

## Review Essay

### Unsubsidizing Suburbia

*The Urban Origins of Suburban Autonomy.* By Richardson Dilworth, Harvard University Press, 2005.

#### Reviewed by Nicole Stelle Garnett<sup>†</sup>

In my local government law course, I frequently begin by observing that local governments are both important and underappreciated for the same reasons: they pick up trash, fix potholes, and treat sewage. Richardson Dilworth's political history of metropolitan New York City and northern New Jersey<sup>1</sup> supports my observation—although I continue to doubt that it is the most effective sales pitch to law students. By highlighting the connection between public infrastructure and suburban political autonomy, Dilworth's book also provides an important opportunity to consider how infrastructure policies shape metropolitan America.

Dilworth uses several case studies of late nineteenth- and early twentieth-century suburbs to link suburban political autonomy to public investments in water, roads, and sewers. He argues that big cities (here New York City, Jersey City, and Newark) developed infrastructure relatively early and then sought to use the promise of extended public works projects to entice their suburban neighbors to join them. Suburbanites wanted the services that big cities could offer, but worried that annexation meant political corruption and higher taxes. Suburban governments which developed infrastructure independently remained autonomous; some which lagged behind sacri-

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<sup>†</sup> Lilly Endowment Associate Professor of Law, Notre Dame Law School. I thank David Barron, Patricia Bellia, Alejandro Camacho, Lee Anne Fennell, William Fischel, Richard Garnett, Bob Jones, John Nagle, Richard Schragger, and Julian Velasco for helpful comments and suggestions. Krista Steinmetz provided valuable research assistance.

1. RICHARDSON DILWORTH, *THE URBAN ORIGINS OF SUBURBAN AUTONOMY* (2005).

ficed their political independence to gain needed services.<sup>2</sup> Over time, as urban governments perfected infrastructure development techniques (and employed more and more engineers who could sell their services to developing suburbs), it became easier for suburbs to achieve political autonomy. Municipal consolidations and annexations became rare, leaving us with the hodgepodge of municipal governments that characterizes all American metropolitan areas.<sup>3</sup>

Dilworth's careful study does highlight the connection between infrastructure development and suburban political autonomy, but his thesis—that suburban infrastructural investments somehow *caused* metropolitan fragmentation<sup>4</sup>—is unconvincing and unproven. One is struck when reading this book that the *real* origin of suburban autonomy is the *suburban* desire to remain autonomous. Suburbanites then—like suburbanites now—preferred to maintain their independence from urban governments whenever possible. Certainly, some cities expanded geographically by promising needed services to their suburban neighbors. A well-known example is the annexation of the San Fernando Valley to Los Angeles in 1913,<sup>5</sup> an uneasy marriage of convenience achieved with the promise of water that almost unraveled several years ago when a majority of Valley residents voted to secede and form their own municipal government.<sup>6</sup> Other suburban communities turned away urban suitors because early investment in public works projects made annexation unnecessary. But, most interestingly, still others chose to spurn annexation and *needed* services because of worries that rapid development threatened their suburban identity.

This book is an impressive work of history. Dilworth promises more, however, and a serious shortcoming of the book is his failure to apply the history to current debates about metropolitan governance. While Dilworth does refer to these debates, his

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2. See, e.g., *id.* at 25–27.

3. See *id.* at 32–35 (discussing the relationship between infrastructure development and metropolitan fragmentation).

4. *Id.* at 11.

5. See *id.* at 25 (describing Los Angeles's decision to supply water to outlying communities only if they were annexed to the city).

6. See Sue Fox & Patrick McGreevy, *Secessionists Weigh Options*, L.A. TIMES, Nov. 7, 2002, at B1 (noting that a slim majority of Valley residents approved of seceding from Los Angeles, but that state law required city-wide approval).

efforts at drawing connections between the historical case studies and modern local government policy are fleeting and unsatisfactory. As a result, many readers might question Dilworth's broad assertion that microhistories connecting infrastructure development and suburban autonomy at the turn of the twentieth century have continued relevance today. This is unfortunate. Modern policymakers could, in fact, benefit from understanding why—for example—Brooklyn consolidated with New York City and Yonkers did not. This Essay represents my own brief, and far from complete, effort to follow through on Dilworth's promise to connect the history presented in this book to modern local government and land use policy.

As a prelude to that discussion, the Essay draws three lessons from Dilworth's study. First, this book serves as a helpful reminder that suburban resistance to joining forces with central cities has deep economic and psychological roots. This is not a hopeful history for proponents of regional governance. During the period Dilworth studies, some suburban communities may have reluctantly surrendered their autonomy to gain access to public works, but the tables have turned. Today, urban governments, with their aging infrastructure, might appear to have little to offer their more technologically advanced suburban neighbors. Second, the book highlights (albeit unintentionally) the degree of autonomy exercised by local governments today. In so doing, this book tends to support the argument that the ills of metropolitan fragmentation stem not from weak urban governments, but rather from the strong suburban ones that began to emerge during the time that Dilworth studies.<sup>7</sup> Third, and perhaps most importantly, Dilworth highlights that early suburban governments sought to preserve their uniquely suburban identities by, among other things, managing infrastructure development so as to attract the right kind of residents. By the turn of the twentieth century, it appears that Charles Tiebout's market for "consumer-voters" was developing.<sup>8</sup>

The remainder of the Essay uses these historical lessons to reflect upon the continuing connection between suburban growth and public infrastructure policy. Over the course of the

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7. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) [hereinafter Briffault, *Our Localism*].

8. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417–20 (1956).

past century, rapid suburbanization has left most major American cities landlocked. They are surrounded by dozens (if not hundreds) of municipalities, many of which incorporated precisely to immunize themselves from annexation.<sup>9</sup> It is an article of faith among antisprawl activists and academics that government subsidization of the kinds of public works that Dilworth studies—roads, water, and sewers—encouraged suburbanization.<sup>10</sup> Dilworth seeks to add an interesting twist to this commonly accepted tale. While many scholars have explored the link between public works subsidies and suburban sprawl,<sup>11</sup> he connects these subsidies to the beginnings of metropolitan fragmentation, which itself fosters sprawl.<sup>12</sup>

Many economists applaud metropolitan fragmentation, arguing that it promotes competition between local governments. Because impediments to mobility are reduced within metropolitan areas, a citizen may leave a locality with regulatory, tax, and public-goods priorities that are incompatible with her preferences and locate in one that offers more attractive policies. Thus, fragmentation may increase governmental responsiveness and efficiency by subjecting local authorities to some ap-

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9. See, e.g., Briffault, *Our Localism*, *supra* note 7, at 73–77 (describing this process of defensive incorporation); see also NANCY BURNS, *THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS* 37–38 (1994) (discussing incorporation as a response to threat of annexation and higher taxes); GARY J. MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* 79 (1981) (asserting that avoidance of annexation led to incorporation of multiple suburban localities near Los Angeles). On fragmentation, see Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *STAN. L. REV.* 1115, 1118–20 (1996) [hereinafter Briffault, *Local Government Boundary Problem*].

10. See, e.g., ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 795 (3d ed. 2005) (discussing causes of sprawl, including subsidies for roads and sewers). *But cf.* WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 67 (2001) (“Many commentators nonetheless claim that local governments continue to subsidize sprawl . . . [T]his myth . . . continues to be an article of faith among the antisprawl set.”).

11. See, e.g., KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 130–32 (1985) (discussing the “massive public investments in roads, storm sewers, street lighting, curbs and gutters, playgrounds, and schools . . . necessary for growth”).

12. DILWORTH, *supra* note 1; see, e.g., Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter*, 88 *GEO. L.J.* 1985, 2015 (2000) (arguing that fragmentation “inculcates a narrow conception of self-interest”); Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 *N.Y.U. L. REV.* 190, 236 (2001) (recounting the “malign” account of suburbanites’ behavior).

proximation of market forces.<sup>13</sup> Metropolitan fragmentation is not, of course, costless. Fragmented local power virtually guarantees that local governments' decisions will affect neighboring municipalities in both positive and negative ways.<sup>14</sup> Increasing numbers of local government and land use scholars have called for greater consolidation of local power in order to address the negatives, especially suburban sprawl and the stark economic and demographic differences within metropolitan areas.<sup>15</sup> These scholars propose a variety of institutional reforms to curb interlocal externalities and ensure a more equitable distribution of public resources. This debate has produced a rich literature that engages deep normative questions about the meaning of community, the purposes of local government, and the value of decentralized decisionmaking.

This Essay uses Dilworth's case studies of early metropolitan fragmentation as a springboard for discussing the continued connection between public infrastructure investment, suburban growth, and intrametropolitan equity. In particular, the Essay examines the tendency among opponents of metropolitan fragmentation to embrace limits on infrastructure subsidies as one solution to the sprawl problem. These "new infrastructure

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13. See, e.g., John D. Donahue, *Tiebout? Or Not Tiebout? The Market Metaphor and America's Devolution Debate*, 11 J. ECON. PERSP. 73, 74 (1997) (asserting that "[d]iverse policy regimes can cater to heterogeneous preferences"); Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, in PERSPECTIVES ON PUBLIC CHOICE 73, 83–86 (Dennis C. Mueller ed., 1997) (arguing that interlocal competition will increase efficiency in production of public goods); Richard E. Wagner & Warren E. Weber, *Competition, Monopoly, and the Organization of Government in Metropolitan Areas*, 18 J. L. & ECON. 661, 684 (1975) ("[A]n increase in the number of competing and overlapping governments will lead the public economy more closely to perform as a competitive industry."); see also MARK SCHNEIDER, *THE COMPETITIVE CITY: THE POLITICAL ECONOMY OF SUBURBIA* 63–69 (1989) (purporting to find that tax rates are lower in more fragmented metropolitan areas).

14. As Clayton Gillette has observed, it is a "truism" that "[t]he actions of local governments affect their neighbors," sometimes in negative ways. Gillette, *supra* note 12, at 190.

15. See, e.g., ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994); GERALD E. FRUG, *CITY MAKING* 143–65 (1999) [hereinafter FRUG, *CITY MAKING*]; MYRON ORFIELD, *METROPOLITICS* 74–104 (1997); NEAL R. PEIRCE, *CITISTATES* 291–325 (1993); DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993); Briffault, *Local Government Boundary Problem*, *supra* note 9, at 1144–64; Cashin, *supra* note 12, at 2027–47; Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1906–13 (1994); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 316–28 (1993) [hereinafter Frug, *Decentering*].

policies”<sup>16</sup> have intuitive appeal: if infrastructure subsidies foster sprawl and enable metropolitan fragmentation, then limiting subsidies should limit sprawl (and perhaps fragmentation as well). Unfortunately, however, using infrastructure policies to curb suburban growth and rein in municipal autonomy may have negative distributional consequences including, importantly, a loss of affordable housing and a related reduction in opportunities for intrametropolitan mobility.

### I. THE SUBURBAN ORIGINS OF SUBURBAN AUTONOMY

Most of Dilworth’s book consists of microhistories of four urban consolidation efforts in the late nineteenth and early twentieth centuries: New York City’s effort to annex Yonkers in the early 1870s,<sup>17</sup> the consolidation of greater New York City in 1898,<sup>18</sup> Jersey City’s expansionist ambitions in the late 1860s and early 1870s,<sup>19</sup> and the “Greater Newark” movement in the early twentieth century.<sup>20</sup> The history of the decisions that gave this important region its modern political shape is, standing alone, a fascinating one, and Dilworth provides a dauntingly detailed account of the various factors influencing these decisions. In his introduction and conclusion, however, Dilworth asserts that his account, with its particular focus on the provision of city infrastructure, helps explain the political fragmentation that characterizes modern metropolitan regions.<sup>21</sup> In an effort to understand whether—and why—this claim is valid, this part of the Essay focuses on three ways that Dilworth’s historical account sheds light on the current debates about the growth and governance of modern metropolitan America.<sup>22</sup>

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16. Throughout this Essay, I use the term “new infrastructure policies” because these efforts represent a significant departure from the century-long pattern of public subsidization that developed around the time that Dilworth’s study begins. I use the term “new” for convenience, despite the fact these policies began to emerge over three decades ago. See ALAN A. ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ WITH ARNOLD M. HOWITT, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 18–33 (1993).

17. DILWORTH, *supra* note 1, at 51–62.

18. *Id.* at 90–107.

19. *Id.* at 108–51.

20. *Id.* at 152–93.

21. *Id.* at 1–10, 194–201.

22. See, e.g., Briffault, *Local Government Boundary Problem*, *supra* note 9, at 1115 (“The governance of metropolitan areas is the central problem for local government law today.”).

First, the parallel attitudes toward “big cities” a century ago and today serve as a helpful reminder that suburban aversion to urban governments is nothing new. Second, the evolution of local government power over the past century—from the truly disabled city governments that Dilworth describes to municipalities armed with broad home-rule authority—makes suburban aversion to joining forces with their urban neighbors all the more difficult to overcome. Third, and perhaps most importantly, by emphasizing the early connection between public infrastructure and suburban development, Dilworth helpfully highlights the roots of modern ambivalence about suburban growth. The suburbs that Dilworth studies already understood the importance of local infrastructure policy. By shaping public works projects, many of these late nineteenth-century communities were able to define their own, suburban, identities—to remain independent from territory-hungry urban neighbors, to attract the right kind of residents to migrate to their borders, etc. This pattern, which has replicated itself many thousands of times over the course of the past century, continues to shape our metropolitan regions today.

#### A. SUBURBAN IDENTITY AND SUBURBAN AUTONOMY

Dilworth’s book seeks to illuminate why metropolitan fragmentation began to emerge during the late nineteenth century. Dilworth painstakingly accumulates evidence suggesting a correlation between suburban communities’ decisions to incorporate independently or join another municipality and the level of investment in public works.<sup>23</sup> Ultimately, however, while he makes the case that early investments in public works helped shape the political landscape in New York and New Jersey,<sup>24</sup> his account falls short of its promise causally to connect urban infrastructure and suburban autonomy. Instead, if these tales prove anything, it is that suburban communities remained autonomous whenever possible. Suburbanites then, as suburbanites now, saw urban governments as corrupt, inefficient, tax-generating leviathans. They reluctantly joined their urban neighbors only when they could see no other alternative.

Several themes dominated the debates surrounding the urban annexation and consolidation efforts that Dilworth studies. All of them will be familiar to those attuned to modern de-

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23. DILWORTH, *supra* note 1, *passim*.

24. *Id.*

bates about metropolitan governance. First, late nineteenth-century suburbanites believed—with reason—that urban governments were corrupt and inefficient. Interestingly, the very public works projects that cities used to lure their suburban neighbors frequently were the font of the corruption. Most famously, in 1870, a state senator named William Tweed succeeded in securing the enactment of a new “home-rule” charter for New York City.<sup>25</sup> Senator “Boss” Tweed became the first commissioner of the public works department under the new charter, where he proved to have a true gift for marshalling public-works-related graft into political power.<sup>26</sup> Not surprisingly, the desire to remain “clean” and avoid “machine” politics played a central role in many suburbs’ decisions to spurn annexation proposals—even if it meant turning away a promise of needed services. In response to a proposal by Jersey City to annex neighboring Bayonne, for example, the local paper warned that “every improvement would degenerate into a job, and only those streets would be opened for which the ring received the most money.”<sup>27</sup>

Suburbanites also associated urban governments—and the services that they promised—with high taxes. The *Bayonne Herald* article quoted above, for example, warned that annexation by Jersey City would mean higher taxes to “fill the pockets of ‘patriotic’ place hunters and political thieves.”<sup>28</sup> Opposition to Jersey City’s expansion plans in Hoboken—a town that had been privately developed as a “suburban location where one could escape the trials of the big city, such as yellow fever and ‘heavy taxes’”<sup>29</sup>—also centered on the tax burden associated

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25. *Id.* at 47.

26. *See id.* at 43 (noting that as early as the 1850s, the term “laying pipe” had come to refer to the patronage and corruption generated by construction of the Croton Aqueduct); *id.* at 47 (discussing the rise of Boss Tweed).

27. *Id.* at 138; *see also id.* at 73–74 (noting that Mount Vernon’s decision to remain independent coincided with “shocking revelations” about the extent of corruption in New York City); *id.* at 74 (quoting a newspaper article observing that opposition to a Greater New York proposal in Queens County was motivated by “fear of Tammany”); *id.* at 86–88 (arguing that Brooklyn narrowly approved on consolidation with New York because, at the time, New York City’s “reform” government was viewed as preferable to Brooklyn’s own machine politics); *id.* at 129 (quoting a newspaper editorial suggesting that Hoboken consolidation with Jersey City threatened residents with “the disease *ringology* or *ringold* prevailing there”).

28. *Id.* at 138.

29. *Id.* at 121.

with the expanded infrastructure.<sup>30</sup> In Hoboken and elsewhere, residents were willing to accept fewer services rather than risk the high taxes and corruption associated with infrastructural development.<sup>31</sup> Dilworth makes a convincing case that Newark's cautionary approach to infrastructural development in the late nineteenth century, driven by a fear of taxes and municipal debt, set the stage for the city's failed efforts to expand during the early twentieth century.<sup>32</sup>

Finally, and most interestingly, Dilworth's case studies illustrate the extent to which suburban decisions to remain autonomous were driven by an emerging suburban identity. A number of historians have linked the early development of American suburbs with the rise of an antiurban ideal during the late nineteenth century.<sup>33</sup> Kenneth Jackson has observed, for example, that as early as the mid-nineteenth century, "[s]uburbia, pure and unfettered and bathed by sunlight and fresh air, offered the exciting prospect that disorder, prostitution, and mayhem could be kept at a distance, far away in the festering metropolis."<sup>34</sup> Dilworth's book provides ample evidence that early suburbanites' desire to separate themselves politically, as well as geographically, from urban life (and immigrant and minority urban residents) drove opposition to annexation in many communities. Early suburbanites saw their communities as a way to escape the perceived chaos of city life. Two years before residents of Mount Vernon, New York, rejected a proposal to consolidate with New York City, the incoming mayor opined in his inaugural address,

This city is purely a place of residence, a home. The hum and noise, the smoke and steam, with the hurry and bustle of traffic . . . is all absent here. The quiet of the villa, the park, the pleasant lawn, the modest, substantial and beautiful home characterize Mount Vernon. A large majority of our citizens go into the great metropolis daily, and there amid the din and strife, fight the battle of life, leaving their peaceful homes meantime in our care.<sup>35</sup>

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30. *Id.* at 128–29.

31. *See id.* at 110–11 (“Infrastructural development would probably have proceeded at a quicker pace in Hoboken had residents approved consolidation. Instead . . . residents appear to have voted by a majority against consolidation because of concerns about political corruption and taxation.”).

32. *Id.* at 154–65.

33. *See, e.g.*, Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1205–06 (2001) (reviewing literature).

34. JACKSON, *supra* note 11, at 70.

35. DILWORTH, *supra* note 1, at 73.

Even in Brooklyn, which we hardly think of as a suburb today, the main opposition to the Greater New York proposal came from “the ‘Protestant social elite,’ who saw their ‘city of homes’ as a place of moral virtue that would be defiled by a closer association with New York City.”<sup>36</sup>

Dilworth makes a particularly strong case that this ethnic and moral superiority undermined the early twentieth-century “Greater Newark” movement. For example, residents of nearby Bloomfield were concerned that annexation by Newark would introduce “Sunday activities” associated with Newark’s large immigrant German population.<sup>37</sup> At a public meeting on the annexation proposal, one resident repeatedly warned that annexation would mean “beer gardens and Sunday baseball galore.”<sup>38</sup> The fact that other Newark suburbs, including Montclair and the Oranges, never seriously considered annexation was likely also linked to the strong antiurban sentiment in these affluent enclaves.<sup>39</sup> It is hardly surprising that the same residents who warned that streetcar service threatened to introduce “the usual and wretched surroundings which always follow in its train—the half-way house, the beer saloon, Sunday picnics, loafers, and other riff-raff”<sup>40</sup> also rejected Newark’s annexation proposal out of hand.<sup>41</sup>

#### B. THE RISE OF THE AUTONOMOUS SUBURB

Richard Briffault has observed that “[t]wo themes dominate the jurisprudence of American local government law: the descriptive assertion that American localities lack power and the normative call for greater local autonomy.”<sup>42</sup> Both of these ideas are strongly associated with Jerry Frug, who has done much to advance the view that city powerlessness is to blame

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36. *Id.* at 105.

37. *Id.* at 178.

38. *Id.*

39. *Id.* at 181–82.

40. *Id.* at 174.

41. William Fischel’s work provides an alternative explanation for the failure of the Greater Newark movement, which did not gain steam until the early twentieth century. Fischel asserts that suburb-city consolidations ceased after 1910, as suburbs began to use zoning to immunize themselves from infrastructure-dependent industry. With their residential character guaranteed, suburbs had less need for the infrastructure that came with consolidation. See William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317, 325–26 (2004).

42. Briffault, *Our Localism*, *supra* note 7, at 1.

for today's urban ills. In his important article, *The City as a Legal Concept*, Frug argues that cities are, legally speaking, rather pathetic creatures.<sup>43</sup> For the reasons that Frug describes in detail, a city's legal status can only be fully understood against the backdrop of the historical evolution of the modern American corporation. Prior to the early nineteenth century, American law made no distinction between public and private corporations. A corporation was a corporation—a legally distinct entity empowered by a legislative charter to carry out certain narrowly defined, and frequently “public,” purposes.<sup>44</sup> During the early years of the nineteenth century, American legal thinking underwent a remarkable transformation—the conceptual separation of the “private” and “public” generally, and of “private” and “public” corporations in particular.<sup>45</sup>

It is beyond dispute that municipalities did not fare well from this transformation. Business corporations became independent rights holders, constitutionally protected from unreasonable state interference. Moreover, the gradual erosion of the *ultra vires* doctrine and the passage of general incorporation laws guaranteed the proliferation of private corporations with broad authority to engage in a wide range of activities.<sup>46</sup> In contrast, municipal corporations came to be viewed as subordinate to—and carrying out the purposes of—the states.<sup>47</sup> By the late nineteenth century, private corporations were well on their way

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43. FRUG, CITY MAKING, *supra* note 15, at 18–25; *see also* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980) [hereinafter Frug, *City as a Legal Concept*].

44. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 111–22 (1977); Frug, *City as a Legal Concept*, *supra* note 43, at 1101–02.

45. *See, e.g.*, HORWITZ, *supra* note 44, at 112–14 (discussing development of the public/private distinction); Frug, *City as a Legal Concept*, *supra* note 43, at 1100–04 (discussing separation of public and municipal corporations); Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225, 232–35 (1985) (discussing the role of municipal corporations in development of public/private distinction).

46. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 77–78 (1992); Frug, *City as a Legal Concept*, *supra* note 43, at 1101 (describing a “Jacksonian effort to pass general incorporation laws, thus allowing the ‘privilege’ of incorporation to be exercised by all”).

47. Hendrik Hartog's history of the Corporation of New York City illustrates both the effect of the transformation on our nation's greatest city and the remarkably conservative approach that posttransformation municipal leaders took toward grants of legislative authority. HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 179–258 (1983).

toward autonomy,<sup>48</sup> while city governments had become subject to state domination.<sup>49</sup> Dilworth's story begins at precisely this time. Indeed, it is an interesting coincidence that his first case study examines Yonkers's 1872 decision to incorporate as a municipality rather than to be annexed to New York City. That same year, Judge John Dillon wrote his famously influential *Commentaries on the Law of Municipal Corporations*, which advocated the application of a "super-strong" version of the *ultra vires* doctrine.<sup>50</sup> "Dillon's Rule" provides that municipalities have only those powers expressly granted by state law, and, moreover, that "[a]ny doubt . . . concerning the existence of power is resolved . . . against the corporation, and the power is denied."<sup>51</sup> It continues to govern questions of local authority absent a grant of "home-rule" authority today.<sup>52</sup>

Dilworth treats the relationship between state and local governments as merely an interesting backdrop to his series of interlocal tales. This is unfortunate, for it neglects an important opportunity to learn more about how the evolving balance between state and local power shaped, and continues to shape, the metropolitan landscape. State-local relations affected the outcome of annexation and consolidation efforts in two very different ways. First, during the late nineteenth century, the truly subservient position of some cities prevented them from developing needed infrastructure. This may have led to consolidation in some cases. For example, according to Dilworth, weak municipal charters may have led Long Island City and Brooklyn to consolidate with New York City.<sup>53</sup> At one point, the New York

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48. See William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1485 (1989) (describing "The Middle Period [of corporate development]—the 1850s to the 1880s," when "[t]he states enacted 'general corporation laws' to assure equal access to the corporate form"); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 208 (1990) (noting "[t]he pervasive adoption of general incorporation statutes by many states during the latter half of the 19th century").

49. See Frug, *City as a Legal Concept*, *supra* note 43, at 1108 (describing how local autonomy gave way to state control in the late nineteenth century).

50. See RICHARD BRIFFAULT & LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT LAW 266–67 (6th ed. 2001) (describing inception of Dillon's Rule).

51. *Id.* at 266.

52. See David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 506–09 (1999) (explaining Dillon's Rule and its application).

53. The 1870 charter incorporating Long Island City, New York limited the city's *total* expenditures to \$25,000 per year. While the spending limit rose

legislature divested Brooklyn—at the time, the third largest city in the nation<sup>54</sup>—of virtually all power, giving authority over essential services such as police and public works to state-appointed commissions.<sup>55</sup> On the other hand, Dilworth asserts (not unconvincingly) that Hoboken’s weak charter, which prevented the development of a municipal waterworks, gave residents a taste for suburban life that led them to reject Jersey City’s overtures.<sup>56</sup> Perhaps, however, Jersey City would have been better positioned to overcome Hoboken’s concerns if, in 1870, New Jersey had not passed a new charter that “divested [the city council] . . . of every public function, except that possibly of granting licenses to saloon-keepers.”<sup>57</sup>

Second, while the struggles over local authority between large cities and state legislatures are not entirely incongruous with modern local government law,<sup>58</sup> Dilworth fails to appreciate the importance of the emerging legislative deference to suburban political autonomy. For example, throughout his study, legislatures granted suburban residents *de facto* self-determination when it came to questions of independence. Today, annexation and incorporation procedures require no direct intervention by state legislatures.<sup>59</sup> The act of municipal government formation is initiated privately, by a petition signed by some specified percentage of residents or landowners living within the proposed municipal boundaries.<sup>60</sup> This petition is

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to \$75,000 per year in 1871, the city government lacked funds to provide desperately needed improvements—street lights, pavement, sewers and waterworks. Instead, residents were forced to petition the legislature to create “special commissions” that had the authority to issue bonds for specific public projects. DILWORTH, *supra* note 1, at 75–77. Brooklyn’s charter also required public infrastructure improvements to proceed piecemeal, with the legislature creating commissions on a project-by-project basis. *Id.* at 84–85.

54. *Id.* at 80.

55. *Id.* at 84.

56. The 1855 charter incorporating Hoboken, New Jersey, restricted municipal expenditures on water to “one dollar per annum, per capita, for every actual resident in the city.” *Id.* at 124–25.

57. *Id.* at 141 (quoting 1 WILLIAM E. SACKETT, MODERN BATTLES OF TRENTON 87–88 (1895)).

58. Importantly, local governments remain mere “political subdivisions” of the states. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). They “derive their powers and rights wholly from the legislature,” which may “destroy, . . . abridge[,] and control” them. *Atkin v. Kansas*, 191 U.S. 207, 221 (1903).

59. See generally OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 230–33 (2d ed. 2001).

60. *Id.* at 230–31.

filed with some intermediate decisionmaker, usually the county government or trial court, which determines that certain minimal prerequisites have been satisfied.<sup>61</sup> Thereafter, an election determines whether the area will be incorporated as a municipality.<sup>62</sup> In most states, boundary changes, such as the annexation of unincorporated territory, proceed according to similar standardized, and locally-driven, procedures.<sup>63</sup>

The trend toward general municipal incorporation and annexation procedures began in the first half of the nineteenth century<sup>64</sup> and the New Jersey suburbs that Dilworth studies may have taken advantage of the state's "borough" incorporation law to immunize themselves from annexation.<sup>65</sup> This "villification" process has been linked with the emergence of metropolitan fragmentation in the late nineteenth century.<sup>66</sup> It is clear from Dilworth's account that these procedures were unavailable in New York during the time that he studies. As a result, the state legislature itself issued charters incorporating municipal governments and specifying their powers; special legislative action was also required for boundary changes, such as annexation and consolidation.<sup>67</sup> Technically, therefore, suburban residents of nineteenth-century Mount Vernon, New York, had no power to "decide" whether to approve or reject an annexation proposal. That decision was solely in the hands of

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61. *Id.* at 231–32.

62. *See id.* at 231–33; *see also* Briffault, *Our Localism*, *supra* note 7, at 74 ("The principal criterion for deciding whether a municipality will be incorporated is whether the local people want it. There are few limits on local discretion.").

63. *See* Briffault, *Our Localism*, *supra* note 7, at 78 ("As a general rule, the states no longer provide for annexation or consolidation by special legislative act. . . . Instead, the states have delegated territorial and boundary decisions to the annexing city, the territory to be annexed or the localities to be merged.").

64. *See* FISCHER, *supra* note 10, at 208 (discussing "more general and automatic procedures for incorporation" adopted in the mid-nineteenth century); Jon C. Teaford, *The Birth of a Public Corporation*, 83 MICH. L. REV. 690, 699–701 (1985) (discussing the trend toward general incorporation).

65. *See* Albert J. Wolfe, *A History of Municipal Government in New Jersey Since 1798*, at 7–8, [http://www.njslom.org/history\\_municipal\\_govt.pdf](http://www.njslom.org/history_municipal_govt.pdf) (last visited Nov. 7, 2005) (explaining that the Borough Act of 1878 allowed small townships to establish themselves as independent boroughs through petition and referendum).

66. *See* JACKSON, *supra* note 11, at 150–53.

67. *See, e.g.*, DILWORTH, *supra* note 1, at 44–51.

the state legislature; popular votes were purely advisory.<sup>68</sup> Yet, legislators tended to respect local desires.<sup>69</sup>

Kenneth Jackson has chronicled the extent to which state legislatures ratified the forcible annexation of suburban communities against the clear wishes of their residents during most of the nineteenth century.<sup>70</sup> He also demonstrates, however, that annexations began to fall in the 1870s, precisely when Dilworth's study began.<sup>71</sup> Jackson posits three general explanations for this phenomenon: general incorporations laws that permitted communities to immunize themselves from annexation, the related abolition of the doctrine of forcible annexation, and substantial improvements in suburban infrastructural capacity.<sup>72</sup> Dilworth's history supports all of these hypotheses. Clearly, the state legislatures of the time, dominated by rural, Republican, and Protestant interests, shared suburban contempt for urban government. It is unlikely that the same legislators who sought to restrict urban power in myriad ways would go out of their way to force consolidation upon hostile suburban communities. Thus began the pattern of legislative permissiveness toward suburban autonomy that set the stage for metropolitan fragmentation.<sup>73</sup>

The legislative deference to suburban autonomy that began to emerge during the late nineteenth century continues to contribute to intrametropolitan inequities. Most local governments operate under a broad delegation of power,<sup>74</sup> including (in many cases) "home-rule" authority to advance local interests without legislative authorization.<sup>75</sup> Moreover, once municipal boundaries are established, state legislatures rarely act to change

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68. *See id.* at 90–95.

69. *See* FISCHER, *supra* note 10, at 210 (noting that, after 1850, consolidations and annexations tended to occur only with both parties' consent).

70. *See* JACKSON, *supra* note 11, at 147–48.

71. *See id.* at 149–51.

72. *See id.* at 152–53.

73. *See generally* JON C. TEAFORD, CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA 1850–1970, at 5–31, 184–86 (1979).

74. *See* Briffault, *Our Localism*, *supra* note 7, at 1 ("Most local governments in this country are far from legally powerless. Many enjoy considerable autonomy over matters of local concern. State legislatures . . . have frequently conferred significant political, economic and regulatory authority on many localities.").

75. *See generally* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2225, 2325–28 (2003) (describing the "initiative" function of home rule, which authorizes local governments to act without legislative permission).

them. They also are loathe to interfere with the exercise of local regulatory authority within them, even when local policies generate significant interlocal externalities.<sup>76</sup> Indeed, a strong case can—and has—been made that central cities' difficulties stems from *too much* local autonomy rather than *too little*.<sup>77</sup> One result of this deference is the local government fragmentation that characterizes all major metropolitan areas.<sup>78</sup>

### C. THE INFRASTRUCTURE PARADOX

Gerald Frug has suggested that “there is little in the historical account to suggest that city services were designed to fragment American cities into separate, homogenous components.”<sup>79</sup> Dilworth's book suggests otherwise. His account chronicles how suburban governments over a century ago understood that they could shape public investments to attract the right kind of residents and exclude others. By the late nineteenth century, suburban residents—despite their antiurban leanings—understood that they needed city services. During the first half of the nineteenth century, a “municipal revolution” had begun:<sup>80</sup> “Nineteenth-century cities . . . changed Americans' expectations of urban government. Streets were paved, swamps drained, wells dug, aqueducts constructed, and police forces hired, as city governments responded to and shaped unprecedented urban growth.”<sup>81</sup> Not surprisingly, urban governments were the first to make these improvements; population density made infrastructure improvements a public-health imperative.<sup>82</sup> Less populous communities generally were

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76. See Briffault, *Local Government Boundary Problem*, *supra* note 9, at 1147–48.

77. See Briffault, *Our Localism*, *supra* note 7, at 5 (criticizing deference to local action that generate interlocal externalities); see also Barron, *supra* note 75, at 2266–71 (describing literature). Frug himself acknowledges as much in his later work proposing to make local boundaries more permeable in order to address interlocal inequities created by fragmented local power within our metropolitan regions. See Frug, *Decentering*, *supra* note 15, at 294–300.

78. See Briffault, *Local Government Boundary Problem*, *supra* note 9, at 1120 (describing metropolitan fragmentation).

79. Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 39 (1998) [hereinafter Frug, *City Services*].

80. See generally JON C. TEAFORD, *THE MUNICIPAL REVOLUTION IN AMERICA* 91–110 (1975).

81. HARTOG, *supra* note 47, at 4–5.

82. See TEAFORD, *supra* note 80, at 105–06 (noting that most major cities had water works by mid-nineteenth century).

able to defer such expenditures for longer, but eventually circumstances necessitated substantial improvements in suburbia as well.<sup>83</sup>

It was at this point in history that urban governments were poised to use their early investment in infrastructure to expand geographically, by promising services to suburbs in exchange for annexation. That such exchanges occurred is beyond dispute.<sup>84</sup> For example, support for the “Greater New York” proposal in the Bronx and Brooklyn likely was driven by a need to gain access to New York City’s substantial supply of clean water.<sup>85</sup> New York was able to use the promise of expanded infrastructure to annex a number of smaller Westchester County communities as well.<sup>86</sup> In contrast, the late-coming “Greater Newark” proposal failed in part because of Newark’s city fathers’ long-standing reluctance to make substantial investments in public works. As a result, Newark had less to offer reluctant suburban neighbors that might overcome their concerns about beer gardens and Sunday baseball.<sup>87</sup> Newark’s only successful efforts to expand involved the annexation of a few small and relatively undeveloped communities.<sup>88</sup> Dilworth also makes case after case that early infrastructural development in the suburbs correlated with decisions to remain autonomous.<sup>89</sup>

What is most interesting about Dilworth’s book, however, is not that some suburban communities reluctantly surrendered their independence to gain needed public works while others remained independent because they did not need them.<sup>90</sup> Rather, the most fascinating stories are of communities that spurned annexation even when it meant turning away needed

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83. See FISCHER, *supra* note 10, at 211 (noting that big cities used water systems as “bait” for suburbs with inadequate, and low quality, water supply).

84. See JACKSON, *supra* note 11, at 144–46 (discussing nineteenth-century motives for incorporation).

85. DILWORTH, *supra* note 1, at 56–57, 81–86.

86. *Id.* at 58–59.

87. *Id.* at 178–80.

88. *Id.* at 167–69.

89. *Id.* at 59–62 (Yonkers, N.Y.); *id.* at 95 (Mount Vernon, N.Y.); *id.* at 153 (Irvington and Montclair, N.J.); *id.* at 171 (Bloomfield, N.J.).

90. *Id.* at 58–59 (describing Yonkers as “one of the best governed, best graded, best lighted villages in the country”); see also *id.* at 74–75 (noting that Flushing was the only Queens County community to vote against consolidation and that it had the best infrastructure); *id.* at 93–95 (discussing Mount Vernon’s rejection of annexation because of independent infrastructural development).

infrastructure. Dilworth's case studies suggest that many suburban residents had contradictory feelings about infrastructural development. They realized that public works were needed to maintain a comfortable suburban lifestyle, but they worried that these improvements might invite development that would threaten their peaceful retreats.<sup>91</sup> Suburban communities reacted differently to these worries. Some invested in "premium" infrastructure in an effort to attract the right kind of residents. As Dilworth observes, in East Orange, New Jersey—a self-styled "progressive residential haven"—public improvements were extensive, but "[t]he cost of progress was . . . the second-highest tax rate in the county, which had the added benefit of keeping out undesirable elements."<sup>92</sup> Other communities, however, accepted fewer services rather than risk urbanization. This was the case in Hoboken, where residents continued to rely on private water suppliers rather than invest in an expensive public water works or consolidate with neighboring Jersey City.<sup>93</sup>

The decisions made by these communities further suggest that early suburban governments had also come to understand that, sometimes, less is more: rapid development does not always attract the right kind of residents; on the contrary, it may scare them away. As a result, the preservation of suburban identity requires careful growth management. Early suburbs, Dilworth's work suggests, used infrastructure policy to manage growth. Undoubtedly, other growth management policies, especially nascent zoning regulations, began to play a role by the time that his book closes in the early 1920s.<sup>94</sup>

## II. FRAGMENTATION, INFRASTRUCTURE, AND SPRAWL

The further fragmentation of metropolitan governance in the decades following this study has only increased the opportunities—and incentives—to engage in such "identity" management, through, among other things, infrastructure policy. Metropolitan fragmentation both results from and produces

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91. See, e.g., *id.* at 96–97 (discussing this tension in Mount Vernon).

92. *Id.* at 182; see also *id.* at 136 (discussing "uniquely suburban" investments in Bayonne, N.J.).

93. See *id.* at 130 (discussing Hoboken's response to water shortage).

94. See, e.g., Fischel, *supra* note 41, at 325–33 (discussing rise of exclusionary zoning).

suburban sprawl. Sprawl causes fragmentation for the reasons identified in Dilworth's study—many communities developing on the urban fringe separately incorporate to form independent municipal governments. Fragmentation causes sprawl when intermunicipal competition leads local governments to adopt policies that encourage development on the urban fringe.<sup>95</sup> As noted above, government subsidies for the kinds of improvements that Dilworth studies—water, roads, and sewers—frequently are included among the policy “culprits.”<sup>96</sup> The extent to which local investments in public works projects have contributed to suburban sprawl is not well understood. (One difficulty with indicting *local* governments for flawed infrastructure policies is that the federal and state governments often provide the funding—and establish funding priorities—for “local” improvements.)<sup>97</sup> What is clear, however, is that local government spending of funds from all sources on these improvements decreased dramatically in recent decades.

Until the late nineteenth century, “special assessments” levied against property owners who benefited directly from the project funded most public works projects. This method of financing left the decision making about the pace and scale of improvements in the hands of property owners.<sup>98</sup> Generally, those affected were required to agree to petition the local government to take action.<sup>99</sup> As a result, wealthier neighborhoods usually were the first to receive improvements.<sup>100</sup> Around the time that Dilworth's study begins, local governments began to pay for public works projects through general tax revenues.<sup>101</sup> A number of different factors might explain this shift, including: a demand for better city sanitation in unimproved commu-

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95. See, e.g., Briffault, *Local Government Boundary Problem*, *supra* note 9, at 1134–35; William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 87–88 (1999) (discussing regional business competition as cause of sprawl).

96. See Fischel, *supra* note 41, at 325–26.

97. See, e.g., U.S. GEN. ACCOUNTING OFFICE, *COMMUNITY DEVELOPMENT: EXTENT OF FEDERAL INFLUENCE ON “URBAN SPRAWL” IS UNCLEAR* 47–48 (1999) (examining and questioning the link between urban sprawl and the subsidization of federal public water and sewer systems).

98. See JACKSON, *supra* note 11 at 131.

99. See ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 16, at 17 (explaining the practice, benefits, development, and importance of special assessments for public works funding in cities).

100. See DILWORTH, *supra* note 1, at 12–13.

101. See, e.g., JACKSON, *supra* note 11, at 131.

nities;<sup>102</sup> the ascendancy of progressive urban elites who sought to improve the living conditions of the urban masses;<sup>103</sup> local government officials desiring to build their reputation through successful development policies;<sup>104</sup> and, importantly, the demands of suburban residents who argued that public subsidies would encourage development and strengthen the local tax base.<sup>105</sup>

In the 1970s, local government spending on infrastructure began to decline. A number of interrelated factors explain this policy shift. By 1965, federal aid to states and localities—including, importantly, grants-in-aid for physical infrastructure—began to fall short of need.<sup>106</sup> A related backlog of new projects led to concern that the existing infrastructure was overstretched and undermaintained in many communities.<sup>107</sup> This infrastructure “crisis”<sup>108</sup> coincided with two major political developments that caused local officials to reconsider their previous subsidy policies.<sup>109</sup> The first was the advent of successful “tax revolts.”<sup>110</sup> Beginning with California’s “Proposition 13,” voters amended a number of state constitutions to limit local governments’ ability to raise taxes, especially property taxes.<sup>111</sup> Deprived of their primary revenue raising source, cash-strapped local governments struggled to find new sources of revenue.<sup>112</sup> Second, during the same time period, antigrowth activists began successfully to challenge longstanding assumptions about the benefits of suburban growth.<sup>113</sup>

While members of the antitax and antigrowth coalitions were not natural bedfellows, antigrowth policies were and still

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102. DILWORTH, *supra* note 1, at 16.

103. See Frug, *City Services*, *supra* note 79, at 39–41.

104. See PAUL E. PETERSON, *CITY LIMITS* 136–43 (1981).

105. See JACKSON, *supra* note 11, at 131.

106. ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 16, at 25–26.

107. *Id.* at 26–31 (connecting infrastructure backlog to a decline in federal subsidies); see also, e.g., Andrew C. Revkin, *Federal Study Calls Spending on Water Systems Perilously Inadequate*, N.Y. TIMES, April 10, 2002, at A22 (discussing the Environmental Protection Agency’s draft report warning that spending to maintain and expand water and sewer system lags behind need by tens of billions of dollars).

108. ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 16, at 23.

109. *Id.* at 20–25.

110. *Id.* at 23.

111. *Id.* at 23–25.

112. See *id.* at 25–26.

113. *Id.* at 20–25.

are attractive to local governments facing both revenue shortages and pressure to curb development.<sup>114</sup> While a complete description of the resulting policies is beyond the scope of this Essay, this Part briefly describes three ways that infrastructure policy has changed in response to these incentives: First, some local governments link the pace of suburban growth to infrastructure capacity through so-called “adequacy of public facilities” programs that preclude new development absent construction of public facilities, such as adequate roads, sewers, and schools.<sup>115</sup> Second, a majority of U.S. cities now use development exactions and impact fees, ostensibly to internalize the cost of new development by forcing developers to fund a wide range of government infrastructure and services. And third, there is a growing support for transferring authority over infrastructure funds to regional entities that will channel public subsidies, and direct development, in a more rational and equitable manner.

#### A. ADEQUACY OF PUBLIC FACILITIES REQUIREMENTS

Beginning in the mid-1970s, many local communities began to enforce temporary moratoria in new development projects. Lawmakers justified these restrictions on a number of grounds. Some, such as the thirty-two-month moratorium in Lake Tahoe, California that the Supreme Court recently upheld,<sup>116</sup> are said to be necessary to promote the government’s interest in “facilitating informed decisionmaking by regulatory agencies,”<sup>117</sup> who need to deliberate on the pace and scale of development.<sup>118</sup> Development moratoria frequently are tied to infrastructural capacity, in part because such moratoria have a greater chance of surviving legal scrutiny. “Timed” or “phased” growth programs limit the number of new units that can be

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114. See, e.g., James A. Kushner, *Smart Growth, New Urbanism, and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 J. ENVTL. L. & POL’Y 45, 47–48 (2002) (linking infrastructure limits with antigrowth concerns); Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 FLA. L. REV. 373, 415–16 (2004) (connecting the rise of exactions for infrastructure with antigrowth consensus).

115. See ELLICKSON & BEEN, *supra* note 10, at 812–13.

116. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 339–41 (2002).

117. *Id.* at 339.

118. *Id.* at 311–12.

built within a specific period of time.<sup>119</sup> The regulating agency—usually a local government—essentially rations permits, awarding them to developments that satisfy certain prerequisites, including the availability and sufficiency of public services and infrastructure.<sup>120</sup>

“Adequate public facilities” or “concurrency regulations” also limit development based upon the infrastructural capacity by requiring a developer to demonstrate that necessary public facilities are available before beginning a project, or, in some cases, requiring a developer to pay fees to ensure that these facilities can be made available concurrently with a development.<sup>121</sup> Adequacy of public facilities requirements are widespread. Indeed, many local governments tie development approvals to infrastructure capacity at least on an ad hoc basis—for example, by denying requests for rezoning or delaying new subdivision approvals because of concerns about infrastructure shortfalls.<sup>122</sup> Local governments impose most formal adequacy of public facilities requirements. These programs, which vary in detail, mandate that developers ensure that infrastructural capacity for a new development comports with preestablished “level of service” standards for the community.<sup>123</sup> A handful of states also require local governments to integrate concurrency requirements into local land use policies.<sup>124</sup>

#### B. EXACTIONS AND IMPACT FEES

Over the past three decades, increasing numbers of local governments also have turned to new methods of financing public works projects, especially land use exactions and impact fees. Land use exactions generally require developers to provide

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119. See, e.g., JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL* LAW § 9.2 (1998).

120. *Id.* § 5.2 (explaining that judicial approval of a timed-growth program adopted in Ramapo, New York represented an early victory for growth-management proponents (citing *Golden v. Planning Bd.*, 30 N.Y.2d 359 (1972))); ERIC DAMIAN KELLY, *MANAGING COMMUNITY GROWTH: POLICIES, TECHNIQUES, AND IMPACTS* 48–53 (1993).

121. S. Mark White & Elisa L. Paster, *Creating Effective Land Use Regulations Through Concurrency*, 43 NAT. RESOURCES J. 753, 754 (2003); see, e.g., KELLY, *supra* note 120, at 44–48.

122. See White & Paster, *supra* note 121, at 755.

123. *Id.* at 758–62.

124. See FLA. STAT. §§ 163.3177(6)(h), .3202(2)(g), .3180 (2005); MD. CODE ANN., STATE FIN. & PROC. § 5-7B-03(d) (West 2003); VT. STAT. ANN. tit. 10, § 6086(a)(9)(a) (2004); WASH. REV. CODE § 36.70A.070(6)(b) (2005).

property or public facilities as a condition of receiving regulatory permission to develop. Exactions can be in-kind—the developer must make certain improvements, such as installing sewers, providing street lighting, or paving roads—or, they can be monetary, in which case the developer must pay impact fees in lieu of the in-kind improvements.<sup>125</sup> Exactions are, in many ways, nothing new.<sup>126</sup> The Standard State Zoning Enabling Act,<sup>127</sup> adopted in many states in the 1920s, authorizes local governments to require developers to construct streets, water mains, and sewers in new developments.<sup>128</sup> Since that time, many local governments have required developers to construct and dedicate facilities to the community. Over time, communities increased their demand for such dedications from basic infrastructure—sewers, streets, and sidewalks—to property for public facilities such as schools, fire and police stations, and parks.<sup>129</sup> Today, subdivision regulations routinely require developers to provide certain public improvements as a condition of receiving regulatory approval.<sup>130</sup>

While data regarding the nature and extent of local government exactions are lacking,<sup>131</sup> it is clear that current practices depart dramatically from earlier antecedents. Importantly, a majority of cities now impose impact fees in addition to traditional dedications and improvements.<sup>132</sup> As Alan Altshuler and Jose Gómez-Ibáñez have persuasively argued, the shift toward impact fees was an “epochal” one.<sup>133</sup> More recently, a United States Department of Housing and Urban Development report characterized the “increasingly widespread adoption of impact fees” as a “dramatic change in the regulatory en-

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125. ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 16, at 3.

126. FISCHER, *supra* note 10, at 67 (asserting that exactions have been “a widely used tool in American land-use controls for at least a half a century”).

127. The Standard State Zoning Enabling Act is reprinted in DAVID R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* (6th ed. 2005).

128. See Vicki Been, *Impact Fees and Housing Affordability*, 8 *CITYSCAPE: J. POL'Y DEV. & RES.* 139, 140 (2005).

129. *Id.*

130. JUERGENSMEYER & ROBERTS, *supra* note 119, § 7.7.

131. See, e.g., Been, *supra* note 128, at 163–64. (calling for more research on the effects of impact fees on price and growth).

132. *Id.* at 141 (explaining that 59 percent of cities with more than 25,000 residents imposed impact fees (citing U.S. GEN. ACCOUNTING OFFICE, *LOCAL GROWTH ISSUES—FEDERAL OPPORTUNITIES AND CHALLENGES* (2000))).

133. ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 16, at 122.

vironment” and asserted that “communities are asking developers to bear a larger share of the front-end burden of supplying new infrastructure and added services as a means of paying for continued growth.”<sup>134</sup> Moreover, cities are increasingly applying impact fees to different types of development to include nonresidential land uses<sup>135</sup> and even renovations of existing properties.<sup>136</sup>

Local governments today also use exactions and impact fees to fund a much wider range of services and facilities. As recently as 1985, the vast majority of impact fees funded water lines, sewers, and roads.<sup>137</sup> More recent studies suggest that increasing numbers of local governments rely on impact fees for other public services, including schools, low-income housing, fire and emergency services, traffic mitigation, public transportation, and open space.<sup>138</sup> A growing minority of communities rely upon exactions to provide affordable housing as well. Linkage programs require developers, especially commercial developers in central cities, to agree to “offset” the anticipated costs of the proposed development.<sup>139</sup> San Francisco, for example, requires commercial developers seeking to “convert” residential property to nonresidential uses to pay a substantial fee to offset the anticipated loss of moderate-priced housing.<sup>140</sup> Inclusionary zoning programs impose similar requirements on residential developers. Usually, inclusionary zoning rules require developers to set aside a certain percentage of new residential units for “low- and moderate-income” residents and to sell or lease these units to the targeted residents at “affordable” (i.e., below market) prices.<sup>141</sup>

Not surprisingly, the fastest growing communities are most likely to impose fees,<sup>142</sup> and impact fees have generally

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134. U.S. DEP’T OF HOUS. & URBAN DEV., “WHY NOT IN OUR COMMUNITY?": REMOVING BARRIERS TO AFFORDABLE HOUSING 8 (2004), available at <http://www.huduser.org/Publications/pdf/wnioc.pdf>.

135. See Been, *supra* note 128, at 140–42.

136. See, e.g., Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011, 1027 (1991).

137. Been, *supra* note 128, at 141.

138. See *id.* at 141 (describing the types of projects which impact fees fund).

139. See Schukoske, *supra* note 136, at 1015–27 (describing the characteristics and implementation of linkage fee programs).

140. See *San Remo Hotel v. San Francisco*, 41 P.3d 87, 92 (Cal. 2002).

141. See also Been, *supra* note 128, at 140–41; Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167, 1170–84 (1981).

142. See Been, *supra* note 128, at 142 (noting that “communities undergo-

been championed as a way to internalize the full cost of new development.<sup>143</sup> As Vicki Been observes, “by requiring the developer and its customers to pay to mitigate the negative effects a development may have on a neighborhood . . . impact fees again may encourage efficiency by making the developer and its customers internalize the full cost of the harms that the development causes.”<sup>144</sup> This view is generally shared across the political spectrum. For example, in the conservative Heritage Foundation’s *Guide to Smart Growth*, Samuel Staley asserts that “[p]roperty owners and developers should bear the full costs of property development.”<sup>145</sup> The idea that developers and their customers should bear the full cost of new development is rarely challenged, although both judges<sup>146</sup> and economists have questioned the ability of government to calibrate those costs accurately.<sup>147</sup> Objections to exactions generally focus on policy design questions about the level and extent of exactions.<sup>148</sup> There is a significant concern that local governments may dramatically overcharge developers—that is, that impact fees do not simply force newcomers to internalize the cost of new developments. Staley, for example, asserts that “fees are often abused and become another source of general revenues for local governments.”<sup>149</sup> His concerns are echoed in a recent report by the

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ing the most growth . . . appear to be most likely to adopt fees”); cf. Andrejs K. Saburskis & Mohammad Qadeer, *An Empirical Estimation of the Price Effects of Development Impact Fees*, 29 URB. STUD. 653 (1992) (examining the relationship between land development and impact fees).

143. See, e.g., FISCHER, *supra* note 10, at 66–67.

144. Been, *supra* note 128, at 143.

145. Samuel R. Staley, *Reforming the Zoning Laws*, in A GUIDE TO SMART GROWTH: SHATTERING MYTHS, PROVIDING SOLUTIONS 61, 73 (Jane S. Shaw & Ronald D. Utt eds., 2000).

146. See, e.g., Reynolds, *supra* note 114, at 417–25 (discussing application of “proportionality” review—which requires a relatively close connection between the exaction imposed and the impact of the proposed development—to exactions and impact fees).

147. See ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 16, at 122 (arguing that the “central premise of this trend—that responsibility for communal needs can be allocated objectively to private parties—is largely a myth”); see also, e.g., Wes Clarke & Jennifer Evans, *Development Impact Fees and the Acquisition of Infrastructure*, 21 J. URB. AFF. 281, 287 (1999) (noting that local officials may use impact fees to slow growth, rather than to finance infrastructure).

148. See ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 16, at 122 (“[E]ven if one accepts the basic premise underlying exaction usage, that all new development should cover the full local cost of service expansion and mitigation attributable to it, wide room exists for dispute about the scope and scale of exactions.”).

149. Staley, *supra* note 145, at 73; see also FISCHER, *supra* note 10, at 67 (noting that exactions may “extract payments in excess of the social costs of

Department of Housing and Urban Development, which warns that many impact fees are “disproportionate to actual development costs” and unreasonably drive up the cost of housing as a result.<sup>150</sup>

### C. THE NEW-REGIONALIST SOLUTION

Opponents of metropolitan fragmentation have set forth a variety of proposals to guarantee a more equitable distribution of resources among the municipalities within a metropolitan area.<sup>151</sup> These “new-regionalist” proposals tend to advance the same goals as so-called “smart-growth” policies.<sup>152</sup> Both favor directing growth within a metropolitan area through a variety of planning mechanisms, including selectively channeling infrastructure subsidies to areas deemed appropriate for new growth, such as suburban infill projects. New regionalists argue that decisions about land use and infrastructure policy should be centralized to prevent fragmented local governments from making decisions that exacerbate regional inequities. In an example cited by Sheryll Cashin, between 1980 and 1990, Chicago’s growing, affluent northwest suburbs—home to forty percent of the region’s people—enjoyed the benefit of sixty percent of the regional highway expenditures.<sup>153</sup> In response to these disparities, new regionalists would take away local government’s power to make many fiscal decisions, including the decision to invest in new infrastructure. Jerry Frug’s “regional

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development”).

150. See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 134, at 8.

151. See, e.g., Briffault, *Local Government Boundary Problem*, *supra* note 9, at 1164–71 (arguing for regional general-purpose governments that would assume many governmental functions currently carried out by cities); Cashin, *supra* note 12, at 2034–47 (same); Ford, *supra* note 15, at 1909 (arguing that local boundaries should be maintained but made more porous by permitting cross-jurisdictional voting); Frug, *Decentering*, *supra* note 15, at 295 (proposing a regional legislature).

152. Smart-growth advocates and new regionalists tend to use different justifications for their policies. Smart-growth proponents seek to capitalize on popular aversion to suburban growth to advance their agenda, whereas new regionalists focus on the need to remedy intrametropolitan inequities. See, e.g., Cashin, *supra* note 12, at 2037–43 (noting the connection between regionalism and smart growth and stating that “environmental and quality of life issues offer a route to regionalism that may be more politically feasible . . . [and] that ultimately address issues of social and economic fairness”).

153. See Sheryll D. Cashin, *Public Subsidies and the Role of Suburbanization in Urban Economic Development: A Reply to Timothy Bates*, 14 *ECON. DEV. Q.* 242, 245 (2000).

legislature” would be charged with “the allocation of entitlements to local governments.”<sup>154</sup> Richard Ford would not only make local governments more “permeable” by giving outsiders a vote in local elections, but would also deprive cities of the right to distribute local revenues. Instead, “a state legislature or a regional administrative body could distribute [the revenues] according to egalitarian principles of need.”<sup>155</sup> Similarly, both Richard Briffault and Sheryll Cashin have argued in favor of regional, general-purpose governments with the authority to ensure an equitable distribution of revenues for physical infrastructure.<sup>156</sup>

Local governments in most metropolitan regions, however, have proven stubbornly resistant to arguments that they should surrender land use and infrastructure-planning authority in the name of interlocal equity. Important exceptions exist, but are rare.<sup>157</sup> For example, the decade-old political reorganization of Minnesota’s Twin Cities region is frequently applauded by both regional government and smart-growth proponents. Since 1994, the Metropolitan Council of the Twin Cities, or Met Council, has exercised all sewer, transit, and land use planning authority within the region.<sup>158</sup> The Met Council’s most important authority comes from its power to administer all sewer and transportation funds for the seven counties and 188 cities in the Minneapolis-St. Paul metropolitan area. At least theoretically, given the connection between infrastructure and suburban growth, this authority allows the Met Council to establish regional growth priorities and to remedy the excesses

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154. Frug, *Decentering*, *supra* note 15, at 296.

155. Ford, *supra* note 15, at 1910.

156. See Briffault, *Local Government Boundary Problem*, *supra* note 9, at 1166 (arguing that the “optimal metropolitan area government” must have, *inter alia*, the power to “collect and distribute [local] revenues in order to promote greater equalization of local fiscal capacity and local service quality” and to “provide regionwide physical infrastructure”); Cashin, *supra* note 12, at 2041–42 (endorsing Briffault’s proposal).

157. See, e.g., Cashin, *supra* note 12, at 2037–39 (discussing federally mandated infrastructure limits in Atlanta); Cashin, *supra* note 153, at 246 (discussing regional transportation authorities in Seattle and Portland). Regional special-purpose local government units, such as transportation authorities, provide some regionwide coordination in other metropolitan areas. See Gillette, *supra* note 12, at 204–06 (discussing costs and benefits of special purpose authorities). A handful of county-city government mergers also increase regional coordination. See BRIFFAULT & REYNOLDS, *supra* note 50, at 503 (noting that city-county consolidations “have been extremely rare”).

158. See ORFIELD, *supra* note 15, at 13.

and inequities of the previous system of fragmented authority.<sup>159</sup> Moreover, each municipality in the region is required to share a percentage of any annual growth in tax revenues, ostensibly to redistribute some of the benefits of the infrastructure investments received by growing communities.<sup>160</sup>

More recently, Maryland adopted a statewide infrastructure-based growth management program called the “Smart Growth and Neighborhood Conservation Initiative.”<sup>161</sup> Proponents bill the initiative as an “incentive-based” approach to growth: state funds for infrastructure are channeled into designated “Priority Funding Areas.”<sup>162</sup> Growth is not prohibited outside of these areas, but state infrastructure funding is withheld unless the local government demonstrates that proposed development meets certain state criteria, including a concurrency requirement. The Priority Funding Program accompanies a Rural Legacy Program, which provides state funds to landowners to purchase conservation easements to protect rural land from new development.<sup>163</sup>

### III. EQUITY AS EXCLUSION?

The new-regionalist and smart-growth literature frequently contrasts the fortunes of two types of local governments—sprawling fringe suburbs and struggling central cities—and two groups of metropolitan residents—*nouveau riche* McMansion owners and the urban poor.<sup>164</sup> Opponents of metropolitan fragmentation blame the bad fortune of cities and their residents on the selfishness of suburban governments and their “consumer voters.” They therefore champion policies that seek

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159. *Id.* at 135.

160. *See* Cashin, *supra* note 12, at 2036.

161. *See, e.g.*, Parris N. Glendening, *Maryland's Smart Growth Initiative: The Next Steps*, 29 *FORDHAM URB. L.J.* 1493, 1497–1502 (2002) (describing the Maryland program); J. Celeste Sakowicz, *Urban Sprawl: Florida's and Maryland's Approaches*, 19 *J. LAND USE & ENVTL. L.* 377, 408–18 (2004).

162. *See* Glendening, *supra* note 161, at 1497.

163. *See id.* at 1497–98.

164. *See, e.g.*, Buzbee, *supra* note 95, at 69 (asserting that “[e]ach decision by residential or commercial real estate developers to build on the urban periphery rather than invest in central urban areas contributes to the woes of the central city” and that this pattern “create[s] a predictable confluence of harms . . . [that] fall most directly on central city residents who often are people of color and are most economically vulnerable”); Lee Anne Fennell, *Homes Rule*, 112 *YALE L.J.* 617, 620–54 (2002) (providing account of the distributional consequences of metropolitan fragmentation).

to curb suburban growth—including the infrastructure limitations outlined above—as a way to improve the fortunes of cities and their poorest residents. These policies are initially appealing. If metropolitan fragmentation and suburban sprawl contributes to urban decline, then it seems self-evident that curbing growth will improve the fortunes of the urban poor. This superficially attractive palliate, however, overlooks an important distinction between central cities and their residents: residents can move; cities cannot.

There are at least two reasons why this distinction is important. First, the reality of metropolitan fragmentation means that most policies affecting the pace and scale of growth, such as impact fees and adequacy-of-public-facilities requirements, will be adopted by local governments with an incentive to exclude those of more moderate means. Infrastructure controls may simply enhance a local government's "fiscal zoning" toolbox. Dilworth's book illustrates, after all, that local governments have used infrastructure policy to manage their growth and identity for over a century. Second, even when imposed at the regional level—which is not likely to be a political reality in most places—infrastructure limitations, like all growth management techniques, still may limit intrametropolitan mobility by reducing the supply of affordable housing.

#### A. NEW INFRASTRUCTURE POLICIES AND COMMUNITY EXCLUSION

The tendency of local governments to use land use regulations to exclude less desirable residents is well-known. As William Fischel recently demonstrated, the home owners who tend to dominate local politics favor policies that maximize property values, including zoning policies that favor single family homes.<sup>165</sup> Because homeowners are "richer [and] whiter" than renters,<sup>166</sup> these policies tend to exacerbate existing intrametropolitan inequities. This fact is well understood by the new regionalists: exclusionary zoning frequently tops their list of the evils associated with metropolitan fragmentation. Exclusionary zoning and growth controls also contribute to suburban sprawl, both because exclusionary techniques (such as minimum lot size and square footage requirements) necessitate vast

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165. FISCHEL, *supra* note 10; *see also* Fennell, *supra* note 164, at 634–35 (discussing why homevoter dominance leads to exclusionary zoning).

166. Fennell, *supra* note 164, at 628.

amounts of land and because communities located on the urban fringe are generally more willing to accept land uses rejected by affluent “inner ring” suburbs. Older, wealthier suburbs exclude new development, especially of less desirable land uses, effectively pushing it outward to communities with more lenient land use policies. Over time, these newer communities seek to curb their growth, and the cycle of exclusion and invitation repeats itself. The result is the sprawling “leapfrog” style development that characterizes our municipal areas.<sup>167</sup>

Infrastructure limitations also can serve as a highly effective fiscal zoning tool. As the Advisory Commission on Regulatory Barriers to Affordable Housing warned more than a decade ago, “one of the most effective ways of limiting growth is to relate development to the availability of public services.”<sup>168</sup> For example, while some opponents of suburban growth criticized concurrency policies for encouraging overinvestment in infrastructure,<sup>169</sup> it is generally accepted that they are also used to slow or stop new development. The connection between impact fees and fiscal zoning is a more complicated one. A major study of impact-fee practices conducted in 1989, for example, found that communities generally do not consider impact fees to be the most effective exclusionary device.<sup>170</sup> Not surprisingly, therefore, many communities imposing fees also utilize other

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167. See Robert C. Ellickson, *Monitoring the Mayor: Will the New Information Technologies Make Local Officials More Responsible?*, 32 URB. LAW. 391, 399 (2000) (attributing urban sprawl to exclusionary zoning in established suburbs); Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 163–65 (2001) (reviewing literature). On the connection between growth controls and sprawl, see generally, for example, WILLIAM A. FISCHER, *DO GROWTH CONTROLS MATTER?* (1990) (discussing the connection between growth controls and sprawl). On the exclusionary effects and motives of growth controls, see generally, for example, Arthur C. Nelson et al., *The Link Between Growth Management and Housing Affordability: The Academic Evidence*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING 150–53 (Anthony Downs ed. 2004); Michael H. Schill, *Comment on Richard P. Voith & David L. Crawford*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING, *supra*, at 102–03; Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977) [hereinafter Ellickson, *Suburban Growth Controls*].

168. ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., “NOT IN MY BACKYARD”: REMOVING BARRIERS TO AFFORDABLE HOUSING 2-2 (1991), <http://www.huduser.org/Publications/pdf/NotInMyBackyard.pdf>.

169. See, e.g., Sakowicz, *supra* note 161, at 402; White & Paster, *supra* note 121, at 756.

170. See Joseph Gyourko, *Impact Fees, Exclusionary Zoning, and the Density of New Development*, 30 J. URB. ECON. 242 (1991).

growth-management devices.<sup>171</sup> Clearly exactions and impact fees can, and have, been used to exclude unwanted development.<sup>172</sup> The 1989 study also found those communities that do believe fees are effective exclusionary devices impose higher fees than communities that prefer other techniques.<sup>173</sup> Another study found that impact-fee use was highest in the lowest-growth and highest-growth communities. (The highest levels were found in the fastest growing communities.) The high levels of fees in high-growth communities obviously correlates with a need for new infrastructure. Since low-growth communities generally do not face these same demands, one explanation for the u-shaped pattern is that established communities use fees to maintain their exclusive status.<sup>174</sup>

#### B. IMPACT FEES AND HOUSING AFFORDABILITY

As Michael Schill recently observed, “[t]he Achilles’ heel of the ‘smart-growth’ movement is the impact that many of the proposals put forth by its advocates would have on affordable housing.”<sup>175</sup> This is certainly the case with respect to new infrastructure policies. Consider, for example, impact fees levied on a new suburban housing development. Even if the fees are not adopted for exclusionary purposes, they will still drive up housing costs if they are levied in excess of the benefits received by the housing consumer.<sup>176</sup> When levied in excess of the benefit received—as is frequently the case—impact fees will increase housing costs either directly or indirectly, depending upon whether the consumer, developer, or landowner bears the cost of the fee.<sup>177</sup> While housing consumers do not *always* pay im-

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171. See Been, *supra* note 128, at 146.

172. See, e.g., U.S. DEP’T OF HOUS. AND URBAN DEV., *supra* note 134, at 5 (arguing that smart-growth techniques, including impact fees, are used to exclude affordable housing); see also Been, *supra* note 128, at 146–47.

173. Gyourko, *supra* note 170, at 244 (noting that “there is a statistically significant positive correlation between the amount of the fee and the rating of its exclusionary strength” among cities imposing fees).

174. See Been, *supra* note 128, at 146–47.

175. Schill, *supra* note 167, at 102. This collection contains an excellent recent sampling of the voluminous literature on the connection between growth management and affordable housing.

176. See Been, *supra* note 128, at 148 (noting that consumers may benefit from impact fees if they are more efficient, i.e., cheaper, than taxes, special assessments or other funding mechanisms); Ellickson, *Suburban Growth Controls*, *supra* note 167, at 431–35 (discussing price effects of development charges under various economic conditions).

177. Whether the consumer, the developer, or the initial landowner bears

pact fees, they frequently do. It is obvious that housing developers will pass the cost of the fees onto housing consumers whenever possible, in which case the fees will act to directly increase the price of housing. But, even when the developer or landowner bears the cost of the fee, prices will still rise eventually because the amount of land developed will fall.<sup>178</sup> In any of these cases, the incidence of impact fees is regressive for the same reason that the property tax is regressive—wealthier individuals spend less of their net worth on housing than poorer ones.<sup>179</sup> Empirical studies of the price effects of impact fees demonstrate (unsurprisingly) that impact fees tend to raise the price of housing significantly.<sup>180</sup>

One obvious response to the concern that new infrastructure policies increase housing prices is that the true victims of fragmentation are the urban poor who have very little hope of moving to the suburbs. It is commonly asserted that these individuals are trapped in desperately poor, segregated inner-city communities.<sup>181</sup> As I have elsewhere argued, policymakers certainly should be cognizant of the way that local policies affect the lives of our most vulnerable citizens.<sup>182</sup> However, there are serious reasons to question accounts that suggest the poor have

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the incidence of impact fees depends on the elasticities of supply and demand for undeveloped land and new housing within a community. *See* Been, *supra* note 128, at 150–53.

178. *See* Mark Skidmore & Michael Peddle, *Do Development Impact Fees Reduce the Rate of Residential Development?*, 29 GROWTH & CHANGE 383, 392 (1998) (finding that introduction of impact fees correlated with a thirty percent reduction in the number of new homes built). *But see* Christopher J. Mayer & C. Tsurriel Somerville, *Land Use Regulation and New Construction*, 30 REGIONAL SCI. & URB. ECON. 639 (2000) (finding that impact fees did not reduce housing starts).

179. *See* Been, *supra* note 128, at 167.

180. *See, e.g.*, Jennifer S. Evans-Cowley et al., *The Effect of Development Impact Fees on Land Values*, 36 GROWTH & CHANGE 100 (2005); Keith R. Ihlanfeldt & Timothy M. Shaughnessy, *An Empirical Investigation of the Effects of Impact Fees on Housing and Land Markets*, 34 REGIONAL SCI. & URB. ECON. 639 (2004); Shishir Mathur et al., *The Effect of Impact Fees on the Price of New Single-family Housing*, 41 URB. STUD. 1303 (2004).

181. *See* Cashin, *supra* note 12, at 1987.

182. *See* Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1 (2004) [hereinafter Garnett, *Ordering*] (arguing that current property regulations may negatively affect the citizens of urban neighborhoods by hindering efforts to cure social disorder); Nicole Stelle Garnett, *The Road from Welfare to Work: Informal Transportation and the Urban Poor*, 38 HARV. J. ON LEGIS. 174 (2001) (arguing that policies prohibiting low-cost forms of private transportation limit welfare recipients' ability to find and maintain jobs).

nothing to lose (or everything to gain) from higher housing prices on the urban fringe.

First, Dilworth's history itself provides an important reminder that the story of suburban expansion is one of urban exodus. (Indeed, this exodus is a central problem with fragmentation, according to the new regionalists.) It is undoubtedly the case that many suburbs, including some of the ones that Dilworth describes, practiced primitive forms of exclusionary zoning even before zoning laws began to sweep the country in the 1920s. The connection drawn by East Orange, New Jersey between expensive infrastructure and exclusive identity, discussed above, is an early illustration of this phenomenon.<sup>183</sup> But other suburbs billed themselves as "workmen's paradises" and sought to use investments in public infrastructure to make suburban life accessible to the urban masses. For example, Dilworth describes the concern in Bayonne, New Jersey—a community that rejected annexation in order to remain suburban—that improvements were needed to attract the "mass of humanity" trapped in nearby New York.<sup>184</sup> Kenneth Jackson has also documented early efforts to relocate the urban poor to suburban areas where Progressives, somewhat patronizingly, believed they would lead healthier, more moral, and more "American" lives.<sup>185</sup>

There remain strong reasons to favor policies that enable the urban poor to relocate to the suburbs today. Importantly, the "spatial mismatch" between the center-city poor and service industry employment in the suburbs means that, in many cases, willing workers simply cannot get to available jobs, even when they know about them.<sup>186</sup> There are reasons to indict suburbanization for contributing to this mismatch, including the asserted connection between suburbanization and urban disinvestment and the fact that public transportation cannot efficiently serve low-density suburban development. It remains the case, however, that many poor people likely would be better

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183. See DILWORTH, *supra* note 1 at 136, 182.

184. *Id.* at 135–36.

185. JACKSON, *supra* note 11, at 116–37; see also, e.g., Richard H. Chused, Euclid's *Historical Imagery*, 51 CASE W. RES. L. REV. 597 (2001) (discussing Progressive ideology motivating zoning laws).

186. E.g., Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 797–808 (1991) (reviewing voluminous literature supporting this point).

off if they could move to the suburbs, where jobs are more plentiful, public schools are better, and neighborhoods are safer.

While significant economic and regulatory impediments continue to prevent many urban residents from moving to the suburbs, the situation is not hopeless. On the contrary, the 1990s witnessed promising and dramatic declines in concentrations of poverty. Evidence from Census 2000 indicates that both the absolute “number of high-poverty neighborhoods—census tracts with a poverty rate of forty percent” or higher—and the percentage of Americans living in these neighborhoods declined by roughly one-fourth in the 1990s.<sup>187</sup> The greatest decline in concentrated poverty was experienced by poor African Americans: the percentage of African Americans living in high-poverty neighborhoods fell from 30.4 percent to 18.6 percent.<sup>188</sup> American suburbs, interestingly, actually became poorer during this time period—a development that might be seen either as a hopeful indicator of the intrametropolitan mobility of the urban poor or as a harbinger of developing pockets of suburban poverty.<sup>189</sup>

The need for affordable housing in the suburbs has been made more acute because of the massive HOPE VI public-housing reforms, which fund the demolition of existing urban high-rise projects and their replacement with lower-density, mixed-income developments.<sup>190</sup> Because the existing units will not be replaced on a one-for-one basis, the program necessarily entails an increasing reliance on Section 8 Housing Mobility Vouchers. These HOPE VI projects are generally viewed as a success in the popular press.<sup>191</sup> Critics, however, assert that the

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187. Paul A. Jargowsky, *Stunning Progress, Hidden Problems: The Dramatic Decline of Concentrated Poverty in the 1990s*, in 2 REDEFINING URBAN AND SUBURBAN AMERICA 137, 142 (Alan Berube et al. eds., 2005).

188. *Id.* at 153.

189. See Alan Berube & William H. Frey, *A Decade of Mixed Blessings: Urban and Suburban Poverty in Census 2000*, in 2 REDEFINING URBAN AND SUBURBAN AMERICA 111, *supra* note 187, at 111.

190. See generally Patrick E. Clancy & Leo Quigley, *HOPE VI: A Vital Tool for Comprehensive Neighborhood Revitalization*, 8 GEO. J. ON POVERTY L. & POL'Y, 527 (2001) (describing and defending HOPE VI); U.S. DEPT OF HOUS. & URBAN DEV., HOPE VI PROGRAM AUTHORITY AND FUNDING HISTORY, <http://www.hud.gov/offices/pih/programs/ph/hope6/about/fundinghistory.pdf> (last visited Nov. 7, 2005) (noting Hope VI was immediate response to the Commission's findings).

191. For recent commentary, see Jeanette Almada, *Construction Begins on Roosevelt Square Project*, CHI. TRIB., Dec. 12, 2004, at 9; Ilene Lelchuk, *Back Home in North Beach: Residents of Project Glad to Return After Renovation*,

program “succeeds” by throwing out the neediest tenants, who are deprived of the resources that they need to secure housing and forced to resettle in equally dangerous and segregated communities.<sup>192</sup> Tenant-displacement studies tend to paint a more hopeful picture: displaced tenants tended to relocate to wealthier, more diverse neighborhoods—albeit to ones that remain relatively poor and segregated.<sup>193</sup> Because of the critical need for affordable housing in low-poverty areas, policies that may drive the up the price of housing in the suburbs may undercut the success of the HOPE VI and Section 8 programs.<sup>194</sup>

Finally, leaving aside the question of urban-suburban mobility, suburban developments also play an entirely different role in the provision of affordable housing. Many affordable housing units come available through what housing economists call “filtering.” Wealthier families in the U.S. tend to occupy new housing—hence, suburban sprawl. As housing stock ages,

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S.F. CHRON., Oct. 2, 2004, at B1; Brigid Schulte, *New Public Housing Courts Middle-Income Tenants; Chatham Square Replaces the Berg*, WASH. POST, Nov. 11, 2004, at T3; Eric Siegel, *For O'Malley, a Legacy in Improvement, Neighborhoods: The Mayor's Strength May Be in Rebuilding*, BALT. SUN, Sept. 16, 2004, at 2B; Leslie Williams, *Home Sweet Home: Old St. Thomas Site Blooms, City Officials Open River Garden*, TIMES-PICAYUNE (New Orleans), Nov. 17, 2004, Metro, at 1.

192. See, e.g., Michael S. FitzPatrick, *A Disaster in Every Generation: An Analysis of Hope VI: HUD's Newest Big Budget Development Plan*, 7 GEO. J. ON POVERTY L. & POL'Y 421 (2000) (summarizing these arguments); NAT'L HOUS. LAW PROJECT ET AL., FALSE HOPE: A CRITICAL ASSESSMENT OF THE HOPE VI PUBLIC HOUSING REDEVELOPMENT PROGRAM (2002), <http://www.nhlp.org/html/pubhsg/FalseHOPE.pdf>; NAT'L ALLIANCE OF HUD TENANTS & NAT'L PUB. HOUS. TENANTS ORG., REPORT ON THE LOSS OF SUBSIDIZED HOUSING IN THE U.S. (2002), [http://www.saveourhomes.org/Senate\\_Report.htm](http://www.saveourhomes.org/Senate_Report.htm) (summarizing data showing loss of subsidized housing attributable to HOPE VI).

193. See LARRY BURON, URB. INST., AN IMPROVED LIVING ENVIRONMENT? NEIGHBORHOOD OUTCOMES FOR HOPE VI RELOCATEES 1 (2004), [http://www.urban.org/UploadedPDF/311059\\_Roof\\_3.pdf](http://www.urban.org/UploadedPDF/311059_Roof_3.pdf) (“Our findings indicate that relocatees generally moved to neighborhoods with lower levels of poverty, slightly more racial diversity, and significantly less criminal activity.”); LARRY BURON ET AL., URB. INST., THE HOPE VI RESIDENT TRACKING STUDY 78–93 (2002), [http://www.urban.org/UploadedPDF/410591\\_HOPEVI\\_ResTrack.pdf](http://www.urban.org/UploadedPDF/410591_HOPEVI_ResTrack.pdf) (studying 818 households displaced by eight HOPE VI projects); SUSAN J. POPKIN, URB. INST., THE HOPE VI PROGRAM—WHAT ABOUT THE RESIDENTS? 1 (2002), [http://www.urban.org/UploadedPDF/310593\\_HopeVI.pdf](http://www.urban.org/UploadedPDF/310593_HopeVI.pdf) (“The studies paint a mixed picture, but on balance the story is generally positive. Many former residents now live in better housing in less poor neighborhoods.”).

194. See SUSAN J. POPKIN & MARY K. CUNNINGHAM, URB. INST., SEARCHING FOR RENTAL HOUSING WITH SECTION 8 IN THE CHICAGO REGION (2000), <http://www.urban.org/UploadedPDF/410314.pdf>.

wealthier owners move and their original homes tend to “filter down” to less-affluent individuals.<sup>195</sup> New housing developments (even of expensive homes) therefore foster the filtering process. If the chain of moves is disrupted—for example, because the price of new housing increases, leading wealthier individuals to remodel their existing home rather than move to new ones—the pool of affordable housing will be reduced. Several studies suggest that impact fees affect the market for affordable housing in this way, that is, to cause existing units to “filter up” to a less affordable market.<sup>196</sup>

### C. THE REGIONAL PLANNING PANACEA

None of this is to say that new regionalists do not understand these perils. On the contrary, concerns about the exclusionary effects of local land use policies are frequently cited as a primary reason why metropolitan infrastructure and planning authority should be centralized. New regionalists also understand the possibility that the kinds of policies they favor might negatively impact affordable housing opportunities. But again, centralized authority over infrastructure- and land use policy is cited as an antidote to the problem. Properly implemented, the argument goes, regional planning can minimize the regressive effects of, for example, policies that seek to “channel” and “internalize” infrastructure costs. New regionalists argue that in the best-case scenario, the careful implementation of other planning tools—linkage and inclusionary zoning, density bonuses, impact-fee waivers, and mixed-use zoning—actually may increase the supply of affordable housing.<sup>197</sup>

While there is simply not enough evidence to know whether affordability-promoting policies can effectively counteract the regressive effects of growth management,<sup>198</sup> there are a number of reasons to question the “perfect planning” corrective. First, policymakers may lack the political will to adopt effective affordability-promoting policies. For example, Americans’ preference for low-density development and opposition to sprawl might lead regional planners to favor growth controls to

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195. Ellickson, *supra* note 141, at 1184–85.

196. Been, *supra* note 128, at 165–66.

197. See, e.g., Richard P. Voith & David L. Crawford, *Smart Growth and Affordable Housing*, in *GROWTH MANAGEMENT & AFFORDABLE HOUSING*, *supra* note 167, at 82, 86–100.

198. See Been, *supra* note 128, at 168.

the exclusion of efforts that promote denser, more diverse, development.<sup>199</sup> Second, inclusionary zoning programs might themselves slow the filtering process and reduce the supply of affordable housing. Or, even if the effect on filtering is minimal, inclusionary zoning tends to provide a relatively small supply of housing for moderate-income, rather than poor, families.<sup>200</sup>

Third, regional planning that fails to address the regressivity problem actually may exacerbate the housing affordability crisis to an even greater extent than locally imposed growth limits. As Vicki Been has argued, competition between municipalities for development may provide an important political check on the price of exactions and impact fees.<sup>201</sup> But, the entire point of regional planning is to prevent this kind of competition by preventing local governments from either overpricing or underpricing new development within their jurisdiction. The housing-affordability concerns raised by regional planning proposals were highlighted during the 2002 election cycle, when statewide growth control initiatives were defeated by voters in Colorado and Arizona.<sup>202</sup> These proposals, which essentially would have mandated Portland-esque growth-boundary models, were wildly popular until housing developers and low-income housing advocates combined forces to oppose them. In Colorado, Habitat for Humanity took a public stand on an initiative for the first time in their history—expressing concerns that statewide planning would shrink the pool of affordable housing.

Fourth, infrastructure policies that seek to force new owners to internalize the cost of their mobility raise transitional fairness concerns. Public opinion polls consistently find that substantial majorities of both renters and owners believe that people are better-off owning their homes.<sup>203</sup> A majority of Americans also consider a single-family home in the suburbs to be the most attractive housing option and are willing to make

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199. See Garnett, *supra* note 167, at 161–64; Schill, *supra* note 167; see also Sakowicz, *supra* note 161, at 416 (raising this concern about Maryland program).

200. Ellickson, *supra* note 141, at 1194–96.

201. See Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 509–28 (1991).

202. See Garnett, *supra* note 167, at 165–76.

203. See Fennell, *supra* note 164, at 627; FANNIE MAE, THE GROWING DEMAND FOR HOUSING: 2002 NATIONAL HOUSING SURVEY, available at <http://www.fanniemae.com/global/pdf/media/survey/survey2002.pdf>.

significant financial sacrifices—and commute long distances—to live in one.<sup>204</sup> A number of commentators have questioned the fairness of asking newcomers to suburbia to pay directly, through impact fees, for infrastructure which was previously funded by tax revenues.<sup>205</sup> Regionally imposed impact fees may exacerbate these equity concerns for two reasons. First, if regionally imposed fees are excessive, and the overcharge is used as a supplementary revenue source, then existing homeowners in established suburbs will have succeeded in extracting rents from new homeowners in fringe suburbs. Second, even perfectly calibrated fees may signal to suburban newcomers that they are being required to “pay twice”—first to fund their own improvements directly and again through tax revenues for services provided to older homes.<sup>206</sup> (Locally imposed exactions may reduce this possibility to the extent that metropolitan fragmentation frequently guarantees that many neighbors are similarly situated.) These transitional fairness problems have both a generational and a racial component.<sup>207</sup> In 2004, Americans over the age of fifty-five were nearly twice as likely to own their homes as those under thirty-five (81 percent versus 43 percent).<sup>208</sup> Moreover, homeownership rates are highest for whites (75 percent), but minority homeownership rates continue to rise, with nearly half of all African Americans and Hispanics owning homes.<sup>209</sup> It would be unfortunate if new infrastructure policies had the effect of slowing these impressive gains.

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204. Garnett, *supra* note 167, at 177–78.

205. See *supra* Part II. The actual “fairness” of this situation depends on a number of factors, including, as discussed above, whether the property owner receives amenities equal to or exceeding the impact fee, the extent to which the fees reduce later tax burdens, etc.

206. On impact fees and transitional fairness, see Been, *supra* note 128, at 147; Reynolds, *supra* note 114, at 430–34. On the transitional fairness problem generally, see Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657 (1999).

207. See Been, *supra* note 128, at 166 (“If impact fees have a greater impact on first-time homebuyers, for example, that may have different impacts on racial minorities . . . because so many more Caucasians than minorities already own their own homes.”).

208. See U.S. Census Bureau, *Housing Vacancies and Homeownership Ann. Stat.: 2004*, Table 15, <http://www.census.gov/hhes/www/housing/hvs/annual04/ann04t15.html>.

209. See U.S. Census Bureau, *Housing Vacancies and Homeownership Ann. Stat.: 2004*, Table 20, <http://www.census.gov/hhes/www/housing/hvs/annual04/ann04t20.html>.

Finally, it is critical to consider how new-regionalist “channeling” priorities might affect the promising trend toward suburban racial diversity. Evidence from the 2000 Census shows that minorities comprise 27 percent of suburban populations (up from 19 percent a decade earlier).<sup>210</sup> The most diverse suburbs are found in western metropolitan areas which are characterized by the low-density, sprawling development that draws the ire of smart-growth proponents.<sup>211</sup> Moreover, the available data also suggests that it is important to increase the supply of “starter homes” in the suburbs because these new neighborhoods tend to be more racially diverse than older neighborhoods.<sup>212</sup> New-regionalist policies may well reduce these housing opportunities because “starter-home” developments are frequently located in the fast-growing communities on the urban fringe that fall low on the infrastructure priority list.

### CONCLUSION

By returning us to the time when the American metropolitan landscape was just unfolding, Richardson Dilworth provides a welcome opportunity to consider the relative merit of subsidizing suburban growth and suburban political autonomy through infrastructure policy. Over the past three decades, opponents of suburban growth have successfully fought to reverse decades of infrastructure policy in order to curb sprawl. More recently, the new regionalists have made a sophisticated case for using these new infrastructure strategies to address the ills associated with metropolitan fragmentation. This Essay has sought to examine the implications of infrastructure-based growth-management strategies for late-comers to American prosperity.

Admittedly, I have no grand plan to solve all of the problems associated with metropolitan fragmentation. But, as I have previously argued, it is critical for cities to evaluate how their *own* land use policies affect the health and vitality of ur-

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210. William H. Frey, *Melting Pot Suburbs: A Study of Suburban Diversity*, in 1 REDEFINING URBAN AND SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000, at 155, 155 (Bruce Katz & Robert E. Lang eds., 2003).

211. Racial diversity rose most sharply in so-called “Melting Pot metros” with large and growing Hispanic and Asian-American populations. *Id.* at 155–62. Southern cities have also experienced significant gains in minority suburbanization, largely attributable to Black migration to the suburbs.

212. Been, *supra* note 128, at 164.

ban communities.<sup>213</sup> There is a risk that the metropolitan fragmentation will give cities an excuse to avoid inward-looking reforms that may hold the most promise for urban regeneration as well as city-suburb cooperation. Dilworth's study emphasizes the danger of relying too heavily on the regional blame game. Suburbanites then, as now, resisted joining forces with their urban neighbors in part because of their justified concerns about the health and efficiency of urban governance. In his introduction and conclusion, Dilworth suggests that things might have been different. If only the Greater Newark movement had succeeded, for example, then our cities might not be struggling islands of dysfunction surrounded by a sea of selfish and wealthy municipal neighbors. The central difficulty with this argument is the fact that Dilworth's case studies tend to undermine it. While Dilworth presents evidence connecting infrastructure development and metropolitan fragmentation, he also makes fragmentation seem almost inevitable: as soon as the suburbanites that he studies could remain autonomous, they did.

When I read Dilworth's book, I experienced *déjà vu*. I live in an urban neighborhood in South Bend, Indiana, less than one mile from what remains of a once vibrant downtown. Over the past four decades, South Bend lost a sizable percentage of its population, while at the same time it grew geographically through annexation.<sup>214</sup> This is a common story for many "Rust Belt" cities, thanks in large part to the precipitous decline of the Midwestern industrial base and the out-migration of residents and businesses to surrounding suburban communities. But South Bend hardly has clean hands. For example, although sizable territorial gains have done nothing to stem the economic and population spiral, the city's main economic develop-

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213. See Garnett, *Ordering*, *supra* note 182; *accord*, JERRY J. SALAMAN ET AL., THE N.Y. UNIV. SCH. OF LAW CTR. FOR REAL ESTATE & URB. POL'Y, 1999 REPORT: REDUCING THE COST OF NEW HOUSING CONSTRUCTION IN NEW YORK CITY (1999), [http://www.law.nyu.edu/realestatecenter/CREUP\\_Papers/cost\\_study\\_1999/Summary.pdf](http://www.law.nyu.edu/realestatecenter/CREUP_Papers/cost_study_1999/Summary.pdf) (analyzing the regulatory impediments to new housing construction in New York City and concluding that regulatory reform could reduce rents charged by nearly 30 percent).

214. Between 1960 and 2000, the city population declined from 132,445 to 107,789. During this same time period, the city increased in size from twenty-four to thirty-nine square miles. Dep't of Cmty. & Econ. Dev., *City of S. Bend, City Plan*, <http://www.southbendcityplan.org/Plan.htm> (last visited Nov. 10, 2005).

ment strategy in past years has been annexation.<sup>215</sup> Interestingly, many of the area's wealthy residential subdivisions are located in unincorporated territory, where residents enjoy few city services. Despite the fact that the city would be obligated to provide services to these developments upon annexation—importantly, to replace well-and-septic with sewer-and-water systems—residents oppose annexation with such vehemence that they succeeded in securing a state legislative act prohibiting South Bend from annexing them.<sup>216</sup> South Bend is currently in the process of adopting a city plan. During this process, the city would do well to consider ways to make South Bend a better place to live—for example, amending the zoning code to permit more mixed-use development. These relatively small regulatory changes would not transform South Bend overnight, but they would begin to address why so many who can leave, do.

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215. See Dep't of Cmty. & Econ. Dev., *City of S. Bend, Annexation Policy and Plan*, <http://www.ci.south-bend.in.us/redevelopment/Community%20Branch/Annexation.htm#AnnexC> (last visited Nov. 10, 2005).

216. This law was recently invalidated as illegal "special legislation" burdening one municipality. *City of South Bend v. Kimsey*, 781 N.E.2d 683, 693–696 (Ind. 2003); cf. Frug, *City as a Legal Concept*, *supra* note 43, at 1116 (noting that special- or local-legislation bans were "designed to curb state efforts to control detailed city decisionmaking by specific legislation"). Communities like unincorporated Granger, Indiana—where many of my friends and colleagues live—are motivated by economics as much as or more than antiurban bias. Cf. Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1849 (2003) (describing low-density, "low-cost geographies" where wealthier residents move to lessen need for city services).