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## Gayborhoods: Intersections of Land Use Regulation, Sexual Minorities, and the Creative Class

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## **GAYBORHOODS: INTERSECTIONS OF LAND USE REGULATION, SEXUAL MINORITIES, AND THE CREATIVE CLASS**

**Charles J. Ten Brink\***

*This Article advocates the municipal encouragement and maintenance of diversity, specifically the inclusion of sexual minorities, through changes in the traditional application of the forms of land use regulation. Bringing together previously distinct conversations about the societal goals of land use planning and the social value placed on diversity by increasing numbers of consumer voters, this Article draws on New Urbanism and Richard Florida's concept of the creative class to argue that the presence in a municipality of a visible, accepted, and integrated LGBTQ community signifies and stimulates not only the social but the fiscal health of that municipality. Building on and distinguishing the historical development of naturally occurring gayborhoods, this Article suggests a rationale and mechanisms for encouraging the growth of such communities. Land use regulation is one means by which a diversity-sensitive municipality can establish marginal advantages over otherwise similarly situated municipalities; in a society offering a wide variety of choices to members of the creative class, this competitive advantage is significant.*

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## INTRODUCTION

Where can I live? And more critically, where can I live well? These are foundational questions for every person. Our image of The Good Life is inextricably tied to our homes and the neighborhoods in which we find them. For the better part of the last century, municipalities have provided their residents with answers to these questions. The municipal response, through the regulation of land use, has created a narrow and increasingly indefensible definition of “living well.” Zoning laws have established a social goal of the estate: single-family dwellings on large lots, far removed not only from the noise and dirt of commercial and industrial uses, but also from the unpleasantness of living near people who do not share the

same characteristics: class, education, income, race, religion, and sexual orientation. Historically, many people shared that goal, and many still do. Increasingly, many more do not.

Richard Florida's *The Rise of the Creative Class*<sup>1</sup> argues that the economic health and social vibrancy of a municipality are tied to a robust "creative class," which he describes using four factors: numbers of creative workers, numbers of high-technology workers, rate of innovation, and tolerance/diversity.<sup>2</sup> This Article explores the final factor, focusing on sexual minorities as one measure of diversity. It observes that traditional regimes of land use regulation have stifled diversity by creating socioeconomically homogeneous and heteronormative environments, forcing members of the LGBTQ community into the periphery either physically—living in "gay ghettos"—or socially—leading closeted, or at best covered, lives—in a compulsorily heterosexual environment. The Article suggests that, given a baseline acceptance of sexual minorities in a community, the municipality can adapt its scheme of land use regulation to eliminate or minimize heteronormative effects and attract those members of the creative class who value tolerance and diversity.<sup>3</sup>

The background of zoning in the United States is tied to the seminal case approving zoning as an application of the municipality's police power, *Village of Euclid v. Ambler Realty Company*.<sup>4</sup> Part II of this Article will discuss the hegemonic effect of *Euclid*; how it established norms for zoning regulations which segregated communities socioeconomically, racially, and ethnically; the tangled social purposes of usage and dimensional restrictions; judicial reactions to this social fallout, in particular the New Jersey Supreme Court's decisions in the *Mount Laurel*<sup>5</sup> cases; and the heteronormative effect of traditional zoning.

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1. RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* (2002) [hereinafter FLORIDA, *RISE*].

2. *Id.* at 244–45.

3. The focus on sexual minority status may be seen as something like a case study for the broader principle that encouraging diversity in general contributes to the economic vibrancy of a community.

4. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

5. *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983); *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J.

The Tiebout hypothesis<sup>6</sup> suggests that this deployment of traditional schemes of land use regulation has implicitly established segregation and heteronormativity as public goods, and that consumer voters have often agreed.<sup>7</sup> The strong interrelationship of implicit property rights among neighboring landowners has also inhibited changes that might encourage diversity. Part III of this Article analyzes these problems and constructs the argument that diversity is emerging as a recognizable public good: one that is valued and should be produced, but for which there is no feasible means of directly charging the consumers of that good. It suggests that municipal decision making fostering gayborhoods is an expenditure of political capital in furtherance of that good, and that the advantage to the municipality—the expansion of the creative class and consequent economic gain—justifies that expenditure.

The New Urbanist school has analyzed the socioeconomically segregative problems of planning from the point of view of the destruction of city neighborhoods and economic diversity, and many of its proposed mechanisms for reestablishing healthy neighborhoods, like the reasoning in the *Mount Laurel* cases, provide useful guidelines for nourishing diversity. Part IV of this Article discusses the New Urbanist programs and their adaptation to that end. It uses Richard Florida's *The Rise of the Creative Class* and his subsequent publications<sup>8</sup> as a foundation for establishing diversity as a trait desired by members of what he calls the creative class. It further argues that a diversity-sensitive municipality can establish marginal advantages over otherwise similarly situated municipalities, and that in a society offering a wide variety of choices to members of the creative class, this competitive advantage is significant.

Historically, the naturally occurring gayborhoods was a refuge from persecution. Evolving social acceptance of sexual minorities is,

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1975).

6. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

7. *See generally id.*

8. RICHARD FLORIDA, *CITIES AND THE CREATIVE CLASS* (2005) [hereinafter FLORIDA, *CITIES*]; RICHARD FLORIDA, *THE FLIGHT OF THE CREATIVE CLASS* (2005) [hereinafter FLORIDA, *FLIGHT*]; RICHARD FLORIDA, *WHO'S YOUR CITY?: HOW THE CREATIVE ECONOMY IS MAKING WHERE TO LIVE THE MOST IMPORTANT DECISION OF YOUR LIFE* (2008) [hereinafter FLORIDA, *WHO'S YOUR CITY*].

however, in the process of creating a very different landscape. Although gay men and lesbians continue to face legal discrimination and social ostracism, the depth of disapproval varies widely both socially and geographically. Part V of this Article provides a brief history of the evolution of these communities from ostracism to acceptance and suggests ways in which municipalities can learn from that evolution to encourage the development of stable, diverse neighborhoods.

Part V of this Article also argues that the solution to segregated heteronormative environments is not more planning and regulation, but less regulation. Traditional homogeneity-enforcing land use regulations give neighbors an intrusive quasi-property interest in each others' homes, and therefore lives, enforcing a degree of economic and even social intimacy that is inimical to the toleration of differences necessary to support a diverse neighborhood. It suggests an analytical framework for the proposition that a diverse urban neighborhood results from robust interactions among neighbors in their public lives, while their private interactions may be organized along social lines outside of geography.

This approach implies a solution that is open-ended rather than exhaustively planned, allowing repurposing of the urban core. A municipality could select neighborhoods for diversity development, eliminating zoning whose purpose or effect is to segregate living styles. Permitting higher density central core developments with a mix of housing styles and light commercial uses could encourage a neighborhood in the process of development to evolve into a community that values diversity.

## II. LAND USE REGULATION—SEGREGATIVE AND HETERONORMATIVE EFFECTS

### A. Traditional Euclidean Zoning

The scheme of land use regulation approved by the Supreme Court in *Euclid*<sup>9</sup> dominated urban planning in the United States for the next half-century and continues to have substantial force today. The critical point of such a scheme is a strict geographic separation of incompatible uses; the less compatible the uses, the greater the desired separation.<sup>10</sup> In approving this far-reaching police power limitation on the rights of private landholders, the Court leaned heavily on the language, if not the legal principles, of traditional nuisance actions.<sup>11</sup> It suggested that there were no “bad” uses, only inappropriate juxtapositions—“like a pig in a parlor.”<sup>12</sup>

So far, so good—no one wants to live next door to a coke plant or a brickyard. However, the distinction was at best disingenuous. It was quite clear that the Village of Euclid, and the Court, wanted to preserve the parlor and exclude the pig altogether, and that the Court was approving a scheme of land use regulation that made myriads of unstated assumptions about social values and left important questions unanswered. What kinds of uses are incompatible? And more importantly, who shall decide?

The approval of the classic Euclidean scheme by the Supreme Court of the United States meant that it was widely copied and therefore worthy of a detailed description. It establishes a pyramid of uses. The apex of this pyramid is occupied by a detached single-family dwelling. The next level down—the direction is significant—might be a duplex, or row houses; the classifications then descend to apartment houses, boarding houses, and finally a variety of commercial and industrial uses. Each use classification was cumulative, including all of the uses higher in the pyramid. The

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9. *Euclid*, 272 U.S. at 397.

10. *Id.* at 379–83.

11. *Id.* at 387–88.

12. *Id.* at 388–89.

scheme also included dimensional restrictions overlaying the usage zones to promote a uniformity of appearance within a district even when distinct uses within that district were allowed. These dimensional restrictions also established socioeconomic hierarchies within the levels of use: for example, different sizes of houses and lots within the basic zoning for single family dwellings.<sup>13</sup>

The popularity of a scheme that has received the constitutional imprimatur of the Supreme Court cannot be overemphasized. Approval by a bare majority was nonetheless approval, and municipalities eager to zone saw in the Euclid usage and dimensional restrictions a safe harbor. Euclid's relatively simple scheme, involving only six levels of uses, saw increasingly elaborate modification. Detached single-family dwellings, for example, could vary enormously in size and value. In order to prevent a hovel being built next door to a respectable house, municipalities created subclasses dictating minimum lot size, minimum square footage, and large setbacks. The stated purpose of such dimensional restrictions was to leave open spaces and create a park-like atmosphere, a country-style community of broad lawns.

The segregative possibilities of *Euclid* were welcomed by at least one racist group, the White People's Protective League, who apparently saw in this expansive exercise of the police power the ability to maintain racial separatism.<sup>14</sup> And the socioeconomic segregation fostered by Euclidean zoning worked beautifully to this end because it did not need any overt racist classifications to maintain racial separation. The disparate impact of creating narrow cost classifications for housing would do quite nicely. Combined with redlining, racially restrictive covenants, and violence or overt hostility, segregation became more thoroughly entrenched than ever, just in time to ameliorate what an entrenched majority saw as the potentially dangerous mixing of races in the northern United States as a result of the Great Migration.<sup>15</sup> Opposing forces could only operate

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13. *Id.* at 379–83. Use and dimensional restrictions are considered at greater length *infra* Part II.A.

14. SEYMOUR I. TOLL, ZONED AMERICAN 242 & 352 n.51 (1969).

15. For a discussion of the Great Migration, see STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION

interstitially; because neighborhoods change relatively slowly, changes in the law (the Fair Housing Act,<sup>16</sup> *Shelley v. Kraemer*,<sup>17</sup> etc.) could only effect change over lengthy periods of time, if at all.

Less often discussed, perhaps because it is so painfully obvious, is the underlying heteronormativity of Euclidean zoning structures. The emphasis on single-family dwellings left little room for flexibility in defining a family in any way other than a traditional married man and woman and their dependent children, possibly with a grandfather or aunt thrown into the mix to liven things up. The upper-middle-class neighborhoods that stood at the apex of the pyramid of uses created by Euclidean zoning schemes were always centered upon support for families with children.<sup>18</sup> Municipalities thus enabled people choosing new homes in established neighborhoods to easily see that they were going to live among people like themselves—people who not only shared a similar economic status but would value similar child-friendly amenities like good schools and playgrounds.

Segregation by economic status and racial, ethnic, and sexual minority was a powerful statement of social values that went largely unquestioned for decades, and with regard to the last characteristic, has only begun to be recognized. The group making decisions about the control of others' use of their property was overwhelmingly composed of members of the class that believed it benefited from perpetuation of that segregation.<sup>19</sup> In the first half of the twentieth

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(2003).

16. Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2006).

17. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

18. See *Euclid*, 272 U.S. at 394 (“[T]he segregation of residential, business and industrial buildings will . . . increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, . . . preserve a more favorable environment in which to rear children, etc.”); U.S. DEP’T HOUS. URBAN DEV. ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, “NOT IN MY BACK YARD” 2-6 to 2-7 (1991) (“[Zoning board actions] tend to exclude housing types and households considered less desirable. Not surprisingly, especially in suburban areas, there is often a bias toward single-family detached housing on generous-sized lots. The bias in favor of single-family housing units may persist in spite of market demand.”); Kristine Nelson Fuge, *Exclusionary Zoning: Keeping People in Their Wrongful Places or a Valid Exercise of Local Control?* 18 HAMLINE J. PUB. L. & POL’Y 148, 159 (1996) (noting that proponents of locally controlled exclusionary zoning argue based on an interest in “preserving community characteristics” and “preserving homogeneity”) (citing ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, *supra*, at 1-5 to 1-7).

19. See generally Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993); Richard Thompson Ford,

century, members of the ruling class unlikely were even aware of the heteronormativity of their decisions. Homosexuality was simply not a conscious part of their thought processes; but had they considered it at all, they would doubtless have been satisfied that it had no place in their neighborhoods.

Communities adopting this form of regulation in effect adopted the view that these forms of segregation were a public good,<sup>20</sup> and that it was worth expending resources to maintain that public good. Their voting constituencies overwhelmingly approved of—and indeed pressured for—a continued protection of their segregated neighborhoods because they had a vested economic interest in the continuation of that segregation.<sup>21</sup> The “not-in-my-back-yard” (NIMBY)<sup>22</sup> phenomenon was typically, sometimes hysterically, reinforced by a cry of, “What about the children?”<sup>23</sup> Any difference, particularly a difference of lifestyle, was a threat.

This Article does not suggest that there is no place whatsoever in a zoning scheme for narrowly defined types of neighborhoods; it is the hegemonic quality of this worldview that has stifled alternatives. That is, a large municipality may well want to create some spaces where homeowners can choose to congregate with others who share their socioeconomic status where there is ample demand. But when this approach is the exclusive organizational principle, the result is a stifling homogeneity, segregation throughout the entire municipality, and exclusion of alternative forms of social organization burdening those who are different or who choose to live differently.<sup>24</sup>

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*The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295 (1999); Michael Allan Wolf, *Euclid at Threescore Years and Ten: Is This the Twilight of Environmental and Land-Use Regulation?* 30 U. RICH. L. REV. 961 (1996).

20. “Public good” as a term of art will be discussed in detail *infra* Part III. For the purposes of this section, it may be briefly defined as a desirable service for which it is impossible to charge the user.

21. See LEE ANNE FENNELL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* 25–44 (2009) (using the work of William Fischel, *infra* note 99).

22. See ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, *supra* note 18.

23. This cry has been deftly and devastatingly parodied by *The Simpsons* since its debut in 1989, as the trademark of Helen Lovejoy, the parson’s wife. *List of Recurring The Simpsons Characters*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_recurring\\_characters\\_in\\_The\\_Simpsons](http://en.wikipedia.org/wiki/List_of_recurring_characters_in_The_Simpsons) (last visited Feb. 16, 2011).

24. One study finds that these biases may persist in spite of changes in market demand, which

Attempts to curb the excesses of zoning as a form of social engineering have seen only limited success when constitutional challenges have been raised in the courts. The Supreme Court, having granted municipalities an astonishingly broad-based ability to exercise the police power, has been reluctant to pull back and has typically done so more in the protection of economic than social interests. For example, in *Lucas v. South Carolina Coastal Council*,<sup>25</sup> the Court found that an attempt to control use that results in a functionally complete deprivation of economic value is a taking requiring compensation under the Fifth Amendment.<sup>26</sup> The protection of economic interests in property was reinforced in *Nollan v. California Coastal Commission*<sup>27</sup> and *Dolan v. City of Tigard*,<sup>28</sup> which established tests for determining the appropriate rationale and extent of municipal regulation. In each of these cases, the regulating body was attempting to reinforce what it characterized as a public good, whether environmental protection, visual access to public spaces, or public access to green space. None of these cases questioned the primary authority of the municipality to establish use restrictions, and the general economic effects were not part of the analysis; the only concern was the right of the property owner balanced against the zoning power of the state. While appropriate within the relatively narrow scope of the Fifth Amendment, this analysis left unstudied the problem of the effect of regulation on those excluded. In essence, this catch-22 meant that those excluded had no standing to argue the economic effect of zoning legislation upon them because they lacked the ability to buy such property in the first place.<sup>29</sup>

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suggests both a bias against change and a failure on the part of those in control of the machinery of local government. ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, *supra* note 18, at 2-7.

25. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

26. U.S. CONST. amend. V.

27. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

28. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

29. See *Warth v. Selden*, 422 U.S. 490, 504 (1975), in which the Court found no case or controversy embodied in the allegations of a variety of plaintiffs, including potential low-income residents, who complained of the exclusionary zoning practices of Penfield, a suburb of Rochester, New York. This holding occurred in spite of a record which showed "total, purposeful, intransigent exclusion of certain classes of people from the town, pursuant to a conscious scheme never deviated from." *Id.* at 523 (Douglas, J., dissenting).

Indeed, having decided in *San Antonio Independent School District v. Rodriguez*<sup>30</sup> that poverty is not a suspect class, the Supreme Court left little room in the Federal Constitution for any limit on the enormous socioeconomic segregationist power left in the hands of municipal bodies. The difficulties facing would-be zoning challengers are exacerbated by the fact that zoning boards and municipal governing bodies are among the most ignored and the least well understood elected boards in our political system.

Even at this very low level of scrutiny, municipalities have occasionally managed to offend even the Court's limited sensibilities. In *City of Cleburne, Texas v. Cleburne Living Center*,<sup>31</sup> the Court found that a system of classification allowing an array of group living environments (boarding houses, fraternities, etc.), but specifically excluding such a home for the developmentally disabled is simply irrational. *Cleburne* suggests that there may be some limits, but only rarely has such line-drawing been applied.

In a similar vein, but outside of the zoning context, the Court in *Romer v. Evans*<sup>32</sup> and *Lawrence v. Texas*<sup>33</sup> found that classifications based on sexual orientation may be irrational. However, these classifications involve either general status issues or a curb on activity that falls within developing constitutional understanding of the right of privacy in the pursuit of one's intimate relationships. Legislative activity like zoning, which is facially neutral but has significant discriminatory effects on members of sexual minorities, lies beyond the reach of these doctrines at this point in their development.

### *B. Socioeconomic Effects—Maslow's Hierarchy of Needs*

The public goods chosen by consumer voters<sup>34</sup> are various and variously implemented, but all ultimately derive from the municipality's exercise of the police power. These goods may be

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30. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973).

31. 473 U.S. 432, 450 (1985).

32. *Romer v. Evans*, 517 U.S. 620 (1996).

33. *Lawrence v. Texas*, 539 U.S. 558 (2003).

34. Public goods and the consumer voter will be defined and discussed in detail in Part III, *infra*.

usefully organized by the now familiar five-level hierarchy of needs described by Maslow: at base, physiological needs; followed by physical safety and security; community, belonging, and affection; esteem; and finally self-actualization.<sup>35</sup> The typical physiological public goods are clean water and sewer services; public goods providing security include police, fire protection, and street maintenance. As might be expected from the prophylactic nature of these services, consumer voters are likely to take them for granted, and their absence or inadequacy will typically be a veto on moving to such locations by all those who can afford to live elsewhere.<sup>36</sup> Many consumer voters would place public education in this category as well, or at least as a hybrid with the concept of belonging, where we might also place public libraries, parks, recreation facilities and parking lots. Municipalities have not typically been thought to be in the business of providing esteem and self-actualization, but in fact they often do so without openly recognizing that goal. The exclusivity and prestige of those communities that have established a reputation for being regional centers of wealth, taste, and sophistication is of primary importance to many consumer voters who seek the opportunity to surround themselves with those who are similarly “successful.”<sup>37</sup> Municipalities should engage in more honest consideration of these needs in designing the array of public goods they offer to consumer voters.

Under this taxonomy, the regulation of land use is seen to offer an astonishing variety of public goods in the guise of a single zoning scheme. Zoning responds to physiological and safety needs when it isolates or bans uses that threaten those values: uses that are dangerous, filthy, or illegal, such as munitions factories, hog farms, or brothels. Zoning aimed at limiting traffic and noise responds to lighter but no less compelling desires for physiological comfort and

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35. A. H. Maslow, *A Theory of Human Motivation*, 50 *PSYCHOL. REV.* 370 (1943).

36. This is a critical point. The establishment of diversity as a goal of municipal planning cannot take place in a vacuum, and this article accepts the need for a baseline of prophylactic services. See JONATHAN LEVINE, *ZONED OUT*, *infra* note 94.

37. Concerns about the maintenance of property values is related to displays of status and wealth, but is typically felt by consumer voters as more akin to security. I am indebted to Lee Anne Fennell for pointing out the more visceral nature of threats to home values.

safety. However, a glance at even the most modestly sized city's zoning code reveals that these dire problems play only a small part in the scheme of regulation of owners' use of their property. Most of the regulatory energy of the municipality is expended in the pursuit of public goods that relate to the top three levels of Maslow's hierarchy, the psychological or emotional needs of the consumer voter.

The fundamentally emotional nature of these schemes of regulation is obscured by their illusory objectivity and quasi-scientific, mathematical aura. Zoning regulations regulate in two fundamentally different ways: by type of land use and by dimensional restrictions. Regulations on use typically create a hierarchy of uses, the Euclidean scheme described in Part II.A., *supra*. As noted, some use restrictions will respond to physiological/security needs. Many, however, respond to the consumer voter's need for belonging or esteem, such as restrictions on even the most innocuous commercial uses or the strict segregation of single-family and multi-family housing. A neighborhood consisting entirely of one classification of single-family houses does not necessarily guarantee the absence of traffic and noise, but it does guarantee that one will be surrounded entirely by "traditional" families with approximately the same levels of resources to spend on housing. The consumer voter's desire for such a community is based entirely on the probability that she will feel a greater sense of belonging. Since such a living situation is typically more expensive, it also contributes to her sense of esteem.

Dimensional restrictions are even more insidious because their apparent mathematical precision tends to mask their social effects.<sup>38</sup> Such restrictions include minimum lot sizes, minimum square footage for dwellings, setbacks from adjoining property, and limitations on the height and bulk of dwellings. All of these reduce the density of development in the neighborhood and therefore drive up the cost per unit. Fewer lots per acre mean a higher cost per lot, and the bigger the house, the more it costs. In turn, restrictions on

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38. See, e.g., Catherine Durkin, Comment, *The Exclusionary Effect of "Mansionization": Area Variance Undermine Efforts to Achieve Housing Affordability*, 55 CATH. U. L. REV. 439 (2006).

height and bulk, typically justified by the need for air and light, place an upper bound on the size of dwellings, ensuring that no resident can overbuild. The net effect is that all homes are built to essentially the same standards of size and quality.

These types of restrictions often masquerade as addressing security issues. Limitations on multi-family housing, for example, are often justified by the argument that apartments lead to more traffic and crime, although this is not ineluctably logical.<sup>39</sup> Similarly, dimensional restrictions, which reduce density, are deemed justifiable because they minimize noise and traffic. Nonetheless, their dominant effect is quite otherwise. Because housing tends to be built at the limits allowed by regulation, all of the houses in a neighborhood subject to such a scheme will be of comparable value. Because most people buy the most home they can afford, this means that the ultimate result is a neighborhood of people with essentially the same level of ability to pay for housing and who have similar values with regard to cost and style.<sup>40</sup> Although seldom stated baldly, zoning ordinances have therefore operated to establish neighborhood homogeneity of economic status as a public good. Economic status is also a marker for a variety of other characteristics: education, race, and ethnicity.

This reordering of the cityscape was purposive, and urban planners deliberately sought to eliminate not only unsafe and unhealthy conditions, but also a variety of uses within a single neighborhood. They were convinced that “the mixed-use, rezoning form of many urban neighborhoods was hopelessly antiquated.”<sup>41</sup> The enormous outlay of funding through the Housing Act of 1949<sup>42</sup> provided planners and politicians with the opportunity to put this conviction

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39. See NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 39 (2010).

40. The housing bubble, recently burst, may be thought to have distorted this process by permitting those with lower incomes to “invade” pricier neighborhoods. This may have resulted in a mixing of over-leveraged grasshoppers with more fiscally conservative ants; however, the status level of those living in the neighborhood remained unchanged because status is based on social appearances rather than on some underlying objective level of wealth.

41. GARNETT, *supra* note 39, at 44.

42. 42 U.S.C. § 1452b (repealed 1990).

into practice. Urban renewal did not merely eliminate dangerous conditions; it razed entire neighborhoods with the avowed goal of rebuilding the city with “everything in its proper place.”<sup>43</sup> The goal of eliminating the good—or at least what some might perceive as the good—with the bad was approved by the United States Supreme Court in *Berman v. Parker*,<sup>44</sup> which allowed the bulldozing of a perfectly useful department store on the theory that its location in an otherwise blighted area obstructed the creation of an overall plan for the neighborhood—one which precluded or at least severely restricted a diversity of uses.<sup>45</sup> As one writer put it, the resulting urban neighborhood was one in which “[the] whole is a boring, low intensity, and gelatinous sum of the parts.”<sup>45</sup>

Attempting to legislate counter to this long-standing practice will require some degree of courage in the face of entrenched interests in the persistence of the status quo. This Article argues that political decision-making fostering gayborhoods will require the expenditure of political capital. In order to justify that expenditure, there must be some commensurate economic advantage to the municipality—the expansion of the creative class and consequent gain in economic activity and municipal life.<sup>46</sup>

### *C. Mount Laurel*

The most extensive judicial consideration of the socioeconomically segregative effects of traditional zoning can be found in the decisions of the New Jersey Supreme Court in the *Mount Laurel* cases.<sup>47</sup> These cases were the result of a lawsuit challenging the zoning scheme of Mount Laurel, a formerly agricultural community that experienced substantial growth as part of suburban Camden in the post-World-War-II era.<sup>48</sup> Like many such

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43. LUDWIG HILBERSEIMER, *THE NEW CITY: PRINCIPLES OF PLANNING* 158 (1944).

44. *Berman v. Parker*, 348 U.S. 26 (1954).

45. DOUGLAS S. KELBAUGH, *REPAIRING THE AMERICAN METROPOLIS: COMMON PLACE REVISITED* 134 (2002).

46. *See infra* Part IV.C.

47. *Mount Laurel II*, 456 A.2d 390 (1983); *Mount Laurel I*, 336 A.2d 713 (1975).

48. *Mount Laurel II*, 456 A.2d at 390; *Mount Laurel I*, 336 A.2d at 717.

municipalities, Mount Laurel had responded with a comprehensive zoning ordinance that divided the city into zones for industrial, commercial and residential uses.<sup>49</sup> Unlike the Supreme Court of the United States, the New Jersey Supreme Court took issue with the economic effects of residential use and dimensional restrictions.<sup>50</sup>

*Mount Laurel I* focused on ways in which the residential portions of the zoning ordinance violated the New Jersey Constitution.<sup>51</sup> The court found inherent in the state constitution's guarantees of equal protection and substantive due process<sup>52</sup> a right to fair access to housing and imposed on municipalities like Mount Laurel an obligation to provide that access:

[P]roper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. . . . [T]he presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.<sup>53</sup>

The court found that many of the traditional forms of zoning regulation had the effect of violating the right to fair access to housing.<sup>54</sup> Nearly all of the residential property in the city was zoned

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49. See generally *Mount Laurel I*, 336 A.2d at 718–21.

50. *Id.* at 723.

51. *Id.* at 728. The court was effectively precluded from consideration of federal constitutional issues by the prior decision of the United States Supreme Court in *Warth v. Seldin*, 422 U.S. 490 (1975).

52. *Mount Laurel I*, 336 A.2d at 725. The court derived these rights from article I, paragraph 1 of the New Jersey Constitution: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, para. 1.

53. *Mount Laurel I*, 336 A.2d at 727–28.

54. See *id.* at 724.

for single family dwellings.<sup>55</sup> Most of those areas required minimum lot sizes of a quarter- to a half-acre, with minimum street frontages of 75 to 100 feet.<sup>56</sup> Minimum house sizes were 1100 square feet for one-story houses and 1300 square feet for houses of one and one-half story or more.<sup>57</sup> The only multiple-family dwellings permitted in the city were authorized as a part of planned unit developments, which were admittedly designed for the relatively affluent.<sup>58</sup> The court also found that the reservation of a substantial portion of the community—more than a quarter of its land area—for industrial uses was disingenuous.<sup>59</sup> The probability of significant industrial development was slim, and the effect of the reservation was to preserve more or less agricultural styles of residential development in those areas—in other words, more expensive low density housing.<sup>60</sup> Mount Laurel had no significant commercial development—no “downtown”—and only a small amount of land was zoned for small, scattered stores servicing a fundamentally residential community.<sup>61</sup>

Having propounded a state constitutional principle of fair access to housing for low and middle income residents, the court left fashioning the remedy in the hands of Mount Laurel, confident that it would “do so in the spirit we have suggested, both by appropriate zoning ordinance amendments and whatever additional action encouraging the fulfillment of its fair share of the regional need for low and moderate income housing may be indicated as necessary and advisable.”<sup>62</sup>

Of course Mount Laurel did no such thing, fulfilling the prediction of Justice Pashman, whose concurrence argued that the decision had not gone far enough.<sup>63</sup> He felt that the problem was systemic and exposed the inherent evils of the existing schemes of land use

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55. *Id.* at 719.

56. *Id.* at 719–20, 729–30.

57. *Id.* at 730.

58. *Id.* at 721, 729.

59. See *Mount Laurel I*, 336 A.2d at 730; *id.* at 740 (Pashman, J., concurring).

60. *Id.* at 730 (majority opinion).

61. *Id.* at 719.

62. *Id.* at 734.

63. *Id.* at 736 (Pashman, J., concurring).

regulation in ways that required “broad guidelines for judicial review of municipal zoning decisions which implicate these abuses.”<sup>64</sup> As he predicted, the case found its way back to the New Jersey Supreme Court nearly eight years later, very little having been accomplished in the interim except continued growth under the old regulatory patterns.<sup>65</sup>

It was therefore in an acerbic frame of mind that the New Jersey Supreme Court returned to this question in 1983, in *Mount Laurel II*.<sup>66</sup> Finding that the municipalities of New Jersey had done virtually nothing in the interim, it legislated a solution from the bench, in effect establishing the New Jersey courts as the final authority for zoning decisions.<sup>67</sup> Many of the mechanisms put in place, although shocking to the municipalities and residents of cities throughout the state, are not of concern here.<sup>68</sup> For our purposes, the most interesting suggestion made by the court was not a requirement for affirmatively inclusive legislation. Rather, it was the elimination, or at least the relaxation, of existing zoning practices that were facially neutral but exclusionary in effect.<sup>69</sup>

The court held that “municipalities must remove zoning and subdivision restrictions and exactions that are not necessary to protect [the public] health and safety”<sup>70</sup>—in other words, limiting municipal action to types of controls we have characterized as catering to the physiological and security needs of the consumer voters. In the context of New Jersey constitutional principles regarding fair access to housing, this substantially curbed, if it did not altogether eliminate, the use of the police power to legislate in favor of what we have characterized as the emotional and psychological needs of the consumer voter. Citing its opinion in *Mount Laurel I*, the

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64. *Id.*

65. *Mount Laurel II*, 456 A.2d 390 (1983).

66. *Id.*

67. *Id.* at 410, 417, 490.

68. For example, the court established a judicial tribunal that would have oversight over all municipal zoning decisions. *Id.* at 419. It required set-asides in all new developments for low and moderate income housing and suggested a variety of other methods, such as subsidies and other developer incentives, incentive zoning, and zoning for mobile homes. *Id.* at 446–52.

69. *Id.* at 441.

70. *Id.*

court dictated that minimum lot size and frontage should be reduced<sup>71</sup> and suggested that building codes should be adjusted to permit the use of modern and cheaper materials.<sup>72</sup> It also held that the creation of a pricey retirement community was clearly discriminatory; even though it was higher density multi-family residential, the style and cost were clearly beyond the reach of low and middle income residents.<sup>73</sup>

It is important to note the limits of the *Mount Laurel* decisions. The New Jersey Supreme Court found a constitutional requirement for diversity within the municipality as a whole, not within specific neighborhoods.<sup>74</sup> It was perfectly possible for a city to fulfill the mandate to provide a fair share of low and middle income housing while still maintaining segregation among neighborhoods; in other words, the municipality was free, if not actually encouraged, to create a “wrong side of the tracks.”<sup>75</sup> Of course, the court did not go so far as to demand diversity of any stripe other than socioeconomic;<sup>76</sup> however, as we have seen, this form of diversity has shadow effects in a variety of other ways.<sup>77</sup>

Although the *Mount Laurel II* decision was widely considered to be an extraordinary example of legislating from the bench, the form of its legislation is suggestive. Although it may seem inapposite because it relied entirely on the economic inequalities, the reasoning of the court and the mechanisms it adopted for solving the constitutional defects of the zoning scheme provide an instructive roadmap for our purposes. Having achieved judicial as well as academic recognition of the segregative effects of traditional residential zoning schemes, how may a municipality that wishes to foster diversity as a public good apply these principles?

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71. *Mount Laurel II*, 456 A.2d at 461.

72. *Id.* at 441 n.25. The court suggested that municipalities should be limited to enforcing standards suggested by the U.S. Department of Housing and Urban Development. *Id.* at 442.

73. *Mount Laurel I*, 336 A.2d at 722.

74. *Id.* at 731.

75. *Mount Laurel II*, 456 A.2d at 442.

76. *Id.*

77. *See, e.g.*, Dubin, *supra* note 19; McFarlane, *supra* note 19; Wolf, *supra* note 19.

It should first be noted that the court in *Mount Laurel II* recognized that its solution could be prospective only—that is, a community that was already fully developed could not be expected to reverse the segregative effects that had already resulted from its zoning regulations without serious dislocation of entrenched economic interests and the corresponding reliance on the effectuation of the social norms embedded in the existing scheme of regulation.<sup>78</sup> In this vein, this Article suggests that a legislative scheme encouraging diversity is best applied to a developing, or more likely a redeveloping area, one in which there are not entrenched interests favoring the retention of segregative zoning practices.

Every municipality of any appreciable size has neighborhoods in need of redevelopment. Such neighborhoods could be rezoned pursuant to a comprehensive plan that effectuates a goal of increasing diversity within them. Municipalities should eliminate any regulation whose design or effect is to limit diversity, retaining only those truly necessary to protect health and safety, and *Mount Laurel II* provides them with a pattern for doing so, at least within the scope of residential zoning requirements.

Non-exclusive residential zoning is a critical part of the creation of a neighborhood that encourages diversity among its residents.<sup>79</sup> Part IV of this Article will argue that the *Mount Laurel* test of “true” public health and safety for the propriety of zoning regulations is the backbone of an overall plan of redevelopment that should also include diversity of use as well as of residential style. It will extend the *Mount Laurel* principles for the inclusion of reasonable levels of commercial development integrated into a variety of different types of housing.

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78. See *Mount Laurel II*, 456 A.2d at 433.

79. See *infra* Part IV.

## III. PUBLIC GOODS—THE TIEBOUT HYPOTHESIS

*A. Public Goods*

There are many definitions of a public good used in the field of land use regulation, but this Article adopts that of Charles Tiebout: a good “which should be produced, but for which there is no feasible method of charging the consumers” of that good.<sup>80</sup> Tiebout argues that consumer voters will choose to live in those communities whose priorities of expenditure on public goods most closely match their preferences.<sup>81</sup> A large number of communities, and a pronounced variance of public goods available in those communities, will increase the likelihood and the completeness of a match with the homeowners’ priorities.<sup>82</sup>

The Tiebout hypothesis is a popular and robust model for analyzing municipal decisions about the allocation of resources.<sup>83</sup> Tiebout characterized the then-prevailing model of municipal expenditures as a political mechanism in which the municipality attempts to envision the desires of a “typical voter,” compares those desires with revenues, and derives a budget.<sup>84</sup> Contrasting this with a private market, Tiebout suggested that voters’ preferences remain hypothetical rather than expressed and that without determining those preferences the entire system will be unresponsive to actual desires.<sup>85</sup> Rather, “[t]he consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods,”<sup>86</sup> and municipalities should respond to and anticipate those preference patterns. Although a theory of “expenditure” may seem inapposite, and Tiebout did focus primarily on economic goods, he recognized that this theory applies as well to non-economic variables

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80. Tiebout, *supra* note 6, at 417.

81. *Id.* at 419.

82. *Id.* at 418.

83. *Id.* at 416.

84. *Id.* at 417.

85. *Id.*

86. Tiebout, *supra* note 6, at 418.

(the desire to live among “nice” people<sup>87</sup>). Subsequent authors have expanded upon this concept in a variety of ways.<sup>88</sup>

Tiebout hypothesizes a large market of communities with a wide array of preference patterns and associated taxes and a well-informed body of mobile consumers.<sup>89</sup> For each municipality’s preference pattern there is an optimum population; municipalities having a population below that optimum level will attempt to attract consumer voters to spread the costs, and those above the optimum level will try to do the opposite.<sup>90</sup> Optimum population exists but is a moving target. The key element of this analysis is that it reverses the roles of the consumer voter and the municipality. The city is not, strictly speaking, in the business of responding to hypothetical existing desires, but rather creating a set of local public goods that will attract new consumer voters.<sup>91</sup> Their mobility, in turn, creates constant pressure for more movement; the willingness to move is the primary evidence of consumer voter preferences.<sup>92</sup> In short, the package of public goods does not “adapt to” existing preferences, but is “adopted by” an economic system and by those voters who find the package attractive.<sup>93</sup> For most municipalities, patterns of revenue and expenditure are well-established, and the consumer voter will be able to choose a municipality in much the same way as consumers choose any other good. The mobility of the consumer voter is a key element in this analysis and is a marker of the emerging creative class.<sup>94</sup>

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87. *Id.* at 418 n.12 (“Not only is the consumer-voter concerned with economic patterns, but he desires, for example, to associate with ‘nice’ people.”).

88. *See generally* FENNELL, *supra* note 21; Dubin, *supra* note 19; Ford, *supra* note 19; Fuge, *supra* note 18; McFarlane, *supra* note 19; Wolf, *supra* note 19.

89. Tiebout, *supra* note 6, at 419.

90. *Id.* at 419–20.

91. *Id.* at 420.

92. *Id.*

93. *Id.* (quoting Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 211–21 (1950)).

94. *See infra* Part IV.C. Tiebout’s model was further developed by Bruce Hamilton, who constructed a three-dimensional matrix of preferences for distance, housing density, and the degree of preferences for services. Bruce Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975). Tiebout is not without his detractors, whose criticisms are based in large part on the extreme artificiality of the assumptions of his economic model of the expression of the preferences of consumer voters. For example, he assumes that consumer voters are all independently wealthy (“living on dividend income”), Tiebout, *supra* note 6, at 419, and thus free from economic restraints in

What is the goal of the municipality in this process? Like the search for any form of legislative intent, the group motivations of a corporate body are murky at best.<sup>95</sup> For our purposes, it is enough to assume only one goal, and a fairly obvious and unobjectionable one, which is that the governing body of the municipality wishes to ensure the economic prosperity of the community. Historically, cities have tried to do this by attracting businesses, often through competitive and even counter-productive attempts to lure firms from one jurisdiction to another. These have included a variety of economic attractions, such as tax abatement, tax increment financing, and business-friendly zoning practices. In attracting business, cities have always placed some reliance on the available workforce as well, including its size and level of education. However, workforce demographics have usually been assumed to be a given, like the climate. With the exception of providing good schools, states and municipalities have rarely attempted to claim that they have taken positive action to create and maintain a workforce that business employers would find desirable.

Richard Florida's work suggests that this is placing the cart before the horse.<sup>96</sup> He argues forcefully that the workforce attracts the employers. Attracting a workforce that entrepreneurs find desirable will in turn attract employers to the municipality in which desirable workers congregate. The first step towards building an economically vibrant community is not a focus on the businesses themselves, but on creating a community in which the human capital desired by those businesses will congregate and flourish.

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deciding where to live, which is plainly absurd. For a particularly trenchant criticism of both Tiebout and Hamilton, see JONATHAN LEVINE, *ZONED OUT: REGULATION, MARKETS AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE* 68–70 (2006). Levine focuses on the degree to which other zoning-related transaction costs skew these models. For our purposes, however, the Tiebout hypothesis is useful and continues to be a robust model precisely for its utility in isolating particular aspects of a consumer voter's pattern of preferences, however artificially. If the argument ended there it would be of limited use, but having isolated a particular preference as a public good, we can then place it in a more realistic context. See *infra* Part IV.

95. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) (“And to tell the truth, the quest for the ‘genuine’ legislative intent is probably a wild-goose chase anyway.”).

96. See *supra* notes 1 and 8 (listing Richard Florida's works on the subject).

### *B. Problems with Tangled Ownership*

There are many ways in which traditional schemes of land use regulation inhibit these developments, and the problem is as simple as traditional conservative NIMBYism. Although scholars have posited a net economic gain to the community by the abandonment of the Euclidean style of segregation, it persists in large part because of the opposite fear—that of economic loss as the probable result of any change. Lee Ann Fennell's *The Unbounded Home*, extending Tiebout, suggests that this fear exists because traditional homogeneity-enforcing land use regulations give neighbors an excessive quasi-property interest in each others' homes, and therefore lives. This property interest in turn enforces a degree of economic and even social intimacy that is inimical to the toleration of differences necessary to support a diverse neighborhood in Florida's sense.<sup>97</sup>

Fennell provides an analytical framework for Jane Jacobs's assertion<sup>98</sup> that a diverse urban neighborhood resulted from robust interactions among neighbors in their public lives, while their private interactions were organized along social lines outside of geography.<sup>99</sup> Zoning ordinances create a cluster of rights and liabilities between the municipality and the property owner—this much is obvious. What is less obvious is that these schemes of land use regulation also create a web of interlocking rights and liabilities among neighboring property owners subject to that regulatory regime. These mutual responsibilities, rather like a publicly imposed contractual relationship, are easy to ignore because they are typically implicit. In their inception, community controls increase the net value of property in the community and the value of most individual parcels.<sup>100</sup> The

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97. FENNELL, *supra* note 21, at 32–44.

98. *See infra* Part IV.A.

99. Fennell's work builds upon the pioneering efforts of William Fischel, notably WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* (1985) and WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001). This article relies on Fennell's formulation because her argument more closely tracks with issues involving minorities.

100. FENNELL, *supra* note 21, at 41.

loss of freedom in the use of one's own property is more than offset by the benefit accruing to the landowner from the same restraints on her neighbors' use of their property.<sup>101</sup>

This enforced mutuality of land use obligations has a significant economic impact on property owners and corresponding social implications. Those implications are, among other anti-diversity results, heteronormative. The desire to protect one's investment has led many landowners to internalize the majoritarian strictures of zoning schemes, seeing them as a natural attempt to protect their investment in their homes. This is illustrated in the racial context by the "white flight" of the mid-twentieth century. It is also a powerful factor in the continuing attempt to exclude or marginalize sexual minorities, or to force them into the closet or under cover.

### *C. Diversity as a Public Good*

Many of the public goods Tiebout gives as examples are in fact private goods publicly furnished, like beaches, golf courses, and parking facilities, all of which could be furnished privately and for which a municipality could charge fees.<sup>102</sup> Diversity, however, is clearly a public good in the Tieboutian sense: it is valued and there is no feasible means of charging for it. Diversity inheres in the entirety of a neighborhood; consumer voters who desire it must either seek it out as a naturally occurring phenomenon or find a municipality that has sought or is seeking to create conditions under which diversity can flourish.<sup>103</sup>

As will be developed later in this Article,<sup>104</sup> the existence of such consumer voters is the precondition to any attempt to foster diversity. This Article does not attempt to argue that land use regulations should establish diversity as a competing public good and enforce it retroactively in an attempt to undo the pernicious effects of traditional segregative zoning. Rather, demographic analysis shows

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101. *See id.*

102. LEVINE, *supra* note 94, at 54.

103. The creation of a public good is essentially the problem of collective action. *See, e.g.*, JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* (1989).

104. *See infra* Part V.G.

an increasing percentage of the population places a high value on diversity. Municipalities seeking prosperity will be well-advised to take these desires into account in their plans for redevelopment.

#### IV. NEW URBANIST RESPONSES TO TRADITIONAL ZONING

##### A. *Jacobs and Anti-Planning*

Jane Jacobs, an early critic of mid-twentieth century attempts at planning, established a vocabulary for the critics who followed her.<sup>105</sup> Her fundamental argument, limiting for our own purposes her comprehensive condemnation of the planners of the day, was that cities are utterly unlike small towns, and that the imposition of village values on an urban environment was a disastrous mistake. She was a strong proponent of density and diversity, by which she meant diversity of uses.<sup>106</sup> She defined her ideal urban neighborhood by several conditions.

First, the district should serve at least two primary purposes, and preferably more; people should be out of doors using common facilities on different schedules and for different purposes.<sup>107</sup> This idea supported one of her most important principles, that a large and varied number of “eyes on the street,” including residents, workers, and customers, would make the street safer.<sup>108</sup> Second, blocks should be small; there should be “[m]any streets and many opportunities to turn corners.”<sup>109</sup> This design not only promoted the flow of foot traffic, but encouraged mixed use, as small shops found an easy home on a busy corner. Third, “The district [should] mingle buildings

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105. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (modern library ed. 1993).

106. Employing Jane Jacobs to bolster an argument for diversity which includes sexual minorities is not without its irony. Her curt dismissal of Philadelphia’s Washington Square in the 1950s as that city’s “pervert park” clearly indicates that sexual minorities found no place in her “diverse” urban neighborhoods. *Id.* at 120. It is possible that this was mere pandering to the prevailing mores and discrimination of the time, as it could hardly have escaped Jacobs’s notice that her own beloved Greenwich Village was one of the ur-gayborhoods of America. It is nonetheless problematic, and her use of “diversity” must be carefully distinguished from the diversity of sexual orientation for which this article advocates.

107. *Id.* at 198.

108. *Id.* at 45, 198–99.

109. *Id.* at 233.

that vary in age and condition . . . .”<sup>110</sup> Fourth, there should be a dense concentration of people, there for a variety of purposes, particularly including residents.<sup>111</sup>

It is important to remember that Jacobs and the New Urbanists have a limited definition of diversity. Like the New Jersey Supreme Court in the *Mount Laurel* cases, when she uses the word diversity, she is speaking of socioeconomic diversity; that is, she is encouraging mixed housing and mixed uses, typically light commercial uses to which residents can easily walk. It is assumed that racial and ethnic diversity follow from this mix, just as the previously prevailing homogeneity of housing options encouraged segregation, but this is by no means guaranteed.

Proponents of urban renewal, against whom Jacobs was reacting, argued that mixed uses were ugly and dangerous. They caused traffic congestion, encouraged crime, and provided opportunities for nuisance-like conflict among a variety of uses that classic Euclidean zoning schemes were created to prevent. Subsequent commentators have responded that this is an essentially aesthetic complaint, a matter of taste—what seems disorder to the proponents of urban renewal is to others the enjoyable bustle and diversity of an urban environment that works for, and is enjoyed by, those who work, play, and dwell there.<sup>112</sup>

### *B. New Urbanism—Measures and Limitations*

The New Urbanism school drew on Jacobs’s criticism of the blandness and homogeneity of post-war planning, admitting that the resulting homogeneity was fundamentally at odds with the naturally developed character of the urban environment. For the most part, New Urbanism’s response was not to plan less—the libertarian stance advocated by Jacobs—but rather to plan differently.

Emily Talen has established a taxonomy of the various strands of New Urbanism and the conflicts among them: incrementalism, urban

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110. *Id.* at 244.

111. JACOBS, *supra* note 105, at 261.

112. *See, e.g.*, GARNETT, *supra* note 39.

plan-making, planned communities, and regionalism.<sup>113</sup> Incrementalism will be our focus here; it takes a fine-grained view of urban culture and its environment and suggests mechanisms by which the urban fabric can be strengthened and extended rather than entirely reworked. Jacobs was not the first to suggest that the grand plans of the City Beautiful and the City Efficient were destructive to the fine grain of working urban neighborhoods.<sup>114</sup> Small-scale diversity was sacrificed to grandeur of development in projects ranging from Papal Rome to Baron Haussmann's Parisian boulevards. Similarly, the segregation of the population by class was not new; wealthy and impoverished neighborhoods existed long before there were plans or zoning regulations in place to enforce them. However, urban planning and the resulting schemes of zoning were new, in that they established a different narrative structure that attempted to clothe these outcomes in socially attractive goals.<sup>115</sup>

What defines incrementalism is not its goals, but its tools. It is intended, like all aspects of New Urbanism, to create a more livable city: more attractive and safe, furthering the goals of "diversity, community, accessibility, connectivity, social equity, [and] civic space."<sup>116</sup> Its fundamental belief is that a city can be fixed by small-scale change, rather than tearing it down to start over again. Incrementalism starts with the basic assumption that "[p]eople like to be around other people for safety, comfort, and excitement, and business enjoys certain advantages where there are other businesses."<sup>117</sup>

Planning that does not take this into account has been described as "anti-urbanism": "[G]ood urbanism is about diversity, equity, mix, interconnectivity and the ability to make those principles work

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113. EMILY TALEN, *NEW URBANISM AND AMERICAN PLANNING: THE CONFLICT OF CULTURES* 6 (2005).

114. *See, e.g.*, CAMILLO SITTE, *CITY PLANNING ACCORDING TO ARTISTIC PRINCIPLES* (Rudolph Wittkower ed., George R. Collins & Christiane Crasemann Collins trans., Random House 1965) (1889); *THE EXPLODING METROPOLIS* (William H. Whyte, Jr. ed., 1958).

115. Contrast the suburban idyll apparently contemplated by Mount Laurel with the urbanity of Jane Jacobs's model city and the New Urbanists who expanded upon this. *See infra* Part IV.

116. TALEN, *supra* note 113.

117. JAMES HOWARD KUNSTLER, *HOME FROM NOWHERE: REMAKING OUR EVERYDAY WORLD FOR THE TWENTY-FIRST CENTURY* 197 (1996).

successfully . . . .”<sup>118</sup> Although we are considering the gayborhood as an urban phenomenon, its application is not exclusive to the megalopolis. Large cities are by their nature more heterogeneous, or at least they are likely to furnish more raw material for heterogeneity simply by virtue of their largeness. However, cities with modest populations can sustain these kinds of neighborhoods.<sup>119</sup>

The concepts underlying New Urbanism are sometimes obscured by its overtly normative social program. The principles found in the Charter of New Urbanism<sup>120</sup> include “housing for a diverse population, a full mix of uses, walkable streets, positive public space, integrated civic and commercial centers, transit orientation and accessible open space.”<sup>121</sup> Effective New Urbanist communities, like those described by Jacobs, will have well-connected streets and sidewalks, a mix of housing styles and prices, and include basic commercial and social spaces within a convenient walking distance.<sup>122</sup> Proponents assert that these attributes increase sociability, environmental responsibility, and diversity, but have seldom asked whether these values are consistent with those of the consumer voter. An additional problem with the practical side of New Urbanism is illustrated by Seaside, one of the exemplars of the school: it tends to focus attention on Greenfield developments,<sup>123</sup> rather than the more difficult and interesting problem of recreating useful urban neighborhoods in existing environments.<sup>124</sup>

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118. TALEN, *supra* note 113, at 45.

119. See generally SPIRO KOSTOF, *THE CITY ASSEMBLED: THE ELEMENTS OF URBAN FORM THROUGH HISTORY* (1992); SPIRO KOSTOF, *THE CITY SHAPED: URBAN PATTERNS AND MEANINGS THROUGH HISTORY* (1991).

120. CONG. FOR THE NEW URBANISM, *CHARTER OF THE NEW URBANISM* (2001), available at [http://www.cnu.org/sites/files/charter\\_english.pdf](http://www.cnu.org/sites/files/charter_english.pdf).

121. Peter Calthorpe, *The Region*, in *THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY* xi, xv (Peter Katz ed., 1994).

122. PHILIP LANGDON, *A BETTER PLACE TO LIVE: RESHAPING THE AMERICAN SUBURB* 236 (1994).

123. “Greenfield” is a term that refers to land not previously developed. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 549 (2003). Occurring both in urban and rural contexts, Greenfield developments are not “infill” construction on reused sites but instead new construction most often “unconstrained by surrounding land uses.” JIM HEID, *GREENFIELD DEVELOPMENT WITHOUT SPRAWL: THE ROLE OF PLANNED COMMUNITIES* 2, 4 (2004).

124. *Id.* at 107–18.

The principal study on consumer voter preferences, published in 2004,<sup>125</sup> is limited by its scope and response rate, but established a firm methodology for analyzing consumer voter preferences for specific aspects of New Urbanist communities. It is particularly helpful in that it compared residents of such a community with residents of a more traditional suburban development, thus testing actual satisfaction with these principles rather than hypothetical approval of them.<sup>126</sup> The study found that residents of New Urbanist communities do place a high value on a compact urban form of development; on mixing land uses generally, and particularly within or in close proximity to the neighborhood; and neighborhood walkability. Interestingly, while compactness and mixed use were more highly valued by New Urbanist residents, the last variable, walkability, was equally highly valued by the residents of both community types.<sup>127</sup>

There was no support for the proposition that New Urbanist residents would value a mix of residential styles and prices or diversity among neighborhood residents.<sup>128</sup> Unfortunately, the diversity measured by this study was limited to diversity of income and age, and the results were equivocal. Residents favored age diversity, but not income diversity. The author rather naively suggests this is “another area to focus educational efforts on if these attitudes are to be modified among potential homebuyers,” also pointing out the internal inconsistency, in that income typically varies with age.<sup>129</sup> It should be noted there was no significant income diversity present in the New Urbanist community surveyed in the study; unlike such attributes as mixed use and compactness, income diversity was for the respondents a hypothetical question.

The strength of a study like this, in that it measures actual satisfaction with New Urbanism principles, is also a weakness, in that

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125. DAVE C. WAUGH, BUYING NEW URBANISM: A STUDY OF NEW URBAN CHARACTERISTICS THAT RESIDENTS MOST VALUE (2004), *available at* <http://ecommons.txstate.edu/cgi/viewcontent.cgi?article=1022&context=arp>.

126. *Id.* at 49.

127. *Id.* at 74–77.

128. *Id.* at 76, 78.

129. *Id.* at 78.

the consumer voters being surveyed have already expressed their satisfaction with the package of preferences offered by that community. Both the positive and negative results of the survey are infected with confirmation bias: the tendency to focus on those results consistent with one's preconceived notions. Having voted with their feet and their purchase money, the residents, not surprisingly, find themselves satisfied with the status quo of the neighborhood in which they purchased their homes.

In order to designate a community as diversity-oriented, which is a new marketing strategy, we cannot rely on information about the actual voting patterns of consumer voters, because there has been no opportunity provided for observing those votes. This lack of information injects a substantial element of risk into the process.

### *C. Diversity as Goal—Florida's Creative Class*

As noted at the outset, Richard Florida's *The Rise of the Creative Class* argues that the economic health and social vibrancy of a municipality are tied to a robust creative class, a group that places a high value on diversity.<sup>130</sup> Like Florida, this Article has focused on sexual minorities as a measure of diversity, arguing that a municipality can adapt its scheme of land use regulation to eliminate or minimize heteronormative effects and attract those members of the creative class who value tolerance and diversity. *The Rise of the Creative Class* and Florida's subsequent publications<sup>131</sup> have aroused a great deal of comment in the planning community and among various levels of government that find Florida offers attractive descriptions of what a city should be, like the Michigan Cool Cities initiative, for example.<sup>132</sup> Nonetheless, Florida is not without his detractors. Some suggest that this is a chicken-and-egg argument, that creative people come to places where there are jobs, not jobs to the creative class. Although Florida convincingly shows that the

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130. FLORIDA, RISE, *supra* note 1.

131. FLORIDA, CITIES, *supra* note 8; FLORIDA, FLIGHT, *supra* note 8; FLORIDA, WHO'S YOUR CITY, *supra* note 8.

132. See, e.g., Office of the Governor, State of Michigan, *Cool Cities Summary* (2006), [http://www.michigan.gov/documents/CooCities\\_162146\\_7.doc](http://www.michigan.gov/documents/CooCities_162146_7.doc).

existence of a creative class tends to attract more jobs, there must be some base line of economic activity to start the process.

The acceptance of sexual minorities in a community is not important only for its own sake, but as signaling behavior. That is, such acceptance is evidence that such a community will also be tolerant of all manner of “deviant” behavior. Homosexuality being the last frontier of acceptable prejudice in much of mainstream society, the mere absence of homophobia indicates a great deal more about a community than the naked fact of that absence.

One significant criticism of Florida’s use of sexual minorities as a bellwether for tolerance is the perceived problem of reverse discrimination. Critics suggest that the LGBTQ community (typically denominated simply “gays”) are themselves intolerant of diversity of opinion, citing, for example, lobbying to prevent public funding for overtly homophobic groups like the Boy Scouts of America.<sup>133</sup> It would not be unusual for a persecuted minority, having achieved a zone of safety and even of power, to exercise that power against those it perceives as its persecutors. Indeed, the notion that the only thing that is intolerable is intolerance is at least as old as the European religious wars growing out of the Reformation. This may be a difficult public relations issue for a municipality wishing to hold itself out as pro-diversity or “gay-friendly,” and is a part of the political cost of these proposals. However, the trend toward greater tolerance is clearly on the side of acceptance.

In spite of its many shortcomings, Florida’s work provides some of the best available evidence of the existence of a class of consumer voters interested in finding a municipality that offers diversity as part of its preference package. One measure of that preference is based on Florida’s Composite Diversity Index.<sup>134</sup> The Composite Diversity Index is a combination of three measures: the Gay Index, the Melting Pot Index, and the Bohemian Index. The Gay Index in particular shows a high degree of correlation with the presence and growth of

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133. See, e.g., Jack Cashill, *The Rise of the Procreative Class*, WORLDNETDAILY (Oct. 26, 2006, 1:00 AM), <http://www.wnd.com/index.php?fa=PAGE.view&pageId=38548>.

134. FLORIDA, RISE, *supra* note 1, at 255–63.

high-technology industries. Florida is at some pains to dispel the notion that this means that sexual minorities are prevalent in high-tech industries: “It simply represents a leading indicator of a place that is open and tolerant. These qualities are important to high-tech workers and Creative Class people in general . . . . [They] want places where they can fit in and live as they please without raising eyebrows.”<sup>135</sup> Implicit in these expressed desires is a corresponding willingness to encourage others to live as *they* please, even when those others express their individuality based on very different characteristics.

However, when it comes to demonstrating the market for diversity, let us not overlook the obvious: there already exist gayborhoods that are diverse, stable, and economically vibrant. Ferndale, Michigan, a short if death-defying jog across 8 Mile Road from the city of Detroit, is such a community. Ferndale succeeded Detroit’s Palmer Park neighborhood in the late 1970s.<sup>136</sup> Palmer Park, once the acknowledged gayborhood of Detroit, succumbed to the same problems plaguing many of that city’s neighborhoods in the post-riot era: economic malaise, high crime rates, and substandard public services.<sup>137</sup> Those leaving Palmer Park had choices to make. Royal Oak already had thriving gay-oriented businesses but was built out to capacity and expensive. “Ferndale [was empty and] could have gone [in] either direction at that point.”<sup>138</sup> The ready availability of affordable space made it an attractive beachhead. However, Ferndale did not, like Cary Grant in *Bringing up Baby*, “just [go] gay all of a sudden.”<sup>139</sup> The gay diaspora from Palmer Park split the community into small and politically less potent groups; it was not until 1999 that Ferndale elected a gay council member, and a civil rights ordinance

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135. *Id.* at 258.

136. Wendy Case, *Affirming Ferndale: How a Once-Faltering Suburb Became a Hub for a Gay Community*, METRO TIMES (Detroit), May 30, 2007, <http://www2.metrotimes.com/printStory.asp?id=10562>; see also *On Gayborhoods*, SUPERGAY DETROIT BLOG (Aug. 16, 2007, 12:22 PM), <http://supergaydetroit.blogspot.com/2007/08/on-gayborhoods.html>.

137. Case, *supra* note 136.

138. *Id.* (internal quotation marks omitted).

139. BRINGING UP BABY (RKO Radio Pictures 1938).

protecting sexual minorities, first proposed in 1991, was not passed until 2006.<sup>140</sup>

## V. ENCOURAGING INTEGRATION OF SEXUAL MINORITIES

### A. A Brief History of Gayborhoods

The term gayborhood, drawn from popular culture, requires both definition and defense. The Urban Dictionary defines a gayborhood as “[a] neighborhood containing homes, clubs, bars, restaurants, and other places of business and entertainment that cater to homosexuals”<sup>141</sup> or “[a]ny neighborhood with a high concentration of same-sex oriented individuals.”<sup>142</sup> The latter definition will be our focus here. Wikipedia has an article under the heading “Gay Village,” similarly defined, noting gayborhood as an alternative slang term.<sup>143</sup>

“Gayborhood” is widely used in the LBGQT community. I have chosen the term partly for that reason and more so because it is descriptive, instantly recognizable, and lacks the pejorative or isolative connotations of other commonly used phrases: “gay ghetto” suggests deliberate exclusion; “gay village” suggests that the area is not a part of the larger urban environment; and “LGBTQ enclave” is unwieldy and unpronounceable. Although subject to the criticism that it may be thought to include only homosexual men, it echoes William Eskridge’s *Gaylaw*<sup>144</sup> and has the additional virtue of cheerful insouciance.<sup>145</sup>

For the purpose of this Article, I accept these definitions of gayborhood with modifications. Implicit in the commonly used term

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140. Case, *supra* note 136.

141. Mia Shields, *Gayborhood*, URBAN DICTIONARY (Jan. 5, 2006), <http://www.urbandictionary.com/define.php?term=Gayborhood&defid=1577999>.

142. Brett West, *Gayborhood*, URBAN DICTIONARY (Aug. 9, 2006), <http://www.urbandictionary.com/define.php?term=Gayborhood&defid=1908400>.

143. *Gay Village*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Gayborhood> (last modified Nov. 11, 2011, 6:49 PM).

144. WILLIAM ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999).

145. See DONALD F. REUTER, *GREETINGS FROM THE GAYBORHOOD: A NOSTALGIC LOOK AT GAY NEIGHBORHOODS* (2008).

are the concepts of visibility and acceptance. The gayborhood is not merely an area with a concentration of persons belonging to a sexual minority; members of that concentration must also be out and embraced by the other residents of that area. A gayborhood in the sense used here is not a neighborhood dominated by members of sexual minorities, but it is a neighborhood in which such persons can flourish in conjunction with others who appreciate diversity and do not accept the typical majoritarian modes of traditional zoning. Unlike neighborhoods organized around identification with race, ethnicity, or religion, this group will typically not constitute the majority of the population. It must be recognized that the concept is a fluid one and not subject to perfectly mathematical demographic definition. This is making a virtue of necessity because there is a dearth of solid demographic information, a problem which will be discussed in greater detail below.

A recent article in *The Advocate*<sup>146</sup> attempted to measure municipal gay-friendliness and is a measure of the pitfalls of defining a gay city and, by extension, a gayborhood. The factors it used were highly idiosyncratic and drew some criticism from its readership.<sup>147</sup> On the more serious side, the survey included the number of same-sex couple households per capita, the number of gay public elected officials, and the availability of marriage equality.<sup>148</sup> More frivolously, the survey employed gay bars and cruising spots per capita, online gay hookup profiles per single male population, and the number of gay movies in Netflix favorites.<sup>149</sup> Although these factors perpetuate a variety of gendered and sexually aggressive stereotypes, the article predicts a more positive future. “These cities where everyday gays live—towns and boroughs with a mix of baby carriages, gay bars, and B&Bs—signal the continuing movement of gay people into mainstream American life, which in turn signals an

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146. Mike Albo, *Gayest Cities in America*, *ADVOCATE*, Feb. 1, 2010, at 32.

147. *Feedback*, *ADVOCATE*, Mar. 2010, at 6.

148. Albo, *supra* note 146.

149. *Id.*

eventual end to lists like these.”<sup>150</sup> This Article suggests that it is worth our while to work toward this eventuality.

It will do so by suggesting that municipalities foster diversity as an economic development strategy<sup>151</sup> and treats gayborhoods as a fundamentally urban phenomenon. Of course this is not a complete picture. Sexual minorities are everywhere and create their own spaces and sense of community wherever they find themselves.<sup>152</sup> Nonetheless, urbanity has been critical to the development of a gay sensibility and a gay community.<sup>153</sup> Cities have provided cover, critical mass, and opportunities for congregating that are simply not available in more sparsely settled areas. Cities have historically been more tolerant of diversity because they cannot be otherwise; in a city, intolerance is, if not intolerable, irrelevant. Unlike a rural setting, where everybody knows everyone else’s business, “in the city it [is] possible for [a gay man] to move between social worlds and lead a double life.”<sup>154</sup>

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150. *Id.*

151. Pursuing diversity as an overall development strategy may be related to but should be distinguished from pursuing the “pink dollar.” See, for example, SHIHE FU, SEXUAL ORIENTATION AND NEIGHBORHOOD QUALITY: DO SAME-SEX COUPLES MAKE BETTER COMMUNITIES? 31 (2007), available at <http://mpr.ub.uni-muenchen.de/7678/1/gentrification.pdf>, which shows a “significant correlation between the spatial concentration of same-sex couples and housing values.” And many municipalities have attempted non-diversity-based initiatives to attract members of the creative class. See Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 483 n.148 (2006).

152. See, e.g., MARY L. GRAY, *OUT IN THE COUNTRY: YOUTH, MEDIA, AND QUEER VISIBILITY IN RURAL AMERICA* (2009).

153. The absence of identifiable gayborhoods in smaller cities has become a cliché, sometimes treated with acerbic humor. See Lance Cuellar, *I Can’t Seem to Find the Moline Gay District*, THE ONION (Feb. 7, 2001), <http://www.theonion.com/articles/i-cant-seem-to-find-the-moline-gay-district,10847/>.

154. GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940*, at 131 (1994). There are of course counter-examples of rural LGBTQ enclaves, typically established by choice. See, e.g., *GLBT History of the Saugatuck-Douglas Area*, SAUGATUCK-DOUGLAS HISTORICAL SOCIETY, [http://sdhistoricalsociety.org/gay\\_history.htm](http://sdhistoricalsociety.org/gay_history.htm) (last visited Oct. 6, 2011), (discussing the historical development of the gay and lesbian community in Saugatuck, Michigan). The small town of Saugatuck, Michigan, developed into such an enclave after the Chicago Art Institute established its summer art camps there in the 1920s. See generally *Albert Henry Krehbiel (1873-1945), American Impressionist and Muralist: Biography*, KRIEBEL, <http://www.krehbielart.com/biography.htm> (last modified Apr. 9, 2007); *GLBT History of the Saugatuck-Douglas Area*. Rural Sonoma County has a substantial and vibrant lesbian community. See *Come Out to Sonoma County*, SONOMA COUNTY TOURISM BUREAU, <http://www.sonomacounty.com/gay-lesbian> (last visited Oct. 6, 2011). The development of rural or resort communities, though interesting in itself and suggestive of other possible schemes for encouraging neighborhood diversity, is beyond the scope of this Article.

*B. Antecedents and the Historical Problem of Queer Spaces*

In an era in which sodomy could be punished by death, castration, the galley, or extended imprisonment, communities of sexual minorities were necessarily hidden.<sup>155</sup> Openly homosexual communities were possible only among the upper classes, where they were to some extent protected by their social and political power. The reaction of the heterosexual majority ranged from horror to bemused indifference. Henry III of France and his “mignons,” for example, were tolerated with smirking distaste; on the other hand, the affair of Edward II of England with Piers Gaveston was at least partly responsible for Edward’s deposition and murder.<sup>156</sup> These communities tended toward pairings or small social groups, rather than being organized around a physical neighborhood. In an era which identified homosexuality as a physical act (sodomy) or reverse-gendered behavior (cross-dressing), discretion and dissembling could protect the well-born from persecution—witness the tolerance of the ambiguous sexuality of William III of England, whose reputation as a warrior to a large extent insulated him from open opprobrium, though not from gossip.<sup>157</sup>

In spite of these dangers, England, France, and Holland had recognizable gay communities at least as early as 1750, and some of these had a physical as well as a social locus.<sup>158</sup> That we are aware of them largely because they were discovered and extirpated, sometimes bloodily, means first, that our information about them comes for the most part from their persecutors rather than their participants, and second, that it is likely or at least possible that such communities also existed and escaped detection. Because the focus of anti-sodomy hysteria was almost exclusively male-on-male sex,<sup>159</sup> it also means that we have very little information about communities of women.

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155. See generally LOUIS CROMPTON, *HOMOSEXUALITY AND CIVILIZATION* (First Harvard Univ. Press paperback ed. 2006) (2003) (giving an era-by-era account of homosexual history).

156. See *id.* at 328–31, 372–75.

157. *Id.* at 402–10.

158. NEIL MILLER, *OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* 137–96 (1995); RICTOR NORTON, *MOTHER CLAP’S MOLLY HOUSE: THE GAY SUBCULTURE IN ENGLAND 1700–1830* (Chalfont Press 2d ed. 2006) (1992); see generally CROMPTON, *supra* note 155.

159. With a few notable exceptions, the public attitude about lesbian behavior ranged from ignorance

As Michel Foucault argues, it may be dangerously ahistorical to discuss the concept of homosexuality, much less homosexual communities, in an era in which the concept could scarcely be said to exist.<sup>160</sup> As his critics point out, however, it is undoubtedly true that there have existed throughout history men and women whose primary desire for physical and emotional intimacy was with members of the same sex, regardless of the labels which others applied to them at the time or which they adopted for themselves.<sup>161</sup> When revolutionary France and the ensuing Napoleonic Code swept the crime of sodomy from the statute books as a vestige of ecclesiastical law, it set the stage for further developments.<sup>162</sup>

However much those developments changed the state of the law in continental Europe, homosexual activity remained a crime in the United States and Great Britain until very recently—the laws against sodomy being backstopped by such “lighter” charges as gross indecency or lewd vagrancy.<sup>163</sup> Nonetheless, large cities could provide opportunities for gays to congregate and establish not just social networks, but gayborhoods. George Chauncey’s *Gay New York* and Matt Houlbrook’s *Queer London* provide an elaborate, though thoroughly male, picture of how gay communities could thrive in a hostile environment, remaining hidden to all but the participants and sympathetic cognoscenti.<sup>164</sup> Entire apartment houses could gradually come to be populated by gay men.<sup>165</sup> Lesbian social networks seem to have been similarly robust.<sup>166</sup>

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to disbelief—not much of a spectrum. CROMPTON, *supra* note 155, at 472–99.

160. See generally 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 42–45 (Robert Hurley trans., Random House English trans. 1978) (1976) (describing ancient concepts of sexuality as revolving around moderation versus excess, as opposed to sexual preference).

161. CHAUNCEY, *supra* note 154, at 126; CROMPTON, *supra* note 155, at 174–75; MARTIN DUBERMAN, *ABOUT TIME: EXPLORING THE GAY PAST* (rev. and expanded ed. 1991).

162. The influence of the Napoleonic Code eliminated sodomy as a crime throughout continental Europe. CROMPTON, *supra* note 155, at 528. England would not eliminate the death penalty until 1861, and sodomy remained a crime until the 1960s. *Id.* at 533.

163. ESKRIDGE, *supra* note 144, at app. A2.

164. CHAUNCEY, *supra* note 154; MATT HOULBROOK, *QUEER LONDON: PERILS AND PLEASURES IN THE SEXUAL METROPOLIS, 1918–1957* (2005).

165. CHAUNCEY, *supra* note 154, at 151–52.

166. ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, *BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY* (1993).

Perhaps the most significant development in the United States during this period was the emergence of two neighborhoods in New York City in which closet and cover were all but ignored: Greenwich Village and Harlem.<sup>167</sup> These neighborhoods had large, open, and accepted gay populations at least as early as the 1920s. Each neighborhood was a stable enclave of outsiders within the confines of the larger metropolis: Greenwich Village an artistic “bohemian” neighborhood only recently incorporated into the City, and Harlem a once-distant neighborhood populated largely by African-Americans.

The explosive effect of World War II, with its immense congregation of men and women in unisex environments and the exposure of soldiers to the more open attitudes of Europe,<sup>168</sup> stimulated the post-war growth of homosexual networks, including the development of gayborhoods. This growth was countered by the severe homophobic regime of the period.<sup>169</sup> Increasing social concerns about sexual predation and deviance enforced the severity of the closet and maintained a fiction that homosexuals were few and isolated.<sup>170</sup> That this was a fiction was demonstrated by the immediate “appearance” of gayborhoods after the regime of homophobia began to be less insistent.

### *C. Immediate Post-Stonewall Developments*

A great deal of scholarship has debunked the widely held notion that sexual minorities prior to the galvanizing effect of the Stonewall protests led isolated and miserable lives.<sup>171</sup> That debunking should not be allowed to obscure the fact that 1969 was nonetheless a watershed year for the visibility of sexual minorities. Gayborhoods became much more generally recognized, and, to a limited extent,

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167. CHAUNCEY, *supra* note 154, at 227–32.

168. ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* (1990).

169. JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970*, at 92–107 (2d ed. 1998); ESKRIDGE, *supra* note 144, at 4.

170. ESKRIDGE, *supra* note 144.

171. *See, e.g.*, CHAUNCEY, *supra* note 154; *see also* DUBERMAN, *supra* note 161; HOULBROOK, *supra* note 164; CHARLES KAISER, *THE GAY METROPOLIS: 1940–1996* (1997).

accepted in the wake of that revolution. Gayborhoods so recognized tended to be of a particular form: entertainment-centered, aggressively sexualized, youthful, male, and white. Majority recognition of such gayborhoods was in part the result of majority wish-fulfillment, playing up heteronormative stereotypes of the (male) homosexual as predatory, promiscuous, frivolous, and debauched. This was not an auspicious beginning; however, as the future grows out of the past, it will be useful to consider these gayborhoods, however limited in scope, in some detail.

The choice of living space conveniently located near gay public spaces (bars, bathhouses, and other cruising sites) was a continuation of the same choices made earlier in the century, with the crucial difference that both gay public space and gay living space had at least partially emerged from the closet.<sup>172</sup> This created what was in many ways simply a larger closet, as may be inferred from the term gay ghetto most frequently used to describe such communities at the time, and continued to both protect and isolate the members of those communities. Bars and bathhouses in this era could be more openly patronized but continued to be tolerated, like their customers, only in the more marginalized portions of the city.<sup>173</sup>

The focus on sexualized entertainment also sexualized the emerging gayborhood. When most residents of an area tolerated, or at least were unable to enforce their distaste for public sexual activity, such activity increased.<sup>174</sup> The gayborhood was thus markedly more sex-positive than suburbia, and the ability to behave in public with greater intimacy was and remains one of its hallmarks.

Demographics of types of gayborhoods are more problematic. They were demonstrably and overwhelmingly gendered.<sup>175</sup> My own small city of Lansing provides an anecdotal illustration. The near west side of town, with older homes in the process of reclamation and gentrification, is popularly known as the gayborhood. The

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172. See QUEERS IN SPACE: COMMUNITIES / PUBLIC PLACES / SITES OF RESISTANCE 3–7, 139–43 (Gordon Brent Ingram et al. eds., 1997) [hereinafter QUEERS IN SPACE].

173. *Id.*

174. *Id.*

175. See *infra* Part V.D.

prevailing sexual minority there is gay male couples with a few lesbian couples now filtering in. An area on the east side of town, with comfortable but more affordable housing, is known as “lesbian heights.”

The popular image of gayborhoods is tied to the gentrification movement of the last half-century. The prevailing story line, now almost urban folklore, is embedded in our understanding of the LGBTQ community and urban dynamics. Gays (almost always men) move into a marginalized neighborhood adjacent to their bars and baths. They titivate their houses and keep immaculate gardens. They attract or establish chi-chi art galleries and darling little bistros, which in turn attract wealthy straight people. The gay men are then priced out and move on to the next marginalized neighborhood.<sup>176</sup> As one commentator puts it:

Gayborhoods were born in the second half of the 20th century in relatively run-down, forsaken parts of cities, away from the establishment that could give a damn about man-on-man [public displays of affection], and side-by-side with others who found themselves similarly sidelined: the poor, drug addicts, ethnic minorities. . . . [G]ays became the Marines of gentrification, storming and conquering destitute places. . . . Disposable incomes turned vacant factories into lofts and abandoned lots into community gardens. They brought a live-and-let-live attitude, a sense of style, and several places to eat sushi.<sup>177</sup>

There is plenty of anecdotal evidence to support this narrative, but its dominance in the popular imagination has blotted out those examples of gayborhoods that do not fit the stereotype. It suggests that there are no blue-collar gays, no gays of color, and no lesbians. The development of gayborhoods as advocated by this Article assumes a degree of both public safety and economic diversity that is

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176. Mickey Lauria & Lawrence Knopp, *Toward an Analysis of the Role of Gay Communities in the Urban Renaissance*, 6 URB. GEOGRAPHY 152 (1985).

177. Matt Katz, *There Goes the Gayborhood*, OBIT MAG. (Apr. 6, 2010), <http://obit-mag.com/articles/there-goes-the-gayborhood>.

inclusive of women, people of color, and a wider spectrum of economic resources.

#### *D. Gayborhoods as Gendered Spaces*

It may seem obvious that the various constituencies that make up the LGBTQ community—gay men and lesbians in particular—have widely divergent living situations, and that the sharing of status as sexual minorities has resulted in very little in the way of shared experience. Lesbians labor under the double social disadvantages of being members of a sexual minority and being women, and often have fewer resources than men as a result. They are also more likely to have children, another significant drain on their resources.<sup>178</sup> (Indeed, in the popular imagination “gays” are typically characterized as more wealthy because they have two incomes and no child-rearing expenses—another example of the sexism of the popular imagination.) Lack of understanding and shared community have plagued these two segments of the community from the beginning of the homophile movement in the 1950s, with the establishment of the Mattachine Society for men and the Daughters of Bilitis for women.<sup>179</sup> Members of both groups have not so facetiously compared this absence of cooperation to the supernatural animus between werewolves and vampires—both creatures of the “darkness,” both persecuted by the majoritarian, “normal” society, but scarcely able to coexist, much less to band together for greater strength against persecution.

It was not always thus. George Chauncey has exhaustively documented a gay urban social structure that was significantly less gendered and less racially segregated as well.<sup>180</sup> His exhaustive archival research on the emerging New York gayborhoods of Greenwich Village and Harlem in New York City in the 1920s shows

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178. See RANDY ALBELDA, M.V. LEE BADGETT, ALYSSA SCHNEEBAUM & GARY J. GATES, *POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* (2009); Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 *DEMOGRAPHY* 139, 151 (2000).

179. D’EMILIO, *supra* note 169.

180. CHAUNCEY, *supra* note 154, at 151–77, 227–67.

a society that was remarkably heterogeneous with regard to both gender and race. Nonetheless, as we shall see, the prototypical gayborhoods, at least in the popular imagination, were created and inhabited largely by gay men.

*E. Naturally Occurring Gayborhoods*<sup>181</sup>

Naturally occurring gayborhoods have typically been the result of ostracism, or at least marginalization, with the municipality only begrudgingly willing to allow members of the sexual minorities to live in places no one else wanted anyway. The role of the municipality as tolerator and later defender of members of the LGBTQ community has been critical. This attitudinal shift has historically followed a pattern first of tolerance—the lightening or elimination of police harassment—then of acceptance, and finally encouragement—the passage of equal rights ordinances and perhaps the election or appointment of gay or lesbian municipal officers.

Existing demographic information on sexual minorities provides only a limited glimpse of their living patterns. Much of it focuses on gay and lesbian partnering, because that is the principal hard data available.<sup>182</sup> The problem of measuring the presence of sexual minorities is aggravated by definitional difficulties, particularly the requirement for self-identification. Nearly every attempt to measure LGBTQ presence in a community is hamstrung by a sociological version of Heisenberg’s uncertainty principle.<sup>183</sup> The self-identification question cannot be asked in a vacuum—the persons questioned always need to know who is asking, why, to what ends this information may be used, and whether it is private or not. To

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181. “Naturally occurring” is adopted from the literature on naturally occurring retirement communities (NORCs). See NORCS: AN AGING IN PLACE INITIATIVE, <http://www.norcs.org/index.aspx> (last visited Oct. 11, 2011). What it means in this context is a neighborhood with a substantial LGBTQ presence and support network that has come into existence without any governmental intervention. A naturally occurring gayborhood may, of course, come to dominate the political landscape.

182. See Carol S. Walther & Dudley L. Poston, Jr., *Patterns of Gay and Lesbian Partnering in the Larger Metropolitan Areas of the United States*, 41 J. SEX RES. 201 (2004).

183. Heisenberg’s Uncertainty Principle states that when measuring the velocity or position of an electron, the act of measuring one variable itself destroys [or alters] information about the other variable and so complete knowledge of both is impossible. WERNER HEISENBERG, *THE PHYSICAL PRINCIPLES OF THE QUANTUM THEORY* 20 (Carl Eckart & F.C. Hoyt, trans., 2004) (1930).

some extent, the argument of this Article denies these premises; that is, any municipal attempt to create a gayborhood assumes a set of positive answers to these questions, and more importantly assumes that there exists a group of consumer voters who are not worried in the traditional sense about potential fallout of identifying themselves as sexual minorities.

Whatever its limitations, the demographic data we have gives us information about one important variable: the comfort and level of willingness of the members of sexual minorities within a community to self-identify. Florida exploits this variable in his analysis of the diversity/tolerance aspect of the creative class. Although the information about same-sex couples is highly problematic in that it does not identify the wide variety of other types of living situations in which sexual minorities may find themselves, it operates as a kind of “bravery index.” While each self-identifying couple is engaged in their own decision-making process with regard to their willingness to be open, the existence of large numbers of such couples in a particular urban area provides us with evidence of a high level of toleration of openness in that city.<sup>184</sup>

It is important to note Florida’s concerns about the limited nature of diversity in the creative class. Because the creative class by definition consists of “successful” people, it continues to be segregated by income. Of course, as we have seen in the context of the price of housing, segregation by income is intertwined with segregation by race. Florida deals with this at some length in his *Flight of the Creative Class*,<sup>185</sup> which argues that society must deal with the increasing divergence between the creative and service classes by embracing a more expansive definition of creativity. This work is of particular interest in our context because it focuses on competition for members of the creative class. It catalogs a deepening divide between those regions of higher creative growth and those that are stagnant or growing only in the service economy, and points out one of the most troubling aspects of the growth of the

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184. See FLORIDA, RISE, *supra* note 1, at 255–56, 404–05 nn.14–16.

185. See generally FLORIDA, FLIGHT, *supra* note 8.

creative class, the lack of affordable housing.<sup>186</sup> For the creative class to grow by incorporating a more expansive definition of creativity—to incorporate the members of the service economy with less discretionary income—then there must be a corresponding availability in affordable housing. As it stands now, the existing creative class can afford to pay top dollar for housing, and their economic success is the reason why municipalities want to attract them. However, municipalities run the danger of repeating the cycle of stultifying economic segregation like Mount Laurel. In many cities like San Diego, San Francisco, and Cambridge, a new and more broadly defined creative class is priced out of the housing market.<sup>187</sup> As new municipalities now enter the competition for the creative class, their affordable housing is, perhaps, a competitive advantage.

Florida suggests the root of the problem is that the emerging creative economy is incomplete,

an economic system in search of the institutional and social arrangements that can unleash its full potential. . . . New kinds of social institutions and policies will be needed to complete the system and make it work well. We can't know exactly what these will look like in advance.<sup>188</sup>

After suggesting a great social focus on tapping the creativity of all members of society through education and greater emphasis on creative infrastructure, he turns to cities:

[W]e can't legislate urban creativity any more easily than we can legislate economic growth. What we can do, though, is provide the physical and social space needed for creative and economic opportunities to take root. A simple example . . . would be an initiative in which a city maintained a certain amount of 'garage' space. Garages, warehouses, historical buildings, affordable

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186. *Id.* at 189.

187. *Id.* at 198.

188. *Id.* at 241.

housing—all of these are the places where dreams and economic innovations take hold.<sup>189</sup>

Florida echoes key elements of Jane Jacobs's list of things that make a city work<sup>190</sup> and bolsters the argument that diversity of uses and diversity of inhabitants are interwoven.

Encouragement of diversity for sexual minorities must take into account the back story of LGBTQ communities. The history of gayborhoods is of course dominated by the history of the social and legal maltreatment of sexual minorities. Although gayborhoods existed even under the most repressive regimes, they were not widely recognized until the gay liberation movement of the 1970s. The image of a gayborhood at that time was the gay ghetto (e.g., the Castro in San Francisco, Greenwich Village in New York City, or Boystown in Chicago). These communities provided the heterosexual majority with a highly distorted and often lurid view of LGBTQ communities: young, male, entertainment-centered, and aggressively sexual. Similarly stigmatized, although somewhat less gendered and originating in a different set of community needs and desires, were gay resort communities (e.g., Provincetown, Fire Island, or Saugatuck).<sup>191</sup>

Like many stereotypes, there was a grain of truth underlying the flamboyant imagery of a gay neighborhood as a place of outré—even prideful—behavior, rather than a refuge from the persecutions of society. When the term “gay ghetto” is brought into the discussion, the image of a refuge becomes simultaneously that of a prison. No matter what term is used for the gayborhood, as Michel Foucault suggests, the decision to live in such a community may constitute an adoption of majoritarian sexual binarism.<sup>192</sup>

It is therefore necessary to ask whether there exists a market of members of sexual minorities who want to live in a neighborhood in

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189. *Id.* at 259.

190. *See* JACOBS, *supra* note 105.

191. *See, e.g.,* ESTHER NEWTON, CHERRY GROVE, FIRE ISLAND: SIXTY YEARS IN AMERICA'S FIRST GAY AND LESBIAN TOWN (1993).

192. 1 FOUCAULT, *supra* note 160.

which they are part of a diverse group, rather than the most visible aspect of the community. This is a question of market analysis of the choices of LGBTQ consumer voters, not a prescription of what those voters should or should not desire. Many gay men and lesbians in fact prefer refuge to integration.<sup>193</sup> Those who do so may be said to have been forcibly deprived of their public expression of “role distance,” to adopt the vocabulary of Erving Goffman.<sup>194</sup> Goffman’s work on performances<sup>195</sup> recognizes that the glue that holds a society together is made up of rituals, whether tacit or acknowledged, in which all members of that society are called upon to play a variety of roles. No one role is the entire self, although those who uncritically accept the roles they are called on to play may become identified with them. Others, who recognize that any given role is only one facet of their personhood, will display gestures of disengagement with that role, whether overt or subtle, thus establishing role distance.

Adapting this concept to the social roles of sexual minorities is not straightforward. Hostility and violence against sexual minorities has fettered their display of role distance and made it more difficult for them to make public gestures of disengagement, and there is a wide array of coping mechanisms for this difficulty. For some individuals, the role of “homosexual” impressed upon them by a condemnatory society has been internalized as their dominant and defining aspect of personality. Their gestures of disengagement can run the gamut from complete closeting to flamboyant displays of behavior that the majority considers stereotypical. This is a familiar trope for those members of the LGBTQ community who came of age during the repressive 1950s, when the tiny homophile movement in the United States struggled even to gain recognition that the status of homosexuality should not be stigmatized as illegal, immoral, or sick, and available choices of public behavior were to be either “normal” or a “fairy.”<sup>196</sup>

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193. See generally QUEERS IN SPACE, *supra* note 172, pt. 4.

194. See generally ERVING GOFFMAN, ENCOUNTERS: TWO STUDIES IN THE SOCIOLOGY OF INTERACTION (1961).

195. See generally *id.*

196. See CHAUNCEY, *supra* note 154, at 131–49.

Many others reject this binarism and wish to display their sexuality as one facet of their personalities. Their ability to do so is often hampered by a majoritarian society's inability to accept, or even comprehend, any deviation from sexual norms, and is exacerbated by the overarching sex negativity of that society. The performative aspects of sexuality are, like those of race, only beginning to be recognized.<sup>197</sup> Those who reject binarism are also subject to criticism from their fellows, being stigmatized as “sell-outs” who have adopted majoritarian social norms centered around monogamous relationships.<sup>198</sup>

Given freedom of choice, members of sexual minorities will choose to live where they are accepted, and where the performative aspects of their sexuality—whatever they choose them to be—are also accepted by others in that community. Municipalities have traditionally provided such choices only adventitiously, or when forced upon them by a group that has achieved sufficient political power to impress their concept of the group and its performative aspects on the community as a whole. This Article advises municipalities to pay more attention to the choices they offer and to attempt to create such communities, rather than merely allowing them to be created without any encouragement.<sup>199</sup>

The performative and public aspects of sexuality may be particularly controversial depending on the nature of the existing community. At a minimum, the community must be prepared to recognize and wholeheartedly accept “the freedom to engage in social intercourse that is taken for granted by the heterosexual

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197. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 888–89 (2002).

198. This description can barely scratch the surface of the rich body of literature describing the varied nature of the community created by a long history of persecution. A generation of visibility still leaves the LGBTQ community deeply divided about the propriety of behaviors from the closet to cover flamboyance, and indeed whether that community should play any role at all in passing judgment on these behaviors.

199. Much of the foregoing discussion is based on an implicit rejection of Schelling, whose argument for the intractability of racial segregation is based on the premise that people have an innate desire to be near those who share their defining characteristics. *See, e.g.*, Thomas Schelling, *Models of Segregation*, 59 AM. ECON. REV. 488 (1969). Florida's demographic work on the creative class suggests that this desire is substantially softened, if not altogether overborne, by the emerging desire to live in a diverse environment.

citizen.”<sup>200</sup> Visibility of identity is only a halting beginning for the growth of a gayborhood; evidence of intimate contact must also be allowed to be open and obvious.<sup>201</sup> This does not mean sex in the streets, but it does mean more open acceptance of sexualized behaviors that have traditionally been subjected to different levels of scrutiny depending on the status of the participants. Many public behaviors—kissing, handholding, and so forth—have traditionally been seen as sexualized only when the participants are members of sexual minorities; the sexual content of those behaviors is scarcely perceived by majoritarian society when the participants live within heteronormative standards.<sup>202</sup>

There are two points to be drawn from this discussion and from the successes and limitations of naturally occurring gayborhoods. The first is that this Article posits the existence of consumer voters of all backgrounds who are comfortable with, and indeed welcome, the expression of others’ sexuality as a part of their overall expressions of self. Florida’s investigation of the creative class demonstrates that this demographic group exists and is growing, as is a group that is more nearly resistant to the overarching sex negativity of American society. It must again be emphasized that these groups vary a great deal in size and scope, both geographically and in age.

The second point is that this Article places a substantial public relations burden on a municipality which may wish to adopt some form of this plan. It may be impossible for a municipality with a fundamentally conservative base of existing consumer voters to announce that its degenerating downtown is going to be rezoned to encourage its redevelopment as a gayborhood, no matter how farsighted it may be to engage in the attempt to attract a core group of

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200. Grube, *supra* note 172, at 128.

201. *Id.*

202. Viktor Frankl argues that group identification and unity requires the existence of an “other” against which the group can contrast itself, typically with a felt hostility toward that other. It is worth asking to what extent a neighborhood designed as a locus for members of the creative class can exist when one defining characteristic of that class is the desire to live in an environment that embraces diversity. Will the residents reject Frankl’s concept of categorization? Or will they contrast themselves with those who are not interested in diversity—“non-bobos”—and look down upon those whom they regard as less enlightened? VIKTOR E. FRANKL, *MAN’S SEARCH FOR MEANING* 168 (Isle Lasch trans., Beacon Press rev. ed. 1962) (1946).

the creative class. At the same time, municipalities must recognize that there is no virtue in a half-hearted attempt to attract a diverse group. A municipality that announces its commitment to diversity but tries to hedge its bets will surely fail. Overt homophobia is patently hurtful; invidiously hurtful is the hint that the community is trying to attract gays and lesbians only insofar as they are “like us.” A perpetuation of the offensive and gendered stereotype of “those nice undemonstrative professional boys who dress so well and keep such a beautiful garden” is not what members of the creative class are looking for and is therefore not conducive to attracting them.

#### *F. Public-Private Distinctions*

As Jacobs noted, one of the problems with the homogeneity of traditionally zoned communities is the lack of robust public relationships among the diverse groups of residents and users of the neighborhood. Not only do such communities lack a large number of eyes on the street, the eyes that do exist are limited both in temporal and social scope; similarly situated people tend to have similar use patterns (temporal) and similar world views (social). Their relationships, if they exist at all, tend to be private or social, rather than public, in nature.<sup>203</sup>

Interlocking property rights created by the schemes of zoning also hamper the development of a robust system of public relationships. All zoning laws in effect provide neighboring property owners with some level of enforceable interest in each others’ property; that is, they can press the enforcement of zoning regulations. This web of mutual interests in each others’ property is inherent in any such system of regulation and indeed was implicitly recognized by the Supreme Court<sup>204</sup> even before its decision in *Euclid*.<sup>205</sup>

The positive aspect of this web of land use regulations is that it ameliorates the tragedy of the commons. Rather than expecting every land owner to purchase from surrounding land owners the rights

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203. JACOBS, *supra* note 105, at 72–73.

204. *See, e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

205. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

necessary to secure her personal vision of quiet enjoyment of her property, a regime of land use regulation avoids the problem of these externalities altogether by imposing an overarching legislative decision that parcels out rights and responsibilities among the landowners in an area.

The pernicious aspects of this web in the zoning context are the tendency toward conservatism and the overreliance on one's ability to force one's neighbors to live up to not merely the explicit rules of the zoning laws, but also to observe the underlying norms implicit in those rules, including heteronormativity. The principal economic difficulty in moving from a homogeneous housing stock within a neighborhood to heterogeneity is the problem of properly distributing the windfall.<sup>206</sup> Since zoning produces public goods in the Tieboutian sense, taxes have been assessed accordingly; where all of the housing stock is of approximately the same value, that assessment will be roughly equitable. Allowing the construction of more affordable, higher density housing after the fact upsets this balance. Taking an existing bland but stable neighborhood and choosing which sites will provide higher density (and therefore less expensive) housing, much less determining where commercial development will be allowed, is inherently disruptive economically and probably runs afoul of the traditional judicial hostility toward spot zoning.

This disruption is an additional reason why it is reasonable to contemplate the establishment of a diversity zone as part the redevelopment of a moribund neighborhood: there will be fewer possibilities of misallocation of benefits if the municipality is essentially starting from a base in which property owners do not have significant entrenched expectation interests. The uncertainty factor is particularly important because the array of public goods available in a municipality is seldom fully understood by the consumer voter at the time of purchase.<sup>207</sup>

However, where diversity is the public good in question, concerns about the inequitable effect of mixed levels of development may be

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206. FENNELL, *supra* note 21, at 40.

207. *Id.* at 39.

completely inapposite. As we have argued, heterogeneity of housing stock is inherent in a neighborhood designed to attract a population of consumer voters who have a strong preference for diversity. In that sense, diversity is a perverse public good because its value is not tied to its “use.” In addition, the “edginess” of a diversity-centered neighborhood can be seen as part of its mystique and as a way of sustaining and protecting it from gentrification.<sup>208</sup>

Assuming that the municipality has marshaled the economic arguments and wants to do all this, what mechanisms should it employ? Affirmative action for the LGBTQ community is not politically feasible even if it were desirable. To the contrary, this Article argues that the solution to segregated heteronormative environments is not more planning and regulation, but less regulation. As noted, Jacobs suggests that the natural virtues of a traditional city neighborhood cannot be reproduced in a design that attempts to replicate a village or a suburban neighborhood.<sup>209</sup> Acceptance of non-majoritarian behaviors has historically been a hallmark of that environment; expanding that acceptance and making it an explicit goal rather than an accidental effect of urbanity is one of the ways in which a municipality can attract those who value a less controlled, more open and diverse neighborhood.

### *G. Tolerance, Assimilation, and the Integrative Ideal*

This Article argues that the solution is unlikely to be perfectly plannable, but must be more open than traditional land use regulation. Adapting the test used by the New Jersey Supreme Court in the *Mount Laurel* cases, this Article suggests that a reversion to what that court described as “true” public health and safety regulation would provide urban centers with an opportunity to be repurposed.<sup>210</sup> That is, a municipality could select neighborhoods for diversity development, eliminating zoning whose purpose or effect is to

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208. See Bernard E. Harcourt, *Policing L.A.'s Skid Row: Crime and Real Estate Redevelopment in Downtown Los Angeles [An Experiment in Real Time]*, 2005 U. CHI. LEGAL F. 325, 400–02.

209. JACOBS, *supra* note 105 *passim*.

210. *Mount Laurel II*, 456 A.2d 390 (1983); *Mount Laurel I*, 336 A.2d 713 (1975).

segregate living styles. For example, lot size and floor area ratio limitations, segregation of multi-family from single-family dwellings, and the exclusion of low-impact, desirable businesses from residential areas all tend to favor a very narrow socioeconomic group, with shadow effects on diversity of racial, ethnic, and sexual minorities. Permitting higher density central core developments with a mix of housing styles and light commercial uses should encourage the evolution of a community which values diversity. Nicole Stelle Garnett, in *Ordering the City*, develops these arguments in the context of the New Urbanism, addressing and adding considerable nuance to the empirically derived criticisms of Jacobs.<sup>211</sup>

Garnett argues convincingly that concerns about crime are misplaced<sup>212</sup> and adopts the common taxonomy of urban disorder: physical disorders (the famous “broken windows” hypothesis),<sup>213</sup> social disorders, crimes, and economic disorders.<sup>214</sup> The question whether the proposed mixed-use gayborhood will produce more disorder is an important one because it is the typical critical response to New Urbanist attempts to create more economically diverse and vibrant neighborhoods. Such critics have substantial empirical evidence on their side. Contrary to Jacobs’s “more eyes on the street” philosophy,<sup>215</sup> statistical studies of mixed-use neighborhoods in fact show increased levels of criminal activity.<sup>216</sup> However, such studies do not demonstrate causality. Mixed use areas, with the variety of uses and users envisioned by Jacobs and her followers, have more people in them. “Crimes-per-persons-present is difficult to gauge,” and there may be a net increase in social capital in spite of the increase in crime because it reflects the willingness of people to be on the street at all.<sup>217</sup> Crime victimization may therefore result from an increased feeling of safety, a common perception among librarians

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211. GARNETT, *supra* note 39.

212. *Id.* at 126–49.

213. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982, at 29.

214. GARNETT, *supra* note 39, at 56.

215. JACOBS, *supra* note 105, at 45.

216. GARNETT, *supra* note 39, at 126–49.

217. *Id.* at 68.

whose students neglect even the simplest precautions because they feel safe at home in the library.

This is all very interesting, but a focus on the emotionally charged term “disorder” masks a variety of social pressures. The term is both highly contested and contextual<sup>218</sup>—it typically says more about the speaker than about the conditions described. The urge to suppress disorder can further two very different ends. The first is a reversion to the ideals of Euclidean-style zoning, with strict segregation employed as the only mechanism that can truly protect public health and safety. The second, more common and more insidious, is the New Urbanist desire to create a thoroughly planned form of mixed-use neighborhood. Rather than allowing such a neighborhood to grow of its own accord, it is artificial and non-organic. However laudable the goal, such a planned neighborhood is inherently stymied by and inhibitive of the diversity of the very group municipalities wish to attract. Trammled by the planners’ own personal preferences, however well-meant, a fully-planned community is almost certain to be overly-planned. It merely “replace[s] one version of legislated order, based upon land use, with another arguably more-complicated one, based upon aesthetics.”<sup>219</sup> And aesthetics is an inherently personal and subjective perception.<sup>220</sup>

A municipality’s decision to move away from a fixation on segregation as a means of maintaining order too often results merely in a more complex scheme of regulation based on aesthetics rather than land use.<sup>221</sup> This militates in favor of an incrementalist, less command-and-control approach. This Article does not include a model diversity district zoning ordinance, simply because the attempt to create one would be a fool’s errand, merely reflecting my own prejudices and experiences, and not those of the municipality and neighborhood residents who must whole-heartedly support such an attempt if it is to have any chance of success. Garnett suggests incremental changes such as easing home-occupation restrictions and

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218. *Id.* at 52.

219. *Id.* at 200.

220. See Harcourt, *supra* note 208.

221. GARNETT, *supra* note 39, at 189–211.

non-conforming use regulations, but her focus is on “mixed-use zoning without the strings.”<sup>222</sup> Reduction of burdensome transaction costs would include elimination of the need for variances, special use permits, and expensive planned unit developments.

Variation in the style and cost of housing stock is a key element in easing the current separatism that prevails between lesbians and gay men. As noted previously, the disadvantaged status of women, who have traditionally been burdened both by social restrictions on more highly remunerated jobs and an increased probability of child-rearing responsibilities, has economically restricted their array of choices as consumer voters.<sup>223</sup> A diversity district of the type envisioned by this Article should provide housing options that are affordable and attractive to that segment of the community desiring a more heterogeneous environment.

Although this discussion focuses on the economic effects of mixed-used zoning, those effects are deeply entangled with the public perception of the purely behavioral aspect of social disorders—“disfavored behaviors thought to signal a breakdown in healthy social norms in struggling communities.”<sup>224</sup> Many of these behaviors, like prostitution and drug dealing, are more appropriately treated as crimes, violating legal norms rather than social norms.<sup>225</sup> What of the performative aspects of homosexuality? In the not-too-distant past, public displays of same-sex affection were in fact crimes, variously clothed as solicitation, lewd vagrancy, or public indecency.<sup>226</sup> It is probable that in many neighborhoods such public displays, while no longer criminal, would continue to be thought of as social disorder. This will vary enormously from one community to another; for example, the conservative community of Holland, Michigan, is

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222. *Id.* at 200.

223. *See supra* Part V.D.

224. GARNETT, *supra* note 39, at 55.

225. *Id.*

226. Cross-gender dressing was particularly problematic. *See, e.g.*, ESKRIDGE, *supra* note 144, Introduction. Historically, social disapproval attached to both genders. More recently, it is noticeably asymmetrical, with women dressing as men, or at least boyishly, garnering less disapproval. *See* MADONNA, *What It Feels Like for a Girl*, on MUSIC (Warner Brothers 2000): “Girls can wear jeans / And cut their hair short / Wear shirts and boots / ‘Cause it’s OK to be a boy / But for a boy to look like a girl is degrading / ‘Cause you think that being a girl is degrading.”

currently experiencing a drive for a more open environment for sexual minorities, with widespread support but also a widespread and horrified pushback from those members of the community who still view the mere existence of sexual minorities as an abomination, never mind the performative aspects of their behavior.<sup>227</sup> Clearly, Holland is not ready for a gayborhood.

Municipalities should employ a two-pronged approach to the establishment of a diversity-oriented neighborhood. It must provide, in as flexible as possible a form, a fertile ground for economic diversity, both among the housing stock and in the inclusion of commercial uses. The other prong is the need to make diversity an avowed purpose of such a neighborhood. An open profession on the part of the municipality that this is its goal provides the consumer voters who value diversity a clear opportunity to vote with their feet and their dollars. The attempt to create a gayborhood *sub rosa* is doomed to failure.

In this regard, the experience of an existing successful gayborhood is instructive. Ferndale, Michigan, the suburb of Detroit already described, is widely recognized in the region as a gayborhood.<sup>228</sup> In a population of 20,000, its LGBTQ population is estimated at 3,000.<sup>229</sup> Ferndale has a robust human rights ordinance protecting sexual minorities, and its current mayor is openly gay. Its housing stock is a mix of periods, styles, and prices, and the variety is particularly noticeable within walking distance of the downtown. In short, it represents a successful, if accidental, application of the principles laid down by Jane Jacobs in her *Death and Life of Great American Cities*.<sup>230</sup> The development of this happy situation, however, is not so clear. Like the more traditional gayborhood—perhaps in this case the term gay ghetto is in fact more appropriate—Ferndale began as a decaying and marginalized blue-collar neighborhood adjacent to the

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227. Jim Larkin, *Holland is Ready*, BETWEEN THE LINES (Livonia, Mich.), Apr. 29, 2010, at 7.

228. Case, *supra* note 136.

229. *Gay Mayor Calls Vote a Win for Diversity: Ferndale Leader Calls Acceptance 'Neighbors Getting to Know Neighbors'*, GRAND RAPIDS PRESS, Nov. 8, 2007, at B6, available at 2007 WLNR 22982760.

230. See *supra* Part IV.A.

decaying and blue-collar city of Detroit. Its cheapness and proximity made it a logical landing place for the marines of gentrification. But Ferndale does tell us something about the long-term sustainability of such an enterprise. Unlike other public goods, diversity is nothing if it is not advertised. In a town like Ferndale, the advertisement comes after the fact of its existence. For a municipality wishing to establish itself as a center of diversity and a magnet for the creative class, that advertisement must come first.

#### VI. CAVEATS

It is important to note the limitations of the argument for encouraging gayborhoods. In particular, this is not an argument that diversity is an abstract social good.<sup>231</sup> The proposition that municipalities should foster diversity is, rather, market driven. Given the existence of a significant number of consumer voters who value diversity—whatever their reasons for doing so—municipalities should respond to that perceived value in the marketplace. Diversity is, in this case, recognizable as a public good in the Tieboutian sense: that which is desirable, or at least desired, but for which individuals are unwilling or unable to pay. Like public beaches, ample parking, or safe streets, the question is how much the consumer voter is willing to pay as part of the tax package of the municipality. It is enough that there is a numerous and growing class of consumer voters who believe that “there is beauty in the wild flowers that grow randomly among our wheat.”<sup>232</sup> Those municipalities that respond to that desire will have a competitive advantage in attracting consumer voters who place a high value on diversity as one facet of their overall package of preferences. This moral neutrality should not be confused with any lack of passion for the political decision to favor diversity; rather, it removes the discussion to a measurable plane.

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231. I believe that it is, but this may be a matter of faith rather than science. In any case, it is not necessary to convince the reader to accept diversity as a social good, but rather a public good that leads to economic advantage for the municipality that embraces it.

232. ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 205 (1995).

Diversity's offer of a potential economic advantage is only one argument in its favor, but it is a potent and politically palatable one.

Second, it is not an argument for any form of municipal affirmative action for members of sexual minorities. The application of affirmative action principles to members of sexual minorities is at best problematic.<sup>233</sup> Although sexual minorities have suffered long-term discrimination, it is a commonplace belief that members of that group are not, in some sense, "hereditary." That is, unlike members of racial, ethnic, or religious minorities, they are overwhelmingly born into and raised in families that are members of the majority group,<sup>234</sup> rendering moot one of the dominant rationales in favor of affirmative action: that it undoes systemic discrimination built into the history of the families belonging to a minority. In any case, a municipal attempt to make a portion of its territory attractive, safe, and welcoming for members of sexual minorities can scarcely be equated with a set-aside or favoritism; the neighborhoods thus envisioned will present equally welcoming opportunities for members of any group that values diversity in their living arrangements.

Third, the changes suggested for creating gayborhoods should be viewed as supplementary to, rather than a substitute for, other forms of zoning. It is doubtful whether any municipality could prosper by subordinating all other potential preferences of attractive consumer voters to the preference for diversity. Rather, this should be part of an overall comprehensive plan that includes a variety of residential and commercial schemes. Simply put, the argument is that traditional forms of zoning regulation have "zoned out" diversity, specifically including diversity of sexual minorities, by exclusively employing schemes that foster deadening levels of homogeneity. The cure, or at least the palliative for this is not to create a new, equally exclusive regime at the opposite end of the spectrum, but rather to modify the existing regime to include this possibility among the array of choices available to the consumer voter. A municipality of one giant

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233. *Id.* at 107; Albo, *supra* note 146.

234. *See* DUBERMAN, *supra* note 161; ESKRIDGE, *supra* note 144; SULLIVAN, *supra* note 232.

gayborhood would be no more attractively diverse than the homogeneous neighborhoods decried by Jane Jacobs and the New Urbanists.<sup>235</sup>

Finally, it is critical to recognize that there is probably no consumer voter, or at least a very small number of them, who will regard the existence or encouragement of diversity in a municipality as outcome-determinative.<sup>236</sup> In Tieboutian terms, the municipality must continue to offer consumer voters a package of public goods that most closely matches their preference packages. There is a group of consumer voters who place a high value on diversity, but that value may be overborne by the absence of other important factors in their preference packages. A gayborhood in the sense for which this Article advocates can no longer be, for example, a child-free zone centered on hedonic values. It must offer an array of supportive public goods—convenient transportation opportunities, public safety, good schools, and so forth—that have traditionally been valued by consumer voters of all types.<sup>237</sup>

What if we build—or zone for—a gayborhood and nobody comes? The scheme proposed is a less homogeneity-producing regulation, with the explicit inclusion of diversity as a goal. Such a scheme is projected to encourage the influx of consumer voters who appreciate the aspects of New Urbanist styles, including a variety of housing styles, convenient light commercial uses, relatively higher residential density, and a busy, vibrant streetscape.<sup>238</sup> These changes are inherently valuable and typically involve less, rather than more, government intervention. The cost of establishing a diversity zone within a community is, in purely economic terms, nothing. On the other hand, many communities will find the political cost prohibitive and they will be the losers in this particular race to economic success.

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235. *See supra* Part IV.

236. This may seem a weak statement, but contrast this relative and benign indifference with historic levels of revulsion toward alternative sexuality that has previously isolated members of sexual minorities in the least desirable neighborhoods. *See supra* Part V.

237. *See* LEVINE, *supra* note 94.

238. *See supra* Part V.

## VII. CONCLUSION

Traditional structures of land use regulation have been anti-diverse in two very different senses: in the pursuit of order, they have rigidly separated commercial from residential uses; in the pursuit of psychological comfort, they have equally rigidly segregated residents by wealth. Both these forms of segregation have had ripple effects: segregating communities not only by income, but by race, ethnicity, education, and sexual identity. This has produced communities of isolation and blandness. In the past, many people have sought the comfort of similarity. Increasingly, many people do not. The rising importance of what has been characterized as the creative class places diversity and enjoyment of difference at the center of the debate over how communities should be structured.

Municipalities should see themselves as active marketers of the best and most distinctive public goods they can offer, creating packages of preferences to appeal to consumer voters as potential residents of the community. Those communities that accept diversity and are willing to reinforce and advertise that acceptance will have a competitive advantage in the long run over those communities that do not. This requires a willingness to embrace some level of what has traditionally been regarded as disorder—differences not only of income and skin color, but of the performative aspects of race and sexuality.<sup>239</sup>

This is, admittedly, a relatively modest suggestion for one way in which a municipality can advantage itself in the competition for settlers of the creative class. It assumes, as some of Florida's critics have pointed out,<sup>240</sup> that there is already some degree of economic and social infrastructure on which to build. The preferences of consumer voters will continue to be based on a variety of choices,

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239. Of course, not all performative aspects of race and sexuality are perceived as disorderly, minority-only performances. Celebrations of majority identity, like traditional homecoming courts and St. Patrick's Day parades, are functionally invisible as performances because they have been so thoroughly incorporated into the majority's worldview. Attempts to make such public acts more inclusive are seen as sexualizing them because those attempts run counter to the heteronormative, and therefore sexualized, assumptions of the majoritarian participants.

240. See *supra* Part IV.

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with diversity varying in degree of preference among them. Schools, for example, continue to be a measure of worth, even for those without children. It also assumes the signaling of a basic level of acceptance—one hopes for something better than mere tolerance—of members of the LGBTQ community: a human rights ordinance or existing visibility within the municipality. However, many municipalities find themselves in a position to take advantage of this marginal difference. Experimentation in regulatory structures that attract the creative class may be politically difficult, but is relatively inexpensive fiscally.

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