

The Rationale for Including Disadvantaged Communities in the Smart Growth Metropolitan Development Framework

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While *Brown v. Board of Education* marked the beginning of the end of de jure discrimination in American society,¹ the decision did not lead to de facto equality for African-Americans, Hispanics, and members of other disadvantaged groups. Notwithstanding the efforts of distinguished jurists such as Judge A. Leon Higginbotham, Jr., the economic disparities between blacks and whites actually increased in the aftermath of the *Brown* decision—especially for blue-collar workers.²

In the years since *Brown*, wealthy and middle-class white residents, as well as many businesses, left urban areas to relocate to surrounding suburbs.³ This exodus led to a vicious cycle of decline for older and poorer urban neighborhoods, producing an increase in unemployment⁴ and crime,⁵ as well as lower property values.⁶ This erosion of the urban tax base, in turn, resulted in the curtailment of municipal services and decreased funds for education in these

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“[I]n the field of public education the doctrine of ‘separate but equal’ has no place.”).

2. See JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* 479 (5th ed. 1980) (stating that, during this period, unemployment rates for African-Americans were more than double that of whites).

3. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY UNDERCLASS AND PUBLIC POLICY* 121 (1987) (claiming that manufacturing industries are relocating from older central cities to suburbs and to other parts of the country). Between 1990 and 2000, over one million white, non-Hispanic residents moved out of the nation's five largest cities, and the non-white percentage of the population in these cities decreased from 52% to 44%. CTR. ON URBAN AND METRO. POLICY, BROOKINGS INST., *RACIAL CHANGE IN THE NATION'S LARGEST CITIES: EVIDENCE FROM THE 2000 CENSUS*, at <http://www.brook.edu/dybdocroot/es/urban/census/citygrowth.htm> (Apr. 2001).

4. From 1960 to 1980, the black male population nearly doubled from 5.6 million to 10.7 million, but the number of employed black men increased from 4.15 million to only 5.94 million, adding 3.5 million men to the ranks of the unemployed. LESLIE W. DUNBAR, *MINORITY REPORT: WHAT HAS HAPPENED TO BLACKS, HISPANICS, AND THE AMERICAN INDIANS, AND OTHER MINORITIES IN THE EIGHTIES* 41 (1984).

5. See WILSON, *supra* note 3, at 22 (asserting that blacks only constitute 13% of the population in cities but account for half of all arrests for violent crime) (citing U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS FOR THE UNITED STATES, 1984* (1985)).

6. For example, although gentrified neighborhoods in Minneapolis increased in value between 1988 and 1993, buildings in ghetto neighborhoods lost one-fifth their value, while the value of buildings in transitional areas decreased by 10%. See MYRON ORFIELD, *METROPOLITICS* 63 (1997).

areas. This reduction of services made conditions in the inner cities worse, encouraging even more residents to leave, thus perpetuating the cycle of decline.⁷ The fact that white middle-class citizens often moved to more automobile-dependent, low-density communities along the rural periphery or fringe areas further isolated poorer, racially-diverse communities.

One of the primary causes of the mass exodus that led to center-city decline is the marketplace distortion caused by county, state, and federal government investments that encourage development of “fringe” areas outside of inner cities.⁸ Although massive shifts in the economic organization of regional economies are significant factors in the decline of center cities,⁹ these massive state and federal subsidies and investments in infrastructure (such as roads, sewers, and waterlines) have greatly aided the flight from urban centers and older suburbs, and intensified inequalities.¹⁰ These subsidies and investments tend to benefit wealthier citizens who can afford to move to the outlying communities,¹¹ and help draw businesses and jobs away from center cities and inner suburbs, disproportionately impacting minorities.¹²

One recent study from the University of Illinois at Chicago found that while the Chicago urban area received more governmental expenditures oriented toward consumption,¹³ communities in outlying suburbs received larger levels of wealth-building assistance related to infrastructure and housing.¹⁴ Although the study found that the outer suburbs actually received less per capita federal expenditures than the urbanized area (\$2744 versus \$5350), it also found that the suburbs benefitted more from a higher level of assistance related to capital accumulation (e.g., housing, roads, public transit).¹⁵ This capital-based assistance

7. *Id.*

8. These new outlying communities tend to be built on natural habitats or greenfields. Ctr. for Watershed Prot., *The Economics of Urban Sprawl*, 2 WATER PROT. TECHS. 461, 461 (1997).

9. Regions are shifting from goods-producing to service-producing economies. Manufacturing industries have relocated from center cities to the suburbs, which has “been especially devastating for low-income blacks and other minorities because these groups are concentrated in the central areas that have been hardest hit by economic dislocation.” WILSON, *supra* note 3, at 121.

10. KAID BENFIELD ET AL., NAT. RES. DEF. COUNCIL, ONCE THERE WERE GREENFIELDS 106 (1999).

11. John Powell, *Addressing Regional Dilemmas for Minority Communities*, in REFLECTIONS ON REGIONALISM 218, 228 (Bruce Katz ed., 2000) (discussing the hypothesis that while the wealthiest whites benefit from sprawl, poorer whites do not).

12. WILSON, *supra* note 3, at 121 (documenting the disproportionate impact of central city job losses on minorities).

13. Consumption-based governmental assistance includes medical assistance, redistributional grants, food stamps, unemployment, and Supplemental Social Security, while wealth-accumulating assistance consists of highway grants, public transit, other infrastructure, income tax subsidy for housing, environment assistance, and disaster relief. JOSEPH PERSKY & HAYDAR KURBAN, BROOKINGS INST., DO FEDERAL FUNDS BETTER SUPPORT CITIES OR SUBURBS?: A SPATIAL ANALYSIS OF FEDERAL SPENDING IN THE CHICAGO METROPOLIS 7 (2001), available at <http://www.brook.edu/dybdocroot/es/urban/publications/persky.pdf> (last references Apr. 15, 2002).

14. *See id.*

15. The tax subsidy for housing was shown to contribute to the largest disparity between center cities and outlying suburbs. “A suburban family of four receives about \$2,200 per year while a city family of four receives about \$500. . . . The richest third of municipalities have an average subsidy of

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reduces the cost of greenfield development, helps fuel inequalities of wealth, and indirectly subsidizes the flow of residents and businesses further away from the center cities. This increases inequalities and potentially fuels the need for more government transfers.

Government investments and subsidies add great value to outer ring communities while inner cities stagnate. According to the Natural Resources Defense Council, sprawling development rarely generates sufficient revenues from taxes and traditional fees to cover the cost of providing services, which means that the remaining taxpayers (from outside these areas) and users of infrastructure have to cover these unmet infrastructure costs.¹⁶ Thus, the infrastructure of new outlying developments are paid for by taxes and fees levied on residents and businesses in older parts of the city.¹⁷ This obviously reduces the chances for disadvantaged groups to obtain socioeconomic equity.

Government policies regarding utility rates can also exacerbate social inequalities. Providing utility services to poor, inner-city residents is often cheaper than providing it to residents of outlying communities, because people in those areas live farther away from each other and so require the creation and maintenance of more infrastructure. Nonetheless, the government often requires that urban and non-urban residents pay the same rates for utilities.¹⁸

In this Article, I argue that the government's past focus on largely white, suburban areas in its investments and infrastructure and housing subsidies not only had a disparate impact on urban and inner suburban¹⁹ communities,²⁰ but also led to environmentally-damaging outcomes and fiscal decline. By expanding the range of Smart Growth programs, we can further the cause of civil rights while promoting environmental justice. Part I explains the discriminatory impact of the government's current funding priorities for development, as well as their negative impact for the environment. Part II introduces the concept of "Smart Growth," and explains why funding priorities should increasingly focus on Smart Growth factors. This policy shift will not only counter environmental degradation, traceable to distorted incentive schemes that encourage environmentally harmful development, but also be more equitable to disadvantaged

almost \$4000 per family of four." *Id.* at 15. Since the land supply for sprawling homes is bountiful, this tax subsidy reduces the real cost of acquisition and results in savings for sprawling homeowners. For center-city residents, the tax does not result in an equal level of savings per benefit dollar. *See id.*

16. *See* BENFIELD ET AL., *supra* note 10, at 106.

17. *See* MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 63 (1997).

18. *See, e.g.*, MICHAEL L. SIEGEL, THE EFFECTS OF LAND USE ON UTILITY SERVICE COSTS, AND GEOGRAPHICALLY-SENSITIVE USER RATES 3 (1998) ("Lack of density and economy of scale variables" mean that a "Cleveland Division of Water (CDOW) rate structure likely exacerbates regional income disparities, as it can cause communities with lower per capita incomes and higher poverty rates to subsidize service to those with higher incomes and lower poverty rates.").

19. An "inner suburb" or "inner suburban community" is a community close to center city. *See* ORFIELD, *supra* note 17 at 21.

20. *See id.* at 63.

groups and people of color. Part II also explores the degree to which the current framework of statutes and executive orders is amenable to the implementation of Smart Growth principles. Part III examines specific ways in which these principles can be implemented. Part IV concludes.

Improving the social welfare of citizens of disadvantaged communities requires more than formal civil rights protections—it requires a nuts and bolts strategy of tackling broader and entrenched environmental and economic problems. These issues must be addressed in federal and state appropriations committees, county and metropolitan planning boards, local and state taxing and finance authorities, economic development and planning offices, public works districts, and other entities that have been directing the flow of investments and other financial resources outside of declining metropolitan communities.

I. THE DETRIMENTAL CONSEQUENCES OF STATE AND FEDERAL FUNDING POLICIES FOR DEVELOPMENT ON THE ENVIRONMENT AND THE POOR.

In this Part, I review and critique the approach to development funding currently employed by the federal government and many states. Section A discusses how extant policies have led to inequities that harm racial minorities and the poor. Section B describes how these policies harm the environment as well.

A. *Development Funding and the Poor*

The mantra against central cities and older declining areas is that they are dependent on government subsidies. This assertion ignores the government's ongoing role in averting resources away from cities and declining neighborhoods in favor of more affluent suburbs. In this Section, I focus on four types of government programs—mortgage subsidies and insurance, tax deductions, transportation subsidies, and infrastructure subsidies—to demonstrate how they have had a discriminatory impact against low-income inner-city/inner-suburban groups.

1. *Mortgage Subsidies and Insurance*

The federal government has played a significant role in financing mortgages, to the disadvantage of older, poorer, ethnically diverse communities. The increased availability of mortgages has led to a greater demand for housing outside of urban areas, drawing families away from existing communities and eroding cities' tax bases.²¹ Between 1933 and 1935, the government-run Home

21. "Of those living in concentrated poverty, more than half are black (despite the fact that blacks make up only 12 percent of the national population) and one-fourth are Hispanic." Powell, *supra* note 11, at 224. Most telling in terms of a declining tax base is that "between 1970 and 1990, there was a 69.7% increase in the number of blacks in neighborhoods of concentrated poverty, despite the fact that

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Owner Loan Corporation (HOLC) supplied over \$3 billion for more than a million mortgages or loans, a large proportion of which was for owner-occupied housing.²²

These funds were provided in such a way as to facilitate outward expansion, away from inner cities. The Federal Housing Administration (FHA) directly influenced the exodus from cities to the suburbs by grading communities within or near declining areas as uninsurable. HOLC devised an appraisal process that “undervalued neighborhoods that were dense, mixed-use or aging.”²³ This process excluded neighborhoods with large Jewish populations, and gave black communities the lowest grade. As a result of this biased appraisal process, private sector loans were disproportionately channeled to white, suburban areas.²⁴

Another FHA policy that discriminated against inner city minorities focused on enabling families to purchase single-family homes. The FHA did not finance mixed-use or multi-unit housing, which are the most typical forms of housing in center cities. Between 1936 and 1972, FHA had helped nearly eleven million families buy homes, yet it insured only 1.8 million multi-family projects.²⁵ Moreover, FHA loans for home repair were insufficient to support rehabilitation of existing properties.²⁶ As a result, FHA insurance tended to go to new residential developments on the edges of metropolitan areas, to the neglect of city cores. Perhaps most disturbingly, in an attempt to preserve property market values, FHA recommended in its underwriting manual the inclusion of restrictive covenants in deeds to exclude resale to minorities.²⁷

2. Tax Deductions

Allowing families to deduct the amount of their local property taxes from their taxable income effectively provides wealthy communities with a greater subsidy for financing local services, such as education, than poorer communities receive.²⁸ The tax deductions also create non-market influences over consumers by dramatically reducing the cost of homeownership relative to apartment living. Brownfields redevelopments, which are often amenable to mixed-use developments, are potentially harmed by this tax system bias.

the national poverty rate for African Americans was the lowest ever.” This suggests severe impacts from sprawl increasing social and economic isolation. *Id.*

22. KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 196-98* (1985).

23. *Id.* at 197.

24. *Id.* at 197-98; Powell, *supra* note 11, at 224 (“[T]he loan corporation (HOLC) channeled mortgage funds to white, outlying neighborhoods.”).

25. See JACKSON, *supra* note 22, at 205.

26. *Id.* at 205-06.

27. JACKSON, *supra* note 22, at 208-09 (on the use of restrictive covenants); Powell, *supra* note 11, at 224.

28. See I.R.C. § 25(a)-(b) (1994).

The federal government also allows homeowners to deduct mortgage payments from their taxable income.²⁹ The combined property tax and mortgage interest deduction, according to Federal Reserve Bank economist Richard Voith, decreases the after-tax cost of housing by 15% and, more importantly, reduces residential density, on average, by 15%.³⁰ This means that the tax intensifies the preference for large-lot low-density developments, thereby increasing pressure on metropolitan sprawl.

Until 1997, the tax code also gave homeowners significant financial disincentives regarding the proceeds of the sale of their homes.³¹ The only way for homeowners to rollover the capital gains from the sale of their homes was to purchase a newer, larger, and more expensive home, often in the suburbs.³² This tended to diminish demand for existing properties, infill developments, and rehabilitated lower-cost housing in older inner suburbs or center cities.³³ The 1997 Tax Relief Act removed this capital gains rollover provision.³⁴

3. *Transportation Subsidies*

The over-emphasis on funding highway construction has reduced access to job opportunities for our most vulnerable and poor citizens. In a twenty-year span, \$1 trillion was invested in a vast system of highways; suburbs received a much greater share of highway funding than cities.³⁵ The Federal Highway Administration's Committee on Oversight of State-Reported Motor Fuel Data, which met May 2001, concluded, "In total, about \$12 billion in Federal-aid funds are distributed based on motor fuel data."³⁶

Highway construction is a hidden subsidy to motorists, encouraging longer commutes and more auto-dependent communities. Although user fees (tolls) are often charged, according to most studies they are insufficient to cover construction and maintenance costs.³⁷ More road construction means more devel-

29. See I.R.C. § 163(a) (1994).

30. Richard Voith, *Does the Federal Tax Treatment of Housing Affect the Pattern of Metropolitan Development?*, BUS. R., Mar./Apr. 1999, at 10.

31. See I.R.C. § 1034 (1994).

32. ENVTL L. INST., LINKING TAX LAW AND SUSTAINABLE URBAN DEVELOPMENT: THE TAX PAYER RELIEF ACT OF 1997, 7-9 (1998).

33. *Id.* at i, 1.

34. See I.R.C. § 121 (1994).

35. *Urban Sprawl: Not Quite the Monster They Call It*, ECONOMIST, Aug. 21, 1999, at 25.

36. Office of Highway Policy Info, U.S. Dep't of Trans., *FHWA Committee on Oversight of State-Reported Fuel Data Met In May*, HIGHWAY INFO. Q., June 2001, at 1, available at <http://www.fhwa.dot.gov/ohim/hijun01.htm> (last visited Apr. 2, 2002).

37. BENFIELD ET AL., *supra* note 10, at 110 ("Impact Fees do not cover many of the costs imposed by sprawl;" they "cannot be used to cover the staggering costs of maintenance and repairing the existing infrastructure."); see also NELSON ARTHUR & DUNCAN JAMES, GROWTH MANAGEMENT PRINCIPLES AND PRACTICES 122 (1995) ("Impact fees have been used to finance a variety of public services" including "water, wastewater, roads, parks, fire, protection, law enforcement, beach, electric power, . . . [and] stormwater.").

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opment, which further increases the demand for roads;³⁸ it is a cycle that ensures that the government's attention and resources are continuously diverted away from inner cities. Indeed, funds used for roads are funds that are diverted away from inner suburbs and center cities. In addition, increased emissions caused by increasing trends in vehicle miles traveled (VMT) or increased vehicle trips (VT) could threaten to reduce future benefits from the Clean Air Act.³⁹

4. *Infrastructure Subsidies*

Government funding for sewers, parks, and schools influences private investment decisions. Grant programs and revolving loan funds⁴⁰ supporting the development of new water and sewer facilities influence private real-estate markets toward ex-urban development. For example, federal investments in wastewater systems from 1972 to 1990 totaled more than \$60 billion.⁴¹ A recent estimate is that the combined federal, state, and local contributions totaled \$250 billion since 1970.⁴² Again, these funds are available primarily for building new infrastructure rather than for operation or maintenance of existing infrastructure. This encourages growth away from under-utilized properties in disadvantaged communities with abandoned properties that have potential environmental liabilities. By supporting growth along the outlying or underdeveloped periphery areas of metropolitan regions, sprawl and urban decline continue.

Such growth patterns tend to be very inefficient. For example, energy efficiency obtained from district networks of heat, cooling, and co-generation is better served by clustered or more densely populated urban development⁴³ than

38. Donald T. Chen, *If You Build It, They Will Come: Why We Can't Build Ourselves Out of Congestion*, PROGRESS, Mar. 1998, at 4, available at <http://www.transact.org/Progress/mar98/build.htm> (last referenced Apr. 15, 2002).

39. EPA, OUR BUILT AND NATURAL ENVIRONMENTS: A TECHNICAL REVIEW OF THE INTERACTIONS BETWEEN LAND USE, TRANSPORTATION, AND ENVIRONMENTAL QUALITY 26 (2001).

40. See, e.g., 33 U.S.C. § 1301 (1994) (establishing a revolving loan fund for sewer treatment facilities).

41. Nikos D. Singelis, Financing Priority Watershed Projects with the State Revolving Fund (June 8, 1996), available at <http://www.epa.gov/OWOW/watershed/Proceed/singelis.html> (last visited Apr. 1, 2002).

42. Congress has appropriated approximately \$100 billion to EPA to provide funding through the Construction Grants program, Clean Water State Revolving Loan Funds (SRFs), and other programs. State and local governments have contributed the remaining \$150 billion, primarily from revenues received from local ratepayers. See STAFF OF HOUSE SUBCOMM. ON WATER RES. AND ENV'T, 107TH CONG., WATER INFRASTRUCTURE NEEDS (2001), available at <http://www.house.gov/transportation/water/03-28-01/03-28-01memo.html#BACKGROUND> (last visited Apr. 1, 2002).

43. District energy systems distribute steam, hot water, and sometimes chilled water from a central plant to individual buildings through a network of pipes. "In high-density areas, district energy is usually more economical and energy-efficient than individual heating and cooling systems. . . especially when district energy plants include combined heat and power." These systems achieve energy efficiencies of 60 to 90 percent, which emits less greenhouse gas emissions. STATE AND LOCAL CLIMATE CHANGE PROGRAM, EPA, CLIMATE CHANGE TECHNOLOGIES: COMBINED HEAT AND POWER (Jan. 2000), available at

other forms, such as sprawling, low-density development. Sprawling development patterns require expensive investments in sewer, water, and road extensions.⁴⁴

In addition to being inefficient and draining resources that would otherwise be available to inner cities, low-density developments actually deprive poor disadvantaged groups of their limited financial resources through cross-subsidization, or “average cost pricing.” As noted earlier, all customers pay average costs, which means that total costs are divided equally among service recipient regardless of the marginal or incremental cost of providing the service.⁴⁵ Residents in more urban, higher-density areas subsidize those on the fringe under this arrangement. A recent Florida study of utility costs by development type found that it may cost more than twice as much to service utilities in low-density developments.⁴⁶

B. *Development Funding and the Environment*

Poorly-planned sprawl development affects not only the poor, but also many aspects of environmental quality. For instance, sprawl can have severe effects on water quality. When watershed development exceeds 10 to 15% “impervious cover,”⁴⁷ it is extremely difficult to maintain pre-development stream quality. According to data from the National Water Quality Inventory:⁴⁸

- ◆ 38% of assessed estuary miles are impaired⁴⁹ from meeting beneficial uses, with 46% of this impairment attributable to urban runoff
- ◆ 36% of river miles are impaired, with 12% affected by urban runoff
- ◆ 39% of lake acres are impaired, with 21% of the impairment caused by urban runoff
- ◆ 13% of assessed ocean shorelines are impaired, with 55% of the impairment due to urban runoff through storm sewers⁵⁰

<http://www.epa.gov/globalwarming/publications/outreach/technology/combinedheatandpower.pdf> (last visited Apr. 1, 2002).

44. SIEGEL, *supra* note 18, at 14-16.

45. ARTHUR & JAMES, *supra* note 37, at 113.

46. SIEGEL, *supra* note 18, at 1, 3.

47. “Imperious cover” includes pavement, roofs, and roads, and allows polluted water from run-off into streams; it can also increase water temperature. See *The Importance of Imperviousness*, in THE PRACTICE OF WATERSHED PROTECTION 9 (Thomas R. Schueler & Heather K. Holland eds., 2000), available at <http://www.stormwatercenter.net/Practice/1-importance%20of%20Imperviousness.pdf> (last visited Apr. 1, 2002).

48. To assess water quality, states and other jurisdictions compare monitoring results to the water quality standards that have been set for their waters. Section 305(b) of the Clean Water Act establishes the Water Quality Inventory Report, which contains information from each state on the quality of rivers, lakes, wetlands, estuaries, coastal waters, and ground water. See OFFICE OF WATER, EPA, THE QUALITY OF OUR NATION’S WATER, available at <http://www.epa.gov/owow/305b> (last visited Apr. 1, 2002).

49. For an explanation of the causes of water contamination and impairment, see OFFICE OF WATER, EPA, 1998 SECTION 303(D) LIST FACT SHEET: NATIONAL PICTURE OF IMPAIRED WATERS, available at <http://www.epa.gov/owow/tmdl/states/national.html> (last visited Apr. 1, 2002).

50. EPA, *supra* note 39, at 14-15. The Clean Water Act, 33 U.S.C. § 1251(a), addresses impaired

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Stormwater runoff costs the commercial fish industry \$17-31 million per year in environmental damage to adjoining communities. Pollution of water supplies induced the New York City's Catskill Delaware System to spend \$4.57 billion on a new filtration system that will increase drinking water bills by 45%.⁵¹

Development also has adverse effects on the atmosphere, largely due to increased automobile emissions; emissions from increased vehicle miles traveled (VMT) contribute greatly to air pollution nationwide and are the primary cause of air pollution in many urban areas. Sprawl-induced automobile dependency has also increased emissions of several harmful gases.⁵² Transportation sources emit 56% of U.S. emissions of nitrogen oxide, 77% of carbon monoxide, 47% of the volatile organic compounds, and 25% of particulate matter.⁵³ Mobile sources also produce several other important air pollutants, such as carcinogenic air toxics and greenhouse gases.⁵⁴ The estimated annual costs of this motor vehicle-based pollution are huge, ranging from under \$30 billion to over \$500 billion in increased health care costs, \$2.5 to \$4.6 billion in crop damage, and \$6.0 to \$43.54 billion in damage to visibility.⁵⁵

Other damages from sprawl include breaking up or fragmenting stretches of pristine habitats and wildlife and reductions in the abundance and diversity of bird species.⁵⁶ Researchers have found that smart growth development, discussed later in this article,⁵⁷ would reduce consumption of fragile lands by almost one-fifth.⁵⁸ According to Congressional Testimony by the former Acting Assistant Administrator of the EPA:

97 million people live in areas that do not meet the health based 1 hour ozone standard according to 1997 to 1999 data. Reducing ozone levels will result in fewer

waters. The objective of this section is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters. . . . [W]herever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." *Id.*

51. George Aponte Clark & Nancy Stoner, *Stormwater Strategies: The Economic Advantage*, 2 STORMWATER 10, 11 (2001), available at http://www.forester.net/sw_0101_stormwater.html (last visited Mar. 1, 2002).

52. These gases include carbon monoxide, nitrogen monoxide, nitrogen dioxide, ozone, sulfur dioxide, precursors to ozone, volatile organic compounds, and nitrogen. The amount of harmful particulate matter in the atmosphere also increases as a result. EPA, *supra* note 39, at 25.

53. Hearing Before the Senate Comm. on the Env't and Pub. Works, 107th Cong. (2001) (testimony of Robert Brenner, Acting Assistant Administrator, EPA), available at http://www.senate.gov/~epw/brenner_0801.htm (last visited Apr. 14, 2002).

54. *Id.* at 28.

55. *Id.* at 29.

56. EPA, *supra* note 39, at 29.

57. See discussion *infra* Part II.

58. ROBERT W. BURCHELL & DAVID LISTOKIN, LAND, INFRASTRUCTURE, HOUSING COSTS AND FISCAL IMPACTS ASSOCIATED WITH GROWTH 9 (1996); see also The Endangered Species Act, 16 U.S.C. § 1531 (1994) (recognizing that various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation).

hospitalizations, emergency room and doctors visits for asthmatics, significantly fewer incidents of lung inflammation for at risk populations, and significant fewer of moderate to severe respiratory symptoms in children.⁵⁹

Given the harmful social and environmental effects of unlimited sprawl, government funding should not provide incentives for it.

II. THE VIRTUES OF SMART GROWTH

Having explored the deleterious social and environmental consequences of the government's current policies toward growth and development, this Part examines the benefits offered by a Smart Growth approach to development. I argue that government incentive programs, in particular overt and hidden subsidies, should be tailored toward encouraging Smart Growth and reducing non-market incentives for sprawl and decreasing density.

A Smart Growth policy is one built upon the following principles:

- ◆ Offering a range of housing choices for all income levels;
- ◆ Combining different land uses (e.g. commercial and residential);
- ◆ Encouraging new growth into existing communities;
- ◆ Designing communities to support increased transportation choices (e.g. walking, transit); and
- ◆ Utilizing existing infrastructure.⁶⁰

The fiscal benefits of Smart Growth policies which encourage clustered, compact, or denser mixed-use developments are substantial. Under current sprawl-inducing policies, capital facility costs are 60% more expensive, school facilities are over 7% higher, and utilities are approximately 40% more costly than under a Smart Growth scenario.⁶¹

Smart Growth can be viewed as an attempt to help level the playing field by directing investment back to the communities most affected by sprawl—communities which tend to be of color and with underutilized properties and unused infrastructure capacity. Due to the departure of businesses from urban centers, the location efficiencies these places have to offer are largely untapped.⁶² In fact, benefits from luring development back to cities have been dubbed the “urban competitive” advantage.⁶³ One study found that inner city communities, a mere subset of urban or center city areas, have an unmet market

59. *The Impact of Air Emissions from the Transportation Sector on Public Health and the Environment: Hearing Before the Senate Comm. on the Env't*, 107th Cong. 406 (2001) (statement of Robert Brenner, Acting Assistant Administrator, EPA).

60. See Smart Growth Network, *Principles of Smart Growth*, at <http://www.smartgrowth.org/about/principles/default> (last visited Mar. 1, 2002).

61. ROBERT W. BURCHELL & NAVEED A. SHAD, *THE COSTS OF SPRAWL VERSUS COMPACT DEVELOPMENT* 12 (1998).

62. Michael E. Porter, *The Competitive Advantage of the Inner City*, HARV. BUS. REV., May-June 1995, at 55, 55.

63. *Id.* at 56.

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potential of \$85 billion dollars.⁶⁴ From 1995 to 2020, Florida could enjoy \$6.15 billion in individual and government savings by fostering compact development—a Smart Growth policy.⁶⁵ In addition, assets such as a ready supply of untapped labor, strategic access to key industries and markets, and transportation make many inner cities potentially powerful places for businesses to expand. Meanwhile, development along the fringe—which threatens greenspace, endangers sensitive ecosystems, and impairs water quality—is becoming less profitable.⁶⁶

This policy framework is also extremely compatible with the objectives of civil rights. By strengthening existing communities instead of encouraging fringe development, providing greater transit and housing choice, and making development decisions fair and cost-effective, policies based on Smart Growth principles will provide greater opportunities for economic and social mobility to low-income and disadvantaged communities.⁶⁷

Thus, the effects of current inequitable practices and policies could be reversed by Smart Growth policies that direct resources back to underutilized infrastructure, avert greenfield redevelopment, clean up abandoned industrial properties, and redevelop poorly-maintained properties.

Several federal statutes and executive orders recognize Smart Growth principles. The National Environmental Policy Act (NEPA) of 1969, for example, requires public disclosure of adverse environmental impacts of new developments.⁶⁸ The Act's public participation and disclosure requirements reflect smart growth and environmental justice objectives. Executive Order 12,898 coordinates environmental justice activities and strategies across many Departments and agencies, thereby establishing environmental justice as a national priority.⁶⁹ The Order focuses federal attention on the environmental and health conditions of minority and low-income populations. Even Executive Order 12,866, the Clinton Administration outline for cost/benefit evaluation of regulatory action, explicitly includes distributive and environmental justice among

64. Boston Consulting Group, *The Business Case for Pursuing Retail Opportunities for the Inner City* 3-5 (June 1998), available at http://www.icic.org/research/pubs_and_studies.html (last visited Mar. 1, 2002).

65. ROBERT BURCHELL ET AL., *EASTWARD HO! DEVELOPMENT FUTURES: PATHS TO GROWTH* 210 (1998)

66. *Id.*

67. See ENVTL L. INST., *supra* note 32.

68. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (1994). The statute states, in part, that for "major Federal actions significantly affecting the quality of the human environment," the federal agency must prepare a detailed environmental impact statement (EIS) that assesses the proposed action and alternatives. NEPA requires EISs to be broad in scope, addressing the full range of potential effects of the proposed action on human health and the environment.

69. Exec. Order No. 12898, 3 C.F.R. 59 (1994). The Order requires that "each Federal agency [unless excepted by the President] shall develop an agency-wide environmental justice strategy . . . that identifies and addresses disproportionately high human health or environmental effects of its programs, policies, or activities on minority populations and low-income populations."

cognizable “benefits” to society.⁷⁰ Title VI of the Civil Rights Act of 1964 bans the denial of federal funds or of access to federally-funded programs “on the ground of race, color, or national origin.”⁷¹ Title VI could also be viewed as a prescription for the implementation of sustainable development practices that promise to reduce the disproportionate effects of damaging sprawl development on certain communities. Read in the light of NEPA and later regulations, Title VI implies that the Environmental Protection Agency has a legal basis for incorporating environmental equity and justice into considerations into its policymaking.

III. PRACTICAL WAYS TO IMPLEMENT SMART GROWTH

The challenge is to redevelop inner-city communities and reduce the benefits of investing in outlying areas, new developments, and suburban communities. Several opportunities exist under current law to tap into new sources of funds and to re-engineer financial priorities to achieve a more efficient balance between development of the core communities and of outlying fringe areas.

A. *Cleanups Under the Brownfields Act*

The new Brownfields Act provides up to \$200 million in program budget authority for assessment, cleanup, and reuse of sites, including sites with petroleum contamination.⁷² More importantly, it clarifies legal liability for cleanups, exempting small contributors, and prospective purchasers or innocent owners and operators from expensive superfund liabilities.⁷³ The U.S. Conference of Mayors projected that over one half million jobs will be created, and up to \$2.4 billion dollars in additional tax revenues could be generated through brownfields redevelopment.⁷⁴ This presents a unique opportunity to increase the conversion of properties with unused development potential to more beneficial uses.⁷⁵ The Brownfields Act represents a substantial opportunity to revitalize core urban and inner suburban communities.

70. Exec. Order No. 12,866 3 C.F.R. 638 (1993).

71. Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1994).

72. Brownfields Revitalization and Environmental Restoration Act of 2001 § 211, 42 U.S.C. § 9601 (2002). The term “brownfield site” means “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” See also EPA, *Benefits of Brownfield Clean-Up*, at <http://www.epa.gov/swerosps/bf/html-doc/2869ben.htm> (last referenced Apr. 14, 2002).

73. 42 U.S.C. §§ 9601, 9607 (2002).

74. Press Release, U.S. Conference of Mayors, *City Report Shows Effects of Brownfields in America* (Feb. 24, 2000), at http://www.usmayors.org/uscm/news/press_releases/documents/brownfields022400_final.asp (last visited Apr. 2, 2002).

75. U.S. Conf. of Mayors, *Major Provisions of H.R. 2869—The Small Business Liability Relief and Brownfields Revitalization Act* (2002), at http://www.usmayors.org/uscm/us_mayor_newspaper/documents/01-14-02/brownfields2.asp (last visited Apr. 2, 2002).

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B. *Reduce Cross-Subsidization*

There are many strategies that can be used to prevent cross-subsidization of fringe communities by urban areas and city cores. First, new state, regional, and federal investment in new infrastructure and in business development should be steered to areas with existing capacity. Underutilized infrastructure represents a waste to taxpayers and an onerous burden on the poor. Since 1997, the State of Maryland has successfully instituted a sprawl-reduction program.⁷⁶

Second, community groups should understand the potential implications of the General Accounting Standards Board's (GASB) requirements for improving financial disclosure of capital investment policies in their communities. Statement #34, a new requirement of the GASB, has a major influence on how governments account for capital assets. This revision, which will be implemented by 2003, requires capital asset management practices to include accrual accounting and depreciation of future expenses of infrastructure.⁷⁷ Declining communities will benefit from this development because it only applies to infrastructure built after 1980, so only newer communities with a large proportion of new infrastructure will have to depreciate or report the expenses associated with their assets in a manner that could affect their credibility in capital markets. This could indeed help level the playing field for regional development policies that allow unfettered expansion of infrastructure to new low density developments.

Third, federal mortgage subsidies could give special priority to "location efficient mortgages," which calculate the amount available to be loaned as a function of the degree to which the home to be purchased is located in a transit-oriented location and not dependent on automobiles. Homes in areas not requiring dependence on automobiles leave owners with more disposable income, due to transportation savings, and hence a greater ability to make mortgage payments.

Fourth, implications of racial segregation on sprawl and losses to disadvantaged communities should be studied. "Housing markets don't just distribute education they also distribute education employment, safety, insurance rates, services, and wealth in the form of home equity."⁷⁸ And they determine the level of exposure to drugs and crime and peer groups that one's children experience. Surveys have also shown that while blacks prefer to live with whites, the reverse is not true.⁷⁹ The damages from the vestiges of past dis-

76. MD. DEP'T OF PLANNING, 2001 ANNUAL REPORT at 4, at <http://www.mdp.state.md.us/annual.pdf> (last visited Apr. 2, 2002).

77. Daniel Bajadek, *The Public Sector 'Fesses Up: Understanding GASB 34's Infrastructure Reporting Requirements*, GLOBAL REAL EST. NOW, Fall 2001, at 26.

78. Douglas S. Massey, *American Apartheid: Housing Segregation and Persistent Urban Poverty* (1994), at <http://www.ssri.niu.edu/dl/massey.html> (last visited Mar. 28, 2002).

79. *Id.*

crimination create a self-perpetuating process of outward moves for whites and some non-whites away from harsh conditions in the inner city—a process that even upwardly-mobile non-whites can't bypass. This has profound implications on the social welfare of minority groups and the environment and the welfare of the region that has to subsidize this outward exodus. Douglass Massey states that the demand for housing in all white areas is strong, but that once a black or two enters the neighborhood, white demand begins to falter at a rapid rate as the percentage of blacks increases.⁸⁰ Hopefully, new generations of whites and blacks will be able to experience new harmony. Until then, efforts to alleviate severe economic disparities caused by this form of rolling segregation should proceed. Programs that aid inner cities and make those areas more attractive to whites include enterprise zones, transit oriented development to alleviate the jobs-hosting imbalance, and educational initiatives. Efforts to prohibit fiscal zoning or exclusionary real-estate requirements and efforts to improve fair housing enforcement would alleviate barriers to Smart Growth and achieve more sustainable outcomes.

C. *Increase Investment in Existing Communities*

A cornerstone of any successful Smart Growth program would be to increase investment in existing urban and core city communities.

1. *Transportation Efficiency Act (TEA-21)*

The Act appropriates \$218 billion over six years, in part to fund the development of transportation systems consistent with a cleaner environment and community revitalization goals.⁸¹ Smart Growth and the redevelopment of abandoned properties can also be furthered through the TEA-21's Congestion, Mitigation, and Air Quality Improvement (CEMAQ) program.⁸² CEMAQ includes provisions for funding transportation control measures, stormwater improvements, and privately owned intercity bus terminals.⁸³ The amount of funds available for this program is substantial. For fiscal years 2002 and 2003, it is \$1,407,474,000, and \$1,433,996,000 respectively.⁸⁴ Since minorities are dis-

80. *Id.*

81. Transportation Equity Act for the 21st Century, 23 U.S.C. § 149 (1994); see also U.S. Dep't of Trans., *TEA-21-Transportation Equity Act for the 21st Century: Moving Americans into the 21st Century* (July 14, 1998), at <http://www.fhwa.dot.gov/tea21/suminfra.htm> (last visited Apr. 3, 2002).

82. EPA, *Transportation and Brownfields*, available at <http://www.epa.gov/brownfields/swerosps/bf/pdf/tea-21.pdf> (last visited Apr. 3, 2002).

83. 23 U.S.C. § 149 (1994) ("A State may obligate funds apportioned to it under section 104(b)(2) for the congestion mitigation and air quality improvement program only for a transportation project or program if the project or program is for an area in the State that is or was designated as a nonattainment area for ozone, carbon monoxide, or particulate matter under the Clean Air Act.") (internal citation omitted).

84. U.S. Dep't of Trans., *The Congestion Mitigation and Air Quality Improvement (CMAQ) Program Under the Transportation Equity Act for the 21st Century (TEA-21): Program Guidance Memorandum 5* (Apr., 1999), at <http://www.fhwa.dot.gov/environment/cmaq99gd.pdf> (last referenced Apr.

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proportionately represented in non-attainment regions,⁸⁵ and these funds are geared to improve air quality improvements, disadvantaged communities are eligible to benefit from these funds, which can redistribute capital back to declining communities.

In addition to CMAQ, TEA-21 creates a new program for Job Access and Reverse Commute Grants for 1999-2003 with \$400 million available from TEA-21. This program develops transportation services designed to transport welfare recipients and low-income individuals to and from jobs, and it develops transportation services for residents of urban to suburban employment opportunities.⁸⁶

2. *Brownfields Tax Incentives*

Other programs to improve the development potential of existing communities include the Brownfields tax incentive, which allows environmental cleanup costs to be fully deductible in the year they are incurred, rather than having to phase in tax benefits over a longer periods of time.⁸⁷ The government estimates that while the tax incentive costs approximately \$300 million in annual tax revenue, the tax incentive is expected to leverage \$3.4 billion in private investment and return 8000 brownfields to productive use.⁸⁸ Smart growth enthusiasts could tweak these incentives for transit oriented and mixed-use designs to improve overall environmental and economic outcomes.

3. *Low-Income Housing Tax Credits*

Low-Income Housing Tax Credits offer yet another set of tools to support the equitable development of existing communities. The Low-Income Housing Tax Credit improves the supply of affordable housing by providing tax incentives to increase affordable rental units. It is a tool that can address concerns of gentrification of popular urban neighborhoods. It was first created by the Tax Reform Act of 1986, and it authorized tax credits in the amount of \$1.25 per capita for each state. The authorized tax credits were increased last year by 40%.⁸⁹ The tax credit program is one means of directing private capital towards

15, 2002).

85. EPA, *Reducing Risks For All Communities Volume 2: Supporting Document*, at <http://www.epa.gov/cgi-bin/claritgw?op-display&document=clserv:epa-cinq:1355;&rank=4&template=epa> (June 1992) (noting that approximately 52% of whites, 62% of blacks, and 71% of Hispanics reside in areas of non-attainment of the Clean Air Act standards for ozone according to this report).

86. See 23 U.S.C. § 149(b) (1994).

87. Taxpayer Relief Act of 1997 § 941, 26 U.S.C. § 198 (Supp. 2001) ("In general a taxpayer may elect to treat any qualified environmental remediation expenditure which is paid or incurred by the taxpayer as an expense which is not chargeable to capital account. Any expenditure which is so treated shall be allowed as a deduction for the taxable year.").

88. Office of Solid Waste and Emergency Response, EPA, *Brownfields Tax Incentive* (2001), at <http://www.epa.gov/werosps/bf/bftaxinc.htm> (last referenced Apr. 15, 2002).

89. National Low Income Housing Coalition, *2001 Advocate's Guide to Housing and Com-*

the creation of affordable rental housing. States could enact a new policy to direct these tax credits to compact and transit oriented developments. Since fast-growing areas have a lack of affordable housing but have ample jobs, a targeted low-income tax credits policy could support an improved housing-to-jobs balance and provide greater efficiencies for businesses who need an available labor pool.

IV. CONCLUSION

Synergies exist between Smart Growth and environmental justice. Sprawling low-density land uses are inconsistent with a clean environment and an efficient economy where investment decisions are not influenced by subsidies. The status quo is not the outcome of an efficient free market process, but a heavily-subsidized process that promotes increased physical division between people of different races and classes while devouring natural resources at a pace outstripping population growth. Green spaces are lost and massive investments flow toward new infrastructure in exclusive outlying areas rather than to existing communities with unused capacities.

Smart Growth, if it includes low income and disadvantaged communities, will ensure that housing, employment, and transportation choices are beneficial to the environment, as well as to poor people and minorities. The challenge is to get federal, local, and state offices to deliberate on the best strategies to strengthen older towns and communities and improve the environment. This may entail using federal funds, tax credits, and bond capacities. Title VI of the Civil Rights Act gives disadvantaged people a tool to make governments more responsive to their concerns.⁹⁰ Because people of color and low-income groups generally live in core areas that are more conducive to environmentally-sound development practices, including compact and mixed-use development, the rationale to include these communities in a Smart Growth framework is compelling. Members of center-city organizations and environmental groups have similar interests in encouraging Smart Growth outcomes.

One collaborative organization, Policy Link, is an excellent example of a community development organization tackling the problem of regional equity. It advocates targeting public funding for infrastructure, transportation systems, education and brownfields redevelopment, and services to support equitable outcomes for areas affected by disinvestments. Through organizations such as this, environmental and civil rights activists can join forces to promote social justice while saving the environment.

munity Development Policy—National Low Income Housing Tax Credit (LIHTC), at <http://www.nlihc.org/advocates/lihtc.htm> (last visited Apr. 14, 2002).

90. See 42 U.S.C. § 2000d (1994). (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”).