Book Review

Homes Rule

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The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies. By William A. Fischel.[*] *Cambridge: Harvard University Press*, 2001. Pp. 329. $45.00.

In this important new book on local governance, economist William Fischel presents and defends a deceptively simple and intuitively resonant proposition: "that homeowners, who are the most numerous and politically influential group within most localities, are guided by their concern for the value of their homes to make political decisions that are more efficient than those that would be made at a higher level of government."[1] The book makes both positive and normative claims about the workings of local government. The positive claim can be boiled down to two words: Homes rule.[2] The home represents most homeowners' single largest asset, an undiversified holding subject to uninsurable drops in value.[3] In Fischel's

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1. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 4 (2001).

2. I am not alone in drawing this distilled message out of Fischel's work. *See* Anthony Flint, *Economist Says Home Rules Local Government*, BOSTON GLOBE, Dec. 27, 2001, at D8 (book review).

3. FISCHEL, *supra* note 1, at 4-5, 9. To be precise, the home is the largest single asset of most Americans aside from human capital. *See* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1353 (1993) (noting that "more than seventy-five percent of wealth takes the form of human capital"); *see also infra* note 47 and accompanying text (discussing the significance of the relative holdings of human and nonhuman capital).

account, homeowners are driven to wield their considerable political power in the manner that will maximize the value of this asset. He dubs these property-value-conscious homeowners "homevoters" to emphasize the link between their home ownership and their political behavior.[4]

The normative claim can be approximated with the addition of an exuberant exclamation point: Homes rule! Fischel reins in his enthusiasm for the outcomes generated by risk-averse homevoters in the final chapter, but the book generally smiles on the results that flow from allowing home values to dominate the political process. Thus, Fischel undertakes to show us not only *how* local politics works, but also *how well* local politics works—at least when evaluated using the criterion of efficiency and when considered in comparison with the available alternatives. A homeowner will generally make socially responsible political decisions, Fischel argues, because anything that affects the community will ultimately be reflected in her home's value through capitalization.[5]

While one need not accept Fischel's normative points to appreciate his positive ones, the normative tilt of the book is integral to the analysis and indeed appears to have been an important catalyst for the work.[6] Drawing on decades of his prior work, Fischel formulates a careful, thoughtful, and well-supported apology for local government. By the time Fischel confronts some of the failures of local government in the final chapter, there is no doubt that the "tough love" reforms he prescribes are based on real, abiding, and well-considered appreciation.[7] This is clearly a form of governance that he wants to see survive.

Fischel's book reflects genuine affection not only for the subject of his study—local government—but also for the scholarly undertaking itself. He writes in an entertaining and accessible style and deftly synthesizes much of the current legal and economic scholarship on local governance. Not content to theorize abstractly from the armchair, Fischel goes out to real places and sniffs things out (sometimes quite literally) to see whether his claims square with conditions in the real world.[8] Whether or not one

4. FISCHEL, *supra* note 1, at ix.
5. *See id.* at 6-7 (describing capitalization).
6. As Fischel explains in the preface, *id.* at x, the book is in part a response to a comment made by Carol Rose that located one of his earlier books within the tradition of "localism bashing." *See* Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1131 (1996) (reviewing WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995)). Although Rose went on to qualify this comment considerably, *see id.* at 1131-32 (noting Fischel's approval of the array of choices that local governments offer citizens and the efficiency with which they provide services), the comment prompted Fischel to articulate more carefully and comprehensively the merits of local government.
7. *See* FISCHEL, *supra* note 1, at 288.
8. *See, e.g.*, *id.* at 196 (explaining, after visiting landfill host Tullytown, Pennsylvania, that "[a]lthough it was a hot day when I visited in July, my normally sensitive nose did not at any point notice unusual odors").

ultimately agrees with Fischel's arguments, the book is an eye-opening analysis that challenges the conventional wisdom about local government and offers a powerful template for rethinking the way municipalities function.

The plan of the book is both straightforward and ambitious. In the first four chapters, Fischel explains his homevoter-driven model of local government, working systematically through discussions of capitalization, zoning, the Tiebout hypothesis, and the theory of the median voter. In the next six chapters, Fischel takes his model out into the real world to see how well it works (both in terms of explanatory power and in terms of generating normatively desirable results), scrutinizing the model's applicability to such issues as environmental quality, school funding, and metropolitan sprawl. In the final chapter, Fischel takes a harder look at local government, acknowledges many of the real and unresolved problems of localism, and outlines some ideas for reform. Here, he acknowledges that homevoters may be too risk-averse for their own (and everyone else's) good, and explains that their obsessive fixation on property values can at times yield suboptimal outcomes.

Fischel's well-crafted explication and defense of local government is subtle, perceptive, and quite persuasive. My reservations about the hypothesis involve a cluster of concerns that fall under the general rubric of distributive justice. Although Fischel gives some attention to these concerns, existing inequities in the provision of local public goods are far more troubling than his analysis would suggest. These inequities cannot be dismissed as regrettable by-products of an efficiently operating market-oriented system. Despite the rhetoric of free consumer choice that often surrounds localism, the fragmented and stratified forms of local control that exist in America today are extensively shaped by government intervention.[9]

In this Review, I work through some of the central themes presented in Fischel's book as they relate to the distributive consequences of localism. Significantly, the distributive concerns I raise are also symptomatic of inefficiencies that directly bear on Fischel's efficiency-based normative defense of local government. In Part I, I focus on the background conditions

9. The impact of governmental grants of local power on patterns of metropolitan development has been emphasized by Jerry Frug:

> To achieve any significant level of homogeneity, suburbs need state-granted autonomy: the right to incorporate as a separate municipality; immunity from annexation by the central city; the privilege of engaging in exclusionary zoning; the ability to legislate and provide services solely in their own self-interest; the authority not only to tax the real property located within city boundaries but to spend the revenue collected solely on local residents.

Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1070 (1996); *see also* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 3-4, 134-35 (1999) (discussing the role of government policy in shaping metropolitan residential patterns).

necessary to the operation of Fischel's model and take a closer look at his "homevoters" and their portfolio choices. In Part II, I examine the distributive issues implicated by the model and explain how these distributive concerns correspond to inefficiencies in Fischel's model. In particular, I explore the role played by homeowners' preferences about the people with whom they will be consuming local public goods and the ways in which those preferences—and the socioeconomic stratification that results—can profoundly affect home values, exclusionary zoning choices, locational decisions, and the quality of the local public goods themselves. Because exclusionary choices can push costs across jurisdictional boundaries within a metropolitan region, homeowners' decisions about exclusion are likely to be suboptimal. In Part III, I evaluate Fischel's ideas for reform by assessing their traction in addressing these distributive concerns.

I. HYPOTHESIZING ABOUT HOMEVOTERS

Fischel's hypothesis about homevoter behavior is set within a legal landscape containing features that are so familiar that they might appear to be natural or inevitable. They are not. They are, instead, the product of governmental choices about the allocation of money and power. In this first Part, I hope to cast useful light on the assumptions and conditions that form the building blocks of Fischel's theory. In Section A, I outline some of the basics of Fischel's analysis, including the background assumptions about local autonomy that are necessary to the operation of his hypothesis. In Sections B and C, respectively, I discuss two additional foundational questions: Who are the homevoters? And why does the home occupy such a prominent position in their portfolios? The analysis in this Part emphasizes that governmental action plays a primary role in constructing and sustaining the artificial conditions under which homevoters operate, and begins to raise questions about the normative desirability of the homevoter-controlled vision of local government that Fischel presents.

A. *Fundamentals of Homemade Politics*

According to Fischel, homevoters are primarily motivated by one thing: protecting and enhancing the value of their homes.[10] This claim is less reductionist than it might seem, thanks to the neat trick of capitalization. As Fischel explains, just about everything that human beings might care about in connection with a home or community tends to get capitalized into home

10. FISCHEL, *supra* note 1, at 12.

values.[11] The idea is simple: Other things being equal, people will pay more for a home in a neighborhood with good schools than they would for an identical home in a neighborhood with bad schools. Likewise, if taxes are higher (or lower) in one place than in another, the additional tax premium (or bargain) is incorporated into the price of the housing stock in that community. The same goes for everything else that affects the quality of life in a community, from smelly factories to pretty views.

In Fischel's account, capitalization is the secret to efficient decisionmaking by homevoters, because it brings the homeowners' interests into alignment with the interests of the community.[12] What is good for the community is also good for the homeowner, because it will affect her home's value. While the empirical data on the extent to which capitalization really takes place are a bit mixed, Fischel convincingly argues that capitalization works almost perfectly where factors influencing home values can be accurately anticipated and where those factors are expected to be permanent.[13] Housing markets do a tremendously efficient job of incorporating information about local conditions, services, and taxes into the sales prices of homes, Fischel argues, giving homeowners a strong incentive to participate in local politics in a manner that will protect and enhance the value of their homes.

Capitalization, however, can only work in the presence of certain background conditions. An examination of those conditions requires a brief digression into the line of analysis pioneered by Charles M. Tiebout, on whose work Fischel builds (and to whose memory Fischel dedicates his book).[14] Tiebout famously hypothesized that consumer-voters sort themselves among local communities based on their preferences.[15] In

11. *Id*. at 45-46.

12. A wide variety of local governmental entities exists in the United States, including municipalities, counties, school districts, and special districts. *See id.* at 20-22 (providing a taxonomy of local governmental entities). The analysis in Fischel's book focuses primarily on homeowner political behavior within municipalities and school districts (the boundaries of which may not be coterminous). *See id*. at 20, 22. In Fischel's book and in this Review, these local jurisdictions are often referenced by the generic shorthand term "community," with an appreciation of the fact that this term is something of a simplification and abstraction. Of course, homeowners are also influenced by (and can influence) what is happening in the larger metropolitan community outside of their own municipality or school district. *See infra* text accompanying notes 144-151.

13. *See* FISCHEL, *supra* note 1, at 49-51 (discussing empirical work that supports the proposition that there is full capitalization of anticipated, permanent taxes).

14. Tiebout died in 1968, at the age of forty-three. *Id*. at 80. In an engaging passage of the book, Fischel relates the results of his efforts to learn more about the man and his ideas. *Id*. at 76-80. One useful gem that Fischel passes along is the correct pronunciation of Tiebout's name: *Tee*-bow (with "bow" pronounced like the bow that launches an arrow). *Id*. at 76.

15. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 422 (1956) (explaining that consumers make choices among communities just as they make choices among goods in private markets, so that "[s]patial mobility provides the local public-goods counterpart to the private market's shopping trip").

making a residential decision, the consumer chooses the local government that offers her most-preferred package of taxes, amenities, and services, and she then "votes with her feet" by moving there.[16] The greater the number of local governments there are from which to choose, and the greater the variety of options they comprise, the more likely it is that the consumer will find a package that aligns closely with her own set of personal preferences.[17] Because residents are pooling together with other residents who have selected the same bundle of taxes and services, providing the desired package would seem to be a straightforward matter of taxing the residents and buying the services. Pooling by "tastes" is therefore deemed to be efficient.[18]

Despite the apparent simplicity and clarity of this approach, it works only if certain assumptions hold true. Tiebout included some simplifying assumptions in his model,[19] and later theorists have refined the model by identifying additional conditions necessary to its operation. Most fundamentally, the model depends on a local government having control over both the "taxing" and the "spending" ends of its relationship with its citizens. In order for local governments to offer residents meaningful choices and to compete with each other based on consumer tastes, they must have both the power to collect taxes from the residents and the power to use those tax proceeds to provide the preferred package of goods and services to the residents. The ability to pay for what you are getting and to get what you are paying for is central to the notion of consumer sovereignty in all private contexts, and it underlies the Tieboutian notion of local government.

On this view, disconnecting the payment of taxes from the disbursement of benefits in the local government context yields the same disastrous results we might expect to find in a private setting. Imagine, for example, that each person entering a cafeteria is asked to pay for the food she wishes to receive, but then is given a meal that represents her pro rata share of the money collected by the cafeteria that day. People with gourmet

16. *See id*. at 418 (explaining that in his model "the consumer-voter moves to that community whose local government best satisfies his set of preferences"). As Fischel notes, Tiebout did not actually use the expression "voting with their feet" in his work; it has, however, become a well-known shorthand expression for his theory's focus on consumer sovereignty. FISCHEL, *supra* note 1, at 73.

17. *See* Tiebout, *supra* note 15, at 418 (observing that "[t]he greater the number of communities and the greater the variance among them, the closer the consumer will come to fully realizing his preference position"); *see also* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 309 (1974) (observing that "a diverse range of communities" allows more people to approximate more closely their preferred way of life).

18. *See, e.g.*, RICHARD A. MUSGRAVE, FISCAL SYSTEMS 299 (1969) (positing that "it is efficient for people with similar tastes in social goods to reside together").

19. *See* Tiebout, *supra* note 15, at 419-20 (setting forth his full set of assumptions, some of which he relaxes later in the analysis).

tastes would quickly realize that paying gourmet rates would yield them no better fare than that available to people with gruel tastes (or, more likely, gruel pocketbooks[20]), who were paying far lower gruel rates. Ultimately, everyone would end up paying the gruel rate to receive gruel, so as to avoid cross-subsidizing other people, even though many people would have preferred to pay the gourmet rate to receive the gourmet food.[21] Of course, if exit is possible, those with tastes (and budgets) for cuisine above the gruel level will go to another restaurant where the link between payments made and goods received is maintained.

This, in effect, is the story that Fischel tells about public education in California following *Serrano v. Priest*, which mandated statewide equalization of school financing.[22] In Fischel's account, disgruntled homeowners were unwilling to spend money on school funding in a legal regime where the benefits of that funding would be dispersed across the state and thus sought the passage of Proposition 13, which strictly limited property assessments and tax levels.[23] Nobody wanted to pay more than the minimum possible tax in a world where the connection between taxes paid and benefits received had been severed.[24] Residents who valued education highly (and who could afford to indulge that preference) increasingly turned to private schools or sought ways to obtain private financing for additional

20. The extent to which people are actually heterogeneous with regard to the "richness" of their tastes (rather than merely being heterogeneous with respect to factors like wealth and mobility) is questionable. *See* Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 31 (1998) (noting the implausibility of attributing to anyone a "taste" for unsafe neighborhoods and failing schools).

21. Another alternative would be to average everyone's tastes, charge everyone the same price, and provide the same fare to everyone. While this would not involve any cross-subsidization (everyone would be paying the same amount and receiving the same thing), the result would be inefficient. *See* Daniel L. Rubinfeld, *The Economics of the Local Public Sector*, *in* 2 HANDBOOK OF PUBLIC ECONOMICS 571, 582 (Alan J. Auerbach & Martin Feldstein eds., 1987) (discussing a situation in which "the actual level of public provision would be an average of the demands of the two types of individuals" and explaining that this result is suboptimal because "[n]either the low nor the high income group would then be consuming their most preferred level of public services given the taxes that they pay").

22. Serrano v. Priest, 557 P.2d 929, 939-40 & n.21, 958 (Cal. 1976) (*Serrano II*) (affirming the trial court's judgment, which held that any significant wealth-related interdistrict disparities in per-pupil expenditures, aside from expenditures for categorical aids special needs programs, violated the state constitution). In an earlier decision, the California Supreme Court held that the factual allegations in the plaintiffs' complaint stated a constitutional violation, and remanded the case for further proceedings. Serrano v. Priest, 487 P.2d 1241, 1265-66 (Cal. 1971) (*Serrano I*). For a discussion of these cases, and the response to them, see FISCHEL, *supra* note 1, at 98-118.

23. *See* FISCHEL, *supra* note 1, at 108-18 (discussing this and other possible explanations for Proposition 13); *see also id*. at 83 (describing Proposition 13).

24. *See id*. at 109 (explaining that the California legislature's compliance with the dictates of *Serrano II* "converted that half of the local property tax that went for schools into the sort of tax payment whose benefits were divorced from how much homeowners paid" and that this disconnect explains Californians' decision to cut taxes).

increments of public education in their districts.[25] Whether or not one buys the causal connection Fischel draws between *Serrano* and Proposition 13,[26] the internal logic of his argument is compelling: Where the connection between taxes paid in and benefits received back is attenuated, people will look for alternative ways of restoring the connection between paying and receiving.

Because local public goods are typically financed with a property tax, an additional local power is necessary to seal the link between taxes and benefits and to make Tiebout's system work: the power to exclude residents who do not pay their fair share in property taxes. Bruce Hamilton importantly refined the Tiebout model by explaining that unless entry into a community were constrained in some manner, people who desired premium services (good schools and responsive police departments, for example) but who did not want to pay the full cost for their share of these services, could get them "on the cheap" by occupying small housing units in otherwise fancy neighborhoods.[27] Some exclusionary device was necessary, Hamilton argued, to avoid a perpetual game of "musical suburbs" in which poor people would follow the wealthy into well-off communities to enjoy premium services cheaply, thus eroding the tax base and forcing the wealthy to move elsewhere.[28]

Such exclusion is accomplished virtually always through zoning, an institution that swept the country in the first part of the twentieth century and that remains a central organizing feature in American metropolitan life.[29] While local control of taxing and spending prevents money from

25. *See id.* at 159 (discussing the increase in private school enrollments following *Serrano II* and the possibility that this increase was blunted somewhat by the ability of wealthy suburbs to augment public school funding with private financing); *see also* ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 133 (2000) (explaining that equalization of school spending in California resulted in "more equality in public schools and more flight to private schools").

26. *See* Kirk Stark & Jonathan Zasloff, *Did* Serrano *Really Cause Proposition 13?*, 50 UCLA L. REV. (forthcoming 2003) (disputing the causal connection that Fischel draws between *Serrano* and Proposition 13, and presenting empirical work that suggests other factors were responsible for the passage of Proposition 13), *available at* http://www.ssrn.com/abstract_id=326362.

27. Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975).

28. *Id.* at 205.

29. *See* FISCHEL, *supra* note 1, at 213 (noting that "[z]oning was sweeping the country" in the era following 1910, and that "contemporary accounts of its spread among the suburbs make it sound a bit like the spread of dance crazes"); CHARLES M. HAAR, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 185-86 (3d ed. 1976) (discussing the rapid spread of zoning). The U.S. Supreme Court upheld the practice in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and by 1967 over ninety-seven percent of cities with a population of more than five thousand had implemented zoning. HAAR, *supra*, at 185. Houston is the only major American city to eschew zoning. Christopher Berry, *Land Use Regulation and Residential Segregation: Does Zoning Matter?*, 3 AM. L. & ECON. REV. 251, 260 (2001). Houston homeowners are able to achieve results that resemble those produced by zoning through private covenants, which can be enforced publicly under Texas law. *See* TEX. LOC. GOV'T CODE ANN.

seeping out to surrounding communities, zoning keeps the connection between spending and receiving from being eroded as a result of entry into the community. It ensures that residents consume a certain minimum amount of housing, and thereby forces them to contribute a certain amount to the community in the form of taxes.[30] The result, as Fischel explains, is that "the local property tax becomes an unavoidable fee for services rendered," such that "homebuyers get exactly what they pay for (since they have a choice of many communities' service packages), and they pay for exactly what they get (since local zoning sees to it that they cannot shirk by building a smaller than average house)."[31]

A legal regime containing these structural features must exist in order for homevoters to have the power and the motivation to behave in accordance with Fischel's hypothesis. The governmentally constructed conditions that sustain the homevoter hypothesis are designed to make localities work as closed, membership-controlled systems. If the system is not closed, so that the money the local community raises in taxes leaks out to benefit people outside the local community, or if new individuals who have not paid their fair share can sneak in to enjoy the benefits more cheaply, the system breaks down.[32] If homeowners are not reliably able to get back what they pay in, either in kind or in the form of enhanced housing values, they will not make the right decisions about how much to spend or what to buy, the argument runs. One can analogize this vision of local government to the operations of a private club dispensing goods to its members in exchange for membership dues.[33]

§§ 212.131-.137 (Vernon Supp. 2002) (empowering a municipality with a population in excess of 1.5 million and no zoning ordinances to adopt an ordinance for the uniform enforcement of restrictive covenants); TEX. PROP. CODE ANN. §§ 203.001-.005 (Vernon Supp. 2001) (empowering the county attorney in counties of more than two hundred thousand to enforce certain restrictive covenants); *see also* Berry, *supra*, at 260-63, 271 (discussing Houston's enforcement scheme).

30. Hamilton, *supra* note 27, at 206; *see also* Rubinfeld, *supra* note 21, at 590 ("By forcing equal housing consumption, the exclusionary zoning device changes the property tax to a 'head' tax, with everyone in the community paying an equal share of the cost of the public good.").

31. FISCHEL, *supra* note 1, at 66.

32. The analysis is no different conceptually than that which supports private ownership of land. *See* Ellickson, *supra* note 3, at 1327 (explaining that "[w]hen land uses have no spillover effects, individual ownership directly and precisely punishes land misuse and rewards productive labor").

33. *See, e.g.*, ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS 41 (1977) (observing that "[b]oth the private club and the exclusive suburban community make it possible for groups of similar individuals to obtain goods and services that require collective provision and in the quantities and qualities suited to their closely shared means and preferences"). For economic work in "club theory," see, for example, James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1 (1965); and Todd Sandler & John T. Tschirhart, *The Economic Theory of Clubs: An Evaluative Survey*, 18 J. ECON. LITERATURE 1481 (1980). For criticism of approaches that treat local public goods as ordinary consumer goods, see Frug, *supra* note 20, at 45-47.

Of course, local governments are dynamic political entities, not vending machines that statically provide a fixed slate of local public goods to those who place tax money into the slot. Likewise, homeowners are often in no position to comparison shop; moving is relatively costly and may be extraordinarily painful if it means realizing a loss.[34] Thus, people are also motivated to act politically, using "voice" to influence the actions taken by the municipality.[35] They do so, Fischel explains, not only because they want to live in a community that provides the things that they personally value, but also because they want to encourage the "exit" decisions (here broadly construed to include choices about whether or not to enter the community) that will maximize the resale prices of their homes.[36]

B. *Who the Homevoters Are (and Why It Matters)*

Now that we have sketched the background conditions under which homevoters operate, it is worth taking a closer look at the homevoters themselves. Despite the centrality of homevoters to Fischel's schema, they remain enigmas throughout the book.[37] Nationwide, close to 68% of Americans own their own homes.[38] Yet homeowners do not comprise a representative cross section of America. First, there are racial and ethnic differences in homeownership rates.[39] In 2001, the homeownership rate was 74.3% for white, non-Hispanic householders, compared with homeownership rates of 47.7% for African-American householders and

34. *See* FISCHEL, *supra* note 1, at 74-75 (discussing the consequences associated with selling a home at a loss).

35. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 30-43 (1970) (discussing the use of "voice"); *see also* FISCHEL, *supra* note 1, at 73-74 (discussing Hirschman's work).

36. FISCHEL, *supra* note 1, at 75 (explaining that "'[e]xit'—unwillingness by prospective homebuyers to enter—promotes 'voice' (political participation) by would-be homesellers").

37. The book's jacket features a small inset photograph of a hand holding papers that presumably represent ballots. Unfortunately, the book does not help us gain a much better perspective on the homevoter than this—although we are indeed reminded that she can vote with her feet, as well as with the appendage pictured on the cover. *Id*. at 72-73.

38. Census Bureau data for the first quarter of 2002 show a homeownership rate of 67.8% nationwide, U.S. Census Bureau, Housing Vacancy Survey, First Quarter 2002, tbl.5, *at* http://www.census.gov/hhes/www/housing/hvs/q102tab5.html, the same as the 2001 annual figure, U.S. Census Bureau, Housing Vacancies and Homeownership, Annual Statistics: 2001, tbl.20, *at* http://www.census.gov/hhes/www/housing/hvs/annual01/ann01t20.html [hereinafter 2001 Housing Vacancies]. Census data of this type capture only the percentage of householders who report living in owner-occupied housing at a given point in time. Almost 90% of Americans will own a home at some point during their lives. *See* James A. Berkovec & Peter M. Zorn, *Summing Up a Lifetime: Nearly Ninety Percent of Americans Will Achieve Homeownership*, SECONDARY MORTGAGE MARKETS, Apr. 1997, at 10, *at* http://www.freddiemac.com/finance/smm/#apr97; *see also* FISCHEL, *supra* note 1, at 80 (citing similar statistics).

39. *See* Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 668-70 (2002) (discussing racial disparities in homeownership).

47.3% for Hispanic householders.[40] Second, homeownership is not equally distributed among family types. Nearly 83% of married couples owned their own homes in 2001, while men and women living entirely alone showed homeownership rates of about 48% and 59%, respectively.[41] Married couple households containing children enjoyed homeownership rates of almost 77% in 2000, while women raising children without a spouse present posted homeownership rates of just under 38%.[42] Third, homeownership is more prevalent among certain age groups. According to 2002 data, nearly 81% of householders over the age of 65 own their own homes, while just 41% of householders under the age of 35 are homeowners.[43]

These demographic differences in homeownership rates cannot be wholly attributed to differences in preferences. In opinion polls, homeownership is favored over renting by both homeowners and renters,[44] and homeownership remains a defining achievement for many Americans. A better explanation is found by examining another dimension along which homeowners differ markedly from renters—financial resources. In 1998, the median family income of renters was less than half that of homeowners, and the median family net worth of renters was less than one-thirtieth that of homeowners.[45] The lower rates of homeownership among minority

40. 2001 Housing Vacancies, *supra* note 38, tbl.20. The Census Bureau uses the term "householder" to refer to "the person (or one of the persons) in whose name the housing unit is owned or rented or, if there is no such person, any adult member, excluding roomers, boarders, or paid employees." *Id.* app. A, *at* http://www.census.gov/hhes/www/housing/hvs/annual01/ann01def.html.

41. *Id*. tbl.15, *at* http://www.census.gov/hhes/www/housing/hvs/annual01/ann01t15.html.

42. JEANNE WOODWARD & BONNIE DAMON, U.S. CENSUS BUREAU, HOUSING CHARACTERISTICS: 2000, at 7 tbl.5 (2001), *at* http://www.census.gov/prod/2001pubs/c2kbr01-13.pdf. Male householders with children and with no spouse present showed homeownership rates of just under 51% in 2000. *Id*.

43. Robert R. Callis & Linda B. Cavanaugh, *Census Bureau Reports on Residential Vacancies and Homeownership*, U.S. DEP'T COM. NEWS, Apr. 25, 2002, at 1, 7 tbl.6, *at* http://www.census.gov/hhes/www/housing/hvs/q102prss.pdf.

44. In a housing survey conducted in 1996, 83% of renters responded to the question, "Generally speaking, would you say that people are better off owning a residence or better off renting?" with a response of "better off owning." Ninety-four percent of owners answered the same way. HOUSING STATISTICS OF THE UNITED STATES 79 tbl.1.48 (Patrick A. Simmons ed., 2d ed. 1999); *see also* FANNIE MAE, NATIONAL HOUSING SURVEY 2001, at 10, *at* http://www.fanniemae.com/global/pdf/media/survey/survey2001.pdf (stating that 51% of renters described their decision to rent "more as a result of circumstance," while 41% said it was "more a matter of choice"). Of course, it is possible that some renters' stated preferences have been adjusted to comport with what is realistically attainable (the "sour grapes" phenomenon) or that their responses may reflect the opposite distortion (in which the unattainable is desirable *because* it is unattainable). *See* JON ELSTER, SOUR GRAPES 109-12 (1983) (discussing adaptive and counteradaptive preferences, in which preferences are shaped by the "feasible set").

45. *See* Arthur B. Kennickell et al., *Recent Changes in U.S. Family Finances: Results from the 1998 Survey of Consumer Finances*, 86 FED. RES. BULL. 1, 4-5 tbl.1 (2000) (showing a 1998 median before-tax family income of $43,700 for owners and $20,300 for those in the category "renter or other"); *id*. at 7 tbl.3 (showing a 1998 median family net worth of $132,100 for owners

groups, single people, and younger people are consistent with the lower levels of income and wealth that members of these groups, on average, command.[46] The strong correspondence between financial resources and homeownership suggests that people who can afford to purchase their residences usually choose to do so.

The fact that homeowners as a group are richer, whiter, older, and more likely to be married than are their renting counterparts should not be ignored in assessing a homeowner-controlled model of local governance. For one thing, the personal characteristics of homeowners may bear on their decisionmaking strategies. For example, it is likely that older homeowners are more risk-averse homevoters, due to the declining value of their remaining human capital and their increasing share of personal wealth in home equity.[47] It is also plausible that entrenched attitudes about such personal characteristics as race, ethnicity, poverty, and single parenthood could play a significant role in local political decisions. Indeed, empirical work cited by Fischel shows that age and race can play a role in school funding: Communities containing a greater proportion of people over sixty-five tend to spend less money on public education, and this effect is intensified when the school-age population comprises a different racial or ethnic mix than the older residents.[48] Such findings should make us take a harder look at homeowners' political decisions—including decisions about whether to exclude certain housing types that may be disproportionately used by members of minority groups, poor people, and single mothers.

These demographic imbalances in homeownership call into question the normative desirability of homeowner control of the local political apparatus. As Fischel observes, renters are not actually disenfranchised in

and $4200 for renters and others). Even when home equity (with a median value of $100,000) is subtracted out, the median owner still has between seven and eight times the wealth of the median renter. *See id.* at 17 tbl.8B.

46. In 1995, the median net worth for African-American and Hispanic households was $7073 and $7255, respectively, approximately one-seventh of the median net worth of $49,030 for white householders. MICHAEL E. DAVERN & PATRICIA J. FISHER, U.S. CENSUS BUREAU, SERIES P70-71, CURRENT POPULATION REPORTS: HOUSEHOLD NET WORTH AND ASSET OWNERSHIP: 1995, at v, xv fig.6 (2001), *at* http://www.census.gov/prod/2001pubs/p70-71.pdf. Married couples had a median net worth of $64,694, considerably higher than the net worth figures for male householders ($16,346) and female householders ($14,949). *Id.* at v, xvi fig.7. Finally, household net worth corresponded to the age of the householder, with those under age thirty-five showing a median net worth of $7428, compared with a median net worth of $92,399 for householders over age 65. *Id.* at v, xiii fig.5. Unsurprisingly, median net worth was positively correlated with income. The median net worth of those in the top income quintile was $116,232, while the median net worth of those in the lowest income quintile was $5000. *Id.* at ix tbl.B.

47. The inability to recoup financial losses through further work may explain the risk aversion in financial matters often observed in the elderly. RICHARD A. POSNER, AGING AND OLD AGE 117 (1995). We might expect this same risk aversion to carry over into "homevoting" behavior.

48. James M. Poterba, *Demographic Structure and the Political Economy of Public Education*, 16 J. POL'Y ANALYSIS & MGMT. 48 (1997), *cited in* FISCHEL, *supra* note 1, at 150.

local municipalities (as they usually are in private residential communities), but they tend to participate less in local politics.[49] This fact becomes worrisome if there is reason to believe that this noninvolvement is at least partly the result of systematic, structural factors out of the renters' control, rather than simply a product of disinterest on the part of renters. Fischel's explanation for renters' lower levels of political involvement is that they do not have a large financial stake in the community, as homeowners do in the form of their homes.[50] This is a good explanation, but it provides only a partial account. After all, renters do have a large stake in the quality of their own lives and in the life chances of their children—and this should be sufficient to capture their attention and motivate their participation.

Another important reason that renters are relatively uninvolved in the decisions made by homeowner-controlled local governments is that they do not constitute a significant presence in those communities. Nearly half of all renters live in large, central cities—the sorts of places where homeowner interests do not hold sway.[51] These renters' residential choices are profoundly constrained by the exclusionary decisions of the suburban municipalities in their respective metropolitan regions, but they have no say in those decisions, because they are not members of those communities.[52] While almost as many renters live in suburban areas as live in central cities, the much larger number of owner-occupied units in the suburbs makes renters a minority in these communities.[53] These suburban renters are not outnumbered merely by happenstance; suburbs often implement land-use policies that limit the sorts of housing units that are most popular with

49. *See* FISCHEL, *supra* note 1, at 80-81.

50. *Id*. at 81 (concluding discussion of lower levels of renter involvement in local politics with the succinct statement "[a]sset ownership matters").

51. In 1999, there were 34 million year-round housing units in the United States occupied by renters; 15.6 million of these were located in central cities, 12.8 million were located in suburban parts of metropolitan areas, and 5.6 million were located in nonmetropolitan areas. U.S. CENSUS BUREAU, SERIES P23-205, CURRENT POPULATION REPORTS: POPULATION PROFILE OF THE UNITED STATES: 1999, at 30 fig.7-1 (2001), *at* http://www.census.gov/population/pop-profile/1999/chap07.pdf; *see also* FISCHEL, *supra* note 1, at 15-16, 90-93 (explaining that the interests of homeowners may not dominate in large central cities, and noting that only about a quarter of Americans live in cities with populations greater than 100,000).

52. *See, e.g.*, Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 418-19 (2001) (discussing the holding in *Warth v. Seldin*, 422 U.S. 490 (1975), that city residents lacked standing to challenge a suburb's exclusionary decision).

53. Less than a quarter of suburban housing units in metropolitan areas of the United States are occupied by renters; nearly 70% are owner-occupied, and the balance are vacant. U.S. CENSUS BUREAU, *supra* note 51, at 30 fig.7-1 (showing that 12.8 million of the 52.1 million suburban units are occupied by renters, while 36.0 million are owner-occupied); *cf.* Georgette C. Poindexter, *Beyond the Urban-Suburban Dichotomy: A Discussion of Sub-Regional Poverty Concentration*, 48 BUFF. L. REV. 67, 72 (2000) (noting that the voices of the poor are diluted in suburbia "because their presence is more scattered").

renters.[54] If we assume with Fischel that the median voter determines local policy,[55] the renters in a given community may rationally conclude that their attempts to involve themselves in the local political processes would be futile. The social stigma attached to renting and the presumption that renting is a transitional stage of life[56] may also serve to mute the voice of renters.

If Fischel's model of homeowner political control is accurate, local political decisions are largely being made by a subset of the population that is not demographically representative, and this is happening at least in part because of past patterns of exclusion. These facts should make us question the quality of civic engagement stimulated by homeowners' interest in their homes. No matter how independently valuable we judge homeowner participation in local politics to be, if identifiable segments of American society are systematically underrepresented, this form of civic engagement will lack the essential characteristics of meaningful political discourse. To the extent existing patterns of exclusion constrain the local political discourse, the results of that discourse are likely to be skewed in the direction of further exclusion.

C. *House-Heavy Portfolios*

As Fischel points out, most Americans have very little in the way of savings aside from the equity in their homes.[57] The fact that the home represents the largest investment of most Americans is foundational to Fischel's hypothesis, and it raises two important questions. First, why do homeowners concentrate so much of their wealth in their homes? Second, is this something we, as a society, want to continue encouraging them to do? Fischel entertains these questions briefly, but there is much to be gained from exploring them more fully. Early on he asks, "If homeownership is such a risky portfolio choice, why is it so common?"[58] His answer mentions "[p]ride of ownership" as well as two important tax advantages—the fact that homeowners need not pay income tax on "imputed income" (the

54. For additional explanations for the concentration of poor people in cities, including cities' relatively greater provision of public transportation and other public services used by the poor, see generally EDWARD L. GLAESER ET AL., WHY DO THE POOR LIVE IN CITIES? (Nat'l Bureau of Econ. Research, Working Paper No. 7636, 2000).

55. *See* FISCHEL, *supra* note 1, at 87-89 (discussing the median voter model).

56. *See* CONSTANCE PERIN, EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA 53 (1977) ("No matter how orderly renters' progression through life may actually be, the opprobrium attached to them arises instead from their category itself, by definition one of transition in American axioms about the sequence of life.").

57. FISCHEL, *supra* note 1, at 4.

58. *Id*. at 10.

amount of rent they would have to pay to live in their own homes)[59] and the fact that capital gains on the sale of residences are untaxed.[60]

These tax subsidies for homeowners are, in fact, quite massive—totaling more than $100 billion in 2001.[61] Fischel recognizes that these tax expenditures might have an impact on homeownership patterns and, ultimately, homeowner behavior. Although he quickly rejects the argument that these subsidies promote sprawl,[62] he suggests that they might encourage NIMBYism in the sense that they encourage homeownership generally.[63] Yet he spends very little time on the question that these

59. *Id*. Not having to pay income tax on "imputed income" may not sound like much of a tax advantage, until one considers the familiar shadow of this advantage—the deductibility of mortgage-interest expenses and local property taxes. *See* I.R.C. § 163(h) (2000) (establishing the deductibility of mortgage interest on one's home); *id*. § 164 (establishing the deductibility of local property taxes). For other sorts of investments, such as real estate one rents to others, such expenses can be deducted, but the income associated with the investment must also be reported. The incongruity in the context of investment in owner-occupied housing arises from the fact that these expenses can be deducted even though the income (in this case, the imputed rent) need not be reported. *See* Joseph Gyourko & Todd Sinai, The Spatial Distribution of Housing-Related Tax Benefits in the United States 1 (July 2001), *at* http://www.brookings.org/dybdocroot/es/urban/publications/gyourko.pdf (explaining that "[o]wner-occupied housing is favored by the current tax system because owner occupants are able to deduct certain expenses without having to declare any related income on the asset").

60. FISCHEL, *supra* note 1, at 10; *see also* I.R.C. § 121 (excluding gains from the sale of a principal residence from federal income taxation). The amount of untaxed gain is subject to limits of $250,000 for individuals and $500,000 for married couples filing jointly, and certain tests regarding ownership and use of the residence must be met in order to claim the exclusion. *See id.*

61. The deductibility of mortgage interest on owner-occupied homes represented a revenue loss of just under $61 billion in 2001, while the deductibility of property taxes on owner-occupied homes amounted to a tax expenditure of about $23 billion, and the capital gains exclusion for the sale of owner-occupied homes ran taxpayers a bit over $19 billion. EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2001, at 117 tbl.5-3, *at* http://w3.access.gpo.gov/usbudget/fy2001/pdf/spec.pdf. These three tax expenditures added up to about $103 billion in 2001. Of course, tax revenues would not necessarily increase by a comparable amount in the absence of these subsidies. It is possible that elimination of these breaks for the well-off would lead to a less progressive tax-rate schedule, or that wealthy homeowners would find other ways to shelter their incomes from taxation if the tax subsidies for homeownership were eliminated. *See* HARVEY S. ROSEN, PUBLIC FINANCE 353-54 (6th ed. 2002) (discussing difficulties in accurately measuring tax expenditures, given the possibility of behavioral adjustments to tax changes and the lack of any universally accepted baseline against which to assess tax breaks); RAYMOND J. STRUYK, SHOULD GOVERNMENT ENCOURAGE HOMEOWNERSHIP? 36 (1977) (observing that "to some degree, reducing homeownership-associated tax savings will serve merely to increase other forms of such savings").

62. *See* FISCHEL, *supra* note 1, at 232 (arguing that homeownership subsidies do not encourage sprawl, since the subsidies are provided regardless of whether one buys in a dense or sprawl-riddled area). For a contrary view, see generally Richard Voith, *Does the Federal Tax Treatment of Housing Affect the Pattern of Metropolitan Development?*, BUS. REV., Mar.-Apr. 1999, at 3. *See also* PIETRO S. NIVOLA, LAWS OF THE LANDSCAPE: HOW POLICIES SHAPE CITIES IN EUROPE AND AMERICA 12-34 (1999) (discussing a wide variety of governmental policies, including tax and transportation policies, that work together to encourage suburban development in the United States).

63. *See* FISCHEL, *supra* note 1, at 232 (observing that "[a] nation of homeowners is likely to be a nation of NIMBYs, and their anxieties are likely to be manifest in zoning laws"). NIMBY is

subsidies seem to invite: whether American homeowners might be consuming too much owner-occupied housing.[64] Because the dominance of the home in the homeowner's portfolio is a cornerstone of Fischel's hypothesis and the basis for the often problematic risk aversion that homeowners exhibit, this question is worth investigating.

Here it is helpful to distinguish between the "breadth" of homeownership across society (how many people choose to become homeowners, rather than renters) and the "depth" of homeownership (how much housing each homeowner is consuming). Significantly, the federal tax subsidies provided to homeowners do little or nothing to expand the breadth of ownership among the less well-off.[65] Low-income people typically either owe no income taxes or are better off taking the standard deduction rather than itemizing their deductions; hence, they receive no benefit at all from the mortgage interest and property tax deductions. The largest tax benefits flow to those who earn high incomes (by shielding money on which a higher marginal tax rate would otherwise have to be paid) and to those who consume large amounts of housing (because the mortgage interest and local taxes are higher for an expensive house).[66] Although the deductions may

an acronym that stands for "not in my back yard"—a common refrain of homeowners contemplating a potentially undesirable land use. *Id*. at 9.

64. At another point, Fischel notes that the scarcity of rental housing may lead to higher homeownership rates than are optimal for employment-related mobility, *id*. at 86-87, but attributes this situation to legislation that "restricts consensual exchange in the housing market," *id*. at 87. For a recent examination of the impact of tax subsidies on homeownership patterns, see JOHN O. FOX, IF AMERICANS *REALLY* UNDERSTOOD THE INCOME TAX 177-200 (2001). *See also* Edwin S. Mills, *Dividing Up the Investment Pie: Have We Overinvested in Housing?*, BUS. REV., Mar.-Apr. 1987, at 13 (examining whether tax subsidies have caused Americans to allocate an inefficiently large proportion of capital to housing investments).

65. *See* FOX, *supra* note 64, at 178 ("Tax policy for homeownership remains largely indifferent to the plight of people whose housing welfare is least assured. Instead, the laws principally expand the comforts of people who are capable, and often extremely capable, of owning a home without government assistance.").

66. The distributive impacts are astounding. *See* CITIZENS FOR TAX JUSTICE, THE HIDDEN ENTITLEMENTS 42 tbl. (1996) (showing that the mortgage-interest deduction alone generates an average tax benefit of nearly $5000 for those earning incomes in excess of $200,000, while it yields an average benefit of $108 for those in the $30,000-$40,000 income range and an average benefit of $0 for those earning less than $10,000); Terry Ashley et al., *The Impact of the Home Mortgage Interest Deduction on Homeowners' Tax Liabilities and the Home Purchase Decision*, 11 ADVANCES TAX'N 27, 42 (1999) (noting that "[i]n 1990, 65% of the benefits [from the mortgage-interest deduction] went to taxpayers in the tenth decile and 92% to taxpayers in the top three deciles"); Voith, *supra* note 62, at 8 tbl.2 (showing that, based on certain assumptions, the owner of a half-million-dollar house would receive tax benefits worth more than $12,000, while the owner of a $95,000 house would receive less than $400 in tax benefits).

This is not to say that well-off taxpayers enjoy unlimited housing-related tax deductions. For example, there is a $1 million cap on the amount of home-acquisition indebtedness for which mortgage interest may be deducted, subject to an exception for debt acquired before October 13, 1987. I.R.C. § 163(h)(3)(B)(ii), (h)(3)(D) (2000). Likewise, high-income taxpayers are subject to limits on their allowable itemized deductions. *See id*. § 68. My point in noting the distribution of the tax subsidies is to emphasize that these tax expenditures provide little or no assistance to help convince some significant number of well-off renters to "take the plunge" into homeownership sooner rather than later, the deductions also do a great deal to encourage the consumption of additional increments of housing by those who would probably be homeowners in any event.[67]

Likewise, exempting capital gains on homes from taxation enables people who are moving from one home to another to purchase more expensive homes in the new location than they could otherwise.[68] Homeowners who are occupying housing in the cheapest neighborhoods are likely to enjoy fewer capital gains than other homeowners;[69] hence, the exemption does little to keep marginal homeowners from sliding back into the ranks of renters as a result of a move. While it is possible that the prospect of a future untaxed capital gain might lure some additional renters into homeownership, there are far more direct and tailored ways to encourage renters to become homeowners than by presenting them with the prospect of a distant, speculative, untaxed gain on resale. Moreover, because renters who wish to become homebuyers must compete for housing against relocating homeowners who are carrying more dollars as a result of the tax exemption, the subsidy may make renters relatively less able to move up to homeownership.

individuals who are likely to have the greatest amount of difficulty entering the ranks of homeownership.

67. *See, e.g.*, FOX, *supra* note 64, at 196 ("Most middle-income households, and all upper-income households, could afford to own a house without a subsidy, though the house may be more modest than the one in which they live."); Voith, *supra* note 62, at 9 (noting that "mortgage and property tax deductions represent large incentives for higher income people to purchase more expensive houses").

68. Because exempting capital gains from taxation can make it cheaper for people to move from one house to another, it might seem that this tax policy helps the labor force move more efficiently. The great majority of moves, however, do not occur for employment-related reasons. Census survey data tracking moves that occurred between March 1999 and March 2000 show that "work-related" reasons accounted for only 16% of all moves, and just 6% of intracounty moves. *See* JASON SCHACHTER, U.S. CENSUS BUREAU, SERIES P23-204, CURRENT POPULATION REPORTS: WHY PEOPLE MOVE: EXPLORING THE MARCH 2000 CURRENT POPULATION SURVEY 2 tbl.1, 3 fig.1 (2001), *at* http://www.census.gov/prod/2001pubs/p23-204.pdf. If the goal is to achieve mobility in the work force, a more targeted means of pursuing this goal would seem preferable. Census survey data indicate that nearly a quarter of all moves between March 1999 and March 2000 occurred either because the mover wanted a "new/better house/apartment" (18.5%) or wanted a "better neighborhood/less crime" (4.4%). *See id.* at 4 tbl.2. To the extent these movers are homeowners opting for more expensive dwellings, their moves increase the depth and not the breadth of homeownership.

69. *See* David Rusk, Brookings Inst. Ctr. on Urban & Metro. Policy, The "Segregation Tax": The Cost of Racial Segregation to Black Homeowners 4 (Oct. 2001), *at* http://www.brook.edu/dybdocroot/es/urban/publications/rusk.pdf (noting that homes in low-cost neighborhoods "are poor long-term investments" because, "[g]enerally, low-cost markets have lagged behind national means in terms of the growth in value of the housing stock").

Notably, the societal benefits traditionally attributed to homeownership relate to the breadth of homeownership, not to its depth.[70] Using public funds to artificially deepen the homeownership of the well-off seems particularly hard to justify.[71] In fact, we might want to discourage deeper homeownership among the wealthy, if we think that the conspicuous consumption of ever-larger and more elaborate homes contributes to a destructive cycle of competitive status-seeking.[72] To be sure, the consumption of more expensive owner-occupied housing gives homeowners a larger stake in the community and might therefore be expected to heighten their vigilance with regard to community matters. But, as Fischel recognizes, homeowners are made so risk-averse by their portfolio imbalances that their decisions become suboptimally NIMBYesque. Indeed, this is the largest blemish that Fischel identifies in his model of local governance.[73] A large and regressive government subsidy program that contributes to that portfolio imbalance therefore deserves close scrutiny.

There is another set of governmental policies that also tends to inflate the amount of housing well-off people consume. Here I am speaking of exclusionary zoning powers, which help to make a home a less risky and more attractive investment than it would be in the absence of those exclusionary powers. Fischel correctly emphasizes the undiversified risk associated with homeownership (that is, the fact that one's entire investment is tied up in one place), but the fact remains that zoning laws typically enable homeowners to mitigate these home-investment risks rather successfully by giving them power to behave as NIMBYs. If homeowners lacked the power to address their home-investment risk in this way, the

70. *See* FOX, *supra* note 64, at 196 (arguing that "[r]ather than enable people to buy larger homes, homeownership tax subsidies ought to maximize the number of homeowners"). Homeownership has long been viewed as producing more involved and engaged citizens. *See, e.g.*, JOHN P. DEAN, HOME OWNERSHIP: IS IT SOUND? 3-5 (1945) (collecting quotes crediting homeownership with fostering democracy and turning back threats associated with communism and other "disintegrating influences"); FISCHEL, *supra* note 1, at 80-81 (discussing higher rates of homeowner political activity). It is also possible that homeownership generates positive externalities in the form of social stability. *See* Mark Dynarski, *Residential Attachment and Housing Demand*, 23 URB. STUD. 11, 19 (1986) (observing that homeowners may be more likely to form social attachments than renters). *But see* ROSEN, *supra* note 61, at 101 (noting that Switzerland appears to enjoy social stability, despite homeownership rates of less than one-third).

71. This is not a new observation. *See, e.g.*, HENRY J. AARON, SHELTER AND SUBSIDIES: WHO BENEFITS FROM FEDERAL HOUSING POLICIES? 70 (1972) (describing the tax benefits granted to homeowners as "capricious and without rationale").

72. *See* ROBERT H. FRANK, LUXURY FEVER 159-60 (1999) (discussing the negative effects of competitive cycles of conspicuous consumption). Significant numbers of homeowners end up in bankruptcy, sometimes in part because of their housing-consumption choices. *See* TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS 199-237 (2000) (discussing characteristics of homeowners in bankruptcy); *id.* at 251 (observing that "[t]he classic middle-class vulnerability may be a house-poor or, at least, house-stretched family struck by a layoff of one spouse").

73. *See* FISCHEL, *supra* note 1, at 262.

home would become a much more risky—and hence less attractive—repository for investment dollars. Thus, part of the reason homeowners choose to place so much value into their homes (which gives them lopsided portfolios and large incentives to act as NIMBYs) is precisely that the law empowers them to protect home values through exclusionary land-use decisions.

In addition, the stratified residential patterns that result from the exercise of these exclusionary powers of local government make the purchase of higher-end housing far more important to a family's quality of life than would otherwise be the case. With exclusionary zoning in place, the purchase of a large quantity of housing is effectively bundled with the opportunity to live in a "good" neighborhood and to send one's children to the best public schools.[74] Thus, many people feel that if they want the good life for themselves and their children, they have to buy an expensive house.[75] Houses in the communities containing the best schools are bid up accordingly.[76] Perversely, federal tax policy makes attainment of these sought-after houses easier for those earning more money; they will be in a higher tax bracket and will enjoy larger mortgage interest and property tax deductions, and therefore lower real costs, than their lower-income competitors.

One final perspective on the role of zoning in housing consumption bears mention. To the extent that well-off homeowners wish to live in communities that are homogeneous as to income level,[77] they must employ some sort of legally sanctioned exclusionary device to keep out the less well-off. One way to accomplish this is by zoning for types of housing that poor people cannot afford. Fairly obviously, those wishing to exclude through this mechanism must be willing to consume housing at a level that is out of the reach of the poor. This may mean consuming more housing than they would otherwise prefer, or than they would consume if they could

74. *See, e.g.*, FRANK, *supra* note 72, at 159 (noting parents' interest in securing the best possible education for their children and observing that "[f]or the typical American family, that means buying a house in the best school district it can afford").

75. *See id.* at 192 (explaining that the choice to move to a smaller home in a cheaper neighborhood may entail unacceptably high costs in the form of decreased safety, increased pollution, and inferior schools).

76. *See id*. at 270 (explaining that "the ineluctable mathematical logic of musical chairs assures that only 10 percent of all children can occupy top-decile school seats" no matter how much money their parents spend on housing); Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 185 (2002) (observing that, in the districts she studied, demand for desirable schools "has driven up housing prices").

77. *See infra* Section II.B (discussing the possibility that homeowners might be motivated by such preferences).

exclude the poor directly (based, say, on an income requirement for entrance into the neighborhood).[78]

In sum, the homevoter hypothesis is built on a foundation that is both artificial and normatively controversial. People's portfolios are heavily dominated by owner-occupied housing, not just because people like to consume a lot of housing, but also because of conscious government action that tends to further that result. We would do well to question this arrangement. In an important sense, it is the homes themselves, not the homeowners, that drive the machinery of local government. Homeowners are held in thrall by their homes—tempted by tax breaks, goaded by social pressures, strangled by outsized mortgages, and far too easily spooked by remote or imagined threats to their hard-won and tenuously held "way of life." Questioning the normative desirability of current levels of housing expenditures does not undermine the descriptive force of Fischel's model. But the fact that Fischel's homevoters gained some of their power, their motivation, and their vulnerability as a result of government action does call his normative claims into question.

II. POOLING PREFERENCES

Equipped with a basic understanding of homevoters' operating environment, personal characteristics, and portfolio choices, we can now turn our attention more fully to some of the distributive concerns implicated by the model of local governance Fischel presents. The problems I identify in this Part are not *just* distributive problems, however—they also represent inefficiencies. Contrary to the Tieboutian model's assumption that each locality operates as a self-contained system,[79] the real world features substantial spillovers among communities within metropolitan regions. As I will explain, exclusion—one of the hallmarks of a Tiebout-inspired system of local government[80]—can operate to shift costs across municipal borders, generating externalities.[81] The potential for municipalities to export costs in this manner distorts homevoter incentives and leads to local decisionmaking that falls short of the social optimum.

78. *See* Joseph E. Stiglitz, *The Theory of Local Public Goods Twenty-Five Years After Tiebout: A Perspective*, *in* LOCAL PROVISION OF PUBLIC SERVICES: THE TIEBOUT MODEL AFTER TWENTY-FIVE YEARS 17, 46 (George R. Zodrow ed., 1983) (noting that efforts to exclude the poor through devices such as large-lot zoning or manipulation of tax rates or service levels "clearly create distortions relative to the first best optimum where poor individuals could be directly excluded or discriminatory taxation could be imposed").

79. *See supra* Section I.A.

80. *See supra* Section I.A.

81. *See infra* text accompanying notes 144-151.

I start by presenting and critiquing Fischel's arguments about the prospects for heterogeneous communities in a Tieboutian world. I then turn to a set of factors—homeowners' preferences for certain kinds of neighbors—that present tremendously difficult issues for any Tiebout-inspired model. This leads into a discussion of the way that capitalization impacts decisionmaking about inclusion and exclusion. I close this Part with an exploration of the social costs—including efficiency costs—associated with exclusionary choices, using Fischel's discussion of school finance as a springboard.

A. *Homogeneity and Heterogeneity*

What will a metropolitan region look like after it has sorted itself out Tiebout-style? The primary attraction of the Tiebout hypothesis is that it allows people to realize disparate preferences about what they want from local government.[82] This suggests that any Tiebout-inspired model will contemplate at least one sort of homogeneity within communities: homogeneous tastes regarding the preferred mix of amenities and services. This homogeneity in tastes also implies homogeneity in the amount one is willing (and able) to pay to realize those tastes.[83] But people occupying each community need not be homogeneous with respect to other characteristics, such as race or religion—or even with respect to family configuration or the size of the house that they occupy. These last two items are worth discussing because they appear to contradict the notion of avoiding cross-subsidization of some community members by others.

Families with children enrolled in the public school system typically consume far more of the resources provided at the local government level than do families without children.[84] Why is this form of heterogeneity and

82. *See* Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185, 1192 (1996) (observing that a key attraction of decentralized government "is its capacity to offer different packages of goods and services and thus to appeal to the various preferences of different actors who can, with relative ease, migrate to jurisdictions that offer the package that is most attractive").

83. When individuals' resources are not equal, willingness to pay (which includes ability to pay) may diverge from the actual, but unknown, strength of an individual's subjective preferences. Nevertheless, a system that adopts the principle "get what you prefer, but pay what you can" cannot survive, because each person will have an incentive to state preferences that exceed her own ability to pay. In a world of limited resources, such an approach would quickly devolve into a system of "pay the bare minimum, receive the bare minimum"—that is, a system in which nobody's preferences are satisfied. *See generally* LEE S. FRIEDMAN, THE MICROECONOMICS OF PUBLIC POLICY ANALYSIS 619-20 (2002) (discussing difficulties associated with demand revelation in the provision of public goods).

84. *See* Poterba, *supra* note 48, at 48 (explaining that education spending is the largest budget item for state and local governments and that "most of the return to such spending accrues to families with children").

implicit intragroup cross-subsidization tolerated by those without children? Part of the answer has to do with societal values regarding children and families, as codified into laws like the Fair Housing Act,[85] as well as with the positive externalities generated by education. But the answer that Fischel emphasizes is that the home values of the childless are tied to the quality of the schools. Because many potential homebuyers will have school-age children (or will recognize that *their* potential homebuyers may have school-age children), the childless homeowner will ultimately receive some compensation for education-related expenditures when it comes time to sell the house.[86] Fischel's analysis thus suggests that homeowners are willing to accept those forms of cross-subsidization that translate in a straightforward manner into increased home values.

This observation is in some tension with the basic premise of the Tiebout hypothesis—that people will choose communities based on their preferences about the bundles of local goods and services they wish to consume. If this were the case, people who were uninterested in consuming education would presumably choose to locate in places with low-quality schools. Fischel's analysis suggests that what people seek from local government is only partly a function of their consumption preferences; it is also partly a function of their investment preferences. For example, people without children may believe that a home in a school-rich environment will make a better long-term investment than a home in a neighborhood with lousy schools. Good schools are not only a source of increased property values but may also be correlated with other things that many people value, such as affluent neighbors, large lots, and safe streets.

If choosing a community is less about realizing one's individual consumption preferences and more about making a good investment, and if the best investment opportunities are to be found in the most affluent neighborhoods,[87] then it becomes more likely that sorting in a given metropolitan area will occur primarily along one dimension—wealth. To the extent this is the case, the charming image of Tieboutian foot-shoppers choosing from different bundles of goods and services based on their individual preferences begins to be supplanted by the somewhat less charming image of community choice based primarily on the number of investment dollars that each citizen-consumer holds.

85. The Fair Housing Act prohibits discrimination in housing on the basis of family status, 42 U.S.C. § 3604 (1994), although it does exempt housing for older persons from this prohibition, *id*. § 3607(b).

86. FISCHEL, *supra* note 1, at 148-52.

87. *See* Rusk, *supra* note 69, at 4 (noting that homes in low-income neighborhoods tend to realize lower rates of appreciation).

This leads directly into the next point. Fischel goes out of his way to argue that heterogeneity of housing types and income levels within a community is not incompatible with either zoning or capitalization.[88] Hamilton's original explanation of the importance of zoning, as set forth above, suggested that homogeneous housing stock was essential—that is, a particular housing minimum must be established for the community, so that everyone is paying a fair share in property taxes for the services received.[89] But, as Fischel explains, Hamilton soon recognized that this need not necessarily be the case.[90] The fundamental fiscal problem identified by Hamilton is not the cohabitation of the wealthy with the poor, but rather the uncontrollable influx of new residents into an area to free-ride on public services.[91] Where housing stock is fixed (that is, not subject to expansion through new building or through subdivision of existing units into additional smaller units), this influx cannot occur, even if part of that fixed housing stock is made up of multifamily housing or smaller houses.[92]

Capitalization explains how residents can occupy heterogeneous housing types and still pay the same amount for locally provided goods and services, thus satisfying the criterion of homogeneity discussed above. If a property tax is used to finance local governmental operations, the owner of the smaller house would indeed be paying less in property taxes for locally provided goods and services than are the other residents. However, the excess value of these premium services (above and beyond the "tax price" that the resident of the small house must pay) gets capitalized into the value of the small house.[93] So, while the owner of the small house gets a property-tax bargain, she also has to pay more for the house itself, because it comes packaged with that built-in property-tax bargain.[94] Under conditions of full capitalization, the Susie Smallhouses of the world will end up paying *just as much* for the local services received in the community as any Bentley Bighouse. The difference is that only part of the money is paid in the form of taxes, and the rest is paid in the form of a higher home price.[95]

88. *See* FISCHEL, *supra* note 1, at 68-69.
89. *See supra* text accompanying notes 27-31.
90. *See* FISCHEL, *supra* note 1, at 68 (citing Bruce W. Hamilton, *Capitalization of Intrajurisdictional Differences in Local Tax Prices*, 66 AM. ECON. REV. 743 (1976)).
91. *Id*. at 68-69.
92. *Id*.
93. *See id*.; Hamilton, *supra* note 90, at 744.
94. Hamilton, *supra* note 90, at 744.
95. *See* Rubinfeld, *supra* note 21, at 592 n.22 (explaining that under conditions of capitalization "individuals moving into a community must pay what is in effect a two-part tariff," where one part "is contained in the portion of the price of housing which is associated with the capitalization of fiscal differences" and the other part "is the direct payment made in terms of property taxes").

Capitalization explains why the Smallhouses could coexist bargain-free with the Bighouses in a community in which zoning constrains the supply of housing stock, but it does not explain why the Bighouses would let the Smallhouses into the community in the first place. No matter what Susie Smallhouse paid for her place originally, the fact remains that she will always pay less in property taxes for the same local services as the Bighouses. The extra taxes the Bighouses must pay as a result of Susie's presence will not only cost them extra money while they live in the community, but will also be capitalized into the homes of the Bighouses so that they will receive a lower price when they sell.[96] This represents a transfer from the Bighouses to someone—but to whom? Not to Susie (who, recall, had to pay a premium for her house because it came packaged with local services at bargain rates). To find the true recipient of the transfer, we have to trace backward through successive owners who paid premiums for the small house until we get back to the person originally holding the land when the construction of the small house was permitted—call her Littlebuilder.[97]

How did Littlebuilder get permission to build the small house in Bighouse Bog in the first place? Not, presumably, by politely explaining to the Bighouses that it would be nice for them to offer her a transfer payment in exchange for her bringing them the privilege of living near less well-off people occupying cheaper, smaller housing units. Why then would the Bighouses of the world ever grant permission to allow small houses into the neighborhood, if they had the power simply to refuse this permission?[98] The short answer is that they wouldn't—unless the Bighouses collectively received a payment (whether in cash or in kind) from Littlebuilder that effectively gave them back the extra money that they (and those who purchase from them) will have to spend in taxes as a result of the presence of the small house. This payment might take the form of an exaction or an impact fee.[99]

96. *See* FISCHEL, *supra* note 1, at 68 (explaining the capitalization of tax differences into relative home values).

97. By the same token, the transfer comes out of the pockets of the Bighouses who owned the land at the time of the zoning change, not out of the pockets of their successors (who had the opportunity to adjust their purchase price to reflect the extra tax burden). *See id.* at 69 (noting that "[t]he people who gain or lose from rezonings are those who owned the land prior to the anticipated implementation of the new zoning laws").

98. An underlying assumption is that the community could refuse to allow new development that fails to meet certain specifications regarding square footage and lot size. Although such zoning ordinances are typically upheld, some courts have limited the ability to exclude on these bases. *See, e.g.*, *id.* at 282 (discussing the Pennsylvania Supreme Court's unusual approach to matters such as large-lot zoning).

99. For a discussion of constitutional limits on these mechanisms that could impede such deals, see Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1 (2000). Those committed to making a deal happen, however, are likely to find

There is another factor that will affect whether such a deal will go through—whether the Bighouses tend to attach negative or positive value to living near less wealthy people occupying smaller houses. Fischel suggests that there is a bit of a backlash against homogeneous neighborhoods and that people are beginning to attach positive value to heterogeneity in housing.[100] If so, Littlebuilder might be able to compensate the Bighouses for their disproportionate tax burden partly through an impact fee or exaction, and partly in kind by introducing a valuable amenity into the community—lower-income residents! On the other hand, if most Bighouses attach negative value to living near lower-income people, they might require *more* than the tax-bargain premium Littlebuilder will receive from Smallhouse before they would grant permission to build. If this is the case, it is not likely that a deal moving the community in the direction of greater heterogeneity will occur, unless the Smallhouses are willing and able to pay an additional premium for the privilege of living near the Bighouses (in addition to the premium they will already be paying to make up for the property-tax bargain they will be receiving).

This critique should not obscure the important and little-recognized theoretical point that Fischel makes about the prospects for heterogeneous communities in a Tieboutian world. But Fischel's analysis might leave some readers with the impression that the primary significance of homogeneity in housing is the part that such homogeneity plays in enforcing an equal property-tax contribution from homeowners. On that view, moving to heterogeneity in housing is just a matter of solving a fairly simple mathematical problem—that is, how to make the small householders pay as much for the public services provided in the community as the large householders are paying. But the introduction of smaller, cheaper housing units signals more than the possibility of a fiscal inequity for many people. Rather, the introduction of these units portends the introduction of lower-income people into the community and may therefore be perceived as a much greater threat to the quality of life of the well-off than an analysis of fiscal burdens would suggest.[101]

practical ways around doctrinal limits. *See id*. at 27 n.109 (noting the potential for such circumvention); *see also* FISCHEL, *supra* note 1, at 278 (explaining that "[d]evelopers and community officials who want to make a deal can often get it done"); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1286-99 (1997) (suggesting that developers who expect to continue interacting with the local government may tolerate conditions that fail to meet constitutional requirements).

100. FISCHEL, *supra* note 1, at 69-70.

101. *See, e.g.*, PERIN, *supra* note 56, at 55, 93 (discussing the threat to a neighborhood's reputation associated with the arrival of tenants and the use of income-group homogeneity in ordering social space); Anthony Downs, *Reducing Regulatory Barriers to Affordable Housing Erected by Local Governments*, *in* HOUSING MARKETS AND RESIDENTIAL MOBILITY 255, 268 (G. Thomas Kingsley & Margery Austin Turner eds., 1993) (observing that "[m]any residents of

B. *Preferences About People*

When people choose communities, they are opting not just for the exogenously produced goods that the local government has to offer them (school buildings, police cars, low taxes, and the like). Homeowners (and the homebuyers who will ultimately buy their homes) are also choosing a set of neighbors, and they may have preferences for neighbors with certain characteristics.[102] Fischel's analysis sometimes exhibits a curious blind spot about these motivations and their implications. For example, he explains that homebuyers can readily identify communities with the best public schools by looking for high concentrations of the sorts of people (e.g., the wealthy) who might be expected to demand good schools.[103] The idea that people with money base their evaluations of school quality on the observed choices of those in their social status group seems true as a matter of casual observation, and it is supported by recent empirical work.[104] They do so, however, not only because the well-off are reliable connoisseurs and effective complainers whose presence signals the level of educational quality that is being served up by exogenous others, but also because the children of the wealthy are viewed as desirable co-consumers of education.[105] Fischel's discussion, which analogizes homebuyers' decisions about schools and communities to his own decision about buying a personal computer, does not convey the importance of the preferences that homebuyers often have about the other people in the user pools they are joining.[106]

middle- and upper income [sic] suburbs fear that 'invasion' of their communities by low-income residents will bring undesirable consequences such as rising crime rates, students in local schools from homes that do not encourage good educational performance, and rising drug abuse").

102. *See* Thomas C. Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143, 145 (1971) ("To choose a neighborhood is to choose neighbors.").

103. FISCHEL, *supra* note 1, at 61 (citing Kenneth N. Bickers & Robert M. Stein, *The Microfoundations of the Tiebout Model*, 34 URB. AFF. REV. 76 (1998)).

104. *See* Holme, *supra* note 76, at 201 (observing, based on interviews with forty-two parents who had purchased homes in areas known for having good schools, that "[m]ost parents neither gathered their own information about schools nor visited prospective schools themselves before deciding to buy their homes 'for the schools'; rather, they based their choices primarily on information from other parents in their social networks").

105. *See id.* at 194-99 (collecting excerpts from interviews that indicate the importance to parents' school choices of their beliefs about the characteristics of the other students in the schools). For example, the wealthy parents Holme interviewed feared that their own "gifted" children would be shortchanged educationally as a result of the special needs and challenges faced by children in the "bad" schools, and that the children in such schools could pose a physical threat to their own children. *Id.* They expressed a desire to place their children in schools "with other high-achieving kids," *id*. at 195, and among children who "would pose less of a physical risk," *id.* at 199.

106. *See* FISCHEL, *supra* note 1, at 61 (suggesting that homebuyers go about selecting a community in much the same manner as he himself goes about selecting a computer: "I mainly

Associational preferences of this sort are not necessarily just a matter of snobbery, ignorance, and prejudice (though they may well carry more than a tinge of these elements[107]). As I have argued elsewhere, people recognize that the quality of the local public goods available in a given community—notably public education and neighborhood security—importantly depends on the quality of the participation of the community's members.[108] For example, the achievements, work habits, and motivational levels of students in a school can affect the achievement levels of other students through peer effects.[109] Likewise, a neighborhood that is filled with concerned, safety-minded people who are always looking out for one another will have a higher level of public safety than will a neighborhood filled with apathetic, withdrawn residents—or with residents who are themselves involved in criminal activity.

Thus, a community filled with what I have termed "quality-enhancing users"—people who actively contribute in positive ways to the community's well-being—will be able to achieve better schools and safer neighborhoods than could a community filled with "quality-detracting users."[110] Of course, these categories are not immutable; norms, cultural influences, and contextual features will influence whether a particular person will act as a quality enhancer or a quality detractor in a given situation. Nevertheless, at any given point in time, some individuals are better equipped and better disposed to be quality-enhancing users than are others. A rational, quality-conscious individual would wish to join a user pool containing as many quality-enhancing users as possible and would want to find effective ways to screen out those users most likely to be quality-detracting. Doing so would enable the individual to obtain higher-quality local services at a lower cost.

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ask colleagues whose work and habits are similar to mine what they have purchased and how they have liked it.").

107. *See* Holme, *supra* note 76, at 180-81 (arguing that "status ideologies" about supposed cultural differences of different groups shape the school choices of high-status individuals).

108. Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1 (2001); *see also* ANTHONY DOWNS, OPENING UP THE SUBURBS 61 (1973) (discussing "social linkages" in neighborhoods, consisting of spillover effects "that link the quality of life in each household to the behavior of other people living or working nearby").

109. *See, e.g.*, JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 118-20 (1990) (discussing the influence of peers on achievement); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2105-07 (2002) (noting the impact of the peer group on school culture and on the motivation, behavior, and achievement of students); Theodore M. Crone, *House Prices and the Quality of Public Schools: What Are We Buying?*, BUS. REV., Sept.-Oct. 1998, at 3, 10-11 (collecting studies demonstrating peer influences on academic achievement); CAROLINE HOXBY, PEER EFFECTS IN THE CLASSROOM: LEARNING FROM GENDER AND RACE VARIATION (Nat'l Bureau of Econ. Research, Working Paper No. 7867, 2000), *at* http://www.nber.org/papers/w7867.

110. Fennell, *supra* note 108, at 16.

Quality-enhancing users and quality-detracting users can certainly be found among all income strata. Well-off user pools, however, generally enjoy higher levels of public education and safety than less well-off user pools, after controlling for differences in expenditures, and it appears that user characteristics and behavior play some role in these differences.[111] In the context of education, there is a well-established and consistently documented correlation between the achievement of students in a given school and the socioeconomic status of the student body.[112] In part, this may reflect differences in school-readiness and work habits that the children bring to school with them, as well as differences in parental expectations.[113] It may also reflect the fact that people of higher socioeconomic status face fewer obstacles and stressors in their daily lives and may therefore be able to devote more time and attention to education. Whatever the cause, education-conscious parents know that the easiest way to find a pool of good students is to find a pool of well-off, educated parents.

Motivated by similar user-pool concerns, communities may attempt to screen out the less wealthy by requiring residents to make a large minimum housing purchase. Under exclusionary zoning, money is used not only as a rough proxy for determining who is likely to be a better co-consumer but also as a way of allocating the valuable spots in the best user pools.[114] The result is that the moneyed use exclusion to gain not only the benefits of the services provided exogenously by local governments but also the benefits associated with membership in a particular sort of user pool. Those who are excluded are often relegated to a troubled user pool. A Tiebout-inspired model might characterize them as having "chosen" this pool and its accompanying low level of quality (by failing to express a "willingness to

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111. The impact of population characteristics on the quality and cost of local public goods such as education and neighborhood security has been explored in a number of economic analyses. *See, e.g.*, Mark Dynarski et al., *Local Characteristics and Public Production: The Case of Education*, 26 J. URB. ECON. 250 (1989); Charles F. Manski, *Educational* Choice *(Vouchers) and Social Mobility*, 11 ECON. EDUC. REV. 351, 356 (1992); Wallace E. Oates, *The Use of Local Zoning Ordinances To Regulate Population Flows and the Quality of Local Services*, *in* ESSAYS IN LABOR MARKET ANALYSIS 201 (Orley C. Ashenfelter & Wallace E. Oates eds., 1978); Robert M. Schwab & Wallace E. Oates, *Community Composition and the Provision of Local Public Goods: A Normative Analysis*, 44 J. PUB. ECON. 217 (1991).

112. *See, e.g.*, CHUBB & MOE, *supra* note 109, at 101 (noting a persistent correlation between the socioeconomic background of students' families and their educational achievement); Ryan & Heise, *supra* note 109, at 2103-05 (discussing some of the numerous studies establishing that schools with higher poverty rates typically post lower levels of educational achievement than do schools with lower poverty rates); Crone, *supra* note 109, at 10 (citing studies that combine a number of family characteristics into an "index of socioeconomic status" and noting that such indexes are consistently found to be predictive of children's academic achievement).

113. *See, e.g.*, Ryan & Heise, *supra* note 109, at 2105-07.

114. *See* Fennell, *supra* note 108, at 81 n.275 (discussing the use of wealth as an imperfect proxy for "quality-enhancing" potential).

pay" for anything better). Most of the choosing was done for them, however, by those with a comparatively greater ability to gain membership in one of the more exclusive pools.[115]

Where the quality of local public goods depends not just on exogenous inputs, but also on the users, membership matters greatly. Yet it is impossible to construct legal rules that will simultaneously ensure the satisfaction of everyone's associational preferences. Either those who wish to live in an exclusive pool are granted the legal power to exclude, which constrains the choice set of those who are excluded, or such exclusion is not permitted, which thwarts the desires of those wishing to purchase exclusivity.[116] Because zoning laws generally give priority to the former set of choices, one of the amenities well-heeled citizen-consumers can purchase through their locational choices is a well-off set of neighbors.

C. *Capitalizing Neighbors*

As Fischel explains, capitalization is capable of building into home values anything that people care about in a neighborhood or community.[117] Capitalization is, therefore, an indiscriminate force that will work its magic regardless of whether the factors that affect what people are willing to pay for a home are of the benign sort that take center stage in the book (a desire for good schools, a pleasant environment, and low taxes) or whether they are more problematic (such as a preference for living near certain kinds of people). For example, empirical studies suggest that the racial composition of a neighborhood can affect home values and locational decisions.[118] And, as the discussion above suggests, people may believe that a well-off neighborhood is more likely to contain desirable co-consumers (and coproducers) of goods like public safety and education.

115. *See* DAVID POPENOE, PRIVATE PLEASURE, PUBLIC PLIGHT 153 (2001) (arguing that "residents are only partly clustered by choice and partly by force of discrimination, and they must take locations that are left over after spatial decisions have been made by those with more power and other resources").

116. *See* Fennell, *supra* note 108, at 29 (observing that all consumers cannot be fully and simultaneously empowered in their quest to join the best possible user pool); Schragger, *supra* note 52, at 419-20 (noting that community formation requires that some preferences for voluntary association be privileged over others).

117. FISCHEL, *supra* note 1, at 45-46.

118. *See, e.g.*, Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1994 (2000) (noting that "recent empirical literature on locational choice suggests that race, as opposed to the mix of services and taxes a jurisdiction offers, is the strongest of the factors that influence locational decisions"); Rusk, *supra* note 69, at 3 (presenting findings based on an analysis of 1990 census data suggesting that homeowners in majority black neighborhoods realize lower home values as a result of segregation).

The fact that the perceived desirability of one's neighbors can influence homeowner decisions and home values presents a tremendously difficult set of issues for local governance.[119] Placing more emphasis on these sources of homeowner motivation does not change the shape of Fischel's arguments about capitalization, but it does make an important rhetorical difference that bears on his normative claims. The image of a homeowner taking political action to protect the value of her home is not one that strikes us as socially destructive or controversial, and the capitalization examples that Fischel spends most of his time examining reinforce this innocuous vision of civic involvement. The picture becomes far more disturbing, however, if homeowners' protection of their home investments involves keeping out categories of people thought to threaten a particular vision of the good life.

Significantly, the phenomenon of capitalization means that a homeowner's local political decisions are based not only on her own preferences but also on the preferences that she imagines the relevant pool of future homebuyers to have.[120] The relative weights that a given homeowner will attach to her own preferences and to those of potential homebuyers will depend on factors such as the homeowner's discount rate, the length of time she expects to stay in the house, and whether (and how soon) she plans to borrow against the home's equity.[121] Notwithstanding these individual variations, it seems accurate to assume that the "median homevoter" who controls political outcomes in Fischel's model is at least moderately concerned about resale values. To the extent political decisions are influenced by resale concerns, the results will only be as normatively desirable as are the preferences of those imagined buyers. If the imagined buyers care about a clean environment and safe schools, our homeowner

119. Fischel is not unmindful of these problems. He mentions exclusionary zoning several times in the book, FISCHEL, *supra* note 1, at 2, 70, 230, 261-62, and explicitly notes homeowners' fears that new entrants into a community could lower home values, *id.* at 261, 270-71. He engages, however, in little sustained discussion of the matter. One of his most extensive treatments of the topic appears in the last chapter, where he devotes just over two pages to what he terms "[p]robably the most complicated and intractable of the problems of localism." *Id.* at 270-72.

120. *See* Jan K. Brueckner & Man-Soo Joo, *Voting with Capitalization*, 21 REGIONAL SCI. & URB. ECON. 453, 453 (1991) (explaining that "the voter's ideal public spending level reflects a blend of his own preferences and those of the eventual buyer of his house").

121. *See* FISCHEL, *supra* note 1, at 150. A rational homeowner might view the bundle of local public goods in her community as an asset that will generate a stream of utility while she lives in the community and a lump sum of realized value in the form of a higher home sales price when she departs from it, and attempt to maximize the present value sum of these two components. *See generally* Brueckner & Joo, *supra* note 120 (presenting a formal model of voter decisionmaking about local public goods where capitalization is present). The "market discipline" imposed on homeowners who might be tempted to satisfy their own preferences at the expense of others in the community is much stronger if those homeowners will be moving in a year or two, rather than in a decade or two. *See id.* at 464 (concluding that voter behavior aligns more closely with the maximization of home values "the nearer is the date of his departure from the community or the greater is the chance of an early departure when he is uncertain about the future").

will attempt to procure those goods through the political process. Likewise, if the imagined buyers prefer to avoid contact with lower-income people and are attracted to communities where the "yards are wide, [and the] people few,"[122] the rational homeowner will oppose proposals that would compromise this preferred environment.

Where the target audience of buyers is heterogeneous, the homeowner must decide which part of the potential market she should aim to please. We might initially think that such homeowners would always try to make decisions that would please a "median homebuyer" within that target audience. This makes good sense with regard to decisions about things like schools and development, where the trick is to strike the right balance between the impact on taxes and the impact on quality of life. It also makes sense in other settings where two competing values must be balanced—for example, the convenience and vitality associated with increased commercial activity versus the peace and quiet that accompany a heavily residential community. Going too far in either direction will risk losing too much of the spectrum of potential homebuyers by creating an unacceptably large disparity between a homebuyer's preferences and the community's offerings. A middle-of-the-road approach will not please everyone either, but it will minimize the amount of divergence between preferences and offerings for the entire spectrum of potential homebuyers in the target market. Even in a Tieboutian world, homebuyers are unlikely to find a community that matches their preferences precisely, and will accept communities that diverge somewhat from their ideal, as long as the divergence is not too great.

Homeowner behavior would not necessarily follow this same middle-of-the-road approach when it comes to choices that do not present tradeoffs between two goals that are highly valued by potential buyers. For example, consider choices about whether to allow a housing project, halfway house, homeless shelter, or low-income apartment building into the community. It is true that the pool of potential homebuyers may occupy a spectrum of attitudes about such uses, ranging from "completely tolerant" at one end, to "completely intolerant" at the other end. But it seems plausible that most or all of the potential homebuyers occupying positions toward the "completely tolerant" end of the spectrum would be just as eager to buy a home within a neighborhood that does not contain, say, a low-income housing project, if the price were the same in the two instances.[123] On the other hand, many of

122. This phrase comes from *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974), a case upholding a local zoning ordinance that prohibited groups of more than two unrelated individuals from living in homes zoned for single-family use.

123. To be sure, a potential homebuyer near the "completely tolerant" end of the spectrum might be very happy to snap up a house that is only a little bit cheaper because of its proximity to

those occupying positions toward the "completely intolerant" end of the spectrum would be utterly unwilling to buy a home in a neighborhood containing such a feature or would buy it only if it were very deeply discounted.

In the circumstances just outlined, the homeowner will be better off pleasing the least tolerant portion of the pool of potential homebuyers. Doing so will ensure that the largest possible portion of the potential homebuying spectrum will be bidding for the house and that it will capture the largest possible resale price. Indeed, as long as the "completely tolerant" buyers remain equally willing to buy no matter what the community does, there is no downside to keeping out even a *potentially* off-putting use that fails to generate positive benefits for the community, regardless of how few potential buyers would actually view it as objectionable. It is true that if enough potential homebuyers began to attach positive value to the presence of a feature like a low-income housing complex—such that they would pay *more* to live in a community containing that feature—homeowners might begin to take a more middle-of-the-road approach to decisions about such uses. But such attitudes are not terribly plausible in settings where introducing a new use would have an uncertain impact on the neighborhood.[124] Fischel supplies the reason: risk aversion.[125]

Because people feel losses far more intensely than they do gains of the same amount, this leads them to exhibit a strong bias in favor of the status quo over a risky change that offers the same utility in expected value terms.[126] As a result of this feature of human cognition, the potential gain that might accompany a more inclusive land-use decision, such as the opportunity to live in a more diverse or inclusive community, is likely to pale against imagined prospects of plummeting property values and overburdened, unsafe public schools. Homeowners may be willing to

a homeless shelter. But this assumes that the shelter has indeed had a negative effect on home values, which is the very outcome our current homeowner wishes to avoid.

124. Here it is important to recognize that letting in a given use may set in motion a dynamic process that will lead to additional changes in the neighborhood. For example, the presence of an apartment building might alter the pool of residents who are attracted to the single-family homes in the neighborhood when vacancies occur through normal mobility, and each new resident who fills a vacant spot in the neighborhood subtly changes the picture for each new resident considering the neighborhood. *See* THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 150 (1978) (describing the dynamic of chain reactions in neighborhoods, whereby "[e]verybody who selects a new environment affects the environments of those he leaves and those he moves among").

125. An anecdote that Fischel relates at the beginning of the book, in which two homeowners vehemently opposed a routine and quite innocuous request for a special exception at a zoning-board meeting, hints at the magnitude of the problem. *See* FISCHEL, *supra* note 1, at 9.

126. *See, e.g.*, RICHARD H. THALER, THE WINNER'S CURSE 68-74 (1992) (discussing status quo bias and loss aversion).

endure the mild guilt and ennui associated with life in a homogenous community in order to avoid any chance of a catastrophic outcome.[127]

Capitalization, then, is a double-edged sword. It translates human preferences into home values, regardless of whether those preferences are worthy or base. As a result, community decisions that are driven by concerns over home values will be no more and no less enlightened than are the homeowners in that community and the future homebuyers to whom they imagine reselling. Unfortunately, homeowners have little opportunity to call upon their own better natures in addressing social issues, so addled are they by their fear of undiversified property-value loss.

D. *Drowning Pools*

At what level, if any, should we be concerned about the exclusionary dynamics I have just described? My answer comes in two parts. First, as a matter of social justice, we should be concerned about the harm that accrues to those who are excluded. Second, as a matter of economic efficiency, we should be concerned about the spillover effects of the resulting concentrated poverty on the larger metropolitan community. Each of these points requires some elaboration, and I will take them up in turn.

It may seem apparent that communities containing high concentrations of poverty as a result of patterns of municipal exclusion will suffer social and economic harm. Fischel argues, however, that economic forces will brake the fall of any community and provide the means by which it can return to a position of viability. For example, he contends that if a community has an inadequate tax base, and therefore has to tax its property at higher rates, this will not send the community into a "death spiral" by driving away business, as is often alleged.[128] The reason, once again, is capitalization. The worse things get, the more property values in the area drop and the more attractive the land becomes to homebuyers and businesses that might wish to move into the area (notwithstanding the higher property-tax rates).[129] Also, the worse things get, the more eager the local homeowners become to accept tax-base-augmenting uses that they might otherwise shun, and Fischel suggests that this, too, is as it should be.[130]

127. *Cf.* Holme, *supra* note 76, at 199 (quoting one parent who lauded the low crime rate in a community known for its good schools, explaining that "[i]t's protected [even if] it's probably a little bit too . . . what do they say, White bread, or stale" (second alteration in original)).

128. *See* FISCHEL, *supra* note 1, at 152-53.

129. *See id.* at 153.

130. *See id.* at 181 (describing the greater willingness of low-income communities to accept "low-level polluters such as industrial sites and power plants" as "a desirable thing, a

Fischel makes a very important point in exposing the economic flaw in the usual "death spiral" reasoning, and he effectively debunks the notion that a limited tax base will send a community into a fiscal death dive. It would be inaccurate, however, to suggest that communities always can simply take advantage of the natural buoyancy provided by economic forces to bounce back from decline. The reason that they may be unable to do so is that a tax base is not the only resource that declining communities lack. They also, and more importantly, lack the sort of quality-enhancing user pools that will help to generate safe neighborhoods and high-quality schools.

To see how a focus on user pools alters Fischel's analysis of the distributive problems facing local government, consider the example of public education. Fischel's discussion of tax bases provides a good starting point. He carefully explains that, contrary to popular belief, many of the poor live in districts containing relatively rich tax bases.[131] This represents an important empirical counter to the claims that have been made (and contested) in school-finance litigation for decades.[132] The plaintiffs in school-finance litigation typically hail from districts that are both "property-poor" (meaning that there is little assessed property value in the district) and filled with a large proportion of people who are personally impecunious.[133] The standard argument for some form of equalization runs like this: If local property taxes largely determine school funding at the district level, then the system operates to the disadvantage of those in "poor" districts (with the notions of personal poverty and "property poverty" typically conflated), because they possess a thinner property-tax base.[134]

If, in fact, many poor people live in "property rich" districts, such as districts containing concentrations of expensive commercial and industrial property, then this argument loses its force. Indeed, tax-base equalization would require redistribution away from those poor individuals who happen to be located in property-rich school districts and toward relatively wealthier people who may happen to reside in districts containing less

manifestation of voluntary exchange of local amenities for fiscal and employment rewards" (citation omitted)).

131. *Id*. at 133-35.

132. *See id*. at 133-34; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 23 (1972) (observing that "there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts").

133. *See, e.g.*, *Rodriguez*, 411 U.S. at 11-13 (contrasting the income levels and tax bases of the appellees, who hailed from Edgewood Independent School District, with those prevailing in nearby Alamo Heights).

134. *See* FISCHEL, *supra* note 1, at 146-48 (discussing this litigation strategy).

property wealth.[135] The fact that the rich and the poor do not correspond neatly to property-rich and property-poor school districts thus gravely compromises the tax-base equalization argument, and Fischel explains this with extraordinary clarity and force. This does not, however, change the fact that extremely serious problems of educational inequity remain that *do* tend to correspond strongly to socioeconomic status.[136] Yet even if we were to assume, counterfactually, that every school district had access to an equivalent amount of property wealth per pupil, local autonomy would continue to generate educational inequities. The tax base alone does not tell the whole story.

The first important fact to note is that school districts in a given metropolitan area tend to be stratified along socioeconomic lines, so that poor children are frequently concentrated in majority-poor districts.[137] Because of this, rich children and poor children who live in school districts containing exactly the same amount of assessed property wealth per pupil will, nonetheless, generally be in *different* districts from each other—and hence will not encounter the same educational environments. Poor children who are members of minority groups are especially likely to attend school with other poor children.[138] Property-poor districts that contain high concentrations of poor children face not only a strapped tax base, but also a very troubled user pool that manifests all of the difficulties associated with concentrated poverty.[139] More money might help, but it might not help very much.[140] What is truly needed is for the user pool (the students and their parents) to be either transformed from within or buttressed from without.[141]

135. For example, well-off people might reside in areas containing nothing but residences, resulting in a relatively low tax base. *See id.* at 134 (noting that some jurisdictions that were required to serve as "donors" in New Hampshire's equalization scheme were made up of people whose median household income was below the state median).

136. *See, e.g.*, Diana Jean Schemo, *Neediest Schools Receive Less Money, Report Finds*, N.Y. TIMES, Aug. 9, 2002, at A10 (discussing a report released by the Education Trust indicating that, in most states, school districts containing larger numbers of needy students receive lower amounts of school funding from state and local sources).

137. *See* Ryan & Heise, *supra* note 109, at 2096 (citing a recent study that "revealed that most poor primary school students are clustered in majority-poor districts").

138. David Rusk, *Overcoming America's Core Problem: Concentrated Poverty*, *in* CITIES IN THE 21ST CENTURY 14, 17 (Urban Land Inst. ed., 2000) ("If you are poor and black, the odds are three out of four that your children will be surrounded by other poor schoolchildren."). Poor white children in urban areas are much more likely to attend school with middle-class peers. *See id.* at 16-17.

139. *See* Ryan & Heise, *supra* note 109, at 2103-06 (discussing the negative impact of concentrated poverty on educational outcomes and the role of peer-group effects in generating these results).

140. *See id*. at 2106 (discussing the disappointing track record of attempts, through increased funding, to improve educational achievement in schools serving impoverished populations).

141. Such a transformation could take place among the membership of the existing user pool through, for example, the adoption of norms favoring quality-enhancing behaviors, or it could involve an influx of quality-enhancing users. *See* Fennell, *supra* note 108, at 64-66 (discussing

In contrast, the well-off children who live in districts with relatively low amounts of property wealth are likely to attend school with other well-off children and to have the benefit of a concerned, engaged, easy-to-serve user pool. Through peer effects, children in these districts can help each other learn. Because these students are relatively easy to teach, having internalized various forms of "school-readiness" from their families, the best teachers are likely to be attracted to these districts and to work there for less money.

The same analysis serves to distinguish the situations of the poor who live in property-rich districts from those of the rich living in property-rich districts. The former are more likely to live cheek by jowl with unpleasant industrial and commercial uses (which they put up with for the tax base) and to attend school with other poor children. The latter are more likely to live next to either inoffensive commercial uses (pricey boutiques) or other wealthy people and to attend school with other well-off children.

Thus, even when poor children are living in property-rich districts, they are unlikely to get access to a high-quality user pool; in contrast, the wealthy typically have access to such a user pool regardless of the relative amount of property wealth contained in their tax bases. Moreover, the well-off get more education for their money, because, thanks to the deductibility of local property taxes, they do not bear the full cost of their local public goods.[142] The poor, in contrast, must shell out a full dollar for each dollar's worth of benefits.[143] The resulting distributive disparities outpace the self-correcting tendencies predicted by economic theory. This should come as no surprise when one recognizes that the well-off are helped by two forms of government intervention: exclusionary power, which enables them to harness the benefits of pooling together, and tax subsidies, which keep them from paying full price for the local public goods they consume.

The results are not only unfair but also inefficient. This becomes apparent when we recognize exclusion as a mechanism through which a community can externalize some of the costs associated with benefits that it

various ways of achieving a "critical mass" of quality-enhancing users in a given user pool); *see also* Ryan & Heise, *supra* note 109, at 2107-08 (discussing the potential for improved educational outcomes through the movement of students into different peer groups).

142. *See* Voith, *supra* note 62, at 9 (noting that "[i]n high-income communities, property tax deductibility lowers the cost of providing local amenities, such as schools and parks, that are financed by property taxes," and providing an example in which residents in a 36% tax bracket could supplement local educational spending by $1 million at a price of only $640,000). The highest federal income tax bracket is 38.6% for 2002 and 2003; it will drop to 37.6% for 2004 and 2005, and to 35% starting in 2006. *See* Economic Growth and Tax Relief Reconciliation Act of 2001 § 101(a), I.R.C. § 1(i)(2) (West 2002).

143. *See* Voith, *supra* note 62, at 9 (explaining that "[f]or a community composed of moderate-income residents who find it most advantageous to use the standard deduction, the local residents would pay the full $1 million for school funding" in order to receive $1 million in benefits).

enjoys. Tiebout's model was never equipped to deal with spillovers between communities in a metropolitan area,[144] and Fischel's Tiebout-inspired model exhibits the same limitation. Such models conceive of each municipality as a closed system, much like a private club. Yet no local government in a metropolitan region can operate as a hermetically sealed entity. If a locality can inflict negative externalities on neighboring communities, or if a locality can enjoy positive externalities generated by a neighboring community without paying for them, the decisions that homeowners make to maximize the value of their own homes within their fragmented communities no longer can be expected to correspond to the social optimum.

For example, homelessness imposes costs on communities. Use of local governmental power to successfully exclude the homeless means displacing onto one's neighbors the costs associated with the homeless population.[145] Likewise, public education rather clearly generates externalities across an entire metropolitan region, not just within a given school district. If some students in a given metropolitan region are harder to educate than others, one obvious self-serving move is to get another locality to take on the costly job of educating them—thereby keeping them out of one's own district so that they do not drag down standardized test scores[146] or dilute educational quality through peer effects.[147] It is also fairly easy to accomplish, in at least a rough fashion, given the well-established links

144. Tiebout's model starts with the assumption that the goods and services provided by local governments "exhibit no external economies or diseconomies between communities." Tiebout, *supra* note 15, at 419. When considering the effects of relaxing this assumption, he observes that "[i]n cases in which the external economies and diseconomies are of sufficient importance, some form of integration may be indicated." *Id*. at 423 (citation omitted).

145. *See* Robin Law, *"Not in My City": Local Governments and Homelessness Policies in the Los Angeles Metropolitan Region*, 19 ENV'T & PLAN. C: GOV'T & POL'Y 791, 812 (2001) (finding, in a study of municipal policies toward the homeless in the Los Angeles area, "some evidence of interjurisdictional burden shifting through avoidance and displacement").

146. Falling test scores could mean falling property values, as a result of capitalization. *See* FISCHEL, *supra* note 1, at 60-61 (discussing capitalization of school quality and the tendency of homebuyers to "gravitate toward schools with higher test scores").

147. Fischel correctly notes that the presence of peer effects could keep the movement of individuals among various communities from being a zero-sum game from a societal standpoint. *Id*. at 69-70; *see also* Fennell, *supra* note 108, at 17-22 (exploring this point). But the mixing of high- and low-ability students still generates winners and losers, and we would not expect one group to accept losses voluntarily simply because those losses are outweighed by gains to another group. Fischel elides this point when he suggests that "judicious mixing of students makes for a better education," FISCHEL, *supra* note 1, at 70, but the study he cites in support of that proposition presents the conflicting interests very clearly. *See* Vernon Henderson et al., *Peer Group Effects and Educational Production Functions*, 10 J. PUB. ECON. 97, 105-06 (1978) (estimating that when strong and weak students are mixed together, about half of the achievement gains of the weaker students come at the expense of more able students, and observing that "[i]t is quite unlikely that the parents of more able students will be easily persuaded to sacrifice the achievement levels of their children in order to raise the performance of less able students," at least in the absence of special programs that also benefit their children).

between socioeconomic status and educational achievement. The locality simply screens out the poor by adopting zoning restrictions that permit only those housing types and sizes attainable by the relatively well-off.

To the extent that another community bears the shifted costs, exclusive localities can free-ride on the positive externality this generates for them. Everyone throughout the metropolitan region benefits when, for example, difficult-to-educate children are educated or homeless people receive necessary assistance. And, to the extent that these needs go unaddressed, each exclusive locality bears only a portion of the costs in the form of regional spillovers. These dynamics lead homeowners who are interested only in maximizing their home values to make decisions that depart from the social optimum.

Fischel acknowledges the potentially confounding role of externalities but suggests that longstanding symbiotic relationships among localities in a given region generally operate to sustain strong norms of reciprocal good dealing and to restrain self-serving conduct.[148] While this may be true in the context he discusses (landfill placement),[149] it appears to be less true in contexts that involve choices about including or excluding people. This is in part due to the slippery and intangible nature of the externalities involved in such settings, which are sometimes not even recognized *as* externalities.[150] But even more important is the rhetoric of local governance, which denies that any individual outside a community could have any claim on resources within the community. Inquiries into how the individual ended up outside the community in the first place are shut down rapidly; we are assured that the patterns of stratification we see in our metropolitan areas are merely the result of individual consumer preferences. In this manner, a locality can effortlessly deflect any suggestion that it is obligated to pay for the burden that its exclusion has placed on another community.[151]

148. *See* FISCHEL, *supra* note 1, at 202-04 (discussing the role of norms and informal patterns of cooperation and citing ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991)).

149. *See id*. at 184-206 (discussing the role of relationships between local governments in matters such as landfill placement).

150. For example, localities that successfully keep the homeless out of their jurisdictions may not perceive their actions as having created any externalities. *See* Law, *supra* note 145, at 797 (finding, based on interviews with local government officials, "a pervasive commonsense understanding that homelessness was the responsibility of those places where homeless people were currently located"). Likewise, education has an interesting dual character, serving both as an item of individual consumption and also as a source of important societal spillovers. There is sometimes a tendency to focus on the benefits that education yields to individual consumers (children attending a particular school, for example) and to ignore the "public good" aspects of education provided in the form of an educated populace. *See* BURTON A. WEISBROD, EXTERNAL BENEFITS OF PUBLIC EDUCATION 3 (1964) (noting economists' relative neglect of the external benefits produced by education).

151. *See* Schragger, *supra* note 52, at 422 (arguing that "[t]he relevant externality *is* exclusion, which is embedded in the structure of local government").

III. REFORMING LOCAL GOVERNMENT

Fischel does not contend that local government works perfectly. He acknowledges that homevoters acting in their own self-interest can bring about bad results like exclusionary zoning and metropolitan sprawl. The answer, according to Fischel, lies not in stripping localities of their power or shifting power upward to regional or state authorities, but rather in reshaping homevoter-led local decisionmaking through the judicious use of a variety of carrots and sticks. In the closing pages of the book, he sketches the basics of his program of "tough love" for local government.

In this last Part, I will discuss and critique Fischel's suggested reforms as they relate to the distributive issues that have been the focus of this Review. Fischel's proffered solutions address these issues in three ways: by reducing homevoter risk, by reducing homevoter power, and by altering homevoter preferences.

A. *Reducing Homevoter Risk*

Fischel recognizes that the disproportionate importance of the home in the pocketbooks and imaginations of homeowners can have negative effects. "Indeed," he says, "the main problem with homevoters is that they care too much about the value of their homes."[152] Having all of one's eggs in a single basket makes people unduly protective of that basket and surrounds one's civic engagement with an aura of fear.[153] Because of the large stake that each homeowner has in her home's value, almost *any* risk of a catastrophic outcome becomes unbearable.[154] This makes homeowners skittish about any proposed change, no matter how apparently innocuous.

Fischel's suggested solution is to offer homeowners a form of insurance against neighborhood decline modeled on the "assurance" programs pioneered in Oak Park, Illinois.[155] As Fischel recognizes, this sort of

152. FISCHEL, *supra* note 1, at 262.

153. Fear rarely brings out the best in people. *See, e.g.*, EDMUND BURKE, A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL 57 (James T. Boulton ed., Routledge & Kegan Paul 1958) (1757) ("No passion so effectually robs the mind of all its powers of acting and reasoning as fear."). *See generally* PHILIP FISHER, THE VEHEMENT PASSIONS 109-31 (2002) (discussing the role of "mutual fear" in society).

154. *See* FISCHEL, *supra* note 1, at 9-10; *see also* DAVID HUME, A TREATISE OF HUMAN NATURE 444 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1739-1740) ("We find that an evil, barely conceiv'd as *possible*, does sometimes produce fear; especially if the evil be very great. . . . The smallness of the probability is compensated by the greatness of the evil; and the sensation is equally lively, as if the evil were more probable.").

155. FISCHEL, *supra* note 1, at 268-70; *see also* Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 2005-07 (2000) (discussing the use of home-equity insurance to stem panic selling in changing neighborhoods).

insurance presents many conceptual and design difficulties that make its widespread implementation questionable.[156] There is also reason to believe that such insurance works best to keep a favorable baseline situation (such as an integrated neighborhood) from unraveling into an unfavorable situation (such as resegregation). In that context, the insurance serves a purpose analogous to FDIC insurance by reassuring people that their money is safe where it stands—in their current homes. Indeed, the Oak Park home-assurance program was invented to prevent panic selling in a changing neighborhood—the neighborhood equivalent of a run on the banks.

Fischel does relate reports of some successful uses of home-value insurance in Chicago to reassure homeowners and to get them to accept new development.[157] But it is not clear that this type of insurance could be expected to make homeowners in exclusive, wealthy communities welcome the introduction of low-income housing units.[158] For NIMBY-minded homeowners, the offer of development coupled with insurance is likely to sound about as attractive as an offer of fire insurance from someone who proposes to operate a blowtorch in one's living room. Even if the insurance were provided free of charge to the homeowner, it is unclear why the homeowner would have an incentive to let in the use, if he or she had the power to exclude it costlessly.[159] And insurance that *overcompensated* homeowners for any losses they suffered would bring in its train exaggerated versions of the usual moral hazard problems associated with insurance. Moreover, to the extent that the insurance did make people stop paying attention to threats to their home values (or made them actively attempt to make those values drop), the virtues associated with the homevoter hypothesis would be lost.

Nevertheless, risk reduction of the type Fischel has in mind could make sense if undertaken in conjunction with some other structural change that alters either the preferences or the power of homeowners, or both. Insurance could help prevent the gains achieved through other means from being undone through patterns of flight. If risk reduction does seem like a sensible idea, however, it also makes sense to scrutinize other factors responsible for the existing levels of risk. To the extent that tax policy and other malleable factors systematically increase the importance of the home

156. FISCHEL, *supra* note 1, at 269-70 (noting the difficulty of establishing a baseline against which to assess whether an insured loss has occurred and the moral-hazard problems that might stem from such insurance).

157. *Id.* at 270, 278-79.

158. *See id.* at 279 (observing that "[h]igh transaction costs might preclude a general home-equity program to deal with suburban resistance to higher-density development").

159. *Cf.* Bell & Parchomovsky, *supra* note 155, at 2008 (noting that home equity "insurance comes at a price, while the result it guarantees may be accomplished costlessly").

in the homeowner's portfolio, the possibility of addressing those factors should not be neglected.

Another possibility that bears investigation would be to allow a homeowner's tax bill to reflect both capital gains and capital losses from home sales, with generous carry-over provisions that would allow earlier losses to offset later gains, and vice versa. The idea would be to allow the homeowner's serial ownership of individual homes to provide, in some measure, the diversification that is presently lacking in her portfolio. Such a change also would directly reduce the level of risk by blunting the best and worst outcomes. For other investments, the "highs" experienced from a capital gain are dampened somewhat by the tax, while the "lows" experienced from a capital loss are softened somewhat by the ability to use those losses to offset gains.[160] This compression of the range of possible outcomes does not occur in the context of homeownership. The highs that go with home appreciation are not trimmed by taxation, and there is no tax break to soften the experience of a capital loss.[161]

B. *Reducing Homevoter Power*

Another set of reforms that Fischel discusses would withdraw certain exclusionary powers from the homeowner's present bundle. Fischel suggests that the Takings Clause be used to crack down on exclusionary zoning.[162] He also suggests using the doctrine of substantive due process to limit the powers of local government.[163] These are worthy suggestions, but they face at least three sets of obstacles. First, as a practical or political matter, it may be difficult to convince courts to withdraw from homeowners the right to exclude different housing types, such as apartment buildings, from areas presently zoned for single-family dwellings. While courts or legislatures may be willing to rein in some of the more extreme forms of large-lot or large-footprint zoning, and some may go further to protect the interests of lower-income people,[164] the types of widespread changes that would meaningfully break down socioeconomic divisions are unlikely to be forthcoming. This is particularly true given the arsenal of pretextual or

160. *See* ROSEN, *supra* note 61, at 395-96 (explaining that a tax on capital gains that permits losses to be fully offset "tightens the dispersion of returns—the highs are less high and the lows are less low—and hence, reduces the risk").

161. I.R.C. § 121 (2000) (exempting capital gains on qualifying home sales from taxation); Treas. Reg. § 1.165–9(a) (as amended in 1964) (disallowing capital losses from sales of personal residences).

162. FISCHEL, *supra* note 1, at 272-75, 283-85.

163. *Id.* at 282-83.

164. *See id.* at 282 (discussing decisions by the Pennsylvania Supreme Court striking down zoning ordinances prescribing minimum lot sizes in excess of one acre, as well as ordinances excluding apartment buildings from suburban communities).

quasi-pretextual rationales that homeowners can employ to keep out development—such as a concern for wetlands or a concern for farmers.[165] The removal of certain strands of exclusionary zoning power may push communities to resort to subterfuge or to new ways of fencing out the poor that generate even larger distortions.[166]

Second, a remedy that addresses suburban exclusion without also addressing the concentrated inner-city poverty that has resulted from such exclusion can provide only a partial solution. If a sweeping decision were handed down tomorrow by the U.S. Supreme Court that invalidated all exclusionary zoning measures (including zoning ordinances that are pretexts for such exclusion), low-income people could indeed be expected to start entering the newly opened suburbs in increasing numbers. But lifting exclusionary zoning risks leaving even more depleted user pools behind in the urban core, unless all of the people presently occupying impoverished areas could be completely dispersed into more affluent areas—a result that seems both unlikely and undesirable. The lifting of exclusionary measures must, therefore, be matched with efforts to improve areas of concentrated poverty (by either attracting more quality-enhancing users into the area, or by concentrating resources on these areas to improve them from within).[167] This is not to say that exclusionary land-use practices should be permitted to continue, but only to point out that changes in such exclusionary practices must be coupled with other measures to strengthen the areas in which the excluded have long been concentrated.

The third set of impediments is possibly the most daunting. These reform discussions are taking place in the lengthening shadow of private alternatives. Private schools have long been an option for people dissatisfied with the public schools. Now homeowner associations, which use private covenants to do the work of exclusion traditionally handled through zoning, are becoming increasingly prevalent and soon may be the dominant form of ownership in many parts of the country.[168] Any solution

165. *See id*. at 270-72 (discussing the potential for exclusionary zoning to masquerade as land-use decisions motivated by a concern about farms or wetlands).

166. *See* Stiglitz, *supra* note 78, at 46 (observing that "introducing further restrictions on the set of exclusionary devices (*e.g.*, not allowing certain zoning requirements) may simply lead to the substitution of less efficient and desirable exclusionary devices").

167. *See* Fennell, *supra* note 108, at 85-87.

168. In 1999, the Community Associations Institute estimated that there were 231,000 community associations in the United States, housing 47 million Americans; this form of housing constituted 15% of all U.S. housing. CMTY. ASS'NS INST., COMMUNITY ASSOCIATIONS FACTBOOK (1999), *excerpted at* http://www.caionline.org/about/facts99.cfm. In many large metropolitan regions, community associations dominate the new housing market. *See* NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 112 (1998) (noting that 70% of new housing in Los Angeles and San Diego counties is within residential community associations and that such communities "make up more than 50 percent of new home sales in the fifty largest metropolitan areas"). For background on the history and recent

that impacts only the "public" face of exclusion will not be a complete solution, or perhaps even a very important or lasting solution, in a world where similar limits are not placed on private communities and other private arrangements for securing the goods and services traditionally provided through local government.[169]

By noting these difficulties, I certainly do not mean to suggest that we should just leave well enough alone. The generally unquestioned ability of the well-off to fence out the poor has led to unacceptable societal results that call out for a remedy. But it is unlikely that the damage can be undone by tinkering with a few policies here and there, or even by convincing the U.S. Supreme Court to take a slightly harder line against exclusionary zoning. Rather, the kinds of radical changes in power arrangements necessary to undo entrenched patterns of residential stratification and to equalize opportunities across entire metropolitan communities would strike at the heart of a homeowner-controlled model of local governance.

C. *Changing Homevoter Preferences*

Another set of tactics Fischel explores involves changing what the homevoters want.[170] To the extent this is feasible, it is a powerful and direct way of achieving change. If a mix of income levels is thought to improve the education of the children of the well-off, then rational parents with mobility and choice will do their best to get into such mixed pools. If socioeconomic diversity is valued by enough wealthy homeowners, it will begin to add value to homes, and rational homevoters will seek it out. The fact that people are starting to express at least limited preferences for greater heterogeneity would seem to provide some reason for cautious optimism.[171]

explosive growth of this form of community, see Robert H. Nelson, *Zoning by Private Contract*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 157, 159-66 (F.H. Buckley ed., 1999). The appropriate limits on the powers of these "private governments" have been the subject of much discussion. *See, e.g.*, Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375 (1994); Nelson, *supra*, at 163-65.

169. *See, e.g.*, Berry, *supra* note 29, at 271 (suggesting, based on a study comparing segregation patterns in Houston and Dallas, that deed covenants may achieve results similar to those produced by zoning).

170. *See* FISCHEL, *supra* note 1, at 277-83 (discussing "carrots" of developer side-payments and public school subsidies attached to low-income students, and "sticks" involving shaming of exclusionary behaviors).

171. Fischel notes that a growing taste for diversity can be seen in the admissions policies of private schools and colleges. *Id*. at 70. Recent studies also suggest that diversity improves higher education. *See, e.g.*, Expert Report of Patricia Gurin, Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-CV-75321), Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928), *reprinted in Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 241,

The problem is that rational self-interest lies behind at least some portion of the exclusionary preferences that are currently being expressed by the well-off. The introduction of lower-income students tends to raise, not lower, educational costs for the well-off, and the introduction of enough low-income students threatens a drop in standardized test scores and in the quality of the education consumed by the well-off. The introduction of large numbers of low-income people into a community also may be positively correlated with other neighborhood effects that could depress home values. These are uncomfortable facts that are rarely expressed out loud, but they must be confronted if we are really interested in changing the distributive consequences of local governance. As a whole, all communities become worse off when pockets of entrenched poverty threaten equality of opportunity and spread disutility in the form of crime and squandered human capital across the metropolitan area. But it is not in the interest of any individual community to bear the costs of alleviating that poverty through more inclusive policies.

One way of changing what people want is to alter the payoffs they confront by attaching money to the more inclusionary choice. Fischel proposes doing this in the context of school funding by attaching additional increments of public school funding to poor children attending local public schools.[172] Because a district would be able to access this additional funding only by bringing poor children within its attendance zone, Fischel argues that this could lead to more inclusive land-use decisions.[173] Of course, Title I of the Elementary and Secondary Education Act of 1965 has long provided additional funding to public schools based on the number of low-income students in attendance.[174] However, local educational agencies do not become eligible for this form of federal funding unless they educate a minimum number of low-income children (at least ten children, and at

363-425 (1999). This suggests that the well-off might ultimately find it in their own interest to make more inclusive choices. It is important to recognize, however, that private schools and colleges are institutions that can carefully prescreen all entrants on numerous dimensions before allowing them in and can readily eject any students that prove problematic. We would not necessarily expect to see the same preferences for socioeconomic diversity expressed in a context lacking these controls. *Cf.* Holme, *supra* note 76, at 196 (discussing the views of parents who "said that they did not mind diversity in their child's middle school, as long as it was the 'right type' of diversity").

172. FISCHEL, *supra* note 1, at 279-81. Significantly, Fischel is not advocating a voucher program that would attach funding to the child without requiring the child to live within the school district. *See id.* at 280. As Fischel explains, the homevoter hypothesis requires that everyone in the community have an incentive to support the public schools; a voucher program removes this incentive from the childless, because their tax dollars are no longer necessarily going to the local public schools. *Id*. at 280-81.

173. *Id*. at 279-80.

174. The current version of this statutory provision is codified at 20 U.S.C.A. § 6333 (West Supp. 2002).

least two percent of the total school-age population in the agency's jurisdiction).[175] Fischel's proposal would contain no such minimums.[176]

A problem with this strategy (which may also explain why Title I funding has failed to generate very impressive results) is that money seems to make less difference to educational quality than does the membership of the student body.[177] A rational school district may do better for itself by excluding low-income students even when those low-income students come with substantial numbers of dollars attached. Rather clearly, wealthy people would have no incentive to draw lower-income students into the community unless doing so generated a surplus for them—that is, unless the subsidy attached to each student was larger than the marginal cost increases associated with educating that student.[178] Moreover, because of peer effects, low-income students are likely to become increasingly costly to educate as their numbers increase (at least above some critical threshold), meaning that wealthy schools are likely to receive a decreasing marginal surplus from the acceptance of each additional low-income student. If school districts can become eligible for the extra funding without educating any minimum number or percentage of students, they might choose to pursue an optimizing strategy that involves permitting only a few low-income housing units into the district. And unless every low-income student can gain access to a well-off group of peers, this will mean leaving impoverished user pools behind.

Another alternative Fischel discusses involves facilitating side-payments by developers (whether in cash or in kind) to communities that agree to accept new development.[179] As the tale of the Bighouses and the Smallhouses suggested,[180] there are multiple obstacles to achieving greater heterogeneity, but even the easiest of these to overcome—the fiscal drain associated with the introduction of cheaper housing units—requires that money change hands rather freely. To the extent that existing preferences create additional obstacles to heterogeneity, allowing money or other valuable amenities to flow more freely becomes even more important. The

175. *Id.* § 6333(b).

176. *See* FISCHEL, *supra* note 1, at 280.

177. *See* Ryan & Heise, *supra* note 109, at 2106-07 (discussing the relative failure of additional funding, including Title I funding, to increase achievement levels in predominantly poor schools, and the relative success of strategies that provide poor students with access to a wealthier peer group).

178. *Cf. id.* at 2125 (explaining that, in order for education vouchers to be acceptable to a self-interested suburban public school district, "the voucher amount not only will have to ensure that the district does not lose money, but also will have to ensure that the district is compensated for the extra costs associated with educating poorer students").

179. *See* FISCHEL, *supra* note 1, at 277-78 (discussing such developer side-payments); *see also supra* note 99 and accompanying text.

180. *See supra* text accompanying notes 93-100.

use of side-payments can be successful in overcoming resistance to, and even generating enthusiasm for, uses that might otherwise be deemed undesirable. For example, the town of Greenburgh, New York, recently cut a deal to allow a homeless shelter, whose lease had previously been limited to ten years, to stay in the community in exchange for annual payments of $1.6 million and other concessions.[181] Greenburgh's situation also attests to the fact that residents' attitudes toward a use can change as they gain experience living with the use. The residents had planned to move the homeless out of the community at the end of the initial ten-year lease, but after those ten years passed uneventfully, the prospect of allowing the homeless to stay (for a price) appeared quite appealing.[182]

The elimination of judicial doctrines that constrain or cast doubt on the legitimacy of deal-making between local governments and developers would remove obstacles to more inclusive land-use policies.[183] Just as important as facilitating the flow of money and amenities, however, is ensuring that development of low-income housing remains attractive to developers. Here, the use of government subsidies to developers who build low-income housing would make sense. This would spread the costs that the developers must incur in overcoming resistance to low-income housing more broadly across society. An attractive source of funding for such subsidies would be the tax subsidies that wealthy homeowners are currently receiving.[184] Here again, however, it is important that any dispersal of the poor into suburban communities be matched by either an influx of the more well-off into the user pools left behind or by intensive programs to strengthen those user pools from within.

Another way of influencing what homevoters want involves the use of norms and shaming sanctions. If exclusion becomes socially unacceptable (and if euphemisms for it are unmasked and condemned with equal fervor) then exclusionary behaviors can be expected to decline. Like money-based strategies, norm-based strategies seek to change the payoffs facing homeowners by making the inclusive choice look better (or by making the exclusive choice look worse). But norms require widespread acceptance in order to take hold, and it is unclear who could be expected to take the leadership role in establishing and entrenching these norms among the well-off.[185] The less well-off, and those who advocate on their behalf, could try

181. David M. Halbfinger, *Yes, in Our Backyard: A Shelter's New Value*, N.Y. TIMES, Feb. 24, 2002, at A29.

182. *See id*. (quoting a homeowner who explained that, contrary to residents' initial expectations, not everyone in the homeless shelter turned out "to be a sex offender or a thief").

183. *See supra* note 99.

184. *See supra* notes 61-69 and accompanying text.

185. *See* Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 10-17 (2001) (discussing the role of "change agents" in promoting new norms); Cass R. Sunstein, *Social*

to get these norms going, but the better-off would likely dismiss such attempts as self-serving gambits to take away the money and power that "belong" to the better-off. More promising is Fischel's suggestion that we allow regional or state authorities to set standards for inclusive behavior, as a way of exerting pressure on those local governments who fall short.[186] Yet even the largely toothless versions of regional or state authority that Fischel has in mind operate in some tension with the model of fragmented local control he endorses.

Ultimately, it is unlikely that efforts at widespread preference change can make much headway within the rhetorical confines of a Tiebout-inspired vision of local government. This approach treats municipalities as the public equivalent of private clubs, delegitimizes claims made upon them by those on the outside, and takes as a given their absolute power to exclude. What is more, it treats choices about joining and maintaining communities as simple exercises of consumer sovereignty. It also ignores several key facts: that individuals begin with different financial resources, that the choices made by fragmented municipalities can generate externalities for an entire metropolitan region, that people have preferences about the other people with whom they wish to pool together, and that these patterns of pooling impact the quality of local public goods. As a result, it does not begin to come to terms with distributive problems.[187]

Tiebout's model of local government is vivid, elegant, and tremendously appealing, and Fischel's elaboration and extension of it in *The Homevoter Hypothesis* is deeply illuminating. But the beauty and appeal of the model should not distract us from the necessary and important work of finding even better ways to model reality. And what is most needed now is an approach that squarely confronts the distributive problems that the Tiebout model leaves unsolved.

CONCLUSION

The Homevoter Hypothesis offers a refreshingly lucid and down-to-earth exploration of the complex economic issues surrounding local politics. Fischel's nuanced and field-tested insights should make this book required reading for anyone who wishes to gain a better understanding of

Norms and Social Roles, 96 COLUM. L. REV. 903, 929-30 (1996) (discussing "norm entrepreneurs" who can help society reach "a 'tipping point' when norms start to push in new directions").

186. FISCHEL, *supra* note 1, at 281-83.

187. *See, e.g.*, Harold M. Hochman, *Individual Preferences and Distributional Adjustments*, 62 AM. ECON. REV. PAPERS & PROC. 353, 359-60 (1972) (discussing the "normative insufficiency of the Tiebout mechanism" given differences in real-world initial endowments that are unalleviated by sorting and clustering).

how local government really operates. His reasoned defense of localism provides a much-needed antidote to the knee-jerk impulse to call in higher levels of government to solve every social problem. Local government holds an important place in the social ecosystem, as Fischel explains, and overriding or dispensing with it is not the costless move that many imagine it to be.

Yet local governance presents some real problems. The problems that loom largest, in my estimation, are those relating to distributive justice. *The Homevoter Hypothesis* presents a fairly reassuring picture of local governance that does not highlight these problems or intimate that solving them could require a radical reconceptualization of local government. Fischel's analysis suggests that our current system of local governance, if somewhat flawed around the edges, is basically sound and certainly better than the other options that have been tried. But if it is indeed true that our current community-based arrangements for providing education and public safety to the poor are the best of what has been tried, this should give us no solace. It means, instead, that we must try harder.

Fundamental change is necessary if we wish to approximate conditions of justice in the provision of local public goods. Fischel's book does not place great emphasis on the need for such change, but by giving us a clearer picture of how local government works, it does a great deal to advance the dialogue concerning the shape that change should take.