-family structures have been erected in the southwest portion of Houston, which

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195. PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 85 (1997).

196. *Id.* at 85–86.

197. See Siegan, *supra* note 123, at 295.

is partially within or readily accessible to downtown. (The reason is obvious: that's where people choose to live.) The city has a high population density, greater than Dallas and Phoenix zoned cities, with which it is often compared. Less land is accordingly devoted to residential occupancy in Houston than in the two zoned cities.<sup>198</sup> Interestingly, a survey of cities that led in downtown population growth between 1990 and 2000 shows Houston first with a growth of 69% and Portland fifth with a growth of 35%.<sup>199</sup> And, of course, there are no personal attacks and accusations that often occur at zoning hearings because there are no such hearings.

Coastal or other environmental regulations in the cities cause developers to build homes in the suburbs or rural areas. The California Coastal zone covers land along and within five miles of California's 1100 miles of shoreline. The California Coastal Commission regulates the use of this land and substantially limits development of it. In my home city of San Diego, there are so many restrictions on building structures higher than three stories, both in the coastal areas and elsewhere, that terminating development in the suburbs will greatly reduce the total amount of developable land in the region. San Diego is not about to accommodate smart growth by removing height and density requirements.

The Houston system of land use controls, which relies principally on economic controls and on relatively few regulations, presents an alternative to zoning and smart growth. I will discuss and explain Houston's system in the next section of this Article. My purpose is not to advocate repeal of current land use regulations and substitute Houston's system. That would be entirely unrealistic. Zoning is not about to disappear. However, Houston offers a market approach to achieving the goals of smart growth. As Professor Staley put it, "by attempting to work with

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198. As part of his requirements for obtaining a B.A. degree in Economics at Dartmouth College, Kihara Rufus Kiarie submitted a dissertation on "The Effects of the Lack of Zoning on Urban Structure in Houston." Kihara Rufus Kiarie, *The Effects of the Lack of Zoning on Urban Structure in Houston* (1996) (unpublished B.A. thesis, Dartmouth College) (on file with author). Among other things, he compared Houston's density with that of Dallas, Phoenix and Tampa. He found that Houston had greater density than Dallas and Phoenix and slightly less than Tampa. However, Tampa was not comparable because it lies on Tampa Bay. Areas constricted by water have a higher population density because of the lack of land for urban use. However, the difference between Houston and Tampa is much less than between Houston and the other two cities.

199. *Vital Statistics*, U.S. NEWS & WORLD REP., May 21, 2001, at 13.

the dynamic nature of the real estate market, planning can be retooled” to achieve the benefits of the private market.<sup>200</sup> In our country, freedom is always to be preferred over regulations, both for ideological and pragmatic reasons. This concern is especially important when lawmaking bodies consider imposition of smart growth controls (on mobility and private property) which threaten to eviscerate basic freedoms of the people. The nation owes its great political and economic successes to freedom and not to regulation.

I agree with smart growers who consider zoning dumb, but I do so for different reasons. Let me elaborate by again discussing the most famous of all zoning cases, *Village of Euclid v. Ambler Realty Co.*, decided in 1926, which held zoning constitutionally valid.<sup>201</sup> The property involved in that case consisted of sixty-eight areas owned by the Ambler Realty Company in the Cleveland suburb of Euclid.<sup>202</sup> This acreage fronted on Euclid Avenue, a major thoroughfare. The ordinance set forth rules that indirectly established prices for vacant land.<sup>203</sup> Thus, Euclid’s zoning ordinance classified the property adjoining Euclid Avenue as U-2, permitting only single- and two-family dwellings.<sup>204</sup> The Ambler Company asserted that in the absence of zoning, the land in question had a value of \$10,000 per acre and would be used for industrial and commercial purposes.<sup>205</sup> However, under the U-2 zoning classification, its value was only \$2500 per acre.<sup>206</sup> Despite Ambler’s complaint that the zoning confiscated most of the value of its land, the U.S. Supreme Court upheld the zoning classification as a reasonable exercise of legislative power.<sup>207</sup> The Court’s theory seemed to be that public control of land use would better serve society than market control of land use.

This position is devoid of merit. Ignoring the difference between the political and market prices eliminates this most vital factor for satisfying the people’s wants and desires. The fact that the property was worth \$10,000 per acre if it could be used for commercial and industrial purposes reflected a substantial demand in the area for the erection of such structures. In other words, measured by dollars there was a greater need in the area for stores, offices and light industrial plants than for houses and apartments. By denying Ambler’s request for a ruling that

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200. Samuel R. Staley, *Reforming the Zoning Laws*, in A GUIDE TO SMART GROWTH 75 (Jane S. Shaw et al. eds., 2000).

201. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388–97 (1926).

202. *Id.* at 379.

203. *Id.* at 384.

204. *Id.* at 382.

205. *Id.* at 384.

206. *Id.*

207. *Id.* at 397.

would allow the land to be used for such purposes, the Court in effect rejected the best measurement of community preferences. It also deprived the community of a mechanism which automatically adjusts to both supply and demand changes over time. As the commercial demands are met, the price of the property may decrease, possibly to a figure lower than offered for residential property. Erecting stores and plants would also lead to more employment and availability of goods and services probably raising the demand for housing. Because it is governed by the political process, zoning is far less resilient to economic changes.

To be sure, many in the land use community applaud the *Euclid* decision because they likewise advocate local control of land use. Included in this group are the new urbanist-smart growth proponents who uphold local majority rule as implementing democratic rule. They apparently assume that their planning objectives will be accepted and approved by local majorities. This may occur, but clearly it is not inevitable. The U.S. Constitution is not similarly confident of the wisdom or virtue of majorities. The most important Framer of the U.S. Constitution and Bill of Rights was James Madison, who in time was elected fourth President of the United States. According to Madison, a just and viable state can only exist when government is structured to reconcile and benefit from the various interests and tensions that exist among its citizens.<sup>203</sup> Madison and other Framers of our Constitution rejected the rule of the majorities and designed the government to limit and distribute power among three branches of government: the legislative, executive and judicial. "Madison rejected majority rule as a matter of principle."<sup>209</sup> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>210</sup> "In fact, it is only re-establishing, under another name and more specious form, force as a matter of right."<sup>211</sup> In a letter to Thomas Jefferson, he asserted that the invasion of private rights is chiefly to be apprehended "from acts in which the Government is the

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208. James Madison, *Vices of the Political System of the United States, April 1787*, in *THE FOUNDERS' CONSTITUTION* 166, 168-69 (Philip B. Kurland & Ralph Lerner, eds. 1987).

209. SIEGAN, *supra* note 1, at 53.

210. *THE FEDERALIST* NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

211. SIEGAN, *supra* note 1, at 53 n.29 (quoting *THE FORGING OF AMERICAN FEDERALISM: SELECTED WRITINGS OF JAMES MADISON* 45 (Saul K. Padover ed., 1965)).

mere instrument of the major number of constituents.”<sup>212</sup>

According to the legislature unlimited power, Madison wrote, violated a fundamental principle of a free society:

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?<sup>213</sup>

American zoning experience reveals the problems inherent in according local residents and their legislatures full control over land use in their communities. Residents tend to use this power to exclude people or groups they consider undesirable from their communities. Those excluded are otherwise ready, willing and able to move into the communities. Three presidential commissions have concluded that local exclusionary land use policies were a major barrier to a greater and fairer distribution of housing in the nation.<sup>214</sup> Existing residents acting in their own self-interest imposed regulatory obstacles, excluding persons they did not like or believed threatened their life style. It is, of course, questionable that the goals of smart growth will necessarily be in accord with the local electorate. As I have previously reported in Part II, city residents are not likely to welcome high density development in their areas. In view of the current zoning rules, the goals of smart growth will largely succumb to existing zoning practices that smart growthers deplore. Local land use authorities will instead apply smart growth to make land use more exclusionary than ever. Smart growth will be used to justify nongrowth in suburban and rural areas, and minimal growth in city areas.

The Supreme Court’s decision in the *Euclid* case transferred control of land use in this country to a group of planners and politicians not suited to this enormous responsibility. (This is not a criticism of them, but a conclusion about the enormity of the task they assume.) Because land planning is not a scientific discipline, its practitioners vary greatly in their recommendations for land use.

Thus, in the *Euclid* case, most planners and developers would not restrict land on Euclid Avenue, a major thoroughfare, to residential use. But then, planners have a very limited role in deciding land use. This

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212. *Id.* (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 616 (1971)).

213. THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

214. See *supra* note 123 and accompanying text.

power belongs to the city councils, whose members are experts at politics but hardly at making land use decisions. Like office holders and would-be office holders everywhere, they for the most part will do that which will keep them in office or elevate them to higher office.

Federal Judge Richard Posner has described the operation of the political process in an article he coauthored with University of Chicago, Professor William Landes.<sup>215</sup> They write that in the economists' version of the interest-group theory of government, "legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation. . . . Payments take the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes. In short, legislation is 'sold' by the legislature and 'bought' by the beneficiaries of the legislation."<sup>216</sup>

The failings and infirmities of lawmakers were well-known to the Framers of the U.S. Constitution and caused them to protect individual liberties by separating and substantially limiting the powers of government. Madison was concerned about the frailties of legislative bodies which he observed as a member for three years of the Virginia House of Delegates.<sup>217</sup> Far from being dedicated to the public good, he believed most of the legislators were pursuing their own political or financial interests.<sup>218</sup> He wrote that men seek public office to achieve ambition, personal interest, or public good.<sup>219</sup>

Unhappily, the two first are proved by experience to be most prevalent. Hence the candidates who feel them, particularly, the second, are most industrious, and most successful in pursuing their object; and forming often a majority in the legislative Councils, with interested views, contrary to the interest, and views of their Constituents, join in a perfidious sacrifice of the latter to the former. A succeeding election, it might be supposed, would displace the offenders, and repair the mischief. But how easily are base and selfish measures, masked by pretexts of public good and apparent expediency? How frequently will a repetition of the same arts and industry which succeeded in the first instance again prevail on the unwary to misplace their confidence?<sup>220</sup>

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215. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

216. *Id.* at 877.

217. Madison, *supra* note 208, at 168–69.

218. *Id.*

219. *See id.*

220. *Id.* at 168.

## VIII. SMART GROWTH IN HOUSTON

By contrast, the economic controls of the marketplace operate quite rationally and coherently. Consider land use in Houston. In the absence of zoning, it has relatively few regulations excluding people who want to settle there. Its land use policies are quite friendly to consumers and property owners. With a population in 1998 of 1,786,691 persons, it is the largest city in the south and southwest United States and the fourth largest in the nation.<sup>221</sup> In that year, its area contained 539.9 square miles.<sup>222</sup>

I have previously set forth the many smart growth benefits that the land use system in Houston provides. Its economic restraints conserve land and enable it to be used efficiently and productively. To be sure, Houston has no urban boundary law, and some may consider its absence a defect of proper land use regulation. My reply to these critics is that the Houston system has more than overcome its absence by its commitment to entry of people and land uses. Very few laws exist that exclude people or property. A nonzoned city is a cosmopolitan collection of property uses. The standard is supply and demand. If there is economic justification for the use, it is likely to be forthcoming. Zoning restricts the supply of uses, and thereby prevents some demands from being satisfied. It likewise impedes innovation.<sup>223</sup> In the absence of land use regulations, there are many builders in the city fiercely competing with each other to obtain consumer acceptance.

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221. THE WORLD ALMANAC AND BOOK OF FACTS 2001 at 376 (William A. McGeeveran, Jr. et al. eds., 2001).

222. *Id.* at 436.

223. Zoning rules have prohibited the construction of many low cost accommodations. In Houston, in the late 1960s, rental projects were built in minority neighborhoods containing sixteen or more detached houses per acre, an unusually high concentration by prevailing standards. This density was even too much for Houston's planning department, which sought unsuccessfully to ban them. At the time, single-family detached units typically ranged in density in the United States between one and five units per acre. REAL ESTATE RESEARCH CORPORATION, THE COSTS OF SPRAWL 65 (1974). The developments in question were being erected in very low income, African-American areas by private, unsubsidized investors, a rare occurrence in the United States. The principal inducement for the developers was the opportunity afforded by the large density to reduce land and construction costs. These projects offer unusually inexpensive rental housing, in all likelihood superior to that which the tenants last occupied. Because Houston imposes no restriction as to size and type of construction, the market for new houses is very flexible. As mortgage rates rise, for example, the developer is able to reduce the size of units to limit prices. In many suburbs of Dallas, on the other hand, where zoning regulates dwelling unit size and type, it is not possible to construct units below a specified square footage. Texas developers maintain that as a result they have had to discontinue building in these suburbs, denying many potential customers an opportunity to purchase housing. See SIEGAN, *supra* note 1, at 189-98 (comparing the housing prices between unzoned Houston and zoned Dallas).



In this connection, the question often comes up whether nonzoning has an effect upon racial distribution in Houston. I have done no study concerning this subject. Interestingly, a recent magazine article contains information about it.<sup>224</sup> On the basis of a readers' choice survey, *Black Enterprise* magazine, in its July 2001 issue, selected Houston as the best city in the nation for African-Americans, who number about 25% of its population.<sup>225</sup> Ten cities were finalists in the survey. The magazine reveals this information about African-Americans who live in the city:

- (1) The city has a low level of segregation, which enables African-Americans to live throughout the city.
- (2) Among the ten finalists, Houston had the second lowest cost of living index.
- (3) The average house price is \$108,500, the lowest house price among the ten cities.
- (4) Forty-three percent of African-Americans are homeowners despite a home mortgage rejection rate of nearly 41%.
- (5) There are twenty-nine African-American residents for every African-American business, the best ratio in the list of cities.<sup>226</sup>

In the competition for the best city for African-Americans, the ten leading cities were ranked in the following order: Houston, Washington, D.C., Atlanta, Charlotte, Memphis, Detroit, Baltimore, Dallas, Chicago, and Philadelphia.<sup>227</sup>

The absence of zoning has not made the use of land in Houston chaotic or disorderly. If such conditions actually existed, Houston's voters would likely have demanded zoning, not rejected it. The evidence indicates that various land uses (commercial, residential, and industrial) on the whole are about as separated in Houston as they would be under zoning. How has this occurred without zoning controls? The answer is that Houston does have land-use controls, but these are primarily economic. The use and development of land and property in Houston are controlled in three different ways. First, they are controlled by the normal economic forces of the marketplace; that is, some uses are acceptable only in certain areas of the city and not in others. Second, they are controlled through legal agreements, principally restrictive

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224. See Monique R. Brown & David A. Padgett, *10 Best Cities for African Americans*, BLACK ENTERPRISE, July 2001, at 74.

225. *Id.* at 90.

226. *Id.*

227. *Id.* at 92.

covenants imposed by developers of subdivisions that specify the required use characteristics of each lot, and enable every lot-owner to sue in the event of a violation. The city enforces restrictive covenants that the private sector has imposed on property. Third, use and development are controlled through a relatively limited number of land-use ordinances adopted by the city.

Houston also controls development through subdivision, building, traffic, nuisance, and housing regulations that do not seem to vary significantly from those of other cities in its region. But the contrast with zoning is clear: unless a property is subject to an enforceable restrictive covenant, the city exercises minimum control over the uses that will be made of that property.

As I have previously reported, a major benefit of Houston's system of land use controls is that it keeps housing prices low. Almost all credible scholarly studies show that growth controls, which are basically strong zoning restrictions, elevate housing prices.<sup>228</sup> The prices go up as the restraints become more severe. Zoning regulations, by imposing production and development requirements not related to nuisances, or health and safety problems, or matters of vital and pressing concern, raise needlessly the price of housing.<sup>229</sup>

The Houston experience demonstrates that in the United States, zoning schemes regulating land-use separation and density are not essential to the livability and viability of cities. In the absence of zoning, residential, commercial, and industrial uses will be abundant and will develop separately from each other. Certain uses will locate only in certain places. Gas stations and fast-food franchises, and most other major commercial developments, provide an obvious illustration: regardless of where they are permitted, they will locate only on heavily trafficked streets.

"This means that major business and commercial uses generally will be absent from the residential or local streets which constitute close to eighty percent of total street mileage within Houston, and probably about the same elsewhere."<sup>230</sup> Covenants and restrictions imposed in residential areas generally prohibit nonresidential uses.

In areas of Houston no longer subject to restrictive covenants or in which covenants were never [executed], these local streets contain relatively few commercial uses, probably no more than five percent within a [subdivision]. The bulk of these are home occupations and businesses that [usually] serve the residents of the area, and therefore, . . . are probably compatible with the area.<sup>231</sup>

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228. SIEGAN, *supra* note 1, at 189.

229. *Id.*

230. Siegan, *supra* note 123, at 296.

231. *Id.*

There is also a great tendency for industrial uses to group and concentrate separately from residential uses. This pattern is generally confirmed by the land use maps of Texas cities that were not zoned in the 1960s (about when the maps were drawn): Pasadena, Wichita Falls, Laredo, and Baytown.<sup>232</sup> It is generally too costly in terms of land prices and potential public hostility for heavy industry to locate adjoining new residential subdivisions. The plants and factories in the Houston area which are contiguous to and which were erected subsequent to homes are usually "light" rather than "heavy" in character. Apartment and condominium development also reflects a pattern of separation. As previously noted, the vast bulk of multifamily development in Houston has occurred in the southwest section of the city.

There are substantial areas in and around Houston where there is small demand for multiple-family, industrial, and commercial development. These areas provide the land for single-family occupancy. Most single-family developers in Houston (as well as in many other parts of the country before and even after the advent of zoning) have traditionally imposed restrictive covenants to permit only the erection of houses of specified characteristics within their subdivisions. Because many of the earlier restrictive covenants in Houston were limited in duration, legally insufficient, or not enforced by owners, zoning would probably have kept more areas exclusively for single families.

Studies have shown that market mechanisms operate to reduce the impact of uses that are regarded in zoning theory as adverse to property values. This is evident in Houston, where the price of vacant land depends in part on the actual or potential use of adjoining land. Thus, land on the perimeter of a residential subdivision may sell for much less than that located in the interior if the land adjoining the subdivision is vacant or used for purposes other than similar residential development. In a nonzoned market, economic forces operate to reduce or eliminate adverse economic land development and use.

Most of the covenants in Houston created subsequent to World War II are much more durable and seem to offer a reasonably practical solution

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232. SIEGAN, *supra* note 1, 217 n.57 (citing Bernard Johnson Engineers, Inc., Summary Report of the Comprehensive City Plan for Baytown, Texas 32, pt. 5, 7 (1964); Marmon, Mok & Green, Inc., Development Plan for Pasadena, Texas 77 (1967); Texas Highway Department, Laredo Urban Transportation Study, fig. 9 (1964); Wichita Falls, Texas, Urban Transportation Plan 1964-1985, at fig. 9 (1964) (on file with author)).

to the conflicting desires of allowing for change yet maintaining stability. Most post-World War II covenants contain an automatic extension provision. They provide for an initial duration period of twenty-five to thirty years, and an indefinite number of ten-year automatic extension periods. Agreement on the part of fifty-one percent of the owners (usually one vote per lot or on the basis of frontage) may cancel or amend the covenants before the end of the initial period or before the end of any subsequent ten-year period. Under this provision, a majority of homeowners can control the destiny of their subdivision.

Because enforcement of restrictive covenants can be costly for homeowners in lower income subdivisions and small subdivisions, Houston adopted an ordinance in 1965 enabling the city to enforce these covenants. Houston has also adopted an off-street parking ordinance for residential development, a limited number of location restrictions (such as prohibiting sexually oriented businesses, junk yards, and helicopter pads in or near residential areas), requirements for minimum lot sizes, minimum densities and building lines, and a relatively small number of other government regulations designed to cure problems of land use not satisfactorily controlled by the private market. As elsewhere in the nation, laws exist to prevent or abate nuisances. The absence of zoning does not preclude authority of the city to adopt land use or any other ordinances provided they are within state and federal limitations.

For homeowners, restrictive covenants serve the same purpose of maintaining exclusivity as does zoning. While similar in this respect, the covenants otherwise vary greatly from zoning both in application and operation, and they illustrate the difference between the economic and political marketplaces in determining land use and development. As heretofore explained, zoning is controlled by the political system and principally achieves that which is most important politically. It allows homeowners to influence zoning of land within an area that is far removed from their subdivision, and whose development will have little impact on them.

By contrast, developers or owners, and their lenders, impose covenants on their subdivisions solely as a means to secure and maximize their investments. They will apply covenants in accordance with what they believe are the desires of their prospective purchasers. Since there is usually no incentive for owners to restrict the use of their land while it is in a raw state, covenants normally affect little more than land already developed or programmed for development, and then largely for homes or townhouses. As a result, probably no more than twenty-five percent of the land area of Houston is subject to restrictive covenants. Under zoning, every square inch of the city's land would be regulated.

Restrictive covenants are a device of the market to maximize the value of property. Most American homeowners prefer to live in a homogeneous environment, and they should have the freedom to pursue this goal, provided others are not harmed. Restrictive covenants come close to achieving this balance. Under the covenants, homeowners cannot control the use of land that is beyond what they or their neighbors own. However, zoning allows almost unlimited pursuit of exclusionary purposes, often with adverse effects upon nonresidents.

Subdivisions in a nonzoned city are separate and independent enclaves preventing subdivision controversies from becoming city or county conflicts. A local subdivision controversy can be resolved within a subdivision without the need for making the issue a city-wide concern that the city council may have to resolve. For example, the desire of subdivision owners to ban noisy leaf-blowing machines used for gardening purposes is largely a matter for decision by these homeowners. However, in a zoned community, ordinances to prohibit these machines become issues affecting not only the subdivision residents but also people who own or are employed in gardening, which, in effect accords them political power on a par with the subdivision owners.

During the Gore-Bush presidential election, charges were made that Texas and Houston were lax in enacting antipollution measures. I have made no evaluation in this Article or elsewhere of these charges. There is no relation between the existence of zoning and pollution controls. The state and city have the power to adopt antipollution laws and their use of this authority is a matter of legislative discretion. Both have enacted nuisance laws which can be applied to curb pollution.

Human resourcefulness and inventiveness are able to thrive in Houston because of the absence of their enemy, government regulation. Unfortunately, in zoned cities, these talents are often spent in persuading or outmaneuvering the zoning authorities.

#### IX. CONCLUSION

Many commentators have explored the question of whether zoning “works” better than nonzoning. The assumption is that a municipality should adopt the system that is “best.” However, the United States Constitution does not give legislators complete discretion in this regard. Whatever system they adopt must conform to constitutional requirements.

Dedicated by its preamble to securing the “Blessings of Liberty,” the Constitution protects the right of ownership in nearly a dozen provisions.<sup>233</sup>

People should be free to live their lives where they wish. This idea does not prevail in land use regulation. Planners and politicians greatly influence where people live. The failures of eighty years of land use planning and regulation do not inspire confidence in their workability or viability. Our planners and politicians have not learned the lesson of these many years, and seem increasingly interested in asserting greater controls over the supply of housing and thereby impeding the attainment of better shelter for people. Smart growth is the newest example with also a dim likelihood of success. If land use regulation does not work, government should impose less of it—surely not more.

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233. U.S. CONST. art. 1, § 9; art 4, § 2; amends. II, III, IV, V, VII, VIII, IX.