BOOK REVIEW

POLITICS, GAY RIGHTS AND THE LIGHT
AT THE END OF THE RAINBOW

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First they ignore you.
Then they laugh at you.
Then they fight you.
Then you win.

—Mahatma Gandhi

Legal scholars and practitioners concerned about the future of the law rather than merely its present know that successful strategies for advancing the law require not only a facility with the nuts and bolts of legal analysis but a sense of history and an awareness of the ways in which law is shaped by politics, public opinion, cultural norms, and moral and political philosophy.

Challenging those laws that discriminate on the basis of sexual orientation offers one of the most active and exciting undertakings for modern civil rights advocates. The losses are frustrating but the victories are exhilarating. The long-term outlook is favorable, because the pattern, which has emerged in recent years, is one of slow but steady progress toward full equal rights. The question is no longer whether equal rights will be achieved, but how, and when.

On any day when losses seem to temporarily outweigh victories, the weary advocate may benefit from the perspectives of history and social science. For a whirlwind tour of the history, sociology and politics of the gay civil rights movement that will put current events in their proper perspective, one might

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Most of the contributing authors, including the three editors, are political scientists rather than lawyers. Their essays offer a guide not to making legal arguments, but to understanding the many forces that converge to create legal change over time. Noting in their preface that the brutal murders of Matthew Shepard and Billy Jack Gaither raised public awareness of hate crimes while the text was in progress, the editors have dedicated their book "[t]o all those who have been the target of hate crimes." A worthy tribute, this collection impresses the reader with the progress that has been made in recent decades, without understating the enormous challenges that remain.

Two of the essays provide useful overviews. Kenneth Wald's introductory piece, *The Context of Gay Politics*, outlines the challenges currently faced by proponents of gay rights. In addition to being consistently outspent by its better-financed opponents, the gay civil rights movement is hampered not only by popular antipathy and the efforts of conservative religious organizations, whose well-entrenched and hierarchical power structure enables them to mobilize their membership and resources behind efforts to restrict gay rights, but also by the constant threat of retaliatory violence, harassment, and discrimination against those who dare to identify themselves as members of this minority group. An enlightening counterpoint to Wald's introduction, John D'Emilio's

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3 Editors Craig A. Rimmerman and Kenneth D. Wald are political science professors at, respectively, Hobart and William Smith Colleges and the University of Florida; Clyde Wilcox is a professor of government at Georgetown University.
4 Rimmerman et al. eds.
5 See *id.* at 1.
Cycles of Change, Questions of Strategy\textsuperscript{6} examines the movement's history, from its early glimmerings in the aftermath of the social upheaval triggered by World War II, through alternating cycles of "leaping" (the galvanizing years of the AIDS crisis) and "creeping" (the closeted Reagan years), to today, when the movement is beleaguered by another round of conservative attacks and weakened by internal disagreements about priorities. Nonetheless, the gay rights movement seems poised for another period of "leaping" change, which, D'Emilio predicts will be achieved through building coalitions with potential civil rights supporters outside of the gay community.

The remaining essays are arranged in four groupings. Those in Part I examine the political evolution and current status of the gay rights movement, including its strategies for effecting change and the internal conflicts that sometimes interfere with those strategies. Part II focuses on the opponents of gay rights -- who they are, why they feel the way they do, and what strategies they have employed to achieve their goals. Part III highlights specific issues that have generated national controversy in recent years -- the blatant demagoguery and probable toothlessness of the Defense of Marriage Act, the so-far-unsuccessful federal Employment Non-Discrimination Act, the devastation of AIDS and the lessons it taught on the politics of public health, and the continuing saga of gay persecution by the United States military, with its disproportionate impact on women of color. Finally, the essays in Part IV examine the different political arenas in which equal rights are being pursued -- state and local politics, Congress, the Supreme Court, and the "court" of public opinion.

Although the topical scope of the collection is broad, each essay explores its subject with depth and extensive scholarly documentation. The endnotes and bibliographies that accompany each essay provide an invaluable resource for further investigation. Collectively, the essays and their supporting references offer an excellent introduction to the current state of affairs in the movement for gay civil rights, complete with critical insights into what has gone right and wrong in the past, and recommendations for more effective future strategies. To offer just a few examples:

Craig Rimmerman's Beyond Political Mainstreaming\textsuperscript{7} examines the different strategies that the gay rights movement has employed to effectuate political, social and legal change. Reliance on traditional interest group politics alone, he argues, has proven to be too limiting because elected officeholders cannot stray far from the sensibilities of their constituents if they hope to win future elections. Even a legislator convinced that justice demands full equality may hesitate to voice a position that is strongly opposed by a substantial number of his or her constituents. Further aggravating this leadership vacuum is the fact that, in attempting to join the political mainstream, the gay rights movement has operated at a severe disadvantage compared with many competing in-

\textsuperscript{6} See id. at 31.
\textsuperscript{7} See id. at 54.
terest groups that are better funded and have not been burdened with the discrimination and public animus that limits gay advocates' access to important resources. Rimmerman apparently agrees with Urvashi Vaid's observation that the pursuit of mainstream politics has led the gay rights movement to a state of "virtual equality," in which "gay and lesbian people are at once insiders, involved openly in government and public affairs to a degree never before achieved, and outsiders, shunned by our elected officials unless they need our money or votes in close elections."\(^8\) As an example, Rimmerman points to the Log Cabin Republicans, who were at first snubbed outright by Republican presidential candidates Bob Dole and George W. Bush, and later only grudgingly acknowledged by them, and who continued to endorse their party's candidates in the 2000 campaign even though the official Republican platform was conspicuously anti-gay. One might also point to President Clinton and a long list of Democratic Senators and Members of Congress who actively courted the support of gay voters and then betrayed them on such matters as the Defense of Marriage Act\(^9\) and the military's tragic and farcical "don't ask, don't tell" policy.\(^10\)

What are the alternatives to mainstream politics? As the gay rights movement has increasingly discovered, politicians respond to changes in public opinion, and education is the key to effecting such change at the grassroots level. In their essay *Gay Rights in the Public Sphere*,\(^11\) Clyde Wilcox and Robin Wolpert evaluate the distribution of positive versus negative attitudes

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\(^8\) See id. at 57 (quoting Urvashi Vaid, *Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation* 4 (1995)).


\(^10\) Although the "don’t ask, don’t tell" policy was presented to the public as a relaxation of the previous ban on gays in the military, the Department of Defense’s (DoD) own statistics show that while the number of persons discharged from the military on the basis of their sexual orientation initially decreased after the new policy took effect in 1994, that number dramatically increased in subsequent years. Harassment of military personnel perceived as gay has reportedly increased even more. See William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 381-82 (1999) (collecting DoD statistics); Stacey L. Sobel, Kathi S. Wescott, Michelle M. Benecke & C. Dixon Osburn, *Conduct Unbecoming: The Sixth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,”* app. (Servicemembers Legal Defense Network 2000) (collecting DoD statistics and other data). Commenting on the high number of discharges, the DoD’s own report in 1998 noted that “the consistent upward trend from 1994 to 1997 raises questions about how our policy is working in practice,” and acknowledges that the discharges have had a disproportionate effect on women. Office of the Under Secretary of Defense (Personnel and Readiness), *Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department’s Policy on Homosexual Conduct in the Military* (April 1998).

\(^11\) See Rimmerman et al. eds. at 409.
toward the gay and lesbian community throughout the general population. Their conclusions offer a crucial roadmap for efforts to combat the ignorance, myths and stereotyping that present the greatest roadblock to equal rights.

Wilcox and Wolpert compile data from numerous surveys of public attitudes on gays and lesbians, and use regression analysis to correlate that data with such factors as age, gender, educational level, and religious affinity. Their results demonstrate that positive attitudes toward gays and lesbians correlate strongly with higher levels of education. Positive attitudes are also more common among women, young people, and persons who do not identify themselves as highly religious. And, not surprisingly, people who have more frequent contact with members of the gay and lesbian community are more likely to express positive feelings toward this group.

The prevalence of positive attitudes among women and young people certainly bodes well for the future of gay rights, as both of these constituencies move into positions of greater political power. And while civil rights advocates cannot, by themselves, increase the overall educational level of the electorate, there is a great deal they can do to overcome the public's lack of information regarding the gay and lesbian community and the legal and economic hardships visited on that community by the persistence of discriminatory laws at the state and federal level. With gays and lesbians throughout the country becoming more open about their sexual orientation, a much larger segment of the public will come to know them as family, friends, co-workers, and neighbors, and will in due course recognize the false stereotypes for what they are. As Justice Stevens has noted: “Unfavorable opinions about homosexuals 'have ancient roots.' Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions.”

The catch-22, however, is that the persistence of de facto and de jure discrimination continues to discourage many people from identifying themselves as members of this particular minority group. To a greater extent than most minorities, many gays and lesbians can hide their minority status from public view, either by denying their sexuality altogether, or by curtailing even the most commonplace public expressions of that sexuality, such as holding hands or even mentioning the existence of a same-gender romantic partner. Such reticence is encouraged and reinforced by the explicit and implicit threats of discrimination, harassment, and physical violence, which might penalize them for deviating from this practice.

As for the connection between religious affinity and hostility toward the gay and lesbian community, Wilcox and Wolpert's study demonstrates that the gay rights movement must continue to combine its educational efforts with a

strategy of civil rights litigation in order to establish the constitutional infirmity of laws which deprive citizens of equal rights either on religious grounds or on the grounds of animus toward a particular minority group. Fortunately, the outlook for such litigation is more encouraging today than it was a mere decade ago. In Romer v. Evans, the United States Supreme Court struck down an amendment to Colorado's constitution which would have invalidated all state and local laws prohibiting discrimination against gays and lesbians.\textsuperscript{13} Six of the nine justices held that no rational basis existed for imposing this special disability on a minority group:

[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. . . .

. . . We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "Class legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . ."

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.\textsuperscript{14}

Romer is certainly encouraging. However, as illustrated by the zeal of Justice Scalia's dissent in Romer\textsuperscript{15} and former Chief Justice Burger's concurrence a decade earlier in Bowers v. Hardwick,\textsuperscript{16} opponents of discrimination still face an uphill battle against what Wilcox and Wolpert describe as "a core of visceral opposition to gay rights that is likely to be slow to change."\textsuperscript{17}

Several of the essays in this book address divisions and differences of opinion within the gay rights movement. Keith Boykin, former Executive Di-

\textsuperscript{13} See Romer v. Evans, 517 U.S. 620 (1996).

\textsuperscript{14} Id. at 634-35 (citations omitted).

\textsuperscript{15} Id. at 653 (Scalia, J., dissenting) (describing legalized discrimination against gays and lesbians as "an appropriate means" to "prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans").


\textsuperscript{17} Rimmerman et al. eds. at 415.
rector of the National Black Gay and Lesbian Leadership Forum, contributes *Where Rhetoric Meets Reality*, a thoughtful essay on the marginalization of African-Americans in what has, in recent years, come to be a largely white-dominated gay rights movement. Although Boykin criticizes this turn of events, he also offers specific and practical suggestions for creating a more inclusive environment. Other divisions in the movement are explored in *Lesbian and Gay Policy Priorities*, by Jean Reith Schroedel and Pamela Fiber, who observe, that while gay men and lesbians generally agree on the need for equal rights, the community often splits along gender lines when it comes to specific priorities. Women, for example, tend to place higher priority on such issues as employment discrimination, marriage rights, and the parental rights of same-gender couples; women also devote more of their energy to issues that affect not only lesbians but women generally, such as abortion rights and women's health issues. Ironically, the authors note, the divisions between gay men and lesbians have decreased markedly during those periods in which the gay rights movement has experienced the greatest stress. This banding-together was observable during the AIDS crisis, which saw many lesbians taking on caregiver roles even though "their" segment of the gay and lesbian community was the least affected (directly) by this disease (and was, indeed, far less affected than the heterosexual community). More recently, the conservative religious backlash against equal rights has once again unified the gay and lesbian community in spite of their different priorities.

Who opposes gay rights, and why? John C. Green, an expert on religion and politics, explores this question in *Antigay: Varieties of Opposition to Gay Rights*. At the root of most anti-gay sentiment, he posits, is the religious constituency that has come to be collectively known as the Christian Right. Their influence permeates not only those institutions that are explicitly religious in their purpose, such as fundamentalist Protestant denominations, but also many seemingly secular institutions that either embrace the social and cultural traditions of those religious institutions or view with suspicion any influences which might alter the traditional social order. As examples, Green points to the police and the military (noting, however, that even within these generally conservative institutions there may be diverse points of view). One might add to this list the once-venerable Boy Scouts of America (BSA), whose official anti-gay stance is now a matter of public record and has already cost them dearly in financial support and good will. Why the BSA chose to embrace discrimination remains something of a mystery; their policy has been resoundingly rejected by other mainstream youth organizations, including the Girl Scouts of America, the 4-H Clubs, the Boys and Girls' Clubs of America, the YMCA, the YWCA, the Campfire Boys and Girls, and the Boy Scouts and Girl Scouts of Canada. Per-

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18 See id. at 79.
19 See id. at 97.
20 See id. at 121.
haps the answer lies in the BSA's predominantly male leadership; as demonstrated in Wilcox and Wolpert's regression analysis, anti-gay sentiment is far more prevalent among men than women.

What strategies are favored by the opposition to gay rights? One weapon employed by gay rights opponents at the state level is direct democracy, as illustrated by the recent wave of anti-gay ballot initiatives. In *Direct Democracy and Gay Rights Initiatives after Romer*, Todd Donovan, Jim Wenzel, and Shaun Bowler examine the many such initiatives that have appeared on state ballots in the last few years. While the authors note that most such initiatives have failed, their essay predates the success of the Knight Initiative in California, which, combined with the recent success of other anti-gay initiatives in Hawaii and Alaska, may encourage initiative proponents in other states. The authors also note, however, that even where such initiatives succeed, they are often struck down by the courts, the Colorado initiative invalidated in *Romer* offering perhaps the most dramatic example. They point to some striking parallels between anti-gay ballot measures and similar measures that have sought to diminish the rights of other (usually ethnic) minority groups as soon as those minority groups have begun to have a voice in the legislative process; examples include ballot initiatives that were designed to reinstate segregation in public schools, housing, and public accommodations during the 1960s, and, more recently, initiatives designating English as the "official language" of a state. The danger of such initiatives is that they enable a majority to vilify a minority based on emotion, propaganda, and ignorance; unlike elected legislators, individual voters need not account to the public for their choices, and thus need not articulate any justification for their support of these measures. In a particularly intriguing observation, the authors point out that the leading proponents of these anti-gay initiatives have usually run for elected office soon after their initiatives appeared on the ballot. Thus, it appears, many of these anti-gay initiatives may be motivated not by concern for the public's welfare, but by the proponent's own political ambitions. Much as Senator Joe McCarthy and attorney Roy Cohn used the communist/homosexual spectre during the 1950s to feather their own political nests at the expense of countless lives and reputations, the purveyors of today's anti-gay ballot measures have attempted to parlay the emotions stirred up by these issues into their own political fortunes. The success or failure of the initiative, or its legal validity, is therefore irrelevant; because its true purpose is to attract political capital, its legal consequence is merely a side effect. This may explain why many of these initiatives are drafted so poorly that they are likely to prove unenforceable. By the time the

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22 See Rimmerman et al. eds. at 161.
23 Nevada's recent anti-gay ballot initiative is a good example. The proposed amendment to the state constitution reads, in its entirety: "Only a marriage between a male and female person shall be recognized or given effect in this state." However, neither the initiative itself nor current Nevada law defines "marriage." More amusing still, the initiative appears to outlaw divorce.
fraud is revealed, the proponent hopes to have moved on to bigger and better things.

Which is why, although mainstream politics and grassroots efforts to change public opinion may in the long run be instrumental in achieving full equality, in the short term there is often no substitute for judicial intervention. If the Supreme Court had not struck down anti-miscegenation laws in Loving v. Virginia, how long would it have taken for public opinion to force their repeal? Yet public opinion, mainstream politics, and judicial redress are not unrelated. Witness the Supreme Court's remarkable turnaround in the ten years between Bowers v. Hardwick (upholding Georgia's ban on sodomy by a 5-4 vote) and Romer v. Evans (striking down, by a 6-3 vote, Colorado's constitutional ban on laws prohibiting sexual orientation discrimination). Only three justices -- Rehnquist, O'Connor, and Stevens -- participated in both decisions. One of these-- O'Connor -- voted against the interests of the gay movement in Bowers, but voted in favor of those interests ten years later in Romer. The other six Bowers justices had been replaced by the time Romer was decided. Although the cases raised different legal issues, and therefore cannot be viewed simply as barometers of the changing climate for gay civil rights, it is interesting to note that the new justices who voted in favor of gay interests in Romer -- Ginsburg, Souter, Kennedy, and Breyer -- are generally considered to be political moderates rather than traditional liberals. Indeed, the traditional partisan politics of judicial nomination and confirmation virtually ensured that no one whose politics veered too far to the left would have been appointed to the Court during this period. Yet these moderates joined the traditionally conservative O'Connor to issue the most pro-gay decision ever to emerge from the Supreme Court.

24 For a detailed and analytical history of gay civil rights litigation, see Patricia A. Cain, Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement (2000).
26 A ban on interracial marriage, unenforceable since 1967, remained in Alabama's constitution until the November 2000 election, and the ballot initiative repealing this deadwood was not unopposed. Polls showed that 34% of Alabama's voters still disapproved of interracial marriage, and that while the repeal was likely to succeed, only 64% of the electorate was expected to vote for it. The actual vote was even closer, with a full 40% of Alabama's electorate voting to uphold the interracial ban. (Although it comes as no surprise that the racial attitudes of some voters might lead them to vote against the ban, even if that vote was largely symbolic, it is more difficult to explain the 17% of voters who still described themselves as "undecided" as late as September). See Mike Gadd, Views on Mixed marriage are Stuck in the Past, The San Francisco Chronicle, Sunday Chronicle section at 6 (Jan. 7, 2001); Judy Sheppard, Alabama Voters May Bury Interracial Marriage Ban, The Atlanta Journal and Constitution, Sept. 26, 2000 at 11A; Dale McFeatters, Focusing on the Undecided Voters, Scripps Howard News Service, Oct. 4, 2000, available in LEXIS, News Group File, Most Recent Two Years. A similar provision in South Carolina's constitution was not repealed until 1998, with only 60% voting in its favor. See Louis Jacobson, Cast Away, The National Journal, July 1, 2000, at 2150.
27 Justice Ginsburg was considered to be the crucial "swing vote" on the polarized D.C. Circuit before her appointment to the Supreme Court.
Thanks to *Romer*, and to the new generation of jurists who crafted that decision, it appears that recognizing the rights of sexual minorities has become downright respectable.

Is Gandhi smiling somewhere?
BOOK REVIEW

LAND USE PLANNING OVER THE LAST FORTY YEARS: FIGHTING SPRAWL THROUGH SMART GROWTH PLANNING

Richard J. Ansson, Jr.*


INTRODUCTION

In the last forty years, the suburban areas around our cities have grown both rapidly and haphazardly. In most instances, this virtually unchecked suburban sprawl has accommodated our country's population growth. However, suburban sprawl has required local governments to expend vast amounts of financial resources on building highway systems and other needed infrastructure, has led to the deterioration of inner cities, has caused the consumption of prime

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This author had the pleasure of working with Robert Freilich's Kansas City law firm of Freilich, Leitner & Carlisle during the late 1990s. From experience, I can attest to Bob's sincere devotion to implementing land use planning schematics in metropolitan areas.


2 See id. Metropolitan areas have also grown by leaps and bounds. For instance, "by 1990, nearly 192 million persons, 77.5% of the population, lived in metropolitan statistical areas, compared with 112 million or 63% of the population, in 1960." Shelby D. Green, *The Search For A National Land Use Policy: For The Cities' Sake*, 26 Fordham Urb. L.J. 69, 73 (1998).
agricultural lands, and has required individuals to use more energy resources while commuting. As a result of the problems associated with sprawl, local governmental entities have struggled with minimizing suburban growth, protecting natural resources, and revitalizing older inner city areas.

In an effort to prevent uncontrolled sprawl, a number of metropolitan areas have adopted growth management plans. From Sprawl to Smart Growth, by Robert H. Freilich, evaluates the plans adopted in these areas and explores how such plans can reduce sprawl, protect the environment, and preserve agricultural lands. For local governmental entities that are considering adopting smart growth plans, this book provides an insightful look into how local governmental entities should utilize smart growth planning and also renders an impassioned explanation of why metropolitan areas should adopt smart growth plans. By adopting smart growth plans, local governmental entities will:

1) reduce "the consumption of land for roads, houses, and commercial buildings by channeling development to areas with existing infrastructure";

2) center the "growth around urban and older suburban areas";

3) "preserve green space, wetlands, and farmland"; and

4) help communities "reap the benefits of growth and development, such as jobs, tax revenues, and other amenities, while limiting the disasters of growth, such as degradation of the environment escalation of local taxes, and worsening traffic congestion."

If a local governmental entity is planning to adopt a smart growth plan, then it should be mindful of numerous pressing legal issues that may affect a smart growth plan's enactment. Hot Topics in Land Use Law, edited by Robert H. Freilich and Patricia E. Salkin, provides a comprehensive overview of pressing legal issues in land use planning. More importantly, this book explores the progression of the comprehensive smart growth plan from an advisory guide to its current status as binding law.

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5 Over the years, local governmental entities have experimented with a number of different zoning and planning concepts. For instance, a number of communities have recently embraced a suburban planning technique known as neotraditional development. See Braun, supra note 4. Neotraditional developments are so named because these communities are designed to reflect city-planning techniques developed prior to World War II. See id. At this time, homes were located near clusters of retail, office, and manufacturing developments. See id. As such, local citizens lived near the places they worked and shopped. See id.
6 See Robert H. Freilich, From Sprawl to Smart Growth (1999). From Sprawl to Smart Growth will be cited in this review as FSSG.
7 See FSSG at 32.
8 See Hot Topics in Land Use Law, Patricia E. Salkin & Robert H. Freilich eds., (2000). Hot Topics in Land Use Law will be cited in this Review as HTLL.
9 See HTLL at 35-47.
This review examines *From Sprawl to Smart Growth* and *Hot Topics in Land Use Law* in tandem because together these two books provide extensive information as to how local governmental entities can best effectuate smart growth plans. Part I explores the development of smart growth planning. Further, this section focuses on the need for cities, counties, and states to utilize smart growth planning. Part II discusses current topics in land use planning law that may affect cities' abilities to utilize such planning. This review concludes by advocating that governmental entities - whether local, county, or state - should adopt smart growth plans to ensure that their communities are not threatened by continuous and unwieldy suburban sprawl.

I. THE SMART GROWTH PLAN

Robert H. Freilich first encountered smart growth planning in the 1960's when he lived in Ramapo, New York. During this time, Ramapo was experiencing the effects of urban sprawl. The city adopted a smart growth plan in the late 1960's, whereby it developed a system of timing and sequential controls for subdivision residential development. Subsequently, the city hired Freilich to expand, and then implement the plan. Under the Ramapo plan, single residential developers had to obtain a Residential Development Use permit before they could begin construction. The Residential Development Use permit required that there be an adequate number of municipal facilities present before single residential development projects could be pursued. To determine whether residential building could proceed, Freilich created a numeric scoring system. Under the system, permits were issued if the proposed development scored fairly high based on the availability of "five essential public improvements and services:"

1) sewers or an approved substitute;
2) drainage facilities;
3) parks or recreational facilities, including public school sites;
4) state, county or town roads improved with curbs and sidewalks; and
5) firehouses."

This system allowed Ramapo to accomplish two important goals. First, the town was able to manage the residential growth rate. Second, the town was

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10 Ramapo is located in Rockland County, approximately thirty miles northeast of New York City. *See FSSG* at 40.
11 *See id.* at 39-40.
12 *See id.* at 50-51.
13 *See id.*
14 *See id.* at 51.
15 *See id.* at 56.
16 *See id.* at 51-52.
17 *Id.* at 51.
18 *See id.* at 54.
able to establish priorities for the locations of residential subdivisions.19 Indeed, as Freilich explained, the point system allowed the town to have:

[c]ontrol over the rate of development. [This control] can be viewed as an extension of traditional land use planning techniques, which have always had the effect of limiting the total residential buildout or capacity of a community. The second aim of the point system - that of determining the location of residential development - set location priorities by tying development to the adequacy of public facilities. Thus priority was given to residential areas the development of which will minimize future public investments. Because future growth is tied to the provision of facilities, it was certain that the plan would lead to a more desirable fiscal position on the part of the Town and a lower tax burden than would exist under conditions of uncontrolled growth.20

As a result, the point system helped curb unchecked sprawl, and in so doing helped to decrease development costs, prevent the consumption of enormous amounts of vacant land, and protect the environment.21

Notwithstanding its success, the Ramapo plan was not immune from legal challenge. A builder who failed to receive a permit claimed, among other things, that the plan was invalid because the state had not given the town the authority to regulate the timing of the development.22 The Supreme Court of Rockland County found that the state had given the town such authority.23 On appeal, the appellate division, in an extremely divided opinion, held that the state had not granted the town the authority to regulate population growth through timing and sequential controls.24

Ramapo subsequently appealed, and in a now-legendary decision, the New York Court of Appeals reversed the appellate decision, holding that Ramapo had the power to enact timing and sequential controls to manage population growth and suburban sprawl.25 The Court of Appeals reasoned that although

19 See id.
20 See id.
21 See id. at 39-54.
22 See id. at 56-57. The builder also asserted that the plan was not comprehensive and, therefore, violated state law, that the plan violated the builder's Fifth Amendment rights because the land was taken for public use without just compensation, and that the plan was exclusionary. See id at 57.
23 See id. at 56.
24 See id. at 57. The appellate division only reversed as to the authority of the town to enact timing and sequential controls. See id. The appellate division found for the town on the other three issues. See id. For more on the other three issues, see supra, note 22.
25 See id. at 57-58. The dissenting opinion "expresses the view that timing and sequential controls are not authorized by enabling legislation that delegates the power to regulate subdivision development to the Town." Id. at 63. Additionally, the dissenting judge asserted that "without specific legislative language authorizing such restrictions, communities may utilize controlled growth techniques as means of excluding low- and moderate-income families from these communities and thus have a negative impact upon regional growth patterns." Id.

Critics of smart growth typically cite to the dissenting opinion. See, e.g., Peter A. Buchsbaum, Timed Growth Ordinances Rejected in New Jersey, 31 URB. LAW. 823 (1999).
the state statute did not specifically give town the ability to enact timing and sequential controls, it did so implicitly. As such, this decision affirmed the ability of towns to use timing and sequential controls to combat unwieldy sprawl.

After the New York Court of Appeals upheld Ramapo's smart growth plan, Freilich has created and implemented smart growth plans in numerous metropolitan areas across the nation. Freilich has developed smart growth plans for: Minneapolis-St. Paul, Minnesota; San Diego, California; Lexington-Fayette County, Kentucky; Baltimore, Howard, and Montgomery Counties, Maryland; Central Puget Sound Metropolitan Area, Washington; Portland, Oregon; Reno-Washoe County, Nevada; Park City and Summit County, Utah; Palm Beach County, Florida; Boulder, Colorado and Grand Junction and Mesa County, Colorado; Riverside, California; and Simi Valley-Ventura County, California.

In each instance, Freilich tailored the plan to fit both the growth patterns and the political needs of local governmental communities. For example, when Freilich developed the plan for Minneapolis-St. Paul, the governing entities wanted to thwart uncontrolled sprawl developing around the metropolitan area. The sprawl was rapidly expanding in increasingly scattered patterns.

Further, when legalities are set aside, critics of smart growth plan generally argue:

The more sophisticated programs, such as Ramapo's, which involved long-term adherence for twenty or more years to growth control schemes based on infrastructure development, required a degree of municipal fidelity to consistent planning that is frequently at odds with the vicissitudes of local electoneering. For that reason, four dimensional zoning, which involves temporal as well as height, width, and depth regulations, may not survive over the long run. Such a fate apparently befell the Ramapo system which appears to have been abandoned several years ago, possibly through a change in electoral direction. Id.

See FSSG at 59. The two state provisions at issue were sections 261 and 263 of New York Town Law. "Section 261 states:

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of the building and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. ...

Section 263 reads:

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, to secure safety from fire, flood, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements .... (Emphasis supplied.) See id. at 58.

The New York Court of Appeals also ruled in Ramapo's favor on the other three issues. See id. at 59-63; supra, note 22. As to the takings issue, the court noted that this plan did not result in a taking because: 1) under the plan all residential property had to be subdivided within an eighteen year time period; 2) the developer could accelerate the date when her land would be developed by providing, at her expense, the facilities and services required to obtain a special permit; and 3) any diminution of property value was offset by the future financial benefit from the orderly development of the township. See FSSG at 61.

For more on these smart growth plans, see FSSG at 108-202.

See id. at 108-10.
Many government officials feared that if this scattered pattern of development continued, then public and private facilities would be more costly, capital investment in built-up areas would not be used efficiently, valuable open space would be lost, substantial surface and groundwater pollution would occur, and tax rates increase.\textsuperscript{31} To prevent this from occurring, Freilich developed a five-tiered framework, whereby development would be managed through timing and sequential controls and local government involvement would be incorporated in the decision making process.\textsuperscript{32} The five separate tiers included:

1) Area I which encompassed the downtown areas of Minneapolis and St. Paul;
2) Area II which encompassed older suburban existing built up areas;
3) Area III which encompassed areas of active urbanization;
4) Area IV which encompassed agricultural, open space, environmental, or rural areas; and
5) Area V which encompassed freestanding new towns and cities within Area IV.\textsuperscript{33}

The Council established clear policy directives to be employed within each tier.\textsuperscript{34} Specifically, the Council's policy provided:

1) that Area I would encourage a broader socio-economic mix, as well as the operation of financial institutions, specialized retail functions, office space users, and metropolitan cultural and entertainment complexes;
2) that Area II would emphasize "the maintenance of structures and neighborhoods in generally sound condition, the redevelopment or rehabilitation of deteriorating neighborhoods, the construction of new houses in types and densities consistent with the market preferences of the population at large, the removing of uncertainties about future of older neighborhoods and the reduction of concentrations of minorities and low-income families[;]\textsuperscript{J}"
3) that Area III would "be reserved for limited growth around existing freestanding rural towns in which development of a purely local economic base for growth would be emphasized[;]\textsuperscript{J}" and
4) that Area IV and V "would remain primarily rural, with provisions for the optional development of freestanding new towns and expansion of existing farm town communities."\textsuperscript{35}

Each smart growth plan that Freilich has developed attempts to regulate

\textsuperscript{30} See id. at 109.
\textsuperscript{31} See id.
\textsuperscript{32} See id. at 110-11.
\textsuperscript{33} See id. at 111.
\textsuperscript{34} In 1967 the Minnesota legislature passed the Metropolitan Council Act, commonly referred to as the “Council.” See id. at 109.
\textsuperscript{35} See id. at 111-13. To help in aiding this plan, the Council would use, among other things, tax incentives, tax increment financing, infrastructure grants, CDBG funds, and redevelopment assistance. See id. at 111.
and control unwieldy sprawl.\textsuperscript{36} These plans have always focused on protecting undeveloped areas while concomitantly ensuring that deteriorating developed areas are redeveloped. Cities and counties should adopt smart growth plans to promote agricultural and rural preservation,\textsuperscript{37} to allow for urban renewal,\textsuperscript{38} and to manage suburban growth. States should also adopt smart growth plans. Currently, Hawaii, Colorado, and Vermont have adopted timed and sequenced growth schematics in an effort to curtail suburban sprawl. Likewise, Maine, Florida, and New Jersey have also attempted to control suburban sprawl by adopting comprehensive state plans.\textsuperscript{39}

II. CURRENT LAND USE TOPICS

Most recently, in its \textit{City of Monterey v. Del Monte Dunes} decision, the United States Supreme Court reiterated that courts should evaluate the zoning powers of local governmental entities under a rational basis test.\textsuperscript{40} The Court overruled a Ninth Circuit decision that would have required courts to apply a heightened level of scrutiny to an inverse condemnation claim involving an

\textsuperscript{36} For instance, in the early 1990s, Reno-Washoe County, Nevada adopted a smart growth plan similar to the Minneapolis-St. Paul plan. \textit{See id.} at 176. In 1989, the Nevada State legislature adopted a measure that required cities and counties to develop master and area plans. \textit{See id.} at 168. If they did not, then the state would develop its own plan under the mandatory legislation. \textit{See id.} In designing a plan for Reno-Washoe County, Freilich had to please five different competing interest groups. \textit{See id.} at 171. Therefore, Freilich developed five different smart growth plans for the region. \textit{See id.} at 168-76. The various factions adopted a tiered growth concept similar to the Ramapo and Minneapolis-St. Paul plans. \textit{See id.} at 176. The proposed Washoe County tiers included: 1) a core section; 2) an urban section; 3) an urbanizing section; 4) a future urbanizing section; 5) an urban reserve section; and 6) a permanent rural/open space section. \textit{See id.} at 176. The key policies of the tiered system included: "1) designation of areas within the region that are to be treated similarly in terms of urbanization; and 2) creation or preservation of community identities as part of that urbanization." \textit{Id.}

\textsuperscript{37} There are a number of ways to protect rural lands. \textit{See id.} at 279-96. For instance, cities and counties can zone land specifically for agricultural use. \textit{See id.} at 283-84. Additionally, cities and counties can reduce taxation rates on farmers so they are not forced to sell their land due to rising taxation rates. \textit{See id.} at 286-87.

\textsuperscript{38} Cities can promote urban redevelopment through statutes that preserve historic districts; can redevelop run down sections by providing bonus, incentive, or enterprise zoning; and can revitalize other sections by providing tax abatements and tax increment financing. \textit{See id.} at 253-70. Some cities may also be able to revitalize deteriorating urban areas by utilizing federal government initiatives that are designed specifically for urban revitalization. \textit{See id.} at 303-12.

\textsuperscript{39} \textit{See id.} at 209-52. Several other states, which include Washington, Oregon, California, Georgia, Arizona, Maryland, Iowa, Tennessee, and South Carolina, have adopted partial smart growth plans. \textit{See id.}

\textsuperscript{40} \textit{See City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702-703 (1999).} This author had the privilege of co-authoring a United States amicus brief with Bob Freilich on behalf of Monterey, California. We drafted the brief at the behest of the American Planning Association. For more on this decision, \textit{see Richard J. Ansson, Jr., Dolan v. Tigard's Rough Proportionality Standard: Why This Standard Should Not Be Applied to An Inverse Condemnation Claim Based Upon Regulatory Denial,} 10 SETON HALL CONST. L.J. 417 (2000).
economic taking. Prior to the Ninth Circuit decision, courts had only applied a heightened level of scrutiny to inverse condemnation claims involving title takings or exactions in lieu of dedication.

Had the Supreme Court affirmed the Ninth Circuit decision and imposed a heightened scrutiny standard to economic regulations that merely diminish value, then the Court would have effectively authorized courts to adjudge almost all land use regulations under a heightened standard. Indeed, a decision like this would have:

1) "revive[d] Lochner-type substantive due process and empower[ed] the federal courts to sit as superlegislatures;
2) as a practical matter, shift[ed] the presumption in land use cases from validity to invalidity;
3) cause[d] more litigation in the already overburdened federal court system; and
4) jeopardize[d] the validity of all land use regulations and the community welfare that they protect[ed]."

Furthermore, a decision like this "would have yielded an outright assault on a governmental entity's ability to effectuate land-use policies. Such a standard would have undermined a governmental entity's ability to effectively engage in land use planning and would have jeopardized the health, safety, morals, and general welfare of the community."

Fortunately, the Supreme Court did not apply a heightened level of scrutiny to economic regulations that merely diminish value. As a result, local governmental entities still have the power to use planning to enact comprehensive plans that "reduce congestion and sprawl, save historic districts, foster affordable housing, promote economic development, protect the environment, reduce infrastructure deficiencies, and save agricultural land."

Over the years, courts have typically upheld a local governmental entity's ability to enact comprehensive plans that regulate the development of lands. For example, in Lake City Corp. v. City of Mequon, the city of Mequon amended its master plan to increase the minimum size of lots within a particu-

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41 See Del Monte Dunes, 526 U.S. at 701-703.
43 See HTLL at 20.
44 HTLL at 20-21.
45 Ansso, supra note 40 at 425. The Supreme Court recognized that these powers belong to local governmental entities as early as 1922 in Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). In Pennsylvania Coal, the Court noted that: "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." Id. at 413.
46 HTLL at 21.
47 See id. at 35-47. Please note for research purposes that Chapter 12 in HOT TOPICS IN LAND USE LAW specifically discusses internet research sites. See id. at 172-95.
lar residential zone. The City subsequently denied a builder's plat request because it violated this newly adopted amendment. The builder challenged the denial. The district court held in favor of the city, and the court of appeals reversed. The Wisconsin Supreme Court held in favor of the city, finding that the planning commission had the authority to deny a builder's plat request solely on the ground that it conflicted with the newly revised master plan.

Similarly, courts have typically validated comprehensive plans where the local governmental regulation has sought to revitalize depreciated areas through programs that exclusively focus on spurring cultural and commercial activity. Today, numerous cities are attempting to revitalize inner city areas and make them centers of economic viability. Indeed, New York City has revitalized 42nd Street, Baltimore a harbor area, and Cleveland its waterfront. In the future, as more and more metropolitan areas enact comprehensive smart growth management plans, local governmental entities will enact plans designed to revitalize decaying urban areas.

CONCLUSION

Local governmental entities should adopt smart growth plans to prevent unnecessary suburban sprawl. Uncontrolled sprawl usually costs governing entities hundreds of millions of dollars in infrastructure costs, leads to the deterioration of inner cities, causes citizens in suburbia to spend more monies on fuel, and changes valuable agricultural land into newly formed subdivisions. Whenever local governmental entities adopt smart growth plans, the plan generally:

1) enhances a sense of community;
2) protects investment in existing neighborhoods;
3) provides a greater certainty in the development process;
4) protects environmental quality;
5) rewards developers with profitable products, financing, and flexibility;

48 See Lake City Corp. v. City of Mequon, 558 N.W.2d 100, 102-103 (Wis. 1997).
49 See id.
50 See id.
51 See id.
52 See id. at 108.
54 See HTLL at 141.
55 See id.
6) decreases congestion by providing alternative modes of transportation; and
7) makes efficient use of public money.\textsuperscript{56}

As a result of all of these advantages, local governmental entities would be foolish not to adopt smart growth plans for their communities.

\textsuperscript{56} FSSG at 32.