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LIMITING THE COLLECTIVE RIGHT TO EXCLUDE

Andrea J. Boyack*

ABSTRACT

For decades, society's disparate interests and priorities have stymied attempts to resolve issues of housing affordability and equity. Zoning law and servitude law, both of which have been robustly empowered by decades of jurisprudence, effectively grant communities the legal right and ability to exclude various sorts of residences from their wealthiest neighborhoods. Exclusion by housing type results in exclusion of categories of people, namely, renters, the relatively poor, and racial minorities. Although our society's housing woes may indeed be intractable if we continue to treat a group's right to exclude with the level of deference that such exclusionary efforts currently enjoy, this treatment is unjustifiable. Courts should acknowledge and consider the broad public and private costs that are created by a group's unfettered right to exclude. A more balanced approach would weigh individual autonomy to control property and various public harms resulting from community exclusions against legitimate community needs to exclude certain residents and uses. Judicial limits of the collective right to exclude may enable real progress toward fair and affordable housing to be achieved at last.

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INTRODUCTION

At first glance, there is nothing remarkable about judicial enforcement of local use-based zoning restrictions or private community regulations prohibiting rental housing in a given community. Most courts agree that public and private community interests in maximizing property values and development harmony amply justify far-reaching zoning and servitude limitations on an individual owner’s control of her property. In some cases, the public good might actually warrant such limitations on individual property rights, but perhaps not in cases where asserted public benefits are outweighed by actual public harms. The question of whether a community can exclude certain uses and residents from its midst should be determined by balancing not only purported community benefits against the autonomy impact of limitations on a particular owner’s right to use, but should also weigh the broader societal harms caused by a collective right to exclude, including ill-effects on non-owners, including would-be residents, and on the housing market as a whole. Such broader effects could in many cases justify limitations on a group’s right to exclude. By limiting a community’s ability to exclude, courts may be able to break through the land-use stalemate that currently renders America’s housing system unsustainable and unfair and may allow market forces and individual owner self-interest to increase housing supply, affordability, and equity.

In his thought-provoking article, “*Affordable Housing*” As Metaphor,¹ Professor Steven J. Eagle articulates and addresses the systemic challenges that plague efforts to achieve three affordable housing goals: (1) developing an ample supply of a range of housing that maximizes economic productivity, (2) preserving neighborhood accessibility and value for existing residents, and (3) improving housing affordability and equity.²

1. Steven J. Eagle, “*Affordable Housing*” As Metaphor, 44 FORDHAM URB. L.J. 301 (2017). Professor Eagle frames “affordable housing” as a metaphor for disparate societal agendas. Here, I conceive of the issue of affordable housing in a more economic sense, focusing on localized supply constraints (in terms of housing type and location) and the resulting inflated price of housing, and comparing broad societal costs of community limitations on local housing supply to its asserted benefits.

2. *Id.* at 304-05. Professor Eagle points out that housing affordability concerns typically focus on housing needs of low- and extremely low-income households, but that optimal prosperity in a city requires housing affordable for a range of incomes.

Although noting that scholars and government agencies have broadly asserted the need for society to achieve all three of these housing goals, Eagle points out that numerous social and economic forces prevent each of these important objectives from being achieved.³ Affordable/fair housing problems are indeed multifaceted and tangled, and we lack an adequate weapon to cleanly and quickly slice through them á la Gordian Knot. Acknowledging that there can be no quick and easy solution without the unlikely “broad change in political will leading to a consensus on goals and priorities,”⁴ Eagle suggests that we settle for a series of Burkean incremental changes that may eventually work marginal improvements in housing supply, neighborhood quality, and integration.⁵ Eagle is correct that housing problems will not self-resolve,⁶ but a bold new approach to a group right to exclude could possibly give housing a needed push.

In many cases, upholding a community’s right to exclude reflects the long-held governmental polity preference for homeownership over rental residency.⁷ Federal legislatures and courts have consistently upheld the

Neighborhood preservation concerns exist for both distressed urban cores that are vulnerable to gentrification and—at the opposite end of the income scale—for wealthier suburban neighborhoods resisting densification and housing development, including location of affordable rental housing in such neighborhoods. Eagle explains that “affordable housing” conflates multiple concerns impacting equitable and financial needs for adequate shelter, quality neighborhoods, and residential integration. *See also* Tim Iglesias, *Maximizing Inclusionary Zoning’s Contributions to Both Affordable Housing and Residential Integration*, 54 WASHBURN L.J. 585, 585 (2015) (exploring how changes in zoning law can address both financial and equitable housing mandates); J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L. J. 527, 528 (2007) (discussing the complex and comprehensive objectives that housing policy attempts to address). Housing “equity” concerns not only affordability but also neighborhood desegregation and fair access to housing for all individuals, regardless of race, ethnicity, religion, disability, or family status, *inter alia*.

3. Eagle, *supra* note 1, at 305 (decrying the “lack of a societal consensus” that “tends to perpetuate the status quo,” and pointing out the conflicting, opaque, inefficient, corrupt, and abusive practices that have marked local government actions with respect to housing).

4. *Id.* at 307. Eagle explains that forceful constituent preferences pressure governments to carry out homeowners’ collective desire for neighborhood exclusivity. *Id.* at 316-18.

5. *Id.* at 307 (referencing EDMOND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1791)) (suggesting that “modest efforts, building upon a Burkean notion of incremental change, might be more prudent and ultimately desirable”).

6. *Id.* The contradictory objectives of various interested groups are apparent in “the promulgation of ordinances and regulations demanding either densification or large-lot zoning, lawsuits objecting to development approvals based on often-ostensible environmental concerns, and judicial challenges to community growth that disparately affect legally protected groups, without regard to intent.” *Id.* at 308.

7. *See* Andrea J. Boyack, *Equitable Housing (Almost) Half a Nation of Renters*, 64 BUFF. L. REV. 109, 125-130 (2017) [hereinafter *Nation of Renters*]; *see also* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190-94

right of local governments to use zoning laws to exclude rental populations and rental uses from a community,⁸ even in cases where owner-occupant segregation has disparately impacted populations protected under the Fair Housing Act.⁹ Very few states have pushed back against local self-determination when it comes to neighborhood content.¹⁰ Homeowners who vote (“homevoters”) have captured local governments to some extent, and this has inspired some scholars and legislators to advocate for more federal

(1985) (exploring the government’s complicity in and the social costs of the phenomenon of suburbanization); DONALD A. KRUECKEBERG, *THE GRAPES OF RENT: A HISTORY OF RENTING IN A COUNTRY OF OWNERS* 9-10 (1999) (explaining the “ideology of property” and how federal preferences for homeownership reflects this); William Apgar, *Rethinking Rental Housing: Expanding the Ability of Rental Housing to Serve as a Pathway to Economic and Social Opportunity* 4-5 (JOINT CTR. FOR HOUS. STUD., HARV. UNIV., Working Paper No. W04-11, 2004) (criticizing the government’s subsidization of homeownership and cataloguing the harms mis-incentives to purchase real property have created). The federal government’s long history of favoritism to owners as opposed to renters has undercut efforts to improve fair and affordable housing for all. *Nation of Renters*, *supra*. See also John J. Infranca, *Housing Resource Bundles: Distributive Justice and Federal Low-Income Housing Policy*, 49 U. RICH. L. REV. 1071, 1137 (2015) (advocating for equality and utilization of the “bundle of resources approach” to achieve this end); Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1753 (2005) (explaining “the deep legal and philosophical contradiction in the United States between civil rights guarantees—particularly the duty to affirmatively further fair housing—and state and federal low-income housing policy” and arguing that fair housing duty should take priority before other policy considerations).

8. Municipalities have broad discretion to exclude based on zoning laws. In some cases, municipalities have even been able to legally exclude non-homeowners from communities, claiming that renters needed to be stopped from spreading like a virus in their community. See *Dean v. City of Winona*, 843 N.W.2d 249, 263 (Minn. Ct. App. 2014), *cert granted* (No. A13-1028) (Minn. May 20, 2014), *vacated as moot* 868 N.W.2d 1, 5 (Minn. 2015). Homeowners’ associations and other common interest communities have even more judicial leeway to exclude non-owners and other populations and property uses from their midst. See Andrea J. Boyack, *American Dream in Flux: The Endangered Right to Lease A Home*, 49 REAL PROP. TR. & EST. L.J. 203, 230-31 (2014) [hereinafter *American Dream in Flux*].

9. See, e.g., *Pres. at Forrest Crossing Townhome Ass’n v. DeVaughn*, 2013 WL 396000, at *7 (Tenn. Ct. App. Jan. 30, 2013). But see, e.g., *Bailey v. Stonecrest Condo. Ass’n, Inc.*, 696 S.E.2d 462, 465 (Ga. Ct. App. 2010); *Villas W. II of Willowridge v. McGlothlin*, 841 N.E.2d 584, 588 (Ind. Ct. App. 2006), *vacated as moot* 885 N.E.2d 1274 (Ind. 2008), *rev’d*, 885 N.E.2d 1274, 1284 (Ind. 2008).

10. The most notable example of state push-back against local exclusionary policies is the New Jersey Supreme Court holding that localities had the obligation to provide fair and affordable housing in their jurisdictions in the series of *Mount Laurel* decisions. *Hills Dev. Co. v. Bernards*, 510 A.2d 621, 632 (N.J. 1986); *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983); *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel Cases*]. See also Eagle, *supra* note 1, at 336-37 (discussing the *Mount Laurel* doctrine as well as inclusionary zoning efforts in New Hampshire and Pennsylvania, affordable housing allocations in Massachusetts and Connecticut, and the complex and “not totally useless” provisions in California law).

oversight with respect to local land use decisions and their effect.¹¹ The federal government may be unable to engineer a top-down solution, however, because Congress also remains beholden to public opinion, and public opinion can be illogical, and fickle.¹²

Even if competing constituent objectives inhibit a comprehensive political solution to the decades-old affordable housing crisis, the legal system can still take steps to disengage housing issues from the tug-of-war of opposing interest groups. Instead of merely waiting for a political consensus to develop, courts should de-politicize the issue of affordable

11. See, e.g., OFF. OF U.S. SEN. MARIA CANTWELL, ADDRESSING THE CHALLENGES OF AFFORDABLE HOUSING & HOMELESSNESS: THE HOUSING TAX CREDIT 4-7 (2016); HOUSING DEVELOPMENT TOOLKIT, THE WHITE HOUSE (2016), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf [<https://perma.cc/9DWP-3HWV>]; *A Responsible Market for Rental Housing Finance: Envisioning the Future of the U.S. Secondary Market for Multifamily Residential Rental Mortgages*, CTR. FOR AMERICAN PROGRESS (2010); Anthony Pennington-Cross & Anthony M. Yezer, *The Federal Housing Administration in the New Millennium*, 11 J. HOUS. RES. 357, 357 (2000); *Nation of Renters*, *supra* note 7. Even Eagle admits that “it is likely that the federal judicial and executive branches will become more immersed in local housing decisions,” although he believes that such a role is an awkward one for the federal government. Eagle, *supra* note 1, at 306.

12. Professor Eagle highlights the political barriers to achieving a sustainable legislative approach to the various challenges termed “affordable housing.” Eagle, *supra* note 1, at 344-46. Eagle also aptly notes that “[m]uch will depend on whether President Trump and his administration would be desirous of pursuing those goals,” namely, HUD’s renewed commitment to the goal of affirmatively furthering Fair Housing. *Id.* at 351. Prior to being appointed the Secretary of Housing and Urban Development, Ben Carson, publicly decried the “socialist [sic] experiment” of affirmative governmental efforts to further Fair Housing. Ben S. Carson, *Experimenting With Failed Socialism Again*, WASH. TIMES (July 23, 2015), <http://m.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish/> [<https://perma.cc/G9GY-CP4B>]. Although Trump initially indicated that he would support revitalizing inner cities, later proposals to cut HUD’s funding by more than six billion reinforces the current lack of political will to tackle affordable housing at the federal level. See Jose A. DelReal, *Trump Budget Asks for \$6 Billion in HUD Cuts, Drops Development Grants*, WASH. POST. (Mar. 16, 2017), https://www.washingtonpost.com/politics/trump-budget-asks-for-6-billion-in-hud-cuts-drops-development-grants/2017/03/15/1b157338-09a0-11e7-b77c-0047d15a24e0_story.html [<https://perma.cc/EG34-B5P6>]; Jose A. DelReal, *Fair Housing Advocates Call Potential HUD Cuts “Devastating,”* WASH. POST. (Mar. 9, 2017), https://www.washingtonpost.com/politics/fair-housing-advocates-call-potential-hud-cuts-devastating/2017/03/09/b8dcbf88-0511-11e7-b1e9-a05d3c21f7cf_story.html [<https://perma.cc/9WVV-5G63>]. Carson’s recently expressed opinions regarding affordable housing and predictions that the Trump administration will pull back on HUD’s nascent push to affirmatively further fair housing under the 2015 AFFH Rule make it increasingly unlikely that there will be a top-down federal solution to the three housing problems Eagle discusses during the Trump Administration. Megan R. Wilson, *Carson Likely to Roll Back Housing Equity Rule*, HILL (Jan. 12, 2017), <http://thehill.com/homenews/administration/313970-carson-likely-to-roll-back-housing-equality-rule> [<https://perma.cc/U9TL-Q2L9>]; Yamichi Alcindor, *Don’t Make Housing for the Poor Too Cozy, Carson Warns*, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/2017/05/03/us/politics/ben-carson-hud-poverty-plans.html> [<https://perma.cc/25MQ-KURC>].

housing so that market forces could naturally work to increase housing supply, affordability, and equity. This can be done by reining in the property right of a community to exclude certain uses and populations from its boundaries.¹³ By adopting a more skeptical view of a group's asserted exclusionary justifications, and by promoting individuals' rights to control the possession and use of their private property, courts might counteract one of the principal causes of housing unaffordability and unfairness: the broadly supported right of communities to exclude. If housing production and location can be somewhat freed from community zoning and servitude control, economic motivators may provide leverage to break through our current political stalemate and, ultimately, create more efficient and fair housing.

Part I of this Article explains the various justifications that have been cited in upholding a group's collective right to exclude and acknowledges that limiting a group's right to exclude would reduce the community's power of self-determination. As articulated in Part II, however, limiting the collective right to exclude may in some cases be warranted based on the costs that certain group exclusions impose on individuals (owners and non-owners) and on society as a whole. Part III briefly considers how a group's right to exclude might be constrained through a new judicial approach to zoning and servitude law, even in the absence of sufficient political will to enact federal or state regulations of local exclusionary powers. This Article concludes that judicial limits on collective rights to exclude could remove market barriers to equitable and affordable housing.

I. JUSTIFICATIONS FOR THE COLLECTIVE RIGHT TO EXCLUDE

A. The Core Right in Property's Proverbial Bundle of Sticks

Every first-year law student learns that property is a collection, or "bundle," of legal rights with respect to a given thing. Like the empowered pigs in Orwell's *Animal Farm*,¹⁴ however, some sticks in this proverbial

13. See, e.g., *Lutz v. New Albany City Plan. Comm'n*, 101 N.E.2d 187, 191 (Ind. 1951); *Sycamore Realty Co. v. People's Counsel of Baltimore Cty.*, 684 A.2d 1331, 1337 (Md. 1996); *City of Omaha v. Glissmann*, 39 N.W.2d 828, 831 (Neb. 1949); *Roselle v. Mayor & Council of Borough of Moonachie*, 139 A.2d 42, 45 (N.J. Super. Ct. App. Div. 1958); *Newport Assocs. v. Solow*, 283 N.E.2d 600, 600 (N.Y. 1972); *McElveen-Hunter v. Fountain Manor Ass'n*, 386 S.E.2d 435, 436 (N.C. Ct. App. 1989), *aff'd*, 399 S.E.2d 112 (1991). Courts almost always assert that common interest community restrictions trump individual rights to control their property because "each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed." See *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639-40 (Fla. Dist. Ct. App. 1981).

14. GEORGE ORWELL, *ANIMAL FARM* 192 (1946).

bundle seem to have become “more equal than others.”¹⁵ Courts and scholars have christened the right to exclude the superlative right among all property rights.¹⁶ Recent property scholarship has shown a renewed theoretical interest in the core right to exclude, but its property law primacy is foundational.¹⁷ William Blackstone himself famously defined property in terms of the right to exclude, explaining that property is “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”¹⁸ Indeed, the essence of an owner’s specifically enforceable right to exclude at her whim is what distinguishes what Professors Calabresi and Melamed term a “property” sort of right from other sorts of

15. RICHARD A. EPSTEIN, *TAKING: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 63 (1985); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730-31 (1998).

16. Merrill, *supra* note 15, at 730. Professor Merrill calls the right to exclude the “*sine qua non*” of property, far “more than just ‘one of the most essential constituents’ of property,” citing to *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (in which the court held that “the right to exclude others” is “one of the most essential sticks in the bundle of rights that are commonly characterized as property”). As Merrill points out, the Supreme Court has quoted their characterization of the right to exclude in several other cases pertaining to alleged regulatory takings, including *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1044 (1992); and *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987). In *Loretto v. Teleprompter*, Justice Scalia even held that a regulation permanently limiting an owner’s right to exclude something as physically insignificant as a television cable was a *per se* compensable taking. 458 U.S. 419, 435 (1982) (calling the right to exclude, “one of the most treasured rights of property”).

17. The Supreme Court has long championed individual owners’ right to exclude. For example, Justice Brandeis, in 1918, noted that “[a]n essential element of individual property is the legal right to exclude others from enjoying it.” *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). See also *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (characterizing the right to exclude as “[t]he hallmark of a protected property interest”). Although scholars sometimes quibble with respect to whether the right to exclude is, as Professor Glazer put it, property’s “favorite child or only child,” scholars recognize that the right to exclude is at least a fundamental part of what makes property rights property rights. Elizabeth M. Glazer, *Rule of (Out)law: Property’s Contingent Right to Exclude*, 156 U. PA. L. REV. ONLINE 331, 343 (2008). See e.g., PAUL GOLDSTEIN & BATRON H. THOMPSON, JR., *PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION* 53 (2006) (stating that “the cornerstone of private property is the right to exclude anyone and anything from your property that you don’t want on your property”); Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1836 (2006) (calling the right to exclude “foremost among the property rights”). Note that the primacy of the right to exclude is not universally acknowledged, and several prominent scholars have pointedly rejected the absoluteness of an owner’s exclusionary rights. See, e.g., JOSEPH SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 95-139 (2000); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 746-48 (2009).

18. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 2 (1765-1769). Blackstone subsequently qualified this oft-quoted hyperbolic assertion.

rights.¹⁹ The right to exclude is part of what enables an owner's property rights to protect her autonomy,²⁰ liberty,²¹ privacy,²² and personhood.²³ In American jurisprudence, an individual's property right to exclude is, in a word, "sacred."²⁴

B. Justifications for a Collective Right to Exclude

The right to exclude may be a critical component of an individual's property rights, but that does not render the right to exclude inviolable, particularly in the context of such a right exercised by a collective rather than an individual. Neighborhoods, communities, and municipalities assert the right to exclude (and other property rights) through planning, zoning and restrictive covenants, and some courts and scholars conflate such asserted group rights (including the right to control communal property and to control property uses and inhabitants in a neighborhood), with individual property rights in order to evidence their legitimacy.²⁵ In fact, however, the

19. "An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller," contrasted with the value-only protection that a "liability rule" provides. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

20. See, e.g., THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 406 (Foundation Press 2007); Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1284-90 (2014); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354-58 (1967); John Martinez, *Bikinis and Efficient Trespass Law*, 2013 UTAH L. REV. ONLAW 290, 290 (2013).

21. See Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627, 638 (1988) ("To the framers [of the Constitution], identifying property with freedom meant that if you could own property, you were free."); see also David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39, 39-40 (2000).

22. See Jace C. Gatewood, *The Evolution of the Right to Exclude-More Than A Property Right, A Privacy Right*, 32 MISS. C. L. REV. 447, 448 (2014).

23. See Margaret Jane Radin, *Property and Personhood*, 34 STAN L. REV. 957, 957-58 (1982).

24. In *United States v. Jones*, Justice Scalia opined that "our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." 565 U.S. 400, 405 (2012) (citing *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)).

25. For a discussion of a community's right to exclude with respect to a common property, see Merrill, *supra* note 15, at 750-51. For legal opinions equating community with individual property rights, see, e.g., *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 810 P.2d 27, 28 (Wash. App. 1991) (holding that the collective property interests of a community amply justified density restrictions, even when these restrictions were created in conjunction with unenforceable racial restrictions on occupancy). Free speech concerns were balanced against the "property rights" of a group of owners (a community association) in *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 890 A.2d 947, 961

underlying justifications for protecting owners' individual rights to exclude are quite distinct from the relevant concerns in the context of a group, and the impacts of individual exclusions are likewise dissimilar to the impacts of collective exclusions.²⁶ Nevertheless, our culture, society, and laws generally do support the existence of a collective right to exclude, in part because the ability to exclude outsiders is seen as an essential part of establishing and preserving group identity.²⁷ Conceptually, boundaries are necessary for defining an "us," and in order for boundaries to have meaning they must be strong enough to exclude a "them."²⁸

Based upon this asserted need to preserve a group's identity, courts have recognized the existence of broad exclusionary powers in the realm of property law. But justifications for an individual's property right to exclude do not necessarily translate into justifications for group-based exclusions.²⁹ In the context of housing, municipalities exercise their right to exclude through zoning authority that limits entry into a community

(N.J. App. Div. 2006), *rev'd*, 929 A.2d 1060 (2007). The collective right of a community to exclude residents is related to an organization's right to exclude from its membership (right of association), a concept most infamously explored during the past two decades with respect to the Boy Scouts of America. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003); *see also* John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149 (2010). In the context of a neighborhood, however, the impacts of exclusion on would-be residents affects access to physical space, not just access to association membership.

26. For example, a few courts have held that individual rights to transfer property should be protected against zoning provisions attempting to exclude renters from neighborhoods. *Gangemi v. Zoning Bd. of Appeals of Town of Fairfield*, 763 A.2d 1011, 1018 (Conn. 2001). For more on the particular costs that arise in the context of group exclusions, see *infra* Part II.

27. Professor Stahl explained that "the very notion of community, however broadly conceived, is dependent on exclusion." Kenneth A. Stahl, *The Challenge of Inclusion*, 89 TEMP. L. REV. 487, 492 (2017). *See also* Georgette Chapman Phillips, *Boundaries of Exclusion*, 72 MO. L. REV. 1287, 1288 (2007) (explaining the "we feeling" as a desire to belong, which is connected with exclusion of those who do not belong).

28. RICHARD SENNETT, *THE USES OF DISORDER: PERSONAL IDENTITY & CITY LIFE* 36-40 (1970). *See also* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989) (explaining that a boundary's instrumental function is maintaining a group's separate identity); Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983 (2010); Stahl, *supra* note 27; Strahilevitz, *Information Asymmetries*, *supra* note 17.

29. Phillips, *supra* note 27, at 1288 (asking "if a citizen can defend and exclude based on individual property rights, can a community that is composed of citizens likewise defend and exclude non-community members from community property?"). Economist Robert Nelson would answer this question in the affirmative and claim that zoning is essentially a transfer of the private property right to exclude from the individual to the community, as a collective property right. ROBERT NELSON, *PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT* 146-47 (2005).

(often through segregation of uses).³⁰ Euclidean, use-based zoning is founded on the notion that optimal land use requires the exclusion of certain uses in order to protect other uses.³¹ In the *Euclid* case itself, the Supreme Court upheld local land-use regulations that precluded commercial and non-owner-occupancy residential use from being located in a single-family, owner-occupied residential neighborhood.³² The growth of common interest communities has empowered smaller subsets of society to self-identify and self-govern in an exclusionary way using servitude law.³³ Gated and planned communities governed by homeowners'

30. Although municipal boundaries are indeed "porous," in that there is little that a local government can do to legally block someone from moving into a particular jurisdiction, zoning restrictions on certain uses and types of property can effectively do just that. Phillips, *supra* note 27, at 1288 ("Municipal boundaries, although superficially quite porous, reify when utilized to differentiate residents from non-residents."). For example, limitations on rental-occupancy, multi-family housing, or affordable housing units can be effective ways to keep poorer inhabitants out of a given community. It was this very exclusionary effect that inspired the New Jersey Supreme Court to strike down the zoning laws at issue in the *Mount Laurel* cases. See *Mount Laurel Cases*, *supra* note 10.

31. The Supreme Court first upheld a city's exclusionary zoning laws as a valid exercise of police power in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

32. In *Euclid*, the land use that was alleged to endanger residential neighborhoods was the construction of multifamily rental housing. *Id.* Although not articulated as such, clear undertones of racial discrimination are apparent in the imagery of the *Euclid* opinion. Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597 (2001). Justice Southerland states in his opinion that apartment houses "come very close to being nuisances," and calls multifamily rental housing "a mere parasite." *Euclid*, 272 U.S. at 394-95. See also Eagle, *supra* note 1, at 320 (discussing *Euclid*). Since the *Euclid* decision, use-based zoning has become a widespread norm across most of America. "Operating from the premise that everything has its place, [Euclidean] zoning is the comprehensive division of a city into different use zones." JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 4.2, 70 (1998). For more on the pros and cons of Euclidean zoning, see generally Eliza Hall, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 68 U. PITT. L. REV. 915 (2007).

33. A "common interest community" is defined by the Restatement (Third) of Property to be a "development or neighborhood in which individually owned lots or units are burdened by a servitude" that cannot be avoided by nonuse or withdrawal. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (2000). Common interest communities ("CICs") include condominiums, cooperatives, and neighborhoods governed by homeowner associations (also known as planned unit developments or "PUDs"). Data regarding the number of CICs and their residents is tracked by the Community Association Institute ("CAI"), and based on CAI data, there were more than sixty-five million residents of CICs as of 2016, representing 20.1% of the U.S. population at the time (323 million in 2016), as estimated by the U.S. CENSUS BUREAU. CMT. ASS'NS INST., <https://www.caionline.org/AboutCommunityAssociations/Pages/default.aspx> [<https://perma.cc/AH9A-VPTS>]; *Population Finder*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml?src=bkmk [<https://perma.cc/2ZJC-L4BU>]. The initial popularity of community restrictive covenants likely reflects the desire of multiple societal segments (governments, banks, as well as white communities) to exclude non-white residents from higher opportunity, suburban neighborhoods. Indeed, the use of race-based occupancy restrictions was widespread until the middle of the twentieth century and were explicitly encouraged by

associations can use covenants and community rulemaking to exclude certain types of uses as well as certain types of people.³⁴ Although the legal ability of both zoning and servitude law to exclude based on enumerated, protected grounds is somewhat constrained by constitutional provisions and the Fair Housing Act,³⁵ ample leeway still exists for communities to engage in less protected (or less direct) forms of discrimination and to erect various types of legal barriers to entry into a community.³⁶

the Federal Housing Administration and the National Association of Realtors and (until the seminal *Shelley v. Kraemer* decision of 1948) upheld and enforced by the Supreme Court. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Corrigan v. Buckley*, 271 U.S. 323 (1924).

34. Reciprocal restrictive covenants can create private restrictions on land use that function like a sort of private zoning law. These covenants are enforceable based on the principles of servitude law as perpetual limitations on the land. Such servitude-based restrictions often limit land use in much more extensive ways than even local zoning laws. Andrea J. Boyack, *Community Covenant Alienation Restraints and the Hazard of Unbounded Servitudes*, 42 REAL EST. L.J. 450, 454-57 (2014) [hereinafter *Unbounded Servitudes*]; *American Dream in Flux*, *supra* note 8, at 220-21. *See also* Paula A. Franzese, *Privatization and its Discontents: Common Interest Communities and the Rise of Government for “the Nice,”* 37 URB. LAW. 335, 336-37 (2005) (“Covenants have been devised to regulate everything from whether pets are permitted, what the maximum weight of an allowed pet must be, the permissibility and, if permitted, the design of one’s doghouse and birdhouse, the precise contours of landscaping content and style, the architectural style of one’s home, the color of one’s home, the color of one’s shutters, the color of one’s interior drapes, the permissibility of screen doors, the posting of signs, and even the propriety of wok-cooking.”).

35. The Supreme Court invalidated race-based zoning in the early twentieth century. *Buchanan v. Wharley*, 245 U.S. 60 (1917) (holding that a city ordinance prohibiting “colored” people from occupying certain houses was unconstitutional). The Fair Housing Act prohibits the denial of housing based on race, religion, national origin, family status, or disability. The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (2006). The Act, as amended, prohibits discrimination in sale, rental, and financing of dwellings and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of eighteen living with parents or legal custodians, pregnant women, and people securing custody of children under the age of eighteen), and disability. *See* 42 U.S.C. § 3604 (2006). Under the Act, it is illegal to lie about housing availability, advertise discriminatorily, steer buyers to or from housing based on a suspect criteria, or choose not to rent or sell property based on such a criteria. *See id.* Housing segregation was identified as one of the greatest threats facing American Society when the Fair Housing Act was passed in 1968. REP. OF THE NAT’L ADVISORY COMM. ON CIV. DISORDERS 115-20, 263 (March 1, 1968) [hereinafter the Kerner Commission Report]. The Fair Housing Act was passed in the wake of violent urban riots and the assassination of Dr. Martin Luther King, Jr. *See id.* at 259; DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 26-50 (1993). States have also passed fair housing legislation, in many cases expressly invalidating race-based occupancy restrictive covenants. *See American Dream in Flux*, *supra* note 8, at 224 n.129.

36. *See* Sheryll D. Cashin, *Privatized Communities and the “Secession of the Successful”*: *Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675, 1689-91 (2001) (calling the “practice of exclusion” the “familiar, unfortunate way of the

In upholding a group's right to exclude by using zoning or private land restrictions, courts and legislatures reference any of three basic justifications: (i) the need to avoid property law's incompatible use problem, (ii) the need to address the tragedy of the commons in the context of publicly used amenities, and (iii) the desire of a community to create an identity and preserve its property values. The first two justifications are fairly legitimate; but the last may be less justifiable, particularly if the asserted benefits of the community's exclusion are balanced against the exclusion's true costs.

The possibility of spillover harms from particular land uses justifies some measure of use exclusion by a group. After all, a factory or a cattle feedlot will almost certainly create negative externalities that impose costs on surrounding homeowners.³⁷ Some uses simply should not be proximately located to one another, as Ronald Coase famously explained in his hypothetical regarding a confectioner situated next to a physician.³⁸ The tort of nuisance theoretically provides a common law limit on improper (or improperly located) land uses, but nuisance law is of limited utility because it is notoriously difficult to predict and apply.³⁹ Nuisance law's deficiencies adequately justify the development of both zoning- and servitude-based limits on uses of land to the extent that such limitations are employed to avoid incompatible uses. The problem is, of course, that some so-called limitations on purported "uses" of land are, in reality, barriers to entry for particular users.⁴⁰

American suburb"); Chused, *supra* note 32; Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047 (1996); *American Dream in Flux supra* note 8.

37. See *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970); *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972).

38. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8-9 (1960) (discussing *Sturges v. Bridgman*, 11 Ch. D. 852 (1879)). See also *id.* at 26, 105-06, 112 (explaining that negative externalities from land uses could be conceptualized as a reciprocal problem caused by the proximate location of incompatible uses).

39. Prosser famously called the common law of nuisance the most "impenetrable jungle" of the entire law, remarking that nuisance "has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 616 (W. Page Keeton ed., 5th ed. 1984). See also Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006) (explaining the amorphous nature of nuisance law and articulating a potential outer boundary for the principle).

40. *Unbounded Servitudes, supra* note 34, at 477 (explaining that leasing a home is actually the same use of the property as is residential use by an owner-occupant, since the use of a given parcel of real estate "turns on how it is enjoyed and employed by the party in possession").

In the context of shared amenities or commonly held property, land use governance through zoning or servitude law is usually appropriate.⁴¹ Public ownership of a resource can lead to collective action and free-rider problems.⁴² Public governance or private common interest community control address inefficiencies caused by this “tragedy of the commons.”⁴³ In the context of a municipality, the tragedy of the commons is solved through a combination of zoning, rules governing use of public property, and taxation power.⁴⁴ In common interest communities, association assessment power together with covenant restrictions and Board of Directors’ governing powers similarly address freeriding and collective action problems.⁴⁵ The need for governance and contribution in the context of commonly held property, however, does not necessarily sanitize all exclusionary powers of public or private governments. For example, although mandatory golf club membership in upscale planned “golf course communities” is arguably responsive to the tragedy of the commons, the very design and creation of a golf course community might in itself indicate a troubling collective desire to exclude non-white residents from the neighborhood.⁴⁶

Land use regulation to combat negative externalities or to address the tragedy of the commons may be defensible on economic grounds, but it is harder to find a legitimate justification for a community’s desire to exclude simply in order to become and remain exclusive. Nevertheless, courts have

41. See Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375 (1994).

42. Garret Hardin, *The Tragedy of the Commons*, 162 SCI., NEW SERIES 1243, 1244-45 (1968); Thrainn Eggertsson, *Open Access versus Common Property*, in TERRY L. ANDERSON & FRED S. MCCHESENEY, *PROPERTY RIGHTS: COOPERATION, CONFLICT AND LAW*, 74-82, 84-85 (2003); James E. Krier, *The Tragedy of the Commons, Part II*, 15 HARV. J.L. & PUB. POL’Y 325, 345, nn.50 (1992). See generally Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

43. Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 LOY. U. CHI. L.J. 53, 72-75 (2011) [hereinafter *Community Collateral Damage*]; MERRILL & SMITH, *supra* note 20, at 500-01. See also Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 891 (2004) (explaining that there are obvious tragedy of the commons problems in neighborhoods, but pointing out that there are “tragedy of the anti-commons” problems as well).

44. See Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45 (1994); Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POL’Y REV. 281 (2016).

45. *Community Collateral Damage*, *supra* note 43, at 72; WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW* 29-32 (3d ed. 2000). See also Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907 (2004) (discussing ways that common interest communities use exclusionary rights to address the tragedy of the commons).

46. See Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006).

upheld a collective's right to exclude based on the community's asserted need to create and maintain a distinctive identity,⁴⁷ its asserted desire to preserve community culture,⁴⁸ the hope for increased neighborhood harmony,⁴⁹ and—most commonly—the purportedly legitimate objective of promoting local property values.⁵⁰ Courts routinely cite to these public values when they uphold a community's right to exclude.⁵¹

It is relatively easy to characterize as improper efforts of white, upper-class neighborhoods to exclude low-income housing assistance recipients. Such exclusions seem motivated by discrimination and elitism. But similar goals to preserve a neighborhood's character also motivate community efforts to exclude in a very different context: resistance of development by poorer, ethnic enclaves.⁵² Numerous scholars have advocated that affordable housing be affirmatively included in low-poverty neighborhoods.⁵³ It is less common for scholars to advocate inclusion of

47. The right of a group of owners to, by majority-rule, pass exclusionary rules in order to protect the group's identity is particularly robust in the context of housing cooperatives. See Harvey S. Epstein, *Weisner Revisited: A Re-Appraisal of a Co-Op's Power to Arbitrarily Prohibit the Transfer of its Shares*, 14 FORDHAM URB. L.J. 477, 483-502 (1986). See also, e.g., *Bachman v. State Div. of Human Rights*, 104 A.D.2d 111 (N.Y. App. Div. 1984); *Goldstone v. Constable*, 84 A.D.2d 519 (N.Y. App. Div. 1981); *Gorman v. Residential Towers Residence, Inc.*, N.Y.L.J. 6 (Oct. 4, 1976) (N.Y. Sup. Ct.) (discussed in Epstein, *supra*). Cooperatives have been specifically empowered to exclude on the basis of occupation (particularly for being a lawyer), family background (being from "new money"), and being "too public a figure." The idea that geographically defined neighborhoods (or people living in the same large multifamily building) have an inherent (or necessary) group identity, however, has been criticized as naïve. Professor Frug explains that a suburban community is unlike "a voluntary association, such as a political organization, church, or country club," because "[p]eople join voluntary associations to be with people like themselves or to pursue a common interest," and suburban communities are, essentially, groupings of "strangers." Frug, *supra* note 36, at 1050. "Residents of America's central cities lack this sense of a common identity." *Id.*

48. See, e.g., *Pres. at Forrest Crossing Townhome Ass'n, Inc. v. DeVaughn*, 2013 WL 396000 (Tenn. Ct. App. Jan. 30, 2013). Preservation of neighborhood culture is often the justification advanced for community efforts to exclude gentrification. See RUTH GLASS, *ASPECTS OF CHANGE* xvii (1964) (decrying the "invasion" of wealthier residents "into traditionally working class neighborhoods," and explaining that gentrification harms the community by changing "the social character of the neighborhood").

49. The court in a widely cited Florida case held that group exclusionary restrictions are reasonable and valid if they purport to support "the health, happiness and peace of mind of the unit owners." *Hidden Harbour Est., Inc. v. Norman*, 309 So. 2d 180, 181-82 (Fla. 1975).

50. See *infra* Section I.C.; see also Lawrence G. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

51. See *American Dream in Flux*, *supra* note 8, at 292-93; *Unbounded Servitudes*, *supra* note 34, at 467.

52. Eagle, *supra* note 1, 304-05.

53. See, e.g., Iglesias, *supra* note 2; Brian R. Lerman, Note, *Mandatory Inclusionary Zoning – The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383 (2006); Jania S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 UCLA L. REV. 1689, 1704 (1996); Marc Seitles, *The Perpetuation of Residential Racial*

gentrification in more impoverished, ethnic enclaves, and exclusion of “outsiders” is usually characterized as justified in that context.⁵⁴ For example, efforts of the Orthodox Jewish community in New York City’s Lower East Side to exclude outsiders in order to “keep their community intact” are perceived as more legitimate than rich neighborhood efforts to exclude recipients of housing assistance.⁵⁵

Professor Ellickson has theorized that the value of group homogeneity and cohesiveness justifies a collective, community right to exclude.⁵⁶ Ellickson refers to a study by Robert Putnam regarding social capital in the context of diverse and homogeneous communities and notes that “residents of diverse neighborhoods have less social capital than do residents of more homogeneous neighborhoods,” explaining that diversity leads to “weaker ties to members of their own ethnic group” than those that exist in ethnic enclaves.⁵⁷ Nevertheless, in the context of housing, a group’s right to exclude for exclusion’s sake is an exercise of privilege, whether the

Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies, 14 J. LAND USE & ENVT. L. 89 (1998); Lisa C. Young, *Breaking the Color Line: Zoning and Opportunity in America’s Metropolitan Areas*, 8 J. GENDER RACE & JUST. 667 (2005). Some scholars, on the other hand, do criticize inclusionary efforts, even in the context of integrating poorer residents into better neighborhoods. See, e.g., Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 CALIF. L. REV. 1167 (1981).

54. See, e.g., Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1 (2008); Michael Barton, *An Exploration of the Importance of the Strategy Used to Identify Gentrification*, 53 URB. STUD. 92 (2016). Jon Dubin, for example, advocated for “a right to protective zoning” to protect minority neighborhoods from the intrusion of “higher-quality residential” uses that would “create market pressures that effectively price out low-income residents through the process of gentrification.” Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 742 (1993). Cf. J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405 (2003) (pointing out the many economic benefits that inure to existing residents from gentrification in their neighborhoods). To be fair, for many critics of gentrification, the source of harm comes not from community access, but rather from displacement of current residents. See, e.g., Hannah Weinstein, *Fighting for a Place Called Home: Litigation Strategies for Challenging Gentrification*, 62 UCLA L. REV. 794 (2015) (stressing the displacement aspect of objectionable gentrification, and citing to ROLF GOETZE, UNDERSTANDING NEIGHBORHOOD CHANGE: THE ROLE OF EXPECTATIONS IN URBAN REVITALIZATION (1979)).

55. Professor Eagle discusses the value of a community’s social capital in Eagle, *supra* note 1, at 316-17, and references efforts by the Orthodox Jewish community in New York City’s Lower East Side to exclude outsiders in order to “keep their community intact.” *Id.* at 316.

56. Ellickson, *False Promise*, *supra* note 28.

57. *Id.* at 1014-15 (discussing Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137 (2007)).

privilege of high income elites or protected ethnic communities.⁵⁸ The value preserved in upholding a community's right to exclude is an aspect of "status property," and protection of status typically benefits society's "haves" at a cost to society's "have nots."⁵⁹ As poignantly sung by Billie Holiday, "them that's got shall get. Them that's not shall lose."⁶⁰

A desire to promote high property values is perhaps the most ubiquitous justification given for a community's right to exclude.⁶¹ This is unsurprising. After all, the value of homes in a neighborhood reflects not only the quality of the physical structures in the neighborhood, but also popular perceptions regarding the quality of the people inhabiting those structures.⁶² This is why lenders, realtors, and even the federal government specifically encouraged communities to create restrictive covenants that would ensure that certain people (people of different races, religions, and ethnic backgrounds, as well as people with young children or disabilities), and these sorts of exclusions were rampant until they were prohibited by law. The motive behind such collective exclusions was the shared desire of residents, mortgagees, and municipal taxing authorities to preserve neighborhood property values against declines that would occur by including these "undesirable" populations.⁶³

School segregation and quality also factor into a community's right to exclude. In the 1970s, the Supreme Court foreclosed the developing regulatory and judicial mandate to integrate schools using redistricting and busing, and in *Milliken v. Bradley*, the Court held that a region could divide

58. "The maintenance of privilege necessitates the ability to exclude others from access. If all can freely obtain the advantages of the privileged group, the now unrestricted benefit correspondingly depreciates." Bela August Walker, *Privilege As Property*, 42 WASH. U. J.L. & POL'Y 47, at 55 (2013).

59. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013). See also Trina Jones, *Occupying America: Dr. Martin Luther King, Jr., the American Dream, and the Challenge of Socio-Economic Inequality*, 57 VILL. L. REV. 339, 344 (2012).

60. Billie Holiday, *God Bless the Child* (Edward B. Marks Music Co., 1941).

61. See, e.g., *Villas West II of Willowridge Homeowners Ass'n, v. Edna McGlothin*, 885 N.E.2d 1274, 1283-84 (Ind. 2008).

62. Professor Frug explains that for most cities and communities across the nation, "pursuit of prosperity has usually meant trying to attract the 'better kind' of commercial life and the 'better kind' of people while excluding the rest." Frug, *supra* note 36, at 1048.

63. JESUS HERNANDEZ, *The Kirwan Institute for the Study of Race and Ethnicity*, THE RESIDUAL IMPACT OF HISTORY: CONNECTING RESIDENTIAL SEGREGATION, MORTGAGE REDLINING, AND THE HOUSING CRISIS (2009); Florence W. Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 489 (1995); Seitles, *supra* note 53, at 95. The Federal Housing Administration expressly promoted racial restrictions in communities, tutored developers in the art of race-based restrictive covenants, and promulgated maps that designated certain neighborhoods undesirable based on the racial composition of their population. JACKSON, *supra* note 7, at 195; Andrea J. Boyack, *A New American Dream for Detroit*, 93 U. DET. MERCY L. REV. 573, 576-81 (2016) [hereinafter *Detroit*].

into tiny self-governing school districts, and that each of these districts would have the right to exclude non-resident students.⁶⁴ Once local school districts could exercise self-determination using their robust right to exclude, wealthier jurisdictions were able to effectively quarantine themselves from impoverished areas.⁶⁵ Regional school system fractionalization separated poor (and often non-white) students and schools from their wealthy (and often white) counterparts. School system exclusions not only effectively undermined the seminal holding of *Brown v. Board of Education*,⁶⁶ but also allowed richer communities “to foster their own prosperity . . . at the expense of their neighbors.”⁶⁷

Doubtless, another motivation for creating exclusive communities has been fear of the “other.”⁶⁸ Professor Cashin points out that gated communities’ appeal, and hence their value, very well may turn on perceptions of exclusivity and the ability to exclude, founded on a general sense that fairly homogeneous (typically majority white) neighborhoods are safer.⁶⁹ Suburban neighborhoods’ *raison d’être* may very well be the desire to control the identity of one’s neighbors. Community homogeneity

64. *Milliken v. Bradley*, 433 U.S. 267 (1977). *See also Detroit*, *supra* note 63, at 601-04; Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041 (1984); Daniel Herz, *You’ve Probably Never Heard of One of the Worst Supreme Court Decisions*, WASH. POST (July 24, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/07/24/youve-probably-never-heard-of-one-of-the-worst-supreme-court-decisions/> [<https://perma.cc/K2SW-HZ7L>].

65. *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999); Shane, *supra* note 64; Bradley W. Joondeph, *A Second Redemption? Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education*, 56 WASH. & LEE L. REV. 169 (1999).

66. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), *rev’d in part sub nom.*, *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955); Ryan, *supra* note 65.

67. Frug, *supra* note 36, at 1048. Political power, even in a democracy, does not in practice represent equality of opportunity. As political scientist Harold Lasswell explains, elites have a substantial advantage when it comes to political influence and power. HAROLD D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936).

68. WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* 333-34 (1985). *See also* Seitles, *supra* note 53, at 90 (“The existence of isolated and racially segregated housing has preserved racial mistrust.”). “See, you have to understand the fundamental feeling in suburbia is fear, let’s face it. The basic emotional feeling is fear. Fear of blacks, fear of physical harm, fear of their kids being subjected to drugs, which are identified as a black problem, fear of all the urban ills. They feel [that] by moving to the suburbs they’ve run away from it, in fact, they haven’t, in reality they haven’t, but in their own mind’s eye they’ve moved away from the problem.” EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 155-56 (1997). Fear of others has even made it into law review articles as a legitimate basis to uphold a community’s right to exclude. *See* Laura T. Rahe, Note, *The Right of Exclude: Preserving the Autonomy of the Homeowners’ Association*, 34 URB. LAW. 521, 521 (2002) (opining that “[i]f residents are to reap the benefits of membership, courts must uphold the associations’ right to exclude the general public from their property”).

69. Cashin, *supra* note 36, at 1682 (quoting from a marketing brochure for a gated community that strongly evokes community safety and exclusion of others).

in wealthier suburban communities has a perceived—and therefore actual—positive impact on property values.⁷⁰ Community culture and property values are two oft-cited justifications for a group’s need to exclude the “other,” but perhaps the most emotionally charged asserted reason for a group’s right to exclude pertains to community safety.⁷¹ Data regarding crime and comparative sale prices of homes arguably lends exclusions motivated by safety concerns some legitimacy,⁷² in spite of a

70. HADLEY ARKES, *THE PHILOSOPHER IN THE CITY: THE MORAL DIMENSIONS OF URBAN POLITICS* 324 (1981) (explaining that residents choose to live in a particular suburb particularly based on “a judgment about the kind of people one wished to live with, and the conditions under which one expected to live.”).

71. Blakely and Snyder note that a community’s preference for exclusion for exclusion’s sake appears to be more prevalent in areas with high immigrant populations. BLAKELY & SNYDER, *supra* note 68, at 1. They note that “gated areas . . . represent[] a concrete metaphor for the closing of the gates against immigrants and minorities and the poverty, crime and social instabilities in society at large.” *Id.* at 152. The surprising popularity of Donald Trump in the 2016 Presidential Election similarly discloses a widespread fear of immigration and immigrants among suburban and rural white Americans. *See, e.g.*, Mirren Gidda, *How Donald Trump’s Nationalism Won Over White Americans*, NEWSWEEK (Nov. 15, 2016), <http://www.newsweek.com/donald-trump-nationalism-racism-make-america-great-again-521083> [<https://perma.cc/SEZ4-U436>]; Rich Morin, *Behind Trump’s Win in Rural White America: Women Joined Men in Backing Him*, PEW RES. CTR (Nov. 17, 2016), <http://www.pewresearch.org/fact-tank/2016/11/17/behind-trumps-win-in-rural-white-america-women-joined-men-in-backing-him/> [<https://perma.cc/J8VB-LXAS>]; Toni Morrison, *Making America White Again*, NEW YORKER (Nov. 21, 2016), <http://www.newyorker.com/magazine/2016/11/21/making-america-white-again> [<https://perma.cc/TRZ6-3A2Y>]; Derek Thompson, *Donald Trump and the Twilight of White America*, ATLANTIC (May 13, 2016), <https://www.theatlantic.com/politics/archive/2016/05/donald-trump-and-the-twilight-of-white-america/482655/> [<https://perma.cc/JT27-RR66>].

72. *See* Judith R. Blau & Peter Michael Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114 (1982) (showing that economic inequality and not poverty or race is the dominant correlate with violent crime); Richard Block, *Community, Environment, and Violent Crime*, 3 CRIMINOLOGY 46 (1979) (showing a very strong correlation between violent crime and residential proximity between the poor and the middle class, even when controlling for other factors); *see also* U.S. DEP’T OF HOUS. & URB. DEV., *IN THE CROSSFIRE: THE IMPACT OF GUN VIOLENCE ON PUBLIC HOUSING COMMUNITIES*, 14 (2000), <https://www.ncjrs.gov/pdffiles1/nij/181158.pdf> [<https://perma.cc/9V8Y-DXVF>] (“There is a strong correlation between income and violent crime; thus the low-income population in public housing is especially vulnerable to gun violence.”); MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* 18-19 (1976) (explaining the “inner city” concept that equated poorer, blacker neighborhoods with crime); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994). It should not be ignored, however, that safety concerns have been widely invoked to justify discrimination based on race and national origin. *See, e.g.*, Allison S. Hartry, *Gendering Crimmigration: The Intersection of Gender, Immigration, and the Criminal Justice System*, 27 BERKELEY J. GENDER L. & JUST. 1 (2012) (discussing the “notorious example” of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act of 2010, known as S.B. 1070).

clear discriminatory effect.⁷³ But community safety can be protected by less exclusionary means, and in many cases the need to exclude in order to protect is not necessarily based on any actual safety threat.

There are some legitimate reasons for a community to exclude certain uses and users of a neighborhood. Group exclusion is an important tool to resolve spillover effects and the problem of truly incompatible uses of proximate parcels. Commonly used or held amenities in a neighborhood likely require some group exclusion in order to avoid freeriding and the overuse and under-maintenance of property. A community's desire to exclude in order to be perceived as exclusive, however, is somewhat more difficult to justify, even though such exclusion may to some extent promote community safety, character, and harmony. Safety is important, but can be achieved in other ways. The character of a homogenous neighborhood is not objectively preferable to that of a diverse one. And short-term easy harmony achieved through enforced sameness while stoking fear of the "other" stymies society's long-term ability to achieve social harmony that is genuine and enduring.

C. Promoting Property Values by Limiting Housing Supply

Limiting the development of additional housing in a particular community may also increase property values, based on basic economic theories of supply and demand.⁷⁴ Excluding additional housing units or certain types of housing from a neighborhood limits the supply of housing, and caps on supply protect prices from the inevitable market-based decrease that would result from making more units available in a given location.⁷⁵ Propping up housing prices by limiting the housing supply

73. See generally Adam Gordon, *Making Exclusionary Zoning Remedies Work: How Courts Applying Title VII Standards to Fair Housing Cases Have Misunderstood the Housing Market*, 24 YALE L. & POL'Y REV. 437 (2006); Margery Austin Turner & Stephen L. Ross, *How Racial Discrimination Affects the Search for Housing*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 81, 86 (Xavier de Souza Briggs ed., 2005).

74. Elementary economic theory posits that increasing demand for a product relative to its supply will increase its price in the short term. ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 199 (1890). The law of supply and demand is fundamental economic theory and hypotheses that price will always move toward the point where quantities supplied and those demanded equalize. In the realm of housing, studies have confirmed that economic theory holds true: limited supply does increase the cost of housing. Michael Lewyn, *Zoning and Land Use Planning*, 44 REAL EST. L.J. 558, 558 (2016). The economic impact of limitations on housing supply has been extensively documented by economists. See, e.g., Ed Glaeser & Joe Gyourko, *The Economic Implications of Housing Supply*, Zell/Lurie Working Paper #802 (Jan. 4, 2017), <http://realestate.wharton.upenn.edu/wp-content/uploads/2017/03/802.pdf> [<https://perma.cc/QL6X-FAAD>].

75. The law of supply and demand works in the inverse as well: when supply increases relative to demand, price will decrease. MARSHALL, *supra* note 74, at 199.

benefits current homeowners who experience asset appreciation. In addition, local governments, which raise revenue through property taxes, and developers, who profit from new home sales, benefit when comparative home values increase.⁷⁶ Because courts presume that promoting a community's property values is always a legitimate public concern, zoning and restrictive covenants that exclude additional housing units from being built in a community for this reason are usually upheld.⁷⁷ Artificially propping up property values by limiting housing supply, however, does in fact create significant adverse externalities on non-owners and the public in general.⁷⁸

As economic theory would have predicted, the recent dramatic upswing in demand for rental housing in the highest-growth areas of the country has led to an equally dramatic increase in rental rates.⁷⁹ Economic theory would also anticipate that an increase in the demand for and price of a product would naturally cause supply of the product to eventually increase, and accordingly, one might expect huge increases in rental housing supply resulting from the recently dramatic uptick in rental housing price and

76. See *Community Collateral Damage*, *supra* note 43.

77. See e.g., *Quality Built Homes, Inc. v. Vill. of Pinehurst*, No. 1:06CV1028, 2008 WL 3503149, at *9 (M.D.N.C. Aug. 11, 2008); *Kasper v. Town of Brookhaven*, 142 A.D.2d 213, 215 (N.Y. App. Div. 1988); *G.M.P. Land Co. v. Bd. of Sup'rs of Hegers Twp.*, 601, 457 A.2d 989, 995 (Pa. Commw. Ct. 1983). Cf. *Petition of Carpenter v. City of Petal*, 699 So. 2d 928, 934 (Miss. 1997).

78. Deficiency in supply of housing leads housing prices to increase, impacting affordability. This imposes costs on lower-income households, who must spend a higher percentage of earnings on housing and therefore cannot afford to pay for necessary healthcare, education, and other expenses, let alone contribute disposable income to the economy in the form of discretionary consumption. Higher home prices and increasing need for housing assistance drains the public fisc, imposing costs on all taxpayers. The number of households requiring assistance increases as rental rates increase, and the amount needed to adequately supplement a renter's ability to pay likewise grows with rising rental rates. For further discussion of the costs of unaffordable housing, see *Nation of Renters*, *supra* note 7, and Andrea J. Boyack, *Side by Side: Revitalizing Urban Cores and Ensuring Residential Diversity*, CHICAGO-KENT L. REV. (forthcoming 2017) [hereinafter *Side by Side*]. Furthermore, housing supply limitations has been shown to significantly constrain economic growth in a municipality. See Glaeser & Gyourko *supra* note 74, at 21-24.

79. The current state of housing market problems involving inadequate, expensive rental housing is discussed in the Joint Center for Housing Studies of Harvard University's recent annual report. JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *The State of the Nation's Housing 2015* 30-32 (2015) [hereinafter *State of the Nation's Housing 2015*]. "Rental vacancies are reaching new lows, and rental rates are reaching new highs." *Nation of Renters*, *supra* note 7, 109-10. See also Josh Miller, *Eye on Housing: Rental Vacancy Rate at 20 Year Low*, EYE ON HOUS. (Jan. 29, 2015), <http://eyeonhousing.org/2015/01/rental-vacancy-rate-at-20-year-low> [<https://perma.cc/MUB4-K2BP>]; *Out of Reach 2015*, NAT'L LOW INCOME HOUS. COAL., at 4 (2015) http://nlihc.org/sites/default/files/oor/OOR_2015_FULLL.pdf [<https://perma.cc/XJ9C-63J8>] [hereinafter *Out of Reach 2015*]; Eagle, *supra* note 1, at 335.

demand.⁸⁰ But reality diverges from economic theory in that the supply of rental housing has been slow to respond to the increasing rental housing demand.⁸¹ There has been some, albeit inadequate, increase in the number of rental units in the housing market, but over the past several years, new housing units are clustered at the high-end of the market (luxury rentals).⁸² Housing demand is constrained by income and cannot stretch to meet rising market rates.⁸³ Thus, the supply of affordable housing remains well below, and has failed to keep pace with, burgeoning demand.⁸⁴

Why is affordable housing supply relatively unresponsive to increases in demand? For one thing, local land-use systems (permitting, regulatory approvals, and the like) have significantly raised the cost of producing housing.⁸⁵ Land-use compliance costs make it more difficult for

80. “America’s population of renters is large and rapidly growing larger.” *Nation of Renters*, *supra* note 7, at 112. “The median asking rate for rentals is now higher than ever before, having nearly doubled in the past two decades.” *Id.* at 117. See also ANTHONY DOWNS, GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? (2004).

81. “Supply inadequacies in rental housing across most income levels have exacerbated housing affordability problems.” *Nation of Renters*, *supra* note 7, at 117. See also Lewyn, *supra* note 74. See generally Eagle, *supra* note 1, at 335; *Out of Reach 2015*, *supra* note 79, at 5.

82. *Nation of Renters*, *supra* note 7, at 118, 124. See also Janet Viveiros et al., *Paycheck to Paycheck: A Snapshot of Housing Affordability for Millennial Workers*, NAT’L HOUS. CONF. & CTR. FOR HOUS. POLICY, September 2015; Laura Kusisto, *Rising Rents Squeeze Middle Class*, WALL ST. J. (May 9, 2016), <https://www.wsj.com/articles/middle-class-families-feel-more-squeezed-by-rising-u-s-rents-1462738692> [<https://perma.cc/WCF7-E4V4>].

83. “An unprecedented 11 million renter households—more than one in four of all renters in the U.S.—spend more than half of their monthly income on rent.” THE CASE FOR EXPANDING THE LOW-INCOME HOUSING TAX CREDIT, AFFORD. HOUS. TAX CREDIT COAL., <http://www.taxcreditcoalition.org/wp-content/uploads/2015/12/Revised-Need-Document.pdf> [<https://perma.cc/K9WZ-6BEU>] [hereinafter EXPANDING LIHTC]. “Rapidly rising rents outpace wages, which have become fairly stagnant for most Americans.” *Nation of Renters*, *supra* note 7, at 118. Rental rates have become “out of reach” for many workers, and “the number of renters spending more than they can afford on housing is unacceptably high and growing.” *Housing America’s Future: New Directions for National Policy*, BIPARTISAN POL’Y CTR. 7-11 (Feb. 2013), http://cdn.bipartisanpolicy.org/wp-content/uploads/sites/default/files/BPC_Housing%20Report_web_0.pdf [<https://perma.cc/9YY4-TMRZ>] [hereinafter *Housing America’s Future*]. Affordability affects home prices as well as rental rates in high-growth, intensively zoned cities. See Glaeser & Gyourko *supra* note 74, at 10-17.

84. See *State of the Nation’s Housing 2015*, *supra* note 79, at 2, 3 fig. 3; OFF. OF POL’Y DEV. & RES., U.S. DEP’T OF HOUS. & URB. DEV., EVIDENCE MATTERS (Summer 2013); see also *Nation of Renters*, *supra* note 7, at 115-19 (explaining the various demographic and economic forces that have caused and will continue to cause the population of renters to grow).

85. James J. Hartnett, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 97 (1993) (concluding that “overregulation directly increases housing development costs both through lengthy and expensive approval processes and the imposition of high permit

developers to produce a product that can be acquired in a market transaction, free from government subsidy.⁸⁶ Gaps in affordability, after all, can result not only from inability of consumers to pay, but also from overly expensive real estate prices (land, regulatory approvals, plus production).⁸⁷ The gap between the costs to create housing and what housing consumers can afford to pay (typically defined as 30% of gross income) is particularly true for housing with respect to households earning median and below-median incomes.⁸⁸ Although federal, state, and local governments provide housing assistance to help fund this gap, there is insufficient funding to meet the need: only one-fourth of households eligible for housing assistance actually receive it.⁸⁹

In addition to increasing costs of housing production, zoning barriers often preclude the location of affordable rental housing in the most desirable neighborhoods.⁹⁰ Localities employ a wide variety of zoning tools to limit housing supply, including minimum lot sizes, setbacks, height restrictions, and other anti-density zoning requirements, as well as exclusion of multifamily housing from wealthier neighborhoods composed

fees—costs that are passed on to home buyers and renters.”). *See also* Glaeser & Gyourko *supra* note 74, at 10-17 (measuring the impact of over-regulation of housing development by showing the extent to which housing prices exceed the “Minimum Profitable Production Cost” for housing).

86. Bernard K. Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L.J. 577, 587-88 (1997); *Building Affordable Housing Communities using the Low-Income Housing Tax Credit*, AFFORD. RENTAL HOUS. A.C.T.I.O.N., Spring 2015, at 12-13, www.taxcreditcoalition.org/wp-content/uploads/2015/03/Housing-Credit-Ed-Deck-March-2015-ver-14-3.pdf [<https://perma.cc/M2H9-Y9CN>] [hereinafter *Building Affordable Communities*]. *See also* Apgar, *supra* note 7, at 7 (arguing that reducing the costs of zoning and regulatory approvals would positively impact housing affordability).

87. Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, FED. RES. BANK N.Y. ECON. POL’Y REV. 21 (2003).

88. *Building Affordable Communities*, *supra* note 86, at 6 (estimating that land development costs would have to be reduced by twenty-eight percent to make it profitable for the private sector to create affordable housing).

89. *Housing America’s Future*, *supra* note 83, at 10-11. *See also* *Out of Reach 2015*, *supra* note 79, at iii (noting that “only 25 percent of eligible households receive housing assistance”).

90. ADVISORY COMM’N ON REG. BARRIERS TO AFFORD. HOUS., *Not In My Back Yard* 1-1 (1991); Kristine Nelson Fuge, *Exclusionary Zoning: Keeping People in Their Wrongful Places or a Valid Exercise of Local Control?*, 18 HAMLINE J. PUB. L. & POL’Y 148, 148 (1996); Roderick M. Hills, Jr., *Saving Mount Laurel?*, 40 FORDHAM URB. L.J. 1611, 1615 (2013); Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1 (2001). *See, e.g.*, U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., No. 06-CV-2860, 2012 WL 13777 (S.D.N.Y. Sept. 13, 2013). Some of the locations with the most recent economic growth, such as San Francisco, also have the strictest exclusionary laws and covenants. Glaeser & Gyourko *supra* note 74, at 15-16 (“Our formula suggests that the land underlying this particular modest quality house cost about \$490,000—roughly 10 times the amount presumed for MPPC calculations.”).

of single-family detached homes.⁹¹ Where public laws fail to impose such zoning limits, private servitude restrictions often perform the same function.⁹² Zoning and covenant restrictions on density and housing type adversely impact both affordability and availability of fair housing, and as long as group rights to exclude are upheld, such barriers to production will likely continue.⁹³

Homeowners are some of society's most empowered interest holders, and they profit when local housing supply is limited; thus, homeowners are likely to put political pressure on municipalities and private governments to continue to erect roadblocks to housing production.⁹⁴ This political pressure has been successful in achieving its aim. Existing homeowners have benefitted from rising housing prices benefits, even as non-homeowners in a community are simultaneously harmed. Artificially limited supply and inflated housing costs in a community therefore operates as a wealth transfer from the least wealthy to the wealthiest segments of a community.⁹⁵ The wealth transfer effect also exists across generations, with supply-constrained inflations of housing costs benefitting older people and correspondingly working economic harm on the younger

91. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 4.13 (3d ed., 2016) (discussing minimum lot sizes and building setback lines); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 41 (1990) (discussing minimum lot sizes); Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 102 (1970) (discussing minimum lot sizes in Houston, a city purportedly without zoning); *Side by Side*, *supra* note 78. See generally Lewyn *supra*, note 74; Michael Lewyn, *The (Somewhat) False Hope of Comprehensive Planning*, 37 U. HAW. L. REV. 39 (2015); Hall, *supra* note 32; Michael Lewyn, *You Can Have It All: Less Sprawl and Property Rights Too*, 80 TEMP. L. REV. 1093 (2007); Michael Lewyn, *Suburban Sprawl, Jewish Law, and Jewish Values*, 13 SE. ENVTL. L.J. 1, 17-21 (2004). For a look at anti-density zoning techniques employed in Canada, see Michael Lewyn, *Sprawl in Canada and the United States*, 44 URB. LAW. 85 (2012).

92. See generally, RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS (2013). Courts are even less likely to invalidate community restrictive covenants that limit land use, both because, in theory, homeowners in a common interest community chose to be bound by these covenants and because such privately governed communities are not state actors subject to the Fourteenth Amendment. See HYATT, *supra*, note 45, at 61-73; Fennell, *Contracting Communities*, *supra* note 43, at 857-60; Ryan McCarl, *When Homeowners Associations Go Too Far: Political Responses to Unpopular Rules in Common Interest Communities*, 43 REAL EST. L.J. 453, 491-92 (2015). But see Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J. L. & Pol'y 767 (2014).

93. See Eagle, *supra* note 1, at 320; Lee Anne Fennell & Julie A. Roin, *Controlling Residential Stakes*, 77 U. CHI. L. REV. 143, 143-44 (2010).

94. See WILLIAM A. FISCHER, HOMEVOTER HYPOTHESIS (2001).

95. See Glaeser & Gyourko *supra* note 74, at 17-18 ("When housing costs rise, the owner is essentially hedged . . . The renter, conversely, experiences rising housing costs and is poorer in real terms.").

generation.⁹⁶ Indeed, the increase in housing wealth over the past 30 years has accrued “almost exclusively among the wealthiest, older Americans.”⁹⁷

Any effective solution to the housing affordability problem must address the cause of barriers to increasing housing supply (motivations of certain constituents) and not merely the symptom (gaps in affordable housing supply).⁹⁸ Existing homeowners have everything to gain, and little to lose, if they can collude to limit housing supply; the tighter the supply of housing, the higher the value of homeowners’ real estate investment. Homeowners, quite rationally, care a great deal about the value of their homes. For the vast majority of owner-occupants, their home is by far their largest financial investment and the single most significant component of their household wealth.⁹⁹

The value of a home is both difficult to quantify and vulnerable to significant market vacillations, as the 2008 Foreclosure Crisis made clear.¹⁰⁰ Real estate valuation has always presented somewhat of a legal and market puzzle in that each parcel is arguably unique (meaning there is no true market comparable).¹⁰¹ In addition, subjectivity in real property

96. *Id.* at 18 (speaking of the “reduction in housing supply” that creates “an intergenerational transfer to currently older people”).

97. *Id.* at 19.

98. See Eagle, *supra* note 1, at 323-24.

99. FISCHER, *supra* note 94, at 4; Fennell & Roin, *supra* note 93, at 144. “For most U.S. families, a home usually comprises the largest portion of their assets.” Laura Shin, *The Racial Wealth Gap: Why a Typical White Household Has 16 Times the Wealth of a Black One*, FORBES (Mar. 16, 2015), <https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/> [<https://perma.cc/N67Q-4NX7>] (quoting Catherine Ruetschlin saying that, “[h]omeownership is the central vehicle Americans use to store wealth, so homeownership and access to homeownership are at the heart of that widening wealth gap.”).

100. Property values are volatile and are “strongly impacted by fluctuating factors, including the quality and cost of improvements, the availability of capital, and the legal framework for interests in property.” Andrea J. Boyack, *Lessons in Price Stability from the U.S. Real Estate Market Collapse*, 2010 MICH. ST. L. REV. 926, 927-28 (2010) [hereinafter *Price Stability*]. From January 1996 to March 2007, average new home sale prices rose approximately 112% (from \$155,300 to \$341,400). Prices fell in 2007 and 2008, and by January 2009 the average new home sale price had dropped to \$245,200, a decline of twenty-five percent. Average prices for new homes bounced back up to \$384,000 by October 2014, another fifty-six percent increase and a new record high. See *Median and Average Sales Prices of New Homes Sold in the United States*, U.S. CENSUS BUREAU, <https://www.census.gov/construction/nrs/pdf/uspricemon.pdf> [<https://perma.cc/4V9H-EP2R>].

101. See Restatement (Second) of Contracts § 360 cmt. e; Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 364 (1984) (noting that land is considered by the law to be a unique good). Because each parcel of land is unique and because there is no organized market that prices real estate, “no one knows the true market value of a parcel of real estate until it actually sells.” John F. Shampton, *Statistical Evidence of Real Estate Valuation: Establishing Value Without Appraisers*, 21 S. ILL. U. L.J. 113, 114 (1996); see also,

pricing is quite high.¹⁰² Generally speaking, there are three primary methods for determining the value of a parcel of property: comparative sale valuation, stream of income valuation, and replacement value.¹⁰³ Insurers estimate home values based on land purchase price plus the estimated cost to reconstruct a home.¹⁰⁴ Mortgage lenders value homes as collateral and appraise them based on likely proceeds from resale.¹⁰⁵ Builders and homeowners also look to comparative sale prices as the best way to estimate their expected return from conveying the property.¹⁰⁶ Landlords, on the other hand, value homes based on the income stream they produce and calculate the present value of real estate based on market rental rates.¹⁰⁷

Homeowners, mortgage lenders, developers, and local governments all directly benefit from high nominal values of homes measured by comparative purchase prices, and landlords benefit from higher rental rates.

Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 715 (7th Cir. 1998) (noting that “real estate appraisal is not an exact science”); United States v. Esposito, 970 F.2d 1156, 1160 (2d Cir. 1992) (acknowledging that real property and the “relationship between a person and his or her home” are unique); Johnson v. U.S. Dep’t of Agric., 734 F.2d 774, 788 (11th Cir. 1984) (“It is well recognized that real property is unique and not fungible.”); Hillard v. Franklin, 41 S.W.3d 106, 111 (Tenn. Ct. App. 2000) (“Given that real property is unique, damages are generally deemed an inadequate remedy for breach of real estate contracts, and, accordingly, such contracts are generally eligible for specific performance.”). *But see* Tanya D. Marsh, *Sometimes Blackacre Is a Widget: Rethinking Commercial Real Estate Contract Remedies*, 88 NEB. L. REV. 635 (2010).

102. Owner occupants have additional, subjective value in their homes. A home is the type of property that is the least fungible and likely the most reflective of an owner’s personhood. Radin, *supra* note 23, at 991-92 (describing a home as “a moral nexus between liberty, privacy, and freedom of association”). For more on particular issues regarding the subjective value of a home, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (Aspen, 8th ed. 2011); Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 277 (2006); John Fee, *Eminent Domain and the Sanctity of the Home*, 81 NOTRE DAME L. REV. 783, 790-94 (2006); Lee Anne Fennell, *Just Enough*, 113 COLUM. L. REV. SIDEBAR 109, 111 (2013); Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 613 n.71 (2013).

103. *Price Stability*, *supra* note 100, at 932-36.

104. *Id.* at 934-35. Replacement valuation is also known as “cost-to-replace” or simply the “cost approach.” See Daniel F. Sullivan, *Market Value of Single-family Residence—Market Comparison Appraisal*, 5 AM. JUR. PROOF OF FACTS 2d 411 (2016 update).

105. For lenders, comparative sale prices of similar products in the same local market are the most relevant factors in valuation. *Price Stability*, *supra* note 100, at 932-34. Comparative sales valuations are often cited as the product of an exact appraisal science and methodology by those unfamiliar with how these valuations are calculated. In fact, however, comparative sales methodology is very “squishy” and guesstimates abound. Reasonable appraisers can come up with widely different estimates of value for a given home, even if each appraiser purportedly uses the same process. For a critique of comparative sales valuation, see Shampton, *supra* note 101, at 124-28.

106. See *Price Stability*, *supra* note 100, at 932-34.

107. See *id.* at 935.

All of these groups are therefore economically motivated to create or uphold barriers to increasing the housing supply.¹⁰⁸ Local governments are theoretically most responsive to demands of current residents, particularly homeowners, who have the financial incentive to prop up prices.¹⁰⁹ In private community governments, the only residents who have a vote are property owners, and they directly benefit from high property values.¹¹⁰ Local governments, whose tax revenue is directly tied to appraised values, and developers, who benefit from high sale prices, also support supply limitations, although both municipalities and builders would also benefit from a controlled increase in supply as long as it is not enough to drive property values down.¹¹¹

Federal housing policy, perhaps because of its prioritization of homeownership over affordable rental housing, also conceptualizes property values as something worthy of public protection and support.¹¹² This is, in part, because higher home values not only benefit homeowners, but also their mortgage lenders who depend on collateral valuation to protect their loan value, and the government has a vested interest in growing mortgage loan collateral values. Government sponsored enterprises in the residential housing secondary mortgage market (Fannie Mae and Freddie Mac) have been particularly concerned with ensuring stable property values, and this concern has been framed as an essential component of underwriting and ensuring market safety and soundness.¹¹³

In sum, numerous factions and sectors in society are aligned in their desire to prop up housing prices, and as long as the legal tools to limit supply are readily available and employable to this end, housing prices will remain “too damn high,” much to the dismay of affordable housing advocates and impoverished members of society in dire need of a reasonably priced place to live.¹¹⁴ So long as owners, lenders, developers,

108. See Eagle, *supra* note 1, at 320-21. See also Derek Thompson, *Why Middle-Class Americans Can't Afford to Live in Liberal Cities*, ATLANTIC (Oct. 29, 2014), <https://www.theatlantic.com/business/archive/2014/10/why-are-liberal-cities-so-unaffordable/382045/> [<https://perma.cc/XGT3-CQVU>].

109. See generally FISCHEL, *supra* note 94.

110. See HYATT, *supra* note 45.

111. See FISCHEL, *supra* note 94.

112. *Nation of Renters*, *supra* note 7, at 126-32.

113. See Julie Andersen Hill, *Shifting Losses: The Impact of Fannie's and Freddie's Conservatorships on Commercial Banks*, 35 HAMLINE L. REV. 343 (2012); Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 AM. U. L. REV. 1489 (2011).

114. “Rent is too DAMN high!” was the slogan popularized by habitual fringe New York Governor and U.S. Presidential candidate Jimmy McMillan and his self-named “Rent is Too Damn High Party.” RENT IS TOO “DAMN” HIGH, <http://www.rentistoodamhigh.org> [<https://perma.cc/PVE7-XGQ4>].

and local governments can use zoning and servitude restrictions to limit the housing supply, housing development will continue to be unnecessarily expensive, and housing costs will continue to be unsustainably inflated.¹¹⁵

II. CALCULATING THE COSTS OF COLLECTIVE EXCLUSION

Allowing a community to exclude (through zoning and restrictive covenants) has:

[I]nhibited the ability of millions of people to participate fully in the American economy, deprived the poor of basic services while enriching the country's most privileged citizens, fueled racial and ethnic hostility, and, most fundamentally of all, undermined the ability of metropolitan residents even to understand each other, let alone work together on the region's problems—all at the cost of billions and billions of taxpayer dollars.¹¹⁶

Because of the broad and significant costs of a group right to exclude, courts should be suspicious of such an unfettered collective right. Exclusion by a group causes broad social and economic harm and is more likely to undermine the human values that property law was designed to promote in the first place.¹¹⁷ In order for a collective right to exclude to be legitimate, therefore, its benefits must outweigh all costs that the collective exclusions would impose on individuals and society as a whole. These costs include the broader societal adverse impacts that community exclusion has on housing affordability, integration, and economic growth.

Limiting density and housing types artificially increases property values and drives up rents. Homeowners may perceive inflated property values to be a good thing, but inflated home values also lead to higher housing costs.¹¹⁸ Barriers to entry for new housing units interfere with the free-market forces of supply and demand and can lead to a loss of economic output in an area where the housing supply is constrained.¹¹⁹ This market

115. See Eagle, *supra* note 1, at 320-21; *Nation of Renters*, *supra* note 7.

116. Frug, *supra* note 36, at 1048. For a more recent economic study attempting to measure these costs, see Glaeser & Gyourko, *supra* note 74.

117. *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971) (“property rights serve human values”); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 675-78 (1988) (arguing that the right to exclude should always be limited in cases when non-owners need access to property to prevent serious harm). See also Glazer, *supra* note 17, at 341-42. Even though the right to exclude has achieved special status in the lexicon of property rights, this right has never been absolute, nor has exclusion as a property right been fully theorized in the context of the collective rather than the individual. See Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063, 1065 (2009); RICHARD BABCOCK, *THE ZONING GAME* (1966); NELSON, *supra* note 29.

118. Eagle, *supra* note 1, at 359.

119. Glaeser & Gyourko, *supra* note 74, at 22-24; Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* (Nat'l Bureau of Econ. Res.,

meddling creates inefficiencies and effectuates a wealth transfer from the poorer members of society who have to pay more for housing to society's richer homeowners who enjoy the benefits of growing equity values.¹²⁰ Housing supply limitations significantly decrease equality of opportunity and housing equity. Furthermore, because the government, through housing assistance programs, pays for some of the increased housing costs resulting from affordable housing supply limitations, such collective exclusions also impose financial costs on the taxpaying public.¹²¹ In this way, limitations on housing supply reallocate economic value from the public as a whole to exclusive neighborhood homeowners as a group.

Although homeowners enjoy an inequitable economic benefit from exclusionary limitations on housing supply, members of exclusive communities may also impose psychological harms on society generally and, in fact, upon themselves. New York University Humanities and London School of Economics Sociology Professor Richard Sennett posits that community diversity exposes community members to a wider spectrum of perspectives and promotes healthier and more sustainable individual attitudes and group dynamics; while, on the other hand, living in a less diverse neighborhood can be psychologically and socially limiting.¹²² An

Working Paper No. 21154, 2015), <http://www.nber.org/papers/w21154.pdf> [<https://perma.cc/3QLH-E7HY>].

120. Limitations on a homeowner's ability to rent her property, rather than a limitation on supply of rentals, impose costs on would-be landlords as well as would-be tenants. *American Dream in Flux*, *supra* note 8, at 281-91. See also Glaeser & Gyourko, *supra* note 74.

121. *Nation of Renters*, *supra* note 7, at 134 (talking about how amount of government funding in housing vouchers is based on market rental rates). See also MICHAEL DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).

Today, landlords overcharge voucher holders simply because they can. In distressed neighborhoods, where voucher holders tend to live, market rent is lower than what landlords are allowed to charge voucher holders, according to metropolitan-wide rent ceilings set by program administrators. So the Housing Choice Voucher Program likely costs not millions but billions of dollars more than it should, resulting in the unnecessary denial of help to hundreds of thousands of families.

Id. at 311. HUD has recently started calculating rental rates based on zip code in some areas. *Id.* at 402-03 n.55. On the impact of overcharging in Milwaukee, see *id.* at 356-66 n.6.

122. RICHARD SENNETT, *FLESH AND STONE: THE BODY AND THE CITY IN WESTERN CIVILIZATION* 26-27 (1994). Sennett believes that a community's desire for insular homogeneity is a manifestation of an "adolescent" psychological state, reflecting an immature and vulnerable mindset. SENNETT, *supra* note 28, at 16-49. Sennett's terminology reflects the widely accepted psychological theory that adolescents seek predictability and sameness to help cope with anxiety about the unknown and the bewildering. SENNETT, *supra* note 28, at 16-49. In her magnum opus, *The Death and Life of Great American Cities*, Jane Jacobs also famously extolled the broad social values promoted by creating healthy, diverse, and densely populated neighborhoods. JANE JACOBS, *THE DEATH AND LIFE OF GREAT*

externally constructed homogeneous community does not inspire true identity and cohesion among its members, but rather establishes a fragile myth of commonality.¹²³ In the context of imposed and artificial neighborhood commonality, the collective focus on exclusion of the “other” actually amplifies the fear of “otherness,” and fear of “otherness” can intensify until “the collective sense of vulnerability to otherness becomes so strong that acts of aggression against outsiders, even violence, can appear life-preserving; the very survival of the community seems to depend on the exclusion of difference, on the control of disorder.”¹²⁴

A vulnerable, homogeneous community, therefore, may in the long term pose more societal risk than would a diverse, inclusive one. Such a “purified community” keeps its members in a “state of absolute bondage to the status quo, diminishing their ability to absorb and enjoy the world,” suggesting that an unfettered collective right to exclude the “other” imposes high costs indeed, for both individual community members and society as a whole.¹²⁵

In addition to imposing economic and psychological costs on members of the excluding group, communities’ rights to exclude create separate and unequal neighborhood realities and impose harms on excluded individuals as well.¹²⁶ Historically, community exclusion based on race led to the ghettoization of America, poignantly described in Douglas Massey and Nancy Denton’s book, *American Apartheid: Segregation and the Making of the Underclass*.¹²⁷ A century of empowering wealthier, whiter, suburban

AMERICAN CITIES (1961). Renowned legal scholars have also cited the benefits of diverse neighborhoods to justify calls for less exclusionary communities. *See, e.g.*, Frug, *supra* note 36, at 1051 (advocating the societal benefits to be gained by “citizens’ engagement with otherness”).

123. Because they are not yet able to achieve a mature tolerance of differences, adolescents typically practice a strategy of avoidance to create a facade of control. *See also* Frug, *supra* note 36, at 1052-53. Adolescents seek the artificial comfort of sameness and eschew diversity in order to construct a “fantasy of community” that is devoid of true, deep human connections. SENNETT, *supra* note 28, at 37-39. *See also* Frug, *supra* note 36, at 1052-53.

124. Frug, *supra* note 36, at 1053.

125. SENNETT, *supra* note 28, at 134; Frug, *supra* note 36, at 1053 (discussing Sennett’s hypothesis).

126. *Side by Side*, *supra* note 78 (manuscript at 17-18, nn.53-60 and accompanying text).

127. MASSEY & DENTON, *supra* note 35, at 17-60. For the past century, zoning and covenants have successfully excluded minorities and lower-income households from wealthier, healthier neighborhoods. When distressed, predominantly minority neighborhoods were revitalized through urban renewal projects, the disadvantaged local residents generally were forcibly removed and/or their community was sliced up by new highways and non-residential developments. *See* MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL 1949-1962* (1964); Peter Marris, *A Report on Urban Renewal in the United States*, in *THE URBAN CONDITION* 113, 119 (Leonard J. Duhl ed., 1963).

groups to exclude created a pervasive geography of “separate, hostile, and unequal” neighborhoods,¹²⁸ racially defined and inequitable per numerous metrics.¹²⁹ Minority neighborhoods are disadvantaged in a wide variety of ways, not only because their residents are more impoverished.¹³⁰ Lower-income communities may be located outside of a reasonable commuting distance to employment options or away from public transportation which renders poorer residents immobile.¹³¹ Housing in predominantly minority neighborhoods is usually further away from public amenities and provided with fewer public services,¹³² and poorer neighborhoods are more likely to be distant from recreational and retail venues, even including grocery stores.¹³³ Inhabitants of high-poverty, minority neighborhoods are generally located farther away from hospitals and health care providers, and inhabitants of these communities accordingly suffer a variety of adverse health outcomes.¹³⁴ Buildings and other infrastructure in poorer minority communities are far less likely to be adequately maintained.¹³⁵

Not only are poor, minority neighborhoods more likely to be denied geographical access to public goods, services, and amenities, they are more likely to be situated proximate to noxious uses that further decrease the quality of life of their residents.¹³⁶ Such value-destroying hazards range “from dangerous and environmentally toxic . . . to more commonplace hazards.”¹³⁷ This disparate treatment of minority communities once again reflects the relative political power of wealthier (and whiter) homeowner

128. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 46-51 (1992). See also James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Segregation in the United States*, 22 *HOW. L.J.* 547, 559-60 (1979).

129. See MASSEY & DENTON, *supra* note 35; Frug, *supra* note 36, at 1074.

130. For a discussion of some of the many ways that impoverished neighborhoods disadvantage their inhabitants in terms of health, wealth, and prospects, see DESMOND, *supra* note 121, at 256-57, 305-06. See generally *Side by Side*, *supra* note 78.

131. Sager, *supra* note 50, at 781-82. See also Alfred W. Blumrosen, *The Duty to Plan for Fair Employment: Plant Location in White Suburbia*, 25 *RUTGERS U. L. REV.* 383 (1971) (discussing location of public and private employment facilities away from black communities).

132. “Service deficiencies typically involve street paving and lighting, surface water drainage, sewers, water mains and fire hydrants, parks and recreational facilities, and police, fire, sanitation and public utility services.” Dubin, *supra* note 54, at n.91. See also Donald G. Hagman, *The Use of Boundary Lines to Discriminate in the Provision of Services by Race*, 54 *U. DET. J. URB. L.* 849 (1977).

133. Sager, *supra* note 50, at 781-82.

134. Cassandra Q. Butts, *The Color of Money: Barriers to Access to Private Health Care Facilities for African-Americans*, 26 *CLEARINGHOUSE REV.* 159, 161-62 (1992) (discussing relocation of hospitals away from black communities).

135. Sager, *supra* note 50, at 781-82.

136. Dubin, *supra* note 54, at 742.

137. *Id.*

groups. Empowered, and armed with their legally protected right to exclude, homeowner groups can successfully assert what is commonly known as “NIMBY-ism,” the exclusion of undesirable uses from their neighborhoods.¹³⁸ If such uses are costly, but necessary for regional development (for example, communities may need a sewage treatment plant or a garbage disposal facility), they must be put in someone’s backyard and, unsurprisingly, such uses end up in the backyard of the least politically empowered communities.

A community’s right to exclude is unjustifiable unless its purported benefits outweigh its costs, including costs borne by society and various would-be community residents. Property value increases may benefit neighborhood homeowners but still be inadequate to justify their broader, external harms. For example, renters who cannot find affordable housing in a low-poverty, high-opportunity neighborhood are relegated to living in less healthy, less safe, and less desirable communities,¹³⁹ and the context of one’s residence impacts long-term outcomes for members of a household.¹⁴⁰ “Siting of affordable housing in low-income, high-minority neighborhoods and clustering public housing in huge projects that are geographically distant from amenities and commercial activity do not alleviate the long-term effects of poverty.”¹⁴¹ Individual rental assistance does nothing to end “the cycle of intergenerational inequality of opportunity, particularly if recipients remain in impoverished neighborhoods.”¹⁴² Residents’ inability to break out of a disadvantaged economic state means that their housing assistance requirements will not foreseeably abate, and already there are more than four times as many qualified applicants for public housing funds than there is available funding.¹⁴³ Unless public funding for affordable housing increases fourfold

138. NIMBY is an acronym for “Not in My Backyard.” Michael B. Gerrard, *The Victims of NIMBY*, 21 *FORDHAM URB. L.J.* 495 (1994). Closely related to NIMBY are LULUs (Locally Undesired Land Uses); both concepts which focus on relocating costs onto less politically agile communities and persons. Some housing commentators suggest that there is an even more extreme form of a reflexive desire to exclude: BANANA, meaning “Build Absolutely Nothing Anywhere Near Anyone.” *Id.*

139. *Side by Side*, *supra* note 78 (manuscript at 17-18, nn.53-60 and accompanying text); *Detroit*, *supra* note 63, at 582-84.

140. See Ingrid Gould Ellen & Margery Austin Turner, *Does Neighborhood Matter? Assessing Recent Evidence*, 8 *HOUS. POL’Y DEBATE* 833 (1997); John Goering et al., *A Cross-Site Analysis of Initial Moving to Opportunity Demonstration Results*, 13 *J. HOUS. RES.* 2 (2002); Maria Cruz Melendez, *Moving to Opportunity & Mending Broken Windows*, 32 *J. LEGIS.* 238 (2006); Kelly DeRango, *Black-White Segregation, Discrimination, and Home Ownership* (Upjohn Inst. for Emp’t Research Working Paper No. 01-71, 2001).

141. *Side by Side*, *supra* note 78 (manuscript at 20).

142. *Id.* at (manuscript at 20).

143. *Out of Reach 2015*, *supra* note 79, at iii.

(at least), today's financial supports must be carefully invested to build future affordability rather than simply set up an unending need for public subsidy.¹⁴⁴

Location of affordable housing is a key component of crafting a more permanent solution to the affordable/fair-housing conundrum.¹⁴⁵ Children growing up in distressed neighborhoods, attending inadequate schools, and coping with the effects of neighborhood crime and violence are more likely to remain in the cycle of poverty as adults.¹⁴⁶ Concentrated poverty is morally troubling and inequitable. Economically, concentrated poverty is inefficient because it perpetuates an aid recipient's demand for and dependence on public funds rather than charting a path to independence. Individual critical needs for access, in terms of access to quality neighborhoods and access to an adequate supply of affordable rental housing, and society's interests in meeting such needs, outweigh the hollow assertions that a neighborhood should have the right to exclude the "other" in order to preserve neighborhood homogeneity and boost neighborhood real estate prices.¹⁴⁷

III. HOW TO LIMIT THE COLLECTIVE RIGHT TO EXCLUDE

Over the past century, courts have increasingly held that individual property rights must give way to collective community judgments regarding "use" and exclusion.¹⁴⁸ Considering the harms that certain

144. Essentially, this is the principle of "teaching a man to fish," rather than merely providing him with fish to eat. Maxims to this effect have been traced to various philosophical commentaries and traditional proverbs in several cultures. *See Give a Man a Fish, and You Feed Him for a Day. Teach a Man To Fish, and You Feed Him for a Lifetime*, <http://quoteinvestigator.com/2015/08/28/fish/> [<https://perma.cc/597T-MLJT>].

145. *See generally* Eagle, *supra* note 1; *see also Side by Side*, *supra* note 78.

146. According to the "Moving to Opportunities" Study, a decades-long experiment conducted by HUD starting in the 1990s, children who relocated from disadvantaged neighborhoods to neighborhoods with "high opportunity" experienced better ultimate educational and employment outcomes than children who remained in impoverished communities. *See* Margery Austin Turner et al., URBAN INSTITUTE, *Benefits of Living in High-Opportunity Neighborhoods: Insights from the Moving to Opportunity Demonstration* (2012). *See also* Goering et al., *supra* note 140; Melendez, *supra* note 140. Citing other studies, however, some scholars doubt the validity of HUD's findings. *See* Ellickson, *False Promise*, *supra* note 28, at 1014-15 (discussing Philip Oreopoulos, *The Long-Run Consequences of Living in a Poor Neighborhoods*, 118 Q.J. ECON. 1533 (2003)).

147. For discussions regarding why and when the right to exclude should be limited based on costs imposed on non-owners, see Singer, *supra* note 117, at 675. *See also* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1391 (2013); Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1010, 1054-55 (2009); Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009).

148. *See supra* notes 20, 51, and accompanying text.

community exclusions impose on communities, owners and excluded would-be residents, as well as general negative impacts on housing affordability and equity, it is time for American property law to reclaim individual property autonomy and allow individuals to opt out of certain types of collective efforts to exclude. In situations where community exclusionary powers are being used merely to promote property values or group identity rather than to combat a legitimate problem of negative externalities or a true tragedy of the commons, empowering individuals to defect from the group's exclusivity scheme could ameliorate its social and personal harms. Allowing greater individual owner autonomy relative to a group's majority-rule exclusions may not at first seem to be a sufficient method to limit the collective right to exclude because it relies on the hope that individuals will "do the right thing" rather than on the power of the government to compel a certain result. This approach may be more palatable to our pluralistic society, however, and it avoids the political problems that reliance on a government-imposed solution would create.¹⁴⁹ Empowering individual property owners to make more autonomous decisions regarding their property's transfer and use may embolden the housing market's invisible hand and encourage improvements in affordable and fair housing as individual owners attempt to maximize their individual, rather than their collective, property values.

Part III, Section A of this Article explains briefly how federal and state efforts to solve housing problems through regulation and affirmative requirements have proven ineffective. Section B discusses why diversity and affordability are good for the economy and explains why individual economic maximization efforts may result in more affordable and equitable housing options if collective exclusionary power were somewhat constrained. Section C then suggests that protecting individual property rights relative to group-imposed use and transfer limitations is not only theoretically justifiable, but would also have salutatory effects in our housing system.

A. Ineffectiveness of Top-Down Control of Local Housing Exclusion

Every level of government has been complicit in creating and perpetuating unfair and unaffordable housing, and every level of government has also attempted to affirmatively combat these problems in

149. Furthermore, there is ample reason to believe that governments lack the political will to rein in zoning and servitude exclusionary efforts of their constituents. *See* Eagle, *supra* note 1, at 348-49; *see also supra* notes 3-4, 11-12, 61-63, 94-96 and accompanying text.

several ways.¹⁵⁰ The federal government passed the Fair Housing Act in 1968, pursuant to which all Housing and Urban Development (“HUD”) aid recipients were affirmatively required to “further fair housing.”¹⁵¹ The precise scope of this requirement has varied during the past fifty years, as has HUD’s ability and inclination to take decisive strides toward improving housing equity. In 2015, the Supreme Court upheld the concept of disparate impact as a basis for a Fair Housing Act violation, and in the aftermath of this decision,¹⁵² HUD finalized its current “Affirmatively Furthering Fair Housing” (“AFFH”) Rule. The current AFFH Rule requires states and localities to specifically test the impact of housing decisions on housing integration aspirations.¹⁵³ In 2016, Congress showed an increased willingness to address affordable housing issues, and unanimously passed the Housing Opportunities Through Modernization Act (“HOTMA”), which was signed into law by President Obama in July 2016.¹⁵⁴ Based on these developments, as of 2015 and 2016, the fair housing pendulum appeared to be swinging toward more active federal involvement, but current uncertainties about HUD’s fair housing policies in the Trump administration have tempered the hopes that the Fair Housing Act would finally “get its groove back.”¹⁵⁵

150. For a fascinating look at governmental complicity in so-called “private” racially restrictive covenants, see generally BROOKS & ROSE, *supra* note 92, at 71.

151. The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (2006).

152. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

153. *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5).

154. The Housing Opportunities Through Modernization Act of 2016, H.R. 3700, was passed unanimously in both the House and Senate before being signed into law by the President. Pub. L. No. 114-201, 130 Stat. 782. See *Housing Opportunity Through Modernization Act of 2016*, NAHMANALYSIS (Aug. 22, 2016), <https://www.nahma.org/wp-content/uploads/2014/06/NAHMANalysis-HOTMA-FINAL-2-1.pdf> [<https://perma.cc/3MJX-7XG6>]. The full text of the HOTMA is available at *Housing Opportunity Through Modernization Act of 2016*, Pub. L. No. 114-201, <https://www.congress.gov/114/plaws/publ201/PLAW-114publ201.pdf> [<https://perma.cc/XQ5W-WHZ7>]. The HOTMA is the first major authorizing federal legislation affecting voucher and public housing programs since the Quality Housing and Work Responsibility Act of 1988. See Will Fischer, *Housing Bill Unanimously Passed by House Would Build on Effectiveness of Rental Assistance*, CTR. ON BUDGET & POL’Y PRIORITIES (Feb. 17, 2016) <http://www.cbpp.org/research/housing/housing-bill-unanimously-passed-by-house-would-build-on-effectiveness-of-rental> [<https://perma.cc/H3L9-RSTK>].

155. This phrase is not only a nod to the novel *HOW STELLA GOT HER GROOVE BACK*, by Terry McMillan, but also gratefully references the fair-housing discussion group at the 2016 annual meeting of the Southeastern Association of Law Schools entitled “Has Fair Housing Gotten its Groove Back?” that was organized and adeptly moderated by Professor Rigel Oliveri. For current speculation regarding HUD during the Trump administration, see Lisa Rein & Elise Viebeck, *HUD Job to Pit Carson Ideology Against Long-standing Housing Policy*, WASH. POST (Dec. 5, 2016), <https://www.washingtonpost.com/national/hud-job-to->

The federal government plays a key role in promoting housing affordability as well. HUD provides rental assistance in the form of vouchers, payable to landlords or to tenants, that attempt to bridge the gap between what lower-income renters can pay and what landlords legitimately expect to receive in rent.¹⁵⁶ Other federal affordable housing programs, such as the low-income housing tax credit (“LIHTC”) and various development grants, attempt to grow the supply of affordable housing.¹⁵⁷ One problem with federal affordable housing efforts is that they historically have been concerned with quantity of housing rather than the location of affordable units.¹⁵⁸ Because housing funds have historically been allocated without affirmatively considering the optimum location for affordable housing, and because of the effectiveness of community exclusions described above, most affordable housing is located in high-poverty neighborhoods.¹⁵⁹ Another problem with federal affordable housing funding is that the aid provided is hugely insufficient to meet needs.¹⁶⁰ Insufficient funding means that housing assistance ends up being allocated based either on political judgments regarding merit or even on sheer luck.¹⁶¹

Even though the federal government sets the tone for policy and provides much of the funding for fair and affordable housing efforts, local governments continue to control almost all of the nation’s land-use decisions. In this role, local governments regulate the placement, allocation, and approach to housing production and neighborhood

pit-carson-ideology-against-long-standing-housing-policy/2016/12/05/6e7e8d76-bb25-11e6-94ac-3d324840106c_story.html?utm_term=.f3108365b191 [https://perma.cc/HG29-UNPU]; Alana Semuels, *The Future of Housing Segregation Under Trump*, ATLANTIC (Nov. 29, 2016), <https://www.theatlantic.com/business/archive/2016/11/the-future-of-desegregation-under-trump/509018/> [https://perma.cc/WJC6-7MUW]; Lorraine Woellert & Kyle Cheney, *Key Moments from Senate Hearing on Ben Carson*, POLITICO (Jan. 12, 2017, 11:33 AM), <http://www.politico.com/story/2017/01/ben-carson-confirmation-hearing-233538> [https://perma.cc/8YSQ-G5RH].

156. *Policy Basics: Section 8 Project-Based Rental Assistance*, CTR. ON BUDGET & POL’Y PRIORITIES, <http://www.cbpp.org/research/housing/policy-basics-section-8-project-based-rental-assistance> [https://perma.cc/SW6Q-HS2U] (last updated June 1, 2015); *Project Based Section 8 Rental Assistance*, NAT’L COUNCIL ST. HOUSING AGENCIES, <https://www.ncsha.org/advocacy-issues/project-based-section-8-rental-assistance> [https://perma.cc/B8WK-ZVK2]; *Housing Choice Vouchers*, U.S DEP’T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about/fact_sheet [https://perma.cc/L9YV-WJUN].

157. *Low Income Housing Tax Credit*, U.S DEP’T HOUS. & URB. DEV., <https://www.huduser.gov/portal/datasets/lihtc.html> [https://perma.cc/X6N7-HLB8].

158. *Nation of Renters*, *supra* note 7, at 124-25.

159. Cashin, *supra* note 36, at 1683-84.

160. *See supra* notes 143-44.

161. *Side by Side*, *supra* note 78 (manuscript at 12).

design.¹⁶² Although local governments purport to promote affordable housing production and housing integration, almost fifty years of local government action under the Fair Housing Act has failed to alleviate housing inequities and unaffordability.¹⁶³ It seems as though unconstrained majority-rule local government control of land use in our pluralistic society inhibits a sustainable housing system from developing naturally (legislatively). Even if local governments accurately do express the desires of their constituents, homeowners typically vote their pocketbook over what may be in society's best interests for the production and placement of affordable housing. A collective right to exclude through zoning and restrictive covenants essentially creates a legally enforced monopoly on housing affordability. Homeowners can avoid the collective action problem that would undermine un-coordinated efforts to fix the prices of housing by limiting supply and excluding certain types of residences and residents because they can act as collectively.¹⁶⁴ Our land use decisions are made by community groups who collectively prioritize their insular self-interest over broader state or national concerns.¹⁶⁵

For decades, scholars have recognized that a political solution to housing integration and affordability is unlikely. In the 1990s, Professor Frug postulated that “[o]nly a central government seems capable of bringing together the disparate groups that have grown so remote from each other.”¹⁶⁶ In his current article on the intractability of affordable housing, Professor Eagle agrees that local governmental solutions are unrealistic.¹⁶⁷ Both Frug and Eagle admit, however, that a federal solution to local

162. *Id.* at (manuscript at 12).

163. The degree of *de facto* housing segregation and the problem of housing unaffordability have not significantly decreased over the past several decades and, indeed, by some metrics have worsened. Arthur C. Nelson et al., *The Link Between Growth Management and Housing Affordability: The Academic Evidence*, BROOKINGS (Feb. 1, 2002), <https://www.brookings.edu/research/the-link-between-growth-management-and-housing-affordability-the-academic-evidence/> [<https://perma.cc/LSM8-XZXC>]; Jonathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. & ECON. REV. 290, 347-48 (2011).

164. FISCHER, *supra* note 94, at 79. The ability of an individual property owner to dissent from collective land use decisions has also been termed a problem of the “anti-commons.” See generally, e.g., Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, (1998). Neighbors’ right to include inefficiently could be conceived as an anti-commons problem, but so can a neighborhood’s right to exclude an efficient use. See generally Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907 (2004).

165. “Decentralization of power to the dozens of cities into which metropolitan regions have been divided is likely to exacerbate their separation and inequality, given their current powers and policies.” Frug, *supra* note 36, at 1074.

166. *Id.*

167. Eagle, *supra* note 1, at 305.

exclusionary policies is likewise improbable.¹⁶⁸ Congress has shown no desire to rein in state or municipal zoning powers, nor has it indicated any discomfort with the broad exclusionary authority exercised by common interest community governments. To date, courts have typically deferred to public and private local group decisions with respect to land use.¹⁶⁹

B. Economic Motivators and Market Meddling

All levels of the government seem to be fairly impotent when it comes to growing affordable housing supply in a way that addresses long-term housing challenges. Economic incentives could motivate owners to individually respond to growing demand for rental housing by producing more and varied rental housing supply, but individual responses are not possible under our current land use system. If markets are left unrestrained, however, housing equity and affordability may both improve in response to pent up demand. Not only would more affordable housing result from a freer market, but more affordable housing itself would create a positive economic effect. According to a recent National Bureau of Economics study,¹⁷⁰ housing affordability in a region increases general economic prosperity in several ways, and this affordability-prosperity connection provides further justification for allowing markets the freedom to promote housing affordability.¹⁷¹

City and regional productivity increases when housing markets are in sync, with sufficient supply to meet demand. More affordable housing leads to more robust economic growth.¹⁷² San Francisco, for example, has aggressively promulgated anti-density zoning laws that have kept housing prices in the city high. The city's expensive housing inhibits its economic growth and explains why San Francisco's economy is growing slower than, for example, Houston's economy.¹⁷³ On the other hand, Houston, the only

168. *Id.* at 350-53.

169. Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U. J.L. & POL'Y 663, 666 (2000). *See e.g.*, *Hidden Harbour Est., Inc. v. Basso*, 393 So. 2d 637, 639-40 (Fla. Dist. Ct. App. 1981); *Hidden Harbour Est., Inc. v. Norman*, 309 So. 2d 180, 181-82 (Fla. Dist. Ct. App. 1975); *Pres. at Forrest Crossing Townhome Ass'n, Inc. v. DeVaughn*, No. M2011-02755-COA-R3CV, 2013 WL 396000, at *3 (Tenn. Ct. App. Jan. 30, 2013); *see also* BROOKS & ROSE, *supra* note 92, at 88-93 (explaining how once courts loosened the traditional "touch and concern" requirement for covenants running with the land, there was little to no substantive limit on what could be controlled through covenants).

170. Hsieh & Moretti, *supra* note 119.

171. Eagle, *supra* note 1, at 312-14; *see also* Glaeser & Gyourko, *supra* note 74.

172. Hsieh and Moretti have assembled data that convincingly shows this correlation between housing affordability and economic growth. Hsieh & Moretti, *supra* note 119. *See also* Glaeser & Gyourko, *supra* note 74 (citing to and confirming Hsieh & Moretti's data analysis).

173. *Id.* *See also* Eagle, *supra* note 1, at 323.

large city in America that does not engage in use-based zoning, has much more affordable rents, and lower rents have fueled the city's relatively rapid prosperity gains.¹⁷⁴

Another related way that affordable housing leads to economic prosperity is that communities with housing available for households of all income levels will attract workers at all income levels who can live close to their employment.¹⁷⁵ Affordability increases labor's mobility and its optimum allocation.¹⁷⁶ A variety of housing options in a community benefits households along the entire income spectrum.¹⁷⁷ And because middle- and lower-income workers typically provide services that benefit upper-income residents, and higher-income residents provide relatively more tax revenue, local income diversity benefits everyone. A community is enriched when schoolteachers, firemen, police, retail, and food service workers can all live in the neighborhoods in which they work.¹⁷⁸

Barriers to community entry are problematic when they keep affordable housing out of wealthier neighborhoods. Neighborhood exclusion also inhibits productivity when gentrification is excluded from a neighborhood in distress. From an economic standpoint, the best thing that can happen to economically distressed neighborhoods, such as declining urban cores, may very well be gentrification.¹⁷⁹ A community can benefit from economic revitalization in several ways, particularly when infrastructure and property value improvements occur organically, through market actors, rather than according to a top-down comprehensive "urban renewal" program that may abusively employ a government's eminent domain powers.¹⁸⁰ Revitalization provides justifiable benefits, however, only when existing residents are not forced to relocate, either because of eminent domain or rising housing costs.

Some scholars opine that the biggest downside to increasing affordable housing in healthy communities and gentrifying distressed communities is that such developments permit the influx of "others" into a community in a

174. EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 186-93 (2011).

175. See Eagle, *supra* note 1, at 313; Matthew J. Parlow, *Whither Workforce Housing?*, 23 J. AFFORD. HOUS. & CMTY. DEV. L. 373, 384 (2015).

176. Hsieh & Moretti, *supra* note 119; Eagle, *supra* note 1, at 312.

177. Hsieh & Moretti, *supra* note 119; Eagle, *supra* note 1, at 312-14.

178. See Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 537 (1992) ("Many children of the suburbs find that they no longer can afford to live in the communities where they grew up. Teachers, firemen, and policemen often cannot afford to live among those they serve because of the restrictive costs of housing.").

179. See Byrne, *supra* note 54; Eagle, *supra* note 1, at 314.

180. See Byrne, *supra* note 54; Eagle, *supra* note 1, at 314.

way that denies the collective its right to exclude.¹⁸¹ Admittedly, a lessened ability to exclude might harm group identity and neighborhood “authenticity” and lead to loss of a sense of community.¹⁸² The purported value of community homogeneity is overstated, however, and results from and perpetuates faulty assumptions regarding the absolute benefit of preserving group autonomy and collective property values. Not only are individual and communal benefits from group exclusions exaggerated (or at least unquantifiable), but community exclusivity imposes significant communal and individual costs.¹⁸³

Once freed from a group’s deliberate exclusionary control, economic forces in a housing market will naturally promote housing affordability, and housing affordability is the key to housing equity.¹⁸⁴ Unless a true efficiency problem exists (as in the case of negative externalities or the tragedy of the commons), there is no market justification for neighborhood barriers to entry—whether with respect to integrated affordable housing or gentrification. A desire to preserve group dynamics, community identity, and inflated property values fails to provide a convincing justification for group exclusion when balanced against the lost opportunity costs related to unaffordability and the individual harms that exclusion imposes on the most vulnerable segments of society.

C. An Individual Rights Approach to Controlling the Collective

Because politics stymie a macro-level solution to housing affordability and equity, a micro-level, individual rights approach may be the best option to control unjustified exclusions by local community groups.¹⁸⁵ An individual property rights approach to constraining group exclusionary power avoids housing’s realpolitik of opposing constituent priorities and group collusive price-fixing. Increased judicial protection of individual property rights is justifiable both theoretically and based on positive societal effect and could constrain harmful group exclusions without needing to navigate the impenetrable political jungle of land-use politics.¹⁸⁶

181. See e.g., Eagle, *supra* note 1, at 314-16.

182. See *id.* at 314-15. On the other hand, Jane Jacobs was a firm believer in the community value of vibrant diversity of inhabitants. JACOBS, *supra* note 122, at 148.

183. *Supra* Part II.

184. Eagle, *supra* note 1, at 314. See also DESMOND, *supra* note 121.

185. Eagle, *supra* note 1, at 336-37, 350-52. Legislative efforts to limit community exclusionary powers are hamstrung by the political influence wielded by society’s most empowered, wealthy, and organized interest groups who are the most likely to desire exclusion. *Id.* See also *supra* Section I.C.

186. Professor Eagle does not focus on individual rights protection, but his discussion of the pluralistic nature of public opinion and equally legitimate, varying individual preferences suggests this may be the best approach. See generally Eagle, *supra* note 1, at 306-08.

Property law provides ample theoretical support for favoring the protection of individual property rights over the majority-rule powers of a group. A group's power to exclude directly limits the rights of its members to invite and include and indirectly limits members' rights to individually transfer their property and to use it in the most economically efficient, utility-optimizing way. The various theories that justify legal protection of private property as a general matter, including utilitarianism, personhood, labor, and civic republicanism, all justify prioritizing individual rights over the rights of a collective as long as a clear market failure (such as a negative externality or freeriding) does not suggest otherwise.¹⁸⁷

Utilitarian theory posits that property rights are justified as a means to maximize societal happiness, and for utilitarians, happiness is measured by aggregating individuals' utility.¹⁸⁸ In espousing his view of utilitarian theory, Jeremy Bentham explained that when property is under individual control, aggregate wealth naturally increases as people rationally seek to increase their own personal wealth.¹⁸⁹ According to the modern law and economics strain of utilitarianism, allocation schemes and property rights protections are justifiable only to the extent they promote optimal societal utility.¹⁹⁰ Utilitarian theory is perhaps the most popular and influential theory underlying property law today,¹⁹¹ even though the theory's

187. Professor Eagle suggests that moving into wealthier areas to take advantage of better-funded schools, for example, is another form of freeriding. *Id.* at 321-24. I believe that the law should distinguish between private amenities (such as a community pool in a gated communities) and public goods, such as schools, roads, transportation, libraries, and the like. Although it would be appropriate for a private community to create *private* amenities and fund those amenities through members-only assessments, it is unjustifiable to exclude poorer citizens from a community and the high-quality *public* amenities therein, even though it is true that poorer residents would contribute relatively lower dollar amounts toward the cost of public goods. Allowing equal access to public goods is usually not considered "freeriding."

188. See Alexander, *supra* note 20, at 1264 (explaining that utilitarians want to maximize "the individuals' satisfaction"). "It is precisely because the utilitarian takes the individual's own definition of his or her satisfaction as given that the utilitarian is committed to personal autonomy." *Id.* at 1264-65.

189. JEREMY BENTHAM, *Idea of a Complete Law*, in *OF LAWS IN GENERAL* 156, 177 (H.L.A. Hart ed., 1970).

190. JESSE DUKEMINIER & JAMES KRIER, *PROPERTY* 137-38 (2nd ed. 1988) (discussing the law and economics strain of property law theory). Achieving optimal economic value is lauded as "efficient," and both of the main flavors of efficiency theory (Kaldor-Hicks efficiency and Pareto optimal efficiency) evaluate efficiency based on the aggregate of individual value judgments, not the collective decisions of a group. Kaldor-Hicks efficiency posits that decreases to any individual's welfare can only be justified if sufficient increases to other individuals' welfare outweigh the decrease. Pareto optimal efficiency goes even further, providing not only that an efficient outcome maximizes aggregate happiness, but does so without decreasing the happiness of any given member of the conglomerate. *Id.*

191. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 64 (5th ed. 1998); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 *COLUM. L. REV.* 1697,

imperfections are acknowledged.¹⁹² Not only do people sometimes behave in economically irrational ways, but economic theory ignores the fact that some values are stubbornly non-quantifiable.¹⁹³

In spite of the imperfections of economic theory in the real world, individual decision-making is still likelier than group decision-making to come close to the ideal of rational maximization of utility. Group dynamics are complicated and often the result of messy bargaining among unequally situated constituents.¹⁹⁴ Decision-making by a group is often even more likely to be based on irrational and incorrect assumptions.¹⁹⁵ A homogeneous community's fear of outsiders and group peer pressure do not aid decision-making rationality. When the collective imposes its will on dissenting individuals, this discounts the value of individual judgments, and inhibits rather than cultivates aggregate utility. Such a devaluation of individual utility is unjustified except in the case of a market failure, such as where increasing an individual's utility creates a true negative cost externality or where common property use is involved.¹⁹⁶ In cases where legitimate cost externalities do not exist, and issues involving the need to exclude non-contributing users from common property are not involved,

1701-02, 1711 (1988); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 591-92 (1984); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 21 (1985); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998-99 (1999); Lewis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 560 (1986); Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 268 (2004). Utilitarian theory is really an umbrella term for several types of consequentialist and economic-driven property theories.

192. For one thing, economic theory presumes that everyone is a "rational maximizer" who accurately makes decisions to improve her own welfare, but people sometimes make bad decisions, including decisions that harm themselves in the short or long term. Sometimes this is because people have inadequate or incorrect information, sometimes it is because people do not understand what is in their self-interest, and sometimes it is because people are irrational and behave in a self-destructive way. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 10 (2008).

193. See, e.g., Radin, *supra* note 23, at 1007.

194. See Eagle, *supra* note 1, at 307; see also Franzese, *supra* note 34, at 340, 343 (discussing the undemocratic realities behind local group decision making).

195. One example is Professor Sennett's description of the psychology underlying a group's desire to exclude the "other" from its "purified community." SENNETT, *supra* note 28, at 20-29.

196. In cases of negative externalities, individual welfare maximization may decrease rather than increase aggregate utility. In the context of publicly held property, the tragedy of the commons renders individual utility maximization destructive. Group-level decision making should justifiably have primacy over individual property rights in these contexts. See *supra* Section I.B.

individual decision making should take precedence as more likely to reflect and achieve aggregate utility maximization.

Several property law scholars agree. An individually focused view of utilitarianism accords with Professor Gregory Alexander's property theory of "human flourishing."¹⁹⁷ Individual empowerment is essential in Alexander's human flourishing model¹⁹⁸ because group-level flourishing would ignore society's "morally pluralistic" reality. Alexander "rejects the notion that there exists a single, irreducible, fundamental moral value to which all other moral values may be reduced," and explains that endowing individuals with property right protections simultaneously achieves multiple societal values in an egalitarian and equitable way.¹⁹⁹ Individual empowerment is therefore key to maximum human flourishing, contrasted with group coercion of its constituent dissenters, which is disrespectful to society's pluralism and to individual worth. Professors Iglesias and Eagle have also both stressed that the pluralistic perspectives of community values render collective solutions to affordable housing both unlikely and less justifiable.²⁰⁰ Societal pluralism not only predicts persistent political impasse, but also provides a moral mandate for individual-level property rights protection as a counter-balance to group rights to exclude.

The personhood theory of property law likewise justifies protecting individual rights to property from group-based desires to exclude.²⁰¹ The collective right to exclude from a community (as opposed to exclusions from specific commonly held property) necessarily involves limiting an individual owner's ability to invite, include, use, and transfer her own property. In the realm of residential neighborhoods, the *res* involved is typically an individual's home, the particular type of real property that personhood theory deems the most personal and thus most worthy of

197. See Alexander, *supra* note 20, at 1261, 1275. According to Alexander, human flourishing is the "normative foundation of private property," meaning that property rights should support a person's "opportunity to live a life as fulfilling as possible for him or her." *Id.* at 1260.

198. See generally *id.*

199. See *id.* at 1257, 1260. According to Professor Alexander, property laws that maximize "human flourishing" naturally achieve other property values, such as "individual autonomy, personal security/privacy, self-determination, self-expression, and responsibility." *Id.* at 1260.

200. See Iglesias, *supra* note 2, at 596; Eagle, *supra* note 1, 330-31.

201. See Radin, *supra* note 23, at 958. Radin's theory of personhood in property reflects German philosopher Georg Hegel's hypothesis that people become emotionally connected to certain tangible things to such an extent that these things become part of their identity. The thing or place that has this connection ceases just to be a mere object, but it is instead the way that the individual expresses herself and/or the way that she establishes her individuality. As Hegel succinctly put it, "Property is the embodiment of personality." *Id.* at 973 n.57.

protection.²⁰² Group control of an individual's ability to use and transfer her property, such as limitations on leasing, may render an owner's continued tenure economically unfeasible, coercing an owner to relinquish ownership before she wishes, and this raises liberty and fairness issues.²⁰³ The identity-related, personhood harms imposed by group control of a person's home are akin to those autonomy and personhood harms created when government takes private homes for the community's "economic benefit."²⁰⁴ Similarly, a collective's right to exclude limits an individual's ability to invite, diminishing her liberty, autonomy, and identity-based expressive rights.

Property law's civic republican theory also justifies protecting individual rather than group self-determination with respect to property. According to civic republican theory, property ownership facilitates democracy and freedom.²⁰⁵ Thomas Jefferson, an early proponent of this theory, believed that citizens' ability to exercise their natural rights of liberty and the pursuit of happiness are best protected by allowing individuals autonomy with respect to real property they own.²⁰⁶ Private property and individual autonomy with respect to its transfer, use, and exclusion not only protect people from government tyranny, but also ensure independence from municipal and private community control. More recently, Professor Sunstein similarly described how safeguarding an individual's autonomy with respect to her private property preserves and protects democratic values. As Sunstein explained:

[I]n a state in which private property does not exist, citizens are dependent on the good will of government officials, almost on a daily basis They come to the state as supplicants or beggars rather than rightholders. Any challenge to the state may be stifled or driven underground by virtue of the fact that serious challenges could result in the withdrawal of the goods that give people basic security. A right to private property, free from government interference, is in this sense a necessary basis for a democracy.²⁰⁷

202. *See id.* at 959.

203. *See Unbounded Servitude*, *supra* note 34, at 483-86.

204. *See Radin*, *supra* note 23, at 1005.

205. *See generally* GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970*, 27 (1997).

206. In a letter to Samuel Kercheval in 1816, Thomas Jefferson explained that "[t]he true foundation of republican government is the equal right of every citizen, in his person and property, and in their management." Thomas Jefferson, *Letter to Samuel Kercheval*, TEACHING AMERICAN HISTORY, <http://teachingamericanhistory.org/library/document/letter-to-samuel-kercheval/> [https://perma.cc/UWH6-FA8F].

207. Cass R. Sunstein, *On Property and Constitutionalism*, 14 *CARDOZO L. REV.* 907, 917 (1993).

A more individualistic approach to land use controls would protect independence and democracy not only in the context of state and federal governments, but also with respect to localities. Municipal governments and their highly lobbied zoning boards and private community governments, do not always carry out the will of their constituent majority, in practice.²⁰⁸

Professor Richard Pipes, a notable Russian scholar at Harvard, also believes that individual autonomy is essential to democracy and, in fact, postulates that it is society's need to protect private property rights that justifies the very existence of the state.²⁰⁹ According to Pipes, it is impossible to have personal freedom and liberty without the right to individual control of private property.²¹⁰ Pipes famously opined that, "while property in some form is possible without liberty, the contrary is inconceivable."²¹¹ These important societal values—individual autonomy, freedom, and individual and societal efficiency—can only be achieved if, as a general rule, individuals retain the right to control their own property, free from unjustifiable group-level efforts to exclude the "other" in a way that overcomes constituent property owners' will.²¹²

A group's power to exclude also limits the rights of non-owners to community access. The individual rights of non-owners deserve judicial recognition and protection as well.²¹³ Would-be residents of a community lose their right to access public goods and services in a desirable neighborhood when zoning laws or restrictive covenants operate to keep them out. Rampant Euclidean zoning in effect segregates residents by income (and often by race). Restrictive covenants that disparately exclude poor and minority would-be community residents from the best neighborhoods (with some of the best public schools) are common.²¹⁴ These sorts of exclusionary barriers impose unjustifiable costs on the most disadvantaged segments of society and, as such, are inherently unjust under

208. See Franzese, *supra* note 34, at 343 ("The potential for autocratic rule [in a CIC] is compounded by less than participatory governance structures and resident apathy.").

209. See RICHARD PIPES, PROPERTY AND FREEDOM, at xii (1999).

210. *Id.* at xii.

211. *Id.* at xiii.

212. Richard Pipes rails against the devaluation of individual private property rights. See *id.* at 287-88.

213. See 42 U.S.C. §§ 3601-3619.

214. See Nelson, *supra* note 53, at 1698. Exclusion of poor and minority residents has long been a deliberate policy choice underlying zoning decisions, and does not exist merely based on an un-apprehended collateral effect. See Chused, *supra* note 32, at 604-06, 614. Professor Eagle cites a "quest by affluent parents for neighborhoods with excellent schools" as one of the motivations behind this attempt to keep lower-income residents out of wealthier neighborhoods. Eagle, *supra* note 1, at 321.

a Rawlsian definition of justice.²¹⁵ When groups erect barriers to entry into “their” communities in order to keep “them” out, liberty of those excluded is sacrificed on the altar of the group’s asserted right of self-determination.²¹⁶

A century of empowered group exclusions has imposed clear and significant adverse effects on vulnerable segments of American society. As notable Professors Massey and Denton, authors of *American Apartheid: Segregation and the Making of the Underclass*, point out, today’s residential hypersegregation was caused by allowing and even encouraging communities to exercise an unfettered (and, later, barely fettered) right to exclude persons of color and lower-income residents.²¹⁷ Urban black ghettos have their origin in a robust group right to exclude.²¹⁸ The general practice of siting the bulk of affordable housing in high-poverty neighborhoods perpetuates the cycle of poverty and relegates poor and minority households to a reality plagued by neighborhood violence, lack of community amenities, inadequate schools, and poor health outcomes.²¹⁹ Allowing the collective to exclude the “other” has thus rendered the American ideal of equality of opportunity illusory.²²⁰ Yes, exclusion by a group may, in fact, support constituent property valuations, but this reverse Robin Hood allocation of housing costs, so the poor pay more in order to “feed” the rich, is both unjust and unjustifiable.²²¹

CONCLUSION

Our housing system has long struggled with persistent segregation, unaffordability, and tension between neighborhood decline and revitalization, and little improvement in these metrics has been seen over the past decades. Scholarship explaining why these problems are intractable may help spur a search for novel legal solutions because, after all, admitting that we have a problem is step number one.²²² Various

215. John Rawls, in the 1970s, advanced a comprehensive theory of justice. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971). Under Rawls’s conception, political structures are deemed just only if they impose no involuntary costs on the least advantaged members of society and provide each individual in society an equal right to equal liberties available to all. *Id.* at 246. According to Rawls, it is unjust to require individual liberty and welfare to be sacrificed to benefit others. *Id.* at 3-4.

216. Eagle, *supra* note 1, at 355-56; *see also* BABCOCK, *supra* note 117, at 124.

217. *See* MASSEY & DENTON, *supra* note 35, at 27.

218. *See id.*

219. *See supra* notes 126-47 and accompanying text.

220. *See* DESMOND *supra* note 121 at 294-95, 315-16.

221. *See supra* notes 61-67, 78, 116-21 and accompanying text.

222. *See, e.g.,* *The Twelve Steps of Alcoholics Anonymous*, ADDICTION CTR. (last updated Jan. 21, 2016), <https://www.addictioncenter.com/treatment/12-step-programs/> [<https://perma.cc/5H2K-GKYA>].

interest holders have diametrically opposed goals when it comes to the price of housing and neighborhood content.²²³ Many of our laws and regulations have been enacted and justified as ways to preserve “property values,” based on the presumption that owners of property in a neighborhood have the legal right to enact protective policies to buoy their home’s market value.²²⁴

We have allowed neighborhoods to collude to exclude. There is insufficient justification for allowing such a broad collective right, notwithstanding a community’s preference for higher property values and our country’s general lack of consensus regarding housing policy priorities. Group exclusions are costly, and these costs are imposed not only on the group’s constituent members but also on would-be homebuyers and renters and the public as a whole. In addition to perpetuating housing unaffordability, community exclusivity in order to preserve the community’s property values re-entrenches historic housing inequality and patterns of residential segregation.²²⁵ Legal, market, social, and political forces have conspired to effectively exclude “others” from entering homogeneous neighborhoods, in spite of fair housing laws and decades of anti-housing-segregation advocacy.²²⁶ Allowing groups to exclude for the sake of exclusivity has prolonged market inefficiencies and created inequitable constraints on and placement of the affordable housing supply.²²⁷

The intractable lack of consensus regarding housing policy priorities does not mean that our legal system is powerless to promote fair and affordable housing goals. Political disagreements have only been able to effectively inhibit affordable and fair housing because the law has allowed groups an almost unlimited right to exclude. Communities have been able to exclude additional housing units, certain property uses, and even certain people from their midst. The collective’s right to exclude populations and residential uses has unjustifiably contributed to housing’s inequity and expense.²²⁸

Communities have long employed exclusionary tools to self-segregate by income and divert investment out of broadly accessible public goods, for example by crafting excessively fractionalized school districting

223. See Eagle, *supra* note 1, at 306-07.

224. See *supra* Section I.C.

225. See Cashin, *supra* note 36, at 1690-91.

226. See *supra* notes 30-36 and accompanying text.

227. See *supra* notes 78, 85-87, 91-93 and accompanying text.

228. See *supra* Part I.

schemes rather than more sustainable regional ones.²²⁹ Allowing communities this broad discretion to exclude at the whim of the majority tramples individual ability to deviate from community norms and erodes the associated human rights of individual autonomy, liberty, and personhood that property law is designed to protect. Collective exclusion evidences not only the tyranny of the majority over individual choice and defection, but also the tyranny of the empowered, allowing wealthier segments of society to profit on the backs of the least advantaged. Community exclusion that denies access and wealth-building opportunities to society's most vulnerable individuals eradicates equality of opportunity and flies in the face of Rawlsian justice.²³⁰ Group identity and homeowners' property values may be legitimate concerns, but these individual preferences do not trump the compelling societal needs for housing integration, equity, and affordability.

Because affordable housing is a politically tangled issue, attempts to control a group's right to exclude through top-down regulation and oversight have proven fairly ineffective. On the other hand, a judicially protected renaissance of individual property rights could provide a counterbalance to a collective's desire to exclude. Endowing individual owners with the presumption of autonomy with respect to their property use, access, and transferability would break through our housing system's restraints on land use and transfer, eventually rendering housing less costly and more integrated.²³¹ The rights of individuals—owners as well as non-owners and would-be residents—need property law protections from group exclusionary powers. Although the right to exclude may be an essential stick in property's metaphorical bundle, it is a right to be exercised by and for the benefit of individuals, not a tool for inequitable, collective control.

229. See *supra* notes 64-67 and accompanying text; see also *Detroit*, *supra* note 63, at 582-83.

230. John Rawls deemed that laws and policies that restrict some people's rights in the name of benefits given to others are inherently unjust. See RAWLS, *supra* note 215, at 302; *supra* notes 213-216 and accompanying text.

231. See Alexander, *supra* note 28, at 26, 60 (explaining that courts are the appropriate institution to maintain diversity by protecting individual rights from majority-rules tyranny).