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Properties of Concentration

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Abstract

Although collective action problems in spatial association can produce undesirable outcomes like concentrated poverty, policy responses are rarely calibrated to address the underlying scarcities in a flexible or fine-grained manner. This paper examines what it would mean to view problems of spatial association as resource dilemmas. I argue that the rich literature surrounding the allocation and protection of entitlements can and should be used to gain analytic traction on group formation decisions that are capable of producing sustained, problematic spatial concentrations. My analysis centers on a single context: concentrated poverty in metropolitan neighborhoods. However, the article probes outward from that focal point to consider the relationship between property and association more generally and to identify conceptual stopping points for the application of property theory to matters of association. By doing so, I make the case for an appropriately limited notion of associational entitlements.

Properties of Concentration

Lee Anne Fennell†

INTRODUCTION

Concentrated poverty is costly.[1] Indeed, its negative effects on education,[2] safety, and the overall life chances of children may be large enough to outweigh any gains produced at the high end of residential stratification. If this is so, then the process of residential grouping is not a zero-sum game, and collective action problems in residential grouping can produce suboptimal results. Why, then, is it unusual to

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1 See generally, for example, Christopher Jencks and Susan E. Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood*, in Laurence E. Lynn, Jr. and Michael G.H. McGreary, eds, *Inner-City Poverty in the United States* 111 (National Academy 1990). To be sure, the mechanisms through which the effects of spatially concentrated poverty operate are not well understood, and many empirical questions remain. See id. The recent Moving to Opportunity studies, which made moves to lower-poverty areas randomly available to eligible households, offer new insights into this set of questions. See Moving to Opportunity Research, online at http://www.nber.org/~kling/mto/ (visited Oct 17, 2006) (collecting research papers and briefs based on this set of studies). The mixed results found in those studies offer important cautions about the ability to engineer improvements across all life domains by moving families from high-poverty neighborhoods to lower-poverty neighborhoods, but do not negate the body of work establishing that negative consequences are associated with growing up in conditions of concentrated poverty.

2 See, for example, James E. Ryan and Michael Heise, *The Political Economy of School Choice*, 111 Yale L J 2043, 2103 (2002) (observing that "schools of concentrated poverty almost always perform poorly"). Residential groupings in the United States have traditionally determined not only the physical and social environment in which children grow up, but also their school assignments. It is of course possible to break the two components apart, although I do not examine here the advantages and disadvantages of doing so. The possibility that a grant of associational priority in one realm (schooling) might be used as a lever to alter associational choices in another realm (residential neighborhoods) has been interestingly explored by Mechele Dickerson in a recent book review. See generally A. Mechele Dickerson, Book Review, *Caught in the Trap: Pricing Racial Housing Preferences*, 103 Mich L Rev 1273 (2005), reviewing Elizabeth Warren and Amelia Warren Tyagi, *The Two-Income Trap: Why Middle Class Mothers and Fathers are Going Broke (with Surprising Conclusions That Will Change Our Children's Futures)* (Basic 2003). See note 129 for a discussion of Dickerson's proposal.

approach housing patterns—or, indeed, *any* problem of spatial grouping—as a resource dilemma[3] amenable to the tools of property theory?[4]

To put the point another way, why has the amenity of preferred spatial association not developed into a property interest in its own right?[5] People spend large sums of money to locate themselves in the "right" neighborhoods and, conversely, incur significant costs to keep away the "wrong" neighbors.[6] Yet only rarely are these associational purchases priced to take account of their external costs. New Jersey's Regional Contribution Agreements (RCAs), which permit municipalities to buy their way out of state-imposed low-income housing obligations, represent an interesting (if flawed) exception.[7] What is most sur-

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3 See Part I.B (discussing resource dilemmas and explaining the sense in which selectivity in association might qualify as a "resource" vulnerable to such dilemmas).

4 Many property scholars are deeply concerned with exclusionary land use controls and their impacts on residential patterns. But the idea that property itself offers tools for grappling with the dynamics of exclusion (rather than simply serving as the context in which such problematic exclusion can be observed) has received only scattered attention. For example, some scholarship has raised the possibility of addressing matters of association through subsidies, side payments, or other compensation schemes. See note 21. Joseph Singer has also discussed the idea of employing property law language to express the rights that antidiscrimination law provides individuals against property owners. See Joseph William Singer, *Entitlement: The Paradoxes of Property* 39–44 (Yale 2000). A distinct line of work considers the possibility of configuring or assigning entitlements in ways that would encourage existing groups to maximize the surplus generated by their interactions. See, for example, Amnon Lehavi, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 Urban Law 1, 4–8 (2004) (discussing the possibility of tailoring takings remedies to recognize groups' rights in local public goods that depend upon their cooperation); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 Duke L J 75, 76–78 (1998) (proposing "block-level improvement districts"). A new paper by Sheila Foster focusing on social capital within cities also shares important ground with the approach taken here. See Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 Notre Dame L Rev (forthcoming 2006), online at http://ssrn.com/abstract=899617 (visited Oct 17, 2006) (conceptualizing social capital within cities as a common resource with spatial dimensions and discussing strategies for protecting that resource, including the use of property rights).

5 See, for example, Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am Econ Rev 347, 354 (1967) (positing that property rights emerge when resources become valuable enough to make recognizing such rights efficient); Charles A. Reich, *The New Property*, 73 Yale L J 733, 774–87 (1964) (proposing that government benefits be recast as forms of property, given their ubiquity and power).

6 An "exclusive" neighborhood or municipality might be defined as one that has in place legal and political mechanisms capable of keeping out unwanted residents. To the extent such exclusivity is capitalized into the home's value, exclusivity makes up part of the home's purchase price. See Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 Fordham Urban L J 23, 55 (1996) (discussing the "exclusivity premium" that attaches to homes in exclusive neighborhoods). Homeowners may also incur political and legal costs to maintain that exclusivity over time. See generally William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* 4–18 (Harvard 2001) (suggesting that homeowners' politics at the local level are largely driven by the desire to preserve the value of their homes).

7 RCAs were formulated pursuant to New Jersey's Fair Housing Act, which was enacted in the wake of the *Mount Laurel* litigation. See *Southern Burlington County NAACP v Township*

prising about RCAs is not their existence or the well-deserved criticisms they have attracted, but rather that there have been so few attempts to improve on them or even to recognize the full menu of creative alternatives that transferable associational rights might open up.

There is a telling gap where property meets up with questions of human association. Law is inevitably implicated in associational outcomes, even when it does nothing more than enable or disable choices that exhibit logical interdependence.[8] Yet, property law contains no doctrine capable of accounting for the surplus or deficit that flows from individuals' residential association with others. As a result, property law possesses no tools for resolving conflicts over group formation or forestalling undesirable concentrations. Roland Bénabou raises some of the questions that property theory has left unanswered when he asks "[w]ho owns the assets, property rights or legal rights which allow stratification to occur and earn the rents which it creates?"[9] I argue here that the rich literature surrounding the allocation and protection of entitlements[10] can and should be used to gain analytic traction on group for-

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of Mount Laurel, 67 NJ 151, 336 A2d 713, 731–32 (1975) (*Mount Laurel I*) (finding that a municipal zoning scheme violated the state constitution by impermissibly excluding low income housing); *Southern Burlington County NAACP v Township of Mount Laurel*, 92 NJ 158, 456 A2d 390, 421 (1983) (*Mount Laurel II*) (prescribing remedies); *Hills Development Co v Township of Bernards*, 103 NJ 1, 510 A2d 621, 642 (1986) (*Mount Laurel III*) (finding New Jersey's Fair Housing Act consistent with state constitutional requirements). See also note 131 and accompanying text. Under RCAs, a "sending" jurisdiction can pay another jurisdiction to take on up to half of its "fair share" affordable housing obligation. See NJ Stat Ann § 52:27D-312 (West 2001 & Supp 2006). For example, taxpayers in Tewksbury, New Jersey "agreed to pay an additional $800 a year in taxes for six years to send 45 [low-income] units to Perth Amboy" pursuant to an RCA. Mark Alan Hughes and Therese J. McGuire, *A Market for Exclusion: Trading Low-Income Housing Obligations under* Mount Laurel III, 29 J Urban Econ 207, 213 (1991). The Council on Affordable Housing (COAH), the agency that administers New Jersey's Fair Housing Act, maintains a list of approved RCAs. See http://www.state.nj.us/dca/coah/ (visited Oct 17, 2006).

8 That group formation is often strongly interdependent has been vividly emphasized by Thomas Schelling. See Thomas C. Schelling, *Micromotives and Macrobehavior* 137–66 (Norton 1978). Choices not only limit possible later choices but also can set in motion a chain of choices that create further constraints on possible groupings or, alternatively, that offer new grouping opportunities. See id at 143–47.

9 Roland Bénabou, *Equity and Efficiency in Human Capital Investment: The Local Connection*, 63 Rev Econ Stud 237, 247 (1996). See also Foster, 82 Notre Dame L Rev (cited in note 4) (emphasizing the need to account for social capital in thinking about urban land and observing that "[c]urrently we have no mechanism in land use law and regulation that can provide such an accounting").

10 The catalyst for work in this area was Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089 (1972). A voluminous and expanding literature builds on the original framework articulated by Calabresi and Melamed. For example, see generally Keith N. Hylton, *Property Rules and Liability Rules, Once Again* (Boston Univ School of Law Working Paper 05-17, 2005), online at http://ssrn.com/abstract=818944 (visited Oct 17, 2006); Ronen Avraham, *Modular Liability Rules*, 24 Intl Rev L & Econ 269 (2004); Richard R.W. Brooks, *The Relative Burden of Determining Property Rules and Liability Rules: Broken Elevators in the Cathedral*, 97 Nw U L Rev 267 (2002); Ian Ayres and Paul M. Goldbart, *Optimal Delegation and Decoupling in the Design of*

mation decisions that are capable of producing sustained, problematic spatial concentrations.[11]

Property theory, I submit, has been hampered by an attitude toward questions of grouping that is at once skittish and overconfident. Skittish, because matters of association quickly shade into the core concerns of constitutional law scholars and civil rights scholars. Without robust conceptual stopping points in place, talk of "propertizing" association sounds inappropriate, even frightening. Property scholars rarely enter this contested terrain, typically engaging matters of association only obliquely through the interface of land use law.

At another level, property theory is overconfident about association, inasmuch as boundary-exclusion models purport to explain how property interacts with associational choice. Property is presented as an associational envelope of sorts, with hard outer boundaries that exclude the uninvited outside world and protect an invitation-only enclave in which people may mingle at the owner's pleasure.[12] Yet, defending the boundaries of individually owned parcels is not an effective strategy for obtaining the full complement of associational control that people often seek when they buy homes. Property's response, of course, has been to expand the envelope, through both public and private land use controls.

The expanded-envelope metaphor fits imperfectly, however, both because the physical defense of boundaries is rarely a viable strategy for protecting associational resources in communities,[13] and because

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Liability Rules, 100 Mich L Rev 1 (2001); Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 Mich L Rev 601 (2001); Symposium, *Property Rules, Liability Rules, and Inalienability: A Twenty-Five Year Retrospective*, 106 Yale L J 2081 (1997); Louis Kaplow and Steven Shavell, *Property Rules versus Liability Rules: An Economic Analysis*, 109 Harv L Rev 713 (1996); James E. Krier and Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 NYU L Rev 440 (1995); Madeline Morris, *The Structure of Entitlements*, 78 Cornell L Rev 822 (1993); A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 Stan L Rev 1075 (1980); A. Mitchell Polinsky, *Controlling Externalities and Protecting Entitlements: Property Right, Liability Rule, and Tax-Subsidy Approaches*, 8 J Legal Stud 1 (1979).

11 I will use the term "problematic concentrations" to refer to population concentrations that produce undesirable social effects through any of a large number of possible mechanisms, many of which relate only indirectly to the behavior or characteristics of the people who are in the concentrated spatial grouping.

12 See, for example, Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb L Rev 730, 740 (1998) (characterizing the property owner as a "gatekeeper" who has "the power to determine who has access to Blackacre and on what terms"); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L Rev 711, 742–44 (1996) (defining property by reference to the owner's right of exclusion and explaining that that this right "permits one to make a social use of one's property . . . via the *selective* exclusion of others").

13 Gated communities might seem at first blush to employ a boundary defense approach, but the association that occurs inside the gates is mediated less by the physical barrier than by a set of covenants and homeowner association rules that determine the types of structures and

public law concerns are implicated as the zone of control expands. Where simple exclusion fails, governance regimes spring up to manage the associational realm outside of the individual parcel.[14] But these regimes lack the strength and flexibility of true property instruments. Notably, there has been a tendency to rely almost entirely on categorical prohibitions to govern association—whether forbidding entry or forbidding exclusion. These prohibitions are difficult or impossible to adjust and can generate significant externalities of their own. *Alienable* entitlements relating to association make only cameo appearances in the legal and policy literature, leaving their potential to produce gains in equity and efficiency almost entirely untapped.

This Article examines what it would mean to take spatial association seriously as a property problem by recognizing such association as a valuable resource that is vulnerable to collective action problems. Specifically, I argue that it makes sense (both as a positive and a normative matter) to recast association as a distinct property entitlement where patterns of exclusion combine to produce sustained spatial concentrations of poverty. Just as problems of pollution and natural resource preservation have been addressed through innovative property mechanisms, so too could certain problems of association.[15] To meaningfully address problematic spatial grouping patterns, I submit, we need a theory of associational entitlements.[16]

My analysis centers on a single problem: the spatial concentration of poverty in metropolitan neighborhoods. The case for importing entitlement theory into associational matters is perhaps at its strongest in this context, for reasons I will develop below. However, this Article probes outward from that focal point to consider the relationship be-

uses that are permitted in the community. See Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U Chi L Rev 1375, 1383–85, 1396–99 (1994) (noting the kinds of covenants commonly found in private communities and explaining how such restrictions may operate to exclude people with particular characteristics).

14 For work discussing governance regimes as alternatives to exclusion in the management of resources, see generally Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 Va L Rev 965 (2004); Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J Legal Stud S453 (2002).

15 For examples of such property mechanisms, see note 94.

16 The idea that people may have "entitlements" or "property interests" that relate to association is not new, but often this terminology is used without intending to introduce the possibility of transferable interests. See, for example, Pala Hersey, Moore v. City of East Cleveland*: The Supreme Court's Fractured Paean to the Extended Family*, 14 J Contemp Legal Issues 57, 62 (2004) (using the phrase "familial associational entitlements" in connection with the Supreme Court's decision in *Moore v City of East Cleveland*, 431 US 494 (1977)); Singer, *Entitlement: The Paradoxes of Property* at 39–44 (cited in note 4) (observing that civil rights laws might be viewed as granting an easement to enter private property). Some actual and proposed policy mechanisms do involve transferable interests in association, but these are only rarely tied into the theoretical framework of entitlements. See notes 7 (discussing New Jersey's RCAs) and 21 (citing scholarship proposing various transferable interests in association).

tween property and association more generally. For example, I show how property theory can enter the realm of association without tumbling down a slippery slope in which the most intimate and constitutive forms of human association—one's choice of a domestic partner or one's religious affiliation—become propertized objects. Property theory can embrace a limited notion of associational entitlements without doing violence to either the meaning of association or the meaning of property.

Spatially concentrated poverty in metropolitan areas is worthy of attention *as a property problem* for two reasons. First, residential choice presents a spatial grouping interaction that is structured similarly to familiar common-pool resource dilemmas, at least to the extent that it is not zero-sum. While it will often be unclear whether a particular pattern of groupings generates net gains or losses system-wide, concentrated poverty has well-known impacts that make it useful as a diagnostic touchstone.[17] Where concentrated poverty exists and appears to be generated at least in part by exclusive grouping decisions elsewhere in the system, we might suspect the existence of a collective action problem. An entitlement structure capable of detecting and responding to such a problem could prove quite valuable in this setting.

Second, residential settings capable of generating spatial concentrations are, by definition, contexts in which freedom of association objections that might weigh against limits on exclusion are largely absent. This is not because people lack strong preferences about their neighbors, but rather because neighborhoods are formed in a spatially bounded context that exhibits an interesting logical feature: all individuals cannot simultaneously indulge their preferences to *exclude* unwanted others from their immediate presence. To the extent that freedom of association is bound up in the power to form exclusive groups and avoid unwanted association, someone's freedom of association must give way. In these settings, law must decide—and does decide—whose exclusionary preferences prevail.

This observation suggests a more general point: residential associational entitlements already exist, if only implicitly. Where the residential preferences of individuals conflict, the law necessarily determines which choices—and which choosers—shall receive priority in composing neighborhoods and communities. Law determines which compositional

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[17] I do not mean to suggest that areas of concentrated poverty inevitably suffer from particular problems, nor that concentrated poverty has a fixed meaning that is independent of contested definitional choices. See generally, for example, Jennifer Wolch and Nathan J. Sessoms, *The Changing Face of Concentrated Poverty*, online at http://www.usc.edu/schools/sppd/lusk/research/pdf/wp_2005-1004.pdf (visited Oct 17, 2006) (questioning conventional measures of concentrated poverty based on research in southern California).

choices are forbidden or required,[18] as well as which compositional choices are discretionary.[19] Law also determines who shall be allowed to complain about grouping choices[20] and what currencies it shall recognize in bids to control group composition. These determinations are not transparent, however, and typically operate in the background as unacknowledged features of land use policy.

Articulating the structure of existing associational entitlements affecting housing patterns might be interesting in its own right, but this Article is not fundamentally about affixing fancy property labels to familiar arrangements. Rather, by making associational entitlements explicit, I mean to prompt rethinking of existing residential grouping protocols along two lines. First, where grouping arrangements present the potential for collective action problems, assignment and protection of entitlements should be responsive to that fact. Second, existing entitlements in residential association have relied too heavily on inalienability in contexts where transferable interests would offer important advantages. I am not suggesting that transferable rights displace certain kinds of inalienable associational rights, such as those that preclude exclusion on racial grounds, or those that reserve to families the right to determine their internal composition within the household. Rather, I identify a middle ground of associational interests that can be usefully ordered through property entitlements.

Transferable associational entitlements, which could take any of a variety of forms, would provide a targeted means of prioritizing residential selectivity in situations where not all preferences for selectivity can be honored simultaneously. Existing scholarship has already identified some ways to couple payments with associational choices in housing.[21] However, these explorations, as valuable as they have been,

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18 Rather than prohibiting or requiring particular acts of exclusion or inclusion, the law often sets criteria that cannot be used for making decisions about inclusion and exclusion. For example, the federal Fair Housing Act prohibits discrimination based on enumerated protected characteristics. 42 USC § 3601 et seq (2000).

19 Associational choices that are discretionary might represent rights (to be protected, if necessary, by the coercive force of law) or merely privileges (which the law allows, but will not enforce). See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* 36–42 (Yale 1964).

20 See, for example, *Warth v Seldin*, 422 US 490, 502–08 (1975) (holding that a group of low-income plaintiffs lacked standing to challenge a city's residential zoning practices).

21 See, for example, Ronald H. Silverman, *Subsidizing Tolerance for Open Communities*, 1977 Wis L Rev 375, 377 (proposing individual and community subsidies for communities experiencing low-income entry, and individual subsidies for low-income households exiting from segregated areas); James M. Buchanan, *Principles of Urban-Fiscal Strategy*, 11 Pub Choice 1, 13–15 (1971) (discussing strategies to keep "high-income, high-demand" residents from migrating out of urban centers, including various types of cash or in-kind payments); Abraham Bell and Gideon Parchomovsky, *The Integration Game*, 100 Colum L Rev 1965, 2011–15 (2000) (proposing "institutional subsidies" to communities); Robert C. Ellickson, *Suburban Growth Controls: An*

have collectively suffered from appearing in disconnected parts of the legal and economic literature, variously appended to discussions of land use planning, urban public finance, and residential segregation. I hope to mark out associational entitlements as a distinct concept worthy of serious theoretical inquiry by property scholars.

The analysis proceeds in four steps. Part I uses a set of stylized examples involving concentration to work through intuitions supporting associational entitlements. By analogizing to other sorts of common-pool resource dilemmas, I outline the circumstances in which a tragedy of the "associational commons"[22] might occur. Part II makes the case for a propertized solution to associational dilemmas in certain contexts. Part III explores the notion of associational entitlements in residential neighborhoods and examines some possible incarnations of such entitlements, building on the framework pioneered by Guido Calabresi and Douglas Melamed.[23] Part IV considers some of the most important implications of the approach introduced in this Article and addresses some objections.

I. ASSOCIATIONAL CHOICE AS A RESOURCE DILEMMA

Under what circumstances does it make sense as a descriptive matter to conceptualize association as a resource that is vulnerable to collective action problems? To make a start at answering that question, I consider here a special class of grouping problems—those in which a spatially bounded background population must be partitioned

Economic and Legal Analysis, 86 Yale L J 385, 509–11 (1977) (suggesting a liability rule regime in which municipalities compensate for harms of restrictive zoning); Michelle J. White, *Suburban Growth Controls: Liability Rules and Pigovian Taxes*, 8 J Legal Stud 207, 226–30 (1979) (comparing liability rule regimes like those proposed by Ellickson with Pigovian taxes on exclusionary zoning and growth controls). For further discussion on Pigovian taxes, see note 107. See also Paul Gewirtz, *Remedies and Resistance*, 92 Yale L J 585, 652–56 (1983) (discussing possible use of in-kind "sweeteners" or even direct payments as "bribes" to promote educational integration).

22 The phrase "associational commons" has been used in a much different way by Peter Levine to refer to voluntary associations that operate in common resource settings. For example, Levine proposes an "associational commons for the internet" that would comprise "a voluntary, democratic organization that can demand something of its members and take collective action on their behalf." Peter Levine, *Building the Electronic Commons*, 11 The Good Society 1, 8 (No 3, 2002), online at http://muse.jhu.edu/journals/good_society/v011/11.3levine.pdf (visited Oct 17, 2006). In contrast, I use the phrase to reference the "commons" that is itself made up of associational possibilities.

23 See Calabresi and Melamed, 85 Harv L Rev at 1090–93 (cited in note 10). My discussion will include the possibility of using a form of self-assessed valuation to set the transfer price for entitlements. See Lee Anne Fennell, *Revealing Options*, 118 Harv L Rev 1399, 1404–11 (2005) (explaining how entitlements subject to self-made options (ESSMOs) allow one party to set the transfer price that the other party can choose whether to act upon). See also Part III.B.1.

into subsets, where such partitioning carries the potential to produce problematic concentrations.[24]

A. Games of Concentration

Consider a situation in which five groups (A1 through A5) are permitted to selectively admit or exclude members from a closed background population.[25] All of the individuals who are not selected by one of the A groups form a residual pool known as Group B. Suppose that as a result of individually maximizing selections made by groups A1 through A5, Group B manifests concentrations that produce virulent negative synergies or other negative effects resulting from isolation.[26] How, if at all, should this result bear on the selectivity permitted Groups A1 through A5?

Arguments about grouping arrangements often blend assertions about the empirical effects of different arrangements with assumptions about the normative desirability of different cost allocations. As a first step, we can classify situations along two dimensions: (1) how large the costs of concentration are relative to the benefits of the exclusion that produced the concentration, and (2) on whom the costs of concentration fall. The first dimension goes to the efficiency of the arrangement,[27] while the second dimension involves questions of distributive justice. In our stylized example, the costs of concentration

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24 Whether or not a given population characteristic is "concentrated" in a given group is obviously a matter of degree. The degree of concentration depends on how the characteristic is defined and how the group is defined, as well as the incidence of the characteristic within the group. See, for example, Wolch and Sessoms, *The Changing Face of Concentrated Poverty* at 1–12 (cited in note 17) (discussing problems of scale and measurement that have attended efforts to identify areas of concentrated poverty). For purposes of the analysis here, I will use the terms "concentration" and "concentrated" in a simplified manner to refer to an incidence level of a given characteristic within a given group that is much higher than the overall incidence of that characteristic within the larger background population from which the group is formed.

25 The members of Groups A1 through A5 are part of this same closed background population but entered the groups at an earlier stage.

26 I am setting aside the case in which concentration is desired by the concentrated group, so that interests in grouping are aligned. Where concentrations occur spontaneously out of self-interest on the part of the concentrated, exclusion has no effect. In real-world settings it will not always be obvious whether, and to what extent, exclusionary tactics block choices that would otherwise be made. See note 95 and accompanying text. A separate issue is the extent to which concentration produces objective benefits for the concentrated, by, for example, facilitating efficient service delivery. See Philip J. Cook and Jens Ludwig, *Assigning Deviant Youths to Minimize Total Harm* 3 (National Bureau of Economic Research Working Paper No 11390, June 2005), online at http://www.nber.org/papers/w11390.pdf (visited Oct 17, 2006). See also note 210.

27 I am using the term "efficiency" here in the Kaldor-Hicks sense; efficient arrangements are those that produce gains sufficient to enable the winners to compensate the losers—even though no compensation need actually be paid. See, for example, Robert Cooter and Thomas Ulen, *Law and Economics* 48 (Addison-Wesley 4th ed 2004) (defining Kaldor-Hicks efficiency and explaining how it differs from Pareto efficiency).

might be borne primarily by Group B or might be dispersed (in whole or in part) among the other groups. Moreover, those costs might or might not exceed the benefits that Groups A1 through A5 enjoy as a result of their exclusionary prerogatives. The intersection of these possibilities produces the four stylized variations shown in Table 1.

TABLE 1: CLASSIFYING CONCENTRATION PROBLEMS

	Dispersed Costs	Concentrated Costs
Inefficient Concentration	I. Shared Tragedy	II. Isolated Tragedy
Efficient Concentration	III. Shared Burden	IV. Isolated Burden

Cell I in Table 1 features an inefficient concentration with dispersed costs. Here, the negative synergies produced in Group B impose costs on Groups A1 through A5 that are larger than the cost savings the A Groups internalized through the exclusion of the individuals who ended up in Group B. Suppose that each act of exclusion saved Group A1 ten, but contributed to the costs ultimately borne by A1 through A5 by a total of twenty (one-fifth of which, or four, fell directly on Group A1). Assuming Groups A2 through A5 face the same structure of costs and benefits as Group A1, we would expect each of these groups to engage in exclusionary behaviors that are individually rational but collectively suboptimal—not only from a societywide perspective, but from their own perspectives. This is a true collective action problem for the A Groups, in that each of them could be made better off through coordinated decisionmaking that would stem exclusionary impulses. Significantly, it is not necessary to take the interests of Group B into account in order to recognize the existence of a problem worth addressing. The structure of the situation in which A1 through A5 find themselves is a standard tragedy of the commons.[28]

[28] The tragedy of the commons amounts to a multiplayer version of the prisoner's dilemma. See, for example, Douglas G. Baird, Robert H. Gertner, and Randal C. Picker, *Game Theory and the Law* 33–34 (Harvard 1994) (describing the two-party prisoner's dilemma and noting that the basic problem type is also known as the tragedy of the commons); Hanoch Dagan

One example of shared tragedy might be extremely shoddy schools that produce students who are incapable of taking on the responsibilities of citizenship or self-support. While many of the costs of inadequate education fall on those who attend the subpar schools, sufficient costs may leach out into the surrounding population to make the result undesirable even when considered solely from the perspective of the excluding groups that generated the concentration.

Cell II in Table 1 features an inefficient concentration—one for which the costs exceed the benefits when considered societywide—but the costs are largely or entirely borne by the concentrated group. To return to our example, the A Groups engage in acts of exclusion that, as before, each generate a gain of ten for each excluding group, and a cost of twenty. Unlike in the Cell I case, however, the costs of twenty are not spread among the excluding groups but are instead concentrated on the members of Group B. A possible example of an isolated tragedy would be a crime-riddled neighborhood, assuming that most of the costs are borne by those living in the neighborhood, rather than by those in the surrounding (excluding) communities.[29]

As before, exclusion in the Cell II case is causally connected to harm through the mechanism of concentration. And, as before, the potential exists for societywide gains—the costs Group B bears exceed the benefits of exclusion enjoyed by the other groups. However, Groups A1 through A5 are likely to deny having any obligation to participate in producing those gains, which would be enjoyed exclusively or primarily by the reassigned members of B.[30] The excluding groups are not experiencing a collective action problem because ceasing to exclude has no potential to increase their payoffs.[31] Rather, the

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and Michael A. Heller, *The Liberal Commons*, 110 Yale L J 549, 555 & n 12 (2001) (observing that commons property is the "axiomatic" example of the prisoner's dilemma); Lee Anne Fennell, *Common Interest Tragedies*, 98 Nw U L Rev 907, 944–46, 957–58 (2004) (discussing the payoff structures for two-player and multiplayer prisoner's dilemmas).

29 As these examples suggest, the notion of a "shared" or "isolated" tragedy is a matter of degree. In fact, the distribution of the costs of concentration might fall at any point along a spectrum ranging from completely dispersed to completely concentrated.

30 This point relates to the distinction between harms and benefits. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv L Rev 1165, 1196–97 (1967). A basic difficulty involves defining the baseline. Should the baseline be a world in which Group B members are included in other groups, so that excluding Group B members causes them harm, or should the baseline be a world in which Group B is isolated, so that acts by the A Groups to alleviate the isolation would mean conferring a benefit on the members of Group B?

31 Gary Miller has made a similar observation in assessing the impact of municipal fragmentation. See Gary J. Miller, *Cities by Contract: The Politics of Municipal Incorporation* 164–67 (MIT 1981). As he explained, there is a tendency to either view fragmentation as a collective action problem structured like a prisoner's dilemma (in which everyone would be better off cooperating) or as an efficient state of affairs (in which fragmentation produces Tiebout-style gains

A Groups are likely to maintain that they have a right to their own groupings, and to insist that the costs of concentration borne by Group B "belong to" Group B. The fact that costs remain concentrated on B may lead too readily to the conclusion that the members of Group B deserve their own fate, and may reinforce rather than call into question the initial decision to exclude.

In this context, it matters greatly who holds the entitlement to associate with whom, and on what basis group-formation rights are prioritized.[32] Should we understand the priority given to Groups A1 through A5 in exclusion as appropriating something from, or shifting costs unfairly onto, Group B? Or should we instead understand the grouping priority as something to which the A Groups are entitled, so that taking away that priority would expose them to costs inflicted upon them by Group B? Answering these questions requires a theory of associational entitlements.

Of course, concentration flowing from exclusion may not always generate net societal harm. Cell III in Table 1 presents a variation in which the costs of exclusion are exceeded by the benefits, and those costs are also dispersed throughout society. While it is unlikely that any real-world institutions designed to concentrate excluded populations meet these criteria perfectly, a prison offers a useful illustration of the basic idea. Without question, prisons provide settings for powerful negative synergies associated with concentration.[33] Nonetheless, it is at least possible that society gains more than it loses through its exclusion of certain incarcerated populations from the mainstream of civil society. The negative synergies produced by incarceration are costly for

systemwide), when in fact it may produce some winners and some losers. Id at 166–67. As Table 1 emphasizes, there are both efficient and inefficient versions of the "some win, some lose" scenario.

[32] It is true that if transaction costs were zero and wealth differentials did not present a problem, Group B's members would be able to bribe the other groups to allow them in. See R.H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1, 2–15 (1960). Such idealized conditions for bargaining do not exist, however. The inability of local governments to adequately resolve regional spillovers through bargaining has been the subject of some scholarly attention. See Clayton P. Gillette, *The Conditions of Interlocal Cooperation*, 21 J L & Politics 365, 373–82 (2005) (discussing a variety of "obstacles to cooperation" and suggesting that "contracting costs" pose the most significant impediment to redistributive interlocal cooperation); Amnon Lehavi, *Intergovernmental Liability Rules*, 92 Va L Rev 929, 960–87 (2006) (proposing a system of liability rules to overcome bargaining difficulties in addressing positive and negative spillovers).

[33] In addition to the risk that a concentration of inmates may be especially likely to engage in criminal behavior while in prison, such concentration provides opportunities to share knowledge and make contacts useful in committing future crimes. Other, less obvious impacts may also flow from incarceration. See Rucker C. Johnson and Steve Raphael, *The Effect of Male Incarceration Dynamics on AIDS Infection Rates among African-American Women and Men* 2–4 (Population Association of America July 2005), online at http://paa2006.princeton.edu/download.aspx?submissionId=61207 (visited Oct 17, 2006) (demonstrating a positive correlation between incarceration rates and the incidence of HIV both in and out of prison).

society as a whole, and not just for the incarcerated population, even if the costs are proportionately higher for those who are incarcerated.[34]

Where no net costs are generated as a result of the concentration, a basic criterion for "tragedy" is not met; the acts of exclusion increase the overall pie rather than shrink it.[35] Any externalities that the excluding groups happen to generate would be irrelevant to efficiency on these facts—requiring the internalization of those costs would not change the decision to exclude.[36] The offloading of costs could be distributively unfair of course, even if it does not cause inefficiency.[37] However, the dispersal of costs beyond the confines of Group B in the Cell III case reduces the danger of unfair treatment of a powerless concentrated group, compared with the Cell IV situation.

Finally, Cell IV in Table 1 presents the possibility that exclusion might be efficient, but might nonetheless leave burdens concentrated on those who are excluded—Group B in our example. Quarantines may fit these criteria, if costs of enforcing the quarantine are relatively low. Populations isolated in quarantines typically face severe restrictions on liberty and higher rates of disease transmission than would prevail in the general population in the absence of the quarantine.[38] At the same time, the quarantine may generate a net benefit by stopping or slowing the spread of disease throughout the general population.[39] Whether it is acceptable as a normative matter to trade off the costs imposed on the quarantined population against larger benefits to society as a whole requires making judgments, whether explicit or implicit, about associational entitlements.

B. Tragedies of the Associational Commons

In the following discussion, I will focus on concentrations that are inefficient or "tragic" in the sense that overall social value is need-

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[34] It is useful to distinguish between the costs of exclusion itself (for example, guards, locks, and fences) and the costs of the concentration produced by exclusion (for example, recidivism and crime within prison). To the extent that exclusion is itself costly, the net benefits that accrue to the excluders are reduced (that is, the costs are necessarily spread to the excluders). The costs produced by concentration may be distributed in any number of ways. In addition, the costs of exclusion and the costs of concentration could interact. For example, if prison riots and prisoner-on-prisoner violence are generated by concentration, these effects might be expected to raise the costs of exclusion by putting greater stress on guards, fences, and the like.

[35] See Part I.B.2.

[36] See James M. Buchanan and Wm. Craig Stubblebine, *Externality*, 29 Economica 371, 380–81 (1962) (distinguishing Pareto-relevant externalities from externalities produced by actions that generate net benefits).

[37] See, for example, Jesse Dukeminier, et al, *Property* 44 (Aspen 6th ed 2006).

[38] See Daniel Markovits, *Quarantines and Distributive Justice*, 33 J L Med & Ethics 323, 325–26 (2005).

[39] See id at 326.

lessly reduced—that is, Cell I or Cell II situations. While distributive and efficiency goals sometimes produce conflicting normative prescriptions, *inefficient* concentrations often present opportunities to advance distributive and efficiency goals simultaneously. Of course, real-world concentrations do not arrive labeled "efficient" or "inefficient"—a point that becomes important in deciding how to structure a response to an observed concentration.[40] For now, it is useful to focus on the mechanisms through which tragedy might be produced.

1. An associational lexicon.

First, it is helpful to specify why grouping might not be a zero-sum game. In this connection, a foundational concept is *associational surplus*—gains from grouping.[41] These gains, which go by a variety of names in the literature,[42] may be produced through economies of scale, complementarities of various sorts, or political or institutional advantages.[43] Associational surplus represents a local public good or club good that benefits the group's members and may also spill over onto those outside the immediate group.[44] In many cases, realization of associational surplus is dependent on choices (for example, cooperation) by group members. Where this is the case, it becomes important to distinguish between the amount of associational surplus that a group

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40 See Part II.B.1.

41 The analogous ideas of "marital surplus" and "household surplus" have appeared in legal scholarship. See, for example, Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 Va L Rev 509, 529 n 40 (1998) (describing marital surplus as consisting of "all utility-enhancing effects that would not exist in the absence of the relationship"); Robert C. Ellickson, *Unpacking the Household: Informal Property Rights around the Hearth*, 116 Yale L J (forthcoming 2006) (defining household surplus as "[g]ains that arise from [ ] internal household trade"). An important definitional point involves designating the baseline from which to measure associational surplus. Because the alternative of completely atomistic agents acting wholly independently of each other is not realistic in any known political or social system, it seems artificial and unhelpful to compare a given grouping with the baseline of no grouping at all. A more useful formulation might examine the special surplus that a given group generates as a result of its group-specific interactions, screening out the gains that are merely a part of existing within a developed political and social structure. I thank Mitchell Kane for drawing my attention to this issue.

42 See, for example, Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 18–24 (Simon & Schuster 2000) (discussing "social capital" generated through social groupings); Anthony Downs, *Opening Up the Suburbs: An Urban Strategy for America* 61 (Yale 1973) (using the term "social linkages" to reference interactions within neighborhoods that can affect quality of life).

43 The complementarities in question might be a function of behavioral propensities, skill sets, or other characteristics. Gains might be tangible and pecuniary (as where a firm is able to enjoy higher profits than could a series of independent contractors) or intangible (as where a group of neighbors is able to produce a "sense of community").

44 See Richard Cornes and Todd Sandler, *The Theory of Externalities, Public Goods, and Club Goods* 24–25 (Cambridge 1986).

is actually generating at a given point in time, and its associational capacity—the surplus that it could generate if the group members made certain desirable behavioral choices in their interactions with each other.[45]

The flip side of associational surplus is *associational deficit*—losses from grouping.[46] In addition to the institutional and political disadvantages that may flow from groupings that isolate vulnerable populations, losses from grouping can occur in two ways. First, the group can be internally self-destructive, whether as a result of infighting or transmission of negative or uncooperative behaviors. The second way that losses from grouping can occur is very different—the group works well internally and is able to successfully achieve its goals, but the goals themselves are socially destructive. What appears to those inside the group as a local public good has negative spillovers that are, on balance, harmful. Familiar examples include organized crime rings, street gangs, and price fixers.[47]

My discussion will focus on spatial groupings in which direct, sustained interaction among group members is capable of producing associational surplus or deficit.[48] However, some or all of the associational surplus or deficit actually produced in a given grouping may be generated indirectly through institutional, social, or political factors, rather than directly through the interaction of individual group members.[49] I will use the notion of associational surplus and deficit to refer-

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45 Associational capacity, as I use the term here, is limited to the immediately available frontier of associational surplus, not the potential for associational surplus that might become available if members of the group engaged in long-term self-improvement courses, took up training to develop better or different skills, or otherwise "remade" themselves. However, associational capacity can grow over time both as a result of changes in individuals, and as a result of the group members gaining experience with each other so that more cooperative behaviors become feasible.

46 See, for example, Gary S. Becker and Kevin M. Murphy, *Social Economics: Market Behavior in a Social Environment* 12 (Belknap 2000) (observing that "negative capital" might be generated by social interactions).

47 See Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 Ann Rev of Sociology 1, 18 (1998) (observing that "[m]afia families, prostitution and gambling rings, and youth gangs offer so many examples of how embeddedness in social structures can be turned to less than socially desirable ends").

48 Hence, I will not address issues arising from administrative or demographic classifications that have the effect of grouping people together on paper for purposes of enumeration, policy analysis, or legislation—although such classifications undeniably have important impacts.

49 See Jencks and Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood* at 113–15 (cited in note 1) (describing epidemic, collective socialization, and institutional models for determining "how the social composition of a neighborhood or school affects young people's behavior").

ence all of the surplus or deficit that results, whether directly or indirectly, from the grouping.[50]

Heterogeneity among current and potential group members drives differences in associational surplus and deficit. The notion of *individual contribution capacity* refers to an individual's group-relevant characteristics that, when combined with the capacities of other group members, are capable of producing associational surplus (or deficit). Depending on the behavioral choices made by the individual and by others in the group, individual contribution capacity may or may not be fully realized. Hence, individual contributions to group goals depend not only on capacities, but also on levels of cooperation.

In the analysis that follows, I will employ as abstractions two polar types of individuals to capture heterogeneity in contributions to group goals—the quality-enhancing group member (designated "E") and the quality-detracting group member (designated "D").[51] These labels are obvious simplifications, but broadly denote individuals who currently have both the capacity and the inclination to engage in behaviors that enhance or detract from the local public goods that a given group generates. Two factors are important to keep in mind when encountering Es and Ds in the analysis. First, the factors that make one an E or a D are not immutable characteristics, but rather behavioral ones; hence, the number of Es and Ds is not fixed in advance but subject to change over time.[52] Second, because part of what makes someone an E is the capacity to engage in behaviors that enhance quality, resources that increase that capacity become relevant.[53]

To fit together the ideas that have just been introduced, the contribution capacities of individuals within a grouping combine (often in a synergistic rather than simply additive manner) to create associa-

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[50] See id at 115 (taking a similar approach by using a "verbal shorthand" that does not specify the precise mechanism empirically producing a given change).

[51] See Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 Tex L Rev 1, 6–32 (2001) (defining and discussing "quality-enhancing" and "quality-detracting" users).

[52] Models analyzing group effects often specify two types of individuals, but the categories are usually presented as static ones. See, for example, Stephen Ross and John Yinger, *Sorting and Voting: A Review of the Literature on Urban Public Finance*, in P. Chesire and E.S. Mills, eds, 3 *Handbook of Regional and Urban Economics* 2001, 2044–45 (Elsevier 1999) (dividing the population into two types: type-1 people who diminish public services and type-2 people who increase public services); Robert M. Schwab and Wallace E. Oates, *Community Composition and the Provision of Local Public Goods: A Normative Analysis*, 44 J Pub Econ 217, 220–30 (1991) (dividing population into types A and B). See also Peter H. Schuck and Richard J. Zeckhauser, *Targeting in Social Programs: Avoiding Bad Bets and Removing Bad Apples*, ch 5 at 2–8, 25–27 (Brookings forthcoming 2006) (identifying a category of "bad apples" that negatively affect social programs, but noting the potential for preventative and reform efforts).

[53] These resources may often (but need not always) take forms that correlate with socioeconomic position.

tional capacity. Depending upon the behaviors that the individuals within the group exhibit separately and in combination, associational capacity may manifest itself as associational surplus (or deficit). Heterogeneity in contribution capacities makes group composition relevant to the achievement of associational surplus and the avoidance of associational deficit. Self-interested parties would presumably prefer to join a group in which they can benefit from the contributions of others, regardless of what they are able to bring to the table themselves. An existing group that can control the entry of new members will attempt to admit only those who will maintain or increase the per capita "draw" of associational surplus.[54]

It is worth emphasizing at this point that I am limiting the analysis to *spatial* groupings, for two related reasons. First, it is realistic to assume that the surplus or deficit produced by such groupings is capable of being influenced by the behavior and characteristics of all of those members (and only those members) located within a given spatial range of one another.[55] Second, because the spatial range in which people can realistically interact is necessarily limited, group size is functionally constrained.[56] Together, these two features create a strong incentive toward selectivity in group formation.[57] Not only is it impossi-

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54 One's own admittance into a group may say something about the odds of being able to surround oneself with uniformly higher contributors. Hence, Groucho Marx's aphorism: "I don't care to belong to any club that will have me as a member." Arthur Sheekman, *Introduction*, in *The Groucho Letters* 7, 8 (Simon & Schuster 1967).

55 Two caveats bear mention here. First, the spatial range for interaction is not fixed for all purposes but will vary depending on the scale at which the local public good in question is being produced. Neighborhood ambience, for example, might be produced at the block level, while the quality of education or city parks will depend on the interaction of a larger group of households. Second, some goods will depend on the personal interaction of a subset of people within that range (for example, households with children in public schools). Nonetheless, anyone located within the range in which the local public good is produced or consumed will be in a position to influence the product, and even those who have a neutral impact will take up a spatial position that would otherwise be occupied by someone who could have a positive or negative influence. To state the point in the text more precisely, spatial proximity is necessary and often sufficient for contribution to local public goods produced through spatial interaction.

56 For example, a school district the size of an entire state would be too large to interact as a single unit in producing associational surplus or deficit—as a functional matter, subsets would form the relevant groupings that would produce such surpluses or deficits.

57 This incentive is largely absent in groups of people linked together by the consumption of the same product or the use of the same standard or platform. Network effects can be enjoyed notwithstanding the consumption or use of the product or standard by many people with whom one has no desire to interact, and there is no upper bound to the number of people who can be part of the network. It is of course possible that the overpopularity of a product or standard (or its adoption by a group with controversial beliefs or practices) could degrade the value that other people derive from its consumption. See William M. Landes and Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U Chi L Rev 471, 485–86 (2003) (noting the possibility that overuse of an image could diminish its value). But these effects are unlikely to be significant enough to provide a strong motive for excluding individuals from the group of consumers.

ble to avoid the impact of a less-preferred group member on the overall fortunes of a spatial group, such a member takes up a scarce place that could otherwise be allocated to a more-preferred group member.

Selectivity in group formation might be applied on the "front end" when assembling a group or admitting new members, or it might be applied on the "back end" by ejecting unwanted members while retaining preferred members. In either case, group membership decisions affect not only the associational capacity of the group making those decisions, but also the remaining associational capacity available to other groups drawn from the same background population. Moreover, the degree of selectivity that each group is permitted to employ can influence cooperation levels within that group, and hence whether associational capacity is translated into associational surplus. The challenge is to maximize the total amount of associational surplus realized by all of the groups drawn from a given population. Hence, associational surplus might be viewed as a common-pool resource—an *associational commons*.[58]

To characterize associational potentialities as a commons does not imply any particular normative judgment about whose interests should be prioritized or subordinated in group formation. Rather, the characterization allows us to consider systematically the possibility of a collective action problem that would make the system as a whole worse off than necessary.[59] Just as the identification of an overfishing problem does not foreclose the possibility of allocating fishing rights based on independent normative criteria,[60] the identification of a collective action problem in the associational realm does not dictate any particular policy response.

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[58] The notion of an associational commons that I develop here is distinct from the idea that human talents are part of a common pool from which everyone is equally entitled to draw. See generally Anthony T. Kronman, *Talent Pooling*, in J. Roland Pennock and John W. Chapman, eds, *Nomos XXIII: Human Rights* 58 (NYU 1981) (exploring and critiquing this idea). One might believe that people are entitled to the products of their own human capital (including innate talents) without agreeing that they are entitled to the entire associational surplus that results when they pool together with other people, if that grouping choice imposes externalities elsewhere in the system.

[59] See Cook and Ludwig, *Assigning Deviant Youths to Minimize Total Harm* at 29–31 (cited in note 26) (distinguishing "system-level" studies from "mover" studies that look only at the impact of a grouping change on those experiencing the change).

[60] For example, salmon fishing permits in Alaska are allocated based on the hardship that denial of a permit would present; allocation thus requires a factual inquiry into each applicant's past fishing experience and economic dependence on fishing. Bruce Twomley, *License Limitation in Alaska's Commercial Fisheries* 5 (2003), online at http://dlc.dlib.indiana.edu/archive/00001197/00/Twomley,Bruce.pdf (visited Oct 17, 2006).

2. Conditions for tragedy.

Viewing associational possibilities as a commons raises the question of whether, and under what circumstances, a "tragedy of the commons" might result.[61] All commons tragedies share two features: actors do not internalize all the costs and benefits of their actions, and those actions have the potential to reduce the overall amount of the good available for everyone.[62] The second feature presents (in a technological sense) the opportunity for tragedy, while the first feature provides a motive for tragic moves.[63] Nearly all associational choices produce externalities in that the choosers fail to take account of how their actions will affect the associational choices available for others. Only where the technological possibility exists for grouping actions to make everyone worse off are these externalities relevant to efficiency[64] and hence capable of producing "tragic" results.[65]

Whether the technological possibility of tragedy exists depends on the production function for associational surplus within a particular domain.[66] Consider first a situation where the production function

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61 The phrase was popularized by Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243, 1243–45 (1968). Since the time of Hardin's article, the tragedy of the commons (and the possibilities for avoiding tragedy) has been extensively studied. Some recent work has shifted focus to a different type of collective action problem, dubbed the "tragedy of the anticommons." See, for example, Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv L Rev 621, 624 (1998) (defining an anticommons as a situation in which "multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use"). Below, I will examine a mechanism for distributing entitlements that could generate an anticommons-like dynamic. See Part III.B.2.

62 See, for example, Fennell, 98 Nw U L Rev at 919–21 (cited in note 28).

63 The incentives for the players and the formal structure of the game depend on how the costs of grouping choices are distributed. In the classic tragedy of the commons situation represented by Cell I in Table 1, players face the payoff set associated with the prisoner's dilemma. See note 28. In this context, it is in the interest of all of the players to reach a cooperative result. Where most of the costs are instead concentrated on the excluded group members, as in Cell II, the payoff structure does not provide any opportunity for the excluders to realize gains through cooperation. This situation more closely resembles a standard case of externalities imposed on another party. Absent Coasean bargaining between the excluders and the excluded, the excluders will have no incentive to reach an agreement to eliminate exclusion that is costly on net. I thank Shayna Sigman for discussions on this point.

64 To put the point another way, adding the criteria of the potential for a net loss distinguishes "technological" externalities from those that are purely "pecuniary"—such as those that competitors routinely inflict on each other when they attract customers away. See, for example, Landes and Posner, 70 U Chi L Rev at 486 (cited in note 57) (distinguishing a "technological" externality that "imposes a real cost on third parties" from a "pecuniary" externality that "merely alter[s] the distribution of wealth").

65 I am using the terms "tragedy" and "tragic" in the specialized efficiency sense in which they are used in the commons and anticommons literature. See note 61. Purely distributive changes that do not serve to shrink the overall societal "pie" do not constitute tragedies under this usage, although they may be normatively undesirable (or desirable) for other reasons.

66 Preliminary questions involve defining the system and determining the extent to which it operates as a closed rather than open system. See, for example, White, 8 J Legal Stud at 216–26

for associational surplus is perfectly linear. Here, the movement of a quality-enhancing E from one group to another produces perfectly offsetting gains and losses for the gaining and losing groups.[67] Assuming that the process of group formation and reconfiguration over time is costless,[68] grouping becomes a matter of pure distribution that does not implicate efficiency; the same total associational surplus is produced and is merely allocated in various ways among the groups depending on their respective compositions.[69]

Where production functions take a different shape, however, net gains or losses can result from different grouping configurations.[70] In these cases, one pattern of groupings is not just as good as another. Consider, for example, the production function shown in Figure 1, which tracks one possible relationship between the percentage of quality enhancers (Es) and the total associational surplus produced in a grouping.[71]

(cited in note 21) (discussing the impacts of exclusionary zoning under a variety of assumptions regarding the size of the city and the degree to which it is open or closed).

67 See, for example, Jencks and Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood* at 122 (cited in note 1).

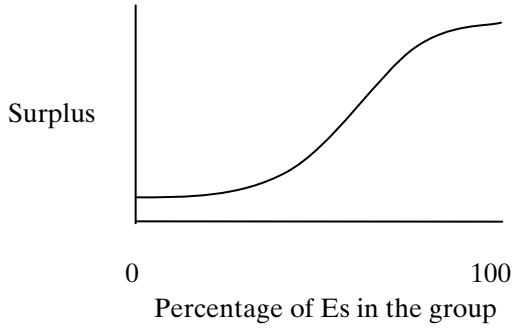
68 The possibility that the process of grouping may itself impose costs that reduce the total amount of surplus available to be shared raises an additional complication that could lead to tragedy even in the case of linear production functions. By analogy, consider a natural resource that exists in a fixed amount and is valued equally by three harvesters. The question of who ends up with what quantity of the resource appears to be purely distributive. However, if the harvesters overinvest in harvesting equipment or incur costs through haste, the total amount of surplus available to them will be reduced. See Fennell, 98 Nw U L Rev at 923 (cited in note 28). See also Richard A. Posner, *Economic Analysis of Law* 35–36 (Aspen 6th ed 2003) (discussing overinvestment in recovery efforts for sunken treasure). Likewise, in the grouping setting, inherently wasteful selectivity mechanisms (like large-lot zoning) could reduce surplus even where movement of members between groups produces no gains or losses on its own. See, for example, Ross and Yinger, *Sorting and Voting* at 2015 (cited in note 52) (noting the possibility that zoning constraints might "force people to consume more [housing] than they want, and may reduce property values"); Dietderich, 24 Fordham Urban L J at 32 (cited in note 6) (observing that "exclusionary zoning forces people to consume land and improvements they do not want," resulting in inefficiencies).

69 Determinations of total surplus must take into account not only the surplus experienced within each group (as a local public good), but also the spillovers in surplus that affect groupings other than the producing group—either immediately, or over time. See, for example, Bénabou, 63 Rev Econ Stud at 250 (cited in note 9) ("Closely related to the idea that stratification is detrimental to metropolitan performance is the view that suburbs cannot durably prosper at the expense of their central cities.").

70 See, for example, id at 248 (discussing possible shapes of a production function for surplus associated with the percentage of rich households in a community, and observing that for a convex function the optimum "coincides with the stratified market equilibrium," while for a concave function "there are decreasing social returns to the concentration of human capital"); Cook and Ludwig, *Assigning Deviant Youths to Minimize Total Harm* at 17–38 (cited in note 26) (discussing the significance of "the shape of what might be called the 'social contagion function'").

71 See, for example, Pamela Oliver, Gerald Marwell, and Ruy Teixeira, *A Theory of the Critical Mass. I. Interdependence, Group Heterogeneity, and the Production of Collective Action*, 91 Am J Sociology 522, 527–28 & fig 1(a) (1985) (presenting and discussing S-shaped production functions); Fennell, 80 Tex L Rev at 16–23 (cited in note 51) (showing how the S-shaped production function might apply in the context of local public goods).

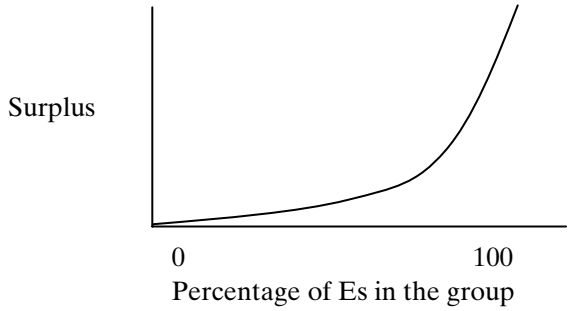
FIGURE 1: S-SHAPED PRODUCTION FUNCTION



In the Figure 1 case, a movement of Es from groupings where they constitute a large majority or a small minority into groupings where E membership falls in the midrange can produce net gains. This shape fits with the intuition that a small number of quality enhancers may do little good, but once a "critical mass" is reached, gains will increase at an increasing rate.[72] Eventually, however, surplus will plateau and further additions will produce increasingly smaller marginal improvements.[73]

Of course, the production function might instead take a very different shape, as an empirical matter. Consider, for sake of comparison, the curve in Figure 2:

FIGURE 2: INCREASING RETURNS



[72] In other words, the first part of the S-curve is an "accelerating production function." See Oliver, Marwell, and Teixeira, 91 Am J Sociology at 542–43, 546–47 (cited in note 71) (discussing characteristics of accelerating production functions and the significance of a critical mass).

[73] See id at 547–48 (discussing the decelerating portion of an S-curve).

Here, Es do the most good in marginal terms when loaded into groups already containing a large majority of Es. In this case, a systemwide shift from mixed groups of Ds and Es to groups containing all Ds or all Es would generate net gains. It is, of course, an empirical question whether the production function in a given setting is linear, or, if nonlinear, whether it takes the shape shown in Figure 1, Figure 2, or some other shape entirely. But it is at least plausible that many grouping situations involve nonlinearities that generate the technological possibility of tragedy. If so, the manner in which grouping rights have been allocated and the arrangements (if any) that have been made for their transfer become important to efficiency.

The focus here on concentration can be recast in terms of production functions. To say that concentrations produce net harm is another way of saying that movement from the excluding groups to the concentrated group is not a zero-sum move. Thus, concentration provides a shorthand way of capturing intuitions about production functions. Because it is impossible to observe production functions directly and the ability to derive them from empirical work remains rather limited, concentration may be the best available diagnostic for identifying situations where collective action may be producing inefficient or unfair results. Of course, the mere presence of concentration, without more, will not establish either inefficiency or unfairness. But where concentrations appear to be both costly and involuntary, the case grows stronger for consciously using entitlements to prioritize claims to selectivity.

3. Behavioral effects of grouping protocols.

At this point, the reader may complain that the foregoing line of argument proves too much. Might there not always be net gains associated with group reconfiguration? What about employees in firms, members of families, students in law schools, and so on? Must we stand ready to reshuffle all these groupings lest the grouping results be characterized as tragic? Should every act of selectivity be curtailed as unfair "overgrazing" of the associational commons? Should every concentration (along any dimension) trigger a reconfiguration of associational entitlements?

To answer these questions requires addressing a layer of analysis that has remained in the background so far: analogues to undercultivation as well as to overgrazing can create a tragedy of the commons.[74]

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[74] See Thráinn Eggertsson, *Open Access versus Common Property*, in Terry L. Anderson and Fred S. McChesney, eds, *Property Rights: Cooperation, Conflict, and Law* 73, 77 (Princeton

The amount of associational surplus available to be shared among a set of groups depends not only on grouping choices (extracting surplus from a commons), but also on decisions by current and potential group members (the cultivation of surplus). Any system that would limit or reprice exclusion must contend with the possible effects on the investments and behavior of current and potential group members.

Consider a background population containing equal numbers of Ds (quality detractors) and Es (quality enhancers). Assume further that the shape of the production function is such that each additional E in a group produces diminishing marginal returns. Viewed as a problem of how best to allocate Es systemwide, it might appear that we would do best by dividing up the Es among the groups. But if a system that splits up the Es returns to each of them less surplus than they would receive if allowed to group together without limit, the result could be a change over time in the total number of Es. If it is costly to become an E and to act like an E over time, changes in the rules governing group formation that reduce the returns to being an E might produce unwanted results that could erase theoretical gains associated with reconfiguring groups. The choosing protocols employed in group configuration could affect incentives at two points in time: at the "investment" stage in deciding whether or not to develop the characteristics that make one an E, and at the "cooperation" stage, in deciding whether to manifest E-like characteristics within the group in which one finds oneself.

In some settings, such as employment and higher education, individuals invest heavily in human capital development in hopes of securing a place in a desired grouping. In such cases, it is probable that the long-run incentive effects associated with selective grouping outweigh any short-run gains from reallocating group members. Awarding associational entitlements in a way that limits the associational prerogatives of people who have invested in becoming good group members, or in a way that provides prime associational opportunities to those who have failed to make such investments, carries the potential to distort incentives and thereby reduce social value.

Grouping protocols can also influence the behavioral choices of group members once they are assembled into groups. For example, if a group has the power to expel noncontributors, members may be more

2003) (observing that an open access regime may suffer from "supply side" effects, such as the disincentive to invest); Elinor Ostrom, Roy Gardner, and James Walker, *Rules, Games, and Common-Pool Resources* 14–15 (Michigan 1994) (discussing the problem of inadequate provision of common-pool resources).

likely to cooperate or otherwise contribute to group goals.[75] Similarly, a group member who joins a group freely might be more cooperative (other things being equal) than a group member who has been forced into a group.[76] Conversely, someone trapped in a group who hopes to soon escape may do little to pursue the group's goals.

There is yet another wrinkle that deserves attention. The simple example just given assumes that everyone can tell who is an E and who is a D, so that Es could easily self-segregate if only they were permitted to do so. This level of discernment is not commonplace in real-world settings. Assume that it is not possible to readily tell Es from Ds and that some rough proxy must be used instead that, on average, screens out more Ds than Es and lets in more Es than Ds, but that generates both false negatives and false positives. The screening system might be expected to reduce the investments of would-be Es who know they are very likely to be mislabeled as Ds, given the proxies in use. Suppose, for example, that the standard screening proxy is wealth or income. If we assume that prospects for group membership have large impacts on investments in contribution capacity, then less well-off individuals would have diminished incentives to make such investments. Interestingly, wealthy people (that is, those who possess the proxy characteristic) might also see less need to invest in developing the underlying characteristics deemed valuable to the group.[77]

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[75] For example, some recent work has examined how the threat of exclusion might motivate group members to contribute to the production of a local public good. See Kjell Arne Brekke, Karine Nyborg, and Mari Rege, *The Fear of Exclusion: Individual Effort When Group Formation is Endogenous*, University of Oslo Economics Memorandum No 09/2005 2–4 (2005), online at http://www.oekonomi.uio.no/memo/memopdf/memo0905.pdf (visited Oct 17, 2006); Matthias Cinyabuguma, Talbot Page, and Louis Putterman, *Cooperation under the Threat of Expulsion in a Public Goods Experiment*, 89 J Pub Econ 1421, 1422–23 (2005).

[76] Empirical work on this question suggests some interesting complexities. Esther Hauk and Rosemarie Nagel found that players who are forced into a prisoner's dilemma game when they would prefer not to play will usually defect; hence a system in which one or both players is forced to play yields higher defection rates than a system that permits free exit from the game. Esther Hauk and Rosemarie Nagel, *Choice of Partners in Multiple Two-Person Prisoner's Dilemma Games: An Experimental Study*, 45 J Conflict Resol 770, 772, 778 & Table 1 (2001). However, arrangements that allowed the game to proceed without the consent of one or both players increased *overall* cooperation rates over arrangements where mutual consent was required for the game to proceed. Id at 778 & Table 1. Where mutual assent was required, many matches failed to occur. Id at 778–80. Where matches could be forced, some of those forced to play cooperated (even though most defected). Id at 780. These findings suggest that it may not be the fact of being forced to play that leads to defection, but rather that those predisposed to defection are unable to take themselves out of the game. See id at 784, 786–88. See also Esther Hauk, *Leaving the Prison: Permitting Partner Choice and Refusal in Prisoner's Dilemma Games*, 18 Computational Econ 65, 65–68 (2001) (demonstrating through simulations that stable cooperation in prisoner's dilemma interactions can be achieved if players employ a rule of thumb for choosing and for refusing partners that rewards cooperation and punishes defection).

[77] A subtly distinct issue involves the appropriate role of money in *purchasing* spots in preferred groupings. It is possible to reject wealth as a basis for assigning priority in grouping without

If behavioral responses to group-formation protocols are very strong, then perfecting the proxy might be a rational way of improving group formation. Antidiscrimination law attempts to do this by ruling out the use of criteria that have no relevance to the cultivation or manifestation of quality-enhancing group-relevant behaviors.[78] In settings where behavioral responses are not very strong or where no good proxy is available, then changing the protocols for group configuration may be a more promising alternative.

C. Revisiting Resource Analogies

1. Behavioral responses and replenishing resources.

As just discussed, the associational setting presents novel challenges to the extent that investment and cooperation levels are implicated. These factors introduce the possibility that behavioral responses will counteract or perhaps overwhelm efforts to reduce the risk of problematic concentrations. One might reasonably wonder whether complex and unique human behavioral responses make resort to common-pool resource analogies fundamentally untenable. Without minimizing the obvious differences involved, close consideration of replenishing resources such as animals or fish can go some distance in rehabilitating the comparison. In replenishing resource settings, optimizing involves limiting extraction enough to foster a thriving population capable of replenishing itself over time. In associational settings, the number of Es that develop will depend in part on how suitable the associational conditions are for fostering E-like behaviors and investments.

Following the logic of replenishing resource games, if Es are skimmed away too quickly from the background population into exclusive groupings, the overall number of Es may drop over time.[79] A slower rate of removal of Es from the background population could foster the development of more Es—at least up to a point. Too little movement of Es into more-selective groups could discourage the development and exercise of E-traits though, if part of the incentive to become an E is the chance to participate in selective groupings.

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withdrawing the allocation of spots in groups from market mechanisms altogether. See Part IV.C (discussing concerns about wealth differentials and commodification of associational prerogatives).

[78] See Part IV.B.1 (discussing the interaction between associational entitlements and antidiscrimination law).

[79] I do not mean to suggest that the resource at issue in grouping games literally consists of people who can be "harvested." The real issue is the removal of associational capacity and, ultimately, the question of how to maximize the total amount of associational surplus systemwide. Associational capacity depends on the development of individual contribution capacity, which in turn depends on associational conditions. The simplification in the text jumps over some intermediate steps to make this point intuitively.

Significantly, there is often interdependence among the various groupings that people move through in life. Hence groupings like neighborhoods and schools that affect people at the outset of their lives, as children, merit special attention. For example, a child in a failing school may suffer from peer effects that make it more difficult for her to become a valuable group member in the future. A system of associational entitlements that gives her access to a better school may dampen parental incentives in some respects,[80] but the better school may increase the child's ability to make positive contributions in later groupings.

2. Selectivity within limits: an environmental analogy.

The stylized concentration problems discussed in Part I.A involved pervasive exclusion that forced excluded persons together into a separate, concentrated grouping. Not all exclusionary acts will produce such dramatic results. As with other collective action problems, unwanted outcomes are produced by the interaction of many separate decisions. In settings involving natural resources, the fact that tragedy would eventuate from unbridled individual acts of appropriation does not imply that all such acts of appropriation are normatively undesirable. Rather, it suggests a need for consciously setting limits or establishing sustainable appropriation protocols. Likewise, the fact that exclusion can produce inefficient or otherwise undesirable results when carried out on a wholesale basis does not suggest that groups should be forbidden from applying any selective membership criteria at all. Rather, exclusionary acts should be assessed based on their destructive potential in light of the offsetting benefits, if any, that they produce.

Some kinds of exclusionary acts, such as racial discrimination, are so intrinsically destructive and lacking in justification that categorical bans are appropriate in all but the most intimate associational spheres. I will assume for purposes of this analysis that public law has identified and banned the sorts of exclusionary acts that always and everywhere produce unacceptable results, whether undertaken in isolation or in combination.[81] My focus here is not on these straightforward

[80] As elsewhere in social policy, the pairing of parents and children creates dilemmas in setting up incentives appropriately. Even though the incentives of children are not affected by grouping protocols, parents' incentives might well be affected. To employ Dworkin's terminology, a parent's "option luck" can produce a child's "brute luck." Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 Phil & Pub Aff 283, 293 (1981) (describing the difference between option luck—the result of a deliberate choice—and brute luck—the result of circumstances beyond the individual's control).

[81] I do not mean to assert that existing antidiscrimination laws are perfectly drawn so that they reach all instances of harm that produce no offsetting benefits. I mean instead to suggest that where such categorical harms without benefits exist, categorical prohibitions are appropri-

"everywhere and always" exclusionary harms, but rather on categories of exclusion (or to use a less pejorative term, selectivity) that may be benign or even beneficial when they occur below a given threshold, but which produce net harms above that threshold. Just as the optimum level of many sorts of pollution and resource extraction is not zero, the optimum level of associational selectivity may not always be zero.[82]

II. A JOB FOR PROPERTY?

The fact that association may present a collective action problem does not, in itself, make out a case for a *propertized* solution.[83] It would be possible to balance the interests involved and apply a command-and-control solution designed to achieve desired grouping configurations.[84] But if we are less than confident in our ability as social engineers, or if we have autonomy or process-based objections to forcing groups into particular configurations, then setting up a system that simultaneously accounts for associational externalities while permitting transfers to occur begins to look attractive. Before making the case for a propertized approach to associational dilemmas, however, it is necessary to reconsider more generally the relationship between property and association.

A. Property's Associational Gap

Property theory has dealt rather uneasily with association. Perhaps this is due in part to property's deep roots in an asocial, if not antisocial, construct—"that sole and despotic dominion that one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[85] To be sure, property scholars have recast property in less lonesome terms by

ate. In such contexts, transferable entitlements would offer no advantages and could needlessly erode the expressive force of the law. See Part IV.B.1 (discussing the relationship between associational entitlements and antidiscrimination law).

82 See generally, for example, Robert C. Ellickson, *The Puzzle of the Optimal Social Composition of Neighborhoods*, in William A. Fischel, ed, *The Tiebout Model at Fifty: Essays in Public Economics in Honor of Wallace Oates* 199 (Lincoln Institute of Land Policy 2006) (discussing the optimal degree of residential sorting).

83 I thank David Barron for focusing my attention on this point.

84 Such efforts have at times achieved considerable success. For a recent example, see Alan Finder, *As Test Scores Jump, Raleigh Credits Integration by Income*, NY Times S1 (Sept 25, 2005).

85 William Blackstone, 2 *Commentaries on the Laws of England* *2 (1766). See also Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, in Charles Geisler and Gail Daneker, eds, *Property and Values: Alternatives to Public and Private Ownership* 3, 8 (Island 2000) ("When most people think of property, they have an image in their minds of an individual owning a plot of land with a house on it. . . . Only one person is involved.").

studying its social meaning,[86] emphasizing the selective inclusion that accompanies the right to exclude,[87] and considering various forms of common property ownership.[88] But the idea that social groupings *themselves* might be a locus of property interests has received little attention, notwithstanding the significant value of these groupings and, as shown above, their vulnerability to collective action problems.

There are two ready responses to the charge that property law neglects matters of association. First is the idea that property is simply the wrong conceptual tool for the job, and that, instead, "rights-based" notions of constitutional law, civil rights, and political philosophy should govern inquiries about inclusion, exclusion, and association.[89] The second response comes from the opposite direction, positing that property law and theory already deal with associational conflict to the extent necessary through existing forms of private property, as augmented by mechanisms such as land use controls. After all, if property's signature attribute is the right to exclude[90] (and, by extension, to selectively include), then why is it not sufficient to create well-defined rights in property and let association take care of itself? These two complementary ideas converge in what has become the dominant paradigm for understanding the connection between property and association.

Private property is commonly viewed as an associational envelope of sorts, a protected space in which people can mingle at the owner's pleasure while the law maintains an exterior boundary that excludes the uninvited.[91] What happens inside the envelope is usually

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[86] See, for example, Singer, *Property and Social Relations* at 8–17 (cited in note 85) (presenting "the social relations model" of property). See also generally Stephen R. Munzer, *Property as Social Relations*, in Stephen R. Munzer, ed, *New Essays in the Legal and Political Theory of Property* 36 (Cambridge 2001) (describing and evaluating the social-relations approach to property).

[87] See, for example, Eduardo M. Peñalver, *Property as Entrance*, 91 Va L Rev 1889, 1938–47 (2005) (focusing on the use of property to create autonomous enclaves for group interaction); Penner, 43 UCLA L Rev at 744 (cited in note 12) ("The right to property is like a gate, not a wall.").

[88] See, for example, Dagan and Heller, 110 Yale L J at 551–55 (cited in note 28); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U Chi L Rev 711, 723–30 (1986).

[89] On the limits of "property," see, for example, James E. Penner, *Misled by "Property,"* 18 Can J L & Juris 75, 76–77 (2005) (suggesting that the "property" label should be reserved for interests that are not central to identity within a given normative system); Iris Marion Young, *Justice and the Politics of Difference* 25 (Princeton 1990) ("Rights are not fruitfully conceived as possessions.").

[90] See, for example, Merrill, 77 Neb L Rev at 730 (cited in note 12) ("Give someone the right to exclude others from a valued resource . . . and you give them property. Deny someone the exclusion right and they do not have property."). For a recent exploration of the mechanisms of exclusion in property, see generally Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 Mich L Rev 1835 (2006).

[91] For a recent discussion and critique of the view that property is primarily concerned with withdrawal into a protected realm, see Peñalver, 91 Va L Rev at 1890–93 (cited in note 87).

understood to involve "privacy" or "freedom of association," while what happens outside the envelope is usually deemed beyond property theory's jurisdiction—work better suited for constitutional law or civil rights scholars. Debates typically center on how "public" in character property arrangements must be before the baton of associational control properly passes from private owners to public lawmakers.[92]

This way of framing associational issues is not without descriptive force, but it suffers from two weaknesses. First, the "associational envelope" story offers no coherent account of where the dividing line might fall between completely free association and association that is properly regulated by public law. The result has been an undue fixation on markers of "public" or "private" property. For example, there is a commonplace assumption that private land use controls stand on different footing than public land use controls.[93] If association were treated as an interest in its own right, however, a comprehensive approach to both sources of exclusion follows logically. Second, the idea of a crisp boundary between private property and public policy is misleading, in that it rules out the possibility that an associational choice can be both an appropriate object of public policy and appropriately packaged as a private property interest.

To be sure, people generally have broad discretion within private realms to make decisions about associational matters. It is also true that they shed certain aspects of that discretion when the associational interest at stake is sufficiently infused with the public interest. But property concepts are capable of doing more than drawing a line between a private realm of near-absolute associational discretion and a public realm of open-ended regulatory power. Associational interests can be recognized as property interests in their own right, untethered from land, and assigned and protected in ways that cross-cut the pub-

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[92] See, for example, Singer, *Entitlement: The Paradoxes of Property* at 43–44 (cited in note 4) (discussing privacy-based distinctions between homes and places of business with respect to the applicability of public accommodations law); Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L J 1, 20 (1964) (explaining that problems involving prohibited or required associations "must be framed in terms of drawing the line between the public and private sectors of our common life").

[93] See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 Harv L Rev 1843, 1883–85 (1994) (observing that exclusive private entities like homeowners associations are generally regarded "as a natural outgrowth of a commitment to private property and to freedom of contract"). Ford has urged a unified approach to desegregation that would address both private and public action. See id at 1846. A recent New Jersey case has somewhat narrowed the gap between public and private land use regulation by holding that a homeowners association must respect fundamental rights under the state constitution. See *Committee for a Better Twin Rivers v Twin Rivers Homeowners' Association*, 383 NJ Super 22, 890 A2d 947, 960–61 (2006) ("[P]laintiffs' fundamental rights as established in the New Jersey Constitution, including their free speech rights, must also follow them to their new residences in planned developments."), cert granted 186 NJ 608, 897 A2d 1061 (2006).

lic-private boundary. The analogous point has gained broad acceptance in the environmental context. The fact that property boundaries mark out an enclave of free choice with regard to many uses does not disqualify property from the job of ordering prerogatives to engage in uses that have environmental impacts beyond property boundaries.[94] So too with matters of association.

B. Three Observations

The fact that property *could* handle the ordering of associational interests without conceptual difficulty does not establish that it *should*. Three observations prompted by the examples presented in Part I help to make the case for a propertized solution to associational dilemmas.

1. Classification difficulties.

First, real-world situations will not arrive neatly slotted into the categories presented in Table 1. The magnitude and distribution of costs will often be in doubt, making it unclear whether a given concentration is inefficient or unfair. Indeed, it may be difficult to assess whether concentrations are producing harm at all, and where harm is present, it may often be unclear whether exclusion is responsible for the harm.[95]

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[94] For example, tradable emissions permits constitute at least a semipropertized system of interests that are independent of property interests in the underlying land and capable of being detached from particular parcels and attached to new ones in the course of trade. See, for example, Carol M. Rose, *Expanding the Choices for the Global Commons: Comparing Newfangled Tradable Allowance Schemes to Old-Fashioned Common Property Regimes*, 10 Duke Envir L & Policy F 45, 71 (1999) (observing that tradable environmental allowances "combine Leviathan with private property" and noting the potential to further combine such instruments with common property regimes); James E. Krier, *Marketable Pollution Allowances*, 25 U Toledo L Rev 449, 449 (1994) (discussing marketable pollution allowances as "hybrid property rights"); Richard B. Stewart, *Privprop, Regprop, and Beyond*, 13 Harv J L & Pub Policy 91, 93–95 (1990) (explaining that tradable emissions systems "mak[e] alienable the property rights created by regulation").

[95] The causal connection between exclusion and costly concentrations was stipulated in the examples in Part I.A. In some real-world settings, such as the intentional concentration of people in quarantines or prisons, the connection will be just that clear. But concentrations can come about in the absence of exclusion, either intentionally or spontaneously through the intersection of many individual actions. Even where exclusion is evident, it will not always be clear how much of the work exclusion is doing in producing concentrations. Residential concentrations are a case in point. See, for example, Peter H. Schuck, *Diversity in America: Keeping Government at a Safe Distance* 231 (Belknap 2003) (explaining that "housing patterns are intricate mosaics in which the pieces are shaped and fitted together by many private choices of individual consumers, commercial and industrial firms, property owners, developers, insurers, lenders, the construction industry, utilities, and other institutions"—all of which are affected by a wide range of public policies). Although the data used are now old, an excellent examination of the role of exclusion in producing income clustering within metropolitan areas is Eric J. Branfman, Benjamin I. Cohen, and David M. Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residen-*

One way to approach these challenges is to design policy in a way that induces parties to undertake at least some of the analysis themselves. If entitlements and cost obligations are assigned in a way that harnesses information and spurs efficient exchanges, it may be possible to both test out the potential for improvements and realize any improvements that are feasible. A command-and-control approach, in contrast, depends on a central planner's possession of all of the relevant information about the costs and benefits of different grouping arrangements. Such an approach cannot elicit or capitalize on information in the possession of the parties affected by grouping arrangements.

2. Multiple pathways.

Problems arising from grouping patterns might be addressed in any number of ways. One obvious response to an inefficient concentration would be to alter grouping protocols directly. For example, groups could collectively reach an agreement that will rein in exclusionary impulses, or society could make a rule accomplishing the same thing. But it is also possible that actions could be taken earlier in time—either by society or by would-be group members—that eliminate the features of the situation that later make exclusion rational for the excluding groups. For example, the conditions prompting the impulse to quarantine might be greatly reduced by earlier actions to vaccinate.[96] Likewise, research has raised the possibility that some early-childhood interventions could operate as "behavioral vaccines" that would eliminate the need for special tracking of disruptive students.[97]

Alternatively, or in addition, society might make efforts to mitigate the effects of existing concentrations without attempting to undo the concentrations themselves. Here, we might think of community development efforts, monetary inputs, training programs and the like that are designed to transform the population from within or otherwise ameliorate the deleterious effects of concentration. Likewise, the concentrated grouping might itself take action to build social capital networks capable of counteracting negative effects.

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tial Patterns of the Poor, 82 Yale L J 483, 484 (1973). Also useful are models that examine the way that urban spatial arrangements would be expected to play out in the absence of exclusionary zoning. See, for example, Susan Rose-Ackerman, *Racism and Urban Structure*, 2 J Urban Econ 85, 102 (1975).

96 See Markovits, 33 J L Med & Ethics at 323 (cited in note 38). Markovits suggests that vaccinations are preferable even where they are less efficient than a quarantine because they more fairly spread burdens across society. Id.

97 See Cook and Ludwig, *Assigning Deviant Youths to Minimize Total Harm* at 14–15 (cited in note 26) (discussing the "Good Behavior Game" used in elementary school classrooms, which has been characterized by one scholar as a "behavioral vaccine").

It is in society's interest to encourage both individuals and groups to take cost-effective actions with regard to costly concentrations.[98] From an efficiency perspective, the goal is to structure entitlements in a way that harnesses actors' information about the costs and benefits of different courses of action and induces efficient responses to concentration and the threat of concentration. If we view concentration as a potentially costly mishap, then we might wish to place (or leave) concentration costs on the party who can most cheaply avoid the mishap.[99] That party will invest in concentration avoidance, mitigation, or dispersion to the extent that doing so is cheaper than simply bearing the costs of concentration. One of the goals of a system of associational entitlements would be to encourage these efficient reductions in concentration costs.

3. Various normative goals.

It is worth emphasizing that propertizing association does not require the single-minded pursuit of efficiency to the exclusion of other normative goals. This point is especially important given the possibility, illustrated in Table 1, that distributive goals and efficiency goals may not always line up.

The manner in which a society chooses to assign and protect entitlements will inevitably have distributive implications.[100] Choices about entitlements can involve the conscious pursuit of equity or other normative goals whether or not efficiency is advanced. It will often be normatively desirable to explicitly assign associational entitlements in a way that helps to spread the costs of exclusion. It is possible, however, to imagine other possible normative claims for priority in associational entitlements—such as those premised on a labor-desert theory. There is nothing in the use of entitlement language itself that would preclude either basis for assigning initial entitlements.

In other words, entitlements are neutral structures into which normative values of various sorts can be poured.[101] However, the capacity of entitlements to harness private information and produce efficient results is one of their most attractive features. My focus in

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98 An analogy can be drawn to tort law, where ideally both victims and injurers would take optimal precautions. See Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 Cal L Rev 1, 3–4 (1985) (discussing the ideal of "double responsibility at the margin").

99 In other words, costs would be placed on the "cheapest cost avoider." See Guido Calabresi, *The Costs of Accidents* 136–38 (Yale 1970) (discussing the allocation of accident costs to parties who are able to avoid these costs most cheaply).

100 See generally Part IV.C.

101 However, some normative approaches might disapprove of the use of entitlement language or argue for inalienable interests. See Part IV.C (discussing concerns about undue commodification).

this Article is on situations in which costs appear to fall heavily and unfairly on the concentrated group. In these cases, if efficiency gains are available from group reconfiguration, the potential exists to advance distributive and efficiency goals simultaneously.

C. Making Property Mind Its Own Business

One cannot qualify property for associational work without carefully specifying the jobs that it can and cannot do. How might we sum up property's associational domain? What limiting principles keep the analysis from overtaking all matters of association? What, in short, would it mean for property to mind its own (and only its own) business? One can draw out of the analysis above five features that converge to produce the strongest case for using overt transferable entitlement forms to manage associational interests. While the absence of one or more of these factors may not doom the case for associational entitlements, each offers a logical stopping point. Depending on the normative goals that society wishes to achieve, some of these factors may take on greater or lesser importance.

1. Unchosen concentrations.

Where a situation involves the exhaustive partition of a background population into subsets, it may generate the potential for unchosen, problematic concentrations. Unchosen concentrations are of particular concern where costs of concentration remain focused on those who are concentrated.

2. Heterogeneity and space.

I have focused on spatial groupings in which all individuals in the group interact to produce group goods. Because individual contribution capacities are important to the achievement of group goals, heterogeneity in the background population along group-relevant capacity dimensions provides a motive for exclusion. Grouping together with the "best" group members in a spatial context requires keeping the scarce interaction space free of members who contribute less. In contrast, where a nonspatial network produces gains, this motive for exclusion is not (usually) present. For example, a cell phone network provider need not worry about whether all of its customers are compatible with each other; members can interact with desired portions of the network while costlessly avoiding other portions of the network.

3. Nonlinear production functions.

Where the production function for associational surplus or deficit is related in a nonlinear way to individual contributions, grouping is not a zero-sum game. Gains or losses are possible through reconfiguration of group members. This need not always be the case. Consider a situation in which a school assigns students to different rooms for purposes of administering standardized tests. If the school receives rewards based on the average test score, aggregated across all test rooms, the act of allocating students among testing rooms is zero-sum; putting a good student in Room A rather than Room B will not affect the overall results. In contrast, the allocation of students to classrooms for the entire year might well affect overall performance on the standardized test if peer effects operate in a nonlinear fashion to facilitate or inhibit learning.

4. Variable harm thresholds and offsetting benefits.

Transferable entitlements have advantages where actions that carry some social benefit interact and accumulate to produce harmful outcomes. In such cases, there is often more than one way of counteracting harmful outcomes, and assigning transferable entitlements can help to locate the cheapest way of doing so.[102] Where a particular sort of action *always* produces a harmful result without any countervailing benefits,[103] inalienable rights remain appropriate. Of course, inalienable rights can be conceptualized as entitlements as well—simply inalienable ones.[104] Whether it is helpful to adopt the language of entitlements in such contexts is an open question,[105] and one that I do not take a

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102 This is analogous to enabling market forces to locate the "cheapest cost avoider." See Calabresi, *The Costs of Accidents* at 136–38 (cited in note 99).

103 I am assuming here that there are some forms of utility—such as the bigot's enjoyment from discrimination—that society will not recognize as valid. Similar assumptions are commonly made in analyses of criminal law, where the criminal's utility from crime is disregarded, although conceptual questions abound regarding the precise justification for doing so. See, for example, Jeff L. Lewin and William N. Trumbull, *The Social Value of Crime?*, 10 Intl Rev L & Econ 271, 278–82 (1990) (discussing why the criminal's gains should be excluded in assessing the net social costs of crime and enforcement).

104 See Calabresi and Melamed, 85 Harv L Rev at 1092–93, 1111–15 (cited in note 10) (defining and discussing inalienability rules).

105 See Singer, *Entitlement: The Paradoxes of Property* at 39–44 (cited in note 4) (querying whether the use of property language is as appropriate or effective in discussing civil rights as is the language of rights). One possible function of using entitlement language would be to test out, as a matter of logic, how far the asserted rights can actually extend without conflicting with one another and requiring some system of setting priorities. At the same time, there are good reasons to avoid labels that obscure the true nature of the interest. James Penner has forcefully argued that interests that cannot be plausibly held by others should not be regarded as property. Penner, 18 Can J L & Juris at 76 (cited in note 89) (maintaining that property rights are "ones which the

position on here. The important point is that my notion of associational entitlements would not displace or dilute antidiscrimination laws.[106]

5. Minimal distortions to individual contributions.[107]

Individual contributions to group goals can be affected both by investments to develop individual contribution capacity and by decisions regarding cooperation once within the group. The manner in which society assigns and protects associational entitlements could affect either or both of these inputs. For example, an entitlement regime that operates to raise the price of selectivity in a given domain might be expected to reduce the amount of selectivity in that domain. That reduced selectivity could attenuate the relationship between behavioral inputs and membership in a desired grouping. Whether this is a problem from an efficiency perspective depends on the magnitude and direction of the behavioral response that such a change might elicit.[108]

III. INTRODUCING RESIDENTIAL ASSOCIATIONAL ENTITLEMENTS

Suppose that all of the features just summarized are present in a given grouping situation—as they seem to be in residential contexts. What next? The discussion to this point has suggested that such situations are ripe for using transferable associational entitlements to achieve efficiency gains—or at least to test out whether such gains are

holder can dispose of in various ways and remain the same person, with full legal and moral status, and for the same reason, such rights can be *taken away* from the holder without diminishing his or her moral or legal status").

[106] See Part IV.B.1 (discussing the interaction between associational entitlement and antidiscrimination law).

[107] The term "distortions" here refers to unwanted changes in behavior. When selectivity is reduced in order to achieve other goals, one concern is that behavioral shifts will thwart the achievement of those other goals, and will do so at some cost. One can analogize to the inverse elasticity rule in taxation, which suggests that policymakers should tax most heavily the least elastic commodities in order to minimize the deadweight loss associated with a behavioral response. See Harvey S. Rosen, *Public Finance* 310–11 (McGraw-Hill 6th ed 2002). In some cases, however, entitlements may be consciously structured to influence behavior by making actors internalize costs. Here the analogy would be to Pigovian taxes that are designed to correct distortions. See, for example, Maureen L. Cropper and Wallace E. Oates, *Environmental Economics: A Survey*, 30 J Econ Literature 675, 680 (1992) (defining a Pigovian tax as "a levy on the polluting agent equal to marginal social damage"). In the present context, the goal is to correct for externalities produced by exclusion, but to do so without creating distortions in the acquisition and use of positive group-relevant traits.

[108] Important to this inquiry is the degree to which desired behaviors are pursued solely for purposes of group membership rather than for independent reasons. For example, failure to seat high school students at a graduation dinner in accordance with their grade point averages would be unlikely to diminish the degree of effort and preparation that students put into their schoolwork. In contrast, failure to use grades as an input into higher education admissions decisions would rather clearly erode academic efforts (although it would not do so entirely, nor would it do so for all students).

possible. Yet, merely specifying "transferable entitlements" does not narrow things down much. The work of Calabresi and Melamed and their successors has taught us that entitlements can be assigned and protected in a variety of ways. The next section presents a taxonomy of entitlements to illustrate some of the myriad ways in which transferable property interests might be structured.

A. Assigning and Protecting

The same basic framework of analysis that has been useful in thinking about how to allocate other contested and valuable resources can be translated into the associational setting.[109] Before introducing concrete examples, I will begin by setting out a simplified menu of property rules and liability rules.

1. A menu of associational entitlements.

According to Calabresi and Melamed, society must make two decisions about any given entitlement—which party will be allocated the entitlement, and how the entitlement will be protected.[110] These decisions require some antecedent work in defining the parties and the entitlement. In the standard "polluting factory" example, the parties are a polluting factory and a nearby resident.[111] The entitlement itself might be characterized as the right to pollute, which, if held by the victim of pollution, would entail the right to keep the air unpolluted.[112]

In the associational context, defining the parties is tricky, since groups are more or less fluid combinations of individuals. Yet we can draw a distinction between individuals acting together through a local political apparatus such as a municipality or homeowners association (which I will here term "the group"), and an individual who is not currently part of that apparatus ("the individual"). The entitlement in question might be framed as the right to exclude, which if held by the individual, would entail the right not to be excluded. A larger political body, such as a state government, might hold or exercise rights on be-

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[109] For example, a recent article extends the Calabresi and Melamed framework to account not only for environmental harms but also for the effects of segregation. See Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 Emory L J 1807, 1875 (2004) (proposing a "Resident's Choice" rule that would allow households harmed by pollution to collectively choose between an injunction and damages adjusted by a "segregation multiplier").

[110] Calabresi and Melamed, 85 Harv L Rev at 1090 (cited in note 10).

[111] See Carol M. Rose, *The Shadow of* The Cathedral, 106 Yale L J 2175, 2175–76 (1997) (noting the prevalence of this example).

[112] For a critique of this formulation of the problem, see Henry E. Smith, *Self-Help and the Nature of Property*, 1 J L Econ & Policy 69, 73–77 (2005) (arguing that "the law is in fact radically asymmetric" in the polluting factory model).

half of "the individual" in some instances, so that the interaction would play out between "the group" (a political subdivision) and that larger political entity.[113]

From these premises, we can generate a full menu of alternative ways of assigning and protecting entitlements, as shown in Table 2.[114]

TABLE 2: EXCLUSION CONTROL CHOICES

Rule	Individual Holds	Group Holds	What It Means
0a	Entitlement Protected by an Inalienability Rule	Nothing	Exclusion is absolutely forbidden.
0b	Nothing	Entitlement Protected by an Inalienability Rule	Exclusion is mandatory.
1	Entitlement Protected by a Property Rule	Nothing (except the opportunity to negotiate)	Exclusion is forbidden, except as otherwise negotiated.
2	Entitlement Subject to a Call Option	Call Option	Exclusion is taxed.
3	Nothing (except the opportunity to negotiate)	Entitlement Protected by a Property Rule	Exclusion is permitted, except as otherwise negotiated.
4	Call Option	Entitlement Subject to a Call Option	The individual can get into the group by paying a fee.
5	Nothing-Minus	Entitlement Plus a Put Option	The group can exclude the individual *or* include her and collect a fee
6	Entitlement Plus a Put Option	Nothing-Minus	The individual can demand inclusion *or* stay out and collect an exclusion fee.

Table 2 begins with two kinds of inalienability rules—exclusion that is absolutely prohibited, and exclusion that is mandatory and

[113] Alternatively, some entity such as a developer might act on the individual's behalf.

[114] Table 2 is adapted from Fennell, 118 Harv L Rev at 1447 fig 6 (cited in note 23), which was in turn based on Ian Ayres, *Protecting Property with Puts*, 32 Valp U L Rev 793, 798 table 3 (1998). In adapting previous tables to the new problem of exclusion, I have put the group, which is the party engaging in the potentially harmful conduct (that is, excluding) in the position traditionally occupied by the polluting factory.

nonnegotiable.[115] An example of the former would be a law forbidding discrimination based on protected characteristics such as race, while an example of the latter would be a fire code that forbids exceeding a maximum occupancy. Both kinds of inalienability rules have a place in land use law, but there has been an unfortunate tendency to deny that any middle ground lies between them. Zoning regulations that do not amount to prohibited exclusion are forced to the "mandatory" side of the ledger, where an ill-fitting police powers justification precludes their open sale.[116] This dichotomous framework is needlessly restrictive and at odds with the reality of residential land use controls, most of which have nothing to do with preserving health, safety, or morals.[117]

The remaining six rules in Table 2 represent transferable associational entitlements.[118] These entitlements differ along two dimensions: who holds the entitlement initially, and who controls whether or not the entitlement will be transferred to the other party. Entitlements that are protected by property rules (Rules 1 and 3) cannot be transferred unless both parties agree to the transfer. Under Rule 1, the individual cannot be excluded unless the group pays a price that the individual deems acceptable. Conversely, under Rule 3, an individual can only gain entry if she (or someone acting on her behalf) offers a price acceptable to the exclusive group. Entitlements protected by liability rules can be subdivided into "call options" (Rules 2 and 4), which permit a unilateral transfer on the initiative of the party who is

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115 I have numbered these rules 0a and 0b because they lie outside of the four-rule property rule/liability rule structure developed by Calabresi and Melamed. Inalienability rules stand apart from, and in some ways anterior to, rules that permit transfers of entitlement on various conditions, making the zero-series numbering appropriate. See Calabresi and Melamed, 85 Harv L Rev at 1105–24 (cited in note 10).

116 The fact that zoning regulations are not freely alienable has drawn significant criticism from economists. Of course, bargaining over land use regulations does occur through the medium of exactions. Even there, however, the police power justification for regulation has spawned judicial constraints on the content of bargains. See *Nollan v California Coastal Commission*, 483 US 825, 837 (1987) (requiring an "essential nexus" between the permit condition and the reason for the original restriction on development); *Dolan v City of Tigard*, 512 US 374, 391 (1994) (adding a requirement of "rough proportionality" in exaction bargains). Nonetheless, developers do strike deals with local governments regularly. See, for example, David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 NC L Rev 1243, 1286–99 (1997).

117 See, for example, Robert H. Nelson, *Private Neighborhoods and the Transformation of Local Government* 144–46 (Urban Institute 2005) (noting how poorly fitted the "nuisance" analogy is to zoning that protects high-status residential neighborhoods).

118 Rules 1 through 4 appear in the original Calabresi and Melamed framework. Calabresi and Melamed, 85 Harv L Rev at 1105–24 (cited in note 10). Rules 5 and 6 were added later by other scholars; they appear at some points in the literature with the numbers reversed from what is shown here. See Ayres and Goldbart, 100 Mich L Rev at 7 n 13 (cited in note 10). These six rules do not come close to exhausting all of the possible ways that entitlements might be assigned and protected. See, for example, Fennell, 118 Harv L Rev at 1405–06 nn 20–21 (cited in note 23) (citing sources presenting various compilations of rules).

not initially assigned the entitlement, and "put options" (Rules 5 and 6), which allocate the power to initiate a unilateral transfer to the same party who is initially assigned the entitlement.[119]

2. From rules to policies.

The preceding catalog of stylized possibilities may strike readers as akin to a bestiary filled with mythological animals—diverting, perhaps, but with little correspondence to reality. In this section, I will report a few important sightings of these entitlement regimes, both in the wild and in the literature.

To start, it is worth noting that the most pervasive form of neighborhood associational entitlement is embedded within the laws governing land use controls.[120] While some states have cracked down on exclusionary zoning in more serious ways than others, local jurisdictions usually have broad latitude to adopt exclusionary land use controls. Zoning restrictions are not freely saleable and hence might be viewed as corresponding to Rule 0b (mandatory exclusion)—at least while a given restriction is in force. But developers and local governments routinely engage in dealmaking in which zoning designations are changed or zoning restrictions are relaxed.[121] The predominant regime thus corresponds more closely to Rule 3, in which exclusion is permitted except as otherwise negotiated.

It is true, of course, that individuals can enter any jurisdiction by purchasing housing of a type permitted in the jurisdiction. One might wonder, then, whether the typical zoning regime is more akin to Rule 4, in which the individual holds the right to get into the group by paying a fee—here by buying a permissible home. This characterization seems strained—the payment is not made to the excluding jurisdiction and is not keyed in even a rough fashion to the costs that the community bears by including the household or to the gains the household enjoys by virtue of inclusion.[122] In contrast, a "head tax" set by a juris-

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119 See Ayres and Goldbart, 100 Mich L Rev at 6 (cited in note 10). I am setting aside for the moment the manner in which the transfer price is determined. Standard discussions of liability rules assume that the transfer price will be set by a third-party governmental body such as a court or an administrative agency. Recent work building on the literature of self-assessment has explored the possibility of allowing the party against whom the option may be exercised to set its price in advance. See, for example, Lehavi, 92 Va L Rev at 973–74 (cited in note 32); Fennell, 118 Harv L Rev at 1404–11 (cited in note 23).

120 I will focus here on the case of zoning, although the idea of associational entitlements would apply broadly to both private and public forms of land use control. See Part IV.B.2.

121 See note 116.

122 For purposes of comparison, consider what kind of entitlement regime would be presented if bicyclists were absolutely excluded from a roadway (through roadblocks administered by police, say). Although a bicyclist could avoid exclusion by purchasing and driving an automo-

diction to cover the cost of local services and amenities, coupled with a repeal of all zoning restrictions distinguishing among kinds of residential uses, would constitute a clear example of Rule 4. Edwin Mills proposed just such an approach over twenty-five years ago.[123]

A variety of other scholarly proposals for introducing transferable entitlements in association have appeared in the literature over the years. Robert Ellickson suggested the possibility of applying a type of liability rule (Rule 2) that would allow municipalities to enact exclusionary policies if they paid damages to affected landowners or housing consumers.[124] Michelle White followed with the suggestion that a Pigovian tax on exclusion (another Rule 2 alternative) might be a superior instrument for achieving efficiency.[125] While not denominated as associational entitlements, both proposals were designed to make actors internalize the costs of their exclusionary policies.

A proposal by James Buchanan took a different tack.[126] Buchanan suggested that the differential fiscal impacts of low-income and high-income residents within a central city would justify policies that effectively "bribe" the better-off people to stay.[127] Such an approach corresponds loosely to Rule 5, if we understand the act of exit by the well-off (who are likely to be more mobile than the less well-off[128]) as a form of exclusion. Other scholars have examined a different variation on Rule 5—that of subsidizing inclusive communities.[129] Here, the mu-

bile, it would seem odd to view this regime as establishing a liability rule with respect to the entry of bicyclists. That logic aside, any liability rule that sets an extremely high transfer price is commonly regarded as a property rule for practical purposes. See Kaplow and Shavell, 109 Harv L Rev at 724 (cited in note 10) (observing that "a liability rule with very high damages is equivalent to property rule protection of victims").

123 See Edwin S. Mills, *Economic Analysis of Urban Land-Use Controls*, in Peter Mieszkowski and Mahlon Straszheim, eds, *Current Issues in Urban Economics* 511, 537 (Johns Hopkins 1979).

124 Ellickson, 86 Yale L J at 410–14, 436–38, 467–70, 505–10 (cited in note 21).

125 White, 8 J Legal Stud at 210 (cited in note 21). See also Cropper and Oates, 30 J Econ Literature at 80 (cited in note 107) (defining Pigovian taxes).

126 James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 Pub Choice 1 (1971) (suggesting that financial inducements that encourage city taxpayers to remain in the jurisdiction are a possible solution to municipal fiscal problems).

127 See id at 1. See also Clayton P. Gillette, *Opting Out of Public Provision*, 73 Denver U L Rev 1185, 1204–05 (1996) (discussing inducements to prevent "opting out" from local government services for private alternatives); Gewirtz, 92 Yale L J at 652–56 (cited in note 21) (discussing the possibility of offering incentives or even cash "bribes" to promote integration in the educational context). For a recent critique of policies aimed at attracting affluent residents to the inner city, see generally Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U Pa J Const L 1 (2006).

128 See Gerald E. Frug, *City Services*, 73 NYU L Rev 23, 27, 31–32 n 31 (1998).

129 See, for example, Silverman, 1977 Wis L Rev at 377 (cited in note 21) (proposing a three-prong proposal that would include: 1) federal payments to local governments to compensate them for the costs of low-income entry, 2) direct payments to individuals residing in more inclusive communities to compensate them for their "tolerant and accepting behavior," and 3) direct payments to households migrating from lower-income areas to higher-income areas); Bell and

nicipality has not only the power to exclude, but also can collect a fee by being more inclusive. The subsidy is not collected directly from an included individual, but rather comes from a higher level of government, where it is financed by a broader demographic group than those at risk of exclusion.[130]

An interesting, albeit deeply flawed, real-world associational entitlement regime was developed by the New Jersey legislature in the wake of the controversial *Mount Laurel* decisions.[131] Regional Contribution Agreements (RCAs) authorized under New Jersey's Fair Housing Act offer an alternative way for municipalities to meet up to 50 percent of their "fair share" obligations for low-income housing.[132] A sending jurisdiction purchases the right to be free of its obligation to house some number of low-income households, while a receiving

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Parchomovsky, 100 Colum L Rev at 1972–74 (cited in note 21) (proposing subsidies for communities); John Yinger, *Prejudice and Discrimination in the Urban Housing Market*, in Mieszkowski and Straszheim, eds, *Current Issues in Urban Economics* 430, 460 (cited in note 123) (critiquing proposals to offer communities or individuals "desegregation bonuses"). A recent proposal by A. Mechele Dickerson shares some ground with subsidy proposals. See Dickerson, 103 Mich L Rev at 1288–94 (cited in note 2). Dickerson suggests that school assignments be delinked from residence, and that parents who locate in integrated neighborhoods be given priority in an auction for school placements. Id. Here, inclusive residential choices are subsidized as in Rule 5—but not in cash. Instead, the subsidy takes the form of associational priority in the educational domain. The associational priority granted to well-off parents in integrated communities would include not only the ability to participate in the auction, but also the capacity to use direct cash payments to outbid their less well-off neighbors for the most desirable public school spots. See id at 1292 (explaining the auction system for school assignment and noting that "the market ultimately would determine the cost of school slots").

130 See, for example, Fischel, *The Homevoter Hypothesis* at 279–81 (cited in note 6) (suggesting that educational subsidies that follow low-income children may offer incentives toward more residential income integration). To work as an incentive, however, a subsidy must be large enough to more than make up for the costs of inclusion. See Ryan and Heise, 111 Yale L J at 2067–68, 2124–26 (cited in note 2) (discussing this point in the education context).

131 See *Southern Burlington County NAACP v Township of Mount Laurel*, 67 NJ 151, 336 A2d 713 (1975) (*Mount Laurel I*); *Southern Burlington County NAACP v Township of Mount Laurel*, 92 NJ 158, 456 A2d 390 (1983) (*Mount Laurel II*). In these cases, the New Jersey Supreme Court articulated municipal obligations under state constitutional law with respect to a "fair share" of low-income housing. The judicial remedies for exclusionary zoning set out in *Mount Laurel II* sparked a legislative response in the form of the New Jersey Fair Housing Act. The Act, which established the Council on Affordable Housing (COAH) to administer local governments' "fair share" obligations under the state constitution, was upheld in *Hills Development Co v Township of Bernards*, 103 NJ 1, 510 A2d 621, 642 (1986) (*Mount Laurel III*).

132 RCAs have received significant scholarly attention. See generally, for example, Harold A. McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 Temple L Q 665 (1987); Mark Alan Hughes and Therese J. McGuire, *A Market for Exclusion: Trading Low-Income Housing Obligations under* Mount Laurel III, 29 J Urban Econ 207 (1991); Patrick Field, Jennifer Gilbert, and Michael Wheeler, *Trading the Poor: Intermunicipal Housing Negotiation in New Jersey*, 2 Harv Neg L Rev 1, 3 (1997). As noted in McDougall, 60 Temple L Q at 681–82, a student note published before RCAs were developed had anticipated the idea. See Note, *Zoning for the Regional Welfare*, 89 Yale L J 748, 749 (1980).

jurisdiction takes on that obligation at a price.[133] Low-income households are not involved in the negotiations; however, developers are intimately involved, usually serving as the catalysts for formulating and consummating deals.[134]

Put into the framework outlined in Table 2, the New Jersey approach replaces the background Rule 3 regime (in which exclusion is permissible unless otherwise negotiated) with a three-stage regime. Rule 0a (with exclusion absolutely prohibited) prevails as to half of the municipality's fair share obligation. For the remaining half of the fair share obligation, the regime is Rule 1, in which exclusion is prohibited unless otherwise negotiated—here by finding another jurisdiction willing to take on the obligation.[135] The jurisdictions negotiate the transfer price themselves (with intercession by the interested developer), and if they fail to strike a mutually acceptable bargain, no transfer occurs.[136] Once the entire fair share obligation has been met through some combination of negotiation and inclusion, Rule 3 applies, in which exclusion is permitted unless otherwise negotiated. Notice here that the parties who might seek to "buy up" the jurisdiction's exclusionary prerogatives include not only individuals or developers, but also other jurisdictions that are looking to transfer the second half of their fair share obligations.

As this brief, nonexhaustive survey suggests, ideas corresponding to associational entitlements have been around for a long time, although they are not always denominated as such. Associational entitlements are not improbable creatures, but rather familiar features of our legal regime and scholarly discourse. Yet the potential of such instruments has gone largely untapped. Some of the problems associated with the best-known example, New Jersey's RCA scheme, can shed light on the challenges that policymakers face.

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133 The associational nature of the entitlement in play has not gone unnoticed. See Hughes and McGuire, 29 J Urban Econ at 216 (cited in note 132) (observing that "[t]he conventional point of view is that lower-income housing units are being traded," but suggesting that it is really "the right to exclude lower-income households that is being traded").

134 See Field, Gilbert, and Wheeler, 2 Harv Neg L Rev at 25–26 (cited in note 132) (discussing the role of private sector developers in negotiations).

135 McDougall has characterized the RCA regime as involving liability rules rather than property rules. McDougall, 60 Temple L Q at 69 (cited in note 132). This characterization appears to flow from the fact that the deals are legislatively sanctioned and subject to some degree of administrative oversight by the COAH. See id. But because the transfer price is mutually derived through negotiation between two different bodies (the sending and receiving jurisdictions), and because there is no requirement that any deal be struck at all, the regime appears to function more like a property rule regime.

136 While the COAH sets a minimum per-unit transfer price and is required to approve all transactions, in practice it has played a relatively minor role. See Field, Gilbert, and Wheeler, 2 Harv Neg L Rev at 10, 28–29 (cited in note 132).

Scholars have identified a number of shortcomings in RCAs. First is the concern that unequal bargaining power between "sending" and "receiving" communities produces unfair results.[137] Second, RCAs have been criticized for improperly commodifying governmental obligations.[138] Commodification concerns might arise with any entitlement regime that permits exchanges of associational interests for cash.[139] However, some of the concerns in the RCA context may be attributed to an entitlement design that leaves the low-income households out of the conversation, allowing bargains to proceed without regard for their associational preferences.[140] Third, the RCA system is not sensitive to problems of spatial distribution and concentration. If a small group of receiving jurisdictions takes on a disproportionate share of the area's low-income population, problematic concentrations are possible.[141] This shortcoming is not surprising, given that the *Mount Laurel* analysis under the state constitution did not focus on the problems of concentrated poverty as such.[142] Finally, racial segregation has continued under the RCA approach.[143]

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137 See Field, Gilbert, and Wheeler, 2 Harv Neg L Rev at 3 (cited in note 132) (noting that some critics believe the bargaining power among New Jersey communities is "unfairly tilted"); Hughes and McGuire, 29 J Urban Econ at 215–16 (cited in note 132) (discussing factors that affect bargaining power); McDougall, 60 Temple L Q at 686–88 (cited in note 132) (discussing the respective bargaining positions of cities and suburbs). See also Ford, 107 Harv L Rev at 1900–03 (cited in note 132) (discussing possible reforms that would respond to shortcomings of RCAs, including unequal bargaining power).

138 See, for example, Field, Gilbert, and Wheeler, 2 Harv Neg L Rev at 3 (cited in note 132).

139 See Part IV.C (discussing concerns associated with commodification, wealth disparities, and fairness).

140 See McDougall, 60 Temple L Q at 683–84 (cited in note 132) (discussing the possibility that the poor may be harmed by agreements struck between municipalities that fail to take their interests into account).

141 In perfectly functioning markets, one might expect that the receiving jurisdiction would scale its prices to account for the true marginal impact of additional low-income households. But factors such as unequal bargaining power and incomplete internalization of the harms of concentration by the decisionmaking apparatus may prevent this check from operating robustly in practice.

142 In some places, the *Mount Laurel* court seems to suggest that only fiscal burdens are at issue. See *Mount Laurel I*, 336 A2d at 723 (asserting that "[t]here cannot be the slightest doubt that the reason for this course of [zoning] conduct has been to keep down local taxes on *property* . . . and that the policy was carried out without regard for nonfiscal considerations with respect to *people*, either within or without its boundaries"); id at 730–32 (rejecting Mount Laurel's fiscal defense of its zoning policy and explaining that "every municipality [in a region] must bear its fair share of the regional burden").

143 See Naomi Bailin Wish and Stephen Eisdorfer, *The Impact of* Mount Laurel *Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 Seton Hall L Rev 1268, 1302–04 (1997) (presenting empirical work finding that racial disparities in housing patterns and in success in obtaining housing persist under the *Mount Laurel* initiatives). These findings bear on the interaction between antidiscrimination law and associational entitlements, discussed in Part IV.B.1.

B. Two Sketches

The menu of alternatives presented above provides only a few starting points for formulating associational alternatives. Consciously recognizing where existing and proposed examples fit into the analytic framework that has been used in other contexts may yield new and improved variations. To offer a sense of the range of possibilities, I will briefly sketch two new ways residential associational entitlements might be structured. The first idea builds on self-assessed valuation devices to sidestep difficulties in determining the relative values attached to associational choice. The second idea uses associational impact statements—analogous to environmental impact statements[144]—as a starting point for defining group obligations.

1. Options in space.

The discussion above identified a number of shortcomings in the design of RCAs. It would be possible to address some of these concerns through a redesigned RCA-like instrument that is made sensitive to spatial concentrations as well as more responsive to the valuations that different communities place on exclusion. Consider the observations of Mark Hughes and Therese McGuire:

> The primary advantage of the RCA mechanism is that it works like a tax on exclusionary behavior. A major disadvantage of the RCA mechanism is that it is complex and subject to the strengths and weaknesses of the negotiators of the agreement. A reform that addresses this problem would be simply to tax income of the residents of the exclusionary communities. However, the demand for exclusion is related to factors other than income. Therefore, revenue raised from a tax on income might not well reflect the willingness to pay to exclude.
>
> A more radical reform would be elimination of the RCA mechanism for trading housing units, and a stronger enforcement of the fair share obligation.[145]

In this passage, we see property rules, liability rules, and inalienability rules considered in turn. Property rules, which are used in RCAs as presently formulated, can present difficulties where parties dissipate value as they struggle for shares of the available surplus. Even where bargaining struggles do not lead to an impasse, unequal bar-

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144 See National Environmental Policy Act of 1969, 42 USC § 4332(2)(c) (2000) (requiring environmental impact statements). For further discussion, see note 160 and accompanying text.

145 Hughes and McGuire, 29 J Urban Econ at 216–17 (cited in note 132).

gaining power may generate distributive problems. A liability rule (Rule 2) solution would permit exclusion upon payment of a predetermined fee—here, Hughes and McGuire suggest a tax on the income of the excluders. However, liability rules can only promise efficient results if the transfer price is set properly. The typical approach would be to approximate the damage that is inflicted on others by the exclusionary acts—an approach which would assign all of the surplus from the transaction to the excluding jurisdiction.[146] An alternative that would allocate all of the surplus to the excluded would set the transfer price at a level that corresponds to the gains produced by exclusion.[147] There is no reason to think that an income tax would happen to match up well to either the harms of exclusion or the gains from exclusion. And, of course, an inalienability rule (simply making jurisdictions take on their fair share) means forgoing the flexibility of a market mechanism.[148]

An alternative would be to use the entitlement regime itself to harness information from the communities about the value that they place on exclusion.[149] One possibility would be to require each community to state, at annual or other regular intervals, how much a given exclusion increment (corresponding to a standard number of low-income housing units) was worth to it. Two consequences would attach

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146 See A. Mitchell Polinsky, *On the Choice between Property Rules and Liability Rules*, 18 Econ Inquiry 233, 234 (1980) ("[A]ll of the 'gains from trade' from moving from the entitlement point to the efficient outcome are obtained by the party subject to the liability rule.").

147 See Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 Yale L J 2149, 2156–57 (1997) (discussing restitutionary versions of liability rules). See also James E. Krier and Christopher Serkin, *Public Ruses*, 2004 Mich St L Rev 859, 870–73 (discussing the possibility of "gain-based compensation" in the eminent domain context).

148 See Hughes and McGuire, 29 J Urban Econ at 217 (cited in note 132) (asking "[w]hether this particular market mechanism [RCA] is preferable to strong enforcement or worth the loss in income integration").

149 Self-assessed valuation has been considered in other land use contexts. One of the most-discussed applications in the literature is the use of self-assessment to determine property values for both property taxation and eminent domain (or other forced purchase) purposes. See, for example, Daniel M. Holland and William M. Vaughn, *An Evaluation of Self-Assessment under a Property Tax*, in Arthur D. Lynn, Jr., ed, *The Property Tax and Its Administration* 79, 112–15 (Wisconsin 1969); T. Nicolaus Tideman, *Three Approaches to Improving Urban Land Use* 52–69, unpublished PhD dissertation, University of Chicago (1969); Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 Va L Rev 771, 779, 784–90 (1982); Thomas S. Ulen, *The Public Use of Private Property: A Dual-Constraint Theory of Efficient Governmental Takings*, in Nicholas Mercuro, ed, *Taking Property and Just Compensation: Law and Economics Perspectives of the Takings Issue* 163, 182–83 (Kluwer 1992); Abraham Bell and Gideon Parchomovsky, *Bargaining for Takings Compensation* 28–33 (2005), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=806164 (visited Oct 17, 2006). See also Fennell, 118 Harv L Rev at 1471–81 (cited in note 23) (discussing applications of a self-assessment approach to conservation and land use externalities); T. Nicolaus Tideman, *Integrating Land-Value Taxation with the Internalization of Spatial Externalities*, 66 Land Econ 341, 347 (1990) (describing a self-assessed tax on the right to remain on a given site within a land rent regime as "a charge for the diminution of social flexibility that results from putting immobile improvements on land").

to that valuation statement. First, the community would be required to pay a tax into a state coffer based on its valuation. Second, the valuation would create a call option that could be exercised by the state agency; the agency could override the community's exclusionary measures by paying the community's stated valuation. These dual consequences would help to induce honest valuations: a too-high valuation would result in unnecessary tax payments, and a too-low valuation would create the risk that low-income housing might be placed within the jurisdiction at a price that the jurisdiction deems to be too low.[150]

This approach combines two of the liability rules discussed above.[151] First, the community's valuation statement sets a tax that it must pay for exclusion—a call option that corresponds to Rule 2 in Table 2. At the same time, the community's valuation states a price at which each increment of exclusion power can be bought up, thus granting the state agency a call option that roughly corresponds to Rule 4 in Table 2. Here, however, the state agency would exercise the call option on behalf of individuals who would otherwise be excluded. In addition, the predetermined price at which transfer may occur (that is, the exercise price of the call option) is set by the community itself rather than by a third party. The arrangement as a whole amounts to a "callable call."[152] The community's call option to engage in exclusion for a price can be overridden by a state agency acting on behalf of excluded individuals, upon the agency's payment of the community-stated price.

The array of valuations provided by communities throughout a metropolitan area would permit a state agency to easily find the lowest-cost sites for the low-income units. The agency could also build in additional spatial criteria (or any other criteria) in deciding when and

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150 This approach tracks the law of general average contribution, which used a similar pair of consequences to induce honest valuations of shipments. See, for example, Levmore, 68 Va L Rev at 860 n 214 (cited in note 147); Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J L & Econ 553, 582–84 (1993). Under that regime, each merchant was required to state a value for the shipment; the value was used both to determine compensation in the event that the shipment was lost at sea and to determine the share that the merchant would be required to pay toward compensation of other shippers in the event that other shipments were lost at sea. Epstein, *Holdouts, Externalities, and the Single Owner* at 582–84. In the event of a storm, this system provided a handy index for the captain to use in deciding which shipments should be thrown overboard to save the ship. Id.

151 A number of scholars have proposed combining liability rules in various ways to better achieve policy objectives. See, for example, Ian Ayres and J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 Yale L J 703, 715–16 (1996); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U Chi L Rev 681, 738–48 (1973).

152 See Fennell, *Revealing Options*, 118 Harv L Rev at 1407–08, 1464–67 (cited in note 23) (describing how a "callable call" would work in environmental and neighborhood aesthetics contexts). See also id at 1407–08 n 32 (discussing the scholarly antecedents of the "callable call" notion).

where to exercise its options. For example, concentrations above a critical threshold could be avoided altogether, or each potential site could be evaluated based on a combination of price and spatial attributes.[153] Hence, the system could be made responsive to concentrations in a way that the present RCA structure is not. The state agency could use valuation information along with any other inputs to respond flexibly to changing conditions over time.

Because a community with a lower true valuation saves tax dollars under this scheme, communities would undertake efficient efforts to reduce their own valuations of the exclusion entitlement.[154] Such efforts might take the form of innovations like better crime control, better after-school programs, or better neighborhood design that would reduce the impacts of poverty within the community and thereby reduce the costs of including low-income housing. Of course, the system would not necessarily create incentives for *all* efficient cost-reduction efforts.[155] The incentive effects for a given action would

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153 Compare Jonathan Remy Nash and Richard L. Revesz, *Markets and Geography: Designing Marketable Permit Schemes to Control Local and Regional Pollutants*, 28 Ecol L Q 569, 624–28 (2001) (presenting a proposal that would make marketable permit schemes sensitive to spatial and temporal nonlinearities).

154 This conclusion depends on the exclusion tax creating an incentive for those responsible for the exclusion decision. There are any number of ways that costs imposed on a collective body might fail to translate into meaningful incentives. See, for example, Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U Chi L Rev 345, 348 (2000) (observing that "government actors respond to political, not market, incentives," and suggesting that this fact calls into question whether the "government will internalize social costs just because it is forced to make a budgetary outlay"). In this context, a particular concern is whether some of the costs of the exclusion tax might be passed along to those entering the community, perhaps through a property tax assessment, thereby raising the cost of entry beyond the present baseline. I thank Claire Priest for this point. The costs of entry would presumably be lowered elsewhere in a given region (both as a result of state buy-ups of exclusion rights and as a result of more inclusive decisionmaking prompted by the schema), but the possibility that excluding communities could effectively pass along some of the costs of exclusion to those who will later seek entry adds a problematic wrinkle.

The problem is a general one that plagues efforts to apply incentives to communities as a way of reshaping the communities. For example, James Loewen recently suggested that financial penalties attach to exclusionary choices that produce and sustain segregated results. See James W. Loewen, *Sundown Towns: A Hidden Dimension of American Racism* 443–45 (New Press 2005) (proposing that segregated white towns be denied some forms of state and federal funding and that their residents be made ineligible for the home mortgage interest deduction on their federal income taxes). Yet it is difficult to imagine how these proposals could achieve Loewen's goal of raising costs for whites who live in those communities without also raising costs for nonwhites who live in the communities or who wish to enter them.

155 For example, if fair share obligations were calculated and recalculated periodically based on regionwide needs for low-income housing, individual municipalities that successfully reduce the rate or severity of poverty throughout the region would not receive the full benefit of that reduction. Application of spatial criteria might even reward higher poverty rates with lower tax rates. If concerns about concentrated poverty would limit the amount of additional low-income housing that would be sited in a community that is already experiencing high poverty rates, such

depend on the way in which its costs and benefits are distributed. If most local expenditures that reduce the overall costs associated with concentrated poverty and its avoidance translate into local comparative advantages in accepting low-income housing, the benefits of bearing those costs will be internalized and efficient choices would be expected. If, instead, local expenditures that reduce overall concentration costs (and concentration-avoidance costs) generate benefits that are shared by the region as a whole, some worthwhile expenditures may be forgone.[156]

A remaining problem is that the state agency responsible for siting low-income housing may not do a good job of choosing the criteria that will best advance the interests of the low-income households themselves. One possibility would be to delegate siting decisions to nonprofit organizations or private developers who might do a better job of aggregating the interests of low-income households. Coalitions of low-income households might be given either an advisory role or a veto power. More direct preference aggregation systems might also be devised, although not without introducing additional complexities.

Another concern relates to the risk of inappropriate commodification of associational interests. Explicitly attaching monetary valuations to associational preferences might be viewed as an especially harmful kind of discourse. Rather than being told subtly through land use controls (or the simple absence of affordable housing) that they are not welcome, low-income people would be confronted with a dollar figure that tells them just how unwelcome they are. This criticism assumes that subtle means of communicating associational distaste are less harmful than overt ones. While some traces of this view can be seen in antidiscrimination law,[157] transparency is often valued precisely

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a community might be able to get away with an artificially low valuation of its right to exclude—secure in the knowledge that the option it was writing would not be exercised. However, the direct impact of poverty on the community should blunt any perverse incentives along these lines, and the distributive and efficiency benefits associated with reducing problematic concentrations probably outweigh any such concerns.

156 If the benefits that are internalized justify the expenditure on their own, the positive externalities produced would not deter action. See, for example, David D. Haddock, *Irrelevant Internalities, Irrelevant Externalities, and Irrelevant Anxieties* 28–29 (Northwestern Law & Economics Research Paper No 03–16, 2003), online at http://papers.ssrn.com/abstract=437221 (visited Oct 17, 2006).

157 For example, the so-called Mrs. Murphy exception in the Fair Housing Act exempts from liability for certain discriminatory acts landlords who own buildings made up of four or fewer units and who actually occupy one of those units as a residence. 42 USC § 3603(b)(2) (2000 and Supp 2005). Yet it does not exempt those landlords from liability for discriminatory advertisements and statements. See 42 USC §§ 3603(b), 3604(c) (2000 and Supp 2005). The result is a regime in which these landlords can legally discriminate (except as prohibited by other laws, such as 42 USC § 1982 (2000 and Supp 2005)), as long as they do not say that they are doing so. Among the justifications for the divergent coverage of the two provisions of the Act is the con-

because it provides opponents with a clear target and exposes the actor to the risk of public disapproval. It is an empirical question, but social norms could produce a shaming control[158] that limits the willingness of municipalities to present themselves as having an extraordinarily high willingness to pay for exclusion.[159]

2. Associational impacts and inclusion credits.

Another way to approach the problem would be to attach associational obligations to exclusionary land use controls. The content of the obligations would be governed by the results of an associational impact assessment.[160] Those obligations could be satisfied by transactions involving associational entitlements or by other actions designed to reduce the overall costs of concentrated poverty. An example will help to flesh out the idea.

Suppose that Montazalea, an exclusive suburb of a major metropolitan area, has enacted a zoning ordinance that bans all multifamily dwellings from zones that cumulatively amount to 90 percent of the jurisdiction's land mass.[161] This enactment, like any land use control

cern that certain kinds of statements and advertisements are particularly harmful to members of protected groups and may make them feel unwelcome even in places where the law *does* protect them from discrimination. See Strahilevitz, 104 Mich L Rev at 1867–68, 1886–87 (cited in note 90); Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urban L J 187, 249–51 (2001).

158 A high price would only be shameful if norms against exclusion exist and if, under those norms, payment was not viewed as an appropriate alternative to inclusion. For a discussion of the links between norms and shame, see Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich L Rev 338, 355–75 (1997). A norm against exclusion might not actually exist, or, if it exists, paying the price established through self-assessment might be viewed as a sufficiently cooperative act to constitute compliance with the antiexclusion norm. See generally Uri Gneezy and Aldo Rustichini, *A Fine Is a Price*, 29 J Legal Stud 1 (2000) (presenting results of a study showing that late day care pickups increased when parents were charged for each instance).

159 In this connection, the fact that excluding individuals inevitably involves excluding types of structures cuts both ways. It arguably softens the exclusionary message that is conveyed by the pricing of exclusion. On the other hand, it may make shaming either ineffective (because people believe that pricing decisions are based on structures and not on people) or inappropriate (if it truly is the case that pricing decisions are based on structures and not on people).

160 These assessments would be analogous to environmental impact statements required under the National Environmental Policy Act (NEPA). The "impact statement" idea has already spread from the environmental field to the area of land use. A number of states have enacted legislation requiring "takings impact assessments" that consider the impact of proposed government action on the value of land. See, for example, Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L J 203, 257–58 (2004) (describing state legislation requiring "takings impact assessments" and citing examples of such legislation). Sheila Foster has recently examined in detail the potential to address social impacts directly through NEPA. See Foster, 82 Notre Dame L Rev (cited in note 4) (discussing the possibility of "urbanizing NEPA" so that it would meaningfully address urban environmental impacts, including impacts on patterns of population concentration).

161 As this example suggests, land use controls that do not entirely ban low-income housing from the jurisdiction, as well as more comprehensive bans, would trigger obligations under the

affecting residential patterns, would trigger a requirement that Montazalea file an associational impact statement.[162] The associational impact statement would require an assessment of the ordinance's tendency to produce problematic concentrations, both within Montazalea proper, and within the larger metropolitan area of which Montazalea is a part. Importantly, this assessment would be indifferent to the proffered or actual motivations behind the ordinance's classifications—that is, whether it is actually or purportedly designed to control traffic, secure the benefits of open space, help family farmers, safeguard the environment, preserve a "small town feel," or achieve any other objective.[163] The only question would be its expected impact on associational patterns.

Where, as here, the excluding actor is part of a larger system of interdependent exclusion decisions, it will not be enough to consider the marginal impact of Montazalea's ordinance in isolation.[164] Instead, one would want to examine the potential contribution of the ordinance to systemwide concentrations given the capacity of other similarly situated jurisdictions to enact similar ordinances.[165] To that end,

approach under discussion. Intrajurisdictional zoning as well as whole-jurisdiction zoning can produce associational harms—whether by providing too little housing for the local demand, or by creating problematic concentrations of low-income housing within some portion of the jurisdiction. However, it is important to examine the impact of scale—both the scale of exclusion and the scale of concentration—on the harms and benefits of selectivity. See Vincent Ostrom, Charles M. Tiebout, and Robert Warren, *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 Am Polit Sci Rev 831, 833 (1961) (observing that "[n]ot all public goods are of the same scale" where "[s]cale implies both the geographic domain and the intensity or weight of the externality").

162 While it is conceptually easier to use an example involving a newly enacted zoning law, any realistic and equitable system of attaching obligations to exclusionary zoning would have to apply to already-existing zoning ordinances, given the widespread use of "holding zones" that give undeveloped land low-density designations. See Robert C. Ellickson and Vicki L. Been, *Land Use Controls* 90 (Aspen 3d ed 2005). There are difficulties associated with implementing any rule change that alters established expectations, though the reciprocal benefits produced by making a change across the board may help to buffer the impact through in-kind compensation. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 195–215 (Harvard 1985) (explaining how the benefits flowing from a given legal rule or government action can serve as "implicit in-kind compensation").

163 Note, however, that this proposal would not displace *other* laws (such as civil rights legislation) that make motives relevant. See Part IV.B.1 for a discussion of the implications of making associational analysis insensitive to motives and an explanation of how that analysis would interact with antidiscrimination law.

164 Where harms are cumulative and nonlinear, doing so would produce incentives to race to exclude.

165 The intuition is captured by the question "what if everyone did that?" which implicitly underlies "fair share" allocations. Compare Mary Anne Case, *Community Standards and the Margin of Appreciation*, 25 Human Rights L J 10, 15 (2004) (suggesting that *Schad v Borough of Mt. Ephraim*, 452 US 61 (1981), "appears to stand for a principle something like the categorical imperative: Any juridical unit of local government authorized to make independent zoning decisions may only engage in exclusionary zoning or regulation that would be constitutional if universal"). The conceptual difficulty in the present context is that not every jurisdiction *can* exclude at the same levels if grouping preferences are incongruous; that is what produces the

policymakers might develop tools to model and simulate the effects of such policy changes on residential patterns.[166]

Once these simulations had been run, a score ("concentration quotient") would be assigned to capture the extent of concentration-producing harm that Montazalea's ordinance would be expected to produce. That score could be made the basis for a variety of consequences. A simple approach would be to make the concentration quotient the basis for an exclusion tax (a Rule 2 regime). Nonlinearities could be accounted for by making the tax progressively steeper as the quotient rose. Alternatively, the tax might be a default that Montazalea could avoid by taking actions to mitigate the associational impact or by purchasing inclusion credits elsewhere. Yet another variation would require Montazalea to reduce its impact score to a prescribed level before it could enforce the exclusionary ordinance. To the extent these quotient reductions depended on purchasing entitlements from other municipalities, this approach would equate to Rule 1; exclusion (above the threshold) would be prohibited unless the right to exclude could be purchased. Below the established threshold, the regime would revert to Rule 2; Montazalea could simply pay the exclusion tax.

How could a municipality like Montazalea bring down its concentration quotient, short of abandoning its exclusionary ordinance? It could either earn credits through its own actions in related spheres or it could purchase credits from other entitlement holders. To offer one example of the former approach, credits might be awarded for certain spatial and institutional practices—such as the choice whether to foster development in self-contained private communities with sharp

problem of involuntary concentration. Nonetheless, there should be ways to arrive at rough proxies for determining how much each act of exclusion contributes to the systemwide potential for concentration. For example, a policymaker might use factors like the amount of undeveloped land in a jurisdiction or the median income or wealth of a jurisdiction's residents to determine which jurisdictions have both the motivation and the ability to mimic a given act of exclusion and which jurisdictions are most vulnerable to concentrations of poverty.

[166] Mapping programs exist that show how concentrated poverty has actually changed over time. See, for example, The Bruton Center at the University of Texas at Dallas, *Windows on Urban Poverty*, online at http://www.urbanpoverty.net/ (visited Oct 17, 2006) (offering an interactive mapping program developed with funding from the Brookings Institution). In addition, sophisticated modeling programs capable of simulating patterns of demographic and metropolitan change under varying assumptions have been developed. See, for example, Paul Waddell et al, *UrbanSim*, online at http://www.urbansim.org/ (visited Oct 17, 2006) (providing "a software-based simulation model for integrated planning and analysis of urban development, incorporating the interactions between land use, transportation, and public policy"). That such modeling could illuminate legal issues has been explored in, for example, Daria Roithmayr, *Locked in Segregation*, 12 Va J Soc Policy & L 197, 236–39 (2004) (using an agent-based model to demonstrate "how de jure segregation on the basis of race can mutate to become de facto segregation on the basis of economic barriers to entry"); Randal C. Picker, *SimLaw 2011*, 2002 U Ill L Rev 1019, 1020 (2002).

outer boundaries or in neighborhoods set on grid streets that flow directly into other neighborhoods.[167] A virtually limitless number of such factors could be built into an evaluative system, allowing great creativity in mitigating the impacts of concentration. An obvious drawback, however, is the enormous informational burdens required to determine when particular practices sufficiently "make up for" impacts produced by other practices.

Instead of being allowed to earn inclusion credits, Montazalea might be required to buy credits that would bring its concentration quotient into the acceptable range. One possibility would be to allow the buying and selling of inclusion credits among municipalities. However, unless spatial side constraints were built in to limit acceptable trades, problematic concentrations could result.[168] Another interesting possibility would be to endow each low-income household with an inclusion credit that a municipality like Montazalea could "purchase" by providing the household with housing assistance for a home acceptable to the household, either inside or outside the jurisdiction. The concern about concentrations might still be present, but under this variation individual households would be able to make decisions about what the appropriate tradeoffs should be. If we believe that individuals are the best stewards of their own long-term interests (and those of their children), and if we also believe that the costs of concentration fall mostly upon those who live in concentrated poverty, then this approach would place control directly into the hands of those who are in the best position to make decisions about housing patterns.

It is important to distinguish this approach from tenant-based Housing Choice Vouchers (also known as "Section 8" vouchers).[169] The housing assistance provided through vouchers can be realized only if the household is able to locate a home that meets program requirements and a landlord willing to accept vouchers.[170] The stock of qualifying housing at which vouchers are welcome is quite limited, and holders of vouchers are sometimes forced to return the vouchers un-

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167 See Young, *Justice and the Politics of Difference* at 238–39 (cited in note 89) (discussing the significance of "open and undecidable" borders to city life). Where borders are less sharp, the background population might be viewed not as partitioned into strict subsets, but rather into "fuzzy sets" with unclear boundaries. See, for example, Daniel McNeill and Paul Freiberger, *Fuzzy Logic* 34–42 (Simon & Schuster 1993).

168 Analogous problems of nonfungibility plague efforts to develop tradable permits for environmental impacts, habitat loss, and the like. See James Salzman and J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 Stan L Rev 607, 625–30 (2000).

169 See 24 CFR § 982.1 (2006) (describing the Section 8 voucher program).

170 While some state and local laws prohibit discrimination against tenants based on source of income or Section 8 status, federal law does not require private landlords to participate in the voucher program. See John J. Ammann, *Housing Out the Poor*, 19 SLU Pub L Rev 309, 322 (2000).

used.[171] Exclusionary land use controls do not trigger obligations to make vouchers—much less actual housing opportunities—available. The alternative approach outlined here would tie affordable housing obligations explicitly to exclusionary actions, and would also place power in the hands of the low-income households by making the excluding municipality responsible for locating acceptable housing for each family. There are a number of difficulties that would have to be confronted, however, including the appropriate definition of low-income households and the concern with perverse incentives to become such a household, but those concerns are not unique to this proposal.

A more fundamental concern relates to the way that heterogeneous preferences for moving and staying might interact with such a proposal. Suppose that half of the low-income households in a high-poverty area are "stayers" who are willing to part with their inclusion credits for housing assistance in their present neighborhood, and the other half are "movers" who will not let go of their credits unless they are provided housing assistance for a home outside of their current neighborhood. Assume further that the amount of exclusion occurring metropolitan-area-wide requires excluding municipalities to purchase (in the aggregate) inclusion credits from three-quarters of those who are presently living in a concentrated inner-city area. We might expect municipalities to first collect entitlements from the "stayers" and then from the easiest-to-place half of the "movers." The remaining (would-be) "movers" would not receive any assistance under this scenario because their inclusion credits would not be needed to fulfill the governmental obligations. The possibility of losing out on housing assistance altogether could generate strong pressures for households to exchange their inclusion credits for lower-valued housing assistance within the present neighborhood rather than agitate for a move that may be more expensive for the excluding municipality to carry off.[172] Competition among municipalities might help to reduce this problem, but risk aversion and unequal bargaining power might produce perverse results.

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[171] Households can spend months or even years on a waiting list for a voucher, and may end up having to forfeit the voucher because they cannot find a home within the allotted time period. See id at 321–22. Though the problem is quite general and longstanding, the efforts of Hurricane Katrina evacuees to use housing vouchers have recently focused attention on these supply difficulties. See Jodi Wilgoren, *Vouchers in Their Pockets, Evacuees Find It Hard to Get Keys in Hand,* NY Times A19 (Oct 28, 2005).

[172] It is also possible, in the scenario just given, that the easy-to-place "movers" differ systematically from the hard-to-place "movers" and the "stayers." To return to our earlier terminology, suppose there are more Es among the easy-to-place "movers," and more Ds among the other categories. In this case, after the dust has settled, the concentration in the high-poverty area may be more problematic than before.

An alternative would be to require the excluding municipality to purchase the entitlements not from low-income households in general, but rather from a specified set of low-income households drawn from, say, a housing assistance waiting list. If the municipality could not proceed until it had managed to secure entitlements from each and every household to which it had been assigned, however, then the situation begins to take on the structure of an anticommons.[173] Effectively, each low-income household would hold a veto on the municipality's ability to proceed with its exclusionary plans. Holdout problems could generate enormous deadweight losses unless some constraints were placed on the ability of households to refuse consent.

Some of the innovative ideas that have been floated for resolving other multiplayer holdout problems, such as those that accompany land assembly,[174] might be considered in this context. Municipalities might negotiate not with individual households, but rather with groups of households that would be made collectively responsible for securing acceptable housing assistance for each of their members. It is also possible that other parties, such as governmental agencies or nonprofit organizations, could serve a fiduciary role that would involve aggregating preferences and negotiating with the municipality on behalf of the low-income households.

IV. OBJECTIONS AND IMPLICATIONS

The sketches just provided are admittedly incomplete, but they offer some idea of the policy space that the notion of associational entitlements might open up. In this Part, I want to step back and consider in a more general way the theoretical implications of an explicit recognition of associational entitlements in the neighborhood context. Doing so requires countering some objections.[175] As my responses to

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173 See Frank I. Michelman, *Ethics, Economics and the Law of Property*, in J. Roland Pennock and John W. Chapman, eds, *Nomos XXIV: Ethics, Economics and the Law* 3, 6, 9 (NYU 1982) (positing a hypothetical regulatory regime in which everyone has the power to prevent others from using a given resource); Heller, 111 Harv L Rev 621 (1998) (cited in note 61) (refining and expanding on the notion of the "anticommons" as a resource setting in which the fragmentation of ownership presents difficulties in assembling sufficient rights to make use of a given resource).

174 See, for example, Michael A. Heller and Roderick M. Hills, Jr., *LADs and the Art of Land Assembly* (Oct 2005) (unpublished draft on file with author) (discussing the possibility of using "land assembly districts" to negotiate with developers); Nelson, *Private Neighborhoods and the Transformation of Local Government* at 268 (cited in note 117) (suggesting that private neighborhoods could choose to "sell the whole set of neighborhood properties in a single package for comprehensive redevelopment in an altogether new type of land use").

175 Interestingly, analogues to some of these objections can be found in the intellectual history of incentive-based approaches to environmental law. For a fascinating distillation of this history, see Wallace E. Oates, *From Research to Policy: The Case of Environmental Economics*, 2000 U Ill L Rev 135 (2000). As Oates explains, objections to using economic ideas to control

these objections will make clear, I see associational entitlements as occupying a space that is bounded by important normative constraints.[176]

I will begin by explaining why making the theoretical move suggested in the Article would not prove damaging to existing notions of associational freedom. Next, I discuss how my approach offers a new tool for countering exclusion and address concerns about its interaction with antidiscrimination law. Finally, I revisit questions relating to commodification and fairness.

A. Rethinking Freedom of Association

Efforts to address residential patterns by limiting exclusionary land use controls are often rebuffed by assertions that doing so would impede the right to freely choose one's neighbors and associates. This objection is almost entirely a red herring.[177] To see why this is the case, it is necessary to explain how partitioning a bounded background population into spatial subsets, as in the residential context, differs qualitatively from other kinds of voluntary group formation.

1. Why spatial partitioning is different.

Freedom of association is typically invoked to defend a system of association by mutual consent. Such mutual consent pairs the group's right to exclude unwanted members with the individual's right to exclude herself from an unwanted grouping. In other words, entry into a grouping is by invitation only, but nobody is compelled to enter. This system of mutual consent works uncontroversially and well in a wide range of contexts—consider the choice of friends, spouses, partners,

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pollution emanated both from environmentalists who saw the system as "basically immoral" and from polluting industries who resisted any new taxes on their activities. Id at 138–39. Likewise, objections to the notion of associational entitlements come both in the form of concerns about putting prices on associational interests and in the form of skepticism about any new limits on associational freedom.

[176] A more ambitious project might seek to generate an all-inclusive theory of associational entitlements that would operate across the board and build in all of the normative values that should influence law's interaction with groups of all sorts. As it is, I carve out an area where the tools of property theory offer analytic traction, and cabin that domain by reference to side constraints. One such constraint is the prohibition of discrimination against protected groups; another involves constitutional protection for groups formed for expressive or religious purposes. The appropriate reach of each of those constraints is hotly contested, but lies beyond the scope of my limited inquiry here; thus, my approach does not read directly on the content or development of either body of law. Of course, to the extent that my approach would add a middle domain between prohibited selectivity and the privileging of selectivity, I cannot rule out the possibility that it might have some impact on the terms of the debates surrounding antidiscrimination law or the constitutional protection of groups by altering the stakes associated with drawing a line in one place rather than another.

[177] I say "almost entirely" for reasons that will become clear in Part IV.A.3 (discussing residential groups that form for constitutionally protected reasons).

and housemates. In other broad classes of situations, the principle of mutual consent remains foundational, even though it is modified somewhat by public law—here, consider the matching of employees to workplaces and students to institutions of higher education. In still others, such as membership in religious communities and social groupings, mutual consent remains important, even though practical, institutional, and familial considerations may condition this consent to varying degrees.[178]

Mutual consent works as an organizing principle in these settings only because any individual can opt out of all available groupings of a given type. That is, the ability to exclude oneself from all nonpreferred groupings is critical to the notion of mutual consent that underlies freedom of association as conventionally understood. As a matter of logical possibility (not normative desirability), one can remain completely outside of all of the grouping types just mentioned—single, friendless, outside of any religious group, workplace, or college.[179] If one is excluded from all of one's preferred groupings in these realms, one is not summarily grouped together with a set of unchosen others with whom one must live, worship, or work.[180]

Where people in a bounded area form spatial groupings, in contrast, it is not possible to operate under a system of mutual consent, unless people happen to have perfectly congruent preferences about grouping.[181] Absent such perfect congruence, exclusion from one group in such spatially bounded settings necessarily involves elements of forced inclusion. For example, if we suppose that everyone must live in exactly one of two available jurisdictions within a metropolitan area with fixed boundaries, exclusion from one jurisdiction operates as

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178 As Michael Walzer has emphasized, much of associational life is unchosen. Michael Walzer, *Politics and Passion: Toward a More Egalitarian Liberalism* 2–3 (Yale 2004).

179 It is true that one might view oneself as forced to be a member of an amorphous group known as "the friendless" or "the unemployed," or that outsiders might place a group label such as "atheists" on all those who fail to choose a religion. The difference is that these labels do not require one to engage in interactions with others who have been similarly categorized. I posit that spatial proximity and the need to work together to produce local public goods makes forced inclusion in residential groupings relevantly different from being "left out" of preferred groupings in other domains. I acknowledge, however, that this requires taking a particular view of what kinds of groupings interfere most with human autonomy. I thank Robert Post and Jerry Mashaw for discussions on this point.

180 If unemployment leads to severe want that can only be satisfied through welfare, and if welfare in turn requires working or living in a state-provided setting, the element of forced grouping would be present. Consider in this connection the historical practice of concentrating poor people in workhouses or poorhouses. See Michael B. Katz, *In the Shadow of the Poorhouse* 10–36 (Basic rev ed 1996).

181 For a discussion of whether such perfect congruence is plausibly the case in the residential context, see Part IV.A.2.

forced inclusion in the other jurisdiction.[182] Even where exclusion does not literally force households into specific unchosen groupings, it changes the composition of the groupings of which such households can potentially be members.[183]

The stylized examples in Part I.A involved a background population that was, in the language of set theory, partitioned into subsets, so that every member of the background population occupied a place in exactly one subset.[184] In such a case, it is impossible for anyone to stand outside of all subsets. This observation is of no consequence if each individual can make up a subset of one if she so chooses. But if we further posit subsets of fixed (or even relatively inflexible) capacity, then the logic of set partitioning begins to have interesting consequences. Most notably, unless everyone happens to have perfectly nonconflicting preferences about grouping, basing group formation purely on the principle of mutual consent is no longer possible. Some people will end up in groupings that they did not choose and do not wish to be in.[185]

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[182] A dramatic example of the potential connection between exclusion and forced inclusion can be seen in the facts of *Korematsu v United States*, 323 US 214, 215–21 (1944). The petitioner was convicted of violating an exclusion order promulgated pursuant to Executive Order 9066, which authorized the Secretary of War and his designees "to prescribe military areas . . . from which any or all persons may be excluded." Franklin D. Roosevelt, Authorizing the Secretary of War to Prescribe Military Areas, Executive Order 9066, 3 CFR 1092 (1938–1943). The exclusion order that was the basis of Korematsu's conviction made it a crime for him to remain in any part of the zone in which his home was located *except* a designated "assembly center," where he would have been detained for relocation to an internment camp. See *Korematsu*, 323 US at 230 (Roberts dissenting). Another military order precluded his exit from his home zone, see id, effectively setting a hard boundary around two possible locations: the assembly center and the rest of Korematsu's home zone. Exclusion from the latter translated into forced inclusion in the former. While the majority framed the case as involving only the violation of an exclusion order, the dissenters recognized it as directly implicating the question of whether an American citizen could be forcibly detained in a concentration camp solely on the basis of his ancestry. See id at 231–33 (Roberts dissenting); id at 243–44 (Jackson dissenting).

[183] See, for example, Robert Sommer, *Personal Space: The Behavioral Basis of Design* 153 (Prentice Hall 1969) (noting the potential of self-segregation by one group, such as middle-class families departing for the suburbs, to leave "an involuntarily segregated [group] at the city core"). The broader principle that exclusion offloads costs on other jurisdictions remains current, notwithstanding the changes in metropolitan areas that have altered the relationship between "city core" and "suburb." See Ellickson, 86 Yale L J at 450 (cited in note 21) ("[I]t is clear that the exclusionary policies of a suburb force growth on its neighbors.").

[184] See, for example, Robert R. Stoll, *Sets, Logic, and Axiomatic Theories* 14 (W.H. Freeman 1961) (defining a "partition of set X" as a "disjoint collection . . . of nonempty and distinct subsets of X such that each member of X is a member of some (and, hence, exactly one) member of [the collection of subsets]").

[185] That incongruent associational preferences cannot be simultaneously satisfied was famously emphasized in Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1, 34 (1959) (observing that "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant"; the result is "a situation where the state must practically choose between denying the association to those

Of course, the lines between residential groupings may not always be quite so stark and consequence laden. The boundaries between different residential areas may be fuzzy, people may engage with each other in more than one geographic area, and group membership lines may be drawn differently for different residence-linked groupings (for example, the school attendance zone may be different from the neighborhood watch zone).[186] Moreover, in real-world situations, it will rarely be accurate to describe group membership as "forced."[187] For example, instead of locating within an undesirable residential grouping in a metropolitan area, a household might strike out on its own into rural or wilderness areas and avoid at least the spatial elements of forced grouping.[188] Nonetheless, grouping situations occupy various points on a spectrum as to the practical and normative viability of opting out of all groupings of that type (or forming one's own "group of one"). On one end might be various forms of intimate association from which one can (relatively) easily remove oneself, and at the other end might be school districts, residential areas, or other spatially configured groupings that mobility- and liquidity-constrained actors have limited ability to avoid.[189]

The important point for property theory purposes is that the structure of such set-partitioning situations makes it impossible to simultaneously honor all preferences *to exclude*.[190] The ultimate act of

individuals who wish it or imposing it on those who would avoid it"). Wechsler's analysis encompasses situations in which society must choose between allowing exclusion from a desired association and compelling inclusion in an association that is not desired. My analysis focuses primarily on instances where society cannot allow exclusion without simultaneously compelling inclusion.

186 See, for example, Schuck, *Diversity in America* at 21 (cited in note 95) (observing that group boundaries are often unclear, and that even if clear, "their memberships would overlap because individuals belong simultaneously to many different groups"); Young, *Justice and the Politics of Difference* at 238–39 (cited in note 89) (discussing advantages of ambiguity in neighborhood boundaries).

187 In a narrow sense, all choices to become or remain members of a given grouping could be couched as "voluntary," insofar as it is usually possible to drop out of the background set completely by shunning the entire domain. Yet there are some settings in which "opting out" is so unsustainable a choice that it seems descriptively accurate to treat the choice to remain in a residual category as involuntary. It is true, of course, that some theory of justice or vision of human flourishing is necessary to identify the instances in which opting out is, as I put it here, "unsustainable." I thank Bruce Ackerman for discussions on this point.

188 The household would still be a member of some local political subdivision, however, which would entail some consequences of group membership based on residence.

189 Indeed, the associational disadvantage that confronts individuals in residential settings is in part a function of reduced mobility. See Frug, 73 NYU L Rev at 31–32 n 31 (cited in note 128) (observing that the diminished mobility of the poor flows not only from lack of money but also from heightened dependence on "a support network" of friends, family members, and neighbors in a given location).

190 It is sometimes suggested that stronger powers of exclusion be granted to all residential groupings—inner-city neighborhoods along with suburbs. See, for example, Nelson, *Private Neighborhoods and the Transformation of Local Government* at 394–95 (cited in note 117). The

exclusion, opting out altogether, is unavailable.[191] It is a matter of great significance, then, how entitlements to exclude are allocated and protected. Where opting out of all available groupings is extremely difficult, one group's priority in membership selectivity imposes the disamenity of diminished selectivity on other groupings. Where preferences about association conflict, a spatially bounded system cannot grant groups the power to exclude without creating at least one residual group from which, by definition, no further exclusion is possible.[192] Selectivity, then, is a scarce and valuable resource that is effectively extracted from the common pool as groups form. The distribution of entitlements to exclude should be sensitive, I posit, to the dynamics of the resulting common pool resource problem.

In sum, it is impossible to grant one residential grouping associational autonomy (the ability to choose its members) without interfering with the associational autonomy of other residential groupings in the same metropolitan area. The choice, then, is not about how much associational autonomy we wish to allow, but rather whose associational autonomy shall be given priority.[193] The status quo grants associational priority in ways that are not sensitive to the external effects of exclusive groupings. It does no violence to the overall levels of "free association" to rethink that allocation of associational priority.

2. Tangling with Tiebout.

Nobody can write about sorting and grouping within urban areas without confronting the most influential extant model of residential choice—the Tiebout hypothesis.[194] Tiebout characterizes citizens as consumers who "vote with their feet" for preferred communities within a metropolitan area, much as shoppers would choose from an

problem, however, is that those excluded must end up somewhere, and that "somewhere" will, by definition, be a place from which no further exclusion is possible.

191 This is a subtly different problem than that which accompanies unreciprocated desires to join a group. One is not only kept out of the preferred group but cannot avoid being part of a less-favored group. In other words, the structure of the situation does not just limit entry, but rather eliminates the possibility of *exit*. See Hanoch Dagan and Michael A. Heller, *The Liberal Commons*, 110 Yale L J 549, 567–71 (2001) (emphasizing the importance of exit and arguing that there is an asymmetry between exit and entry in terms of liberal values).

192 Consider again the stylized example of the A and B Groups, presented in Part I. The exclusion exercised by Groups A1 through A5 was only possible within a bounded area because there existed a Group B that had no ability to exercise rights of exclusion. Granting Group B exclusion powers in a closed universe would only eventuate in the creation of yet another group, Group C, made up of those excluded from Group B. Group C, in turn, could not be granted exclusion powers without creating yet another group. Ultimately, the least preferred grouping must be one from which no further exclusion is possible.

193 I thank Jed Rubenfeld for helpful comments on this point.

194 See generally Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J Polit Econ 416 (1956).

array of products. The hypothesis presents two challenges to my thesis, both of which relate closely to notions of freely-chosen association.[195]

First, the Tiebout hypothesis, at least as popularized, seems to downplay or even deny the existence of true associational conflict. A primary attraction of Tiebout's image of people self-sorting into communities is the idea that different people want different things—some value high-quality education, others serenity, and others excitement. Groupings on this account are a matter of personal taste on which reasonable minds can differ, rather than stratified pools that can be objectively arrayed on a ladder from best to worst. If dozens of unique, specialized communities are allowed to flourish in a given metropolitan area, people can choose what suits them best. The possibility of conflict over group membership is obscured by the rhetoric of a rich and varied choice set capable of satisfying everyone.

If a pattern of groupings produces associational arrangements that are ideal for everyone,[196] then there is no associational conflict, no scarcity in the associational goods of exclusion or selectivity, and hence no need for property rights in those goods. Absent perfect preference alignments capable of creating fully consensual groupings, however, conflicts among grouping preferences will arise.[197] It seems facially implausible that all residential and educational groupings are, in fact, preferred by everyone.[198] The prevalence of exclusionary zoning

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[195] While exclusionary zoning was not part of Tiebout's model, Bruce Hamilton suggested that zoning would be necessary in order for Tiebout's theory to work without the poor endlessly chasing the rich from jurisdiction to jurisdiction. See generally Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 Urban Stud 205 (1974). See also Bruce W. Hamilton, *Capitalization of Intrajurisdictional Differences in Local Tax Prices*, 66 Am Econ Rev 743, 744 (1976) (refining Tiebout's theory to account for the possibility that differences in tax burdens could be capitalized into housing prices).

[196] I am eliding two important points when I use the phrase "ideal for everyone" here. First, household locational decisions may not be based on the preferences of all household members; hence, a locational choice that appears voluntary from the outside may be involuntary for some people when viewed from inside the household. Second, if we suppose that some individuals are poorly informed, myopic, or vulnerable to other cognitive biases, expressed preferences might not match up with the "true" preferences that individuals would have if they were taking into account all information relevant to their long-term interests. See, for example, John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, in Amartya Sen and Bernard Williams, eds, *Utilitarianism and Beyond* 39, 55 (Cambridge 1982) (distinguishing "true preferences" from "actual" or "manifest" preferences).

[197] See Becker and Murphy, *Social Economics: Market Behavior in a Social Environment* at 23 (cited in note 46) ("Conflicts arise when preferences clash, so that the number of persons who want to join a particular group exceeds the number of places available.").

[198] See Frug, 73 NYU L Rev at 31 (cited in note 128) (suggesting that lack of choice, rather than taste, explains decisions to locate in neighborhoods with high levels of crime and low-quality schools).

suggests as much, although it is admittedly not conclusive.[199] We would expect conflicting associational preferences where some groupings are better able than others to produce local public goods. If these conflicts are not always apparent, it may be because they are presently resolved without discussion, through embedded property arrangements.[200]

Second, the Tiebout hypothesis emphasizes the benefits of interjurisdictional competition, which might seem to require a certain degree of associational selectivity. For example, cooperation within a given residential group (whether exercised directly or through the political apparatus) may be partly directed at attracting and retaining desirable residents. Entitlement structures that weaken the connection between cooperative inputs and the desired residential cohort might be expected to reduce those cooperative inputs—a result that could be not only intrinsically harmful, but also harmful to the competitive structure of fragmented local government.

Yet existing de facto associational entitlements in the form of exclusionary land use controls *already* distort the connection between cooperation and membership through the unequal allocation of exclusionary powers. Indeed, one of the primary ways in which jurisdictions presently compete with each other is through the use of exclusionary powers that have been allocated without regard to their negative spillovers.[201] Nothing is lost by requiring competitors to refrain from

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[199] Exclusionary land use controls would seem to be unnecessary if groups were capable of spontaneous and conflict-free formation. However, land use policies might be viewed as coordination devices that help like-minded individuals find each other, much like the movie titles that appear over different theaters in the multiplex. Ross and Yinger have also noted the possibility that zoning could be superfluous: "Voters who do not understand that matched sorting may arise naturally may pass zoning ordinances to mimic what the market would do anyway." Ross and Yinger, *Sorting and Voting* at 2015 (cited in note 52). Moreover, fiscal zoning would not be inconsistent with spontaneously self-sorting, conflict-free groupings—a zoning regulation that requires a particular level of housing consumption could merely serve as a way of allocating property tax burdens fairly among those who would in any event want to group together. See text accompanying note 207 (explaining how zoning that prevents residents from occupying less expensive housing precludes freeriding on community services funded by the property tax).

[200] Residential arrangements that were initially involuntary might come to be preferred by some residents as a result of adaptations made in light of a restricted choice set. See Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U Chi L Rev 1129, 1146–50 (1986) (discussing such "adaptive preferences"). Similarly, site-specific investments (such as the development of extensive social networks) made in reaction to an initially undesirable residential location could change the assessment of alternatives. Such adaptation effects would not undo associational harms visited on excluded groups (and would not justify continuing practices that produce those harms), although these adaptations might bear on the appropriate remedial structure.

[201] See generally, for example, Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, in Fischel, ed, *The Tiebout Model at Fifty* 163 (cited in note 82). Jurisdictions may compete not only by excluding uses from the whole jurisdiction, but also through intrajurisdictional zoning choices. See Richard Thompson Ford, 107 Harv L Rev at 1854 (cited in note 93).

appropriating entitlements from (or offloading costs onto) others while carrying out their competition.

3. Constitutionally protected residential groupings.

The discussion of freedom of association to this point has emphasized that some allocation of exclusion rights is necessary in spatial grouping problems involving conflicting preferences. I have suggested that the common-pool resource dimensions of grouping choices should be relevant to determining how associational rights are allocated. However, other considerations may come into play in some instances. For example, exclusion that serves ends that are tightly linked to constitutionally protected expression or religious exercise stands on different footing from garden-variety exclusion pursued out of self-interest.[202]

How would the analysis presented here apply to voluntary groupings formed to pursue such constitutionally protected ends? First, an associational dilemma is potentially implicated only when a voluntary grouping excludes others who would like to enter.[203] Hence, religious or expressive groups that are formed solely through self-selection would not contribute to forced inclusion elsewhere in the system. Second, if such groups are small relative to the overall population in a metropolitan area, their effects on concentrations elsewhere may be de minimis. However, it is not impossible to imagine an instance in which exclusion for constitutionally protected reasons, if carried out on a broad enough scale, would have a tendency to generate or exacerbate concentrated poverty. In these instances, the marginal costs that the exclusive grouping generates might be borne by society as a whole

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[202] See, for example, Peñalver, 91 Va L Rev at 1940–44 (cited in note 87) (distinguishing "separatist" groups with a distinctive community life that furthers nonmainstream values from typical homeowners associations that do nothing to set themselves apart from the mainstream); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 NYU L Rev 144, 218–29 (2003) (using a taxonomy that divides organizations along three dimensions to define "expressive associations"); Nomi Maya Stolzenberg, *"He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 Harv L Rev 581, 588–98 (1993) (discussing the threat that assimilation might pose to certain religious groupings).

[203] I have suggested at several points that differential mobility could make exit a form of exclusion. Typically, however, that mobility is fortified with exclusion once the new location is reached. However, I cannot rule out entirely the possibility that differential mobility could make a group de facto exclusionary, even when no land use barriers are erected. Consider, for example, enclaves that can only be reached by automobile and that are inaccessible from public transportation. While my analysis has focused on exclusion that is carried out through a centralized decisionmaking apparatus, such as a homeowners association or local government, the analysis could also be adapted to cover instances where individuals exclude by exercising heightened mobility capacities. For example, individual moves could be taxed or subsidized to account for their capacity to increase or decrease involuntary concentrations. I thank Eric Posner for prompting me to consider this point.

rather than imposed upon the excluding group, in deference to the side constraints that constitutional values place on the allocation of associational costs.[204]

B. A New Approach to Exclusionary Impacts

1. Resetting defaults without proving fault.

Associational entitlements that respond to harm from exclusion, rather than to motives for exclusion, offer a way to shift associational defaults from their present position without the need to prove improper exclusionary motives. Because land use controls operate to exclude uses as well as people, it can be hard to establish whether the true purpose of a control is to address externalities generated by land uses (with only incidental impacts on the composition of the population) or whether the true purpose is to control the composition of the population.[205] Moreover, even when exclusion is clearly intended, there can be a variety of possible motivations for it.[206] For example, exclusionary zoning is often justified on fiscal grounds as a way to prevent people from freeriding on premium services within the community by occupying smaller houses that will contribute less to the tax base.[207] That assertion triggers well-worn debates about the obligations that individuals do or do not owe each other in the provision of local public goods.

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[204] Note, however, that nothing in the analysis presented here takes a position on precisely how narrowly or broadly the constitutional protection for religious or expressive groups should be drawn.

[205] See, for example, Mills, *Economic Analysis of Urban Land-Use Controls* at 520–21 (cited in note 123) (noting the existence of mixed motives and pretexts, and discussing the relative significance of exclusion in urban land use policy).

[206] See, for example, Dietderich, 24 Fordham Urban L J at 31 (cited in note 6) (listing "many motives" for restrictive zoning, including the potential impact of new residents on the tax base or service levels, as well as motives such as dislike, fear, and the desire to maintain aesthetic values or political power); William T. Bogart, *"What Big Teeth You Have!": Identifying the Motivations for Exclusionary Zoning*, 30 Urban Stud 1669, 1671–72 (1993) (discussing "fiscal zoning," "public goods zoning," "consumption zoning," and "political economic zoning"); Henry Hansmann, *A Theory of Status Organizations*, 2 J L Econ & Org 119, 119 (1986) (observing that people might have an incentive to live in "a community composed of people who build expensive residences" not only because of their "taste for attractive surroundings and affluent friends, but also [because] such neighbors raise the community's property tax base and thus reduce the effective price of municipal services"); Wallace E. Oates, *On Local Finance and the Tiebout Model*, 71 Am Econ Rev Papers & Proceedings 93, 96 (1981) (distinguishing "fiscal zoning" prompted by tax concerns from "public-goods zoning" that is directed at "controlling the composition of the local population so as to enhance the quality of local services").

[207] See, for example, Hamilton, 12 Urban Stud at 206 (cited in note 195) (suggesting that a zoning ordinance that mandated a minimum level of housing consumption would solve the freerider problem by ensuring that everyone in the jurisdiction paid a minimum amount of property tax for the services that they would receive).

These debates miss the primary point that I am emphasizing here. The fact that good reasons may exist for the exclusion does not *also* justify the offloading of associational harms onto excluded parties.[208] Where externalities are produced by exclusion, the reasons for exclusion merely inform the design of entitlements that address those externalities.[209] To be sure, associational externalities are often difficult to spot.[210] One project of this Article has been to employ conceptual forms that might help to make those externalities palpable.

The idea of addressing exclusionary impacts without the need to show an improper exclusionary motive raises another important set of questions, however. How will the approach in this Article interact with antidiscrimination law—both as it exists today, and as it might develop in the future? As an initial matter, it bears emphasis that associational entitlements, as developed here, are not designed to address discrimination based on protected characteristics. As noted above, rights vouchsafed by antidiscrimination law are, and should remain, inalienable. Nor do I envision my approach as in any way substituting for the further development or more rigorous enforcement of antidiscrimination law.[211] Nonetheless, it is likely that a good deal of the exclusion that actually takes place today has at its heart some element of discrimination. It is necessary, therefore, to explain how associational entitlements would complement rather than impede efforts to advance antidiscrimination law.

Clearly, there are huge swaths of exclusion that are not actually reached by antidiscrimination law, as presently formulated and en-

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[208] As discussed above, it may be appropriate for society as a whole to bear the costs generated by exclusion that vindicates constitutionally protected associational interests. See Part IV.A.3.

[209] For example, the decision whether to use property rules, liability rules, or inalienability rules to protect associational entitlements may depend on the reasons for particular grouping choices and whether socially cognizable benefits are produced as a result.

[210] The fact that exclusion is deeply embedded in familiar institutional structures makes its role as a source of associational externalities more difficult to appreciate. See Richard C. Schragger, *The Limits of Localism*, 100 Mich L Rev 371, 422 (2001) ("The relevant externality *is* exclusion, which is embedded in the structure of local government."). Even when exclusion is apparent, its production of externalities may be disputed. For example, sometimes the rationale for exclusion rests on claims that exclusion is in the best interests of the excluded. In residential settings, this claim has been raised in support of "dispersal" measures that seek to *avoid* concentrations. See note 224. In other settings, claims have been made (and disputed) that concentration is in the best interest of certain populations because it would allow them to benefit from efficient delivery of services or treatments. See, for example, Cook and Ludwig, *Assigning Deviant Youths to Minimize Total Harm* at 3 (cited in note 26).

[211] Without question, antidiscrimination law has fallen short of the goal of eradicating invidious discrimination against minority groups. But outlining precisely how antidiscrimination law can best be advanced lies outside the scope of the present project.

forced.[212] My approach would price exclusion in those contexts, whether or not some discriminatory element is actually present in that exclusion.[213] Significantly, this would *not* amount to accepting payment for discrimination privileges. Discrimination should be forbidden outright, and nothing in my approach alters that normative commitment. Instead, the idea of associational entitlements represents a supplemental, parallel system that prices impacts, however caused. Any associational entitlement that is purchased through such a system would extend only to *nondiscriminatory* exclusion—no entity or person would be able to buy the right to discriminate. An analogy might be drawn to concurrent civil and criminal liability, where the availability of civil liability does not dilute the moral force of the criminal law or suggest that the right to commit a crime can be purchased.

An important concern is whether the notion of associational entitlements would in any way delay or crowd out the further development of antidiscrimination law or dispel the political will that otherwise would gather in support of it. While it is an empirical question, it seems unlikely that an approach like the one outlined here would hinder such efforts. On the contrary, by raising the cost of exclusion in general, an associational entitlement approach might be expected to reduce the incidence of exclusion based on irrational factors, leaving more resources available to direct against remaining instances of discrimination. Even where a community chooses to exclude and pay, the distributive outcome seems preferable to the status quo system of unpriced exclusion.

Of course, no strategy designed to alleviate social problems comes without some risk to other possible strategies. Indeed, closely analogous questions have been raised about the optimal strategy *within* antidiscrimination law.[214] As long as the impacts of exclusion continue unabated, however, it is difficult to defend a policy of doing

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212 Under the federal Fair Housing Act, as under Title VII, discrimination can be established through disparate impact analysis without the need to show discriminatory intent. See, for example, *Huntington Branch NAACP v Town of Huntington*, 844 F2d 926, 933–41 (2d Cir 1988), affd 488 US 15 (1988) (per curiam). However, it is relatively difficult for plaintiffs to prevail under this standard, and it has produced limited results. See generally Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L Rev 701 (2006).

213 To do otherwise would be perverse. It would mean allowing a municipality to escape paying for the impacts of exclusion whenever any element of discrimination was present. Because we are speaking of discrimination that is not currently reachable on constitutional or statutory grounds, such an exception would amount to a free pass for those suspected of discrimination.

214 See Selmi, 53 UCLA L Rev at 767–82 (cited in note 212) (suggesting that the disparate impact theory of discrimination may have been counterproductive to the extent that it impeded the development of a more robust understanding of intentional discrimination).

nothing to address those externalities on the grounds that it leaves a cleaner slate for future reformers.

2. Zoning and covenants—together at last.

Both public and private land use controls have been pressed into service to influence the composition of neighborhoods. If exclusion creates problematic associational patterns, entitlements designed to address those patterns must be comprehensive enough to reach both public and private forms of exclusion. Yet, private covenants are often regarded as an almost untouchable target where protected characteristics like race are not overtly implicated.[215] Unlike zoning classifications, covenants seem to employ pure property forms to achieve exclusion. Moreover, private communities that are based on covenants are often characterized as a freer and more fully voluntary form of association than ordinary political subdivisions.[216] In other words, covenant-bound communities are viewed as a more authentic "expanded envelope" of private property.[217]

Recognizing associational entitlements as valuable interests in their own right makes irrelevant the public or private nature of the exclusion that implicates those interests.[218] What matters is the existence of externalities. The ability of an entitlement approach to transcend the public-private divide is crucial, given the dramatically increasing market share of housing found in private communities governed by land use covenants.[219] While important differences exist between zoning and covenants, most of these differences go to the relative impact of the exclusion that each currently practices. For example, most private communities are much smaller than most general-

[215] Racially restrictive private covenants were ruled judicially unenforceable under the Equal Protection Clause of the U.S. Constitution in *Shelley v Kraemer*, 334 US 1 (1948) and are now forbidden under both the federal Fair Housing Act, 42 USC § 3601 et seq, and § 1982 of the Civil Rights Act of 1866, 42 USC § 1982 (2000).

[216] This point is open to dispute. Compare Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U Pa L Rev 1519, 1520, 1523 (1982) (suggesting that private communities can be distinguished from their public counterparts based on the former's "perfect" voluntariness), with Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U Pa L Rev 1589, 1590–91 (1982) (questioning this distinction).

[217] See Part II.A (discussing the "associational envelope" model of property).

[218] The public-private divide has been broached already, of course, by antidiscrimination law and has been critiqued more generally in property contexts. See, for example, Peñalver, 91 Va L Rev at 1897–98 (cited in note 87) (critiquing distinctions in property theory between public and private forms of coercion); Schragger, 100 Mich L Rev at 389–90 (cited in note 210) (suggesting that the public-private distinction between cities and private neighborhoods is "tautological").

[219] Estimates for 2005 from the Community Association Institute indicate 274,000 private residential communities in the United States, representing 22.1 million housing units and 54.6 million residents. Community Associations Institute, *Data on U.S. Community Associations*, online at http://www.caionline.org/about/facts.cfm (visited Oct 17, 2006).

purpose municipalities, but some private communities are very large indeed (such as Reston, Virginia, with a population over fifty-six thousand). There is no reasoned basis for distinguishing between exclusionary acts based simply on the public or private nature of the actor when approaches exist that can offer appropriately calibrated responses based on impact.

The need for a coordinated response to exclusion becomes apparent when one recognizes that different mechanisms of exclusion can substitute, if imperfectly, for each other.[220] If exclusion were made significantly more costly for municipal actors without changing the price assessed against private actors, some substitution of private exclusion would be expected. Not only would this substitution introduce a deadweight loss, it could also produce unintended spatial distortions.

Because of the need to obtain unanimous consent from all neighbors in order to establish a web of reciprocal covenants, it is nearly impossible to accomplish private land use control in areas that are already built up.[221] In new developments, in contrast, the developer simply drafts a master deed or declaration at the outset containing the applicable covenants, and every member of the community to whom she sells becomes thereby bound by the covenants. These new developments require significant contiguous land, however, and will be built predominantly in outlying areas where undeveloped land exists.[222]

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[220] The motivations for the two kinds of land use controls differ somewhat, although there is significant overlap. For example, fiscal motivations, which depend on newcomers contributing at least as much to the tax base as current residents, are not served by exclusion from private communities—assuming that the community does not have the political clout to avoid paying taxes to the municipality as a whole. But exclusionary zoning is likely overdetermined, and many of its motivations—such as the desire to control neighbor characteristics—could be served by covenants as well. See Fennell, *Exclusion's Attraction* at 172–77, 186–89 (cited in note 201) (parsing motivations for exclusion and examining how covenants and zoning vary); William T. Bogart, *"Trading Places": The Role of Zoning in Promoting and Discouraging Intrametropolitan Trade*, 51 Case W Res L Rev 697, 717 (2001) (observing that the available evidence "consistently indicates that homeowners are willing to pay for exclusion and developers are creative at finding a way to provide it").

[221] Simply coordinating all of the required covenants in the absence of a developer who can serve as a hub presents a formidable administrative burden. See Richard A. Epstein, *Covenants and Constitutions*, 73 Cornell L Rev 906, 914–15 (1988) (noting the large number of pairwise covenants necessary to cover a hundred-household neighborhood). Even if those hurdles can be overcome, holdout problems could thwart any effort to obtain a coordinated system of land use control in an existing neighborhood. To address this problem, Robert Nelson has proposed allowing private neighborhoods to form, and a covenant regime to be imposed, on less than unanimous consent. See Nelson, *Private Neighborhoods and the Transformation of Local Government* at 265–67 (cited in note 117).

[222] See William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's* "Privatizing the Neighborhood," 7 Geo Mason L Rev 881, 901–02 (1999) (explaining that neighborhood associations are more difficult to form in partially developed areas that lack significant amounts of contiguous land); Bogart, 51 Case W Res L Rev at 717 (cited in note 220) (noting that contractual land use controls work best in "newly developed 'greenfields'").

An approach to exclusion that focuses only on zoning, then, would make exclusion cheaper in outlying locations and might be expected to skew development into farther-flung spatial patterns.

3. Exclusion without concentration.

The notion of a comprehensive approach to exclusionary impacts naturally raises the question of whether my focus on concentration is too narrow. One reason for focusing on concentration is that it offers a convenient proxy for, and easy illustration of, the kind of net harms that can be produced through grouping patterns. A focus on this rationale leads to the observation that other examples and proxies for net harms may exist. Clearly, we can imagine exclusion that produces harmful, if unconcentrated, impacts. The production function analysis introduced in Part II.B.2 above suggests that we might also have net gains or losses as a result of grouping changes, even where no concentrations are produced. Assuming that the costs of identifying harmful, nonconcentrated impacts are not too large, it might seem that the analysis would imply the use of associational entitlements to restrict those impacts as well.

But there is a second reason that I have singled out involuntary concentrations as a focal point here. Involuntary concentration is possible only in settings where it is logically impossible for all exclusion claims to be simultaneously honored, as where a spatially bounded population is partitioned into subsets. As explained in IV.A.1 above, it is precisely in these settings that the usual "freedom of association" objections to restricting selectivity carry the least force. In other words, the structure of the situations that produce concentrations also offer a (nearly) categorical rejoinder to free association objections to the use of associational entitlements to advance efficiency and equity goals.

To say that unwanted concentrations always have these elements of forced association, however, does not mean that unwanted concentrations are the *only* possible example of forced spatial association. Indeed, any exclusion that occurs in a spatially bounded context limits selectivity elsewhere, whether that selectivity operates to produce concentrations, dispersions, or some other pattern. If the resulting pattern also generates significant harm, then both of the reasons for focusing on concentration would be present. In a sense, then, "concentration" serves as a stand-in concept for any harmful pattern produced as a result of forced inclusion.[223] However, some of the most well-

[223] Sometimes harm comes from failure to achieve a particular synergy. For example, if people sharing a given characteristic are dispersed as a result of exclusion and cannot band together to achieve desired results, the element of forced inclusion in a grouping with many who

known examples of exclusion producing deconcentrated results have involved classifications that implicate antidiscrimination law, introducing another layer of analysis beyond that presented in this Article.[224]

C. Commodification, Wealth, and Fairness

I close by spotlighting the objection that market mechanisms are fundamentally inappropriate in the realm of association. An initial question is whether association should be entirely a matter of nonmarket choice. For that to be the case, some background allocation of implicit associational entitlements must determine whose choices are to trump in the event of conflict. In other words, an objection to the commodification of association would be fully consistent with the associational envelope paradigm, in that it suggests that either association must be up to the excluders or public law must mandate inclusion—there is no room for middle ground. As discussed above, it is appropriate to treat some associational decisions as nonmarketable. But to apply the dichotomy across the board seems likely to pass up value-maximizing possibilities in the intermediate cases in which parties with conflicting associational interests each have some claim to their respective positions.

An additional set of concerns with using markets to allocate associational interests has less to do with the unseemliness of interposing

do not share the characteristic blocks interactions that would produce social surplus. I thank Clay Gillette for discussions on this point.

[224] For example, efforts to combat concentrations through exclusion have been analyzed under the federal Fair Housing Act. In *United States v Starrett City Associates*, a mammoth private housing development in Brooklyn applied racial quotas in an effort to maintain integration. 840 F2d 1096, 1098 (2d Cir 1988). Because of different levels of demand for the units among different racial groups, the quotas had the effect of placing minority applicants on lengthy waiting lists, while white applicants were accommodated promptly. Id. The practice was held to violate the Fair Housing Act. See id at 1102–03. For discussion of related issues, see generally Rodney A. Smolla, *In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980s*, 58 S Cal L Rev 947 (1985); Boris I. Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 Yale L J 1387 (1962). Another program designed to combat concentration was evaluated in *Familystyle of St. Paul v City of St. Paul*, 923 F2d 91, 94–95 (8th Cir 1991). There, a state statute and a local zoning ordinance mandated the spatial dispersal of group homes for people with mental disabilities. The Eighth Circuit upheld the practice against a Fair Housing Act challenge, making the following observation about the harms of concentration: "The state's group home dispersal requirements are designed to ensure that mentally handicapped persons needing residential treatment will not be forced into enclaves of treatment facilities that would replicate and thus perpetuate the isolation resulting from institutionalization." Id at 95. For a case reaching the opposite conclusion, see *Larkin v Michigan Department of Social Services*, 89 F3d 285 (6th Cir 1996) (holding that Michigan's statutory scheme prohibiting "excessive concentration" of adult foster care facilities violated the Fair Housing Act, and suggesting that part of *Familystyle*'s analysis was invalidated by a subsequent Supreme Court opinion, *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers v Johnson Controls, Inc*, 499 US 187, 197–200 (1991)).

money into associational matters than with the outcomes that such interposition is likely to produce in a world where wealth is spread unequally. The impact of wealth differentials on the outcomes generated by market-mimicking entitlement regimes are of enormous concern in the present context. Low wealth levels are often both the reason for exclusion *and* the reason why exclusion can be so successfully accomplished through land use regulations. Transactions carried out against a backdrop of unequal economic power can generate results that are normatively unfair.

It is helpful to distinguish preexisting wealth differentials among the parties from the effects on the parties' wealth produced by the entitlement regime itself. While preexisting wealth differentials present endemic difficulties for using markets to allocate associational advantages, wealth effects that are an artifact of the specific entitlement regime chosen are subject to direct policy control.[225] For example, it is possible to assign and protect entitlements in ways that distributively advantage the party with less preexisting wealth. If existing arrangements allocate associational advantages (implicitly) to parties with more preexisting wealth, then explicitly acknowledging and reassigning entitlements to less wealthy parties would produce distributive changes in the direction of greater equality. Other possibilities might include coupling associational entitlements with other forms of assistance to low-income individuals or communities, using tokens or points rather than cash to allocate associational goods, or seeking other metrics for valuation than willingness to pay. None of these ideas is straightforward or unproblematic, but neither are any other existing mechanisms for seeking to overcome distributive disadvantage.

CONCLUSION

Law has exhibited an unfortunate tendency to view associational interests in dichotomous terms, as either "everybody's business" (and hence amenable to public law regulation) or as "nobody's business" (and hence a matter of private prerogative). To be sure, there is plenty of debate about precisely where the line should be drawn, but the idea

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225 A simple Coasean example will illustrate the point. If it is efficient for a rancher to graze exactly three cattle given the impacts on the crops of a neighboring farmer, then in a world of zero transaction costs that result would be reached either by granting farmers the entitlement to a cattle-free farming area *or* by granting ranchers the right to unlimited ranching. See Coase, 3 J L & Econ at 2–15 (cited in note 32). Yet farmers will be better off in distributive terms if the former course is chosen; rather than having to pay to make ranchers scale back their ranching efforts, farmers will receive payment for the harm caused by cattle. See A. Mitchell Polinsky, *An Introduction to Law and Economics* 14 (Aspen 3d ed 2003) (noting distributive impacts of the choice of legal rule under zero transaction cost assumptions).

that such a line exists seems to go largely unquestioned. Property theory has contributed to this dichotomy by fostering a vision of property as an associational envelope that seals off a private inner sanctum into which people may enter at (and only at) the owner's pleasure. As a result, property rights have often been viewed as an impediment to addressing associational problems, rather than as a prime candidate for solving those problems.

I have suggested here that it would be useful to think about certain problems of association in property terms. Situations in which exclusion is a scarce resource and involuntary concentrations a real possibility are structured similarly to other resource problems. Just as recognizing the full spectrum of entitlement forms in other contexts has been helpful, so too might an explicit consideration of associational entitlements lead to unexplored alternatives.

I do not claim to have fully worked out the details of the associational entitlement regimes that I have sketched here. The project of this Article was not to concoct the best possible entitlement regime, but rather to suggest that scholars should think about association in entitlement terms and approach problems of concentration with a full slate of alternatives. Any effort to devise a real-world entitlement scheme for responding to associational collective action problems will be controversial and fraught with conceptual and practical difficulties. But when similar difficulties have beset efforts to address other legal and social problems, creative solutions have been devised—because people viewed the problems as important enough to command attention. Problems of association are also worthy of our best theoretical tools and our most serious scholarly attention.