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NICOLE STELLE GARNETT

## Unbundling Homeownership: Regional Reforms from the Inside Out

*The Unbounded Home: Property Values Beyond Property Lines*

BY LEE ANNE FENNELL

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**AUTHOR.** Professor of Law, Notre Dame Law School. I am indebted to A.J. Bellia, Richard Briffault, Peg Brinig, Rick Garnett, Dan Kelly, John Nagle, and Sarah Waldeck for helpful comments and conversations. Mistakes are my own.



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**INTRODUCTION**

Two seemingly intractable puzzles plague the American system of land use regulation. The first puzzle is how to encourage land use diversity while protecting owners from harmful spillovers. Historically, regulators have responded to the latter concern by essentially ignoring the former. The dominant form of public land use regulation in the United States—*Euclidean zoning*<sup>1</sup>—operates prophylactically. That is, zoning rules seek to prevent externalities by imposing *ex ante* inalienable limitations on owners' freedom to use their property as they please. And, it is worth noting, the dominant form of *private* land use regulation in the United States—covenants imposed by private developers—operates in essentially the same way. Since local governments (and private developers) can rarely calibrate the level of regulation to residents' true preferences, *ex ante* prohibitions frequently impose excessive "prevention costs." That is, the costs imposed by the regulations to prevent possible, future harms tend to exceed the benefits of actual harm prevention. But, because property owners—especially, homeowners—are extremely risk averse, they accept (even demand) high prevention costs as a means of shielding their investment. The result is the overprotection of property owners' investments and, many would argue, a monotonous, sterile, inefficient, and inconvenient suburban landscape.

Academic skeptics of zoning (and, to a far lesser extent, of covenants) have offered several alternatives to the traditional prohibitory model of land use regulation. Some—for example, Robert Ellickson—have suggested that *ex post* fines or nuisance remedies could address harmful spillovers while enabling a more efficient distribution of commercial and residential land uses.<sup>2</sup> Other commentators have suggested that land uses should be permitted if they satisfy certain regulatory goals or "performance standards."<sup>3</sup> More recently, the self-styled "new urbanists" have proffered an alternative to zoning that relies heavily on aesthetic controls.<sup>4</sup> For reasons that are elaborated in greater detail below, however, none of these alternatives satisfactorily addresses the puzzle of

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1. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).
  2. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).
  3. See, e.g., DOUGLAS R. PORTER, PATRICK L. PHILLIPS & TERRY J. LASSAR, *FLEXIBLE ZONING: HOW IT WORKS* 11-12, 112-13 (1988).
  4. See DUANY PLATER-ZYBERK & CO., *THE LEXICON OF THE NEW URBANISM* (2002); Andrés Duany & Emily Talen, *Transect Planning*, 68 J. AM. PLAN. ASS'N 245, 247-49 (2002); Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637 (2006).

overprotection: ex post monetary remedies raise inevitable concerns about undercompensation—a problem present whenever entitlements are protected by liability rules;<sup>5</sup> performance standards have proven both difficult to articulate and to apply;<sup>6</sup> and new-urbanist-inspired aesthetic coding, which has supplemented or supplanted traditional land use regulations in some jurisdictions, generates exceptionally high compliance costs.<sup>7</sup>

The second land use puzzle is how to address the intrametropolitan inequalities resulting from the fragmented distribution of regulatory authority among multiple local jurisdictions without undercutting the beneficial effects of interjurisdictional competition. While this “local government boundary problem” extends beyond property law,<sup>8</sup> land use regulations are particularly problematic because they empower local jurisdictions to exclude unwanted residents by imposing what are, for all practical purposes, high entrance fees. Critics of metropolitan fragmentation generally offer one of two strategies for addressing interjurisdictional inequality: some propose new regional government structures that would supersede local government authority in problematic areas, including the authority to regulate land uses;<sup>9</sup> others advocate fiscal redistribution between rich and poor municipalities within a metropolitan area.<sup>10</sup> The difficulty with these strategies is that each threatens to undermine the efficiency gains that are produced when, as Charles Tiebout influentially predicted,<sup>11</sup> local governments compete for residents by structuring distinctive packages of taxation, regulation, and other publically provided amenities and services.<sup>12</sup> This competition for Tiebout’s “consumer

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5. See *infra* notes 51-53 and accompanying text.

6. See, e.g., Douglas R. Porter, *Flexible Zoning: A Status Report on Performance Standards*, ZONING NEWS, Jan. 1998, at 1.

7. See *infra* notes 146-149 and accompanying text.

8. Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996).

9. See, e.g., ARTHUR C. NELSON & JAMES B. DUNCAN, GROWTH MANAGEMENT PRINCIPLES AND PRACTICES (1995); Briffault, *supra* note 8.

10. See, e.g., ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA (1994); MYRON ORFIELD, METROPOLITICS 9-10 (1997); DAVID RUSK, CITIES WITHOUT SUBURBS 22-34 (2d ed. 1995); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Urbanism*, 88 GEO. L.J. 1985, 2015 (2000); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

11. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

12. See, e.g., THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES (William A. Fischel ed., 2006) (exploring various applications of the Tiebout Hypothesis).

voters” is hardly fine grained; it is also a primary generator of the very inequities lamented in the local-government literature. But it does subject local governments to some approximation of market competition, and regional-government and regional-redistribution proponents struggle to demonstrate that the benefits of regionalization outweigh the costs of limiting intermunicipal competition.

In *The Unbounded Home*,<sup>13</sup> Professor Lee Anne Fennell proffers innovative solutions to both of these land use puzzles. The genius of Fennell’s excellent book is that she treats these puzzles as property-entitlement problems, rather than regulatory-design problems. By resorting to property theory, Fennell is able to break free from the standard land use and local-government debates and offer novel insights into what generally seem intractable difficulties. This Review focuses on two of Fennell’s recommendations that I believe hold the most promise for successfully addressing the land use puzzles identified above: first, the use of “entitlements subject to self-made options,” or “ESSMOs,” rather than prohibitory limitations or fines, to address local land use spillovers; and second, the reconfiguration of homeownership to minimize owners’ incentives to demand exclusionary land use policies. I am less enthusiastic about her third suggestion—a “propertization” of associational rights within local jurisdictions—as the policy proposals flowing from it do not differ dramatically from the redistributive approaches to exclusion championed by regional government proponents.

Fennell’s proposed use of options to efficiently calibrate local land use regulations to resident preferences ultimately is the most promising of her policy prescriptions. Fennell argues that, in lieu of the standard prohibitory land use regulations, local governments or private developers could give property owners the right to buy or sell certain land use entitlements at prices set by the entitlement holders themselves. That is, rather than prohibiting outright activities that might generate harmful spillovers, regulators could price the right to engage in, and to be free from, the potentially harm-producing activities. Fennell’s proposed pricing system would rely on options, by entitling owners to purchase the right to engage in a land use activity, or to enjoin neighbors from the same, and would be “self-made” because it would use self-valuation devices to price land use entitlements. Fennell makes a strong case that self-priced options could better calibrate land use controls to residents’ true preference than existing regulatory devices. But, they have the potential to do even more. Fennell arguably undersells the transformative

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13. LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009).

power of this intriguing proposal by assuming that it primarily addresses intralocal regulatory spillovers and discounting the possibility that it might address regional inequalities as well. Yet this is not necessarily the case. Most proponents of regional government and growth control proceed on the assumption that poorer jurisdictions simply cannot compete with wealthier jurisdictions for the “right” kind of residents. According to this view, the exclusion of less-advantaged residents from richer jurisdictions is problematic because it denies lower-income individuals access to the amenities (safety, quality public schools, etc.) that wealthy residents demand and that wealthy jurisdictions provide. Of course, the relative status of poorer jurisdictions and their less-advantaged residents also would be improved if poorer jurisdictions (generally speaking, center cities and older, inner-ring suburbs) *could* compete successfully with wealthier jurisdictions. And, although the current housing crisis has placed a cloud of doubt over urban prospects, evidence from recent decades suggests that center cities in particular are getting better at competing with their suburban counterparts.<sup>14</sup>

As Edward Glaeser and Joshua Gottlieb plausibly argue, this competition may have been driven by an increased affinity among elites for city life, especially for the social interactions and consumer amenities enabled by dense, mixed land use urban environments.<sup>15</sup> Unfortunately, as I have argued elsewhere, existing land use regulations frequently impose “suburban” land use patterns on city neighborhoods, arguably hamstringing urban officials’ ability to capitalize on this advantage.<sup>16</sup> Yet even city officials who recognize this as a problem—and many do not—find it difficult to use land use policy to promote density and vitality because urban residents often are not appreciably less averse to spillover risk than the suburban homeowners that take center stage in *The Unbounded Home*. Neither of the common responses to this risk aversion—either to maintain a regulatory status quo that stifles urban vitality or to swap the current regulatory system for a new system of aesthetic controls that drives up housing costs—promotes urban competitiveness. But, for reasons explored in greater detail below, Fennell’s ESSMO proposal might well enable cities to achieve greater land use diversity and thereby gain an edge vis-à-vis suburbs in the competition for residents with a taste for urban life. And, by reducing homeowner anxieties, it might also serve to open up wealthier suburbs to less-advantaged residents as well.

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14. See Conor Dougherty, *Cities Grow at Suburbs’ Expense During Recession*, WALL ST. J., July 1, 2009, at A5.

15. Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275 (2006).

16. Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 43-50 (2004).

## I. PRICING PROPERTY REGULATION

Several years ago, the University of Notre Dame, the institution where I teach, announced plans for a new “college town” development, called “The Eddy Street Commons,” immediately adjacent to campus. As it happens, this development also would be a few blocks from my house, which is located in an older neighborhood near downtown South Bend, Indiana. The development which featured a mixed-use, “new urbanist” design, was slated to include apartments, townhomes, a hotel, and a variety of small stores and restaurants. My husband and I were delighted by the news. We immediately began composing a “wish list” of preferred tenants for the development—Trader Joe’s, Chipotle, an ice cream shop for our kids. We looked forward to the convenience of being within walking distance of a grocery store and restaurants where we could grab a quick dinner with our family. We also hoped that the development would help Notre Dame attract outstanding faculty and students by partially rectifying the unfortunate reality that South Bend, Indiana, lacks the charm and amenities of many university towns.

Not all of our neighbors joined in our celebration. Some objected to the development for essentially the same reason that we supported it—the fact that it would inject a more “urban” vibe into our relatively quiet, single-family residential enclave. Some expressed concern that the development might attract strangers, including potentially unsavory ones. Others worried that our proximity to the Eddy Street Commons would increase traffic in our neighborhood and make it less attractive to families with young children. A small group of environmentally sensitive individuals objected to the destruction of the wooded area where the development would be located and launched a “Save the Notre Dame Woods” campaign. Residents closest to the development worried that the restaurants would draw unruly undergraduates from Notre Dame into the neighborhood late into the night, raising the risk of drunk driving and other alcohol-related disorder.

The conflict illustrates the Coasian insight that each side of a land use dispute “harms” the other.<sup>17</sup> While my neighbors worried that Notre Dame and its developer would generate commercial spillovers in our community, their demand that the Notre Dame Woods remain undeveloped would impose costs on the University, the developer, and my family as well. As would have been the case in any city, these competing concerns were channeled through South Bend’s land use regulatory process. Before Notre Dame could begin the development, the University first had to convince the city to rezone the

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17. See R.H. Coase, *The Problem of Social Cost*, 3 L. & ECON. 1, 2 (1960).

property from “University District” to “Planned Unit Development District.” City officials considered the University’s rezoning request in two stages. The request and accompanying development proposal were first considered by the Area Plan Commission in a two-hour-long public hearing. After listening to the testimony of university officials, developers and thirty-three South Bend residents (twenty-three in support and ten opposed), the Plan Commission voted to recommend that the City rezone the parcel. Approximately a month later, following a heated five-hour hearing, the City Council voted to rezone the property, subject to several conditions, my favorite of which was the “relocation of small animals that inhabit the wooded thicket currently on the site, as well as dislocated animals that find their way into neighboring homes.”<sup>18</sup> Other concessions included limits on the height of the hotel, retail, and restaurant buildings, the creation of a new park, preservation of six acres of the “Notre Dame Woods,” and the use of environmentally friendly building principles.<sup>19</sup>

A. *The “Leaky Bucket” Problem*

Each year, versions of this story repeat themselves thousands of times in hundreds of communities across the United States, and South Bend’s resolution of the conflict over the Eddy Street Commons development comports with standard regulatory practices. These practices dictate that land use restrictions act as an on-off switch: before the rezoning decision, my neighbors and I were all protected *entirely* against the risk that commercial land uses might generate negative spillovers in our community.<sup>20</sup> In fact, we

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18. Dennis Brown, *Council Approves Rezoning for Eddy Street Commons*, NOTRE DAME NEWS, July 16, 2007, <http://newsinfo.nd.edu/news/8936-council-approves-rezoning-for-eddy-street-commons>.

19. *See id.* (containing a complete list of all concessions, including: “A limitation on the height of the Marriott to six stories for the hotel topped by three stories for condos;” “The creation of a pocket park of some 5,000 square feet to provide more green space;” “The incorporation of bike lanes, bike racks and a bike cage within a parking garage;” “The use of environmentally friendly building principals;” “A limitation of the height of the retail and restaurant buildings on Eddy Street to four stories, except for two five-story buildings on the corner of Eddy and Edison;” and “Preservation of six of the 13 acres of the woods”); Margaret Fosmoe, *Council Approves Eddy Street Commons*, S. BEND TRIB., July 17, 2007, at A1; Marti Goodlad Heline, *Crowd Vocal at Hearing: More Speakers Favor Development than Speak Against It*, S. BEND TRIB., June 20, 2007, at A1; Heidi Prescott & Margaret Fosmoe, *Project Sparking Interest: Public Hearing for Eddy Street Commons on Tuesday*, S. BEND TRIB., June 18, 2007, at A1.

20. It is worth noting that the preexisting regulatory regime did not protect landowners *at all* from other potentially disruptive land uses. For example, the University might, without



probably were *overprotected* from that risk since many of us preferred to live closer to commercial land uses than the existing zoning rules permitted. The rezoning, however, effectively eviscerated the adjacent homeowners' protection from spillovers that may be generated by the businesses and restaurants that have gradually begun to fill the Eddy Street Commons. While the conditions placed upon the rezoning clearly were designed to address concerns expressed by opponents of the project, the conditions actually do very little to address risk of development-related spillovers (with the possible exception of construction-related animal dislocation). Many of the conditions addressed the concerns of a small, but vocal, group of opponents—champions of the “Notre Dame Woods.” Even those designed to limit the scope of the project—for example, height restrictions on the commercial buildings—do not speak to the risks that concern homeowners, such as disorderly students and drunk drivers. And, had the city chosen to condition rezoning on the payment of monetary exactions to offset the costs of development, a regulatory option it did not exercise, these exactions would have gone to the public treasury, rather than to neighboring residents.<sup>21</sup>

Guido Calabresi and Douglas Melamed's seminal 1972 article provides the standard starting point for analyzing land use conflicts like the Eddy Street Commons dispute.<sup>22</sup> When faced with conflicting interests—such as the desire to develop and the desire to avoid development-generated spillovers—the law must first decide which side to favor (the entitlement-assignment question) and then decide how to enforce its choice (the entitlement-protection question). As Calabresi and Melamed observed, after assigning the entitlement initially, the law generally protects entitlements in one of three ways: inalienability rules prohibit the transfer of an entitlement, even at the option of the entitlement holder; property rules entitle the protected individual to set the price at which she will waive an entitlement (and give her an absolute right to refuse waiver); and liability rules guarantee an entitlement holder an externally set level of compensation when an entitlement transfer occurs (but not the right to prevent the transfer).<sup>23</sup> American land use regulations incorporate

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seeking any zoning changes, have built a dormitory in the woods—a land use that would have been consistent with the previous zoning scheme but also would have raised many of the concerns that residents expressed about the Eddy Street Commons.

21. On exactions, see generally ALAN A. ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ WITH ARNOLD M. HOWITT, *REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS* (1993).
22. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972).
23. *Id.* at 1092-1116.

elements of all three. Zoning rules are inalienable, although amendable through the local legislative process.<sup>24</sup> Covenants in private communities generally employ property rules to impose reciprocal obligations on all owners, although some covenants are enforced, at least initially, through fees or other liability-rule devices.<sup>25</sup> And judges use both property rules (that is, injunctions) and liability rules (that is, damages) to enforce nuisance laws.<sup>26</sup>

As a practical matter, however, the American land use regulation system is dominated by inalienability rules (zoning laws) and property rules (covenants). And, for two related reasons, these rules tend to overprotect owners in an effort to prevent *possible, future* harms. First, zoning rules and covenants are difficult to change, albeit for different reasons. While zoning rules are not alienable, they are amendable through the political/legislative process. Still, political actors respond to many incentives other than economic ones, especially the demands of politically powerful constituents, especially homeowners who—for reasons articulated more completely below—tend to demand overprotection.<sup>27</sup> While covenants are alienable and waivable, the fact that they are usually protected by property rules means that each protected owner has the right to establish the price at which she will waive her entitlement. This right is the great advantage of property rules—they enable owners to set prices that reflect both objective and subjective valuations.<sup>28</sup> But, it is also the great weakness, since property rules also enable owners to behave strategically—for example, by falsely overvaluing an entitlement or holding out to capture the gains from assembly.<sup>29</sup> Since covenants generally are imposed reciprocally on all property owners in a development, an owner wishing to assemble a waiver has to incur significant transaction costs to secure the

24. FENNELL, *supra* note 13, at 69-70 (describing zoning).

25. *Id.* at 75-80 (describing governance in private developments).

26. See, e.g., Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1005-06 (2004) (discussing nuisance remedies).

27. See *infra* notes 34-46 and accompanying text.

28. See Ellickson, *supra* note 2, at 736 n.192 (noting that consensual bargaining permits owners to incorporate subjective valuations into prices); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1785 (2004) (“The attraction of property rules is that they protect individuals’ values without their having to be able to justify these values or even reason about them at a conscious level.”).

29. See, e.g., Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1309, 1404 (2005) (discussing the problem of strategic and false valuation); Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1473 (2008) (discussing how strategic behavior can impede efficient land assembly).

consent of each protected owner.<sup>30</sup> Moreover, because each protected owner has the right to set her own price for a waiver, or to refuse to grant one at all, reciprocal covenants can present what is now known as an “anticommons” problem—that is, a scenario where too much ownership impedes efficient property use.<sup>31</sup> For example, as Fennell illustrates, an anticommons problem may arise in a planned community if the assembly costs prevent a landowner from securing an efficient waiver of a land use restriction.<sup>32</sup>

As the Coase theorem suggests, when entitlements are sticky—that is, when there is reason to believe that transaction costs impede efficient recalibration of initial entitlements—it becomes more important to get an entitlement allocation “right” in the first instance, or, at the very least, to assign the entitlement so as to minimize transactions costs.<sup>33</sup> Unfortunately, the facts on the ground do not always favor efficient entitlement allocation. An important contribution of *The Unbounded Home* is Fennell’s careful elucidation of why homeowners’ demand for regulatory *overprotection* from the risks attendant to, among other things, spillovers generated by neighboring land uses, is both rational and frequently suboptimal. Most Americans’ homes dominate their investment portfolios, a reality which generates incentives to jealously guard against fluctuations in property values. Moreover, many of the things influencing home values are external to the physical structure and the parcel upon which it sits. For example, in recent years, Henry Smith has gone far toward debunking the traditional “bundle of sticks” property metaphor—familiar to any first-year law student. Smith has used the importance of boundaries and exclusion to demonstrate that property is not made up of distinct and separable “sticks” (that is, relational “rights”) but rather more

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30. It is not unusual for covenants, conditions, and restrictions (CC&Rs) to establish democratic procedures for the abolition or amendment of covenants, but these procedures typically require supermajority approval.

31. On the “tragedy of the anticommons,” see generally MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 1-22 (2008); and Lee Ann Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 926-33 (2004). The idea of the anticommons, attributed to Frank Michelman, was popularized in Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998). See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1322 n.22 (1993) (attributing the anticommons problem to Michelman); Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in *ETHICS, ECONOMICS AND THE LAW: NOMOS XXIV* 3, 6, 9 (1982).

32. See FENNELL, *supra* note 13, at 56-57.

33. See, e.g., James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 447-49 (1995) (discussing initial entitlement assignment and the “cheapest cost avoider” principle).

closely approximates a bucket containing the rights attendant to ownership, which are, in reality, an undifferentiated whole.<sup>34</sup> But, like all buckets, Fennell correctly notes, the property bucket sloshes and occasionally leaks. And sloshes can impose costs upon neighboring buckets. For this reason, the traditional Blackstonian conception of property as an owner's "sole and despotic dominion," protected primarily through the right of exclusion, arguably does not accurately capture the typical homeowner's situation. To borrow from *The Unbounded Home*, invisible property boundaries cannot contain the visual sloshes resulting from a homeowner's affinity for displaying pink flamingos or garden gnomes in her front yard.<sup>35</sup>

Since home values reflect amenities that are both internal and external to the parcel, homeowners—again as Tiebout predicted—"shop" for both homes and communities. By virtue of their ability to enter and exit communities, homeowners exert market pressure on both local governments and private developers to offer policies that satisfy their preferences. Homeowners' desire to protect their investment from their neighbors' sloshes also incentivizes them to organize and exercise, to borrow from Albert Hirschman, "voice," by demanding that local governments and private developers alike enact and sustain regulatory and public goods policies that maximize property values.<sup>36</sup> And local governments and regulators respond to these demands because homeowners exert significant economic and (especially in the suburbs) political clout.<sup>37</sup> This is not necessarily a bad thing. As Fennell notes, we expect the law, through regulation, to "clean up routine spills and sloshes."<sup>38</sup> Moreover, many of the policies that homeowners demand from their local governments—such as high-quality public schools, safe communities, and efficient governmental services—undoubtedly generate significant positive externalities.<sup>39</sup> Certainly, recent housing trends suggest that policies that help

34. Smith, *supra* note 28, at 1759-61 ("[O]wnership 'is no more conceived as an aggregate of distinct rights than a bucket of water is an aggregate of separate drops.'") (quoting WILLIAM MARKBY, *ELEMENTS OF LAW* 158 (6th ed. 1905)).

35. FENNEL, *supra* note 13, at 97-98.

36. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 30 (1970).

37. WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 90-94* (2001) (discussing the majoritarian influence of homeowners in suburbs versus in cities); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *YALE L.J.* 385, 408-10 (1977) (same).

38. FENNEL, *supra* note 13, at 15.

39. For a thorough explication of the benefits of homeowners' majoritarian influence over local government policies, see generally FISCHER, *supra* note 37.

stabilize property values are also socially beneficial—as Fennell herself has recently argued.<sup>40</sup>

Still, for reasons that Fennell helpfully elucidates in *The Unbounded Home* as well as previous work, homeowners' anxieties do not always, or even usually, lead to a socially optimal package of land use regulations and local public amenities and services.<sup>41</sup> Importantly, while competition for homeowners is often a good thing, it is also imperfect. Neither local governments nor private developers (nor the two working in tandem through the development-approval process) can perfectly calibrate their regulation and public-service offerings to each individual homeowner-shopper. Instead, they must offer a regulatory/public goods bundle that, hopefully, will appeal to the residents that they seek to attract. This reality may force homeowner-shoppers to “buy” regulatory/public goods packages that contain policies that they would not choose in an ideal world.<sup>42</sup> For example, as Bob Ellickson observed nearly four decades ago, the convenience afforded by a corner store in a residential neighborhood can generate many benefits for nearby homeowners. These benefits should lead some residents to prefer zoning policies that permitted some small-scale commercial uses in residential neighborhoods.<sup>43</sup> But, if most local governments respond to homeowner anxieties about commercial spillovers by banning all commercial uses in residential zones, residents may be forced to choose between urban settings, which might contain too many commercial uses, and suburban ones, which contain too few. The same is undoubtedly true, as Fennell argues in *The Unbounded Home*, of private developments.<sup>44</sup> Indeed, questions about both the extent of choice provided by the housing development market and resident's degree of satisfaction in private developments has generated an extensive academic literature,<sup>45</sup> with Fennell herself questioning the extent of diversity in the market.<sup>46</sup>

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40. See, e.g., Lee Anne Fennell & Julie Roin, *Controlling Residential Stakes*, 77 U. CHI. L. REV. 145 (forthcoming Apr. 2010) (observing that many homeowners rationally abandoned their homes when housing values dipped below the foreclosure value).

41. See Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, in THE TIEBOUT MODEL AT FIFTY, *supra* note 12, at 163 (2006); Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 634 (2002) (book review) [hereinafter Fennell, *Homes Rule*].

42. Moreover, residents' choices are made more complicated by the fact that home values are affected by the policy decisions of multiple, overlapping local jurisdictions, as well as by the actions of both neighboring owners and local governments. FENNELL, *supra* note 13, at 26-31.

43. See Ellickson, *supra* note 2, at 685-87.

44. FENNELL, *supra* note 13, at 81-86.

45. See Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 10 (1989); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1523 (1982); Richard A. Epstein, *Covenants and*

The bundling effect also enables residents to “buy” regulatory policies that they do not desire *for their own sake* but for some secondary, associational- or property-protective effect.<sup>47</sup> As Fennell has elsewhere observed, deed restrictions in private developments can serve a “population-screening function, as opposed to merely a behavior-screening function.”<sup>48</sup> Covenants that increase the cost of housing (for example, by mandating minimum housing and lot size, architectural constraints, or high membership fees) promote socioeconomic clustering. And, while some benefits may come from this clustering—perhaps individuals of similar socioeconomic status are more likely to engage in community activities<sup>49</sup>—exclusionary rules undoubtedly also have malign effects and motives. Consider an example explored in the work of Lior Strahivetz. In recent years, increasing numbers of residential developments have featured golf courses, and increasing numbers of nongolfers have purchased homes in such developments. Pairing these phenomena with the racial demographics of golfers, Strahilevitz has speculated golf courses may act as “exclusionary amenities” that signal the likely demographics of a housing development.<sup>50</sup> Similar conclusions can reasonably be drawn about classic “exclusionary zoning” devices—such as large-lot mandates and restrictions on multifamily housing. Even if a would-be resident would be content to live in a condominium or a house on a small lot, she might choose to live in a jurisdiction that bans condominiums and mandates half-acre lots, reasoning that these restrictions act as a version of housing-value insurance by pricing out the kind of residents associated with reduced housing values.

In theory, liability rule devices, such as damages or ex post fines, could provide landowners with protection from spillovers while enabling a more optimal mixing of land uses. Liability rules could also, as Fennell illustrates in Part II of her book, be used to offload some of the risks that exclusionary zoning attempts to reduce. But liability rules have their own difficulties. While liability rules minimize transactions costs, they also generate high “assessment

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*Constitution*, 73 CORNELL L. REV. 906, 917 (1988); Clayton P. Gillette, *Courts, Covenants and Communities*, 61 U. CHI. L. REV. 1375, 1375-76 (1994).

46. Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 890-91.

47. FENNELL, *supra* note 13, at 26-40.

48. Fennell, *supra* note 46, at 842.

49. See, e.g., Robert C. Ellickson, *The Puzzle of the Optimal Social Composition of Neighborhoods*, in THE TIEBOUT MODEL AT FIFTY, *supra* note 12, at 199, 204-06 (arguing that community composition will effect levels of social capital).

50. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 464-76 (2006).

costs,” since regulators and courts frequently are ill-equipped to accurately assess harms imposed by spillovers.<sup>51</sup> Moreover, and perhaps more importantly, the available evidence suggests that just as property rules and inalienability rules tend to bestow *too much* protection on homeowners, liability rules bestow too little. That is, if over-compensation—stemming from the owner’s ability to refuse to relinquish an entitlement—is the “signature risk” of property rules, undercompensation—stemming from the owner’s inability to refuse to relinquish an entitlement—is the “signature risk” of liability rules.<sup>52</sup> Thus, while proposals for partially replacing property or inalienability protections with liability rules abound in the land use and law and economics literatures—including my own<sup>53</sup>—these proposals have failed to generate either political or market traction. And, as a public choice matter, it is reasonable to assume that this is in large part because homeowners are unwilling to accept the risk of undercompensation that attends liability rules.

### B. Enter Options

Most proposals for shifting to liability rules in the land use regulation context assume that the protection afforded land owners from spillovers would come either from court-ordered nuisance damages or legislatively determined fees. As Fennell observes, the two concerns associated with liability rules could be partially addressed if community members consented in advance to a fee schedule designed to penalize rule violations. In a private community, homeowners would signal consent to such a fee schedule by purchasing a home in the development. In the case of public land use regulations, approval by a representative political body would have to serve as a (very poor) substitute for

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51. See, e.g., Heller & Hills, *supra* note 29, at 1474 (observing that “the administrative costs of judicial valuation require courts to choose crude measures of values—for instance . . . the court’s estimate of the value that a willing buyer would pay a willing seller”); Krier & Schwab, *supra* note 33, at 453-57 (discussing assessment costs); Smith, *supra* note 28, at 1777-78 (arguing that property rules have “information cost advantages” over liability rules because courts are ill-equipped to accurately value entitlements).
  52. See, e.g., Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2095 (1997) (discussing the strengths and risks of property versus liability rules and observing that one of the “signature risks” of liability rules is undercompensation); Fennell, *supra* note 29, at 1404 (noting that liability rules may result in the underpricing of entitlements); Heller & Hills, *supra* note 29, at 1474-75 (discussing the reality of undercompensation in the eminent domain context).
  53. See Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1243-44 (2001) (suggesting that fines, rather than ex ante prohibitions, might be used to police home-based businesses).

the consent achievable in the private development context. But regulators would still face valuation problems, both because fees would have to be set in advance, with limited information about resident preferences, and because it would be difficult to conceive of a fee schedule that responded dynamically to changes affecting resident preferences. Moreover, fee schedules would continue to reflect regulatory bundling, since regulators would be forced to make decisions about what fees to include in/exclude from the schedule.<sup>54</sup>

Building upon her previous work, Fennell offers, in *The Unbounded Home*, an intriguing twist on the fee schedule model: a regulatory pricing system based upon pre-set, self-assessed options, or “entitlements subject to self-made options” (ESSMOs).<sup>55</sup> Options provide the legal right, but not the obligation, to buy (a “call option”) or sell (a “put option”) a given commodity at a pre-set price. Traditional liability rules are, in a sense, “call options.” That is, they give an actor the right, but not the obligation, to purchase an entitlement from the entitlement holder at a price set by a third party. In the land use context, for example, when a court awards nuisance damages to one neighbor for harms caused by another neighbor’s activities, the offending neighbor has, in essence, exercised her option to purchase her neighbor’s right to live nuisance free. Fennell offers a creative twist on this familiar model, suggesting that self-valuation devices could be used to involve the affected property owners in the setting of the prices for regulatory protections and entitlements. By utilizing information-forcing devices designed to elicit reasonably truthful information about how much an owner values certain land use protections and privileges, Fennell intuits, regulators can take advantage of liability rules’ signature benefit—the ability to unilaterally force entitlement transfer—while sidestepping both assessment and undercompensation concerns.<sup>56</sup>

Fennell’s ESSMO proposal is illustrated by the following example (drawn primarily from *The Unbounded Home*): one common criticism of planned residential developments is that they mandate too much homogeneity. Covenants may permit very little architectural variation among the “cookie cutter houses” that line a development’s streets, tightly control paint colors, prohibit exterior decorations, etc. (Some local jurisdictions have enacted aesthetic zoning regulations imposing similar controls.) The regulatory “bundling” response to homeowners’ risk aversion that Fennell helpfully elucidates, as described above, provides a partial explanation for this mandated homogeneity: since developers and local governments lack a mechanism for

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54. FENNELL, *supra* note 13, at 99-101.

55. *Id.* at 103-16.

56. *Id.* at 108-10.



tailoring regulatory protection to individual regulatory tastes, they may tend to over-respond to homeowner risk-aversion by mandating *too much* protection from aesthetic spillovers. If so, would-be homebuyers, who wish to protect themselves against the overly eclectic tastes of their neighbors, must choose to purchase homes in communities mandating *less* aesthetic diversity than they would prefer in an ideal world.

Self-assessed options, however, could empower local governments or developers to better tailor the level of regulatory protection to individual residents' tastes. For example, suppose a private developer wished to experiment with aesthetic diversity, while at the same time reassuring would-be homeowners that the diversity will not get out of control. Rather than seeking to ascertain, and then mandate, the optimal level of diversity in the community, the developer might instead adopt a covenant permitting homeowners to engage in some potentially harm-producing behavior—Fennell suggests the displaying of tacky pink flamingos as illustrative—upon payment of a pre-determined fee. The developer might also set a price at which members of the community could buy back a homeowner's flamingo-display rights—enabling residents to respond to fluctuations in the tackiness quotient of flamingo displays. To address fluctuations in individual aesthetic tastes, Fennell further suggests that the developer might allow residents to customize the price at which her neighbors could buy back their flamingo-display rights. A resident with a particular affinity for the pink feathered creatures might increase the call option price for her display. And, as long as the developer engaged mechanisms to elicit truthful valuations—which Fennell describes in detail, but which I leave to one side for purposes of brevity—this ESSMO device would enable the developer to achieve an optimal level of flamingo displays: neighbors would only call in flamingo display rights when the collective disutility of a display exceeded its utility to the displayer.

The ESSMO proposal obviously generates a number of complex institutional design problems, many of which Fennell discusses in *The Unbounded Home*. For example, the community would have to determine which entitlements to protect by ESSMOs. Clearly, as Fennell acknowledges, ESSMOs cannot govern every aspect of community life. Not only would the administrative costs of identifying and then pricing the entitlements to be protected likely overwhelm any regulatory systems,<sup>57</sup> but as Fennell herself observes, normative considerations may weigh against pricing some

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57. See Amnon Lehavi, *Is Law Unbounded: Property Rights and Control of Social Groupings*, LAW & SOC. INQUIRY (forthcoming 2010) (reviewing *The Unbounded Home* and discussing the problem of defining the universe of entitlements protected by ESSMOs).

entitlements.<sup>58</sup> Fennell intriguingly suggests that the households in a community might themselves, in the first instance, do the work of specifying which entitlements should be protected by ESSMOs, although she fails to elaborate on how such self-designation would work in practice.<sup>59</sup> Presumably, in the private development context, a developer might specify the process by which residents would go about determining whether, when, and how, ESSMOs would be established and priced. In the context of public regulation, the initiative process might be used to approximate the self-designation envisioned by Fennell, although historical experience with “ballot box zoning” casts doubt on whether ESSMOs driven by direct democracy could be expected to address the problem of *overregulation*. In large cities, ESSMOs might also be employed, as discussed in more detail below, by sublocal governmental entities like business improvement districts (BIDs).<sup>60</sup> Even after the universe of ESSMO protection is determined, however, numerous questions remain—from the difficulty of eliciting truthful valuation information and avoiding strategic behavior to the need to enable regulatory evolution as individual and community preferences inevitably change.<sup>61</sup>

Finally, and perhaps most importantly, there remains the question of whether ESSMOs will “sell”—either politically (as reflected in local-government innovation) or economically (as reflected in new servitude-enforcement devices). When it comes to making ESSMO regulation a reality, I must acknowledge some pessimism. Fennell correctly notes that ESSMOs can be most easily implemented in private neighborhoods “given the relative freedom of such neighborhoods to engage in creative entitlement restructuring.”<sup>62</sup> Yet, while the private-development market grows every year—the Community Associations Institute estimates that, in 2009, 60.1 million Americans lived in over 305,000 common interest communities<sup>63</sup>—Fennell does not point to the implementation of her ESSMO idea in any

58. FENNEL, *supra* note 13, at 118-19.

59. *Id.* at 111-12.

60. On sublocal governmental institutions, see generally Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 509 (1997) [hereinafter Briffault, *The Rise of Sublocal Structures*]; Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998). On BIDs, see generally Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 370 (1999) [hereinafter Briffault, *A Government for Our Time?*].

61. FENNEL, *supra* note 13, at 106-19.

62. *Id.* at 111.

63. Community Associations Institute Industry Data, <http://www.caionline.org/info/research/Pages/default.aspx> (last visited March 1, 2010).

existing developments. Indeed, as noted above, she has expressed concern about the lack of diversity of governance forms in the private development market.<sup>64</sup> The fact that option-based land use regulations have not been implemented to date is at least suggestive of the possibility that there is no “market” for ESSMOs. The same tentative conclusions might be said of the political feasibility of ESSMOs in the public regulation context—where regulatory innovation proceeds at a much slower pace. Fennell points to no examples of local governments replacing traditional land use regulations with regulatory options, even during a period marked by the emergence of new local-government innovations, including the rise of sublocal government entities and new regulatory models that seek to increase land use diversity, such as the form-based “transect zoning” promoted by the new urbanists.<sup>65</sup>

In the end, however, I hope that this pessimism is misplaced and that Fennell’s ESSMO proposal proves more than an intriguing academic exercise. Fennell makes a powerful case that self-assessed options would not only enable more efficient land use regulation, but would also facilitate more land use diversity, both within and between jurisdictions, than risk-averse owners currently accept—an important reality that I return to in Part IV, below.

## II. PROPERTIZING THE METROPOLITAN COMMONS

Fennell acknowledges that her ESSMO proposal also can partially address the interjurisdictional inequities within our metropolitan regions. As Fennell notes, if ESSMOs come to replace traditional regulatory devices that drive up housing costs, then they may provide a mechanism for opening up affluent suburbs to less-affluent residents. This will only occur, of course, if residents of affluent suburbs come to accept ESSMOs as a kind of insurance against the concerns that provide the impetus for excessive and exclusionary regulation—and I remain dubious about this coming to pass. Still, there is no question that regulatory barriers to entry into the suburbs are a primary cause of interjurisdictional inequality within our metropolitan regions, and Fennell is to be commended for offering an institutional innovation that might overcome some of those barriers.<sup>66</sup> Fennell’s ESSMO proposal, however, plays only a bit

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64. Fennell, *supra* note 46, at 890-98.

65. See *infra* notes 146-148 and accompanying text.

66. FENNEL, *supra* note 13, at 81-86. On regulatory barriers to housing affordability and intermetropolitan mobility, see generally ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, “NOT IN MY BACKYARD”: REMOVING BARRIERS TO AFFORDABLE HOUSING (1991); and U.S. DEP’T OF HOUS. & URBAN DEV., “WHY NOT IN OUR COMMUNITY?": REMOVING BARRIERS TO AFFORDABLE HOUSING (2005).

part in her discussion of the metropolitan commons. In its place, she offers two very different solutions to the problems of intrametropolitan mobility and interjurisdictional inequality. This Part briefly discusses the first—a “propertyization” of associational rights in local jurisdictions<sup>67</sup>—which is the weakest link in Fennell’s otherwise outstanding book.

To begin, Fennell’s suggestion that associational rights might be reconceived, in part, as property rights is an entirely reasonable one. As Fennell notes, the traditional discourse on associational rights is not completely divorced from conceptions of property. Nor could it be, since property’s signature attribute—the right to exclude—is ultimately what gives associations the room to exist. As Fennell helpfully describes, property, according to the traditional view, is “an associational envelope of sorts, with hard outer boundaries that protect an invitation-only enclave,” within which rights of privacy and association are protected from governmental intervention.<sup>68</sup> It does not seem incongruous, for example, that rights of association in a private residential development are defined by property rights and restrictions in recorded servitudes—or that the entity charged with enforcing these rights and restrictions is usually a “homeowners’ association.” Nor does it come as a surprise that disputes *within* private associations frequently center on questions of ownership. To give just one example, in recent years, a number of religious congregations have broken off from the Episcopal Church in the United States and affiliated with conservative Anglican bishops in Africa. Legal disputes over the ownership of church buildings have ensued, with splinter congregations attempting, in essence, to take church buildings with them.<sup>69</sup> That such disputes are resolved according to principles of property law is no more astonishing than courts’ refusal to entertain any invitation to resolve the theological disputes underlying them.<sup>70</sup> The property-law rules governing the ownership of church buildings set, in a sense, the exclusionary boundaries of religious associations.

Fennell is also correct that some attributes of membership in a local political community (usually a municipality) bear striking resemblance to the

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67. FENNELL, *supra* note 13, at 123-69.

68. *Id.* at 148.

69. See, e.g., Dan Gilgoff, *California Ruling in Episcopal Church Dispute Deals Setback to Breakaway Parishes Nationwide*, U.S. NEWS & WORLD REP., Jan. 8, 2009, <http://www.usnews.com/articles/news/religion/2009/01/08/california-ruling-in-episcopal-church-dispute-deals-setback-to-breakaway-parishes-nationwide.html> (surveying ongoing legal disputes).

70. See *Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969).

attributes of membership in a private development or other private association. Indeed, local governments have long straddled the uncomfortable divide in American law between public and private associations, as indicated both in the name of the dominant form of local government (the municipal *corporation*) and in the functions that local governments serve.<sup>71</sup> Moreover, as Fennell elucidates, local government policies—like private association policies—have membership effects: they exclude undesired member-residents and attract desired ones. And disaffected residents respond to disfavored local political decisions in the same way that disaffected church members respond to disfavored religious policies: They either take over and change the rules,<sup>72</sup> or they leave. Usually disaffected residents “exit” a local jurisdiction the old fashioned way—by moving to a new one, in much the same way that a disaffected Episcopal might become a Presbyterian or Roman Catholic. Occasionally, however, disaffected residents (like disaffected Episcopalians) try to take their property with them. Disputes about deannexation or secession—featuring residents seeking to disconnect property from one jurisdiction and either join another or form an entirely new one—are not unheard of in local government law (with the efforts of Staten Island and the San Fernando Valley to secede from New York City and Los Angeles, respectively, being the most spectacular cases in point).<sup>73</sup>

The central difficulty with *The Unbounded Home*'s discussion of propertized associational rights comes when Fennell transitions from the theoretical to the practical. Immediately after her careful effort to categorize associational rights along an expanded menu of entitlements (building upon Calabresi and Melamed), she promises to move the reader “from rules to policies.”<sup>74</sup> The reader is, by this point, prepared to listen, especially because Fennell has built a strong case that the costs of exclusion from membership in a local political

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71. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 111-14 (1977) (chronicling the rise of the “public-private” distinction in American law); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1100-04 (1980) (discussing the effect of the public-private distinction on evolving ideas of municipal power); Joan Williams, *The Development of the Public, Private Distinction in American Law*, 64 TEX. L. REV. 225, 232-35 (1985) (book review) (same).

72. See, e.g., Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) (observing that local government action, stemming from a “take over” by dissenters, can voice opposition to prevailing norms and legal rules).

73. See Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775 (1992); Michelle Cottle, *Down in the Valley: Why L.A. Should Remain Intact—Barely*, NEW REPUBLIC, Aug. 19, 2002, at 16.

74. FENNELL, *supra* note 13, at 148.

community are frequently much higher than the costs of exclusion from most private associations. Unfortunately, the policy prescriptions that flow from “propertized” associational rights turn out not to differ dramatically from the standard redistributive solutions to intrametropolitan inequalities offered by local government scholars. Fennell’s use of New Jersey’s highly criticized Regional Contribution Agreement (RCA)—which entitles a wealthier jurisdiction to pay a poorer jurisdiction to absorb a portion of its state law obligation to provide affordable housing—as an illustration of “propertized” associational rights within a metropolitan region only heightens my skepticism.<sup>75</sup> Fennell’s response to what she acknowledges are valid criticisms of RCAs combines both interjurisdictional redistribution *and* centralized state regulation.<sup>76</sup> As I have previously argued, there are serious questions about whether the *potential* benefits of these redistributive and centralizing regulations outweigh their costs—particularly the reduced interjurisdictional competition. This competition, while far from perfect, undoubtedly generates many real benefits by subjecting local governments to some approximation of market pressure that government generally lacks.<sup>77</sup> The question—which Fennell’s “properterization” discussion does not satisfactorily answer—is whether the benefits of reduced exclusion outweigh the costs of reduced competition.

### III. SLICING HOMEOWNERSHIP

Fennell’s second prescription for curing metropolitan ills—Homeownership 2.0—is more promising. As discussed previously, Fennell correctly observes that residents value exclusion—and therefore demand regulatory barriers to entry—for the same reason that they demand regulatory overprotection against land use spillovers: they are exceedingly risk averse when it comes to protecting their investment in their homes. Thus, residents will buy into jurisdictions offering amenities (regulatory or otherwise) that have the effect of exclusion, even if they do not desire the exclusionary amenities for their own sake. Most land use and local government scholars propose to address the resulting exclusion directly—for example, by recommending preemptive state regulation, centralization of authority over land use regulation, or fiscal redistribution. *The Unbounded Home* contains

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75. *Id.* at 157–60.

76. *Id.* at 160–61.

77. See Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277, 297–98 (2007).

elements of many of these proposals. In Part IV of the book, however, Fennell takes a different tack. Rather than addressing exclusionary regulations directly, she proposes addressing a primary contributor to the homeowner risk aversion that generates demand for exclusion: the fact that most homeowners are “overstaked” in their homes—that is, their investment portfolios are not well-diversified, but rather are dominated by a single large asset.<sup>78</sup>

Fennell suggests that, as is the case with regulation, would-be homeowners face a “bundling” problem. Clearly, homeownership carries a variety of benefits that makes it preferable, for many residents, to renting.<sup>79</sup> But, those wishing to secure these benefits face a stark choice: rent (thereby avoiding all risks, but securing none of the benefits of ownership) or buy (thereby assuming all of the risks in order to secure the benefits of ownership). Indeed, the recent housing fiasco suggests, as Fennell and Julie Roin have argued, that both owners and lenders may have overestimated the benefits and underestimated the risks of homeownership in many cases.<sup>80</sup> It is reasonable to assume that many homeowners would happily offload some of the risks of ownership, especially risks attendant to factors that are beyond the owners’ direct control—from the regulatory and public-goods policies of the local jurisdiction to regional, national, and even international economic trends. In fact, as Fennell notes, most owners already do offload risks by, for example, purchasing homeowner’s insurance and mortgaging their property, thereby sharing the risks of ownership with lenders.<sup>81</sup>

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78. FENNEL, *supra* note 13, at 184. As an aside, it is worth noting that, as Fennell and Julie Roin have elsewhere argued, now many homeowners are also—thanks to the housing bubble—“understaked.” That is, they owe more money than their home is worth, giving them an incentive to default on costly mortgages. Fennell & Roin, *supra* note 40, at 146. This is not mere academic speculation. On the contrary, the *New York Times* recently reported that even homeowners who can afford to pay high mortgage payments have begun to walk away from their homes. See David Streitfeld, *No Help in Sight, More Homeowners Walk Away*, N.Y. TIMES, Feb. 2, 2010, at A1.

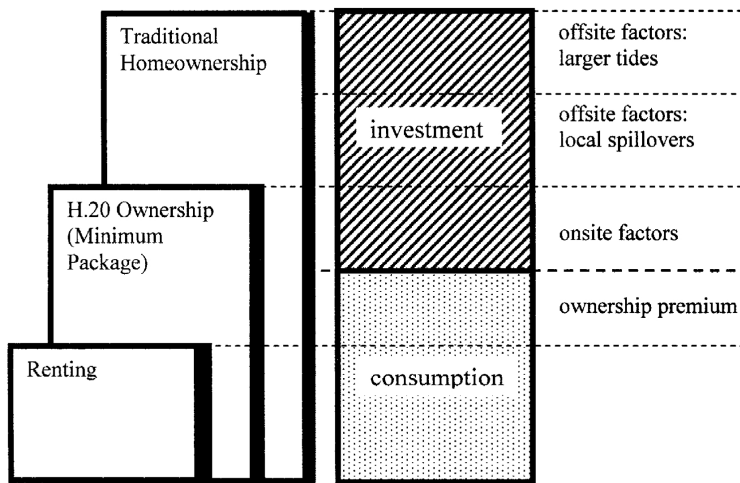
79. FENNEL, *supra* note 13, at 181-84.

80. See Fennell & Roin, *supra* note 40.

81. H2.o is not the only way to slice home ownership. Other examples include community development land trusts, which divide ownership between residents and nonprofit housing organizations, see JOHN EMMEUS DAVIS, NAT’L HOUS. INST., SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING 18 (2006); J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 541-51 (2007), as well as the division of ownership characterized by many common interest communities, see Michael A. Heller, *The Dynamic Analytics of Property Law*, 2 THEORETICAL INQUIRIES IN LAW 79, 89-91 (2001). Additionally, in other countries, long-term leases are quite common tenure form, where residents holding leaseholds lasting many years but a remainderman/landlord claims

Fennell’s Homeownership 2.0, or H2.0, would enable homeowners to further diversify their investment portfolio. Specifically, Fennell suggests that the traditional homeownership bundle could be sliced and shared between owners and investors, with owners investing in, and assuming the risks of, the slice of ownership roughly approximating the value/risk of onsite factors and investors assuming the residual investment in the slice approximating the value/risk of off-site factors (local spillovers, metropolitan, and national economic trends, etc.). H2.0 is helpfully illustrated in *The Unbounded Home* as follows:

**Figure 1.**  
 “COMPONENTS OF HOMEOWNERSHIP”<sup>82</sup>



As this graphical representation illustrates, H2.0 eliminates the need for home shoppers to make the sharp choice between renting and owning. H2.0 “owners” capture the entire consumption stream associated with ownership, as well as the investment benefits/risks attributable to onsite factors, but are able to offload the risks associated with off-site factors over which they have no control.

Since H2.0 does not directly disable interjurisdictional competition, it offers a far superior means of addressing regulatory exclusion and the

the residual value of the lease. FENNELL, *supra* note 13, at 190 (noting that leasehold reform represents an alternative to H2.0).

82. FENNELL, *supra* note 13, at 188 (featuring this diagram as “Figure 8-1”).



intrametropolitan inequality that flows from it than the regulatory or redistributive alternatives favored by many local government scholars. H2.o is an intriguing mechanism for addressing intrametropolitan inequality for at least two significant reasons. First, if investors come to bear the risks associated with local spillovers, Fennell intuitively, homeowners' motivation to demand regulations resulting in the exclusion of "risky," spillover-prone, entrants may diminish. In this sense, H2.o does the same work as the "home equity insurance" proposed by William Fischel to reduce homeowner risk-anxiety and the inefficient policies that result from it.<sup>83</sup> Second, the availability of a "minimum" homeownership package would reduce the cost of homeownership, thereby inducing some renters to buy and enabling greater economic mobility within our metropolitan regions by decreasing the costs of entry into more affluent suburbs. By so doing, it might also prevent a replay of the current housing crisis by minimizing the risk that fluctuating housing prices will lead to a situation where over-exuberant home purchasers find themselves upside down on costly mortgages.

All of that said, Fennell's H2.o proposal prompts many questions, some of which can only be answered by the kind of legal experimentation that she advocates. The remainder of this Section details three of these concerns:

#### A. Structuring Owner-Investor Relationships

The first question is how the relationship between homeowners and investors would be structured. Possibilities, some of which are suggested in the *Unbounded Home*, include:

##### 1. Shared Ownership

Theoretically, an owner and an investor might take advantage of existing tenure forms and invest in a home as co-tenants—with owners and investors holding different fractional shares. Such an arrangement is not altogether uncommon. Family members (and even friends) sometimes choose to increase affordability and spread risk by sharing ownership—for example, my father was a co-owner of my first car. But co-ownership is an awkward fit for the H2.o proposal. While throughout the discussion of H2.o, Fennell refers to "the

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83. See FISCHEL, *supra* note 37, at 268-70. As both Fennell and Fischel note, in Oak Park, Illinois—an inner-ring Chicago suburb—such an insurance program was implemented as part of a (largely successful) effort to prevent panic selling during the time that the community became more integrated. The Oak Park program has been widely implemented in Chicago as well. FENNELL, *supra* note 13, at 177; FISCHEL, *supra* note 37, at 270.

owner” and “the investor,” it seems unlikely that owners would actually be paired with individual investors, rather than with anonymous pools of investors. (Indeed, Fennell’s suggestion that derivative markets and housing indexes might adapt to accommodate H2.0—discussed below—assumes as much.) Even if mechanisms might develop to pair individuals and owners, it is highly improbable that strangers (as opposed to family members or friends) would choose to enter into co-ownership arrangements. The arrangement has significant downsides, since, as co-owners, investors and owners would have both equal rights of possession (regardless of the division of shares) and the right to unilaterally sell and divide their shares among other owners. The former reality could presumably be addressed through a contract “leasing” the investor’s shares/possessory rights to the owner. The latter poses a significant risk that subsequent transfers of an investor’s shares would lead to excessive fragmentation, generating an anticommons problem.

## 2. *Derivative Markets and Housing Indices*

*The Unbounded Home*, to be clear, does not propose traditional co-ownership arrangements between homeowners and investors. Instead, Fennell suggests that either existing derivative markets might be adapted to implement H2.0 or that legislation might be enacted recognizing H2.0 as a new tenure form. The former is a promising, but underdeveloped, suggestion. Fennell argues that derivatives markets pegged to indices that fluctuate according to off-site investment risk could be used to offload risks from owners to investors. But, as she acknowledges, “important design challenges remain.”<sup>84</sup> Remember that the goal of H2.0 is to limit homeowners’ exposure to offsite risk. Yet, as Fennell admits, “there are questions about whether any given housing index will pick up too much of what owners are doing on their own parcels . . . or too little of what is happening outside the parcel.”<sup>85</sup> It is also unclear who would devise the relevant housing indices. In *The Unbounded Home*, Fennell seems to assume that financial markets will generate them, but she has elsewhere suggested that local governments might be uniquely situated for the task.<sup>86</sup> As for this latter point, while it is true that a number of municipalities have adopted voluntary equity insurance programs pegged to the local housing

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84. FENNELL, *supra* note 13, at 200.

85. *Id.* at 201.

86. Fennell & Roin, *supra* note 40.

indices that Fennell advocates,<sup>87</sup> I question whether (for all the reasons that Fennell articulates in the book) local governments can be trusted to overcome a natural tendency toward parochialism and generate accurate indices. Elsewhere, Fennell has nodded to this concern—suggesting that state governments might take on a coordination and oversight role or a “platform for joint ventures” between municipalities.<sup>88</sup> (But the suggestion for more centralized control over local affairs raises many of the same red flags discussed above.)

*The Unbounded Home’s* stylized discussion of the form that derivative contracts between owners and investors might take also raises a host of questions about actual market implementation. How dramatically would H2.0 differ from the home-equity-insurance programs implemented in a number of local jurisdictions that, Fennell elsewhere acknowledges, have not been widely accepted?<sup>89</sup> Would investors hold a security interest in H2.0 properties, and, if so, how dramatically does H2.0 differ from traditional mortgages or from shared-equity mortgages, which, again, have not been widely adopted?<sup>90</sup> While these questions are beyond the scope of this Review, the success of H2.0 as a practical reform will likely improve the ability of market and regulatory actors to answer them to the satisfaction of owners and investors.

### 3. *A New Tenure Form*

Fennell also floats the suggestion that, instead of relying upon existing derivative markets, H2.0 might be introduced as “a new package”—that is, as a new tenure form—even if derivative markets either have—or will soon have—the “technical capacity to reshape home investment risk in endlessly flexible ways.”<sup>91</sup> Fennell argues that adopting the “H2.0 package as a new starting point”<sup>92</sup> will speed the pace of reform by offering a coherent alternative to the existing homeownership bundle that can serve as a “focal point” around which

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87. See Robert J. Shiller, *Radical Financial Innovation*, in *ENTREPRENEURSHIP, INNOVATION, AND THE GROWTH MECHANISM OF THE FREE-ENTERPRISE ECONOMIES* 306, 316 (Eytan Sheshinski, Robert J. Strom & William J. Baumol eds., 2007).

88. Fennell & Roin, *supra* note 40.

89. *Id.*

90. See Andrew Caplin et al., *Shared-Equity Mortgages, Housing Affordability, and Homeownership*, 18 *HOUSING POL’Y DEBATE* 209 (2007).

91. FENNELL, *supra* note 13, at 203.

92. *Id.*

new mechanisms for spreading homeownership risk can develop.<sup>93</sup> This argument is undoubtedly correct as far as it goes. That is, it is entirely reasonable to assume that H2.o will be more readily accepted, and new financing mechanisms likely to develop enabling it, if state legislatures adopt legislation recognizing it as a new tenure form. The rapid acceptance of condominiums following the adoption of state legislation authorizing them in the 1960s is case in point. As Thomas Merrill and Henry Smith observe, “In theory, it might be possible to create a condominium by clever combination of preexisting property forms. But in practice, condominiums did not emerge until the 1960s, when virtually all states adopted statutes expressly authorizing the creation of condominiums.”<sup>94</sup> Recognizing a new tenure form would also undoubtedly solve some of the information-cost problems discussed below, since investors would presumably register their shares in local land registries.

That said, it is far from clear whether, at least at this point, state legislatures have enough information to successfully design a new tenure form. For the reasons articulated below, H2.o presumably would have to at least begin with a standardized default package. Yet households have different financial needs and varying levels of risk tolerance, which presumably could be better addressed through the flexibility offered by ad hoc financial market experimentation anticipated in Fennell’s discussion of derivatives. Without the information that would be generated by such experimentation, state legislatures will be left guessing about the optimal division of risk between owners and investors. In her previous work, Fennell addressed these concerns by arguing that she did not intend, by suggesting a “new tenure form,” to propose a new possessory estate. Instead, she argued that “H2.o would retain the fee simple estate as the basic unit of analysis and would accomplish the transfer of risk contractually within that structure.”<sup>95</sup> While this explanation addresses concerns about the information costs facing legislatures, it also blurs the distinction between a new H2.o “package” and the use of derivatives discussed above.

### *B. Recalibrating “Voice”*

Fennell argues that H2.o will serve two purposes. First, it will address the reality that the current “homeownership form . . . no longer serves the needs of

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93. *Id.* at 203-04.

94. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1, 15-16 (2000) (footnote omitted).

95. See Lee Anne Fennell, *Homeownership 2.0*, 102 *NW. U. L. REV.* 1048, 1086 (2008).

most households.”<sup>96</sup> Second, it will reduce homeowners’ impulse to demand exclusionary regulations by decreasing their exposure to risks unrelated to on-site factors, such as the quality of local public schools. My enthusiasm for H2.0 (and, I suspect, hers) flows primarily from the second claim—that H2.0 can promote intrametropolitan mobility by increasing housing affordability and decreasing exclusionary regulation. Yet, I question the extent to which H2.0 will actually reduce homeowners’ exclusionary impulses. As Fennell acknowledges, and as explored in great detail in the work of economist William Fischel, concerns about the quality of local public schools are a primary driver of competition among local jurisdictions. In 2004, almost one-quarter of parents reported having moved to their current neighborhood to enable their children to attend the local public school. What’s more, this kind of residential sorting increases as parents’ educational attainment rises.<sup>97</sup> Fischel argues that, because public school quality is capitalized in home values, homeowners have strong incentives to demand high-quality public schools.<sup>98</sup> Undoubtedly, asset risk spreading between owners and investors can assuage the concerns of homeowners who demand high-quality schools in order to protect their primary investment from market fluctuations. But concerns about home values are not the only, or even the primary, reason homeowners demand high-quality schools. Parents’ primary motivation for moving to districts with high-performing public schools likely is a desire to secure a high-quality education for their children. And, while parents are not always perfect school consumers—that is, they may tend to overestimate the quality of their children’s schools and/or to use home values as a proxy for school quality<sup>99</sup>—the available evidence also suggests that higher-income parents have better information about school quality than lower-income parents.<sup>100</sup> Not only are these high-income movers the very residents that local jurisdictions are most desirous of attracting, but they also are mostly likely to be aware that classroom

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96. FENNELL, *supra* note 13, at 203.

97. See Jack Buckley & Mark Schneider, *School Choice, Parental Information, and Tiebout Sorting: Evidence from Washington, D.C.*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES*, *supra* note 12, at 104.

98. FISCHEL, *supra* note 37, at 154-55.

99. See *id.* (discussing literature suggesting that home buyers use housing prices as a proxy for school quality); Buckley & Schneider, *supra* note 97, at 107-11 (discussing literature suggesting that higher-income parents have better, but imperfect, information about school quality than lower-income parents).

100. See, e.g., Paul Teske et al., *Establishing the Micro Foundations of a Macro Theory: Information, Movers, and the Competitive Local Market for Public Goods*, 87 AM. POLI. SCI. REV. 702, 709 (1993) (reviewing empirical evidence suggesting that high income movers have better information about schools).

demographics affect school performance—knowledge that provides an incentive to exclude independent of property values.<sup>101</sup> And, of course, assuaging concerns about home values may do little to address exclusionary impulses with malign motives such as racial prejudice, as suggested in Strahilevitz’s work on “exclusionary amenities.”<sup>102</sup>

My second concern is the mirror image of the first—that is, whether H2.o might work too well. In other words, a reduced homeownership package might act to suppress homeowners’ exercise of “voice” within a local jurisdiction. As Fennell acknowledges, anxieties about home values incentivize homeowners (or, to use Fischel’s term, “homevoters”) to organize to demand many *socially beneficial* policies. As Fischel observes, “Asset risk is a good thing when it makes homeowners pay attention to the quality of schools and municipal services. It helps overcome the free-rider problem that is otherwise endemic to boring, local political concerns.”<sup>103</sup> Moreover, some of the exclusionary impulses generated by asset risk are *also* a good thing. For example, risk-averse homeowners may organize to quash new developments that will generate spillover costs in excess of their benefits—a reality that is not to be discounted in an era of concern about sustainable development and suburban sprawl.<sup>104</sup> On the other hand, homeowner anxieties also generate “NIMBY” (Not In My Backyard) pressures for local jurisdictions to enact inefficient exclusionary policies that exacerbate the existing maldistribution of resources within our metropolitan regions,<sup>105</sup> further contribute to the “spatial mismatch” between poor urban residents and suburban jobs,<sup>106</sup> deny access to quality public

101. See, e.g., James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2102-07 (2002) (discussing the effects of poverty on school performance).

102. See Strahilevitz, *supra* note 50.

103. FISCHEL, *supra* note 37, at 268.

104. *Id.* at 269.

105. See, e.g., Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 9-12 (2000) (discussing connections between exclusionary zoning, sprawl, and urban poverty); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 351 (1990) (discussing the connection between local regulatory powers and maldistribution of resources within metropolitan areas); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 69-70 (1999) (arguing that suburban sprawl has resulted in urban disinvestment).

106. See, e.g., Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 798-808 (1991) (discussing the “spatial mismatch hypothesis,” which attributes inner-city poverty to the suburbanization of low-skilled, service jobs). The spatial mismatch hypothesis is attributed to John Kain. See John F. Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82 Q.J. ECON. 175, 197 (1968); see also Richard Arnott, *Economic Theory and the Spatial Mismatch Hypothesis*, 35 URB. STUD. 1171, 1171-72 (1998) (attributing the theory to Kain).

schools to those who lack the means to overcome the entry costs established by exclusionary regulations,<sup>107</sup> and even promote suburban sprawl by driving new development further into the exurban fringe.<sup>108</sup> Previous exchanges suggest that Fennell is less sanguine than Fischel that, on average, the benefits of “homevoter” preferences outweigh their costs.<sup>109</sup>

But, in *The Unbounded Home* Fennell does not—and, in all fairness, could not—provide evidence that H2.o will correctly calibrate owner/investor incentives to demand efficient, high-quality local public goods while muting the temptation to demand inefficient exclusion. We simply cannot know at this point whether the apparent benefits of H2.o, including reduced incentives to exclude, would in fact outweigh the costs, including reduced incentives to organize and demand the high-quality local services that are capitalized in housing prices. Moreover, while Fennell satisfactorily demonstrates that H2.o will adequately incentivize owners to make site-specific investments in their property, she does not fully convince me that investors can be trusted to fill in the gaps left by the reduced homeowner incentives to promote sound local policies.<sup>110</sup> To begin, the extent to which investors would be *able* to influence local politics is not clear. If derivative markets did the job of dividing up homeownership risk between investors and owners, then outsider investors would be powerless to exercise influence over the local political process in the same way that homeowners do—that is, by voting. Presumably, if states adopted legislation recognizing H2.o as a new tenure form, investors would be entitled to the same package of political rights as absentee owners, which include participation in local land use debates and, under some circumstances, voting rights in local elections.

Still, except in the unlikely event that H2.o reforms actually result in the pairing of individual residents with a single investor, or even a small group of investors, an investor’s stake in any given H2.o property likely will be insufficiently large to incentivize the same level of participation as existing homeowners. The recent experience with the securitization of subprime mortgages only heightens this concern. Mortgage securitization is, in essence, a risk-spreading device between owners and investors. But, as David Dana illustrates in a recent article, investors in securitized mortgages did nothing to

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107. See, e.g., Ryan & Heise, *supra* note 101, at 2093-96 (discussing connections between residential patterns, school district demographics, and educational attainment).

108. See, e.g., Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 163-65 (2001) (reviewing literature suggesting that local growth controls and exclusionary zoning exacerbate suburban sprawl).

109. See Fennell, *Homes Rule*, *supra* note 41.

110. FENNELL, *supra* note 13, at 192-93.

police homeowner and local government behavior. Indeed, holders of securitized mortgages are so detached from the individual homes in which they invested that they now lack adequate incentives to reform failing mortgages, even when reform is in their financial interest.<sup>111</sup> That is not to suggest that H2.o would recreate all of the problems associated with mortgage securitization. It may be preferable to encourage investors to hold equity shares rather than debt shares, and it may be that equity investment could be achieved with less fragmentation than characterizes the mortgaged-backed securities market. But, there likely is a threshold of diversification—a threshold that most rational investors are likely to meet—beyond which investors will lose interest in the kinds of local policies that influence housing values.

*C. Avoiding Information Cost and Anticommons Problems*

Finally, *The Unbounded Home* leaves unanswered questions about the extent to which H2.o could be calibrated to individual owner/investment preferences without creating information-cost and anticommons problems.<sup>112</sup> Fennell seems to assume that, at least if adopted as a new tenure form, H2.o will have standardized default settings—that is, that the division of the ownership shares between owners and investors will be the same for every H2.o parcel.<sup>113</sup> I tend to agree with this assumption for the reasons fully explored in Henry Smith and Thomas Merrill’s work on the *numerus clausus*—the civil law principle that property rights must conform to a limited number of standardized forms. Too much customization of ownership (for example, what might be called H2.o.1) may impede efficient market transfers by raising information costs for owners and investors.<sup>114</sup> As long as the owner-investor division of H2.o property remains standardized, in other words, purchasers of, and investors in, H2.o properties will know what they are getting themselves into. But, there will be inevitable pressures for customization: soon enough an owner will wish to assume some, but not all, of the off-site risks that Fennell envisions resting with investors. And, as soon as the form is customized, each would-be owner and investor will have to exert significant effort to learn exactly “how much” ownership any given H2.o property offers.

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111. David A. Dana, *The Foreclosure Crisis and the Anti-fragmentation Principle in State Property Law*, 77 U. CHI. L. REV. 99 (forthcoming April 2010).

112. Fennell acknowledges and addresses these questions in somewhat more detail in previous work. See Fennell, *supra* note 95, at 1085-87.

113. FENNELL, *supra* note 13, at 194-205.

114. Merrill & Smith, *supra* note 94, at 24-40.



A related difficulty would arise if a would-be homeowner wished to reassemble the pieces of the H2.o bundle in order to assume “complete” ownership. Students of property law, or readers who have familiarized themselves with Fennell’s artful explanation in Part I of *The Unbounded Home*, will immediately identify the risk of an anticommons problem: like the owner in a private development seeking to assemble flamingo-display rights, owners seeking to reconvert H2.o properties to “full” fee simple form will face the assembly costs associated with purchasing the ownership shares of investors — each protected by the very property rules that enable holdouts and other strategic behavior. The greater the extent of division among investors, the higher the assembly costs, and the lower the likelihood of reassembly. Again, the recent experience with mortgage securitization is illustrative. As Dana argues, the dispersal of shares in securitized mortgages among hundreds of investors has made mortgage reform a near-impossibility in many cases.<sup>115</sup> As discussed above, I assume that fragmentation will almost certainly follow from the adoption of H2.o, and that, as a result, reassembly of any given home back to H1.o will become a near impossibility. As a result, most H2.o homes will, by design or necessity, remain H2.o homes, in the same way that affordable units developed pursuant to “inclusionary zoning” policies remain affordable units.<sup>116</sup> While the resulting decline in homeowner choice does not lead me to reject H2.o, the inevitable “static” nature of homes originating in the new tenure form is a downside of the proposal and a reality in tension with the common law assumption about the uniqueness of each parcel of property.<sup>117</sup>

#### IV. OPTIONS FOR PROMOTING URBAN HEALTH

In *The Unbounded Home*, Fennell devotes a great deal of attention to reducing barriers to interjurisdictional mobility within metropolitan regions. And with good reason. A plausible case can be made that efforts to “open up the suburbs”<sup>118</sup> to less affluent residents are more important than city-focused redevelopment efforts — at least as a means of improving the long-term prospects of the urban poor. As Robert Bruegmann argued in his recent history of suburban sprawl, urban life has always been the most difficult for the poor —

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115. See Dana, *supra* note 111.

116. See, e.g., DAVIS, *supra* note 81, 64-70 (discussing resale restrictions).

117. See E. ALLAN FARNSWORTH, 3 FARNSWORTH ON CONTRACTS § 12.6 (3d ed. 2004) (discussing the legal presumption that each parcel of real property is “considered ‘unique’”).

118. See ANTHONY DOWNS, OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA (1973).

and suburbs still represent a great hope for a better life—precisely because the suburbs offer the good schools, economic opportunities, safe neighborhoods, and environmental amenities that wealthy urban dwellers can afford to purchase for themselves.<sup>119</sup> Primarily for this reason, I previously have expressed skepticism about policies that would limit suburban growth in order to promote city health and improve the plight of the urban poor.<sup>120</sup>

That said, improving the economic prospects of our urban centers remains an important goal. Not only would rising city fortunes help mute the stark interjurisdictional inequalities that concern Fennell and other land use and local government scholars, but it remains an unfortunate reality that cities will continue to be home to a disproportionate number of poor people living in poor neighborhoods. For example, urban poverty declined precipitously during the 1990s—after increasing dramatically during the 1970s and 1980s. The number of high-poverty neighborhoods (that is, neighborhoods with poverty rates of forty percent or more) fell by more than one-fourth, and the total number of people living in such neighborhoods declined by twenty-four percent (from 10.4 million in 1990 to 7.9 million in 2000). Promisingly, the decline in concentrated poverty spanned racial and ethnic lines: the most significant decline was among African Americans; the percentage of poor African Americans living in high-poverty neighborhoods declined from 30.4 percent to 18.6 percent between 1990 and 2000. These declines are *not* attributable to the decline in the overall poverty rate—the poverty rate did decline, but only by about one percent; the number of poor people in the U.S. actually rose slightly. What happened was that poverty was redistributed spatially, a trend generally regarded as positive by social scientists and poverty advocates alike.<sup>121</sup>

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119. See ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* 25-29 (2005). See generally Ryan & Heise, *supra* note 107, at 2102-08 (discussing the connection between concentrated urban poverty and educational performance); Schill, *supra* note 106, at 811-31 (advocating policies that enable poor urban residents to live in suburbs).

120. See, e.g., Garnett, *supra* note 77, at 298-300.

121. See generally Alan Berube & William H. Frey, *A Decade of Mixed Blessings: Urban and Suburban Poverty in Census 2000*, in 2 *REDEFINING URBAN AND SUBURBAN AMERICA* 111 (Alan Berube, Bruce Katz & Robert E. Lang eds., 2005) (analyzing data from Census 2000 and finding that poverty rates in central cities and suburbs converged during the 1990s, with over half of center cities experiencing declining rates of concentrated poverty); Paul A. Jargowsky, *Stunning Progress, Hidden Problems: The Dramatic Decline in Concentrated Poverty in the 1990s*, in *REDEFINING URBAN AND SUBURBAN AMERICA*, *supra*, at 137, 142-44 (finding that in the 1990s, concentrated poverty declined dramatically, especially among ethnic minorities).

While the vast majority of cities saw a decrease in concentrated poverty, however, they hardly saw the problem of poverty disappear. In the central cities anchoring 102 largest metropolitan areas, for example, nearly one in five individuals had incomes below the poverty level, compared to one in twelve individuals in the suburbs.<sup>122</sup> And, although the decline of concentrated poverty among minorities is hopeful, African Americans continue disproportionately to live in highly segregated, poor, urban neighborhoods.<sup>123</sup> And, sadly, the current economic downturn has cast doubt upon the prospects for the further renewal of poor urban neighborhoods, many of which have been devastated by the foreclosure crisis.<sup>124</sup> As the New Testament reminds us, the poor will always be with us,<sup>125</sup> making urban development a practical and moral necessity.

One curiosity of Fennell's excellent book is her relative inattention to the role that her policy innovations might play as urban development tools. For example, it seems likely that H2.o would be particularly attractive as an affordability promotion device in urban communities. Many affordable housing organizations already are experimenting with using divided ownership to increase housing affordability, such as through "community investment land trusts," which divide ownership shares between residents, who own their homes, and nonprofits, who own the land upon which these home are situated.<sup>126</sup> In city neighborhoods, H2.o could similarly enable some renters to own their homes, a move that undoubtedly would generate neighborhood benefits, since tenants have fewer incentives to make site-specific investments in their homes than do owners and tenants' time horizons as neighbors tend to

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122. See Berube & Frey, *supra* note 121, at 114-15.

123. See ORFIELD, *supra* note 10; Cashin, *supra* note 10; Jargowsky, *supra* note 121, at 153-56.

124. Cf. Dougherty, *supra* note 14 (arguing that, during the current recession, cities are losing fewer residents than suburbs). See generally ELIZABETH KNEEBONE & ALAN BERUBE, BROOKINGS INST., REVERSAL OF FORTUNE: A NEW LOOK AT CONCENTRATED POVERTY IN THE 2000S (2008), available at [http://www.brookings.edu/papers/2008/08\\_concentrated\\_poverty\\_kneebone.aspx](http://www.brookings.edu/papers/2008/08_concentrated_poverty_kneebone.aspx) (discussing the decline of concentrated poverty in the 1990s and analyzing the effects of the recession on poor urban neighborhoods); Kristopher S. Gerardi & Paul S. Willen, *Subprime Mortgages, Foreclosures, and Urban Neighborhoods*, (Federal Reserve Bank of Boston, Public Policy Discussion Paper No. 08-6, 2008), available at <http://www.hks.harvard.edu/m-rcbg/Events/Papers/Willen,%20Subprime%20Mortgages.pdf> (discussing the disproportionate impact of subprime foreclosures on minority neighborhoods).

125. See *Matthew* 26:11; *Mark* 14:7; *John* 12:8.

126. See National Community Land Trust Network, Overview, <http://www.clnetwork.org/index.php> (last visited March 1, 2010) (follow "What Are CLTs?" hyperlink).

be shorter, leading them to be less invested in neighborhood affairs.<sup>127</sup> (Not surprisingly, a large body of social science research suggests that residential tenure and homeownership are two of the most significant predictors of neighborhood health.<sup>128</sup>) At the very least, recent events suggest that devices like H2.o and community investment land trusts likely are superior to subprime mortgage lending as a mechanism for promoting higher levels of home ownership in poor communities.

### A. *The Urban Option*

The remainder of this Review takes up, in a sense, where Fennell leaves off, by seeking to explore how one of the proposals from *The Unbounded Home*, the ESSMO, might enable cities to compete more effectively with their suburban neighbors. In undertaking this exploration, it is important to acknowledge the many ways in which the deck is stacked against cities, making head-to-head competition with suburbs difficult.<sup>129</sup> Yet as a proponent of “inward-focused” urban development policies and a cautious optimist about the ability of smart urban policies to promote city-suburb competition,<sup>130</sup> I am always intrigued by policy innovations that may better enable our cities to gain a competitive edge—and the ESSMO proposal may be such an innovation.

To understand why, it is important to tackle the somewhat opaque question of why cities apparently began to rebound during the last decades of the twentieth century. Beginning in the 1990s, many American center cities enjoyed an unexpected ascendancy, with many cities experiencing population gains for the first time in decades.<sup>131</sup> Edward Glaeser and Joshua Gottlieb have argued that large cities rebounded because elites increasingly developed an

127. See FENNELL, *supra* note 13, at 192; Fennell & Roin, *supra* note 40; see also, e.g., Denise DiPasquale & Edward L. Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?*, 45 J. URB. ECON. 354 (1999); Donald R. Haurin et al., *The Impact of Neighborhood Homeownership Rates: A Review of the Theoretical and Empirical Literature*, 13 J. HOUSING RES. 119 (2003).

128. See, e.g., Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 919 (1997) (reviewing the social science literature connecting residential tenure, home ownership, and neighborhood health).

129. See, e.g., Richard Briffault, *Beyond City and Suburb: Thinking Regionally*, 116 YALE L.J. POCKET PART 203 (2006).

130. See NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 4-6 (2010).

131. Rebecca R. Sohmer & Robert E. Lang, *Downtown Rebound*, in 1 REDEFINING URBAN AND SUBURBAN AMERICA 63, 65 (Bruce Katz & Robert E. Lang eds., 2003).

affinity for urban life.<sup>132</sup> Rising incomes and educational attainment fueled the shift in lifestyle preferences, Glaeser and Gottlieb posit, and the dramatic decline in central city crime rates and urban disorder enabled individuals with urban tastes to act on their preferences by increasing the ease of access to the consumer amenities, energy, and informal social interactions that cities foster.<sup>133</sup> If, as Glaeser and Gottlieb argue, increasing numbers of Americans are coming to prefer city life because dense, mixed land use urban environments offer amenities that less-dense-suburban environments do not, then cities must find ways to offer more dense, mixed land use urban environments to potential residents. In other words, cities are most likely to succeed when they focus on doing what they do best—that is, being cities—especially in light of the evidence that “urbanness” is increasingly attractive to many Americans. Whatever the competitive obstacles facing cities, there is one overriding reason why cities should concentrate on being urban: a city is better at being urban than suburban.<sup>134</sup> If cities are to capitalize on their “urbanness,” however, they must do more than engage in efforts to promote a “hip” image.<sup>135</sup> They must also address the fact that prevailing urban land use regulations impose a “suburban” feel on many city neighborhoods by segregating different, presumptively “incompatible” land uses. As I have argued elsewhere, a reluctance to abandon the longstanding presumption favoring segregated land uses, and to reform the land use regulations codifying it, can hamstring city-suburb competition.<sup>136</sup>

That said, city officials are understandably wary of proposals to deregulate land uses. If Glaeser and Gottlieb are correct,<sup>137</sup> then improvements in public safety—including increased attention to urban disorder and the quality of life

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132. See Glaeser & Gottlieb, *supra* note 15, at 1286, 1297.

133. *Id.* at 1276.

134. This conclusion is somewhat analogous to economic theory of comparative advantage, which holds that weaker international trading partners should focus on doing the things at which they are least bad. As the theory of comparative advantage suggests, cities should concentrate on being cities even if *suburbs* come to offer urban lifestyles (for example, by encouraging the construction of “new urbanist” developments) that are, at least in some senses, superior to traditional urban neighborhoods.

135. I have elsewhere expressed skepticism about the “cool cities” urban development strategies promoted, most prominently, by Richard Florida in his popular book *THE RISE OF THE CREATIVE CLASS* (2002). GARNETT, *supra* note 130, at 138-39. For other criticism, see Alec MacGillis, *The Rise of the Creative Class*, *AM. PROSPECT*, Jan. 4, 2010, at 12.

136. See GARNETT, *supra* note 130, at 93-95; Garnett, *supra* note 16, at 21-23.

137. Admittedly, the reasons for the “urban rebound” remain somewhat mysterious. See, e.g., Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 *U. CHI. L. REV.* 315 (forthcoming 2010).

in urban neighborhoods—played a significant role in the new urban renaissance, as did a dramatic decline in violent crime rates (which may or may be related to disorder-focused policing tactics).<sup>138</sup> And, the assumption that economic activity is disorderly and even dangerous, fosters disorder and crime, and even degrades human character has influenced thinking about land use in the United States for nearly a century.<sup>139</sup> While Jane Jacobs’s contrarian views—that mixing commercial and residential land uses will suppress disorder and crime by guaranteeing a consistent presence of private “eyes upon the street” and by fostering informal social interaction among relative strangers in a community<sup>140</sup>—have come into vogue in recent years,<sup>141</sup> the available empirical evidence tends to support traditional assumptions about land use policy. Importantly, the popular and academic commentary on Jacobs’s work and its “new urbanist” promoters, overlooks the empirical literature testing her hypothesis that mixed land uses suppress, rather than foster, disorder and crime. In a number of studies, criminologists, sociologists, and environmental psychologists have sought to examine the connection between different land use patterns (that is, exclusively residential versus mixed use) and disorder and crime. These studies mount a serious challenge to Jacobs’s now popular hypothesis that proponents of mixed land use urban environments (including myself) must confront.

Most of the researchers who have empirically studied the effects of different land use environments on disorder and crime reject Jacobs’s hypothesis as intuitively appealing but empirically unsustainable. They find instead that commercial land uses are connected to crime and disorder and that exclusively residential neighborhoods have lower crime rates and less disorder than mixed land use neighborhoods.<sup>142</sup> Drawing upon the “routine activities” theory of

138. See, e.g., Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165 (1996); Nicole Stelle Garnett, *Private Norms and Public Spaces*, 18 WM. & MARY BILL RTS. J. 183 (2009); Nicole Stelle Garnett, *Save the Cities, Stop the Suburbs?*, 116 YALE L.J. 598, 618-20 (2006) (book review). For an interesting discussion on the role that urban policy played in reducing crime rates, see Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163 (2004).

139. See, e.g., Richard H. Chused, *Euclid’s Historical Imagery*, 51 CASE W. RES. L. REV. 597 (2001); Garnett, *supra* note 53, at 1202-05.

140. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES*, 44-48 (1961).

141. See, e.g., GARNETT, *supra* note 130, at 64-65.

142. See, e.g., Stephanie W. Greenberg et al., *Safety in Urban Neighborhoods: A Comparison of Physical Characteristics and Informal Territorial Control in High and Low Crime Neighborhoods*, 5 POPULATION & ENV’T 141 (1982); Ralph B. Taylor et al., *Street Blocks with More Nonresidential Land Use Have More Physical Deterioration*, 31 URB. AFF. REV. 120 (1995);

crime, these researchers hypothesize that nonresidential land uses serve to invite strangers—including would-be offenders—into a neighborhood,<sup>143</sup> and, contrary to Jacobs’s intuition, decrease private surveillance efforts by making it difficult for residents to discern who “belongs” in their community.<sup>144</sup> In one study, for example, residents on blocks with nonresidential land uses reported that they recognized other block residents less well, felt that they had less control over events in the neighborhood, and were less likely to count on a neighbor to monitor suspicious activity than residents of exclusively residential blocks.<sup>145</sup>

In addition to the need to respond to these *legitimate* concerns that crime and disorder will follow upon land use reforms promoting density and the mixing of land uses, city officials also face many of the same demands for exclusion as their suburban counterparts. As Michael Schill has observed:

[M]any inner-city residents would be happy not to have new neighbors, new barriers to their views, and new competitors for parking spaces. . . . Community opposition to new development manifests itself every day in opposition to rezoning, drawn-out land use and environmental approval procedures, and endless lawsuits, meritorious and frivolous . . . .<sup>146</sup>

These realities make regulatory proposals that offer the opportunity to carefully control the details of a transition from single-use to mixed-use

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Pamela Wilcox et al., *Busy Places and Broken Windows?: Toward Defining the Role of Physical Structure and Process in Community Crime Models*, 45 SOC. Q. 185 (2004). See generally Robert J. Sampson & Stephen Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 610 (1999) (reviewing empirical literature linking commercial land uses with disorder and crime).

143. The “routine activities” theory of crime posits that most crime is opportunistic—that is, that crime “involves the intersection in time and space of motivated offenders, suitable targets, and the absence of capable guardians.” Sampson & Raudenbush, *supra* note 142, at 610; see also Greenberg et al., *supra* note 142, at 162 (discussing “routine activities” and commercial land uses); Taylor et al., *supra* note 142 (same); Wilcox et al., *supra* note 142 (same).
144. Taylor et al., *supra* note 142, at 122. This argument flows from Oscar Newman’s important work on “defensible space.” Newman argued that architectural and urban design can decrease crime by increasing opportunities for residents to exercise “ownership” over public spaces. OSCAR NEWMAN, *DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN* (1972). See generally Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002) (applying Newman’s work to modern land use policies).
145. Ellen M. Kurtz et al., *Land Use, Physical Deterioration, Resident-Based Control, and Calls for Service on Urban Streetblocks*, 15 JUST. Q. 121, 135 (1998).
146. Michael H. Schill, *Comment*, in *GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT?* 102, 104 (Anthony Downs ed., 2004).

neighborhoods attractive to urban officials. They promise to offer a means of promoting an “urban” feel in city neighborhoods while minimizing concern about the risk of spillovers in mixed land use communities. The prevailing alternative to use-based-zoning today is the “form-based” codes promoted by new urbanist planners and architects.<sup>147</sup> These codes flow from the assumption that a development naturally progresses from urban (most intense) to rural (least intense). New urbanists call this progression the “transect” and urge cities to replace use zoning with the regulation of building form appropriate to the various “transect zones” along the progression.<sup>148</sup> Theoretically, the concept is relatively simple: buildings appropriate for the city center should go in the city center (regardless of what they are used for); suburban buildings should look suburban. New urbanists argue that their system of regulation promotes careful planning that balances the need for city busyness with the concern about urban disorder. In practice, however, new urbanist form-based codes have tended to supplement, rather than supplant, traditional zoning rules, and they frequently rely on detailed architectural regulations—both realities that significantly increase development costs.<sup>149</sup>

As a means of promoting city-suburb competition, Fennell’s ESSMO proposal is superior to current form-based code proposals precisely because it enables cities to advance urban vitality and address homeowner anxieties about spillovers without dictating the details of urban design. Elsewhere, I have argued that it may be the uncomfortable reality that urban disorder and urban vibrancy are sometimes in tension with one another. If so, city officials wishing to promote vibrancy need to come to terms with that reality—and carefully consider what Richard Sennett has called the “uses of disorder,” which may include the promotion of urban vitality, social capital, and city-suburb competition.<sup>150</sup> Of course, this is easier said than done. City residents arguably signal a preference for greater density and mixing of land uses by virtue of choosing to live in an urban neighborhood. Yet, as the Eddy Street Commons

147. See, e.g., Peter Katz, *Form First: The New Urbanist Alternative to Conventional Zoning*, PLAN., Nov. 2004, at 17, 18–20 (describing the merits of form-based coding).

148. DUANY, PLATER-ZYBERK & CO., *supra* note 4, at C3.2; GARNETT, *supra* note 130, at 183; Duany & Talen, *supra* note 4, at 247–49; Emerson, *supra* note 4.

149. See, e.g., Joseph E. Gyourko & Witold Rybczynski, *Financing New Urbanism Projects: Obstacles and Solutions*, 11 HOUSING POL’Y DEBATE 733, 739–40 (2000) (concluding, based on an extensive survey of builders and developers, that new urbanist projects are more expensive); Philip Langdon, *The Not-So-Secret Code: Across the U.S., Form-Based Codes Are Putting New Urbanist Ideas into Practice*, PLAN., Jan. 2006, at 24, 28 (asserting that the cost of form-based codes “exceeds that of a conventional land-use plan” making citywide form-based coding “prohibitively expensive”).

150. See GARNETT, *supra* note 130, at 73–74.



anecdote above illustrates, it remains the case that city residents (and would-be residents) have varying levels of concern about, and tolerance for, spillovers generated by density and mixing of land uses.<sup>151</sup> By allowing residents to set prices for those preferences, the ESSMO proposal may empower city officials to inject more *urbanness* into center-city neighborhoods, thereby enabling them to provide a distinctive alternative to suburban life while muting the land use risks that residents reasonably associate with city life.

*B. ESSMOs and Sublocal Governance*

There remains the question, of course, of implementation. As Fennell observes, it is easiest to envision ESSMOs being implemented in new private developments, where residents would accept the regulatory model, at the front end, by virtue of their entry into a community. At least as a thought experiment, however, it also is worth considering how ESSMOs might work in conjunction with the sublocal government institution that have come to play an increasingly prominent role in urban development efforts. Questions of “subsidiarity”—that is, “the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level”<sup>152</sup>—have come to dominate contemporary debates about land use and local government law. Most of these debates are motivated by the interjurisdictional inequities that concern Fennell and therefore focus intensely on whether some or all authority to regulate land uses should be removed to a higher-level governmental entity—a regional-, metropolitan-, or state-level institution. The thinking about the allocation of local government power within cities, however, increasingly runs in the opposite direction. As Richard Briffault has observed, recent decades have seen a rise in “sublocal” government innovations—BIDs, tax increment financing districts, enterprise zones, and special zoning districts—all of which are predicated on the assumption that some local government functions are best performed at the neighborhood level.<sup>153</sup> And, the rise of sublocal governmental institutions may itself have contributed to the recent urban renaissance by enabling a more efficient provision of local government services.

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151. See WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DEATH IN AMERICAN NEIGHBORHOODS* 7 (1990) (arguing that the premise of Jane Jacobs’s work is that some individuals have a taste for *disorder* in urban environments).

152. See 17 OXFORD ENGLISH DICTIONARY 59 (2d ed. 1989) (defining subsidiarity).

153. See Briffault, *The Rise of Sublocal Structures*, *supra* note 60.

The implementation of ESSMOs at the sublocal level arguably would be appropriate for at least two related reasons. First, large cities tend to be made up of numerous distinctive urban enclaves. Not only is it reasonable to believe that the residents' regulatory "tastes" vary from neighborhood to neighborhood, but there is reason to believe that the spillover risks of different land uses also vary from neighborhood to neighborhood. For example, researchers studying the connection between land use patterns and crime/disorder have generally found that nonresidential land uses are detrimental in stable neighborhoods, but beneficial in unstable ones. In poorer communities, therefore, it might be appropriate to encourage more land use diversity, especially because crime and disorder are most strongly correlated with *vacant* commercial property.<sup>154</sup> Second, sublocal-level decisionmaking would enable intramunicipal regulatory experimentation. Although sublocal implementation would by no means eliminate the public choice realities of land use reform,<sup>155</sup> urban neighborhoods arguably would have an incentive to experiment because diversity offers neighborhoods, like cities, the opportunity to compete with one another for residents and because residential choices, at least in many cases, undoubtedly signal land use preferences.<sup>156</sup>

In fact, several scholars have elsewhere used neighborhood distinctiveness to advocate devolving certain decisions about land use regulation to neighborhood institutions similar to the now popular "business improvement districts." BIDs are public, sublocal entities empowered to levy special assessments against property owners to pay for local infrastructure improvements, business and development promotion, and supplemental governmental services (for example, street sweeping, security officers, and even social services for the homeless). While BIDs do not currently engage directly in regulatory activity, scholars such as Robert Ellickson, George Liebmann, and Robert Nelson all have made the case for permitting neighborhood-level or block-level community institutions to either regulate or deregulate land uses. As Ellickson argues, these reforms would effectively retrofit poor urban

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154. See GARNETT, *supra* note 130, at 71 (discussing literature connecting vacant property to crime and disorder). See generally Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. ILL. L. REV. 1061 (discussing the vacant property problem in urban neighborhoods).

155. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 893-909 (1983) (acknowledging and defending the extent of neighborhood-level influence in existing land use policies on sublocal specialization grounds).

156. The caveat here is obviously that residential choices, in cities no less than in metropolitan areas, are limited by financial means.

neighborhoods with the equivalent of the residential community associations prevalent in many wealthy, planned suburban communities.<sup>157</sup>

These proposals are not uncontroversial, and they present complicated institutional design problems.<sup>158</sup> At least theoretically, however, an entity like a BID—or, as Robert Ellickson has proposed, a block-level improvement district (BLID)—could be empowered to employ ESSMOs. For example, the board of the BID or BLID might be given the authority to employ options, rather than traditional zoning rules, to regulate any range of land use issues, such as the neighborhood density, off-street parking, “teardown” restrictions, limitations on the number and size of commercial establishments in a neighborhood, liquor licenses, advertising, and so on. This list might be generated at the municipal level or sublocally. If the sublocal governing body opted for ESSMOs, it could then employ the self-valuation devices described in *The Unbounded Home* to customize the value of each owner’s land use entitlements. The owners’ exercise of their ESSMOs would generate revenue, which might either be used to supplement the special assessments already funding BID activity or to compensate owners objecting to land use changes.

## CONCLUSION

Land use and local government scholars have to date done a much better job at identifying the problems with the current system of land use regulation than with formulating efficient and just solutions to those problems. The benefits of each proffered solution, it frequently seems, trade against the benefits of the existing regime. *The Unbounded Home* represents an important step forward, and in a sense away from, standard debates about the metropolitan commons. The book promises to influence debates about, and hopefully prompt reforms to, land use policies for years to come.

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157. Ellickson, *supra* note 60, at 77-78.

158. In planned communities, residents voluntarily submit to covenants establishing the ground rules of community life by moving to a neighborhood governed by them. Any proposal to retrofit older neighborhoods ultimately necessitates a mandatory, rather than voluntary, governance structure. Moreover, most sublocal government structures, such as BIDs, privilege property ownership. That is, property owners receive the lion’s share of political authority; residents that do not own property are substantially disenfranchised. These voting procedures have survived equal protection challenges because most sublocal structures are, at least arguably, quasi-private and lack formal regulatory authority. Any proposal to vest them with regulatory authority would most certainly resurface these constitutional concerns. See Briffault, *A Government for Our Time?*, *supra* note 60, at 431-46 (discussing equal protection challenges to BIDs).