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## The Core Plan or How I Learned to Stop Worrying and Love the Central City: Shifting Control of Regional Mass Transit to the Central City

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# The Core Plan or How I Learned to Stop Worrying and Love the Central City: *Shifting Control of Regional Mass Transit to the Central City*

JEFFREY BALTRUZAK\*

## I. INTRODUCTION TO THE CORE PLAN

Mass transit in the United States is moribund: it plays a meaningful transportation role in only a handful of American regions.<sup>1</sup> It is clear that the status quo—where state-created special-purpose districts (SPDs) provide limited regional mass transit options and new mass transit construction progresses at a glacial pace—is a colossal failure. This failure necessitates a new model of mass transit ownership and management. *It is time for the region's central city to own and operate the region's mass transit system extraterritorially, free from significant control by the outer cities (the suburbs) and the state.*<sup>2</sup> This article calls this arrangement the “Core Plan.” The key advantages of the Core Plan are: (1) the re-politicization of the mass transit planning process via the heavily politicized central city, allowing the public to effectively express its policy desires while reinvigorating the mass transit debate; (2) the central city's significant institutional competence concerning regional transportation operations, as shown by the central city's ownership of large international airports and systems of airports that serve entire regions; and (3) the faster pace at which the central city will be able to build mass transit versus the status quo of SPDs. The Core Plan reflects and integrates the United States' long history of municipal extraterritorial powers, where cities own property and operate businesses beyond their territorial limits, including regional transportation operations (international airports). The Core Plan returns power over the region's mass transit to the local level, while dramatically speeding up the mass transit construction and integration process.

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\* Associate, McDermott, Will & Emery, Chicago, Illinois. The views expressed in this article are not necessarily the views of the Firm or its clients. The author wishes to thank his wife and family for their unwavering support, and Professor Gerald Frug for his insights. The author would also like to thank the 405 Freeway in Los Angeles for inspiring him to think about how to improve mass transit.

1. See U.S. CENSUS BUREAU, MEANS OF TRANSPORTATION TO WORK FOR WORKERS 16 YEARS AND OVER, 2002 AMERICAN COMMUNITY SURVEY (2002), available at <http://factfinder.census.gov>.

2. The term “outer city” is deliberately used in this paper rather than “suburb” because of the connotations of the term “suburb.” Such connotations include the assumption that all suburbs are wealthy and disproportionately white, while central cities are poor and dominated by minorities.

## II. THE CORE PLAN DESCRIBED IN DETAIL

### A. *The Core Plan Generally*

As stated above, the crux of the Core Plan is fairly simple: the state legislature grants the central city in a metropolitan area the right to build and own the mass transit system for the entire metropolitan area, including the right to construct, own, and run mass transit facilities in outer cities' territories. In addition, pursuant to the Core Plan, the legislature transfers control and ownership of existing mass transit in the metropolitan area to the central city. The two main legal components of the Core Plan are its authorizing statute and its ongoing review discussion between the central city and outer cities. The Core Plan will not be funded in any way by the outer cities; rather, a combination of diverted highway funds and value capture will support mass transit construction and operation. Contrast the Core Plan with the current status quo, where regional SPDs (or a patchwork of SPDs)<sup>3</sup> provide mass transit in America's large metropolitan areas. The primary advantage of the Core Plan over traditional models of mass transit administration is politicization and publicity: the Core Plan avoids the technocratic SPD regime, and brings the mass transit issue to the forefront of the public discourse. In addition, the Core Plan builds mass transit quickly. The speed of the Core Plan is a natural byproduct of the power imbalance between the region's municipalities. By putting one city—the largest and most important city in the region—in charge, the outer cities' resistance to mass transit is transformed from a barrier to mass transit expansion to self preservation-driven cooperation. Under this system, an individual outer city's interests lie in convincing the central city that the outer city's mass transit plan is best for the region and best for the outer city. Or, if the individual outer city feels strongly enough about a certain mass transit route and is willing to pay for the specific route, the outer city may build the mass transit, pending the approval of the central city.

The Core Plan in action could best be demonstrated by an example using one of the Core Plan candidate regions identified in Part VI, Phoenix,

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3. Many American metropolitan areas have mass transit systems that operate on a regional basis. The Boston metropolitan area's Massachusetts Bay Transit Authority is a prime example. These authorities are created by an act of the state legislature. See, e.g., Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 375 (1990). A large number of different mass transit agencies service the Los Angeles metropolitan area. They include the Los Angeles County Metropolitan Transportation Authority (LACMTA), the Orange County Transportation Authority, and the Southern California Regional Rail Authority (METROLINK). Smaller, individual city-run transportation agencies also abound, including Long Beach Transit, Culver CityBus, and Santa Monica's Big Blue Bus, to name a few.

Arizona. Under the Core Plan framework, the Arizona legislature would authorize central city Phoenix to build, own, and run the mass transit in the metropolitan region, including the outer cities. For instance, Phoenix might decide to build a light rail line through its own territory and the southeastern outer cities of Mesa, Gilbert, Chandler, and Tempe. After the planning and safeguard process, Phoenix would then buy the real estate in the outer cities required for the light rail line. If open real estate is not available, Phoenix would condemn the necessary parcels in the outer cities via eminent domain. Once built, Phoenix would have complete operational control over the light rail line. In addition, Phoenix would gain control over all existing mass transit in the region through a transfer authorized by the Legislature.

B. *Context: What the Core Plan Is, and What It Is Not*

The Core Plan is regional in focus, but it is not regionalist.<sup>4</sup> It recognizes that mass transit solutions will be regional, but it does not seek to solve the problems of the region by taking the decision away from the region's municipalities through a state-created regional mass transit SPD.<sup>5</sup> The Core Plan does not ask the cities to communicate with one another and work through their mass transit problems as a regional collective;<sup>6</sup> rather, it creates power imbalances that *force* the conversation between a region's municipalities. Similarly, the model of a state-created regional transit authority is intended to capture the efficiencies of a regional transit solution by taking mass transit decisions away from the municipalities and giving them to an independent authority.<sup>7</sup> The Core Plan rejects the notion that regions need an entirely new level of government to solve their mass transit needs or that the municipalities themselves are unable to generate regional mass transit solutions simply because they are municipalities. The Core Plan is not subordination of the outer cities under the central city in the regional mass transit realm; rather, it is a policy choice and *an assign-*

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4. The Core Plan has regionalist undertones, as the Plan recognizes that a mass transit solution should be regional. *See, e.g.*, GERALD FRUG ET AL., LOCAL GOVERNMENT LAW 481-85 (3d ed. 2001). But the Core Plan is not regionalist in that it sees the region as the appropriate political subdivision. *See* DAVID RUSK, CITIES WITHOUT SUBURBS 85 (1993).

5. *See* Briffault, *supra* note 3.

6. *See, e.g.*, Gerald Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553, 562 (1987). Frug suggests that cities should talk among themselves to generate solutions to regional problems. *Id.* The Core Plan is more aggressive than Frug's recommendations in that the conversations under the Core Plan between the central city and outer cities, as well as the conversations among the outer cities, are set by statute under the Core Plan, rather than the result of a natural process. *See* discussion *infra* Part II.

7. *See, e.g.*, Comment, *An Analysis of Authorities: Traditional and Multicounty*, 71 MICH. L. REV. 1376, 1429 (1973).

*ment of responsibility.* In much the same way, the central city is often assigned the responsibility of regional air transportation; the central city often runs the region's large international airport. No one argues that the outer cities are somehow subordinated to the central city because the central city owns the airport.

The Core Plan agrees with the SPD model that the static relationships between the municipalities must be broken to build and run effective mass transit.<sup>8</sup> However, the SPD model breaks these static relationships by assuming the municipalities cannot solve mass transit problems. However, there is nothing inherent in a municipal-level government that makes it incapable of running a large mass transit system, as Part IV.B on Los Angeles World Airports will demonstrate. It is true that the region's municipalities likely cannot build an effective mass transit under the status quo; too many equally powerful municipalities that are accustomed to significant autonomy are unlikely to generate a common regional transportation plan.<sup>9</sup> But this phenomenon only holds as far as the outer cities are defined as separate municipalities, on par legally with the large central cities. From a municipal perspective, the crucial problem in the region as far as mass transit is concerned is that the central city, or a group of cities in a region, cannot force an individual outer city to pursue mass transit.<sup>10</sup> The Core Plan represents another (locally-based) option, that is, the Core Plan *recalibrates the power relationships* between the region's municipalities by placing the central city in a position of power above the outer cities in the narrow realm of mass transit.

### C. *More Context: The Concept of Favoring the Central City in Both Mass Transit and Leader Choice*

The Core Plan, by design, favors the central city in the mass transit realm. Implicit in the Core Plan's assignment of mass transit responsibility to the central city is a policy judgment that the central city is the most important player in the regional mass transit game, and that regions should leverage the central city's comparative advantage of mass transit experience. Not surprisingly, mass transit is much more prevalent in denser areas; these areas are most commonly found in the more urban central city.

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8. See Briffault, *supra* note 3, at 349. Briffault notes that suburbs (outer cities) often differ from central cities both economically and socially, but local government law does not draw a distinction between the two for legal purposes. *Id.*

9. See *id.*

10. For instance, membership in Valley Metro, the Phoenix metropolitan area's regional transportation SPD, is entirely voluntary. See Valley Metro, RPTA Legal Status and Membership, <http://www.valleymetro.org/VM/index.html> (last visited Jan. 5, 2007).

This fact should not be easily set aside; rather it should be embraced as a natural operation of mass transit economics. Therefore, the Core Plan, as a policy choice, favors denser development simply because mass transit favors denser development: mass transit is more efficient in dense areas.<sup>11</sup> Of course, the byproduct of this policy choice is leader choice. In general, elected central city officials are more familiar with mass transit than their outer city counterparts because the central city officials' constituents are much more reliant on mass transit than the outer city officials' supporters. In short, central city officials are more likely than outer city officials to see mass transit as a legitimate policy choice.

*D. Core Plan Definitions: What Is a Metropolitan Area? A Central City? An Outer City?*

This article is focused on mass transit in metropolitan areas, and uses terms like central city, outer city, and metropolitan area. But if state legislatures are to pass the Core Plan, they need to know what municipalities in the region are covered by the Core Plan and which are not. The solution is to refer to the independent definitions created by the U.S. Census Bureau. The ideas of a metropolitan area, an outer city, and a central city all have common sense definitions closely tracked by Census Bureau definitions. The concept of a metropolitan area, from a common sense standpoint, is a group of cities in close geographical proximity that share some common identity or connection. These areas often consist of one or more "urban," or densely populated municipalities, surrounded by many less densely populated "suburban" municipalities. The metropolitan area, therefore, can be visualized as a central city surrounded by multiple outer cities. For example, the Phoenix metropolitan area could be conceptualized as the more urban city of Phoenix surrounded by the more suburban cities of Gilbert, Glendale, Paradise Valley, Scottsdale, Tempe, and other cities nearby. This conception of a metropolitan area is reflected in the Census Bureau's current practice, and Core Plan legislation links the definitions of central city and outer city to the Census Bureau's definitions. The Census Bureau defines a metropolitan area as "a core area with a large population nucleus, together with adjacent communities that have a high degree of economic and social integration with that core."<sup>12</sup> The Census Bureau defines the central city as the "largest place" in a metropolitan area.<sup>13</sup> For the pur-

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11. See, e.g., Christopher Duerksen & C. Gregory Dale, *Creating City Centers*, COMMISSIONER, Summer 1999, <http://www.planning.org/thecommissioner/summer99-1.htm>.

12. See U.S. CENSUS BUREAU, GLOSSARY OF BASIC GEOGRAPHIC AND RELATED TERMS—2000 CENSUS (2001), available at <http://www.census.gov/geo/www/tiger/glossary.html#glossary>.

13. *Id.*

poses of this article, the outer cities are defined as the cities in the metropolitan area that are not the central city.

#### E. *Statutory Authorization for the Core Plan*

First, it is clear that the Core Plan must be put in place by the state legislature; history and case law are clear that the powers required by the central city in the Core Plan cannot be implied by the central city itself.<sup>14</sup> The authorizing statute has three goals: (1) removing outer city restraints on the central city-owned mass transit in outer city territory; (2) transferring existing mass transit located in both the central city and the outer cities to the central city; and (3) granting extraterritorial power to the central city to build, own, and operate the region's mass transit.<sup>15</sup> In passing the Core Plan, the state legislature grants a central city significant extraterritorial power, or the power to provide services and to regulate in areas outside city limits.<sup>16</sup> The Core Plan requires three specific types of extraterritorial power to be granted to the central city for the purpose of building, owning, and maintaining a mass transit system: (1) the power to condemn property in the outer cities; (2) the power to own property in the outer cities; and (3) the powers germane to operating a mass transit system effectively in the outer cities. In general, cities do not have extraterritorial powers—either to own property or to exercise police powers—without express authorization from the state.<sup>17</sup> Even though these extraterritorial powers cannot be implied by the municipality, the powers required by the Core Plan fit squarely within the tradition of municipal extraterritoriality in the United States as shown below.

#### F. *Eliminating Outer City Controls Over Central City-Owned Mass Transit*

It is also clear that the legislation authorizing the Core Plan must free the central city from outer city controls on mass transit lines that run through the outer cities. With no statutory support, the central city's mass transit lines would be subject to outer city control, because the central city

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14. See CHESTER ANTIEAU, MUNICIPAL CORPORATION LAW § 2.00 (1980) (discussing the general rule in the United States that state legislatures have "complete control" over local governments, except where limited by federal and state constitutions); see generally *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907).

15. This process will likely mean the state is transferring mass transit systems from SPDs to the central city.

16. See, e.g., Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 385-86 (1993).

17. See ANTIEAU, *supra* note 14, § 5.11 (owning property); *id.* § 5.12 (exercising police power).

cannot imply the power to operate mass transit outside its municipal limits. Without such an express authorization, the central city could find itself in the situation of North Olmstead, Ohio, which established a municipal-owned bus line to downtown Cleveland via ordinance in 1931. In *Cleveland Railway Co. v. Village of North Olmstead*,<sup>18</sup> the court upheld a Cleveland licensing scheme for bus lines that operated inside Cleveland city limits, even if the bus line was owned by another municipality. The Ohio court reasoned that North Olmstead operated its bus line within Cleveland as a private business, and as such was subject to Cleveland's municipal police powers, including reasonable restrictions on private bus lines.<sup>19</sup> However, once the state legislature grants an express authorization to an entity to operate a mass transit system, this authorization trumps parochial control, even if there is no express language indicating local ordinances will be preempted. For example, in *Lustfield v. Chicago Transit Authority*,<sup>20</sup> the court ruled that the Chicago Transit Authority (CTA) had the power to run its electric rail lines through the Cities of Berwyn and Cicero without the individual municipalities' control or input because the statute authorizing the creation of the CTA superceded the powers of the local governments. The court expressly rejected Cicero's argument that the municipality had exclusive police powers over the thoroughfares in the City; the court held that the Legislature's grant of complete mass transit authority to the CTA superceded any local regulations.<sup>21</sup>

#### G. *Transfer of Existing Mass Transit Systems to Central Cities*

Many metropolitan areas already suffer from the disease of disjointed and parochial mass transit systems. The Phoenix metropolitan area has no fewer than seven different mass transit agencies, including four separate agencies owned by individual outer cities.<sup>22</sup> One solution to integrate these diffused existing parochial mass transit investments would entail the central city acquiring existing mass transit in the metropolitan area through its extraterritorial eminent domain power. This idea would be both expensive and slow; the central city probably could not afford to buy these existing systems and, if that is the case, integration with the new Core Plan system would be slow or nonexistent. A second, and better option, would be a

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18. 198 N.E. 41, 43 (Ohio 1935).

19. *Id.*

20. 97 N.E.2d 347, 350 (Ill. 1951).

21. *Id.*

22. See FED. TRANSIT ADMIN., NATIONAL TRANSIT DATABASE 2004 TABLES: TABLE 19: TRANSIT OPERATING STATISTICS; SERVICE SUPPLIED AND CONSUMED: DETAILS BY TRANSIT AGENCY, available at <http://www.ntdprogram.com/ntd/NTDData.nsf/2004+TOC/Table19> (last visited Jan. 5, 2007).



legislative transfer of existing mass transit owned/operated by SPDs or other local governments to the central city. The SPD is the most common model of mass transit construction and control in the United States; therefore under the Core Plan this transfer will take the form of the state legislature liquidating an existing SPD and giving its assets to the central city. This concept of asset transfer from local government to another is common in local government law tradition because it represents a transfer of one state creation to another.<sup>23</sup> Traditionally, state legislatures may “divest local governments of their properties and turn them over to other public bodies without the consent of the municipality and without compensation of any kind.”<sup>24</sup> This tradition reflects the *Hunter v. City of Pittsburgh* reasoning that the states, as sovereigns, have plenary control over their creations, be it a municipality or SPD.<sup>25</sup> This power has been exercised in the past to transfer structures previously controlled by a municipality to other public entities created by the state legislature.<sup>26</sup> For example, in *Mayor of Baltimore v. State*,<sup>27</sup> the Maryland state assembly passed legislation creating a new Baltimore police force, giving existing constable and justice of the peace stations and property to a new police force to be controlled by a police board.<sup>28</sup> The court reasoned that the property was for public use, and transferring control over the property merely changed which government entity controlled it, whereas “the use of [public property] is in no manner altered.”<sup>29</sup> The reasoning would be no different if the legislature inserted language into the Core Plan authorization statute transferring all of the metropolitan area’s existing mass transit to the central city. This option would dramatically increase the central city’s ability to run the region’s mass transit, because it makes Core Plan implementation cheaper for the central city. If the central city is forced to buy existing mass transit, new mass transit construction will be stunted. This grant of control by the legislature also avoids the incongruous result of a central city not owning the mass transit inside its own city limits. Houston’s recently completed light rail line, for instance, is owned by the Metropolitan Transit Authority of

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23. See, e.g., *Mayor of Baltimore v. State ex rel. Bd. of Police*, 15 Md. 376, 489-90 (1860) (Le Grand, C.J., concurring).

24. ANTIEAU, *supra* note 14, § 2.00. This rule is consistent with the view that municipalities are creations of the state and are under the state’s complete control. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

25. See *Hunter*, 207 U.S. at 178.

26. For example, in *City of Coronado v. San Diego Unified Port District*, 38 Cal. Rptr. 834, 844 (1964), the court upheld legislation that transferred tidelands from existing San Diego-area municipalities to a state-created special authority.

27. *Mayor of Baltimore*, 15 Md. at 489-90 (Le Grand, C.J., concurring).

28. *Id.*

29. *Id.* at 491.

Harris County (METRO).<sup>30</sup> Without the Legislature's transfer of the light rail line to the City of Houston, the City would be responsible for the metropolitan region's mass transit, yet it could not easily integrate the existing rail line into the metropolitan network; presumably it would still be run and owned by METRO. Perversely, METRO would be moribund, unable to expand its transportation offerings due the Core Plan, and the City of Houston would be weakened by the presence of a competing mass transit agency.

#### H. *The Core Plan and the Tradition of Extraterritoriality*

Extraterritoriality has a long history, dating back to the city-states of ancient Greece and Rome.<sup>31</sup> As city-states, they had a "sphere of control" over the areas surrounding the cities.<sup>32</sup> Later, cities in the thirteen colonies were granted extraterritorial powers in their charters from the British Crown, and early American cities also exercised extraterritorial powers, including control over river transportation.<sup>33</sup> Though the Core Plan involves a recalibration in the balance of power in metropolitan areas concerning mass transit, it fits squarely in the American tradition of extraterritoriality in scope, if not in scale. As discussed briefly before, extraterritoriality has been defined as the ability of a municipality to exercise some form of power beyond its municipal boundaries.<sup>34</sup> The history and current practice of extraterritoriality in regard to large international airports also implicates the Core Plan, though not in a legal authorization sense, like the three extraterritorial powers listed below. Rather, the central city's experience in building, owning, and running large international airports suggests that central cities have extensive institutional competence in running regionally-focused transportation infrastructure. As previously discussed, the Core Plan requires three specific types of extraterritorial powers: (1) the power to condemn property in the outer cities; (2) the power to acquire/own property in the outer cities; and (3) the power to exercise police powers germane to running a public transit system in the outer cities. As stated before, because all of these powers normally require a city to receive

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30. See METRO, TRANSIT AUTH. OF HARRIS COUNTY, RAIL MAP AND SCHEDULE, available at [http://www.ridemetro.org/images/PDFs/pdf\\_routes\\_700-redline.pdf](http://www.ridemetro.org/images/PDFs/pdf_routes_700-redline.pdf) (last visited Jan. 5, 2007).

31. RUSSELL MADDOX, EXTRATERRITORIAL POWERS OF MUNICIPALITIES IN THE UNITED STATES 6 (1955).

32. *Id.*

33. *Id.* at 8. Baltimore's 1796 charter allowed it to regulate navigation on the Patapsco River. *Id.*

34. See generally Briffault, *supra* note 16.

an explicit statutory grant of power by the state,<sup>35</sup> these powers should be clearly included in the Core Plan's authorizing statute.<sup>36</sup>

State legislatures have often authorized a municipality to own and condemn property in another municipality for transportation purposes; the case law is clear on this point.<sup>37</sup> A statute concerning municipalities owning transportation facilities extraterritorially—Georgia's Uniform Airports Act of 1933—was upheld in *Howard v. City of Atlanta*.<sup>38</sup> In that case, the court upheld a grant of power by the Georgia state legislature that permitted municipalities to condemn property in other municipalities for creating and expanding airports, explaining that municipalities are “agents of the state” for the purpose of developing airports.<sup>39</sup> The legislation in the Core Plan would be similar to the Uniform Airports Act in *Howard*, with central cities as a specific type of municipality acting as an agent of the state for the purpose of regional mass transit. Similarly, states have authorized municipalities to own property beyond city limits for many different purposes, including transportation purposes (airports).<sup>40</sup> There is no significant debate that states may grant municipalities the power to own and condemn property extraterritorially.

The statutory grant of police powers germane to running a mass transit system is slightly more nebulous. It is clear that the state legislature may grant police powers germane to mass transit for the central city to exercise in the outer city.<sup>41</sup> This language may be express, as in “the central city police may provide security on the mass transit,” or it may be vague, as in “the central city may exercise all powers that are consistent with the purpose of mass transit.” Thus a tension: the Core Plan is not meant to give the central city control in the outer cities beyond the realm of mass transit. On the other hand, effective management and control of mass transit requires some flexibility in the amount of regulation that is germane to effective operation of mass transit. So, what is the “realm of mass transit?” An example is instructive: a central city may want to build a parking garage next to a mass transit node in the downtown area of an outer city in order to encourage park-and-ride trip scenarios.<sup>42</sup> Condemning land to do so is unproblematic as shown in the previous section. However, this plan may clash with an outer city plan to make the street next to the parking garage

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35. See ANTIEAU, *supra* note 14, § 5.10.

36. See *id.* § 5.11.

37. See CHARLES S. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 18.4 (1980).

38. 10 S.E.2d 190, 191-92 (Ga. 1940).

39. *Id.* at 193.

40. See RHYNE, *supra* note 37, § 12.8.

41. See FRANK SENGSTOCK, EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA 45 (1986).

42. These parking lots and garages are common around BART stations in the San Francisco Bay area, especially in those municipalities the Core Plan would consider outer cities.

pedestrian-only to foster local small business development. In the subsequent litigation, the central city may argue that street access to the parking garage is a core mass transit necessity and required to run effective mass transit; in general, the outer city plan is an unacceptable outer city restraint of the central city's mass transit prerogative under the Core Plan statute. The outer city will argue that the Core Plan does not allow the central city to exercise control over outer city streets and thoroughfares. Both arguments have merit, and both arguments implicate the amount of nuts-and-bolts control the central city may gain over the outer city under the Core Plan. Therefore, the Core Plan authorizing statute must lay out some guidance to judges concerning what police powers are sufficiently crucial to mass transit and give those powers to the central city. These powers should focus on the purpose of mass transit: getting large numbers of people from one place to another efficiently. If the purpose of the central city's action is consistent with the mass transit purpose, it should be upheld. Similarly, if the purpose of the outer city's action is to frustrate this purpose, it should be struck down. Considering the above example, making the parking garage useless by shutting off the street to automobiles dramatically frustrates the park-and-ride trip scenario. However, if the outer city wants two entrances to the parking garage rather than three, the outer city would have a stronger argument that it is not impeding mass transit, and is merely exercising some control over its downtown area. This article does not pretend to account for all possible permutations of conflict between the central city and outer city. Courts will be required to engage in statutory interpretation as to what is "frustrating the purpose of mass transit" and what is the "realm of mass transit."

### *I. Core Plan Funding: The Money Shift*

Perhaps the greatest policy shift accompanying the Core Plan is the shift required to finance mass transit construction on a large scale. Without significant state funding, central cities will be unable to finance large mass transit projects out of their tight budgets. This article suggests two specific ways to fund the Core Plan: (1) diverting highway capacity improvement funds; and (2) value capture through special assessments. These two options—which are not mutually exclusive—represent policy choices most consistent with the Core Plan. The most important promise of the Core Plan is *more* mass transit, and this inevitably involves an explicit policy decision to favor mass transit over other transportation priorities, most notably highways. Highway funding should be the first source of mass transit funds because highways most directly compete with mass transit for funding and ridership.

### 1. *Diversion of Highway Funds*

Federal, state, and local governments earmark an enormous amount of money for highways; \$126.5 billion was spent by all levels of government in 2000 alone.<sup>43</sup> These expenditures break down into three principal categories for the purposes of this article: (1) capital investments for highway capacity improvement (including construction on existing highways<sup>44</sup> and new highway construction) (\$64.6 billion in 2000); (2) maintenance of existing highways (\$30.9 billion); and (3) other expenditures, including administration, patrol costs, and debt service (\$31.1 billion). It is clear that these funds represent a massive potential funding source for new mass transit construction; if all highway capacity improvement funds (\$64.6 billion) stayed constant from their 2000 level and were diverted over a ten year period, these funds would have a present value of \$498.8 billion.<sup>45</sup>

As a policy, highway maintenance funds should not be diverted to mass transit. Increasing mass transit funding should not include cutting highway maintenance support because a neglected highway can easily become unsafe. The funds most appropriate for shifting to mass transit uses, on the other hand, are the expenditures intended to increase highway capacity, beginning with the funds appropriated for new highway construction. These new highway funds represent an enormous potential source of mass transit funds; state governments spent \$9.4 billion on new highway and bridge construction in 2000.<sup>46</sup> These new highway construction funds should be appropriated to mass transit use, because these new highways are generally less important than existing roadways, and are more likely to lead to new sprawl than existing highways. More importantly, new highways undermine the Core Plan's mass transit goals by (1) encouraging sprawl, and (2) inducing car travel.

New highways are not as important as existing highways because building patterns are substantially influenced by existing highway routes. On the other hand, no one has relied upon the unbuilt highway and the people it brings, nor have drivers relied on new highways for new routes to their destinations. Furthermore, new highways encourage additional

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43. U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., OUR NATION'S HIGHWAYS 2000, HIGHWAY FUNDING AND EXPENDITURES, available at <http://www.fhwa.dot.gov/ohim/onh00/onh2p10.htm> (last visited Jan. 5, 2007).

44. Examples of capacity improvements on existing highways include widening and reconstruction. See *id.*

45. This calculation assumes a five percent discount rate. Available funds over a twenty year period would be \$805.1 billion; nearly \$1 trillion would be available over thirty years. These figures are likely conservative; they assume a constant cash flow of \$64.6 billion, while these cash flows would most likely grow over time.

46. U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., *supra* note 43.

sprawl by furthering the reliance on car travel and low density development, both of which discourage mass transit use, an anathema to what the Core Plan is trying to accomplish. Moreover, new highway construction suffers from the problem of induced travel. Induced travel is the phenomenon where a new road “that generates travel time savings is perceived by travelers to reduce the cost of travel.”<sup>47</sup> Put simply, if a trip that used to take a driver thirty minutes now takes fifteen minutes because of a wider road or a new highway, people will make the trip more because it costs them less, in terms of time, to make it.<sup>48</sup> In addition, because the traveling speed to a destination is now faster, people will drive longer distances because it does not take them any additional time to make the trip.<sup>49</sup> Soon, however, the extra capacity of the wider highway is taken up by these people making more trips and longer trips, and the road is as congested as ever. Experts note that while the population of American metropolitan areas grew twenty-two percent in the period of 1982-1997, traffic delays experienced by metropolitan drivers increased 235%, and only thirteen percent of the growth in miles driven in the United States could be attributed to population growth.<sup>50</sup> Ironically, metropolitan areas that could not build enough highways to keep up with population growth over the past decades have less congestion than those regions that built highway capacity faster than their population growth.<sup>51</sup> The final result of new highway construction is that the traffic problem intensifies and the environment of sprawl—where mass transit is less effective—grows larger. Put simply, the Core Plan represents a strong policy choice in favor of mass transit; therefore it seems appropriate to fund the Core Plan by de-funding policy choices that significantly undermine it.

Governments may also fund the Core Plan by diverting funds that would be used to make capital improvements to existing highways. This is a much larger pool of money: state governments spent \$38.3 billion on capital improvements in 2000.<sup>52</sup> These improvements include road widening, reconstruction, and other efforts to increase capacity. The arguments for this shift are much the same as that in favor of diverting new highway funds, though improving an existing highway does not undermine the mass

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47. TRANSTECH MGMT., INC. & HAGLER BAILLY, ASSESSING THE ISSUE OF INDUCED TRAVEL: A BRIEFING ON EVIDENCE & IMPLICATIONS FROM THE LITERATURE 1 (2001), available at [http://www.seconcrossing.org/Assessing\\_Induced\\_Travel.htm](http://www.seconcrossing.org/Assessing_Induced_Travel.htm).

48. *See id.*

49. *See id.*

50. SURFACE TRANS. POLICY PROJ., WHY ARE THE ROADS SO CONGESTED: A COMPANION ANALYSIS OF THE TEXAS TRANSPORTATION INSTITUTE'S DATA ON METROPOLITAN CONGESTION (1999), available at <http://www.transact.org/PDFs/constr99.pdf>.

51. *Id.*

52. U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., *supra* note 43.

transit objective as much as building new highways. But improved existing highways still induce travel in the same way new roads do: travel times are reduced and people are encouraged to drive further distances. However, these improved highways may not encourage sprawl to the same degree as new highways, at least not sprawl directly adjacent to the improved highway. With an existing highway, the adjacent areas will likely already be built-up; this especially applies to highways busy enough to warrant capacity improvements. But improved highways will encourage sprawl on the edges of the metropolitan region, because the associated travel times will decrease and individuals will be able to move further afield.

Critics of these funding shifts to mass transit may suggest that diverting these funds will cause dramatic traffic increases as growth in a metropolitan region continues with no additional highway capacity improvements while the mass transit system is built. This argument's multiple assumptions fail, however. First, it is not clear that if stopping capacity increases while the metropolitan area grows ("starving the beast"), this phenomenon will result in more traffic in growing metropolitan areas. A study by the Surface Transportation Policy Project found that eight out of the ten most congested metropolitan areas built enough roads to accommodate their growth between the period of 1982 and 1997.<sup>53</sup> As noted before, the metropolitan regions that did not build roads to keep pace with population growth had *less* congestion than those regions that increased the amount of road capacity per person.<sup>54</sup> This highway building hiatus will also signal strongly to the public that the state is making a policy shift from highways to mass transit.

## 2. Value Capture

While diversion of highway funds represents the most obvious source of funds for the central cities because the Core Plan represents an explicit policy choice of mass transit construction over highway expansion, value capture represents a cutting edge funding idea. Value capture is the idea that mass transit projects can be financed by the public entity's capture of the increase in land value of the areas adjacent to mass transit nodes through a tax or assessment.<sup>55</sup> Applied in the mass transit context, economists have noted that all else held constant, land that is more accessible is

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53. SURFACE TRANS. POLICY PROJ., *supra* note 50.

54. *Id.*

55. See H. William Batt, *Value Capture as a Policy Tool in Transportation Economics*, 60 AM. J. ECON. & SOC. 195, 195-96 (2001).

more valuable.<sup>56</sup> Consequently, land close to mass transit is more valuable, because businesses are closer to additional customers and employees, and residents of the area have more convenient and cheaper commutes.<sup>57</sup> When mass transit is built in an area, the property values around the transit node often increase. Under value capture, the goal of a public entity (the central city under the Core Plan) would be to acquire the incremental increase in property value received by the private landowner through some sort of taxing mechanism.<sup>58</sup> Of course, a small part of this incremental value may be easily acquired through the property tax mechanism. An increase in assessed value would be met with an increase in the tax revenue equal to the incremental increase multiplied by the property tax rate. Assume a property owner's building increases in assessed value from \$100,000 to \$120,000 due to proximity to a new mass transit node. If the property tax rate is ten percent per \$1,000 in assessed value, the city will capture an additional \$2,000 in property tax. However, the property owner retains the remaining \$18,000 in value derived from the property's proximity to the mass transit extension.

As shown above, this property tax capture recoups but a small part of the benefit received by the private property owner; the Core Plan should employ an additional mechanism for value capture. The tradition of special assessments in local government law dovetails nicely with the concept of value capture. Traditionally, if special benefits of a capital improvement "flow to identifiable real property, a special assessment is levied on such specially benefited property."<sup>59</sup> To stay consistent with the idea that the special assessment is intended to capture the benefit received by the property owner as a result of the mass transit construction, the special assessment must be based on the city's power of taxation; the special assessment "is merely compensation paid by the property owner for the improved value of his land."<sup>60</sup> Under the above example, the city could assess the property owner for the additional \$18,000 of value resulting from the mass transit extension. Overall, after the additional property tax and the special assessment, the owner is no worse off; he/she has paid out

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56. See JEFFERY J. SMITH & THOMAS A. GIHRING, VICTORIA TRANS. POLICY INST'T., FINANCING TRANSIT SYSTEMS THROUGH VALUE CAPTURE (2006), <http://www.vtppi.org/smith.pdf> (last visited Jan. 5, 2007).

57. See *id.* Of course, mass transit can negatively impact land value at the same time it improves land value. Trains and buses can be loud and cause additional pollution. However, in general, mass transit's effects on property value are assumed to be positive. See *id.*

58. See *id.*

59. RHYNE, *supra* note 37, § 29.1.

60. *Id.* § 29.2. The special assessment should not be confused with a taking, though a special assessment may qualify as a taking if the assessment exceeds the value of the benefit the private property owner receives. *Id.*



\$20,000 to the city but has property worth \$20,000 more. A caveat: the central city would require specific statutory authorization to make special assessments in conjunction with the Core Plan,<sup>61</sup> and these assessments would likely be limited to the territory of the central city due to the Core Plan's promise not to raid outer city treasuries; in addition, special assessments are based on a city's taxation power, a power that does not extend beyond the central city limits under the Core Plan.

In order to apply a special assessment to the property around a new mass transit node, a court must find the benefit of the transit node to be local in nature;<sup>62</sup> thus, the benefit has to flow to the parcels close to the transit node as opposed to the public at large.<sup>63</sup> With mass transit value capture, this standard is met. Mass transit improves the property values of the land directly surrounding it; studies on value capture have focused on the areas within 500 meters of mass transit nodes, the distance people are usually willing to walk to a node.<sup>64</sup> Of course, a mass transit node may improve property values beyond 500 meters or throughout the region because people everywhere now have better access to a particular area of the region. However, these effects are of a secondary, small, and remote nature; they are increasingly difficult to quantify the further one travels from the node in question. The effects of the mass transit node on the property values directly surrounding it, by comparison, are far more concrete. Fast connections to other areas of the city, shorter and more convenient commutes for residents, and more foot traffic past adjacent businesses add clear value to property because people consciously desire these qualities in a property. Thus mass transit nodes clearly pass the special benefit test. In addition, it is not difficult to decide which property around a mass transit node is subject to the assessment; property does not have to directly touch the area of the node to be subject to the assessment, as long as it receives a benefit from the node.<sup>65</sup> It may be politically desirable to use value capture as compared to property tax hikes to finance the purchase of the local mass transit node site and right-of-ways, (often the most substantial costs of mass transit).<sup>66</sup> Property owners may feel better about the special assessment if the payment will help construct local mass transit nodes; general property tax increases will burden those who do not benefit from increased property values from mass transit.

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61. *Id.* This power cannot be implied from the authorization to make the improvement. *Id.*

62. *Id.* § 29.3.

63. *Id.*

64. SMITH & GIHRING, *supra* note 56.

65. RHYNE, *supra* note 37, § 29.4.

66. *See* SMITH & GIHRING, *supra* note 56.

J. *Safeguards Against the Central City's Power: The Partial Lesson of London and Judicial Review of the Central City's Transportation Plans in the Outer Cities Under the "Hard Look" Standard*

The Core Plan seeks to empower the central city to take the lead in regional transportation; it does not give the central city unbridled power to remake the outer cities in bad faith. The outer cities will likely fear the central city's ability to transform them. The Core Plan leverages this fear into action on mass transit construction, as shown below. Overall, a balance is required: outer cities must feel protected from bad faith, while the central city must be empowered. But what is bad faith on the part of the central city? While inherently a subjective determination, an example of bad faith could be Los Angeles, as central city, deciding to build an overhead light-rail line down Rodeo Drive in outer city Beverly Hills, rather than two blocks over on less well-known Canon Drive. Needless to say, such a project would likely ruin the special cachet of Rodeo Drive to the detriment of Beverly Hills' tax base, and it is unlikely that Los Angeles could justify placing the rail line above the famous street rather than two blocks east or west. In short, there must be safeguards to protect the outer cities from unreasonable actions by the central city.

1. *The Erroneous Assumption of a Central City/Outer City Dichotomy*

A localized version of realpolitik facilitates an assumption that the Core Plan will generate a strict divide in the legislature between central city representatives and outer city representatives. This assumption says the central city representatives<sup>67</sup> in the legislature will vote for the Core Plan because it increases the central city's power vis-à-vis the outer cities. For the same reason, the assumption is that the outer city representatives will vote against the plan because they will lose control over the mass transit in their cities. This view of the Core Plan's politics rests on a myth that central cities are poor and very different from the rich outer cities, and it does not take into account the implicit tradeoff under the Core Plan: the outer cities give up substantial control over mass transit in exchange for free mass transit connections. As Myron Orfield points out, there is considerable economic stratification among outer cities.<sup>68</sup> Orfield identified six types of outer cities, including three types of outer cities designated "at-

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67. State legislature boundaries are not strict overlays of municipality boundaries. Thus, this section assumes that each representative's district is primarily either a "central city district" or an "outer city district," depending on what percentage of the legislator's constituents reside in the central city and what percentage live in outer cities.

68. MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 32-34 (2002).

risk suburbs”; these outer cities have “high social needs but relatively limited, and often declining, local resources.”<sup>69</sup> These at-risk outer cities may have more in common economically with many central cities than other rich outer cities, which Orfield deems “affluent job centers.”<sup>70</sup> Many outer cities have significant minority populations as well. The assumption that whites dominate outer cities is imprecise; rather, whites dominate *some* outer cities.<sup>71</sup>

This discussion of Orfield’s work is not offered to suggest that the poor outer cities will vote with the central cities, or that white-dominated outer cities will vote against minority-dominated central cities. Rather, Orfield’s insights suggest it is unlikely that all the outer city representatives will be against the Core Plan and all the central city representatives will be for it. It is more likely that a coalition of legislators who represent areas that would benefit most from mass transit—and who want free mass transit—will pass the Core Plan. Many other factors beside central city/outer city status are likely to influence legislators. For instance, a legislator from a close-in outer city might be in favor of the Core Plan because his/her municipality is closely integrated with the central city both socially and economically. A representative whose outer city has an enormous tourist attraction might want mass transit to his/her city. On the other hand, a central city representative may worry the Core Plan will interfere with existing plans to expand a highway into his/her district. The list of factors is as long as the imagination, but the point is this: it cannot be assumed that the outer cities’ representatives will be automatically against the Core Plan, just as it cannot be assumed that all the central city’s representatives will be for it.

## 2. *The Core Plan Safeguards and the Idea of the Proactive Outer City*

The most important safeguard for the outer cities is democracy; the outer cities will be well represented in the legislature. In the United States overall, the central city’s share of the metropolitan population has declined steadily since the 1960s,<sup>72</sup> and the central city represents over forty percent of the metropolitan population in only about a fifth of the fifty largest met-

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69. *Id.* at 35.

70. *Id.* at 44. Orfield notes these affluent job centers are Joel Garreau’s “edge cities,” or outer cities with considerable office space and large tax bases. *See generally* JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* (1991). These edge cities include Schaumburg, Illinois (Chicago metropolitan region), and Irvine, California (Los Angeles metropolitan region). *See* ORFIELD, *supra* note 68, at 44.

71. *See* ORFIELD, *supra* note 68, at 37.

72. David Rusk, *Growth Management: The Core Regional Issue*, in *REFLECTIONS ON REGIONALISM* 84 (Bruce J. Katz ed., 2000).

ropolitan areas (in terms of number of workers) in 2000.<sup>73</sup> In the legislature, outer city representatives will likely represent the interests of both their individual outer cities and, to a lesser degree, outer cities in aggregate. The central city acting unreasonably in its dealings with one outer city will likely trigger the ire of other similarly situated outer cities and their representatives, and to a lesser extent, outer cities in general. To continue the example, Los Angeles acting in bad faith toward Beverly Hills will likely worry representatives from other wealthy outer cities like Palos Verdes, Santa Monica, and Malibu. Some issues, on the other hand, may drive the outer cities back into a collective mindset. If the central city charges outer city residents outlandish fares to use the region's mass transit, not only will people not use mass transit, but the central city's ownership and management of the mass transit system will become unpopular in the legislature. A central city run amok is a politically untenable position.

The second major safeguard is outer city participation in the central city's mass transit planning process. The sound bite deployed by Core Plan critics might be, "how does the central city know best what the transportation should be in our outer city?" The answer is: the outer city *needs to tell* the central city what the outer city thinks is best for that outer city's mass transit. Outer cities have an incentive to influence the central city's planning process as much as possible to have the mass transit built and run in the style the outer city wants. The outer city will want to develop robust plans for mass transit in the outer city; the outer city will also want to defend its plan upon central city questioning. Again, the public nature of this process is crucial. If the outer cities' suggestions are unreasonable or clearly deficient in key areas, the central city will be able to publicly reject it, sending a message to the other outer cities. There are two positives that come out of this discussion between the central city and the outer city: (1) the cities will work out a mass transit plan; and (2) the cities will build a relationship that will encourage future cooperation on not just mass transit, but other issues.<sup>74</sup>

Taking this analysis a step further, it is conceivable (even likely) that an outer city will build its own mass transit connections to the overall system, rather than waiting for the central city to build them because the outer city fears the central city's power concerning mass transit. Put frankly, Beverly Hills will fear Los Angeles's ability to change the ritzy outer city. After all, the outer city incorporation that occurred after World War II was based in part on people's fear of the problems of the central city, including

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73. See U.S. CENSUS BUREAU, *supra* note 1.

74. See Frug, *supra* note 6. Working together to solve mass transit problems may foster conversations about other regional issues.

crime, heavy taxes, and overcrowding.<sup>75</sup> By building the mass transit itself, the outer city would not be at the central city's mercy in the implementation of the Core Plan. This would give the outer city more leverage in its dealings with the central city. For example, the central city and outer city could disagree substantially about the route of a light rail extension through the outer city. The outer city could offer to pay for the rail line if the outer city's preferred route is used. Of course, the outer city cannot build mass transit that is completely different from what the central city wants, because the central city would then have right to build yet more mass transit, tearing up the city again to install a rail line on the central city's preferred route.

In either situation, the mass transit extensions in the outer cities would have to be fully integrated with the existing system, a necessary precondition of an outer city-financed extension. The scenario that the outer city builds mass transit in a way against the central city's wishes may be unlikely because: (1) mass transit is expensive and time consuming to build; and (2) the central city can refuse to integrate the outer city-built mass transit with the regional system. However, the *threat* is required for outer city cooperation, in some form, with the central city. Again, the theme of speed: under this scenario, the Core Plan has converted the outer city's fears into quick action on mass transit.

To expand, it is inconceivable that a proactive outer city like the one in the above hypothetical would only talk to the central city about its mass transit connections. The proactive outer city will want to talk to other outer cities around it to coordinate mass transit. Pasadena, for instance, would not build a piece of a rail line without talking to neighboring Glendale and Arcadia about how it would connect to their plans. Furthermore, the central city is unlikely to approve an outer city plan to build mass transit if it is not coordinated with neighboring outer cities for maximum effectiveness. In any event, mass transit will be considered and built at a quicker pace than under the status quo. Mass transit will become a hot topic and citizens who ignored mass transit issues before will suddenly find themselves arguing over bus routes and light rail right-of-ways.

### 3. Institutionalizing the Core Plan Safeguards

In order to encourage outer city participation in the central city's mass transit plans under the Core Plan, state legislatures must institutionalize the participation of the outer cities, creating a sort of "due process" procedural

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75. See Briffault, *supra* note 3, at 366.

requirement on the part of the central city.<sup>76</sup> By institutionalizing these procedures, the legislature can help the central city can avoid grumbling from the outer cities that the central cities are acting unilaterally or unfairly. London's method of transportation planning provides helpful guidance. The London metropolitan area has a regional government called the Greater London Authority (GLA).<sup>77</sup> Transportation is one of the GLA's primary responsibilities; Transport for London, an arm of the GLA, administers London's mass transit.<sup>78</sup> Under the provisions of the Greater London Authority Act of 1999,<sup>79</sup> the Mayor of London—the chief executive of the GLA—determines the regional transportation policy. The boroughs, which are similar to American municipalities, must then submit “local implementation plans” to the Mayor after consulting Transport for London.<sup>80</sup> If the borough does not submit a plan, or submits a plan that the Mayor judges to be inadequate or inconsistent with the regional transportation policy, the Mayor gives the borough a second chance. If the Mayor is still unsatisfied, he/she may draft a local implementation plan for the borough.<sup>81</sup>

The London protocol strikes a good balance in terms of its procedure, though it cannot be copied wholesale for Core Plan use because it combines review power and implementation power; it does not allow for independent review of borough implementation plans. In general, it tips the power too much in favor of the Mayor (central city in the Core Plan). The Core Plan requires an extra procedure to prevent the central city from acting in bad faith or in a patently unfair way: state supreme court review. The first step of the Core Plan's procedure incorporates the GLA procedure. The central city will create a regional plan and a central city implementation plan, and outer cities will supply their individual implementation plans. The central city will comment on the plans and submit revisions to the outer city. After several rounds of revisions, the central city will have final approval and decision making power on all implementation plans, both for the central city and outer cities. At worst, this process will open a dialogue about the future of mass transit in the region. Throughout the review process, the primary safeguard preventing overstepping by the central city is the public nature of the revision process. In the event that political safeguards are not enough, there must be an additional, independent safeguard: independent review by the state supreme court via petition from

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76. The term “due process” is used to suggest that central cities will have procedural hoops they must jump through in order to provide transparency and legitimacy. It is not used to suggest outer cities have any constitutional rights under the Core Plan.

77. *See generally* Greater London Authority, <http://www.london.gov.uk> (last visited Jan. 5, 2007).

78. *Id.*

79. Greater London Authority Act 1999, 1999, c. 29 (Eng.).

80. *Id.* § 145.

81. *Id.* § 147.

an outer city. Of course, it is in both the central city's and outer cities' interest to negotiate rather than resort to independent review because it will slow down the mass transit construction process.

#### 4. *Judicial Review and the Standard of Review*

The two critical issues with judicial review are: (1) the burden of proof; and (2) standard of review used by the judges. They are crucial considerations because the Core Plan relies on careful considerations of power distribution between the central city and the outer cities. Overall the standard of review must be deferential to the central city to (1) maintain central city control of the region's mass transit, and (2) make sure the political will expressed by the public is realized, an important advantage of the Core Plan over the SPD. Of course, this interest must be balanced to some degree with protection for outer cities from unreasonable or bad faith actions by the central city. That said, the burden must be on the outer city to overcome the presumption that the central city's actions are permissible. In addition, courts should not be in the business of dictating mass transit routes or overriding the now-politicized mass transit policy process. The Core Plan seeks to avoid two types of situations in terms of the central city's treatment of the outer cities: (1) instances where the central city does not research or support its mass transit decision; and (2) situations where the central city, out of spite or another improper motive, seeks to damage the outer city's financial base. These statements imply that a standard of review concerned with procedure and the narrow substantive consideration of outer city tax bases is best in the Core Plan context.

The most appropriate standard for review of the central city's mass transit decision is the "adequate consideration" or "hard look" standard found in federal administrative law. The hard look standard is a decidedly procedural one: the court would require the central city to show "it has taken a hard look at the factual and policy issues involved in the subject [mass transit decision], once that showing has been made, the court will defer to the [central city] decision if it is rationally connected to the facts found."<sup>82</sup> Under the Core Plan, this standard would have one additional caveat: the central city's decision must not have a substantial and completely unreasonable adverse effect on the outer city's tax base. If courts remand under the hard look standard, it is usually on procedural grounds, emphasizing courts' "own relative expertise in procedural matters as op-

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82. STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 15.09 (3d ed. 1999) (quoting in part *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

posed to . . . substantive expertise.”<sup>83</sup> The requirement that the decision must be rationally related to the facts found by the central city provides an additional small measure of substantive review.

In terms of the protections for the outer cities, the Core Plan is primarily concerned with the central city’s proper consideration of the outer cities’ recommendations in the back-and-forth planning process. If the central city does not properly follow the procedure or dismisses the outer cities’ recommendations out of hand, it delegitimizes the mass transit planning process specifically and the Core Plan generally.<sup>84</sup> The standard, therefore, encourages central cities to document and justify their mass transit decisions; these actions will only help the central city in the court of public opinion. The hard look standard’s requirement that the decision must be rationally connected to the facts determined by the central city will help eliminate situations where the central city does not adequately research mass transit decisions. If the central city has little or no evidence to support a mass transit decision, it will be impossible to argue that the decision was rationally related to the facts at hand, as there are no facts.

The additional caveat of tax base protection is meant to control situations like the Beverly Hills/Rodeo Drive hypothetical outlined previously. The greatest fear of the outer cities is likely that the central cities’ actions will negatively impact their tax bases. After all, the SPD system was designed in part as a tax base protection.<sup>85</sup> The standard that the central city’s decision must not have a substantial and unreasonable effect on the outer city is the explicit protection for the outer city’s tax base provided by the Core Plan. It has two facets: (1) the word “substantial”; and (2) the “completely unreasonable” language. The first facet is to ensure that outer cities cannot question trivial impacts on their tax bases, especially when it is unclear if mass transit will have an overall negative impact on property values (greater access to the outer cities will in theory raise property values). The “completely unreasonable” language is meant to imply a balancing test that favors the central city and requires that the outer city show the negative effects of the planned mass transit on the city’s tax base will substantially outweigh the benefits of the mass transit (and that no reasonable person could think otherwise). This language is directly targeted at the Beverly Hills/Rodeo Drive scenario. Putting an overhead train above Rodeo Drive or bulldozing its famed stores for a bus depot would not bring more benefits than costs to Beverly Hills, and would qualify in most peo-

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83. *Id.*

84. Again, such actions will not endear the central city to the state legislature who has ultimate control over the Core Plan’s existence.

85. See Briffault, *supra* note 3.



ple's minds as "completely unreasonable." On the other hand, if the outer city shows merely that the mass transit decision will trim its tax base by one percent, it would not be "completely unreasonable" to think that benefits of mass transit will outweigh the one percent tax base loss, especially in the long run when mass transit access will likely raise property values. Like any standard of review, this standard will be subject to litigation, but the hard look/tax base standard seeks to defer to the central city while protecting the most critical outer city interest: tax base.

### III. THE CORE PLAN COMPARED TO THE MASS TRANSIT STATUS QUO OF SPDS

The primary model of regional mass transit ownership and operation is the SPD, a public authority created by state legislatures to provide a particular service—often transportation—to outer cities and metropolitan regions as a whole.<sup>86</sup> Mass transit SPDs abound in the United States, including the MBTA in the Boston metropolitan area, BART in the Bay Area, and ValleyMetro in the Phoenix area. Of the forty largest<sup>87</sup> mass transit entities in the United States, thirty-two—eighty percent—are SPDs,<sup>88</sup> making the SPD the dominant model of mass transit ownership and management. In contrast, just two of the forty largest mass transit entities are central city-owned and operated, and these entities are limited to the corresponding city limits.<sup>89</sup> Thus the question: how is the Core Plan better than the dominant SPD model? This section considers first why the central city provides the best platform to politicize and publicize mass transit and second why the outer cities may favor the Core Plan over the SPD regime. The three critical reasons the Core Plan is more effective than SPDs in constructing mass transit are:

- The central city provides the best political arena to channel mass transit policy preferences; currently, the technocratic nature of SPDs removes mass transit from the public consciousness.
- The Core Plan allows the outer cities more influence over the mass transit decisions within their individual outer cities.
- The Core Plan will build mass transit faster because: (1) it creates a clear participation process for the outer cities and forces them to

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86. SPDs are also referred to as a "limited purpose governments." See Briffault, *supra* note 3.

87. See FED. TRANSIT ADMIN., *supra* note 22.

88. See *id.*

89. See *id.* The two are San Francisco's MUNI system and the Detroit Department of Transportation. These entities operate exclusively within the city limits of San Francisco and Detroit.

consider how mass transit will operate in their communities; (2) it raises the profile of the mass transit issue; and (3) it allows mass transit policy creation to coalesce around high-profile central city leaders.

A. *The Problem of Mass Transit De-politicization*

Perhaps the best indication that SPDs are ineffective in the mass transit context is the lack of mass transit in the United States. Currently, more than ten percent of workers commute using mass transit in only two regions in the United States.<sup>90</sup> The ineffectiveness of SPDs can be traced to their technocratic nature and the subsequent de-politicization of mass transit decisions. Put simply, mass transit and mass transit issues are not high in the political conscious of the American public. This is not to say Americans do not care about transportation issues at all. Rather, the transportation issue Americans care about, as a matter of politics, is *traffic*, and the traffic problem continues to grow. But the fundamental disconnect in the political conscious is caring about traffic *but not caring about mass transit*. The traffic/mass transit link should be a natural and obvious one, but it is not. After all, the public knows that more people on buses and trains mean less people on roads. This section argues that this disconnect derives from the de-politicization of mass transit and regional transportation issues in general. As a result of the de-politicization of regional transportation issues, the general populace does not have effective means to challenge the opinions of transportation technocrats.

SPDs handle mass transit matters, and SPDs are a de-politicized, technocratic government structure. First, as Richard Briffault explains, SPDs were concocted as a way to approach infrastructure problems without touching the outer city tax bases or impinging on the fragmented municipal structure of central cities surrounded by many outer cities.<sup>91</sup> Disturbing these tax bases and structures would generate a huge political debate. SPDs, rather, are offered as a business-like approach to run drab and routine government services that have long lost the public imagination; services that many people felt should not be politicized.<sup>92</sup> By and large, the SPD model works well for many government services. For example, few citizens care about their water or sewage service in any great detail. Citizens expect clean water, and expect sewage to go away, end of story. The SPD continues to quietly do its job, and few complain. The goal is to take

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90. See U.S. CENSUS BUREAU, *supra* note 1.

91. Briffault, *supra* note 3.

92. See FRUG ET AL., *supra* note 4, at 474.

the politics out of supplying water and sewage service, and the SPD structure succeeds in that purpose. Secondly, the politics are sometimes removed from SPDs by appointing, rather than electing, members to SPD boards or executive committees. If SPDs elected their members, their actions would be subject to a public debate channeled by the election. If no elections occur, the policy debates go inside the SPD, away from public scrutiny.

Mass transit—unlike water or sewage—is not fit to be de-politicized because: (1) there is no general consensus on what should happen with mass transit; and (2) the government service of moving people is much more rife with social, economic, and emotional concerns than water or sewage. There is no great political debate about municipal water service. The challenge of supplying homes and businesses with water has been solved, more or less, in an uncontroversial fashion. Similarly, the challenge of getting sewage away from buildings no longer vexes the American public. But the problem of how to get people from point A to point B is very much an issue in today's society; Americans feel the consequences of decisions about regional transportation everyday in the form of traffic (or lack of it). With regional transportation, the public's policy preferences must be channeled through politics: preferences stated on a constant basis, because not everyone agrees about everything. Therefore, politics, not technocracy, are necessary to decide how people employ mass transit to deal with their traffic problem. To this end, people need a political forum to express their views and values about mass transit.

Moving to the second point, mass transit necessarily touches on social, economic, and even emotional concerns of people in a region, because it involves moving people around. While SPDs might allow the accumulation of technical knowledge about how to supply a government service,<sup>93</sup> they do a poor job of recognizing and respecting the economic and social implications of mass transit. These issues cannot be effectively handled by a technocratic local government operation; they must be hashed out and confronted in the public discourse.

But why the central city? In short, politicization and publicity. The SPDs' de-politicization dictates that mass transit decisions and policy do not attract the public's attention by and large. Contrast this scant attention with the substantial attention paid to the politics of the central city; the central city is politically the most important local government in the region because "in areas with multiple local governments, cities are the focus of local political life."<sup>94</sup> Central city political institutions are well-developed

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93. See Comment, *supra* note 7.

94. Briffault, *supra* note 3, at 347.

and time tested. Central city politics receive an enormous amount of media attention, and city elections are fought with an intensity beyond the responsibility of the positions at stake. Large central city mayors are nationally known, but SPD board members are relatively anonymous. The byproduct of this anonymity is that SPD mass transit policy making cannot coalesce around a single, well-known leader. All these factors indicate the central city will provide a more appropriate decision-making arena for mass transit policy choices. In short, mass transit needs to become a larger issue on the political landscape. The answer is putting mass transit decisions on the biggest stage with the brightest lights: the central city. The central city, as an institution, has the best ability to jumpstart the debate about the region's mass transit.

B. *How the Core Plan Enhances, Rather Than Reduces, the Outer City's Control Over Mass Transit Within Its Borders*

Briffault has commented that SPDs are a method to provide infrastructure to outer cities without affecting outer city autonomy.<sup>95</sup> Through SPDs, an individual outer city is only linked to other cities and the central city through the thin basis of the SPD; outer cities can insulate themselves in many ways from the other cities, their social and economic homogeneity unaffected.<sup>96</sup> The creation of the SPD presented outer cities an alternative to annexation by or consolidation with the central city or full regional governments.<sup>97</sup> In short, SPDs allow outer cities to protect their tax bases while still gaining the economies of scale that derive from construction and operation of infrastructure on a large, regional scale.<sup>98</sup> In some SPDs, participation by local governments is voluntary, further fragmenting the region. To join ValleyMetro, the mass transit SPD in the Phoenix area, a local government (either a municipality or county government) must transfer some or its entire share of transportation revenue from the state lottery to the SPD.<sup>99</sup>

Briffault's insights concerning SPDs, applied in the Core Plan context, illuminate reasons why outer cities may favor the Core Plan over SPDs. First, it is clear that the Core Plan does not dramatically reduce the outer

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95. *Id.* at 375.

96. *See id.* at 376.

97. *See id.* at 375-76.

98. *See id.*

99. *See ValleyMetro, supra* note 10. The amount of local transportation funds a municipality must turn over depends on its population. Cities over 300,000 in population must turn over all funds. *See also Briffault supra* note 3, at 376 n.134 (citing William E. Schmidt, *Racial Roadblock Seen in Atlanta Transit System*, N.Y. TIMES, July 22, 1987, at A16 (discussing how certain suburban counties in the Atlanta metropolitan area refused to join the regional transportation agency due to racial fears)).

city's control over regional mass transit within the specific outer city's borders. Rather, the Core Plan *enhances* the outer city's ability to guide mass transit extensions inside its territorial limits. Under the Core Plan, the individual outer city directly negotiates and attempts to influence the central city's mass transit efforts in the individual outer city. Its influence is advisory (subject to protections), and the area concerned is limited to just the individual outer city itself. But functionally, is the individual outer city's influence any different under the SPD system? This article suggests the functional level of control exercised by the outer city is the same. After all, with an SPD, the board making decisions about mass transit in an individual outer city might be appointees of the governor;<sup>100</sup> in other situations, the outer city may have just one representative (or even a partial representative) on the SPD's board.<sup>101</sup> A close look at SPDs shows that the power lost by the outer cities concerning mass transit under the Core Plan is not more extensive than the power lost under the SPD regime. Under the SPD system, the individual outer city has very little power to control mass transit within its specific borders. For instance, the Dallas metropolitan mass transit SPD, DART, is directed by a board of fifteen members from the various cities of the region.<sup>102</sup> The City of Dallas, predictably, has the largest representation on the council at eight members, not including another member that represents Dallas as well as three outer cities. But other outer cities do not have a full representative. For instance, Addison, Highland Park, Richardson, and University Park have just one representative for all four cities, giving each city just one-sixtieth<sup>103</sup> of the total political power of the DART board. With one-sixtieth of the power of the council, the City of Addison hardly has control over mass transit within its borders; it likely could not block or even influence a mass transit project substantially affecting its city. Even one-fifteenth of the power on the board would not represent, functionally, any more control than the control lost by the outer cities under the Core Plan. In addition, the member that represents Addison as well as other cities may be conflicted when considering a project that affects one of the four outer cities more than the other three.

The individual outer city may favor the Core Plan over the SPD because it does not allow other outer cities to control mass transit in the indi-

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100. The Governor of New York nominates members (based on recommendations from the affected counties and subject to confirmation by the New York State Senate) to sit on the board of the Metropolitan Transportation Authority, the largest mass transit agency in the United States. MTA Leadership, <http://www.mta.nyc.ny.us/mta/leadership/index.html> (last visited Jan. 5, 2007).

101. *See* DART Board Biographies, <http://www.dart.org/boardbios.asp> (last visited Jan. 5, 2007).

102. *See id.*

103. Each of these cities has one-fourth of a vote on a fifteen member board. *See id.*

vidual outer city. While this may not have been a concern in the past—it is now. In the past, the outer cities were generally and uniformly wealthier than the central cities<sup>104</sup> and had similar interests in terms of the metropolitan region vis-à-vis each other and vis-à-vis the central city; the outer cities came into existence as a haven from the problems of the central cities. This is no longer true. As Orfield and Briffault note, the outer cities are becoming more diverse economically: some outer cities are failing badly while others next door remain successful.<sup>105</sup> The outer cities' interests are becoming more divergent as they become more economically and socially diverse. One outer city may take a traditional view and see mass transit as a perceived threat to a certain way of life, while another outer city may require mass transit to jumpstart the local economy. While in the past Addison, Texas may have been able to rely on other outer city representatives to represent its interests because outer cities were similar and stuck together; now it is more likely that the outer city will see itself as a lone wolf. The individual outer city must now consider its interests and its interests alone. The Core Plan better channels this new metropolitan calculus for the outer cities.

During the Core Plan process, the central city and outer cities must resolve their mass transit issues using institutionalized procedures. Thus, mass transit decision-making rests on a *municipal*—not state—level.<sup>106</sup> Ironically, this process empowers the region's central and outer cities to solve their own problems without having to turn to a state-created SPD to furnish mass transit service. In addition, the Core Plan does not affect many of the reasons why outer cities have favored SPDs over the past decades. The Core Plan does not raid outer city coffers, nor is the Core Plan consolidated with or annexed by the central city. In many ways, under the Core Plan, the outer city is making the same cession of power to the central city that it currently makes to the SPD. The difference, of course, is the result of the cession of power: the outer city will not have the ability to drag its feet on mass transit issues or be able to use veto power over mass transit projects.

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104. ORFIELD, *supra* note 68, at 28-29.

105. *Id.*; *see also* Briffault, *supra* note 3, at 353-54.

106. The state is still sovereign; it merely has decentralized power with an express grant. The general rule in the United States is that municipalities can only exercise powers specifically granted to them, or powers incident to express powers. JOHN DILLON, *MUNICIPAL CORPORATIONS* § 237(89) (5th ed. 1911).

*C. How the Core Plan Will Build Mass Transit Faster Than SPDs*

The current SPD does not force the outer cities to consider mass transit in a meaningful way. As discussed before, they have little, if any, influence on SPD boards. The planning process outlined in Part II will force outer cities to consider mass transit on a municipal level. This will engage more of an outer city's leadership and citizenry than the current SPD system. Returning to the example of the Dallas region's DART, decision-making on the DART board may implicate a single representative of the outer city. If the outer city is forced to go through the Core Plan mass transit planning process, suddenly the outer city's council, mayor, and city manager are implicated in the mass transit policy creation process. In turn, with so many leaders engaged in the debate, combined with the public nature of the Core Plan process, outer city residents will become more concerned about mass transit. At this point, the connection in the public's mind between mass transit and traffic will crystallize. This concern about mass transit, in turn, will put additional pressure on local leaders to act on the issue in a feedback loop.

The mayor of the central city is probably the best known local leader in each metropolitan region. This person is a lightning rod for public debate on local issues. The Core Plan leverages the central city mayor's high profile by placing the mayor's government in charge of mass transit. Public and media attention should then follow from this high profile. This situation corrects a true weakness of the SPD system. SPD leaders do not generate substantial attention; they are generally anonymous and technocratic and many are appointed<sup>107</sup> rather than elected. This anonymity is a by-product of the design of SPDs; as stated before, they are intended to hum along in a professional and low-profile manner.

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107. For example, the board of the Metropolitan Atlanta Rapid Transit Authority (MARTA) includes representatives from the Georgia State Properties Commission, the Georgia Building Authority, the Georgia Regional Transportation Authority, the Georgia Department of Revenue, and the Georgia Department of Transportation. MARTA—About MARTA—Meet the Board, <http://www.itsmarta.com/board/meet.htm> (last visited Jan. 5, 2007); *see also* MTA Leadership, *supra* note 100 (all MTA board members are nominated by the Governor).

#### IV. THE CENTRAL CITY'S INSTITUTIONAL COMPETENCE

##### A. *Experiences From International Airports Suggest a Central City's Institutional Competence*

The Core Plan fits squarely within the tradition of extraterritoriality in the United States; the history and current status of central city airport ownership and administration supports this notion. Central cities have taken the lead in construction and operation of large international airports, a process that benefits the entire region. Of the fifty busiest airports in the United States, twenty-two are owned by the central city, while sixteen are owned by SPDs.<sup>108</sup> These central city-owned large international airports service the entire metropolitan region.<sup>109</sup> The central city ownership model may take one of two forms, both of which are relevant to considerations of the Core Plan: (1) the international airport may be located within the city limits of the central city, as in the case of Chicago and Houston; or (2) the airport is located outside the limits of the central city, and is owned and operated under an extraterritorial grant of power, like San Francisco International Airport, and Ontario Airport in Ontario, California. As this section will show, central cities have proven they can operate both territorial and extraterritorial regionally-focused large international airports, and this suggests central cities could administer the Core Plan effectively. But to consider the Core Plan/airport analogy, the first question is: how is the Core Plan like (and unlike) an international airport?

The most crucial similarity between the central city owning and operating the region's mass transit system and the central city owning an international airport is that in both situations, the central city is leading the region and making decisions on behalf of the region in a transportation context. It is economically infeasible for each city in a metropolitan area to build an airport because they are so expensive to construct and generate many negative externalities like noise, air pollution, traffic, and crime. Similarly, if every outer city creates a mass transportation system for itself, the outer city will not receive the economies of scale that derive from a regional mass transit solution. Therefore, one public authority must take the lead in the airport context for the region. This public authority is the

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108. See FED. AVIATION ADMIN., PRIMARY AIRPORTS BASED ON 2004 PASSENGER ENPLANEMENTS (2005), available at [http://www.faa.gov/airports\\_airtraffic/airports/planning\\_capacity/passenger\\_allcargo\\_stats/passenger/media/cy04\\_primary\\_boardings.pdf](http://www.faa.gov/airports_airtraffic/airports/planning_capacity/passenger_allcargo_stats/passenger/media/cy04_primary_boardings.pdf).

109. One model has SPDs running large international airports. An example is the Massachusetts Port Authority (Massport), which runs Boston's Logan International Airport as well as other transportation infrastructures. See MASSPORT: About Massport, [http://www.massport.com/about/about\\_board.html](http://www.massport.com/about/about_board.html) (last visited Jan. 5, 2007).



central city in forty-four percent of the fifty busiest airports in the country.<sup>110</sup> Compare this to just eight percent for the fifty largest mass transit agencies.<sup>111</sup>

Central cities build and own large airports for the benefit of themselves and the region, because what is good for the region is usually good for the central city. After all, it makes little sense for the City of Chicago to limit use of O'Hare International Airport to residents of Chicago. Rather, it makes much more sense for a central city's airport construction and operation to focus on the region; in fact, central city-owned international airports have a self-described regional focus. For example, the mission statement of the Houston Airport System—a division of the City of Houston—states that the system “fosters economic vitality for the transportation industry and the greater Houston region.”<sup>112</sup> Outer cities, on the other hand, generally do not build or run large airports that will benefit the entire region.<sup>113</sup> Common sense dictates that because outer cities have smaller tax bases, they cannot afford the large capital outlay for an international airport.<sup>114</sup> The logic is much the same for capital-intensive mass transit systems, but mass transit systems are typically owned and run by SPDs. Thus, an interesting comparison arises: both SPDs and central cities run large airports, but only SPDs run regional mass transit systems. However, the fact that central cities run key regional transportation outlets like international airports suggests that the central cities could effectively run regional mass transit systems.

Critics of the Core Plan may argue that the analogy between the Core Plan and international airports is weak at best because there is no tradition of central city-owned mass transit, but there is a tradition of central city-

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110. See FED. AVIATION ADMIN., *supra* note 108.

111. See FED. TRANSIT ADMIN., NATIONAL TRANSIT DATABASE, 2004 DATA TABLES, TABLE 19: TRANSIT OPERATING STATISTICS, available at <http://www.ntdprogram.com/ntd/NTDDData.nsf/2004+TOC/Table19>.

112. History of HAS, <http://www.fly2houston.com/aboutHAS> (last visited Jan. 5, 2007).

113. Notable exceptions include Burbank and Long Beach, California, both of which would be considered outer cities under the Core Plan. For example, Bob Hope Airport in Burbank is controlled by an authority owned by the city governments of Burbank, Glendale, and Pasadena. Burbank Glendale Pasadena Airport Authority, <http://www.burbankairport.com/authority/index.html> (last visited Jan. 5, 2007).

114. Outer cities are also generally newer, having sprung up in the wave of post-World War II suburbanization. See Briffault, *supra* note 3, at 353-54. At this point, many central cities had established airports. However, this fact does not account for why central cities continue, even now, to take the lead in large airport ownership and construction. For instance, Chicago recently completed a \$927 million overhaul of Midway Airport; it is one of the fastest growing airports in the United States. Fran Spielman, *Daley, Air Execs Cheer Midway 'Cinderella' Story*, CHI. SUN TIMES, June 9, 2004, at 4. Meanwhile, state plans have floundered to build a third airport in the Chicago area in suburban Peotone, Illinois. See, e.g., Christi Parsons, *At Times, You Build It, No One Comes; From an Empty Prison to a Little-Used Airport, State Projects Have Fizzled. Will a Baseball Stadium Be Next?*, CHI. TRIB., Dec. 18, 2005, at C2.

owned large airports. While this may be true, this history is no longer relevant. The reason central city-owned airports have become common and central city-owned mass transit has never existed may not be because central cities cannot run mass transit operations or that central cities are incompetent in the mass transit context. Rather, the distinction may be the result of judicial interpretations of early twentieth century statutes. In the early 1900s, judges wanted to encourage the fledgling aviation industry, a notion that is now outdated and unrelated to a central city's institutional competence to run mass transit.<sup>115</sup> Oscar L. Pond explains that judges in the early twentieth century consistently interpreted statutes concerning municipal airport power liberally, including the power to obtain large tracts of land within and beyond city limits for airport use.<sup>116</sup> These same judges, Pond notes, did not give cities the power to operate "interurban stations in connection with their municipal activities."<sup>117</sup> Pond suggests the judges were motivated by a desire to encourage aviation, a "new method of rapid transportation,"<sup>118</sup> whereas rail travel was already common (no additional judicial encouragement needed). It should be noted that when central cities were developing their airports in the early half of the twentieth century, regions did not have the large numbers of outer cities they now have. From a twenty-first century perspective, the difference between central city-owned large airports and central city-owned mass transit is no longer present; aviation is now ubiquitous in the United States and no longer needs any judicial assistance. In short, history does not matter anymore: the argument that tradition dictates that central cities can develop regional airports but not regional mass transit loses traction. Had the judges ruled differently one hundred years ago, we may have central city run regional mass transit; the rise of the SPD regime may not have been inevitable. There is little functional difference between regions (and outer cities) encouraging central cities to build and run international airports with a regional focus and central cities building and running regional mass transit systems.

Of course—to anticipate an outer city argument—there are differences between a central city-owned international airport and the Core Plan. The Core Plan involves the central city running mass transit that affects many outer cities. A central city-owned international airport, on the other hand, does not affect as many outer cities because it is located in a single, albeit large, geographic area. Presumably, the outer cities most affected are those

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115. See OSCAR L. POND, LAW OF PUBLIC UTILITIES § 45 (4th ed. 1932).

116. *Id.*

117. *Id.*

118. *Id.*

directly adjacent to the airport. However, this effect on a smaller number of cities is a function of the nature of commercial aviation, not through any will of the central city or resistance from the outer city: large airports must be consolidated in one area to operate effectively; mass transit must be more diffused. Simply comparing the installations involved in airports and mass transit systems fails to illustrate why the experience of operating an airport would be significantly different from running a mass transit system. Both are large infrastructure projects with a regional focus. The argument is weakened further when the City of Los Angeles's system of airports is considered.

B. *The Lessons of Los Angeles World Airports: Ontario, California and the Advantages to Outer Cities of Extraterritorial Operation of Mass Transit*

In the middle of the continuum between a single central city-owned international airport and the Core Plan exists Los Angeles World Airports (LAWA), the *system* of Los Angeles-owned airports in Southern California.<sup>119</sup> LAWA, a division of the City of Los Angeles, owns four airports, two within the Los Angeles city limits (Los Angeles International and Van Nuys Airport),<sup>120</sup> and two owned extraterritorially in other municipalities (Palmdale Regional Airport and Ontario International Airport, located in the Cities of Palmdale and Ontario, respectively).<sup>121</sup> The Palmdale airport is located sixty miles northeast of central Los Angeles, while the Ontario airport is located thirty-five miles east of downtown Los Angeles. While Palmdale is a busy general aviation airport with no commercial passenger service,<sup>122</sup> the Ontario airport served 7.2 million commercial aviation passengers in 2005.<sup>123</sup> In terms of the Core Plan, these two extraterritorial airports separate LAWA from a system like Houston or Chicago—both of which operate multiple airports—because the Houston and Chicago airports are within the city limits, while Los Angeles, through LAWA, has gone far beyond its territory to own airports and take the regional lead in air travel management. LAWA is approaching the Core Plan on the con-

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119. Four Airports, One Vision, <http://www.lawa.org/LAWA.cfm> (last visited Jan. 5, 2007).

120. Van Nuys Airport is the world's busiest general aviation airport (private planes), though it has no commercial airline service. Van Nuys Airport, <http://www.lawa.org/vny/welcomeVNY.cfm> (last visited Jan. 5, 2007).

121. *Id.*

122. The Palmdale airport had commercial passenger service until 1998. LAWA hopes to use the Palmdale airport to relieve pressure at Los Angeles International. See *Mayor Villaraigosa Supports Federal Grant Sought by Palmdale Regional Airport to Help Attract Air Service to Southern California*, L.A. WORLD AIRPORTS, Apr. 10, 2006, <http://www.lawa.org/news/newsDisplay.cfm?newsID=794>.

123. General Description (Ontario Airport), <http://www.lawa.org/ont/generalDescription.cfm> (last visited Jan. 5, 2007).

tinuum mentioned above because LAWA has an extraterritorial *system* of transportation outlets. Perhaps more importantly, Ontario, as an outer city, supports LAWA's extraterritorial ownership and operation of the airport. Ontario likes that LAWA pays for airport expansions—including a recent \$384 million upgrade—and that LAWA is liable for aircraft disasters.<sup>124</sup> Ontario derives huge tax base benefits from businesses that cluster around the transportation node of the airport.<sup>125</sup> There is no reason to believe that outer cities would not experience similar financial benefits from mass transit nodes. The LAWA/Ontario experience also demonstrates that a central city's extraterritorial operation will not result in the central city running roughshod over the outer city. Ontario city officials have stated that LAWA always consults them on "property-related moves," including planning and infrastructure issues.<sup>126</sup>

## V. OTHER ISSUES

### A. *The Core Plan and the Lack of Outer City Political Representation in the Central City*

The Core Plan does not affect political boundaries or individual voting rights in the region. In fact, the Core Plan depends on the central city leaders *not* being directly politically accountable to outer city voters. As such, critics of the Core Plan (and residents of the outer cities) may object to the fact that, under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, outer city residents cannot vote for central city leaders planning the region's mass transit. Courts will likely find the Core Plan constitutional under the Supreme Court's six-to-three decision in *Holt Civic Club v. City of Tuscaloosa*,<sup>127</sup> authored by former Chief Justice William Rehnquist. In that case, Tuscaloosa exercised extraterritorial police power over unincorporated areas beyond city limits within a three mile radius.<sup>128</sup> The residents in the unincorporated areas sued, arguing that they should have voting rights in Tuscaloosa on par with Tuscaloosa residents because the regulations affected the extraterritorial area in much the same way as those citizens within Tuscaloosa. They argued that because the right to vote on city issues was limited by geography there was a violation

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124. Chip Jacobs, *Airport Diplomacy*, L.A. CITY BEAT, June 19, 2003, <http://www.lacitybeat.com/article.php?id=43&IssueNum=2>.

125. *Id.*

126. *Id.*

127. 439 U.S. 60 (1978).

128. *Id.* at 61.

of the Equal Protection Clause.<sup>129</sup> The Supreme Court disagreed in broad language, applying the rational basis test and holding “a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.”<sup>130</sup> Rejecting the argument that extraterritorial residents are entitled to equal political footing, the Court reasoned that a city’s decisions affect many individuals beyond its corporate boundaries, and everyone affected by a municipal decision cannot expect voting rights.<sup>131</sup>

Based on the reasoning of *Holt*, courts should reject Equal Protection challenges to the Core Plan. First, it should be noted that the extraterritorial powers exercised by Tuscaloosa and tacitly approved of by the Supreme Court in *Holt* are more extensive in legal scope than the powers exercised by central cities under the Core Plan. The Alabama statute in question in *Holt* gave Tuscaloosa a three mile police jurisdiction ring beyond its city limits, where “residents are subject to the city’s ‘police [and] sanitary regulations.’”<sup>132</sup> These regulations include Tuscaloosa city court criminal jurisdiction and the power to license businesses in the extraterritorial area. The Core Plan, on the other hand, only gives central cities extraterritorial power over one type of service: mass transit. *Holt* acts as a test case of how much regulation a geographic population may be subject to without receiving the franchise. Under *Holt*, the type and scope—but not the impact—of extraterritorial regulation must be examined. If the statute in *Holt* allowed Tuscaloosa to apply every regulation in the City to the extraterritorial area, save regulations on dog-catching, the Supreme Court would have ruled the scheme unconstitutional because the City would regulate this extraterritorial area almost completely. Therefore, those citizens in the extraterritorial area must be able to vote in that scenario.<sup>133</sup> As Justice Rehnquist indicates in footnote eight:

By setting forth these various state provisions respecting extraterritorial powers of cities, we do not mean to imply that every one of them would pass constitutional muster. We do not have before us, of course, a situation in which a city has annexed outlying territory in all but name, and is exercising precisely the same governmental

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129. *Id.* at 62-63.

130. *Id.* at 68-69.

131. *See id.* at 69.

132. *Id.* at 61.

133. This is what the Supreme Court means by “bona fide residency requirements.” *See id.* at 81. In this hypothetical, limiting the franchise to just those within the city limits of Tuscaloosa would not be a limitation “appropriately defined and uniformly applied.” *Id.* at 82; *see also* *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); Briffault, *supra* note 16, at 386 (this would be the equivalent of treating the three mile radius as the true municipal boundary).

powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits.<sup>134</sup>

It is clear that the Core Plan does not rise to the level described in the above quote; the Core Plan does not approach the breadth of regulation of de facto annexation. Rather, the Core Plan's regulations are narrow but deep. The impact on the outer cities may be large under the Core Plan, but impacts are not considered under the framework of *Holt*. However, the type of regulations imposed on the extraterritorial areas must be considered.

Justice Rehnquist notes later in footnote eight that Tuscaloosa's powers in the extraterritorial zones did not include "vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses."<sup>135</sup> Every statute authorizing extraterritorial powers will present a different mix of regulation; the Core Plan clearly invokes the extraterritorial power of eminent domain, but not taxing or zoning power. Rehnquist does not indicate that the plan is a *per se* Equal Protection violation if one of these "traditional and vital" municipal powers is extraterritorial. But the Core Plan's use of eminent domain power does not rise to the level of an Equal Protection violation for two reasons. First, the eminent domain power in the Core Plan is not a general eminent power. Rather, it is limited to the mass transit context and purpose. Not only can the central city condemn just for a public purpose, but it can only condemn for a *mass transit* public purpose. Justice Rehnquist, in footnote eight, does not elaborate enough on this issue to assume anything; however, by invoking the context of tradition he refers to the general (not limited) eminent domain power municipalities have traditionally exercised. Second, due to the proliferation of SPDs, providing mass transit cannot be described as an archetype of "vital and traditional" municipal service over which citizens would expect to have direct and close political control through their municipal leaders. Rather, mass transit in America is currently run by state-created SPDs, where representation of affected municipalities on district boards varies widely on a district-by-district basis.<sup>136</sup> Often, the governor has the power of appointment to these district boards<sup>137</sup>—the members are not directly elected—so the only recourse citizens of a municipality currently have, in terms of mass transit, is in the state legislature. The Supreme Court has never held that this arrangement is constitutionally deficient. Outer city

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134. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 72 n.8 (1978).

135. *Id.*

136. Compare *MTA Leadership*, *supra* note 100 with *DART Board Biographies*, *supra* note 101.

137. *MTA Leadership*, *supra* note 100.

citizens have the same recourse under the Core Plan as under the SPD regime.

Critics may argue the Core Plan has such a large impact on outer cities that outer cities should have the right to vote on transportation issues in the central city. But in *Holt*, Justice Rehnquist makes it clear that significant impact of a city's decision on surrounding areas does not justify surrounding areas receiving the franchise. He cites a city condemning property at the edge of its municipal limits for a waste treatment plant as an example of a decision by a city that affects other cities in a significant, even ruinous way. This impact, however, does not give the affected cities the right to the franchise because many municipal decisions affect other cities.<sup>138</sup> In short, mass transit construction and operation does not rise to the level of regulation where participation in the political process is necessary under the Equal Protection Clause because cities do not generally provide mass transit anyway and the extraterritorial power of the Core Plan is narrowly tailored to the mass transit context.

#### B. *Outer City Tax Implications*

The Core Plan will only be sustainable if the central city is able to avoid taxation over central city-owned transportation property by outer cities. It is completely possible that outer cities who disfavor the Core Plan will attempt to manifest their displeasure with the Core Plan through retaliatory taxation on central city-owned property in outer cities. It is similarly possible that such taxation will completely inhibit the central city from implementing the Core Plan because outer city taxes make the Core Plan too expensive for the central city to implement. It is unlikely, however, that outer cities could legally maintain such a tax scheme under the current local government law tradition in many states. The majority rule is that Municipality A's property located inside Municipality B cannot be taxed by Municipality B, except by express state-level legislation, as long as the property is used for a public purpose.<sup>139</sup> Mass transit represents perhaps the paradigm example of a public purpose, and therefore, it is not surprising that cases concerning extraterritorial property taxation extend to the transportation context. For example in *Collector v. City of Boston*,<sup>140</sup> the Supreme Judicial Court of Massachusetts held that railroad tracks—part of a rapid transit system—owned by the City of Boston but located in Milton were not subject to taxation.<sup>141</sup> The court did not look to a specific

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138. *Holt*, 439 U.S. at 69.

139. RHYNE, *supra* note 37, § 12.6.

140. 180 N.E. 116 (Mass. 1932).

141. *Id.* at 116-17.

statute for guidance on this issue, but rather to “general principles of expediency and justice” because property that benefits the public should not have “to share the burden of paying the public expenses.”<sup>142</sup> The minority rule is that property owned by Municipality A in Municipality B would be subject to taxation, unless there is an express authorization of a tax exemption.<sup>143</sup> The minority rule suggests that the statute authorizing the Core Plan should include such an explicit exemption for the central city’s property in the outer cities.

## VI. CORE PLAN CANDIDATE REGIONS

### A. *Determining the Best Regions for Core Plan Political Success*

The Core Plan is tough medicine. It represents a strong dedication to mass transit and a dramatic recalibration of the regional power structure. A certain type of metropolitan region will find the Core Plan appealing: (1) the region will be dominated, in terms of population, by the central city; and (2) the region will have low mass transit use rates. The first requirement is a political reality. Though the Core Plan will ultimately benefit the entire region as shown above, it is likely that many, though not all, outer city representatives will vote against the Core Plan in the state legislature, simply because outer cities lose power to the central city (however shortsighted these votes against the Core Plan may be). Therefore, a larger ratio of central city representatives to outer city representatives will make passage of the Core Plan more likely. It is crucial to note, however, that economic differences will not create a strict outer city versus central city vote because the classic conception of the poor central city and the rich outer city has broken down (as discussed previously).<sup>144</sup> The second requirement above reflects a candidate city with a strong desire to jumpstart its mass transit system. Core Plan candidate cities are likely trying to limit and then counteract a long tradition of sprawl, as sprawl becomes outdated and increasingly expensive. Furthermore, it is easier for a central city to take the lead in mass transit in a region under the Core Plan when there are neither pre-existing parochial mass transit institutions nor political turf. Of course, the Core Plan is not intended for cities like New York and Chicago that have large mass transit systems. In short, it will be easier—both institutionally and politically—to begin implementation of the Core Plan with a blank slate.

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142. *Id.* at 117.

143. RHYNE, *supra* note 37, § 12.6.

144. *See* ORFIELD, *supra* note 68, at 32.



### B. *The Statistical Survey Methodology and Results*

The goal of the statistical study is to use data that serve as accurate proxies for the two factors listed above using Census Bureau data from the 2000 Census. In terms of political clout of the central city versus the outer cities in the state legislature, population serves as a reliable proxy of representative count considering the Supreme Court's decision in *Reynolds v. Sims*,<sup>145</sup> mandating legislative districts of equal population in state legislatures under the Equal Protection Clause of the U.S. Constitution. In the statistical survey, the number of workers over the age of sixteen serves as the population figure because the Census Bureau links mass transit use to commute-to-work statistics. The number of workers sixteen and over who use mass transit approximates the mass transit use factor described above. Of course, the weakness of this data is that it only considers mass transit use for work commutes, rather than trips overall. It is unclear, however, whether this understates or overstates mass transit use. For example, an individual could use mass transit only for work commutes (overstating general mass transit use) or an individual could only drive to work and use mass transit for all other trips (understating general mass transit use). The statistical survey assumes these two effects cancel out.

The survey starts with the fifty largest metropolitan statistical areas (MSAs) in the United States (Core Plan legislation uses the MSAs as an objective measure of which municipalities are in a region and which are not) and their central cities. Mass transit use rates are calculated by dividing the number of workers who use public transportation to commute to work by the total number of workers over the age of sixteen. The mean mass transit use rate of the fifty MSAs is 3.6 percent with a 2.6 percent standard deviation when the New York City MSA is eliminated as an outlier.<sup>146</sup> If a region's mass transit rate was more than one standard deviation above the mean,<sup>147</sup> it was judged to have "significant mass transit." If a central city has more than forty percent of the MSA's workers over the age of sixteen, the central city is considered to "dominate" the region. Thus,

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145. 377 U.S. 533, 562-63 (1964); see also SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 172 (2d ed. 2002) (courts generally consider state legislative districts that vary up to ten percent in population to be presumptively valid).

146. The New York City MSA's mass transit use rate is 24.9%, more than double the next highest usage rate (Chicago's is 11.5%). The New York City metropolitan region has such a well-developed mass transit infrastructure and high usage rate that it skews the results significantly as to which cities are Core Plan candidates. In terms of mass transit usage, the New York City MSA is singular among American regions. See U.S. CENSUS BUREAU, *supra* note 1.

147. To have "significant mass transit," a region would have to have a mass transit rate of  $3.6\% + 2.6\% = 6.2\%$ . See *id.*

Core Plan candidate regions are regions with dominant central cities but without significant mass transit.

Out of the fifty regions, eleven qualify as Core Plan candidates. They are: Houston, Phoenix, San Diego, Indianapolis, Columbus, San Antonio, Austin, Nashville, Jacksonville, Memphis, and Oklahoma City (if the domination rate is raised to fifty percent, only San Antonio, Austin, Jacksonville, and Memphis qualify). These eleven cities are among America's fastest growing cities and many are in the fast-growing Sun Belt. Their growth rates from 1990 to 2000<sup>148</sup> are in Table 1. All but Indianapolis and Memphis (two cities outside the Sun Belt) beat the national median growth rate of 8.7%.<sup>149</sup> These regions have the most need for the Core Plan.

Houston	19.8%
Phoenix	34.4%
San Diego	10.2%
Indianapolis	8.3%
Columbus	12.4%
San Antonio	22.3%
Austin	41.0%
Nashville	16.7%
Jacksonville	15.8%
Memphis	6.5%
Okla. City	13.8%

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148. See Edward L. Glaeser & Jesse M. Shapiro, *City Growth and the 2000 Census: Which Places Grew, and Why*, in THE BROOKINGS INSTITUTION, SURVEY SERIES 2-5 (2001), available at <http://www.brookings.edu/es/urban/census/whygrowth.pdf>.

149. *Id.* at 1.

## VII. CONCLUSION

The Core Plan, first and foremost, seeks to jumpstart mass transit construction in the United States; mass transit policy making has lived in the shadows of the SPD for too long. It represents a substantial policy shift in two key ways: (1) it favors the central city and dense building patterns over sprawl; and (2) it favors localities over the state by rejecting the idea that SPDs and technocracy are the answer to regional mass transit. As such, the Core Plan is likely 1.5 policy shifts past the present climate, as American regions wake up to the crushing effects of traffic and sprawl. It has been a groggy wake up for sure; regions struggle to build institutions and policies to counteract sprawl because mass transit has been out of the public eye for so long. What American regions need is a huge screaming match over mass transit; the public's long-stifled policy preferences need new voices, a new political dynamism. The central city, for all its problems, has no deficit of political dynamism. It is time for American regions to step aside and let the sometimes savage politics of the big city loose on mass transit.