Urban Sprawl, Federalism, and the Problem of Institutional Complexity

William W. Buzbee

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Cover Page Footnote
Associate Professor, Emory School of Law. The author thanks Lisa Chang, Frank Alexander, Vicki Been, Richard Briffault, Robert Schapiro, Richard Fogleson, Will Haines, Rosalie Sanderson and research assistants Alan Chan, Gordon Hamrick, and Michelle Van Wiggeren for their support and suggestions. Cross campus Emory University professors and frequent brainstorming companions Peggy Barlett, Richard Doner, and Howard Frumkin also deserve thanks for their part in sharpening the analyses presenter here. The author also thanks Robert Bullard, the Clark Atlanta University Environmental Justice Resource Center, and the Turner Foundation for their support for earlier research and conference discussion from which this article is in part drawn.

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URBAN SPRAWL, FEDERALISM, AND THE PROBLEM OF INSTITUTIONAL COMPLEXITY

William W. Buzbee*

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INTRODUCTION

In both state and federal politics, the ills associated with urban sprawl and the political opportunities these problems present are once again hot topics of discussion.1 This focus on sprawl, however, is

far from a new phenomenon. The fact that urban sprawl and its associated effects would trigger and sustain political attention for decades is unsurprising. Urban sprawl causes many direct and indirect societal and environmental harms. Sprawling metropolitan development requires substantial new infrastructure investments by all levels of government and generally requires more costly infrastructure investments than more concentrated forms of development. Urban sprawl also threatens biodiversity and contributes to transportation-caused air pollution and the deterioration of river water quality as development destroys green areas, displaces agricultural uses, creates impervious surfaces and adds to river discharges. Decisions to develop in a sprawling pattern also necessarily involve choices of locations for new real estate development investment. These development decisions can contribute to an ongoing avoidance of underutilized or decaying urban centers and "brownfields" sites. Abandonment of the urban core, which is both a cause and effect of sprawl, increases disparities in wealth, housing, environmental, and business conditions.

The counter to this litany of harmful effects is that urban sprawl represents a logical choice for millions of citizens, businesses, and


4. For a discussion of the nature of brownfields and programs to encourage their reuse, see William W. Buzbee, Brownfields, Environmental Federalism, and Institutional Determinism, 21 Wm. & Mary Envtl. L. & Pol'y Rev. 1, 1-6 (1997). An exodus of businesses and residents from urban to suburban areas may contribute to urban blight and increased municipal government burdens, see infra Part I.A.l., but also should lead to reduced demand for business and residential space and thereby lead to reduced central city rents or land prices as landlords seek to earn a return on their real estate in a buyers’ (or renters’) market. See Paul Peterson, City Limits 22-24 (1981).
units of government seeking to address market, social and political demands at reasonable cost. Critics question whether urban sprawl presents a problem at all. They view anti-sprawl initiatives as reflecting political opportunism and anti-car and anti-suburb animus rather than actual societal need.\(^5\) Even environmental pessimist Bill McKibben notes that in highly populated regions such as the northeastern United States, increasing tree cover is a more prevalent phenomenon than sprawling development.\(^6\) In newer booming cities of the South, the Southwest, and the West, however, the existence of urban sprawl is irrefutable.\(^7\) Sprawling developing patterns in these newer cities represent the norm, not the exception. Disagreement generally centers not on whether sprawl exists, but on whether sprawl constitutes a problem or merely reflects rational choice and an appropriate diversity of government policies and priorities.

Even if policy analysts could agree on causes of urban sprawl and different modes of development that would reduce associated harms and better meet citizens' political or market preferences, it is not clear that urban sprawl is a phenomenon that can be addressed through any one legal strategy. Urban sprawl's causes are part social, part market-driven, and part the result of current legal structures and divisions of political authority. Sprawl's causes and effects cut across jurisdictional lines and are in part the result of institutional complexity. As Professor Been notes in a cogent critique of community-oriented visions for urban form, aspirations and sound visions are insufficient to lead to successful legal or political reform if the dynamics that create a social ill are inadequately understood: "a solution needs to fit the problem."\(^8\)

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5. For a few recent criticisms of proposed sprawl reforms and the "new urbanism" response to sprawl, see Gregg Easterbrook, Suburban Myth, New Republic, Mar. 15, 1999, at 18; Gordon & Richardson, supra note 2; Steven Hayward, Suburban Legends, Nat'l Rev., Mar. 22, 1999, at 35; Randall G. Holcombe, In Defense of Urban Sprawl, PERC Reps., Feb. 1999, at 3 (attributing most types of sprawling development to market forces representing rational consumer choice and, where less salutary "single dimension" development occurs, blaming government intervention in the form of zoning laws); O'Toole, supra note 1; Tierney, supra note 1.


7. For an excellent discussion of the increase in sprawling forms of urban growth, including a discussion of older metropolitan areas such as New York City, see Robert Fishman, America's New City: Megalopolis Unbound, Wilson Q., Winter 1990, at 24, 24.

8. Vicki Been, Comment on Professor Jerry Frug's The Geography of Community, 48 Stan. L. Rev. 1109, 1111 (1996) (commenting on Jerry Frug, The Geography of Community, 48 Stan. L. Rev. 1047 (1996)). Professor Been questions if Frug's otherwise rich and provocative work adequately acknowledges the contribution of fiscal and economic motivations to the destruction of vibrant urban centers and concurrent sprawling urban forms. See id. at 1109. Despite these concerns, Been views Frug's work as a key contribution to the literature addressing reasons for current urban form and why corrective actions should be taken.
Legal literature oddly contains little examination of urban sprawl in
light of prevailing federalism doctrine and political-economic and com-
parative institutional analysis frameworks used to analyze other social
ills. This Article begins to fill this gap in the literature. It does not
resolve whether efforts to combat sprawl are, in fact, justly viewed as a
political priority requiring immediate reform efforts across the country.
At the national, state, and local level, different social concerns may
legitimately take precedence over political scrutiny of sprawl and its
effects. Legal reform or government intervention to address sprawl
and its associated ills may promise to be effective in some contexts and
be utterly ineffective in others. Furthermore, different stages in a ju-
risdiction's political and economic growth will change both the dy-
namics and incentives of sprawl-related market and political activity.

This Article therefore does not promote a particular optimal mix of
urban, green space, and sprawling development forms. Given the insti-
tutional complexity that underlies sprawl, this Article concludes that
overly rigid legal prescriptions or prohibitions would be a mistake; dif-
ferent incentives and policies will be appropriate in different contexts.
As part of this analysis of institutional complexity and federalism, this
Article looks at lessons from the history of environmental law to assess
whether transformative political and legal reforms are likely to arise
and remain effective in combating ills associated with urban sprawl.
The Article concludes that the complex institutional terrain affecting
urban form and sprawl requires substantial reliance on outright acqui-
sition of important green spaces as well as reliance on regulatory
strategies that entice participants, rather than prescribe a particular
urban form or seek to punish or coerce regulatory targets.

9. The legal literature that obliquely touches on sprawl's political and economic
dynamics and prospects for effective legal reform is found in an array of articles more
generally looking at problems of urban forms of governance and the usual lack of re-
gional units of government that can address regional needs and still provide for the
benefits associated with local government politics. See generally Richard Briffault,
The Local Government Boundary Problem in Metropolitan Areas, 48 Stan. L. Rev.
1115 (1996) [hereinafter Briffault, Local Government] (discussing the conflict be-
tween local political autonomy and effective metropolitan area governance); Richard
Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107
Harv. L. Rev. 1843 (1994) (asserting that political geography might promote racial
segregation and discussing implications of the lack of regional government units); Jerry Frug, Decentering Decentralization, 60 U. Chi. L. Rev. 253 (1993) (questioning
the benefits of decentralized metropolitan governance and calling for the creation of
metropolitan regional legislatures); Frug, supra note 8, at 1081-89 (arguing that cur-
rent U.S. urban policy has created social division and alienated certain groups). For
one of the few articles that discusses sprawl's effects and a possible federal role in ad-
dressing the problems associated with sprawl and other land use harms, see Shelby D.
Green, The Search for a National Land Use Policy: For the Cities' Sake, 26 Fordham

10. See Buzbee, supra note 4, at 27-66 (developing hypothesis that state-federal
dynamics and institutional roles and incentives have changed over time and that ap-
propriate state or federal roles therefore will continue to change).

11. The conclusions of this Article share features of recent analyses of global envi-
Part I of this Article starts by briefly reviewing the market and government actions contributing to sprawling development patterns, offering empirical observations about the causes, benefits and harms associated with sprawl. This part then briefly discusses the benefits of an alternative anti-sprawl or "new urbanism" vision for urban form. Part II offers a theoretical political-economic framework to understand why sprawl is pervasive and difficult to deter. Part III demonstrates how urban sprawl, while resulting in predictable harms and often caused by similar market, social and political forces, lacks any obvious single legal "hook" or institution that can be the focal point for reform efforts. While federalism cases and our constitution permit federal, state and local efforts to address ills associated with sprawl, they also strongly indicate that no single legal strategy is available as a remedy. State and local governments, as well as regional authorities, are likely to remain the focal point for sprawl-related political battles, but federal policies and incentives can influence those state and local decisions. Federal policies have already influenced sprawling development patterns and, if modified, could reduce incentives for such sprawling urban forms of development. Part III then examines federal use of conditional spending incentives to encourage state and local consideration of measures to address sprawl's ills. This part concludes by suggesting particular strategies that could reduce sprawling development and associated ills. Part IV compares the dynamics, successes, and failures of environmental law to glean insights into the substantial hurdles facing initiatives intended to deter sprawl or address its associated harms. Urban sprawl is unlikely to give rise to a political and legal context for transformative, enduring, and effective legal reform proposals. Instead, diverse initiatives that offer incremental encouragement for changes in development patterns may be the best available opportunities for legal reform. For any reform measures and incentives to be effective, however, techniques to enhance government accountability and responsiveness are critical.

I. SPRAWL'S CAUSES AND EFFECTS

Urban sprawl often goes undefined, but essentially assumes an urban area that through a confluence of housing, transportation, and associated private and government decisions expands in an outward sprawling pattern, usually encompassing a multiplicity of local governments. In doing so, the growth leaves behind increasingly impoverished central urban areas. While obvious discomforts associated with sprawl are often mentioned—such as air pollution, costly delivery of government services, increased commuting times and traffic congestion, destruction of previously exurban green and agricultural areas, and abandonment of urban centers that would benefit from “infill” efforts—sprawl in most respects cannot be analogized to societal dynamics leading to environmental destruction. Sprawl is not solely the result of unintended harms or side effects, like the environmental destruction of a water body or air resource due to industrial pollution. Sprawling development patterns directly constitute harms while they also generate benefits. The effects of sprawl flow from private and government decisions that reflect both a desire for the benefits of sprawling development and responses to government created incentives for sprawling development patterns. Any assessment of legal reform proposals must start with an accurate evaluation of baseline market, legal, and social influences on sprawl.

A. Sprawl's Causes, Benefits, and Harms

Urban sprawl arises from a confluence of private and government decisions. Although government policies are correctly identified as substantial contributors to sprawl, private market and political choices

12. See GAO Sprawl Report, supra note 1, at 1, 4; Nelson et al., supra note 3, at 2-3; see also Robert G. Healy & John S. Rosenberg, Land Use and the States 17 (2d ed. 1979) (defining sprawl as having three basic forms—subdivision homes on large lots, development along transportation lines, and “leapfrog” development). As discussed infra notes 29-30, 83-84 & 129-32 and accompanying text, increasing congestion will often lead to some market-caused revitalization of central urban areas.

13. Urban “infill” initiatives are efforts to encourage development of underutilized real estate in central city areas, usually in lieu of or in preference to development outside the central metropolitan area. Infill strategies are often combined with urban “containment” strategies utilizing growth boundaries or constraints. See Nelson et al., supra note 3, at 85-87.

14. For a survey of the costs and benefits of sprawl, see Robert W. Burchell, Economic and Fiscal Costs (and Benefits) of Sprawl, 29 Urb. Law. 159 (1997); see also Been, supra note 8, at 1109-11 (discussing why sprawling forms are often chosen); Frug, supra note 8, at 1097-98 (discussing reasons why “those who can afford to [move out] are moving... to areas more and more remote from the central city,” but also identifying many ways local, state, and federal legal frameworks encourage, if not underwrite, this move).

15. See Healy & Rosenberg, supra note 12, at 18 (“[S]prawl reflects the divergence of interests between individuals, who wish to maximize private space and accessibility, and society as a whole, which seeks larger, contiguous blocks of open space.”).
likewise contribute to sprawl. This section starts by discussing empirical observations about the roots of sprawling development patterns by examining residential and business location trends. It then analyzes harms flowing from sprawl and visions for a more concentrated urban form.

1. Sprawl's Causes and Benefits

Private real estate markets create much of the impetus for sprawl, but those private choices have also required antecedent government investments to make exurban or suburban residential and business moves possible.\textsuperscript{16} Initial flight from urban centers to suburbs started decades ago with the development of highways and mass transit systems.\textsuperscript{17} The exponential increase in the use of cars made previously inaccessible areas available for residential and business use.\textsuperscript{18} The availability of a federal income tax deduction for mortgage payment interest also marginally increased the economic attractiveness of home ownership over the lease arrangements that are far more common in central urban areas.\textsuperscript{19} Furthermore, other tax policies regarding deferral of tax liabilities following sales of homes created incentives for homeowners to increase the size and value of each new home purchased.\textsuperscript{20} Much of the shift from urban to suburban housing also resulted from racial tension and so-called "white flight" during and

\begin{itemize}
  \item \textsuperscript{16} For a thorough discussion of the private motives and government policies contributing to "the suburbanization of the United States," including an emphasis on Americans' deep-rooted interest in suburban private home ownership, see Kenneth T. Jackson, \textit{Crabgrass Frontier: The Suburbanization of the United States} (1985). \textit{See generally} Green, \textit{supra} note 9 (discussing harms associated with sprawl and policies facilitating sprawl).
  \item \textsuperscript{17} \textit{See} Jackson, \textit{supra} note 16, at 163-71; Michael H. Schill, \textit{Privatizing Federal Low Income Housing Assistance: The Case of Public Housing}, 75 Cornell L. Rev. 878, 894-97 (1990) (discussing federal policies subsidizing movement of middle and moderate-income households from the city to suburbs).
  \item \textsuperscript{18} \textit{See} \textit{Land Use in America} 45-48 (Henry L. Diamond & Patrick F. Noonan eds., 1996); \textit{The Exploding Metropolis}, \textit{supra} note 2, at 144; Lawrence D. Frank, \textit{Land Use Impacts on Household Travel Choice and Vehicle Emissions in the Atlanta Region} 21-22, 97-98 (City Planning Program, College of Architecture, Georgia Institute of Technology Jan. 1999).
  \item \textsuperscript{19} For a discussion of how the mortgage deduction acts as a subsidy, but may also lead to reduced rents in central cities with increased vacancies due to a shift in previous renters to suburban residential and business sites, see Peterson, \textit{supra} note 4, at 21-22.
  \item \textsuperscript{20} \textit{See} David Bollier, \textit{How Smart Growth Can Stop Sprawl} 12-14 (1998) (quoting and citing Kunstler's more extensive treatment in \textit{James Howard Kunstler, Home from Nowhere: Remaking Our Everyday World for the Twenty-First Century} 197-206 (1996)); \textit{Frug, supra} note 8, at 1068 (discussing federal mortgage policies and other federal programs and appropriations for work in areas like defense contracting that undercut central city vitality). For an optimistic appraisal of reasons why recent amendments to federal tax law may reduce incentives for sprawling urban forms, see \textit{Environmental Law Institute, Linking Tax Law and Sustainable Urban Development: The Taxpayer Relief Act of 1997} (1998).
\end{itemize}
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following the civil rights era, as well as from government policies and market practices that contributed to racially segregated housing patterns.\textsuperscript{21} The flight of residents and businesses from central urban areas contributes to reduced urban and business vitality that in turn further renders central urban areas unattractive.\textsuperscript{22}

Even where central city neighborhoods are not at a notable market disadvantage due to the ills of urban deterioration, housing on the periphery of the urban center often offers larger homes on larger plots of land for less money.\textsuperscript{23} Many citizens favor affordable housing and new residential communities over urban settings where homes are smaller, closer together, and stores are in greater proximity.\textsuperscript{24} Many urban planners and legal scholars, particularly the "new urbanists," favor development patterns that concentrate residential areas, retail areas, and mass transit in close proximity. Many Americans recently surveyed about sprawl, however, confirmed market trends that indicate many, if not most, citizens favor new residential developments with cul de sacs set at a substantial distance from retail markets and

\begin{footnote}
\textsuperscript{21} See United States v. Starrett City Assocs., 840 F.2d 1096, 1102 (2d Cir. 1988) (discussing integration efforts and "white flight" phenomena and the legality of race-conscious decisionmaking for the purpose of maintaining integrated populations in a New York City housing development); see also Frug, supra note 8, at 1088-69 (discussing government lending practices and public housing practices and their contributions to racial housing segregation).

\textsuperscript{22} See GAO Sprawl Report, supra note 1, at 7 (discussing the historical development and the factors contributing to urban sprawl).

\textsuperscript{23} See Been, supra note 8, at 1110 (discussing economic factors that induce movement beyond the city center); Jackson, supra note 16, at 6 ("[T]he price of land falls with greater and greater distance from city centers."). Differences in price, house, and lot size are stark and apparent in any newspaper's real estate section. In 1999, three to four bedroom homes in intown Atlanta neighborhoods (defined as neighborhoods within a circling highway and proximate to down- and mid-town offices), sold for between $300,000 to $600,000. See, e.g., Atl.-J. Const., June 21, 1999 (Classifieds), at E8 (listing many homes for sale in this price range). Substantially larger homes in new subdivisions located 20 to 30 miles outside of the Atlanta perimeter highway not only sell for less than half of intown prices, but also have more land and lower property taxes. See American Farmland Trust and The Georgia Conservancy, Summary Report, An Unlevel Playing Field: How Public Policies Favor Suburban Sprawl Over Downtown Development in Metropolitan Atlanta 8-10 (Jan. 1999) [hereinafter An Unlevel Playing Field] (discussing the lower costs of land development in suburban areas).

\textsuperscript{24} See Choices Between Asphalt and Nature: Americans Discuss Sprawl: Analysis of 20 Focus Groups Across the U.S. 6-7 (Feb. 1998) [hereinafter Choices] (unpublished report of surveys conducted for The Biodiversity Project, exploring American opinions on housing choices in partnership with The Nature Conservancy; surveys by Belden Russonello & Stewart). These surveyors found focus group reactions to be consistent regardless of race or economic background. Only when questions were posed in terms of issues of civic responsibility or direct harms of major traffic congestion did respondents waver in their preference for exurban development styles and patterns. See id. Also, see generally Jackson, supra note 16, for a discussion that emphasizes the deep roots of Americans' prevalent desire for suburban home ownership.

\textsuperscript{25} The "new urbanist" visions for urban form and politics are discussed infra Part I.A.3.
\end{footnote}
mass transit. These survey responses indicate a potential lack of grassroots support for major sprawl reforms, but citizens' preferences or choices may change if presented with an alternative vision or if discomfarts associated with long commutes and congestion increase. While private preferences are shaped in part by government policies and laws, the strength of private preferences for suburban living appears substantial. Even with shifts in government policies and legal incentives to discourage sprawl, private preferences for suburban residential living may remain and sprawling development may continue.

Private preferences for more distant suburban living will predictably lessen as sprawl's ills make exurban living increasingly unpleasant. The market is thus likely to respond to a segment of the populations' reduced enthusiasm for sprawl, with wealthier residents' demand for real estate located in inner ring suburbs and the central city predictably increasing as sprawl's ills grow. It is less clear, however, that increasing interest in inner suburban and central city real estate will be accompanied by a substantial reduction in demands for sprawling development, particularly if metropolitan areas continue to grow in population.

The shift of many families in the 1950s and 1960s to suburban housing seldom involved a shift in the location of workplaces. Most employment in metropolitan areas remained in central cities. Today,

27. Professor Frug notes that the current preferences of citizens are probably at variance with his vision and that of the "new urbanists," see Frug, supra note 8, at 1094-95, but argues that the costs of sprawl and empty central cities coupled with the benefits of a vigorous urban culture may suffice to start experimentation with alternatives that will prove their worth and solidify an incipient "central city-inner suburb coalition." See id. at 1094, 1099. Additional discussion of the benefits of the "new urbanism" or anti-sprawl vision are further discussed below in Part I.A.3.
28. See Choices, supra note 24, at 7. See generally Robert Ellickson, Order Without Law: How Neighbors Settle Disputes (1991) (discussing how California ranchers' perceptions of legal rights influenced behavioral norms and frequently led to conflict resolution without recourse to courts, but that perceptions of legal rights were often contrary to actual law).
29. During the 1990's, Atlanta's inner ring residential suburbs have skyrocketed in value as many metropolitan area residents have sought to avoid traffic and long commutes. This increased demand and accompanied increase in prices has led to denser new development close to Atlanta's central business districts, but has once again led to a significant price differential between central metropolitan living and housing located on the urban periphery. See supra note 23 (citing to local Atlanta newspaper providing cost comparisons); see also Joel Garreau, Edge City: Life on the New Frontier 60 (1991) (reporting that as exurban office parks were built near Trenton, New Jersey, inner city Trenton residential properties escalated in value from approximately $22,000 in the 1970's to "more than $220,000 [around 1988]").
30. See Garreau, supra note 29, at 59-62 (observing that "edge city" development has often been accompanied by revitalization of downtown areas).
31. See generally Deindustrialization and Regional Economic Transformation: The Experience of the United States (Rodwin & Sazanami eds., 1989) (discussing the effect of emerging international economy and deindustrialization on the types of available jobs).
in contrast, the increasing magnitude of sprawling development patterns and associated harms includes not only a shift in residential housing, but also a shift in workplace locations. Business changes both linked to and unrelated to government policies have further contributed to abandonment of once vital urban centers. In the last twenty years, with the shift away from reliance on railroad or river transportation and increasing use of trucks for transportation of goods, many businesses have abandoned the central city in favor of new factories, warehouses, and service sector offices on the urban edge. The increasing prevalence and market and political clout of huge retail stores such as Wal-Mart, Home Depot and mall-building and management companies have further led to land-intensive retail development, usually at a distance from urban centers. Furthermore, in a phenomenon influencing urban center woes but not necessarily urban sprawl, many employers have shifted operations to the South, Southwest, or abroad to locations that offer cheaper labor and a less rigorous regulatory climate.

Even in largely suburban cities like Atlanta or Los Angeles, the population shift away from the metropolitan centers continues. In some areas, abandonment of the central city follows concerns about deteriorating infrastructure, education services, and crime. The decline in central city investments is not just the result of federal tax

32. See id.; see also Jackson, supra note 16, at 266-71 (examining the movement of factories and offices to more suburban sites).

33. See Burchell, supra note 14, at 161-62 (detailing the creation of “edge cities” at the intersection of interstate highways); Fishman, supra note 7, at 28-36 (same); Karen P. Lane, Studies Buoy New Hopes for Brooklyn Waterfront, Crain’s N.Y. Bus., Sept. 2, 1996, at 22.


36. See generally Garreau, supra note 29 (surveying the population shifts away from urban centers in a number of large cities); Robert Liberty, Planned Growth: The Oregon Model, 13 Nat. Resources. & Env’t. 315, 317 (1998) (contrasting population density growth in metropolitan Portland, Oregon with dropping density in Atlanta); J.B. Ruhl, Taming the Suburban Amoeba in the Ecosystem Age: Some Do’s and Don’ts, 3 Widener Law Symp. J. 61, 63 & n.7 (1998) (discussing growth in suburban areas and citing to works discussing suburban and perimeter development).

37. See, e.g., Randall W. Eberts, Some Empirical Evidence on the Linkage Between Public Infrastructure and Local Economic Development, in Industry Location and Public Policy, supra note 35, at 83, 96 (examining the effect of deteriorating infrastructure on urban population); Fishman, supra note 7, at 25 (discussing the increase in sprawling forms of urban growth).
policies and transportation expenditures. This decline is also substantially the result of political clout and priorities in intrastate battles between urban, suburban, and exurban municipalities for state dollars, as well as in municipal battles over how to use available funds and to plan for new development. Urban mass transit has generally been a low priority in many sprawling cities. The newer sprawling cities of the South, Southwest, and West tend to lack the commuter rail infrastructure characteristic of older cities such as Boston, New York, and Chicago. For these newer sprawling cities, cars are the main, if not the only, option for transportation. In recent decades, there has been a dramatic increase in the percentage of dual career families, causing many households to contribute pollution from at least two cars while still using transportation infrastructure built when single career, one car families were the norm.

While residential and business real estate decisions explain why more cars and traffic are on the road every day, these largely private decisions have nonetheless been substantially influenced by the legal terrain and decisions by all levels of government. In particular, the most significant subsidy of sprawling development patterns is from federal and state expenditures on highway development pursuant to federal and state transportation laws. Each new or expanded highway near an urban center opens up new real estate for development.

38. See supra Part II.
39. See Briffault, Local Government, supra note 9, at 1134-41 (discussing the sources of and competing uses for funds); Burchell, supra note 14, at 165-67 (summarizing use of public and private funds); Frug, supra note 8, at 1070-75, 1081-89 (surveying municipalities' decisionmaking and use of funds).
40. Sprawl cities such as Los Angeles have sought to add mass transportation alternatives, but with preexisting dispersed business and residential neighborhoods, anticipated ridership for new rail lines is low. See Todd S. Purdum, A Subway Line Extends to Hollywood: But in Car-Crazed Los Angeles, Underground Travel Has Its Critics, N.Y. Times, June 12, 1999, at A9 (reporting on opening of new segments of the Los Angeles subway, but pointing out that while 3.4 million commuters in New York City use subways every day, Los Angeles hopes that weekday commuter use will rise to 125,000 passengers daily).
41. See U.S. Dep't of Commerce, Statistical Abstract of the United States 403 (117th ed. 1997) (reporting that between 1960 and 1996, percentage of employed married women jumped from 31.9% to 61.2%, while percentage of employed married men dropped slightly from 89.2% to 77.6%). In 1940, only 14.7% of married women were in the workforce. See U.S. Dep't of Commerce, Statistical Abstract of the United States 223 (1970). A recent survey by a nonprofit organization, Catalyst, found that in 1950, 63% of working families had a stay-at-home spouse, while in 1998 only 17% of working families had a stay at home spouse. Dual-worker couples now make up 43% of the total workforce, up from 20% in 1950. See Nancy Rivera Brooks, Two-Career Couples Just Want Some Workplace Flexibility Study Shows, L.A. Times, Feb. 8, 1998, at D5. For a thorough exploration of changing demographics in the workforce and their implication for transportation policy and efforts to clean the nation's air, see Craig N. Oren, Getting Commuters Out of Their Cars: What Went Wrong?, 17 Stan. Envtl. L.J. 141 (1998).
42. See infra notes 97-100 and accompanying text.
43. See F. Gerard Adams et al., Undeveloped Land Prices During Urbanization:
As discussed in greater detail below, highway development in the United States has been and often continues to be financed by federal dollars provided for state and local transportation projects. Other transportation dollars come from state and local taxes. State and local land use and zoning practices, particularly the tendency to isolate types of uses and hence eliminate or deter more vital mixed urban uses, have further contributed to reliance on the automobile and the strip malls and shopping centers that dominate the sprawl landscape.

2. Sprawl's Harmful Effects

Despite substantial private and public contributions to sprawling development patterns and the many benefits associated with sprawling development, private and public entities and the environment all suffer from aggregate harms of urban sprawl. The dispersed and often periodic or delayed nature of these harms, however, makes it unlikely that they will be addressed. Where anti-sprawl reforms are proposed, political and market preferences for current sprawling development patterns may deter government intervention. Nevertheless, these harms are real and predictable. This section briefly provides an empirical assessment of the harms associated with sprawling forms of metropolitan development.

a. Abandonment of the Inner Urban Core

Each 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. Disinvestment, or decisions to invest elsewhere, create a predictable confluence of harms. In many cities, these harms fall most directly on central city residents who often are people of color and are most economically vulnerable. Loss of a refurbished residential housing supply leads to decreased property values, harming the most vulnerable residents, particularly children. Declining property values in turn lead to a decreased tax base and a need for higher tax rates to make up for lost revenues and

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44. See GAO Sprawl Report, supra note 1, at 10, 41-44 (discussing substantial federal share of transportation spending, but also noting that federal expenditure's contribution to sprawl is difficult to discern because of gaps in the collected data).
45. Georgia, for example, has long had an infamous, constitutionally-based gas tax that requires that seven and a half cents from each gallon of gasoline purchased go exclusively to work on roads and bridges. See Ga. Const. art. III, § 9, par. 6(b); Ga. Code Ann. § 48-9-3 (1995) (implementing legislation).
46. See Frug, supra note 8, at 1081-89, 1091-94 (discussing the historical trend of separating commercial and residential land uses and the new urbanist theory).
47. For a collection of articles analyzing environmental inequity and the relationships among transportation, investment decisions, and race and class, see Just Transportation: Dismantling Race and Class Barriers to Mobility (Robert D. Bullard & Glenn S. Johnson eds., 1997).
pay for increased social services. Rents in the central city, however, may drop as the demand for urban real estate decreases.48

Deteriorating housing is often accompanied by the departure of local employers and industry.49 Exurban development of new manufacturing or service sector facilities results in old industrial sites remaining unused or underutilized. Older industrial sites with actual or perceived contamination problems are often described as “brownfield” sites.50 The ongoing abandonment of such sites is often primarily the result of private choices to invest in facilities on the urban periphery. Brownfield sites are also often avoided because developers fear substantial contamination cleanup liability under federal or state statutory law, or under toxic tort case law.51 Many states and the federal government have developed new regulatory programs to encourage cleanup and reuse of brownfield sites, but these programs generally focus upon counteracting fears of contamination liability through more responsive regulatory regimes rather than constituting a general redevelopment program.52 Even with brownfields incentive schemes, such as streamlined and responsive regulatory treatment and brownfield grants and loans,53 elective investment decisions may still be made to establish or expand exurban sites.54

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48. See Jackson, supra note 16, at 285; Briffault, Local Government, supra note 9, at 1137.
49. See Jackson, supra note 16, at 266-71.
50. For a frequently updated and detailed discussion of the brownfields phenomenon and federal, state, and local laws and initiatives, see Brownfields Law and Practice: The Cleanup and Redevelopment of Contaminated Land (Michael B. Gerrard ed., 1997) [hereinafter Brownfields Law and Practice].
51. See Buzbee, supra note 4, at 5-12.
52. See id. at 12-19; see also William W. Buzbee, A Roadmap to the Brownfields Transaction—Perspectives and Goals of the Parties, in Brownfields Law and Practice, supra note 50, § 2.03, at 107-10, 118-22; Joel B. Eisen, “Brownfields of Dreams?”: Challenges and Limits of Voluntary Cleanup Programs and Incentives, 1996 U. Ill. L. Rev. 883, 886 (“The most prominent approaches [to encourage reuse of brownfield sites] are those . . . that attempt to alleviate developers’ fears of liability . . . ”).
54. See Buzbee, supra note 52, at 1-10. Nevertheless, the track record of federal brownfields initiatives and several states' voluntary cleanup approval programs suggests reason for optimism. Only a small amount of governmental encouragement may be necessary to modify decisions that would otherwise contribute to inner city and brownfields ills that usually accompany urban sprawl. See id.; Eisen, supra note 52, at 886-87. Brownfield site successes may, however, be difficult to replicate outside of the context of massive contamination fears that are removed through a responsive regulatory scheme and redevelopment grants. Without recent brownfields redevelopment incentives, owners and potential developers of brownfields sites were unable
For central urban areas with governmental units providing services to area residents, the disappearing tax base coincides with a need for increased expenditures on government services.\textsuperscript{55} For states with counties that wield largely independent taxing authority and fiscal resources, residents and employers who move to exurban sites generally leave one county for another. Competition between counties for new residents and employment is a partial explanation for private decisions to change residential or business locations.

\textit{b. Traffic and Air Pollution}

Two effects of sprawling development—traffic congestion and air pollution—are inextricably linked. As cities develop in a sprawling pattern, with new highway links and more distant workplaces and dispersed residents, citizens travel increased miles in their cars.\textsuperscript{56} In Atlanta, a quintessential sprawl city, for example, residents travel the highest vehicle miles per capita of any city in the country.\textsuperscript{57} Because of ever more rigorous federal emissions control regulation under the Clean Air Act, automobiles now emit far less pollution per mile than older cars.\textsuperscript{58} Nevertheless, residents of sprawling cities drive increasing distances each day due to increased commuting distances and the tendency of residents to drive even to acquire basic home necessities.\textsuperscript{59}

\textsuperscript{55} See Buzbee, \textit{supra} note 53, at 47-60 (discussing the substantial uncertainty of brownfields cleanup liability in the absence of guidance from a responsive regulatory scheme). Under the recent wave of brownfields and voluntary cleanup regimes, preferential regulatory treatment can convert sites viewed as liability risks into sites of substantial value. The EPA's Brownfields redevelopment case histories indicate that once worst-case liability fears are allayed, sites in commercially viable locations are attractive for new development. See \url{http://www.epa.gov/swerosp/bf/pilotlst.html}. In contrast, sites that are part of deteriorated central urban areas may remain abandoned, despite additional brownfields incentives such as the substantial but narrowly focused brownfields federal tax breaks intended to encourage redevelopment of high poverty central city sites. Few other underutilized central city sites are likely to offer such sudden enhancement of property values. See \textit{id}. Despite federal dollars being conditioned on site-specific brownfields redevelopment proposals, rather than being provided a block grant context, federal brownfields grants and related initiatives appear to have widespread political support. See, \textit{eg.}, \textit{Cities Ask Congress for Brownfields Relief as Hearing Begins on Chafee-Smith Bill}, 30 Env. Rep. 166-67 (May 28, 1999) (discussing bipartisan interest in brownfields legislation and municipalities' interest in additional brownfields funding and regulatory relief). For discussion of forms of federal conditional spending and enactment and implementation hurdles to effective spending, see \textit{infra} Part III.B.3.

\textsuperscript{56} See Frank, \textit{supra} note 18, at 18-19; Oren, \textit{supra} note 41, at 168-69.

\textsuperscript{57} See Frank, \textit{supra} note 18, at 21.

\textsuperscript{58} For a discussion of pollution control efforts and their successes, as well as the destructive effects of increased usage of larger and higher polluting sports utility vehicles and light trucks, see Keith Bradsher, \textit{Light Trucks Increase Profits but Foul Air More Than Cars}, N.Y. Times, Nov. 30, 1997, at A1.

\textsuperscript{59} See Oren, \textit{supra} note 41, at 160-73.
This increase in vehicle miles traveled per resident has substantially undercut the benefits of improved automobile pollution control. In addition, the increased number of dual career families usually means that two family cars are on the road.

A further obvious harm of increased reliance on the automobile and increased vehicle miles traveled per capita is increased commuter times. Even without traffic congestion, increased commuting distances mean that metropolitan area residents spend more time commuting, and less time at work, with family, or enjoying leisure activities. The added delays attributable to increased congestion over longer commuting distances increase the travel times, inconvenience, and stress of drivers.

Automobile pollution contributes primarily to two types of air pollution that raise concerns under the federal Clean Air Act. All states must create air quality control regions and prepare State Implementation Plans ("SIPs") that will lead each region to attain or move towards attainment of federally set National Ambient Air Quality Standards ("NAAQS"). NAAQS are numerical limits for ambient levels of particular pervasive "criteria" pollutants. The criteria pollutants most relevant to urban sprawl and transportation pollution are ozone, carbon monoxide, and particulate matter. For the many metropolitan areas classified as nonattainment areas for ozone, federal law requires stringent measures to move towards attainment status. In addition, should a jurisdiction fail to meet its SIP obligations or fail to prepare an adequate SIP, federal highway funds can be jeopardized and new construction can be subjected to a federally-imposed moratorium.

60. See Frank, supra note 18, at 23 (discussing how sprawling growth will outpace benefits of technological improvement in automobile pollution); Tirza S. Wahrman, Breaking the Logjam: The Peak Pricing of Congested Urban Roadways Under the Clean Air Act to Improve Air Quality and Reduce Vehicle Miles Traveled, 8 Duke Envtl. L. & Pol'y F. 181, 184-88 (1998).
61. See supra note 41 and accompanying text.
62. See Oren, supra note 41, at 171-72; see also Wahrman, supra note 60, at 186 (noting that motor vehicles accounted for 88.2% of miles traveled in 1990).
63. See Jackson, supra note 16, at 10 (contrasting 1980 census data revealing average American worker travels 9.2 miles and 22 minutes to work compared to other countries' common work practice of lunch at home and siestas); Oren, supra note 41, at 171-72.
65. See id. § 7409.
66. See id.; id. § 7410 (setting forth State Implementation Plan requirements); id. § 7509 (stating general sanctions and consequences of nonattainment); id. § 7511(a)-(j) (setting forth more detailed requirements for multistate ozone nonattainment areas).
67. See id. § 7410(m) (establishing basic procedures for applying sanctions); id. § 7509(b)(1) (specifying sanctions that may be imposed on highway projects); Environmental Defense Fund v. EPA, 167 F.3d 641, 651 (D.C. Cir. 1999) (striking down EPA regulation regarding intersection of Federal Clean Air Act and local planning requirement under transit-related federal laws); see also David Goldberg, Deadline is
Development patterns leading to increased use of automobiles are problematic because cars are often the most significant contributor to cities' Clean Air Act ozone nonattainment problems. Cars emit volatile organic compounds and nitrogen oxides, both of which contribute to the formation of ground level ozone. Cars also emit carbon monoxide, another criteria pollutant. Trucks contribute less to ozone problems than do cars, but diesel fuel combustion produces substantial particulate matter pollution. Federal NAAQS for both ozone and particulate matter were made more stringent in 1997 by the United States Environmental Protection Agency. These lowered NAAQS require all jurisdictions to derive and implement even more stringent air pollution control efforts. In addition to monetary and planning burdens imposed on citizens and governments due to the Clean Air Act and the linked federal transportation laws, high levels of ozone and particulate pollution create substantial respiratory risks. These pollutants pose especially severe risks to the young, the elderly, and others suffering from respiratory illnesses such as asthma.


68. See Oren, supra note 41, at 150-61 (discussing contribution of cars to air pollution and effects of such pollution).

69. See id. at 153-54.

70. See id. at 151-52.


72. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997) (to be codified at 40 C.F.R. pt. 50); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (to be codified at 40 C.F.R. pt. 50); Lucinda Minton Langworthy, EPA's New Air Quality Standards for Particulate Matter and Ozone: Boon for Health or Threat to the Clean Air Act?, 28 Envtl. L. Rep. 10,502, 10,504 (1998). In a recent case, the United States Court of Appeals for the District of Columbia Circuit struck down the validity of these regulations on "delegation doctrine" grounds, finding that legislative instructions to the EPA were unconstitutionally broad if not cured by a narrowing EPA construction of statutory criteria. See American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999) ("Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own."). The EPA, however, may seek a rehearing en banc or Supreme Court review of this decision. See Matthew L. Wald, Court Overturns Air Quality Rules, N.Y. Times, May 15, 1999, at A1.

73. See Oren, supra note 41, at 150-60.

74. Id. at 155.
Low levels of investment in mass transit also can be linked to sprawling development patterns and traffic ills, although it is both a cause and an effect of sprawl. The economic viability and attractiveness of mass transit systems, particularly rail systems, decrease as development spreads over wide areas instead of concentrating near commuter rail service.\textsuperscript{75} Sprawling development renders rail service inconvenient for residents of distant housing and may result in an underutilization of available mass transit.\textsuperscript{76} Without mass transit as an alternative to automobile travel, employers may have difficulty in attracting and retaining employees. Urban residents often have no choice but to travel by automobile, even in cities suffering from substantial congestion.\textsuperscript{77}

c. Green Space, Biodiversity Loss, and Water Quality Effects

Sprawl also causes several other types of traditional environmental harms. As agricultural lands and green spaces are cleared for residential or business use, the aesthetic and environmental benefits of green spaces are forever lost,\textsuperscript{78} as are the biodiversity benefits of linked green spaces.\textsuperscript{79} In addition, the process of clearing green spaces for new construction and associated increased areas of impervious surface contribute to degraded water quality in nearby rivers and streams. Siltation and associated increases in turbidity contribute to rivers failing to meet water quality standards under the federal Clean Water Act.\textsuperscript{80} The Clean Water Act requires state or federal authorities to

\begin{footnotes}
\item[75] See Purdum, supra note 40 (assessing reasons for low usage and questionable economic viability of subways in Los Angeles).
\item[76] See Fishman, supra note 7, at 33-35; Oren, supra note 41, at 169-70.
\item[77] See Oren, supra note 41, at 169-73. To encourage state and local expenditures to provide transportation links between low-income employees and employers, the Transportation Equity Act for the 21st Century (TEA-21) federal transportation law provides special monetary incentives in the form of a “competitive grant selection” for private and government efforts to provide needed transportation links. See Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, § 3037, 112 Stat. 107, 387-92 (1998) (to be codified at 49 U.S.C. § 5309) (entitled “Job Access and Reverse Commute Grants”). Section 3037 includes legislative findings that “94 percent of welfare recipients do not own cars” and that with “two-thirds of all new jobs . . . in the suburbs” and “three-quarters of welfare recipients liv[ing] in rural areas or central cities,” mass transit to link low income workers and suburban jobs is sought by such residents “to gain access to suburban employment opportunities.” Id. § 3037(a).
\item[78] See Bollier, supra note 20, at 20-24. “Green space” refers to land that still has substantial plant life and has not yet been developed for residential, transportation, or business use. Green spaces range from parks to government-owned lands of all types that are not yet developed, to privately owned property that is either undeveloped or has retained substantial undeveloped acreage.
\item[79] See infra notes 89-91 and accompanying text.
\item[80] Although the water quality portions of the federal Clean Water Act long remained moribund, citizen suit litigation during the late 1990s has activated state and federal agencies to comply with the law. For a discussion of relevant legislative and regulatory language, as well as litigation and regulatory activity, see generally three
ratchet down permitted pollution levels of industrial polluter “point sources” if a river cannot meet its designated use. Point sources of permitted pollution such as factories and publicly owned sewage treatment works either must modify their modes of production or find ways to buy out other sources of pollution. Sprawl thus further adds to costs of industrial production as industry must pay for methods to reduce water pollution to a total maximum daily load of pollution that a river segment can handle without becoming impaired.

3. The Alternative Vision of an Anti-Sprawl World?

When only the benefits, causes, and harms associated with sprawl are analyzed, a critical piece of the urban sprawl policy equation is lacking. If current development patterns in sprawling cities are viewed as problematic, one needs a competing vision for policymakers, citizens, developers, and industry to assess. A major challenge for anti-sprawl proponents results from the lack of models for an alternative urban form. The enticements of vital urban centers are easy to identify, particularly when one looks at flourishing older urban centers such as New York City, Chicago, San Francisco, and Boston. Each of these cities experiences and suffers from the complex array of urban ills associated with older American cities, but they also offer business vitality, an active street life, abundant restaurants, widely used mass transit, and a rich cultural and political life. The long-existing problem for anti-sprawl proponents, however, is that many residents of newer, rapidly sprawling cities have had no exposure to the pleasures of urban life in these more concentrated urban settings. At this time, many sprawling cities have experienced decades of decay in the central urban areas and thus for many years have not offered citizens the amenities associated with more concentrated forms of de-


81. “Point sources” are defined as any “discernible, confined and discrete conveyance” that discharges or may discharge pollutants. See Clean Water Act, 33 U.S.C. § 1362(14) (1994).

82. For a classic scholarly embrace of the charms and benefits of complex, older city life, especially in areas not yet marred by attempts at comprehensive planning and modern zoning methods, see Jane Jacobs, The Death and Life of Great American Cities (1961).

83. See William H. Whyte, Introduction, in The Exploding Metropolis, supra note 2, at 8-19 (discussing benefits of vital urban centers and the need for citizen involvement to counter likely harms of exurban development).
velopment. Apart from the possible examples of Portland, Oregon or Seattle, Washington, it is difficult to point to a new or rapidly booming city that along with its aggregate increase in population and wealth has retained or created a vital urban core. Some sprawl cities have begun to experience downtown and inner suburb business and residential revitalization, or at least substantial increases in real estate prices, but distant sprawling residential and business development continues.

Nevertheless, despite the lack of a paradigmatic new or booming city that has created or retained such a vital urban center, the "new urbanists," as well as advocates of the virtues of "civic republicanism," advocate more concentrated forms of urban design that include more mixed types of uses in close proximity, and rely less on automobiles and more on mass transit. The hope is that with a different urban form less dominated by single family homes distant from each other and from commercial amenities and workplaces, greater urban vitality, political involvement, and a vibrant cultural center will arise and thrive. These advocates of a changed urban development pattern are substantially hobbled in their advocacy by most citizens' lack of exposure to these more urban styles of development and life. For

84. Portland's creative efforts to constrain growth and retain nearby green spaces are often touted as an example for other jurisdictions to follow. See, e.g., Carl Abbott, Portland: Planning, Politics and Growth in a Twentieth-Century City 206-28 (1983) (discussing Portland's efforts to redefine the city through downtown planning); Bollier, supra note 20, at 33-34 (stating that Portland has become one of the most attractive cities in the nation through its comprehensive planned growth); H. Jeffrey Leonard, Managing Oregon's Growth: The Politics of Development Planning (1983) (describing Oregon's efforts to address land use and development challenges). Portland has thrived economically and offers alternative modes of governance, but its use of urban growth boundaries to encourage "infill" and deter sprawl has met with only limited success. See Arthur C. Nelson, *Oregon's Urban Growth Boundary Policy as a Landmark Planning Tool*, in *Planning the Oregon Way* 25-45 (Carl Abbott et al. eds., 1994); infra notes 302-11 and accompanying text.

85. See *Garreau*, supra note 29, at 59-62 (observing that the "edge city" development appears to be accompanied by revitalization of many metropolitan areas' urban center).

86. For the normative argument that city life offers political and social benefits precisely because of its diversity and interactions among strangers, see Iris Marion Young, *Justice and the Politics of Difference* 236-41 (1990). For legal scholarship exploring the "civic republican" theory of constitutional democracy, see Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1511 (1992); Symposium, *The Republican Civic Tradition*, 97 Yale L.J. 1493 (1988). "Civic Republicans" can be categorized generally as scholars or political activists who emphasize the importance of pursuing public policies that will foster civic engagement, debate, and deliberative decisionmaking about societal issues and needs.

many citizens, benefits of sprawl and a more suburban lifestyle are readily perceived while benefits of more urban living are largely an unknown quantity. Of course, the choices of urban form are neither theoretically nor practically all sprawl or all new urbanism. Instead, reform efforts are likely over time to modify incentives and reduce current government policies that underwrite sprawl and concomitantly disadvantage efforts to revitalize central urban areas.

Less sprawling, more concentrated forms of urban development also provide opportunities for preservation of exurban green spaces and the economic and aesthetic benefits of agricultural uses. The preservation of green and open spaces not only provides recreational and psychic relief for nearby urban and suburban residents, but also provides at least the possibility that green spaces may remain linked and hence reduce the rapidity of biodiversity loss. To preserve ecosystem integrity and a sustainable mix of "biota and physical traits," many ecologists now believe that society must preserve "many large, contiguous, undisturbed chunks of land." The political constituencies that might join together to advocate and support political initiatives designed to deter sprawl are uncertain, but the widespread and sustained political support for protection of the environment continues to confound the predictions of many political and economic theories of law and regulation.

II. SPRAWL AND POLITICAL-ECONOMIC THEORY

Urban sprawl thus offers many metropolitan area residents and businesses benefits, but also causes substantial negative effects borne by citizens, businesses, governments, and ecosystems. The political economy of sprawl must be examined if one is to assess the efficacy of reforms to reduce sprawling urban growth or alleviate the harms associated with sprawl. This section provides such a political-economic analysis.

This theoretical framework has its roots in economic theories of legislation and regulation, but tempers that literature's sometimes

88. For a classic work that explores the deep roots of American's romanticized view of independent suburban home ownership, see Jackson, supra note 16.
90. Ruhl, supra note 36, at 66.
91. See infra Part IV. Professor Ruhl suggests that if the federal government sought to increase its involvement in biodiversity protection by enacting more laws or regulations utilizing coercive regulatory strategies, it would likely lead to "a full scale political rumble." Ruhl, supra note 11, at 651. Ruhl instead proposes increased reliance on a largely cooperative regulatory regime that includes monetary incentives and streamlined regulatory processes as enticements to involve state and local governments in biodiversity protection efforts. See id. at 661-71 (setting forth Ruhl's suggested components of a Biological Resources Zone Management Act).
monochromatic concepts of rationality and self-interest. While the analytical framework offered in this part shares many attributes with “public choice” and its often close cousins, “positive political theory” and “social choice” schools of scholarship, this discussion’s cogency does not depend on unidimensional assumptions that all persons, whether they be categorized as voters, politicians, citizens, or market participants, act only in their self-interest with wealth enhancement as their major goal. Instead, this part builds more upon the insights of Ronald Coase, Mancur Olson, and many of the shared insights of public choice and social choice literature to assess political and economic dynamics in a world of complex and often disparate tastes and incentives. All contributors to the urban sprawl phenomenon are likely to have both self-regarding and public-regarding moments. Nevertheless, focusing primarily on the self-interests of all sprawl contributors both in their individual and institutional roles in light of pre-

92. The theoretical framework offered shares many attributes with the recent “political market” equilibrium suggested by Professors Keohane, Revesz and Stavins, see Nathaniel Keohane et al., The Choice of Regulatory Instruments in Environmental Policy, 22 Harv. Envtl. L. Rev. 313, 322-23 (1998), as well as often-similar insights about the dynamics of environmental politics suggested in Christopher H. Schroeder, Rational Choice Versus Republican Moment Explanations for Environmental Laws, 1969-73, 9 Duke Envtl. Law & Pol’y F. 29 (1998). Keohane, Schroeder, and this Article all draw on an earlier generation of legal, economic, and political science scholarship that bridges disciplines to explore the underpinnings of legislative and regulatory activity, particularly in environmental law, where rigorous regulatory regimes are generally unexpected due to disparate economic and political incentives of individuals and groups deciding whether and how to act to achieve political success. See id. at 33-41 (discussing theories of rational choice, collective action and environmental politics); infra Part III.B.3.a.

93. “Public Choice” scholarship generally refers to the application of the tools of economic analysis to the study of behavior in the political arena. See Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 1, 7 (1991) (citing the definition of public choice scholarship offered in D. Mueller, Public Choice II 1 (1989)). A basic tenet of public choice scholarship is that one cannot assume that political activity is public regarding or will in fact achieve its stated public regarding goal. Much as markets can fail, political solutions may from their inception or in their implementation fail to achieve stated goals. This skeptical perspective on politics predates the recent wave of public choice scholarship. One of the earliest modern critiques of politics that closely resembles the public choice perspective was offered by Ronald Coase in 1960: “[T]here is no reason to suppose that government regulation is called for simply because the problem is not well handled by the market or the firm. Satisfactory views on policy can only come from a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects.” Ronald Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 18 (1960).

vailing legal frameworks allows one to derive a theoretical framework that closely matches observable political and economic dynamics that contribute to sprawl. This analytical framework examines private "demands" in the market and for particular government actions, the "supply" incentives of politicians themselves, and the relative disparities in power and strengths of preferences of the various sprawl actors and institutions to suggest both the dynamics leading to pro-sprawl policies and why anti-sprawl efforts face an uphill battle. Under virtually all major strains of political-economic analysis, sprawl is readily predictable, but difficult to deter.

A. Politicians' Incentives and Interest Group Clout

Ongoing political commitments to fund highways and rail transit and retain other policies that encourage sprawling development are consistent with predictable political and economic incentives underlying sprawling development patterns. Such government transportation expenditures are an essential contributor to sprawling development patterns. At least in their early months of use, new highways offer residents of outlying areas faster commutes, although those faster commutes rapidly disappear as commuters adjust their travel plans. Highway construction offers jobs, and once built, highways allow easy access to land that was previously difficult to reach.

95. See Jennifer Arlen, Comment: The Future of Behavioral Economic Analysis of Law, 51 Vand. L. Rev. 1765, 1767-70 (1998) (acknowledging significance of diverse theories of human and institutional motivation and behavior, but arguing that "rational choice remains a reasonable description of individual choice" and that even where other theories of non-rational behavior apply, no alternate "robust, tractable model" yet exists).

96. For a similar framework built upon much of the same preceding theoretical literature but applied to address the different question of why particular regulatory instruments are used in environmental laws, see Koehane et al., supra note 92.

97. See, e.g., Jackson, supra note 16, at Chapters 5, 6, 9 & 11 (discussing the contributions to suburbanization of commuter railroads, trolleys, cars, and government policies); An Unlevel Playing Field, supra note 23, at 11-12 (attributing patterns of urban impoverishment and suburban wealth in Atlanta to the unintended consequences of transportation policies); Fishman, supra note 7, at 28-38 (correlating the transformation of modern cities with the development of the transportation system through the twentieth century); Frank, supra note 18, at 30 (arguing for linked transportation modes to reduce harms associated with the excessive use of cars).

98. New highways seldom create lasting lower traffic densities. Commuters and developers adjust, leading to quick elimination of touted lower density traffic. See Michelle Garland & Christopher Bender, How Bad Transportation Investment Decisions Affect the Quality of People's Lives, 9 Progress 4, 6 (May 1999) (Surface Transportation Policy Project) (reporting that traffic congestion levels in cities undertaking substantial new highway expansion projects was not significantly different than in cities undertaking 25% less growth in lane miles); Oren, supra note 41, at 172 (analyzing short-lived benefits of new highways and describing this phenomenon as the "Field of Dreams' rule: if you build it they will come" (quoting a line from the movie, Field of Dreams (Universal 1989), which in turn was based on W. P. Kinsella's novel, Shoeless Joe (1982))).
near new highways is suddenly valuable due to its accessibility to highways and attractiveness either for new business offices, warehouses, factories or residences.\textsuperscript{99}

Real estate and transportation construction interests have substantial monetary incentives to favor continued government expenditures on the highways as well as rail lines that are essential to urban sprawl.\textsuperscript{100} Contrary to the implications of some recent economics-oriented skeptics about anti-sprawl reforms, the status quo development patterns have not arisen in a free market vacuum uninfluenced by government policy.\textsuperscript{101} Furthermore, as earlier generations of political and economic scholars have observed, particularly Mancur Olson, both markets and politics will result in skewed results that are often not public regarding or beneficial to society when citizens, industry, and politicians have disparate stakes in a government policy choice.\textsuperscript{102} Such skewing of results is likely in the passage and implementation of policies influencing development patterns. Transportation construction agencies and industries, as well as large scale residential, retail,

\textsuperscript{99} See Adams, supra note 43, at 249; Jackson, supra note 16, at 163-68; supra note 43 and accompanying text. See generally Richard Fogelsong, Married to the Mouse: Walt Disney World and Orlando (Yale University Press, forthcoming) (recounting substantial efforts of Orlando business people and officials to build new highway links and the critical importance of those links to the decision of Disney to build Walt Disney World in Orlando).

\textsuperscript{100} Anti-highway politics may similarly be skewed in favor of private interests such as the rail and alternative transportation industry for the same reasons highway construction has been such a durable political and economic commodity. Public benefits may accrue from each type of development, especially rail transit's creation of an alternative to the automobile, but the likelihood of "rent seeking" behavior in which private citizens or officials seek to extract personal wealth from government decisions is high in these contexts. See Fred S. McChesney, Money for Nothing: Politicians, Rent Extraction, and Political Extortion 9-10 (1997) (defining "rents" as benefits created through government regulation "that were unavailable other than through politics, or were more cheaply available through politics"); see also Purdum, supra note 40 (reporting that Los Angeles' new subway segments were built with substantial cost overruns, costs of up to $500 million a mile, with "pork-barrel politicking . . . determin[ing] [their] proposed route in an effort to spread the spoils of construction jobs"). Commuter rail lines may encourage newer development to cluster near the rail lines, but as much as highways open up new land to economically attractive development, new rail lines will similarly trigger new exurban development, albeit in a more concentrated context that is also less reliant on automobiles. Less land will be consumed by development linked to new rail lines and less car pollution may be created, but such rail lines will trigger new development. For a historical discussion of the link between rail construction and suburbanization, see Jackson, supra note 16, at 91-102.

\textsuperscript{101} See, e.g., Holcombe, supra note 3, at 5 (arguing that government land-use planning is "more likely [to] hinder than help the development process"). But see John W. Frece & Andrea Leahy-Fucheck, Smart Growth and Neighborhood Conservation, 13 Nat. Resources. & Env't. 319, 322 (1998) (explaining Maryland's "smart growth" policies and showing how past government policies contributed to sprawl).

\textsuperscript{102} For the classic analysis of why small groups with high stakes in a particular action may prevail over more broadly held preferences that in the aggregate exceed the small groups' interests, see Mancur Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups (1965).
and mall developers, have powerful incentives to use their political clout to ensure that government investment in transportation infrastructure continues and that local land-use ordinances allow continued development. This clout is asserted through campaign contributions and political support for politicians or agency officials who endorse such government expenditures. Of course, corrupt types of influence are also a substantial possibility, but need not occur to observe signs of strong political influence of interest groups, especially considering the substantial link between economic prosperity and politicians' job security.

The political influence of the transportation and real estate industries is unlikely to be countered effectively by voters, who as commuters, homeowners, or renters may be opposed to sprawl and might embrace anti-sprawl policies. Many citizens, of course, seek their own piece of suburban living, and as such, might oppose anti-sprawl reforms. Nevertheless, at least a portion of a metropolitan regions' citizens feel the brunt of sprawl every day. Each of these citizens, however, has a small stake in development patterns compared to politicians, agency officials, and industries making a living from infrastructure investment and opportunities made available through government investments in transportation and favorable land use policies. These citizens can be expected to be rationally ignorant or, even if they are aware of the stakes surrounding sprawling development, be tempted to despair about the likelihood of influencing the government. Many citizens will free ride on the anticipated (or desired) actions of others. Basic collective action dynamics lead one to predict...

103. See Keohane et al., supra note 92, at 328; Schroeder, supra note 92, at 55-56; An Unlevel Playing Field, supra note 23, at 11 (reporting on wealth creation in land adjacent to new highway development); Poughkeepsie '85, supra note 34, at 24-52 (recounting the extraordinary efforts of a mall developer to elect candidates to the local zoning board through secret campaign contributions).


105. See generally Jackson, supra note 16 (exploring the deeply rooted American preference for suburban living despite the many attendant harms and losses).

106. See Carol M. Rose, Environmental Lessons, 27 Loy. L.A. L. Rev. 1023, 1025-26 (1994) (discussing reasons citizens in ordinary times "have too few reasons even to notice commons problems" that are leading to environmental destruction and hence lack the "motivational spur" to act to prevent environmental harm). That citizens have incentives to remain inactive in ordinary times, however, does not mean that...
that politicians (including both legislators and agency officials), will generally be more concerned with the desires of entities with a concentrated interest in an issue than with the interests of those with a lesser stake in the benefits or costs of development. Those entities with a substantial economic or political interest in sprawling development are thus likely to be successful in demanding or preserving legal frameworks and political structures that allow continued political and economic success.

This prediction of successful interest group demands for more sprawl-related government investment and government policies that allow further sprawling development also makes sense from a "supply" perspective that focuses on the interests of government officials. Politicians and agency officials do not merely calculate interest group pressure and act, but have their own incentives based on their own internal cost-benefit analysis. Economic affluence, an enhanced tax base, increased employment in both the private and public sectors, and visible successes in securing new private or government invest...
ments all provide benefits to government officials. Paul Peterson's influential *City Limits* applies political science frameworks and empirical analysis to conclude that local governments have strong incentives to pursue policies that enhance the economic vitality of the jurisdiction. For state and local governments, supply and maintenance of transportation infrastructure is one of their chief obligations. Transportation expenditures offer substantial political benefits to elected and appointed politicians and also offer substantial opportunity for political patronage. Elected politicians can point to new construction on highways, homes, and offices as tangible signs of political power and economic vitality. In addition, all of this new construction is often claimed to enhance the tax base for local governments and either lead to enhanced services or a reduced tax burden on those previously in the jurisdiction. Politicians' concerns with real estate and transportation interest groups' preferences may at times be overridden by priorities of an energized electorate or due to politicians' own ideological preferences. Such politicians may see advantage in acting as anti-growth leaders. Nevertheless, as a matter

110. See Peterson, supra note 4, at 22-38.
111. See id. at 57-58, 60-63.
112. See Purdum, supra note 40 (reporting on patronage-driven subway development in Los Angeles); cf. Jackson, supra note 16, at 21 (observing that real estate exploitation of impending government decisions enhancing value of land was evident as long ago as the 1795 acquisition of Beacon Street land due to inside knowledge of imminent plans to locate the State House nearby).
113. See generally Vicki Been, "Exit as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine," 91 Colum. L. Rev. 473 (1991) (discussing the tendency of local governments to seek new investment and business activity rather than to overregulate).
114. Actually, the urban planning and economics literature often questions the common perception that growth creates economic value for the jurisdictions experiencing new growth. For a summary of this literature, see Nelson et al., supra note 3, ch. 1.
115. For articles exploring the political and economic dynamics leading to the enactment of often stringent and durable federal environmental laws, see Buzbee, supra note 4, at 27-46; E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. Econ. & Org. 313 (1985); Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. Econ. & Org. 59 (1992); Schroeder, *supra* note 92. See also Rose, *supra* note 106, at 1025 (stating that "people in practice sometimes do manage to cope with collective resources, so that the 'inexorable' logic of commons does not always play out so inexorably after all"). While most literature on politicians' incentives finds a pro-growth slant, anti-growth or pro-environment politicians can seize a political advantage and enhance their political prospects. See Elliot et al., *supra*, at 338. See generally Mark Schneider & Paul Teske, *The Antigrowth Entrepreneur: Challenging the "Equilibrium" of the Growth Machine*, 55 J. of Pol. 720 (1993) (acknowledging frequent strength of the "growth machine" view of local politics, but also reviewing case studies and theory to explain why antigrowth entrepreneurs can be politically successful despite excessively "deterministic" views of politics by other scholars); Mark Schneider & Paul Teske, *Toward a Theory of the Political Entrepreneur: Evidence from Local Government*, 86 Am. Pol. Sci. Rev. 737, 745 (1992) (surveying literature on political entrepreneurs and concluding that
of general prediction, Olson's and Peterson's observations that concentrated interests will more often than not prevail over dispersed interests remains sound.\textsuperscript{116} Even if dispersed anti-sprawl interests begin to coalesce, it is unlikely that citizens' views toward sprawl-related issues will ever be uniformly anti-sprawl. Substantial citizen interest in suburban home ownership is likely to remain.\textsuperscript{117}

\textbf{B. Externalities and Sprawl}

If one turns to the cost side of the sprawl equation, few of the costs of sprawl will be borne by businesses, politicians or agencies that profit in markets or politics from sprawl-related construction, nor will they be borne in any substantial way by individual residents or employers in outlying urban areas. If federal, state or local governments pay for highway construction and much of the infrastructure investment that accompanies the conversion of green areas into land for new residential or business construction, then companies and agencies profiting from that construction have huge ongoing incentives to preserve that flow of business. These infrastructure businesses and agencies see little or nothing of the "externalized" harms flowing from their activities.\textsuperscript{118}

Automobile commuters from new tract developments on the pe-

\textsuperscript{116} See Buzbee, supra note 4, at 17-38 (noting that groups with common interests are more likely to prevail politically); Olson, supra note 102 (same); Clarence N. Stone, \textit{Summing Up: Urban Regimes, Development Policy, and Political Arrangements}, in \textit{The Politics of Urban Development} 269-88 (Clarence N. Stone & Heywood T. Sanders, eds.) (summarizing empirical studies presented in the book as showing that pursuit of growth remains a powerful force in urban politics, but that the particulars of local political history and climate influence the strength of that motivation and battles over what measures should be embraced to further growth). Nevertheless, as further explored below in Part IV, environmental laws that are both stringent and durable have been a prominent part of the legal landscape since the late 1960s. A combination of active citizens, political entrepreneurs and active and knowledgeable not-for-profit environmental and citizen groups can at times act together and succeed despite general predictions about collective action problems and interest group behavior. See \textit{infra} Part IV; see also Rose, supra note 106, at 1025; Schroeder, supra note 92, at 43-56 (discussing the history of early federal environmental laws under a modified "rational choice" account).

\textsuperscript{117} See \textit{supra} notes 26-28 and accompanying text.

\textsuperscript{118} For a discussion of "externalities," defined as costs associated with activities that are not borne by the person creating those costs, see Peter S. Menell & Richard B. Stewart, \textit{Environmental Law and Policy} 54-60 (1994). Many local governments have begun to use exaction strategies to require entities requiring discretionary permits to pay for some of the costs of their proposed development, see Alan Altshuler et al., \textit{Regulation for Revenue: The Political Economy of Land Use Exactions} 114-21 (1993), but it is doubtful such exaction could possibly pay for all governmental costs associated with new development.
riphery of new cities play a critical role in the air and water quality problems plaguing the rapidly expanding urban areas. These costs of sprawl, however, will only partially be borne by residents of outlying urban areas in the absence of substantial highway tolls, commuter taxes or other corrective “Pigouvian taxes.”

119 County and local governments that do not share common fiscal concerns or answer to a powerful governor have little incentive to discourage new development as long as traffic congestion is bearable and local services can handle increased numbers of residents and employers.120 Perhaps of equal importance, no single unit of government bears most of the costs of sprawl or is likely to bear the blame for sprawl’s harms and inconveniences. Moreover, the widely felt harms and discomforts of sprawl do not fall in a concentrated way on any particular segment of the public that is likely to be roused to political action.

C. Sprawl and Commons’ Dynamics

The basic dynamics of resource overutilization described in Hardin’s and Gordon’s classic analyses of “tragedy of the commons” also contribute to sprawling development.121 Under the “tragedy of the com-

119. For a discussion of the rationale for “commuter taxes” in the context of an analysis of tax policies and population shifts in the Washington D.C. area, see Robert P. Strauss, The Income of Central City and Suburban Immigrants: A Case Study of the Washington D.C. Metropolitan Area, 51 Nat’l Tax J. 493, 516 (Sept. 1, 1998), 1998 WL 25355913, at *1. See generally Wahrman, supra note 60 (advocating the use of “peak pricing” tolls to modify commuting patterns and harms flowing from traffic congestion). For a discussion of how a “Pigouvian” tax is a tax that seeks to correct an otherwise external cost by forcing the harming actor to in effect pay for the harms he causes, see Arthur Cecil Pigou, The Economics of Welfare (1920). As observed in the recent critique of choices of regulatory instruments in environmental laws, Pigouvian taxes are the preferred choice of economists to deal with pollution or other environmental harms. See Keohane et al., supra note 92, at 314 & n.2. Whether Pigou’s contribution has been correctly characterized is doubtful, but the concept of a Pigouvian tax is now well established. See James E. Krier, The Tragedy of the Commons, Part Two, 15 Harv. J.L. & Pub. Pol’y 325, 325-26 & n.3 (1992) (observing that Pigou focused on subsidizing pollution control activities rather than taxing). Setting an appropriate tax, let alone finding political support for such a tax disincentive scheme, is fraught with difficulty. See Keohane et al., supra note 92, at 349 & n. 108 (exploring why firms that are already regulated prefer almost any regime of harm regulation over pollution taxes); Krier, supra, at 325-26 (pointing out overwhelming barriers to constructing a market-oriented environment protection regime).

120. See generally Briffault, Local Government, supra note 9; Frug, supra note 9. Analyses of the fiscal effects of sprawl sometimes neglect to acknowledge the significance of separate budgetary “ledgers” of local, state and federal governments, as well as further separate budgetary concerns of departments and agencies acting under local, state or federal authority. See, e.g., Burchell, supra note 14, at 165-70 (making a powerful case for aggregate fiscal waste associated with sprawl, but failing to break down budgetary and fiscal incentives of various units of government in connection with sprawl-related policies).

121. For a superb discussion of these classic works, see Rose, supra note 106, at 1024 (discussing commons overuse issues and citing Garrett Hardin, The Tragedy of the Commons, 162 Sci. 1243 (1968)); see also Briffault, Local Government, supra note
mons” scenario, a common resource, such as a grazing or fishing area, will be overdepleted by individuals who individually gain from each use of the common resource, so that the aggregate effect of these individual acts is overdepletion of the resource. In the sprawl setting, each contributor to sprawl obtains direct and substantial benefits, but the substantial harms of sprawl are dispersed and borne by many. Each contributor to sprawl eats up an increment of available land, air and water resources, and increments of free highway space. As long as each denizen of outlying sprawl areas sees greater benefits than individually felt harms, other immigrants to outlying sprawl regions will arrive. Each contributor to sprawl, acting rationally and in his or her self interest, will continue developing in a sprawling pattern unless the contributor bears the costs of the harms of sprawl or a government unit prohibits or creates corrective disincentives for such activities. The end result may be substantial aggregate harm and inconvenience, but that point will be reached based on individually rational decisions. Thus, from the viewpoint of most private and government actors, the individual decisions that cumulatively add up to sprawl are rational choices and expressions of both market and political preference. These market and political choices are also, however, influenced by the political and legal framework in which they occur. As these economic theories of political and market dynamics establish, individually rational behavior can lead to substantial societal harms that justify government intervention.

9, at 1149 (observing that local governments’ parochial pursuit of self interest can lead to a tragedy of the “regional ‘commons’”); Währman, supra note 60, at 183 (observing how traffic congestion in part results from “tragedy of the commons” dynamics).

122. See Ruhl, supra note 11, at 658 & nn.314, 315 (discussing the “tragedy of the commons” in analyzing strategies to protect biodiversity); see also Karkkainen, supra note 11, at 74-75 (applying the common resource overdepletion theory to conclude that local governments are unlikely to protect important sources of biodiversity because they are better off externalizing the costs by leaving the costs of conservation to others).

123. For a more complete discussion of the benefits of sprawl, see supra Part I.A.

124. Critics of anti-sprawl reforms sometimes describe the current sprawling forms as though they are the result of some pre-legal set of market choices. See, e.g., Tierney, supra note 1 (discussing the benefits of urban sprawl when it is the result of local choice and initiative, not official government intervention). While market and social preferences are undoubtedly part of the sprawl equation and must be considered, see supra Part I.A., such preferences and development patterns are undoubtedly influenced by past government actions and legal frameworks. For example, whether the common law, statutes, and regulations recognize or deny a right to compensation for private activities imposing harms or cost on others is itself the result of legal and political choice, not some pre-legal allocation of natural rights. Similarly, whether citizens or businesses should pay for benefits conferred through government investments or acts is the result of existing political and legal frameworks. See, e.g., Altshuler et al., supra note 118, at 115-20 (exploring political and economic roots of increased reliance by local governments on exactions to raise revenue); Joseph L. Sax, Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council, 45 Stan. L. Rev. 1433, 1442-51 (discussing the dynamic nature of what property rights are recognized by law and give rise to rights to compensation or obligations to pay for harms).
D. Institutional Incentives and Interjurisdictional Competition

If one moves the focus from the level of individuals and their incentives to the incentives of government units, sprawl's dynamics are further illuminated. Businesses looking to find low cost locations benefit not only from cheaper land prices on the urban periphery, but also may be able to elicit tax benefits and other financial packages from municipalities eager to attract new investment and an increased tax base. States and even nations have historically competed to attract such capital investment. Similarly, municipalities that wield substantial political and fiscal independence compete to attract investment, often offering up more lenient regulatory treatment or financial packages to attract investment.

For businesses that successfully play municipalities and states off against each other, the availability of numerous exurban development sites creates great potential for auction dynamics leading to beneficial development incentives. Businesses can maintain regional business links while shifting, or threatening to shift, their locations among competing local governments. Thus, businesses have substantial


126. See Briffault, Local Government, supra note 9, at 1133-41; Peterson, supra note 4, at 20-22. For a critique of development dynamics and interjurisdictional competition for business, and laws or judicial opinions addressing such dynamics, compare Been, supra note 113, at 478 (finding that "the market for development suffers many functions, but nevertheless may be sufficiently competitive to constrain local governments' exaction practices"), with Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210, 1233 (1992) (stating there is no support for the claim that "without federal intervention, there will be a race to the bottom over environmental standards") [hereinafter Revesz, Rethinking]. For a sampling of the criticisms of the theoretical, empirical, and normative observations and implications of Revesz's influential article, see Buzzee, supra note 53, at 110-16 (discussing reasons why states might underprotect the environment); Kirsten H. Engel, State Environmental Standard-Setting: Is There a Race and is it "To the Bottom"?, 48 Hastings L.J. 271, 315-51 (1997) (challenging Revesz's conclusion with data indicating frequent state laxity); Daniel C. Esty, Revitalizing Environmental Federalism, 95 Mich. L. Rev. 570, 652-53 (1996) (concluding that the appropriate level of government intervention will vary based on the situation); Peter P. Swire, The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law, 14 Yale L. & Pol'y Rev. 67, 91-94 (Symposium Issue 1996) (analyzing reasons why states might frequently underprotect the environment). For a response to some of those criticisms, see Richard L. Revesz, The Race to the Bottom and Federal Environmental Regulation: A Response to Critics, 82 Minn. L. Rev. 535, 545-63 (1997) [hereinafter Revesz, A Response]. For a discussion of local government taxing and spending authority, see Perry Sentell, A Profile: The Theory and Practice of Local Government Law (1994) and R. Perry Sentell, Jr., The County Spending Power: An Abbreviated Audit of the Account, 16 Ga. L. Rev. 599 (1982) (describing county spending power under Georgia Law).

127. See Been, supra note 113, at 512-14 (citing articles discussing interjurisdictional competitions for business).
reasons to support pro-sprawl government policies as long as the benefits of sprawl outweigh the costs of sprawl borne by that business. The financial benefits of sprawl are immediately realized and directed to a single business, while the costs are dispersed, delayed, and may not even be borne by that business. Therefore, sprawl is likely to be favored by businesses that can move their sites of operation.\footnote{128} Similarly, real estate developers and brokers benefit from sprawl and bear few of its costs because they make their profit at the time of sale and may bear no discomforts associated with sprawl. The aggregate effects of excessive sprawling residential development may not become fully apparent for decades.

\section*{E. Anti-Sprawl Dynamics}

Over time, the market is likely to provide a partial cure for some ills associated with sprawl. In particular, residents and businesses inconvenienced by congestion and long commutes will, if they have the economic resources, predictably respond to the inconveniences of sprawl and in private market transactions locate closer to the urban center or places of work. More central metropolitan areas thus may over time experience at least a partial revival, but that revival will likely be accompanied by ongoing sprawl trends and incentives, particularly as central metropolitan area real estate prices rise.\footnote{129}

As a metropolitan region matures and businesses and their employees develop deeper roots in particular locations, increasing numbers of businesses may come to support anti-sprawl initiatives that they would have had economic incentives to oppose at the time of initial location decisions.\footnote{130} Businesses and residents that have substantial investments in, or other business ties to, a particular city or region will have strong reasons to support anti-sprawl policies, and thereby enhance their economic position or quality of life.\footnote{131}

Inner city or inner ring suburbanites of sprawling cities might come to support policies designed to reduce the harms associated with new exurban development. Even if such a coalition of businesses and residents forms to support anti-sprawl policies, many reasons exist to question the effectiveness of anti-sprawl reforms, although some alleviation of sprawl’s discomforts is possible.\footnote{132}

\footnotetext{128}{See Buzbee, \textit{supra} note 53, at 114-15 (exploring similar government incentives to attract businesses through lax environmental policies due to delayed nature of any attendant harms and difficulty of monitoring such laxity); \textit{see also} Swire, \textit{supra} note 126, at 87-90 (exploring how, due to “measurement problems” in assessing benefits and costs of environmental regulation, environmental policy is likely to be “skewed” to the benefit of regulatory targets).}

\footnotetext{129}{See \textit{supra} note 29 and accompanying text.}

\footnotetext{130}{See \textit{infra} Part IV.}

\footnotetext{131}{See \textit{infra} Part IV (discussing reasons why anti-sprawl coalitions may form despite general political-economic dynamics and associated predictions).}

\footnotetext{132}{See \textit{infra} Part IV.}
F. Information Asymmetries and the Public-Regarding Official

Even if one shifts the assumption that government officials act in a manner that is primarily self-interested to an assumption of public-regarding official motivations, sprawl would remain expected for reasons predicted by Olson, and further developed by analysts of regulatory capture and "tit for tat" game theory models of government behavior.\(^1\) Even a public-regarding official relies on political input and information to discern societal needs and constituency desires.\(^2\) The disparate stakes of interest groups benefiting from sprawl and the dispersed interests harmed by sprawl lead one to predict that in sprawling metropolitan regions, aggregate political demands and pressure will be felt most often from concentrated interests rather than dispersed interests. Some officials, particularly those representing central city businesses, neighborhoods, or inner ring suburbs, will look to their citizen and business constituencies and hence may oppose pro-sprawl policies.\(^3\) In the absence of regional forms of government, however, outlying jurisdiction officials will be unlikely to share that interest.\(^4\)

The costliness of information, be it political or market information, means that even a public-regarding official seeking to enhance aggregate social welfare is likely to have skewed perceptions due to repeat contacts with and information provided by sprawl beneficiaries.\(^5\)

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\(^1\) See Olson, supra note 102, at 2; see also Robert Axelrod, The Evolution of Cooperation 124-29 (1984) (developing and analyzing implications of "tit for tat" model of evolution of cooperative behavior and exploring how repeat interactions are essential for cooperative behavior to emerge). Axelrod demonstrates that repeat relationships can promote beneficial cooperation but also notes, as does this Article, that in some circumstances the cooperation that will likely flow from repeat interactions may be the opposite of the desired result. See id. at 125.

\(^2\) See Krier, supra note 119, at 331 (discussing "comparative organizational or lobbying advantage" of industry groups in battles over environmental quality); Glen O. Robinson, The FCC: An Essay on Regulatory Watchdogs, 64 Va. L. Rev. 169, 216-19 (1978) (discussing problem of agency's "uncritical reliance" on regulated industries for information and analysis); Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1213-14 (1997) (discussing reasons agency officials can adopt policies favorable to regulated interests due to frequency of contacts).

\(^3\) For sources regarding pro-environment and anti-growth political entrepreneurs, see supra note 115.

\(^4\) See Briffault, Local Government, supra note 9, at 1133-41 for a discussion of different incentives of central city and more suburban or exurban jurisdictions. For a discussion of the implications of the common lack of regional forms of governance in the United States, see infra Parts III.A.2 & III.A.3.

\(^5\) See Farber, supra note 115, at 71 (developing a theory to explain the successes of environmental laws despite concentrated opposition interests, and suggesting that environmental groups serve an informational role and that due to their "incentives as . . . 'repeat player[s]' to maintain [their] reputation for reliability" prompts such information to be "relatively unbiased"). See generally George J. Stigler, The Economics of Information, 69 J. Pol. Econ. 213 (1961) (exploring how reality of costliness of information must be considered in economic models).
When one adds to this analysis the game theory insight that repeat contacts lead to cooperative and more conciliatory modes of interaction, one sees that a public-regarding official is unlikely to take on and oppose pro-sprawl interests. In some areas of public policy, particularly in the environmental law arena, national environmental groups have gained political clout by offering politicians reliable information and policy expertise, thus providing a counterweight to industry views. These counterweights have been critical to national legislative and regulatory environmental successes. In the state and local arenas where most sprawl-related decisions occur, however, it is doubtful if representatives for otherwise underrepresented constituencies will likely emerge and participate in the far more numerous low-visibility contexts where sprawl-related decisions occur.

When one adds into the equation the reality that politicians can only pursue their agenda if they remain in government and gain seniority within political institutions, then one sees that ongoing success in obtaining campaign contributions and being reelected or reappointed is essential to the pursuit of public-regarding ends. Publicly oriented officials surely exist and can gain reputations that enhance their electoral and political clout. Even if such public-regarding officials succeed in electoral or appointment politics, however, skewed in-

138. See Axelrod, supra note 133, at 125; Farber, supra note 115, at 66.
139. See Farber, supra note 115, at 71.
140. See infra notes 335-39 and accompanying text.
141. In their critiques of several environmental “reinvention” and “reform” initiatives, Professors Steinzor and Mank explore why decentralized and largely discretionary decisionmaking is likely to lead to less effective or minimal participation by well funded and expert environmental not-for-profit entities, contrasted with such groups’ effective participation at the national level. See Bradford C. Mank, The Environmental Protection Agency’s Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization, 25 Ecology L.Q. 1, 60-61 (1998); Rena I. Steinzor, Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control, 22 Harv. Envtl. L. Rev. 103, 144-45 (1998).
142. For a discussion of how the link between legislative seniority and control of key committees and the legislative agenda is well established, particularly in the federal legislature, see Barbara Hinckley, The Seniority System in Congress (1971) (detailing the history and continued presence of the seniority system in choosing subcommittee leaders); David R. Mayhew, Congress: The Electoral Connection 94-97 (1974) (stating that as seniority increases in Congress so too does a representative’s “turf”); Kenneth A. Shepsle & Barry R. Weingast, The Institutional Foundations of Committee Power, 81 Am. Pol. Sci. Rev. 85, 87 (1987) (stating that committee power “consisting of gatekeeping, information advantage, and proposal power” establishes committees as agenda setters); see also Glenn R. Parker, Congress and the Rent-Seeking Society 143 (1996) (explaining that even with the implementation of new rules for electing committee chairs, seniority remains the overwhelming factor). Reduced reliance on seniority in choosing committee leaders and the proliferation of subcommittees in the U.S. Congress has reduced the clout once wielded by a handful of key senior legislators. Seniority, however, remains an important factor in choosing legislative leadership. See Christopher J. Deering & Steven S. Smith, Committees in Congress 126-44 (1997); McChesney, supra note 108, at 104-06.
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formation may lead to skewed policy.\textsuperscript{143}

This political-economic analysis reveals that few political or economic incentives will be strongly anti-sprawl across an entire metropolitan region. Furthermore, such analysis shows that sprawl beneficiaries have strong ongoing incentives to maintain their market and political power by opposing anti-sprawl initiatives. As discussed below in parts III and IV, broad voting blocks of citizens feeling sprawl's negative effects, coupled with businesses and politicians invested in central city vitality, may emerge to counter these predictable political-economic incentives. They, however, face substantial hurdles, especially in light of the fragmented legal frameworks potentially applicable to address sprawl's ills.

III. LEGAL PRESUMPTIONS, FEDERALISM, AND SPRAWL REFORMS

This part examines the legal frameworks within which sprawl-related decisions occur. Well established legal presumptions and traditional roles of federal, state, and local government make difficult any significant new attempts to alleviate and prevent harms associated with urban sprawl's cross-jurisdictional effects and roots. Sprawl and current legal frameworks are mismatched. Local governments traditionally make land use choices, yet sprawl arises out of dynamics, causes, and effects that tend, at a minimum, to be regional. Any shift away from state and local governments' primacy in regulating land use, however, would be a major change in allocations of governmental responsibilities. This part concludes that if anti-sprawl reforms remain a source of political activity, an increased federal role is constitutionally permissible, politically likely, and desirable. This Article suggests that if federal reforms are enacted to deter sprawl or address its ills, monetary incentives in the form of conditional federal spending are preferable to regulatory coercion or substantial federal intervention in land use decisionmaking.

A. Federalism and Local Primacy Over Sprawl Policy

In this country, layers of law and regulation are the norm.\textsuperscript{144} Even if citizens, politicians, or policy analysts can come to an agreement on a social ill deserving government intervention, it must then be determined what level of government has the authority and capacity to address the problem. The third analytical step involves determining

\textsuperscript{143} See infra Part IV.D.

\textsuperscript{144} See Peterson, supra note 4, at ch. 4. See generally David L. Shapiro, Federalism: A Dialogue (1995) (exploring divergent approaches to the role of federalism in the functions of government); Alfred R. Light, He Who Pays the Piper Should Call the Tune: Dual Sovereignty in U.S. Environmental Law, 4 Envtl. Law. 779 (1998) (discussing the existence of a dual system of government and the relation between state and federal governments).
what regulatory strategies will best correct the ills. This section examines the political economy of sprawl in light of the divisions of authority among federal, state, and local governments. This examination of the federalism framework reveals that the federal role can be expanded further, but authority over the most significant land use and transportation decisions affecting sprawl have traditionally been the domain of state and local governments and for pragmatic reasons will likely remain principally in those fora.

1. The Traditional Dominant Local Role in Land Use Decisionmaking

Two hundred years of traditional divisions of government authority must be considered in evaluating sprawl and relevant legal frameworks. Local governments have long been in charge of land use and zoning activity, though state governments occasionally intervene. Given the polycentric nature of land use decisionmaking, where many affected people and interests are likely to want a say in how land is developed, local and county governments are often the only levels of government that knows of, or has the capacity to discover, the preferences of local constituencies. State, county, and local governments

145. This tiered analysis of regulatory goals, institutional options, and regulatory tools must occur in any effort to attack a social ill, be it predominantly a local, state, federal, or global issue. See Wiener, supra note 11, at 686-701 (applying comparative institutional frameworks and political-economic literature to suggest regulatory strategies most likely to succeed in addressing global environmental ills). As Wiener notes, much of the existing political-economic literature assumes that a single, coercive, and effective government body is available to enforce a regulatory scheme. As he demonstrates, this assumption of what he calls “Unitary Fiat” is inappropriate at the level of global ills. Id. at 701-04. This assumption is seldom appropriate even in analyzing domestic environmental or urban sprawl policies in the context of a federalist scheme of government that grants and retains different spheres of authority for local, state, and federal governments. See Susan Rose-Ackerman, Does Federalism Matter? Political Choice in a Federal Republic, 89 J. of Pol. Econ. 152, 154-57 (1981). The array of appropriate regulatory designs and tools will necessarily differ in different contexts. See id. at 162 (stating that “[e]ven when the central government has the power to preempt state and local laws, its democratic choices will depend upon the strategic position of citizens living under alternative state legal regimes”); see also Buzbee, supra note 4, at 27-58 (examining the dynamics of environmental federalism to develop hypothesis that most effective allocation of authority among federal, state, and local governments shifts over time depending on context and cannot be predicted by an approach that assumes deterministic character traits of government institutions); Wiener, supra note 11, at 681 (stating that the “economics of instrument choice are embedded in and contingent on the underlying legal system”).

146. See Daniel R. Mandelker, Land Use Law 1-2 (3d ed. 1993) (noting that all states authorize local governments to use comprehensive planning as a guide for land use controls); Tarlock, supra note 11, at 557 (explaining that land use has almost exclusively been dealt with by local governments).

147. For arguments that state and local governments will better tailor their policies to constituent desires and needs than would a federal regulator, see Revesz, A Response, supra note 126, at 536-45. See also Henry N. Butler & Jonathan R. Macey, Externalities and the Matching Principle: The Case for Reallocation of Environmental
often appear to favor powerful economic interests or their own agencies over the interests of dispersed citizens, but there have also been instances of state and local government opposition to developer or industry proposals.148

Even when the federal government has enacted laws and regulations impinging on local and state land use primacy, local and state governments retain a substantial role. For example, the effectiveness of federal environmental legislation such as the Clean Air Act and the two most recent amendments to federal transportation law depends upon planning activity that is sensitive to local politics and local priorities.149 Under such federal legislation, state and local governments are offered the chief planning role, especially regarding land use. This role is conditioned on either the receipt of federal dollars or state or local officials displacing federal officials who would otherwise implement and enforce federal programs.150 Analysts of state and federal roles in protecting the environment point out that the federal gov-

148. See, e.g., Leonard, supra note 84, at xi (describing Oregon's commitment to sprawl control and growth boundaries); Peterson, supra note 4, at 20 (analyzing reasons why local governments tend to pursue pro-growth policies); Revesz, Rethinking, supra note 126, at 1223, 1243. The thesis of Butler and Macey is strangely imbalanced because it expresses concerns about interest group dominance and regulatory failure in Washington, but fails to consider different interest group and political-economic incentives and sources of potential regulatory failure if regulatory policies were shifted to state and local government venues. See Butler & Macey, supra, at 28, 44-45, 53. Butler and Macey critique federal regulation and its anticipated dysfunctions, but fail to look at state and local fora with a similarly skeptical eye. See Geoffrey Moulton, The Quixotic Search for a Judicially Enforceable Federalism, 83 Minn. L. Rev. 849, 918-19 (1999) (observing that advocates of more intrusive judicial review to protect states fail to examine interest group pressures at state and local levels).


150. See Buzbee, supra note 4, at 52-54.
ernment cannot bear the burden of taking over local planning activity, but is dependent on state and local cooperation and planning due to the huge administrative responsibilities and local knowledge needed for local and state land use planning. Land use planning is likely to remain primarily the domain of state and local governments even if federal goals and incentives seek to shape those local decisions. The historical division of authority among federal, state, and local governments is not a historical accident, but has largely arisen as a result of the relative institutional competence of each level of government in addressing particular social needs. The optimal mix of federal, state, and local regulatory roles, however, inevitably changes over time as technological, environmental, market, and political changes occur.

2. The Absence of Regional Political Units

One of the most intractable problems for efforts to address sprawl and its harms is the absence of political units coextensive with the geographic reach of major metropolitan areas. Local governments are usually the chief land use policymakers, but sprawling metropolitan regions typically encompass many local jurisdictions, none of which has authority to address such regional issues. In some cities, such as New York, a single mayor and city council wield most governmental clout and govern a jurisdiction that is smaller than the entire sprawling metropolitan area, but nevertheless encompasses millions of residents and several counties making up five boroughs. In many of America's more recently expanding cities, such as Atlanta, in contrast, no single mayor is the chief executive for more than a tiny segment of the metropolitan area. Many areas in sprawling metropolitan regions are not even incorporated, and thus can only look to county or state


153. See Briffault, Local Government, supra note 9, at 1117 (referring to New York City's 1898 consolidation but also stating its goals were "undone" by the further expansion of the city); Richard Briffault, Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination, 92 Colum. L. Rev. 775, 775-76, 780-82 (1992) (discussing New York's 1898 consolidation and proposed secession of Staten Island).

154. Instead, approximately ten counties include at least portions of what is commonly described as the Atlanta metropolitan area. Furthermore, county governments wield substantial clout and independent authority. See R. Perry Sentell, Jr., Georgia Local Government Law: A Reflection on Thirty Surveys, 46 Mercer L. Rev. 1, 24-25 (1994).
governments for necessary services or political action.155

The mismatch between regional development and numerous independent municipal or county governments means that no single government unit has an incentive to take the lead and suggest measures to address sprawl's harms.156 Similarly, no local government has authority to impose any region-wide sprawl policies. Outlying municipalities and counties will often oppose anti-sprawl policies due to their interest in securing ongoing residential and business expansion.157 Central urban cities usually have a major stake in reducing sprawling development trends, but they lack authority over outlying areas and are often in positions of fiscal weakness due to the movement of capital and increased social welfare expenditures.158

One partial solution for rapidly sprawling cities seeking to address broader regional problems is the step New York took approximately one hundred years ago: combine independent local jurisdictions. Such an event, however, is unlikely. Metropolitan government campaigns in most cities have been defeated and are viewed as lacking in political viability.159 For an expanded city to be incorporated and a single mayor or city council to assume chief governing roles would require numerous county governments and officials to surrender their power and perhaps their jobs. Both empirical and theoretical literature on behavior of government officials predicts that officials will in most instances not surrender authority, but seek an expansion of authority and budgets unless major political risks would be associated with that expansion.160 Greater governmental consolidation and coordination might reduce sprawl and its associated ills, but it is difficult to see how such consolidation and coordination would come about in the

155. See generally Myron Orfield, Atlanta Metropolitics: A Regional Agenda for Community and Stability (1998) (analyzing the urban sprawl effect in the Atlanta metropolitan area).

156. Local governments have incentives to free ride on the anticipated or desired actions of others. As anticipated in the literature on free riding, the result may be that no one takes the lead in addressing the sprawl harms that all feel. See supra Part II (discussing free riding and political dynamics leading to exacerbation of sprawl's harms).

157. Urban policy critic William Whyte noted this tension between urban governments and exurban or suburban counties 40 years ago. See William H. Whyte, Jr., Introduction to The Exploding Metropolis, supra note 2, at 13 (discussing "anti-city bias of the rural counties" throughout the United States); see also Briffault, Local Government, supra note 9, at 1133-41 (discussing consequences of locally bounded regulation).


159. See Briffault, Local Government, supra note 9, at 1117-18.

160. See, e.g., Terry L. Anderson & Donald R. Leal, Free Market Environmentalism 6-7, 11, 16 (1991) (asserting the budgetary and turf expansion hypothesis). For a critique of this hypothesis and literature, see Buzbee, supra note 53, at 83-90; Whyte, supra note 157, at 14 ("It is sheer escapism, however, for people to address their energies to a scheme that calls for counties and suburbs to help vote themselves out of existence.").
absence of a period of heightened citizen political involvement sufficient to persuade the state government to modify the authority granted to local governments.  

3. Authorities and Regional Problems

Even if metropolitan areas lack a unitary legal and political identity, and municipalities or counties often wield the most significant political clout in sprawling jurisdictions, state departments, special districts, authorities, and public corporations can be authorized to address regional problems such as sprawl. In many states, state departments, particularly transportation departments, make many of the decisions that spur sprawling patterns of development. The mission vision of these agencies, coupled with powerful entrenched interests supporting these agencies' roles, can lead largely self-sufficient and insulated state agencies directly or indirectly to cause substantial harms.

Three common methods of addressing an intractable problem for which no single governmental unit can take action is for state or local governments to create separately chartered authorities, public corporations, or special districts. These entities are usually created to address a particular type of problem or issue. These newly created entities seldom require explicit weakening of preexisting departments'...
or governmental units’ power, but can be given authority to sidestep or trump these other units’ areas of authority.  

Such authorities, public corporations, and special districts offer a potential means to address regional problems, but have one substantial drawback for citizens fearful of being ignored by the government. Such quasi-governmental entities are subject to few democratic constraints, tending to be led by appointed officials, and sometimes having their own separate budgetary allocations or revenue sources.

Much as a state department can act with little heed for citizen priorities, authorities, public corporations, special districts, and commissions are vulnerable to entrenched bureaucracies, special interest capture, and insensitivity to citizen needs and desires. These types of regional entities thus create a means to address sprawl’s ills, but are largely insulated from democratic accountability. They may be as effective as their leaders desire, but legal and political constraints on their actions are few.

The lack of democratic accountability of these regional entities causes a further harm. Sprawl and numerous other issues facing growing metropolitan areas need both regional units of government and alert citizens participating in governance at the regional level. If states create special regional entities that are not democratically elected and are only indirectly, if at all, accountable to citizens, then little political deliberation focused on regional issues is likely to occur. In the words of Professor Richard Briffault, one confronts a “chicken and egg” problem in seeking to create effective regional units or arms of government. Without such regional entities, political activity

165. In Atlanta, for example, the Atlanta Regional Commission (“ARC”) has been authorized for many years to address regional transportation problems, but jurisdictional conflict between DOT and ARC and weak ARC authority have led to ARC having little impact. A regional transportation authority created by 1999 legislation will now oversee metropolitan Atlanta transportation decisions. See supra note 162.


167. See Briffault, Local Government, supra note 9, at 1145-48 (discussing option of special districts and “federally inspired” regional councils as means to address regional metropolitan issues and noting appointed nature of officials within such entities and lack of accountability and legitimacy).


169. Briffault, Local Government, supra note 9, at 1169.
based on perceptions of a community of interest is unlikely to focus on regional issues. Without citizen clamor for effective regional governance, little incentive exists for local governments, preexisting state departments, or the state legislature or executive to overcome established interests and inertia to support creation of a new form of government. If local governments or states establish appointed and largely unaccountable regional entities, citizen stakes and involvement in the policies of these regional entities will predictably be far less than if these entities had to solicit and maintain public approval. Democratically unaccountable regional entities hence may offer a means to overcome the common lack of any effective regional units of government, but they are at best an imperfect solution.¹⁷⁰

B. **The Traditionally Limited Federal Role in Land Use Decisions**

Despite over thirty years of federal environmental activity and leadership, land use decisions and processes have remained quintessentially within the province of local governments. Indeed, there has been limited involvement or funding by states in local land decisions, though there has been substantial funneling of federal transportation dollars to state and local agencies.¹⁷¹ Any strategy to empower the federal government to take a greater role in addressing urban sprawl and its associated environmental and social ills would constitute a change in current divisions of work among federal, state, and local governments. The limited federal role in encouraging or prohibiting particular urban forms or types of land use is the result of historical traditions and constitutionally limited grants of authority to the federal government. Virtually all scholarly examinations of sprawl and suburbanization trends point out, however, that federal laws and regulations have already influenced metropolitan growth patterns. Thus, an increased federal role seeking to address or to deter sprawl or its ills would constitute a change in federal policy, but would not constitute a wholly new entry into fields of law and regulation influencing urban form. Recent decisions by the United States Supreme Court make less likely any substantial expansion of federal authority to displace state and local land use decisionmaking. These cases, however, preserve the option of a greater federal role in addressing

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¹⁷⁰. Professors Frug and Ford hence devote much of their analysis of metropolitan growth, problems and community to the proposition that a regional legislature is the best cure for regional problems. See Ford, supra note 9, at 1908-09; Frug, supra notes 8, at 1075-81. Professor Briffault questions the viability of such a regional legislature coming into existence as a result of local government sacrifice, and concludes that states will have to act to create effective regional entities, but that such regional entities must be staffed with elected representatives to avoid problems of unresponsiveness and to ensure that their actions are viewed as legitimate. See Briffault, Local Government, supra note 9, at 1166-68.

¹⁷¹. Senator Jackson's proposals to enact federal land use legislation had substantial support, but in the end were not enacted. See supra note 2.
ills associated with urban sprawl. This section starts by reviewing constitutional limitations on federal authority, particularly over land use decisionmaking. It then turns to examine areas in which conditional federal spending has influenced state and local land use decisionmaking. This section concludes that an expanded federal role is constitutional, likely, and potentially a partial solution to address sprawl's causes and ills.

1. Constitutional Constraints on a Federal Sprawl Role

Although under our Constitution the federal government is a government of limited authority, most federal expansions of authority since the New Deal have been justified and upheld under the authority granted by the Constitution's Commerce Clause.\(^{172}\) Despite approximately fifty years of Supreme Court decisions upholding expansions of federal legislative and regulatory authority under the Commerce Clause, the Court in 1995 signaled an unwillingness to rubberstamp such expansions. In *United States v. Lopez*,\(^{173}\) the Court struck down the Gun-Free Zones Act of 1990 as beyond federal authority.\(^{174}\)

Urban sprawl tends to be driven by national real estate markets and financing institutions that do business in numerous states. Sprawl's effects are also often regional, especially in sprawling multi-state metropolitan areas such as New York, Philadelphia, Seattle, and Portland. The federal government could intervene more forcefully to address sprawl's ills without running afoul of constitutional limitations on its Commerce Clause authority. *Lopez* thus may be of limited significance in itself, but taken in conjunction with numerous other recent cases involving issues of federalism and "takings," any expansion of federal authority that excessively impinges on areas of traditional state and local activity may be vulnerable to constitutional attack.\(^{175}\)

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\(^{174}\) See id. at 552.

\(^{175}\) See John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 Mich. L. Rev. 174, 175-76 (1998) (exploring the reach of the Commerce Clause and the *Lopez* case in the context of a constitutional challenge to the reach of the federal endangered species law). A separate development that may also confound anti-sprawl efforts is an increasingly anti-regulatory body of "takings" jurisprudence. Recent Supreme Court cases involving claims of regulatory takings have created disincentives for federal or state efforts to modify land uses to reduce
New York v. United States\textsuperscript{176} is a case of particular importance to federal efforts to encourage state actions to deter sprawl or to address its harms. In New York, the Supreme Court stated that the federal government could not simply order or “commandeer” state governments to take desired actions. Instead, due to implicit constraints on federal authority found in the Tenth Amendment, federal ends can be encouraged only by offering states the option of displacing direct federal enforcement of federal laws and regulations (assuming the area of regulation is justifiable under the Commerce Clause or other independent grants of federal authority), or by offering financial incentives to states in the form of conditional grants where the desired end and the grant subject are related.\textsuperscript{177} So long as the conditions attached to federal dollars are related to the purpose of the funded regulatory scheme, and there is no federal “coercion,” conditional federal spending will pass constitutional muster.\textsuperscript{178} More recently, in Printz v. United States, the Court extended New York by concluding that the federal government cannot commandeer state bureaucratic processes to further federal goals or implement federal programs, even where

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\textsuperscript{176} 505 U.S. 144 (1992).

\textsuperscript{177} For the Supreme Court’s earlier upholding of federal authority to use conditional funding to encourage changed state behavior, see South Dakota v. Dole, 483 U.S. 203 (1987).

\textsuperscript{178} See id. at 210. As stated by Richard Epstein, a strong critic of conditional federal spending, after Dole “any constitutional challenges to the conditions attached to federal grants are hopeless under the current law.” Richard A. Epstein, Bargaining With the State 157 (1993).
that burden is only a small administrative obligation.\textsuperscript{179}

The Court's 1999 trio of divided federalism decisions, particularly \textit{Alden v. Maine}, less directly bears on the federal government's authority to create incentives for states to further federally-defined ends, but again reveals the Rehnquist Court's active revisiting of the contours of state and federal authority.\textsuperscript{180} They also make clear the limited menu of regulatory strategies that remain on a firm constitutional footing. Based on the Eleventh Amendment and pre-constitutional conceptions of sovereign immunity, the Court broadened the scope of state immunity from private causes of action based on federal law, even if brought in state courts.\textsuperscript{181} The Court, however, once again cited \textit{South Dakota v. Dole}'s blessing of conditional federal spending as a means to enlist states in pursuit of federal ends, indicating that states can voluntarily elect to participate in federal programs.\textsuperscript{182} The Court in \textit{College Savings Bank} similarly reaffirmed the federal government's ability to use its spending power to secure state “agreement . . . to actions” that “Congress could not require them to take.”\textsuperscript{183} These cases will change the dynamics of federal-state nego-

\begin{footnotesize}


\textsuperscript{181} Alden thus closed the door on the option seemingly left open in \textit{Seminole Tribe v. Florida}, 517 U.S. 44 (1996), for federal statutory rights to be enforced against states in state courts, even though \textit{Seminole} concluded that “Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts.” \textit{Alden}, 119 S. Ct. at 2243 (citing and characterizing \textit{Seminole}).

\textsuperscript{182} Alden, 119 S. Ct. at 2267 (“Nor, subject to constitutional limitations, does the federal government lack the authority or means to seek the State's voluntary consent to private suits.” (citing with a "cf." signal \textit{South Dakota v. Dole}, 483 U.S. 203 (1987))).

\textsuperscript{183} \textit{College Savings Bank}, 119 S. Ct. at 2231. Justice Scalia's opinion for the Court also includes language that perhaps sets the stage for efforts to undercut \textit{South Dakota} by limiting contexts in which offers of conditional federal dollars will not be viewed as “coercive” and hence unconstitutional. He states:

\begin{quote}
In any event, we think that where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.
\end{quote}

\textit{Id.} “Otherwise lawful activity” will perhaps be limited to contexts like that in \textit{College Savings Bank} where a state participates in markets and it is therefore asserted (unsuccessfully in \textit{College Savings}), that the state waived its immunity from suit under federal law, but one can easily foresee contexts in which this language might be extended to limit the use of federal dollars to enlist states in furtherance of federal ends. For example, if instead of a state hiring private contractors to build transportation infrastructure with partial federal funds, a state decides to do the work itself, could it be
tations about the obligations accompanying receipt of federal dollars. They appear to require explicit state waivers of sovereign immunity if states or arms of the state are to be vulnerable to damage suits in federal or state court for failure to abide by federal laws, regulations, or particular conditions linked to conditional federal dollars. It appears, however, that citizen suits against states for injunctive or declaratory relief seeking to compel state officials to take action in compliance with previous state commitments remain available under *Ex Parte Young.* States deciding to assume regulatory responsibilities due to receipt of conditional federal dollars or due to a choice to displace federal regulators can likely still be held to such commitments in either state or federal courts despite these recent modifications of the bounds of federal and state authority.

This recent wave of federalism cases affirms that the authority of the federal government is limited. They signal to sprawl reformers that major new areas of federal intervention will be scrutinized and possibly frustrated by federal courts, particularly if they rely heavily on judicial enforcement by citizens against states as states. Although the Supreme Court for a short time embraced Professor Herbert Wechsler's much cited theory that allocations of authority between the federal government and the states would adequately be "safeguarded" and maintained by the political process without judicial intervention, the Supreme Court has clearly reentered the arena of federalism. Nevertheless, as developed in greater detail below,

subject to a waiver argument if the dollars arrived with an explicit state acceptance of certain administrative obligations or waivers of sovereign immunity. Such an argument would substantially undercut the usual understanding of *South Dakota.* See Epstein, *supra* note 178, at 155.

184. For discussion of ways states can waive and federal actions that will not suffice to create a waiver, see *Alden v. Maine,* 119 S. Ct. 2240, 2267-68 (1999); for a discussion of reasons states will still be subject to suits for declaratory and injunctive relief, see *id.* at 2262-63.

185. 209 U.S. 123 (1908) (discussed approvingly, with explanation for why *Young* remains sound law, in *Alden,* 119 S. Ct. at 2262-63).

186. Much as the 1999 trio of federalism cases reaffirm the validity of state waivers of sovereign immunity in connection with receipt of conditional federal dollars, states will be held to waive federalism objections when they choose to displace the federal regulator. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981), *cited approvingly* in *New York v. United States,* 505 U.S. 144, 167 (1992)). Even if this waiver logic were held to be modified in light of the 1999 federalism decisions discussed *supra* notes 180-85 and accompanying text, *Ex Parte Young* still provides for injunctive or declaratory relief against state officials. See *supra* note 185 and accompanying text. Federal enforcement against states also remains an option. See *Alden,* 119 S. Ct. at 2262-63.

187. See *Alden,* 119 S. Ct. at 2267 ("[T]he second important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the state." (citations omitted)).

188. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government,* 54 Colum. L. Rev. 543, 558-60 (1954). For a critique of Wechsler's theory, see William T. Mayton,
these cases also reaffirm the federal government's important ability to offer conditional federal dollars to encourage modified state and local government behavior.

2. Federalism Norms and Strategic Uses of Multiple Political Venues

Apart from the constitutional boundaries to overreaching federal action, federalism norms act as a brake on major new federal initiatives that might intrude on areas previously within the domain of state and local governments. Despite these anti-federal norms, sprawl partisans will likely participate in all political venues, including federal fora, to further or protect their interests. This section concludes that greater federal involvement in deterring sprawl or alleviating its ills could provide benefits, even if, as concluded below, most sprawling metropolitan areas are likely to continue to sprawl.

Even where the federal government has authority to act, politicians and scholars frequently voice a normative argument or presumption against such new federal action. In the "race to the bottom" debate, for example, the anti-federal view is that apart from the federal government's constitutional capacity to act in an area, one needs to examine proposed federal initiatives or intrusions with a presumption that a federal role must be justified. Professor Richard Revesz

"The Fate of Lesser Voices": Calhoun v. Wechsler on Federalism, 32 Wake Forest L. Rev. 1083 (1997). Wechsler's theory was embraced by a majority of the Court in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 n.11 (1985). While the cases discussed above do not directly overrule Garcia, they reflect a markedly different judicial approach in their active redrawing of the lines of federal and state authority despite Congress having drawn different lines in statutes at issue. See Moulton, supra note 147, at 880, 886.

189. See Barry Friedman, Valuing Federalism, 82 Minn. L. Rev. 317, 319 (1997); Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 907-08 (1994); see also Buzbee, supra note 4, at 21-27 (discussing normative and instrumental federalism views to explore changing federal and state roles in environmental law).

190. The "race-to-the-bottom" theory is that states or local governments seeking to secure or retain potentially mobile business and industry (or low fiscal burden residents in the social safety net program context) will sacrifice regulatory rigor, particularly safety and health regulation, to offer business and industry potentially higher returns in a more favorable business environment. Other jurisdictions, however, will compete by offering similarly lax regulation, resulting in competing jurisdictions offering sub-optimal levels of regulatory protections as jurisdictions race to the regulatory bottom to retain business, but with no actual ultimate business-attracting advantage due to the equally low levels of protection resulting from this competition. For one of the early influential explorations of "race-to-the-bottom" theories, see Richard B. Stewart, supra note 134, at 1210-12 (describing race-to-the-bottom dynamics and characterizing this regulatory competition as an example of a "Tragedy of the Commons"). See also Revesz, Rethinking, supra note 126, at 1211-12 (agreeing that such regulatory competition occurs, but arguing that such competition is desirable and should not be foreclosed by federal standards unless some other independent rationale justifies such federal intervention).
builds on the classic Tiebout hypothesis and race-to-the-bottom literature to question whether federal legislation should interfere with a state's choice to bundle its amenities, including environmental protection, to meet most closely the array of priorities of its citizens, politicians, or successful interest groups. An opposing view is that the political and scholarly bias against federal efforts to address social needs is a "national neurosis" that imprudently hobbles potentially effective policy in a country where state boundaries may be insignificant. This Article largely adopts an instrumental approach to the federalism question, focusing on what allocation of responsibility is most likely to ascertain political preferences and effectively act on those political priorities. Nevertheless, the anti-federal bias and devolutionary impulse is undoubtedly not just a scholarly artifact, but also a political reality.

Another examination of political-economic frameworks and incentives sheds light on why, even with a frequent anti-federal norm, a combination of federal, state, and local intervention is likely. From both the political-economic theoretical perspective and an empirical perspective, all entities and individuals confronting benefits, harms and opportunities associated with sprawl can look to all levels of government to play roles in advancing sprawl or anti-sprawl goals. Each sprawl partisan, including private entities and all affected government officials, sees an array of harms and benefits in status quo arrangements and also sees an array of opportunities and risks in proposed new initiatives. As discussed above in the exploration of the political-economic roots of sprawl, partisans can choose to use all of their political and monetary resources in support of one candidate or policy, or they can spread their influence among several candidates or participate in the political realm individually or through advocacy

191. See Revesz, Rethinking, supra note 126, at 1211-12. See generally Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956) (discussed in Revesz, Rethinking, supra note 126, along with a survey of further refinements of Tiebout's theory). For a survey of articles critiquing Revesz's analysis of regulatory dynamics and federalism, see supra note 126.

192. See Rubin & Feeley, supra note 189, at 907. For a critique of debates over the federal role in light of federalism doctrine, see Shapiro, supra note 144, at 104-06. For Shapiro's critique of the argument that federalism principles should constrain the federal role, see id. at 58-106.

193. See Shapiro, supra note 144, at 107-08.

194. As concluded above, Supreme Court cases make clear that in addressing sprawl, federal, state, and local governments all have authority to act.

195. As observed by Jonathan Macey, officials will sometimes find it politically advantageous to surrender or delegate authority to subordinate levels of government. See Jonathan R. Macey, Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism, 76 Va. L. Rev. 265, 267 (1990) ("Congress will delegate to local regulators only when the political support it obtains from deferring to the states is greater than the political support it obtains from regulating itself.").

196. See supra Part II.
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The ability of each sprawl partisan to allocate resources among levels of government is akin to a cumulative voting scheme: each sprawl partisan can use local, state, or federal voting rights plus a combination of monetary and advocacy resources to influence the level of government viewed as most significant. Each sprawl partisan, including government officials, could seek to enlist federal, state or local assistance, or more likely, some optimal combination of all three levels of government. The assistance sought might, of course, be to obtain political action opposing a new initiative.

Given the constitutional competence of federal, state, and local governments to play a role in evaluating and addressing sprawl issues, one can anticipate sprawl partisans using their political clout and their monetary resources in a complex series of measures and countermeasures in light of anticipated actions by other sprawl partisans in each jurisdiction. Elegant theories about local expenditures or races-to-the-bottom inform normative arguments about what levels of government intervention are desirable. Nevertheless, in an area of concurrent authority of three layers of government, and agencies and departments within each layer of government, plus operations of the market that will often be matters of primarily private choice, plus metropolitan areas facing their own unique stages of urban form and development, sprawl partisans are likely to use all venues to assert their interests.

Anti-sprawl advocates are particularly likely to seek federal intervention due to the perception, confirmed in numerous empirical and theoretical political science analyses, that local governments generally will be more focused on growth goals than will federal and possibly state officials. As concluded by Paul Peterson, policies with the goal or effect of redistributing wealth, as would many anti-sprawl reforms, will generally be avoided by local governments, but are more likely to be enacted by central governments. As one moves from local, to

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197. This comparison to cumulative voting is similar in concept to Professor Frug’s suggestion of the use of cumulative voting to allow voters to influence various local governments in a region and thereby reduce detrimental interjurisdictional competition or failures to cooperate. See Frug, supra note 9, at 329-30. Briffault critiques Frug’s proposal by questioning if regional cooperation could ever be achieved without substantial reliance on oversight or coercion from higher levels of government. See Briffault, Local Government, supra note 9, at 1156-64.

198. For an exploration of ways government officials may use threatened changes in policy to extract benefits or “rents” from potentially affected entities, whether these entities support or oppose the government proposal, see Fred S. McChesney, supra note 100.

199. See Peterson, supra note 4, at 69-70 (discussing reasons central governments are more likely to enact redistributual policies than are local governments), 90-91 (arguing that larger constituencies influence central governments and will support policies providing “broader and more diffuse” benefits, while local governments will be more influenced by dominant economic interests), 116-23 (observing lack of group politics at local level that might give voice to diffuse citizen concerns), 170-71 (explaining reasons local governments are unlikely to embrace pollution control meas-
state, to federal fora, one can anticipate relatively greater interest in policies with the goal or effect of redistributing wealth. Hence, rational anti-sprawl reformers will seek reforms from federal officials, and to a lesser extent state officials, rather than expend substantial resources in seeking anti-sprawl measures from local officials. Such officials are least likely to be amenable to enactment of such initiatives and typically lack authority over the multiplicity of jurisdictions affected by sprawl in each urban area.

This political-economic theory of sprawl politics could concededly be applied in virtually any context of concurrent federal, state, and local authority. Federalism (or anti-federal) norms inform this discussion and assist in understanding sprawl politics and law because the anti-federal norm plus the tradition of state and local policy dominance in land use decisionmaking mean that obtaining an enhanced federal role in areas of currently limited federal involvement will likely cost more votes, activity, or money. On the other hand, in areas such as transportation funding where federal dollars have long played a huge role, tweaking the uses or amounts of federal dollars will likely meet little anti-federal related resistance. Entities with a stake in status quo uses of federal dollars will, as discussed above, have strong incentives to oppose policy changes, but that opposition will not necessarily be grounded in federalism doctrine or norms.

Although much economic analysis assesses potential gains and losses of a similar magnitude as creating equal incentives (or disincentives), actual psychological research reveals that people are generally risk averse and value what they have against loss more than they value similar potential gains. For this reason, sprawl partisans are likely

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200. See Peterson, supra note 4, at 167-83 (stating that lessening of restrictions on flow of capital and credit at the national level allows for redistributive policies). Even Clarence Stone concedes such a local government focus on growth, although Stone's work concludes that local political coalitions and history will at times embrace policies contrary to the "growth machine" hypothesis. See supra note 104 (citing Stone's scholarship). Other scholars examining local politics observe that "anti-growth" political entrepreneurs also may find success in local governments. See supra note 115 and accompanying text.

201. Professor Stewart, in an early important work on environmental federalism, posits that federal regulatory turf and stringency are unlikely to be "abandoned or compromised" in part because the costs of such regulation will be felt remotely at the state and local level. See Stewart, supra note 134, at 1218-19. For a critique of Stewart's view, see Butler & Macey, supra note 147, at 48-51.

202. See, e.g., Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263, 265-66 (1979) (describing several classes of choice problems in which preferences systematically violate the axioms of expected utility theory where individuals value objects in possession more highly than they would pay initially to acquire the same object).
to succeed most when they go with existing trends or suggest changes that minimally threaten to divest current sprawl beneficiaries of their past gains or advantaged positions. This loss aversion trend may, in fact, be one of the reasons sprawl reformers are suddenly finding increased citizen, business, and political receptivity to reform proposals. As developed more below, perhaps a critical mass of citizens and businesses already invested in and established on the urban periphery in many metropolitan areas now find that beneficial location threatened by yet more sprawl and congestion. If their votes, arguments, or campaign contribution dollars are significant to policymakers, their demands for government intervention may be heard. That clout may far exceed mere numbers of potential voters or contributors. Particular segments of the electorate, such as the increasingly important suburban population, can become the critical swing vote and hence will be courted by politicians.

3. Conditional Federal Dollars as Anti-Sprawl Incentives

An underlying assumption in this Article is that if one looks to the government and legal reforms to remedy ills associated with sprawl, one must address the risk that the government will “drift” from its assigned task. The history of environmental legislative and regulatory reforms, discussed in greater depth in part IV, teaches that legal reforms must provide means to encourage agents to carry out their publicly defined task. One of the most promising and traditional methods for the federal government to encourage state or local actions consistent with a federal goal is to provide conditional federal funding for certain state or local activities. Given the substantial undercutting by the Supreme Court of other federal strategies to enlist states in furthering federally defined ends, conditional federal spending has become a particularly significant regulatory strategy. New York v. United States and the 1999 Alden trio of state immunity decisions reaffirmed the constitutional validity of such uses of federal dollars.

The basic concept of conditional federal spending is that state or local governments receive or seek federal funding for activities consis-

203. See infra Part IV.
204. See Mitchell, supra note 1 (reporting that due to growing numbers of suburban voters and relative decline in urban voters, coupled with suburban voters' shifting of political alignments, both parties are tailoring “the language and policy proposals” to attract such votes).
205. The concept of government “drift” is similar to the concept of “agency cost.” Both terms describe the phenomenon of a government agent or agency with a defined task straying from, or deviating from, the intent of the entity defining the agency's task. See, e.g., Arthur Lupia & Matthew D. McCubbins, Designing Bureaucratic Accountability, 57 L. & Contemp. Probs. 91, 91-94, 106-110 (1994) (discussing bureaucrat's drift from legislative goals and responsive strategies).
206. See supra Part III.B.1. (discussing implications of Supreme Court federalism and Commerce Clause decisions).
tent with a desired federal end. Alternatively, state or local actions inconsistent with federal goals can lead to the potential loss of otherwise available federal dollars or other forms of subsidy such as insurance. Such dollars seek to entice state or local activity, but do not force state or local participation or compliance. When a variety of targeted grants or subsidies are available or vulnerable to loss, states and local governments can seek the particular array of programmatic supports that best meet a jurisdiction's interests.

Conditional federal spending influences federal, state, and local activities in several ways. All conditional federal funding or related preclusion of federal subsidy laws require federal officials to review state or local activities and use of dollars. That routine oversight in itself creates incentives for state and local officials to consider repercussions of their actions that might otherwise be neglected. The mere existence of oversight deters sloppy work and also reduces the risk of corrupt or patronage-driven development projects. Furthermore, manipulating the federal financial spigot directly increases the odds that particular federal goals will be considered. Such regulatory programs put federal officials in the position of potentially reviewing state, local, or private sector activity, and thus impinge on state and local autonomy and the market's operations. They, however, do not preclude state or local governments from deciding to proceed with a project if they are willing to live with the reaction of the federal government. In addition, despite the presence of federal financial incentives, state and local governments remain the primary decisionmakers regarding land use as they have for many decades. All conditional federal spending schemes leave state and local governments with greater locally sensitive discretion than would be the case with direct federal interven-

207. See Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1918 (1995); Jerry L. Mashaw & Dylan S. Calsyn, Block Grants, Entitlements and Federalism: A Conceptual Map of Contested Terrain, 14 Yale L. & Pol'y Rev. 297, 299 (Symposium Issue 1996) (discussing block grant and entitlement regulatory schemes and stating that such federal grants “each have more varied structures and more heterogeneous purposes than the current debate suggests”).

208. See supra Part III.B.

209. Although such federal spending is an option for potential recipients to consider, some scholars question if state and local governments have much actual choice to turn down available federal dollars. See, e.g., Baker, supra note 207, at 1935-54 (developing a normative argument against the appropriateness of conditional federal spending jurisprudence and characterizing the federal government as having “monopoly power” over sources of state revenue); Epstein, supra note 178, at 153 (discussing conditional federal spending cases and characterizing federal use of tax and spending incentives as “coercive” and unfortunate due to their subversion of the structural benefits of more independent and competitive governments).

The federal role in influencing sprawling development patterns has to date been most substantial in its significant underwriting of state and local transportation projects, although its tax policies, particularly deductibility of home mortgage interest, have also influenced urban form. In addition, apart from the political opportunities for credit and patronage that highway spending offers, many safety, health, and environmentally-oriented laws use the coercive clout of highway funding cutoffs, often referred to as "crossover" or "crosscutting" sanctions, to enlist state and local governments in working to achieve goals first articulated in the federal legislature.

While such transportation funding is often provided to states or local governments based on criteria that require no project-specific commitment to fulfill particular obligations, this funding is nevertheless loosely conditioned in the sense that recipients must use the dollars for the designated purpose and often must also follow procedural requirements such as providing opportunities for public participation. Additional targeted uses of federal dollars should be considered to alleviate ills associated with sprawl. Similar conditional uses of federal dollars have been effective, although certainly imperfect, in encouraging states to further federal goals that impinge on traditional local and state primacy over

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211. For a recent critical assessment of the concept of "cooperative federalism" and reasons "the federal government should not... conscript the services of nonfederal governments," see Hills, supra note 179, at 817.

212. See Nelson et al., supra note 3, at 2-3; Peterson, supra note 4, at 144-46 (discussing federal policies facilitating use of the automobile); id. at ch. 11 (discussing tax policies acting to promote home ownership and suburban development).

213. See Advisory Comm'n on Intergovernmental Relations ("ACIR"), Regulatory Federalism: Policy, Process, Impact and Reform 8-9 (1984) (describing "crosscutting" sanctions as "across the board" requirements attached to federal dollars, while "crossover" sanctions "threaten the termination or reduction of aid provided under one or more specified programs unless the requirements of another program are satisfied"); Julie Roin, Reconceptualizing Unfunded Mandates and Other Regulations, 93 Nw. U. L. Rev. 351, 375 & n.90 (1999) (discussing use of federal highway funds "as a recurring tool of persuasion" under other regulatory programs). The conditional federal spending threat of greatest significance to sprawl is found in the Clean Air Act and linked provisions of transportation laws. Where a jurisdiction is not meeting its Clean Air Act obligations, federal transportation dollars are often subject to a project moratorium. See Environmental Defense Fund v. EPA, 167 F.3d 641, 643 (D.C. Cir. 1999) (striking down EPA regulations and discussing restrictions on use of federal transportation dollars for projects in areas not conforming to Clean Air Act and planning requirements). TEA-21 largely reauthorizes, but also in substantial part replaces and amends the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (codified in scattered sections of 23 U.S.C.). For a complete version of the House Conference Report on TEA-21, see H.R. Conf. Rep. No. 105-550, at 1 (1998), reprinted in 1998 U.S.C.C.A.N. 70. As of the time of drafting and submission of this Article, no fully conformed version of TEA-21 that combines previous law and amending or new language is yet codified in the United States Code. Numerous TEA-21 provisions link state and local transportation activities to potential federal transportation funding. See, e.g., TEA-21, Pub. L. No. 105-178, §§ 1110, 1203, 1204, 3004, 3005 & 3037, 112 Stat. 107 (1998).
land use decisionmaking.

The following section discusses conditional funding statutory precedents and offers suggestions for how the conditional funding strategy can be used to combat ills associated with urban sprawl. The section then steps back from particular conditional spending precedents to examine the politics and efficacy of conditional federal spending strategies across the continuum from revenue sharing, to block grants, to project-specific competitive grant regulatory schemes. This section closes with a discussion of sprawl-targeted strategies that, if ever enacted by local governments or states either acting on their own or due to federal encouragement, might help to alleviate sprawl’s causes and associated ills.

a. Conditional Federal Spending Regulatory Precedents

Four recent laws that use conditional federal spending to influence state and local land use patterns provide a model for efforts to structure an effective federal role to address sprawl’s impacts. In addition, regulatory initiatives directed to brownfield sites offer similar monetary enticements, but in a less substantial program. This section primarily focuses upon the structures and efficacy of the Coastal Zone Management Act (“CZMA”),214 the Intermodal Surface Transportation Efficiency Act (“ISTEA”) and its successor, the Transportation Equity Act for the 21st Century (“TEA-21”),215 brownfield grants, and earlier transportation laws requiring avoidance of harms to environmental amenities and historic sites. This section also briefly discusses a few additional regulatory precedents.

The CZMA seeks to protect coastal areas by offering federal grant dollars to states that, in a manner consistent with broadly worded federal statutory and regulatory guidelines, create plans to protect those areas.216 Under the CZMA, states have substantial flexibility in the coastal protection measures they adopt.217 States creating coastal plans are granted authority to ensure that federal projects in that state are consistent with the state plan.218 Most coastal and Great Lakes

216. See The Center for Urban and Regional Studies (University of North Carolina at Chapel Hill), Evaluation of the National Coastal Zone Management Program iii-vii, 1-31, 53-77 (1991) [hereinafter CZMA Evaluation] (describing CZMA’s provisions and its passage and implementation); see also Karkkainen, supra note 11, at 81-82 (assessing CZMA as a possible model for enhanced federal efforts to protect biodiversity); Ruhl, supra note 11, at 616-20 (same); Martin J. LaLonde, Note, Allocating the Burden of Proof to Effectuate the Preservation and Federalism Goals of the Coastal Zone Management Act, 92 Mich. L. Rev. 438, 441-46 (1993) (describing CZMA and focusing on federal consistency provisions’ implementation).
217. See CZMA Evaluation, supra note 216, at 81-166 (reviewing states’ varied responses to CZMA incentives).
218. See id. at 33-41; LaLonde, supra note 216, at 441-46.
states have prepared plans to comply with the CZMA. A related statute, the Coastal Barrier Resources Act ("CBRA") similarly seeks to protect coastal areas through federal financial incentives.\textsuperscript{219} CBRA, however, does not provide federal dollars for particular state actions, but prohibits federal subsidies or insurance for new development in undeveloped coastal barrier islands.\textsuperscript{220} Both CZMA and CBRA provide programmatic, predictable incentives to direct development in ways avoiding environmental harms, yet without requiring any federal displacement of local choices.\textsuperscript{221} States using federal CZMA dollars have varied coastal protection strategies.\textsuperscript{222} Critics assail this inconsistent protection of coastal zones in various states and question if the law adequately ensures the protection of irreplaceable coastal resources.\textsuperscript{223} Others praise the flexibility CZMA provides to states.\textsuperscript{224}

The ISTEA statute, recently reauthorized and amended in TEA-21, provides federal funding for transportation projects undertaken at the state and local level. Only in the last decade has the federal government allowed and even required state and local governments to consider using federal transportation dollars for projects other than roads. ISTEA and TEA-21 no longer are as biased in favor of highway expansion as was much earlier federal transportation funding, but it is far from clear that these more flexible laws will result in fewer highway expenditures. TEA-21 is only a small break from the traditional spending focus on new highways. TEA-21 provides the overwhelming majority of its funding for yet more highway construction, with many of those dollars guaranteed to states.\textsuperscript{225} Nevertheless, ISTEA and its successor TEA-21 encourage consideration of environmentally sensitive choices, dovetailing their provisions with Clean Air Act sections encouraging transportation development projects that would either

\textsuperscript{221} David Salvesen, Sand Castles: On Topsail Island, Homeowners Discover that Building on Barrier Islands is Risky Business, The Amicus J., Winter 1997, at 28, 31 (reporting that aerial photographs show markedly different development patterns in CBRA and non-CBRA areas).
\textsuperscript{222} See CZMA Evaluation, supra note 216, at 81-166 (surveying state coastal protection programs).
\textsuperscript{223} See Oliver A. Houck, Ending the War: A Strategy to Save America's Coastal Zone, 47 Md. L. Rev. 358, 359-60 (1988).
\textsuperscript{224} See Ruhl, supra note 11, at 616-20. "Swampbuster" provisions in federal farm bills have similarly provided for losses of federal subsidies should a farmer convert wetlands to crop production. See Federal Agriculture Improvement and Reform Act of 1996 § 321(a)(2), 16 U.S.C. § 3821 (Supp. 1999). The efficacy of such provisions is in doubt due to recent shifts in strategies to provide farmers with monetary support; instead of variable price supports, recent legislation relies more on "market transition payments" that are less targeted to particular activities. See Karkkainen, supra note 11, at 66-68 (citation omitted). Without activity-specific subsidies, "swampbuster" provisions lose much of their efficacy. See id.
improve air quality or at least prevent additional deterioration in air quality. Apart from gross violations of federal laws like the Clean Air Act, the planning processes encouraged under these newer federal transportation laws do not preclude the same conjunction of patronage politics and established political and economic interests from securing yet more federal dollars for highway construction.

The main strategy in ISTEA and TEA-21 to avoid patronage-driven transportation decisions is in their provisions mandating a more open and participatory planning process as a condition for receipt of federal dollars. ISTEA and TEA-21 supporters hope that this combination of more flexible federal dollars and a more participatory mode of decisionmaking will lead to transportation dollars being used in ways that will create less environmental destruction and greater public benefits. As with the CZMA, however, federal oversight and possible financial coercion remain the primary means for encouraging a more open and at least potentially environmentally sensitive transportation planning process at the state and local level.

Federal transportation laws have for decades prohibited federal approval or funding of any projects that would destroy park spaces or historic sites. Like coastal zone and barrier laws, this preclusion of federal funding for environmentally harmful projects has been instrumental in some highly visible battles stopping major highway proj-

226. For a sympathetic review of ISTEA's achievement published by a group favoring alternative transportation methods, see Surface Transportation Policy Project, Green Streets, The 1991 Intermodal Surface Transportation Efficiency Act and the Greening of Transportation Policy in the United States 24. For analysis of the intersection of Clean Air Act programs and federal transportation laws, particularly focusing on transportation planning requirements, see Arnold W. Reitze, Jr., Transportation-Related Pollution and the Clean Air Act's Conformity Requirements, 13 Nat. Resources & Env't 406 (1998).

227. See Briffault, Local Government, supra note 9, at 1152-56 (discussing viability of a regional legislature and concluding that past federal laws encouraging or requiring regional planning and deliberation did not force planning participants to surrender preexisting positions of strength). Briffault critiques Jerry Frug, Decentering Decentralization, supra note 9, at 294-98, and approvingly quotes Frug's statement that "it is unlikely that those who profit from current law will undo it themselves." Briffault, Local Government, supra note 9, at 1155 n.194 (citing Frug, supra note 9, Decentering Decentralization, at 285).


229. See, e.g., Surface Transportation Policy Project, A Blueprint for ISTEA Reauthorization: A Common Sense Guide to Transportation Priorities for the 21st Century 3 (1997) (making twenty-five recommendations to improve and reauthorize ISTEA); Cynthia Burbank & S. Lawrence Paulson, Congress Battles Over Successor to ISTEA, Public Roads, July/Aug. 1997, at 41 (ISTEA "gave states unprecedented flexibility to use federal funds ... [a]nd it attempted to balance the need for improved transportation with other vital national goals - a cleaner environment ... .").

230. As discussed infra notes 247-52 and accompanying text, these and most other conditional federal spending regulatory schemes make little or no use of statutory citizen suit provisions to enlist citizens in ensuring that programs or projects receiving federal funds conform to legal requirements.
ects that would otherwise have destroyed parklands.231

A different type of federal spending incentive exists in the current federal brownfields initiative. The EPA offers $200,000 grants to developers, local, or state governments seeking to redevelop brownfields sites.232 This initiative lacks explicit legislative authorization, but has widespread political support and appears generally consistent with federal hazardous substance laws' goals.233 The combination of federal seed money and state regulatory schemes offering guidance and approvals to entities voluntarily cleaning up contamination at brownfields sites has led to the rehabilitation and reuse of numerous brownfields sites.234 Reinvestment in brownfields occurs most often in central urban areas that offer prime real estate locations for residential or commercial use. One important lesson from brownfields redevelopment efforts is that where a market opportunity can be seized (or created) minor federal monetary incentives, in conjunction with cooperative state or local governments, can be effective in modifying land use decisions and encouraging urban center reinvestment.235

Direct subsidy programs that seek to encourage farmers through actual cash payments to retain and to restore wetlands have similarly met with political and private sector support and success.236 Federal historic preservation grants and tax incentives constitute another limited but effective spending program that already provides some encouragement for central urban reinvestment. An expanded program generally encouraging reuse of central urban properties would further discourage sprawl.237

Most anti-sprawl strategies, if implemented with conditional federal

231. For the most famous case under such transportation law provisions, see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411 (1971) (stating that § 4(f) of the Department of Transportation Act of 1966 and another statute with similar language prohibited release of federal highway funds for a new road through a Tennessee park unless there was a federal finding that there was "no feasible and prudent alternative to the use of such land, and ... (the) program include[d] all possible planning to minimize harm" (citation omitted)). Critics question the effectiveness of this provision. See Oliver A. Houck, Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws, 60 U. Colo. L. Rev. 773, 821-22 (1989).

232. For a discussion of brownfields initiatives and federal-state interactions and innovations, see Buzbee, supra note 4.

233. See supra note 50-54 and accompanying text.

234. See Eisen, supra note 52, at 887-88.

235. See supra notes 50-54 and accompanying text.

236. See Karkkainen, supra note 11, at 68-70 (discussing Conservation Reserve Program, 16 U.S.C. § 3831(b) (1994), and Wetlands Reserve Program, 16 U.S.C. § 3837(a) & (e), and accompanying regulations, both of which provide for direct monetary payments to farmers retaining or restoring wetlands). Karkkainen notes that, in contrast to schemes that seek to protect wetlands through regulatory prohibitions, these subsidy programs are "warmly regard[ed]" by farmers subject to their provisions. Karkkainen, supra note 11, at 70.

spending encouragement, will ultimately depend on an interested and active public that supports efforts to address sprawls' ills. Such citizen support cannot, however, be assumed. Conditional federal dollars can at least serve to encourage more open state, regional, and local planning processes. Laws and regulatory schemes that encourage opportunities for broad participation can, by modifying what might otherwise be insulated or uninformed decisionmaking, change officials' assessments of sprawl-related measures. Where such participatory rights are not only encouraged, but made a condition precedent to receipt of federal dollars, as under ISTEA and TEA-21, such participatory opportunities are likely to arise. Even under routine state and local land use and transportation planning, public efforts to influence discretionary state and local decisions remain the heart of any anti-sprawl strategy. An active public can influence and possibly change a project simply because it is viewed as bad policy. Many projects contributing to sprawls' ills are now and will likely remain legal and rational to project proponents, but are imprudent and costly when viewed from a broader societal perspective.

Because most major land use and transportation decisions require discretionary government approvals that involve some adverse environmental impacts, active participation in environmental impact statement processes that accompany most of these decisions provides a key opportunity to gather information and influence government plans. Environmental analyses frequently reveal previously unknown impacts, often slow down a projects' approval, and sometimes reveal environmental effects that may require project modification or cancellation. In particular, wetland or endangered species impacts revealed through environmental analyses are potential sprawl-stoppers and biodiversity protectors. In addition, rigorous air pollu-
tion analyses may lead to modification of development and transportation projects to avoid the harms associated with Clean Air Act sanctions. State environmental impact laws often are weaker than their federal counterparts, but still provide opportunities to scrutinize and possibly slow down proposed projects. When sprawl threatens to make incursions on coastal areas, parks or historic sites, federal and state laws often provide a substantive legal hook to modify or defeat such proposals. Creative use of Title VI litigation to deter use of federal dollars that might exacerbate environmental and racial inequities may also succeed in slowing or deterring developments that would lead to more sprawl.

A weakness in many federal programs that seek to achieve their goals through conditional federal spending is their minimal usage of citizen litigation to ensure that these laws are effective and implemented in accordance with their terms at both the state and federal level. For example, federal, state, or local government actions inconsistent with legal requirements in coastal laws can likely be pursued under the federal Administrative Procedure Act and analogous state laws. Other persons or entities acting inconsistently with CZMA’s mandates and goals, or local or state plans, however, are likely vulnerable only to the indirect pressure of federal funding cutoffs or causes of action possibly available under state law. ISTEA and TEA-21 similarly lack the crucial “citizen suit” provision found in most environmental laws. Case law is limited, but courts interpreting ISTEA have allowed suits against federal agencies under the Administrative Procedure Act. It appears, however, that the law did not provide a basis for suits against private entities or state or local agen-

244. See supra notes 64-74 (discussing Clean Air Act and its sanction provisions).
245. See supra notes 216-24, 230 & 236-37 and accompanying text.
247. For an analysis of why private enforcement may be necessary to implement anti-sprawl control laws, see James Poradek, Putting the Use Back in Metropolitan Land-Use Planning: Private Enforcement of Urban Sprawl Control Laws, 81 Minn. L. Rev. 1343, 1366-74 (1997).
249. These provisions empower aggrieved citizens to sue polluters, government officials, or agencies that are breaking the law. Such citizen suit provisions have been essential to prod reluctant agencies or correct illegal agency activity. See infra Part IV for further discussion of the importance of such provisions to federal environmental laws.
cies acting in violation of ISTEA. TEA-21 even more explicitly limits options for citizens seeking, through litigation, to force private, state, or local compliance with TEA-21’s provisions. As further developed below, mere federal reliance on monetary incentives without substantial opportunities for citizen participation leaves these programs vulnerable to failure and unresponsiveness.

While the discussed regulatory schemes continue to provide benefits and constitute a potential model for other sprawl-targeted use of federal conditional dollars, other conditional federal spending programs have met with only limited success in efforts to encourage regional planning and the creation of regional planning organizations. Other federal programs have sought through conditional federal dollars to further particular and more targeted goals such as revitalizing impoverished neighborhoods. These programs have had, at best, limited success in attaining their declared goals. Conditional federal funding is thus far from a panacea; as with any government program or regulatory technique, failure or limited success is a distinct possibility. Nevertheless, the use of conditional federal dollars, especially when linked to requirements of a more open and participatory planning process, offers several marked advantages over more prescriptive or punitive regulatory strategies to address sprawl’s ills.

Use of the federal monetary carrot reduces the need for more rigid

251. See TEA-21 §§ 1203(f)(2) & 1204(c)(2) (to be codified at 23 U.S.C. §§ 134(f) & 135(c)). Both provisions, pertaining, respectively, to metropolitan and state transportation planning, state that failures to consider planning factors required by the statute “shall not be reviewable by any court under this title, subchapter II of chapter 5 of Title 5, or chapter 7 of title 5 in any matter affecting” such plans or planning process. Brownfields funding seldom provides opportunities for citizen litigation, although brownfields rehabilitation efforts could implicate provisions in the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. §§ 9601-9675 (1994), or the Resource Conservation and Recovery Act (RCRA) of 1976, 42 U.S.C. §§ 6901-6992 (1994), both of which do contain citizen suit provisions and other provisions providing for citizen recourse to the courts. See, e.g., 42 U.S.C. § 9613 (providing for challenges to CERCLA regulations); id. § 9659 (providing for CERCLA citizen suits); 42 U.S.C. § 6972 (providing for RCRA citizen suits); id. § 6976 (providing for challenges to RCRA regulations).
252. See infra Part IV.
253. See Briffault, Local Government, supra note 9, at 1148 & nn.162-64 (discussing “rise and fall of federally inspired regional planning councils” and citing sources regarding the same). These programs succeeded during the period of federal funding in modifying state and local planning processes while regional planning councils did their work, but as soon as most federal subsidization ended during the Reagan administration, these councils ceased to serve an important planning function. See id.
255. See generally Komesar, supra note 152, at 274-75 (“The best choices we have or are likely to have will be imperfect and usually significantly so.”).
forms of regulatory intervention. Such flexibility is especially important to address a complex institutional problem such as sprawl. Every jurisdiction confronts a different state of development and political and economic climate. As Professor Jonathan Wiener concludes regarding international environmental regimes, monetary enticements to encourage participation in anti-sprawl initiatives are likely the most effective device to surmount complex institutional frameworks where no unitary entity with coercive authority exists and where different local needs may lead to different levels of interest in such programmatic goals.256

b. *Conditional Federal Spending Enactment and Implementation Politics*

This Article’s call for increased use of conditional federal spending to encourage state and local governments to consider anti-sprawl incentives is incomplete without a brief analysis of the degree to which conditional federal dollars should constrain recipients’ discretion. In constitutional debates over the appropriate contours of federal and state authority, the phrase “conditional federal spending” refers to any regulatory scheme that seeks to enlist state and local governments in furthering federal goals through the enticement of federal dollars.257 A wide range of funding strategies fall within this general constitutional category of conditional federal spending. Federal dollars can be offered or provided to state and local governments through general revenue sharing, which only loosely defines required uses; or through so-called “block grants,” which broadly specify the purposes of the funds but provide few regulatory requirements for how those ends are to be met; or through dollars that are distributed to all states (often through general revenue sharing), but which are vulnerable to loss should recipients fail to meet federal requirements; or through project-specific grants that must be sought through a competitive application process.258 Many funding strategies fall somewhere in between these general categories or share attributes of each.259 A detailed re-

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256. See Wiener, supra note 11, at 714-26.
257. See supra notes 177-86 and accompanying text.
259. A notable example of a so-called block grant scheme that shares attributes
view of the political viability and efficacy of the universe of potential conditional federal spending strategies is beyond the scope of this Article on urban sprawl. A review of legal and political science scholarship, however, provides insights into which conditional federal spending strategies in sprawl-oriented reforms are most likely to be politically palatable in enactment battles and effective in implementation.

General revenue sharing is the broadest and least constrained form of federal funding. Such dollars tend to be provided based on some non-programmatic criteria, such as amount of particular taxes paid by a jurisdiction or numbers of citizens falling in a particular category, and provide maximum discretion to the funding recipient, usually only requiring that funds be spent on broad categories of purposes. Much federal transportation funding is provided to states through revenue sharing formulas; portions of such funding are targeted to particular construction projects, while other transportation funds are provided to grant applicants determined to be worthy of support. General revenue sharing is the least useful of conditional federal funding strategies seeking to achieve particular federal regulatory goals due to the broad discretion these funds provide.

Revenue sharing advocates argue that it returns important discretionary decisions to “local governments [that] are closer to the people than are federal officials.” Civic involvement, however, may actually de-
crease when local governments receive general revenue sharing funds. Dollars delivered to state and local governments through general revenue sharing strategies are often untraceable once received.264

On the other hand, block grant programs providing federal dollars for only loosely defined purposes provide substantial discretion to recipients and once received may be irrevocable.265 Block grants often look much like general revenue sharing, but differ in part due to their history; they have often been the result of reform efforts combining previous categorical grants into one larger block grant.266 State and local governments can use these dollars in a wide variety of ways tailored to the preferences and needs of the recipient jurisdiction.267 Unsurprisingly, state and local governments strongly support block grant-based programs, as do federal politicians advocating states’ rights.268 Those dollars may be used in public-regarding ways, but expenditures to benefit favored constituencies remain a distinct risk.269 Although state and local use of federal dollars arguably separates funding accountability and implementation responsibility, citizens and other participants in state and local politics at least know the officials most responsible for making decisions on how funds are spent and can hold them accountable for imprudent decisions.270
Studies of the realities of state and local politics, however, reveal that grants provided with few criteria or targeted purposes tend to be subsumed into a jurisdiction's general budget.\textsuperscript{271} Little citizen input into how best to utilize those funds actually occurs.\textsuperscript{272} Tracking the effectiveness of state and local governments' uses of federal dollars under such schemes is also difficult due to minimal record keeping requirements or vaguely stated funding goals.\textsuperscript{273} Federal officials also arguably escape accountability due to the general lack of criteria declaring how funds should be spent and the difficulty faced by federal legislators or executive branch officials who may wish to assess the effectiveness of the federal funding. Federal officials can do little more than declare their aspirations for uses of such dollars and claim political credit for their programmatic goals.\textsuperscript{274} Block grants or similar revenue sharing programs thus face perhaps the fewest barriers to enactment, generally finding favor with federal, state, and local officials.

The views of interest groups on block grant proposals are less predictable. Interest group support or opposition will likely depend on whether previous, often more targeted, funding strategies secured an advantage for those groups and whether interest groups anticipate faring well in less visible spending battles at the state and local level.\textsuperscript{275} Block grants do little, however, to foster broad-based political participation and hence may in reality create little state and local political accountability. In addition, the broadly defined nature of block grants creates little federal political accountability. For a regulatory goal such as deterring sprawl, block grants do little to overcome the strong political-economic dynamics that have for many years contributed to sprawl.\textsuperscript{276}

\textit{The Case for Unfunded Environmental Mandates, 69 S. Cal. L. Rev. 1, 10-25 (1995).}

\textsuperscript{271} See Rose, supra note 260, at 11-12.

\textsuperscript{272} See id. at 1-2.

\textsuperscript{273} For a detailed critique of the difficulty in assessing the effectiveness of uses of such funding, see generally United States General Accounting Office, GAO/RCED-99-98, Community Development: Weak Management Controls Compromise Integrity of Four HUD Grant Programs (Apr. 1999).

\textsuperscript{274} David Mayhew's influential work on legislators' focus on reelection predicts that such credit claiming will virtually always occur. See Mayhew, supra note 142, at 16-19, 52-61. Jonathan Macey observes that legislators will sometimes obtain maximum advantage by publicly devolving responsibility to subordinate units of government. See Macey, supra note 195, at 267-68.

\textsuperscript{275} Interest groups may prefer the certainty of targeted grants. See Conlan, supra note 258, at 253, 256-57, 263 (discussing contexts in which interest groups opposed funding shifts that threatened previously secured funding). But see id. at 257-58 (discussing broad-based interest group support for community-based block grants).

\textsuperscript{276} Cf. Dana, supra note 270, at 31-35 (arguing that unfunded mandates requiring state or local activities in compliance with federal requirements, but without federal funding, actually may reflect rational preferences of industry and business due to a more favorable enforcement and implementation terrain at the state and local level and business and industry concern with preventing state and local government advantages in a setting where governments act as market participants).
In contrast to block grants or similarly broad general revenue sharing, federal dollars provided with a more targeted purpose provoke greater local political participation, especially where those dollars arrive with attached participation requirements.\textsuperscript{277} If local political participation and actual accountability are among the goals sought in choosing funding design, it appears that more tailored grants meet with greater success. State and local officials, however, are less fond of such tailored grants due to the decreased discretion they provide and the increased work they require.\textsuperscript{278} Federal officials face greater accountability in justifying the wisdom of targeted federal funding, particularly categorical grants. At least in earlier political eras, federal legislators saw categorical grants as a key means to claim political credit and reelection; they advocated such grants as their “programmatic mainstay... supply[ing] goods in small manipulable packets.”\textsuperscript{2279} Regulatory schemes relying on more narrowly defined purposes for which dollars can be spent thus enhance federal accountability and citizen participation. Nonetheless, due to their reduced spending discretion, state and local officials are less likely to support them. Federal officials advocating a states’ rights agenda may oppose these regulatory schemes.

Regulatory schemes relying on broadly provided federal funds that can be lost due to “cross-cutting” or “crossover” sanctions are perhaps the funding strategy most disliked by state and local officials and by federal officials advocating devolution of authority to states.\textsuperscript{280} Such schemes pose a substantial risk of embarrassment to state and local officials and can lead to the loss of substantial federal funds. Such dollars are also frequently subject to detailed regulatory prescriptions, often in programs that enlist state and local involvement through a combination of conditional federal spending and “displacement” federalism, under which state and local governments have the choice of displacing a federal regulator or facing federal enforcement and pos-

\textsuperscript{277} See Kettl, supra note 259, at 444-46 (observing substantial local participation in all aspects of CDBGs, with “far stronger [public interest] than in the local general fund budget” and numerous citizens seeking government provision of funds for particular projects). Kettl also observes, however, that such participation did not necessarily translate into influence and over time tapered off. See id. As discussed supra note 259, the CDBGs discussed by Kettl were sought in applications and provided only if deemed deserving by HUD. Kettl concludes CDBGs led to “a city manifestation of Lowi’s interest group liberalism.” Id. at 446 (citing Theodore J. Lowi, The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority (1969)).

\textsuperscript{278} Dislike of “categorical” grants that limited state and local discretion due to narrowly defined funding purposes and often detailed regulatory requirements led to political support for general revenue sharing and block grant funding strategies starting in the 1960s. See Conlan, supra note 258, at 250-55.

\textsuperscript{279} Conlan, supra note 258, at 233 (quoting David Mayhew, Congress: The Electoral Connection 129 (1974)).

\textsuperscript{280} See ACIR, supra note 213, at 7-17 (discussing funding sanctions, accountability issues, and criticisms of narrowly targeted and restrictive federal funding strategies).
possible preemption of state and local laws. Proponents of particular federal goals such as a cleaner environment often advocate such sanctions due to the federal clout they provide in overcoming state and local resistance to federal goals. Such funding strategies that actually threaten to lead to state or local losses of already provided or designated federal funds, especially when arriving with detailed regulatory prescriptions, are perhaps least likely to be enacted. In addition, even where such sanctions are already part of federal laws, state and local governments have in several highly visible battles persuaded federal legislators or administrative agency officials to rescue state and local governments from previously available, if not mandated, sanctions.

In a paradoxical quirk of funding politics, the one type of funding strategy that appears consistently to meet with broad-based federal, state, and local support, regardless of party affiliation, are federal funds that can only be obtained through a project-specific private, state, or local government application, often in a competitive grant setting. Support for such funding strategies is paradoxical because such application-based funding strategies involve federal officials in detailed evaluation of a grant applicants' proposal. Project-specific, application-based funding schemes are in many respects the opposite of the popular block grant or revenue sharing strategies often advocated by critics of federal micro-management. Such funding strategies in fact look a good deal like the much-criticized categorical grants, perhaps distinguishable primarily in their less detailed regulatory and reporting requirements.

Application-based funding schemes offer several benefits in their implementation. Programs like the federal brownfields initiative,

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281. Even after recent Supreme Court decisions reducing federal control of state and local governments in furthering federal ends, conditional federal spending and displacement (or cooperative) federalism options remain constitutionally permissible. See supra notes 172-88 and accompanying text. As concluded by David Dana, the Court's opinion in New York v. United States implicitly concludes that such strategies "constitute permissible 'incentives,' rather than impermissible coercion." Dana, supra note 270, at 9 (citing New York v. United States, 505 U.S. 144 (1992)).

282. See supra notes 64-74, 213 and accompanying text.

283. See, e.g., McGarity, supra note 67, at 1595-1600 (discussing agency foot-dragging and legislative offers of a statutory rescue to jurisdictions failing to meet federal automobile inspection requirements); Oren, supra note 41, at 174-201 (discussing legislative amendment of widely disliked Clean Air Act provisions seeking to modify commuter behavior).

284. See Karkkainen, supra note 11, at 68-70, 92-93 (describing the contrast between broad opposition to regulatory restrictions protecting wetlands and endangered species and substantial support for project-specific subsidies provided to farmers retaining or restoring wetlands); supra notes 51-58 and accompanying text (discussing popularity and successes of brownfields rehabilitation grants and accompanying regulatory incentives).

285. The CDBGs, although nominally "block grants," were much like the application-based funding strategy suggested here. See supra notes 259-77 and accompanying text.
which requires grant applicants to define and propose a particular project, create a market for creative thinkers interested in working to combat social ills like abandoned brownfields.\textsuperscript{286} A state or local government succeeding in obtaining a merit-based grant can claim political credit for bringing additional, elective dollars into the jurisdiction. Federal officials can similarly claim credit for funding for a particular tangible project.\textsuperscript{287} State and local governments having little actual use for targeted federal funds are unlikely to seek them, especially if such funds require matching state or local expenditures or the funds' applications require substantial investments of time and money. Applicants expending the time and money to secure such funds are likely to have actual programmatic needs.\textsuperscript{288} Federal officials providing such funds are also accountable for imprudent goals or ineffective programs, facing scrutiny and criticism if federal funds do little to achieve desired ends.

Application-based federal funding thus appears to have broad-based political support and provide a high degree of accountability at all levels of government. One accountability risk of such schemes is the unlikelihood that not-for-profits such as environmental groups or other citizen groups will be able to scrutinize and participate in local or state efforts to obtain or decide how to spend project funding. Local businesses and industry may have proportionately greater influence where regulatory schemes rely substantially on state and local applications for project specific funding rather than on more narrowly targeted funding criteria secured in fewer but higher stakes federal legislative or regulatory battles.\textsuperscript{289}

This Article therefore tentatively advocates that to the extent politically palatable, conditional federal funds should seek to target desired ends in application-based programs, much as a few sections of the TEA-21 law seek to encourage innovative means to facilitate reverse-commutes and development of alternative modes of transportation.\textsuperscript{290} Eligibility for such dollars should include requirements that recipient jurisdictions provide substantial opportunities for public participation in choosing uses for such funds. Historic preservation laws,

\begin{footnotes}
286. See Buzbee, \textit{supra} note 4, at 59-63; Eisen, \textit{supra} note 52, at 980-82.
287. See Mayhew, \textit{supra} note 142, at 52-61 (discussing federal legislators' desire to claim credit as a means to assist reelection efforts).
288. One arguable shortcoming of such application-based funding is that it will tend to favor larger jurisdictions with greater resources available to compete for such funds. See Stein, \textit{supra} note 266, at 335-36.
289. See Dana, \textit{supra} note 270, at 32 (noting that "at the state and local level, there is often an absence of well-organized and well-funded groups to articulate and lobby for the general public's interest in environmental protection"); Mank, \textit{supra} note 141, 60-62; Peterson, \textit{supra} note 4, at 116-30 (exploring reasons for low levels of citizen and citizen-based interest group activity in local government politics); Steinzor, \textit{supra} note 141, at 144-45.
290. See \textit{supra} note 213 and accompanying text (discussing ISTEA and TEA-21's programs seeking project-specific funding support).
\end{footnotes}
brownfields initiatives, and wetland protecting subsidies have been similarly structured and met with political support and greater apparent programmatic success than less targeted grant schemes or mandate-based regulatory regimes. Regulatory schemes relying on crossover and crosscutting sanctions may also be effective, but their political unpopularity makes them of questionable utility for anyone advocating increased federal support for anti-sprawl incentives.

C. Additional Sprawl Strategies and Reforms

The question that remains is how best to convert a general goal, such as reducing sprawl's ills, into tangible programs with discrete and achievable goals. What particular regulatory tools should be considered if a jurisdiction decides to initiate anti-sprawl efforts? The following section offers a brief discussion of several regulatory strategies to address sprawl and its ills. These strategies could independently be embraced by state and local governments, or might appropriately be encouraged by federal legislation providing incentives for such strategies through the conditional federal spending regulatory carrot. None of these strategies alone will prevent sprawl, nor is any combination of these strategies likely fully to achieve such an end. These strategies would, however, act as disincentives to sprawl, might alleviate some of the ills associated with sprawl, and, at a minimum, would reduce ways in which current legal regimes encourage sprawling patterns of development.

More creative imposition of development fees or taxes could help deter sprawling development, although such fees would have to be substantial actually to redirect real estate development projects. Several states now impose fees on developers of new real estate. Such fees create a mild disincentive to new development, but appear to be primarily revenue raising measures, in some instances financing the purchase of other green spaces.

To deter mothballing of urban center properties by real estate speculators, urban centers seeking development might enact a split rate property tax, taxing land at a higher rate than buildings. While

291. See supra notes 214-46 and accompanying text. The Department of Housing and Urban Development recently has combined a wide range of previously separate programs into one "Super Notice of Funds Availability," or Super NOFA, that similarly seeks applications for eligible projects. See Super Notice of Funding Availability for Housing and Community Development Programs, 63 Fed. Reg. 15,490 (Mar. 31, 1998).

292. See Altshuler et al., supra note 118, at 120.

293. See Mandelker, supra note 146, §§ 9.11 to 9.22 (discussing uses of development fees and exactions and constitutional constraints under federal and state law on uses of such fees).

294. See Southern Envtl. L. Ctr. & Envtl. L. Inst., Smart Growth in the Southeast 15 (1999) (advocating split rate property tax (also known as land-value or two-tiered real estate tax) as a means to reduce disincentive to develop and use land more inten-
such a tax strategy would discourage real estate mothballing or underutilization of property, it could also cause the undesirable wiping out of small businesses, low income housing, and neighborhoods that retain a distinctive character. To avoid such harms, a split rate tax strategy might best be targeted to metropolitan center properties that are unused or being used for low-intensity, low-employment uses such as surface parking.

A more nuanced federal transportation funding scheme might also reward states or metropolitan governments, especially multi-jurisdictional entities, which create land use planning schemes that direct development into the urban center and develop strategies to encourage greater reliance on rail and alternative forms of transit. If federal highway and transportation dollars were adjusted to reward states or local governments imposing a tax or fee on new development on the urban periphery, or on development that involved clearing of green spaces, state and local governments would have increased incentives to enact such a fee system. Sprawl could also be discouraged through imposition of congestion fees on users of highways. Although tollbooths are less common today than twenty years ago, scanning equipment would allow use of such user fees without adding to traffic tie-ups. Such a fee could constitute a regressive tax unless offset with some income-linked rebate system, but would create a direct disincentive to drive alone on highways. Such fees would also marginally increase the relative attractiveness of areas offering untaxed transportation alternatives.

A related but differently targeted financial incentive scheme would reduce federal transportation dollars to high vehicle mile per capita metropolitan areas, particularly where cars tend to have only one passenger. Under such a scheme, cities that develop mass transit and al-

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295. See, e.g., Joel Kotkin, For Retailers in Some City Centers, Gentrification is a Four-Letter Word, N.Y. Times, June 27, 1999, at 7 (describing tensions between Baltimore urban development advocates seeking to add economic vitality to a poor neighborhood and residents concerned about displacement of their homes and businesses).

296. Such a scheme would differ from ISTEA or its successor TEA-21 in giving preferential funding (or greater funding) for non-highway-related expenditures. Much of TEA-21 provides a limited version of such preferential funding in its creation of a “Congestion Mitigation and Air Quality Improvement Program.” TEA-21 § 1110 (to be codified at 23 U.S.C. § 149). This section encourages proposals for projects to reduce congestion and air quality problems. An even more targeted monetary encouragement is in TEA-21 § 3037 (to be codified within Title 49). Section 3037, entitled “Job Access and Reverse Commute Grants,” offers special additional federal grants for proposals to fill transportation needs of urban poor seeking access to the many jobs located not in central cities but on the urban periphery. See Notice, Job Access and Reverse Commute Competitive Grants, 63 Fed. Reg. 60,168 (Nov. 6, 1998).

297. See generally Winston Harrington, Paying to Drive Freely, 129 Resources 9 (1997); Wahrman, supra note 60.
ternative transportation options (or improve the status of such options), and hence reduce average vehicle miles traveled per capita, would be financially rewarded, while cities dependent on single passenger high mileage trips would be financial losers.298 Current law provides similar incentives, but only to the extent that state and local efforts are inadequate to meet federal Clean Air Act requirements.299

A related strategy could require that transportation and sprawl-related projects proceed only after an assessment of costs and benefits associated with those plans.300 Particularly in areas such as major infrastructure investment, where political patronage and pork-barrel politics are a substantial likelihood, an assessment of overall costs and benefits often reveals the actual lack of societal benefits of major government projects.301

State acquisition of green spaces or creation of zoned urban growth boundaries also can deter sprawl and alleviate negative effects of current sprawling development.302 Such government acquisitions or regulatory strategies, however, undoubtedly distort land markets and may have fewer environmental benefits than expected.303 Oregon's highly touted urban growth boundaries have contributed to that state's economic vitality and the City of Portland's economic boom, but where low density or no-build rings of land are placed at a substantial distance from the urban center, they appear to lead to accelerated growth and building on previously green spaces inside the growth boundary.304 Such urban growth (or containment) strategies also can raise equity concerns due to suddenly enhanced values of land inside an urban growth boundary, while usually rural or agricul-

298. Professor Larry Frank analyzes in detail the benefits of encouraging less sporadic modes of car use and more interconnected street patterns. See Frank, supra note 18.

299. See supra notes 64-74, 213 and accompanying text.

300. Such a requirement would work much like environmental impact statements under the National Environmental Policy Act ("NEPA") and similar state laws, but would, if made part of such analyses, expand the scope of currently required analysis. For a thorough analysis of NEPA, its regulations and cases, see John E. Bonine & Thomas O. McGarity, The Law of Environmental Protection 1-212 (2d ed. 1992).

301. For example, a similar type of cost-benefit analysis is undertaken by the Endangered Species Committee when evaluating requests to allow a proposal to proceed despite endangered species harms. In numerous high visibility matters, the Committee has found that costs associated with major infrastructure projects exceed project benefits. See Zygmunt J.B. Plater, The Embattled Social Utilities of the Endangered Species Act—A Noah Presumption and Caution Against Putting Gasmasks on the Canaries in the Coalmine, 27 Envtl. L. 845, 874 n.111 (1997).


303. Oregon's experience with its urban growth boundary has been mixed, but the preserved green spaces have remained. See supra note 84 and accompanying text.

tural properties outside of the boundary experience an immediate loss in land value due to reduced potential for real estate development.\textsuperscript{305} To avoid such inequities, any jurisdiction enacting an urban growth strategy should include a combination of either compensation or tax benefits to real estate owners outside of urban growth boundaries.\textsuperscript{306}

Federal, state, and local governments seeking to deter excessive growth, or to address sprawl's associated harms, especially destruction of green spaces, can and should make greater use of outright acquisitions of significant green spaces, thereby preserving agricultural uses, recreational amenities, or helping to preserve biodiversity.\textsuperscript{307} Protected green spaces and parks create environmental benefits, enhance surrounding land values, and can reduce the visual blight of unmitigated sprawling business and residential development. The power of all levels of government to acquire land in consensual transactions is unquestioned, plus governments have the ability to acquire land for the public good under the power of eminent domain.\textsuperscript{308} Government acquisition of land for green space or for alternative transportation uses is a direct means to combat ills associated with sprawl. Such acquisitions might be of a fee simple interest or of conservation easements limiting future uses of such land.\textsuperscript{309} Forcing governments to pay for the benefits of retained green spaces would likely reduce politicians' enthusiasm for such strategies, and hence reduce their probabilities of enactment or effective implementation. Forcing governments and taxpayers to confront the costs and benefits of such strategies, however, would arguably enhance government accountability.\textsuperscript{310} To encourage such acquisitions, federal subsidization for federal, state, or local acquisitions should be expanded from often minor support and funding available under the Land Water and Conservation Fund.\textsuperscript{311}

In addition, provided states leave landowners with profitable uses for their lands, states have substantial latitude to limit types of land uses, especially where those uses of land can be linked to externalized

\textsuperscript{305} See id. at 164-66.

\textsuperscript{306} See id.

\textsuperscript{307} Professor Karkkainen has concluded that outright acquisition of areas that can protect or enhance biodiversity is both politically feasible and equitable. See Karkkainen, supra note 11, at 103-04

\textsuperscript{308} See id. at 84-97 (asserting that government acquisitions of significant lands to preserve biodiversity face fewer constitutional and political obstacles than would regulation to achieve such an end).

\textsuperscript{309} See id. at 55.

\textsuperscript{310} See id. at 96-97.

\textsuperscript{311} 16 U.S.C. §§ 460-4 to 460-11 (1994). See Karkkainen, supra note 11, at 55 & n.310 (also noting potential of the Fund, but noting its limited funding sources and lack of focus on protecting environmentally significant lands); Ruhl, supra note 11, at 656 & n.310 (discussing potential of the Land Water and Conservation Fund to enhance efforts to protect biodiversity, but questioning if the political will exists to actually pay for such efforts).
Direct government intervention in land use patterns by land acquisition or regulation is a major and intrusive form of government intervention. Nevertheless, the experience of Portland, Oregon shows that even if such a strategy leads to fewer environmental benefits than anticipated, it may reduce harms associated with rapid urban sprawl and contribute to enhanced metropolitan vitality and higher property values.  

IV. POLITICAL AND LEGAL WILL: ENVIRONMENTAL LAW'S DYNAMICS AND SPRAWL COMPARED

How the sprawl issue and its associated ills are politically and legally framed will be key to sprawl reform efforts. Environmental protection initiatives have often met with success, but usually only when a confluence of particular factors has been present. Many of sprawl's harms are environmental, and much as pollution-causing industry wields both market and political clout, the beneficiaries of sprawl also wield substantial power in the market and politics. Sprawl's contributors also include millions of citizens choosing to reside on the urban periphery. A comparison of environmental reforms and successes and the political and legal dynamics of urban sprawl reveal that urban sprawl's complex institutional dynamics present a challenge that threatens to be intractable. Nevertheless, this part reviews these environmental lessons to assess sprawl reform efforts, suggesting both pre-enactment contexts favorable to reform efforts and strategies to improve the likelihood of post-enactment implementation success.

A. The Need for a Perceived Disaster

Few environmental initiatives and resulting laws emerged from periods of cool, rational discussion. Instead, most environmental laws emerged from periods of widespread perceptions of crisis. The first federal Clean Water Act with legal teeth was enacted following the Cuyahoga River fire and widespread concern about the environment following the first Earth Day. The Clean Air Act was similarly en-

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312. See supra note 175 (discussing recent takings jurisprudence and how regulatory burdens in the land use context can lead to successful constitutional takings claims seeking compensation).


314. See supra Part II (discussing the political-economic dynamics of sprawl).


317. For history-oriented discussions of the political dynamics surrounding passage of major environmental laws and significant regulatory battles, see Percival supra note, 316, at 106-14 (providing chronology of significant federal environmental legislation); Philip Shabecoff, A Fierce Green Fire: The American Environmental
acted after a period of broad political support and heightened awareness of environmental ills. The federal Superfund law (also known by its statutory acronym of CERCLA), was enacted following widespread concern and publicity regarding hazardous waste contamination at Love Canal in upstate New York and in Times Beach, Missouri, where dioxin contamination required emergency action.318

In contrast to environmental legislative initiatives, where the statutory goal can be presented in a clean manner—cleaner water, cleaner air, or no hazardous waste dumping—initiatives addressing land use issues such as sprawl are difficult to present cleanly. "Unlike pollution controls, land use controls have no ideal of 'pure' land to which they refer."319 Unlike issues of environmental racism, which lend themselves to effective coalition building and strong absolute opposition statements, sprawl is the result of many private and governmental decisions where any overriding motivation is likely impossible to discern.320 Furthermore, there is seldom one overarching adverse impact of sprawl. Instead, many harms all contribute to substantial societal costs, but no one sudden disaster or wrongful act or actor can be used to rouse citizens or politicians.

Nevertheless, despite the lack of a single catalyzing event or harm to trigger political activity to address sprawl, less cataclysmic diverse harms may be felt widely enough that some jurisdictions may be receptive to anti-sprawl political initiatives. In particular, increasing citizen and business concern with traffic congestion, a decrepit urban core, and loss of green space may soon be sufficiently widespread that new legal and political activity will arise in many metropolitan areas as well as in the federal legislature and in federal agencies. Political initiatives to encourage brownfields reuse and redress environmental inequities could also lead to support for anti-sprawl measures.321

B. The Need for Entrepreneurial Politics

A sudden disaster or perceived crisis is often essential to rouse the populace and give politicians reasons to take on issues of harms


318. See Landy et al., supra note 317, at 131-71 (discussing history of CERCLA).
320. For one of the first books articulating problems associated with environmental racism and inequity, see generally Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality (1990).
caused by industry and the process of real estate development. During periods of "business as usual," politicians are likely to encounter and receive entreaties from those entities with concentrated interests in political decisions.\textsuperscript{322} As discussed above, classic economic theories of regulation predict what is actually often seen in politics. Laws are often enacted to address the wishes of constituencies, such as developers and industry, who have substantial incentives to act politically and thus have frequent contacts with officials who could affect their businesses.\textsuperscript{323}

A sudden disaster or perceived crisis provides politicians with opportunities for "entrepreneurial politics."\textsuperscript{324} Politicians can seize upon an incipient issue and use it to make a political name and claim credit for a public initiative.\textsuperscript{325} Several early environmental laws were enacted due to the leadership of Senators Edmund Muskie and Gaylord Nelson. Both of these legislators perceived an incipient environmental movement and through use of actual hard data and legislative advocacy moved environmental issues to the political frontburner.\textsuperscript{326} Legal scholars analyzing reasons for the stringency of the 1972 Clean Air Act amendments suggest that Senator Muskie and President Richard Nixon engaged in an escalating battle to claim the environmentalist mantle for an upcoming presidential election.\textsuperscript{327} Few successful environmental initiatives have lacked this combination of a perceived crisis and entrepreneurial politics.

Sprawl may be ripe for such entrepreneurial politics if politicians perceive the changing demographics of the United States and the potentially wide support for efforts to combat the ills of sprawl.\textsuperscript{328} In New Jersey, for example, Republican Governor Christine Todd Whitman has recently made sprawl and green space initiatives a cen-

\textsuperscript{322} See Schroeder, \textit{supra} note 92, at 30.
\textsuperscript{323} For classic economic theories of regulation, see Gary S. Becker, \textit{A Theory of Competition Among Pressure Groups for Political Influence}, 98 Q.J. Econ. 371, 373-81 (1983); George J. Stigler, \textit{The Theory of Economic Regulation}, in \textit{The Citizen and the State} 114-141 (1975). See also Richard Stewart, \textit{The Reformation of American Administrative Law}, 88 Harv. L. Rev. 1669, 1684-87 (1975) (discussing "capture" theories of regulation but also noting "more subtle explanation of industry orientation" in regulation). For further discussion of the political-economic dynamics leading to sprawl, see \textit{supra} Part II. This section focuses upon contexts where legal reforms have succeeded despite anticipated political-economic hurdles to success.
\textsuperscript{324} For two essential discussions of entrepreneurial politics in the environmental area, see generally Elliott et al., \textit{supra} note 115, and Farber, \textit{supra} note 115. For discussion of these theories in connection with law and policies to encourage rehabilitation of brownfields sites, see Buzbee, \textit{supra} note 4, at 12-19.
\textsuperscript{325} See Mayhew, \textit{supra} note 142, at 13-77.
\textsuperscript{326} See Shabecoff, \textit{supra} note 317, at 112-15.
\textsuperscript{327} See Elliott et al., \textit{supra} note 115, at 316.
\textsuperscript{328} See \textit{supra} note 1 (citing recent articles regarding substantial political, citizen, and press interest in sprawl); see Mitchell, \textit{supra} note 1 (reporting particular importance of suburban voters).
terpiece of her administration.\textsuperscript{329} Similarly, several decades ago, Oregon Republican Governor Tom McCall supported and enforced environmental laws and supported efforts to contain urban sprawl with urban growth boundaries.\textsuperscript{330} In 1998, Georgia Democratic Governor Roy Barnes seized on sprawl as one of his early initiatives.\textsuperscript{331} At the federal level, in 1998 and 1999, Vice President and presidential hopeful Al Gore recently has made sprawl reform a major campaign talking point.\textsuperscript{332} Such a conjunction of constituency support for anti-sprawl measures and politicians perceiving political advantage in leading anti-sprawl initiatives is essential both for enactment of sprawl reform policies and the success of post-enactment implementation efforts. Sprawling cities in the South, Southwest, and West Coast depend less on an industrial base for job creation and wealth, and need to attract and retain corporate headquarters and service sector and high-tech jobs. The competition among jurisdictions for jobs and employers is less likely to be about which jurisdiction will be most lax in regulating industry. Instead, a strong argument can be made that recently expanded cities must focus on policies that will create an improved quality of life and enhanced urban amenities. Sprawl cities such as Atlanta are less likely to compete with Birmingham for steel manufacturing facilities than they are likely to compete with Durham, North Carolina or Seattle, Washington for service sector, high-tech, and university employers and employees.

Furthermore, past sprawl beneficiaries may eventually become anti-sprawl advocates as inner ring suburbs and businesses find their advantages threatened by traffic contributions of yet more distant sprawl developments.\textsuperscript{333} Central city businesses and governments continue to seek measures to enhance central city vitality. Traffic congestion, polluted rivers, generic malls and shopping centers, and lack of a dynamic urban center all pose a risk to a city's vitality in the current economy. All localities within a metropolitan region have incentives to shirk and let others provide essential amenities, but they nevertheless share an interest in ensuring that the metropolitan region offers decent housing, jobs, and attractive recreational opportunities.\textsuperscript{334} A combination of these emerging issues and shared interests of diverse constituencies in anti-sprawl measures may give rise to contexts suitable for successful entrepreneurial politics.

\textsuperscript{329} See Preston, supra note 1.
\textsuperscript{330} See generally Brent Walth, Fire at Eden's Gate: Tom McCall and the Oregon Story (1994); Leonard, supra note 84.
\textsuperscript{331} See supra note 162.
\textsuperscript{332} See Milbank, supra note 1, at 18.
\textsuperscript{333} See supra Part III.B-C.
\textsuperscript{334} See Briffault, Local Government, supra note 9, at 1133-41 (discussing reasons localities are unlikely to surrender parochial perspectives despite shared interests in policies addressing regional issues).
C. *The Need for a Public Interest Constituency*

The active and effective participation of environmental groups interested in furthering environmental goals is another earmark of successful environmental initiatives, especially in the post-enactment implementation phases of environmental protection schemes. Well-established environmental not-for-profits provide a counterweight to pro-development and industry interests and prod resistant or sluggish agencies to comply with legal mandates.335 They generally cannot compete with the financial resources available to development and industrial interests, but their ongoing existence depends on success in furthering their agenda.336 These groups successfully compete in the legislative, department, and agency arenas by offering officials policy information and evidence of citizen support for environmental initiatives.337

Environmental concerns have long had high voter salience.338 Elected officials warily oppose highly visible environmental initiatives.339 The increased interest of environmental groups in issues of sprawl is a promising development for citizens and politicians interested in pushing sprawl reforms, although that same increased interest alarms critics who fear misguided and excessively prescriptive anti-sprawl efforts.340 Anti-sprawl groups such as the Surface Transportation Policy Project and environmental justice groups add an important voice and source of information for anti-sprawl efforts. A major question, however, is whether such groups can be effective in influencing the many dispersed fora where land use and transportation decisions that affect sprawl will be made, even if federal or state anti-sprawl incentives have been enacted.

D. *The Need for Discrete Goals and Empowered Citizens*

Sprawl reformers confront their greatest challenge in trying to define discrete and achievable goals. The institutional complexity underlying sprawl’s dynamics and legal structures makes difficult efforts to define a paramount goal or a main forum for activism, let alone settle upon a dominant regulatory tool to address ills associated with sprawl. Federal environmental laws have had unexpected success and teeth because they usually contain both deadlines for particular private and government actions and also authorize citizen suits for viola-

337. *See id.*
340. *See supra* note 5 and accompanying text (citing recent articles critical of anti-sprawl initiatives).
Environmental groups devote substantial resources to initiating litigation against polluters who violate federal requirements and against agencies and other governmental entities that violate discrete statutory mandates and firm statutory deadlines. Virtually all successful environmental initiatives have depended on this combination of discrete goals, citizen suit provisions, and litigation to prod noncompliers into action. Where older versions of federal laws instead had more amorphous environmental quality goals, little environmental improvement occurred.

Environmentalists have also enjoyed repeated legislative successes because the federal legislative forum has repeatedly been amenable to new environmental proposals. In implementing these laws, the United States Environmental Protection Agency ("EPA") has also been amenable to the participation and suggestions of environmental groups. By concentrating key environmental decisionmaking within the Washington D.C. beltway, environmentalists have been able to focus their limited resources in federal legislative and regulatory fora and seek to lock in successes in the form of legislative and regulatory rules. By concentrating their efforts on the federal government, environmentalists have been able to achieve far greater successes than would be possible if decisions were geographically fragmented and key policy decisions were made in dispersed tribunals.

Given the decentralized nature of land use and transportation planning, no federal tribunals are likely to create firm goals and litigatable mandates to combat sprawl. Any new federal legislative initiatives encouraging state and local anti-sprawl efforts will require substantial public participation at the state and local implementation stage. Instead of securing anti-sprawl implementation through the assistance of

341. Professor Melnick questions the efficacy of such provisions and asserts that statutory deadlines are often intentionally unrealistic, but acknowledges their influence on environmental policy. See R. Shep Melnick, Pollution Deadlines and the Coalition for Failure, in Environmental Politics: Public Costs, Private Rewards 89 (Michael S. Greve & Fred L. Smith, Jr. eds. 1992).

342. See id.


344. See Buzbee, supra note 4, at 42-46 (discussing federal environmental leadership and exploring "first-mover" hypothesis to explain the longstanding federal leadership role); see also Elliott et al., supra note 115, at 338 (exploring political and economic dynamics leading to stringent federal environmental laws); Farber, supra note 115, at 68-69 (discussing reasons why environmental groups have influenced federal policy); Schroeder, supra note 92, at 29.

345. See supra note 141 and accompanying text (discussing critiques of Professors Steinzor and Mank of decentralizing regulatory reinvention proposals and likely effects of dispersing fora in which policy is made); see also Revesz, Rethinking, supra note 126, at 1223-24 & n.37 (discussing how environmental groups are "more effective at the federal level"); Stewart, supra note 134, at 1213-15 (discussing reasons for environmental groups' successes in federal legislative and agency politics).
courts, the far less certain fora of state and local legislative and regulatory politics are likely to be the sites of successful or failed efforts actually to implement sprawl-reducing measures. Citizen participation and advocacy in these state and local fora may be allowed or even invited, but given the complexity and fragmented nature of decisions in these tribunals, effective advocacy by dispersed citizen or not-for-profit groups would be difficult. If democratically unaccountable regional authorities become the main venue for review of regional decisions influencing sprawl, the public's voice is particularly likely to go unheard. As Professor Arnold Reitze noted in his study of transportation planning requirements under federal air and transportation laws, the combination of reliance on computer modeling and sequential and fragmented decisionmaking mean that "the public will continue to depend almost entirely on the good faith" of responsible government agencies.6

CONCLUSION

Urban sprawl is thus predictable based on a confluence of market, legal, and political structures and dynamics. Numerous past and ongoing government activities, particularly the underwriting of transportation infrastructure, have contributed to sprawling urban forms. Sprawl is not all harm. From the perspective of many residents of sprawling metropolitan regions, sprawl offers numerous direct and often substantial economic benefits. Sprawl nevertheless causes numerous tangible harms for citizens, businesses, and the environment.

Modification of present legal structures and incentives within our federalist scheme to alleviate ills associated with sprawl could create substantial societal benefits. The federal government has constitutional authority to provide additional anti-sprawl incentives, but cannot and should not seek to impose rigid mandates for particular urban forms. Instead, federal initiatives making greater use of conditional federal spending offer states and local governments the option of utilizing federal assistance. Conditional federal dollars offer the additional benefit of enticing participation in a context where fragmented decisionmaking and the varied conditions of sprawling metropolitan areas render mandate-oriented regulation unsuitable. Modified incentives and the enticement of project-specific, application-based federal monetary assistance, especially when coupled with mandates that planning processes be made open and participatory, are far more likely to achieve anti-sprawl goals at reasonable cost and with appropriate sensitivity to local conditions than are more prescriptive anti-sprawl measures.

Despite the existence of successful examples of programs using conditional federal dollars to modify state and local land use practices,

346. See Reitze, supra note 226, at 412.
the prospects for effective anti-sprawl reforms remain dim. Even if a jurisdiction chooses to open up the processes of regional and transportation planning, and even if available federal dollars create disincentives for prevailing land use and transportation patterns in sprawling jurisdictions, there is little reason to anticipate that dispersed citizen concerns will be heeded in any ongoing manner. Anti-sprawl voices are likely to exist, particularly as residents and businesses invested in, or seeking to invest in, more central metropolitan locations attempt to avoid or reduce the ills associated with sprawl through market transactions and politics. It is far less clear that such anti-sprawl voices will succeed in deterring sprawl, even if central city and inner ring suburbs slowly revitalize due to private reinvestment and locally responsive politicians.

Even with a more open and participatory process of transportation and regional land use planning, the same confluence of private demands for policies furthering sprawl, coupled with similar state and local government incentives to attract new development, threaten to replicate political and economic dynamics leading to sprawling urban forms. A level playing field where all can speak makes little difference when some sprawl partisans have the means and incentives to participate and lobby on an ongoing basis and hence skew ultimate policy decisions. Were sprawl decisions able to be reduced to a few key legislative votes or administrative deliberations, then perhaps dispersed citizen interests and similarly aligned not-for-profits could succeed in locking in solidly enforceable government commitments. Sprawl decisions, however, will seldom be presented in such a discrete manner before high visibility tribunals where citizens, central city governments, businesses, and environmental justice not-for-profits can concentrate their efforts and perhaps act as a counterweight to pro-sprawl interests. Furthermore, many citizens may oppose anti-sprawl measures that make their lives in suburbia, or hopes for a suburban life, more costly or inconvenient.

Regional transportation authorities or similar subject-limited regional entities can act to address otherwise intractable regional ills that often are ignored by state and local governments. Most such entities, however, are staffed by appointed officials and hence are neither chosen by citizens who embrace their policy views nor are such officials under any electoral compulsion to seek public approval for their choices. Such regional entities are unlikely to operate under prescriptive regulatory schemes. Instead, they are likely to evaluate proposed projects on a case-by-case basis as has long occurred in state and local land use decisionmaking. Few procedural requirements, substantive criteria, or clearly stated regulatory goals are likely to give anti-sprawl interests a toehold to use litigation to further anti-sprawl goals or just keep such regional entities acting in accordance with applicable legal frameworks.
Even if federal or state laws add citizen suit provisions such as have been central to environment protection efforts, such suits are unlikely to be initiated unless prevailing plaintiffs are entitled to attorneys fees. Little reason exists to anticipate that any new anti-sprawl regulatory schemes would contain clearly stated mandates, let alone confer a cause of action on citizens and promise attorneys fees to prevailing litigants. Without such enticements for citizen groups to monitor state and local decisionmaking, sprawl-related decisions are likely to occur with little public scrutiny. Key sprawl decisions are likely to continue to be made by largely unaccountable local, state, and federal officials.

If a culture of professionalism prevails, and senior state or regional officials have publicly committed to enact anti-sprawl measures, one still might see substantive and effective measures to address sprawl's ills. The institutional complexity and skewed political and economic incentives that have contributed to existing sprawling urban forms may occasionally be overcome by political entrepreneurs' embrace of anti-sprawl policies. Sustained and effective anti-sprawl measures, however, have been and are likely to remain a rarity.