

# The Dark Side of Town: The Social Capital Revolution in Residential Property

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The theory of social capital has pervaded property law, with scholars and policymakers advocating laws and property arrangements to promote social capital and relying on social capital to devolve property governance from legal institutions to resident groups. This Article challenges the prevailing view of social capital's salutary effects with a more skeptical account and examination of the dark side of residential social capital—its capacity to effectuate local factions and promote restraints and inegalitarianism that close off property. I introduce a set of claims about social capital's dark side in residential property and explore these points through the examples of local racial purging, land cartels, and residential self-governance. First, contrary to the assumption of social capital deficits, residential racial segregation and land cartelization, perhaps the deepest imprints on the American property landscape today, suggest an abundance of local social capital and possible unintended consequences of interventions to build social capital. Second, “governing by social capital,” or relying on social capital for property self-governance, may empower factions, breed conflict, and increase the demand for residential homogeneity as a proxy for cooperation. In light of the pitfalls of social capital engineering, the mixed evidence for social capital's benefits, and its sizeable dark side, the more pressing and productive role for property law is not to promote social capital, but to address social capital's negative spillovers and illiberal effects.

In 2007, accompanied by a firestorm of publicity, Robert Putnam claimed that residential racial diversity causes declines in social capital.<sup>1</sup> Social capital is a prominent theory, popularized by Putnam, of the aggregate value of citizen participation in associations and organizations, social ties and networks, civic engagement, trust, and norms of reciprocity.<sup>2</sup> In a study of forty-one U.S. communities, Putnam found that people living in racially diverse communities were less likely to work on a community project or volunteer, less likely to expect others to cooperate to solve collective problems, reported lower trust in others, had fewer close friendship ties, expressed less confidence in local government, and registered to vote less frequently.<sup>3</sup> Most provocatively, Putnam found a strong “hunker[ing] down” effect, contrary to

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<sup>1</sup> See Robert D. Putnam, *E. Pluribus Unum: Diversity and Community in the Twenty-first Century*, 30 SCANDINAVIAN POL. STUD. 137, 144, 149–50 (2007) (studying roughly 30,000 individuals drawn from forty-one U.S. communities).

<sup>2</sup> See ROBERT D. PUTNAM, *BOWLING ALONE* 19 (2000).

<sup>3</sup> After controlling for a host of variables at both the census-tract and individual-level, including age, ethnicity, education, affluence/poverty, language, residential mobility, citizenship, commuting time, homeownership, region, gender, financial satisfaction, work hours, crime, population density, and income inequality, there were reductions in

both the constrict and contact hypotheses of integration, where racial diversity caused residents of diverse communities to withdraw from social and civic life and report lower trust in members of other races and of their own race.<sup>4</sup> Unsurprisingly (to all but Robert Putnam it seems), his research provoked a torrent of political commentary and academic response. Conservative commentators argued that this research called into question the value of racial mixing, headlines trumpeted the conclusion that “greater diversity equals more misery,” and Putnam’s research featured in a recent amicus brief as evidence against the value of affirmative action in college admissions.<sup>5</sup> Sociologists and economists reanalyzed Putnam’s data and conducted their own empirical studies to assess his findings (these studies indicate that the diversity decrement is statistically significant, but small). Legal scholars accepted, albeit unhappily, the conclusion that racial diversity diminishes local social capital.<sup>6</sup>

Curiously, in the handwringing about the harms to social capital and the ensuing debate and flurry of empirical work, no one questioned whether the problem was *social capital*. From a property scholar’s perspective, one plausible interpretation of the correlation between high social capital and low diversity is that high social capital reduces the costs of excluding minorities (i.e.,

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social capital as high as 30–50% for the most diverse communities compared to the least diverse. See Putnam, *supra* note 1, at 148, 151–52.

<sup>4</sup> See *id.* at 147–49.

<sup>5</sup> See Brief of Abigail Thernstrom *et al.* as Amici Curiae Supporting Petitioners at 11–13, *Fisher v. Univ. of Tex.*, No. 11-345 (U.S. May 29, 2012) (arguing that Putnam’s research reveals social harms that do not support contact theory and the claimed benefits to diversity). But see Brief of Dr. Robert D. Putnam as Amicus Curiae in Support of Respondents at 11 {AU: suggested pincite}, *Fisher v. Univ. of Tex.*, No. 11-345 (U.S. Aug. 13, 2012) (claiming long-term benefits of diversity not captured by his recent data). See also David Brooks, Op-Ed, *The End of Integration*, N.Y. TIMES, July 6, 2007, at A15; Georgie Anne Geyer, *The Case Against Multiculturalism*, Free Republic, August 14, 2007, available at <http://www.freerepublic.com/focus/f-news/1881086/posts>; Michael Jonas, *The Downside of Diversity*, BOS. GLOBE, August 5, 2007, at D1, D3 (describing reaction of conservative think tank the Manhattan Institute and describing Putnam’s “inconvenient truth”); Ilana Mercer, Op-Ed, *Greater Diversity Equals More Misery*, ORANGE COUNTY REG., July 22, 2007, available at <http://www.ocregister.com/opinion/putnam-59065-diversity-social.html> (“When an academic ‘discovers’ what ordinary mortals have known for eons, it’s called science.”).

<sup>6</sup> See Raymond H. Brescia, *Capital in Chaos: The Subprime Mortgage Crisis and the Social Capital Response*, 56 CLEV. ST. L. REV. 271, 280 (2008) [hereinafter Brescia, *Capital*] (citing Putnam’s work on racial and ethnic diversity and stating that “[i]n more heterogeneous communities, social capital is harder to develop.”); Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 1014–15 (2010) [hereinafter Ellickson, *Mixed-Income Housing*]; Nicole Stelle Garnett, *The People Paradox*, 2012 U. ILL. L. REV. 43, 43–52 (2012); James A. Kushner, *Urban Neighborhood Regeneration and the Phases of Community Evolution After World War II in the United States*, 41 IND. L. REV. 575, 600 (2008) (noting that “the politically correct rhetoric that we celebrate diversity fails to reflect the Nation’s beliefs”); Florence Wagman Roisman, *Living Together: Ending Racial Discrimination and Segregation in Housing*, 41 IND. L. REV. 507, 519 (2008) (describing scholarly and popular reaction to Putnam’s research); Peter Schuck, *In Diversity We (Sorta) Trust*, AM. LAWYER, Dec. 2007, at 83–84 (describing Putnam’s research as “very important in providing a firm empirical confirmation of what many close students of diversity thought we already knew.”).

the non-dominant race in a community) and maintaining racial homogeneity.<sup>7</sup> Holding preferences for racial homogeneity constant and positive, there may be reverse causation: high social capital, in the form of close social networks and strong tastes for organizational participation and voluntary action, may facilitate community organizing to exclude by race or class through both informal and legal mechanisms.<sup>8</sup> The motivation for exclusion may be preferences for homogeneity, increased property values from exclusionary land use policies that limit supply, or in predominantly minority, lower-income areas, concerns that white gentrification will make housing unaffordable. Conversely, low social capital may make it difficult for residents to organize to exclude and may result in greater racial fractionalization. Of course, the effect of social capital may be partial: ex ante residential sorting occurs on the basis of race, a baseline of racial homogeneity may grease the wheels of exclusion, and in racially diverse areas, which are disproportionately low-income, low social capital may reflect resident discontent with economic entrapment in low-status neighborhoods.<sup>9</sup>

The point of this discussion is not to establish a definitive, exclusive, or even likely explanation for the finding of a negative correlation between diversity and social capital. There are multiple possible explanations and potential omitted variables in that research. The aim of this thought experiment is to illustrate how social capital can close off property, including by reducing the overall supply or, as in the hypothetical above, constraining who may access the supply. Rather than concern about diversity's harm to social capital, perhaps we should be concerned about social capital's harms to diversity and to residential property.

Social capital is an influential theory of the value of participation in associations and organizations, social ties and networks, civic engagement and voting, trust, and norms of reciprocity to local and national economic and political flourishing. Putnam analogizes social capital to more traditional forms of capital: “[w]hereas physical capital refers to physical objects

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<sup>7</sup> High social capital could be randomly distributed or more likely endogenously related to other community features, or the result of high social capital types sorting communities with like-minded residents. In practice, it is likely that this effect is strongest in predominantly white communities as middle and upper-class whites generally tout high social capital scores—a fact which raises the question of an omitted variable effect. *See* Part I.B.

<sup>8</sup> For example, exclusionary zoning may work most effectively in communities with high social capital that can not only zone ex ante but hold the line against developers' efforts to circumvent zoning. *See* Part II.B.

<sup>9</sup> Assume that all whites are equally prejudiced but only some are able to live in homogenous communities. Whites in diverse communities may express greater distrust of blacks or other minorities because their prejudice is more salient in a diverse community and they may express greater distrust of other whites because of their frustration with their living situation. Also, selection into diverse communities, which are often lower-status and wealth, may reflect lower ex ante social capital that limits access to information about other housing opportunities and reduces capacity for the stresses of relocation.

and human capital refers to properties of individuals, social capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them.”<sup>10</sup> Social capital exponents claim that social capital operates as a group-level positive externality that promotes economic growth, better health and education outcomes, and, more tautologically, collective action and democratic participation.<sup>11</sup> While not blind to the potential ill effects and negative externalities of social capital, Putnam and other social capitalists advance social capital as a positive public good and indicator of community prosperity.<sup>12</sup> Local social capital is principally a theory of social cohesion, or bonding capital, and the capacity of residential groups to produce public goods without the guiding hand of state or Keynesian intervention—a social science-infused theory of residential *gemeinschaft*.<sup>13</sup>

In the past decade, there has been a remarkable ascendance of social capital theory in property scholarship and law, a trend that has not been examined to date.<sup>14</sup> The underspecified and encompassing nature of social capital makes it simultaneously attractive to property scholars and dangerous to theory—part of the appeal of social capital is that it is capacious enough to justify a breadth of agendas.<sup>15</sup> Property scholars have become enthusiastic social capitalists,<sup>16</sup> writing about how home mortgage reform, land use law, homeownership, block-level

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<sup>10</sup> See PUTNAM, *supra* note 2, at 19.

<sup>11</sup> See *id.* at 289–90.

<sup>12</sup> See generally *The Saguaro Seminar: Civic Engagement in America*, Harvard Kennedy School, <http://www.hks.harvard.edu/saguaro/> (describing social capital policy initiatives, community-building, and research); ELINOR OSTROM, *GOVERNING THE COMMONS* (1991).

<sup>13</sup> Unlike Putnam, other sociological theories of social capital focused on status and power differences in their social capital construct and analyses. See, e.g., JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 300–18 (1990). Pierre Bourdieu, an earlier theorist, conceptualized social capital as an individual asset generated by not only personal and group ties but institutionalized relationships, impersonal networks of material or cultural exchange, and class-based social status distinctions. See Pierre Bourdieu, *The Forms of Capital*, in *HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION* 241, 248–49 (John G. Richardson ed., 1986).

<sup>14</sup> Beyond property, legal articles in fields ranging from federalism to family law have considered how law can increase social capital. See, e.g., Jason Mazzone, *The Social Capital Argument for Federalism*, 11 *S. CAL. INTERDISC. L.J.* 27, 42 (2001); Jason Mazzone, *Towards a Social Capital Theory of Law: Lessons from Collaborative Reproduction*, 39 *SANTA CLARA L. REV.* 1, 60–75 (1998) (arguing that family law should maintain family, rather than community, social capital); Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 *U. PA. L. REV.* 2055, 2063 (1996).

<sup>15</sup> For example, William Fischel maintains that local public schools, unlike voucher schools, enhance the flow of information and collective action by building social capital among geographically proximate parents, while Margaret Brinig and Nicole Garnett contend that extending voucher-based education to private Catholic schools increases social capital and collective efficacy areas surrounding parish schools. See William A. Fischel, *Why Voters Veto Vouchers: Public Schools and Community-Specific Social Capital*, 7 *ECON. OF GOVERNANCE* 109, 113–16 (2006); Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 *NOTRE DAME L. REV.* 887, 925–28 (2010).

<sup>16</sup> I use the term social capitalist descriptively to refer to exponents of social capital, not to suggest a perfect parallel with economic capitalism or capital.

governance and neighborhood governance, school finance, process restrictions on eminent domain, and laws governing common interest communities can promote, or capitalize upon, social capital.<sup>17</sup> Social capital has also had far-ranging influence over property policy, with local zoning and planning for social capital, federal Hope VI funding for low-income housing requiring social capital-enhancing design features, homeownership subsidies justified on the basis of social capital, experiments with “neighborhood direct democracy” and block associations, and World Bank development policy to build social capital.<sup>18</sup> Nobel prize winner Elinor Ostrom has been an influential proponent of the importance of social capital to avoid tragedies of the commons and enable successful community governance of natural resources.<sup>19</sup>

There are two threads to the account of social capital in the property literature. First, property law should promote social capital in residential communities on the theory that robust social capital benefits local institutions and, in some accounts, spills over to advantage national democracy and economic growth. Property law can affirmatively build social capital by promoting interpersonal interaction, mutual reliance, or residential tenure and stability—at which point law should recede.<sup>20</sup> Alternatively, the omission or downscaling of law encourages cooperation and lessens the risk that ham-handed laws will suffocate the delicate shoots of growing social capital.<sup>21</sup> Second, and somewhat circularly, social capital fuels successful property institutions and enables devolution of governance and public and private goods provision to resident groups.<sup>22</sup> The unifying strand of these narratives is that social capital, properly nourished, produces positive externalities in an acceptably, if not perfectly, egalitarian

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<sup>17</sup> See, e.g., Lisa T. Alexander, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law*, 63 HASTINGS L.J. 803, 825–26 (2012); Brescia, *supra* note 6, at 273; Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 83-84 (1998) [hereinafter Ellickson, *New Institutions*]; Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 530–43 (2006) (exploring how local land use law affects urban social capital); Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 588 (2002) (arguing that developer-created laws governing common interest communities and common regulatory practices of homeowners’ associations chill needed social capital); Asmara Tekle Johnson, *Correcting for Kelo: Social Capital Impact Assessments and the Re-Balancing of Power Between “Desperate” Cities, Corporate Interests, and the Average Joe*, 16 CORNELL J.L. & PUB. POL’Y 187, 191 (2006) (proposing a Social Capital Impact Assessment prior to a taking).

<sup>18</sup> See Matthew F. Filner, *The Limits of Participatory Empowerment: Assessing the Minneapolis Neighborhood Revitalization Program*, 38 ST. & LOC. GOV’T REV. 67, 67–70 (2006); see generally *infra* Part I.A.

<sup>19</sup> See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 2–21 (1991).

<sup>20</sup> See, e.g., ROBERT C. ELICKSON, *ORDER WITHOUT LAW* 269-72 (1994).

<sup>21</sup> Franzese, *supra* note \_\_, at 588; Elinor Ostrom, *Social Capital: A Fad or a Fundamental Concept?*, in *SOCIAL CAPITAL: A MULTIFACETED PERSPECTIVE* 172, 182 (Partha DasGupta & Ismail Serageldin eds., 2000).

<sup>22</sup> See Ellickson, *New Institutions*, *supra* note \_\_, at 83-84;. Franzese, *supra* note \_\_, at 589-90.

manner and decreases the need for legal institutions and the state. Following Putnam, property scholars take a functionalist (and tautological) approach: social capital is present when positive effects accrue.<sup>23</sup> Notably, there appears to be no upward bound on the amount of social capital deemed optimal for communities. The implicit message of social capital is more is always better.

In this Article, I advance a skeptical view of the benefits of local social capital. My critique of social capital focuses on “bonding capital,” the far more ubiquitous and theoretically central form of social capital (I employ the terms social capital and bonding capital interchangeably throughout the paper). Such social capital is at the core of effectuating, and in sometimes creating, local factions with interests contrary to the public interest and rights of other citizens that so concerned Madison in Federalist 10.<sup>24</sup> Networks, reciprocity, trust, tastes for participation, and social ties facilitate factional collusion to restrain residential property supply and to act on pre-existing preferences for illiberal exclusion.<sup>25</sup> Moreover, social capital can also create or heighten such preferences as collective action escalates individual commitments and dense, reciprocal ties lock in bad norms and stifle dissent. The deepest imprints on the residential property landscape—racial segregation and land cartels—illustrate social capital’s pervasive dark side and call into question the view of a social capital deficit that law should remedy.

The enthusiasm for social capital has also obscured tradeoffs in the allocation of property governance to residential groups. Governing through social capital can deliver cost-savings and benefits of local knowledge, but it may also directly empower factions, confine social exchange, and increase the demand for homogeneity.<sup>26</sup> Devolving governance and public goods provision to residents ratchets up the importance of cooperation in the face of inflated, but widely held, perceptions that similar others cooperate best (in recent years, promoting social capital has

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<sup>23</sup> Putnam’s fourteen-item composite measure does not adequately separate the determinants of social capital from its consequences. Other definitions of social capital are also riddled with conceptual ambiguity and circularity, *see, e.g.*, Michael Woolcock, *The Place of Social Capital in Understanding Social and Economic Outcomes*, 2 CAN. J. POL’Y RES. 11, 13 (2001) (circular definition of social capital as “the norms and networks that facilitate collective action.”); *see also* Portes, *supra* note \_\_, at 19 (that social capital “leads to positive outcomes, such as economic development and less crime, and its existence is inferred from the same outcomes.”).

<sup>24</sup> I thank Bruce Ackerman for his helpful insights and comments on factions and social capital.

<sup>25</sup> *See, e.g.*, James DeFilippis, *The Myth of Social Capital in Community Development*, 12 HOUS. POL’Y DEBATE 781, 792 (2001) (ethnic enclaves “completely close[] off the market, and access to the market, to anyone who is not part of the ethnic group creating the enclave.”).

<sup>26</sup> This happens in formal institutions and organizations as well, but subject to thicker legal constraints.

verged perilously close to engineering residential racial homogeneity). Social-capital mediated governance may also encourage illiberal internal distributions of property and governance roles when class- and characteristic-based social status serves as a quick and dirty allocation device to reduce the overwhelming coordination costs of collective action.<sup>27</sup>

Social capital has masked these issues in its sunny language of sociability and the promise that sufficient social capital self-corrects its own harms to a substantial degree. An antidote to harmful private-regarding norms and Madisonian factions is to build more expansive and encompassing communities of interest and mutual obligation. Social capital claims this solution in the form of “bridging ties” across social and geographic divides which ostensibly inculcate public-regarding orientations and tolerance of diversity (and if this doesn’t occur it is because more social capital must be fostered).<sup>28</sup> Yet, we know little about how to build bridging ties in a way that will prevent or mitigate negative externalities from local social capital. And there is no evidence that diffusely constructed social capital, if achieved, will reliably trump tighter-knit bonding social capital or that bridging ties won’t morph into bonding capital.

In developed market economies with established legal institutions, relying on social capital to regulate residential property or sustain community-governed property institutions may be a second-best solution, at least in the absence of constraining laws and supportive institutions. Rather than diminishing the role of law, abundant social capital may *increase* the need for legal safeguards and, in some cases, the desirability of formal institutions. This is not to dismiss the work of Elinor Ostrom or Bob Ellickson but rather to suggest that devolution from law and formal institutions to self-governing groups requires a fuller accounting, one that includes social capital’s costs to residential life, property supply, liberalism, and inclusion. The recent enthusiasm for social capital-building and informal micro-governance may be a step backward to closed and private-minded societies—what Ferdinand Tönnies described as *gemeinschaft*—that limit social exchange and sacrifice social progress and innovation for insularity.<sup>29</sup>

A question remains: are the problems I describe due to social capital or bad norms? The answer is both. The ill effects of social capital derive most frequently from its instrumental capacity to effectuate bad norms and socially harmful motivations. In the residential context,

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<sup>27</sup> These points may underlie Carol Rose’s critiques of non-egalitarianism in Ostrom’s commons. See Carol M. Rose, *Ostrom and the Lawyers: The Impact of Governing the Commons on the American Legal Academy*, 5 INT’L J. OF COMMONS 28, 44 (2011).

<sup>28</sup> See PUTNAM, *supra* note 2, at 22-24 (discussing bridging ties).

<sup>29</sup> See FERDINAND TÖNNIES, *COMMUNITY AND CIVIL SOCIETY* 30, 48 (Jose Harris ed., 2001).

Americans' excessive, undiversified investment in homeownership does not reliably inculcate extra-local civic virtue and the norms attached to residential property imperfectly and inconsistently address broader social obligations and public citizenship.<sup>30</sup> Social capital can also *produce* bad norms in two ways. First, it can create socially harmful preferences or bad norms through the process of cooperating in repeated, often ideologically binding interactions (the very promise of social capital).<sup>31</sup> There is a wealth of evidence that forming or strengthening “in-groups” creates in-group favoritism, biases beliefs in favor of the group’s interests, and yields more extreme group action.<sup>32</sup> Second, social capital reifies self-interested activity at the expense of broader public-regarding conceptions of the local resident-citizen role (contrary to Madison, the problem of uncontrolled factions may not be due to small republics so much as “small republic thinking”). Broader social obligations are less pressing, and the tradeoffs between group benefits and public harms less troubling, because local working-together yields national dividends.

Implicit in my account is a more skeptical assessment of the claimed benefits of cohesive social capital to residential communities. After almost three decades of research, we know little about how to promote or extract positive social capital through property law or residential configurations—many attempts at social capital engineering have been fumbling and ill-fated.<sup>33</sup> There is a sense, undoubtedly correct, that social ties, informal cooperation, and altruism within parent groups, congregations, extended families, and other groups can have social value. However, it is a leap from these voluntary, organic examples of social capital, often subject to thicker constraints or occurring in areas where government non-involvement is pivotal to social or personal identity, to relying on social capital’s beneficial effects to devolve property governance or structure property law.

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<sup>30</sup> See WILLIAM FISCHER, THE HOMEVOTER HYPOTHESIS 10–20 (2005).

<sup>31</sup> Another harm is from “downward leveling norms” in poor but solidaristic communities that impede individual economic advancement. See, e.g., Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANN. REV. SOC. 1, 17 (1998).

<sup>32</sup> See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 184 (1962); IRVING L. JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES 40–47 (1972); CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITED AND DIVIDE 2–5 (2009).

<sup>33</sup> See Part I.B. Other examples include urban renewal intended to create more socially healthy neighborhoods and mixed-use zoning to build social capital that appears to increase crime. See Robert Sampson & Stephen Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 603–11 (1999).

The Article proceeds as follows. Part I describes the rise of social capital theory in residential property law and examines the empirical case for social capital. Part II considers the potential unintended consequences of unconstrained social capital promotion through the examples of racial and economic segregation and land cartels. Part III argues that devolution to resident groups, or governing by social capital, can empower factions and increase the demand for residential homogeneity. To make my analysis more concrete, I consider proposals for neighborhood direct democracy programs, block-level associations, and legal reform of common interest communities. Part IV concludes that residential norms and roles offer weak constraints against social capital's negative externalities. Part V considers the role of law with respect to social capital, including a disaggregated view of social capital, and addresses objections to my account. Notably, if social capital, and correspondingly my account of its negative externalities, still proves too vague or tautological, then we need to turn from social capital and direct legal responses to context-specific harms and benefits.

## **I. The Social Capital Revolution in Property Law**

With his evocatively titled book *Bowling Alone*, Robert Putnam catapulted the theory of social capital to international fame. Social capital is the most recent iteration in a recurrent intellectual history of theories of solidaristic residential community—and laments of community lost.<sup>34</sup> Putnam lauds diverse “bridging social capital”, yet his work, and its uptake in the social science and legal literature, focus on dense and insular “bonding capital” and its positive, causal role in local and national outcomes.<sup>35</sup> The major measurement tools for social capital emphasize tight-knittedness, social interaction, and participation of the type that often occurs in cohesive groups and communities.<sup>36</sup> In particular, the generation and deployment of social capital lends itself to face-to-face interaction and organization at the local and sub-local level, where many

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<sup>34</sup> See ROBERT J. SAMPSON, GREAT AMERICAN CITY 44–45 (2011) (describing social capital as part of a longstanding intellectual history of theories of community lost and an “ideology of community lament” that has impeded serious sociological inquiry).

<sup>35</sup> See PUTNAM, *supra* note 2, at 21–22; CITIZENDIUM CITIZEN COMPENDIUM, THE SOCIAL CAPITAL FOUNDATION, available at [http://www.socialcapital-foundation.org/TSCF/aboutus\\_citizendum.htm](http://www.socialcapital-foundation.org/TSCF/aboutus_citizendum.htm) (social capital is the “semantic equivalent to the spirit of community.”); see also Robert D. Putnam, *The Prosperous Community: Social Capital and Public Life*, 13 AM. PROSPECT 35, 36 (1993) (“Working together is easier in a community blessed with a substantial stock of social capital.”).

<sup>36</sup> Over three-quarters of the items in Putnam’s fourteen-item index capture, at least in part, local social cohesion. See Measurement of Social Capital, Social Capital Research, available at <http://www.socialcapitalresearch.com/literature/operationalisation/measurement.html>. Alternative measures from other researchers and the World Bank similarly emphasize the context of the local community. See *id.*

theorists claim social capital (*i.e.*, bonding social capital) plays its strongest role.<sup>37</sup> Accordingly, my critique of social capital focuses on bonding capital. Bridging social capital is not immune from misuse (certain wars come to mind) or theoretical underspecification. However, on balance, bridging ties appear a less potent contributor to residential social ills and have some potential to reduce illiberal exclusion, faction escalation, and anomie, points I return to in Part V.

The modern-day resonance of cohesion-based social capital has deep roots in nineteenth and twentieth century thought. Ferdinand Toennie's 1887 theory of *gemeinschaft* elaborated the defining features of tight-knit, ideologically homogenous communities characterized by "natural will" and regulated informally by social bonds (*gemeinschaft*) and compared them to atomistic, diverse "associations" governed by rules and regulated competition (*gesellschaft*).<sup>38</sup> Durkheim, a founder of sociology, explored group life in his work and traced the evolution of societies from mechanistic, in-group solidarity to organic solidarity focused more strongly on the rights of individuals.<sup>39</sup> Almost a century later, the Solidarity movement in Poland, rooted in a trade union that advocated sweeping social reform, declared the primacy of communal social relations in opposition to both state and market.<sup>40</sup> Early discourse on social capital and community in America pursued similar themes of cohesiveness and engagement within local civil society. In 1835, De Tocqueville, now termed "the patron saint of social capitalists," posited that the high level of associational activity in America fostered civil society and democracy.<sup>41</sup> In 1916, state supervisor of rural schools L.J. Hanifan, later influential in the Social Center Movement, introduced the term social capital as "goodwill, fellowship, mutual sympathy and social intercourse among a group of individuals and families who make up a social unit . . . ."<sup>42</sup> Subsequently, the Community Studies Movement of the mid-twentieth century expanded on this

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<sup>37</sup> See Part I.A.

<sup>38</sup> Although Toennie argued that *gemeinschaft* was the "childhood of humanity" and *gesellschaft* its maturity, this point has been largely overlooked in the subsequent incorporation of *gemeinschaft* into communitarian movements. See Steven Brint, *Gemeinschaft Revisited: A Critique and Reconstruction of the Community Concept*, 19 SOC. THEORY 1, 2 (2001).

<sup>39</sup> See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1893).

<sup>40</sup> See Brint, *supra* note 38, at 1. In recent years, the European Union has made social cohesion a goal, both across the EU and within residential communities. See Kath Hulse & Wendy Stone, *Social Cohesion, Social Capital, and Social Exclusion*, 28 POL'Y STUD. 109, 117 (2007).

<sup>41</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1945).

<sup>42</sup> See Lyda J. Hanifan, *The Rural School Community Center*, 67 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 67, 130 (1916).

conception of cohesion in residential communities and explored how participation and collective symbols create “place identity.”<sup>43</sup>

### A. Social Capital in Property Theory and Policy

In the past decade, social capital has ascended to property theory as an aim of property law and, somewhat circularly, a prerequisite for successful property institutions and group self-governance.<sup>44</sup> If the classic Lockean debate is whether property predates government (thus that government’s purpose is to protect property), the question now is whether social capital precedes property, or the converse. The accounts in the property scholarship accept the validity of social capital and endorse its narrative of positive effects.<sup>45</sup> They differ, however, in the ideological bases of their affinity for social capital and whether proposals focus in earnest on social capital, as is often the case, or instead deploy social capital to substantiate other agendas. As in the broader discourse, the uptake of social capital into property law has focused on social capital accumulation through group cooperation and social cohesion.<sup>46</sup> It is this sort of social cohesion, the refrain goes, that promotes effective property governance, non-state resolution of collective action problems, and voluntary local production of public goods.<sup>47</sup> Sometimes there is a Mayberry retrospective flavor to these accounts where individuals, powered by their own social capital, not only produce positive externalities for communities but also lead more psychologically fulfilling lives.<sup>48</sup>

Proposals abound for how to promote social capital through property law, with scholars variously positing roles for land-use law, mixed-use zoning, social capital impact assessments of proposed land use change or eminent domain, homeownership subsidies, foreclosure relief,

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<sup>43</sup> Brint, *supra* note 38, at 6. For a classic work in the community studies movement, see LLOYD W. WARNER & PAUL S. LUNT, *THE SOCIAL LIFE OF A MODERN COMMUNITY* (1941).

<sup>44</sup> See *supra* notes 11–13.

<sup>45</sup> See *supra* notes 14–15.

<sup>46</sup> See, e.g., Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 *UCLA L. Rev.* 983, 1014-15 (2010); Elinor Ostrom, *Social Capital: A Fad or a Fundamental Concept?* 176 (defining social capital in her analysis of property self-governance systems as the knowledge, norms, rules, and expectations about patterns of interaction of “groups of individuals”) (emphasis added); Franzese, *supra* note 17, at 588 (common interest communities). Many accounts of social capital in the sociology and political science literature similarly treat social capital as primarily a theory of community. See, e.g., Brint, *supra* note 38, at 7 (“social capital . . . emphasizes the intermixing of social relations and instrumental benefits, though it is closer to the community concept in focusing on the motives underlying social relations . . .”).

<sup>47</sup> See *id.*

<sup>48</sup> See, e.g., Anna di Robilant, *Common Ownership and Equality of Opportunity* 60-63, available at [http://works.bepress.com/anna\\_di\\_robilant/3/](http://works.bepress.com/anna_di_robilant/3/) (describing social capital benefits of community gardens); see generally PUTNAM, *supra* note \_\_\_\_.

alternative dispute resolution, and block-level residential associations.<sup>49</sup> In a detailed account of urban social capital, Sheila Foster writes about the role of land use law and shared urban commons in creating social capital.<sup>50</sup> A number of articles, including Anna di Robilant's recent examination of common ownership, claim an important role for property rights in community gardens in fostering social capital.<sup>51</sup> At times it appears that property determinism is at play with outsized faith in the role of property configurations, including new urbanist communities or homeownership zones, to produce social capital.<sup>52</sup> Often these accounts envision that once law has fostered a sufficient supply of social capital stock, legal institutions will take a back seat to efficient (and social-capital enhancing) group cooperation and private ordering.<sup>53</sup> Work such as Paula Franzese's proposals for reforming common interest communities and Bob Ellickson's scholarship contend that over-specified, heavy-handed, or power-centralizing laws can crowd out social capital and norms.<sup>54</sup>

Scholars also seek to maintain social capital against the erosive effects of laws and policies and to formalize the accounting of social interests alongside economic ones. Asmara Tekle Johnson and Lisa Alexander propose mandatory social capital impact assessments prior to eminent domain or land use changes likely to damage social capital (the latter suggests GIS mapping of community social capital scores).<sup>55</sup> In a similar vein, social capital justifies proposals for foreclosure relief and mortgage-lending reform.<sup>56</sup> More generally, Richard Pildes

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<sup>49</sup> See, e.g., Alexander, *supra* note 17, at 852–64 (proposing social capital GIS mapping, foreclosure relief protection, eminent domain, and affordable housing to protect and promote place-based social capital); Brescia, *Capital*, *supra* note 6, at 273–74 (mortgage crisis); Fischel, *supra* note 15, at 113–15 (land use and education); Foster, *supra* note 17, at 530–46 (2006) (urban community development); Franzese, *supra* note 17, at 588 (common interest communities).

<sup>50</sup> See Foster, *supra* note 17, at 530–42.

<sup>51</sup> See Anna di Robilant, *supra* note \_\_, at 60 (Community gardens are crucial triggers of what scholars call a neighborhood's "social capital.").

<sup>52</sup> See HERBERT J. GANS, *PEOPLE AND PLANS* (1968) (critiquing "physical determinism" and the overreliance of the capacity of urban planning to influence social outcomes).

<sup>53</sup> See *supra* note 22 and accompanying text.

<sup>54</sup> See Franzese, *supra* note 17, at 561–62, 589 (stating that common interest community "planning patterns and modes of dispute resolution, with their emphasis on formalized mandates and broad enforcement mechanisms, create cultures of distrust . . . [F]ormal legal institutions are called upon to accomplish what once was let (and is best left) to informal networks and social capital."); ELLICKSON, *supra* note \_\_, at 269–72 (describing how the design of laws and legal institutions can support, or undermine, informal social control); see also Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 882–885 (examining effect of servitude and contract model on the prospects for community- and norm-based resolution of conflicts).

<sup>55</sup> See Alexander, *supra* note 17, at 854 (proposing using GIS maps of social capital to assess potential project impacts); Johnson, *supra* note 17, at 188–94.

<sup>56</sup> See Alexander, *supra* note 17, at 861–63; Brescia, *Capital*, *supra* note 6, at 273 (contending that community organizations and other lending reforms can infuse social capital and reduce predatory lending).

describes how law can destroy social capital by razing the physical spaces or social structures necessary for norms of cooperation, and undermining reciprocity through legal interpretations dissonant with prevailing norms.<sup>57</sup>

Recently, legal scholars have leapt into the fray to propose legal institutions and policies to reduce the alleged social capital-deflating effects of racial and ethnic diversity. In his recommendation for moderate approaches to diversity engineering, Peter Schuck observes, “Managing diversity wisely while also building, or at least maintaining, social capital is among the most compelling and difficult tasks facing all societies today.”<sup>58</sup> Benjamin Barros proposes formal dispute resolution and increased privatization of common resources in order to preserve both social capital and heterogeneity in common interest communities and natural resources management.<sup>59</sup> James Kushner endorses higher density, mixed use “new urbanist” development to increase racial integration while reducing its negative effects on social capital.<sup>60</sup> Other scholars contend that housing integration is the long-term solution to ensuring social capital in diverse communities.<sup>61</sup>

The property scholarship posits social capital as a cause, as well as an effect, of well-functioning property laws and institutions. Social capital enables devolution of property governance and public goods provision from law and government to resident groups, including homeowners’ associations, neighborhood and block associations, and informally-governed urban or residential “commons.”<sup>62</sup> Indeed, there appears to be little that social capital can’t accomplish. Property scholars contend that social capital produces interstitial and informal self-governance, facilitates resident self-governance, reduces conflicts in common interest

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<sup>57</sup> See Pildes, *supra* note 14, at 2063.

<sup>58</sup> See Schuck, *supra* note 6, at 84 (describing the superiority of positive incentives rather than coercive rules for the twin goals of managing diversity and building social capital).

<sup>59</sup> See D. Benjamin Barros, *Group Size, Heterogeneity, and Prosocial Behavior: Designing Legal Structures to Facilitate Cooperation in a Diverse Society*, 18 CORNELL J.L. & PUB. POL’Y 203, 215-17 (2008).

<sup>60</sup> See Kushner, *supra* note 6, at 599–601.

<sup>61</sup> See, e.g., Gerald E. Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1077 (1996) Integration advocate Florence Wagman Roisman argues that increased residential integration will mitigate the harms described by Putnam and sustain civil society over the long-term. See Roisman, *supra* note 6, at 519–20.

<sup>62</sup> See Ellickson, *supra* note 17, at 83 (support from social capital and “a coterminous informal social network helps an institution [such as a block-level association] flourish”); Franzese, *supra* note 17, at 588 (discussing the importance of social capital and how the regulation of common interest communities creates an environment where “social capital cannot be nurtured, let alone sustained, in settings of unbridled restrictiveness”); OSTROM, GOVERNING THE COMMONS, *supra* note \_\_; cf. Sheila Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 89–93 (2011) (high social capital may justify greater devolution to residents but often some government support is still necessary).

communities, conserves valuable natural resources, and even lessens predatory lending.<sup>63</sup> Bob Ellickson is one of the leading legal proponents of the importance of social capital to efficient property institutions in small-scale residential settings. His work explores how block-level associations foster and capitalize upon social capital, tight-knit communities employ social capital to create and enforce norms, and rental vouchers maintain greater local social capital than mixed-income housing.<sup>64</sup>

Perhaps the most influential, and ardent, proponent of social capital's role in property institutions is Elinor Ostrom, winner of the 2009 Nobel Prize. Ostrom's path-breaking studies of successful community-governed common-pool resources showed that tragedies of the commons are not inevitable, or in game theory terms, that in prisoners' dilemma games people can make credible commitments to cooperate rather than defecting to inferior or last-best solutions.<sup>65</sup> In several articles and a book, Ostrom heralded social capital as a "fundamental concept" for collectively-managed resources: groups with sufficient ex ante social capital, and collective design rules and repeated interactions that maintain social capital stock, can successfully self-govern property.<sup>66</sup>

Turning to the policy arena, social capital is now a staple of land use planning, housing policy, and community and international development. Social capital has rocketed from printed page to policy in large part due to its capacity to support a plethora of agendas and its dovetailing with trends toward local government privatization.<sup>67</sup> The rhetorical force of social capital (its very sociability) and its legitimation of social concerns in an era of economic policymaking drew liberals. For conservatives, social capital substitutes for government and, taken to the logical

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<sup>63</sup> See *supra* notes 60 & 73.

<sup>64</sup> See Ellickson *supra* notes \_\_-\_\_, & \_\_.

<sup>65</sup> See ELINOR OSTROM, GOVERNING THE COMMONS 2–21 (1991).

<sup>66</sup> See *id.*; Elinor Ostrom, *Social Capital: A Fad or a Fundamental Concept?* 173 (noting that while there has been some "hoopla" about social capital "[i]t is important that social capital be taken seriously and not allowed to be carried off as a fad."). She maintained that "when governments [take over community-managed natural resources or schools] they destroy an immense stock of social capital in short order"—an especially troubling turn of events as in Ostrom's view external or top-down processes is not effective at building social capital. *Id.* at 182, 202.

<sup>67</sup> The Ostrom vision of the commons differs from traditional privatization models. However, beyond, Ostrom, the general incorporation of social capital in urban planning, land use, and property has capitalized on social capital as a justification for privatization. See Margit Mayer, *The Onward Sweep of Social Capital: Causes and Consequences for Understanding Cities, Communities, and Urban Movements*, 27 INT'L J. OF URB. & REGIONAL RES. 110, 114–16 (2003). Indeed, Blair's Fabian pamphlet explicitly incorporated social capital, stating that, "The Third Way . . . will build its prosperity on human and social capital." TONY BLAIR, THE THIRD WAY: NEW POLITICS FOR THE NEW CENTURY (London Fabian Society ed. 1998).

next step for some, counsels shrinking welfare—economic distress is due substantially to low social capital and best remedied with participation, not payment.

Social capital is a growing feature of land use planning—a trend unrecognized in the law scholarship and textbooks. Dozens of localities, often funded by community foundations, have completed “Social Capital Assessments” to quantitatively measure their community’s social capital, at an average cost of \$25,000-\$50,000.<sup>68</sup> Comprehensive zoning plans describe the community “stock” of social capital and report on how to enhance social capital through zoning, support for community groups and organizations, and growth controls.<sup>69</sup> For example, the comprehensive plan of the City of Ludington, Michigan, states that, “Events and community groups are an excellent indicator of a community’s social capital” while the Winston-Salem Comprehensive Plan “social capital recommendations” aim to “develop opportunities to increase community interaction” and “support community organizations involved in their planning and development efforts.”<sup>70</sup> Social capital has featured in Environmental Impact Statements under the National Environmental Protection Act (NEPA).<sup>71</sup> In at least two cases, residents have filed objections to highway and prison construction in their communities on the grounds of deleterious impacts on their social capital from the proposed sitings.<sup>72</sup> Researchers Thomas Sander and Lew Feldstein, at Harvard University’s social capital Saguaro Seminar, are developing formal assessments that governments can employ to evaluate the social capital impacts of proposed projects.<sup>73</sup>

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<sup>68</sup> These local social capital assessments were funded by community foundations and conducted by Putnam and his team, who used the data for their research. *See* Social Capital Benchmark Study, <http://www.hks.harvard.edu/saguaro/measurement/measurement.htm>.

<sup>69</sup> As the Forsyth County comprehensive plan declares, “Social capital is important as a planning concept because, as Putnam argues, places that are not increasing their social capital will struggle to provide their residents with the types of economic and social opportunities that make a place a truly healthy and vibrant ‘community.’” *See* North Suburban Area Plan of Forsyth County and Winston-Salem 18 (June 19, 2012 3:30 PM), *available at* <http://www.cityofws.org/Assets/CityOfWS/Documents/Planning/Publications/AreaPlans/NSAP.pdf>; *see also* Vision 2020 Comprehensive Plan Update City of Hamilton, Ohio 87 (June 19, 2012 2:45PM), *available at* <http://www.hamilton-city.org/Modules/ShowDocument.aspx?documentid=494> (“Low-density development leads to a loss of cohesive communities, sense of place, and social capital.”) (citing Ohio Kansas Indiana Strategic Regional Policy Plan 108).

<sup>70</sup> *See* City of Ludington, Michigan Comprehensive Plan (August 2010) 15 (June 19, 2012 12:08 PM), *available at* [www.ludington.mi.us/docs/2009compupdatedraft050510.pdf](http://www.ludington.mi.us/docs/2009compupdatedraft050510.pdf); *see also* North Suburban Area Plan of Forsyth County and Winston-Salem 53 (June 19, 2012 3:30 PM), *available at* <http://www.cityofws.org/Assets/CityOfWS/Documents/Planning/Publications/AreaPlans/NSAP.pdf>.

<sup>71</sup> *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (2010).

<sup>72</sup> *See* Thomas Sander, Environmental Impact Statements and Their Lessons for Social Capital Analysis 4, *available at* [www.hks.harvard.edu/saguaro/pdfs/sandereisandsklessons.pdf](http://www.hks.harvard.edu/saguaro/pdfs/sandereisandsklessons.pdf).

<sup>73</sup> *See, e.g.,* Lew Feldstein & Thomas Sander, Social Capital Impact Assessment, Saguaro Seminar: Civic Engagement in America, Harvard Univ., <http://www.hks.harvard.edu/saguaro/pdfs/skipactassessment.pdf>.

In cities, as funds have dwindled following federal devolution to the states and shrinking state disbursements to localities, communitarian-style ventures that claim to produce social capital have proliferated (or their publicity has greatly increased). Community gardens, gatherings, neighborhood block grants, and other efforts to socialize city residents now ostensibly further social capital goals in an era of shrinking city funds for social services.<sup>74</sup> Cities have subsidized social capital-enhancing new urbanist developments with tax-increment financing, seemingly with mixed motives of promoting community sociability and responding to developer interests.<sup>75</sup> Social capital theory also underlies recent experiments in neighborhood self-governance. As the influence of social capital and participatory empowerment burgeoned in the 1990s, Portland devolved certain land use responsibilities to neighborhood associations and Los Angeles created neighborhood councils to hear land use and zoning requests and manage small funds for neighborhood improvement.<sup>76</sup> The most notable of these neighborhood democracy reforms is the now-defunct Minneapolis Neighborhood Revitalization Program (NRP), established by the state legislature in 1990, which devolved local planning and fiscal funding to neighborhoods.<sup>77</sup>

Social capital has also permeated federal housing policy. The federal government justifies homeownership subsidies, such as the home mortgage interest deduction, in part on its alleged effect of promoting social capital in local communities.<sup>78</sup> It seems development and housing industry interests have found a friend in ever-flexible social capital. The Hope VI low-income housing program administered by the U.S. Department of Housing and Urban Development (HUD) also explicitly incorporates social capital. Federal guidelines for Hope VI public housing developments emphasize new urbanist features claimed to enhance social interaction and build social capital, as well as to increase convenience and quality of life for residents.<sup>79</sup> HUD,

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<sup>74</sup> Nonprofits, such as the Urban Affairs Association, have devoted conferences to social capital and the social reconstruction of the city and major community foundations have made social capital the centerpiece of their work. *See* DeFilippis, *supra* note \_\_, at 788 (describing social capital investment by community foundations).

<sup>75</sup> For a review of the incorporation of social capital into land use law, *see* Stephanie M. Stern, *Urban Junk Science in an Age of Devolution* (manuscript on file with the author).

<sup>76</sup> *See* MATT LEIGHNINGER, *THE PROMISE AND CHALLENGE OF NEIGHBORHOOD DEMOCRACY, A REPORT ON DEMOCRATIC GOVERNANCE AT THE NEIGHBORHOOD LEVEL 7–8* (2008).

<sup>77</sup> *See infra* Part III.

<sup>78</sup> *Cf.* Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 *Colum L. Rev.* 890, 897 (2011).

<sup>79</sup> *See* Thomas H. Sander, *Social Capital and New Urbanism: Leading a Civic Horse to Water?*, 91 *NATL. CIVIC REV.* 213, 215 & n. 11 (2002) (describing connection between social capital and new urbanism and the increasing incorporation of New Urbanist principles into HUD low-income housing projects); *see generally* PRINCIPLES FOR INNER CITY NEIGHBORHOOD DESIGN, A COLLABORATION OF THE CONGRESS

particularly under former HUD secretary Henry Cisneros, has advocated the social capital-related theory of “defensible space” for low-income housing design. Defensible space theory claims to reduce crime by designing buildings to increase sense of community, as well as resident surveillance, through features such as street-facing windows, single-family design, and cul-de-sacs.<sup>80</sup> In some cases, defensible space concerns have led cities to close off residential streets in order to build community social capital and reduce crime and disorder—a stark visual of social capital’s role in closing off property.<sup>81</sup>

## **B. Social Science Evidence and the Case for Social Capital**

The prevailing narrative among legal scholars is that social capital promotes the productive and peaceable utilization of property, produces economic growth and other beneficial community outcomes, fills gaps in the operation of legal institutions, and enables self-governance structures that overcome free rider problems (the problem of free-riding on social capital is left unresolved).<sup>82</sup> Accounts vary, or are silent, on whether social capital changes preferences or merely mobilizes pre-existing preferences—but no matter, at the end of the day social capital does something good for communities and the nation. Before turning to my account of the dark side of residential social capital, it is worth examining these assumptions in light of social science evidence and theory.

While social capital can produce beneficial outcomes, closer examination reveals a noisy picture where benefits may not reliably accrue and negative secondary dynamics can develop. In *Bowling Alone*, Putnam makes a series of bold claims about the value of social capital to local communities: community-level social capital enhances economic growth, educational outcomes,

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FOR NEW URBANISM AND THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *available at* <http://www.huduser.org/Publications/pdf/principles.pdf>.

<sup>80</sup> See OSCAR NEWMAN, CRIME PREVENTION THROUGH URBAN DESIGN: DEFENSIBLE SPACE 1-15, 50, 61 (1972)(describing theory and design features); Blair Kamin, *Building a Sense of Security*, June 21, 1995, *available at* [http://articles.chicagotribune.com/1995-06-21/news/9506210179\\_1\\_defensible-space-public-housing-chicago-housing-authority](http://articles.chicagotribune.com/1995-06-21/news/9506210179_1_defensible-space-public-housing-chicago-housing-authority) (describing HUD backing of defensible space theory).

<sup>81</sup> See *supra* note 92.

<sup>82</sup> See, e.g., Raymond H. Brescia, *The Cost of Inequality: Social Distance, Predatory Conduct, and the Financial Crisis*, 66 N.Y.U. ANN. SURV. AM. L. 641, 679 (2011) [hereinafter Brescia, *Cost*] (concluding that communities with high social capital are “better off”); see also Brescia, *Capital*, *supra* note 6, at 273 (“The relative presence or strength of social capital can mean the difference between a well-functioning society and one that is riddled by corruption, crime, low levels of civic participation and high levels of mistrust of neighbors, civic institutions, and elected officials.”); Ellickson, *Mixed-Income Housing*, *supra* note 6, at 1009 (describing social capital and the importance of “bonding social capital” at the block level); Franzese, *supra* note 17, at 567-69.

child welfare, health, and crime control.<sup>83</sup> However, he offers only state-level data with limited controls.<sup>84</sup> In Putnam's later research on U.S. communities, these extravagant claims are no longer present.<sup>85</sup> Moreover, even at the state level, researchers reanalyzing Putnam's data with more rigorous controls for economic inequality, percent black, region, and time-lagged variables found that the relationship between state-level social capital scores and many outcomes lost significance altogether.<sup>86</sup> Locally, there is little evidence that social capital improves housing outcomes or community development and some research suggesting that higher social capital in a building or block may displace rather than reduce crime or other social ills.<sup>87</sup> There is no evidence from the United States that community social capital increases local economic growth, and the evidence of positive effects on health is inconsistent.<sup>88</sup> The correlation with crime reduction has been established only in urban neighborhoods and using a different construct of collective efficacy, pioneered by Robert Sampson, that focuses on norms of social regulation within communities.<sup>89</sup> Most concerning, recent research by Alejandro Portes and Erik Vickstrom calls into question the validity of Putnam's social capital measure and raises a serious question of whether social capital scores reflect an omitted variable. Portes and Vickstrom find that historical patterns of slavery and Scandinavian immigration offer a better explanation for social capital scores—a pattern they note can't be undone by “exhorting citizens to become more participatory.”<sup>90</sup>

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<sup>83</sup> See Putnam, *supra* note 2. Ben Fine notes that “Social capital offers the golden opportunity of improving the status quo without challenging it. Everything from educational outcomes through crime prevention to better psychological health can be improved if neighbours and communities would only pull together and trust and interact with one another.” Fine, *supra* note 44, at 4.

<sup>84</sup> See PUTNAM, *supra* note 2, at 415–424 (describing sources and methods used in book).

<sup>85</sup> This finding is also subject to a measurement effect where subjects who are positively answering questions about their participation and activities in their community due to consistency drives and cuing are then more likely to answer that they are happy and satisfied with their community.

<sup>86</sup> See Portes & Vickstrom, *supra* note \_\_, at 468.

<sup>87</sup> Temkin and Rohe's study of urban neighborhood social capital concluded that volunteering and organizational participation did not affect neighborhood stability. See Kenneth Temkin & William M. Rohe, *Social Capital and Neighborhood Stability: An Empirical Investigation*, 9 HOUS. POL'Y DEBATE 61, 84-85 (1998); see also Edward L. Glaeser & Bruce Sacerdote, *The Social Consequences of Housing*, 9 J. OF HOUS. ECONS. 1, 17–22 (2000); Susan Saegert *et al.*, *Social Capital and Crime in New York City's Low-Income Housing*, 13 HOUS. POL'Y DEBATE 189, 219 (2002) (concluding that while there was a reduction crime in the housing unit, the crime might have been displaced to other blocks rather than eliminated).

<sup>88</sup> See DeFilippis, *supra* note **Error! Bookmark not defined.**, at 798 (criticizing social capital for failing to create economic development); Megan Perry *et al.*, *Social Capital and Health Care Experiences Among Low-Income Individuals*, 98 AM. J. PUB. HEALTH 330, 330–36 (2008) (reporting mixed findings).

<sup>89</sup> See Jeffrey D. Morenoff, Robert J. Sampson & Stephen W. Raudenbush, *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 CRIMINOLOGY 517, 518 (2001).

<sup>90</sup> *Id.* at 469.

Research in political science, economics, and psychology suggests other stumbling blocks for social capital. First, as J. Eric Oliver observes, it is too simplistic to assume that more social or civic participation equals more democracy or other benefits because these outcomes depend on structural and political factors.<sup>91</sup> One of those factors, as Morris Fiorina notes in his critique of social capital, is whether the civically-engaged group or groups represents the interests and values of the community or of larger society.<sup>92</sup> He argues that communities may be better off with little civic engagement or robust engagement by multiple interest groups, but that the middle ground of civic engagement often represents capture by insular minority interests.<sup>93</sup> In addition, gains to certain aspects of social capital often come at the expense of other aspects of social capital or other values. In *Democracy in Suburbia*, Oliver argues that suburbanization has partially demobilized citizens from local politics.<sup>94</sup> Class and background homogeneity in the suburbs lessens political and social conflict and reduces the need for political engagement, a harm which in his view outweighs the benefits of small community size to social capital.<sup>95</sup>

Second, economic theory suggests some limitations to social capital as a form of capital. Free-riding and displacement limit the amount of welfare-enhancement from social capital, or in the case of social capital's dark side welfare loss, while the availability of substitutes for social capital undermines its claimed primacy to modern life. In their economic critique of social capital, Steven Durlauf and Marcel Fafchamps describe these impediments.<sup>96</sup> Displacement occurs when social capital redistributes a fixed supply of goods rather than creates wealth.<sup>97</sup> For example, if a local budget is limited and fixed, neighborhood social capital that enables a neighborhood to organize to demand better trash pick-up services may result in reductions in the quality and promptness of trash pick-up in other neighborhoods. In some cases redistribution can be desirable for equitable or historical reasons, but in other cases it may be socially undesirable or reflect rent-seeking. Free-riding on social capital can also limit the incentives for

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<sup>91</sup> See J. ERIC OLIVER, *DEMOCRACY IN SUBURBIA* 190 (2001). For a description of this argument, see Kay Lehman Schlozman *et al.*, *Civic Participation and the Equality Problem*, in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 427, 428 (Theda Skocpol & Morris P. Fiorina ed., 1999).

<sup>92</sup> See Morris P. Fiorina, *Extreme Voices: A Dark Side of Civic Engagement*, in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 395, 403 (Theda Skocpol & Morris P. Fiorina ed., 1999).

<sup>93</sup> See *id.* at 418.

<sup>94</sup> See OLIVER, *supra* note \_\_\_, at 188.

<sup>95</sup> See *id.*

<sup>96</sup> See Steven N. Durlauf & Marcel Fafchamps, NAT'L BUREAU OF ECON. RES. WORKING PAPER, No. 10485, at 15 (2004), available at <http://www.nber.org/papers/w10485.pdf>.

<sup>97</sup> See *id.*

its production and its net efficacy to society.<sup>98</sup> Sheila Foster describes this problem in her discussion of free-riding as an impediment to resident collective action in the urban commons.<sup>99</sup> Perhaps most critically, the availability of substitutes calls into question the necessity of abundant social capital; communities with lower social capital can adopt alternatives such as taxation, private provision of goods (*e.g.*, hiring private security or other services), local government institutions, laws, and non-profit organizations to achieve the outcomes ascribed to social capital.<sup>100</sup>

Last, drawing on the psychology research, I contend that social capital faces a problem of second-order effects where the process of collective action, which may be socially positive in the first instance, can subsequently create negative norms and behaviors. Indeed, some of what we perceive as collective action “failure” may occur, and legal and market substitutes arise, because of the risk of negative spillovers from the social capital and in-group formation necessary to support informal collective action. The local social capital described by Putnam tracks the social psychological concept of self-preferencing in-groups. In-groups are an inevitable facet of social life, but strengthening in-groups, empowering them with decisionmaking authority over interests beyond the group, and failing to supply laws or norms to constrain their actions can have substantial negative effects. In-groups typically preference the interests of their group and adopt beliefs that support their group and further its social position.<sup>101</sup> In doing so, members of in-groups, particularly more tight-knit or high-status groups, frequently develop negative views of or behaviors toward members of other groups.<sup>102</sup> Work by Irving Janis on “group think” shows how strong in-group pressures contract independent moral judgment and dissenting action.<sup>103</sup> There is also a large body of evidence, considered by Cass Sunstein in the legal scholarship, on how deliberating (here collectively cooperating) groups go to extremes.<sup>104</sup> The psychological tendency to reduce dissonance between beliefs and actions by changing beliefs to support behavior provides one explanation for intensification of belief through the process of collective

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<sup>98</sup> *See id.* at 24.

<sup>99</sup> *See Foster, supra* note 63, at 71–72.

<sup>100</sup> *See Durlauf & Fafchamps, supra* note \_\_.

<sup>101</sup> *See Miles Hewstone et al., Intergroup Bias*, 53 ANN. REV. PSYCHOL. 575, 576 (2002) (reviewing literature on in-group bias).

<sup>102</sup> *See id.* at 585.

<sup>103</sup> *See IRVING L. JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES* (1972).

<sup>104</sup> *See CASS R. SUNSTEIN, WHY GROUPS GO TO EXTREMES* 10–12 (2008).

action.<sup>105</sup> The fact that people have multiple in-group affiliations may mitigate these harms but does not eliminate them, particularly when a person identifies intensely with one or a small number of in-group memberships.<sup>106</sup>

To conclude, the strong form of social capital, Putnam's expansive social capital measure and its exuberant outcomes claims, has limited utility. It is under-specified, near-limitless, and tautological, the outcomes evidence is weak, and recent reanalysis suggests that social capital scores reflect omitted variables and historical determinants.<sup>107</sup> To the extent that legal commentators mean to adopt Putnam's capacious social capital construct as scientifically established and credit its array of claimed outcomes, their case is weak for the reasons described above. However, much of the legal literature contemplates a narrower iteration of social capital, upon which this paper focuses: the concerted effect of social networks, in-group trust, and tastes for participation on collective action within intermediate- or tight-knit groups.<sup>108</sup> While not eliminating capaciousness and tautology, this construct does at least capture an intuitive aspect of social life and one that is supported in several respects by social psychology research.<sup>109</sup> We need not dismiss this iteration of social capital, but, as the following sections illustrate, we should be skeptical of its ability to sustain property institutions and wary of its potential harms.

## **II. Madison's Factions and the Dark Side of Residential Social Capital**

The enthusiasm for social capital in property law has obscured social capital's capacity to effectuate illiberal exclusion and create and advance factions contrary to the public interest. Social capital is at the heart of Madison's factions, citizen groups who advance interests contrary to the public good, described in Federalist 10, as well as faction's economic cousin cartels.<sup>110</sup> Madison defined factions as "a number of citizens, whether amounting to a majority or minority

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<sup>105</sup> See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 10-23 (1962).

<sup>106</sup> See Hewstone *et al.*, *supra* note \_\_, at 591-93.

<sup>107</sup> See Alejandro Portes & Erik Vickstrom, *Diversity, Social Capital, and Cohesion*, 37 ANN. REV. OF SOC. 461, 470-80 (2011); Joel Sobel, *Can we Trust Social Capital?*, XL J. ECON. LIT. 139, 140 (2002) (Putnam "comes close to equating social capital with good outcomes."); *see generally* Part I.B.

<sup>108</sup> In theory, one could measure social network density and ties, tastes for participation, and trust as inputs or predictors and measure correlations with collective action events.

<sup>109</sup> Empirical research has not assessed this version of social capital. Informal and quasi-formal forms of social interaction and participation, often occurring in small groups and private interactions, may have powerful effects not studied, or successfully captured, by the quantitative research described in this section.

<sup>110</sup> See FED. 10, at 56; *but see* PETER H. SCHUCK, THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE 218-22 (2000) (contending that factions are essential to a vibrant polity and that the power of diffuse interests, different forms of political resources, and the political system's increasing resistance to factional domination reduce the magnitude of danger from factions).

of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of the community."<sup>111</sup> In a similar vein, Adam Smith observed in *The Wealth of Nations* that networks and trust can create monopolization and a group whose "interest is . . . directly opposite to that of the great body of the people."<sup>112</sup> Madison perceived factions in the political sense and thus was less concerned with minority factions (wrongly as scholars of interest group politics have pointed out).<sup>113</sup> As the residential context illustrates, factions operate through informal action and coordination as well as political lobbying and both minority and majority factions can cause harm.

In considering solutions to the problem of factions, Madison observed that "[l]iberty is to faction what air is to fire."<sup>114</sup> In this instance, Robert Putnam and the social capitalists may have the better of Madison. It is not liberty but networks and participation that incite and explode the power of factions, which are, at least at the outset, informal groups with all of the collective action barriers that face self-organizing groups. Recall the constituent elements of social capital: cohesive groups and networks, reciprocity, tastes for participation, civic engagement, and trust. Social networks within groups and communities spread information necessary for planning concerted action and maintaining residential boundaries. Social ties within these groups reinforce the dominant norms and, coupled with reciprocity, recruit participants who might otherwise object. Madison himself described what we now refer to as diffusion in local social networks: the problem of passions spreading to create a majority faction.<sup>115</sup> Trust, a central element of social capital, may be particularly important when the action contemplated is collusive, illegal, or otherwise socially objectionable.<sup>116</sup> Group members must trust others in the relevant community to not defect or report them to authorities. Tastes for participation predict greater inclination and competence at organizing collective action. And social cohesion and group identity provide powerful in-kind benefits that counteract the costs of collective action.<sup>117</sup>

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<sup>111</sup> *See id.*

<sup>112</sup> ADAM SMITH, *WEALTH OF NATIONS* 307 (1993).

<sup>113</sup> *See* Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 726-27, 742, 745 (1985).

<sup>114</sup> The Federalist No. 10, at 51 (Madison) (1982).

<sup>115</sup> He also argued that it was easier for small numbers of individuals to work together in concert. *Id.* at 56.

<sup>116</sup> As Margeret Levi observes, "[Neighborhoods] promote trust of those you know and distrust of those you do not, those not in the neighborhood or outside the networks." Margaret Levi, *Social and Unsocial Capital: Review Essay of Robert Putnam's Making Democracy Work*, 24 POL'Y & SOC'Y, 45, 51 (1996).

<sup>117</sup> *See* Roger Waldinger, *The 'Other Side' of Embeddedness: A Case-Study of the Interplay of Economy and Ethnicity*, 18 ETHNIC & RACIAL STUD. 555, 557 (1995).

Collective activity by resident factions and cartels to constrain housing supply or entrance is facilitated by the same cohesive networks, tastes for participation, experience with organizations, and in-group trust attributed to positive social capital.<sup>118</sup> Indeed, bonding social capital, with its elements of group cohesion and insularity, reciprocity, and collective engagement, is perhaps uniquely well-suited to producing exclusion—likely more so than democracy or other claimed benefits. This may explain why social capital features so prominently in Ostrom’s research on natural resource commons.<sup>119</sup> These resources require exclusion of either entrants or uses in order to avoid depletion and a tragedy of the commons. In the residential context, there is a robust correlation between high social capital and racial exclusion, although the studies to date don’t establish causation.<sup>120</sup> Qualitative studies of bonding capital, often in the context of ethnic control of industries, also provide some empirical support for the tendency of cohesive social capital to confer gains to in-groups at the expense of closing markets.<sup>121</sup> In general, the evidence for social capital’s role in factions and exclusion is difficult to assess quantitatively through standard outcomes measures: if high social capital produces collusive behavior, it may improve some local and state economic indicators, but impose harms on the broader economy that are difficult to link causally.

In addition to its capacity to effectuate factions, social capital may also *create* or intensify factions by bonding together groups that then adopt group-preferencing beliefs and agendas. The type of collective action envisioned by social capitalists—intensive, reiterative, and in pursuit of a common goal—may intensify preferences by escalating group identity and in-group dynamics and increasing the social cost of dissent. As previously discussed, a large body of evidence in social psychology supports these effects: research illustrates the vulnerability of groups to “group think,” the effect of dense social networks on conformity, and even the tendency toward cognitive dissonance where people change beliefs to make them consonant with their actions.<sup>122</sup> Moreover, research suggests that group bias tracks social position and may create a greater propensity for factions among high-status groups, apart from wealth and resource effects.<sup>123</sup>

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<sup>118</sup> Group collusion to restrain supply is problematic when the property in question has demand beyond the group and its restraint is socially harmful, or when the internal distribution of property is inequalitarian.

<sup>119</sup> See Ostrom, *Fad or Fundamental Concept*, *supra* note\_\_.

<sup>120</sup> See *supra* notes\_\_-\_\_.

<sup>121</sup> See Portes, *Origins and Applications*, *supra* note\_\_, at 15.

<sup>122</sup> See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE; JANIS, *supra* note\_\_.

<sup>123</sup> High-status groups, or factions, tend to show more bias and there is some evidence to suggest that this effect is more pronounced when the groups perceive their status differential narrowing or a threat to group status. See

Endeavoring to raise social capital in a town, neighborhood, or block is more likely to coalesce or strengthen factional subgroups than to further the interests of the broader residential collective. The cost of creating and maintaining social capital is lower in small and homogenous groups, all else constant. As a result, social capital disproportionately advances factions, which tend to be discrete and homogenous groups, compared to large groups and more diverse communities of interest. The strong interests entailed in factions also dovetail with social capital. Because social capital requires significant investment and effort by group members to build and maintain networks, trust, and norms, it is most likely to effectuate collective action where participants have strong motivations and will capture a high proportion of the benefits, as is often the case with bad acts as well as private goods. In addition, in developed economies, social networks and informal institutions may be most effective at providing goods that cannot be supplied at a low-cost or at all from the market or government. In my view, it is possible that social capital's dark side and role in factions is so substantial in part because legal and market substitutes are comparatively less available for public bad acts, illiberalism, and illegal activity (though not unavailable as evidenced by laws such as exclusionary zoning and racially restrictive covenants).

Madison was convinced one could not control the causes of factions. In theory, however, reducing the social capital in an area or group can address the mediator of public bads from factions (*i.e.*, social capital mediates the relationship between “passions” and faction effects). Perhaps his views of the protective power of diverse interests and the increased costs of organizing factions in large republics track the idea of breaking up social capital. However, Madison neglected substitutes for social capital. Factions in small geographic areas, such as neighborhoods or small towns, which have the advantage of close proximity and social ties, may employ greater social capital, whereas factions at a larger scale often rely more heavily on the substitutes of economic and political capital. This lends some support to Carol Rose's vigorous refutation of Madison's arguments about the particular susceptibility of local governments to faction.<sup>124</sup> It also suggests a partial explanation for Madison's concern about factions in small geographic areas, as well as the tenacious modern-day suspicion of local government corruption. Perhaps as intrinsically social beings, social capital-fueled actions at smaller levels of

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Hewstone, *supra* note \_\_, at 585. There is also evidence that minority groups express more bias than majority groups. *See id.*

<sup>124</sup> *See, e.g.*, Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1132–34 (1996).

government are not more potent but rather more salient, evocative, and squarely within our experience, than political lobbying, trade associations, and other substitutes that make factions effective at larger scales. Indeed, it may be that Madison suffered from availability bias.

Concededly, the relationship between social capital and factions is imprecise. Social capital does not create a *particular* interest, in the way we typically conceive of factions. I employ factions as a conceptual umbrella, rather than a perfect analog, for the negative externalities of social capital. The dark side of social capital and its role in factions suffers unavoidably from the same capaciousness and tendency toward tautology that plagues the social capital construct.<sup>125</sup> I don't resist these critiques or their implications for the utility of social capital to property law. If social capital, and its role in factions, ultimately proves too encompassing to usefully describe either positive or negative local effects, then social capital should be abandoned in property discourse. My contention in this Article is that, taking the social capital construct as I find it, social capital elicits both socially efficient collective action and factional collective action desirable and sometimes efficient within the group, but harmful to the broader community.

Property scholars have been neglectful, but not blind, to the dark side of social capital.<sup>126</sup> The property scholarship notes in passing negative uses of social capital, but does not address the magnitude or implications of social capital's dark side.<sup>127</sup> However, scholars have raised related concerns about illiberalism in commons situations. Hanoch Dagan and Michael Heller focus on constraints on exit and voice as threats to a liberal commons.<sup>128</sup> Carol Rose argues for at least a minimal framework of law to address concerns of hierarchical, non-egalitarian, and sexist practices in Ostrom's commons.<sup>129</sup> Other perspectives embrace markets and implicitly minimize the role of self-governance, such as work by Thomas Merrill and Henry Smith on information costs and standardized property forms.<sup>130</sup>

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<sup>125</sup> There are some limits, of course, such as situations where distrust or a lack of civic orientation within the group fuels its collective action.

<sup>126</sup> In the areas of business and other law, Frank Cross endorses social capital, specifically the component of trust, but also recognizes the problems of ethnic control of trade and discrimination from strong affective trust. See Cross, *supra* note \_\_, at 1532-43.

<sup>127</sup> See Franzese, *supra* note \_\_, at 568; cf. Foster, *City as Ecological Space*, *supra* note \_\_, at 563 (exploring capital's benefits for urban communities but observing that "the goal of providing "bridging" capital may be undermined by social prejudices and the exclusionary effects of social networks in racially and economically homogenous neighborhoods.").

<sup>128</sup> Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 567-68, 590-91 (2001).

<sup>129</sup> See Rose, *Ostrom and the Lawyers*, *supra* note \_\_, at 44.

<sup>130</sup> See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8 (2000).

In the social science literature, amid droves of papers lauding social capital, a much smaller number have explored social capital's dark side.<sup>131</sup> In her work on community-managed natural resources, Ostrom acknowledges and describes the dark side of social capital but does not grapple with whether or when this dark side should limit her proposals for self-governance of natural resource commons.<sup>132</sup> Putnam readily concedes that bonding capital can be exclusive, but claims two intrinsic safeguards. First, he contends that associational participation and civic engagement promote tolerance and that social capital scores positively correlate with tolerance.<sup>133</sup> In addition to the reliability issues with self-report, the fact that individuals living in segregated communities and likely participating in homogenous groups and organizations report more tolerance may prove little. At the state-level if, as Portes and Vickstrom maintain, state social capital scores reflect historic patterns of slavery, it is not surprising that more tolerant states report higher social capital.<sup>134</sup> Second, Putnam maintains that bridging ties constrain illiberal effects by connecting geographically and socially distant individuals, facilitating diffusion of information and ideas, and in theory generating broader identities.<sup>135</sup> Yet, we have had difficulty engineering the types of bridging ties that trump bonding capital, promote inclusion or tolerance, connect disadvantaged people to opportunities, and create rather than redistribute wealth.<sup>136</sup> Bridging capital typically has a limited radius, necessitating a plethora of different bridging ties to ensure broader solidarity (for example, labor unions bridge across race but not income). Moreover, once achieved bridging ties and capital may morph into bonding capital. On balance bridging capital has some value to residential property, as I discuss in Part

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<sup>131</sup> See Jan W. van Deth & Sonja Zmerli, *Introduction: Civiness, Equality, and Democracy—A “Dark Side” of Social Capital?*, 53 AM. BEHAV. SCIENTIST 631, 632-635 (2010) (reviewing social science literature on dark sides of social capital and introducing contributions to a recent symposium on social capital's detrimental political effects); see also Ben Fine, *Theories of Social Capital* 5 (2010) (noting that among social scientists the critics of social capital are “heavily outweighed”). The accounts that do discuss social capital's dark side often focus on extreme examples of mafia activity, gangs, and genocidal atrocities and insular, religious solidarity. See Levi, *supra* note \_\_, at 52 (describing how the Mafia uses bridging ties within vertical relationships for organized crime); Portes, *supra* note \_\_, at 15 (negative social capital, or embeddedness in social structures, fuels mafia families, prostitution and gambling rights, and youth gangs); Putnam, *supra* note \_\_, at 21-22, 355 (negative social capital enabled the Timothy McVeigh bombing, urban gangs, and the Ku Klux Klan).

<sup>132</sup> See *supra* notes \_\_-\_\_.

<sup>133</sup> Putnam, *supra* note 2, at 355-56.

<sup>134</sup> See Portes & Vickstrom, *supra* note \_\_, at 467-69.

<sup>135</sup> See Putnam, *supra* note 2, at 23; Wilfred Dolfsma & Charlie Dannreuther, *Subjects and Boundaries: Contesting Social Capital-Based Policies*, 37 J. ECON. ISSUES 405, 407-10 (2003). In contrast bonding social capital is horizontal, connecting people within communities characterized by thick trust and shared identity and norms.

<sup>136</sup> See, e.g., Leonard, *supra* note \_\_, at 941.

V. But it is not clear that bridging capital can forestall or remedy the negative externalities of bonding social capital.

My account challenges the legal scholarship's depiction of social capital as a positive good, and augments the social science literature with a view of the pervasive, sometimes quotidian, nature of social capital's dark side in residential property. The enthusiasm for promoting residential social capital has not confronted the disquieting reality of seemingly abundant *negative* social capital in localities—and the unintended consequence that social capital engineering, if effective, may exacerbate such harms.<sup>137</sup> Social capital often functions as a norm-neutral infrastructure that effectuates motivations, which include prejudice, risk-aversion, and rent-seeking. When the social capital that legal scholars and policymakers are attempting to build is mere cohesion, without a strong normative valence toward public interest values, liberalism, altruism, or positive social regulation, there is little reason to assume that such ventures will be welfare-enhancing or egalitarian. This is not to claim that legal proposals or initiatives to promote social capital are solely responsible for these ills, which derive from powerful norms and financial incentives. Rather, it is to elucidate, in the context of anemic residential norms regarding extra-local obligations to the public good, the problem with proposals to promote social capital while diminishing the role of law.

Contrary to the prevailing view in the property scholarship, my analysis of sundown towns and exclusionary suburbs also suggests that bonding social capital can operate effectively beyond the scale of small groups, in part due to leakiness between bonding and bridging social capital. Bob Ellickson has argued that social capital functions effectively only in small-scale settings, typically fifty people or less.<sup>138</sup> In his view, lawmakers should be more concerned about policing at the larger scale of neighborhood, where social capital formation is limited.<sup>139</sup> The case studies in this Article suggest that while scale matters, strong interests and bridging ties can overcome the higher transaction costs of social capital development and deployment at the intermediate scales of neighborhoods and small to mid-sized towns. A critical mass of properly

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<sup>137</sup> *But see* Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1098–99 (2008) (reducing investment stake risk through her proposed homeownership form, which splits consumption and use interests between different owners, might lessen both beneficial forms of “collective control” and negative forms such as exclusion).

<sup>138</sup> *See* Robert Ellickson, *The Puzzle of the Optimal Social Composition of Neighborhoods*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 199, 207 (Fischel & Oates eds. 2006). Ellickson might respond to my analysis with the suggestion that the lack of social capital at these larger scales is the source of the exclusionary dynamics. Yet, the actions in sundown towns and the exclusionary suburbs clearly encompass the constituent elements of social capital, as developed both in the sociological and legal literatures.

<sup>139</sup> *See id.*

motivated actors appears quite capable of recruiting like-minded others through bridging ties, developing cohesive groups and intra-group norms, modifying individual identifications or bridging capital dissonant with group aims, and engaging in coordinated behavior that disadvantages outsiders or out-groups.

In the balance of this Part, I consider the alleged deficit of social capital and proposals to increase residential social capital through the lenses of residential segregation and land cartels. My examples are retrospective accounts intended to illustrate social capital's role in residential factions and exclusion, not prospective hypothesis-testing or conclusive empirical proof. My examination of the dark side of social capital in residential property raises questions of whether law should attempt to affirmatively weaken residential social bonds, perhaps with measures such as incentives for mobility or heavy subsidies for economic integration. I mainly save these questions for future work. In Parts IV and V, however, I do suggest that property institutions with greater reliance on markets and laws, among other alternatives, may foster more broadly cohesive and inclusive forms of solidarity than property *gemeinschafts* and informal collectives.

#### **A. Sundown Towns: Social Capital, Racial Segregation, and Bad Norm Lock-In**

In the early to mid-twentieth century, “sundown towns” across the United States evicted black residents and visitors through threats, labor market exclusion, violence, and signs advising blacks to “not let the sun go down on you in [town name].”<sup>140</sup> These towns illustrate a larger national phenomenon—in the era Robert Putnam claims as the zenith of social capital, white citizens worked together zealously to maintain residential racial homogeneity. Contemporary racial segregation and urban poverty are rooted in part in this national history of racial purging, which appears to have been effectuated through considerable social capital.<sup>141</sup>

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<sup>140</sup> See JAMES LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 3–4, 36–37, 99–101 (2005). Loewen estimates that at least 3,000 and as many as 15,000 independent towns “went sundown” between 1890 and 1930, and several thousand sundown suburbs formed between 1900 and 1968. See *id.* at 60–61. Historians have critiqued Loewen’s research for its lack of attention to black agency, erratic substantiation, and claims about the northern migration. See Luther James Adams, *Book Review of Sundown Towns: A Hidden Dimension of American Racism*, 93 J. OF AM. HIST. 601, 602 (2006) (praising Loewen’s massive and well-documented study but critiquing the limited attention to the black experience); Kenneth Joel Zogry, *Review of Sundown Towns: A Hidden Dimension of American Racism*, 29 PUB. HISTORIAN 105, 106–07 (2007) (critiquing inadequate fact documentation and lack of attention to black reactions and agency). But no historian has disputed the *fact* of sundown towns. Zogry, at 105 (“There is no question that the premise of *Sundown Towns* is correct.”).

<sup>141</sup> Intrinsic satisfaction with racist acts no doubt also helped overcome collective actions and convince perpetrators to pay the costs of action and face the threat, concededly not large in most areas, of arrest or prosecution. See THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 209–50

In sundown towns, collective action was embedded in dense networks of social ties that spread information about riots, pledges, mob violence, and other coordinated action and channeled anti-black norms. Community cohesion helped overcome free rider concerns by rewarding participants with social standing and group identity—benefits in addition to any implicit compensation they derived from racist acts. Groups of residents or business owners gathered to sign pledges not to employ blacks or to allow them to live in the area.<sup>142</sup> Residents converged on blacks to warn them to leave town.<sup>143</sup> Civic engagement and political participation produced sundown ordinances and laws requiring resident approval before subsidized housing could be built.<sup>144</sup> Social network linkages to local realtors, bankers, grocery and gas store owners, and town officials meant that blacks could be excluded not only from jobs, but from necessities of daily living.<sup>145</sup> Intergenerational closure, a key aspect in some iterations of social capital, was employed by white parents to harass black children either directly or through their children.<sup>146</sup> And bridging ties reduced the costs of exclusion by carrying news about town reputations that deterred black entry and spread information about the trend of local racial purging—many towns “went sundown” after residents learned about nearby sundown towns.

Participation in community organizations, a central constituent of social capital, also facilitated racial exclusion—historically, an important *purpose* of neighborhood clubs and associations was racial exclusion.<sup>147</sup> Thomas Sugrue’s history of Detroit describes how neighborhood associations who “saw their purpose as upholding the values of self-government and participatory democracy” organized to keep blacks from moving into their neighborhoods in order to protect property values and the “character” of their communities.<sup>148</sup> For example, in one Detroit West Side neighborhood, over six hundred residents held an emergency meeting to form

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(1996). Some towns still flaunted sundown signs as of 1990, and today some small Southern towns display signs of black mules at their town lines. *See* LOEWEN, *supra* note \_\_, at 380.

<sup>142</sup> *See* LOEWEN, *supra* note \_\_, at 249 *see ALSO* RAY STANNARD BAKER, FOLLOWING THE COLOR LINE: AN ACCOUNT OF NEGRO CITIZENSHIP IN THE AMERICAN DEMOCRACY 120, 130 (1908).

<sup>143</sup> As the Illinois State Register recorded in 1908, “A Negro is an unwelcome visitor and is soon informed that he must not remain in town.” LOEWEN, *supra* note 140, at 227 nn. 124–28}

<sup>144</sup> *See id.* at 253.

<sup>145</sup> *See id.* at 234, 259–62.

<sup>146</sup> *See id.* at 265–66.

<sup>147</sup> For example, one of the earliest razings of a Chinese neighborhood occurred in 1885 when 150 miners and railroad workers, led by the Knights of Labor (a major national labor organization), attacked hundreds of Chinese American miners, drove them out of town, and then burned their homes. *See id.* at 50–51.

<sup>148</sup> *See* SUGRUE, *supra* note 141, at 211–14.

a neighborhood association in response to a black family moving into the area.<sup>149</sup> The National Association of Community Associations organized “to keep the colored race from encroaching on the rights of the property owners by buying into the neighborhood.”<sup>150</sup> “Citizen committees” coordinated to drive out blacks and “Farmers’ Commercial Clubs” sought to replace black residents with white farmers.<sup>151</sup> Following *Shelley v. Kraemer*, neighborhood and civic associations across the country organized to flout the decision through tactics ranging from harassment to misusing “nonconforming use” ordinances.<sup>152</sup>

In addition to effectuating racial purging, solidaristic social capital seemed to intensify racist preferences and lock in bad norms. Recall that groups tightly bound together with insular bonding social capital are likely to develop attitudes and pursue actions that preference their own group.<sup>153</sup> For these reasons, anti-social action may spiral over time—indeed, sundown towns may be a vigilante version of how deliberating groups go to extremes.<sup>154</sup> On the omission side of preference construction and escalation, cohesive social capital tends to lock in bad norms and preferences that hinder or foreclose change. Dense ties mean that dissent would cause friction between close-knit community members and threaten social estrangement.<sup>155</sup> Strong social ties and the rapid spread of information through local networks also enable groups to punish “defectors,” in the case of sundown towns by retaliating against whites who hired, housed, or befriended blacks.<sup>156</sup>

Interestingly, the most recent influence of social capital on residential racial segregation is normative. Community social capital theory frames cohesion and intensive cooperation as requisite to local success. Putnam’s highly publicized 2007 social capital research claims (contrary to the weight of the evidence on this question) that residential racial diversity dramatically lowers social capital.<sup>157</sup> These claims have seeped into public discourse and beliefs.

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<sup>149</sup> *Id.* at 214.

<sup>150</sup> *Id.* at 219.

<sup>151</sup> LOEWEN, *supra* note 140, at 83, 241–42.

<sup>152</sup> For example, the Federated Property Owners homeowners association called for a citywide network “to monitor, harass, and manipulate prices. See SUGRUE, *supra* note 141, at 221.

<sup>153</sup> See *supra* notes \_\_\_-\_\_\_.

<sup>154</sup> See JANIS, *supra* note 32, at 12; see also SUNSTEIN, *supra* note 104.

<sup>155</sup> Interviews and oral histories suggest that some residents disagreed with such actions (or at least claim to in hindsight) but did not speak up from fear of retaliation. See Sunstein, *supra* note 104 at 232.

<sup>156</sup> See *id.* at 244, 271.

<sup>157</sup> A line of subsequent studies using more robust controls and sophisticated analytical techniques finds that the effect of neighborhood diversity on social capital claimed by Putnam is small and contingent on contextual factors like inequality and segregation. See Edward Fieldhouse & David Cutts, *Does Diversity Damage Social Capital? A*

Social capital theory maintains, with limited evidence, that community flourishing and economic success rely on residential behaviors that Americans believe are intrinsically uncharacteristic of blacks and unlikely to occur in racially integrated or otherwise heterogeneous communities. Residential racial beliefs and bias link blacks and integrated neighborhoods to the antitheses of residential social capital: low neighboring, weak social community contribution, and disorderly behavior.<sup>158</sup> By locating prosperity in solidarity and cooperation, social capital appears to validate the reasons whites cite for opposing black entry: concern over community decline and falling property values.<sup>159</sup> It seems that the sundown signs have been replaced by allegedly more benign and “scientific” concerns about cooperation and collective action—delicate processes that can be undone by heterogeneity as well as by prejudice itself.

### **B. Exclusionary Zoning: Social Capital and Local Land Cartels**

The efforts of suburban land cartels to restrain housing supply through monopoly zoning and exclusionary land use regulations are a topic of great interest and consternation to property law scholars.<sup>160</sup> These regulations include large minimum lot-sizes, zoning exclusively for single-family housing, growth controls, and discriminatory enforcement of housing codes against rentals.<sup>161</sup> There has been vigorous debate about the “monopoly zoning hypothesis” and its effect on housing consumers.<sup>162</sup> The weight of the evidence to date indicates that in localities

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*Comparative Study of Neighbourhood Diversity and Social Capital in the US and Britain*, 43 CANADIAN J. POL. SCI., 289, 307 (2010) (“a very large proportion of [the effect of diversity on neighborhood norms] is attributable to [individual and neighborhood] characteristics.”); Melissa J. Marschall & Dietlind Stolle, *Race and the City: Neighborhood Context and the Development of Generalized Trust*, 26 POL. BEHAV. 125, 142 (2004) (finding large effect of neighborhood educational attainment); Natalia Letki, *Does Diversity Erode Social Cohesion? Social Capital and Race in British Neighbourhoods*, 56 POL. STUD. 99, 118–19 (2008); see also DAVID E. CAMPBELL, *WHY WE VOTE 64* (2006) (in communities that are looser-knit and more politically heterogeneous, there is less informal civic engagement but more political activity and voting).

<sup>158</sup> See Lawrence Bobo & Camille L. Zubrinsky, *Attitudes on Residential Integration: Perceived Status Differences, Mere In-Group Preference, or Racial Prejudice?*, 74 SOC. FORCES 883, 896 (1996); Reynolds Farley *et al.*, *Stereotypes and Segregation: Neighborhoods in the Detroit Area*, 100 AM. J. SOCIOLOGY, 750, 769 (1994) (finding that most whites rate blacks as more likely to live off of welfare and less easy to get along with); Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 SOC. PSYCHOL. Q. 319, 336–37 (2004).

<sup>159</sup> See Alberto Alesina & Eliana La Ferrara, *Participation in Heterogeneous Communities*, 115 Q.J. ECON. 847, 850, 886 (2000).

<sup>160</sup> See generally Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977) [hereinafter Ellickson, *Suburban Growth Controls*]; see also ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994).

<sup>161</sup> Exclusionary zoning requires some degree of inelasticity in the demand for location (i.e., limited numbers of substitute communities), which is typically the case for metropolitan suburbs.

<sup>162</sup> It has proven challenging to parse empirically whether price increases are due to the impact of land use regulation on improving housing and providing desirable amenities versus constricting supply (i.e., monopoly). See John M.

with strong monopoly power and politically powerful homeowners, exclusionary zoning reduces the rate and density of housing development below the optimal value of the aggregate land in a competitive market.<sup>163</sup> This artificially constricts supply and increases housing prices and segregation. Recent evidence from the Pew Foundation shows that economic segregation has increased dramatically across the past three decades; racial segregation is substantial but declining.<sup>164</sup> We need not specify a point of optimal economic, or racial, integration in order to conclude that our extraordinarily high levels of segregation raise concerns.<sup>165</sup>

In localities across the United States, social capital helps to effectuate land cartels, the economic counterpart of factions, through both informal and formal (legal) coordination to maintain exclusionary zoning. High social capital entails dense networks, in-group trust, and tastes for participation that facilitate coordination and bring to light opportunities to engage in monopoly behavior. The diamond merchants of New York and other tight-knit groups, lauded for their self-regulation without law, are also examples of how social capital promotes oligopoly to the detriment of market efficiency.<sup>166</sup> In their economic critique of social capital, Steven Durlauf and Marcel Fafchamps offer as an example collusion to drive up prices between fishing groups from different fishing grounds, selling on the same market, who are connected by strong bridging ties and high social capital.<sup>167</sup> Applied to local residential markets, social capital may

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Quigley & Larry A. Rosenthal, *The Effects of Land-Use Regulation on the Price of Housing: What do we Know? What can we Learn?*, 8 CITYSCAPE 69, 70, 81 (2005)(describing methodological challenges).

<sup>163</sup> See, e.g., William Fischel, *Political Structure and Exclusionary Zoning: Are Small Suburbs the Problem?* at 20, available at <http://urpl.wisc.edu/papers/Fischel-Exclusionary%20Zoning.pdf> (concluding that monopoly zoning occurs in fragmented metropolitan statistical areas populated with small suburbs). Research by James Thorson found that communities with more monopoly power have higher house prices but are not more restrictive in producing new housing. Thorson suggested that in addition to monopoly motivations, wealth effects and illegitimate exclusionary preferences may play a role in higher housing costs. See James A. Thorson, *An Examination of the Monopoly Zoning Hypothesis*, 72 LAND ECONOMICS 43, 55 (1996)

<sup>164</sup> See Richard Fry & Paul Taylor, *The Rise of Residential Segregation by Income*, Pew Research Social and Demographic Trends (Aug. 1, 2012), <http://www.pewsocialtrends.org/2012/08/01/the-rise-of-residential-segregation-by-income/>.

<sup>165</sup> This is particularly true in light of the local nature of school financing and the social and individual ill effects of concentrated poverty. See David M. Cutler & Edward L. Glaeser, *Are Ghettoes Good or Bad?*, 112 Q.J. OF ECON. 827, 827 (1997) (concluding that blacks in segregated areas have significantly worse outcomes than blacks in integrated areas); cf. Robert C. Ellickson, *The Puzzle of the Optimal Social Composition of Neighborhoods*, in THE TIEBOUT MODEL AT FIFTY 199-201 (William A. Fischel ed., 2006).

<sup>166</sup> See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115-17 (1992); see also Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANN. REV. SOCIOLOGY 1, 13, 15 (1998) (describing ethnic control of trades and police and fire unions).

<sup>167</sup> Steven N. Durlauf & Marcel Fafchamps, *Social Capital* 31 (Nat'l Bureau of Econ. Research, Working Paper No. 10485, 2004), available at <http://www.nber.org/papers/w10485>. In my view, in-group solidarity may mitigate collusion between groups by increasing insularity and decreasing inter-group contact. However, if there are

effectuate two forms of land cartelization. In a classic cartel, owners and suppliers of housing who wish to limit competition from higher-density developments with smaller houses enforce zoning and other land use regulations to create an artificial restriction on supply and force buyers to pay more than the market-clearing price for houses. Exclusionary zoning also encompasses non-classic cartels where residents are not concerned about competition, but that smaller, higher-density housing will draw “undesirables” who will put off prospective buyers and reduce property values.<sup>168</sup>

Social capital appears to fuel political organization and lobbying for exclusionary zoning.<sup>169</sup> In an empirical analysis of growth controls, William Fischel found that small suburbs were more likely to have strict development and growth restrictions than larger communities.<sup>170</sup> Fischel attributes this to the fact that in larger jurisdictions, developers have more political power while homeowners have more difficulty organizing.<sup>171</sup> This can also be explained in social capital terms with social cohesion mediating the effect of suburb size: in smaller suburbs, greater social cohesion may facilitate the spread of information, lower the costs of civic engagement, and recruit residents who have social ties to growth control supporters. It is uncommon for norms or public interest concerns to constrain such cartelization—as discussed in Part IV, citizen-residents appear to view the vigorous promotion of property values as part of their civic role.

In its more elemental form of informal or quasi-formal collective action, social capital effectuates the social regulation necessary to maintain zoning and growth controls.<sup>172</sup> Exclusionary zoning is under frequent assault by developers seeking profits from higher-density

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sufficient incentives and inter-group ties for cooperation, cohesive groups reduce the transaction costs of colluding by enabling coordination between a small number of groups rather than large numbers of individuals. In addition, structural and market conditions may allow monopoly by a single group.

<sup>168</sup> I thank Richard Squires for his helpful explanation and comments on classic and non-classic cartels.

<sup>169</sup> Readers may question whether Putnam’s social capital construct, which he defines as a precursor to political action as well as informal cooperation, is overbroad. I agree that the fact that Putnam’s social capital definition encompasses political organization, lobbying, and voting, as well as less formal collective action, threatens to render the construct limitless and meaningless. This paper focuses most of its attention to social capital’s role in informal and quasi-formal community self-governance.

<sup>170</sup> Fischel, *supra* note \_\_, at 20 (also noting that areas whose land use is controlled by very jurisdictions appear subject to the monopoly zoning effect).

<sup>171</sup> *Id.*

<sup>172</sup> In exclusionary zoning, social capital-mediated exclusion may entail the nested institutions and polycentric regulation described in Ostrom’s work: informal collective action to discriminate and exclude may occur within exclusionary legal regimes. See Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 1, 1-4 (2010) (describing polycentric governance).

construction as well as from fair housing advocates and occasionally state legislatures.<sup>173</sup> Maintaining exclusionary zoning requires residents to organize, share information, and protest development plans, permit requests, and variance requests.<sup>174</sup> Residents of neighborhoods also cooperate to informally ostracize undesirable entrants, such as minorities or tenants, through mechanisms such as social exclusion and gossip.<sup>175</sup> High social capital also enables NIMBYism (not in my backyard), as Putnam has recognized, where resident factions organize committees and protests, lobby government, and in some cases pool funds to oppose locally undesirable land uses, such as half-way houses and environmental waste sitings.<sup>176</sup> In the case of affordable housing, one of the most fever-pitched settings for NIMBY opposition, dense ties and a cohesive local identity can intensify and embolden residents' opposition to the "wrong kind of people."

Social capital theory itself may justify land use protectionism. Some local comprehensive plans suggest that growth controls are necessary to maintain their community's social capital. Communities depict such efforts as "protecting our small-town character" and the town's "stock of social capital."<sup>177</sup> For example, the city of Excelsior, Minnesota's Comprehensive Plan states that as a "Social Capital Action[s] and Strategy" the City must "[i]n all City projects and private redevelopment, consider what impact there will be on small town historic character."<sup>178</sup> The Supreme Court case upholding the constitutionality of zoning, *Village of Euclid v. Ambler Realty Co.*, may have alluded to a social capital justification in its decision.<sup>179</sup> The Court described apartments as a "mere parasite" on single-family neighborhoods that zoning must control or a neighborhood's "desirability as a place of detached residences [will be] utterly destroyed."<sup>180</sup> While the Court focused on the impact of multi-family units on open space and amenities, the opinion's impassioned tone, repeated references to maintaining the "residential character" of

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<sup>173</sup> See, e.g., Andrew G. Dietderich, *An Egalitarian's Market: Economics of Inclusionary Zoning Reclaimed*, 24 *FORDHAM URB. L.J.* 23, 51, 65-68 (1996) (describing arbitrage profit incentives for developers to seek density variance and discussing set-asides and other state programs for affordable housing); George Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 *S. CAL. L. REV.* 447, 485-86 (1980-81) (discussing state legislative and agency efforts to compel inclusionary zoning).

<sup>174</sup> Local governments grant variances, which offer case-by-case relief from zoning requirements.

<sup>175</sup> It may be that one important role of the local clubs and organizations so admired by Putnam is to signal racial, political, or religious preferences (e.g., the junior league and the elks are strongly associated with whites). See Lior Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 *VA. L. REV.* 437,464-76 (2006).

<sup>176</sup> See Putnam, *supra* note 2, at 21–22 (conceding that social capital can promote NIMBY-ism).

<sup>177</sup> *Supra* notes \_\_\_ & \_\_\_.

<sup>178</sup> City of Excelsior, 2008 Comprehensive Plan, Excelsior, Minnesota 147 (2008), [www.ci.excelsior.mn.us/DocumentView.aspx?DID=277](http://www.ci.excelsior.mn.us/DocumentView.aspx?DID=277).

<sup>179</sup> 272 U.S. 365 (1926).

<sup>180</sup> *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

single-family neighborhoods, and use of the term parasite to describe apartments suggest that the Court was also concerned with the neighborhood social fabric.<sup>181</sup>

A remaining question is whether weak social capital channels collusion toward law, as opposed to informal action, as a lower-cost but more global and damaging means to effectuate monopoly and entrance restraints. Perhaps communities high in social capital can more easily exclude or constrain supply informally whereas those low in social capital find it more efficient to enact laws. If true, promoting social capital may be the lesser of two evils. While this is a plausible theory and may apply to other contexts such as racial exclusion, it is not clear that it tracks patterns of suburban exclusionary zoning. The broad reach and lower transaction costs of exclusionary laws make them attractive to communities of varying social capital endowments.<sup>182</sup> Even if low social capital does, in some contexts, create incentives for harmful legislation, law retains the virtues of greater visibility, placement in the public sphere of debate and norm construction, and susceptibility to external challenge and revision.

### **III. Residential Property: Governing Through Social Capital**

Ostrom's self-governing collectives have enticed residential property and land use scholars with their merger of pro-sociality and efficiency: through close ties with others, people can overcome collective action problems and manage resources wisely. Yet, is this rosy picture accurate? Can we rely on social capital's positive effects to substitute in substantial share for legal and market institutions in residential property? In the past thirty years, states and localities have experimented with formal and quasi-formal neighborhood and block-level governance, piloted participatory budgeting in districts and wards, relied increasingly on residents to provide public goods and neighborhood services, and witnessed the proliferation of private homeowners associations.<sup>183</sup> Robert Nelson has advocated for a nation-wide system of neighborhood associations, comparable to private development homeowners and condominium associations, with the power to enact regulations, control zoning and development, and provide local

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<sup>181</sup> *See id.*

<sup>182</sup> In his empirical study of growth controls, Fischel observes that growth controls are more likely in small suburbs, which typically have higher social capital and cohesion. *See Fischel, Small Suburbs, supra* note \_\_, at 20.

<sup>183</sup> *See* ARCHON FUNG & ERIK OLIN WRIGHT, DEEPENING DEMOCRACY: INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNMENT 10-12, 28 (2003) (reviewing experiments in participatory budgeting and neighborhood participation and governance); Evan McKenzie, *Common-Interest Housing in the Communities of Tomorrow*, 14 HOUSING POL'Y DEBATE 203, 203-07 (2003) (describing rise of common interest community housing).

services.<sup>184</sup> Bob Ellickson and Elinor Ostrom have proposed de-centralizing certain local governance functions to block-level and community institutions respectively, with varying degrees of legal formality.<sup>185</sup> The work of property scholar Paula Franzese contemplates downsizing aspects of common interest community law in order to enable norms-based self-governance within private homeowners associations.<sup>186</sup>

Residential “micro-institutions” offer the advantages of local knowledge, cost-savings for local government, and, more debatably, a greater sense of personal empowerment or sub-local stake. Yet, they also entail problems and tradeoffs. Governing through social capital does not reliably safeguard against—and in some circumstances can affirmatively promote—rent-seeking, violations of individual rights, and collusion to restrain property supply. Devolving governance power, particularly regulatory and spending power, to resident groups can directly empower factions, who may be motivated to assume unpaid board positions and governance roles to advance their interests. Of course, the risks of collusion and rent-seeking are not limited to informal governance, but endemic to a variety of institutions. However, the idealization of governing through social capital, coupled with weaker rule of law constraints and less transparency, has made the problems of residential self-governance less apparent—and in that sense more dangerous.

Community self-governance also increases the pressure on community composition from its already substantial baseline—race, ethnicity, and other class-based characteristics are often misapplied proxies in this process. When owners benefit from limiting congestion rather than allowing widespread access or participation, coordination costs are high, and interpersonal cooperation is vital, they will try to attract entrants perceived to have the strongest tastes for contribution and capacity to integrate into a cohesive group. Without the ability to predict the behaviors, preferences, and interests of others, the costs of governing through social capital skyrocket. These dynamics ratchet up preferences for homogeneity among existing residents and dissuade minority newcomers who face increased hostility and risk of unequal status and participation. In the scholarship on residential commons, legal scholars gloss over this issue, noting seemingly without upset that “homogenous groups” typically experience greater success

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<sup>184</sup> ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 259-78 (2005).

<sup>185</sup> See Ellickson, *New Institutions*, *supra* note \_\_ (proposing block-level associations); Ostrom, *Beyond Markets and States*, *supra* note \_\_, at 1-4.

<sup>186</sup> See Franzese, *supra* note 17, at 590–91.

in producing local goods and require less government intervention.<sup>187</sup> Yet, should we accept governing by homophily in the service of social capital?

This “logic of homogeneity” may also be at work in Ostrom’s famous examples of natural resource commons.<sup>188</sup> Admittedly, it is difficult to parse the relative contributions of culture, often machismo culture, from the homogenizing influence of social capital-fueled commons governance. Nonetheless, the striking trend toward ethnic exclusion is noteworthy. Informally-managed fishing grounds are often ethnically homogenous and community-managed acequias (irrigation ditches) in New Mexico routinely employ gossip and social sanctions to keep water rights from anglo “newcomers” and within families and communities.<sup>189</sup> In his account of the Maine lobster gangs, James Acheson describes how the gangs, replete with social capital, harassed and cut the traps of entrants based in part on their ethnicity—even Italian and Canadian backgrounds were not sufficiently mainstream.<sup>190</sup> The “kings” or leaders of the lobster gangs also opposed “blacks, . . . hippies, welfare, Russians, Jews, bureaucrats, Arabs, and Iran.”<sup>191</sup> Entrance is tightly controlled in these communities: in the traditional lobster gangs a boy “inherits a place in his father’s gang” and outsiders, without close affiliations to the community or gang find entry difficult, if not impossible.<sup>192</sup> While member selection is formally absent from Ostrom’s eight design principles for community-governance, her writing describes common culture and “rules of the game” as requisite to successful community self-governance—indeed, in some accounts shared culture is part of the definition of social capital.<sup>193</sup>

Some legal scholars and social capitalists have wrongly assumed that social capital, properly nourished through participation and self-governance, will reduce factions and exclusionary

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<sup>187</sup> See Foster, *supra* note 63, at 91–92.

<sup>188</sup> Carol Rose has criticized Ostrom’s commons for their propensity for rigid hierarchies, sexism, or other non-egalitarian norms. See Rose, *supra* note \_\_, at 33–34.

<sup>189</sup> Telephone Interview with Michael Cox, Assistant Professor, Dartmouth College (Oct. 2, 2012); Telephone Interview with José A. Rivera, Professor, University of New Mexico (Oct. 5, 2012).

<sup>190</sup> JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* 69 (1988). There are also barriers for female lobster fishermen, although the 2007 recession has lowered the “glass gangway” as reduced profits have dissuaded young men. See Chris Arnold, *She’s No Man; She’s a Lobsterman*, Nat’l Pub. Radio (Aug. 19, 2012), <http://www.npr.org/2012/08/19/159175781/fishing-for-lobsters-not-just-a-mans-game>.

<sup>191</sup> *Id.* at 61.

<sup>192</sup> *Id.* at 65–68; see also Clark C. Gibson & Tomas Koontz, *When “Community” is Not Enough: Institutions and Values in Community-Based Forest Management in Southern Indiana*, 26 *HUM. ECOLOGY* 621, 639–40 (1998) (case study of community-managed forest residential community that required members to vouch for and pay the debts of applicants during a five-year waiting period).

<sup>193</sup> See ELINOR OSTROM, *CRAFTING IRRIGATION INSTITUTIONS: SOCIAL CAPITAL AND DEVELOPMENT* 24–25, 29–30 (1990) (noting failure of commons with “individuals coming from different regions . . . and ethnic and religious backgrounds” because “[no] social capital exists.”).

harm.<sup>194</sup> This misconception hearkens to the anti-federalist idea of civic virtue as the solution to factions. The anti-federalists emphasized decentralization in small communities that would enable the type of interaction necessary to promote civic virtue or “public happiness.”<sup>195</sup> The anti-federalists championed deliberation and participation in town meeting style government to educate citizens in civic virtue and restrain self-interested factions from subverting the greater good.<sup>196</sup> Notably, the anti-federalists recognized the tension between intensive self-governance and diversity: their model of deliberation and civic virtue explicitly required community homogeneity in terms of wealth, education, and power.<sup>197</sup> Although local micro-institutions are extra-governmental or co-governmental in character, one suspects the anti-federalists, like modern social capitalists, would have been gulled by the seeming civic potential of intensive cooperation in small, self-governing groups.

If Elinor Ostrom showed that individuals can resolve collective action problems absent legal or government institutions, the legal scholarship has not resolved when, or whether, governing by social capital should play that role in residential property.<sup>198</sup> My account of social capital provides a more critical view of residential self-governance and underscores the need for a substantial overlay of law, and other political and institutional supports, to channel collective action to socially desirable means and ends. In a similar vein, scholars such as Carol Rose and Sheila Foster have suggested the need for a minimal level of law and government involvement to mitigate inegalitarianism and free-riding in the commons.<sup>199</sup> To make my analysis more concrete, the following sections briefly assess proposals and initiatives in neighborhood direct democracy, block-level associations, and common interest communities.

### **A. Assessing Neighborhood Direct Democracy and Block Associations**

Across the country, a number of neighborhood direct democracy initiatives have transferred regulatory responsibilities and service provision to neighborhoods with the vision of resident

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<sup>194</sup> See Putnam, *supra* note 2, at 23; Franzese, *supra* note \_\_, at \_\_.

<sup>195</sup> For a description of the anti-federalist case, see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 35–38 (1985).

<sup>196</sup> SEE HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 43–45 (Murray Dry ed., 1981).

<sup>197</sup> Sunstein, *supra* note \_\_, at 36.

<sup>198</sup> Ostrom’s self-governing natural resource commons are often found in countries with unstable or inadequate markets, legal institutions, and financial resources that make self-governance attractive or necessary.

<sup>199</sup> See Rose, *supra* note \_\_, at 44; Foster, *supra* note 63, at 89–90.

participation and self-governance bolstering struggling urban neighborhoods.<sup>200</sup> The Minneapolis Neighborhood Revitalization Program, the most radical experiment in “direct neighborhood democracy” to date, provided twenty million dollars per year for neighborhoods to form neighborhood associations, vote in boards, and create and implement neighborhood action plans for affordable housing and other revitalization efforts.<sup>201</sup> The NRP program envisioned that neighborhood groups would build social capital that would enable them to realize city planning goals with lower costs and higher resident satisfaction.<sup>202</sup> On balance, the Minneapolis NRP realized some significant successes. However, there were challenges and tradeoffs to neighborhood democracy that have been neglected in the enthusiasm for grassroots governance. While the NRP program worked relatively well in homogenous neighborhoods, Edward G. Goetz and Mara S. Sidney describe how in majority-tenant, racially and economically diverse neighborhoods, white homeowners rapidly coordinated to constrict housing supply and exclude “undesirables” by halting rehabilitation of multi-family buildings, gutting a nationally recognized program of leasehold cooperatives, and funding conversions of rentals to homes.<sup>203</sup> In some areas, a hefty chunk of the NRP money funded grants and subsidized loans to individual homeowners for home remodeling.<sup>204</sup>

Endogenous social dynamics no doubt influenced neighborhood governance in the Minneapolis NRP, where white homeowners dominated boards and committees and black homeowners, non-profits, and the small number of tenants who wished to participate were often

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<sup>200</sup> See MATT LEIGHNINGER, THE PROMISE AND CHALLENGE OF NEIGHBORHOOD DEMOCRACY: LESSONS FROM THE INTERSECTION OF GOVERNMENT AND COMMUNITY 5–6 (2009); see generally Part I.A. [http://www.nifi.org/news/news\\_detail.aspx?itemID=14763&catID=13676](http://www.nifi.org/news/news_detail.aspx?itemID=14763&catID=13676).

<sup>201</sup> Sarah Elwood, *Neighborhood Revitalization Through ‘Collaboration’: Assessing the Implications of Neoliberal Urban Policy at the Grassroots*, 58 GEOJOURNAL 121, 124 (2002).

<sup>202</sup> The NRP Policy Board goals describe, “When people organize, collect and analyze information, and become more knowledgeable about their community, they can be significant contributors to the revitalization of their neighborhood . . . . Neighborhood revitalization ultimately depends on a sense of neighborhood identity . . . .” See NRP, NRP Primer, available at <http://www.nrp.org/r2/aboutnrp/Basics/Primer.html>; *id.* at 126-27; see also NELSON, *supra* note \_\_, at 269.

<sup>203</sup> EDWARD G. GOETZ & MARA S. SIDNEY, THE IMPACT OF THE MINNEAPOLIS NEIGHBORHOOD REVITALIZATION PROGRAM ON NEIGHBORHOOD ORGANIZATIONS 11–12 (1994); see also Elena Fagotto & Archon Fung, *Empowered Participation in Urban Governance: The Minneapolis Neighborhood Revitalization Program*, 30 INT’L J. OF URB. & REGIONAL RESEARCH 638, 645 (2006) (describing how property and business owners opposed the use of NRP funds for creating subsidized housing).

<sup>204</sup> One of the goals of the NRP was to improve housing so grants to individual owners were not outside the program’s scope or expectations. However, the volume and value of these grants suggest some degree of rent-seeking. One independent review concluded that over eighty percent of households assisted by the twenty million dollars in annual funds were used to assist homeowners. See Jennifer Turnham & Jessica Bonjorni, *Review of Neighborhood Revitalization Initiatives* 38–39 (2004), available at <http://www.nw.org/network/pubs/studies/documents/revitalizationReview.pdf>.

shut out.<sup>205</sup> However, status may have also played a pivotal role because of the pressures of collective governance: the NRP required residents to self-organize and learn local government functions with only thin legal frameworks and institutional supports. Inegalitarianism may proliferate *within* institutions that govern through social capital in part to reduce the overwhelming costs of coordination. Social status lowers the costs of collective action by determining entrance and distributing authority and tasks with quick and dirty, widely-understood allocation rules.<sup>206</sup> In a sense, this tracks the unasked question in the Demsetz account of why property rights emerge: *how* do people go about the process of setting up a property system. Systems may, and often do, focus on first in time (earlier entrants), prior property holdings, status acquired through contribution to the group, or experience or skill. But, frequently overlooked is the role of *ex ante* social status, often proxied by characteristics such as race, gender, and social class, to coordinate property rules and allocate roles and tasks.<sup>207</sup>

My analysis of governing through social capital favors a more cabined role for neighborhood self-governance, thicker institutional frameworks, and in some cases enhanced political process protections and funding for low-income advocacy groups to secure broader representation.<sup>208</sup> This has implications as well for prominent scholarly proposals for neighborhood and block-level associations in older neighborhoods that lack private homeowners associations. Bob Ellickson has advocated creating block improvement districts (BLIDs) with narrow grants to provide supplementary services and relax zoning restrictions.<sup>209</sup> In my view, the risks of governing through social capital underscore the prudence of Ellickson's limited grant of power to BLIDs to provide supplementary services such as landscaping and street cleaning and his

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<sup>205</sup> Low-income renters sometimes lacked the resources, expertise, and campaign power to win board positions or the social ties to assume committee positions. See Goetz & Sidney, *supra* note 204, at 27–29.

<sup>206</sup> There has been a recent wave of research on the use of status to overcome collective action problems but it focuses on how collective action contribution increases social status, and free-riding decreases it. See Brent Simpson *et al.*, *Status Hierarchies and the Organization of Collective Action*, 30 SOC. THEORY 139, 158 (2012) (reviewing research on reputational gains from contribution to collective action and proposing that social status sequences and coordinates collective action).

<sup>207</sup> Notably, such systems may tend toward rigidity because mobility will create confusion about governance authority and muddy the status rules themselves.

<sup>208</sup> Chicago's recent experiments in neighborhood participatory budgeting offer an example of a well-supported, and constrained, neighborhood democracy initiative. Residents in ward 49 voted on how to spend a limited pool of infrastructure improvement funds (approximately one million) following an extensive process that included the involvement of over fifty community groups to develop the participatory process and oversee it. See Alderman Joe Moore, *Participatory Budgeting*, <http://www.ward49.com/participatory-budgeting/>.

<sup>209</sup> See Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 96-98 (1998).

proposed supermajority voting and legal safeguards.<sup>210</sup> I am skeptical, however, of Ellickson's related proposal for special Regulatory Block Improvement Districts (RBLIDs) with regulatory and zoning power and, more so, of Robert Nelson's call for a nationwide system of neighborhood associations empowered to regulate land development and zoning, provide core services (including police), and assume ownership of city streets, parks, and facilities.<sup>211</sup> The small scale of the neighborhood and especially the block increase the ease with which both social capital and factions develop, as Ellickson seems to intuit in his enumeration of voting and legal protections for BLIDs.<sup>212</sup> Devolving regulatory and spending power directly to residents enhances the power of homeowners relative to developers and tenants (some of these proposals do not allow resident tenants to vote) and can increase cartel-like restrictions on housing supply.<sup>213</sup> As the Minneapolis NRP experience reveals, there is a substantial risk that urban neighborhood self-governance will displace tenants, many of whom live in urban neighborhoods as result of exclusionary zoning and the resulting dearth of suburban rental apartments.

## **B. Common Interest Communities: Condominiums, Co-ops, and Homeowners Associations**

Self-governing, small-scale private residential communities, such as homeowners associations, condominiums, and co-ops, should be incubators of social capital. Yet, high expectations for the realization of community and democracy have given way to conflict, litigation, and controversies over secession from public life.<sup>214</sup> Disputes over noise, dogs, cars, and garbage are common and call into question the assumption that social capital will encourage beneficial norms and secure cooperation.<sup>215</sup> To the contrary, self-governance may intensify

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<sup>210</sup> See *id.* at 97-98, 103, 104 (proposing supermajority vote for BLID establishment and application of common interest community law).

<sup>211</sup> See *id.* at 99-100; NELSON, *supra* note \_\_, at 259-68; Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning With Private Collective Property Rights in Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 833-34, 873 (1999).

<sup>212</sup> See Ellickson, *New Institutions*, at 97-98, 103, 104.

<sup>213</sup> It is not clear that developers will be as powerful in these microinstitutions for a variety of reasons: unlike local government officials, homeowners' interests are narrowly focused on their particular neighborhood or block and the common developer exaction of land or development in another part of town won't be of interest to RBLIDs or neighborhood associations. With respect to voting, Nelson's proposal does not allow for tenant voting. See *id.* at 834. Ellickson's limited grant BLID does not allow tenant voting but his regulatory RBLID requires approval by supermajorities of owner and residents. Ellickson, *New Institutions*, *supra* note \_\_, at 99-100.

<sup>214</sup> See EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNERS ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 26, 135 (1996).

<sup>215</sup> See Domini Hedderman, *Managing Conflicts Among Neighbors*, The New Jersey Co-operator Newsletter, available at <http://njcooperator.com/articles/31/1/Managing-Conflict-Among-Neighbors/Page1.html>. A California

residential discord.<sup>216</sup> In a recent survey of common interest communities in Massachusetts, 64% of boards reported being threatened with at least one lawsuit in the past five years and 22% were currently in litigation.<sup>217</sup> Research by Henry Hansmann and more recently Michael Schill finds that co-operatives, a form of common interest community with more intensive self-governance and common property than condominiums, trade at a sizeable discount to similar condominiums.<sup>218</sup> Efficiency and welfare losses from collective self-governance of common property, among other factors, may be capitalized into the lower sale prices of co-operatives.<sup>219</sup> This analysis reveals a problem unresolved by social capitalists: the proximity and interdependency that purportedly fosters social capital also breeds conflict about uses, upkeep, and resident behavior.<sup>220</sup> The predominant force in resolving these conflicts is not social capital, but the growing use of professional management agents.<sup>221</sup>

In a thought-provoking article, Paula Franzese has proposed that common interest communities have greater legal free rein in order to promote, and capitalize upon, their social capital.<sup>222</sup> In her view, social capital is better nourished by a more participatory and less heavy-handed legal framework than the current panoply of state laws, conditions, covenants, and restrictions (CC&Rs), and community rules.<sup>223</sup> She recommends paring the common interest community legal declaration to the few core rules integral to the community's basic structure and

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attorney described fistfights and other physical violence between residents or residents and resident-board members are "not uncommon." Debora Vrana, *The Runaway Power of Homeowners Associations*, available at <http://realestate.msn.com/article.aspx?cp-documentid=13107752>.

<sup>216</sup> Admittedly, it is difficult to draw firm conclusions as empirical study has been limited and frequently undertaken by interested parties such as trade association for common interest communities.

<sup>217</sup> See Courtney L. Feldscher, *Managing Conflict in Community Associations: The Who, What, Where, When, and Why*, available at [http://www.cairf.org/scholarships/feldscher\\_study.pdf](http://www.cairf.org/scholarships/feldscher_study.pdf) (independent study of community associations).

<sup>218</sup> See Michael H. Schill *et al.*, *The Condominium v. Cooperative Puzzle: An Empirical Analysis of Housing in New York City* (N.Y. Univ. Law & Econ. Research Paper Series, Working Paper No. 04-003, 2004) (cooperatives trade at a fifteen percent discount to condominiums); Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. OF LEGAL STUD. 25, 69 (1991) (concluding that condominium form is somewhat more efficient than the cooperative form and requires a smaller subsidy to make it competitive with rental). Hansmann also concludes that tax subsidies for ownership and rent control encouraged the spread of condominiums and cooperatives despite the fact that rental is in general the more efficient regime. See Hansmann, *supra* note \_\_, at 68.

<sup>219</sup> In addition, shared mortgage risk and restraints on resale (*e.g.*, co-op interviews pre-approval) reduce the value of co-ops.

<sup>220</sup> Moreover, governance by one's peers poses its own problems. As one attorney observed, "When you have a neighbor being put in charge of you, it just breeds resentment." See Vrana, *supra* note \_\_.

<sup>221</sup> The role of management agents, much neglected in property law, appears key to providing an intermediary and coordinator who acts in a professional, non-peer role. See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 222 (1996) (noting growth of management firms).

<sup>222</sup> See Franzese, *supra* note \_\_, at 589-91.

<sup>223</sup> See *id.*

allowing social capital to take root before considering additional rules, as well as limiting association intervention to nuisance-like activities and reducing board authority.<sup>224</sup> Franzese's point is well-taken that poor design and legal excess hinder common interest communities. However, while some culling of law may be beneficial, I don't think dramatically downsizing law in favor of informal self-governance will ameliorate conflicts and factionalism.

First, it is an unanswered empirical question whether common interest community laws impede or foster positive social capital. Cross-country research by Frank Cross in contract and corporate law suggests that in some contexts law can increase trust by providing assurances and incentives for trustworthy behavior.<sup>225</sup> In later work, it seems Franzese agrees, as she subsequently proposes more substantial legal protections to promote trust.<sup>226</sup> Second, reducing common interest community law to a minimal core increases opportunities for rent-seeking. Supermajority voting requirements for amending key governance provisions, thick legal protections, and perhaps even the complexity of common interest community rules create if not formal checks and balances, at least obstacles to radical redistribution at the hands of resident factions (factions on the board are less constrained under some community's governing laws).<sup>227</sup> In addition, state law, CC&Rs, and associational rules may have some degree of expressive value and communicate rule of law expectations to members and boards. Third, common interest communities confront exclusionary proclivities and incentives to reduce the transaction costs of self-governance through homogeneity, often proxied by class-based characteristics.<sup>228</sup> Reducing rules to a minimal core increases the pressure on self-governance and the already-substantial demand for homogeneity. The limited reach of the federal Fair Housing Act and the scarcity of

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<sup>224</sup> See *id.* at 591

<sup>225</sup> See Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1457-62 (2005).

<sup>226</sup> See Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MISSOURI L. REV. 1111, 1139-45 (2007) (recommending sunseting developer-imposed servitude regimes and enabling communities to select from regulatory "templates," homeowner protections, and greater use of alternative dispute resolution).

<sup>227</sup> Franzese's desire to limit the board's power seems to recognize the threat that self-interested members will assume unpaid board positions or that social capital will develop over time between board members and motivate rent-seeking or illiberalism. However, narrowly circumscribing board authority also limits the board's power to address damaging spillovers of social capital and other conflicts among residents.

<sup>228</sup> As Henry Hansmann observes, "conflicts among members are a serious problem in the governance of cooperatives and condominiums . . . homogeneity of membership is an important aid to viability." See *id.* at 201. See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1858-59 (2006) (describing the exclusionary proclivities of common interest communities and their use of "exclusionary amenities" such as golf clubs or Catholic universities to signal their preferences for residents). For other accounts of preferences for residential exclusion, see MCKENZIE, *supra* note \_\_\_, at 60-78; Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 Am. Soc. Rev. 23, 28-29 (1994).

funds for enforcement constrain redress.<sup>229</sup> Accordingly, common interest community laws that inhibit excessive development, or undesirable deployment, of social capital have public value.

In closing, governing residential property through social capital, absent substantial institutional safeguards, may be an uneasy fit for developed and diverse societies. Perhaps, these issues are part of the reason why residential self-governance in the United States often doesn't look like much Ostrom's commons at all. Despite the popular enthusiasm for grassroots governance, local micro-institutions often have limited powers and substantial legal constraints and in some cases, such as Boston's famous Dudley Street Initiative, extensive support and organization from government and non-profit institutions.<sup>230</sup> At the end of the day, governing through social capital in residential micro-institutions is neither the apogee of civic communitarianism nor the apocalypse of pluralism. It is an inexorable part of the cost-savings necessitated by federal devolution and more limited fises for states and cities. And for my purposes, it is a point of reflection for the misguided expectations for social capital.

#### **IV. Residential Norms, Social Capital, and Small Republic Thinking**

Using property law to promote social capital would be less troubling if we could predict that the instrumentality of social capital would be reliably coupled with positive residential norms and motivations. As discussed previously, social capital alone does not offer built-in constraints on bad behavior. In the residential context, civic republicanism ideals cling to property, but imperfectly (some scholars have suggested near-schizophrenically)<sup>231</sup> and often faintly when one is contemplating her own residential property rather than her perceptions of *others'* obligations vis-à-vis their property. These shortcomings of public-minded sensibility in residential property norms are implicit in the vigorous efforts of property scholars such as Gregory Alexander and Eduardo Peñalver to inculcate and disseminate public-regarding property norms.<sup>232</sup> There is

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<sup>229</sup> See Fair Housing Act, Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (2000)); John Yinger, *Sustaining the Fair Housing Act*, 4 CITYSCAPE 93, 99-100 (1999) (describing the history of the Fair Housing Act and the underlying political compromises that led to an "almost ludicrous" lack of federal enforcement authority and capacity).

<sup>230</sup> See Elizabeth A. Taylor, Note, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061, 1077-81 (1995).

<sup>231</sup> See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 561-62 (1984) (discussing how civic republican and economics perspectives stratify takings jurisprudence).

<sup>232</sup> See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 760-73 (2009); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1963-64 (2005).

good to suspect that residential property norms create a substantial risk of dark side dynamics from social capital, particularly with respect to restraining housing supply and entrance.

This point is most precisely understood through the sociological theory of roles. Roles entail shared norms for a given social position that define the expected behavior of the role-holder.<sup>233</sup> In the constitutional arena, Bruce Ackerman has conceptualized mixed public citizen and private citizen roles and explored their importance to a dualist Constitution.<sup>234</sup> In the residential context, the combination of private and public residential activity and orientations appears to produce a mixed public- and private-regarding residential property role. Commitments to equality, altruism, or public citizenship ideals may matter somewhat or sometimes. One can point to examples of local action with respect to climate change or human rights for example.<sup>235</sup> Local citizen groups address not only private property but also local public, albeit limited-access, institutions such as schools and parks that may orient residents toward public-mindedness, at least with respect to these activities or “sub-roles” (though notably any public citizenship attached to schools has not secured de facto school desegregation). Perhaps abundant social capital carries fewer negative externalities, at least in the first instance, when the residential norm or role sub-type relates to certain categories of local public institutions or extra-local public interests. On balance, however, the residential property role is more private-regarding and local group-regarding than other roles. Certainly, the residential role is more private-spirited and insular than how one might conceive one’s role as a student or an African American or a national voter. And the residential *owner* role in particular comprises a perceived prerogative to exert control over housing supply and the social composition of residents.

Residential property norms are strongly, though not exclusively, rooted in the economics of residential ownership. Homeowners, as William Fischel has described, have strong motivation to maintain and enhance the value of their large, undiversified assets: their homes.<sup>236</sup> This excessive ownership stake encourages local investments that increase property values, including beneficial contributions to schools and environmental quality as well as harmful investments in

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<sup>233</sup> See Ralph H. Turner, *Role Theory*, in HANDBOOK OF SOCIOLOGICAL THEORY 233, 233–34 (Jonathan H. Turner ed., 2001).

<sup>234</sup> See BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 232–35 (1991).

<sup>235</sup> See, e.g., Taking the Local Road to Copenhagen: ICLEI USA’s Primer on the Role of Local Governments in an International Climate Change Agreement, ICLEI Local Governments for Sustainability USA, <http://www.icleiusa.org/action-center/affecting-policy/international-policy-resources/taking-the-local-road-to-copenhagen> (last visited Feb. 1, 2013).

<sup>236</sup> See Fischel, *supra* note 30, at 4–19.

racial exclusion and exclusionary zoning.<sup>237</sup> It seems possible, even probable, that this defensiveness of self-interest in one's personal residential property fails to update in perfect Bayesian fashion and instead generalizes to a degree to other property contexts, including some public residential contexts. These norms may spill over to affect tenants, albeit more weakly.

Historical patterns of land collusion and exclusion also affect norms surrounding residential property behavior and institutions. Exclusionary zoning has been well established for decades and sanctioned by the Supreme Court.<sup>238</sup> Given the reinforcement of these norms through weak state and federal laws, it is not surprising that land cartelization and NIMBYism are little-questioned aspects of residential life. With respect to racial and ethnic exclusion, there is a historical resonance to subordinating individual equality to residential property rights, the rhetoric of community, and local property values. Neighborhood associations and residential working together are strongly (though not exclusively) associated with their long history of racial purging and legal and extra-legal maintenance of segregation.<sup>239</sup> Indeed, exclusion may be one of the more resonant ways that communities conceive of and experience collective action.

These tendencies are exacerbated by the fact that for homeowners, who represent a majority share of the national population, ownership is conceptualized as a civic moment. Longstanding and influential sentiments dating to Jeffersonian and civic republicanism over a corporeal land stake in the country as a cultivator of civic capacity.<sup>240</sup> According to Jefferson and other influential thinkers, property makes individuals trustworthy as democratic citizens and voters by assuring necessary independence and developing their civic faculties.<sup>241</sup> Thus, it may be that with respect to national or public citizenship, property ownership allows some resting on your laurels—by becoming a property owner one has already discharged an important act of public citizenship. There is also an intuition, correct in some contexts but not in others, that

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<sup>237</sup> See *id.*

<sup>238</sup> See *Euclid*, 272 U.S. at 394-96.

<sup>239</sup> See SUGRUE, *supra* note 141, at 215–25; LOEWEN, *supra* note 140.

<sup>240</sup> See Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in *The Life and Selected Writings of Thomas Jefferson* 632–34 (photo. reprint 1946) (Adrienne Koch & William Peden eds., 1944); Stern, *supra* note 78, at 922–25 (detailing civic republican virtues attributed to ownership).

<sup>241</sup> As Jefferson explained,

Here [in America] every one may have land to labor for himself . . . Every one, by his property, or by his satisfactory situation, is interested in the support of law and order. And such men may safely and advantageously reserve to themselves a wholesome control over their public affairs, and a degree of freedom, which, in the hands of the *canaille* of the cities of Europe, would be instantly perverted to the demolition and destruction of everything public and private.

Letter from Thomas Jefferson to John Adams, *supra* note \_\_\_, at 633.

contributing to local communities substantially fulfills obligations to the national good. Of course, local provision of private and public goods and ownership enables some government savings by shifting certain costs and service provision responsibilities to citizens. However, this is a far more modest contribution than the popular understanding of local activity and ownership as realizing citizenship and democracy.<sup>242</sup>

Today, social capital plays a similar role in cultural thought by reifying orientations toward individualistic or local “small republic” thinking with the inflated promise that group action yields national dividends. Social capitalists allege that working together to advance private or local self-interest in a group bound by social ties, trust, and norms of reciprocity creates positive spillovers for national democracy, economy, and citizen flourishing.<sup>243</sup> In the context of local working together, we can be less concerned about our obligations to the welfare of others, at least others beyond our group, because our very cooperation produces countervailing societal and national benefits. Social capital theory thus entrenches private-regarding norms by eliding a balancing between broader social benefits and local group interests and claiming that action to advance the latter will provide the former. This is perhaps the local resident version of “doing well by doing good.”

If self- or local-focus is largely due to economic incentives or historical determinants one might question whether it matters if social capital dynamics and small republic thinking suppress civic virtue that would not find expression regardless. This view neglects the noisiness and variability to whether negative spillovers and collusion occur, based on the sum of factors such as transaction costs, political influence, the magnitude of the risk or effect on property values, the availability of explicit or implicit compensation, and norms. Also, to the extent that social capital advances a norm-neutral approach and encourages complacency toward broader social obligations, it may forestall positive normative changes that would be capitalized into home prices and thereby lessen or alter negative homeowner dynamics. For example, as prejudice against black entry into largely white communities decreases through social movements and norm change, drops in housing prices from black residents should also decrease, further

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<sup>242</sup> In light of the subsidies for homeownership and the social contribution of tenants, the magnitude of government savings may be less than assumed. See Stern, *Citizenship Virtues*, *supra* note\_\_.

<sup>243</sup> See PUTNAM, *supra* note\_\_, at 288-89.

attenuating homeowner opposition.<sup>244</sup> These normative changes may be less likely to occur in an age of social capital thinking that elevates residential *gemeinschaft* to noble civic purpose and depicts local, private-regarding cooperative activity as public citizenship.

## V. Beyond *Gemeinschaft* Property

The promise of social capital is its capacity to resolve prisoners' dilemmas. Communities are better off when residents cooperate to clean up parks, refrain from littering, and "keep eyes on the streets."<sup>245</sup> The classic prisoners' dilemma is two prisoners who are jointly best off by cooperating to remain silent but face incentives to defect and secure lighter sentences by unilaterally confessing. The prisoners' dilemma illustrates how individuals acting rationally to advance their self-interest may, as a group, end up worse off. Of course, as any economist recognizes, resolving the prisoners' dilemma maximizes the prisoners' joint utility but does not speak to whether society would be better off if the prisoners (let us assume they murdered innocent bystanders) remained in prison. More precisely, the value of social capital to prisoners' dilemmas in residential property relies on the assumption that there are limited negative externalities from cooperation or the precursors to cooperation.

This Article questions that assumption in light of historical and modern-day examples of residential social capital and weakly protective residential norms. Many property scholars have aligned with social capitalists in the shared mission of promoting social capital through property law and property institutions through social capital.<sup>246</sup> They endorse the view that property law and institutions should produce local social capital by encouraging social interaction, increasing ownership, raising the costs of exit, and devolving governance responsibilities to resident groups as "incubators of local social capital."<sup>247</sup> These accounts neglect the risks and costs to abundant local social capital and vesting control of property in solidaristic mini-societies. The local civil society of bonding social capital is an internally cohesive, but nationally fragmented social structure that can close off property, fuel factions and cartels, and dilute orientations toward national interests or the greater good. Cohesive social capital can also limit information

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<sup>244</sup> See Lawrence Bobo & Camille L. Zubrinsky, *Attitudes on Residential Integration: Perceived Status Differences, Mere In-Group Preference, or Racial Prejudice?*, 74 SOC. FORCES 883, 885–87 (1996).

<sup>245</sup> I thank Robert Ellickson for his helpful comments and questions on this point.

<sup>246</sup> See *supra* Part I.A.

<sup>247</sup> See *id.*; Ellickson, *New Institutions*, *supra* note 17, at 83 (noting that "act of creating a formal block-level organization . . . might foster acquaintanceships that would then strengthen the informal social capital of the block's residents and property owners.").

diffusion, suppress innovation, and chill dissent and non-conformity.<sup>248</sup> And if communities must be tight-knit, *Gemeinschaft* enclaves to prosper, then similarity and social proximity are the coin of the realm.

To be clear, my claim is not that the rotary club should be stricken from the local landscape, neighbors should structure their relations within formal rules, or participatory local government and community-building is inevitably harmful. Indisputably, the constituent elements of social capital have value in certain contexts. Social interaction and informal regimes of sharing information and resources can convey benefits to participants and to society. Certain types of social capital lower the costs of political organizing.<sup>249</sup> Social institutions, norms, and conventions fill gaps within laws (and in some cases are law, properly defined). Perhaps local social capital is best understood as necessary but dangerous: a modest baseline of social capital, or at least some of its constituent elements, is necessary to residential life. But excessive bonding capital or social capital tethered to bad norms can wreak substantial harm.

It may that social capital-building or reliance on social capital is more productive in contexts other than residential property, for example within school communities or families. Social capital may be more consistently beneficial or desirable in settings where norms and roles are better aligned with social welfare enhancement, substitutes for social capital are scarce, or self-governance is critical to personal or social identity. Another issue is whether private-regarding residential norms and local collective action or collusion may create intra-group trust, goodwill, or pro-social motivations (or at least consumer surplus) that enable generosity or wealth redistribution in other contexts. This is possible but seems unlikely. The research on self-preferencing in-groups gives us little reason to anticipate that altruistic, other-regarding behavior will spring from private-regarding residential solidarity.<sup>250</sup> And because local provision of private goods, ownership, and even housing cartelization are often understood as fulfilling public citizenship obligations, they likely decrease the motivation for extra-local altruism and redistribution.

If social capital is to retain a role in property law we must disaggregate its component parts and consider their utility to specific legal contexts. Many of the elements of social capital,

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<sup>248</sup> See Levi, *supra* note 116, at 51–52 (observing that “Historically, there is reason to believe that maintenance of close networks blocks innovation and reinforces traditionalism, generally in the form of closed economies.”); Portes, *supra* note 31, at 15–16.

<sup>249</sup> See *infra* Part I.B.

<sup>250</sup> See *supra* note 32.

such as social ties, particularized trust, civic engagement, participation, and shared norms, can be employed for good or ill. For these aspects of social capital to develop as useful legal constructs, we must turn to the task of animating them with normative content. Examples include norms of respecting personal property or Robert Sampson’s research on diffuse norms of neighborhood social regulation.<sup>251</sup> Disaggregation also necessitates context-specific analyses: the scale and nature of the desired collective action predict the value of individual elements of social capital. For example, research suggests that local social ties increase social cohesion and informal regulation in urban neighborhoods but not participation in public events or willingness to address extra-local social problems.<sup>252</sup> Perhaps the most intriguing and promising aspect of social capital for residential property, however, is the development of generalized trust (the belief that strangers can generally be trusted). Generalized trust creates the preconditions for broad social exchange, minimizes the need to make provisions to control opportunistic behavior, creates fewer negative externalities than in-group trust or social ties, and has the potential to open residential communities.<sup>253</sup> In his empirical study of the effect of law on generalized trust, Frank Cross contends that law can serve as a bridging tie that promotes social trust.<sup>254</sup> Of course, promoting generalized trust is not invariably successful or positive in outcome.<sup>255</sup> For example, generalized trust is both reciprocal to and reliant on trustworthiness—without a substantial level of trustworthiness in the population, generalized trust will not develop and if it does it will make residents vulnerable to deceit and trickery.

The balance of this Part outlines the role of law and then turns to potential objections to my account of social capital’s dark side in residential property. I save the constructive task of developing context-specific legal correctives and typologies of social capital harm for future work. My contention here is plain: the chief role of property law is not to promote social capital,

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<sup>251</sup> See Sampson, *supra* note \_\_, at 150-55.

<sup>252</sup> See *id.* at 193.

<sup>253</sup> See Bo Rothstein & Dietland Stolle, *The State and Social Capital: An Institutional Theory of Generalized Trust*, 40 J. OF COMPARATIVE POLITICS 441, 441-43 (2008) (empirical study finding that experiences with street-level bureaucrats in order-maintaining and public welfare government institutions affect generalized trust).

<sup>254</sup> See Cross, *supra* note \_\_, at 1522-27, 1542 (“The law and even legalization of relationships can produce bridging social capital, increasing the total level of trust in a society and preventing some of the discriminatory effects of trust.”).

<sup>255</sup> Notably, there is emerging evidence that high generalized or social trust may decrease the development of norms of social order, specifically citizen readiness to obey laws and regulations. See van Deth & Zmerli, *supra* note 131, at 635. If this hypothesis proves true it would muddy any neat relationship between law and social trust. Laws that are successful at creating social trust might ultimately lessen norms of law abidingness which over time would reduce laws’ efficacy, both functionally and for trust-promotion.

but to address its negative spillovers and illiberal effects. Carol Rose apprehends these concerns in her argument for a modest overlay of egalitarianism-protecting law in property commons.<sup>256</sup> In my view, the need for law to support and constrain residential self-governance and local social capital applies with substantial force, and somewhat thicker legal institutions, than envisioned by Rose and certainly Dagan and Heller.<sup>257</sup>

Some aspects of the role of law in addressing the dark side of social capital should not be controversial. Most social capitalists would support legal protections against discrimination, such as the Fair Housing Act. More controversially, however, I suggest that high social capital may increase the need for legal protections and in some instances necessitate law to limit, diffuse, or deconstruct social capital (particularly when law cannot directly reach social capital harms due to its design or enforcement).<sup>258</sup> Law can also mitigate illiberalism by providing frameworks and rule infrastructure that lessen the cost of coordination and the pressure on cooperation, and the attendant pressures toward homogeneity and social status-based allocations. And in some cases, legal institutions may reduce “diversity anxiety” by providing rules, safeguards, and supports that signal rule of law values and opportunities for recourse.

Addressing social capital harms requires a variety of legal tools, including direct restrictions, political process safeguards or correctives, incentives, and, in some instances, use of thicker institutions rather than informal self-governance. Co-governance where groups manage property within a substantial framework of state-created law and oversight, offers an intermediate solution to the problems of governing residential property through social capital (notably, the much-vaunted commons of the lobster gangs and fisheries have moved to co-governance and collaborative resource management with state and federal government).<sup>259</sup> Concededly, legal design often strays from the optimal. Peter Schuck’s work has examined law’s tendencies to be heavy-handed, convoluted, costly and inefficient, reductionist due to the need for simple categorizations, and biased in favor of powerful interests or the status quo.<sup>260</sup> In the area of

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<sup>256</sup> See Rose, *supra* note \_\_\_, at 44.

<sup>257</sup> See *id.*; Dagan & Heller, *supra* note 128, at 597.

<sup>258</sup> Social capitalists also do not address whether high social capital should remain a goal in contexts where the scope of law or meager enforcement does not reach social-capital mediated harms.

<sup>259</sup> See, e.g., JAMES M. ACHESON, CAPTURING THE COMMONS: DEVISING INSTITUTIONS TO MANAGE THE MAINE LOBSTER INDUSTRY 97-101 (2004).

<sup>260</sup> See PETER H. SCHUCK, THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE 4-6, 16-17, 428 (2000) (examining costs of legal complexity and the inefficiencies of blunt legal categorization); PETER H. SCHUCK & RICHARD J. ZECKHAUSER, TARGETING IN SOCIAL PROGRAMS: AVOIDING BAD BETS, REMOVING BAD APPLIES 46-49, 131-33 (2006) (discussing problematic legal distributions and policy inefficiencies from bad bets).

diversity, he describes the shortcomings and unintended consequences of aggressive diversity programs and argues that the law's primary role in promoting diversity should be to prevent discrimination and protect competition.<sup>261</sup> While I acknowledge the variable quality of law, there are certainly many legal frameworks that function effectively (i.e., more efficiently than no law). Indeed, well-designed laws often fade to the background precisely because they are working quietly and efficiently. Accordingly, I see a substantial, though not exclusive, role for law to address social capital's negative externalities.

Some scholars have argued to the contrary that law is at odds with social capital and trust. Larry Ribstein believed that law can discourage trust-creating social capital in private and business associations by creating monitoring obligations and reducing exclusivity.<sup>262</sup> Putnam's work at times views law as a sign of crumbling social capital rather than an independent, positive social good.<sup>263</sup> Yet, individual rights and communities are not inevitably at odds. Robert Post describes how tort, privacy, and other laws often simultaneously protect community (social capital) and individuals by protecting essential community norms that constitute both individuals and society.<sup>264</sup> He writes that the interdependency between individuals and community "makes possible a certain kind of human dignity and autonomy that can exist only within the embrace of community norms."<sup>265</sup> In residential property, law and legal debate has often vacillated in a binary fashion between community versus individual rights.<sup>266</sup> Properly understood, laws to promote social capital should also safeguard our most essential and constitutive norms, such as respect and equality, and police against social capital spillovers that threaten public interests.

## **B. Political Organizing, Low-Income Communities, and Social Capital**

One objection to my account is whether there is a better case for promoting social capital to support political organizing, particularly in low-income communities that cannot afford substitutes for social capital (e.g., private security and services)? Barriers to organizing, including low social capital, have undeniably disadvantaged low-income communities in the

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<sup>261</sup> See PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 58-61, 186 309-11 (2006).

<sup>262</sup> See Larry E. Ribstein, *Law vs. Trust*, 81 B.C. L. REV. 553, 584 (2001).

<sup>263</sup> See PUTNAM, *BOWLING ALONE*, at 144-47.

<sup>264</sup> See ROBERT C. POST, *CONSTITUTIONAL DOMAINS* 62-64 (1995).

<sup>265</sup> *Id.* at 51.

<sup>266</sup> For example, the discourse over residential exclusion have focused heavily on the rights of individuals and neglected the harm to community norms.

political process.<sup>267</sup> Yet, it is questionable whether the target of this Article, insular bonding social capital generated through residential law, is a critical precursor of political organizing for poor neighborhoods. Dense and strong social ties and norms of reciprocity, key elements of social capital, are often present in low-income communities.<sup>268</sup> However, research shows that such social capital can harm these communities by creating networks between residents and criminals that lessen crime reporting and informal enforcement of order.<sup>269</sup> If low-income communities must bolster social capital, developing it through participation in public institutions or bridging ties that draw disenfranchised citizens into the broader political community may be more beneficial than promoting bonding capital.<sup>270</sup>

In particular, the skills of organizing and institution-building, or agents with these qualities, may be what is most important to political participation.<sup>271</sup> As Section III illustrates, residential self-governance does not reliably develop institution-building capacities (and if it did a question would remain whether self-governance reduces the time, energy, and social capital available for political organizing). Findings by Robert Sampson underscore the institution-building role of leaders and agents.<sup>272</sup> The penetration of non-profit organizations, not strong and dense ties, predicts community collective action (*e.g.*, protests, fundraisers, neighborhood events, etc.).<sup>273</sup> Social capital is not absent from this process (a common vocabulary, minimal baseline of trust, and social networks help), but it is not front and center. Research is just beginning to determine which types of institutions produce positive outcomes in low-income communities. Some of this scholarship can appear partisan, with proponents arguing for favored institutions.<sup>274</sup> Rather than micro-level social engineering, it may be more beneficial to focus on building certain collective

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<sup>267</sup> See generally KAY LEHMAN SCHLOZMAN ET AL., *THE HEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012).

<sup>268</sup> See Christopher Browning *et al.*, *The Paradox of Social Organization: Networks, Collective Efficacy, and Violent Crime in Urban Neighborhoods*, 83 *SOC. FORCES* 503, 523 (2004).

<sup>269</sup> See *id.* at 520-23 (finding that “While networks promote neighborhood cohesion and informal social control orientations, they also generate network-based social capital . . . that may inhibit more consequential forms of social control.”); Sudhir Alladi Venkatesh, 103 *AM. J. SOC.* 82, 95–97 (1997) (dense and strong social ties lessened support for efforts to rid neighborhood of gangs); *cf.* MARY PATTILLO-MCCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* 69–70 (1999) (similar findings in study of middle-income black Chicago neighborhood).

<sup>270</sup> See Sampson, *supra* note \_\_.

<sup>271</sup> I thank Henry Hansmann for his insights on this point.

<sup>272</sup> See Sampson, *supra* note 34, at 150–55 (model of social cohesion that focuses on shared norms and values in the context of weak neighborhood ties).

<sup>273</sup> See *id.*

<sup>274</sup> See Fischel, *Vouchers*, *supra* note \_\_, at 113 (advocating for traditional local public schools and against a vouch system); Brinig, *supra* note 15, at 887 (advocating for Catholic schools).

identities and bluntly subsidizing non-profit institutions to allow politics, donations, and social forces to roughly sort out valuable institutions for individual communities.

### C. The Social Production of Neighborhood and Individual Capacity

Retreating from local social capital building may be problematic if high social capital or governing property informally is critical to the social production of the neighborhood or the identity of residents. In some instances where we find solidarity and social capital most appealing, the non-market or non-legal nature of the interaction is critical to the production of social units and identities, such as family, friend, or congregation. For example, Bob Ellickson's writing on social norms within the family recognizes norms against monetization of services and contracting within the household as psychologically and socially important to the construction of the household, as well as efficient on the whole.<sup>275</sup> Similarly, hiring a professional PTA would not be an effective substitute for a parent-led school association. Much of the value of the PTA is that is that children observe their parents' participation and infer the value of education.

In contrast, promoting local social capital or informal governance of residential property does not appear comparably important to producing the social unit of the neighborhood or individual identity.<sup>276</sup> Most people rely on nonterritorial communities for a sense of community and strong social ties.<sup>277</sup> For example, in response to the survey question, "What are the ways in which you get a real sense of belonging or sense of community" over 70 percent of respondents cited family and non-neighbor friends.<sup>278</sup> Decades of research establish that neighborhoods are characterized by weak ties and residents have on average only a handful of strong friendship ties in their community—and that they prefer it this way.<sup>279</sup> Indeed, the community studies research

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<sup>275</sup> See ROBERT C. ELLICKSON, *THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH* 28–29 (2008).

<sup>276</sup> I thank Amy Kapczynski for her helpful insights and comments about the role of property in producing identities.

<sup>277</sup> See Avery M. Guest & Susan K. Wierzbicki, *Social Ties at the Neighborhood Level: Two*

*Decades of GSS Evidence*, 35 URB. AFF. REV. 92, 105 (1999). Data averaged across the period of 1974–96 reveal that fully one-quarter of respondents never spend a social evening with neighbors, 15% spend a social evening with neighbors once a month, and 12% several times a month. See *id.* at 99 tbl.1. The amount of socializing with friends is nearly double. See *id.* The comparatively weak attachment to neighborhood and community is also reflected in the mobility data with homeowners reporting a median stay of only 8.2 years in each residence. See William R. Rohe *et al.*, *The Social Benefits and Costs of Home Ownership: A Critical Assessment of the Research* 13 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. LIHO-01.12, 2001) available at <http://www.jchs.harvard.edu/publications/homeownership/liho01-12.pdf>.

<sup>278</sup> See PUTNAM, *BOWLING ALONE*, *supra* note \_\_, at 274, 275 fig. 77. One-third or less of respondents cited local community or neighbors. See *id.*

<sup>279</sup> The average person has approximately a dozen strong social ties but only two or three of those ties are to neighbors. See Press Release, ASA News, American Sociological Association, *Encouraging Neighborliness: National Website Encourages Neighborliness on the Local Level; I-Neighbors Project to*

reveals that residential communities are not very community-like at all. Even ethnic enclaves, long idealized in academia, serve primarily as way-stations that help new immigrants gain economic footing, at which point they often depart.<sup>280</sup> More to the point, indiscriminately devolving governance and public goods provision to residents appears as likely to harm as to benefit any communal social meaning vested in neighborhoods by breeding conflict and faction.<sup>281</sup> My claim here is not that neighborhood, particularly resident involvement in local schools or organizations, invariably lacks meaning. Rather, it is that in view of the comparatively weak construct of neighborhood and the organic social capital in communities, retreat from promoting social capital and *gemeinschaft* property is unlikely to threaten individual or neighborhood identity.

What about the role of social capital and informal collective action in developing individual capacities? This theory traces to John Stuart Mill's assertion that voluntary action educates citizens socially and democratically, producing happier, more thoughtful and civic-minded individuals. My analysis demonstrates more variable outcomes from group engagement in residential settings. Voluntary action can produce illiberal exclusion and collusive activity that provides an anti-social education. Even ostensibly positive or pro-social participation, such as serving on one's condominium board, frequently results in citizen-participants departing frustrated, demoralized, and in some cases disregarded on the basis of status, rather than brimming with civic gravitas. Notably, the evidence for increased happiness from social capital is thin. In the Community Benchmark survey, Putnam reports that higher social capital correlates with greater happiness and community satisfaction.<sup>282</sup> However, this finding is subject to reverse causation, meaning that perhaps happier people are more likely to participate in activities and have social ties that would yield higher social capital scores. A well-established body of research on happiness also undermines a continuous positive relationship between social capital and happiness: while social ties are important to happiness, people are highly individualized in the amount of socializing they require and many are happy with a relatively

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*Strengthen Community* (Sept. 9, 2004), available at [http://www.asanet.org/cs/root/topnav/press/encouraging neighborliness](http://www.asanet.org/cs/root/topnav/press/encouraging%20neighborliness); see also Sampson, *supra* note 34, at 151 (noting how people desire trust with their neighbors but not necessarily thick ties); Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1122-24 (2009) (reviewing literature on weak ties in residential communities).

<sup>280</sup> Indeed, recent demographic trends show that more immigrants are settling directly in the suburbs rather than gateway cities. See MARIE PRICE & LISA BENTON-SHORT, *MIGRANTS TO THE METROPOLIS* 19 (2008).

<sup>281</sup> See *supra* text accompanying notes 91–95.

<sup>282</sup> See The Saguaro Seminar Civic Engagement in America, Social Capital Community Benchmark Survey Executive Summary 1, 7 (2001), <http://www.hks.harvard.edu/saguaro/communitysurvey/results.html>. }

small number of satisfying relationships.<sup>283</sup> In addition, some of the sociological research suggests that solidaristic communities can be quite unhappy places for the successful who are burdened by requests from friends, family, and neighbors for favors, loans, and jobs.<sup>284</sup>

#### **D. Alternatives for Generalized Solidarity and Collective Identity**

Do property *gemeinschafts* and social capital encourage a valuable sense of solidarity that may be otherwise lacking in modern society? Solidarity may bind citizens together with shared purpose and mission and encourage social contribution, redistribution, and individual and national flourishing. Putnam's bridging social capital tracks the conception of broad, cross-cutting solidarity.<sup>285</sup> Without platforms for solidarity, collective identity may founder, endangering collective action, democratic participation, and the polity. At the extreme, a society may develop anomie, where the collective conscience frays and norms and moral regulation no longer check individual appetites and ambitions.<sup>286</sup>

I am dubious of the threat of anomie or other solidarity harms from more constrained residential self-governance or local social capital-building initiatives (assuming such initiatives are even effective at creating social capital). First, other institutions, such as religion, schools, and the workplace, appear at least as, and likely more, central to moral norms and collectivism than residential property.<sup>287</sup> Within the residential context, it is also not evident that greater social distance and less dense residential social relations threaten normlessness or anomie. At larger residential scales of cities and other loose-knit communities, people rely on norms and shared moral conceptions to navigate communities and coordinate interactions under conditions of high population density and relative anonymity. For example, city residents develop widely-

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<sup>283</sup> See, e.g., JOHN CACCIOPPO & WILLIAM PATRICK, LONELINESS: HUMAN NATURE AND THE NEED FOR SOCIAL CONNECTION 94 (2008).

<sup>284</sup> See Portes, *supra* note 31, at 16.

<sup>285</sup> See Putnam, *supra* note 2, at 22-24.

<sup>286</sup> See EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 304-08 (1984) (describing anomie as an unusual and pathological social condition resulting from sudden economic or social change).

<sup>287</sup> See Part V.B. Also, the narrative that diversity may threaten moral regulation and norms is questionable in the residential context if laments about the alienation and social competition in homogenous American suburbs have any truth. See The Evolution of Homeownership, available at [http://www.homeinsight.com/details.asp?url\\_id=7](http://www.homeinsight.com/details.asp?url_id=7). Durkheim recognized the point that mechanical solidarity and greater similarity can increase competition at least in the economic sense. See *id.* at 210.

understood norms to govern such issues as street parking, queues, and behavior in public spaces—these norms may have socializing as well as communicative value.<sup>288</sup>

Second, there are other, more encompassing forms of solidarity—tight-knit localism is not the only option.<sup>289</sup> Retreating from local solidarity may redirect political energy and identity outward and strengthen these broader forms of solidarity. Scholars from a variety of disciplines have described alternatives to *gemeinschaft* solidarity. Durkheim conceptualized “organic societies” based on complex, interdependent roles within society with strong norms associated with the roles.<sup>290</sup> Building on this foundation, Portes and Vickstrom describe organic solidarity as “universalistic rules and their embodiment in specific roles.”<sup>291</sup> The interdependencies and specialization in organic society promote cohesion and cooperation that secure solidarity.<sup>292</sup> In a similar vein, Max Weber described bureaucracies as centralized, hierarchical organizations organized by rational laws, specialization in individual tasks and bureaucratic structure, and the demands of the tasks to be accomplished (although as Daniel Kreiss notes these ideals do not “function in the real world as they do on paper”).<sup>293</sup>

Solidarity may also come from common commitments or shared morals. Drawing from Aristotelian thought, Alisdair MacIntyre writes of the shared moral community.<sup>294</sup> Multiculturalism theorists suggest that shared values, history, and enthusiasm for “deep diversity” may if not create, at least sustain, broader social solidarity.<sup>295</sup> Generalized trust, or the belief that strangers can be trusted, also binds societies together.<sup>296</sup> The sociological theory of

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<sup>288</sup> See, e.g., Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81 (1985) (describing example of shoveling snow).

<sup>289</sup> I have previously discussed the fact that alternative forms of solidarity or bridging ties do not remedy or trump the dark side of local capital. In this section, my point is different: alternative forms of solidarity hold other values for society and can substitute for any reductions in local social capital.

<sup>290</sup> See DURKHEIM, *supra* note \_\_, at 132-33.

<sup>291</sup> See Portes & Vickstrom, *supra* note \_\_, at 473. In more recent writing, task solidarity across the military has emerged as an argument for how the military can preserve solidarity in the face of heterogeneity of sexuality. See Gregory Herek, *Unit Cohesion and the Military Mission*, [http://psychology.ucdavis.edu/rainbow/html/military\\_cohesion.html](http://psychology.ucdavis.edu/rainbow/html/military_cohesion.html) (last visited Feb. 4, 2013).

<sup>292</sup> See DURKHEIM, *supra* note \_\_, at 105.

<sup>293</sup> See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1930); see also Daniel Kreiss *et al.*, *The Limits of Peer Production: Some Reminders from Max Weber for the Network Society*, 13 NEW MEDIA & SOC’Y 243, 249 (2011).

<sup>294</sup> See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE* 251–54, 258 (1984) (criticizing Enlightenment individualism and advocating a return to the Aristotelian tradition of socially-understood virtue and a shared vision of morality).

<sup>295</sup> See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 188-91 (1995) (discussing theories of social unity for polyethnic and multi-nation states).

<sup>296</sup> See Dietland Stolle, *Trusting Strangers The Concept of Generalized Trust in Perspective*, 31 OZP 397-99 (2002), available at <http://www.oezp.at/pdfs/2002-4-02.pdf> (defining and discussing generalized trust).

professionalism describes the development of the professional role and its normative focus on universalistic standards of science and expertise, service to the community, and service-delivery rather than the identity of the client.<sup>297</sup> Although some aspects of the professional role appear overstated, professionalism does create commonality among professionals as well as between professionals and clients through the norm of impartial service-provision.

Stepping back, each of these theories is a form of generalized solidarity, by which I mean a form of solidarity that extends beyond one's immediate group or territorial enclave. The source of generalized solidarity in the accounts above varies between intensive social interdependencies and universal, or at least very broadly shared, norms, morals, or trust. For my purposes, the point is not to endorse one choice but rather to discuss alternative sources of solidarity that sound not only in one's community but in society more broadly. In the setting of residential property, the specific forms of generalized solidarity available vary by context, and even geography, and multiple forms overlap and reinforce one another.

Interestingly, open property markets themselves can be one form of generalized solidarity—though not the most broadly inclusive or necessarily the most desirable. Eighteenth century economic writers described a “gentle commerce” that brings people together and forces them to consider and account for the interests of far-flung others in order to trade.<sup>298</sup> Carol Rose has posited a socializing role of property, writing about how property markets can place people into contact with others far from their geographic home and social niche and inculcate norms and trust.<sup>299</sup> To extend these ideas, it may be that property has the capacity not only to socialize but also to help develop generalized solidarity by structuring open markets and even playing fields of rules for participants to interact.<sup>300</sup> Indeed, this may part of the intensely negative reaction to practices such as mortgage lending discrimination and redlining, which not only impose individual harms but sully the universalizing rules of the market playing field. Residential social capital, and its role in fueling local factions and exclusion, offers a fresh perspective on the

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<sup>297</sup> See Bryan S. Turner, Talcott Parsons, *Universalism and the Educational Revolution: Democracy versus Professionalism*, 44 BRIT. J. OF SOCIOLOGY 1, 14 (1993).

<sup>298</sup> *Id.* at 419.

<sup>299</sup> See Carol M. Rose, *Whither Commodification*, IN RETHINKING COMMODIFICATION 402, 412–13, 419 (eds. Martha M. Ertman & Joan C. Williams 2005) (describing also how imperfect information can encourage dense social networks, long-term relationships, and more complex social structures).

<sup>300</sup> Allport's seminal theory of optimal conditions shows that lessening prejudice and in-group bias through contact, or integration, requires that participants interact on a relatively level playing field of status, goals, norms, and laws. GORDON ALLPORT, *THE NATURE OF PREJUDICE* 4, 44–45 (1958).

longstanding debate about market commodification and alienation.<sup>301</sup> Upon closer view, legal and market institutions may play a larger socializing and liberalizing role in residential property than perceived by social capital exponents. And social capital, despite its cheerful mantle of sociability, can assume anti-social, factional, and illiberal forms.

### Conclusion

Social capital has beguiled property law with its claims of efficiency through sociability, territorial cooperation, and self-governance. This Article offers a fuller accounting of the negative externalities of social capital and its capacity to close off residential property. The enthusiasm for social capital has obscured the tradeoffs and costs to property markets, local politics, and residential diversity from social capital-building and governing through social capital within thin legal frameworks. I contend that we should be skeptical of social capital's primacy to property institutions (and vice versa), realistic about its benefits, and cognizant of its capacity for harm.

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<sup>301</sup> See Margaret Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1904 (1987) (expressing concern about the commodifying and anti-social nature of markets).