

Book Review Essay: Environment in Context

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I.

INTRODUCTION

The interrelationship of problems locally requires a holistic understanding prior to the initiation of public policies.¹ Sprawl, crime, the disappearance of open space, lack of adequate affordable housing, gridlock, unequal access to educational opportunities, and urban decay ought not be assessed and addressed in isolation. Incrementalism,² a hallmark of governments and their policies, contributes to the existence of these problems and hin-

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1. Thus the phrase "Think globally, act locally."

2. In the fields of political science and public policy, there is significant literature on the subject of incrementalism. *See, e.g.,* Charles Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79 (1959); Charles Lindblom, *Still Muddling, Not Yet Through*, 39 PUB. ADMIN. REV. 517 (1979); *see also* AARON WILDAVSKY & NAOMI CAIDEN, *THE NEW POLITICS OF THE BUDGETARY PROCESS* (3rd ed. 1997) (on incrementalism at the policy formulation stage of the policy process); AARON B. WILDAVSKY & JEFFREY L. PRESSMAN, *IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND* (3rd ed. 1984) (on incrementalism at both the policy formulation and implementation stages of the policy process).

An analogous concept is labeled the tyranny of small decisions. *See* William E. Odum, *Environmental Degradation and the Tyranny of Small Decisions*, 32 BIOSCIENCE 728 (1982); Alfred E. Kahn, *The Tyranny of Small Decisions: Market Failures, Imperfections, and the Limits of Economics*, 19 KYKLOS: INT'L REV. SOC. SCI. 23 (1966).

In the context of environmental policy, many problems may be attributed to incrementalism or the tyranny of small decisions. *See* Lynton K. Caldwell, *Environment: A New Focus for Public Policy?*, 23 PUB. ADMIN. REV. 132, 138 (1963) ("It can be demonstrated that many of the current environmental errors are direct or indirect results of segmental public decision-making, of failing to perceive specific environmental situations in comprehensive environmental terms.").

ders the formulation and implementation of public policies designed to correct them.

There is voluminous literature analyzing these problems at the local level (particularly within metropolitan areas). However, scholars and practitioners disagree about the nature of the problems, their causes, and possible solutions. Differing views are presented by Gerald Frug in *City Making*, Charles Haar in *Suburbs under Siege*, and contributors to an edited volume published by the Urban Land Institute ("ULI") entitled *Smart Growth*. Professors Frug and Haar both have extensive experience as practicing attorneys in addition to their current roles as professors at Harvard Law School. The contributors to the ULI volume are planning and policy practitioners.

City Making is the most theoretical of the three books.³ A lesser proportion of *Suburbs under Siege* is theoretical; however, Professor Haar concludes that the events analyzed in the book provide evidence to support certain theoretical propositions and rebut others.⁴ The focus of *Smart Growth* is upon the development of "smart growth" as a concept in planning and law.⁵ Contributions to the volume are descriptive but not theoretical.

3. The term theory as used herein has a dual meaning. It is used in the scientist's sense to mean "a set of related propositions that suggest why events occur in the manner that they do." KENNETH R. HOOVER, *THE ELEMENTS OF SOCIAL SCIENTIFIC THINKING* 32-44 (6th ed. 1995). It is also used in the layman's sense to mean "abstract thought." WEBSTER'S NEW COLLEGIATE DICTIONARY 1200 (1980).

It might be argued that *City Making* is also the most abstract in the sense that it is dissociated from reality; however, I would dispute such a claim and point to the recommendations Professor Frug makes in Chapter 11 as evidence that the book is practical and its author is grounded in reality.

4. See CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* 186-208 (1996). In a curious book note, one author suggests that Professor Haar missed the boat by failing to explicitly adopt the tenets of public choice as the foundation for his analysis. See Book Note, *Public Choice Theory: A Unifying Framework for Judicial Activism*, 110 HARV. L. REV. 1161, 1161 ("Although many of Haar's descriptions and arguments implicate public choice theory, he unfortunately fails to draw on it to provide a coherent theoretical framework for understanding his empirical data and integrating his analysis."). The author goes on to state that "[a]n explicit public choice theory framework would also have provided a theoretical companion to Haar's meticulous description of the *Mount Laurel* cases and their progeny." *Id.* at 1163. Professor Haar has posited a theoretical proposition in *Suburbs under Siege* and drawn upon extensive empirical evidence to test that proposition. The author of the book note appears to suggest (mistakenly) that public choice is the only valid theoretical approach—a suggestion that is simply false.

5. See URBAN LAND INSTITUTE, *ULI ON THE FUTURE: SMART GROWTH* 2-3 (1998).

In this review, I examine the approaches of each book to local problems with particular reference to the environment. None of the books is about environmental law and policy per se, and the only book that prominently features environmental law and policy is *Smart Growth*. Nevertheless, all three have important implications for scholars and practitioners of environmental law and policy. Together the three books demonstrate the interrelationship of seemingly disparate fields of public policy alluded to above.

II.

WHAT IS THE PROBLEM?

Identifying the critical problem or problems that plague communities in the United States is not a simple task. There is not agreement on this issue, although common ground does exist among the authors of *Smart Growth*, *City Making*, and *Suburbs under Siege*. ULI has formulated an explanation that is arguably most widely accepted.

In the suburbs, the problems are urban sprawl, loss of open space and farmland, growing traffic congestion, absence of a sense of place, crowded schools, and air pollution resulting from auto dependence. In the central cities and older inner suburbs, the traditional problems of crime, blight, unemployment, poor schools, and poor quality housing remain.⁶

Whether these problems identified by ULI are problems or the symptoms of underlying problems (or both) is not necessarily evident.⁷

Professor Frug provides a more parsimonious description of the problem. "Every American metropolitan area is now divided

6. *Id.* at 2.

7. For example, sprawl occupies a prominent position in the discussion of problems that communities face, and authors describe it both as a problem and a symptom. The authors of *Changing Places* describe the problem, as "rampant sprawl, a phenomenon that has sucked the economic and social vitality out of traditional communities and filled millions of acres of farmland and open space with largely formless, soulless structures unconnected to one another except by their inevitable dependence on the automobile." RICHARD MOE & CARTER WILKIE, *CHANGING PLACES: REBUILDING COMMUNITY IN THE AGE OF SPRAWL* x (1997). Alternatively, the authors of *The Ecology of Place* contend that "our current use of land and resources is unsustainable." TIMOTHY BEATLEY & KRISTY MANNING, *THE ECOLOGY OF PLACE: PLANNING FOR ENVIRONMENT, ECONOMY, AND COMMUNITY* 6 (1997). They go on to state that "no where is the tendency more conspicuous than in the sprawling growth of urban and suburban areas throughout the United States, where low-density development is literally eating up natural landscapes." *Id.*

into districts that are so different from each other they seem to be different worlds.”⁸ The problem, according to Professor Frug, is the segregation of the United States. This segregation does not simply occur along racial lines—it emanates from a fear of other.⁹ The *other* may be differentiated on the basis of race, class, gender, sexual orientation, religion, or more ephemeral attributes such as living arrangements or dress. We know the other when we see her and, as Professor Frug states, “[w]e all know where we belong.”¹⁰

Professor Haar provides an even more pointed description of the problem that communities face. “No domestic issue is more troubling to American society today than the economic and social division between the races.”¹¹ Thus, according to Professor Haar, the division of races is the predominant problem that plagues local governments in the United States. The schism between racial groups manifests itself as a schism between the haves and have-nots and the suburb and central city. As this schism worsens, “obstacles to equality of educational opportunity threaten to become insurmountable.”¹²

The authors of all three books agree that social conflict is a critical social problem. Whereas Professors Frug and Haar feature social conflict as *the* central problem that communities face, the contributors to *Smart Growth* identify social conflict as one of a number of problems that communities face. Those concerned about environmental law and policy may worry that the preoccupation of the authors with social conflict might lead them to ignore or misunderstand the problem of environmental degradation. But in each instance it appears that such concern would be misplaced and that the authors acknowledge the complex interrelationship between social conflict and environmental degradation.¹³

8. GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 3 (1999).

9. Frug states that “city borders have become a vehicle for dividing us from them, our problems from their problems, our money from their money, our future from their future.” *Id.* at 7-8.

10. *Id.* at 3.

11. HAAR *supra* note 4, at xi.

12. *Id.* at xii.

13. See, e.g., ULI *supra* note 5, at 7-9; FRUG *supra* note 8, at 209-211; HAAR *supra* note 4, at 196-200. Of the three books, *City Making* is the one in which the interrelationship between social problems and environmental problems receives the least attention.

III.

WHAT ARE THE CAUSES?

Identification of the problems that plague communities provides an important first step toward the formulation and implementation of public policies to address and perhaps remedy those problems. But policies are unlikely to be successful unless the underlying causes of the problems are also identified and understood. If problems are identified but their causes are not understood, the response to those problems is likely to be inefficient and ineffective.¹⁴

Because the authors focus upon different problems, it is not surprising that they identify somewhat varied underlying causes for those problems. In *Smart Growth*, Geoffrey Anderson and Harriet Tregoning argue that transportation innovations, including automobiles and expressways, contribute significantly to existing problems.¹⁵ Anderson and Tregoning point to increased home ownership, which resulted, in part, from transportation innovations, as another key cause.¹⁶ Federal laws, including the Federal Highways Act and the GI Bill, fueled both transportation innovations and increased home ownership.¹⁷ In addition, Anderson and Tregoning assert that federal subsidies for infrastructure development including the development of drinking water and wastewater systems resulted in the current development.¹⁸ Thus, transportation innovations and increased home ownership fueled by federal policies are identified as the primary factors contributing to the problems communities face.

14. Examples abound in the area of environmental law and policy. One such example is the "Green Revolution" that took place in the 1960s in response to the need for increased food production to feed growing human populations in developing countries. See ROSEMARY O'LEARY ET AL., *MANAGING FOR THE ENVIRONMENT: UNDERSTANDING THE LEGAL, ORGANIZATIONAL, AND POLICY CHALLENGES* xxi (1999). During the Green Revolution, which began in Southeast Asia, international agencies and national governments promoted the use of hybrid plants, fertilizers, and pesticides to address regional food shortages. The result was often short-term success followed by long-term degradation of the environment and human social institutions. See J. STEPHEN LANSING, *PRIESTS AND PROGRAMMERS: TECHNOLOGIES OF POWER IN THE ENGINEERED LANDSCAPE OF BALI* 112-115 (1991).

Another example is provided in BRUCE A. ACKERMAN ET AL., *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY: A CASE STUDY IN THE FAILURE OF MODERN POLICYMAKING* (1974).

15. See Geoffrey Anderson and Harriet Tregoning, *Smart Growth in Our Future?*, in ULI *supra* note 5, at 5.

16. See *id.* at 6.

17. See *id.*

18. See *id.* at 7.

Don Pickrell, another contributor to *Smart Growth*, suggests that planners, developers, and engineers have all worked to “accommodate the automobile and increase the convenience it affords.”¹⁹ According to Pickrell, this resulted in the transportation problems that communities now face.²⁰ David Petersen presents a third perspective.²¹ He asserts that urban decay “may owe its recent widespread emergence to the convergence of two major forces: the technological capability to support geographic expansion of urban areas and the nationwide unleashing of pent-up purchasing power following the end of World War II.”²² Both Pickrell and Petersen agree with Anderson and Tregoning that transportation innovations contributed to community problems.

In contrast, in *City Making* Professor Frug focuses on the failure of the legal system to empower cities.²³ He states that “it is the legal system that determines the kind of power that cities can exercise, and . . . the way it has done so has had destructive consequences for American society.”²⁴ The argument is straightforward; however, local government law is complex and replete with contradictions. Although central cities and suburbs are both typically governed by municipal governments, Frug argues that central cities are treated as truly public entities while suburbs adopt many of the characteristics (and are afforded many of the protections) associated with private entities.²⁵ The problem is that “the manner in which local government law has empowered cities and the curbs that it has placed on them, taken together, have limited the scope and promise of decentralized power in America.”²⁶

Like Professor Frug, Professor Haar asserts that the law is a key cause of the problems faced by communities, noting that “the law has been a major player in the pattern of segregation and housing discrimination.”²⁷ Professor Haar contends that the con-

19. Don H. Pickrell, *Smart Transportation for Smart Growth*, in ULI *supra* note 5, at 12.

20. *See id.* at 12-13.

21. *See* David C. Petersen, *Smart Growth for Center Cities*, in ULI *supra* note 5, at 46.

22. *Id.*

23. *See* FRUG *supra* note 8, at 3-4.

24. *Id.* at 4.

25. *See id.* at 58-59. Whereas “[the] privatized conception of city power has done little for America’s central cities,” local government law has permitted suburbs to adopt “a privatized conception of the boundary lines between the central city and its suburbs—and between the suburbs themselves.” *Id.* at 7-8.

26. *Id.* at 8.

27. HAAR *supra* note 4, at 8.

tribution of urban sprawl to these problems is not well-recognized.

“[T]he growth of suburbia and movement of capital and other resources away from cities—patterns rarely considered in the formulation of policies concerning race relations and poverty—are key points that must be addressed if we aspire to solve the paradox of great wealth and great poverty coexisting in our metropolitan areas today.”²⁸

Law is a causal factor of the problem that Professor Haar identified—the division that now exists between races. He states that “[l]aw has become a surrogate for physical walls.”²⁹

Each of the three books prominently features government policies as a cause of the problems that communities face today.³⁰ The contributors to *Smart Growth* emphasize federal and local government policies, Professor Frug focuses upon federal and state government policies, and Professor Haar stresses the role of state government policies. Thus, there is agreement that government has caused societal problems, but the issue that receives the most attention in all three books is whether government or other social institutions can formulate and implement policies that will solve the problems that communities face.

IV.

IDENTIFYING THE SOLUTION

The three books diverge to the greatest extent upon the solution to the problems. All recognize the need for drastic change and the constraint imposed by the incremental nature of our political system.³¹ Yet, in striking a balance between these two, the books propose very different solutions.

Not surprisingly, contributors to *Smart Growth* propose smart growth as the solution to problems that communities face. The book begins with the statement that “[s]mart growth is the latest buzzword in urban planning and development circles, and the

28. *Id.* at xii.

29. *Id.* at 8.

30. Likewise, in the classic *The Death and Life of Great American Cities* (1961), Jane Jacobs contends that zoning in the U.S., which is authorized by states and practiced by most municipalities, is a key cause of the problems that cities face. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961). Similarly, Professor Anthony Downs attributes the lack of affordable housing in the U.S. to local zoning laws. See Anthony Downs, *Regulatory Barriers to Affordable Housing*, 58 J. AM. PLANNING ASSOC. 419 (1992).

31. On incrementalism, see note 2 *supra*.

concept is being touted as a new approach that can resolve problems that have long been endemic to urban growth and development in the United States.”³² *Smart Growth* was the product of a conference on that concept. The concept shares many attributes with growth management, new urbanism, and sustainable development, which have all received the attention of urban planners over the past decade.³³

Geoffrey Anderson and Harriet Tregoning provide a description of smart growth:

Smart growth . . . seeks growth, recognizing the crucial role that development plays in maintaining and improving communities. Smart growth also acknowledges the fiscal, environmental, and other concerns that are dominating current discussions and asks the fundamental question: not whether, but how to grow.³⁴

Strategies to achieve smart growth that are identified by Anderson and Tregoning include: conservation of open space, incentives to encourage investment in central cities and older suburbs, creation of high density development nodes around transit, mixed-use development, dispersed affordable housing, and infill development.³⁵ However, it is necessary to alter a host of existing incentives that impede these strategies in order to realize smart growth. For example, federal tax policies encourage homeowners to purchase large homes on large lots,³⁶ current zoning practices often forbid high density development and mixed-use development,³⁷ current financing mechanisms promote low-density as opposed to high-density housing,³⁸ and ubiquitous free parking at suburban shopping centers and workplaces discour-

32. See *Introduction*, in ULI *supra* note 6, at 2.

33. Regarding these concepts in urban planning, see ARTHUR C. NELSON & JAMES B. DUNCAN, *GROWTH MANAGEMENT PRINCIPLES AND PRACTICES* (1995); Charles L. Siemon, *Successful Growth Management Techniques: Observations from the Monkey Cage*, 29 URB. LAW. 233 (1997); Douglas R. Porter, *State Growth Management: The Intergovernmental Experiment*, 13 PACE. L. REV. 481 (1993); MICHAEL LECCESE & KATHLEEN MCCORMICK, *CHARTER OF THE NEW URBANISM* (2000); PETER KATZ, *THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY* (1994); GABOR ZOVANYI, *GROWTH MANAGEMENT FOR A SUSTAINABLE FUTURE: ECOLOGICAL SUSTAINABILITY AS THE NEW GROWTH MANAGEMENT FOCUS FOR THE 21ST CENTURY* (1998); Janet Ward, *Living to Leave a Legacy*, AM. CITY & COUNTY, Jan. 1998, at 20.

34. *Smart Growth in Our Future*, *supra* note 15, at 10.

35. See *id.* at 10.

36. See *Smart Transportation for Smart Growth*, *supra* note 19, at 19.

37. See *Smart Growth in Our Future*, *supra* note 15, at 10.

38. See Karen A. Danielson & Robert E. Lang, *The Case for Higher-Density Housing: A Key to Smart Growth?*, in ULI *supra* note 6, at 24-25.

ages use of mass transit.³⁹ Thus, smart growth may be achieved through a combination of changes in the public sector (at the federal, state, regional, and local levels) and the private sector. In turn, smart growth may effectively address problems such as urban sprawl, loss of open space, traffic congestion, and poor quality housing in central cities.

While the contributors to *Smart Growth* suggest a host of public and private sector reforms, in *Suburbs under Siege*, Professor Haar contends that the judicial branch of government is uniquely positioned and qualified to address the problems that communities face. He forwards the proposition that “[b]y their decrees, judges can change both the legal and physical landscapes of metropolitan areas.”⁴⁰ Whereas other social institutions are unwilling to act or incapable of doing so to redress the economic and social division that exists between races, the judiciary may step in to do so.

The democratic system is unable to act. In the search for a bridge across the racial and ethnic divisions of the metropolitan area, to end the isolation and immobility that reinforces the culture of poverty in the central cores, the courts emerge as the one government agency able to act.⁴¹

This assertion is supported by the case study of affordable housing in New Jersey that Professor Haar chronicles in *Suburbs under Siege*. At the center of the study are three cases decided by the New Jersey Supreme Court known as the Mount Laurel trilogy.⁴²

In the first of these, *Southern Burlington NAACP v. Township of Mt. Laurel*,⁴³ Justice Hall provides the conceptual framework within which the judiciary is to operate. The case was brought on behalf of Ethel Lawrence who was born in Mt. Laurel and resided in the town but could not afford a home there.⁴⁴ The town’s zoning ordinance forbade town houses, apartments, and

39. See *Smart Transportation for Smart Growth*, *supra* note 19, at 15.

40. HAAR *supra* note 4, at 11.

41. *Id.*

42. The cases are *Southern Burlington NAACP v. Township of Mt. Laurel* [Mt. Laurel I], 67 N.J. 151 (1975); *Southern Burlington NAACP v. Township of Mt. Laurel* [Mt. Laurel II], 92 N.J. 158 (1983); *Hills Development Co. v. Township of Bernards*, 103 N.J. 1 (1986).

43. See *Southern Burlington NAACP v. Township of Mt. Laurel*, 67 N.J. 151 (1975)

44. See HAAR *supra* note 4, at 17-18.

mobile homes; and it required single-family, detached homes to have a minimum lot size of 9,300 square feet.⁴⁵

The New Jersey Supreme Court decided the case on the basis of state constitutional law—barring review of the decision by federal courts and limiting the ability of the state legislature to reverse the outcome. Writing for the court, Justice Hall interpreted the state constitution to impose a duty on every municipality to make possible the existence of a variety of housing within its boundaries. As Professor Haar states, “local regulation, [Justice Hall] wrote, must affirmatively make preparations for low- and moderate-income housing ‘at least to the extent of the municipality’s fair share of the present and prospective regional need therefor.’”⁴⁶

Following description and analysis of Mount Laurel I, the balance of the book chronicles the efforts of the state judiciary (and eventually the state legislature) to craft an appropriate remedy. Mount Laurel II framed the remedy pursued by the judiciary.

Mount Laurel II’s approach to judicial management and the framework the court devised to fulfill its aspirations constitute a most remarkable contribution to litigation as a whole . . . This ambitious plan for making doctrine an ongoing reality at trial had three primary components. First, the court divided New Jersey into three judicial areas, in each of which a trial judge would be selected to specialize in Mount Laurel cases . . . Second, the court promulgated a detailed set of rules governing how the specialized trial judges should handle their cases, covering the process from the beginning of a case through the fashioning of remedies to final judgment and appeal . . . Third, Mount Laurel II established a number of procedural devices intended to expedite litigation and settlement.⁴⁷

Professor Haar characterized Mount Laurel II as “overwhelmingly impressive,”⁴⁸ and he concludes that “[t]he totality of the experience shows how well the judiciary can respond to the abdication of responsibility by other institutions when there is a systemic breakdown in governmental behavior.”⁴⁹ For Professor

45. *See id.* at 18.

46. *Id.* at 20 (citations omitted). Professor Haar goes on to explain that “[u]nder Justice Hall’s analysis, the court found that Mount Laurel operated an invidious system of land-use regulations that excluded classes that he defined as constitutionally protected.” *Id.* at 23.

47. *Id.* at 43-44.

48. *Id.* at 51.

49. *Id.* at 188.

Haar, the case study of New Jersey's response to an affordable housing crisis is indicative of the judiciary's ability to formulate and implement remedies to complex problems that society must address.

In *City Making*, Professor Frug acknowledges these two possible solutions to community problems but comes to the conclusion that both will fall short of achieving the objectives of their proponents. Although he does not analyze smart growth per se, Professor Frug does provide analysis of new urbanism, which he describes as having goals similar to those identified by the contributors to *Smart Growth*.⁵⁰ He concludes however, that the ideas proposed by new urbanists can easily be defanged, the notion of community they invoke is overly romantic, and references to race (and social conflict generally) are absent from their writings.⁵¹

With regard to the *Mt. Laurel* litigation, Professor Frug contends that the power of the status quo made it an effective barrier to the implementation of the reforms envisioned by Justice Hall.⁵² "*Mt. Laurel's* impact was limited by its strategy of treating every city as an individual decision-maker required to confront regional needs by itself as a matter of thought."⁵³ Thus, in the wake of the *Mt. Laurel* trilogy, each municipality was permitted to continue to adhere to the conception of itself as a centered subject.⁵⁴ The result, Professor Frug asserts, was the perpetuation of a society characterized by boundaries reinforced by local government law.

The solution identified by Professor Frug is to break down boundaries that separate *us* from *them*. Professor Frug critiques the notion of the centered subject, particularly as it is applied to cities,⁵⁵ arguing that this version of city power has led to city

50. For example, among the aspects of urban design that Professor Frug states new urbanists stress are the creation of multi-use environments and facilitation of use of public transportation. See FRUG *supra* note 8, at 150-152.

51. See *id.* at 153-154.

52. See *id.* at 80.

53. *Id.*

54. See *id.* at 79. In fact, the remedy articulated in *Mt. Laurel I* required each (autonomous) municipality to provide its fair share of affordable housing.

55. Professor Frug provides the following description of the centered self. "One aspect of this sense of self is its emphasis on separateness: to be autonomous requires making a clear distinction between 'self' and 'other.' Another aspect lies in its method for determining how to discover what one's self-interest is: one discovers it, according to this conception, by looking within oneself." *Id.* at 64.

powerlessness.⁵⁶ By shifting its emphasis away from city autonomy and toward the value of public life, Professor Frug believes local government law may contribute to efforts to solve the problems that communities face instead of exacerbating those problems. As envisioned by Professor Frug, "decentralization would mean not local autonomy but the ability to participate in the basic societal decisions that affect one's life. Decentralization would be designed to foster public freedom and community building rather than to mimic state or national power on the local level."⁵⁷

Professor Frug elaborates upon how this goal may be attained by focusing on two types of services local governments frequently provide—education and police.⁵⁸ With regard to education, he proposes that funding for public education should be distributed regionally and that admission requirements and academic tracking should be abandoned.⁵⁹ These alterations to the status quo would break down boundaries that now exist and reinforce the shared interdependence of individuals thereby blurring the lines that exist between them. Other services that Professor Frug suggests cities may provide—from the operation of banks to the construction of housing to the operation of major regional sports teams—all may operate to simultaneously build community and break down boundaries because the choice to provide such services and the ability to benefit from such services need not be made by those who reside within city limits.⁶⁰ By strengthening public life, these actions may operate to resolve the problems that communities currently face.

V.

SOLUTIONS FOR SOCIETY, SOLUTIONS FOR THE ENVIRONMENT

Each of the solutions proposed in the books under consideration is thoughtfully presented and worthy of consideration by scholars and practitioners. But it is not clear that each is feasible within the constraints of the U.S. political system.⁶¹ The political

56. *See id.* at 61-63.

57. *Id.* at 111.

58. See chapters 9 and 10 respectively.

59. *See id.* at 185-195.

60. These are among the examples that Professor Frug provides. *See id.* at 214-216.

61. *See supra* note 2 and accompanying text.

system possesses two important attributes that are likely to affect the feasibility of the solutions proposed. The first, mentioned at the outset of this review, is incrementalism. The second is inertia.⁶² As explained below, other attributes of the political system also affect the proposed solutions.

In addition to the matter of feasibility, it is useful to evaluate the manner in which each solution identified may impact environmental law and policy. As mentioned at the outset of the review, none of the books is about environmental law and policy per se, but all have implications for environmental law and policy.

A. *Smart Growth*

The solutions proposed in *Smart Growth* are numerous,⁶³ and they involve multiple public and private actors. Those solutions that require coordinated action by both public and private sector entities—such as the elimination of free workplace parking and creation of more mixed-income, high-density housing—could not occur on a widespread basis without public and private action. Contributors to *Smart Growth* mention public/private partnerships and the need for collaboration but do not elaborate upon how to translate ideas into actions.

A number of solutions, such as the reform of federal tax policies and local zoning practices, generally have not garnered the support necessary to overcome the incrementalism and inertia inherent in the political system. Furthermore, intense bias continues to fuel opposition to multi-family housing and, to an even greater extent, to affordable housing. Likewise, culturally ingrained perceptions continue to operate to favor the automobile and disfavor mass transportation. The authors recognize these impediments but do not provide a convincing strategy to overcome them.

In addition, few of the solutions proposed are novel. Indeed, proponents of growth management and new urbanism proposed a similar set of ideas (e.g., amendment of local zoning ordinances to allow for higher density housing, changes to federal policies to encourage development of mass transportation, and conservation

62. On the subject of inertia in the U.S. political system, see THEODORE LOWI, *THE END OF LIBERALISM* (2d ed. 1979). Inertia makes it difficult to alter the status quo.

63. Presumably, if only one or a small number of these solutions are successfully implemented the positive impact will be incremental.

of open space) as much as 25 years ago.⁶⁴ Solutions that remain to be implemented may continue to be viable and desirable.⁶⁵ However, critics may question the extent to which smart growth advocates bring anything new to the table aside from a catchy phrase.

One way that smart growth (and new urbanism) may bring something new to the table is by developing a strategy that addresses both social and environmental problems. The need for such a strategy is obvious when one recognizes the fact that there is a strong interrelationship between environmental problems and social problems.⁶⁶ If smart growth advocates are able to craft solutions to those issues that threaten human communities and ecological communities, they may do humanity and the Earth a great service. *Smart Growth* is a first step, but much work remains for the proponents of the concept.

B. *Suburbs under Siege*

In *Suburbs under Siege*, Professor Haar displays a thorough understanding of the arguments against judicial activism;⁶⁷ nevertheless, he concludes that the case of affordable housing in New Jersey affirms the need for an aggressive judiciary to overcome the problems that communities face.⁶⁸ Professor Haar's faith in the judiciary is not shared by all scholars of law and policy. Many have argued that attributes of the judiciary may make it ill-suited to address complex policy problems.

64. See, e.g., U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, STATE GROWTH MANAGEMENT (1976); Oregon Land Use Act of 1973 (codified at Or. Rev. Stat. §§197.005-197.650, §215.055, §215.510, §215.535, and §453.345).

65. The question of when an idea's time has come is addressed in an excellent book by Professor John Kingdon. See JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed., 1995); see also AMBIGUITY AND CHOICE IN ORGANIZATIONS (James March & Johan Olsen eds., 1976).

66. Problems resulting from human population growth, fossil fuel consumption, poverty, and a host of other complex issues cannot be differentiated as either environmental or social. Proponents of sustainable development argue for the development of policies that address environmental and social problems simultaneously. See, e.g., WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987).

67. This is reflected throughout the book, but it is particularly apparent in Chapter 8.

68. See HAAR *supra* note 4, at xiv ("at the present juncture of class and race relations in the United States, an aggressive posture on the part of the third branch of government is indispensable to the achievement of economic and social equality").

Elsewhere I have identified the structural features of the judiciary that may inhibit its ability to resolve difficult issues.

Due to a number of structural features, the judiciary may be ill-suited to address policy questions in an efficacious manner. First, the courts may act when—and only when—a litigant presents a case. As a result of the fact that judges are unable to initiate action, involvement by the courts in the policy process has been described as sporadic, fragmented and episodic. Second, the courts' ability to make policy is constrained by the specific facts of the cases before them. Third, the adjudicatory process is an extreme example of incremental decision making. Finally, a related point that cannot be ignored is that judicial policymaking is "of doubtful democratic legitimacy."⁶⁹

In addition, as I have noted, it may be particularly difficult for the judiciary to deal with environmental issues.

Particular characteristics of environmental policy may exacerbate these problems. Based upon an extensive empirical study of the relationship between the federal courts and the EPA, Professor Rosemary O'Leary draws the following conclusion, "Clearly litigation is not the best way to formulate environmental policy or to determine our nation's environmental priorities."⁷⁰

Environmental issues tend to involve multiple interests and multiple parties.⁷¹ It is frequently difficult to reduce an environmental issue to a controversy between two discrete parties. In addition, environmental issues often involve complex scientific and technical questions that are difficult to evaluate without specialized knowledge. Finally, environmental issues often cross political boundaries whereas the jurisdiction of judges is generally limited by such boundaries.⁷² These structural features of the judiciary may form the basis for a persuasive argument against judicial activism.

Two powerful counter-arguments (in favor of judicial activism) exist in *Suburbs under Siege*. First and most importantly, the book contains detailed, qualitative empirical research in support

69. Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 280 n.248 (2000) (citations omitted).

70. *Id.* (citations omitted).

71. The extent to which interests may be represented in court is limited. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Cf. *Sierra Club v. Morton*, 405 U.S. 727 (1972) (J. Douglas dissenting), Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

72. On the disjuncture between political and natural boundaries, see Weiland *supra* note 69, at 239-240.

of an activist judiciary.⁷³ Second, Professor Haar contends that the decision whether the judiciary should act is not merely academic; instead, it takes place in the real world. Professor Haar's pragmatist tendencies permeate the book.⁷⁴ He contends that as fragmentation grows worse and the system fails to act, judges may act to change the legal and physical landscapes.⁷⁵ Professor Phillip Cooper provides an equally pragmatic perspective based upon his study of federal district court implementation of complex remedies.⁷⁶ Professor Cooper asserts that while the question of whether judges should or should not be involved in complex cases is interesting, "it does not have much to do with the reality of the situation confronting judges."⁷⁷ He goes on to state that judges "are not in a position to refuse to hear proper cases instituted by appropriate parties under provisions of statutory or constitutional law."⁷⁸ Empirical research combined with the contention that someone must act to counter societal problems provides a legitimate response to those who question Professor Haar's conclusions.⁷⁹

73. Social scientists may be concerned about the fact Professor Haar does not dedicate a greater portion of the book to methodological issues (in fact, methodology is hardly discussed at all), but most legal scholars are unlikely to notice this omission.

74. See, e.g., HAAR *supra* note 4, at xii (stating that "I choose to pursue a . . . pragmatic course"). On pragmatism, see JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927).

75. See *id.* at 11.

76. See PHILLIP J. COOPER, *HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS* (1988).

77. *Id.* at 328.

78. *Id.*

79. This is not to say that *Suburbs under Siege* is the beginning and the end of the debate regarding judicial activism. Instead, it is one of a number of valuable empirical studies that provides evidence regarding the desirability and potential effectiveness of judicial activism. Other such studies include ROSEMARY O'LEARY, *ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA* (1993); COOPER *supra* note 76; and R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983).

A third possible argument in favor of judicial activism to address environmental problems is that, in some cases, it has worked in the past. Professor Haar was Special Master appointed by a state court in Massachusetts to oversee the cleanup of the Boston Harbor in 1983. The author of a case study analyzing the Boston Harbor cleanup concludes that the use of a Special Master was successful. See Timothy G. Little, *Court-Appointed Special Masters in Complex Environmental Litigation: City of Quincy v. Metropolitan District Commission*, 8 HARV. ENVTL. L. REV. 435, 473 (1984). But he also states that the case "does not stand for the proposition that the courts should generally become involved with complex environmental problems." *Id.* at 475. A number of contextual factors are likely to affect the ability of the

For environmental justice advocates, the model of judicial activism that Professor Haar proposes may be particularly attractive.⁸⁰ Over the past decade, advocates of environmental justice have sought out means to advance their legal claims.⁸¹ They have proposed novel legal theories under the nation's civil rights laws; however, they have encountered considerable hurdles.⁸² If judges are willing to recognize the legitimacy of environmental justice claims brought and act to redress societal injustice, environmental justice advocates are likely to welcome a greater role for the judiciary.

C. *City Making*

In *City Making*, Professor Frug provides a vision of metropolitan America that differs radically from the status quo. The solution he proposes to the problems that communities face is the deconstruction of the centered self, and, in turn, the breaking down of boundaries (both between humans and communities).⁸³ Incrementalism and inertia are significant obstacles to the realization of Professor Frug's vision. The proliferation of homeowner's associations and gated communities in the U.S. provides indicative of the fact that the centered self is engrained in current culture.⁸⁴ The centered self is, in fact, deeply embedded in Western culture. Consider, for example, the following statement:

judiciary to remedy complex environmental problems. Further research is needed to identify those factors.

80. Professor Haar himself recognizes this when he makes the statement that "Mount Laurel can be said, in more than a symbolic way, to be a forerunner of the environmental justice movement." HAAR *supra* note 4, at 196.

81. See, e.g., THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS (Michael B. Gerrard ed., 1999) (particularly Part I dealing with legal theories).

82. See, e.g., U.S. Environmental Protection Agency Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (Select Steel Complaint) (this decision is the EPA's first decision on the merits in response to an administrative Title VI complaint). For a critical analysis of the decision by an environmental justice advocate, see Luke W. Cole, "Wrong on the Facts, Wrong on the Law": Civil Rights Advocates Excoriate EPA's Most Recent Title VI Misstep, 29 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10775 (1999).

83. The centered self is self-interested. In addition, the centered self defines itself in relation to others and differentiates between 'me' and 'them'. See FRUG *supra* note 8, at 64.

84. These entities have advocates in the legal community. See, e.g., Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 *DUKE L.J.* 75 (1998). Cf. EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNERS' ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* (1994).

And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, be fruitful and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.⁸⁵

When analyzed in historical context, neighborhood associations and gated communities may be simply a contemporary manifestation of the centered self.

Alternative ideas and values have co-existed in Western culture for some time. For example, communitarian notions may be found in the writings of a number of influential political thinkers from the pre-Revolutionary War period in the United States.⁸⁶ One such person was William Livingston who states that “[c]ommunities were formed not for Advantage of one Man, but for the Good of the whole Body.”⁸⁷ Similarly, Jean-Jacques Rousseau’s notion of the general will reflected communitarian values and de-emphasis of the self.⁸⁸

Professor Frug’s ideas will face opposition among both scholars and practitioners; however, he may receive support from many in the environmental community. Although environmental problems are not emphasized in *City Making*, the deconstruction of the centered self has been a goal of many environmentalists over time. Consider, for example, the following statement by

85. Genesis 1:26-28 (King James). This statement establishes a sharp distinction between humankind and the natural world.

86. Regarding the existence of communitarian notions during this period, see GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1779-1970*, at 29 (1997) (“The core of American republican thought during the eighteenth century was the idea that private ‘interests’ could and should be subordinated to the common welfare of the polity”); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 53 (1969) (“The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goals of their revolution.”).

87. William Livingston, *A Discant on the Origin, Nature, Use, and Abuse of Civil Government*, *THE INDEPENDENT REFLECTOR*, July 12, 1753, reprinted in *THE INDEPENDENT REFLECTOR, OR WEEKLY ESSAYS ON SUNDRY IMPORTANT SUBJECTS, BY WILLIAM LIVINGSTON AND OTHERS* 285, 286 (Milton Klein ed., 1963).

88. See JEAN-JACQUES ROSSEAU, *THE SOCIAL CONTRACT* 72 (Maurice Cranston trans., Penguin Paperbacks 1968) (1762) (noting that the general will is a concept that transcends individuals in society).

John Muir as it relates to the above reference to the Book of Genesis:

The world, we are told, was made especially for man—a presumption not supported by all the facts. . . . Why should man value himself as more than a small part of the one great unit of creation?⁸⁹

Deep ecologists are among those who are likely to support Professor's Frug's vision.⁹⁰ Others in the environmental movement who are not deep ecologists may also embrace Professor Frug's vision for at least two reasons. First, the acceptance of the centered self has allowed for widespread damage to the environment. Second, boundaries, such as property boundaries and political boundaries, have obstructed efforts to protect the environment.⁹¹ Long-term sustainability requires that humankind reject the notion of the centered self and adopt an alternative perspective.⁹²

VI.

CONCLUSION

There is no cure-all to the problems that communities face. Each of the books reviewed approaches such problems from a different perspective. All three of them contribute to our collective understanding. Yet the contribution of each book is different. *Suburbs under Siege* provides the legal community with a case study of judicial activism. Empirical research of this quality

89. JOHN MUIR, *A THOUSAND MILE WALK TO THE GULF* 137, 139 (1916).

90. On deep ecology, see Lewis P. Hinchman & Sandra K. Hinchman, "Deep Ecology" and the Revival of Natural Right, 42 *WESTERN POL. QUAR.* 201 (1989); George Sessions, *The Deep Ecological Movement: A Review*, 11 *ENVTL. REV.* 105 (1987).

91. For example, such boundaries have resulted in the existence of externalities. "A negative externality exists when an agent does not bear all of the costs associated with her action." Weiland *supra* note 69, at 239 (citing TOM TIETENBERG, *ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS* 51-52 (3d ed. 1992) and DAVID L. WEIMER & AIDAN R. VINING, *POLICY ANALYSIS: CONCEPTS AND PRACTICE* 57-58 (2d ed., 1992)).

92. See LYNTON KEITH CALDWELL, *BETWEEN TWO WORLDS: SCIENCE, THE ENVIRONMENTAL MOVEMENT AND POLICY CHOICE* 185 (1990) ("The Copernican revolution removed the Earth from the center of the universe around which all extra-terrestrial spheres revolved. By implication it undermined the assumption that the cosmos, including the Earth, was created for man's exclusive dominion. . . . The ecological revolution, where it has occurred, has completed the reorientation of mankind in nature by reintegrating man into the biosphere and demolishing the assumption that all Earth was created for mankind's convenience. This shift of paradigm is less easily accepted than was the astro-physical reorientation. Man's self-image and perceived self-interest are threatened.").

is in short supply in the legal community. In *City Making*, Professor Frug displays his ability to think outside the box and integrate various strands of scholarship to form a persuasive argument in favor of an alternative vision of decentralization in the United States. Finally, *Smart Growth* introduces a planning concept that has the potential to inspire fundamental reconsideration of many concepts in land use and planning law and policy.