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Democracy and Fairness Beyond the Gate**


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PRIVATIZED COMMUNITIES AND THE “SECESSION OF THE SUCCESSFUL”: DEMOCRACY AND FAIRNESS BEYOND THE GATE

*Sheryll D. Cashin**

The fabric of civitas, communal commitment to civic and public life, has begun to rip.¹

* * *

[A] house divided against itself cannot stand.²

* * *

I am trying to envision what happens when 10 or 20 percent of the population has enough income to bypass the social institutions it doesn't like in ways that only the top fraction of 1 percent used to be able to do. . . . The Left has been complaining for years that the rich have too much power. They ain't seen nothing yet.³

INTRODUCTION

In the twentieth century we became a nation of homeowners. Thanks to a phalanx of federal policies that facilitated broad availability of credit for buying a home and stimulated housing production targeted to the middle class, by the dawn of the New Millennium an historic high of sixty-seven percent of the American population were homeowners.⁴ Among this vast majority of

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1. EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 176 (1997).

2. *Id.* at 177 (quoting Abraham Lincoln).

3. Irwin M. Stelzer, *The Shape of Things to Come*, *NAT'L REV.*, July 8, 1991, at 29-30 (quoting Charles Murray).

4. Press Release, Hous. & Urban Dev. Comm'n, *Cuomo Says America's Homeownership Rate Hits Record High of 67 Percent, With 70.5 Million Families Owning Their Homes* (Oct. 28, 1999) (crediting Clinton Administration economic policies with raising American's homeownership rate to a record high of sixty-seven percent) (on file with the Fordham Urban Law Journal), <http://www.hud.gov/library/bookshelf18/pressrel/pr99-220.html>. For a discussion of federal housing policies that stimulated homeownership lending and production, and the racially discriminatory policies that limited minority homeownership opportunities, see DOUGLASS S. MASSEY &

American property owners is a significant and growing subset who live in common interest developments ("CIDs"). Emanating from Ebenezer Howard's seminal conception of the garden city,⁵ CIDs typically require owners who buy units in the development to pay monthly or annual fees to a residential association that manages common areas, provides desired services, and enforces rules or covenants that apply to all who live in the development. CIDs include planned unit developments of single-family homes, condominiums, and cooperative apartments.⁶

As of 1998, about forty-two million Americans were living in CIDs, representing approximately fifteen percent of the U.S. population.⁷ At least eight million members of this CID population reside in gated communities.⁸ The explosive growth of CIDs is evidenced by the upward trajectory of the homeowners associations that govern them. Between 1964 and 1992, the number of homeowners associations grew from a mere 500 to 150,000.⁹ By 1998, that number had reached 205,000.¹⁰ The Community Associations Institute ("CAI") once estimated that by the year 2000, 225,000 such private governance organizations would be formed,¹¹ representing about twenty percent of all U.S. homeowners.¹² This privatized governance "may soon rival the 39,000 elected local governments in numbers and power over individuals."¹³

NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 54-55 (1993); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985).

5. See generally EBENEZER HOWARD, *GARDEN CITIES OF TOMORROW* (M.I.T. Press 1965) (1902). First published in 1902, Howard's book was "a manual for the financing, building, and operation of a new kind of planned community" that married comprehensive physical planning with political and economic organization. EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 2-3 (1994) (discussing Howard's "garden city" theory).

6. MCKENZIE, *supra* note 5, at 7.

7. Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 *GEO. MASON L. REV.* 827, 829 (1999) (citing CLIFFORD J. TREESE, *COMMUNITY ASSOCIATIONS FACTBOOK* 3 (1999)).

8. BLAKELY & SNYDER, *supra* note 1, at 180 n.1 (estimating that approximately 8.4 million people live in gated communities, but acknowledging that this figure "may be biased upwards").

9. MCKENZIE, *supra* note 5, at 11.

10. Nelson, *supra* note 7, at 829.

11. MCKENZIE, *supra* note 5, at 11 & n.41 (citing CAI estimates).

12. Nelson, *supra* note 7, at 863 (citing ROBERT JAY DILGER, *NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE* 145 (1992)).

13. PAUL KANTOR, *THE DEPENDENT CITY REVISITED: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT AND SOCIAL POLICY* 175 (1995).

Among the services that homeowners associations typically provide, in exchange for mandatory fees paid by CID residents, are trash and snow removal, road maintenance, and recreational facilities.¹⁴ These private contractual arrangements for the provision of formerly “public” services have put the nation on a course toward civic secession. The wedge begins with the creation of a large class of property owners the members of which increasingly feel that they are paying twice—in the form of property taxes and residential association fees for privately administered services. This attitude threatens to predominate in the twenty-first century because in areas of rapid growth, most new residential developments now take the form of a CID.¹⁵

The schism widens when one considers the quality of response to community membership cultivated by CIDs. Residents of CIDs tend to view themselves as taxpayers rather than citizens, and they often perceive local property taxes as a fee for services they should receive rather than their contribution to services local government must provide to the community as a whole.¹⁶ Several states, including Maryland, Missouri, New Jersey, and Texas, already allow for adjustments in local taxes for residents of CIDs to reflect services provided by their residential associations.¹⁷ At first blush, this may seem fair. According to the theory supporting such tax adjustments, CIDs are providing services that are public in nature, for example, by maintaining roads and park-like spaces that are open to the public. Hence, proponents of such adjustments argue that the tax code should be used to allow deductions or abatements to private citizens who pay assessments for such public goods or benefits.¹⁸

This conception of the CID’s contribution toward public goods belies reality. Although most CIDs are not physically gated, by design they *are* privatized spaces. Frequently, the streets and recreational amenities in CIDs are restricted to residents and their guests.¹⁹ CIDs offer their residents a private utopia—a

14. *Infra* note 22 and accompanying text.

15. MCKENZIE, *supra* note 5, at 11-12.

16. BLAKELY & SNYDER, *supra* note 1, at 139-40; Andrew Stark, *America, The Gated?*, WILSON Q., Jan. 1998, at 58, 67 (noting that advocates for tax rebates to common interest community residents “believe that ‘the purpose of government is to give you back everything in services that you give it in payments, not to take your money and use it for the benefit of others’”) (quoting Doug Kleine, former head of the research arm of CAI).

17. BLAKELY & SNYDER, *supra* note 1, at 24.

18. Stark, *supra* note 16, at 69.

19. KANTOR, *supra* note 13, at 175.

“privatopia” as one scholar labeled it²⁰—in which they “can set their own taxes in the form of assessments, use them for services they choose, and restrict those benefits to themselves and their immediate neighbors.”²¹ Outsiders who cannot afford properties in a CID cannot participate in its homeowners association. Outsiders, moreover, are not likely to benefit directly from the services most commonly provided by CIDs, such as landscaping, snow removal, garbage collection, swimming pools, street lights, and street cleaning.²²

But the potential schism between CID residents and those who do not live in CIDs goes much farther. The secessionist mindset cultivated by CIDs has crossed an intellectual firewall. In a few jurisdictions, the previously accepted understanding that public tax support should not be available for facilities that are wholly private or exclusive has given way. In 1996, for example, the private gated community of Panther Valley near Hackettstown, New Jersey was allowed to set up a special taxing district for the maintenance of roads that are wholly closed to the general public. As a result, the residents of Panther Valley are able to deduct what they spend for *private* road maintenance from their federal and state income tax returns.²³ Several nearly identical arrangements reportedly have been created in Florida.²⁴

This and other forms of “civic secession” have been occurring across the country. At the extreme, a CID formally secedes from the surrounding city or county, forming its own incorporated municipal government. With such formal secession, the common interest community gains the regulatory powers, particularly zoning powers, that enable it to attract desired entrants and wall out populations deemed undesirable. This practice of exclusion is the familiar, unfortunate way of the American suburb.²⁵ In this essay, I will reflect on how CIDs, and their privatized spaces, are contributing to a broader phenomenon of civic secession, primarily by affluent property owners. In particular, I will analyze the way in which CIDs may affect electoral politics and the allocation of public re-

20. MCKENZIE, *supra* note 5.

21. BLAKELY & SNYDER, *supra* note 1, at 24-25.

22. *Id.* at 25 tbl.1-1 (listing services provided by homeowner associations in declining order of frequency). Less common services, in declining order, included clubhouses, tennis courts, playgrounds, parks, basketball courts, and libraries. *Id.*

23. Stark, *supra* note 16, at 78-79.

24. *Id.* at 79.

25. See generally JACKSON, *supra* note 4; MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* (1976).

sources by federal and state government. The chief threat of CIDs is that they exacerbate inequality in America while also exacerbating the challenges of governing. By giving the private property owner a formal context in which to feel justified in her view that she is “doing her part” simply by paying her way for services, it will be increasingly difficult in the twenty-first century to establish a mandate for governmental policy, whether federal, state, or local, that requires shared sacrifice. Because most CIDs are extremely homogenous in terms of race and class, it will be particularly difficult to build a consensus for public policies that are perceived as benefiting racial and economic groups that are underrepresented in the CID, property-holding class.²⁶

I. SECESSION OF THE SUCCESSFUL—HOW CIDs ATTENUATE THE SOCIAL CONTRACT

Robert B. Reich, former Secretary of Labor, first coined the phrase “secession of the successful” and drew attention to the risks to the social fabric wrought by the so-called new economy and suburbanization.²⁷ CIDs are part of this larger phenomenon. In this Part, I offer several theories as to how CIDs attenuate the social contract: (1) they cultivate property owners rather than citizens; (2) they harness economic and racial homogeneity; and (3) they predominate in new, outer-ring suburban developments, thereby contributing to an existing phenomenon of regional polarization.

A. Property Owner Consciousness

A governance mechanism constructed primarily to protect and preserve private property rights does not build a sense of community. Instead, it cultivates an attitude that is a driving force animating property rights. As some have argued, private property

26. In this essay, I suggest only the potential *costs* to society of the proliferation of CIDs. I have not attempted to analyze the *benefits* to CID residents of participating in a homeowners association; no doubt, CID residents experience benefits in terms of service delivery and protection of property values. Nor have I attempted to analyze the benefits to society of CIDs. Implicit in my critique, however, is a suggestion that any such benefits are likely outweighed by the social costs I have identified. I wish to make clear that I have not yet done the empirical research and analytical work to justify such an assumption. My goal in this brief essay is solely to set out an intuition—a strongly felt one—as to the likely long-term costs of the residential privatization movement.

27. Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 16.

ownership enables the individual owner, acting autonomously, to internalize most of the costs and benefits associated with the property owned.²⁸ In other words, the quality of relationship between the individual and the state that is cultivated by CIDs is one of a private property owner rather than a citizen. The essence of private property ownership is that the property owner will be secure in the expectation that the state will support her right to exclude others from her property as well as derive exclusive benefits in the use of that property.²⁹ Private property rights are necessarily premised upon rational maximization of self-interest.

Citizenship, on the other hand, is premised on the idea of owing allegiance to a state or government in which sovereign power is retained by the people and political rights are shared by all members of the polity. A citizen thus owes allegiance to a larger community and, in turn, expects to be protected by her sovereign government. It is questionable whether CIDs even do a good job of promoting a sense of community among their residents. As Edward J. Blakely and Mary Gail Snyder note:

Studies of homeowner associations have found little evidence that they breed higher levels of participation and self-governance. Robert Dilger attributes this effect to flaws in the structure of [homeowner associations] and to the free-rider problem—because participation is voluntary, a few individuals do most of the work, and as long as there are no glaring problems, the majority feel safe leaving those few to bear the burden of running the association.³⁰

Others attribute the lack of participation in homeowner associations to the fact that the association is premised upon individual member goals of protecting private property. The payment of fees, which are in turn applied collectively to services that protect and enhance property values, is the *sole* rationale for the homeowner association. In this sense, there is nothing in the homeowner association structure that engenders a participatory consciousness.³¹

28. *E.g.*, Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

29. *E.g.*, JEREMY BENTHAM, *THEORY OF LEGISLATION* 67-69 (Harcourt, Brace & Co. 1931) (1840).

30. BLAKELY & SNYDER, *supra* note 1, at 35 (citing ROBERT JAY DILGER, *NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE* 111 (1992)).

31. BLAKELY & SNYDER, *supra* note 1, at 34-35. Beyond participation in the homeowner association, Blakely and Snyder suggest, in their study of gated communities, that the quality of community engendered in CIDs is somewhat impoverished. In the extreme form of the gated community, private gates create privacy rather than

The CID structure thus doubly undermines the notion of citizenship and participation in a larger polity. First, participation in the CID is premised upon property ownership rather than the concept of one person, one vote, which demarcates a reduced, privatized sphere of fealty for the CID resident. Second, the civic or public realm *within* the CID is impoverished because the sole rationale for the homeowners association is protecting private property, and direct engagement with the CID community is not required to do this.

B. Homogeneity

Although homogeneity is not intrinsic to the CID concept, in practice CIDs tend to be highly homogeneous by income and race.³² Economic and racial selection is fueled by the practices of real estate developers and other actors in the real estate industry. Developers tend to tailor new planned developments to particular income brackets, and the real estate industry is notorious for racial steering that contributes to a high degree of racial segregation, particularly of African Americans.³³ Because CIDs are becoming the norm in high-growth, developing areas, the widespread use of exclusionary zoning in such areas also contributes to the homogeneity of CIDs.

The homogeneity of CIDs, like the homogeneity of most developing suburbs, contributes to the phenomenon of civic secession. As Blakely and Snyder suggest, it is difficult to maintain the social contract in a context of increasingly formalized separation of differing classes and races.³⁴ Indeed, there is a great deal of evidence that the desire for homogeneity, particularly by whites, has been

community. Blakely and Snyder note that residents tend to keep to themselves and do not interact with each other. *See generally id.* Similarly, one empirical study of gated communities suggests that relying on the gate and hired security guards creates a false sense of security. Because residents believe that the gated community provides adequate security, they feel no ownership in the protection of community assets. This bulwarking approach to defensible space lacks the element of social responsibility needed to create natural surveillance and community bonding, which is essential for territorial functioning to succeed. Georjeanna Wilson-Doenges, *An Exploration of Sense of Community and Fear of Crime in Gated Communities*, 32 ENV'T & BEHAV. 597, 608 (2000).

32. BLAKELY & SNYDER, *supra* note 1, at 148-49.

33. Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 743-44 (2001) (discussing racial steering and selective marketing practices by the real estate industry).

34. BLAKELY & SNYDER, *supra* note 1, at 154-55.

the chief impetus for the creation of new suburban localities.³⁵ One resident of a suburb poignantly accepted this attitude:

See, you have to understand the fundamental feeling in suburbia is fear, let's face it. The basic emotional feeling is fear. Fear of blacks, fear of physical harm, fear of their kids being subjected to drugs, which are identified as a black problem, fear of all the urban ills. They feel [that] by moving to the suburbs they've run away from it, in fact, they haven't, in reality they haven't, but in their own mind's eye they've moved away from the problem.³⁶

CIDs, particularly those that are gated, also are premised in part on assuaging a fear of "other." For example, one marketing brochure for a gated community north of Dallas called upon prospective residents to imagine a "'perfect place to live . . . outside the pandemonium of the city,' where there can be 'a return to simpler times, when you knew you were secure within the boundaries of your own neighborhood . . . [and] where children could play unattended and be safe after dark.'"³⁷ Indeed, gated communities and CIDs generally are most common in those parts of the country where foreign immigration has been highest.³⁸ Blakely and Snyder conclude that "gated areas . . . represent[] a concrete metaphor for the closing of the gates against immigrants and minorities and the poverty, crime and social instabilities in society at large."³⁹

As a result of this homogeneity, the possibility for cooperation between CID and non-CID communities is lessened.⁴⁰ Homogeneity also decreases the potential for empathy with racial and economic groups that are not represented in the CID because of a lack

35. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1993-94 (2000) (noting that the desire for racial exclusion was a dominant factor in the formation of new suburbs in the 1950s and 1960s).

36. BLAKELY & SNYDER, *supra* note 1, at 155-56 (quoting a participant from a study on community and place).

37. David Dillon, *Fortress America: More and More of Us are Living Behind Locked Gates*, PLAN., June 1994, at 8.

38. BLAKELY & SNYDER, *supra* note 1, at 152 (noting this proliferation in both California and Florida). Blakely and Snyder also report that the seven states that experienced an unprecedented wave of foreign immigration in the 1980s simultaneously encountered significant white out-migration. *Id.* (discussing this migration pattern in California, Florida, Illinois, New Jersey, New York, Massachusetts, and Texas). Many of the states to which whites are fleeing also have experienced a rapid increased in gated communities. *Id.*

39. *Id.*

40. Cashin, *supra* note 35, at 2019-20 (citing empirical research on the formation of inter-local agreements, and noting that predominately white localities only enter into such agreements with localities that have a similar racial composition).

of direct daily experience with such groups. Finally, where homogeneity is achieved, protecting it often becomes a primary rationale, which in turn may encourage CID residents to support exclusionary policies that limit certain opportunities for non-CID residents.⁴¹

C. Privatization Mainly for New Suburban Developments

As of 1990, fifty-one percent of CIDs were planned-unit developments of single-family homes, while forty-two percent were condominiums and seven percent were cooperatives.⁴² In the twenty-first century, CIDs are likely to predominate in high-growth, outer-ring areas, where most new residential subdivisions are being developed. CIDs are likely to be more limited in the urbanized core because the transaction costs of organizing an existing neighborhood into a CID are considerable. It is much easier to impose a regime of mutually enforceable restrictive covenants, including mandatory membership and payment of fees to a homeowner association, when a new residential community is being formed for the first time.⁴³ CID formation in the urban core has been limited mainly to public street closings, which are more likely to arouse opposition by prior users of public streets.⁴⁴

If CIDs predominate in outer-ring suburbs, this will only accelerate a process of regional polarization that has been occurring in many metropolitan areas across the nation. In the typical American metropolis, an affluent, outer-ring quadrant garners the majority of the region's public infrastructure investments and the vast majority of the region's economic growth, while using local powers to effectively wall itself off from most of the region's social service burdens.⁴⁵ Citizens in the outer-ring thus enjoy the best retail and commercial amenities, the best schools, and the strongest tax base, with concomitant low tax rates. Meanwhile, citizens of the urban

41. *Id.* at 2019-22 (citing evidence on the impact of homogeneity in exacerbating political competition and social tension in metropolitan regions).

42. MCKENZIE, *supra* note 5, at 11.

43. *Cf.* *Sanborn v. McClean*, 206 N.W. 496 (Mich. 1925) (upholding a reciprocal negative easement barring commercial uses in a single family subdivision, and explaining that such restrictions "fastened" to the entire subdivision at the time it was held by a common owner, the original developer).

44. According to the CAI, developers of CIDs typically are interested in undeveloped areas; they rarely develop property in preexisting neighborhoods because of the costs associated with such development. When a CID does form in a preexisting neighborhood, it usually is the result of current residents organizing themselves. Interview with staff of Community Associations Institute (Mar. 19, 2001).

45. Cashin, *supra* note 35, at 2002-15.

core often are saddled with a concentration of poverty, rising service demands, higher taxes, and a shrinking or stagnant tax base.⁴⁶ A concentration and cultivation of a CID, property-owning class in the outer-ring threatens to exacerbate this rift by entrenching a belief among affluent property owners that they need not contribute to a regional tax base, much less participate in solving problems that transcend local borders or individual neighborhoods.

Although a CID resident might feel justified in maintaining such a secessionist viewpoint, outer-ring CID developments often benefit from state expenditures on their behalf. Often, “[t]heir streets, fire hydrants, street lamps, and other facilities were paved, installed, or constructed at public expense.”⁴⁷ The extent to which CIDs are subsidized by the non-CID polity should be studied and documented.⁴⁸ Many states and counties have been getting smarter, imposing exactions that force developers (or their buyers) to assume a greater percentage of the cost for the often-duplicative new infrastructures necessary to create new planned unit developments.⁴⁹ However, empirical evidence suggests that a great deal of cross-subsidization is occurring in metropolitan regions: citizens of the urbanized core are subsidizing development in affluent, high-growth communities where CIDs are concentrated.⁵⁰ This reality highlights the fairness and equity concerns surrounding the privatization of residential communities. Scholars and observers of this movement will be called upon increasingly to grapple with the question of whether an affluent class of property owners should be able to use privatization techniques to protect their tax base while continuing to garner certain benefits, including subsidies and workers, from the non-CID polity.

II. CIVIC SECESSION AND THE POLITICAL ECONOMY

CIDs create a risk that, as more and more citizens separate themselves into homogenous private communities, their ties to the

46. *Id.* at 2022-27.

47. David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 *YALE L.J.* 761, 774 (1995).

48. In researching this essay, I was unable to find such data. According to the CAI, there is no system for registering CIDs—registration or membership with CAI is completely voluntary—which makes it difficult to collect data or assess the external costs to surrounding municipalities of CID development. Interview with staff of Community Associations Institute (Mar. 19, 2001).

49. See generally Susan M. Denbo, *Development Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing?*, 23 *REAL EST. L.J.* 7 (1994).

50. Cashin, *supra* note 35, at 2004-09.

larger polity will become attenuated and they will increasingly resist governmental efforts to address problems that they do not perceive as “theirs.” As much as twenty percent of the U.S. population now live in CIDs, and this growing segment is becoming an increasingly organized and vocal constituency, particularly around the issue of tax adjustment.⁵¹ Residents of CIDs have the advantage of being organized via their homeowners associations. More importantly, the CID’s mandatory fee-for-service arrangement encourages CID residents in the belief that they should have a limited fiscal obligation beyond their immediate community.

In California, Florida and other states with permissive government formation laws, developers are working with [CID] residents to create cities that are separate from the existing jurisdiction—city or county. People find these new cities, created by secession, attractive for many reasons. Using housing and growth regulations, the new jurisdictions can pass regulatory ordinances that restrict new entrants. And they can direct publicly collected taxes to locally specified goals rather than allowing them to be used over a larger area.⁵²

Thus, CIDs can facilitate both an informal form of secession in which CID residents procure a tax adjustment for their homeowner association fees and a more extreme, formal secession in which CID residents form their own local government and cut ties to surrounding jurisdictions. Beyond such formal or informal secession, the proliferation of CIDs, like the proliferation of new suburban governments that has accompanied five decades of suburbanization,⁵³ is likely to have an impact on the political economy. In this Part, I offer evidence of secessionist attitudes among suburban voters and conjecture as to the likely impact of CIDs on the political economy as they become an increasingly dominant form of home ownership in the new century. I then suggest how the proliferation of the CID, property-owning class may accelerate structural inequities in the American metropolis.

51. Kennedy, *supra* note 47, at 774-77; Stark, *supra* note 16, at 66-69 (describing the movement to make homeowners association fees tax deductible).

52. BLAKELY & SNYDER, *supra* note 1, at 25; *see also* KANTOR, *supra* note 13, at 164 (explaining the economic rationale for defensive incorporation of a new municipality, including the ability to cut ties to the central city with its higher taxes and redistributive expenditures).

53. Cashin, *supra* note 35, at 1992 (noting that the number of municipalities and special districts doubled from 24,500 to 50,834 between 1942 and 1992).

A. Evidence of Secessionist Voter Attitudes: Electoral Politics

Empirical research by political scientists and public finance scholars suggests that decentralization of the polity limits its capacity for shared sacrifice or redistributive spending. For example, at the state level, the outcome of most fiscal debates is determined by suburban, middle-class voters.⁵⁴ Elsewhere, I have marshaled extensive evidence demonstrating that, at the state level, voters exact a high penalty against state elected officials for redistributive spending.⁵⁵ In particular, voters in state elections display singular antipathy toward welfare spending. They dislike this type of spending three times more than they dislike any other type of spending.⁵⁶ At the same time, voters do not penalize presidents in national elections for welfare spending.⁵⁷

This phenomenon suggests a limit to my theory. Although the fragmentation of the polity into homogenous communities of class and race may be contributing to a schism between middle-class and affluent suburbs, on the one hand, and declining localities in the urban core, on the other hand, this interlocal competition for public and private resources is most pronounced at the state and local level. At the national level, where citizen influence over fiscal policy debates is necessarily attenuated and one national tax base bears the burden of any redistributive spending, formal secession is impossible and voters apparently feel more comfortable with the idea of shared sacrifice.⁵⁸ At the state and local level, however, voters seemingly experience the wrench of government policy choices more potently. They are more likely to view state fiscal policy debates as about spending "their" money, and they are more likely to directly correlate the actions of government with the services they receive. At the same time, middle-class suburban interests compete vigorously for the allocation of public resources in fiscal policy debates, and they appear to be winning.

54. Sheryll D. Cashin, *Federalism, Welfare Reform and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 583-91 (1999) (citing, inter alia, empirical research demonstrating that median-income voters exert decisive influence on the fiscal policy choices of governors).

55. *Id.* at 584.

56. *Id.*

57. *Id.* at 585 (noting that voters do not display antipathy toward particular types of federal spending).

58. That does not mean, however, that voters are enthusiastic about redistributive spending at the national level. *Cf. id.* at 597-98 (noting the limited possibility for changing appreciably current distributions of income and wealth); *see also* text accompanying notes 67-75 (discussing presidential politics in the 1990s and beyond).

The evidence on education finance supports this trend. For three decades, advocates for equal funding in public education have pursued litigation that is typically premised upon state constitution education clauses. To date, about twenty state supreme courts have declared their state's system of school finance unconstitutional and have ordered remedies.⁵⁹ A number of state legislatures also have taken on school finance reform, even in the absence of a court mandate. One study comparing the outcomes of court-ordered and voluntary legislative reforms concluded that only when a state court ordered a specific remedy did state legislatures effectively close the gap in funding between poor and affluent school districts.⁶⁰ In the absence of a court order, school finance reforms did not equalize funding between such districts and sometimes they actually left poor school districts worse off.⁶¹ Instead, middle-class suburban school districts typically benefited most under any voluntary school finance reform.⁶²

This evidence highlights the structural consequences of political fragmentation for public policy choices made at the state level. Formal segmentation of the polity sets up a horizontal competition for public and private investment, for high-end uses of land, and for high-end taxpayers. Those who adhere to Tieboutian⁶³ logic view this horizontal competition as healthy for mobile citizen-voters who have a choice about where to live and work. The dark side to this fragmentation, however, is that citizens in their individual localities rationally are motivated to maximize benefits for their own community and limit fiscal burdens by denying access to populations and land uses that they perceive as undesirable.⁶⁴ New localities in outer-ring developing suburbs, for example, historically have resisted taking on any form of affordable housing. Those few areas in the country that have meaningful regional fair-share af-

59. For an excellent overview of the equity funding litigation movement, see James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999).

60. Cashin, *supra* note 54, at 587 & n.146 (citing William N. Evans et al., *Schoolhouses, Courthouses, and Statehouses After Serrano*, 16 J. POL'Y ANALYSIS & MGMT. 10, 28 (1997)).

61. Cashin, *supra* note 54, at 587-88 & n.149 (citing Neil D. Theobald & Faith Hanna, *Ample Provision for Whom?: The Evolution of State Control over School Finance in Washington*, 17 J. EDUC. FIN. 7, 22-25 (1991)).

62. Cashin, *supra* note 54, at 588 (citing Paul N. Courant & Susanna Loeb, *Centralization of School Finance in Michigan*, 16 J. POL'Y ANALYSIS & MGMT. 114 (1997)).

63. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (arguing that a citizen, as a "consumer-voter," chooses to locate in that community which best satisfies his or her pattern of preferences for public goods).

64. KANTOR, *supra* note 13, at 164.

fordable housing requirements have achieved them as a result of a supra-local mandate—a state court order, for example—that was necessary to overcome virulent local resistance.⁶⁵

I believe that CIDs are likely to magnify this trend. Even though most CIDs are not formal municipal islands unto themselves, they provide a formal context that distances their residents both fiscally and physically from those who live outside the CID. Unlike business improvement districts (“BIDs”), in which businesses within the district tax themselves in order to make their district more attractive and viable to a public that is *invited* to enter the BID,⁶⁶ CIDs are exclusionary and exclusive entities.

One can only guess at the impact such privatized governance would have on the polity were we to reach a point where the majority of American homeowners lived in CIDs. If recent trends in presidential politics are any guide, I believe this formal contextualization and encouragement of fiscal self-maximization (some would say selfishness) will accelerate the suburban politics of the 1990s. In the 1992, 1996, and 2000 presidential elections, both major political parties could not avoid the reality that two-thirds of American voters now lived in suburbs.⁶⁷ With each of these elections, the nation witnessed increasing political competition for the hearts and minds of suburban voters.

One manifestation of this competition was the pursuit of punitive policies toward the most disenfranchised. In 1992, then-candidate Bill Clinton established his bona fides with suburban voters, inter alia, by supporting the death penalty⁶⁸ and promising to “end welfare as we know it.”⁶⁹ In anticipation of his 1996 bid for reelection, President Clinton signed a welfare reform law⁷⁰ that many of

65. Cashin, *supra* note 35, at 2031-33.

66. See generally Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999) (discussing characteristics of BIDs and their contributions to urban life).

67. DAVID RUSK, *CITIES WITHOUT SUBURBS* 5 (1993) (noting that by 1990, more than sixty percent of metropolitan area inhabitants lived in suburbs and a majority of the jobs in those metropolitan areas were located in suburbs).

68. JUSTICE POLICY INST., *TOO LITTLE TOO LATE: PRESIDENT CLINTON'S PRISON LEGACY* (2001) (“During his 1992 campaign, to illustrate his resolve, President Clinton actually interrupted his campaigning to return to his home state of Arkansas to oversee the execution of mentally retarded death row inmate Ricky Ray Rector.”), <http://www.cjcl.org/clinton/clinton.html>.

69. E.g., Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 49.

70. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

his own policy advisors believed was unnecessarily punitive toward the poor.⁷¹ In addition, during his eight years in office, President Clinton oversaw the addition of fifty new death penalties to the federal penal code and the largest expansion of the prison population in American history.⁷² Although Clinton was touted by Toni Morrison as “the first black President,”⁷³ a disproportionate number of these new prisoners were African Americans.⁷⁴ Without question, the poor and racial minorities benefited from numerous Clinton Administration policies.⁷⁵ My point is that Clinton felt compelled to pursue other, more punitive policies that clearly signaled to suburban voters—read whites—that he was a Democrat who could be trusted to govern. President George W. Bush’s pursuit of tax policies that greatly favor affluent voters⁷⁶ is less obviously tied to the suburbanization of the electorate. However, ironic evidence of how far the center of gravity in American politics has shifted with decades of suburbanization can be seen when one considers that it was a Republican President, Richard Nixon, who first proposed a national income floor for welfare recipients.⁷⁷

B. Structured Inequality

CIDs, like homogeneous new suburban localities, may contribute to structural inequalities in American society. The American

71. Edelman, *supra* note 69.

72. David Cole, Editorial, *Faith Succeeds Where Prison Fails*, N.Y. TIMES, Jan. 31, 2001, at A21 (noting that Clinton’s “legacy with respect to the crime problem included the enactment of more than 50 new federal death penalties and the largest increase in the prison population in American history”); *see also* JUSTICE POLICY INST., *supra* note 68 (noting that during President Clinton’s first term 148,000 more state and federal prisoners were added to the nation’s prison system than during President Reagan’s first term, and 34,000 more were incarcerated than during President Bush’s four-year term).

73. Toni Morrison, *The Talk of the Town*, NEW YORKER, Oct. 5, 1998, at 32.

74. JUSTICE POLICY INST., *supra* note 68 (noting that although the African American incarceration rate increased in the twelve years prior to Clinton’s term, the rate actually doubled during the Clinton era).

75. *E.g.*, Editorial, *An Appraisal: Bill Clinton’s Mixed Legacy*, N.Y. TIMES, Jan. 14, 2001, § 4, at 16 (noting a “progressive record” of accomplishments, including an expanded Earned Income Tax Credit, a health care program for poor children, the doubling of Head Start and school aid for the disadvantaged, and an increase in college tuition assistance for low- and moderate-income students, such that “an extraordinary \$64 billion is now newly channeled annually to working-class and poor families”).

76. *E.g.*, Bill Pascrell Jr., Editorial, *Bush’s ‘Goldilocks’ Tax Plan is Irresponsible*, THE RECORD (N.J.), Apr. 9, 2001, at L3 (stating that President Bush’s proposed tax plan will provide almost fifty percent of its relief to those earning more than \$1.1 million annually).

77. Cashin, *supra* note 54, at 570 n.74.

metropolis currently is characterized by differential opportunities for many of its citizens based upon where they live. The differences in the education and economic access available to children of outer-ring suburbs compared to that available to children of inner-city ghettos are all too obvious.⁷⁸ Anyone who lives in America knows about these differences. Less well known or obvious are the differences in opportunity between, for example, middle-class black communities and middle-class white ones. Elsewhere, I have documented the negative impact of racial isolation on affluent or middle-class blacks who live in predominately black settings, demonstrating that the opportunity structure is more precarious in middle-class black suburbs than in predominately white suburban communities.⁷⁹ CIDs, like homogenous local suburbs, may contribute to fiscal inequalities among communities in the American metropolis. Should CIDs predominate in affluent communities, as I predict above,⁸⁰ and should the emerging practice of conferring tax adjustments on CID residents become *de rigueur*, the CID, property-owning class will privatize its tax base to a degree. One possible consequence of such a development would be the reduction of revenues available to states and localities to provide needed government services outside CID areas. Another consequence of CID proliferation also may be to heighten differences in services, amenities, and, ultimately, private investment, between CID and non-CID communities.

To the extent that CIDs cultivate reduced empathy for persons or problems beyond the CID border, the most potent long-term impact of CIDs (and socioeconomic residential segregation) will be a reduced tax base for addressing the problems of the poor. Even at the federal level, where all U.S. taxpayers must participate, there is a risk of increasing resistance on the part of the CID class, and

78. MASSEY & DENTON, *supra* note 4, at 60-82 (discussing the extreme isolation of hyper-segregated, inner-city communities where approximately one-third of African Americans live); James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519 (1993) (documenting the substantial differences in education and employment opportunities available to low-income persons who were placed in assisted housing in Chicago and its surrounding suburbs).

79. Middle-class black suburbs tend to be characterized by lower performing schools and higher crime rates than their predominately white counterparts; they tend to be 180 degrees in the opposite direction from the areas of highest economic growth; and they tend to attract low-income minorities, with attendant social service demands and social distress. *See generally* Cashin, *supra* note 33.

80. *Supra* Part I.C.

others geographically removed from the poor, to expending federal funds for redistributive aims.

Bringing CIDs or gates to poor or minority communities will not equalize the situation and, in some cases, it may even make matters worse. As noted, even affluent blacks are harmed by racial isolation.⁸¹ Organizing a racially isolated community through the creation of a CID is not likely to overcome the systematic disinvestment by whites and commercial actors that tends to accompany racial isolation, particularly of African Americans.⁸² In addition, empirical research on the impact of gating existing low-income communities suggests that such strategies had little impact.⁸³

CONCLUSION

CIDs are an inevitable fact of life in the United States. They are likely to become a dominant form of private home ownership in the next century. They present a very real threat to the social contract in America because they inculcate secessionist attitudes, which will be very hard to counter. As CIDs continue to proliferate, America will need effective public forums in which to mediate and negotiate solutions to problems that transcend borders, gates, and neighborhoods. Federal and state public officials are best positioned to pursue policies that mitigate the externalities wrought by increasingly atomized and privatized communities. But building a consensus or a mandate for public action that requires shared sacrifice will be increasingly difficult as the polity continues to separate.

The best hope for change is the potential for the vast array of citizens who do not live in CIDs to build coalitions based upon enlightened self-interest. Reversing regional inequity will take churches, unions, renters, minority groups, environmentalists, city dwellers, commuters disgusted with traffic, and a host of other potential common allies bound together in an effort to pursue enlightened public policies that can benefit the *entire* metropolitan region. Policies like regional land use planning, regional tax-base sharing, regional affordable housing development, and regional

81. *Supra* text accompanying notes 78-79.

82. Cashin, *supra* note 33, at 763-65.

83. BLAKELY & SNYDER, *supra* note 1, at 153-54 (concluding that although “[g]ated communities do not in themselves cause discrimination and residential segregation . . . they are part of a pattern, with all its attendant effects on economic and social opportunity”).

governance could put our nation on a course toward more fairness, opportunity, and, dare I imagine it, civic engagement.⁸⁴

84. *E.g.*, Cashin, *supra* note 33, at 771-75 (arguing for these regional strategies); Peter W. Salsich Jr., *Thinking Regionally About Affordable Housing and Neighborhood Development*, 28 STETSON L. REV. 577, 578-79 (1999).