

REVIEW

The Evolution of Homeownership

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The Unbounded Home: Property Values beyond Property Lines
Lee Anne Fennell. Yale, 2009. Pp iv, 298.

INTRODUCTION

Buying a home is a bit like getting married. Great hopes, commitment anxiety, giddy first year, and then dealing with the multiple complications that invariably arise in a long-term relationship. You have to accept upside and downside risks (“for richer, for poorer”), suppress possible regrets (“an even better house just came on the market”), and deal with neighborhood effects whose scope is not easily anticipated. Yet both marriage and homeownership are desired and persistent institutions, celebrated for their contributions to social stability as well as to personal satisfaction. Although both have evolved to meet new social circumstances, it is clear that rapid alterations in these institutions are not easily accepted and may have unanticipated collateral effects.

This analogy can be taken just so far. Dissolving a marriage is certainly more fraught than selling a home. The utility of the analogy arises from the many modern proposals (sorry) to amend and extend both institutions. Lee Anne Fennell’s *The Unbounded Home: Property Values beyond Property Lines* is at the leading edge of a scholarly conversation about the nature of homeownership. She unpacks a formidable range of scholarship in a reader-friendly narrative style.

Fennell’s foundational insight is that the value (monetary and personal) of a home to its owner-occupants is affected by many factors over which the owners have little or no control (p 2). You can paint your house to make it more presentable, but you may not be able to induce your near neighbors to do the same. You can prepare your children to be ready for school, but you may not be able to get the school to teach them adequately. You can prevent noisy trucks from

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parking in your driveway but not from roaring noisily by on the nearby interstate highway.

Moreover, all of these difficult-to-control factors affect what others are willing to pay for your home. While inspecting the house, they will notice the unpainted buildings nearby, the not-so-great schools, and the noisy traffic. Because a house is a big part of your financial portfolio (for most people, their largest asset¹), you will spend some sleepless nights—and not just because of traffic noise—if these off-site insults continue or get worse. It is Fennell’s working hypothesis that the off-site factors that affect a home’s value have greatly increased in the past century, but modern property institutions have failed to keep up and now have a suboptimal, if not dysfunctional, effect on the economic, social, and personal well-being derived from housing (pp 197–98). It is the thesis of this Review that the nature of homeownership actually has evolved in response to many of these problems and that her innovations may be less revolutionary—and hence more palatable—than they seem.

I. PUBLIC GOODS AND HOMEOWNERSHIP 2.0

The Unbounded Home first develops the theory that undergirds Fennell’s approach to the problem (pp 45–64). It is basically the problem of public goods, formally framed for economists by Richard Musgrave and Paul Samuelson and for the rest of the academy by Garrett Hardin.² Goods and factors of production in which property rights of exclusion, use, and transferability can easily be established can be efficiently allocated by largely self-ordering markets.³ The common law infrastructure of property, contract, and torts makes these markets operate reasonably efficiently.⁴ Public goods, by contrast, are not easily subject to exclusion.⁵ The atmosphere, the ocean, the ambience of a neighborhood, and the quiet of a summer night are, in varying degrees,

¹ See Andrew Caplin, et al, *Housing Partnerships: A New Approach to a Market at a Crossroads* 80 (MIT 1997) (“[F]or a great many households, housing is the *only* significant asset in their portfolio.”).

² See Richard A. Musgrave, *The Voluntary Exchange Theory of Public Economy*, 53 Q J Econ 213, 232 (1939) (rejecting the voluntary exchange theory of public goods); Paul A. Samuelson, *The Pure Theory of Public Expenditures*, 36 Rev Econ & Stat 387, 389 (1954) (discussing the problem of public expenditure given the “‘external economies’ or ‘jointness of demand’” that is inherent in public goods); Garret Hardin, *The Tragedy of the Commons*, 162 Sci 1243, 1244–45 (1968) (describing the tendency of an individual to overuse public goods because she estimates that the cost will be shared among all individuals but that the benefit will be exclusively enjoyed by her).

³ See Samuelson, 36 Rev Econ & Stat at 388 (cited in note 2).

⁴ See Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089, 1090–91 (1972) (discussing the ordering that the common law provides).

⁵ See Hardin, 162 Sci at 1244–45 (cited in note 2).

public goods. The difficulty in excluding excessive numbers of people from using them means that they can be overused and underconserved.

A related problem is assembling people to produce collective benefits to all. In modern legal theory, assembling disparate elements into a collective unity is called the problem of the anticommons (p 56). Undertaking collective action to deal with these problems is hindered by the free-rider problem: why should I cooperate if others will do the work and I will still benefit? Property institutions (such as nuisance law) and political institutions (such as local governments) have developed to deal with such problems. These institutions are not static, and new economic and technological conditions warrant some modifications in the infrastructure of property and local government law.

The deficiency in property law that has moved Professor Fennell and others is the owner-occupied home in a setting that is specialized to provide residential services. This condition will hardly sound unusual to most readers, who would point out that owner-occupied homes have been around for several millennia.⁶ To put Fennell's enterprise in perspective, in the next Part I limn the historical process by which "home" became a specialized form of property requiring new institutions. This history, which is only alluded to in Fennell's book, provides both the motivation for her reformist enterprise and a baseline from which to evaluate the chances of success for the new form of property that she proposes. But first a brief overview of her theory.

Fennell's new toolbox of property law is cleverly named "Homeownership 2.0," and it is sometimes referred to by another clever (though incongruent) abbreviation, H2.0 (p 187). The computerese allusion is especially apt in one sense. Version 2.0 of an operating system or program is the one that has worked the bugs out. Homeownership 2.0 would be the version that allows homebuyers to avoid some of the present defects of homeownership. Primary among these defects (although third in order in her book) is the mismatch between the impact of off-site activities—like truck traffic—and the owner's ability to mitigate them or ensure that they will not exceed reasonable bounds and devalue the owner's asset (p 198). H2.0 would allow homebuyers to accept or reject control of off-site actions in roughly the same way that purchasers of financial assets can accept risk by purchasing equity shares or reduce it by purchasing bonds or other hedges. Most nonhousing elements of a financial portfolio can be varied on a continuous basis as opposed to a binary, either-or choice.

Under Fennell's legal model, homebuyers who do not want the risks of full ownership can sell fractions of it to investors who do want

⁶ See Robert C. Ellickson, *Property in Land*, 102 Yale L J 1315, 1329 (1993).

it (pp 196–201). Third-party investors to whom the homebuyers sell their risks (and others to whom the originators will resell them—these are financial derivatives (p 197)) will reap capital gains or endure capital losses when the homeowner sells. Other aspects of H2.0 involve purchasing options to do some nonstandard activities in the neighborhood—like not painting one’s home regularly—or paying neighbors to accept one’s offbeat taste in home colors (p 109). More controversially, H2.0 would also allow communities to offload some of their problems to other communities, for a price (pp 160–62). A proposal to divert annoying truck traffic from the community will, after all, induce it to go somewhere else. The cost of that decision would, under H2.0, be internalized by a set of community-level transactions that take into account the well-being of the region rather than just the community itself. Thus, three proposals form the innovative side of H2.0: (1) variable risk of homeownership itself (pp 171–96); (2) neighborhood transactions to control localized spillovers (pp 95–119); and (3) intercommunity transactions to deal with metropolitan-wide public goods (pp 147–69).

II. THE FORMER CONGRUENCE OF HOME AND WORK IN “H0.0”

The nature of homeownership in the United States was much different in the nineteenth century. Until about 1890, the majority of Americans lived on farms and in rural areas, and a good majority of farmers owned their farms. (City residents were more likely to rent until after World War II.)⁷ Farmers did not think of themselves as homeowners as distinct from farm owners. Farm and farmhouse were intimately connected.⁸ The locational unity of residence and occupation applied also to those who were not farmers and lived in cities and towns.⁹ Their businesses were often part of the home they lived in, and even if business and dwelling were in separate places, the physical distance between them was not large. Close proximity was important for the political and legal conception of homeownership in the nineteenth century,¹⁰ a conception one might call Homeownership 0.0.

⁷ Urban ownership was 47.8 percent in 1890 and did not surpass 50 percent until after World War II. Farm homeownership was 65.93 percent in 1890, fell to 53.28 percent in 1940, and rose to 80.52 percent in 1970. See Michael R. Haines and Allen C. Goodman, *A Home of One's Own: Aging and Homeownership in the United States in the Late Nineteenth and Early Twentieth Centuries*, in David Kertzer and Peter Laslett, eds, *Aging in the Past: Demography, Society, and Old Age* 203, 206 (California 1995).

⁸ See id at 205.

⁹ See Robert S. Lynd and Helen Merrell Lynd, *Middletown: A Study in Contemporary American Culture* 64 (Harcourt, Brace 1929) (noting that in 1890, almost everyone walked to work; by 1925, two-thirds of families had automobiles).

¹⁰ Id at 65.

Consider the effects of this condition on nineteenth-century versions of the three specific problems mentioned above: the unpainted house nearby, the noisy truck traffic, and the underperforming local school. In a rural area, the neighboring unpainted house was almost surely owned by someone with whom you would have had regular interactions. Exceptional noises from local traffic were likely to be caused by deliveries to or from someone you knew. Informal controls were easy to undertake.¹¹ The school was a one-room affair governed and financed by the town and neighborhood.¹² If it seemed inadequate, one could complain directly to the school board if one was willing to risk the retort that you should just run for the school board.

This is not to paint a picture of an idyllic life in rural nineteenth-century America. Homes were often hovels, farm work could be dangerous and unpleasantly smelly, and most schools aimed no higher than basic literacy and numeracy (which, come to think of it, was not too bad).¹³ Rather, it is to make two critical points. The more obvious is that distances between homes were not large because local transportation was poor. Hence, the orbit of spillovers from one's neighbors was physically close and correspondingly intimate. Informal contacts of the sort described by Robert Ellickson could often manage the problems that arose from nearby neighbors.¹⁴ (More about the enduring influence of neighborly social capital below.)

The less obvious point is that congruence of home and workplace made the local political objectives of local residents different from what they have become in the modern metropolis. Nineteenth-century homeowners who were concerned about changes in their local environment had to think simultaneously about their homes and their businesses. This was true even if they were wage earners. Workers in most towns and cities walked to work.¹⁵ As a result, employment was usually in the same political jurisdiction as residence. Lower-income people often sought to become homeowners in part because home was also a place of business and a source of extra income.¹⁶ Local policies to

¹¹ See Jack Larkin, *The Reshaping of Everyday Life: 1790–1840* 37 (Harper & Row 1988) (describing economic life in the early 1800s as “deeply, inextricably entangled” in social life).

¹² See William A. Fischel, *Neither “Creatures of the State” nor “Accidents of Geography”*: *The Creation of American Public School Districts in the Twentieth Century*, 77 U Chi L Rev 177, 177 (2010).

¹³ Larkin, *The Reshaping of Everyday Life* at 158 (cited in note 11).

¹⁴ See Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* 52–64 (Harvard 1991).

¹⁵ See Stephen F. LeRoy and Jon Sonstelie, *Paradise Lost and Regained: Transportation Innovation, Income and Residential Location*, 13 J Urban Econ 67, 79–80 & table 1 (1983).

¹⁶ See Margaret Garb, *City of American Dreams: A History of Home Ownership and Housing Reform in Chicago, 1871–1919* 36–38 (Chicago 2005) (describing how lower-income workers

accommodate, say, a new railroad, which could adversely affect residential ambience, might also augment wages, making homeowners more ambivalent about the nuisance effects. (And up to about 1880, voting was not a private affair, so an employer could observe how his employees voted on issues that affected his business.¹⁷) The congruence of business and residence also affected who participated in local government. Business owners could run for local public office in order to promote their interests because their homes were usually in the same jurisdictions as their businesses, so they could meet residency requirements for city elections.

The congruence of home and source of income became attenuated between about 1880 and 1920 in American cities. The original source of the change was the revolution in intra-urban transportation. Railroads had long been the dominant form of transportation between cities, but their use within thickly populated areas was limited.¹⁸ In the late nineteenth century, the spread of a quieter and less noxious motive power, electricity, allowed entrepreneurs to develop street railroads and, in larger cities with high land values, elevated railroads and eventually underground subways to transport passengers.¹⁹ This made it possible for many people, not just the boss in his carriage, to live more than walking distance from their jobs.²⁰

The new physical separation of residence from employment meant that there were fewer business-generated insults to the quality of residential life. Local pollution and noise from factories were, for the new suburbanites, now someone else's problem in the distant downtown. Remoteness also made for a more divided political interest on the part of homeowners. A homeowner might be in a position to gain profits or higher wages if the city in which her business or employer was located helped the business expand, but a similar business located next to her home would not get her support because of its potentially adverse effect on her home's value.²¹ Where once homeowners had to compromise, balancing gains in employment and profit against possible home-value losses, they now became Jekyll and Hyde,

bore the burden of debt, sacrificed necessities, and sent their children into the labor market in order to buy property).

¹⁷ See Lionel E. Fredman, *The Australian Ballot: The Story of an American Reform* 20–26 (Michigan State 1968) (describing employers' intimidation techniques aimed at coercing workers into voting in the employers' best interests).

¹⁸ See Charles W. Cheape, *Moving the Masses: Urban Public Transit in New York, Boston, and Philadelphia, 1880–1912* 2–3 (Harvard 1980) (noting that city residents sought to keep railroads out of city areas because they felt the railroads were dirty, noisy, and prone to accidents).

¹⁹ See *id.* at 6–9.

²⁰ See *id.* at 23–32.

²¹ See Jon C. Teaford, *City and Suburb: The Political Fragmentation of Metropolitan America, 1850–1970* 10–12 (Johns Hopkins 1979).

eagerly promoting business where they worked but opposing it (unless it was benign or offered a compensatory benefit) where their homes were located.²²

Homes isolated from work now were becoming special objects of concern, an example of economic specialization. Homes now offered more satisfaction for their occupants as a refuge from the worry of making a living and the quotidian assaults of commerce. The 1910 druggist who lived upstairs from his shop could never quite put business out of his mind, and decisions about home improvement always had to be mindful of the commercial side of the location. Would the utility of a new porch be ruined by the expansion of a nearby business? Would a bigger investment in the living quarters be undone by the need to respond to new business conditions that required an expansion of the store? Such issues became moot if the druggist could buy a home on the edge of the city in a residential neighborhood and commute by the streetcar line to work every day. Coming home was now a release from business pressures, and an ideology of “home and hearth” helped the new homeowners become a cooperative political force.²³

III. OWNERSHIP RAISED FINANCIAL RISKS

Construction of suburban housing units does not logically require that the occupants own them. They could, after all, rent houses, which would shift the risk of financial setbacks and adverse neighborhood effects onto the landlord. Owning a house in the pre-World War II era had no great tax advantages for most people, primarily because federal (and state) income taxes were low except on the highest incomes.²⁴ The imputed rent on owner-occupied housing is an untaxed source of income for homeowners.²⁵ With little tax liability, the advantage of a tax-favored asset would seldom be decisive.

One reason for promoting homeownership before World War II was developer financing. Large-scale homebuilders, a new breed that called themselves “community builders,” did not want to tie up their

²² See *id.* at 115.

²³ See Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916–1926*, 56 U Pitt L Rev 367, 415–17 (1994).

²⁴ See Steven C. Bourassa and William G. Grigsby, *Income Tax Concessions for Owner-Occupied Housing*, 11 Hous Pol Debate 521, 525 (2000).

²⁵ James R. Follain and Lisa Sturman Melamed, *The False Messiah of Tax Policy: What Elimination of the Home Mortgage Interest Deduction Promises and a Careful Look at What It Delivers*, 9 J Hous Rsrch 179, 180 (1998) (“[T]he main component of the subsidy to owner-occupied housing is . . . the failure to tax gross implicit rental income earned by owner-occupants.”).

assets in the homes they built.²⁶ They wanted to sell them and take the cash to finance more homebuilding.²⁷ The most qualified investors in the newly built single-family homes were families who occupied them. Their investment and maintenance incentives were compatible with maximizing the value of their assets. Moreover, they had an interest in having neighbors who were also homeowners because these neighbors would also be effective on-site managers of their assets. Because the value of a home is affected by its neighbors' condition, having neighbors who have the same incentives helps maximize the total value of the assets. It is common to attribute the affinity of homeowners to live among other homeowners to cultural values,²⁸ but it also appears to be economically rational.

Owner-occupancy entailed two additional problems. One was the buyer's need for financing. Some middle-class homebuyers could pay cash or rely on business credit to finance their new homes, but others had to obtain loans that were specialized for the market. The home mortgage business responded to this demand with mortgage instruments that would now seem less than ideal.²⁹ Mortgages were typically short-term, often only a year, rates were renegotiated annually, and principal was paid episodically, often in the form of a single "balloon payment" at the end of the term.³⁰ Nonetheless, this was sufficient to attract many buyers, in part, one must surmise, because it reduced rental risk. The lease on a rental unit was typically for a year, and inflation or changing tastes in housing could cause a formerly affordable unit to command a rent beyond the means of its current tenants.

Unlike landlords, mortgage bankers cared little whether the home's location was becoming more valuable. A landlord might take the greater attractiveness of an area as a signal to raise rents, but bankers just wanted to be repaid on time.³¹ Thus homeowners accepted location risk (their home could become more or less valuable over time), but they could, by purchasing a home with a mortgage, avoid the risk of higher rents. They could also control building deterioration and tailor the unit to their satisfaction. Even with what in

²⁶ See, for example, Marc A. Weiss, *The Rise of the Community Builders: The American Real Estate Industry and Urban Land Planning* 41–43 (Columbia 1987).

²⁷ See *id.* at 42–43.

²⁸ See, for example, Peter H. Rossi and Anne B. Shlay, *Residential Mobility and Public Policy Issues: "Why Families Move" Revisited*, 38 *J Soc Issues* 21, 30 (1982) (concluding that the preference of homeowners to live among other homeowners derives from "norms deeply embedded in American values").

²⁹ See Susan Wachter and Richard Green, *The American Mortgage in Historical and International Context*, 19 *J Econ Persp* 93, 94 (2005).

³⁰ *Id.*

³¹ See *id.* at 95.

hindsight looks like a financially problematic mortgage market, homeownership was largely a Pareto improvement, a win-win situation for most people. This assumed, however, that the general price level would not unexpectedly decline and make the real burden of their mortgage payments much higher.

The other great innovation that promoted homeownership was the creation of new financial instruments, particularly the fixed-rate, level-payment, long-term mortgage.³² While zoning offered protection from community-wide external threats to residential values (as discussed in the next Part), the new mortgage offered financial security for homebuyers. They could virtually eliminate the risk of interest rate changes as well as rent risk with the fixed rate and at the same time assure their own mobility by making the market liquid. If the home had to be vacated because of a job change or other circumstance, owners could sell their homes and liquidate their long-term mortgages. The institutions that led the way were formed during the Great Depression, when housing prices did indeed unexpectedly decline and the federal government stepped into the mortgage market. These institutions have evolved to become the Federal Housing Administration and the federally chartered Fannie Mae, Ginnie Mae, and Freddie Mac.³³ They provided an organized market that standardized mortgage interests and allowed lenders to spread the risks of default by homeowners.

IV. MOTORIZED TRUCKS AND BUSES INDUCED INSTITUTIONAL INNOVATIONS IN PROPERTY

The second problem faced by new homeowners was off-site risk. Home values, as Fennell makes clear, are acutely sensitive to neighborhood conditions (p 197). This, too, was the product of the increased separation of work and home. When home and work were in the same neighborhood, one asset could offset the risk of another. Less traffic might adversely affect the business but offer an advantage to the home. After homes became more distant from work, this offset was attenuated. Construction of a tenement house down the block, which might adversely affect residential quality of life, would not be offset by the larger number of customers for the druggist and his employees. The home by itself became a more risky asset because of its specialization.

The legal response to this was, like the financial response, to dust off old doctrines—nuisance and protective covenants.³⁴ These did offer protection from extreme insults and from those less-than-nuisance-

³² See *id.*

³³ See Wachter and Green, 19 *J Econ Persp* at 96–98 (cited in note 29).

³⁴ See Robert Fogelson, *Bourgeois Nightmares: Suburbia, 1870–1930* 113 (Yale 2005).

but-still-annoying spillovers from neighbors subject to covenants. The problem with these approaches was transaction costs. Bringing a nuisance suit was (and still is) costly. Homebuilders could establish protective covenants before they sold their homes, and many did so. But homeowners could not easily modify these covenants, which created problems when conditions changed.³⁵

More important was that covenants could not usually extend beyond the land owned by the developer.³⁶ Owners of nearby land could exploit the newly built subdivision by establishing commercial and residential uses that were themselves more profitable as a result of the new development but whose presence, on balance, reduced the value of the new homes. Prospective homebuyers were aware of this risk, and their wariness created sales resistance that could be overcome mainly by lowering the price. Declining prices were not the outcome that developers or purchasers of new homes desired. It was not just owners who complained of this. Frederick Law Olmstead decried in the 1880s the erosion in home values of nicely planned suburbs as a result of subsequent, unplanned development.³⁷

Some of the risk of adverse neighborhood effects in suburban developments originally was held down by the nature of the urban transportation system. Separation of home from work in urban areas was first facilitated by the electric streetcar. In the streetcar era, protection for homeowners from apartment and commercial development could be had in part by distancing their residences from the streetcar lines. Lines were usually fixed once in place, and development of new lines was subject to public scrutiny and homebuilder influence.³⁸ One wanted a streetcar line near enough to homes to facilitate commuting but not so near as to create a nuisance from the line itself or its nearby intensive development. Coupled with covenants and informal sanctions, this arrangement provided reasonable protection for homeowners from adverse neighborhood effects.³⁹

This equilibrium was upset by the invention of low-cost motorized trucks and buses, as epitomized by Henry Ford's introduction of the Model T in 1909. The T was quickly modified to carry freight and

³⁵ Id at 113–14.

³⁶ See id at 114; Weiss, *The Rise of the Community Builders* at 45 (cited in note 26).

³⁷ See Fogelson, *Bourgeois Nightmares* at 28–30 (cited in note 34) (quoting Olmstead's description of the problem as suburbs "laid waste almost as by an invading army").

³⁸ See William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 *Urban Stud* 317, 320 (2004).

³⁹ See Andrew J. Cappel, Note, *A Walk along Willow: Patterns of Land Use Coordination in Pre-zoning New Haven, 1870–1926*, 101 *Yale L J* 617, 632–36 (1991).

multiple passengers on jitney buses.⁴⁰ Over-the-road trucks enabled heavy manufacturers to escape the necessity of locating near rail lines and ports.⁴¹ They could now seek out cheaper land in suburban locations for their operations. Apartment house developers could build in more remote suburban locations knowing that bus service would follow.⁴² Suburban homeowners could locate in more remote locations if they had automobiles, but the same motive power that propelled their cars could also propel buses and trucks. Geographic remoteness was no longer protection from unanticipated neighborhood developments that could wipe out home values.⁴³

The response to the new risk presented by trucks and buses was to seek an institution, zoning, that was outside of the common law of nuisance and servitudes and went beyond the informal institutions of neighborhood comity. Zoning was advanced not just by homeowners but by homebuilders. Southern California homebuilders lobbied for zoning; it was not something adopted reluctantly or forced upon them.⁴⁴ They also urged the Commerce Department under Secretary Herbert Hoover to draw up a model state zoning enabling ordinance, which was wildly successful. Zoning spread rapidly in both cities and suburbs.⁴⁵ In virtually every ordinance, the single-family home occupied the pinnacle of the hierarchical pyramid of uses to be protected.⁴⁶ Zoning provided the off-site security from incompatible developments that was too costly to provide with covenants and nuisance law.

V. OPPOSITE INFLUENCES: MORE EXPANSIVE FINANCE, MORE RESTRICTIVE ZONING

These two institutional innovations—the standardized mortgage and municipal zoning—were the primary responses to what I would call, in Fennell’s spirit, Homeownership 1.0, or H1.0. H1.0 became subject to a local regulatory market (zoning) and a national financial

⁴⁰ Fischel, 41 *Urban Stud* at 321 (cited in note 38) (submitting that “Henry Ford broke up” the “cozy arrangements” that precluded the need for zoning).

⁴¹ See Leon Moses and Harold F. Williamson, Jr, *The Location of Economic Activity in Cities*, 57 *Am Econ Rev* 211, 215 (1967) (noting that of the 473 firms surveyed in 1908 and 1920, 285 moved between those years).

⁴² See Christine M. Boyer, *Dreaming the Rational City: The Myth of American City Planning* 180 (MIT 1983) (observing that bus transit replaced streetcar railroad and subway systems because buses could more easily change their routes to accommodate commuter relocation to the suburbs).

⁴³ See Fischel, 41 *Urban Stud* at 320–23 (cited in note 38).

⁴⁴ See Weiss, *The Rise of the Community Builders* at 79 (cited in note 26) (reporting that Southern California “community builders” viewed zoning and other means of land use regulation as an important way to increase property values).

⁴⁵ *Id* at 65–67.

⁴⁶ See Fischel, 41 *Urban Stud* at 327 (cited in note 38).

market. Both of these have evolved since about 1970, but in substantially different ways. The local regulatory market—zoning—has become more exclusionary, while the financial market has become more expansive.⁴⁷ The expansiveness of the mortgage industry is now notorious. Persistent national policies sought to increase the homeownership rate among low-income people and minorities.⁴⁸ Banks that were formerly reluctant to lend in declining neighborhoods and to buyers with shaky credit ratings were brought to heel by threats of legal action and the creation of subprime mortgages.⁴⁹ Lenders that complied were able to resell their dicey investments through Fannie Mae, which actively created financial instruments that could be profitably packaged and resold to speculative investors.⁵⁰ Homeownership rates responded to this stimulus⁵¹ and rose to almost 69 percent in 2006.⁵²

Exclusionary zoning was once selective. Middle- and upper-income suburbs were hostile to junkyards, heavy industry, high-rise apartments, low-income housing, and halfway houses, but most other uses were permitted on what I have called the “good housekeeping” approach to land use: a place for everything, and everything in its place.⁵³ Most suburbs allowed a mix of housing (within the aforementioned parameters) and commercial uses. Industry was largely permitted only in the oxymoronic “industrial park.” Thus, zoning had only modest effects on the price of housing and the availability of nonresidential land. A developer of modest-priced, Levittown-style homes might have to agree to pay some impact fees and sponsor some commercial sites to offset fiscal costs, but this normally involved no more than haggling with local authorities and, in larger jurisdictions, making campaign contributions to the county supervisors or city council.

The original conception of zoning allowed homeowners considerable say over what happened in their immediate neighborhood (through notice and procedural privileges to owners of abutting land) and within their municipal boundaries, but it did not allow much influence on what happened outside the municipal boundaries. Moreover, local officials

⁴⁷ See, for example, Wachter and Green, 19 J Econ Persp at 98–99 (cited in note 29) (describing the transition of mortgage funding from depository institutions to capital markets).

⁴⁸ See Stan J. Liebowitz, *Anatomy of a Train Wreck: Causes of the Mortgage Meltdown*, in Randall G. Holcombe and Benjamin Powell, eds, *Housing America: Building Out of a Crisis* 287, 291–97 (Transaction 2009).

⁴⁹ See *id.*

⁵⁰ *Id.* at 296–304.

⁵¹ *Id.* at 291–97.

⁵² US Census Bureau, *Housing Vacancies and Homeownership, Annual Statistics: 2006*, online at <http://www.census.gov/hhes/www/housing/hvs/annual06/ann06t12.html> (visited Apr 14, 2010).

⁵³ William A. Fischel, *Zoning and Land Use Regulation*, in Boudewijn Bouckaert and Gerrit De Geest, eds, *Encyclopedia of Law and Economics* 403, 420 (Edward Elgar 2000).

usually had the last word on zoning controversies. If they approved or disapproved of a project, dissenting neighbors and groups outside of the community seldom could upset the ruling.⁵⁴

The extracommunity influences on zoning changed considerably around 1970, and most of these changes made zoning more exclusionary. The most likely impetus was, as in the original zoning laws, a change in mobility of the population.⁵⁵ The completion of the interstate highway system and the accompanying growth of automobile ownership enabled many more low-income households to get access to the suburbs.⁵⁶ This plus legal and legislative movements to “open the suburbs” gave communities an incentive to adopt nondiscriminatory, general exclusionary policies.⁵⁷ Instead of selectively excluding only fiscally unprofitable housing, communities had to downzone (make more restrictive) available land for all uses. Increased restrictiveness was facilitated by the environmental movement. The National Environmental Policy Act⁵⁸ and similar state laws provided a procedural mechanism by which nonresidents or a minority of residents could influence what was formerly a residents-only zoning process.⁵⁹ The Supreme Court of California actively promoted the new antidevelopment ethos,⁶⁰ and the state became notorious as a place where housing development had become so difficult that it pushed housing prices completely and lastingly out of line with the rest of the nation.⁶¹

The new policy of general rather than selective exclusion has important effects. It tends to drive up housing prices. Before the 1970s, it

⁵⁴ See Norman Williams, Jr, 1 *American Planning Law: Land Use and the Police Power* 75 (Callaghan rev ed 1988).

⁵⁵ See Fischel, 41 *Urban Stud* at 329–30 (cited in note 38).

⁵⁶ *Id.*

⁵⁷ See Stephen Schmidt and Kurt Paulsen, *Is Open-Space Preservation a Form of Exclusionary Zoning? The Evolution of Municipal Open-Space Policies in New Jersey*, 45 *Urban Aff Rev* 92, 110–11 (2009) (describing the municipal practice of transferring “affordable-unit obligations” to exclude lower-income individuals).

⁵⁸ National Environmental Policy Act of 1969 (NEPA), Pub L No 91-190, 83 Stat 852, codified at 42 USC § 4321 et seq.

⁵⁹ See Bernard Frieden, *The Environmental Protection Hustle* 22 (MIT 1979) (observing that the California equivalent to NEPA gave third parties the power to resist developments that could harm the environment).

⁶⁰ See Joseph F. DiMento, et al, *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Era*, 27 *UCLA L Rev* 859, 889–91 (1980) (observing that the California Supreme Court held in favor of preservationists in 86 percent of cases from 1967 to 1977).

⁶¹ See Ned Levine, *The Effects of Local Growth Controls on Regional Housing Production and Population Redistribution in California*, 36 *Urban Stud* 2047, 2054–55 (1999); William A. Fischel, *Comment on Anthony Downs’s “The Advisory Commission on Regulatory Barriers to Affordable Housing: Its Behavior and Accomplishments,”* 2 *Hous Pol Debate* 1139, 1143–46 (1991) (ruling out construction and income costs as possible explanations of skyrocketing California housing prices).

was difficult to discern the impact of zoning on general housing prices. After the 1970s, regions that had the most restrictive zoning—California and the Northeast—had the highest prices.⁶² This was not just a bubble. The bicoastal housing premium, which had not prevailed before 1970, became persistent.⁶³ The new exclusion also probably encourages metropolitan-area sprawl.⁶⁴ Developers who are frustrated by more stringent regulations in cities and suburbs do not just disappear. They set up shop in formerly rural, “exurban” locales whose politics are either prodeveloper or whose residents have not had time to set up zoning roadblocks.⁶⁵

The other major change in land use since 1970 is the use of residential private governments. Zoning had largely displaced private covenants in the first half of the twentieth century.⁶⁶ Two of the major drawbacks of covenants were their inflexibility and the difficulty of enforcing them over time. Partly because of the growth of condominiums in the 1970s, new governance institutions were developed that could be modified with less than unanimous consent and could be enforced over a long period of time. The new homeowner associations became so popular that they spread to single-family developments as well as traditional condominiums.⁶⁷ Fifty percent of all new units built in the 1980s and 1990s are subject to these new governance structures.⁶⁸

Community associations and their rules now govern a large fraction of the nation’s housing stock. Despite some hopeful forecasts, these associations have not displaced municipal zoning, at least not in

⁶² See US Census Bureau, *Historical Census of Housing Tables: Home Values* (Dec 2004), online at <http://www.census.gov/hhes/www/housing/census/historic/values.html> (visited Apr 14, 2010).

⁶³ See US Census Bureau, *New One-Family Homes Sold and for Sale: 1963 to 1967* 279, 282 (1969) (listing West Coast housing prices as below the national average); Larry Ozanne and Thomas Thibodeau, *Explaining Metropolitan Housing Price Differences*, 13 *J Urban Econ* 51, 60 (1983) (pointing out that California MSA average prices are among the highest); Karl E. Case and Robert Shiller, *Prices of Single Family Homes since 1970: New Indexes for Four Cities*, *New Eng Econ Rev* 45, 54 (Sept 1987) (concluding that house values rose as fast or faster than consumer prices during the period 1970 to 1986).

⁶⁴ See Rolf Pendall, *Do Land-Use Controls Cause Sprawl?*, 26 *Envir & Planning B* 555, 563–69 (1999) (suggesting that exclusionary zoning, such as “low-density-only zoning” and “building-permit caps,” may cause sprawl effects); Joel Garreau, *Edge City: Life on the New Frontier* 310 (Doubleday 1991).

⁶⁵ See Rolf Pendall, Ronald M. Wolanski, and Douglas McGovern, *Property Rights in State Legislatures: Rural-Urban Differences in Support for State Anti-taking Bills*, 18 *J Rural Stud* 19, 23–32 (2002); Thomas K. Rudel, *Situations and Strategies in American Land-Use Planning* 40–46 (Cambridge 1989).

⁶⁶ Fischel, 41 *Urban Stud* at 331 (cited in note 38).

⁶⁷ See Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 *Duke L J* 75, 81–85, 90–92 (1998).

⁶⁸ Robert H. Nelson, *Private Neighborhoods and the Transformation of Local Government* 28 (Urban Institute 2005) (arguing that residential private governments “may yet challenge the business corporation as the most important form of collective property ownership” in the United States).

any direct sense. Their rise may be explained by the closer proximity of neighbors to one another (most obvious in apartment-style condominiums but evident in gated, single-family communities as well) and the decline in neighborhood interactions among residents. (More discussion of this below.) Many are occupied by young households in which both adults work full-time or by retired people without children at home. Without children to look after, the pathways to meeting one's neighbors are fewer, which in turn makes the informal sanctions and give and take of neighborly interactions less effective for resolving localized problems.⁶⁹ Discovering whether a decorative statue of a flamingo on the lawn—Fennell's paradigm of a low-level neighborhood issue (p 97)—is acceptable behavior is more difficult for residents who do not know their neighbors very well, and so formal rules have to substitute for informal norms.⁷⁰

VI. PROSPECTS FOR H2.0 IN LIGHT OF H1.0

This brief survey of institutions that facilitated Homeownership 1.0 sets the stage for evaluating the political prospects and normative qualities of Fennell's Homeownership 2.0. The most general message is that twentieth-century homeownership, H1.0, was the product of both technological and political changes. The political primacy of the single-family home is largely the product of twentieth-century transportation developments that allowed for separation of work from residence. One might reasonably ask whether this condition is likely to persist in the twenty-first century. A trend that could undermine it is the nature of work itself. For a growing fraction of the labor force, work is not done in a single location. People work in offices but also in their homes and in their cars and in hotel rooms and in coffee shops. The side effects of this work are not overly bothersome to people nearby (except perhaps nearby drivers and pedestrians). If this trend increases, the demand for separation of homes along the hierarchy that traditional zoning sets up may diminish.⁷¹

Working against this trend, however, is what economists call "agglomeration economies." These are spatial scale economies: when people work in physically close (but not uncomfortably close) proximity to one

⁶⁹ See William A. Fischel, *Making the Grade: The Economic Evolution of School Districts* 227–29 (Chicago 2009) (describing the value of "community-specific social capital").

⁷⁰ See Fogelson, *Bourgeois Nightmares* at 149–50 (cited in note 34).

⁷¹ Roderick M. Hills, Jr and David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U Chi L Rev 249, 263 (2010) ("[P]eople and firms may move away from the best location from the point of view of agglomeration economies in order to obtain their desired set of city services.").

another, they become collectively more productive.⁷² These advantages (and their correlative disadvantages) are most evident in large cities. If agglomeration were becoming less important in the last twenty years, during which electronic means of “working at home” have accelerated, we would expect to see a decline in population and productivity in large cities and a decline in their share of the nation’s population as a result. There is no such sign.⁷³ A decade ago there were claims that residential colleges and universities would become obsolete as online courses displaced the need to attend classes and live on campus.⁷⁴ This did not happen. MIT developed an entire online curriculum and then priced it at the marginal cost of an additional viewer: zero.⁷⁵ Giving away its precious courses has done nothing to deter students from applying to MIT or any other selective residential university. Woody Allen’s dictum, “eighty percent of success is showing up,”⁷⁶ still produces knowing nods. I conclude that Americans will not revert to Homeownership 0.0, the nineteenth-century world in which home and work were close at hand, if not in the same place.

The more difficult question that the history of H1.0 raises is whether these institutions—zoning, financing, and private government—are the best we can do. One can think of them as the product of a mostly open political and legal system. Even if one suspects that zoning’s response to the near-nuisances of industrial location in the 1920s was not ideal, the problem (or benefit) of path dependence makes changing them too costly. The level-payment mortgage, the exclusive residential zone, the environmental impact statement, and the homeowner association are widely accepted as institutions that promote and protect homeownership. Moreover, they have evolved over the decades. Zoning originally contemplated expelling previously established nonconforming uses, but there is now an uneasy tolerance of those that do not rise to the level of actionable nuisances.⁷⁷ So it is worth asking whether Fennell’s new H2.0 institutions are likely to nudge this evolution along desirable paths or divert attention from more important issues. I offer my doubts about them in the spirit in

⁷² See Fredrik Andersson, Simon Burgess, and Julia Lane, *Cities, Matching and the Productivity Gains of Agglomeration*, 61 J Urban Econ 112, 118–26 (2007) (using empirical evidence to demonstrate that greater population density allows for more effective “matching” of firm and worker quality that, in turn, increases productivity).

⁷³ See, for example, Edward Glaeser, *Are Cities Dying?*, 12 J Econ Persp 139, 149 (1998).

⁷⁴ See Hope Katz Gibbs, *Can Distance Learning Go the Distance? How Web Browsers’ Windows Are Replacing the Continuing-Education Classroom*, Wash Post N36 (Jan 30, 1998).

⁷⁵ See Massachusetts Institute of Technology, *MIT OpenCourseWare*, online at <http://ocw.mit.edu/about/our-history/> (visited Apr 14, 2010) (offering 1,950 MIT courses online for free).

⁷⁶ See William Safire, *On Language: The Elision*, NY Times Mag 16 (Aug 13, 1989).

⁷⁷ See, for example, Weiss, *The Rise of the Community Builders* at 86 (cited in note 26).

which Fennell promotes them, a conversation about how best to improve an important institution.

Fennell's policy dimensions are divided into three areas: dealing with highly localized spillovers ("the neighborhood commons") (p 67), decisions that affect access to local government units such as municipalities and school districts ("community composition") (p 121), and selecting financial instruments that match the ability to pay and risk preferences of homebuyers ("reconfiguring homeownership") (p 171). I deal with selected issues in each of these dimensions.

In the current legal milieu, problems with the neighborhood commons are dealt with by zoning and, for a growing number of housing units, homeowner associations. The rules these institutions establish are often overprotective, and sometimes underprotective, of neighborhood ambience.⁷⁸ Both institutions have mechanisms for granting exceptions, which are the business of zoning and community association boards. The transaction costs of making them can be high.

Consider a homeowner who wants to operate a home-based hairdressing business that either zoning or association rules prohibit (pp 96–119). In order to improve her chances of getting a zoning variance, the homeowner tells her neighbors that the operations will be limited (nine to three on weekdays) and that she will charge neighborhood residents half-price for her services. She is willing to memorialize the deal in a formal document. Neighbors think this is not a bad deal but worry that the traffic from the business might become offensive to them and that her in-kind payment in services may not be satisfactory to them—quickie haircuts might have negative value. In most situations, this would squelch the deal. The zoning or community board would not grant an exception without the enthusiastic support of the neighbors.

Fennell proposes to rescue this situation. The board could grant the hopeful hairdresser an exception subject to two conditions: that she pay a tax (in this case, half-price haircuts) and that she grant the community (the neighbors) the right to withdraw her exception if they pay a predetermined price (p 103). This amounts to the hairdresser writing a call option for permission to run the business. It is an example of what Fennell calls, in one of her rare moments of infelicity, an "ESSMO," an "Entitlement Subject to Self-Made Option" (p 105). Introduction of ESSMOs into property and zoning law would go some distance toward improving the allocation of resources.

Having been on the Hanover, New Hampshire zoning board for ten years, I would have loved to have been able to offer an ESSMO to

⁷⁸ See, for example, Ellickson, 48 *Duke L J* at 81–87 (cited in note 67).

applicants for variances and special exceptions, provided we could come up with a better name for it. I would suggest “Neighborhood Contingency Agreement.” The problem Fennell points to is pervasive. My board often denied exceptions for proposals that we all thought were good ideas because they might cause some uncompensated harm to neighbors (especially if the neighbors told us they were concerned about it) or because we worried that we would not be able to call back the use if it got out of hand in some difficult-to-anticipate way. By making the option self-made (say, the hairdresser agrees that \$5,000 would be enough to shut her operation down), the problem of private valuation is mooted. She dare not set the price too high lest she not get permission to operate in the first place, nor too low lest a single cranky neighbor shuts her down. Gains from trade could be had by all.

Let me preemptively ask the Chicago Economics Department question: if this is a good idea, why has the market not already brought it forth? One answer in zoning law is that it seems to cede a police power control (zoning) from an official body (the board) to private individuals. Allowing neighbors to have the official last word (as in the Neighborhood Contingency Agreement) was in fact tried early in the history of zoning but rejected by the courts in cases such as *Eubank v Richmond*⁷⁹ and *Seattle Title Trust v Roberge*⁸⁰ as unconstitutional delegations of the police powers to private parties.

Constitutional barriers would be less in the case of private homeowner associations, and I suspect it would not take too much legal creativity to circumvent the zoning doctrines. Judicial views on “contract zoning” seem to be changing, perhaps because of the widespread acceptance of analogous devices in environmental law.⁸¹ Tradable emission permits were once condemned and ridiculed as selling the environment, but now they have become centerpieces of much environmental legislation and embraced by the environmental movement.⁸² Fennell mentions and decries the apparent hostility of the Supreme Court to open-ended bargaining (pp 73–74), but the practical effect of

⁷⁹ 226 US 137, 144 (1912) (holding that a city ordinance allowing neighbors to impose a fine on a property owner for building a house as designed was an “unreasonable exercise of the police power”).

⁸⁰ 278 US 116, 122–23 (1928) (holding unconstitutional a city ordinance that delegated neighbors the power to prohibit a property owner from building a new home on his property).

⁸¹ See *Durand v IDC Bellingham, LLC*, 793 NE2d 357, 366–69 (Mass 2003) (upholding a town’s “contract zoning” measure and noting that “contract zoning” is a generally accepted practice by courts).

⁸² See, for example, Natural Resources Defense Council, *Cap 2.0: Investing in America*, available online at <http://www.nrdc.org/globalWarming/cap2.0/default.asp> (visited Apr 14, 2010) (characterizing today’s policies as “as the next generation of climate legislation, improving on the cap-and-trade proposals of the past”).

these decisions seems modest. Communities may not “extort” exactions, but developers who want their permits will find ways to make “voluntary” contributions.

There may be a more profound problem with Neighborhood Contingency Agreements and monetizing the harms and benefits involved. Robert Ellickson found in his legal-anthropological investigations of how rural neighbors settled disputes in Shasta County, California that there was a profound hostility to using cash to even things up.⁸³ A rancher whose cow strayed onto a neighbor’s garden owed his neighbor a prompt apology and, if substantial damage had been done, some goods in kind (for example, a load of firewood) of his own choosing. But an offer to pay cash or a request for monetary damages from the victim would have seriously violated the neighborhood norms of entitlement and restitution that, Ellickson contended, tended to be economically efficient.⁸⁴

In a class discussion of Ellickson’s *Order without Law* a few years ago, I asked why “cold, hard cash” is so frowned upon as a remedy among neighbors. The answer that struck me as best (I cannot recall who said it) was that a cash settlement was too exact. It settled up debits and credits with a zero balance. And that is precisely what you do not want to have with people with whom you have an ongoing, multi-faceted relationship, unless it is avowedly commercial from the outset. Unpaid favors are part of the obligations that hold people together in long-term relationships. (This may be why holiday gift-giving persists despite its apparent inferiority to cash transfers.⁸⁵) You look after the neighbor’s toddler occasionally while her mother is on call. Doctor Mom gets you an appointment for your skin rash without having to deal with bureaucracy. You mow the neighbor’s lawn while he is away on an extended vacation. His kids shovel the snow out of your driveway while you are away. Such favors are exchanged without contemplation of exact reciprocity. No one cares what the net advantage is because the total neighborhood pie is so much larger as a result of these unsolicited favors and the security that they will continue to be forthcoming.

It is certainly not part of Fennell’s vision that H2.0 should undermine the beneficial web of neighborhood reciprocity. And it must be conceded that it can be taken too far: American novelists of the early twentieth century often had less than complementary visions of

⁸³ Ellickson, *Order without Law* at 56 (cited in note 14).

⁸⁴ *Id.* at 60–62.

⁸⁵ See Joel Waldfogel, *The Deadweight Loss of Christmas*, 83 *Am Econ Rev* 1328, 1329–30 (1993) (demonstrating that gift-giving creates deadweight loss by putting constraints on consumers that would not be present if they received cash instead).

small town life and its busybody gossips and narrow vision.⁸⁶ I raise this point to suggest that something might be lost by vigorous application of Fennell's useful legal innovation. Its advocates ought not to be too surprised if they find resistance to the idea in many quarters. It seems most appropriate to apply it in situations where the balm of local social capital is most thinly spread, as perhaps it is in the gated communities to which people retreat in order to have an unlisted life.

VII. H2.0 AND COMMUNITY COMPOSITION

Perhaps the most controversial aspect of Fennell's suggestions concerns new devices to control community composition (pp 147–69). Zoning law is couched almost exclusively in terms of building types, lot dimensions, and economic uses, but such configurations can be used to determine the social composition of a community. Indeed, promoting a desirable “community character” and maintaining the “character of the neighborhood” are often explicit in local land use documents.⁸⁷ Zoning is thus an important device for many communities to maintain an acceptable (to preexisting residents) mix of racial and economic classes.⁸⁸ Explicitly racial zoning was consistently (and, in my opinion, effectively) struck down by the courts just as zoning was spreading early in the twentieth century,⁸⁹ and racial zoning's imperfect substitute, racial covenants, was held unenforceable by the Supreme Court in 1948.⁹⁰ Nonetheless, supposedly neutral devices regarding building types, uses, and density can have a profound effect on the composition of the community.

An enormous legal and social science literature has typecast American suburbs as exclusionary fortresses whose chief defensive

⁸⁶ See generally Sinclair Lewis, *Main Street: The Story of Carol Kennicott* (Harcourt Brace 1921) (providing a satirical portrayal of a fictional small town full of petty, backstabbing residents).

⁸⁷ For example, in the 2001 Oak Park, Illinois, zoning ordinance, under a section entitled “Factors to Be Considered in Requests for Rezoning,” the first one listed is “the character of the neighborhood.” See Village of Oak Park, Illinois, Zoning Ordinance § 2.2.2(D) (Feb 2002), online at www.oak-park.us/public/pdfs/FY1/rh-zoning-ordinance-01-09-02.pdf (visited Mar 17, 2010).

⁸⁸ See, for example, Jonathan Rothwell and Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 *Urban Aff Rev* 779, 791 (2000) (observing that weak zoning regulations increase desegregation, whereas strong zoning regulations maintain racial barriers).

⁸⁹ See, for example, *Buchanan v Warley*, 245 US 60, 81–82 (1917). See also William A. Fischel, *Why Judicial Reversal of Apartheid Made a Difference*, 51 *Vand L Rev* 975, 990–91 (1998) (arguing that the *Buchanan* decision was crucial to halt the movement toward apartheid in the United States because private covenants were more costly to enforce than zoning).

⁹⁰ *Shelley v Kraemer*, 334 US 1, 20–21 (1948).

weapon is single-family zoning.⁹¹ This stereotype persists not because it is entirely true but because it is not entirely untrue. Empirical studies of suburban life indicate considerably more heterogeneity of income and housing types than the stereotype would lead one to believe.⁹² Indeed, suburbs such as Oak Park, Illinois, Montclair, New Jersey, and Shaker Heights, Ohio, appear to define themselves in part by their racial and social diversity.⁹³

Having said that, it is still undeniable that many suburban communities are homogeneously white and upper-middle class, and their developers and residents are not the least bit bothered by that. Some urban economists have argued that this outcome is both natural and efficient,⁹⁴ but I think these economists have not paid sufficiently close attention to zoning. If the pattern were natural, it would not require costly enforcement by zoning, and if it were efficient, land value disparities would not be nearly as great as they appear to be between central cities and their suburbs.⁹⁵ Zoning is the most eagerly defended local prerogative, and many suburban communities were formally incorporated precisely to wrest control over land use from a county government or forestall annexation by a more permissive jurisdiction.⁹⁶

Fennell's take on this issue is first to establish the dimensions of the problem and then to suggest additional legal tools to deal with it. Her analytical contribution is to show the dimensions of interdependence of communities. Starting from the Tiebout model, which suggests

⁹¹ See, for example, Anthony Downs, *Opening Up the Suburbs* 48–53 (Yale 1973) (arguing that the use of zoning restrictions in the suburbs raises the cost of housing to effectively price out low-income residents).

⁹² See J. Eric Oliver, *Democracy in Suburbia* 67–73 (Princeton 2001); Howard Pack and Janet R. Pack, *Metropolitan Fragmentation and Suburban Homogeneity*, 14 *Urban Stud* 191, 194 (1977) (demonstrating that the average Pennsylvania town is closer to heterogeneity than homogeneity with respect to income, age, years of education, occupation, and household type).

⁹³ See James Borchert, *Cities in the Suburbs: Heterogeneous Communities on the US Urban Fringe, 1920–60*, 23 *Urban Hist* 211, 213 (1996).

⁹⁴ See, for example, Peter Mieszkowski and Edwin S. Mills, *Causes of Metropolitan Suburbanization*, 7 *J Econ Persp* 135, 137–38, 144–45 (1993) (noting the tax, education quality, and safety benefits of high-income homogeneity).

⁹⁵ See Paul Thorsnes and John W. Reifel, *Tiebout Dynamics: Neighborhood Response to a Central-City/Suburban House-Price Differential*, 47 *J Regional Sci* 693, 707–08, 711–13 (2007); Bruce W. Hamilton, *Property Taxes and the Tiebout Hypothesis: Some Empirical Evidence*, in Edwin S. Mills and Wallace E. Oates, eds, *Fiscal Zoning and Land Use Controls: The Economic Issues* 13, 27–28 (Lexington 1975) (arguing that higher suburban housing values can be expected because suburban and city residents have divergent perspectives on property taxes and suburban residents consume a greater amount of housing).

⁹⁶ See William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* 229–59 (Harvard 2001) (describing how municipal incorporation can undercut regional planning efforts); Gary J. Miller, *Cities by Contract: The Politics of Municipal Incorporation* 130 (MIT 1981) (discussing the “politics of resource allocation” in the context of municipality incorporation battles).

that people “shop around” for community services as much as they shop for housing,⁹⁷ Fennell points out that one community’s decision about whom to include and whom to exclude affects what other communities will look like (pp 135–37). If Community X excludes apartments, apartment dwellers will have to head to Community Y or Z. In the original Tiebout model, this problem does not arise because new communities can be costlessly created to serve any taste.⁹⁸ Scholars who have subsequently built on Tiebout’s model, however, recognize that the number of communities, while often quite large, is still finite.⁹⁹ Hence one community’s decisions can affect another’s well-being, even if there are none of the classic externalities like pollution that literally spill across borders. A community that gets all of the low-income housing is apt to have more problems than others, and the concentration of poverty in a single place may create lower levels of well-being throughout the metro area than would be the case if the poor were distributed among several communities.¹⁰⁰

The policy innovation that Fennell contemplates is to apply what have usually been thought of as private remedies to the community level (p 151). For example, the Calabresi-Melamed distinction between property rules and liability rules is applied to collective entities rather than just private parties.¹⁰¹ This part of Fennell’s book is more of a mind-stretching intellectual exercise than a system of practical proposals. I explore but one application that has had some traction.

Obligations to accommodate certain types of land uses (say, apartments) are assigned to various communities in a metropolitan area. Depending on the rule applied to the obligation, communities can then trade some obligations away to other communities that would be willing to accept them if they are compensated. (Obligations not to discriminate on the basis of race or other protected categories are made inalienable.) This trading is analogous to Fennell’s ESSMO (which I renamed “Neighborhood Contingency Agreement”), except that the obligation to accept (or presumably reject) is not self-made (p 105). It would be imposed on the community by some higher government, perhaps the

⁹⁷ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J Polit Econ 416, 422 (1956) (“Spatial mobility provides the local public-goods counterpart to the private market’s shopping trip.”). Fennell ingeniously explicates and explores this model by analogizing to diners selecting restaurants (pp 30–40).

⁹⁸ See Tiebout, 64 J Polit Econ at 419.

⁹⁹ See, for example, Fischel, *Homevoter Hypothesis* at 19–38 (cited in note 96) (noting that scarce resources result in a finite number of communities); Dennis Epple and Thomas Romer, *On the Flexibility of Municipal Boundaries*, 26 J Urban Econ 307, 312–15 (1989) (observing very small boundary changes among municipalities over time).

¹⁰⁰ See Anthony Downs, *New Visions for Metropolitan America* 61 (Brookings 1994).

¹⁰¹ See Calabresi and Melamed, 85 Harv L Rev at 1105–06 (cited in note 4).

courts, as in New Jersey's Regional Contribution Agreements (p 158).¹⁰² So Community X is obliged to accept a certain number of apartments in its land use plans, but it can fulfill that obligation, at least in part, by paying some other community to accept them. Another example would be placement of environmental LULUs (locally unwanted land uses). A regional waste facility could be funded by having communities pay not to have it, with the proceeds going to the one that is willing to accept the dump in exchange for other communities' revenue.

The difficulty with these elaborate plans is less their intellectual coherence than their avoidance of a more serious problem. The problem is that local zoning allocates too little land for all uses, including housing. This withdrawal of land from available supply, and the difficulty of getting it back into play, causes housing prices everywhere to be too high and probably causes excessive metropolitan decentralization, which I would call by the pejorative term "sprawl."¹⁰³ (Not all suburban development is sprawl, though most planning commentary seems to think it is.¹⁰⁴)

The problem with Fennell's (and most other authors') attention to community composition is that it focuses on the *proportions* of various uses and housing types rather than the overall density of these uses.¹⁰⁵ If the optimal mix of housing in Community X is determined to be 50 percent single family, 25 percent duplexes, and 25 percent apartments, this mix is applied to a community of 100,000 as well as to a community of 10,000. Thus, a community of 10,000 with enough land to become a community of 100,000 has no incentive to allow any further development of single-family, market-rate housing (the 50 percent category). If it does so, it will be obliged to accept a housing stock (the duplexes and apartments) that most suburban communities find problematical.

¹⁰² See Jeffrey Rubin, Joseph Seneca, and Janet Stotsky, *Affordable Housing and Municipal Choice*, 66 *Land Econ* 325, 328–29 (1990) (observing that 24 percent of New Jersey municipalities included a Regional Contribution Agreement in their certified housing plans).

¹⁰³ See William A. Fischel, *Does the American Way of Zoning Cause the Suburbs of U.S. Metropolitan Areas to Be Too Spread Out?*, in Alan Altshuler, et al, *Governance and Opportunity in Metropolitan Areas* 151, 162–69 (National Academy 1999) (arguing that transaction costs and endowment effects induce residents in low-density suburbs to maintain the low density by instituting minimum lot sizes).

¹⁰⁴ See Robert Bruegmann, *Sprawl: A Compact History* 18 (Chicago 2005) (defining "sprawl" broadly as "low-density, scattered, urban development without systematic large-scale or regional public land-use planning").

¹⁰⁵ See *Southern Burlington County NAACP v Township of Mount Laurel*, 456 A2d 390, 421 (NJ 1983) ("Finally, once a community has satisfied its fair share obligation, the *Mount Laurel* doctrine will not restrict other measures, including large-lot and open area zoning, that would maintain its beauty and communal character.").

There is at least circumstantial evidence that many of New Jersey's 567 municipalities took this course of action. Once they reached their affordable housing quota (and sometimes before), municipalities shifted into anti-growth mode.¹⁰⁶ This could involve simple down-zoning, or the use of more complex arrangements to preserve farmland from development, often against the wishes of the farmers who own the land.¹⁰⁷ Developers who would otherwise have built housing in convenient locations within the metropolitan area have to find alternative locations that usually involve even more commuting. That this additional scarcity of housing raises housing prices in the communities that cause the scarcity suggests that there would be little internal political pressure to correct this problem.

Even under the best scenario in which communities get the ideal mix of housing, then, the total supply of housing in the metropolitan area can become excessively constrained and costly.¹⁰⁸ That this cost is imposed on would-be homeowners and renters regardless of whether they are rich or poor might offer some dog-in-a-manger solace to some, but the net effect on the poor is likely to be negative. The engineering of community composition obligations might at best result in a few showcase villages, but the side effect on the housing market at large would be unfortunate.

An alternative reform would simply focus on the density of development and use the land market. Communities would be obliged to allow so much housing per square mile of space. If a community wants to escape this obligation, it would simply pay the owners of land not to build, acquiring a public easement for farmland or buying the land outright. The developers shut out of the community would attempt to buy development rights in another jurisdiction, thereby raising the price of land there. Attempts by that municipality to buy its way out of development would become more costly, and less of it would be done. Because the landowners in the first community anticipate this, they would actually be more reluctant to sell in the first place. Thus land values would guide both communities and developers to undertake

¹⁰⁶ See Schmidt and Paulsen, 45 *Urban Aff Rev* at 110–11 (cited in note 57) (concluding that their empirical evidence from New Jersey municipalities suggests that the acquisition of local space was used to slow growth); James L. Mitchell, *Will Empowering Developers to Challenge Exclusionary Zoning Increase Suburban Housing Choice?*, 23 *J Pol Analysis & Mgmt* 119, 123–24, 131–32 (2004).

¹⁰⁷ See, for example, *New Jersey Farm Bureau v Township of East Amwell*, 882 A2d 388, 391–93 (NJ Super Ct 2005) (upholding a local ordinance challenged by farmers that increased the minimum lot size as “reasonably related to the objectives of encouraging agricultural uses and preserving farmland”).

¹⁰⁸ See, for example, Edward L. Glaeser and Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 *J Urban Econ* 265, 278 (2009).

development where it is most socially useful and leave land undeveloped where more housing would be counterproductive to that goal. No master planner has to solve a general equilibrium problem; the market would do it for her.

What I limned in the previous paragraph is an application of the regulatory takings doctrine, whose original (and still relevant) application to suburban land use excesses first was described by Robert Ellickson in a 1977 article.¹⁰⁹ The problem with using the regulatory takings doctrine is that the judiciary has failed to embrace it. I have suggested that the reason may be the lack of agreement about what types of regulations and other government activities should be subject to its discipline.¹¹⁰ My case for applying it more vigorously at the local level is that in that setting interest groups who want to promote reasonable development are largely unrepresented in local politics.¹¹¹ This distinction has not been accepted by any courts, however, and the regulatory takings doctrine in general is dormant if not moribund.¹¹²

Fennell's H2.0 offers an alternative to regulatory takings that might play better. Instead of making development-minded property owners the principals, H2.0 could give municipalities themselves incentives to pay attention to the opportunity cost of excluding development. This would require that some higher government, perhaps a state legislature, set density obligations for the metropolitan area. Communities would be assigned a quota of development rights, but a community that wanted less development could pay another community to accept it. Communities near major transportation nodes and employment centers would presumably have more to gain from higher density and would accept payment from communities in less convenient locations. One might be concerned that too many communities would prefer less development. But if that were the case, they would be forced to pay other communities more to accept development. The higher revenue from accepting more development would persuade

¹⁰⁹ Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *Yale L J* 385, 419–21 (1977) (arguing that application of the regulatory takings doctrine can ensure that the costs of government programs are not “arbitrarily imposed on one group of individuals”). See also Richard A. Epstein, *Takings* 182–83 (Harvard 1985) (discussing compensation to private landowners in exchange for public use); William A. Fischel, *Regulatory Takings* 325–68 (Harvard 1995) (investigating the remedies available for regulatory takings).

¹¹⁰ William A. Fischel, *Why Are Judges So Wary of Regulatory Takings?*, in Harvey M. Jacobs, ed, *Private Property in the Twenty-first Century: The Future of an American Ideal* 50, 55–71 (Edward Elgar 2004).

¹¹¹ *Id.* at 72.

¹¹² See John Echeverria, *From a “Darkling Plain” to What?: The Regulatory Takings Issue in U.S. Law and Policy*, 30 *Vt L Rev* 969, 974–75 (2006) (explaining that the Supreme Court has adopted a narrowing interpretation of the Takings Clause such that a regulatory taking can only occur when the economic effects are the “functional equivalent” of an actual taking).

some communities on the margin to become importers rather than exporters of housing development. Local zoning would not be compromised insofar as no community would be told to place its housing in any particular area (though presumably health and environmental regulations would not be waived so as to shoehorn homes into problematical areas). I have not thought through all the details of such a plan. I offer it primarily to illustrate the creative possibilities to which Fennell's H2.0 can lead.

VIII. H2.0 AND HOUSING FINANCE

The last set of issues that Fennell addresses relates to housing finance (pp 173–96). Her insight is that the standard mortgage package does not fit all customers. By allowing homebuyers to decide what fraction of the risk they want, homes can be made more affordable. This is not a spatial division—homeowners cannot reduce their “out-of-community risk” but keep the “within-community risk.” They can, however, offload some fraction of their risk and put their remaining assets in a more diversified portfolio (p 193). This would open up homeownership (albeit in a more limited package) to people not inclined or able to buy the entire standard package. A secondary benefit (what I once thought of as the primary benefit) is that homeowners would be less nervous about local zoning and other community changes and thus be less inclined to join the NIMBY (“not in my backyard”) crowd when a probably-but-not-certainly beneficial land use change is proposed in their neighborhood.¹¹³

The biggest barriers to adopting these kinds of reforms are the lack of a neighborhood housing index and (more recently) the loss of confidence in financial derivatives, especially derivatives based on the housing market.¹¹⁴ I do not foresee these becoming less of a problem for several years, but then I did not foresee that the Case-Shiller housing price indices would be a viable product.¹¹⁵ Fennell expresses some concern that buyers of homes with reduced equity risk will become less vigilant “homevoters,” to use my term (p 190). The virtue of having all of one's financial eggs in a single basket (one's home) is that, as

¹¹³ See William A. Fischel, *Why Are There NIMBYs?*, 77 *Land Econ* 144, 145 (2001) (arguing that NIMBYs are caused by the lack of homeowner insurance to protect against negative neighborhood effects).

¹¹⁴ See Fischel, *Homevoter Hypothesis* at 269–70 (cited in note 96) (discussing “risk anxiety” in the context of home values).

¹¹⁵ See Karl E. Case, Robert J. Shiller, and Allan N. Weiss, *Index-Based Futures and Options Markets in Real Estate*, 19 *J Portfolio Mgmt* 83, 86–91 (1993) (proposing the introduction of real estate derivative markets as a way to “smooth out the business cycle and allow more rational, even-keel planning in all walks of life”).

Mark Twain once observed, it gives one a strong incentive to “watch that basket.”¹¹⁶ If H2.0 encourages many people to opt out of much of the basket, they may become less irrational about neighborhood change, but they might also be less inclined to vote in the school board election or protest a change that really is bad for the community.

This concern seems not worth worrying about for two reasons. One is that, as Fennell mentions, there would be a self-selection by people toward arrangements for which they had a comparative advantage. Investors in housing derivatives would be those who could monitor local conditions and lobby for value-enhancing community services (p 194). A family that took an active interest in its local schools would be more likely to take a long position in its home, too. Households that just wanted shelter and had little interest in community affairs would probably take a smaller equity position in their own homes, especially if housing derivatives became so popular that ordinary investors could take diversified equity positions in other people’s homes.

The other reason for my lack of concern is that I suspect that housing derivatives would not be especially popular, a possibility Fennell also mentions (p 196). Most people will continue to buy homes in which they hold the full equity position themselves. I take this from the lessons about the “reverse mortgage” experience. Several years ago, a controlled experiment offered older homeowners the opportunity to gradually cash in on their home equity.¹¹⁷ The flow of payments could relieve property tax burdens or allow them to consume other goods. The response was surprisingly tepid, and the reason was summarized in the title of a paper evaluating the experiment, “But They Don’t Want to Reduce Housing Equity.”¹¹⁸ Contrary to the standard life-cycle economics model, older homeowners appear pretty happy with what seems like excessive amounts of their wealth tied up in housing. This does not prove that a program that would allow younger households to acquire a more diversified portfolio would not work, but it does not augur well for the prospects of shared equity mortgages and related diversification strategies in the housing market. Homeownership, like marriage, is an institution that is hazardous to trifle with.

¹¹⁶ Mark Twain, *Pudd’nhead Wilson and Those Extraordinary Twins* 130 (Harper 1894).

¹¹⁷ See generally Steven F. Venti and David A. Wise, *But They Don’t Want to Reduce Housing Equity*, in David A. Wise, ed, *Issues in the Economics of Aging* 13 (Chicago 1990).

¹¹⁸ Id at 26 (arguing that even elderly families with low wealth are uninterested in cashing in on their housing equity due to high transaction costs).

CONCLUSION

The thesis of this Review has been that homeownership is an adaptive, evolving institution. By looking back at how and why Homeownership 1.0 evolved, we can better appreciate Professor Fennell's forward look to Homeownership 2.0. I have argued that owning and occupying a home that is physically and emotionally distant from one's place of work is a twentieth-century invention. A number of institutions developed specifically, though often not consciously, to accommodate and promote that institution. Municipal zoning, independent suburbs, level-payment mortgages, and privately governed homeowner associations developed in large part to deal with the owner-occupied home.

This perspective both deflates and promotes Fennell's project. On the one hand, if one thinks of her ideas as a revolutionary agenda, my account of the history of homeownership reads like a put-down: been there, done that. The homeownership institutions that Fennell would seem to want to change radically are themselves the product of important changes and deserve more respect by modern commentators.

On the other hand, the perspective in this Review offers considerable optimism for Fennell's program if one sees it as a set of incremental improvements. This is actually what Fennell seems to have in mind. While the term Homeownership 2.0 invokes the idea of a computer operating system, in which (we laity assume) all parts have to be working in concert for any of them to work, her discussion of each idea takes each part as potentially independent of one another. Ideas that would help resolve neighborhood conflicts (her ESSMO, my Neighborhood Contingency Agreement) would be helpful even if nothing is done to give homebuyers better ways to spread the risks of homeownership. Reforms that would deal with exclusionary zoning do not depend on finance reforms. Like most successful reforms, the segue to Homeownership 2.0 can be done incrementally.

This is not to say that the elements of H2.0 lack complementarity. If more homeowners were able to assume the financial risks that best suited their circumstances, at least some of the community-wide and intraneighborhood anxieties of ownership would be allayed. A more moderate stake in one's home might make homevoters more open to social changes and legal experiments that could affect their homes' value. The virtue of seeing these proposals as a whole, which is the reason Fennell puts them together in a book, is to make scholars and practitioners aware that what might seem like a strange innovation is actually part of the evolution of property law.