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# City as an Ecological Space: Social Capital and Urban Land Use, The

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## ARTICLES

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### THE CITY AS AN ECOLOGICAL SPACE: SOCIAL CAPITAL AND URBAN LAND USE

*Sheila R. Foster\**

#### INTRODUCTION

Cities are places of human development, both spatially and culturally. They represent the “ultimate handiwork” of our imagination, generating most of our art, culture, commerce and technology.<sup>1</sup> But cities also represent the excesses of human activity, which encroach upon and alter our way of life in profound and often indelible ways.<sup>2</sup> Modern land use regulation grows directly out of efforts to control

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1 See JOEL KOTKIN, *THE CITY*, at xx (2005).

2 See, e.g., WILLIAM CRONON, *NATURE’S METROPOLIS* (1991) (describing the history of the rise of Chicago, a history in which the fabric of the natural ecosystem which supplied the resources for Chicago’s growth were destroyed); Marvin V. Melosi, *The Place of the City in Environmental History*, 17 *ENVTL. HIST. REV.* 1, 3–25 (1993) (discussing the idea of the city that reigns in environmental and land use history as one

particular excesses and impacts from city life and urban growth.<sup>3</sup> It is conventional wisdom that the central problem of land use (and pollution control) law is one of “negative externalities”—the problem of unaccounted for social costs imposed on others arising from a particular use of land or of the commons.<sup>4</sup> One of the goals of land use (and pollution control) law is to force the internalization of these costs.

This otherwise economic view of land use law is also rooted, however, in an ecological understanding of urban land use. Legal scholars writing over three decades ago successfully argued, based upon the ecological facts of life, that “[p]roperty does not exist in isolation” because the effects of its uses flow outside of the boundaries of ownership.<sup>5</sup> The notion that property is inextricably part of a network of social and economic relationships, and that its impacts traverse legally defined boundaries and relationships,<sup>6</sup> is now deeply enshrined in our regulation of public and private land. Indeed, this ecological view of property helped pave the way for the “quiet revolution” in land use

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which evinces a disrespect of ecological limits and boundaries and against which nature and man need to be protected).

3 For instance, the early zoning movement in urban areas emerged as a response to the negative spillovers by incompatible, and “noxious,” uses of neighboring properties. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926). Similarly, the genesis of our modern environmental regulation grew out of early municipal efforts to control particular excesses of urban life—noise, waste, air pollution and the like. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 51 (2004).

4 See, e.g., RUTHERFORD H. PLATT, *LAND USE AND SOCIETY* 44 (2004) (“If there were no externalities among land use management units, there would be little or no need for land use law.”).

5 Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149, 152 (1971) (“Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing.”); see also Donald W. Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 *WIS. L. REV.* 1039, 1045 (“[W]hatever the state of its title, one parcel is inextricably intertwined with other parcels, and [its] causes and effects flow across artificially imposed divisions in the land without regard for legal boundaries. The land simply cannot be neatly divided into mine and yours.” (footnotes omitted)).

6 Sax, for instance, illustrated this truism by pointing out the impacts that certain uses of property could have on natural resources, such as wetlands, streams, and hillsides. Under his view, “members of the diffuse public” wishing to preserve natural resources (e.g., forested land, wetlands, historically valuable areas) on privately owned land should have a right to do so, a right “entitled to the equal consideration in legislative or judicial resolution of conflicting claims to the common resource base.” Sax, *supra* note 5, at 157–59. This public interest was rooted in part in the “maintenance of those resources found necessary to sustain the well being of the community.” *Id.* at 159.

law which ushered in significant state regulation of urban land use in the service of environmental and natural resource preservation.<sup>7</sup>

But not all social costs resulting from land use decisions are accounted for in our regulatory scheme. This Article highlights a category of social costs that remain largely exogenous to the norms underlying our system of land use controls. Scholars from various disciplines have long recognized the centrality of social capital to, and the resources it purchases for, the governance, health, and sustainability of urban communities.<sup>8</sup> Legal scholars have yet to fully grapple with the costs imposed on the social networks and ties, or social fabric of a community, arising from land use and development decisions. This Article asks how, if at all, these costs are accounted for, or integrated into, land use regulation and policy.

Social capital in this Article refers to the ways in which individuals and communities create trust, maintain social networks, and establish norms that enable participants to act cooperatively toward the pursuit of shared goals.<sup>9</sup> In a classic example of the concept of social capital at work, the sociologist James Coleman described how merchants in New York City's wholesale diamond market frequently handed over bags of diamonds, often worth many thousands of dollars, to other merchants to take and examine at their leisure and without any formal agreement or insurance.<sup>10</sup> The market was extremely successful, he explained, because of the high degree of trust (and trustworthiness), shared norms, and the willingness and capacity to cooperate among the community of diamond merchants. These attributes of the community arose from the close social network of the merchants, which was the result of frequent interactions and ethnic and family

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7 For a nice, succinct description of this movement, see ADAM ROME, *THE BULLDOZER IN THE COUNTRYSIDE* 221–53 (2001); see also Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 *PACE ENVTL. L. REV.* 109, 113 (2002) (discussing “smart growth, Growing Smart and local environmental law with a particular focus on what states can do to empower and encourage the enactment of meaningful local environmental land use laws”).

8 Sociologists and other social scientists have long extolled the presence, and lamented the loss, of social capital to the health and welfare of communities, large and small. See, e.g., Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, *J. DEMOCRACY*, Jan. 1995, at 65, 65–67.

9 See, e.g., DAVID HALPERN, *SOCIAL CAPITAL* 1–19 (2005) (reviewing the history, debates, and conceptual understandings of the term over time).

10 James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 *AM. J. SOC.* S95, S98–99 (Supp. 1988).



ties.<sup>11</sup> The social network provided the “insurance” necessary to facilitate the transactions of the market and the individual contributions to the common market enterprise had a payoff in terms of aggregate productivity and efficiency. He concluded from this, and other examples, that “like other forms of capital, social capital is productive, making possible the achievement of certain ends that in its absence would not be possible.”<sup>12</sup>

Strong social networks can produce significant economic and social welfare gains for geographically defined communities, as numerous studies have documented.<sup>13</sup> This capital can also be enhanced or diminished by land use and development decisions. Some decades ago the critic of modern urban planning, Jane Jacobs, famously stood up (at least intellectually) to urban renewers in protest because they were destroying the “irreplaceable social capital” which constitutes the lifeblood of cities.<sup>14</sup> She described this “social capital” as comprising the web of relationships and cooperative action between people who share a geographic space in big cities and/or an interest in maintaining a healthy neighborhood. What emerges from these relationships over time are established networks of “small-scale, everyday public life and thus of trust and social control” necessary to the “self-governance” of urban neighborhoods.<sup>15</sup>

Cities are thus constituted of neighborhoods and communities which come to manage themselves via networks of interested individu-

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11 For instance, the merchants were Jewish and with a high degree of intermarriage, they lived in the same community in Brooklyn, and went to the same synagogues.

12 Coleman, *supra* note 10, at S96.

13 In particular, high levels of social capital are significantly correlated with neighborhood health, environmental quality, disaster survival, and neighborhood control and governance. I discuss some of these studies in Part I.B.3. See also HALPERN, *supra* note 9, 43–169 (reviewing studies linking, or finding correlations between, social networks to various social and economic outcomes). Admittedly the presence and amount of social capital is tricky to measure, as is its causal relationship to various social and economic goods. The most widely accepted type of measurement is to survey individuals (and sometimes organizations) in the relevant communities. They are asked to “self report” their relationships, activities, and trust levels with others. See, e.g., *id.* at 31–38 (discussing the different types of measurements used and their reliability and success). The difficulty of measuring in “hard” quantitative fashion indicators of social capital makes tracing out their causal manifestations complicated. Nevertheless, there is a significant body of literature examining the empirical consequences of social capital from a range of academic disciplines which demonstrates a remarkable range of effects.

14 JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 146–83 (1961).

15 *Id.* at 155–56. There is some empirical support to the positive effects of social capital, particularly in preventing and reducing crime.

als who build and strengthen working relationships over time through trust and voluntary cooperation. This social capital is the "civic fauna" of urbanism, making the successful governance of cities possible.<sup>16</sup> Once this social capital is lost, Jacobs argued, "the income from it disappears, never to return until and unless new capital is slowly and chancily accumulated."<sup>17</sup> Other scholars, such as urban sociologist William Julius Wilson, too have argued that the inability to build or sustain adequate social networks which enable collective action can render communities vulnerable to a host of urban ills and have devastating impacts on urban communities.<sup>18</sup>

What these scholars share in common is a sense that the quality of neighborhood life inevitably shapes the quality of city life. That is, a city is only as strong and vital as its neighborhoods. Contemporary urban land use debates once again call our attention to the social costs imposed on intact, socially cohesive communities from land use and development decisions in urban neighborhoods. Much of the discourse of these debates has focused on the physical placement, or displacement, of land uses and the populations who inhabit them. But lurking very close to the surface of debates about physical placement and displacement is a deeper concern about the disruption to, and destruction of, social organization in neighborhoods most impacted by certain land use decisions. Targeted redevelopment efforts in inner-city neighborhoods can, for example, not only physically displace longstanding residents and businesses but also damage or destroy vital social and cultural ties crucial to residents' ability to raise

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16 DOUGLAS W. RAE, *CITY: URBANISM AND ITS END* 18 (2003).

17 JACOBS, *supra* note 14, at 180.

18 See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* 20 (1996) (describing the "social organization" necessary to "maintain effective social control and realize common neighborhood goals"). Wilson has argued that neighborhoods that are plagued by social disorder and economic distress are often products, and producers, of low levels of social capital:

Neighborhoods in which adults are able to interact in terms of obligations, expectations, and relationships are in a better position to supervise and control the activities and behavior of children. In neighborhoods with high levels of social organization, adults are empowered to act to improve the quality of neighborhood life—for example, by breaking up congregations of youths on street corners and by supervising the leisure activities of youngsters.

Neighborhoods plagued by high levels of joblessness are more likely to experience low levels of social organization: the two go hand in hand. High rates of joblessness trigger other neighborhood problems that undermine social organization, ranging from crime, gang violence, and drug trafficking to family breakups and problems in the organization of family life.

*Id.* at 20–21.

their children, earn a living, and meet other basic social and economic needs.<sup>19</sup> The disproportionate concentration of hazardous land uses in certain communities threatens not only physical health and neighborhood aesthetics, but also can alter the ways in which people live, work, and play—for example, by entrenching historical patterns of discriminatory land use and thereby fragmenting urban space by race and class.<sup>20</sup> Such fragmentation is arguably at the root of collective action problems in the urban commons, preventing the type of “togetherness” essential to “community-building” and collaborations across social and geographic boundaries.<sup>21</sup>

The question that this Article asks is how, if at all, we account for a community’s social capital in land use law and policy. This inquiry is based on the assumption that decisions about physical urban form and design often, but not always, exist in a highly interactive (and integrated) relationship with the social structure and organization of urban communities. This assumption is, as I explain later, consistent with recent urban ecological thought which acknowledges the complexity of interactions and feedback between social, biological and physical processes in urban environments.<sup>22</sup> Whether, and to what extent, this integration and complexity is recognized in our legal doctrine, regulation, and policy regarding urban land use and development is the focus of my inquiry in this Article.

Part I of the Article employs a case study involving a lawsuit to stop the proposed sale of hundreds of community gardens by New York City, the owner of the previously vacant lots, to private developers. The case study highlights how the gardens were used by various communities around the city to build and strengthen social ties, both within each neighborhood and between different neighborhoods, which ultimately produced other social and economic benefits for the surrounding communities and the city as a whole. The case study il-

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19 See, e.g., MINDY THOMPSON FULLILOVE, *ROOT SHOCK* 52–100 (2004).

20 See generally Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 779–807 (1998) (examining the environmental justice movement “from the perspective of the predominantly poor African-American residents of Chester, Pennsylvania who attempted to stop the clustering of waste facilities in their community”).

21 GERALD E. FRUG, *CITY MAKING* 9 (1999).

22 See *infra* Part I.B. It is also consistent, more generally, with an international movement that recognizes the “social function” of property and the social function of the city. See, e.g., Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 VAND. J. TRANSNAT’L L. 435, 462–78 (2006) (exploring how the international “right to the city” movement might improve social and economic justice for the poor in urban areas).

illustrates some of the ways that land use, and questions about land use, in the urban commons can be deeply intertwined with social capital production.

Part II takes a closer look at the legal mechanisms through which we regulate and manage land use in urban environments and through which the impacts on social capital can be assessed. The focus of much of this Part is on the National Environmental Policy Act of 1969 (NEPA)<sup>23</sup> and its state counterparts (SEPA), which have at their core an ecological orientation for assessing a variety of impacts on the environment (natural and urban). Yet, as this Part illustrates, NEPA and its state counterparts have consistently been interpreted in physically deterministic ways, limiting the scope of their normative reach into the ecology of urban environments. This is despite judicial recognition of the ways in which physical land use changes can significantly alter the very ecology of urban communities by severely disrupting, and often triggering the demise of, the fabric of social and economic relationships.

Part III turns to contemporary urban land reform movements, namely “New Urbanism” and “Smart Growth,” which are reshaping the urban landscape in the pursuit of social, economic, and environmental quality goals. What is remarkable about these movements is their recognition of the need to harmonize and integrate the physical, social, and economic elements of metropolitan regions and their cities. Yet, despite this recognition, underlying these reforms is a physical determinism that may be at odds with the integrated vision of urban space embraced by these movements. Reformers’ focus on physically redesigning existing urban space to *create* social capital is ironically inattentive to *existing* social ties and networks. To achieve the social capital and equity goals that reformers want requires a deeper accounting of social networks on community formation and sustainability.

Part IV of this Article suggests that accounting for the integrated relationship between decisions about physical urban space and impacts on a community’s social capital necessarily requires rethinking how we manage and regulate the urban commons. Traditionally the urban commons has been thought of as primarily a highly privatized commons—an aggregation of individual property rights and land ownership subject to market exchange. As indicated before, we accept some restrictions on the use of private property out of recognition that some common resources should be publicly managed, or preserved, and not left to market preferences. This Article argues that

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23 42 U.S.C. §§ 4321–4347 (2000).

social capital is a common resource that deserves protection, in large part because of the ways in which the spatial and social organization of the urban commons are so deeply intertwined and the ways that this capital can be employed to address some of our most entrenched urban commons problems.<sup>24</sup>

## I. LAND USE AND SOCIAL CAPITAL IN THE CITY

It is axiomatic that land use decisions can have indelible impacts on human communities at different degrees and scales. We have come a long way in recognizing and trying to account for the biophysical effects of land use in urban environments. We know that the choices we make about physical space—e.g., patterns of development, infrastructure density, and particular land uses—can yield negative effects on natural and physical resources. Much of our land use law is oriented toward preventing or mitigating those potential impacts—impacts such as air pollution, traffic congestion, and overcrowding.

But the choices we make about physical space can also have profound impacts on the social (and economic) networks of the communities of which that space is a part. This is particularly true in cities.

### A. *A Parable of City Space: The Case of the Community Gardens*

Imagine any post-industrial city in the 1980s—Detroit, St. Louis, Baltimore, Camden, New York City. Abandoned urban renewal programs have left most of these places “pockmarked with vacant lots cleared but never redeveloped.”<sup>25</sup> Many of these lots were left vacant by the demolition of buildings abandoned by their original owners, now owned by the city through tax foreclosures. The move of urban population from cities to suburbs, also known as “white flight,” is complete. Inner cities are ravaged by a new drug epidemic and escalating crime rates.

Now imagine that, in the midst of economically and socially fragile communities, neighborhood residents throughout one of these cities utilize these vacant lots to construct hundreds of “community

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<sup>24</sup> In a somewhat similar vein, Lee Anne Fennell very persuasively argues that spatial association, a common resource vulnerable to collective action problems, should be treated as a distinct property entitlement where patterns of exclusion combine to produce sustained spatial concentrations of poverty in urban metropolitan areas. See Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. (forthcoming 2006).

<sup>25</sup> PLATT, *supra* note 4, at 326.

gardens."<sup>26</sup> They do so with the explicit or implicit consent of the city government, which welcomes any sign of development on these lots. Residents clear the lots of trash and drug paraphernalia. They plant and cultivate trees, flowers, and vegetables. The gardens become places where residents of different ethnic backgrounds and ages interact, local food is produced, and crime is prevented (because the garden participants become the eyes and ears of the community).

### 1. Bulldozer in the Gardens

Fast forward to the 1990s. Urban revitalization is well under way; many suburbanites who left the city decades ago are now itching to return to the promise of safe, burgeoning city life. Private developers are interested in land once thought forgotten. City officials, too, are interested in previously abandoned lots, particularly in selling them to private developers for the construction of new housing and other developments. Toward this end the city announces its plans to bulldoze most of the community gardens now occupying this land and sell off the lots to private developers.

Neighborhood residents sue to stop the auctioning off of the gardens, but to no avail. They discover that they do not have legal standing because they lack a legally cognizable interest in the lots, being essentially short-term tenants of the city government with consent to use the land at the will of the city.<sup>27</sup> Residents also sue the city separately, again to no avail, for a civil rights violation on the grounds that the gardens to be auctioned off were predominantly in neighborhoods of color and the sale would disproportionately deprive those neighborhoods of the green space and social and economic resources the gardens provide.<sup>28</sup> City officials argue that in the long run the communities where the gardens sit would benefit from the new devel-

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26 The story recounted below based on the community gardens litigation in New York City is compiled through a number of sources. They include *New York City Environmental Justice Alliance v. Giuliani*, 214 F.3d 65 (2d Cir. 2000); *In re Application of New York City Coalition for the Preservation of Gardens v. Giuliani*, 666 N.Y.S.2d 918 (N.Y. App. Div. 1998); *In re New York City Coalition for the Preservation of Gardens v. Giuliani*, 670 N.Y.S.2d 654 (N.Y. Sup. Ct. 1997); Community Gardens in New York City, New York Gardens Threatened with Destruction (2002), <http://www.nothingbored.org/gardens.html>; New York City Garden Preservation Coalition, <http://www.earthcelebrations.com/gardens/gardens.html> (last visited Nov. 14, 2006); New York's Community Gardens, [http://www.treebranch.com/community\\_gardens.htm](http://www.treebranch.com/community_gardens.htm) (last visited Nov. 14, 2006); Urban Agriculture Notes, <http://www.cityfarmer.org/nydestroy.html> (last visited Nov. 14, 2006), and a number of news media sources cited below.

27 See *N.Y. City Coal.*, 670 N.Y.S.2d at 658–59.

28 A federal court of appeals rejected this type of argument in the *New York City Coalition* case, in part because of flaws in the methodology for calculating the impact

opment and promise to devote some of the newly redeveloped land to affordable housing.<sup>29</sup>

The day before the auction, hundreds of gardens were bought by a land conservation organization and conveyed to community gardeners who promised to maintain them as gardens.<sup>30</sup> Hundreds of gardens, however, did not receive this stroke of luck and remained vulnerable to being auctioned off.

## 2. Claiming the Gardens

In their dispute over the community gardens, residents contended that destroying the gardens would deprive their communities, especially the most vulnerable, of critical social resources provided by the gardens—including open space, environmental education, intergenerational and intercultural exchange, trees and flowers, and reduced crime and urban decay.<sup>31</sup> As a way to highlight the resources provided by gardens, and their loss should the gardens be taken away, residents engaged in a rhetorical campaign to situate the gardens as the functional equivalent of parks or “parkland,” which receives revered protection under the public trust doctrine.<sup>32</sup>

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of loss of the gardens on minority neighborhoods. *N.Y. City Envtl. Justice Alliance*, 214 F.3d at 71.

29 City officials promised that the developers would build affordable housing but, in the end, many of the gardens were auctioned off for luxury condominiums and parking lots. Monica Polanco, “No Gardens, No Peas” *Cry Protesters in Park*, N.Y. DAILY NEWS, Apr. 11, 1999, at 12 (“City officials say the auction is an opportunity for New York to expand its tax base and bolster its skyrocketing real estate market.”); Jennifer Tierney, *Bulldozing the Grassroots Gardeners: Arcadia*, FIN. TIMES (LONDON), Aug. 15, 1998, at 20 (“The sale last year of four community gardens for luxury condominiums galvanized a big grassroots campaign in the neighborhood to save them from demolition.”). It also came out in the course of the litigation that the city was bereft of a plan for the provision of affordable housing even though it indicated it would use the community garden sites for that purpose. *N.Y. City Coal.*, 670 N.Y.S.2d at 657.

30 Dan Barry, *Sudden Deal Saves Gardens Set for Auction*, N.Y. TIMES, May 13, 1999, at B1 (noting that the deal also included a provision that if the properties are ever used for anything other than gardens, ownership would revert to the city); see also Michael Ellison, *New Yorkers Dig Deep to Save Their Bit of Heaven; Bette Midler Joins Gardeners to Foil Mayor Giuliani’s Homes Plan for Homes*, THE GUARDIAN (LONDON), May 14, 1999, at 15 (noting that urban gardeners defeated a plan to sell over one hundred community gardens to developers).

31 See New York City Garden Preservation Coalition, *supra* note 26.

32 The public trust doctrine, which protects our natural resources by holding them in “trust” for present and future generations, was resuscitated by Joseph Sax in a seminal article, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). He later extended the concept to a variety of other ecological, historical, and cultural contexts. See, e.g., JOSEPH L. SAX, DEFENDING

The residents' arguments resonate with the arguments made for urban parks over a century ago by Frederick Olmstead. Urban parks, he wrote, provide natural resources like trees, which combat pollution, they combat urban vice and social deterioration, and bring together people from all walks of life lending to the social cohesion of cities.<sup>33</sup> But, in truth, the gardens are not "parks."<sup>34</sup>

The rhetorical promotion of the gardens as more than just another piece of undeveloped land reflected an anxiety and fear that the benefits the gardens provide would likely fall outside of the scope of the bundle of rights protected by our property and land use law. Moreover, given the enthusiasm for redevelopment in the city, the residents also feared that they too, along with the gardens, would soon be displaced as a result of development pressures. Not only did they stand to lose the physical resources (trees, plants, and open space) provided by the gardens, but also potentially their community and the social ties that bind them to a place they have known and lived in for many decades.

City officials, on the other hand, persistently characterized the land as "vacant,"<sup>35</sup> a definition that defied the factual reality of the

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THE ENVIRONMENT 172 (1971) (noting the doctrine's applicability to other resources like noise, pesticides, radioactivity, etc.); Joseph L. Sax, *Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England*, 75 CAL. L. REV. 1543, 1558 (1990).

33 See, e.g., Frederick Law Olmstead, Address to the American Social Science Association: Public Parks and the Enlargement of Towns (Feb. 25, 1870), reprinted in THE CITY READER 302 (Richard T. LeGates & Frederick Stout eds., 3d ed. 2003).

34 Although arguably classified as "parks" while the city had placed them under the leases of the Park Department's Green Thumb program, a program created just for the city's management of the community gardens, once those leases were revoked by the mayor and transferred to the Housing Department they fell into normative and legal limbo. They were no longer parks because they were neither dedicated as such nor remained under the jurisdiction of the Parks Department. See, e.g., 56 R.C.N.Y. § 1-02 (defining "[p]ark" as "public parks, beaches, waters and land under water, pools, boardwalks, playgrounds, recreation centers and all other property, equipment, buildings and facilities now or hereafter under the jurisdiction, charge or control of the Department"), available at [http://www.nycgovparks.org/sub\\_about/rules\\_and\\_regulations/rr\\_1-02.html](http://www.nycgovparks.org/sub_about/rules_and_regulations/rr_1-02.html).

35 Certainly the physical transformation of the sites alone rendered them perceptually and spatially distinct from the thousands of other vacant lots in the city. According to the city's own records, there appeared to be thousands of truly vacant lots that could be built on instead. The media reported anywhere from 11,000–14,000 vacant city-owned lots. See, e.g., Harry Bruinius, *Plowed Under: A Tree No Longer Grows in Harlem*, CHRISTIAN SCI. MONITOR, Mar. 12, 1999, at 2; Jesse McKinley, *Browning of Hope for Village Gardens*, N.Y. TIMES, Oct. 19, 1997, § 14, at 6; Guy Trebay, *Uprooted*, VILLAGE VOICE, Nov. 17, 1998, at 41.



transformed land<sup>36</sup> and ignored the ways in which the garden space had transformed the social relations of the communities around them. The city's rhetorical efforts sought to strip the land of its social (and economic) importance to its users and, arguably, to the city as a whole. By treating the land as static and removed from its social context, city officials could easily conclude that the costs of destroying the gardens would be completely outweighed by the benefits that would accrue from more new housing developments, some affordable, in these neighborhoods. Because the sites were zoned for residential and commercial uses, which once sat there, they could naturally be used again for those purposes. Allowing the "vacant" garden space to now be used for housing was consistent with the way the land had been zoned for use, so long as one doesn't account for the changes in the use of the land over the years.

### B. *The Social Significance of City Space*

The rhetorical tension, or battle, between the residents and the city reflects two competing understandings of the land where the gardens sat. The city characterized the land as atomized space, separate from the social fabric of the surrounding community in which it had become actively engaged. The residents characterized the land as integrated space, deeply intertwined with the community's social fabric. While the city's characterization ultimately prevailed in the litigation surrounding the case,<sup>37</sup> the residents' understanding is more in line with how researchers understand the complexity of social and biophysical interactions in cities and other "urban ecosystems."<sup>38</sup>

#### 1. The Ecology of Urban Space

The very markers of cities—population density, diversity of land uses, and proximity of human population to those land uses—result in a "patchy" landscape.<sup>39</sup> The scale and degree of impact from a par-

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36 But that also correctly captured the characterization of such land in a state law passed to encourage the development of community gardens on otherwise unused public land. The state encourages the use of unoccupied or unutilized municipally owned land for community gardens. Under the relevant statute, such land is determined to be "vacant public land"—land that is "unoccupied, idle or not being actively utilized for a period of at least six months and is suitable for garden use." N.Y. AGRIC. & MKTS. LAW § 31-g(6) (McKinney 2004).

37 See *infra* Part II.B.2.

38 See, e.g., Martina Alberti et al., *Integrating Humans into Ecology: Opportunities and Challenges for Studying Urban Ecosystems*, 53 *BIOSCIENCE* 1169, 1170 (2003).

39 See, e.g., James P. Collins et al., *A New Urban Ecology: Modeling Human Communities as Integral Parts of Ecosystems Poses Special Problems for the Development and Testing of*

ticular land use will necessarily vary depending upon what else surrounds it. In other words, a number of social, geological, economic, and political variables determine the character and “footprint” of a particular land use on its surrounding landscape.<sup>40</sup> Ecologists refer to this variation and its local-scale interactions as “patch dynamics.”<sup>41</sup>

Researchers in the field of “urban ecology” have begun to theorize about the complexity of interactions and feedback mechanisms between social, biological, and physical processes in a specified urban area, whether local or regional.<sup>42</sup> Ascertaining the key “drivers” that produce change in human and biophysical environments—such as land use policy and decisions, infrastructure investments, topography, climate, population growth, etc.—can illuminate the landscape-level implications of interactions between social and biophysical agents.<sup>43</sup>

For instance, urban sprawl (scattered low-density development) can be understood by a complexity of interactions and feedback mechanisms between social and biophysical processes. Its main drivers are demographics (e.g., increases in the number of households), socioeconomic trends (e.g., housing preferences, industrial restructuring), and biophysical factors (e.g., geomorphological patterns and processes), which are then reinforced by infrastructure investment choices (e.g., development of highway systems) and land and real estate markets.<sup>44</sup>

For many decades sociologists and urban ecologists have highlighted how social differentiation processes can yield significant spatial and biophysical consequences in urban areas—for instance, resulting in the inequitable distribution of land uses and stratification

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*Ecological Theory*, 88 AM. SCIENTIST 416, 420 (2000) (“A city—with its concrete-and-glass downtown, its golf courses, industrial parks and tree-lined residential streets—is quite a patchy ecosystem, and together with all its patches it is part of a larger landscape full of other patches.”); Mary Parlangue, *The City as Ecosystem*, 48 BIOSCIENCE 581, 582 (1998) (“Any city landscape is hopelessly patchy—‘heterogeneous,’ in scientific jargon. A grassy, tree-filled park might border a large asphalt parking lot. Shopping malls and apartment buildings often flank low-density residential neighborhoods.”).

40 See, e.g., Steward T.A. Pickett et al., *A Conceptual Framework for the Study of Human Ecosystems in Urban Areas*, 1 URB. ECOSYSTEMS 185, 192 (1997).

41 *Id.*

42 They contrast this focus on ecology “of” cities with the study of ecology “in” cities—that is, the focus on the physical environment including soils, plants and vegetation, and animals and wildlife—which has dominated the science of urban ecology until the past few years. *Id.*

43 Alberti et al., *supra* note 38, at 1174–75.

44 *Id.* at 1175.

of populations by race and class.<sup>45</sup> By identifying key factors and dynamics that govern the structure and function of biophysical and socioeconomic processes in and around cities, the new urban ecology tries to ascertain “who gets what, when, how, why and where” in a given urban ecosystem.<sup>46</sup>

Thus, to fully understand the effect that a particular land use will have on a particular geographical “patch” in the city, one should know something about the composition of its inhabitants, its natural and social resources (or lack thereof), the type and quality of its infrastructure, how it (the patch) is arranged in relationship to other “patches” in the city, among many other variables. These and other factors “drive” local-scale interactions to produce particularized ecological effects in different parts of the city.

## 2. The Spatial Production of Social Capital

Even the most vibrant cities have patches of urban spaces in transition—e.g., vacant lots, abandoned industrial land. Much of this land is located in socially and economically fragile neighborhoods, rendered as such by a variety of political and social factors.<sup>47</sup> The transformation of these abandoned lots to community gardens emerged as a means of “self-help” for citizens to address a variety of problems related to, and signified by, vacant land in their communities.<sup>48</sup> The

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45 *Id.* This ecological insight goes as far back as the famed early twentieth century Chicago School of Sociology, where scholars like Robert Park, Lewis Wirth, and Ernest Burgess reasoned about the ways in which the very characteristics of the city—population size, density, and social heterogeneity—lead to spatial segregation by race, ethnicity, economic, and social status. *See, e.g.,* Louis Wirth, *Urbanism as a Way of Life*, reprinted in CLASSIC ESSAYS ON THE CULTURE OF CITIES 143, 155 (Richard Sennett ed., 1969) (“[P]ersons of homogenous status and needs unwittingly drift into, consciously select, or are forced by circumstances into the same area. The different parts of the city acquire specialized functions and the city consequently comes to resemble a mosaic of social worlds in which the transition from one to another is abrupt.”). *See generally* PETER SAUNDERS, SOCIAL THEORY AND THE URBAN QUESTION 52–83 (2d ed. 1986) (discussing major works and theory of Robert Park, Lewis Wirth, Ernest Burgess, and others from the Chicago School).

46 Steward T.A. Pickett et al., *Urban Ecological Systems: Linking Terrestrial Ecological, Physical, and Socioeconomic Components of Metropolitan Areas*, 32 ANN. REV. ECOLOGY & SYSTEMATICS 127, 145–46 (2001).

47 *See, e.g.,* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1847–49 (1994) (recounting much of the history).

48 *See* Jane E. Schukoske, *Community Development through Gardening: State and Local Policies Transforming Urban Open Space*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 351, 351 (2000) (“Despite the prevalence of vacant land and the reality of urban blight, many communities have been successful in transforming these dangerous urban spaces into thriving

gardens also counteract a social status harm that marks neighborhoods as “blighted” and thus inferior; transformation of the space from a barren, degraded one to an aesthetically pleasing green one adds to the self-respect of residents.<sup>49</sup> In addition to plants, trees, and a local source of fresh vegetables in neighborhoods often lacking these resources,<sup>50</sup> the gardens also provide the infrastructure for community interaction—sitting areas (benches and tables), playgrounds, water ponds and fountains, summerhouses—which accommodate cultural and social events as well as informal interactions.<sup>51</sup>

Ultimately, to understand the full significance of the gardens to the communities and cities in which they are located, one has to look beyond the physical resources provided by the gardens. Reclaiming and preserving the gardens made possible, or at least fostered, collaborative relationships and social networks among residents of different racial and generational identities. These networks, or social capital, in turn enable residents to actively work together toward common neighborhood goals and a sense of control over their space.

A survey of hundreds of gardens in New York City illustrates the centrality of the gardens to the social fabric and organization of the communities around the city.<sup>52</sup> The survey revealed how the gardens became a relatively stable feature in their host neighborhoods. At the time of the survey, the community gardens had been in existence on average almost nine years, although it was not uncommon to find community gardens in existence for twenty years or more. Although planting and cultivating vegetables and flowers are the most common

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ing community gardens.”). Schukoska goes on to cite a 1996 national survey in which cities reported that sixty-seven percent of community gardens were neighborhood gardens, sixteen percent were on public housing premises, eight percent were on school grounds, and one percent on mental health or rehabilitation grounds. *Id.* at 355.

49 *Id.* at 359.

50 *Id.* at 359–60 (noting that this production of fresh produce was at least “partial relief to the problem of substandard grocery stores, which often operate in low-income urban neighborhoods where a lack of transportation limits consumer options”).

51 *See generally* Carole Nemore, Senate Ministry Office, *Rooted in Community*, (Apr. 14, 1998), <http://www.cityfarmer.org/NYcomgardens.html> (reporting the results of a survey of 763 community gardens in New York City, and finding, among other things that most community gardens provide these park-like amenities).

52 The 1997 survey results are contained in a report to the New York State Senate that was written on behalf of a State Senator who was in favor of preserving the gardens. *Id.* A questionnaire survey was mailed to a total of 763 community gardens in all five boroughs of New York. Thirty-one percent of the gardens responded to the questionnaire.

activities that occur in the gardens, socializing and networking with others were equally, if not more, cultivated. As the report indicated:

Clearly, community gardens are spaces where socialization is important, as most gardens identified themselves primarily as places to meet friends (#1) and hold neighborhood gatherings (#2). As such, they provide places where individuals can gather and identify together as residents of a neighborhood. This is exactly how a sense of community is created. The incidence of parties, board games, art classes, performance space, and playground activities also indicate that community gardens are places where life is enjoyed in the company of family, friends, and neighbors.<sup>53</sup>

Not only do the gardens provide opportunities to build “bonding” social capital, to connect with other residents in the neighborhood, but the survey also found that they provide opportunities to build “bridging” social capital, serving as a vehicle to connect residents of different neighborhoods.<sup>54</sup> The survey found that a significant percentage of the garden members live outside of the community where the gardens are located. Moreover, the gardens bring together, or “bridge,” people of all ages and different ethnic groups. The survey revealed that the community gardens are “essential to the harmony of the neighborhood and the City” in that “[o]verwhelming majorities of community gardens indicat[e] that more than one distinct ethnic group regularly uses the gardens.”<sup>55</sup>

Even though many sociologists have traditionally assumed, based in part on William Julius Wilson’s work, that poor communities lack adequate social capital and related resources, contemporary social scientists are beginning to question that assumption.<sup>56</sup> Recent scholarship and empirical evidence is beginning to illustrate the “ecological fallacy” that equates high levels of poverty with social dysfunction and frayed community ties.<sup>57</sup> For instance, a recent study by geographers at the University of Southern California provides evidence that

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53 *Id.*

54 See generally Putnam, *supra* note 8, at 66–73 (noting that there is more “bonding” than “bridging” social capital occurring in America).

55 See Nemore, *supra* note 51. The number of ethnicities ranges from forty-four in Brooklyn, thirty-nine in Manhattan, twenty-four in the Bronx, eighteen in Queens, and two in Staten Island. *Id.*

56 Jennifer Wolch & Nathan J. Sessoms, The Changing Face of Concentrated Poverty, [http://www.usc.edu/schools/sppd/lusk/research/pdf/wp\\_2005-1004.pdf](http://www.usc.edu/schools/sppd/lusk/research/pdf/wp_2005-1004.pdf) (last visited Nov. 13, 2006); see e.g. Mark Allan Hughes, *Misspeaking Truth to Power: A Geographical Perspective on the “Underclass” Fallacy*, 65 *ECON. GEOGRAPHY* 187, 190 (1989) (noting the “ecological fallacy” in which “the attributes of shared space are believed to imply shared attributes among individuals occupying that space”).

57 This term comes from Hughes, *supra* note 56, at 191.

the landscape of concentrated poverty can differ dramatically depending upon place-specific local and regional forces, as well as broader economic forces.<sup>58</sup> As we see increasing levels of differentiation among impoverished communities, we need to rethink the equation of low levels of social functionality and capital with poverty.

### 3. The Purchasing Power of Social Capital

Social capital turns out to be a critical resource in urban communities, especially in large cities where people can lead fairly atomized lives and in vulnerable neighborhoods where residents can only meet their economic and social needs through cooperation with others. Thus, where a community has sufficient amounts of social capital it can also “purchase” many other social (and economic) resources that create and sustain healthy neighborhoods and, ultimately, healthy cities. Consider, for example, sociologist Eric Klinenberg’s comparison of how two very similar adjacent Chicago neighborhoods, one African-American and one Latino, of roughly equal size fared in one week of extremely hot weather in Chicago in July 1995 that left over 700 dead.<sup>59</sup> The two neighborhoods, North Lawndale and Little Village, had similar numbers and proportions of senior citizens living alone and in poverty.<sup>60</sup> Yet the two communities experienced very different outcomes during the heat wave: while North Lawndale endured nineteen fatalities, Little Village suffered only three deaths.<sup>61</sup> Klinenberg illustrates how the vibrant street life and plentiful commercial activity of Little Village contributed to the safety of the elderly residents who matched the general profile of heat wave victims.<sup>62</sup> Not only were low-income senior citizens in Little Village more likely to receive visits from concerned friends and neighbors than their counterparts in North Lawndale, even those seniors without social networks were more likely to venture out to air-conditioned stores or other public places, thanks to the busy streets and a greater sense of safety.<sup>63</sup> In North Lawndale, by contrast, the rampant crime, prolifer-

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58 Wolch & Sessoms, *supra* note 56. They found, based on an analysis of census tracts indicating high levels (forty percent) of poverty, that poor neighborhoods in Southern California tend to consist of large and burgeoning working poor and immigrant households. These communities are not home to residents with dysfunctional behaviors or social ills, nor are they geographic spaces marked by blight and decayed structures.

59 ERIC KLINENBERG, *HEAT WAVE* (2002).

60 *Id.* at 86–87.

61 *Id.*

62 *Id.* at 116–21.

63 *Id.*

ation of vacant lots and abandoned buildings—and general absence of any activities indicating a functional, safe community—imposed upon area seniors the brutal choice between staying inside to face the heat alone or going out to risk intimidation, robbery, or worse.<sup>64</sup>

Similarly, as Manuel Pastor's work has shown, the strength of social capital turns out to be one of the best defenses against the disproportionate siting of noxious land uses.<sup>65</sup> In his study of siting practices in Los Angeles County, he discovered that the neighborhoods most likely to have a toxic facility placed in close proximity were those that were undergoing rapid demographic change, where one ethnic group moves out (African-Americans) and another moves in (Latino).<sup>66</sup> His hypothesis is that this "ethnic churning"—changing demographic conditions—weakens the bonds between residents in a community and thus weakens political power, makes community mobilization more difficult, and increases susceptibility to siting by polluters.<sup>67</sup> Low-income neighborhoods are most vulnerable to harmful environmental policies at precisely such points. But a community with strong social capital is more likely to protect its environmental quality.<sup>68</sup>

The purchasing power of social capital is also evident in the use of community gardens in urban neighborhoods. The social networks that residents establish as a result of the gardening and other activities are often employed toward establishing and maintaining social order and organization in communities most in need of them but without the external resources to acquire them. For instance, the gardens are often used strategically to create "defensible space"<sup>69</sup>—areas in which "escape routes for criminal perpetrators are limited and public range of vision is maximized to prevent illicit conduct"—which prevents crime and provides increased public safety for the residents.<sup>70</sup> This reduction of crime in turn creates a sense of stability and an increased sense of belonging.

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64 *Id.* at 91–108.

65 Manuel Pastor, Jr. et al., *Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice*, 23 J. URB. AFF. 1 (2001).

66 *Id.* at 18.

67 *Id.* at 10–11.

68 *Id.* at 3.

69 Schukoske, *supra* note 48, at 356 n.31 (noting that "Oscar Newman first defined the term 'defensible space'" (quoting OSCAR NEWMAN, *DEFENSIBLE SPACE* 3 (1972))).

70 *Id.* at 356; see also Susan Saegert et al., *Social Capital and Crime in New York City's Low-Income Housing*, 13 HOUSING POL'Y DEBATE 189 (2002) (presenting evidence that components of social capital can play a prospective role in preventing crime in low-income housing).

The gardens also can provide youth and other vulnerable residents a place to gather and engage in recreational and educational activities.<sup>71</sup> Responding to a survey question in the New York gardens survey mentioned above about what the youth gardeners would be doing if they were not gardening, one local resident responded “[s]ome would be in jail, most wouldn’t know what to do in our neighborhood.”<sup>72</sup>

This purchasing power not only can transform the social landscape of an entire community, but also potentially its economic landscape as well. For example, there is emerging evidence that property values tend to go up in disadvantaged communities with community gardens, providing an economic measure of revitalized neighborhood quality. A recent study by New York University researchers found a significant positive effect from the opening of community gardens in New York City neighborhoods and property value increases over time.<sup>73</sup> Specifically, the study found that community gardens have a statistically significant positive impact on residential properties within one-thousand feet of the garden, and that the impact increases over time. The gardens have the greatest impact in the most disadvantaged neighborhoods, the study found, where they are associated with other changes in the neighborhood, such as increasing rates of homeownership and reductions in poverty.<sup>74</sup>

But even communities with the strongest social capital, acting by themselves, cannot always be effective in overcoming the larger economic and social forces (such as poverty and racism) that collude to render them vulnerable to events or land use decisions that threaten

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71 One report cites examples of the type of activities engaged in by youth, the elderly, and those being rehabilitated at gardens throughout New York City—including after-school programs where homework and gardening is done, summer day camp, a green laboratory for surrounding schools, and a place where nearby hospital patients can tend to their own garden plot as part of a rehabilitative program. DIANE EGLANDER, THE TRUST FOR PUBLIC LAND, NEW YORK’S COMMUNITY GARDENS—A RESOURCE AT RISK 9–10, 14 (2001), available at [http://www.tpl.org/content\\_documents/nyc\\_community\\_gardens.pdf](http://www.tpl.org/content_documents/nyc_community_gardens.pdf).

72 *Id.* at 10 (quoting a woman from the Bronx, New York). Another woman from Brooklyn commented that the garden “changed our mischievous teenagers to a positive junior block association, learning parliamentary procedure and conducting their own meetings instead of destroying the block.” *Id.*

73 Vicki Been & Ioan Voicu, *The Effect of Community Gardens on Neighboring Property Values* 22–23 (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 06–09, 2006), available at <http://papers.ssrn.com/abstract=889113>.

74 This finding stays steady even when gentrifying areas are pulled out of the study sample. There still remain significant increases in home ownership and median income and significant decreases in poverty. *Id.*



their long-term health and sustainability. Unless there exist strong legal norms that account for the ways in which land use decisions and degrees of social capital shape one another, such considerations may tend to be neglected or undervalued. As the next Part will illustrate, the structure of our current land use regulatory regime is fairly agnostic to these impacts, and arguably undermines the formation of certain forms of social capital by the way it fragments urban space.

## II. ACCOUNTING FOR SOCIAL CAPITAL IN LAND USE REGULATION

In theory, land use decisions take place within a planning framework, done in accordance with a comprehensive plan. In practice, however, private market forces are more apt to directly influence land use decisions than any comprehensive public deliberative process that considers the larger social, economic, or environmental considerations that underlie land use within an urban area. Although there is some move toward stronger local planning requirements, the prevailing law and practice remains a highly atomized approach.

The atomization of urban space has fragmented urban communities in ways that make “bridging” social capital difficult, undermining the formation of socially and economically integrated urban communities. This has had the consequence of isolating certain populations in ways that render them vulnerable to larger structural forces that are difficult for them to overcome without either stronger social and economic resources or collective action on the part of interests who have very little incentive to assist socially isolated communities.

Even when laws force the consideration of various impacts from land use decisions, they do so without much attention to social capital costs or benefits. Impact assessment requirements, the natural place to account for social capital considerations, are weak both as a substantive and procedural mechanism. They tend to elevate physical impacts over all other impacts, which can obscure the degree to which land use decisions affect the social assets of impacted communities. And they are simply procedural overlays on more determinative land use controls like zoning.

### A. *City Space as Atomized Space*

In theory, land use planning would be able to account for the ways in which physical space can structure social relations and build or preserve social capital in urban communities. When done in consultation with the public, urban planning can sufficiently promote, pre-

serve, and strengthen social capital.<sup>75</sup> However, while land use regulatory controls are supposed to take place within a planning framework,<sup>76</sup> the reality is that land use decisions are persistently individualized and ad hoc.

Despite the requirement for comprehensive plans, decisions on land use are more often responses to individual development projects and made on a parcel-by-parcel basis, sometimes after striking a bargain with the individual property owner or developer.<sup>77</sup> The liberal use of zoning amendments and variances situate private interests (i.e., developers) as some of the main influences on land use decisions, displacing, or at least diluting, public deliberative processes that might consider the social costs and benefits that underlie particular land use decisions.<sup>78</sup> Combined with “as-of-right” development, which permits

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75 See, e.g., Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 3, 11 (2005) (“[T]raditional zoning rules were intended to embody and codify the community’s vision for the locality, allowing for only limited flexibility in the execution of this vision.”).

76 Many states mandate that local governments adopt comprehensive plans and that zoning and other land use decisions be “consistent” with those plans. See Edward J. Sullivan & Matthew J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 URB. LAW. 75, 82 (2003) (“In state courts, the most common ‘comprehensive plan’ definition is a functional one: courts apply the existing zoning regulations as the comprehensive land use policy statement.”). See generally ROBERT ELLICKSON & VICKI BEEN, *LAND USE CONTROLS* 58–59, 336–41 (3d ed. 2005).

77 See, e.g., Camacho, *supra* note 75, at 16 (“Zoning regulations no longer serve as a fixed vision of the community’s plan, but rather as a baseline rights allocation from which a locality and developer bargain.” (footnote omitted)); Carol Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 849–50, 879 (1983) (discussing how local governments have continued to develop new devices to retain flexibility, allowing them to bargain ad hoc with individual developers).

78 A recent study in New York City revealed what many scholars have long noted—a very high rate of variances by the local zoning board. Mun. Art Soc’y of N.Y., *Zoning Variances and the New York City Board of Standards and Appeals*, 30 COLUM. J. ENVTL. L. 193, 214 (2005). The study notes that the shift over the past thirty years from “bulk” to “use” variances, which for example permit residential units in manufacturing zones, has brought more significant changes to community character and composition. *Id.* at 196. Such variances have tended to be clustered in “sensitive” locations creating disparate impacts in certain communities. *Id.* at 198. Unfortunately, nothing in the zoning regulations address the impact of clustered variances or provide guidance for issuing use variances which may have a large impact on a community. *Id.* at 198–99. The study’s authors found that the zoning board had essentially “taken on a planning role theoretically reserved for the City Planning Commission.” *Id.* at 196. And although the city planning commission has authority to comment on the variances, it exercises this authority infrequently. *Id.* at 213. In other words, the zoning board, by way of variances, is making planning and use

development without any review by planning bodies, individualized or lot-by-lot zoning decisions don't always take account of the social consequences of development projects on the surrounding community and can frustrate efforts by communities to influence the design of new projects in a way that makes them compatible with the social and economic systems in the community.<sup>79</sup>

The atomization of land use decisions has contributed in no small part to the fragmentation, and even specialization, of urban space. Cities within a metropolitan region and neighborhoods within a city are easily identifiable as much by what type of residential, commercial or industrial space they have attracted as by the types of land uses and populations they have chosen to exclude. As Gerald Frug has argued, this fragmentation has not only had a powerful impact on the allocation of social and economic resources in America's metropolitan areas, but also on the relationships among the different kinds of people with one another.<sup>80</sup> "Across the country, [zoning and redevelopment policies] have segregated metropolitan areas into 'two nations,' rich and poor, white and black, expanding and contracting. And they have undermined the ability of metropolitan residents even to understand each other, let alone to work together on the region's problems."<sup>81</sup>

### B. *Assessing the Social Costs and Impacts of Land Use Decisions*

Environmental impact assessment laws, like comprehensive planning, can theoretically account for the social impacts of land use decisions. The National Environmental Policy Act of 1969 (NEPA)<sup>82</sup> and its state counterparts require that agencies must assess and attempt to mitigate (or avoid) the impacts of a proposed major land use deci-

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changes, a role theoretically belonging to City Planning. *Id.* at 198-99. As in other jurisdictions, courts are highly deferential to variances, as they are to most zoning matters. *Id.* at 230; see also Juliana Maantay, *Zoning Law, Health, and Environmental Justice: What's the Connection?*, 30 J.L. MED. & ETHICS 572, 582 (2002) (finding based on her study of changes to zoning classifications over a twenty-seven year period in New York City that "[c]ity planning's role [is] basically seen as a support mechanism to facilitate private real estate initiatives for projects that the city or state could no longer afford to undertake" and that the "[g]overnment's desire for private sector investment in the city seemed to override the need for conformance to the mandated comprehensive planning process, the desire to guide planning, or the need to put the community's desires on an at least an equal footing with the private sector").

79 Kathreen Codey, Note, *Convenience and Lower Prices, but at What Cost? Watching Closely as Discount Superstores Creep into Manhattan*, 13 J.L. & POL'Y 249, 297 (2005).

80 FRUG, *supra* note 21, at 3-5.

81 *Id.* at 4 (footnote omitted).

82 42 U.S.C. §§ 4321-4347 (2000).

sions on the "human environment," including on its historic, cultural, social, and economic resources.<sup>83</sup> However, the effectiveness of NEPA and its state counterparts has been limited both by courts' opaque interpretations of its reach and also by the limited rights it gives the public to force the full accounting, or internalization, of the social costs of land use decisions.

### 1. Urbanizing NEPA

A few early 1970s cases held that decisionmakers must consider, in particular, effects on "urban environments" such as the contribution to urban decay and quality of life impacts which result from land use decisions.<sup>84</sup> These cases queried the exact scope of NEPA's regulatory concern by addressing challenges to a narrow conception of the term "environment" that was coterminous with natural resources. When courts were asked to assess the impact of a particular development—i.e., the building or conversion of a structure—in an urban neighborhood, they were forced to identify which physical, social, and economic impacts were ecologically significant under NEPA.

Plaintiffs' challenges often rested on the impacts that a particular development activity would have on the quality of their living environment—including noise, traffic, and parking problems.<sup>85</sup> The public agencies in charge of the development typically argued that these types of impacts were not "environmental considerations" at all.<sup>86</sup> Early federal courts reasoned that NEPA's purview of environmental considerations "without question . . . extend[s] beyond sewage and garbage and even beyond water and air pollution."<sup>87</sup> They construed the Act as being equally concerned with protection of the quality of life of city residents, which included impacts such as "[n]oise, traffic, overburdened mass transportation systems, crime, congestion, and

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83 40 C.F.R. § 1508.8 (2005); 40 C.F.R. § 1502.16(g). CEQ regulations define the "human environment" as including not only the "the natural and physical environment" but also the relationship of people to that environment. 40 C.F.R. § 1508.14.

84 See, e.g., *Hanly v. Kleindienst*, 471 F.2d 823, 830–31 (2d Cir. 1972); *Hanly v. Mitchell*, 460 F.2d 640, 646–47 (2d Cir. 1972).

85 *Kleindienst*, 471 F.2d at 827; *Mitchell*, 460 F.2d at 646–47.

86 Plaintiffs argued that the living environment of all the families in the neighborhood of the development would be adversely affected by the presence of the jail and by the fears of "riots and disturbances" so generated. *Mitchell*, 460 F.2d at 646–47. They pointed to a former city prison located in another part of the city which was vacated because of the noise of the inmates, their demonstrations, and the beckoning and signaling between them and their visitors. *Id.*

87 *Id.* at 647.

even [the] availability of drugs.”<sup>88</sup> These types of impacts, the court reasoned partly from the words of Congress, result from the interaction of “high density urbanization [and] industrial expansion” which rendered certain communities particularly vulnerable to these impacts.<sup>89</sup>

## 2. NEPA’s Physical Determinism

Yet while courts in these early cases were resolute in their understanding that the ecological reach of NEPA encompasses a variety of impacts on the quality of human environments, they have been quite tempered about how far NEPA and its state counterparts extend into that environment. Both federal and state courts have tried to demarcate NEPA’s reach by drawing a line, albeit a very opaque one, between physical, social, and economic effects. The primary concern of impact assessment is with the “physical” impacts on the environment. Social or economic effects alone, courts have said, cannot trigger the “significant impact” hurdle to require preparation of an environmental impact statement.<sup>90</sup> Social and economic changes must result directly from primary physical impacts on the environment in order to be deemed “significant.”<sup>91</sup>

The nexus requirement—i.e., that social impacts flow closely and directly from “primary” physical impacts—could have been an important recognition of the ways that choices about urban form and physical infrastructure can shape the social resources necessary to build and sustain human communities. But a careful reading of the cases reveals clearly that the nexus requirement is in fact a limiting tool to

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88 *Id.*

89 *Id.*

90 *See, e.g.,* Como-Falcon Cmty. Coal., Inc. v. U.S. Dep’t of Labor, 609 F.2d 342, 345 (8th Cir. 1979); *see also* Olmstead Citizens for a Better Cmty. v. United States, 793 F.2d 201, 204–05 (8th Cir. 1986) (holding that an environment impact statement is not required for social change). This limitation is codified as well by the Council on Environmental Quality Guidelines. 40 C.F.R. § 1500(a) (2005) (“Economic or social effects are not intended by themselves to require preparation of an environmental impact statement.”).

91 *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983) (determining whether a particular effect must be considered requires looking “at the relationship between the effect and the change in the physical environment caused by the . . . action at issue”); *Como-Falcon*, 609 F.2d at 345 (“When an action will have a primary impact on the natural environment, secondary socio-economic effects may also be considered . . . *But when the threshold requirement of a primary impact on the physical environment is missing, socio-economic effects are insufficient to trigger an agency’s obligation to prepare an EIS.*” (quoting *Image of Greater San Antonio, Tex. v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978) (citations omitted))).

reign in the normative scope of NEPA and its state counterparts.<sup>92</sup> The significance of the impact is heavily determined not by the extent of social or economic destruction caused by changes to physical conditions, but rather by the extent of the change in the physical conditions brought about by the proposed land use. Where disruptions or changes in the physical conditions of a place—such as increased traffic, noise, or odors, “population concentration or water-supply problems or . . . the irreversible alteration of a rare site”<sup>93</sup>—are significant enough, social and economic changes that are caused by those physical changes will then be recognized as secondary impacts.<sup>94</sup> In other words, the extent of physical changes determines or drives the recognition of social impacts.<sup>95</sup>

This physical determinism necessarily restricts the scope and reach of NEPA. For instance, the decision to destroy one community garden (a relatively small parcel) in a dense urban neighborhood may not amount to much of a physical impact. The pollution reducing effect of trees and other plants in the gardens might be notable, but in most cases not significant enough to save an entire garden especially when trees can be planted throughout the neighborhood and the city. Likewise, in cities with large urban parks and other green spaces, the impact of reducing the small acreage that community gardens normally occupy would also likely fall short of the significance threshold.

In the community gardens dispute described above, the city was able to prevail on its legal claims, including the necessity of preparing an impact statement, by arguing that the physical loss of the garden was *de minimus*.<sup>96</sup> Characterizing the land as physically “vacant” allowed the city to avoid a broad impact assessment review to seriously consider the social and economic implications of destroying the gardens.<sup>97</sup> Under existing environmental regulations, if the garden lots were deemed to have been “vacant” since the last structures stood on those sites, then the sale of the lots for the same purpose was exempt

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92 See, e.g., *Como-Falcon*, 609 F.2d at 345.

93 *Olmstead Citizens*, 793 F.2d at 205.

94 *Id.*

95 Social impacts may be defined as the “consequences to human populations of any public or private actions . . . that alter the ways in which people live, work, play, relate to one another, organize to meet their needs and generally cope as members of society.” INTERORGANIZATIONAL COMM. ON GUIDELINES AND PRINCIPLES FOR SOC. IMPACT ASSESSMENT, U.S. DEP’T OF COMMERCE, GUIDELINES AND PRINCIPLES FOR SOCIAL IMPACT ASSESSMENT 1 (1994), available at <http://www.st.nmfs.gov/tm/spo/spo16.pdf>.

96 *In re N.Y. City Coal. for the Pres. of Gardens v. Giuliani*, 670 N.Y.S.2d 654, 660–61 (N.Y. Sup. Cl. 1997), *aff’d* 66 N.Y.S.2d 918 (N.Y. App. Div. 1998).

97 *Id.*

from impact assessment review because putting up new housing would constitute replacement of similar structures that had been there.<sup>98</sup> Thus, replacement of housing structures on those sites, where housing had once existed decades before, would not be a physical loss at all.<sup>99</sup> The New York Court of Appeals largely side-stepped arguments that the construction and use of the gardens in the interim period provided the community with social resources that would now be destroyed by the new development.<sup>100</sup> The impact assessment regulations, the court reasoned, were silent on the effect of an "intervening use or . . . any natural changes that might take place at the proposed site during the period it [was] without buildings."<sup>101</sup>

Drawing a line, even an opaque one, around "purely" social effects<sup>102</sup> by definition limits the normative reach of the statute by excluding social concerns that are unrelated to the primary resources necessary to construct and sustain healthy human communities. Courts understandably fear a runaway, unwieldy NEPA that becomes a vehicle for the airing of a host of general policy objections unrelated to ecological health in urban communities.<sup>103</sup> Toward this end, federal courts have seemingly drawn a line around a set of social concerns—let us call them social preferences—that appear unrelated to its predominant normative concern, the preservation of natural resources and the quality of the built urban environment. Thus, the social concerns excluded from NEPA's purview include a project's potential to alter the character of a neighborhood (e.g., bringing more commercial activity into the area),<sup>104</sup> the psychological fear of "people pollution" (i.e., the introduction of a new social class in the neighbor-

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98 See State Environmental Quality Review, 6 N.Y.C.R.R. 617.5[c][2] (exempting from agency review the "replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site").

99 *N.Y. City Coal.*, 670 N.Y.S.2d at 660 ("There is no dispute that these same lots, zoned for seven story dwellings and commercial space, not very long ago contained low rise tenements housing several apartments in each building. The conclusion is inescapable that the action contemplated . . . is the construction of buildings at the same site as replacements, in kind, of the buildings that once existed at that very site.").

100 *Id.* at 661.

101 *Id.*

102 See, e.g., *Olmstead Citizens for a Better Cmty. v. United States*, 793 F.2d 201, 205 (8th Cir. 1986) (acknowledging the lack of a "bright line" between purely physical and purely social and economic impacts).

103 *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-74 (1983).

104 *Olmstead Citizens*, 793 F.2d at 205.

hood),<sup>105</sup> or the distaste for (or psychological fear of) certain types of land uses.<sup>106</sup> Yet while courts have been clear about excluding these social preference impacts, they have been far less transparent about identifying which type of social impacts are, or would be, sufficiently intertwined with physical effects to be ecologically significant.

### 3. Stretching the Physical to Meet the Social

The physical deterministic stance of NEPA and its state counterparts need not exclude the type of social resources, or capital, with which this Article is concerned. Such concerns could be recognized as secondary in those instances where significant changes to the physical structures of the urban environment are present. A minority of states—California, New York, and Washington—have stepped out a bit in front of federal courts in their elastic interpretation of the nexus requirement and recognition of the social and economic consequences that can be inextricably tied up into physical land use changes.<sup>107</sup> Yet, even this recognition is couched in physically deterministic terms. That is, social (and economic) impacts caused by pro-

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105 See *id.* (placing outside of the realm of significant impacts “the mere dislike or fear of a certain socioeconomic class of persons”); *Nucleus of Chi. Homeowners Ass’n v. Lynn*, 524 F.2d 225, 231 (7th Cir. 1975) (dismissing the fears of neighbors of prospective public housing tenants because as a group they allegedly “exhibit a high incidence of violence, law violation, and destruction of property”); *Md.-Natl. Capital Park and Planning Comm’n v. U.S. Postal Serv.*, 487 F.2d 1029, 1037 (1973) (“Concerned persons might fashion a claim supported by linguistics and etymology, that there is an impact from people pollution of the ‘environment,’ if the term be stretched to its maximum. We think that type of effect cannot fairly be projected as having been within the contemplation of Congress.”).

106 See, e.g., *Metro. Edison Co.*, 460 U.S. at 775–76 (explaining that psychological fear from the “risk” of a nuclear accident is not an effect that is significant under NEPA, absent a nexus to a change in the physical environment); *Olmstead Citizens*, 793 F.2d at 207 n.6 (reiterating that psychological impact “from the distaste for having [a] prison nearby” are “the types of concerns . . . not cognizable under the NEPA”); *Hanly v. Kleindienst*, 471 F.2d 823, 833 (2d Cir. 1972) (stating that plaintiff’s opposition, for most part, is based on “psychological distaste for having a jail located so close to residential apartments,” but “[i]t is doubtful whether psychological and sociological effects upon neighbors constitute the type of factors that may be considered in making such a determination since they do not lend themselves to measurement”).

107 Sixteen states plus the District of Columbia and Puerto Rico have state versions of NEPA. Most are modeled directly after and are very similar in their requirements to NEPA. See generally DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* §§ 12:3 to § 12:5 (2006) (explaining the environmental policy legislation of California, New York, and Washington). These SEPAs also follow closely the exclusion of “social” impacts unrelated to physical ones in assessing the significance of impacts from a proposed development. See Sheila Foster, *Impact Assessment*, in *THE LAW OF ENVIRONMENTAL JUSTICE* 256, 286–300, 300 n.157 (Michael B. Gerrard ed., 1999).



posed physical developments are recognized only when they in turn cause negative physical effects. Where significant negative physical impacts will not result from negative social and economic impacts, they are not recognized as significant in and of themselves.

Consider the widely hailed case, *Chinese Staff & Workers Ass'n v. City of New York*.<sup>108</sup> There, the New York Court of Appeals held that the potential gentrification of a low-income Asian community—i.e., the displacement of residents and surrounding businesses—as a result of a proposed luxury housing project is a “significant” impact that must be considered in an environmental impact assessment.<sup>109</sup> The potential gentrification effects were not deemed significant because of the impact on social ties—e.g., that it might separate families and destroy vital social and cultural networks—but rather because it would disturb population patterns and distribution.<sup>110</sup> Because the state’s Environmental Quality Review Act explicitly included as part of the “physical conditions” of the “environment” effects on “existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character,”<sup>111</sup> the court’s analysis did not need to go any further to address the social impacts resulting from the physical displacement.<sup>112</sup> In fact, the court responded to the city’s assertion that the potential displacement was really a stand-alone “social” impact by tersely concluding the “irrelevancy” of the argument given the expansive definition of physical impacts in the statute.<sup>113</sup>

California has come closest to recognizing that certain social (and economic) impacts could render an otherwise minor physical structural change “significant.” California regulators have explicitly provided examples in the state’s environmental regulations of the ways that the social impacts of a development project can be used to determine the significance of the project’s proposed physical change.<sup>114</sup> The regulations give a few examples of how courts and regulators should integrate physical and social/economic effects to

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108 68 N.Y.2d 359 (1986).

109 *Id.* at 366–67.

110 *Id.* at 367.

111 N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 2005) (defining environment as “the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, *existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character*” (emphasis added)); *Chinese Staff*, 68 N.Y.2d at 365 (citing City Environmental Quality Review Regulation 1(f)).

112 *Chinese Staff*, 68 N.Y.2d at 368.

113 *Id.* at 366–67.

114 CAL. CODE REGS. tit. 14, § 15131(b) (2005).

determine which type of projects have ecologically significant impacts on a community. For instance, "if the construction of a new freeway or rail line divides an existing community, the construction would be [a] physical change, but the social effect on the community would be the basis for determining that the effect would be significant."<sup>115</sup> Likewise, "if the construction of a road and the resulting increase in noise in an area disturbed existing religious practices in the area, the disturbance of the religious practices could be used to determine that the . . . use of the road and the resulting noise would be [a] significant [impact] . . . ."<sup>116</sup>

Courts have yet to find significant any social impact from the introduction of a physical change in a community. However, some state courts have been willing to trace out a chain of cause and effect from a proposed land use decision through its anticipated economic impacts to a finding of significant impacts in urban areas. Nevertheless, as we shall see, courts are still very careful to link any "significance" from the economic impacts to physical changes in the environment. That is, no court has reasoned like California legislators in allowing social or economic impacts arising from physical changes in an environment to elevate a project's impacts to the level of significance.

Both Washington and California courts have ruled that land use decisionmakers must consider the possibility that introduction of big-box retailers (and related shopping complexes) in an urban metropolitan area will cause job loss and physical decay by drawing customers away from a city's downtown business district.<sup>117</sup> The retail complexes at issue in *Bakersfield Citizens for Local Control v. City of Bakersfield*,<sup>118</sup> for example, were to be located a little over three and half miles apart in the relatively dense city of Bakersfield, California.<sup>119</sup> Each shopping center would "contain a Wal-Mart Supercenter . . . plus a mix of large anchor stores, smaller retailers, and a gas station."<sup>120</sup>

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115 *Id.* Another example is if a project would cause overcrowding of a public facility and the overcrowding causes an adverse impact on people in the community, the overcrowding would be considered a significant impact.

116 *Id.* "The religious practices would need to be analyzed only to the extent to show that the increase in traffic and noise would conflict with the religious practices." *Id.*

117 *See, e.g., Bakersfield Citizens for Local Control v. City of Bakersfield*, 22 Cal. Rptr. 3d 203, 220–21 (Cal. Ct. App. 2004); *Citizens for Quality Growth v. City of Mount Shasta*, 243 Cal. Rptr. 727, 734 (Cal. Ct. App. 1988); *Citizens Ass'n for Sensible Dev. of Bishop Area v. County of Inyo*, 217 Cal Rptr. 893, 904–05 (Cal. Ct. App. 1985); *SEAPC v. Cammack II Orchards*, 744 P.2d 1101, 1106 (Wash. Ct. App. 1987).

118 22 Cal. Rptr. 3d 203 (Cal. Ct. App. 2004).

119 *Bakersfield Citizens*, 22 Cal. Rptr. 3d at 210.

120 *Id.*

The *Bakersfield Citizens* court causally traced out how the big-box retail “shopping centers could cause a ripple of store closures and consequent long-term vacancies that would eventually result in general deterioration and decay within and outside the market area of the two . . . centers.”<sup>121</sup> Relying on a number of studies and articles analyzing the cumulative effects of super sized retailers in urban areas, the court pointed to evidence that the saturation of a market area with such retailers can cause

physical decay and deterioration resulting from store closures in the same market area or in established areas of the community (i.e., the “traditional downtown area”) due to competitive pressures, followed by an inability to easily re-lease the vacated premises . . . [It can also be] difficult to find tenants for buildings that formerly housed Wal-Mart stores that were replaced by the new Supercenters. Many of the empty buildings physically deteriorated.<sup>122</sup>

Whether and at what level physical deterioration and decay in urban communities will occur requires an analysis that is more nuanced, as the court in *Bakersfield Citizens* and later courts acknowledge.<sup>123</sup> That is, whether urban decay and deterioration would occur from the introduction of a new shopping center is likely determined by a host of factors or variables that vary by urban area. Factors such as “the size of the project, the type of retailers and their market areas and the proximity of other retail shopping opportunities” are relevant in the analysis.<sup>124</sup>

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121 *Id.* at 222.

122 *Id.* at 224. The court also noted that at the public hearing on the project, one person testified:

[T]here are 45 empty Wal-Marts in the state of Texas. There are 34 empty standing Wal-Marts in the state of Georgia. There are 27 in Utah. Find them. Go look at them. They are empty. When Wal-Mart moves on they leave their boxes. Those boxes are not bought up by other [businesses]; who can afford that huge of a store; that huge of a rent?

*Id.* at 224 (alterations in original).

The court dismissed the city’s arguments that the evidence was “‘hit pieces’ designed to disparage a particular corporation,” stating that the studies relied upon “constitute important anecdotal evidence about the way the proposed shopping centers could serve as a catalyst for urban deterioration and decay in the City.” *Id.*

123 *Id.* at 221; *see also* *Anderson First Coal. v. City of Anderson*, 30 Cal. Rptr. 3d 738, 745–48 (Cal. Ct. App. 2005) (accepting the city’s assessment that there would be no significant indirect environmental impact of urban decay or deterioration on the downtown central business district because the project is more likely to compete directly with the outlying satellite shopping areas and its big-box retailers than the city’s central business district).

124 *Bakersfield Citizens*, 22 Cal. Rptr. 3d at 221.

The use of the nexus requirement to acknowledge the ways that land use changes can trigger a chain of economic, and perhaps social, disruptions is an important recognition of the “ecological facts of life” of urban ecosystems. That is, decisions about land use are inextricably interwoven with, and can thus significantly affect, the network of social and economic relationships, depending upon the very factors that mark urban environments as unique ecosystems—notably, the density of population, diversity of land uses, and proximity of population to those uses. Yet, the reluctance of courts to fully credit these social (and economic) impacts unless they in turn cause significant physical changes has ultimately stunted the usefulness of impact assessment as a tool to properly account for these impacts on urban communities.

### C. *Internalizing Social Costs and Impacts*

The interpretation of NEPA and its state counterparts as simply a “procedural” mandate has also limited the statute’s usefulness as a means of fully internalizing the social costs of land use decisions. Widely criticized as lacking substantive “teeth,”<sup>125</sup> impact review processes are at best information-generating procedures. While courts can force decisionmakers to carefully consider the full scale of impacts of their actions, they cannot impose a substantive duty to mitigate.<sup>126</sup> Information produced by an environmental impact statement (EIS) can be useful both as an effective organizing tool for the interested public, and as a prod for better public agency decisionmaking, and may ultimately influence the outcome of a proposed project.<sup>127</sup>

In the end, however, environmental assessment processes are procedural overlays on more determinative zoning and permitting regulations, which require no more than the “consideration” of larger variables and allow decisionmakers to in the end completely ignore such considerations. In other words, impact assessment requirements are “soft” law as compared to the “hard” law of zoning and other land use regulatory tools that allow development to proceed largely on an

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125 See, e.g., Chester L. Mirsky & David Porter, *Ambushing the Public: The Socio-Political and Legal Consequences of SEQRA Decision-Making*, 6 ALB. L. ENVTL. OUTLOOK J. 1, 20 (2002); Joseph L. Sax, *The (Unhappy) Truth about NEPA*, 26 OKLA. L. REV. 239, 245, 248 (1973).

126 See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 n.16 (1989) (“NEPA merely prohibits uninformed—rather than unwise—agency action.”).

127 LAZARUS, *supra* note 3, at 85; Joseph L. Sax, *Environmental Law: More than Just a Passing Fad*, 19 U. MICH. J.L. REFORM 797, 804 (1986) (agreeing that “legitimizing public participation, and demanding openness in planning and decisionmaking, has been indispensable to a permanent and powerful increase in environmental protection”).

atomized basis, strongly influenced by development interests, and tending to subordinate community input even as it provides access to that input. It is thus not the place where social costs are likely to be internalized in land use decision making.

### III. PLANNING AND DESIGNING FOR SOCIAL CAPITAL

Decisions about how to build, redevelop, and revitalize cities have their roots in grand visions of what a city can be, dating back to the City Beautiful and Garden City urban planning movements of the late-nineteenth and early-twentieth centuries. The contemporary manifestation of grand urban planning visions is currently embodied in the New Urbanism, and, to a lesser extent, Smart Growth, movements. These interdisciplinary efforts entail more prominently situating cities as part of metropolitan regions and harmonizing, or integrating, the various physical, social, and economic aspects of those regions to bring human communities together while preserving natural resources.<sup>128</sup>

Both policy prescriptions are premised upon a type of spatial determinism in which its social goals—like community building through the spatial production of social capital, natural resource preservation through physical growth boundaries, and social equity through the provision of affordable housing—are achieved primarily through the reorganization of urban space.<sup>129</sup> The degree to which this spatial determinism is efficacious in producing the social capital and related social equity goals to which planners aspire is an open question. Planning the urban landscape, even with the best of social aspirations, is difficult in light of a very complex urban landscape, with its persistent race and class stratification. Policymakers must be vigilant about the ways in which physical land use decisions can interact with larger social forces to undermine even the best laid plans for the urban landscape. This is in large part the lesson of mid-twentieth century urban renewal programs which, for all of their visions of grandeur, calami-

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128 See, e.g., PETER CALTHORPE & WILLIAM FULTON, *THE REGIONAL CITY* 15–17 (2001); FRUG, *supra* note 21, at 115–64; Peter Calthorpe, *The Region*, in *THE NEW URBANISM*, at xi–xii (Peter Katz, ed., 1994).

129 See generally Emily Talen, *Sense of Community and Neighbourhood Form: An Assessment of the Social Doctrine of New Urbanism*, 36 *URB. STUD.* 1361, 1368–74 (1999) (discussing the ways in which New Urbanism can reconcile itself with existing social science research); Emily Talen, *The Social Goals of New Urbanism*, 13 *HOUSING POL'Y DEBATE* 165, 178–84 (2002) [hereinafter Talen, *Social Goals*] (explaining the connection between New Urbanism and the social goals of community, social equity, and the common good).

tously unsettled the urban landscape in ways that resonate even today.<sup>130</sup>

### A. *An Ecological Understanding of Urban Space*

The “regionalization” of cities underlying both Smart Growth and New Urbanism has had the effect of opening up a larger discussion about the ways in which urban ills such as sprawl and the fragmentation of metropolitan space are part and parcel of a regional tapestry of cause and effect.<sup>131</sup> By tying the fate of individual cities and neighborhoods together with the fate of the entire urban region, contemporary urban planners have embraced an “ecological understanding” of urban space.<sup>132</sup> This understanding proceeds on two key suppositions that situate our normative conception of cities and their regions in a highly interdependent relationship with one another.

First, the physical space of the city and its surrounding region are inextricably connected with one another.<sup>133</sup> This ecological understanding rejects the notion that a central city and its suburbs exist in atomized universes. The decisions and actions of one physical part of a region—e.g., one political or geographic entity (such as a city or a neighborhood)—profoundly impact and shape the other physical parts of the region.

Second, in theory, there is a high level of interdependence and synergy between various components of an urban region—e.g., its physical, social, and economic systems. As the Charter of New Urbanism frames this relationship, “physical solutions by themselves will not solve social and economic problems, but neither can economic vitality, community stability, and environmental health be sustained with-

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130 See generally Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL’Y REV.* 1, 26–32 (2003) (examining the emergence of the urban renewal program in the early to mid-twentieth century and the role of blight terminology in relocating racial minority populations, restricting racial mobility, and entrenching racial segregation).

131 See, e.g., MYRON ORFIELD, *AMERICAN METROPOLITICS* 129–34 (2002); DAVID RUSK, *INSIDE GAME/OUTSIDE GAME* (1999).

132 See, e.g., TIMOTHY BEATLEY & KRISTY MANNING, *THE ECOLOGY OF PLACE* 72–74 (1997); PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS* 9 (1993) (explaining how “ecological principles of diversity, interdependence, scale, and decentralization can play a role in our concept of suburb, city, and region”).

133 As two prominent urban planners have written: “If the region is the ‘superstructure’ of a metropolitan area—providing the overarching framework—neighborhoods serve as the ‘substructure.’ Our daily life operates simultaneously at these two scales, and the region and the neighborhood have an important reciprocal relation that creates the overall structure of the Regional City.” CALTHORPE & FULTON, *supra* note 128, at 32.

out a coherent and supportive physical framework.”<sup>134</sup> At their highest level of aspiration, Smart Growth and New Urbanist policies promise to stem the decline of public transportation and inner-city business districts, halt the degradation of our natural resources, de-concentrate poverty, and reduce the environmental and economic inequities borne by people of different races and incomes.<sup>135</sup> This promise rests almost entirely on changing the ways that we design and manage metropolitan urban form.

### 1. Ecologies of Scale

While both aim toward similar goals, in practice the two policy prescriptions operate at, and are almost completely focused on, different spatial scales. Smart Growth is an amalgamation of legislative carrots and sticks whose intent is to channel urban growth into existing, usually older communities, often with the aim of revitalizing those areas. Legislative “sticks” can take the form of urban growth boundaries restricting development to “infill” projects in already developed parts of a metropolitan region.<sup>136</sup> Legislative “carrots” typically concern themselves with regional form and redistribution of regional resources, by defragmenting land use controls (e.g., anti-Euclidean zoning), eliminating state subsidies which promote sprawl, and directing resources to rehabilitate existing built areas.<sup>137</sup>

New Urbanism, on the other hand, has been predominantly concerned with neighborhood form and design, and with linking the region and individual towns and neighborhoods through “transit-oriented development.”<sup>138</sup> Thus, regulations influenced by New Urbanism principles strive to promote “good urban form” through the requirements and incentives for mixed use, compact developments which preserve open/public space and provide walkable street layouts

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134 See CONG. FOR THE NEW URBANISM, CHARTER OF THE NEW URBANISM (Michael Leccese & Kathleen McCormick eds., 2000) [hereinafter CHARTER OF THE NEW URBANISM], available at [http://www.cnu.org/cnu\\_reports/Charter.pdf](http://www.cnu.org/cnu_reports/Charter.pdf).

135 See generally Smart Growth America, What is Smart Growth?, <http://www.smartgrowthamerica.org/whatissg.html> (last visited Nov. 13, 2006) (touting all of these as included within the definition of smart growth).

136 Portland’s urban growth boundary is the most famous example of this. See, e.g., Keith Aoki, *All the King’s Horses and All the King’s Men: Hurdles to Putting the Fragmented Metropolis Back Together Again? Statewide Land Use Planning, Portland Metro and Oregon’s Measure 37*, 21 J.L. & Pol. 397, 434–46 (2005).

137 Ed Bolen et al., *Smart Growth: A Review of Programs State by State*, 8 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 145, 147 (2002).

138 See generally CHARTER OF THE NEW URBANISM, *supra* note 134 (providing a list of principles to guide policy and development within the framework of New Urbanism).

close to transportation networks.<sup>139</sup> The focus on a community's physical infrastructure is rooted in part in the belief that urban design can create or influence particular social patterns, like a "sense of community," through increased face-to-face interaction of its residents on streets, sidewalks, and neighborhood gathering places.<sup>140</sup> New Urbanists also aim to tweak urban form to design an "architecture of community" in the region, by physically connecting cities and their suburbs, and neighborhoods within cities, through transportation networks.<sup>141</sup>

## 2. Equalities of Scale

The redistribution of regional resources and the redesign of urban form in neighborhoods are aimed at promoting not just spatial (mixed-use) diversity but also social (ethnic/class) diversity. While Smart Growth advocates embrace these goals, New Urbanists articulate their link most explicitly. Achieving social equity is defined chiefly by references to the deconcentration of poverty/race and the provision of affordable housing. Reformers promote a broad range of housing types and price levels that will bring people of diverse ages, races, and incomes into daily interaction.<sup>142</sup>

New Urbanists thus address the "spatial mismatch" between jobs and residential locations common in urban areas<sup>143</sup> by calling for the

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139 CONG. FOR NEW URBANISM, CODIFYING NEW URBANISM 12–15, 43–79 (2004) (surveying communities using New Urbanism); see also Brian W. Ohm & Robert J. Sitowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 784 (2003) (defining New Urbanism to include "communities . . . designed for the pedestrian and transit as well as the car [and] shaped by physically designed and universally accessible public spaces" (quoting CHARTER OF THE NEW URBANISM, *supra* note 134)); Robert J. Sitowski & Brian W. Ohm, *Enabling the New Urbanism*, 34 URB. LAW. 935, 935–36 (2002) (describing "[n]ew urbanist developments [as] . . . 'more compact, pedestrian friendly, mixed use communities, that incorporate housing opportunities within walking distance of retail shopping, employment centers, and mass transit nodes.'" (quoting Eric M. Braun, *Growth Management and New Urbanism: Legal Implications*, 31 URB. LAW. 817, 817 (1999))).

140 See, e.g., CALTHORPE, *supra* note 132, at 59; WILLIAM FULTON, THE NEW URBANISM 4–5 (1996).

141 See, e.g., Calthorpe, *supra* note 128, at xi, xvi ("The diverse population and functions within a region should have a connecting fabric which makes the region vital and inclusionary. Our freeway and arterial networks now seem to privatize and isolate the components of a region more than connect them.").

142 See CONG. FOR NEW URBANISM, *supra* note 139, at 17–18.

143 Researchers have hypothesized, and studies have corroborated, that the suburbanization of jobs and involuntary housing market segregation have acted together to create a surplus of workers relative to the number of available jobs in inner-city neighborhoods where blacks are concentrated. See generally John F. Kain, *Housing*



physical organization of the region to be supported by a framework of transportation alternatives to maximize access and mobility throughout the region while reducing dependence on the automobile.<sup>144</sup> And they caution that infill development within existing urban areas should conserve not just environmental resources and economic investment, but also the “social fabric” while reclaiming marginal and abandoned areas.<sup>145</sup>

### B. *Problems of Scale and Integration*

Neither policy prescription has achieved the level of integration between the physical, social, and economic elements of urban life consistent with its ecological underpinnings. In fact, embedded in regional growth management strategies might be dislocation risks for some urban communities, upsetting the social fabric in those communities that reformers claim they want to preserve. The demand for and rising cost of housing in central cities in most instances results in the displacement of longstanding communities and businesses who have no guarantee of being welcomed by suburban communities where exclusionary zoning continues to be the rule rather than the exception.

The displacement of existing communities is problematic in and of itself in an urban landscape characterized by exclusionary land use policies. But the point I want to make is slightly different. I want to take seriously urban reformers’ desire to design for “community-building”—that is, for communities where people from different classes and races seriously interact with and cooperate with one another toward mutual community goals (whether the community is local or regional). While accounting for the ways in which urban design can promote interaction in new communities, regional policy reformers have yet to come to terms with the limitations of their spatial determinism in transforming existing communities.<sup>146</sup>

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*Segregation, Negro Employment, and Metropolitan Decentralization*, 82 Q.J. ECON. 175, 179–83 (1968) (testing empirically the effects of housing segregation on employment opportunities for blacks in Chicago and Detroit); John F. Kain, *The Spatial Mismatch Hypothesis: Three Decades Later*, 3 HOUSING POL’Y DEBATE 371, 375 (1992) (noting that the spatial mismatch hypothesis experienced a rebirth of sorts in the mid-eighties in response to a “growing awareness of the worsening of problems of inner-city poverty and growing unemployment”).

144 CONG. FOR NEW URBANISM, *supra* note 139, at 13.

145 *Id.* at 19–20.

146 As others have remarked, it has been much easier for urban reformers to create racially and economically homogenous places like the oft-criticized New Urbanist developments of Seaside and Celebration Florida than to create communities with

In particular, 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 where the displaced are supposed to relocate. At the same time, “in-fill” development in existing urban communities has been threatening to disrupt existing social networks upon which the poor depend and that might be nurtured and built upon to create the type of diverse communities that reformers want. To achieve the social capital and equity goals that reformers want requires a deeper accounting of social networks on community formation and sustainability.

### 1. The Reorganization of Urban Communities and the Disruption of Social Networks

It seems a truism that reducing the supply of a commodity in high demand will drive up its price in the marketplace. It thus should come as no surprise that one of the widely touted tools behind anti-sprawl efforts—limiting urban boundaries and directing urban growth to existing communities—holds the potential to limit the supply of housing (particularly on the urban fringes) and in turn to drive up housing prices. Both New Urbanist and Smart Growth projects have been accused of making housing less, not more, affordable.<sup>147</sup> The empirical evidence documenting the threat of displacement from New Urbanist and Smart Growth mechanisms is still in its infancy.

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real economic and racial diversity. See, e.g., ANDREW ROSS, *THE CELEBRATION CHRONICLES* 223–56, 265–98 (1999) (noting the failure to achieve New Urbanist goals like racial diversity); Alex Krieger, *Whose Urbanism?*, *ARCHITECTURE*, Nov. 1998, at 73, 73–74 (noting the creation by New Urbanists of “[m]ore subdivisions (albeit innovative ones) than towns,” “relatively homogenous demographic enclaves, not rainbow coalitions,” attractive “planned unit development, not yet substantial infill,” and “carefully edited, rose-colored evocations of small-town urbanism, from which a century ago many Americans fled not to the suburbs but to the city”); see also Jeremy R. Meredith, Note, *Sprawl and the New Urbanist Solution*, 89 *VA. L. REV.* 447, 490–95 (2003) (cataloguing some of the critiques, noting that “[e]ven though these communities take a different form than cul-de-sacs and strip malls, they exhibit some of sprawl’s hallmark troubles”). But see Cliff Ellis, *The New Urbanism: Critiques and Rebuttals*, 7 *J. URB. DESIGN* 261, 279 (2002) (addressing the critiques of New Urbanism by noting that New Urbanists have not just focused on new developments but have also been redesigning and “infilling” existing developments).

<sup>147</sup> See, e.g., MARK J. EPPLI & CHARLES C. TU, *VALUING THE NEW URBANISM* 73 (1999); TODD LITMAN, *VICTORIA TRANSP. POLICY INST., EVALUATING CRITICISM OF SMART GROWTH* 35–36 (2005), available at <http://www.visplan.com/fapa/sgcritics.pdf>; ARTHUR C. NELSON ET AL., *THE LINK BETWEEN GROWTH MANAGEMENT AND HOUSING AFFORDABILITY: THE ACADEMIC EVIDENCE* 17–28 (2002), available at <http://www.brookings.edu/es/urban/publications/growthmang.pdf>; Lawrence W. Cheek, *New Urbanism Sees Green*, *ARCHITECTURE*, Mar. 2000, at 74.

Yet, regardless of how the empirical evidence on affordable housing turns out, there is a larger issue lurking in this debate.

The issue is whether spatial mechanisms aimed at the reorganization of both urban space and its residents aptly account for the influence of existing social networks on integrative efficacy. Land use planning reforms are directed not just at urban space but at urban residents. The point is to reorganize space *and* people in the service of the various social goals mentioned above. Thus affluent and middle-class suburban residents would do better to live in denser, walkable environments. Poor residents would do well to live in communities with higher-income residents. Underlying these goals is a desire both to spatially deconcentrate poverty and to create economically and racially mixed communities.

One of the most powerful arguments for poverty deconcentration is that the interaction between people of different mixed-income groups produces "bridging" social capital. Mixing the poor with higher-income families is assumed to provide the poor with educational and employment contacts, role models for social norm generation, and strong community institutions to ensure the health and safety of residents. This underlying assumption has its genesis in the groundbreaking work of William Julius Wilson, particularly his thesis that the absence of middle-class (and stable) families in inner-city neighborhoods left the poor socially isolated and cut off from the resources, information, and social capital that could connect them to educational and employment opportunities.<sup>148</sup>

Notably, government poverty deconcentration programs such as HOPE VI, in which high-rise public housing projects are torn down and replaced with low-density mixed income housing, rest on this assumption and design mixed-income communities based on New Urbanism principles.<sup>149</sup> Similarly, like poverty deconcentration programs sponsored and funded by the federal government, targeted redesign and redevelopment of existing inner city communities influenced by New Urbanism offers the opportunity to bring new, more affluent residents back into existing cities and to create the incentive for existing low-income residents who occupy many of those areas to move into more affluent communities.

Even though many in the poorest of communities would jump at the opportunity to relocate to other neighborhoods, it is a mistake to

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148 WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 20-62 (1987).

149 CONG. FOR THE NEW URBANISM & U.S. DEP'T OF HOUS. AND URBAN DEV., *PRINCIPLES FOR INNER CITY NEIGHBORHOOD DESIGN* 2 (1999), available at <http://www.huduser.org/publications/pdf/principles.pdf>.

assume that all want, or are able, to move. The lack of desire to do so is likely attributable to the fact that residents fear the loss of social capital they have acquired over time in their existing neighborhoods. The loss of extensive networks of family and friends may also render these participants vulnerable because of increased social isolation if their new neighborhoods are hostile to them on account of their class or race. As one commentator has fittingly remarked, “geographic proximity does not a neighbor make—at least not in the social sense.”<sup>150</sup>

A recent study of Chicago’s ambitious “Plan for Transformation”—which seeks to demolish thousands of units of the city’s public housing stock and other “severely distressed” developments around the city and to move tenants into the private housing market—calls into question the assumption that the bridging social capital with which poverty deconcentration is often tied can be achieved through geographic mobility alone.<sup>151</sup> The study notes that one of the most revealing aspects of the “transformation process” is that residents are returning to the neighborhoods around the projects.<sup>152</sup> Finding that seventy-six percent of a tenant’s social network is comprised of other public housing inhabitants, the study’s authors express little surprise, in the end, that families go back to their communities in order to find support and make ends meet:

[T]he social supports they spent years, if not decades, building up are not easy to cast aside. They patronize the same churches—where pastors give them free food and job assistance. They commute with their children for miles to attend the schools around the projects. They have trusting relationships with teachers who understand their plight. In their old neighborhoods, shopkeepers still give them credit and hospital staff may find them free prescription drugs. Our study shows that 54 percent of the residents visit their old community at least once a week.<sup>153</sup>

The authors conclude with two observations about spatial deconcentration programs that should give urban planners some pause. The first is that such programs “fail to take into account that poor people live in networks and that they are materially attached to their

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150 Xavier de Souza Briggs, *Moving Up Versus Moving Out: Neighborhood Effects in Housing Mobility Programs*, 8 HOUSING POL’Y DEBATE 195, 197 (1997).

151 See Sudhir Venkatesh & Isil Celimli, *Tearing Down the Community*, 138 SHELTERFORCE, Nov.–Dec. 2004, at 10, 10, available at <http://www.nhi.org/online/issues/138/chicago.html>.

152 *Id.*

153 *Id.* at 29.

communities.”<sup>154</sup> Tearing people from these networks and communities might well cause more damage than the promised benefits that more affluent communities will bring.<sup>155</sup> The second is that even for families who want to or must move, residents have difficulty finding housing outside of the “poorest, racially segregated communities.”<sup>156</sup> These communities might end up in the same city or in older, “inner-ring” suburbs, which can absorb these populations in part due to their own economic decline and changing demographics.<sup>157</sup> This latter observation poses the issue of the feasibility of achieving “bridging” social capital through spatial deconcentration strategies from another perspective—whether such capital is achievable in the face of exclusionary land use mechanisms and social biases that persist in more affluent communities.

## 2. Integrating into Existing Social Networks

In addition to desegregating existing neighborhoods to limit poverty concentration, urban planning reformers also want to strengthen the ability to distribute resources in a geographically equitable way since socioeconomic homogeneity tends to be highly correlated with inequitable fiscal resource distribution.<sup>158</sup> This dispersal puts pressure on suburban communities to open their communities to the poor and make way for affordable housing. However, as William Fischel has convincingly argued, most suburban homeowners (usually affluent) oppose any policies that might reduce home values, often their main asset.<sup>159</sup> Letting more affordable housing into their communities would do exactly that. In addition, it may well pose the risk, real or perceived, of lowering the quality of their schools and raising property taxes. Thus the persistence of exclusionary zoning and fiscal

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154 *Id.*

155 See FULLILOVE, *supra* note 19, at 11–17.

156 Venkatesh & Celimli, *supra* note 151, at 10.

157 See generally ORFIELD, *supra* note 131, at 1–64 (discussing poverty and race in urban centers); see also Robert Puentes & David Warren, *One-Fifth of America: A Comprehensive Guide to America's First Suburbs*, BROOKINGS INST., Feb. 2006, at 1, available at [http://www.brook.edu/metro/pubs/20060215\\_FirstSuburbs.pdf](http://www.brook.edu/metro/pubs/20060215_FirstSuburbs.pdf) (noting that “America’s older, inner-ring ‘first’ suburbs have a unique set of challenges, such as the concentration of elderly and immigrant populations as well as outmoded housing and commercial buildings”); *id.* at 9 (noting that “alarming” pockets of poverty have emerged in these suburbs).

158 See Talen, *Social Goals*, *supra* note 129, at 181.

159 WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS*, at ix (2002).

zoning renders many places unwelcome for dispersed low-income residents of now gentrifying areas.<sup>160</sup>

In part, this may be a collective action problem that reformers could theoretically solve through regional collaborative arrangements among local governments—such as revenue sharing and fair share agreements promoted by regionalists of all stripes. But one has to wonder what the nature of the incentives would be for suburbs to give up local power in the name of regional “equity.”<sup>161</sup> Regional reformers believe that because the current regime of regional fragmentation imposes hefty costs on suburbs as well as cities, they are already incentivized to coordinate with other localities.<sup>162</sup> However, as Nicole Stelle Garnett has pungently noted, “[l]ocal governments in most metropolitan regions . . . have proven stubbornly resistant to arguments that they should surrender land use and infrastructure-planning authority in the name of interlocal equity.”<sup>163</sup> And the reality of metropolitan fragmentation remains that even policies designed to control the pace and scale of urban growth, such as impact fees, will often “simply enhance a local government’s ‘fiscal zoning’ toolbox,”<sup>164</sup> used to exclude those with more moderate means from its community.<sup>165</sup>

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160 See, e.g., Audrey G. McFarlane, *Redevelopment and the Four Dimensions of Class in Land Use*, 22 J.L. & POL. 33, 39–40 (2006) (explaining that exclusionary and fiscal zoning is a tool that not only contributes to housing unaffordability but also is a reflection of local governments catering to their homeowner majorities and who actively work to protect their economic interests).

161 See, e.g., Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131, 146 (2004). Cummings posits that region-wide proposals for equitable development require coordinated regional level planning authorities; otherwise, local efforts to develop equitable housing patterns within a particular city do nothing to ensure that suburban areas contribute to regional housing needs and thus reinforce metropolitan-level stratification. *Id.*

162 See, e.g., ORFIELD, *supra* note 131, at 31–42 (noting that the majority of suburbs are not resources rich and suffer from many of the same funding and resource problems that plague central cities).

163 Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 MINN. L. REV. 459, 485 (2005) (reviewing RICHARDSON DILWORTH, *THE URBAN ORIGINS OF SUBURBAN AUTONOMY* (2005)). Garnett notes that “[i]mportant exceptions exist, but are rare,” *id.*, and discusses the two prominent examples of Minnesota’s Twin Cities Metropolitan Council and Maryland’s Smart Growth and Neighborhood Conservation Initiative. *Id.* at 485–86; see also RUSK, *supra* note 131, at 178–200, 222–48 (discussing in detail the Maryland and Minneapolis examples).

164 Garnett, *supra* note 163, at 487.

165 *Id.* For instance, impact fees levied on new suburban developments, even if not adopted for an exclusionary purpose, will tend to drive up housing prices. *Id.* at 489–90.

Nevertheless, despite skepticism about the willingness of affluent suburbs to absorb low-income city residents, there is evidence that such absorption has been happening. Empirical studies from both the Gautreaux and Move to Opportunity (MTO) mobility programs<sup>166</sup> demonstrate that relocated, low-income, inner-city residents have been steadily moving to more affluent suburbs.<sup>167</sup> This geographic mobility alone may not necessarily translate into the bridging social capital that reformers hope will accompany the mobility of the poor. In fact, strong social networks, or social cohesion, in the suburbs can be a mechanism for excluding racial and economic outsiders.<sup>168</sup>

Social norms in white middle-class suburbs may constrain low-income blacks or prevent their access to activities. Rather than finding their new communities to be sources of social capital, new residents may feel that they are highly constraining and intolerant of the kinds of behaviors and attitudes with which they are comfortable.<sup>169</sup>

The result might be the loss of old social capital without a concomitant gain in new social capital and the social and economic goods that it can produce.

Perhaps surprisingly, these studies suggest that in fact some low-income city residents who move to predominantly white, economically stable suburbs are able to integrate into existing social networks and

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166 The Gautreaux program, in which low-income (predominantly public housing) families were able to move to private housing middle-class suburbs throughout the six-county metropolitan area of Chicago using Section VII housing certificates, was a result of litigation brought in federal court in the 1970s. See generally *Hills v. Gautreaux*, 425 U.S. 284, 297 (1976) (deciding the scope of a remedial order to redress the Chicago Housing Authority's segregation practices as they applied to family public housing); ALEXANDER POLIKOFF, *WAITING FOR GAUTREUX* (2006) (describing the history of the *Gautreaux* litigation and the resultant desegregation of Chicago's public housing). The MTO program, a similar voucher mobility program which grew out of the Gautreaux program, also gave poor residents (in five urban metropolitan areas) a choice to move to communities with superior educational and employment opportunities. One major difference between the two programs is that while "Gautreaux created both racial and income integration," MTO advanced "income, not race, integration." James Rosenbaum et al., *New Capabilities in New Places: Low-Income Black Families in Suburbia*, in *THE GEOGRAPHY OF OPPORTUNITY* 150, 157 (Xavier de Souza Briggs ed., 2005).

167 See generally LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES* (2000) (reporting this about the Gautreaux program in Chicago); Rosenbaum et al., *supra* note 166, at 156-58 (describing programs that provide such geographic mobility).

168 See generally Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 *ANN. REV. SOC. I.*, 15 (1998) (describing as the negative consequences of social capital: exclusion of outsiders, excess claims on group members, restrictions on individual freedoms, and downward leveling norms).

169 Rosenbaum et al., *supra* note 166, at 154.

acquire new social norms, competencies, and resources in doing so.<sup>170</sup> To be sure, many households who move to suburban neighborhoods initially suffer some degree of social discomfort, race-based harassment, and exclusion from their new neighbors.<sup>171</sup> However, these incidents tend to subside, according to researchers, and are replaced over time by a qualitatively and quantitatively higher degree of social interaction with neighbors, as compared to their experience in their city neighborhoods.<sup>172</sup> Compliance with the new community's social norms and the existence of social reciprocity produces a greater degree of informal social controls, provides new residents tangible resources (like child care and transportation), and confers on them capabilities that they would not otherwise have had.<sup>173</sup> In contrast to the results of the Chicago Plan for Transformation study mentioned above,<sup>174</sup> in cases where residents are able to integrate into new social networks (including their existing norms) they are far less likely to return to the city and their previous social networks.<sup>175</sup>

The social capital gains from poverty deconcentration tend also to be replicated across the urban landscape in different types of communities. Even moving to another part of the central city, while offer-

170 See, e.g., RUBINOWITZ & ROSENBAUM, *supra* note 167, at 103–26.

171 *Id.*

172 Rosenbaum et al., *supra* note 166, at 159–71. For example:

Some women who moved to the suburbs reported finding *a sense of community* that they felt was lacking in their city neighborhoods. They had often felt isolated in the city, had withdrawn from the community, and had even become suspicious and fearful of their neighbors. Sometimes city neighbors ignored crime that they saw, and didn't try to stop it or report it to the police. In contrast, some described suburban neighbors who watched over each other's homes and property. Suburban movers believed that they could count on their neighbors' assistance, and some took active steps to protect others . . . .

. . . .

For many women, these acts of assistance provided important tangible benefits, such as transportation and babysitting. Just as significant for many women, however, was the psychological benefit of knowing that this support network existed.

RUBINOWITZ & ROSENBAUM, *supra* note 167, at 109–10.

173 Rosenbaum et al., *supra* note 166, at 171–74 (noting that “[p]articipant compliance with community norms probably enhanced the perception that they were members of the community,” and that “[h]arassers’ breaking of norms of decency may also have forced other neighbors to back the neighborhood norms of acceptance”).

174 See *supra* notes 151–57 and accompanying text.

175 Rosenbaum et al., *supra* note 166, at 174 (finding “that only 30 percent of suburb movers had returned to the city an average of seventeen years after placement” in their new suburban communities).



ing less economic mobility and less racial diversity, seems to offer net social capital gains. Another study tracking residential mobility from Chicago's Plan for Transformation found that residents who moved out of public housing into another part of the central city found better housing in safer and less poor (though not less racially segregated) neighborhoods along with significant gains in social capital.<sup>176</sup> These residents rated their new neighborhoods higher in "collective efficacy"—i.e., higher in "social control (whether neighbors would take action if they saw someone causing problems) and on measures of social cohesion and trust (whether neighbors trusted each other and shared values)"—than those who remained in public housing.<sup>177</sup>

### 3. Accounting for the Social Costs of Urban Redevelopment and Mobility

These findings tend to bolster the link between spatial mobility mechanisms—including poverty deconcentration programs—and net social capital gains. At least for those who are willing, and able,<sup>178</sup> to move, contemporary urban planning reforms offer significant potential for the type of social and economic benefits that are produced by "bridging" the poor with more (even if only slightly more) affluent communities. Yet it is also true that acquiring this bridging capital carries with it the high possibility of transaction costs—e.g., initial harassment, discrimination, exclusion, etc., in the new community—and the uncertainty of whether net social capital gains will materialize when exchanging an old network for a new one. The costs and uncertainty may also be highly sensitive to the variation in the strength of existing social networks and social attitudes in different parts of the country. It is thus not surprising that some would feel reluctant to leave behind, or eventually attempt to reclaim, longstanding social capital in their old communities.

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176 Susan J. Popkin & Mary K. Cunningham, *Beyond the Projects: Lessons from Public Housing Transformation in Chicago*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 166, at 176, 187 (noting that the average reduction in neighborhood poverty for these households was forty-two percentage points and that the majority of movers live in neighborhoods that are more than ninety percent African-American); *see also* Susan J. Popkin et al., *The HOPE VI Program: What about the Residents?*, 15 *HOUSING POL'Y DEBATE* 385, 393 (2004) (analyzing HUD administrative data regarding whether residents moved to better areas).

177 Popkin & Cunningham, *supra* note 176, at 189.

178 *See, e.g., id.* at 186–87 (reporting that "nonmovers" from public housing were more likely to have faced personal barriers—including poor physical and mental health—that made it "difficult for them to make a successful transition out of public housing").

Contemporary urban reforms offer no real account of how to manage these costs within a land use planning and development framework, particularly for the most socially vulnerable populations. Displaced, low-income populations who are moving, ostensibly out of “choice,”<sup>179</sup> while their old neighborhoods are being redeveloped (via HOPE VI and other programs) and often marketed to the affluent, are expected to bear the social externalities of a redevelopment policy predicated on their exclusion.<sup>180</sup>

Accomplished through a mixture of private market forces and public subsidies, it is fair to ask what obligation local governments owe to these residents when they exercise police power in ways that “deeply impact, reshape, or eliminate residential patterns, property ownership, or leasehold tenancies and community.”<sup>181</sup> Outside of the context of eminent domain and fair share housing obligations,<sup>182</sup> this question has not been addressed at any length by legal scholars. In part this is because we lack a conceptual structure or language in which to assess the interests and rights of nonproperty, non-“commons” owners’ “rights” to the city.<sup>183</sup> To think through how social capital costs and benefits might usefully be worked into a land use and

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179 The extent of this choice is often disputed. In Chicago, about seventy-five percent of public housing tenants have expressed the desire to return to their old, redeveloped, mixed-income neighborhoods, but fewer than twenty percent will be able to do so. See, e.g., Venkatesh & Celimli, *supra* note 151, at 10; see also Popkin et al., *supra* note 176, at 392, 407 (finding that relatively few residents are able to return to HOPE VI sites around the country due to the lack of replacement units and selection criteria).

180 See generally Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 26–33 (2006) (discussing the displacement effects of gentrification).

181 *Id.* at 41.

182 See, e.g., *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *Berman v. Parker*, 348 U.S. 26 (1954); *S. Burlington County NAACP v. Twp. of Mt. Laurel (Mt. Laurel I)*, 336 A.2d 713 (N.J. 1975); *S. Burlington County NAACP v. Twp. of Mt. Laurel (Mt. Laurel II)*, 456 A.2d 390 (N.J. 1983); McFarlane, *supra* note 160, at 41–59 (discussing these cases).

183 See Michael A. Heller, *The Dynamic Analytics of Property Law*, 2 THEORETICAL INQUIRIES L. 79, 80 (2001) (noting the traditional division of property “ownership into a trilogy of private, commons, and state forms” and proposing an integrated approach that would combine and reconceptualize the private and commons types of ownership); see also Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 3 (2003) (arguing for “a new private property regime capable of providing optimal preservation incentives to both market participants and political representatives”); Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 552 (2001) (arguing against the “linking [of] the utilitarian vocabulary of economic success with the conceptual binary of private/commons property”).

development legal framework we have to begin to rethink the city commons itself.

#### IV. RETHINKING THE CITY COMMONS

The landscape of urban land is highly privatized, reflected in our prevailing conceptions of individualized property rights vested in a particular owner. Tracking this highly individualized and privatized conception, our regulatory system treads carefully when controlling or managing what individuals do with their property. Modern pollution-control regulation, for instance, "is premised on the sovereign's police power to regulate private activities that adversely affect public health and welfare because of the impact of those activities on the natural environment notwithstanding [private] property claims."<sup>184</sup> In contrast, the regulation of much of our natural, common resources is premised in large part on federal (and public) proprietary ownership of those resources. The government holds these resources in a sort of a "trust" for the benefit of present and future generations.

How might we account for the interest in urban land that becomes part and parcel of the social fabric of a community, helping to generate a common resource—social capital—so essential to community stability and sustainability? Currently we have no mechanism in land use law and regulation that can provide such an accounting. In this concluding Part, I offer some very preliminary thoughts on how legal norms might be restructured to better account for the ways that property "of" the city can be an enhancer of, and enhanced by, critical social assets that support and sustain its communities.

##### A. *Locating the Public Interest in City Space*

Land uses can change along with economic and social change in cities. In the dispute over the community gardens, abandoned, city-owned land became available for social and recreational uses in neighborhoods lacking those resources.<sup>185</sup> As such, those uses changed the nature of the property at issue, away from simply property to which the city held title into a common resource, whose use accrued to the benefit of not only the surrounding neighborhood, but arguably to the entire city—through improved social relations between different cultures, which in turn purchased other social benefits such as reduced crime and urban decay.

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184 LAZARUS, *supra* note 3, at 50.

185 See *supra* Part I.A.

Recall that the city's characterization of the gardens as "vacant" land cast an inherently private tinge on public property.<sup>186</sup> In other words, the city essentially was saying (and the courts agreed) that "this is our property and we can exclude you (or give you access) at will." This is the essence of the private property right that is so revered in our law and culture. The residents, on the other hand, sought to elevate the status of the land to the status of protected park land.

But there is something inherently different about property owned by the city or municipality, for its inhabitants, and property owned privately within the bounds of the city. The latter is among the most protected in our legal system, most notably by the constitutional prohibition against its "taking" except for public purposes.<sup>187</sup> The former arguably represents a sort of grey area of property rights, neither fully private, like property owned by private individuals, nor fully public, as in natural resources owned by everyone but held in "trust" by the government.<sup>188</sup>

Neither the city's nor the residents' characterization of the gardens truly captured the use of the land nor the way that gardens became a crucial resource for sustaining the well-being of the surrounding communities. One way of doing so is by thinking of the residents' use of the land as giving rise to a limited type of property interest by virtue of the widespread benefits the usage produces. As Carol Rose has written, there is precedent for treating some types of property used by the public as inherently belonging to the public, or "inherently public" property.<sup>189</sup> The public nature of the property rights derived in large part from the public need met, and the public benefits accrued by, access to the land by an indefinite, even if small, group of the public.<sup>190</sup> These doctrines thus vested property rights in the public when those properties were used for travel, communication, commerce, and social interactions that connect people with a larger world in "an otherwise atomized society."<sup>191</sup>

Open access to property for public uses was thought to enhance, rather than detract from, the value of certain kinds of property. Rose

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186 See *supra* note 35 and accompanying text.

187 U.S. CONST. amend. V.

188 See generally Amnon Lehavi, *Property Rights and Local Public Goods: Toward A Better Future for Urban Communities*, 36 URB. LAW. 1, 2 (2004) (investigating "local public goods that are established by governmental bodies and are aimed at serving a relatively local group of residents on a regular basis, especially in an urban setting").

189 See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 713-17 (1986).

190 *Id.* at 761-64.

191 *Id.* at 723, 775-81.

wrote that these public property doctrines were a distinct reversal of the assumption behind the classic “Tragedy of the Commons” tale whereby open access leads to overuse and degradation, thus supporting less, not more, public access.<sup>192</sup> In these cases, “indefinite numbers and expandability take on a special flavor,”<sup>193</sup> one with scaled returns, where “increasing participation *enhances* the value of the activity rather than diminishing it.”<sup>194</sup> The inherently public property doctrine thus came to resemble what we know as the public trust doctrine in natural resources law today.<sup>195</sup> It implies a duty on the part of the government to preserve the property for the uses that defined its public quality.<sup>196</sup>

### B. Forcing Social Cost Accounting Through Limited Property Rights

Recognition of the “inherently public” nature of the land on which the gardens sat offers an alternative way to think about how the city and the courts might have managed the community gardens conflict differently. Perhaps not in all cases, but at least in some, the city might have concluded that the increase of social assets, such as the building of social capital and other benefits of the gardens’ use, outweighed the use of the land for even affordable housing.<sup>197</sup> It might have considered the scaled effects of preserving more gardens rather than less.<sup>198</sup> That is, the more active community gardens, the greater

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192 *Id.*

193 *Id.* at 768.

194 *Id.*

195 *Id.* at 767–71.

196 *Id.* at 721 (“The ‘trust’ language of public property doctrine, in an echo of natural law thinking, suggested that governments had some enforceable duties to preserve the property of the ‘unorganized’ public.”).

197 Land use decisions can be made according to benefits or positive externalities that might accrue from planned development or use of land. For instance in the Supreme Court’s recent *Kelo* case, the majority concluded that the city’s use of eminent domain was in the public interest in large part because the city believed its economic development plan would provide “appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue.” *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005). The Plaintiff’s constitutional takings challenge was thus to be resolved, the Court reasoned, against the benefits said to result from the redevelopment plan. *Id.*

198 See, e.g., Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 976 (2005). Building on Carol Rose’s insight, the author explains why certain traditional and nontraditional infrastructure should be managed in an openly accessible manner because they generate, or have the potential to generate, significant positive externalities that result in large social gains. *Id.* at 928–29. Infrastructure, which includes both natural and socially constructed resources, is defined as that which may be consumed (non)rivalrously (the ability to use

those benefits would be (cleaner air, less crime, more engaged citizens), both to diffuse populations throughout the city but also to the most vulnerable ones in need of scarce public resources.<sup>199</sup>

The best way to force this cost/benefit balancing would be to vest a very limited property right—the right of open access—to the public so long as the community gardens were being used for, and yielded, the benefits claimed by the residents. This limited property right would be just that. It would simply allow an injunction to stop the city from terminating the gardens' leases upon a showing by the challengers that the public value accruing from use of the gardens would more likely than not be irreparably harmed and that such harm is not outweighed by the proposed new land use. Although such a ruling would not tie the city's hands in deciding to change the use of the property ultimately, it would force the city to transparently consider both the quality and the scale of the social, environmental, and economic benefits of the land uses and the effects of taking away or diminishing them as a resource for those benefits.

In the end, after several years of litigation and a change of city administration, residents and city officials reached a settlement that ultimately recognizes the inherently public nature of the gardens.<sup>200</sup> The settlement would preserve most of the gardens so long as the land continues to be used in a way that generates the social gains, or posi-

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the resource without detracting from the consumption opportunities available to others), where social demand for access is driven primarily by downstream productive activities, and the range of goods and services produced downstream varies across the spectrum of public, private, and nonmarket goods. *Id.* at 956.

199 As Frischmann argues:

In some cases, open access to the [resource] may be a more effective—albeit blunt—means for supporting such activities than targeted subsidies. Open access is not necessarily a subsidy, but it eliminates the need to rely on either the market or the government to “pick winners” or uses worthy of access. On one hand, the market picks winners according to the amount of appropriable value generated by outputs and consequently output producers' willingness to pay for access to infrastructure. On the other hand, to subsidize production of public goods or nonmarket goods downstream, the government needs to pick winners by assessing social demand for such goods based on the social value they create . . . . [T]he inefficiencies, information problems, and transaction costs associated with picking winners under either system may justify managing public and social infrastructure resources in an openly accessible manner.

*Id.* at 978 (footnotes omitted).

200 Eliot Spitzer, Att'y Gen., Memorandum of Community Gardens Agreement (Sept. 17, 2002), available at [http://www.oag.state.ny.us/environment/community\\_gardens\\_agreement.pdf](http://www.oag.state.ny.us/environment/community_gardens_agreement.pdf).

tive externalities, that the gardens have become known for.<sup>201</sup> In the event the land ceases to be used for community gardens, the land reverts back to the city for whatever use the city deems is appropriate.<sup>202</sup>

The settlement did not fundamentally challenge or alter the basic framework of land use decisionmaking in the city that gave rise to the conflict in the first place. But by shifting from an atomized approach to the gardens toward one that recognized the importance of that space to the community around it, the settlement opened a range of possibilities for managing the places that are important to the social structure, vitality, and sustainability of the surrounding communities.

#### CONCLUSION: GOVERNING COLLABORATIVELY THROUGH SOCIAL NETWORKS

Let us return to the recognition that social capital is essential to neighborhood governance and community building, as well as that it can purchase additional social and economic resources. One notion that follows from this recognition is that the social networks that exist throughout the city are resources to be mined toward the management, redevelopment, and revitalization of urban neighborhoods. Often this is couched in terms of “community based planning,” a movement that identifies the neighborhood as the appropriate level for urban planning.<sup>203</sup> However, given the acknowledged chasm between land use regulation and land use planning, it might be helpful to move toward a stronger norm of land use governance that places actual decisionmaking power in the hands of those with the capital to exercise it, and that recognizes that those social networks are not always tied to geographic neighborhoods.

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201 Specifically, the city agreed to preserve hundreds of community gardens and to provide for a “garden review process.” *Id.* at 2. However, twenty-eight gardens were slated to be developed without additional delay, in part because their development had already been through the city’s land use review process. *Id.* at 7. Some of the new developments would partially preserve some of these gardens. *Id.* at 8–9.

202 The settlement also provided that the gardens would be subjected to normal environmental impact review process and to a particularized community gardens review process. *Id.* at 2–3. The latter requires the developing city agency to notify community gardeners (and other public officials) when it proposes the development or sale of a community garden and to provide a list of alternate city-owned properties (if available) to which the gardeners can relocate if they so choose. *Id.* at 4.

203 See generally WILLIAM PETERMAN, NEIGHBORHOOD PLANNING AND COMMUNITY-BASED DEVELOPMENT 9–70 (2000) (discussing community and neighborhood planning options).

Collaborative governance of common resources is now fairly entrenched as a regulatory norm and practice. In recent years, we have seen a proliferation of collaborative structures in the natural resources arena—such as watershed initiatives and forestry partnerships—constituted of groups of public agencies and private stakeholders assembled to address mutual resource concerns at relevant ecosystem scales.<sup>204</sup> In these collaborative structures, federal and state land management agencies work with local stakeholders—i.e., those who may depend upon the resource for a living (e.g., fishers) or for recreation (e.g., hunters)—to manage the resource for long-term sustainability.<sup>205</sup>

While the community most often does not own any part of the resource,<sup>206</sup> allowing local communities to manage such resources is an important recognition of the stake that the communities have in those resources. These collaborative structures can expand the normative lens of resource management to encompass both the physical properties of that system which sustain a wide variety of animal and plant species, but also a range of social and economic assets within that system for surrounding communities. Collaborative resource management is also premised on the realization that “fragmented, piecemeal [regulation of natural resources] tends to ignore the synergistic effects and complex interdependencies among the various components and stressors that make up [a natural] ecosystem.”<sup>207</sup> Devolved collaboration seeks to coordinate the mandates of national environmental laws with the creativity of local solutions that recognize the unique ecology, economics, and demographics of the places in which these problems reside.

To be sure, there are some cautionary lessons to be taken from some of these “devolved collaboration” efforts, and potential pitfalls to be mindful of, especially in light of the dangers of excessive local-

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204 See generally RICHARD O. BROOKS ET AL., *LAW AND ECOLOGY* 261–396 (2002) (recounting the development and progress of ecosystem management during the 1990s and suggesting methods for improvement); JULIA M. WONDOLLECK & STEVEN L. YAFFEE, *MAKING COLLABORATION WORK* 71–209 (2000) (discussing examples of successful collaboration during the 1990s and lessons to be taken therefrom).

205 See e.g., BROOKS ET AL., *supra* note 204, at 274–79.

206 But see Jim Robbins, *Community Forestry Bids to Preserve Scenic West*, N.Y. TIMES, Sept. 4, 2005, § 1, at 21 (noting that in the West, these kinds of collaborations often involve vast tracts of federal land, which is intermingled with private land).

207 Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 97 MINN. L. REV. 943, 947 (2003); see also Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 302–03 (1994) (laying out the assumptions and principles underlying ecosystem management).



ism.<sup>208</sup> Nevertheless, the existence (and in some cases notoriety<sup>209</sup>) of devolved collaborative planning structures signals an important shift downward of land management and governance strategies toward bottom-up, flexible, and resource-based regulatory regimes. This is a shift that recognizes the need for broad and deep collaboration, that promises to bring additional local expertise and public values into natural resources management, and a recognition of how long-term ecosystem health depends upon understanding, and planning for, the ways in which the availability and distribution of ecosystem resources is interconnected with socioeconomic and institutional factors.

There has long been a move away from centralized planning in the urban context toward more community-based planning. For example, New York City's community boards and its Charter 197—a neighborhood planning initiative that long ago divided the city into community districts and vested in the appointed community boards zoning and land use advisory power. A number of city governments have followed this model of comprehensive community-based planning and codified it into their local laws and ordinances.<sup>210</sup>

We often assume that the “neighborhood” is the correct locus of community-based decisionmaking, but a number of commentators have problematized our reliance on locally-based planning efforts tailored to individual neighborhoods as sacrificing economies of scale that can be achieved by citywide and regional programs and lacking the power to overcome systemic (local and regional) forces that result in racially and economically segregated communities.<sup>211</sup> Moreover, communities are not always place-based, but are often interest-based (although these two can overlap significantly in segregated areas). Thus, the challenge is to identify ways in which land use planning, but more importantly land use *governance*, can revitalize cities, regions and their neighborhoods by tapping into social networks that span geographic and neighborhood boundaries.

One of the important lessons of devolved collaborative natural resources management is to scale governance to the level of the re-

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208 See Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459, 484–94 (2002) (exploring the phenomenon of “devolved collaboration” and its dangers, especially from an environmental justice perspective).

209 *Id.* at 475–77 (discussing the Quincy Group).

210 See generally SUSAN H. BURKHOLDER ET AL., CENTER FOR NEIGHBORHOOD DEV., PRINCIPLES OF NEIGHBORHOOD PLANNING FOR COMMUNITY DEVELOPMENT, app. B (2003), available at <http://urban.csuohio.edu/cnd/principlesnpcd.pdf> (cataloguing neighborhood planning examples in different localities around the country).

211 See, e.g., BURKHOLDER ET AL., *supra* note 210, at 7; PETERMAN, *supra* note 203, at 41–47; Cummings, *supra* note 161, at 146.

source problem. Partly this is a physical resource scaling—that is, elevating ecosystem boundaries (e.g., watershed, river basin, forest, etc.) over political and other institutional boundaries—but partly it is a social resource scaling in which public agencies problem solve by drawing on the social networks of individuals and entities who have an economic or social “stake” in the resource and are thus vested in its long term sustainability. These social networks might be comprised of individuals who live near the resources—e.g., residents and nearby landowners—but as often are comprised of those who are geographically dispersed (and/or mobile) but who rely upon the resource—e.g., forest workers, timber interests, recreational users, etc.

Collaborating with these networks of interests who have a common stake in the resources is a way that public agencies can draw on

their knowledge and expertise toward the crafting of common solutions. But it is also a way of overcoming collective action problems that make management of the common resources so difficult when there are disparate interests competing for the resource. The success of these collaborative arrangements is partly due to the stake its participants have in the resource, but also to the social capital among different networks of participants which over time allows a “realignment of stakeholder interests that enables completely new bargaining solutions to arise.”<sup>212</sup> Some of this social capital existed between the stakeholders prior to the collaborative project. However, collaboration also stokes, and often creates, additional social capital by providing the structure for building trust, respect, and cooperation between different interests.

In the urban context, too, social networks are not always tied to the geographic level of the resource at issue, especially where people tend to be mobile and tend to develop networks across neighborhoods and more around interests.<sup>213</sup> Recall that in the community gardens context, a significant percentage of the garden members live outside of the communities where the gardens are located.<sup>214</sup> Yet all are vested in preserving and sustaining the gardens for the physical and social resources they provide, at both neighborhood and city scale. The city might have tapped into this social network—which included residents and gardeners from all the city’s five boroughs—and created a collaborative decisionmaking structure for the management of the gardens which would have drawn on the expertise of the existing social network, along with the Parks Department and Housing Department, who at one time or another had the gardens under their management. In the process, social capital—norms of trust, respect, and cooperation—would emerge and be strengthened between communities (of place and interests) and the public agencies and decisionmakers who still retain the ultimate power over land use decisions.

Similarly, drawing upon regional social networks might help solve the collective action problem around regional equity issues discussed above. Voluntary regional networks such as Envision Utah, for example, provide rare but inspiring examples of a grassroots-derived coalescing of public and private interests working toward a coherent

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212 Stephen M. Nickelsburg, Note, *Mere Volunteers? The Promise and Limits of Community-Based Environmental Protection*, 84 VA. L. REV. 1371, 1393–95 (1998).

213 Jane Jacobs made this point in her seminal work. See JACOBS, *supra* note 14, at 114.

214 See *supra* text accompanying notes 54–55.

regional land use and growth strategy.<sup>215</sup> Regional networks in the environmental justice arena too illustrate how even socially and economically vulnerable communities come to form ties across geographical and organizational boundaries to share strategies, devise solutions, and shape policy decisions around shared problems.<sup>216</sup> Unlike the natural resources context, public agencies have yet to draw upon these networks extensively to collaborate and solve problems on the regional urban scale.

Where those regional social networks do not exist, there might also be ways that state governments can incentivize their formation around common resource problems like transportation as a way of generating social capital that can later be used to solve more difficult and divisive problems like affordable housing and the distribution of locally unwanted land uses. It is noteworthy that the most widespread success in implementing regionalism—that is, regional planning and governance authorities—has been in the area of transportation.<sup>217</sup> Transportation is an issue in which every part of the region has a stake and, thus, it is not surprising that collective action problems have been less difficult to overcome in problem-solving around transportation issues than affordable housing ones. What has helped also is the existence of regional structures, created by the federal government, to which public and private interests can direct their problem-solving efforts.<sup>218</sup>

The point is that collaborative regional networks have neither been incentivized by urban land use regulators nor their resources leveraged toward the management of urban land use challenges. The model of collaborative management embraced in the natural resources management arena, where regionalism has enjoyed spectacular success, is a model that holds out some promise for thinking differently about regional coordination in the urban context. Collab-

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215 See, e.g., Note, *Old Regionalism, New Regionalism, and Envision Utah: Making Regionalism Work*, 118 HARV. L. REV. 2291, 2294–303 (2005).

216 See generally LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP 131–32 (2001) (discussing environmental justice networks such as the Asian Pacific Environmental Network, the Southwest Network for Environmental and Economic Justice, and the Indigenous Environmental Network).

217 See Sheryll D. Cashin, *Localism, Self-Interest and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2028–30 (2000).

218 The federal government's creation of Metropolitan Planning Organizations (MPOs) to create long term transportation plans for metropolitan regions is a type of incentive for regional actors to come together which might plant the seeds of cooperation around other issues. See MARK SOLOF, N.J. TRANSP. PLANNING AUTH., HISTORY OF METROPOLITAN PLANNING ORGANIZATIONS 18–31 (1999), available at [http://www.njtpa.org/public\\_affairs/mpo\\_history/MPOhistory1998.pdf](http://www.njtpa.org/public_affairs/mpo_history/MPOhistory1998.pdf).

oration need not involve giving up the "localism" that thick regionalism entails and which local governments have resisted. However, it does provide an alternative strategy that can mine, and promote, the social capital so central to innovative governance.