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## ARTICLES

### THE CHALLENGE OF INCLUSION

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*The creation of diverse and inclusive communities has long been one of American housing policy's most important commitments. The United States Supreme Court recently reaffirmed this commitment in an important decision that interpreted the federal Fair Housing Act to require that municipalities avoid housing policies with a discriminatory impact on protected classes. Following the Court's decision, the Department of Housing and Urban Development (HUD) enacted groundbreaking new regulations requiring communities to take affirmative steps to provide housing for all protected groups. In practice, however, realizing the goal of inclusion will prove exceedingly difficult. The Trump administration will almost certainly kill the new HUD regulation and is unlikely to make affordable housing a priority. In truth, it is doubtful that any administration of either party could succeed in diversifying communities because efforts to do so often stir intense political opposition from homeowners. As a result, scholarly and popular media accounts typically vilify these homeowners as selfish xenophobes.*

*This Article presents a more complex picture. Though inclusion represents our society's highest aspiration, exclusion is both necessary and desirable in any conception of community. I examine research in several disciplines, including economics, sociology, and political theory, and discover in each discipline a strong argument that exclusion is indispensable to the idea of community. Nevertheless,*

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*this Article contends that the arguments in favor of exclusion, like the arguments against it, are overstated. It is possible to create communities that are diverse and inclusive, but doing so will, paradoxically, require some concessions to exclusion. The intractable question, often elided by the false choice between a mosaic of segregated “urban villages” and a “melting pot” that dissolves all differences, is how to balance the aspiration for inclusion against the practical need for exclusion. This Article concludes by suggesting compromises between inclusion and exclusion that may help make inclusive communities a reality.*

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## INTRODUCTION

American housing policy seemingly has no higher aspiration than the creation of diverse and inclusive communities. The federal Fair Housing Act (FHA), enacted in the wake of a series of devastating urban riots that exposed the corrosive effects of a society segregated by race and class, forbids municipalities from enacting policies that restrict housing opportunities for racial minorities and other protected groups.<sup>1</sup> The Supreme Court recently reaffirmed that the FHA is an essential instrument in “moving the Nation toward a more integrated society” and read the statute broadly to require that municipalities avoid housing policies that have a disparate impact on protected groups.<sup>2</sup> On the heels of the Court’s decision, the Department of Housing and Urban Development (HUD) issued a new set of regulations requiring communities to take affirmative steps to provide housing for protected groups.<sup>3</sup> States like California have gone even further and required municipalities’ land use regulations to accommodate all economic classes,<sup>4</sup> while others, such as New Jersey, have judicially mandated that communities provide their fair share of the regional need for affordable housing.<sup>5</sup>

The drive for inclusiveness has taken on new urgency as waves of civic unrest in communities like Ferguson, Missouri and Baltimore, Maryland have once again drawn attention to the scourge of racial segregation in our

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1. See 42 U.S.C. §§ 3604(a), 3605(a) (2012) (providing that it is unlawful to “make unavailable” housing opportunities based on race or other designated criteria); *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S.Ct. 2507, 2521–22 (2015) (describing how unlawful practices under FHA include “zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification”).

2. See *Inclusive Communities*, 135 S. Ct. at 2525–26.

3. See *Affirmatively Furthering Fair Housing*, 24 C.F.R. §§ 5.150–5.166 (2017) (requiring communities to report levels of racial segregation and efforts taken to reduce those levels). The Obama administration also recently issued a “toolkit” on housing development that recommended a number of reforms to land use regulations to permit more development, including allowing more high density and multifamily housing, “streamlining or shortening permitting processes timelines,” and allowing “by-right development.” See THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 3, 14–15 (2016), [http://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing\\_Development\\_Toolkit%20f.2.pdf](http://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf) [<http://perma.cc/3EDW-KV7Q>].

4. See CAL. GOV’T CODE §§ 65302(c), 65580–65589.8 (West 2017). California Governor Jerry Brown recently proposed to reduce zoning barriers by expanding the list of uses allowed “as of right,” but the proposal was killed by a variety of hostile interest groups. See Liam Dillon, *Labor and Environmental Groups Say They Are Done Negotiating over Gov. Jerry Brown’s Housing Plan*, L.A. TIMES (Sept. 1, 2016, 3:26 PM), <http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-labor-and-environmental-groups-are-done-1470693857-htmllstory.html> [<http://perma.cc/UG45-YQNW>].

5. See *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 728, 730–31 (N.J. 1975). In the face of New Jersey’s political leadership’s refusal to enforce the obligations of the Mount Laurel Doctrine, the Supreme Court of New Jersey recently held that it would enforce those obligations itself. See *In re Adoption of N.J.A.C. 5:96 & 5:97*, 110 A.3d 31, 35 (N.J. 2015).

metropolitan areas.<sup>6</sup> Spurred by outrage over police shootings of unarmed black men, these protests have consequently drawn attention to the ways that spatial segregation leads to dramatically unequal life chances: people residing in communities with high concentrations of poverty face fewer opportunities for economic and social mobility, lower quality schools, greater exposure to violence and crime, greater likelihood of incarceration, and a host of other negative consequences.<sup>7</sup> As such, demands for inclusive housing policies that break down patterns of concentrated poverty and de facto racial segregation have grown louder in recent years and have even given rise to a nascent “inclusive cities” movement at the international level.<sup>8</sup>

The desire to make communities more inclusive has, however, remained largely an aspiration. Communities across the nation face an affordable housing crisis, spurred by zoning laws that constrict the supply of housing and drive up home prices.<sup>9</sup> Despite this crisis, affordable housing was largely ignored by both campaigns during the 2016 presidential election.<sup>10</sup> Furthermore, in the wake of Donald Trump’s surprise victory, Republicans in Congress have proposed the Local Zoning Decisions Protection Act of 2017,<sup>11</sup> which would nullify HUD’s “Affirmatively Furthering” Fair Housing regulation and prohibit HUD from

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6. On the relationship between racial segregation and protests in cities like Ferguson and Baltimore, see, for example, Valerie Strauss, *From Ferguson to Baltimore: The Consequences of Government-Sponsored Segregation*, WASH. POST (May 3, 2015), <http://www.washingtonpost.com/news/answer-sheet/wp/2015/05/03/from-ferguson-to-baltimore-the-consequences-of-government-sponsored-segregation/> [<http://perma.cc/43WK-DDMW>].

7. See, e.g., ROBERT J. SAMPSON, *GREAT AMERICAN CITY* 121–48 (2012) [hereinafter SAMPSON, *GREAT AMERICAN CITY*] (demonstrating that a wide variety of outcomes, including those mentioned in the text, are influenced by the characteristics of one’s neighborhood).

8. See Pooja Bhatia, *A Tale of Two Cities: Mixing the Urban Poor into a Rich Urban Life*, NPR (July 1, 2014, 6:55 AM), [http://www.npr.org/2014/07/01/327090645/a-tale-of-two-cities-mixing-the-urban-poor-into-a-rich-urban-life?utm\\_campaign=storyshare&utm\\_source=twitter.com&utm\\_medium=social](http://www.npr.org/2014/07/01/327090645/a-tale-of-two-cities-mixing-the-urban-poor-into-a-rich-urban-life?utm_campaign=storyshare&utm_source=twitter.com&utm_medium=social) [<http://perma.cc/RMK6-T93G>].

9. See, e.g., CAL. LEGISLATIVE ANALYST’S OFFICE, *CALIFORNIA’S HIGH HOUSING COSTS 15–20* (2015), <http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf> [<http://perma.cc/9372-TCFB>] (explaining that due to NIMBY (“not in my backyard”) influence in local government, zoning regulations in California limit density and multifamily housing so as to increase housing costs); Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS’N 6, 12 (2016) (concluding, based on empirical study of ninety-five largest American cities, that density restrictions and local control of land use are associated with higher levels of income segregation); see also Dimitrios Halikias & Richard V. Reeves, *How Land Use Regulations Are Zoning Out Low-Income Families*, BROOKINGS (Aug. 16, 2016), <http://www.brookings.edu/blog/social-mobility-memos/2016/08/16/zoning-as-opportunity-hoarding/?cid=00900015020089101US0001-081801> [<http://perma.cc/8N5E-N4YP>] (collecting studies of land use regulations).

10. See Kriston Capps, *Why Democrats and Republicans Need to Talk About Affordable Housing*, CITYLAB (July 26, 2016), [http://www.citylab.com/politics/2016/07/why-democrats-and-republicans-need-to-talk-about-affordable-housing/492959/?utm\\_source=SFTwitter](http://www.citylab.com/politics/2016/07/why-democrats-and-republicans-need-to-talk-about-affordable-housing/492959/?utm_source=SFTwitter) [<http://perma.cc/29Y9-WNA8>] (bemoaning that affordable housing is a nonissue in 2016 presidential campaign).

11. Local Zoning Decisions Protection Act of 2017, H.R. 482, 115th Cong. (2017).

even gathering data on residential segregation patterns.<sup>12</sup> At the time of this writing, the Affirmatively Furthering regulation remains in force, but its days appear to be numbered.

In assigning blame for the unmet promise of American housing policy, the finger is often pointed at one particular group: NIMBYs (“not in my back yard”).<sup>13</sup> NIMBYs are homeowners who vociferously oppose new developments in their communities—especially affordable housing or any other type of housing—and they have the political clout to get their way with local regulatory authorities.<sup>14</sup> Restrictive land use policies favored by NIMBYs, including the preclusion of multifamily housing and stringent limits on density in residential areas, have been decisively linked to higher home prices and segregation by class and income within metropolitan regions.<sup>15</sup> Efforts to break down these zoning barriers have faced fierce political resistance.<sup>16</sup> Accordingly, most proposals to

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12. For a text of the proposed bill, see Local Zoning Decisions Protection Act of 2017, H.R.482, 115th Cong. (2017), <http://www.congress.gov/bill/115th-congress/house-bill/482/text?r=1> [<http://perma.cc/6HVV-UCVE>]. For commentary, see Tanvi Misra, *Fair Housing Faces an Uncertain Fate*, CITYLAB (Feb. 3, 2017), <http://www.citylab.com/housing/2017/02/fair-housing-faces-an-uncertain-fate/515133/> [<http://perma.cc/T68R-UNBX>].

13. See John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91, 92 n.5 (2014) (defining NIMBY); see, e.g., NAT’L LOW INCOME HOUS. COAL., THE NIMBY REPORT: USING CIVIL RIGHTS LAWS TO ADVANCE AFFORDABLE HOUSING 3–5 (2002), [http://www.housingforall.org/Joomla\\_2.5.4/images/documents/2013-04-04-fha-essential-to-affordable-housing-nimbyreport-fall2002.pdf](http://www.housingforall.org/Joomla_2.5.4/images/documents/2013-04-04-fha-essential-to-affordable-housing-nimbyreport-fall2002.pdf) [<http://perma.cc/CWN8-J65J>]. In a national survey of county governments, seventy-five percent of respondents listed NIMBYism as the single most significant barrier to affordable housing. CTR. FOR HOUS. POL’Y & NAT’L ASS’N OF CNTYS., PAYCHECK TO PAYCHECK: WAGES AND THE COST OF HOUSING IN THE COUNTIES 5 (2004), [http://www.innovations.harvard.edu/sites/default/files/nhc\\_0728rpt.pdf](http://www.innovations.harvard.edu/sites/default/files/nhc_0728rpt.pdf) [<http://perma.cc/G4GY-EHFU>].

14. See generally WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS 9–10 (2001) [hereinafter FISCHER, HOMEVOTER HYPOTHESIS] (describing homeowners’ incentives and their influence in local government); Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. REV. 949, 980–82. For some recent anecdotes, see Natalie Moore, *Despite Mandate, Affluent Suburbs Fail to Build Affordable Housing*, WBEZ NEWS (Oct. 12, 2015), <http://www.wbez.org/news/despite-mandate-affluent-suburbs-fail-build-affordable-housing-113274> [<http://perma.cc/4L2R-KE9D>] (describing resistance to new low-income housing in Chicago suburb); Alana Semuels, *The Pervasive Fear of Affordable Housing in New Jersey*, ATLANTIC (Dec. 22, 2015), <http://www.theatlantic.com/business/archive/2015/12/the-pervasive-fear-of-affordable-housing-in-new-jersey/421581/> (describing opposition by NIMBYs to a New Jersey town’s efforts to implement a state law’s affordable housing requirements).

15. See *supra* note 9 for a collection of studies on the link between zoning and housing prices.

16. See, e.g., Thomas B. Edsall, *Who Will Pay the Political Price for Affordable Housing?*, N.Y. TIMES (July 15, 2015), <http://www.nytimes.com/2015/07/15/opinion/edsall-who-will-pay-the-political-price-for-affordable-housing.html> [<http://perma.cc/58V3-7NM3>] (describing political backlash in Westchester County, New York after county officials agreed to provide more affordable housing under a consent decree). Edsall speculates that the Supreme Court’s recent decision in the *Inclusive Communities* case and the new HUD regulations could spark a similar backlash on a national scale. See *id.* In another provocative piece, Edsall argues that the issue of affordable housing threatens to break up the democratic party coalition between affluent white suburbanites and lower-income minorities. See Thomas B. Edsall, Opinion, *Can Hillary Manage Her Unruly Coalition*, N.Y. TIMES (Aug. 18, 2016), <http://www.nytimes.com/2016/08/18/opinion/campaign-stops/can-hillary-manage-her-unruly-coalition.html?smprod=nytcore-ipad&smid=nytcore-ipad-share> [<http://perma.cc/36D9-7DND>]. That potential fracture would explain why Democratic presidential candidate Hillary Clinton largely

make communities more inclusive have focused on solving the NIMBY problem—for example, by changing homeowners’ incentives (such as providing home value insurance, ending local school financing, or abolishing the mortgage interest deduction),<sup>17</sup> broadening the base of political activity beyond NIMBYs,<sup>18</sup> or inducing NIMBYs to shed their parochial worldview in favor of a “postmodern subjectivity.”<sup>19</sup>

I argue that the NIMBY is not the principal barrier to creating inclusive communities. Rather, the very notion of community, however broadly conceived, depends on exclusion. As the theorist Michael Walzer wrote, if communities lacked the ability to exclude, they could not maintain the very thing that makes them communities: their character as “historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.”<sup>20</sup> The perceived selfishness of the NIMBY is an outward manifestation of this deeply embedded and widely shared desire to preserve community. Therefore, even if NIMBYism could be excised, the challenge of inclusion would remain.

Section I of this article explores several arguments in favor of exclusion. For organizing purposes, I categorize these arguments by discipline, making the case from the perspective of economics, sociology, and political theory, though I recognize that the boundaries dividing these disciplines are quite porous.

Section II then addresses the shortcomings of the various arguments, raising the question of whether exclusion is as strong an imperative as it seems. I argue that while exclusion is an indispensable part of community, it is only a part, not the whole. In our mobile and densely populated urban society, the demand for inclusion is too strong to deny; communities cannot effectively resist change and uncertainty through exclusion.

Section III argues, accordingly, that inclusion is an equally essential

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ignored the issue of affordable housing, while then-candidate Donald Trump stoked fears of violent urban blacks to try to gin up support among suburban whites. *See id.*; *see also* Capps, *supra* note 10 (bemoaning that affordable housing is a nonissue in 2016 presidential campaign).

17. *See, e.g.*, FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 14, at 267–70 (home value insurance); Myron Orfield, *The Region and Taxation: School Finance, Cities, and the Hope for Regional Reform*, 55 BUFF. L. REV. 91, 133–34 (2007) (local school finance reform); John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1608–09 (1993) (mortgage interest deduction).

18. *See, e.g.*, ANDRES DUANY ET AL., THE SMART GROWTH MANUAL §§ 1.1–1.15 (2010) (proposing to make land use decisions on a regional basis so as to minimize the influence of neighboring homeowners).

19. *See* Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 325–36 (1993) [hereinafter Frug, *Decentering*] (arguing that exclusionary zoning is part of a “modernist” suburban consciousness in which residents of incorporated suburbs see their communities as self-sufficient entities rather than as fragments of a whole, and proposing a “postmodern” conception of community identity that will enable these residents to understand their embeddedness in a metropolitan region).

20. MICHAEL WALZER, SPHERES OF JUSTICE 62 (1983). Walzer’s argument largely deals with the nation-state’s use of immigration to control its membership, not local communities. However, as I discuss *infra* note 255, the national immigration debate is in many ways analogous to the local zoning debate.

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component of community, again using economics, sociology, and political theory as support. I conclude that inclusion and exclusion are complementary, rather than competing, aspects of community. Just as exclusive communities are doomed to failure if they refuse to heed demands for inclusion, inclusive communities will not be viable unless, paradoxically, they make some concessions to exclusion. That is to say, if we desire a community that features housing for all socioeconomic classes, we may have to accept some degree of separation within the community. The “challenge of inclusion” is to determine *how much* separation is necessary to achieve a diverse and inclusive community and how we can reconcile such separation with our aspiration for inclusion. While there are no easy answers, I conclude with some suggestions as to how we might confront this challenge.

As a caveat, I recognize that there is more to inclusion than reforming land use policy. For example, market demand in cities like New York and San Francisco has made housing unaffordable to all but the very wealthy. Nevertheless, it is clear that in global cities like these, as well as in more modest communities, restrictive zoning laws have had an independent effect on housing prices.<sup>21</sup> Furthermore, as I hope to show in this Article, the arguments commonly made to support those restrictive zoning laws do not withstand scrutiny. Therefore, my goal is to urge communities to reconsider zoning laws that discourage inclusion.

#### I. THE ATTRACTION OF EXCLUSION

The central problem with any conception of an inclusive community is that including everyone who desires to be part of it would destroy the community.<sup>22</sup> This basic point finds support in numerous disciplines, including economics, sociology, and political theory. Though the boundaries among these disciplines are permeable, it is useful to address each discipline separately.

##### A. *The Economic Perspective*

###### 1. Congestion and the Tragedy of the Commons

In kindergarten we are taught to share, but economists say this is not always a good idea. A public park is a wonderful place to spend a Sunday afternoon, but if everyone else has the same idea, the park becomes crowded and unpleasant. An orchard owned in common has abundant fruit trees, but if you harvest all the fruit, none is left for me.<sup>23</sup> No central authority decides how many visitors the park will admit or how much fruit each individual can harvest; since we all “own” the resource, everyone chooses for him- or herself. What is more, in choosing

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21. See *supra* note 9 for a collection of studies on the link between zoning and housing prices.

22. I concede that the term “community” itself is vague and elusive, a point I shall develop further in Section III. Nevertheless, as this Section shows, exclusion is essential to any concept of community, no matter how broadly defined.

23. For other colorful examples, see KENNETH A. SHEPSLE, *ANALYZING POLITICS* 306–23, 336 (2d ed. 2010).

how to use the resource, no individual necessarily considers the effects of his or her choice on other owners or the carrying capacity of the resource. After all, the thought goes, if I do not use it, someone else will. As a result, common property tends to be overused and common resources quickly depleted. This problem is elegantly named the “tragedy of the commons.”<sup>24</sup> According to received economic wisdom, common property is beset by “externalities”—each owner weighs the costs and benefits only to him- or herself from exploiting the resource because he or she bears none of the external costs imposed on others.<sup>25</sup>

The orthodox economic solution to the tragedy of the commons, as familiar as the parable itself, is the introduction of private property rights and the attendant right to exclude.<sup>26</sup> If a park is privately owned, its owner can control who is allowed to enter, perhaps by pricing entry so as to avoid congestion. If the fruit trees in the orchard are divided up among the common owners so that each owns an individual tree, then each has the incentive to tend to her tree, knowing that no one else can (legally) make off with the fruits, and each also has the incentive to conserve and maintain the resource, since she will only be diminishing her own wealth if she fails to do so. Private property, in other words, forces individuals to “internalize” the externalities of their activities.<sup>27</sup> This only works, of course, if each individual has a right to exclude others from sharing her portion without her permission.

## 2. Zoning as a Solution to the Tragedy of the Commons

Now consider another example. Imagine a city that has an abundance of open space, making it a very desirable place to live. Responding to consumer demand, a developer purchases vacant land and builds homes, thereby diminishing the open space that made the community desirable. Unlike the previous examples, where individual property rights solved the problem of the tragedy of the commons, here property rights *cause* the problem. The developer has the right to build on her own property without regard to the impact on her neighbors. Private property ownership, while solving the externality problem

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24. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244–45 (1968). There is now a well-developed canon of literature regarding the tragedy of the commons. See, e.g., Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 *U. CHI. L. REV.* 711 (1986).

25. See N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 195–202 (6th ed. 2011) (explaining concept of externalities); *id.* at 219–23 (explaining relationship between externalities and the tragedy of the commons); SHEPSLE, *supra* note 23, at 325–34; Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347, 354 (1967) (explaining how common ownership “fails to concentrate the cost associated with any person’s exercise of his communal right on that person”); see also Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 *YALE L. & POL’Y REV.* 281, 288 (2016) (“[T]he difficulty and cost of excluding competing users or uses of the resource render it an open access resource vulnerable to the tragic conditions of rivalry, overexploitation, and degradation.”).

26. See MANKIW, *supra* note 25, at 225; ELINOR OSTROM, *GOVERNING THE COMMONS* 8–18 (1990) (reviewing the traditional argument in favor of private property rights).

27. See Demsetz, *supra* note 25, at 350 (“[P]roperty rights develop to internalize externalities . . .”).



inherent in the commons, creates its own externalities. In this example, though each landowner has an incentive to economize on the use of resources present on her own property, no landowner takes account of the external costs his or her land use imposes on neighboring parcels.<sup>28</sup> The community's open space becomes a commons, which all landowners enjoy jointly but which each landowner is unilaterally free to diminish within his or her own envelope of space.<sup>29</sup> The landowners may execute agreements among themselves to either limit or internalize these externalities, but a rich body of research shows that the ability of landowners to reach such agreements is seriously compromised by each landowner's lack of information and incentive to behave strategically.<sup>30</sup>

Within the branch of economic theory known as public choice, this problem is referred to as an instance of "market failure," meaning that the private land market is inefficient because it creates externalities that property owners do not internalize.<sup>31</sup> The conventional solution to market failure is government regulation.<sup>32</sup> The government can either prohibit the activity that causes the externality or force the party to internalize the cost through some form of tax.<sup>33</sup> In the case of the landowner whose development threatens to eat up a community's open space, the usual governmental response—currently in force in thousands of municipalities throughout the United States—is zoning.<sup>34</sup> Zoning enables municipalities to flatly prohibit the development of housing, or specific types of housing, on certain lands. Municipalities can also use zoning to prohibit housing in excess of a desired density or height, or to condition approval of new housing on a developer's agreement to restore the open space lost by development.<sup>35</sup> Zoning thus either prohibits or internalizes the externalities of

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28. See *id.* at 355–57 (noting that private property ownership has externality problems similar to common property, but contending that they are typically cheaper and more easily overcome).

29. See Fred P. Bosselman, *The Commodification of "Nature's Metropolis": The Historical Context of Illinois' Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527, 573 (1992) (explaining how Chicago residential neighborhoods' low-density residential character became a common good that was easily exploited by unscrupulous scam artists and speculators, leading to adoption of Chicago's first zoning ordinance).

30. See MANKIW, *supra* note 25, at 211–212 (explaining how transaction costs inhibit efficient bargains among landowners to reduce externalities).

31. See Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 155–57 (1977–1978) (discussing how the problem of externalities and transaction costs legitimizes state coercion under the "market-failure" view of public choice theory).

32. See *id.*

33. See MANKIW, *supra* note 25, at 202–209 (discussing government responses to the externality problem).

34. See William A. Fischel, *Homevoters, Municipal Corporate Governance, and the Benefit View of the Property Tax*, 54 NAT'L TAX J. 157, 159 (2001) [hereinafter Fischel, *Homevoters*] ("Nearly every community of any size has zoning. . . . the dominant motive for municipal incorporation in the United States since 1910 has been the desire of residents to control land use.").

35. See DANIEL P. SELMI ET AL., *LAND USE REGULATION* 49–106, 165–201, 527–91 (4th ed. 2012) (discussing various zoning tools).

private housing development.<sup>36</sup>

On this externality theory,<sup>37</sup> zoning is simply a scaled-up version of the individual homeowner's right to exclude. In essence, zoning is a collective right to exclude exercised by the municipality in lieu of the individual's right to exclude, and serves the same end: resolving the tragedy of the commons.<sup>38</sup> Just as individual ownership of a fruit tree causes that individual to absorb the costs and benefits of the tree, collective ownership of the common environment causes the community to absorb the costs and benefits of maintaining its open space. For this reason, zoning is often thought of as a collective private property right belonging to the community of homeowners,<sup>39</sup> a conception that courts have frequently ratified by upholding zoning ordinances on the theory that they protect property values.<sup>40</sup>

So understood, zoning essentially converts the resources that municipalities provide—open space, public schools, and the like—from public goods into market goods.<sup>41</sup> It is widely reported that resources such as these are, as a

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36. See Foster & Iaione, *supra* note 25, at 290 (noting that most cities use zoning “to avoid conventionally tragic outcomes such as negative spillovers from incompatible land uses”).

37. In his classic *The Zoning Game*, Richard Babcock observes that there are two competing theories of the purpose of zoning: the “property value theory,” which postulates that zoning serves to protect homeowners’ property from devaluation as a result of externalities, and the “planning theory,” which holds that zoning is part of a comprehensive plan for the orderly development of the community. RICHARD F. BABCOCK, *THE ZONING GAME* 115–25 (1966). The economic account of zoning is squarely in the “property value” camp.

38. See Lee Anne Fennell, *Exclusion’s Attraction: Land Use Controls in Tieboutian Perspective*, in *THE TIEBOUT MODEL AT FIFTY* 163, 172 (William A. Fischel ed., 2006).

39. See WILLIAM A. FISCHEL, *ZONING RULES!* 1 (2015) [hereinafter FISCHEL, *ZONING RULES!*] (“[L]and use controls are best analyzed as collective property rights. . . .”); ROBERT H. NELSON, *PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT* 6 (2005) (“[Z]oning functions as a ‘property right’ to the collectively owned environment.”); *id.* at 146–47 (arguing that by transferring the right to exclude from the individual to the community, zoning becomes a private property right belonging to the community of homeowners); Fennell, *supra* note 38, at 172.

40. See, e.g., *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1371 (11th Cir. 1993) (finding no due process violation in refusing authorization to site a warehouse in a residential neighborhood because record showed that city’s decision was motivated by concerns over safety, traffic, noise, and decreased property values); *Dry Creek Partners, LLC v. Ada Cty. Comm’rs.*, 217 P.3d 1282, 1291 (Idaho 2009) (describing zoning’s valid purposes as including “preventing visual blight, stabilizing neighborhoods, maintaining neighborhood property values, and preserving the character of the community”); *Lantos v. Zoning Hearing Bd.*, 621 A.2d 1208, 1211 (Pa. Commw. Ct. 1993) (“[P]revention of undue concentration of population, prevention of traffic congestion and maintenance of property values are all legitimate purposes of zoning.”).

41. See FISCHEL, *ZONING RULES!*, *supra* note 39, at 147 (describing how zoning converts public goods into private goods via exclusion); NELSON, *supra* note 39, at 4–6 (arguing that due to zoning, suburbs are properly conceptualized as part of a movement to privatize public space, akin to homeowners’ associations). I use the term “public good” here in the colloquial sense of being nonexclusive rather than the technical economists’ sense of a good that is both nonexcludable and nonrival. See MANKIW, *supra* note 25, at 218–19 (discussing different kinds of collective goods). Most municipally provided goods are “rival” insofar as they are vulnerable to congestion; the combination of being rival and nonexcludable is what creates the potential for a tragedy of the commons. Goods

consequence of zoning, “capitalized” into property values; that is, the purchase price of a home reflects not only its inherent qualities but the quality of these local resources as well.<sup>42</sup> In substance, this means that homeowners have “purchased” these resources by buying a home in the community. The influential Tiebout model of municipal finance, indeed, conceptualizes residents as “consumer-voters” who shop among neighboring communities for the most attractive set of amenities.<sup>43</sup>

Transforming a public good into a market good, of course, means that the ability to enjoy a community’s goods becomes a function of one’s ability to pay. Capitalization serves as a fee that prospective residents must pay in order to live in the community and enjoy its benefits. The amount of the fee is determined either through a market mechanism by which the price settles at the actual cost of the resource or politically by existing residents’ tolerance for new housing. Either way, those who cannot afford the fee cannot live in the community. Indeed, the fee can be seen as a way of winnowing the community’s size to the point that it can maintain its public services without excessive congestion.<sup>44</sup>

### 3. Free Riders and Fiscal Zoning

The discussion so far demonstrates that communities require some mechanism for limiting the *number* of people who may enter; home prices or rents, driven in part by zoning and capitalization, nicely serve this purpose. But there is more: many communities seek not only to limit the number of residents but also to ensure that homes are sufficiently expensive so that poor people (defined as anyone poorer than existing residents) cannot afford to live there.<sup>45</sup>

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with these two characteristics are generally referred to as common-pool resources rather than public goods. *See id.* at 218.

Interestingly, the most significant good municipalities provide, public schools, are neither public goods nor common-pool resources because it is possible to exclude students from a school once it reaches optimal size, as the popularity of private schools demonstrates. *See, e.g.,* WILLIAM A. FISCHEL, MAKING THE GRADE 219–20 (2009) [hereinafter FISCHEL, MAKING THE GRADE] (acknowledging that public schools are not classic public goods). Fischel argues that public schools are nevertheless akin to public goods if we see public schooling as providing social capital for neighbors and thus reducing the cost of coordinating the provision of true public goods. *Id.* at 219–37.

42. *See* FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 14, at 45–46 (reporting that traffic congestion, high crime rates, large public housing projects, and localized air pollution have been shown to decrease property values for nearby property owners, while growth controls, high-quality local schools, and having homeowners rather than renters as neighbors have demonstrably increased property values).

43. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418–20 (1956).

44. Determining the point at which congestion becomes excessive requires a difficult calculation. The high cost of providing municipal services means that the population must be sufficiently large so that each household’s proportionate share is not too great, but the marginal benefit of adding another resident is at some point exceeded by its cost due to congestion. *See id.* at 419–20 (discussing optimal community size).

45. *See* Fischel, *Homevoters*, *supra* note 34, at 159 (describing how communities use lot size and other zoning requirements to screen prospective residents for minimum income); Aaron J. Saiger,

This behavior, again, has an economic rationale. Zoning for population size does not solve the tragedy of the commons. Even where strict limits on population size cause expensive home prices, lower-income families may still be able to afford small homes on small lots or rental apartments in multifamily buildings. From the perspective of preexisting homeowners whose homes sit on much larger lots, this is a form of free riding that presents the tragedy of the commons in a slightly different guise. In the United States, public schools are financed in large part by the local property tax base, which is determined by the assessed value of homes in the community.<sup>46</sup> If individuals purchase small lots with small property tax assessments in towns with quality schools and a preponderance of larger homes, wealthier homeowners are forced to subsidize quality schools for poorer homeowners through their larger property tax assessment.<sup>47</sup> Of itself, such a subsidy is unobjectionable, even laudable. The concern is that absent restrictions on smaller homes, the community may become a magnet for free-riding poorer families.<sup>48</sup> Indeed, the Tiebout model suggests that it would be economically rational for lower income individuals to move to such a community to take advantage of this subsidy.<sup>49</sup> If they do so en masse, of course, the community's public schools may become congested and properties devalued.<sup>50</sup> The upshot is that if a community does not enact appropriate zoning legislation to prevent this sort of free riding, the community may have difficulty attracting residents who contribute more significantly to the tax base.<sup>51</sup> For this reason, economists such as William Fischel and Bruce Hamilton have argued that using zoning to ensure general socioeconomic homogeneity is not only rational but an essential response to the tragedy of the commons.<sup>52</sup> They refer to this practice as

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*Local Government Without Tiebout*, 41 URB. LAW. 93, 107 (2009) (explaining how zoning power gives residents "pervasive influence over the wealth of their future neighbors").

46. See *Public School Revenue Sources*, NAT'L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/programs/coe/indicator\\_cma.asp](http://nces.ed.gov/programs/coe/indicator_cma.asp) (last updated Apr. 2016) [<http://perma.cc/5Q83-VX4U>].

47. See Fennell, *supra* note 38, at 169 ("[B]ecause local public goods are funded with property taxes rather than head taxes, one could obtain a local public good at a bargain by occupying an inexpensive home in a high-service area.").

48. *Id.* at 174 ("An influx of lower-income households that increases service costs without proportionately increasing tax revenues would shift larger tax burdens onto those caught owning more expensive homes at the time of the influx.").

49. See WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 259 (1995) [hereinafter FISCHEL, *REGULATORY TAKINGS*].

50. *Id.*

51. See Fennell, *supra* note 38, at 174.

52. On this justification for zoning, see Fischel, *Homevoters*, *supra* note 34, at 159; Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 206-07 (1975). See also Saiger, *supra* note 45, at 107 (using zoning to screen for wealth "is often a sensible means for advancing local preferences for maximizing the quality of local public goods while minimizing the property tax burden of current residents").

Communities, especially large cities, often have similar fears that providing services for the poor or homeless will cause more indigent people to flock there. On one San Francisco effort to deal with this magnet effect, see Richard Thompson Ford, *Bourgeois Communities: A Review of Gerald Frug's City Making*, 56 STAN. L. REV. 231, 243-46 (2003). An obvious solution to this free-rider problem

“fiscal zoning,”<sup>53</sup> though it is often derisively called “exclusionary zoning.”<sup>54</sup>

### B. *The Sociological Perspective*

#### 1. Elinor Ostrom on the Tragedy of the Commons

The argument advanced so far is that the tragedy of the commons must be resolved through exclusion, either at the scale of the individual by converting the commons into private property or at the scale of the community by using coercive governmental authority—principally zoning—to regulate admission to and use of the commons. Interestingly, however, the Nobel Prize winning economist Elinor Ostrom has argued extensively against the conventional economic wisdom that the tragedy of the commons can only be resolved by private property rights or government coercion.<sup>55</sup> Through extensive ethnographic studies, Ostrom has demonstrated that well-organized communities with strong collective social norms can develop effective cooperative systems for sharing common resources without private property or government intervention.<sup>56</sup>

Ostrom’s research reinforces from a sociological perspective one of the central theoretical points made by economists: that a right to exclude, whether established through direct government coercion or otherwise, is essential to

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would be to disentangle the local property tax from school financing, and there is a recent trend toward property-tax equalization. *See generally* GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW 474–79 (5th ed. 2010). However, as Fischel notes, breaking this link may reduce the quality of local schools because local homeowners, and especially homeowners without children in the local schools, no longer have an incentive to maintain school quality. *See* Fischel, *Homevoters*, *supra* note 34, at 168–69. I address this point further in Section III.

53. *See, e.g.*, FISCHEL, REGULATORY TAKINGS, *supra* note 49, at 259–67.

54. *See, e.g.*, Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in its Place: Affordable Housing and Geographical Scale*, 40 *FORDHAM URB. L.J.* 1667, 1667–70 (2013).

An oft-discussed counterpoint to the “fiscal zoning” narrative is Houston, which does not have single-use zoning laws or density controls. *See* John Mixon, *Four Land Use Vignettes from Unzoned(?) Houston*, 24 *NOTRE DAME J. L. ETHICS & PUB. POL’Y* 159, 159 (2010). However, Houston does regulate land uses in other ways, including mandating off-street parking, setting minimum lot sizes, and mandating road widths and lengths, all of which effectively regulate density. *See id.* Houston also enforces private residential covenants. For an overview of Houston’s land use regulations, *see id.*; Nolan Gray, *How Houston Regulates Land Use*, *MARKET URBANISM* (Sept. 19, 2016), <http://marketurbanism.com/2016/09/19/how-houston-regulates-land-use/> [<http://perma.cc/AN2N-VBDS>].

55. *See* OSTROM, *supra* note 26, at 8–18 (criticizing views that private property or government coercion are the “only” ways to manage the commons).

56. *See id.* at 58–182 (discussing variety of case studies of successful community management of common resources); *see also* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 184–89 (1991) [hereinafter ELLICKSON, *ORDER WITHOUT LAW*] (describing how shared social norms enable cattle ranchers in rural California to resolve disputes without resort to, and often in opposition to, formal legal rules); ROBERT D. PUTNAM, *BOWLING ALONE* 287–95 (2000) [hereinafter PUTNAM, *BOWLING ALONE*] (explaining that social capital, or norms of trustworthiness and reciprocity among neighbors, enables people to effectively coordinate collective action, crediting Ostrom).

overcome the tragedy of the commons.<sup>57</sup> The shared social norms that Ostrom considers necessary to enable governance of the commons without private property or government coercion can only exist where communities strictly exclude outsiders. Otherwise, if a resource is successfully managed, it would be swamped by newcomers who are unfamiliar with the community's norms. Indeed, in reviewing what makes collective efforts to manage communal resources effective, Ostrom lists as especially important factors a small number of participants, a general homogeneity of interest, and a high probability of repeat interactions.<sup>58</sup> This state of affairs can only be achieved through rigid screening of prospective new members to ensure that the population stays stable and the community does not become too large or diverse.<sup>59</sup> As such, Ostrom notes that the communities with the most success collectively managing common resources have also been the most hostile to strangers.<sup>60</sup>

Ostrom's findings are consistent with a wealth of sociological research demonstrating that the formation and maintenance of strong social norms are dependent upon a high degree of population stability, which is itself contingent upon limiting new entrants into the community. Robert Sampson's major study of neighborhoods in Chicago, for example, found that residential stability plays a causal role in residents' ability to form trusting relationships, which can reduce negative outcomes such as crime, poverty, and so forth.<sup>61</sup> Like Ostrom, Sampson points out the importance of repeat interactions and the prospect of continued future interactions as key factors in influencing these trust relationships.<sup>62</sup> This insight makes intuitive sense, as repeated interactions enable individuals to learn a community's shared social norms and reap the consequences for respecting or disrespecting them.

If Ostrom implicitly makes the case for a community's right to exclude, she also implicitly bolsters the argument that government intervention, in the form

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57. See OSTROM, *supra* note 26, at 58–182.

58. See *id.* at 88–102.

59. It is also possible to ensure population stability by limiting the ability of community members to exit. However, as Walzer argues, limiting exit would involve an element of coercion that necessarily diminishes the coerced individuals' commitment to the community and is thus less effective than restrictions on entry. See WALZER, *supra* note 20, at 39–40. Limiting exit would, of course, as a de facto matter, also limit entry into the community.

60. See OSTROM, *supra* note 26, at 206.

61. See SAMPSON, GREAT AMERICAN CITY, *supra* note 7, at 121–48 (discussing how neighbors' willingness to help and trust each other, described as "collective efficacy," affects a wide variety of outcomes); *id.* at 157–59 (discussing relationship between residential stability and collective efficacy). For a review of Sampson's book, with a focus on the importance of his findings regarding residential stability, see Kenneth A. Stahl, *Mobility and Community: An Essay on Great American City by Robert J. Sampson*, 46 URB. L.J. 625 (2014) [hereinafter Stahl, *Mobility and Community*].

62. See SAMPSON, GREAT AMERICAN CITY, *supra* note 7, at 153 (describing how population stability is crucial to building trust because "humans will be less likely to expect engagement in acts of social control in contexts . . . where there is no expectation of future contact or where participants mistrust one another," and finding that repeated interactions, observed interactions, and awareness of potential future interactions is critical.); see also ELLICKSON, ORDER WITHOUT LAW, *supra* note 56, at 164–66, 177–83, 184–229 (proposing and then testing hypothesis that cooperation is most effective among close-knit groups in which repeat interactions are common and expected).

of zoning, is necessary to reinforce that right where strong shared social norms are absent, as they often are in modern urbanized societies. Communities may be able to independently generate social norms without government intervention in sedentary societies where people rarely move and neighbors are all part of a shared culture, such as the cattle ranchers of California's rural Shasta County vividly described by Robert Ellickson.<sup>63</sup> In urban societies with high population densities and levels of turnover, however, it is exceedingly difficult to create and maintain the strong social norms that enable collective management of community resources.<sup>64</sup> It would not be a stretch to say that one central function of local government regulation is to serve as a substitute for, or a supplement to, the collective social norms that are weakened or absent in mobile urban societies. This has been evident since the rise of the modern American city, when pioneering sociologists like Louis Wirth observed that "formal control mechanisms" like traffic lights, zoning regulations, and occupational codes of conduct "furnish the substitutes for the bonds of solidarity that are relied upon to hold a folk society together."<sup>65</sup> Following in the footsteps of sociologists like Wirth and Sampson, legal scholars including Dan Kahan and Tracey Meares argue that city governments can use regulatory policies, such as curfews and gang injunctions, to bolster weakened social norms in inner-city communities.<sup>66</sup> More to the point, considering the importance of population stability to the formation of social norms, William Simon has argued that local governments could strengthen social norms in lower-income neighborhoods through rent control, restrictions on condominium conversions, and other mechanisms to ensure population stability.<sup>67</sup> Notably, insofar as these mechanisms work to exclude

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63. See ELLICKSON, *ORDER WITHOUT LAW*, *supra* note 56, at 15–120.

64. In *Saving the Neighborhood*, a fascinating book about the rise and demise of racially restrictive covenants, Carol Rose and Richard Brooks argue that such covenants were not commonplace in stable neighborhoods with long-standing residents because social norms were sufficiently strong to ward off fears of white flight; racially restrictive covenants were primarily used in neighborhoods with high population turnover where neighbors had little familiarity with each other and thus little sense of whether they could trust each other. However, this very problem of lack of trust made enforcement of covenants extremely difficult, and covenants were soon largely displaced by (facially neutral) zoning laws. See RICHARD R. W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD* 8, 25, 96 (2013).

65. See Louis Wirth, *Urbanism as a Way of Life*, in *CLASSIC ESSAYS ON THE CULTURE OF CITIES* 143, 152 (Richard Sennett ed., 1969).

66. See, e.g., Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 *GEO. L.J.* 1153, 1160–61 (1998); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 *LAW & SOC'Y REV.* 805, 817–21 (1998); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 *U. CHI. LEGAL F.* 197, 199.

67. See, e.g., WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT* 93–95 (2001) (explaining that rent control is "a critical component" of community economic development, "especially where gentrification exerts strong pressure"); Frug, *Decentering*, *supra* note 19, at 289–90 (stating that urban residents fear gentrification "as a destruction of their community" and seek to use condominium conversion legislation "to preserve comparatively homogeneous communities"); Margaret Jane Radin, *Residential Rent Control*, 15 *PHIL. & PUB. AFF.* 350, 369 (1986) (arguing that rent control is a mechanism for preserving "spiritual community").

outsiders for the sake of preserving an existing community, they are functionally the equivalent of zoning regulations.<sup>68</sup> Thus, it once again is evident that the management of common resources requires some collective right to exclude, and where a community's internal social norms are insufficiently strong to enforce this right independently, some form of government-mandated exclusion such as zoning becomes necessary.

## 2. Race, the World of Strangers, and the "Urban Village"

Ostrom's work hints at a darker side to the case for exclusion. The economic argument for exclusion is largely based on the need to screen prospective residents for income. But what about the pervasive pattern of segregation by race and ethnicity that is the core concern of the Fair Housing Act? Race only figures into the economic account insofar as discrimination based on economic status may, *de facto*, amount to racial discrimination. Ostrom's argument, however, indicates a need to screen prospective residents not only for income but expressly for conformity to particular social conventions, which could easily become a proxy for racial or ethnic discrimination.<sup>69</sup> Indeed, empirical research by sociologist Robert Putnam concludes that ethnically and racially diverse communities have a weaker ability to develop "social capital," the norms of reciprocity and trustworthiness that help communities overcome tragedies of the commons.<sup>70</sup> Putnam finds that ethnic and racial diversity within communities is associated with lower trust, lower investment in public goods, lower group cohesion, less cooperation, and "[l]ess expectation that others will cooperate to solve dilemmas of collective action."<sup>71</sup>

The sociological case for racial and ethnic segregation becomes more explicit if we look beyond the tragedy of the commons. Urban sociologists have shown that a community of shared norms, enforced by exclusion, has an essential function in modern society aside from managing common resources: it enables people to survive in an impersonal urban "world of strangers."<sup>72</sup> In the premodern world, individuals rarely came into contact with strangers. When they did, strangers were banished, killed, or incorporated into the community so that they ceased to be strangers.<sup>73</sup> The modern city, on the other hand, can practically

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68. See Frug, *Decentering*, *supra* note 19, at 287 (explaining that condominium conversion legislation, like zoning, is designed "to preserve an existing community by excluding outsiders"); Radin, *supra* note 67, at 379 (stating that rent control, like exclusionary zoning, has "the effect of keeping out would-be entrants"); see also SIMON, *supra* note 67, at 73–75 (comparing rent control to suburban zoning).

69. See OSTROM, *supra* note 26, at 15–18 (describing through a simulation how societies have an incentive to push for certain types of social conformity).

70. Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 142–43, 149–50 (2007) [hereinafter Putnam, *Diversity and Community*].

71. *Id.*

72. See, e.g., LYNN LOFLAND, *A WORLD OF STRANGERS* 66–91, 118–37 (1973).

73. See, e.g., *id.* at 4–10.



be defined as the coming together of strangers who stay strangers.<sup>74</sup> Our communities are densely populated and highly mobile, and individuals are now able to engage in the essential functions of their lives—work, leisure, religion, transportation—without having to form lasting relationships with the vast majority of people they confront every day. In some ways, this “being together of strangers” is the very reason cities exist. It allows us to find people who share our tastes and interests, to experience new ideas and cultures, and to enjoy the thrill of the crowd and the pleasures of anonymity.<sup>75</sup> It makes exchange more efficient by matching consumers with producers and labor with capital.<sup>76</sup> From an economic perspective, cities provide the advantages of “agglomeration” that enable innovation through economies of scale and the sharing of ideas.<sup>77</sup>

But the size, impersonality, and diversity of a city also cause problems. Constantly being around strangers from different normative communities can be disorienting and unsettling, and it can lead to exploitation, harassment, and violence, or at least the fear of it. Putnam’s research shows that a racially and ethnically diverse community is associated not only with lower levels of trust and cooperation, but also with higher population turnover and less civic participation, as well as less confidence and engagement in government, fewer friends, and less happiness.<sup>78</sup> Conversely, ethnically and racially homogeneous groups have higher levels of social capital, which confers all sorts of positive impacts on communities, including safer neighborhoods, better schools, healthier children, and more overall satisfaction with life.<sup>79</sup>

As such, urban residents often simultaneously desire both the intimacy of a community of shared values and the impersonality of the exciting world of strangers.<sup>80</sup> According to the sociologist Lyn Lofland, city dwellers manage this tension by spatially ordering the city; specifically, they create enclaves or “urban villages,” populated by individuals with shared norms and cultural backgrounds, to buffer themselves against the impersonality and diversity of the city at large.<sup>81</sup> As Lofland writes, “[w]e can live in the world of strangers only because we have

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74. See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 237 (1990) (defining city life as “the being together of strangers”).

75. See, e.g., *id.* at 236–41.

76. See RICHARD SENNETT, *THE FALL OF PUBLIC MAN* 23 (1974) (“Out in public was where moral violation occurred and was tolerated; in public one could break the laws of respectability.”); WIRTH, *supra* note 65, at 150 (“[The city] has brought together people from the ends of the earth because they are different and thus useful to one another, rather than because they are homogeneous and like-minded.”).

77. David Schleicher, *The City as a Law and Economics Subject*, 2010 U. ILL. L. REV. 1507, 1509 (explaining agglomeration economies in large cities).

78. PUTNAM, *BOWLING ALONE*, *supra* note 56, at 400; Putnam, *Diversity and Community*, *supra* note 71, at 142–43, 149–50.

79. See PUTNAM, *BOWLING ALONE*, *supra* note 56, at 400 (“[S]ocial capital is inevitably easier to foster within homogeneous communities . . .”).

80. See SENNETT, *supra* note 76, at 294–95 (explaining the assumption that “impersonality is a summation, a result, a tangible effect of all the worst evils” of modernity that makes “face-to-face contacts in a territorial community seem so important”).

81. LOFLAND, *supra* note 72, at 66–91, 118–37.

found a way to eliminate some of the ‘strangeness.’”<sup>82</sup> This does not mean that urban dwellers avoid all interactions with strangers but that their interactions with strangers are made less threatening because strangers can be identified based on their location.<sup>83</sup> Maintaining separate spaces for different groups of people means, as in Ostrom’s case studies, that there must be some mechanism for excluding those strangers who do not share the community’s norms, and Lofland stresses the importance of zoning and policing to forcibly maintain the separation of spaces.<sup>84</sup> Hence, exclusion and segregation of distinct normative communities is not just a luxury but a sociological imperative to manage life in a world of strangers.

A common thread runs through both the sociological and economic justifications for a collective right to exclude: mobility. The ease of mobility in modern society breaks down the folk community and introduces the world of strangers, which catalyzes a desire to create sedentary communities of shared values.<sup>85</sup> Likewise, the ease of mobility threatens to create a tragedy of the commons by inducing large numbers of strangers to move to communities with desirable resources. On both accounts, the solution is to diminish urban mobility through exclusion.<sup>86</sup>

### C. *The Political Theory Perspective*

Political theory provides yet another rationale for a collective right to exclude. Large, diverse communities are often described as “pluralist,” meaning that they tend to feature a diversity of interest groups with competing demands on city hall.<sup>87</sup> Homeowners desire lower property taxes and strict limits on new development; lower-income communities want more spending on infrastructure, schools, and social welfare; public sector unions fight for higher wages and better benefits; businesses want tax breaks; developers want a more efficient and less expensive land-use entitlement process, and so on.<sup>88</sup> This diversity of interests leads to conflict over municipal priorities and the allocation of scarce local funds.<sup>89</sup> If that conflict becomes sufficiently serious, it can fray the social fabric of the community by creating a zero-sum game in which some interest groups

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82. *Id.* at 176.

83. *See id.* at 82–84.

84. *See id.* at 90–91 (identifying use of zoning and policing as means of maintaining spatial order in the city).

85. *See* Wirth, *supra* note 65, at 156–57 (finding that increasing mobility of urban dweller breaks down class structure and leads “toward the acceptance of instability and insecurity in the world at large as a norm”).

86. Stahl, *Mobility and Community*, *supra* note 61, at 650–51.

87. The classic account is ROBERT DAHL, *WHO GOVERNS?* (1961). *See also* FISCHEL, *REGULATORY TAKINGS*, *supra* note 49, at 328 (“[T]he biggest cities are apt to have pluralistic politics because of their large population and resulting heterogeneity of interest groups.”).

88. For an illuminating introduction to urban politics, see DENNIS R. JUDD & TODD SWANSTROM, *CITY POLITICS: PRIVATE POWER AND PUBLIC POLICY* (4th ed. 2004).

89. *See* NELSON, *supra* note 39, at 393–94 (describing how diversity can lead to conflict in neighborhood associations).

win at the expense of others, causing resentment and dissatisfaction with municipal government.<sup>90</sup> Worse, interest group politics may enable “rent seeking,” whereby well-organized groups (and politicians) siphon a disproportionate share of public wealth for themselves.<sup>91</sup> Indeed, in a pluralist community, the will of the majority is often frustrated; a venerable body of research demonstrates that interest group politics often favor smaller, more intense, and well-organized groups over larger, more diffuse groups.<sup>92</sup>

In the absence of consensus among a city’s various constituencies, moreover, democracy may give way to bureaucratic control as decision-making power is increasingly delegated to unelected and unaccountable planners. According to F.A. Hayek, the difficulty involved in reaching agreement on how to rank values in a heterogeneous society “will inevitably cause dissatisfaction with democratic institutions” and lead to the conclusion that “if efficient planning is to be done, [it] must be ‘taken out of politics’ and placed in the hands of experts, permanent officials or independent autonomous bodies.”<sup>93</sup> In practice, ever since the 1970s, municipal governments have increasingly relied on appointed planning commissions to make major land-use decisions precisely because they have found it difficult to balance the need for affordable housing against both the political pressure to reduce growth and the concern about protecting environmental resources.<sup>94</sup>

Aside from interest group diversity, racial and ethnic diversity in a community may independently cause government to be less efficient. Putnam reports that racially and ethnically diverse communities feature lower levels of investment in public goods, less confidence in government, less confidence that one’s own group has influence in government, and lower voter registration.<sup>95</sup>

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90. Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 506 (1997) [hereinafter Briffault, *Sublocal Structures*] (explaining that cities’ greater diversity vis-à-vis suburbs is likely to cause “greater heterogeneity of preferences” and higher degree of dissatisfaction among city residents).

91. See NELSON, *supra* note 39, at 411–14; Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 89 (1998) (noting that with increasing size and diversity, cities are more vulnerable to influence by “rent-seeking groups such as political machines, municipal unions, public works lobbies, and downtown business interests”).

92. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 53–57 (1965) (postulating that small groups of intensely interested individuals can more effectively organize as interest groups than large groups whose members are each less intensely interested).

93. F.A. HAYEK, *THE ROAD TO SERFDOM* 65, 69–70 (1944).

94. See, e.g., Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 900–01 (1976) (asserting that adherence to comprehensive plan for land use development is increasingly important in reconciling three objectives—affordable housing, growth management, and environmental protection).

95. Putnam, *Diversity and Community*, *supra* note 71, at 142, 149–50; see also Jacob S. Rugh & Jessica Trounstine, *The Provision of Local Public Goods in Diverse Communities: Analyzing Municipal Bond Elections*, 73 J. POL. 1038, 1039 (2011) (collecting literature on lower levels of public investment in diverse cities). Interestingly, Putnam also reports that in diverse communities, people are more likely to be informed about politics and to engage in political activities outside the ordinary process of voting, such as protest rallies. See Putnam, *Diversity and Community*, *supra* note 71, at 150. As I discuss *infra* note 180, Rugh and Trounstine present evidence that spending on public goods is

Many of these problems can be avoided, it seems, if a community's population is homogenized in terms of interest and socioeconomic status and its size limited. Studies show that smaller, more homogeneous communities are "majoritarian" rather than pluralist; that is, city government yields to the will of a stable majority.<sup>96</sup> According to Fischel, small, homogeneous communities follow the so-called median voter rule, meaning that the homeowner with the median income or home value receives precisely the public services and taxes he or she demands, with nothing lost to rent-seeking or interest group redistribution.<sup>97</sup> It stands to reason, furthermore, that the more homogeneous the population, the more likely that voters will have a fairly uniform set of preferences that can be satisfied without interest group conflict and without creating a resentful class of "losers."<sup>98</sup>

Establishing and maintaining a small community of relatively like-minded individuals naturally requires some mechanism for exclusion; otherwise more people with perhaps divergent interests may enter. Zoning, again, serves this function. We have seen already that zoning is designed to ensure a community's optimal size and homogeneity.<sup>99</sup> Screening prospective residents in this way has an economic function, but it also has a political function. By guaranteeing that prospective residents have a similar economic status to existing residents, zoning creates a general homogeneity of interest that makes government more efficient.<sup>100</sup>

#### D. Community and Closure

One conclusion we can draw from all three of the accounts above is that exclusion is a *sine qua non* of any community. To include everyone who wishes to be part of a community would be to destroy the community.<sup>101</sup> Although, as I address further in Section III, we can articulate a cosmopolitan vision of

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actually higher in diverse than in nondiverse communities, suggesting a flaw in the political theory argument against diverse communities.

96. FICSHL, REGULATORY TAKINGS, *supra* note 43, at 105–07 (contrasting majoritarian with pluralist political system), 328–29 (describing how small suburbs are majoritarian and large cities are pluralistic).

97. *Id.* at 255–57.

98. See Fischel, *Homevoters*, *supra* note 34, at 164 (arguing that in homogeneous communities, "the risk of factional voting is reduced" because "[i]f everyone has a similar amount of wealth, the temptation to redistribute it is less"); NELSON, *supra* note 39, at 392–94 ("The more homogeneous a neighborhood is, the simpler the workings of the political process will be.").

99. See *supra* notes 28–54 and accompanying text; see also FICSHL, REGULATORY TAKINGS, *supra* note 43, at 259–62 (discussing use of fiscal zoning to ensure homogeneity in small suburbs).

100. See Fennell, *supra* note 38, at 175–76 (observing that communities may use land use regulations to "screen" prospective voters to ensure consistency with the "prevailing preferences within the jurisdiction"); NELSON, *supra* note 39, at 420–21 (arguing that zoning creates a "de facto property qualification" for residence that ensures homogeneity of interest and efficient government).

101. If we insist on an absolute principle of inclusiveness, the political scientist Robert Dahl argues, "all of humanity" must then be included within the community, a proposition that even the most strident advocates of inclusion do not insist upon. ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY 98 (1982).

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community in which diversity and inclusiveness are virtues rather than drawbacks, even in cosmopolitan communities exclusion at some scale is essential. According to Walzer, a leftist who advocates a capacious understanding of membership within a nation-state, recognition of an unfettered right of entry would be unpalatable because it would “tend over time to annul the historical particularity” of the state.<sup>102</sup> As he writes, “The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life.”<sup>103</sup>

Yet, if community depends on “closure,” closure also complicates the realization of community. For while exclusion creates a community among those included, what happens to those excluded? To what community do they belong? This may initially seem a question of small concern to the members of “our” community, at least until a neighboring town approves a hazardous waste site near our border or opposes widening a portion of a county highway that would ease regional traffic congestion. Suddenly, the world outside our community becomes of great concern, but we have no claim against neighboring communities because they, like ourselves, have a right to closure. In a densely populated society, one group’s assertion that it needs closure to build community will inevitably conflict with another group’s similar claim, and in the long run, if every community goes it alone, everyone loses.

The conventional justifications for exclusion elide this difficulty by misreading the scale of community. That is to say, they treat each self-defined community as an autonomous whole, rather than as a fragment of a larger entity that is itself a community. As we shall see, reexamining the three justifications for exclusion in light of this observation casts doubt upon the entire logic of exclusion.

## II. INTERROGATING THE LOGIC OF EXCLUSION

### A. *The Economic Perspective*

#### 1. Interlocal Externalities

The economic argument, as we recall, is that in order for communities to prevent the tragedy of the commons that occurs when collective resources such as roads, schools, or open space become congested, they need the ability to exclude outsiders.<sup>104</sup> This collective right to exclude is a necessary corollary to the individual right to exclude under a regime of private property rights because the individual right to exclude simply compounds the tragedy of the commons: absent zoning, each individual property owner has the freedom to build (housing, for example) at a higher density than would be optimal given the community’s resources, and there is no incentive for any property owner to consider the external costs of such high-density development. Government

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102. See WALZER, *supra* note 20, at 48.

103. *Id.* at 39.

104. See *supra* Part I.A.

intervention, in the form of zoning, mitigates the externalities of private property ownership.

Herein lies the problem. Replacing an individual with a communal right to exclude does not actually solve the tragedy of the commons inherent in private property ownership but merely displaces it from the individual to the community level. Instead of individuals externalizing the costs of their development onto neighboring property owners, communities externalize the costs of their activities onto neighboring communities.<sup>105</sup> One town's decision to approve a new shopping center, for example, can siphon retail customers from businesses in the next town over; one community's decision to place a cap on new housing units can force home prices up throughout the region, and so on.<sup>106</sup> Communities are generally under no obligation to consider the impacts of their activities on neighboring communities, and given each community's need to maximize its own tax base in order to provide constituents with services at the lowest possible tax rate, each has a strong incentive to act in its own self-interest.<sup>107</sup> Thus, to the extent that municipal zoning substitutes a collective right to exclude for an individual right to exclude, it simply replicates the externality problem inherent in the individual right to exclude at a higher scale.

The most pernicious aspect of this interlocal externality problem is not an overabundance of auto malls and shopping centers (though this is hardly cause for celebration) but pervasive segregation by race and income. As I have observed, realization of the economic and sociological objectives of exclusion requires screening of prospective community members based, at least as a de facto matter, on income and race.<sup>108</sup> Under the Tiebout model, this screening would not be problematic if minorities and low-income individuals could simply shop around for other communities that satisfy their "preferences" (the economists' euphemism for ability to pay). But once one community erects zoning barriers to prevent poor people from moving in, the demand for affordable housing then shifts to neighboring communities, which must erect similar barriers to prevent their own resources from becoming congested.<sup>109</sup> The cumulative result is that in most metropolitan areas, a preponderance of communities have zoning laws that largely exclude poor people and minorities.<sup>110</sup> As such, zoning has historically played a major role in creating and

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105. See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1133-41 (1996) [hereinafter Briffault, *Boundary Problem*] (listing numerous problems resulting from current system of local government, in which tiny municipalities have the ability to enact land use regulations without consideration of the regional impacts of their actions).

106. See GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 206-07 (2008) (discussing some consequences of metropolitan fragmentation).

107. See *id.* at 31-43, 99-111, 150-51 (2008) (discussing municipal incentives to engage in parochial behavior); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 355-56 (1990).

108. See *supra* notes 45-54, 71 and accompanying text.

109. See Briffault, *Boundary Problem*, *supra* note 106, at 1134 ("When one locality acts to exclude a use, its neighbors may feel compelled to adopt comparable regulations to protect themselves from the growth they fear will be diverted to them by the initial locality's regulation.").

110. *Id.*

perpetuating a pattern of de facto segregation in which small, affluent, largely white suburbs have been able to maintain their exclusivity with zoning barriers, while people excluded from such communities, usually poor people of color, remain locked into deteriorating urban ghettos.<sup>111</sup> As minorities and the poor have increasingly moved into older, first-ring suburbs in recent years, the pattern has simply repeated itself as the affluent have either moved further out to wealthier and more exclusive communities or back to the cities, leaving behind segregated suburbs.<sup>112</sup>

## 2. The Endowment Effect

Substituting a collective for an individual right to exclude presents an additional problem. Because the right to exclude is often seen as the essence of property,<sup>113</sup> zoning tends to be perceived as a collective property right belonging to the community of homeowners—an enlarged version of the homeowner’s individual property right.<sup>114</sup> Conceptualizing zoning as a “right” rather than a discretionary government benefit, however, can cause a perverse “endowment effect” that makes homeowners act in economically irrational ways. Research in cognitive psychology shows that individuals tend to value things they own at much higher than market value merely because they own them.<sup>115</sup> The belief that homeowners “own” their zoning may therefore irrationally predispose them to oppose any changes in the character of their communities, particularly new housing that threatens property values. Indeed, Fischel observes that homeowners tend to be highly risk averse; in other words, rather than rationally calculating the expected value of new development (the likelihood that a particular development will be a net benefit to the community), homeowners think almost exclusively of the potential negative impacts<sup>116</sup> Hence, one signature feature of NIMBYism is homeowners’ implacable hostility to almost

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111. See GERALD E. FRUG, *CITY MAKING* 130 (1999) [hereinafter FRUG, *CITY MAKING*] (describing role of suburban zoning and other legal mechanisms in creating black ghettos); Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1838 (2003) [hereinafter Schragger, *Consuming Government*] (“The current extreme segregation of American metropolitan regions owes a great deal to the power of localities to restrict in-migrants based on income.”).

112. See FRUG, *CITY MAKING*, *supra* note 112, at 130 (noting that black suburbs are as segregated as inner cities); Alana Semuels, *White Flight Never Ended*, CITYLAB (July 30, 2015), [http://www.citylab.com/housing/2015/07/white-flight-never-ended/400016/?utm\\_source=SFTwitter](http://www.citylab.com/housing/2015/07/white-flight-never-ended/400016/?utm_source=SFTwitter) [<http://perma.cc/6TE2-25UU>].

113. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (holding that right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property”).

114. See *supra* notes 39–40 and accompanying text; Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1260–63 (2008) (discussing how zoning transformed suburb into an “enlarged single-family home”).

115. See, e.g., Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 385–391 (1991) (discussing endowment effect).

116. FISCHEL, *HOMEVOTER HYPOTHESIS*, *supra* note 14, at 9–10.

any new development, regardless of its anticipated benefits.<sup>117</sup>

This aversion to change skews the economic logic of exclusion. If the proffered justification for exclusion is to prevent the tragedy of the commons, exclusion should be precisely tailored to achieve the optimal number of residents: the number at which the marginal cost of providing city services to an additional resident (in terms of congestion) exceeds the marginal benefit of adding an additional resident (in terms of the economies of scale). In his famous paper, Charles Tiebout assumed that municipalities attempted to achieve an economically optimal size.<sup>118</sup> In practice, however, municipal governments rarely seek to obtain the economically optimal number of residents because they are beholden to existing residents who oppose most new development without regard to economic considerations.<sup>119</sup> As a result, many suburban communities are zoned to make huge swaths of land unavailable for development.<sup>120</sup>

### B. *The Sociological Perspective*

#### 1. “Municipal Primogeniture”: Whose Right to Exclude?

If the principal flaw in the economic argument for a collective right to exclude is that it simply replicates the private property externality problem that it presumes to solve, a similar flaw bedevils the sociological rationale for exclusion. This argument, we recall, holds that survival in our modern urban world of strangers would be impossible without some ability to seek refuge within a community of shared social norms, a community that can only exist if it has a right to exclude outsiders.<sup>121</sup> The problem here is that every community is necessarily surrounded on all sides by other would-be communities.<sup>122</sup> Thus, in order for one community to be exclusive, others must be inclusive of those displaced. As Gerald Frug writes: “Suburban exclusiveness is dependent on the neighboring cities’ refusal to exclude; some places have to be open for others to be closed.”<sup>123</sup> This is another way of saying that the externalities of a community’s decisions affect neighboring communities. Where one community can simply refuse to allow land uses that must be located somewhere in the

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117. See, e.g., Peter Margulies, *Building Communities of Virtue: Political Theory, Land Use Policy, and the ‘Not in My Backyard’ Syndrome*, 43 SYRACUSE L. REV. 945, 951–54 (1992) (explaining homeowners’ opposition to new development and the many ostensible rationales they proffer).

118. See Tiebout, *supra* note 43, at 419–20 (“[C]ommunities below the optimum size seek to attract new residents to lower average costs. Those above optimum size do just the opposite. Those at an optimum try to keep their populations constant.”).

119. See, e.g., Margulies, *supra* note 117, at 956–57.

120. In the famous *South Burlington County NAACP v. Township of Mount Laurel* case, the trial court found that one reason why affordable housing was so scarce in the suburban community of Mount Laurel, New Jersey, was because about one-third of the community’s entire acreage was vacant due to restrictive zoning. See *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 718–22 (N.J. 1975).

121. See *supra* Part I.B.

122. See *supra* Part I.C.

123. Frug, *Decentering*, *supra* note 19, at 284.



region, it dumps the burden onto neighboring communities and creates what Richard Babcock termed “municipal primogeniture,” in which the first communities to exclude undesirable land uses have absolute freedom to do so, but the remaining communities are then forced to absorb the regional demand simply because they have “come too late to the planning banquet.”<sup>124</sup>

A New Jersey Supreme Court decision provides a strange example of this phenomenon. The court held that although the First Amendment requires communities’ zoning laws to accommodate adult-oriented uses, a community may nevertheless zone to exclude adult uses if nearby communities make such accommodations.<sup>125</sup> On its face, the ruling gives communities the power to preserve their unique cultural identities and preferences by choosing whether to allow adult uses,<sup>126</sup> but in reality, it makes one community’s right to exclude adult uses contingent on other communities permitting them. By implication, the only communities in a metropolitan region that could ban adult uses would be those that act first. In short, exclusion makes one normative community possible only by making another impossible.

## 2. The Vicious Circle of Withdrawal

A second problem with the sociological argument for exclusion is that although it presents exclusion as enabling communities to cope with life in a world of strangers, groups that create a closed community of shared values eventually grow to reject engagement with the larger, more heterogeneous community, which they see as corrupt and alien. Richard Sennett calls this a form of “pseudo-speciation,” in which “a tribe will act as though it is the only assemblage of human beings who are really human.”<sup>127</sup> For Sennett, the desire to be part of an intimate community of shared impulses and feelings “has the special role of reinforcing the fear of the unknown, converting claustrophobia into an ethical principle.”<sup>128</sup> Rather than focusing its efforts on the provision of common goods or engagement with a wider community, “[t]he only actions the community undertakes are those of emotional housekeeping, purifying the community of those who really don’t belong because they don’t feel as the others do.”<sup>129</sup> As Putnam writes, there is a tension between “bonding” social capital (the social ties among members of homogeneous groups) and “bridging” social capital (the social ties between groups), in that increasing one may decrease the

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124. BABCOCK, *supra* note 37, at 150.

125. See *Borough of Sayreville v. 35 Club, L.L.C.*, 33 A.3d 1200, 1203 (N.J. 2012) (holding that it did not violate First Amendment to exclude adult uses from community provided there are adequate alternative sites elsewhere in the metropolitan region, including out of state).

126. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 87 (1981) (Burger, C.J., dissenting) (arguing that excluding adult uses from small residential village is constitutional because “[c]itizens should be free to choose to shape their community so that it embodies their conception of the ‘decent life,’” and noting that municipality at issue “is a small community on the periphery of two major urban centers where this kind of entertainment may be found acceptable”).

127. SENNETT, *supra* note 76, at 308.

128. *Id.* at 310.

129. *Id.* at 311.

other.<sup>130</sup> Withdrawal by a community becomes a vicious circle in which nonexposure to strangers breeds fear of the other and then further withdrawal. Needless to say, this fear of the other has played a significant role in creating and perpetuating the racial and ethnic segregation of our metropolitan regions.<sup>131</sup> Lurid and often inaccurate depictions of inner-city crime spurred and legitimized white flight to the suburbs.<sup>132</sup> And it is no surprise that once in thrall to such a self-centered view of the world, communities feel free to indulge their own parochial fantasies with little concern for the external costs they impose on neighboring communities.

### C. *The Political Theory Perspective*

Like the economic and sociological arguments for exclusion, the political theory justification also fails on account of intercommunity externalities. As we recall, the argument from political theory holds that exclusion is efficient because it homogenizes the electorate and thereby reduces the interest group conflict and rent seeking that characterize more diverse communities. Once again, however, the fact that communities can easily externalize the costs of their activities onto neighboring communities undermines the political theory argument. There is little difficulty gaining consensus among voters on, say, excluding an undesirable land use when doing so shifts the burden for accommodating that use onto people who don't get to vote—that is, people who live in a neighboring community. In most states, only residents within a community have the right to vote, and the Supreme Court of the United States has affirmed that even where nonresidents are greatly affected by a city's actions, the Constitution does not require that the franchise in municipal elections be extended to nonresidents.<sup>133</sup>

Thus, the supposed efficiency advantages of homogeneous community governance are an optical illusion. Municipal governance only appears to be efficient if we artificially truncate our perspective and envision the municipality as a self-contained, isolated entity that has no relationship with or impact upon neighboring communities.<sup>134</sup> If we expand our view so that we can see the

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130. See PUTNAM, *BOWLING ALONE*, *supra* note 56, at 400 (noting tension and observing that because social capital is easier to create among homogeneous groups, “emphasis on its creation may inadvertently shift the balance in society away from bridging social capital and toward bonding social capital”).

131. See FRUG, *CITY MAKING*, *supra* note 112, at 129–32 (discussing how fear of blacks as the “other” has contributed to racial segregation).

132. See *id.*

133. In *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69–70 (1978), the Court frankly acknowledged that municipal actions frequently have substantial impacts on individuals outside the municipality's borders, but then used that very logic to conclude that states could legitimately limit the franchise to municipal residents because it would be administratively impractical to extend the vote to all persons affected by municipal decisions. For a discussion of *Holt*, see Kenneth A. Stahl, *Local Government, “One Person, One Vote,” and the Jewish Question*, 49 HARV. C.R.-C.L. L. REV. 1 (2014).

134. See, e.g., Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 969 (1991) (noting that the Tiebout model assumes “externalities do not exist”); Schragger, *Consuming Government*, *supra* note

interdependent relationship among municipalities within a metropolitan region, it becomes clear that municipal government is extremely inefficient because it is so easy for one community to externalize costs onto neighbors who are not enfranchised in that community's elections.<sup>135</sup> In the classic public choice text *The Calculus of Consent*, James Buchanan and Gordon Tullock argue that to determine the optimal reach of the voting public, we must balance the efficiency gains realized from homogenizing the interests of the voters against the spillover costs that so circumscribing the electorate imposes on people who are disenfranchised.<sup>136</sup> As this discussion reveals, the substantial externalities resulting from the fragmentation of metropolitan regions into dozens of small municipalities greatly outweigh the benefits of shrinking the electorate.

### III. BUILDING INCLUSIVE COMMUNITIES

All three arguments for exclusion make some version of the same error. To paraphrase Lewis Mumford's indictment of suburbia, they mistake the part for the whole, the fragment of community for community itself.<sup>137</sup> A likely explanation for this mistake lies in the conventional understanding of the term "community." People associate community with the intimate face-to-face relationships of the idealized small town.<sup>138</sup> Perceived as such, community becomes a tautology: a large, diverse population is deemed inconsistent with community because community has already been defined as a small and homogeneous group. There is, though, another view of community, championed by urbanists such as Iris Young and Frug—a cosmopolitan view of community in which difference is celebrated and impersonal relations embraced. As Young describes this vision, "In public life the differences remain unassimilated, but each participating group acknowledges and is open to listening to the others. The public is heterogeneous, plural, and playful, a place where people witness and appreciate diverse cultural expressions that they do not share and do not fully understand."<sup>139</sup>

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112, at 1831 (critiquing William Fischel's *The Homevoter Hypothesis*, arguing that "Fischel has no place in his political economy for interlocal or regional effects").

135. See Schragger, *Consuming Government*, *supra* note 112, at 1830–31 ("The existence of externalities means that the quality or availability of 'local' amenities is often beyond the control of a specific local government or the homeowners who vote within it.").

136. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 113–14 (1962) (arguing that in choosing optimum size of decision-making group, the group "should be extended so long as the expected costs of the spillover effects from excluded jurisdictions exceed the expected incremental costs of decision-making resulting from adding the excluded jurisdictions").

137. See LEWIS MUMFORD, *THE CITY IN HISTORY* 495 (1961) ("But too soon, in breaking away from the city, the part became a substitute for the whole, even as a single phase of life, that of childhood, became the pattern for all the seven ages of man.").

138. See FRUG, *CITY MAKING*, *supra* note 112, at 57 (describing the "romantic" notion of community and its association with the suburbs); YOUNG, *supra* note 74, at 236–37 (discussing traditional "antiurban" view of community).

139. YOUNG, *supra* note 74, at 241; see also FRUG, *CITY MAKING*, *supra* note 112, at 141 ("City life has not demanded a feeling of solidarity or affection or acceptance. It has held out no promise of commonality, no sense that persuasion can bring those with opposed views together. What it has

During the postwar decades, a time of urban disinvestment and white flight to the suburbs, Young's cosmopolitan vision of community would undoubtedly have seemed utopian. In recent years, however, affluent and middle-class individuals have moved in increasing numbers into the core cities they long ago abandoned, and suburbs as well have become more diverse.<sup>140</sup> Indeed, the demarcation between cities and suburbs has blurred as many communities now have the size and diversity of cities along with the low-density residential character and car-centered culture of suburbs.<sup>141</sup> While it would be premature to write the obituary for suburbs, it is undoubtedly true that many more Americans now live in—and desire to live in—diverse communities than they did a generation ago.<sup>142</sup> In turn, many cities are seeking to become more diverse by, for example, enacting minimum wage ordinances that affirmatively entice lower-income individuals to settle there.<sup>143</sup>

In light of these changes, it appears that the cosmopolitan view of community as the celebration of difference may be more than just a utopian fantasy. Indeed, as the next Part demonstrates, today's diverse cities cast further doubt on the three traditional justifications for exclusion. If economics, sociology, and political theory can all make the case for exclusive communities, they can make the case equally well in favor of our diverse cities. At the same time, however, such cities present a paradox: while many diverse cities appear integrated at the city level, they can be highly segregated at the sublocal or neighborhood scale. This paradox raises the normative question, which the remainder of this Section takes up, of what inclusion really means. Is a city "inclusive" if it is diverse at the municipal level but homogeneous at the neighborhood level? Or must each neighborhood be a demographic microcosm of the city as a whole? I argue that, in fact, our cities can be diverse without being entirely segregated, and they can be inclusive without obliterating the distinctiveness of sublocal communities. Inclusion and exclusion are complementary rather than competing aspects of a diverse, cosmopolitan, and inclusive community. The challenge of inclusion is how to strike the balance between inclusion and exclusion in order to achieve as much as possible of the former while conceding as little as necessary to the latter. I conclude with some thoughts on how to do so.

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suggested instead is that one needs to learn how to live with people—and to work with people—who are not like oneself.”).

140. See, e.g., FRUG, *CITY MAKING*, *supra* note 112, at 97–99 (discussing increasing diversity in suburbs); JUDD & SWANSTROM, *supra* note 88, at 346–69 (discussing movement back to central cities).

141. See, e.g., FRUG, *CITY MAKING*, *supra* note 112, at 97–100 (describing increasingly blurred city/suburb divide); JON C. TEAFORD, *POST-SUBURBIA* 1–2 (1997) (documenting changing nature of suburbia).

142. See JUDD & SWANSTROM, *supra* note 88, at 346–69 (discussing increasing population in diverse cities).

143. See, e.g., Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1058 (2007) [hereinafter Gillette, *Local Redistribution*].

A. *Diversity and Inclusion*

1. The Economic Perspective

The tragedy of the commons dictates that unless communities with quality amenities vigorously exclude outsiders, they will attract lower-income individuals who then congest and degrade those amenities.<sup>144</sup> As I just mentioned, however, many communities are now deliberately making themselves attractive to the poor through, for example, minimum wage (or “living wage”) laws. As Clayton Gillette writes, these laws appear to cut against the conventional economic view that local efforts to redistribute wealth will cause the affluent to flee and communities to become “welfare magnets.”<sup>145</sup> The enactment of municipal living wage laws challenges the very idea that municipal services present a tragedy of the commons that only exclusion can overcome.

But why would any community seek to bring more poor people in? Studies have strongly suggested that a diverse population can boost local economies.<sup>146</sup> As Gillette says, “local economic growth may itself be correlated with socioeconomic diversity.”<sup>147</sup> A diverse population brings diverse skills, knowledge, and tastes that enable firms to diversify their use of resources; the larger labor pool reduces the cost of matching labor and skills; and a diversified local economy is better equipped to withstand macroeconomic shocks.<sup>148</sup> Increased population size and diversity also enable communities to take advantage of agglomeration economies—the benefits of proximity to a variety of producers and consumers with whom a business can transact.<sup>149</sup> Indeed, while sociologists like Putnam often discuss the many advantages in trust and reciprocity that come from building strong social networks within homogeneous communities, others emphasize what Mark Granovetter calls the “strength of weak ties,” that is, the fact that innovation is most likely to arise through peripheral relations among strangers.<sup>150</sup> It is for this reason that large, diverse cities are centers of innovation and key engines of job growth in today’s global economy.<sup>151</sup>

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144. See Part I.A.1 for a discussion of the tragedy of the commons.

145. See Gillette, *Local Redistribution*, *supra* note 144, at 1077.

146. See Putnam, *Diversity and Community*, *supra* note 71, at 140–41 (finding that immigration and diversity are associated with creativity and economic growth).

147. Gillette, *Local Redistribution*, *supra* note 143, at 1077.

148. See *id.* at 1077–79 (citing John M. Quigley, *Urban Diversity and Economic Growth*, 12 J. ECON. PERSP. 127, 130–32 (1998)). The advantages of a diverse population were recognized by early observers of the modern city such as Wirth: “[The city] has brought together people from the ends of the earth *because* they are different and thus useful to one another, rather than because they are homogeneous and like-minded.” Wirth, *supra* note 65, at 150.

149. See Gillette, *Local Redistribution*, *supra* note 143, at 1081–84.

150. See, e.g., RICHARD FLORIDA, *WHO’S YOUR CITY* 121 (2008) (citing Granovetter, and observing that, in terms of economic growth “strangers [are] more important than . . . friends”); BILL BISHOP, *THE BIG SORT* 148–50 (2008) (“[N]ew ideas are transmitted first and fastest through weak, peripheral relationships.”).

151. See BISHOP, *supra* note 150, at 140–50; J.B. Wogan, *Why Companies Are Moving Back Downtown*, GOVERNING (Aug. 2016), <http://www.governing.com/topics/urban/gov-urban-downtown->

To place this in economic terms, if diversity has negative externalities (the spillover costs that one person's activity imposes on others), it also has "positive" externalities (the spillover benefits that individual activity confers on others).<sup>152</sup> These positive externalities, like negative ones, can be "capitalized" into property values.<sup>153</sup> In other words, larger population size and greater diversity may actually enhance property values, rather than diminish them as the conventional economic wisdom suggests.<sup>154</sup> This may partially explain why less of a correlation exists between property values and public school quality in large, diverse cities than exists in smaller, more homogeneous communities—people want to live in places where they can obtain the economic advantages of diversity (proximity to creative people) rather than the economic advantages of homogeneity (less congested municipal services).<sup>155</sup> As we recall, one of the major economic reasons why communities seek to exclude low-income individuals is to maintain the quality of local schools, since there is a tight relationship between property values and school quality.<sup>156</sup> By breaking this link, diverse cities incentivize homeowners to welcome lower-income individuals into their communities much more readily than homeowners in communities where property values are closely correlated with school quality. Likewise, diverse

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economicdevelopment.html?utm\_content=bufferf5141&utm\_medium=social&utm\_source=twitter.com&utm\_campaign=buffer [http://perma.cc/NEL8-8QPU] (discussing reasons why several large employers have moved to downtown locations). A recent report shows that nearly half the job growth since the recession has been concentrated in the densest urban areas. See Richard Florida, *Geographic Inequality Is Swallowing the Recovery*, CITYLAB (May 23, 2016), [http://www.citylab.com/politics/2016/05/there-are-more-losers-than-winners-in-americas-economic-recovery-due-to-geographic-inequality/483989/?utm\\_source=SFTwitter](http://www.citylab.com/politics/2016/05/there-are-more-losers-than-winners-in-americas-economic-recovery-due-to-geographic-inequality/483989/?utm_source=SFTwitter) [http://perma.cc/TKP9-YC5Q]. Florida also notes increasing inequality in job growth between the twenty largest counties nationwide and the rest of the country. See *id.*

In a forthcoming book, Florida strikes a more somber note about how cities' pursuit of the "creative class" has widened social inequality. See Josh Stephens, *Richard Florida's Reckoning: Review of the New Urban Crisis*, CAL. PLAN. & DEV. REP., Feb. 8, 2017, <http://www.cp-dr.com/articles/20170208> [http://perma.cc/2UXH-8TQY]. It is beyond the scope of this Article to address the merits of Florida's creative class theory. My goal is to demonstrate the error in thinking that restrictive zoning laws that enforce socio-economic homogeneity are necessary to communities' financial health.

152. See PUTNAM, BOWLING ALONE, *supra* note 56, at 20 (explaining that social capital has "externalities" that benefit the wider community); Foster & Iaione, *supra* note 25, at 313 (noting "positive spillovers . . . from urban agglomeration").

153. See Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 947–49, 955–56 (2013) [hereinafter Stahl, *Neighborhood Empowerment*] (explaining that positive externalities, just like negative externalities, are capitalized into property values).

154. Carol Rose observes that the commons can be a "comedy" rather than a tragedy where the shared nature of a resource induces people to cooperate to improve its value rather than to compete over it. See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 767 (1986); see also Foster & Iaione, *supra* note 25, at 293.

155. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2049 (2002). The causal relationship between property values and diversity is unclear. After all, as I address in the next Part, one reason property values are not as closely correlated with school quality in diverse communities as they are in nondiverse communities is that many more homeowners in diverse communities send their children to private schools.

156. See *supra* notes 41–43, 47–51 and accompanying text.

communities tend to have a higher percentage of renters, who are often less concerned than homeowners about property values and property taxes, and accordingly more amenable to integration.<sup>157</sup> Thus, it is generally believed that there is less NIMBYism and more pluralism in larger, more heterogeneous cities than in smaller, more homogeneous communities.<sup>158</sup>

On this note, although Fischel has long been one of the most persuasive defenders of the “fiscal zoning” rationale for suburban exclusion, in his most recent book, Fischel acknowledges that there is a significant demand for community-level diversity among existing residents and argues that government provision of diversity is justified because diversity (much like homogeneity, ironically) is a collective good that the market will insufficiently supply on its own.<sup>159</sup> In short, it is not inevitable that the inclusion of low-income individuals within a community will lead to a tragedy of the commons; to the contrary, inclusion may bring substantial economic advantages.<sup>160</sup>

## 2. The Sociological Perspective

Diverse communities also challenge the sociologists’ premise that homogeneity (enforced by exclusion) is essential to the formation of shared social norms that can enable effective management of common resources. Even large, cosmopolitan cities comprised of strangers with few common cultural touchstones can have strong social norms. As Eduardo Peñalver states, “[C]oercive informal rules of public behavior arise and are widely obeyed even

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157. See ROSE & BROOKS, *supra* note 64, at 202 (discussing how renters are more willing to live in integrated communities because they have less of a stake than homeowners).

158. See, e.g., FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 14, at 156–58 (describing how larger diverse cities are less beholden to homeowners and more responsive to concerns of developers and renters). *But see* David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1703, 1709–10 (2013) (arguing that NIMBYism is rampant in large cities due to municipal government organization and non-partisan nature of local elections).

159. FISCHEL, ZONING RULES!, *supra* note 39, at 149–52; *cf.* Mankiw, *supra* note 25, at 221–22 (arguing that fighting poverty is also a collective good that the market cannot sufficiently provide).

160. In an important recent article, Sheila Foster and Christian Iaione argue that it is insufficient to think about the commons in purely economic terms. Rather, the commons represents a normative idea about what sorts of goods *should be* publicly provided. See Foster & Iaione, *supra* note 25, at 288, 306, 308, 310, 340–41. Public education, for example, could be seen as a good that ought to be publicly provided even if it could be provided more “efficiently” by the private sector. In broader terms, Foster and Iaione’s argument can be seen as a rejection of the notion, represented in the famous Tiebout model, that urban residents are simply consumers who purchase goods through their locational decisions. Rather, as citizens they have entitlements to a minimum quality of public goods and services and the obligation to provide the same to others. See *id.* at 308 (explaining that the idea of commons means that “an owner cannot always do what she wants with her property; rather she is obligated to make it productive, which may include putting it at the service of the community”). There is rich literature on this point, with which I am largely sympathetic. See, e.g., FRUG, CITY MAKING, *supra* note 111, at 167–69, 171–77 (rejecting Tieboutian conception of urban residents as consumers rather than citizens); Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1195 (2014) (arguing that there is a minimum level of public services to which residents are entitled); Saiger, *supra* note 45, at 110–15. Here, however, it is my argument that even if we perceive the commons in purely economic terms, it can still lead to positive outcomes rather than a “tragedy.”

in quintessentially anonymous communities like large cities.”<sup>161</sup> Peñalver cites examples such as Stanley Milgram’s famous study of the New York City subway, which demonstrated that subway riders almost universally conform to a set of unspoken social rules regarding proper etiquette.<sup>162</sup> The subway, of course, is a common good that could easily give rise to a tragedy of the commons if riders failed to obey these norms, such as, for example, appropriating numerous seats or speaking loudly so as to disturb other passengers.<sup>163</sup> That the city has its own social conventions was evident to early Chicago sociologists such as Robert Park, who observed that despite the absence of any shared tradition among the mobile and transient population of the urban core, a set of social norms nevertheless developed: “Even in regions where custom no longer reinforces conscience, public opinion and fashion exercise a powerful external control.”<sup>164</sup>

Conversely, the very notion that the small, homogeneous suburb represents a community of shared traditions and values is largely mythical. Most suburban communities today are too large, and their populations too ephemeral, for residents to know each other in the intimate way that residents of premodern, sedentary villages supposedly did.<sup>165</sup> As Putnam points out, suburbs no longer breed social capital (the norms of reciprocity and trustworthiness that arise from social networks) because sprawl, a dearth of common spaces, and dependence on the automobile have diminished the opportunities for people to form meaningful ties with their neighbors.<sup>166</sup> No less than the big city that suburban residents reject as anonymous and impersonal, the suburb is an “imagined community”; that is, “it consists of people who have only an image of their connection with each other.”<sup>167</sup>

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161. Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1927 (2005).

162. *See id.* at 1927–28.

163. With regard to the subway, the government does sometimes take steps to reinforce social norms, as in the Metropolitan Transportation Authority’s recent campaign to stop “manspreading” (a practice in which seated subway riders, apparently mostly men, spread their legs so as to make it difficult for other riders to occupy neighboring seats). *See* Emma G. Fitzsimmons, *Dude, Close Your Legs: M.T.A. Fights a Spreading Scourge*, N.Y. TIMES, Dec. 21, 2014, at A1. It is notable that this campaign does not involve exclusion or other coercive punishments but the use of public service advertisements that aim to activate implicit social norms of shame and disapproval. As such, the subway campaign is consistent with an emerging literature that government can shape behavior through “nudging” rather than outright coercion. On nudging, *see*, for example, Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1947–48 (2015).

164. II ROBERT EZRA PARK, *Sociology, Community and Society*, in HUMAN COMMUNITIES 178, 201 (1929).

165. *See, e.g.*, FRUG, CITY MAKING, *supra* note 111, at 69 (explaining that most citizens of suburban areas do not really know their neighbors—rather, they have an image of who their neighbors are).

166. PUTNAM, BOWLING ALONE, *supra* note 56, at 208–14.

167. FRUG, CITY MAKING, *supra* note 111, at 69 (citing BENEDICT ANDERSON, IMAGINED COMMUNITIES 15 (1983)); *see also* SENNETT, *supra* note 76, at 310–11 (discussing how community is based on a “fantasy” that neighbors have an intimate connection); YOUNG, *supra* note 74, at 232 (explaining that the idea of intimate community is a myth because “subjects cannot make themselves transparent”).



Furthermore, as we have seen, the myth of a community in which members know each other intimately has destructive consequences. It leads to the “othering” of anyone outside the community, which reinforces the community’s desire to erect impermeable barriers around itself and disengage from the world.<sup>168</sup> In addition, it robs community members of an essential part of the human experience, the innate yearning to engage with the new and unknown. The familiar trope of suburban ennui confirms that the exclusionary conception of community is lacking something vital.<sup>169</sup> Indeed, the refusal to expose oneself to new experiences stunts the development of the human spirit. As Sennett has said, “precisely what gets lost in this celebration” of a face-to-face community “is the idea that people grow only by processes of encountering the unknown.”<sup>170</sup> What is more, as Sennett and Frug point out, the desire to wall out danger and uncertainty only increases one’s sense of vulnerability and anxiety, as these things can never be completely banished; “they threaten to enter consciousness at any moment.”<sup>171</sup>

Paradoxically, “giving up the idea that the world can be purified or controlled” can reduce one’s anxiety and enable one to live a fuller life as one develops “ego strength,” or “an ability to cope with whatever surprises and conflicts one encounters, a confidence that one won’t be overwhelmed by complexity or disorder, a feeling that one can live with, even learn to enjoy, otherness.”<sup>172</sup> It is, indeed, this feeling that has enticed many people to return to the diverse cities they once abandoned for exclusive suburbs.

### 3. The Political Theory Perspective

Diverse cities also challenge the political theory argument about the supposed efficiency advantages of governance in small, homogeneous jurisdictions. We have already seen that this argument is based on the false premise that the effects of municipal decisions are confined within the city’s boundaries. Even if we make the rather heroic assumption that municipalities generate no interlocal externalities, it is still not clear that governance in larger, more diverse municipalities is any less efficient than in smaller, homogeneous communities. Larger local governments may actually be more efficient than smaller ones. Despite the common belief to the contrary, small municipalities are not particularly efficient providers of local public goods such as police, fire, and water services because such services have huge fixed costs.<sup>173</sup> Small local governments manage this problem by entering into interlocal contracts and relying on special-purpose districts to provide costly public goods at regional

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168. See *supra* notes 127–32 and accompanying text.

169. See FRUG, CITY MAKING, *supra* note 112, at 120–21 (describing trope of boredom in the suburbs).

170. SENNETT, *supra* note 76, at 295.

171. FRUG, CITY MAKING, *supra* note 112, at 120.

172. *Id.* at 120–21.

173. See Briffault, *Boundary Problem*, *supra* note 99, at 1140.

scale while maintaining local political control of zoning, schools, and taxes.<sup>174</sup> The problem this creates is that by fragmenting control of local issues across numerous authorities at different scales, it becomes harder for local citizens and the media to monitor what local officials are doing.<sup>175</sup> For example, several small cities in southeastern Los Angeles county have been racked with political scandals in recent years, and it is reasonable to speculate that these scandals occurred in part because the media has been unable to keep tabs on all eighty-eight cities and hundreds of special-purpose local governments in the county.<sup>176</sup> Moreover, the fragmentation of local authority means that members of the public rarely know who to hold responsible for decisions. Citizens often blame the mayor for failing to fix problems that he or she has no control over simply because the mayor is one of the few local officials people have even heard of.<sup>177</sup> Does anyone know who their water commissioners are? In larger cities, accountability may also be fragmented, but those cities tend to feature “strong” mayors who have wide-ranging responsibilities over many traditional municipal functions and whom citizens can therefore more reasonably hold accountable for the city’s failings.<sup>178</sup>

With regard to diversity specifically, political scientists Jacob Rugh and Jessica Trounstine have demonstrated that despite the conventional economic wisdom that municipal governments in diverse cities will obtain fewer collective goods for residents because of the difficulty residents have organizing to effectively lobby for desired goods, the quantity of common goods obtained by diverse cities is comparable to that of homogeneous communities.<sup>179</sup> Rugh and Trounstine attribute this result to the mediating role played by local political officials in helping to organize and motivate voters.<sup>180</sup> Other empirical studies have concluded that cities with governance structures that facilitate interest group haggling do not experience increased municipal conflict or incidences of

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174. See *id.* at 1144–47 (discussing interlocal contracts and special districts).

175. See *id.* at 1146–47.

176. See James Rainey, *On the Media: How Many More Bells Are Out There?*, LA TIMES (July 21, 2010), <http://articles.latimes.com/2010/jul/21/entertainment/la-et-onthemedial-20100721> [<http://perma.cc/3TGY-PY5M>] (“The [Los Angeles] Times doesn’t have enough reporters to regularly cover the county’s 88 cities, not to mention myriad other agencies and beats (like transportation, education and healthcare) that loom large in the lives of our readers.”).

177. The mayor of Ferguson, Missouri was widely blamed for the recent alleged abuses by law enforcement officers there. As it turns out, however, elected officials in most St. Louis area municipalities, including Ferguson, have little direct power over the local police departments. See Jason Rosenbaum, *Who’s in Charge Here? For Ferguson and St. Louis County Police, Not Elected Officials*, KBIA (Aug. 27, 2014), <http://kbia.org/post/whos-charge-here-ferguson-and-st-louis-county-not-elected-officials> [<http://perma.cc/AE9W-7L5H>].

178. See, e.g., Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2572–76 (2006) (describing advantages of strong mayoral system, including increased accountability); see also FRUG & BARRON, *supra* note 107, at 123–25 (explaining that New York City school committee is selected through mayoral appointment, and noting that this has allowed for “controversial changes”).

179. See Rugh & Trounstine, *supra* note 95, at 1039, 1048–49.

180. See *id.*

pork-barrel spending.<sup>181</sup>

Another argument advanced in favor of community homogeneity is Hayek's notion that the inability to form consensus through the democratic process will necessarily empower unelected planners to make most decisions.<sup>182</sup> Planners would be delighted to learn that they have so much power. In fact, it is well documented that planners have relatively little influence in the land-use decision-making process because fiscal and political considerations usually dominate.<sup>183</sup> Moreover, even if there were some validity to this critique, the cure (creating more homogeneous communities) may be worse than the disease. As Peñalver argues, there is a dangerous whiff of totalitarianism surrounding small, homogeneous communities, in which neighbors rigorously police each other to ensure conformity to shared social norms.<sup>184</sup> The anonymity and impersonality of large, diverse cities, by contrast, enables individuals to engage in behavior that would be considered "deviant" in smaller communities, without fear of being spied on or shamed.<sup>185</sup> In other words, the private, informal enforcement of social norms in small communities can be just as coercive, and just as antithetical to individual liberty, as coercive regulations enacted by unelected big-government planners.<sup>186</sup> The latter may indeed be the lesser of the two evils, a worthwhile tradeoff that enables us to have the personal freedom of the anonymous city.<sup>187</sup>

#### B. Diversity and Exclusion

In summary, our diverse cities appear to challenge the traditional arguments that exclusion is essential to maintaining community. At the same time, and perhaps paradoxically, these cities also affirm those very arguments. As it turns out, many of America's most diverse cities, like Chicago, New York, and Los Angeles, are also its most segregated. That is, although they are highly diverse at the citywide level, they are ethnically and racially homogeneous at the

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181. See, e.g., PEGGY HEILIG & ROBERT J. MUNDT, *YOUR VOICE AT CITY HALL: THE POLITICS, PROCEDURES AND POLICIES OF DISTRICT REPRESENTATION* 101, 113 (1984) (finding no evidence of increased conflict in several cities with district systems); Laura I. Langbein et al., *Rethinking Ward and At-Large Elections in Cities: Total Spending, the Number of Locations of Selected City Services, and Policy Types*, 88 *PUB. CHOICE* 275, 285, 289–90 (1996) (finding no evidence of increased spending in ward-based systems).

182. See *supra* note 93 and accompanying text.

183. See Jonathan Schwartz, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 *S. CAL. L. REV.* 183, 184–86, 198–202 (1997) (discussing the "fiscalization" of land use); see also FRUG & BARRON, *supra* note 107, at 150–51 (describing municipal incentives to use land use powers for fiscal purposes).

184. See Peñalver, *supra* note 162, at 1924–25.

185. See, e.g., Robert E. Park, *Human Migration and the Marginal Man*, 33 *AM. J. SOC.* 881, 888 (1928) (explaining that in cosmopolitan cities, the individual "is not bound as others are by the local properties and conventions").

186. See Peñalver, *supra* note 162, at 1924–25.

187. See PUTNAM, *BOWLING ALONE*, *supra* note 56, at 134–38 (noting that there is more trust in smaller, homogeneous suburbs than big cities, but "weaker informal social control in cities also makes them freer places to live").

neighborhood scale.<sup>188</sup> It is also typical in the most diverse cities for public schools to have a much higher percentage of minorities and children from low-income families than the city as a whole does. At least one reason why diverse cities are segregated in this way is because sublocal groups use mechanisms like private schools, rent control, and neighborhood zoning authority to realize the economic, sociological, and political advantages of exclusion discussed in Section I. In other words, diverse cities trade exclusion at the municipal scale (excluding people from living in the city) for exclusion at the sublocal scale (excluding them from certain places or groups within the city).<sup>189</sup> This tradeoff raises the question of whether diverse cities are any more “inclusive” than homogeneous ones. I take up that question in Part III.C. First, this Part explores some of the ways cities practice sublocal exclusion and why.

I argued earlier that diverse cities may circumvent the tragedy of the commons and overcome the seeming imperative of exclusion by realizing spillover gains from inclusion. Relatedly, property values in diverse cities are less tied up with school quality, minimizing the incentive for homeowners to engage in NIMBYism (which is often driven by the desire to prevent public school congestion and hence, protect property values).<sup>190</sup> But there is more to the story. Homeowners in diverse cities are less concerned about school quality in part because many send their children to exclusive private schools.<sup>191</sup> This explains my earlier observation that public schools in diverse communities have a much higher concentration of minorities and children from low-income families than the concentration within the city at large. (Ironically, many private schools are far more racially integrated than public schools.)<sup>192</sup> Because so many homeowners in these cities do not have children in the public schools, they need not worry, as suburban homeowners do, about low-income migrants flooding into the community and congesting schools.

Thus, it should be clear that affluent residents of diverse cities do not circumvent the tragedy of the commons presented by congested schools; rather, they manage it with a variation on the same strategy used by residents of homogeneous communities: exclusion. The difference between the two strategies is that smaller, homogeneous communities rely on the collective right to exclude through the state (zoning), whereas larger, more diverse cities use the traditional

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188. See Nate Silver, *The Most Diverse Cities Are Often the Most Segregated*, FIVETHIRTYEIGHT (May 1, 2015, 8:28 AM), [http://fivethirtyeight.com/features/the-most-diverse-cities-are-often-the-most-segregated/?ex\\_cid=538twitter](http://fivethirtyeight.com/features/the-most-diverse-cities-are-often-the-most-segregated/?ex_cid=538twitter) [<http://perma.cc/G4FV-ADJ5>] (reporting that Chicago, St. Louis, Baltimore, Los Angeles, and New York are among those cities that are both highly diverse and highly segregated).

189. For an interesting discussion of the matter of scale, see Robert C. Ellickson, *The Puzzle of the Optimal Social Composition of Neighborhoods*, in *THE TIEBOUT MODEL AT FIFTY*, *supra* note 38, at 199 [hereinafter Ellickson, *The Puzzle*].

190. See Ryan & Heise, *supra* note 156, at 2049. See *supra* notes 45–54 and accompanying text for a description of homeowners’ concerns about public school congestion and property values.

191. See Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201, 213 (2010) (“[F]or many parents, a decision to live in a major city also entails a decision to send their children to private schools.”).

192. See Ryan & Heise, *supra* note 156, at 2111.

market mechanism of private property rights and an attendant individual right to exclude (as private schools generally have the ability to charge tuition and exclude those who do not pay). Whichever strategy is used, the consequence is the same for those individuals who cannot afford to send their children to private schools or move to communities with quality public schools: they are *excluded* from the high-quality schools and must instead enroll their children in what are usually low-quality urban public schools. Urban public schools struggle to compete with private and suburban schools precisely because those with the choice to leave have done so, leaving behind school systems that are comprised almost entirely of students of color from low-income families.<sup>193</sup> The demographic composition of urban public schools is troubling because, as James Ryan and Michael Heise report, there is now a consensus “that a student’s own socioeconomic status, as well as the socioeconomic status of the student’s peers, greatly affect the student’s academic achievement and social behavior.”<sup>194</sup>

Private schools are one example of how diverse cities trade exclusion at the scale of the municipality for exclusion at the sublocal scale. The neighborhood is another, perhaps more familiar, example of sublocal exclusion. Many communities give neighborhoods a significant degree of control over zoning changes in their communities, and much like suburban residents, neighborhood residents often use that control to exclude as much new development as possible.<sup>195</sup> For this reason among others, diverse cities are becoming increasingly unaffordable places to live.<sup>196</sup> As this occurs, lower-income neighborhoods are joining in the exclusion party and advocating for rent control and condominium conversion legislation to prevent gentrification that can price poorer families out of their neighborhoods.<sup>197</sup>

A particularly interesting tool of neighborhood exclusion, widely discussed in legal scholarship, is the business improvement district (BID).<sup>198</sup> BIDs enable

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193. *See id.* at 2096–99.

194. *Id.* at 2102; *see also* PUTNAM, *BOWLING ALONE*, *supra* note 56, at 297–305 (discussing how education is profoundly shaped by social networks in the community).

195. *See, e.g.*, NELSON, *supra* note 39, at 177–78 (describing how neighborhoods use special districts, historic preservation districts, and the like to preserve their exclusivity). *See generally* JEFFREY M. BERRY ET AL., *THE REBIRTH OF URBAN DEMOCRACY* (1993) (describing neighborhoods’ extensive land use powers in several cities).

196. Land use regulation is certainly not the only reason why many diverse cities are unaffordable. Because diversity is increasingly prized among the upper and middle classes, market demand is also driving up real estate prices in diverse cities. *See supra* note 15 and accompanying text. This presents a dilemma for city officials, who simultaneously want to make their cities both more desirable *and* more affordable. Nevertheless, studies make it clear that land use regulations have independently contributed to higher real estate prices, and it is these regulations, rather than the operations of the market, that are the focus of the Fair Housing Act and the new HUD regulations. *See supra* note 15 for a discussion of some recent studies. Therefore, for purposes of this paper, I have focused on regulatory barriers to inclusion rather than barriers imposed by the marketplace.

197. *See* Mangin, *supra* note 13, at 95–96, 106–13.

198. *See, e.g.*, Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 384–85 (1999) [hereinafter Briffault, *Government for Our Time*]; Richardson Dilworth, *Business Improvement Districts and the Evolution of Urban*

landowners within a designated geographic area to collect mandatory assessments from each landowner and use the assessments to provide services and amenities for the area.<sup>199</sup> The BID has both a de jure and a de facto exclusionary component. As a de jure matter, in most cases, only landowners have the right to vote on the BID board of directors that decides how to manage the district's finances; residents in the area or others who stand to be affected by the BID's activities are not enfranchised.<sup>200</sup> As a de facto matter, BIDs often use the assessed funds to discourage uses of public space that they dislike. Indeed, BIDs are often analogized to zoning insofar as they designate spaces for particular uses and police the spaces to prevent inconsistent uses.<sup>201</sup>

All of these neighborhood-level exclusionary devices find support in our three traditional justifications for exclusion. To begin with economics, we have just seen that one attraction of the private school is to use the market mechanism of exclusion to overcome the tragedy of the commons presented by public schools in diverse communities. Ellickson insightfully writes that the BID similarly uses exclusion to combat a different tragedy of the commons in diverse communities: the monopolization of public spaces by the homeless and other unwanted users.<sup>202</sup> It is often difficult to exclude the homeless from nominally public places like parks, and, under the orthodox economic analysis, the absence of a right to exclude gives homeless people the incentive to "overuse" the space.<sup>203</sup> But BIDs use their funds to discourage such overuse, often through informal exclusionary actions that make the homeless unwelcome.<sup>204</sup>

There is also a sociological justification for neighborhood-scale exclusion. Social norms are threatened by free mobility in a city with open borders, as is the capacity to create a refuge from the world of strangers. Neighborhood control of zoning and anti-gentrification mechanisms like rent control allow neighborhoods to close their doors to newcomers and thus facilitate the creation of communities of shared social norms within the city.<sup>205</sup>

Finally, there is a political theory rationale for neighborhood-scale exclusion. Devolving power to the neighborhood level enables smaller, more homogeneous communities to exercise some amount of direct political control

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*Government*, 3 DREXEL L. REV. 1, 1-9 (2010); Foster & Iaione, *supra* note 25, at 299-300; Stahl, *Neighborhood Empowerment*, *supra* note 153, at 941-45, 950-51, 1000, 1004.

199. See Stahl, *Neighborhood Empowerment*, *supra* note 153, at 939, 943.

200. See Briffault, *Government for Our Time*, *supra* note 199, at 409-14.

201. See, e.g., Stahl, *Neighborhood Empowerment*, *supra* note 153, at 993.

202. See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1174 (1996) [hereinafter Ellickson, *Controlling Chronic Misconduct*] (referring to "tragedy of the agora"); see also Foster & Iaione, *supra* note 25, at 299-300.

203. See Ellickson, *Controlling Chronic Misconduct*, *supra* note 203, at 1194-200.

204. See Briffault, *Government for Our Time*, *supra* note 199, at 402-03 (discussing BID efforts to manage homeless population, but dismissing most extreme allegations that BID "goon squads" systematically assaulted homeless individuals); Ellickson, *Controlling Chronic Misconduct*, *supra* note 203, at 1198-200.

205. See *supra* notes 67-85 and accompanying text for a description of the sociological imperative to withdraw from the world of strangers into communities of shared social norms.

without the need to haggle with other interest groups. This devolution is formalized in the BID, which essentially disenfranchises everyone other than landowners and provides a special revenue stream that is separate from the general municipal tax base and designated for the exclusive use of the landowners, thereby enabling a fairly homogeneous interest group to avoid squabbling with other groups over the allocation of resources.<sup>206</sup>

In short, diverse communities practice exclusion in much the same way homogeneous communities do, just at a different scale. Arguably, moreover, these diverse cities could not remain diverse without being exclusive at the neighborhood scale. As we recall, under the influential Tiebout model, people will migrate to whichever community has the most attractive bundle of municipal services.<sup>207</sup> The model predicts that cities will become increasingly homogeneous as individuals with similar tastes gravitate toward the same cities, and those with divergent tastes choose different cities.<sup>208</sup> Consistent with this prediction, for at least a generation, affluent residents and investors eschewed diverse cities for exclusive and homogeneous suburbs where they could obtain their preferred level of public goods and services without having to worry about congestion or compromise with groups that have different demands.<sup>209</sup> One way to reverse this pattern of suburban migration and maintain a diverse city, however, is to unbundle residence from public goods and services so that individuals can choose their preferred package of municipal amenities while remaining within the city.<sup>210</sup> This is precisely what exclusionary mechanisms like private schools, BIDs, and neighborhood zoning are intended to accomplish. Indeed, these mechanisms may be seen partially as ways of shifting the scale of Tieboutian competition from the municipality to some other scale: instead of “shopping” for a city, residents can shop for a neighborhood within the city; instead of choosing their neighborhood based on its schools, they can choose neighborhoods based on whatever other characteristics they prefer, and shop for schools separately.<sup>211</sup> Trading exclusion at the municipal level for exclusion at the sublocal level thus has one very significant consequence: where homogeneous communities use exclusion to keep people out, diverse cities use exclusion, paradoxically, to keep

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206. See Stahl, *Neighborhood Empowerment*, *supra* note 153, at 943 (explaining that BIDs and other similar mechanisms “import into the city the most attractive features of suburban governance by devolving power to the smaller scale of the neighborhood, homogenizing the voting public through the restriction of the franchise to landowners, and insulating the group’s power from the politicking and vote-trading prevalent at the citywide level”).

207. See *supra* notes 43–54 and accompanying text.

208. See Stahl, *Mobility and Community*, *supra* note 61, at 634–40 (discussing various implications of the Tiebout model).

209. See generally GARY J. MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* (1981) (describing fiscal motivations that led small suburban communities in Los Angeles County to resist consolidation with larger, more diverse cities).

210. See Garnett, *supra* note 192, at 210–17 (2010) (explaining how private schools help urban residents “unbundle” educational decisions from residential ones).

211. See Briffault, *Sublocal Structures*, *supra* note 90 (describing several devices through which municipalities devolve power to sublocal entities, and explaining that these devices are designed to introduce Tieboutian competition to cities).

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people in.

C. *Balancing Inclusion and Exclusion*

1. The City as a Federation of Neighborhoods

This last point raises the normative question that I set out to answer in the remainder of this Article: if our goal is to create communities that are inclusive as well as diverse, why does it matter if exclusion occurs at one scale rather than another? The answer, I will suggest, lies in ascertaining what we mean by inclusion and why we care about it.

As an initial matter, the scale of exclusion does have certain practical implications. In terms of size, there may not be much difference between a small suburban municipality and a neighborhood within a large city, but legally and politically speaking, the neighborhood and the municipality are worlds apart. An incorporated municipality, regardless of size, has considerable control over its land use regulation, tax base, and local schools; groups within a city only have whatever control the city government delegates to them.<sup>212</sup> Substantively, this distinction matters immensely. It means that although urban neighborhoods or other subgroups may build barriers around themselves, they cannot erect the kind of impermeable walls that incorporated municipalities can. They cannot externalize the costs of their activities onto neighboring communities without the consent of the city government; they cannot hoard their tax revenue; they cannot avoid the push and pull of big city politics. Neighborhoods may have some zoning control but not all of it; cities can circumscribe this power however they like or withdraw it whenever they wish.<sup>213</sup> BIDs have access to a special revenue stream but the landowners who pay assessments to BIDs *also* pay taxes that go into the municipality's general tax fund. In other words, even where residents of diverse cities are largely segregated due to land use regulations, private schools, and the like, they nonetheless form a single political entity, contribute to a shared tax base, enjoy common public space, and most importantly, share a sense of belonging to a community.<sup>214</sup> The city is, in effect, a loose federation of diverse neighborhoods rather than an undifferentiated whole.

Ideally, in a federation of neighborhoods people can find a "thick" community of shared meaning (what Putnam calls "bonding social capital") at the sublocal level and a "thinner" community of reciprocal obligation at the city level ("bridging social capital").<sup>215</sup> Giving neighborhoods the partial ability to control their own resources but tasking cities to set the limits of sublocal exclusion allows communities to have the advantages of exclusion (Tieboutian

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212. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 6–18 (1990) (explaining legal characteristics of incorporated municipalities).

213. See Stahl, *Neighborhood Empowerment*, *supra* note 153, at 999–1000 (discussing municipal incentives to restrain neighborhood zoning control and ways in which they can do so).

214. See Foster & Iaione, *supra* note 25, at 289–90, 300, 333–34 (describing BID as a form of "commons").

215. See PUTNAM, *BOWLING ALONE*, *supra* note 56, at 143–45.



sorting, local management of public goods, the fostering of bonding social capital, a homogeneous electorate) alongside the advantages of inclusion (economies of scale, bridging social capital, greater political accountability). It permits some resources to be redistributed to the less fortunate and some to be retained by those who, though they can afford to leave the city, have chosen to stay. And it enables residents to balance their desire for engagement with the world of strangers against their desire to withdraw into exclusive enclaves. This ability to merge exclusion with inclusion may indeed be what causes people to choose neighborhood-scale exclusionary mechanisms rather than flee to more homogeneous communities.

As a normative matter, the idea of the diverse city as a federation of neighborhoods conflicts with a perhaps more conventional view of diversity as integration at the granular level. The federation of neighborhoods is not a recipe for mutual understanding or deep meaningful interactions between diverse groups of people. To the contrary, it accepts separation as the price of inclusion. Considering the attractions of exclusion and the ease of exit from diverse communities, integration in the granular sense may be unattainable; the federation of neighborhoods is a second-best inclusiveness that takes social capital where it can find it.<sup>216</sup> But there is also a question of whether integration at the granular level is even a desirable vision of a diverse community. It is certainly not what cosmopolitans like Frug and Young have in mind. Neither Young nor Frug imagines that an inclusive city will amalgamate all differences into a melting pot. To the contrary, they envision a mosaic of discrete and culturally distinct subcommunities, through which the urban *flâneur* can wander and experience the full spectrum of a city's diversity.<sup>217</sup> As Ellickson explains, such a vision requires diversity at the scale of the city but homogeneity at the scale of the neighborhood.<sup>218</sup> And this homogeneity may require exclusion, for without it, these "urban villages" cannot survive as such for very long.<sup>219</sup>

If we think about inclusion in terms of equity, that is, improving the quality of life for the most disadvantaged, it is still not clear that granular-level integration is desirable. A federation of neighborhoods may actually be more beneficial to lower-income individuals than integration at all scales. As Sampson writes, efforts to create mixed-income communities have had poor results, and lower-income individuals benefit less from having rich neighbors than from

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216. See *id.* at 362–63 (explaining that because efforts to create bridging social capital may actually diminish both bridging and bonding social capital, we may choose to build bonding social capital at the expense of bridging social capital as a "second-best" alternative).

217. See FRUG, CITY MAKING, *supra* note 112, at 117 (lauding a diverse city that offers "a differentiation between neighborhoods, thereby producing a distinct sense of place when one travels from one location to another"); YOUNG, *supra* note 74, at 239 ("We walk through sections of the city that we experience as having unique characters which are not ours, where people from diverse places mingle and then go home.").

218. See Ellickson, *The Puzzle*, *supra* note 190, at 206–07.

219. See ROSABETH MOSS KANTER, COMMITMENT AND COMMUNITY 148–61 (1972) (arguing that permeability threatens communal cohesion because "the community's distinctiveness and social isolation may be lost when boundaries are relatively permeable").

having effective social norms within their own communities that help combat crime, violence, and low quality schools.<sup>220</sup> Given that, Sampson emphasizes “place-based” remedies such as rent control and community policing that can bolster the internal social fabric of lower-income neighborhoods, rather than efforts to integrate lower-income people with individuals of different income levels.<sup>221</sup> What poor neighborhoods may need most from nearby communities is simply the resources to invest in place-based remedies. The federation of neighborhoods can provide for some redistribution of resources while giving neighborhoods some ability to control their local environment through zoning and the like.

The idea of a municipality as a federation of neighborhoods can also be fruitfully applied to resolve one of the more intractable difficulties in local government today: the fragmentation of governmental authority across numerous small municipalities that all act without regard to regional impact. As we saw in Section II, municipal fragmentation has several undesirable effects, including interlocal externalities, geographic inequality, de facto segregation, and sprawl.<sup>222</sup> Over the years, many scholars have advocated shifting the scale of power upward to the regional level, creating some kind of metropolitan or regional government that can enact land-use, school, and taxing policies for the region as a whole.<sup>223</sup> Time and again, these efforts have failed.<sup>224</sup> It is not hard to see why. As Section I detailed, homogenous communities have many incentives to exclude and are not eager to share control of their resources with neighboring communities.<sup>225</sup>

But this problem could perhaps be surmounted if we were to scale up the idea of the municipality as a federation of neighborhoods and conceptualize the region as a federation of municipalities, in which each municipality would act as a “neighborhood” that exercises some autonomy but does so within a framework of regional authority. Frug and David Barron, for example, propose creating a regional legislature in which local governments would have direct representation, and a system of “qualified voting,” akin to that used by the European Union, which would roughly control for population but also ensure that the concerns of discrete municipalities were given voice.<sup>226</sup> The proposal would create a diverse community at the macro level, with some tax-base sharing and regional land use control, while retaining a strong degree of local control

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220. See Robert J. Sampson, *Move Up or Out? Confronting Compounded Deprivation*, NYU FURMAN CTR. (July 2015), <http://furmancenter.org/research/iri/sampson> [<http://perma.cc/5BH5-P62S>].

221. See SAMPSON, *GREAT AMERICAN CITY*, *supra* note 7, at 420–24; Stahl, *Mobility and Community*, *supra* note 61, at 643–48 (discussing Sampson’s advocacy of “place-based” remedies).

222. See *supra* notes 106–37 and accompanying text.

223. See, e.g., Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to the New Regionalism*, 88 GEO. L.J. 1985, 2018 (2000); Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 488–89 (2007).

224. See Cashin, *supra* note 224, at 2015–27 (discussing failures of regionalism).

225. See *id.*

226. See FRUG & BARRON, *supra* note 107, at 211–23.

over the immediate environment.<sup>227</sup> It combines the “thick” and “thin” notions of community, balancing inclusion against exclusion. The idea is to replicate exactly what I have described as the federation of neighborhoods concept: a shared tax base, a common political enterprise, and hopefully, an expansive conception of community that will entice residents of homogeneous cities out of their enclaves and into engagement with the world of strangers.<sup>228</sup>

## 2. Manipulating the Scale of Exclusion

The main problem confronting the idea of the federation of neighborhoods is how exactly to balance exclusion against inclusion, engagement against withdrawal, “thin” community against “thick” community. If neighborhoods are given too much power—if they can hoard their tax revenue, seal their borders, make their own land use regulations—cities would gain few of the advantages of diversity. On the other hand, if neighborhoods are given too little power, those with the means may flee for neighboring cities, where they can control their own local resources regardless of the impact on nearby cities.<sup>229</sup> But what is the tipping point at which flight occurs? How much must we concede to exclusion in order to have a diverse community? It is arguable, for example, that we would tolerate a completely segregated public school system if that were the price of a diverse city, but surely we would not tolerate it if we were convinced that a diverse city could be achieved at a lower price. So how do we find out the price?

Empirically, these questions are difficult to resolve because they are hard to test.<sup>230</sup> Cities could experiment with loosening some of the barriers between neighborhoods, but doing so risks creating a perception of impending neighborhood decline and thereby triggering flight. Historically, one of the city’s worst enemies has been the self-fulfilling prophecy of neighborhood decline. During the postwar decades, fears that racial change would cause neighborhoods to decline (in the absence of a reliable mechanism to prevent such change) caused urban residents to flee cities for the suburbs, initiating the very decline they had feared and catalyzing further flight and further decline in a vicious cycle.<sup>231</sup> As Sampson observes, the stigma of decline attaches to neighborhoods readily and, once attached, is very difficult to dispel.<sup>232</sup> Many cities today are experiencing an almost miraculous recovery as urban areas have shed their

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227. *See id.*

228. *See* FRUG, *CITY MAKING*, *supra* note 112, at 106–09; FRUG & BARRON, *supra* note 107, at 225 (arguing that regional legislature would raise “consciousness” among residents of metropolitan region that they are part of a broader community rather than just the locality).

229. On cities’ use of sublocal structures to prevent urban dwellers from fleeing to the suburbs, see generally Briffault, *Sublocal Structures*, *supra* note 90.

230. *See* Ellickson, *The Puzzle*, *supra* note 190, at 204 (noting that optimal tradeoff between bonding and bridging social capital is unclear).

231. *See, e.g.*, ROSE & BROOKS, *supra* note 64, at 185–205 (discussing how unsubstantiated fears of racial change in urban neighborhoods led to white flight, thus causing racial change).

232. *See* SAMPSON, *GREAT AMERICAN CITY*, *supra* note 7, at 121–123, 138–48 (describing how stigmatization of neighborhoods as disordered causes self-fulfilling prophecy of decline, and noting the difficulty neighborhoods have shedding the “mold of stigmatizing perceptions”).

previously negative reputations.<sup>233</sup> City officials are justifiably wary of doing anything that might again catalyze the cycle of negative perceptions. This means that the incentive for most urban leaders has been to invest in more barriers rather than fewer.<sup>234</sup>

The dilemma this creates is that barriers make it harder for individuals to develop the “ego strength” that comes from exposure to difference and can thus lead to a new vicious cycle of fear and withdrawal that can only be resolved with still more barriers.<sup>235</sup> As Putnam writes, over the long term people do grow to embrace diversity, but in the short term, they find diversity so destabilizing that they may reject it before they have a chance to build a tolerance for it.<sup>236</sup> In sum, if we tear down barriers so as to build ego strength, it may induce flight from the city, but if we harden the barriers to prevent flight, urban dwellers may never develop ego strength.

I have suggested above that shifting the scale of exclusion from the municipality downward to the neighborhood may help create more inclusive communities. By the same token, we may be able to create more inclusive *neighborhoods* if we shift the scale of exclusion downward even further, to the level of the development or the school. I explore that possibility in this final Part. As I conclude, the scale of exclusion that will produce the most inclusive community remains uncertain, but experimenting with different scales is promising because it enables us to test the rigidity of the boundaries between neighborhoods without raising fears of impending decline.

*a. The Development*

Controversy erupted recently when a New York developer incorporated affordable rental housing and market-rate condos into a single building in an upscale neighborhood (in exchange for valuable concessions under the city’s inclusionary zoning law) and created separate entrances for the two groups of residents.<sup>237</sup> Critics assailed the “poor door” as reminiscent of Jim Crow segregation and symbolic of the increasing and perverse levels of economic

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233. See Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311, 323–26 (2010).

234. As an example, although the BID has often been credited with helping to reverse urban decline and bringing the middle class back downtown, there is also evidence that the changing fortune of many cities was a result of long-term macroeconomic and demographic changes with which the advent of the BID merely coincided. See, e.g., *id.* at 311–13, 326–31 (doubting claims that BID has driven urban resurgence, and casting doubt on the validity of the Tiebout model more generally). If this is true, then the tradeoff between sublocal exclusion and city-level diversity presented by the BID would be revealed as a false choice. Nevertheless, as Frug observes, cities continue to reflexively turn to the BID to protect neighborhood character. See Gerald E. Frug, *The Seductions of Form*, 3 DREXEL L. REV. 11, 17 (2010) (lamenting that the “almost automatic answer when one seeks to create an organization to improve neighborhood life” is “Let’s create a BID”).

235. See generally Putnam, *Diversity and Community*, *supra* note 71, at 138–44.

236. *Id.* at 138–39.

237. See Tim Iglesias, *Maximizing Inclusionary Zoning’s Contributions to Both Affordable Housing and Residential Integration*, 54 WASHBURN L.J. 585, 595 (2015).

inequality in our cities.<sup>238</sup> But the likely alternative to the poor door was that the developer simply would not provide housing for low-income individuals in an affluent neighborhood at all, and then, instead of segregation at the scale of the development, there would be segregation at the scale of the neighborhood or the municipality.<sup>239</sup> The question remains: which level is preferable? If inclusion means mutual understanding between people and dissolving of differences, the poor door obviously does not accomplish that, but neither does neighborhood-level segregation. The ability to reside in affluent neighborhoods, though, may give poor people superior access to transportation, schools, and other amenities, and the opportunity to benefit from potential social capital spillovers (more trust and reciprocity leading to lower crime rates and so forth).<sup>240</sup> At the same time, the poor door may reassure affluent urban dwellers that increasing diversity in their neighborhood need not lead to a tipping point of decline.<sup>241</sup> On the other hand, as Sampson argues, mobility can have destabilizing effects on the poor, and they may be better off building social capital in their own neighborhoods than moving to new neighborhoods to piggyback on those neighborhoods' social capital.<sup>242</sup> Thus, the empirical and normative question of whether to favor neighborhood-scale or development-scale residential exclusion remains unresolved, but the poor door at least trains our focus on the right question.

The poor door controversy is illuminating for another reason. It suggests that exclusion is more problematic when it is imminent and visible than when it is hidden by segregating people into different places. It is discomfiting to face the reality of inequality and segregation on a daily basis.<sup>243</sup> Moreover, it is possible that such visible segregation could stigmatize, and perhaps even traumatize, poor people in a way that neighborhood-level segregation does not. In the absence of empirical evidence on this point, though, I argue that it is preferable for our society to grapple daily with the reality of segregation and decide whether we are prepared to make our peace with it rather than disguise that separation through geography so that we never have to confront it. In any event, the poor door enables us to probe the costs of exclusion at different scales and to ask whether exclusion at the scale of the neighborhood is truly essential to having a diverse

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238. *See id.*

239. *See* Rick Jacobus, *In Defense of the 'Poor Door,'* ROOFLINES: SHELTERFORCE BLOG (Oct. 14, 2015), [http://www.rooflines.org/4267/in\\_defense\\_of\\_the\\_poor\\_door/?utm\\_source=Oct+20+Weekly+In+Defense+of+the+Poor+Door&utm\\_campaign=October+20+2015+Weekly&utm\\_medium=email\[http://perma.cc/3SRK-YXEE\]](http://www.rooflines.org/4267/in_defense_of_the_poor_door/?utm_source=Oct+20+Weekly+In+Defense+of+the+Poor+Door&utm_campaign=October+20+2015+Weekly&utm_medium=email[http://perma.cc/3SRK-YXEE]) (observing that developers use poor doors and other tiered amenities to lower cost of constructing affordable housing in higher income neighborhoods and would be much less likely to provide such housing without a poor door).

240. *See* Iglesias, *supra* note 238, at 596–98; *see also* PUTNAM, *BOWLING ALONE*, *supra* note 56, at 297–307 (explaining how bonding social capital in tight-knit communities boosts school quality).

241. *See* FISCHER, *ZONING RULES!*, *supra* note 39, at 151 (explaining that communities value diversity but require some protection against a “tipping point”).

242. *See supra* notes 221–22 and accompanying text.

243. There has been surprisingly little academic commentary on the poor door thus far, but an interesting blog post notes that “[s]omehow the ‘poor doors,’ by making economic separation present and visible, cause a discomfort that we can easily ignore when income groups are segregated by neighborhood.” Jacobus, *supra* note 240.

community.

*b. The School*

A similar question concerns our segregated schools: in order to maintain a diverse urban community, must we have a racially homogeneous public school system? Perhaps not. As I have previously mentioned, private schools break the link between schools and residence by enabling affluent urban dwellers to reside wherever they like without considering the quality of local public schools. Many school reformers today advocate for giving all urban residents, not just the affluent, the ability to unbundle schooling from residence through “school choice” (essentially, giving poor students in urban areas vouchers to use in private schools and/or public schools outside their neighborhoods).<sup>244</sup> Under school choice, residence would still be segregated by neighborhood (which would preserve the benefits of community at the neighborhood scale), but schools would, at least potentially, be desegregated (thus enabling children from lower-income families to enjoy the advantages that many experts contend come from sharing schools with more affluent children). Ironically, one of the principal barriers to school choice is political opposition from suburban residents, who are wedded to the bundling of residence with schools.<sup>245</sup>

In addition to school choice, other ways to change the scale of exclusion include charter schools, which are formally public but have the flexibility to depart from certain regulations governing public school administration,<sup>246</sup> and “tracking” within public schools, which means separating students into different schools or different programs within the same school based on their level of achievement.<sup>247</sup> Both charter schools and tracking are controversial because, as with private schools, there is an implicit exclusionary or segregatory component. Charter schools often set academic standards for admission, and there may be de facto exclusion of students whose parents have difficulty understanding the often complex application process. New York City’s “Success Academy” charter schools were recently embroiled in controversy because officials at some schools maintained a “got to go” list of undesirable students and used extreme disciplinary measures such as expulsions and repeated suspensions to force out lower performing students.<sup>248</sup> Tracking, on the other hand, separates students into different schools or classrooms where they may have little interaction with students of different achievement levels, thus mirroring the segregation in the community at large.<sup>249</sup> Whatever their drawbacks, charter schools and tracking

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244. See Ryan & Heise, *supra* note 156, at 2100 (discussing how school choice could increase integration levels).

245. See *id.*

246. See *id.* at 2073–78.

247. See FRUG & BARRON, *supra* note 107, at 137–39.

248. See Libby Nelson, *What the Success Academy Fight Over Kicking Out Students Says About the Charter Movement*, VOX (NOV. 4, 2015, 11:00 AM), <http://www.vox.com/explainers/2015/11/4/9669072/success-academy-eva-moskowitz-discipline> [http://perma.cc/QN4H-3L4K].

249. FRUG & BARRON, *supra* note 107, at 137–39.

are, unlike private schools, part of the public school system. Considering that both charter schools and tracking are very popular among affluent city dwellers who have choices for schooling,<sup>250</sup> they may help keep wealthy families in the public school system and reduce school segregation. As Frug and Barron argue, “In a world where differentiation sells and differences in abilities among students are significant, magnet schools and tracking may be one of the major ways to keep some families in central city public schools.”<sup>251</sup>

Charter schools and tracking once again raise the question of scale. In place of a school system that is completely segregated, they offer a system that is integrated at the scale of the district but segregated at the scale of the school or classroom. The latter seems preferable, but as with the poor door, tracking and charter schools make discrimination visible and raise worries that the poor may be stigmatized or left behind.<sup>252</sup> The question is whether this possibility is worse than the likely alternative: public school systems that are segregated based on geography, income, and race.

From these observations, I conclude that to have inclusion at some scale, we must have exclusion at another. If we insist on an open city, we will end up with its opposite; we will trade the permeable boundaries of the neighborhood or the classroom for the fortifications of the suburb and the school district. To paraphrase Walzer, to tear down the walls of the city is not “to create a world without walls, but rather to create a thousand petty fortresses.”<sup>253</sup> The question we are left with is which scale we would prefer to keep open and which we would allow to be closed. This question can only be confronted once we recognize that exclusion and inclusion are complementary rather than conflicting elements of an inclusive community.

#### CONCLUSION

What is inclusion? What is community? These are not terms of art. No court, no legislator, no scholar can define them. These terms can only be given meaning by a public fully engaged in the quest for a better society. That quest, I believe, has been inhibited by the assumption that there can be no compromise between inclusion and exclusion. My goal in this Article has been to prove that such compromise is not only possible but indispensable to meeting the challenge

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250. See FISCHER, *MAKING THE GRADE*, *supra* note 41, at 265 (reporting high levels of parental satisfaction with charter schools).

251. FRUG & BARRON, *supra* note 107, at 137–38.

252. See FRUG, *CITY MAKING*, *supra* note 112, at 193–95 (criticizing tracking); Myron Orfield & Thomas Luce, *Charters, Choice and the Constitution*, 2014 U. CHI. LEGAL F. 377, 388–90 (arguing that charter schools in Minnesota perpetuated racial segregation without improving quality of public schools). It is notable that in his more recent book, coauthored with David Barron, Frug advocates in favor of tracking as a means of keeping affluent residents in the city. See FRUG & BARRON, *supra* note 107, at 137–38. I think Frug’s uncertainty again demonstrates the difficult normative questions involved in attempting to balance inclusion with exclusion.

253. WALZER, *supra* note 20, at 39.

of inclusion.<sup>254</sup>

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254. Many of the arguments I have made in this Article can, of course, be extrapolated from the local to the national level. Our national debates about immigration, for example, often mirror debates about the use of zoning to control the size and nature of the population. *See generally* Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOU. L. REV. 367 (2010) (describing zoning and other local policies as functional analogues to national immigration controls). Concerns about immigrants congesting resources, failing to assimilate to our social norms, or increasing political conflict are common in the immigration context, as are counter-arguments that immigrants boost economic growth, strengthen social capital, and increase the vitality of our political culture. *See, e.g., id.* Su argues that local land use policies complement national immigration policies by controlling where within the nation-state immigrants can locate, thereby buffering existing residents against the localized costs of liberal national immigration policies. Su's argument is analogous to the case I make here that communities can use smaller-scale exclusion to complement an inclusionary policy at the larger scale. Of course, in the current political environment, the trend Su identified has largely been reversed, with local communities expressing greater openness to immigrants while the nation-state is closing its doors to them. This reversal may be occurring because the *benefits* of immigration as well as the costs are most obvious at the local level, and it is becoming increasingly clear to many localities that the benefits may outweigh the costs. Needless to say, this is a complex and evolving issue that I address more fully in my forthcoming book *THE DEMOCRATIC CITY* (forthcoming 2018).