

# REVIEW ESSAY

## EXPANDING METROPOLITAN SOLUTIONS THROUGH INTERDISCIPLINARITY

CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS.

By Gerald E. Frug. Princeton, N.J.: Princeton University Press, 1999. Pp. ix, 256.

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### INTRODUCTION

Ever since population centers in Britain and America shifted from the countryside to cities with the rise of industrialization, the social and economic problems that accompany urbanization have been a prime concern of writers in the Anglo-American tradition.<sup>1</sup> In particular, critics and reformers have focused their attention on the inequality that often accompanies industrialization, advancing various proposals for ameliorating socioeconomic divisions.<sup>2</sup>

Central to these divisions has been geographic separation, with more affluent metropolitanites abandoning central cities for the suburban fringe. This process of suburbanization in the Anglo-American world began a couple of hundred years ago,<sup>3</sup> and planners and other urbanists have been characterizing

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1. See, e.g., PETER HALL, *CITIES OF TOMORROW: AN INTELLECTUAL HISTORY OF URBAN PLANNING AND DESIGN IN THE TWENTIETH CENTURY* (updated ed. 1996).

2. *Id.*

3. See ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* 5, 9 (1987) (arguing that suburbanization as the resettlement of middle class residents beyond the city core began in late eighteenth century London); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 13 (1985) ("Suburbanization as a process involving the systematic growth of fringe areas at a pace more rapid than that of core cities, as a lifestyle involving a daily commute to jobs in the center, occurred first in the United States and Great Britain, where it can be dated from about 1815.").

According to recent archeological research, the middle class suburbanization phenomenon may date back even further than the last two centuries. Two archeologists recently reported that their excavations in Belize suggest that ancient Mayan civilizations had their own version of urban

the phenomenon as “sprawl” since the middle of the twentieth century.<sup>4</sup> Yet urban sprawl may never before have alarmed observers to the extent it has in the past decade.<sup>5</sup>

Writers have examined metropolitan development patterns such as separation and inequality using a range of methodological approaches. Some observers have used quantitative techniques, studying various empirical indicators in an attempt to describe urban problems and identify policy responses to them.<sup>6</sup> Other writers have used more theoretical methods. The disciplines invoked similarly have varied, from the social sciences (city planning, public policy, political science, economics) to the humanities (literature, art, architecture), to combinations from various fields.

The prevailing modes of analysis in the legal literature to date have been those of political science and economics,<sup>7</sup> while the typical approach in monographs targeted to general readers has been the related methodology of public policy.<sup>8</sup> These approaches are intuitively sensible, since changes in metropolitan development patterns most often result from legislative action or other political processes.<sup>9</sup>

sprawl one thousand to two thousand years ago. See John Noble Wilford, *In Maya Ruins, Scholars See Evidence of Urban Sprawl*, N.Y. TIMES, Dec. 19, 2000, at F1.

4. See, e.g., William H. Whyte, *Urban Sprawl*, in THE EXPLODING METROPOLIS (1958); Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 137, 140 (1999) (noting that the word “sprawl” as a planning term did not enter the literature “until roughly the late 1950s and early 1960s”).

5. Indeed, the number of books and articles published the past few years alone with sprawl as their central subject is astonishing. See, e.g., PETER CALTHORPE & WILLIAM FULTON, THE REGIONAL CITY: PLANNING FOR THE END OF SPRAWL (2001); ANDRES DUANY, ELIZABETH PLATER-ZYBERK, AND JEFF SPECK, SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (2000) [hereinafter DUANY ET AL., SUBURBAN NATION]; SPRAWL CITY: RACE, POLITICS, AND PLANNING IN ATLANTA (Robert D. Bullard, Glenn S. Johnson & Angel O. Torres, eds. 2000); ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH (1999); F. KAID BENFIELD ET AL., ONCE THERE WERE GREENFIELDS: HOW URBAN SPRAWL IS UNDERMINING AMERICA’S ENVIRONMENT, ECONOMY, AND SOCIAL FABRIC (1999); RICHARD MOE & CARTER WILLKIE, CHANGING PLACES: REBUILDING COMMUNITY IN THE AGE OF SPRAWL (1997); JAMES HOWARD KUNSTLER, HOME FROM NOWHERE: REMAKING OUR EVERYDAY WORLD FOR THE TWENTY-FIRST CENTURY (1996) [hereinafter KUNSTLER, HOME FROM NOWHERE]; KUNSTLER, THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA’S MAN-MADE LANDSCAPE (1993).

6. See, e.g., DAVID RUSK, CITIES WITHOUT SUBURBS (2d ed. 1995) [hereinafter RUSK, CITIES WITHOUT SUBURBS] (using census data); MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY (1997) (using census, state, and municipal data); DAVID RUSK, INSIDE GAME/OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA (1999) [hereinafter RUSK, INSIDE GAME/OUTSIDE GAME] (same).

7. See, e.g., Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996) [hereinafter Briffault, *Boundary Problem*]; William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57 (1999); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 985 (2000); Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U.L. REV. 1185 (1996).

8. RUSK, CITIES WITHOUT SUBURBS, *supra* note 6; RUSK, INSIDE GAME/OUTSIDE GAME, *supra* note 6; ORFIELD, *supra* note 6.

9. For example, advocates of zoning reform, tax-base sharing, transportation planning, and

Not all analyses have been based on quantitative factors or political theory, however. In *The Culture of Cities*,<sup>10</sup> for example, Lewis Mumford based his prescriptions for metropolitan improvement on a wide array of sources, with history, literature, and personal observation playing key roles, and empirics virtually none at all. Jane Jacobs's classic *The Death and Life of Great American Cities* is similarly grounded.<sup>11</sup> Gerald Frug's recent book, *City Making*,<sup>12</sup> a compilation of four revised, previously published law review articles,<sup>13</sup> follows in a comparable vein. Frug draws on disciplines as disparate as architecture, psychoanalysis, sociology, women's studies, political theory, and medieval history in describing his vision for an improved metropolis.

Such scholarly mixing of disciplines, or "genre blurring" as Clifford Geertz famously has termed it,<sup>14</sup> while not an invention of the twentieth century,<sup>15</sup> did occur with increasing frequency by the end of that period. In 1983, Geertz observed generally that "there has been an enormous amount of genre mixing in intellectual life in recent years,"<sup>16</sup> and more recently Brian Leiter has noted the "remarkable flourishing of interdisciplinary work bringing together law and the humanities and social sciences."<sup>17</sup> Perhaps the best known product of law and other disciplines is the law and economics movement;<sup>18</sup> other familiar

school finance reform often have focused on legislative change.

10. LEWIS MUMFORD, *THE CULTURE OF CITIES* (1938).

11. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

12. GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999) [hereinafter FRUG, *CITY MAKING*].

13. The four articles are reproduced in chronological order and each corresponds to one of the four parts of the book. The articles, in order, are Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) [hereinafter Frug, *Legal Concept*]; Jerry Frug, *Decentering Decentralization*, 60 U. CHICAGO L. REV. 253 (1993) [hereinafter Frug, *Decentering Decentralization*]; Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047 (1996); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998). See FRUG, *CITY MAKING*, *supra* note 12, at ix. The last chapter of *CITY MAKING*, "Choosing City Services," also draws significantly on Gerald E. Frug, *Property and Power: Hartog on the Legal History of New York City*, 3 AM. B. FOUND. RES. J. 673, 687–90 (1984) (reviewing HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870* (1983)). See FRUG, *CITY MAKING*, *supra* note 12, at 214–16. Although Frug revised these essays for inclusion in his book and added a few previously unpublished remarks, the greatest change he appears to have made was to delete textual portions and footnotes that he presumably believed unnecessary for a general audience to understand his basic arguments. See FRUG, *CITY MAKING*, *supra* note 12, at ix, 13.

14. CLIFFORD GEERTZ, *Blurred Genres: The Refiguration of Social Thought*, in LOCAL KNOWLEDGE 19, 19 (1983) [hereinafter GEERTZ, *Blurred Genres*].

15. See, e.g., *id.* at 20 (stating that "to a certain extent this sort of thing [genre blurring] has always gone on").

16. See, e.g., *id.* at 19 (describing works integrating, for example, philosophy and literary criticism, or history and mathematics).

17. Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79, 79 (1992); see also Francis J. Mootz III, *Law and Philosophy, Philosophy and Law*, 26 U. TOL. L. REV. 127, 127 n.1 (1994) ("The past several decades have witnessed tremendous growth in the breadth of interdisciplinary legal scholarship.").

18. See, e.g., Leiter, *supra* note 17, at 79 (describing law and economics movement as "the

movements include law and literature, philosophy of law, law and society, and legal history.

The movement most plainly underlying *City Making* and its multidisciplinary approach is Critical Legal Studies (“CLS”), a school of thought at its height in the 1980s.<sup>19</sup> CLS is known for drawing on disparate intellectual strands such as anthropology, literary theory, and social theory,<sup>20</sup> and Frug was a major figure in the CLS movement.<sup>21</sup> The article that Frug reworked to form Part One of *City Making*, “The City as a Legal Concept,” is considered a classic of “crit” scholarship,<sup>22</sup> and the work reprinted as Part Two, “Decentering Decentralization,”<sup>23</sup> relies on postmodernist deconstruction, a strategy often associated with CLS scholars.<sup>24</sup>

Although Frug has not been identified explicitly with other academic camps, his multidisciplinary approach, not to mention his progressive bent, is also characteristic of the cultural studies movement.<sup>25</sup> As Naomi Mezey has

most visible manifestation” of the rise in legal interdisciplinary work); Jay P. Moran, *Postmodernism's Misguided Place in Legal Scholarship: Chaos Theory, Deconstruction, and Some Insights from Thomas Pynchon's Fiction*, 6 S. CAL. INTERDISC. L.J. 155, 156 n.2 (1997) (suggesting that it “is hard to imagine a legal scholar who is not acquainted with the mass of relatively recent literature supporting connections between law and economics”).

19. See Guyora Binder, *Critical Legal Studies*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 280, 280 (Dennis Patterson ed., 1996) (describing CLS as spanning the late 1970s to the early 1990s, and indicating that the CLS movement had become quite influential in legal scholarship by the end of the 1980s).

20. See, e.g., Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 455–69 (1987) (describing diverse influences on CLS); see also *id.* at 471 (stating that one of CLS’ “striking contributions” is its “success at opening up legal scholarship to fields outside the law.”); Moran, *supra* note 18, at 158 (contending that “CLS relies heavily on an interdisciplinary approach to law”).

21. See, e.g., Williams, *supra* note 20, at 477 (deeming the article underlying Part One of CITY MAKING, *The City as a Legal Concept*, to be “extremely influential in CLS circles”).

22. The term “crit” is a common shorthand for “critical legal scholar,” used throughout the legal literature by both CLS supporters and critics. The term apparently originated with CLS scholars themselves, although some CLS scholars have indicated their discomfort with the term, given that it has also been used by detractors of the movement. See, e.g., Naomi Mezey, Book Note, *Legal Radicals in Madonna's Closet: The Influence of Identity Politics, Popular Culture, and a New Generation on Critical Legal Studies*, 46 STAN. L. REV. 1835, 1837 (1994); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1517 n.10 (1991) (noting that author “find[s] the term ‘crits’ marginalizing”).

23. Frug, *Decentering Decentralization*, *supra* note 13.

24. See, e.g., James T. Kloppenberg, *The Theory and Practice of American Legal History*, 106 HARV. L. REV. 1332, 1334 (1993) (book review).

25. The cultural studies movement originated in the 1960s in England, where scholars established the Centre for Contemporary Cultural Studies at the University of Birmingham. See Jerry Leonard, *Introduction: (Post)Modern Legal Studies as (Critical) Cultural Studies*, in LEGAL STUDIES AS CULTURAL STUDIES: A READER IN (POST)MODERN CRITICAL THEORY 1 (Jerry D. Leonard ed., 1995); Kenneth B. Nunn, *Illegal Aliens: Extraterrestrials and White Fear*, 48 FLA. L. REV. 397, 398–99 (1996). Cultural studies gained ground in the United States later on, “proliferat[ing] . . . through the 1980s and 1990s.” Janet Wolff, *Cultural Studies and the Sociology of Culture*, 1 IN[ ]VISIBLE CULTURE 1, 7 (1999), at [http://www.rochester.edu/in\\_visible\\_culture/issue1/wolff/](http://www.rochester.edu/in_visible_culture/issue1/wolff/). Kenneth Nunn has defined cultural studies as “the interdisciplinary, politically

observed, though “critical legal scholars have yet to capitalize on the full potential of cultural studies,” the latter movement’s “concern for broader historical, anthropological, and ideological practices, and its ethnographic inquiry into quotidian experience,” means that it “shares much affinity with CLS’ vision of law.”<sup>26</sup>

CLS adherents have tended to identify with the politics of the New Left movement of the 1960s and 70s and with the movement’s focus on maximizing participatory democracy and social justice.<sup>27</sup> Similarly, one of the projects of cultural studies is to “develop a language of possibility”—specifically, the possibility of producing “radical social change.”<sup>28</sup> Frug sympathizes with these concerns, and has consistently enunciated his desire to transform society, particularly by increasing both political participation and equality.<sup>29</sup>

Cultural studies’ attempt to transcend disciplinary boundaries is part of its attempt to engender progressive social change. A foundational insight of the school is that the strictures of a discipline tend to “suppress[ ] critical thought.”<sup>30</sup> The same may be said of CLS adherents’ affinity for interdisciplinarity. Frug’s own appeal to disparate influences—his own attempts to surpass disciplinary limitations—is in keeping with his desire to transform American social life by breaking down both physical and psychological walls between different classes and races, the stated aim of *City Making*.<sup>31</sup>

conscious study of culture in its broad anthropological sense.” Nunn, *supra*, at 398.

26. Mezey, *supra* note 22, at 1859; see also Leonard, *supra* note 25, at 1 (noting the “philosophically and politically overlapping arenas” of CLS and cultural studies, and both movements’ “untiring insistence on the possibility of global social justice”).

27. See, e.g., Binder, *supra* note 19, at 280 (stating that “[m]any [CLS] members identified with the leftist politics of the student movements of the 1960s.”); Maurice Isserman, *The Not-So-Dark and Bloody Ground: New Works on the 1960s*, 94 AM. HISTORICAL REV. 990 *passim* (1989) (describing commitment of New Left groups such as Students for a Democratic Society to participatory democracy, civil rights, and antipoverty efforts); Mezey, *supra* note 22, at 1844 (describing CLS as “a school dedicated to radical egalitarianism and the eradication of social hierarchy”). For a contemporaneous statement of New Left goals by a seminal New Left organization, see STUDENTS FOR A DEMOCRATIC SOCIETY, PORT HURON STATEMENT OF THE STUDENTS FOR A DEMOCRATIC SOCIETY (1962). For an interesting recent account of the movement, see DOUG ROSSINOW, *THE POLITICS OF AUTHENTICITY: LIBERALISM, CHRISTIANITY, AND THE NEW LEFT IN AMERICA* (1998).

28. Henry Giroux *et al.*, *The Need for Cultural Studies: Resisting Intellectuals and Oppositional Public Spheres*, at <http://eserver.org/theory/need.html>, at ¶¶ 38, 41; see also Nunn, *supra* note 25, at 399 (noting that cultural studies “was an overtly political movement from the beginning,” and “retains a political thrust that aligns it with the aspirations of the disempowered”).

29. See, e.g., Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1278, 1295, 1386 (1984) [hereinafter Frug, *Ideology of Bureaucracy*] (stating that he considers his article “a necessary part of a larger project designed to promote full democratic participation in all aspects of American life”; that his article takes aim at bureaucracy because it “is the primary form of organized power in America today, and it is therefore a primary target for those who seek liberation from modern forms of human domination”; and that his goal is “the joint reconstruction of social life” through the “quest [for] participatory democracy”).

30. Giroux *et al.*, *supra* note 28, at ¶ 1.

31. FRUG, *CITY MAKING*, *supra* note 12, at 9, 11.

A danger of speaking in the “language of possibility,” however, is that one risks being dismissed as merely utopian; similarly, when engaging in multidisciplinary, especially when attempting to use the humanities to change public policy, one risks being dismissed as a dilettante<sup>32</sup> or mere aesthete. One of the standard critiques of CLS has been that it is excessively idealistic.<sup>33</sup> Furthermore, legal scholars employing interdisciplinary methods have been increasingly taken to task for what is said to be their superficial command of non-legal subjects.<sup>34</sup> Brian Leiter is one critic. Indeed, in attacking what he deemed to be “sub-standard interdisciplinary work”—work that he defined as containing “superficial and ill-informed treatment of serious ideas, apparently done for intellectual ‘titillation’ or to advertise, in a pretentious way, the ‘sophistication’ of the writer”—Leiter takes as his prime example an article by none other than Frug.<sup>35</sup>

Frug’s work may pose a dilemma for his intended audience (which appears to be anyone—particularly nonlawyers and nonacademics—interested in advancing progressive social change through urban policy).<sup>36</sup> On the one hand, his readers undoubtedly will sympathize with his progressive agenda. On the other hand, they may ask themselves whether a man who quotes Michel Foucault<sup>37</sup> and Jean Baudrillard,<sup>38</sup> who speaks of “decentering de-

32. Giroux *et al.*, *supra* note 28, at ¶ 13.

33. *See, e.g.*, Mezey, *supra* note 22, at 1840 (noting that “Critical race theorists . . . routinely criticize CLS for its idealistic claims”); Eugene D. Genovese, *Critical Legal Studies as Radical Politics and World View*, 3 YALE J.L. & HUMAN. 131, 148 (1991) (criticizing CLS scholars’ “facile utopianism”); Williams, *supra* note 20, at 477 (criticizing CLS’ “tendencies to idealism and reductionism”). *But see* Robert W. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 413, 422 (David Kairys ed., rev. ed. 1990) (responding to utopianism critique by arguing that, while “reimagining the world” cannot alone cause progressive change, “reimagination . . . is a necessary first step”). Frug obviously is aware of the utopianism charge, as he has tried to rebut it in CITY MAKING and elsewhere. *See, e.g.*, FRUG, CITY MAKING, *supra* note 12, at 222–23 (anticipating and attempting to counter the charge that his arguments are “utopian,” “romantic,” and “even evangelical”); Frug, *Ideology of Bureaucracy*, *supra* note 29, at 1386–88 (noting that “one might object” that his article “is utopian and farfetched,” then arguing otherwise).

34. *See generally, e.g.*, Leiter, *supra* note 17; Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191 (1991).

35. Leiter, *supra* note 17, at 80 (citing Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988)). CITY MAKING does not include any portion of *Argument as Character*, the article Leiter criticizes.

Perhaps in an effort to mitigate his harsh criticism of Frug, Leiter later notes that “elsewhere [Frug] has written interestingly and intelligently on diverse areas of the law.” *Id.* at 91 & n.41. Leiter does not limit his criticism to Frug, suggesting that many legal scholars use nonlegal sources inappropriately. *Id.* at 102.

Although Leiter concentrates on the perceived misuse of philosophy in progressive legal scholarship, the implications of his critique are not limited to that setting. He focuses on philosophy because of his own expertise in that field, in which he has a Ph.D. *Id.* at 80 n.3.

36. *See* FRUG, CITY MAKING, *supra* note 12, at 13.

37. *Id.* at 96.

38. *Id.* at 95.

centralization”<sup>39</sup> and of the “being together of strangers,”<sup>40</sup> has anything of concrete value to contribute to the urban policy battle for social justice.

Despite the pitfalls others have associated with interdisciplinary scholarship, a number of Frug’s applications of extralegal theory do work quite well, making a serious contribution to the urban policy debate. Some of his resorts to extra-legal sources, however, are susceptible to critique on grounds of unrealistic idealism or incomplete analysis.

In particular, Frug’s focus on the human psyche, reflected in his discussions of decentering the self and the search for purity versus ego strength, highlights an important causal element underlying the metropolitan problems he decries. His reliance on postmodernist humanities scholarship leads him to make novel and intriguing suggestions for implementing a form of semiproportional voting in metropolitan regions, while his philosophical and psychological discussion of “community building” provides further support for the important cause of regional coalition formation.

On the other hand, Frug appears to underestimate the difficulty of translating theoretical rethinking into actual change, an impression he creates through his proposal for a regional legislature and his support for the New Urbanism movement’s reform agenda. In addition, although he is absolutely right to focus on the importance of ideology and psychology, he at times ascribes both not enough and too much power to them. For example, he highlights the mindset that tends to drive affluent residents from central cities, yet fails to acknowledge the importance of psychological “pull factors” that contribute to suburbanization. Nor does he fully acknowledge how difficult it would be to change the psychology of the millions of suburban dwellers he hopes to reform.

Part One of this Essay provides some background on how Frug uses various nonlegal sources both to examine the causes and consequences of metropolitan fragmentation and to develop proposals for beginning to redress these problems. Part Two assesses how well the more prominent of his interdisciplinary “moves”<sup>41</sup> serve his goal of “building communities without building walls.”

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39. *Id.* at 71–112.

40. *Id.* at 116.

41. Critical legal scholars are known to use the term “moves” to refer to the rhetorical steps a legal writer takes to advance her arguments. See, e.g., Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785, 787, 810, 814. That the term conjures up images of a chess game reflects the typical CLS conviction that judges and legal scholars, rather than being constrained to route their arguments along a path preordained by objective truth, instead are free to choose the direction that best suits their subjective political agendas. See *id.*, *passim*; cf. Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 614 n.66 (1989) (characterizing later CLS scholarship as focused on “the study of argument, rhetoric, and conversation”). To suggest that a CLS scholar, such as Frug, is playing with forms of argumentation in service of his convictions is consistent with the insights of CLS. Critical legal scholars tend to admit freely that their observations about legal discourse generally apply to their own writings as well as to those they scrutinize. See, e.g., *id.* at 616 n.81 (noting Martha Minow’s observation that critical legal scholars “seek to express claims of textual ambiguity and historical contingency”—elements they are known for critiquing in the writings of others—“in the very

Subsection A focuses on the more persuasive arguments, while subsection B discusses the more problematic ones. The last section is a conclusion.

#### PART ONE: FRUG'S *CITY MAKING*

Frug seeks to promote two main objectives in *City Making*: increasing what he calls "public freedom," and reducing the divisions between rich and poor in our nation economically, spatially, and psychologically. Both goals serve his ultimate purpose of "reinvigorating the idea of 'the public.'"<sup>42</sup> Frug describes "public freedom," a concept he borrows from Hannah Arendt, as "the ability to participate actively in the basic societal decisions that affect one's life."<sup>43</sup> Under the classic view, which Frug endorses, such active political participation is possible only at the local level.<sup>44</sup> Only in their own municipalities do citizens feel sufficiently invested in outcomes to make consistent efforts to participate in politics, and only at home is it possible for citizens to see democracy in action on a regular basis.

The current level of political decentralization, fragmented though it is, does not permit public freedom to flourish in Frug's view because municipalities have not been accorded enough governmental power to allow this to occur. "The City as a Legal Concept,"<sup>45</sup> from which Part One of *City Making* is derived,<sup>46</sup> describes its project as "explor[ing] how the law has contributed to the current powerlessness of American cities,"<sup>47</sup> and advocates that "real power must be given to cities."<sup>48</sup> City power is essential to public freedom, Frug argues, because unless residents feel that their participation makes a difference—unless there exists "citizen effectiveness"—they will not bother to participate in politics even when they have the opportunity.<sup>49</sup>

Frug presents two main strategies for enhancing both public freedom and social justice in metropolitan areas: "decentering" local autonomy and "community building." The following subsections describe each of these concepts.

##### A. *Decentering The Locality*

Frug's decentering process appears to entail modifying the entitlements states currently grant to local governments by stripping the latter entities of the

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methods of their work") (citation and internal quotation marks omitted).

42. FRUG, *CITY MAKING*, *supra* note 12, at 60.

43. *Id.* at 20 (citing HANNAH ARENDT, *ON REVOLUTION* 30–31, 114–15, 119–20 (1962)).

44. *See, e.g.*, ROBERT A. DAHL AND EDWARD R. TUFTE, *SIZE AND DEMOCRACY* (1973).

45. Frug, *Legal Concept*, *supra* note 13.

46. *See supra* note 13.

47. Frug, *Legal Concept*, *supra* note 13, at 1059.

48. *Id.* at 1150; *cf.* FRUG, *CITY MAKING*, *supra* note 12, at 23.

49. FRUG, *CITY MAKING*, *supra* note 12, at 23 ("Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so."). For a discussion of the concept of citizen effectiveness, *see* DAHL & TUFTE, *supra* note 44, at 20–21, 41.

right to ignore externalities they impose on neighboring municipalities while leaving them (or in some cases granting them) sufficient powers to make political participation meaningful, and thus public freedom possible.

To expand thinking about ways to set localities' legal entitlements, Frug draws upon literature analyzing the nature of human selfhood. He discusses three ways that scholars have characterized human subjectivity: the self as "centered subject," "situated subject," and "postmodern subject."

Traditionally, Frug argues, writers have depicted the human self as what he calls a "centered subject." Such writers believe the construction of identity to be an entirely individual matter that does not depend on interactions with other human beings.<sup>50</sup> Furthermore, these scholars believe that identity is capable of clear-cut definition.<sup>51</sup> More recently, a number of thinkers have recharacterized the self as a "situated subject." Frug cites the work of communitarians, civic republicans, and feminists, among others, all of whom in his view portray the self as "formed only through a relationship with others."<sup>52</sup>

With the onset of postmodernism, yet another set of thinkers has challenged believers in both the centered and the situated self by postulating a third view: the self as what Frug calls (for obvious reasons) the "postmodern subject." Although the concept of the situated self presupposes the existence of both a "self" and "others" who help to define the self, exponents of postmodern subjectivity abandon any notion of a neatly definable self or other. Frug quotes excerpts from postmodern psychoanalytic literature and poststructuralist linguistic theory that present the attempt to pin down individual identity as the equivalent of a dog chasing its tail—an endless, fruitless search.<sup>53</sup> Similarly, Frug cites the postmodern feminist Judith Butler, who presents individual identity, specifically gender identity, as a construct or performance rather than an empirical reality.<sup>54</sup> Other feminists and critical race theorists have argued that an individual's identity may consist of multiple, and sometimes even

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50. FRUG, CITY MAKING, *supra* note 12, at 66.

51. *Id.* at 66, 68.

52. *Id.* at 73. For example, Frug notes communitarian political theorist Michael Sandel's argument that humans "conceive their identity . . . as defined to some extent by the community of which they are a part." *Id.* (quoting MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 150 (1982)). Civic republican Frank Michelman has explained that in the strongest form of republicanism, "the self is understood as partially constituted by . . . [political] engagement" with others. *Id.* at 74 (quoting Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503 (1988)). In addition, Frug portrays psychologist Carol Gilligan's *In a Different Voice* as providing a "relationship-centered version of the self" as an alternative to the prevailing individualist depiction. *Id.* at 75 (citing CAROL GILLIGAN, IN A DIFFERENT VOICE 35, 62, 173 (1982)).

53. *Id.* at 92–93 (quoting Mikkel Borch-Jacobsen, *The Freudian Subject, from Politics to Ethics*, in WHO COMES AFTER THE SUBJECT? 61, 66 (Eduardo Cadava et al. eds. 1991); KAJA SILVERMAN, THE SUBJECT OF SEMIOTICS 158 (1983); EMILE BENVENISTE, PROBLEMS IN GENERAL LINGUISTICS 224 (Mary Elizabeth Meek trans. 1971); ROLAND BARTHES, THE RUSTLE OF LANGUAGE 51, 53 (Richard Howard trans. 1986)).

54. *Id.* at 94 (quoting JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 136–140 (1990)).

contradictory, selves.<sup>55</sup> Postmodern scholars further postulate that, to the extent one may even speak of a relationship between the self and others, that relationship is best described not as a two dimensional line or a circle of situated subjectivity, but as an infinite, multidimensional matrix.<sup>56</sup> In the words of Jean-François Lyotard, “no self is an island; each exists in a fabric of relations that is now more complex and mobile than ever before.”<sup>57</sup>

After canvassing the literature of a multitude of nonlegal disciplines, including political theory, psychology, psychoanalysis, linguistics, feminism, gender studies, philosophy, literary theory, and sociology (as well as a few legal works), Frug takes the alternative conceptions of the human self that he abstracts from these sources and transplants them to the area of local government law, using them as guides for imagining new ways to set local governments’ entitlements under state law.

Under Frug’s theory of situated subjectivity, just as human identity depends in part on the individual’s interactions with others, the existence of a locality is bound up with the existence of those around it. For example, a wealthy suburb’s implementation of exclusionary zoning affects not only its own identity (rendering it more homogeneous economically, ethnically, and racially), but also that of less restrictive communities around it (by increasing the demand for their presumably more affordable housing). Similarly, if a suburb permits the construction of a new shopping mall and office park, it not only increases its own tax base but also reduces that of the central city from which it lures commercial and retail tenants. Frug contends that “every local decision—from schools to sanitation, from housing policy to transportation policy, from gun control to pollution control—affects outsiders.”<sup>58</sup>

Based on the notion that any decision made by a municipality affects other localities in its region, Frug proposes that rather than either giving localities exclusive power over land use, school financing, and similar decisions or reserving such power to themselves, state legislatures should create regional legislatures and shift the power to contemplate regionally relevant issues to the new bodies.<sup>59</sup> As he envisions it, a regional legislature is different from a regional government,<sup>60</sup> a few of which already exist in the United States.<sup>61</sup> A

55. *Id.* at 96–97 (quoting Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584, 608 (1990)); *Id.* at 97 (citing PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991); BELL HOOKS, *Postmodern Blackness*, in *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* 23–31 (1990)).

56. *Id.* at 94–96 (quoting postmodern philosophy, literary, and sociology theorists Jean-François Lyotard, Umberto Eco, Jean Baudrillard, Brian McHale, and Michel Foucault).

57. JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 15 (Geoff Bennington and Brian Massumi trans., 1984) (1979), *quoted in* FRUG, *CITY MAKING*, *supra* note 12, at 94.

58. FRUG, *CITY MAKING*, *supra* note 12, at 85.

59. *Id.* at 85–86.

60. *Id.* at 86.

61. Few United States metropolitan areas are administered by governments that are

regional government, Frug contends, actually makes decisions itself, while a regional legislature would limit itself to engaging in “interlocal negotiations,” the goal of which would be to set the legal entitlements of local governments by determining, for example, “[w]hat portion of the funds derived from the property tax . . . a locality [can] use solely for its own schools.”<sup>62</sup> Determining subsidiary issues, such as how much of a town’s property tax allotment should go to teacher salaries and how much to computer labs, would be left to individual localities. To discourage a regional legislature from commandeering all decisionmaking power to itself, Frug would have representatives elected on a neighborhood basis. This mechanism would ensure that legislators were “sufficiently connected to their communities that they would be under constant pressure to decentralize power.”<sup>63</sup> Having legislative outcomes depend on negotiations rather than voting also would preclude localities from acting selfishly, since “no city could achieve its goals without convincing fellow legislators that its vision of decentralization was a good idea.”<sup>64</sup> Since the regional legislature would permit municipalities to police their own selfish tendencies, there would be no need for states to step in to do so.<sup>65</sup> Thus, localities could still be permitted to exercise substantial power, preserving Frug’s cherished public freedom, while simultaneously being prevented from fostering social injustice.

As with the theory of situated subjectivity, Frug draws parallels between the postmodern theory of human subjectivity and local government law. Clear cut distinctions between the self and others dissolve under postmodern theory; what remains instead is a self that exists within a complex fabric of relations. Similarly, although it can be tempting to describe central cities and suburbs as

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“regional” in the strictest sense. See, e.g., RUSK, CITIES WITHOUT SUBURBS, *supra* note 6, at 89–90, 99 (defining “true metro government” as not only general purpose, but also exercising “exclusive powers within its jurisdiction,” covering “at least 60 percent of the area’s population,” and containing the region’s central city, and discovering comparatively few cities meeting this definition). A few prominent local governments, however, are seen as exemplars of regionalism. Portland, Oregon’s Metropolitan Services District, or “Metro,” for example, is one such entity. RUSK, INSIDE GAME/OUTSIDE GAME, *supra* note 6, at 157. Metro’s jurisdiction extends to the city of Portland, three contiguous counties, and twenty-three other municipalities. *Id.* at 157–58. An elected body, Metro has home rule powers and jurisdiction over an unusually wide array of functions, including regional land use planning, transportation planning, solid waste management, and air and water quality management. RUSK, CITIES WITHOUT SUBURBS, *supra* note 6, at 108. Another notable regional entity is Minnesota’s Twin Cities Metropolitan Council. Although not general purpose or elected, the Met Council is empowered, among other things, to develop regional land use policies. RUSK, INSIDE GAME/OUTSIDE GAME, *supra* note 6, at 226–27, 244–46; CITIES WITHOUT SUBURBS, *supra* note 6, at 106–07.

62. FRUG, CITY MAKING, *supra* note 12, at 86.

63. *Id.* at 87.

64. *Id.*

65. *Id.* at 88. By contrast, unless municipalities desist from selfish localism (or what Frug would call “centered selfhood”), more centralized entities may step in to force them to behave more altruistically. The only way to prevent this incursion on public freedom, in Frug’s view, is for municipalities to police themselves, handling questions of regional resource allocation through negotiation and compromise. “[C]ity residents need to learn that, to the extent that cities fail to agree among themselves, they will be subject to centralized control.” *Id.* at 63.

substantially different entities falling on opposite sides of a distinct line, such a city/suburb distinction in many ways “misrepresents life in contemporary American metropolitan areas.”<sup>66</sup> For example, it is common to contrast the supposedly wealthy suburbs with the supposedly desperate central city. Yet, as Frug points out, not only are there extremely poor suburbs, but also there are leafy, single-family residential areas within the bounds of many major American cities.<sup>67</sup> Although de facto racial separation still exists, the dividing line often falls not so much along the city/suburb boundary as within central cities and between different suburbs.<sup>68</sup> Similarly, traditionally central cities have been depicted as the realm of offices and shops, with suburbs being strictly residential, yet the “Edge City” phenomenon described by Joel Garreau has led to the existence of countless suburbs with shopping malls and office parks.<sup>69</sup>

Frug argues that “[m]ost Americans who live in [metropolitan] areas already disregard jurisdictional boundaries . . . creat[ing] their own idea of the region in which they live by organizing it in terms of the places they know.”<sup>70</sup> Far from being a defined city surrounded by defined suburbs, today’s American metropolitan area is, in Michael Sorkin’s term, an “ageographical city,”<sup>71</sup> or what Frug calls an “endless urban landscape” of “highways, skyscrapers, malls, housing developments, and chain stores.”<sup>72</sup> Moreover, the average American has ties to any number of locations in addition to those in which she currently resides, including the places she used to live, the place she works, the places she shops, and the place she vacations, among others.<sup>73</sup>

Like the theory of situated subjectivity, the theory of postmodern subjectivity suggests various prescriptions for changing local government law, according to Frug. If jurisdictional boundaries have lost their meaning and metropolitan dwellers have allegiances to multiple localities in addition to those where they reside, then “we have to stop building local government law on residency and on the importance of local jurisdictional boundaries.”<sup>74</sup>

This conclusion has several ramifications. First, Frug argues, local services such as schools and hospitals should no longer be limited to local residents, but should be open to anyone connected to the neighborhood, such as “the maids

66. *Id.* at 97.

67. *Id.* See also Georgette C. Poindexter, *Beyond the Urban-Suburban Dichotomy: A Discussion of Sub-Regional Poverty Concentration*, 48 *BUFF. L. REV.* 67 (2000) (describing problems of suburban poverty concentration).

68. *Id.* at 97–98.

69. JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* (1991); see FRUG, *CITY MAKING*, *supra* note 12, at 98.

70. FRUG, *CITY MAKING*, *supra* note 12, at 99.

71. Michael Sorkin, *Introduction* to *VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE* xi, xi (Michael Sorkin ed., 1992), *quoted in* FRUG, *CITY MAKING*, *supra* note 12, at 100.

72. FRUG, *CITY MAKING*, *supra* note 12, at 100.

73. *Id.* at 100–01.

74. *Id.* at 102.

who clean the residents' houses, the grocery store family who provide their milk, and the consumers who drive to the area to shop."<sup>75</sup> In addition, regional revenue sharing should replace the current allocation of tax revenues along jurisdictional lines.<sup>76</sup> To achieve such goals, Frug proposes that elections in all localities within a region be open to any person within the region, whether she resides in the electing locality or not.<sup>77</sup> He suggests that the residents of a region each be accorded an equal number of votes—for example, five—that “they can cast in whatever local elections they feel affect their interest.”<sup>78</sup> He would permit voters to place their votes in any combination; a voter could “cast all five votes in one locality if that’s where her or his attachments are felt to be.”<sup>79</sup> Among other things, this innovation would mean that, more than ever, decisionmaking by Frug’s regional legislature would require negotiation and compromise amongst a number of different interest groups.<sup>80</sup> Although he does not profess certainty, Frug suggests that “postmodernizing” regional representation would likely lead to a more equitable distribution of municipal tax revenues and services.<sup>81</sup>

## B. Community Building

### 1. Community Building In General

A second ingredient essential to Frug’s vision for transforming the American metropolis is what he calls “community building.” As the term itself suggests, community building entails breaking down the boundaries—both physical and psychological—that currently divide metropolitan residents.

The physical fragmentation within American cities is severe, Frug asserts. The “overall impact of American urban policy in the twentieth century has . . . been to disperse and divide the people who live in America’s metropolitan areas”;<sup>82</sup> specifically, “[r]esidential neighborhoods are African American, Asian, Latino, or white, and upper-middle-class, middle-class, working-class, or poor; many are populated by people who share a single class and racial or ethnic status.”<sup>83</sup> Above all, American practice and policy has been to segregate African

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75. *Id.* at 102–03.

76. *Id.* at 104–05.

77. *Id.* at 106–07.

78. *Id.* at 106.

79. *Id.* at 107.

80. The need for compromise would exist because this voting scheme, a form of semiproportional voting, would give minority groups a greater chance to elect candidates of their choice. *See infra* notes 164, 173–78 and accompanying text.

81. FRUG, CITY MAKING, *supra* note 12, at 107. *See infra* notes 159–99 and accompanying text for a fuller discussion of Frug’s electoral reform proposal.

82. FRUG, CITY MAKING, *supra* note 12, at 132.

83. *Id.* at 3.

Americans from other metropolitan residents,<sup>84</sup> both by walling the poorest residents off in central city ghettos and by enforcing separation in suburbs.<sup>85</sup> As Frug explains, “[n]eighborhood boundaries, city/suburb boundaries, and the boundaries between suburbs have also divided residents of metropolitan areas along class and ethnic lines.”<sup>86</sup> Furthermore, physical division has occurred by use, with residential, commercial, and industrial uses consigned to separate areas of the metropolis.<sup>87</sup>

In addition to physical divides, substantial psychological barriers separate metropolitanites, with particular divisions between central city and suburban dwellers. “[B]ig cities,” Frug explains, “are a prime location in America for the experience of otherness: they put people in contact, whether they like it or not, with men and women who have values, opinions, or desires that they find inexplicable, unsettling, even obnoxious.”<sup>88</sup> (Although suburbanites also are unlikely to know most of their neighbors, suburbanites tend to *believe* that they know them, and that their neighbors hold views similar to theirs.)<sup>89</sup> Indeed, Frug avers, “[t]o many people . . . the central city is identified, above all, with the terrifying: the violent, the degenerate, [and] the diseased.”<sup>90</sup> Although the identity of those labeled the terrifying “mob” has changed historically, they always have been poor, considered criminal, and, in recent times, usually have been identified as African American,<sup>91</sup> a state of affairs consistent with the striking degree of black hypersegregation in American cities.

Although Frug hopes to remove both the material and mental barriers separating metropolitan residents, he insists that he is not proposing that they share a single set of beliefs, values, and ideals. Traditionally, opponents of separation have characterized the only alternative as what he calls a “romanticized sense of togetherness.”<sup>92</sup> This standard sense of community entails the bonding of homogeneous groups, or, in social-psychological theorist

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84. *Id.* at 130 (noting that “African Americans are segregated today in a manner that no other minority in the United States is now or has ever been segregated”). *See, e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 2* (1993) (“No group in the history of the United States has ever experienced the sustained high level of residential segregation that has been imposed on blacks in large American cities for the past fifty years.”); PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY 16, 139* (1997) (stating that “black ghettos are the most common type of high-poverty neighborhood” in the United States, and noting that in the 1990s, “racial segregation between blacks and whites in U.S. metropolitan areas remain[ed] extremely high”).

85. FRUG, *CITY MAKING*, *supra* note 12, at 130.

86. *Id.* at 132.

87. *Id.*

88. *Id.* at 116.

89. *Id.* (asserting that, although they know little about each other, “strangers who live in a suburb often think of themselves as constituting a coherent group”).

90. *Id.* at 129.

91. *Id.* at 129–30.

92. *Id.* at 140.

Richard Sennett's words, a striving towards "the 'we' feeling."<sup>93</sup> Yet the search for such mass affinity asks too much, in Frug's view, particularly because it would require members of various subcultures to assimilate to majority norms with which they may disagree.<sup>94</sup> Frug believes that such romantic togetherness is not a necessary prerequisite to the attempt to remedy metropolitan problems.

Frug instead proposes a middle ground, a "compromise between withdrawal from strangers and engagement with them."<sup>95</sup> Such a compromise would not require approval of others, but merely tolerance, a "live and let live" attitude.<sup>96</sup> Ideally, residents would "engage[] with otherness" by "accept[ing]... difference, complexity, and strangeness."<sup>97</sup> Thus, Frug's notion of community is what political philosopher Iris Marion Young has termed "the being together of strangers."<sup>98</sup> Fear of engagement with the unknown, according to Sennett, is a sign of immaturity. Frug's hope is that metropolitan residents, particularly suburbanites, can be persuaded to outgrow such immaturity and develop instead what Sennett has termed "ego strength," the sense of confidence that one can handle life's inevitable encounters with change, disorder, and complexity.<sup>99</sup> Frug wishes to see diverse city and suburb dwellers become comfortable with and work with one another, without requiring that they "fuse with these others into a larger whole."<sup>100</sup>

Frug suggests that this sort of community building serves at least three goals. First, he argues, it will make life more enjoyable for residents currently residing in homogeneous communities. Not only is encountering unfamiliar people "more fun" than life in a purified community, but exposure to heterogeneity "offer[s] stimulation for learning, creativity, experimentation, and growth."<sup>101</sup> In addition, contact with ambiguity, change, and disorder is an unavoidable part of life, and attempts to circumvent the inevitable are doomed to

93. RICHARD SENNETT, *THE USES OF DISORDER: PERSONAL IDENTITY AND CITY LIFE* 39 (1970), *quoted in* FRUG, *CITY MAKING*, *supra* note 12, at 116. The concept of community as "w-ness" has a long history in sociology and psychology. *See, e.g.*, JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 61–62 (1987) (citing sociologist's use of term "we feelings" in 1922 neighborhood study); Emily Talen, *Sense of Community and Neighbourhood Form: An Assessment of the Social Doctrine of New Urbanism*, 36 *URBAN STUDIES* 1361, 1371 (1999) (noting two different scholars' uses of the "notion of 'w-ness'" in 1969 and 1974 monographs on community).

94. FRUG, *CITY MAKING*, *supra* note 12, at 141.

95. *Id.*

96. *Id.* at 127.

97. *Id.* at 118.

98. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 237 (1990); *see* FRUG, *CITY MAKING*, *supra* note 12, at 11.

99. FRUG, *CITY MAKING*, *supra* note 12, at 120–21; *see* SENNETT, *supra* note 93, at 116–18, 126 (introducing concept of ego strength, and asserting that "interpersonal pain and disorder are inevitable in any society").

100. FRUG, *CITY MAKING*, *supra* note 12, at 116.

101. *Id.* at 121, 128.

fail.<sup>102</sup> Lack of recurrent exposure to strangers makes the inevitable encounter even more anxiety provoking, whereas “people learn to stomach a larger range of differences if they are repeatedly exposed to a variety of cultural and social practices.”<sup>103</sup> Reducing metropolitan residents’ suspicion and fear of each other is important not only for increasing the metropolitan comfort level, but also for maximizing the chances of finding a political solution to the problems of declining central cities and inner suburbs.<sup>104</sup> Unless diverse metropolitan residents can tolerate each other, they will be unable to engage in negotiations to address regional problems, negotiations that Frug views as the only way to preserve public freedom while still achieving social justice.<sup>105</sup>

## 2. *Examples of Community Building*

In the remainder of *City Making*, Frug proposes three areas in which he believes community building is both particularly needed and likely to do the most to combat metropolitan fragmentation. Those areas are land use, education, and policing; each is discussed below.

### a. *Land Use*

“City control over land use,” Frug contends, “has contributed more to the dispersal and separation of metropolitan residents than any other city activity.”<sup>106</sup> In particular, Frug targets twentieth-century zoning and re-development policies. He notes that suburbs have used exclusionary zoning to inhibit the arrival of lower income residents for several reasons: to maintain their sense of status, to protect themselves against the feared “otherness” of different social strata, races, and ethnicities, and to protect property values and tax bases.<sup>107</sup> Central cities, in turn, used federal urban renewal funds in the 1950s and 1960s to build hundreds of new office buildings and other commercial spaces, destroying huge quantities of low income housing in the process.<sup>108</sup> With any replacement housing limited and generally too expensive, former residents were forced to relocate. Whites generally were welcome elsewhere in cities and sometimes could afford the suburbs, but black residents typically had little alternative but to move to segregated public housing or to other majority-black city neighborhoods, causing further racial segregation.<sup>109</sup> Although development shifted in the 1970s and 1980s from commercial to retail space, it

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102. *Id.* at 120.

103. *Id.* at 127.

104. *Id.* at 137, 140.

105. *Id.* at 142.

106. *Id.* at 143.

107. *Id.* at 145.

108. *Id.* at 146–47.

109. *Id.* at 133.

still added to segregation, with festival marketplaces and similar developments displacing lower income residents through gentrification.<sup>110</sup>

Despite the problems caused by zoning and development policies, Frug does not suggest abandoning them. Private measures such as restrictive covenants can preserve homogeneity just as effectively as regulation, and abandoning central-city development would only accelerate the hemorrhaging of jobs and consumer dollars to the suburbs.<sup>111</sup> Instead, he seeks to refashion municipal land use powers “in a way that promotes community building rather than the dispersal and separation of metropolitan residents.”<sup>112</sup> The answer he proposes is to embrace the architectural and city planning movement known as the New Urbanism.<sup>113</sup>

New Urbanist planners and architects, as Frug describes them, seek to transform the current, car-dependent municipal pattern of separate and sprawling residential, office, and shopping areas into one of integrated, pedestrian friendly, higher density localities.<sup>114</sup> They reject zoning that separates work, home, and shopping and that segregates neighborhoods by income.<sup>115</sup> In contrast to existing trends, New Urbanists encourage the placement of homes above stores and the mixing of multiple and single dwellings within the same neighborhoods.<sup>116</sup> They support pedestrian friendly communities, which they advocate achieving through car safety measures such as narrowing streets and adding sidewalks, as well as through ambience enhancing measures, such as increasing the building of dwellings with front porches, moving garages behind the buildings they serve, and placing entryways flush with sidewalks.<sup>117</sup> Such neighborhoods help support another New Urbanist goal: encouraging the use of public transportation.<sup>118</sup> Making walks to public transportation safer and more

110. *Id.* at 147.

111. *Id.* at 149.

112. *Id.*

113. Another common term for this movement is “neotraditionalism.” See DUANY ET AL., *SUBURBAN NATION*, *supra* note 5, at 254–55 (explaining usage of term “neotraditionalism” in lieu of “new urbanism”).

114. FRUG, *CITY MAKING*, *supra* note 12, at 150–52; see, e.g., Peter Calthorpe, *The Region, in THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY*, xi, xv (Peter Katz ed., 1994) [hereinafter *THE NEW URBANISM*].

115. FRUG, *CITY MAKING*, *supra* note 12, at 151; see, e.g., Andres Duany & Elizabeth Plater-Zyberk, *The Neighborhood, the District and the Corridor, in THE NEW URBANISM*, *supra* note 114, at xvii, xviii–xix.

116. FRUG, *CITY MAKING*, *supra* note 12, at 151; see Duany & Plater-Zyberk, *supra* note 114, at xix.

117. FRUG, *CITY MAKING*, *supra* note 12, at 151; see, e.g., PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM* 17, 27, 42, 84, 96 (1993) [hereinafter *CALTHORPE, METROPOLIS*]; Elizabeth Moule & Stefanos Polyzoides, *The Street, the Block, and the Building, in THE NEW URBANISM*, *supra* note 114, at xxi, xxii.

118. FRUG, *CITY MAKING*, *supra* note 12, at 151–52; see, e.g., CALTHORPE, *METROPOLIS*, *supra* note 117, at 41–42, 46–49, 56, 62 (explaining centrality of public transit to author’s vision for new form of metropolitan growth, which he terms “transit-oriented development” or “TOD”); DUANY ET AL., *SUBURBAN NATION*, *supra* note 5, at 145 (asserting that “transit-based development”

enjoyable, they argue, encourages its use, as does planning new communities around transit stops.<sup>119</sup> Finally, New Urbanists advocate the importance of public space in municipal design, making public parks, squares, and buildings “the focal points of neighborhood life,” and encouraging the building of streets on connection friendly grid patterns.<sup>120</sup> Their hope is that designing municipalities to encourage public interaction will help metropolitan residents accommodate to persons different from themselves.<sup>121</sup> Indeed, Frug indicates that proposals to bring local zoning and development policies in line with New Urbanist tenets are precisely the sort that he hopes to see negotiated in his proposed regional legislature.<sup>122</sup>

Although Frug acknowledges the argument that current zoning and redevelopment policies would not exist without substantial popular support, he contends that several potential constituencies may be interested in reducing income, racial, and ethnic segregation in metropolitan areas, and thus that there is some chance that regional land-use negotiations would result in reforms. First, he notes that women, to the extent they are primarily responsible for child care and housework, are disadvantaged by the decentralization and car dependence of suburbia, which increases the time needed to reach work, shops, and recreation, and requires them to drive children to most activities.<sup>123</sup> Such women might well support policies aimed at pedestrian and public transit-friendly neighborhoods that integrate residential, office, and retail uses. Another group likely to support New Urbanist policies is the population of inner suburbs, a number of which are currently undergoing the same pattern of disinvestment

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is “the ideal way to organize growth”).

119. FRUG, *CITY MAKING*, *supra* note 12, at 151–52; *see, e.g.*, CALTHORPE, *METROPOLIS*, *supra* note 117, at 41–42, 56 (maintaining that a “‘walkable’ environment” helps reinforce transit use, and noting that organizing development around transit stop increases convenience of transit use); DUANY ET AL., *SUBURBAN NATION*, *supra* note 5, at 145 (“Whenever possible, future development should be organized along a transit corridor, in the manner of our historic streetcar suburbs.”).

120. FRUG, *CITY MAKING*, *supra* note 12, at 152; *see, e.g.*, DUANY ET AL., *SUBURBAN NATION*, *supra* note 5, at 15–16, 60, 190–91 (praising Alexandria, Virginia for its grid-pattern streets, and asserting importance of “walkable public places—streets, squares, and parks,” as well as civic buildings); Duany & Plater-Zyberk, *supra* note 115, at xix (advocating that neighborhoods “structure[ ] building sites and traffic on a fine network of interconnecting streets”); CALTHORPE, *METROPOLIS*, *supra* note 117, at 90, 93 (stating that “[p]ublic parks and plazas are fundamental features of livable and enjoyable higher-density communities,” and that “[c]ivic services, such as community buildings . . . should be placed in central locations as highly visible focal points”).

121. FRUG, *CITY MAKING*, *supra* note 12, at 153; *see, e.g.*, CALTHORPE, *METROPOLIS*, *supra* note 117, at 37 (noting that central to author’s proposal to make communities more open and integrated through New Urbanist planning is his belief that “the more diverse and open a community is, the less people come to fear one another”); DUANY ET AL., *SUBURBAN NATION*, *supra* note 5, at 46–47 (maintaining that neighborhoods whose variety of housing types accommodate income diversity permit residents to “[s]har[e] the same public realm,” allowing them to “interact, and thus come to realize that they have little reason to fear each other”).

122. FRUG, *CITY MAKING*, *supra* note 12, at 162–63.

123. *Id.* at 154–56.

that plagued central cities earlier in the century.<sup>124</sup> Although he does not really explain this contention, Frug's argument presumably is that inner suburbanites would embrace the New Urbanist focus on arresting suburban sprawl, which in theory might direct development back toward the urban core.

The elderly too, Frug suggests, would support the land use reforms he proposes. The current suburban emphasis on low density, single-family development may impose burdens on older residents; those on fixed incomes may be unable to afford the cost of maintaining an entire single-family home, and those no longer able to drive lose a vital link to the outside world.<sup>125</sup> Central city and inner-suburb decline caused by suburban sprawl may also burden older residents by increasing the perception, and perhaps reality, of crime, which could force some to abandon their homes, and others to become prisoners within them.<sup>126</sup> Thus, the elderly are likely to support the New Urbanist emphases on increasing mixed-use zoning, which would permit renting out the unneeded portion of a home, integrating retail and residential uses, which would reduce car-dependency, and encouraging greater density of development, which could help stop the cycle of urban decline.

Finally, Frug believes many African Americans would benefit from a change in current land use policy. Certainly, as he points out, black residents too poor to leave central cities or inner suburbs have not benefited from sprawl-friendly policies that have drained urban cores of both their residential and commercial tax bases.<sup>127</sup> African Americans able to move to more prosperous suburbs still tend to end up segregated from similarly well-to-do whites, for reasons of discrimination as well as choice.<sup>128</sup> Thus black metropolitan dwellers, too, are likely to support New Urbanism's focus on increasing both neighborhood density and the interaction of diverse groups.

### *b. Education*

According to Frug, although public schools could be used for community building, they are used instead to divide metropolitan residents by race and class, in particular through the use of school district boundaries and ability tracking.

Frug makes two key proposals to combat these problems. First, he suggests that the current state policy of permitting localities to keep property tax revenues

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124. RUSK, *INSIDE GAME/OUTSIDE GAME*, *supra* note 6, at 331; *see* ORFIELD, *supra* note 6, at 30–32 (describing decline of inner suburbs in Twin Cities region).

125. *See* FRUG, *CITY MAKING*, *supra* note 12, at 158.

126. *See id.* at 158–59.

127. *Id.* at 160.

128. *Id.* at 161; John A. Powell, *Addressing Regional Dilemmas for Minority Communities*, in *REFLECTIONS ON REGIONALISM* 218, 226 (Bruce Katz ed., 2000); *see also* Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 *CORNELL L. REV.* 729 (2001) (articulating various causes and consequences of African American suburbanization) [hereinafter Cashin, *Middle-Class Black Suburbs*].

raised within their borders, which “empowers some neighborhood schools while disempowering others,”<sup>129</sup> should be abandoned. Instead, local property taxes would be collected region-wide, and should be distributed via regional negotiations.

In addition, Frug would “revise the current entitlement that now enables school districts to define who is eligible for admission to their schools.”<sup>130</sup> He proposes a school choice plan that would allow parents to send their child to any public school in the region “as long as diversity, and not segregation, was promoted by their choice.”<sup>131</sup> He also would abolish tracking, which he believes promotes segregation by race, ethnicity, and class.<sup>132</sup> According to Frug, these reforms would increase community building and fortuitous associations, and thus reduce tensions and increase learning.<sup>133</sup>

Frug anticipates that critics may deem his proposals coercive and redistributive, but claims that his suggestions are no more or less unfair than the current system. On the first page of Chapter One, he asserts that “[s]tates have absolute power over cities,” and notes that “the extent of that power has been extravagantly emphasized by the Supreme Court of the United States” in the leading case of *Hunter v. City of Pittsburgh*.<sup>134</sup> If one accepts *Hunter*’s holding that states are free to grant localities as much or as little power as they wish, then the status quo is not set in stone, but rather represents merely one of several possible delegations of authority. Just as the states were free in the past to make the current delegations, they are free to withdraw or alter them.<sup>135</sup>

129. FRUG, CITY MAKING, *supra* note 12, at 186.

130. *Id.*

131. *Id.*

132. *See id.* at 193–94.

133. *See id.* at 189–90.

134. *Id.* at 17. *See* *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). *Hunter* provides, in pertinent part, that “[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.” *Id.* at 178. Although close to one hundred years old, *Hunter* has retained its weight as a matter of black letter law. *See, e.g.,* Briffault, *Our Localism: Part One—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 85 (1990) [hereinafter Briffault, *Our Localism I*] (noting that *Hunter* is “usually treated as the purest statement of the black-letter position” and that it “remains fundamental to the federal constitutional status of local governments”).

135. FRUG, CITY MAKING, *supra* note 12, at 188–89. It may seem ironic that Frug relies for defense of his proposals on *Hunter*, given his fervent commitment to preserving local power and long held dissatisfaction with the case. He begins the book with a critique of the Supreme Court’s “extravagant” rhetoric in *Hunter* which is taken essentially verbatim from the chapter’s original source, his 1980 article *The City as a Legal Concept*. *See* Frug, *Legal Concept*, *supra* note 13, at 1062–63 n.9. In part, this anomaly stems from the inconsistency between Part One of *City Making*, in which Frug suggests that municipalities are utterly powerless, and the rest of the book, where he seems to acknowledge that at least some localities—principally, wealthy suburbs—have been permitted to exercise substantial power in spite of *Hunter*, as reflected by their tendency to enact exclusionary zoning ordinances and retain all their property tax revenues. Richard Briffault has explored in detail the extent to which municipalities have in reality been accorded far more

*c. Police*

Frug contends that altered policing strategies, in addition to land use and education reforms, could contribute to metropolitan community building. Such reforms are sorely needed, he asserts, because Americans are plagued with a rampant fear of otherness, which contributes to a widespread fear of crime. These two elements operate in a vicious circle, he believes, as the fear of crime simply refuels the fear of otherness. Unfortunately, both fears are especially heightened with respect to black males.

The typical current response of white Americans, Frug argues, is to give in to an “us vs. them mentality” and to isolate themselves as much as possible. This mindset has fed the flight to the suburbs and a get-tough-on-crime attitude that has fueled the “current enthusiasm for building prisons.”<sup>136</sup> These strategies only increase the divisions between classes, races, and ethnicities. Although the divisiveness of white flight is evident, zero-tolerance law enforcement also creates fragmentation, according to Frug, because it engenders hostile police relationships with minorities that do not make crime fighting any easier.<sup>137</sup>

Again, Frug proposes two reforms, one of which relies on the tax revenue sharing tactic that he also recommends in the educational arena. First, he suggests metropolitan-area-wide funding for police services,<sup>138</sup> with resources used for “crime prevention, rather than isolation and withdrawal.”<sup>139</sup> Pursuant to a crime prevention approach, metropolitan residents would stop fleeing poor, high crime areas, and isolating criminals through prison building, toughening criminal laws, and expenditures on private security.<sup>140</sup> Instead, these residents would focus on “becoming familiar with the range of people who live in the metropolitan area,” and learning how to distinguish between “potential troublemakers” and harmless strangers.<sup>141</sup> These efforts would bolster residents’ self-confidence and resilience when in public, and thereby help to free them from the limitations self-imposed by fear of crime.<sup>142</sup> In turn, metropolitan residents would feel free to return to the (no longer) high crime city and inner-suburban neighborhoods, which could help reverse the economic decline that their flight in earlier decades engendered.<sup>143</sup>

Frug’s second proposal is that traditional law enforcement strategies be replaced with the use of community policing, which is a way of “diminishing

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power than *Hunter* would seem to allow. See Briffault, *Our Localism I*, *supra* note 134. The passage of time since 1980 may explain Frug’s suggestion that certain localities might need to be reined in, at least to some degree, in the spirit of *Hunter*.

136. FRUG, *CITY MAKING*, *supra* note 12, at 199.

137. *Id.* at 200.

138. *Id.* at 201–03.

139. *Id.* at 201.

140. *Id.* at 196, 199, 201.

141. *Id.* at 202.

142. *Id.* at 201–02.

143. *Id.* at 202–03.

police-community antagonism by allowing people with very different views to participate in the effort to formulate crime-prevention programs.”<sup>144</sup> Regardless of whether this strategy would have much impact on the crime rate, at a minimum “the police could demonstrate for the public at large how to lower the crime rate by working with people different from oneself.”<sup>145</sup>

#### PART TWO: POTENTIAL AND PROBLEMS

Frug’s method of drawing on a variety of nonlegal, theoretical sources—primarily from the humanities—to craft relatively concrete legal and policy reform proposals is certainly distinctive, at least within local government law.<sup>146</sup> Yet only some of the arguments and proposals he generates through his interdisciplinary methods are persuasive.

His discussion of the effect of consciousness on human behavior accentuates a significant influence on the metropolitan problems he seeks to alleviate. In addition, his readings in postmodernism enable him to showcase his innovative electoral reform proposals, while his multidisciplinary discussion of community building helps advance the worthwhile cause of regional coalition building.

Despite these valuable insights, however, Frug appears to overestimate the ease of bridging the gap between theoretical re-envisioning and actual political and social change, as evidenced by his insufficiently detailed and overly optimistic proposal for a regional legislature, as well as his unrealistic hopes for the New Urbanism movement. Moreover, although he devotes appropriate attention to the significance of intellectual influences on the urban scene as a general matter, in a couple of instances his analysis could be more persuasive. For example, while acknowledging the mindset behind white flight, he overlooks the influence of pastoral ideology in pulling families toward the suburbs. He also understates the difficulties of reforming the suburban consciousness.

#### A. *The Promise of City Making*

Frug’s commitments to fairness and public freedom are unquestionable, and his proposals for achieving those goals show promise in several respects. In particular, his focus on the influence of ideology and psychology in shaping the inequities of our current metropolitan system brings to light causal factors that are ignored all too often in urban policymaking. His suggestion that local and regional offices be filled through semiproportional voting is intriguing and could hold real potential for amplifying the voices of metropolitan minorities. Moreover, his advocacy of community building drives home the necessity of

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144. *Id.* at 206.

145. *Id.* at 207.

146. In this connection, Frug asserts that other areas of the law already have been subjected to the “deconstructive critique,” but not local government law. *Id.* at 65–66.

coalition formation to the achievement of progressive change in metropolitan America.

### 1. *Focus on Intellectual Influences*

In advocating methods to combat the forces—centralization and metropolitan fragmentation—that he believes hinder the achievement of his two main goals—public freedom and social justice—Frug focuses to a significant degree on the intellectual underpinnings of those forces. In other words, he analyzes how the way people think contributes to the current state of metropolitan America, focusing particularly on the mindsets of suburbanites and the affluent. Because understanding metropolitan development trends requires an understanding of the world views and psyches of the individuals whose decisions contribute to such patterns, this attention to consciousness makes a valuable contribution to the local government literature.

In the first two parts of his book, Frug devotes significant attention to describing Americans' predominant understanding of localities: as autonomous entities, or what he calls "centered subjects."<sup>147</sup> "[I]t is considered obvious" by the average local resident, particularly the typical suburbanite, "that the only relevant decision-makers are those who live within city boundaries, and that outsiders affected by the decisions have no voice in the decision-making process."<sup>148</sup> Where local residents obtained this understanding is no mystery, he maintains; they understand localities as autonomous because state courts and legislatures, as well as the United States Supreme Court, have enabled localities to act selfishly in shaping local government law.<sup>149</sup>

The layperson's understanding of municipalities as autonomous is neither idle nor rootless, Frug emphasizes; rather, it forms an ideology of autonomy. The significance of municipal autonomy's status as an ideology is at least twofold. First, the understanding is deeply interwoven into the American consciousness.<sup>150</sup> Residents feel not only that localities are autonomous, but also that they ought to be, that they are entitled to be, that that is how the world is.<sup>151</sup> The "suburban consciousness" incorporates "the felt legitimacy of suburban separation."<sup>152</sup>

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147. *Id.* at 64; see *supra* notes 50–51 and accompanying text.

148. FRUG, *CITY MAKING*, *supra* note 12, at 7, 61–62.

149. *Id.* at 7, 62, 64, 77.

150. Indeed, Frug refers to this ideology, to the extent held by suburban dwellers, as the "suburban consciousness." See, e.g., *id.* at 77, 78.

151. I use the term "ideology" in the Geertzian sense to mean a "schematic image[] of social order," a "map[] of problematic social reality and mati[x] for the creation of collective conscience." CLIFFORD GEERTZ, *Ideology as a Cultural System*, in *THE INTERPRETATION OF CULTURES* 193, 218, 220 (1973). Another common term for this concept is "world view." See, e.g., CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* 5 (1977).

152. FRUG, *CITY MAKING*, *supra* note 12, at 77.

Second, because the perceived right of local separation forms part of their world view, residents benefiting from local autonomy are likely to resent intensely, and resist strongly, any reforms that impinge on local self interest. Reform legislation that forbade exclusionary zoning or required tax-base sharing, for instance, most likely would appear to unsympathetic suburban residents as not simply an ordinary political loss, but as an overturning of their normative vision of the world.<sup>153</sup>

Recognizing the depth and strength of the ideology of autonomy helps one to understand the extent of opposition to metropolitan reform and assists in the shaping of change. For example, as Frug notes, the circumstances surrounding the New Jersey Supreme Court's *Mount Laurel* cases<sup>154</sup> demonstrate the

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153. As Frug explains, an attempt to reduce metropolitan fragmentation "would be experienced by the people who benefit from it as an astonishing invasion of their personal freedom." *Id.* at 80.

154. The New Jersey Supreme Court's landmark exclusionary zoning case, *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), is known as *Mount Laurel I*. In that case, the court held that "developing" municipalities are obliged under the New Jersey constitution to plan and provide, through their land use regulations, for their "fair share" of the regional need for low and moderate income housing. *Id.* at 728.

Despite this mandate, the case returned to the New Jersey Supreme Court eight years later after the plaintiffs appealed the trial court's decision on remand, resulting in a second opinion, *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983), known as *Mount Laurel II*. *Id.* at 411. The court found it necessary to "put some steel into [the *Mount Laurel I*] doctrine" in its new opinion because it found that "ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance." *Id.* at 410. Indeed, the court believed "that there is widespread non-compliance with the constitutional mandate of" *Mount Laurel I* within New Jersey. It therefore strengthened its earlier holding, making it applicable to any municipality designated by the state as a "growth area"; clarifying that municipalities must take action making it "realistically possible for lower income housing to be built"; and mandating that, if rezoning in a less restrictive matter would not create such a possibility, a town would have to take affirmative measures such as implementing mandatory set-asides for low income units or permitting mobile homes. *Id.* at 417-18, 441-52. See Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1270 (1997).

In response to the two *Mount Laurel* cases, the New Jersey Legislature in 1985 enacted the Fair Housing Act. N.J. STAT. ANN. 52:27 D-301 *et seq.* (1986). The statute's main purpose was to transfer control over the state's affordable housing policy from the courts to the legislature. It created a state agency, the Council on Affordable Housing ("COAH"), with the power to determine municipalities' fair share housing obligations, as well as to certify on request that a municipality's fair share housing plan is in compliance with its duties. See Wish & Eisdorfer, *supra*, at 1271. Such certification would preclude litigation against the municipality for six years. *Id.* at 1271. The Act also authorized one municipality to transfer to another, in exchange for payment, up to fifty percent of its fair share housing obligation, pursuant to what it termed a "regional contribution agreement[]." *Hills Development Co. v. Township of Bernards*, 510 A.2d 621, 640-41 (N.J. 1986). Finally, the Act provided for the transfer of pending and future *Mount Laurel* litigation to the COAH. *Id.* at 631.

In *Hills Development Company v. Township of Bernards*, known as *Mount Laurel III*, the New Jersey Supreme Court upheld the Fair Housing Act as consistent with the constitutional requirements it enunciated in the first two *Mount Laurel* cases. *Id.* at 642-46. Nonetheless, the Fair Housing Act, and its approval in *Mount Laurel III*, is generally seen as having appreciably, though not fatally, weakened the cause of affordable housing in New Jersey. See, e.g., DAVID L.

difficulties that arise when judicial and legislative reform initiatives conflict with the world views of their constituents.<sup>155</sup> Constance Perin has pointed out the importance of comprehending the “conventions and understandings” of a society, for although

we understand them less well than we can see the political and economic patterns they result in, if left unexamined . . . [they] can continue to produce the less-than-ideal conditions so clearly manifested in the built landscape of metropolitan areas, still best described in older metropolitan areas . . . as a white noose around the blacks and poor of central cities.<sup>156</sup>

Considering residents’ shared understandings of the world in addition to economic and political factors<sup>157</sup> permits policymakers both to appreciate what they are up against and, to the extent possible, to incorporate elements that speak to residents’ mindsets into reforms.

As for his efforts to promote community building, Frug again turns to intellectual factors, suggesting that residents likely to oppose this reform (most often suburbanites) may suffer from a psychological condition—specifically, a lack of “ego strength” and an excessive fear of the “Other.”<sup>158</sup> According to Frug, this ego frailty and fear is so encoded in suburbanites’ neurons that it is no simple thing to root out. Enabling the “being together of strangers,” whether in already heterogeneous cities or in suburbs newly open to integration by inclusionary zoning and affordable housing plans, requires close attention to

KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* 153–55 (1995) (maintaining that “the creation of COAH neutered affordable housing as a political issue”). At a minimum, the Fair Housing Act’s authorization of regional contribution agreements may bear significant responsibility for the low level of success, to date, in reaching one of the core goals of the *Mount Laurel* cases: improving racial and ethnic segregation by enabling people of color to move from heavily minority urban areas to mostly white suburbs. Wish & Eisdorfer, *supra*, at 1276. A recent empirical study based on data collected from New Jersey’s affordable housing database indicated that eighty-one percent of suburban units in the database were occupied by white households, while eighty-five percent of urban units in the database were occupied by black or Latino households, and that only seven percent of database households changing residence moved from urban areas to suburbia, with sixty-six percent of that fraction being white. *Id.* at 1303. The authors thus concluded that “the judicial and legislative attempt to eliminate exclusionary zoning has not enabled previously urban residents to move to suburban municipalities and has not enabled Blacks and Latinos to move from heavily minority urban areas to the suburbs.” *Id.* at 1305.

155. FRUG, *CITY MAKING*, *supra* note 12, at 78–80.

156. PERIN, *supra* note 151, at 4, 26.

157. The predominant modes for analyzing metropolitan difficulties throughout the twentieth century have been economic, political, and social, and while these approaches provide invaluable insights, they do not tell the entire story. For example, as I have discussed elsewhere, although the causes of protoexclusionary zoning were many, and included economic factors as well as racial, ethnic, and class animosity, various middle class ideologies—including the cult of domesticity and the pastoral ideal—played an important role as well. See Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning for Exclusively Private Residential Areas, 1916–1926*, 56 U. PITT. L. REV. 367, 415 (1994).

158. See FRUG, *CITY MAKING*, *supra* note 12, at 119–21, 129–30, 162; *supra* notes 88–105 and accompanying text (explaining psychoanalytic concepts of ego strength and fear of otherness).

these issues. Reforms that make economic or political sense are unlikely to succeed if they do not take into account what makes their subjects tick, whether such forces are rational or not. Frug's thorough illumination of the often overlooked influence of psychology, as well as ideology, on patterns of metropolitan development, thus performs a valuable service to urban planning progressives.

## 2. *Semiproportional Voting*

Frug also makes interesting use of extralegal sources to propose that seats in his regional legislature, and perhaps all local government elective offices within a region, be filled through a semiproportional representation scheme.<sup>159</sup> He suggests that this methodology would permit nonresidents with an interest in a municipality to participate in electing the locality's officials. Although the general concept of semiproportional voting is familiar in law and political science, Frug draws on readings from postmodern theorists to develop the novel idea of expanding the metropolitan voting jurisdiction so that it is regionwide.<sup>160</sup> Under the right circumstances, his proposal could have the positive effect of increasing minority voice in sub-state elections.

The type of semiproportional voting Frug recommends most closely resembles cumulative voting.<sup>161</sup> Under cumulative voting, instead of dividing a legislative jurisdiction into multiple districts, each of which is entitled to a single representative, districts are merged into fewer, larger voting sectors, each of

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159. The term "proportional representation" refers to electoral systems that permit the percentage of representatives in a legislative body with a particular point of view to match closely the percentage of voters in the overall electorate with that viewpoint. As Mary Becker explains, Under a typical proportional representation scheme, each individual votes for one party: the Greens, the Reds, the Blues, or the Oranges. If the Green Party gets twenty percent of the votes in an election for a hundred-member parliament, then twenty members of the new parliament will be Greens: the top twenty on the Green's list of candidates. If the Reds get thirty percent, then thirty members of parliament are the top thirty individuals on the Red's list, and so on.

Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 *FORDHAM L. REV.* 2007, 2026–27 (2001) (citation omitted). Likewise, the term "semiproportional representation" refers to voting methods that permit the percentage of legislative representatives with certain views to approximate, somewhat more roughly than with proportional representation, the percentage of the electorate sharing those views. See, e.g., Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 *COLUM. L. REV.* 418, 437 (1995) (book review) [hereinafter Briffault, *American Democracy*] (noting that political scientists refer to electoral schemes producing less than "full proportional representation" with the term "semiproportional") (citations and internal quotation marks omitted).

160. Richard Ford also has advocated this reform, citing Frug as an influence. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *HARV. L. REV.* 1841, 1904, 1909 (1994) (proposing that local elections be open to nonresidents) (citing Frug, *Decentering Decentralization*, *supra* note 13, at 324–25, 329–30).

161. In at least one respect, however, Frug's proposed voting system resembles another form of semiproportional voting known as limited voting, rather than cumulative voting. See *infra* note 179.

which is entitled to the same aggregate number of representatives.<sup>162</sup> The result will be larger, multimember districts instead of smaller, single-member districts. Each voter is given as many votes as there are seats to be filled and is permitted to spread those votes among several candidates or use them all on one candidate (in contrast to single-member district voting, where voters may vote only once for a particular candidate).<sup>163</sup> The candidates receiving the most votes are then declared the winners of the open positions. If used wisely, cumulative voting permits cohesive interest groups that do not command a majority in a particular jurisdiction to gain representation in multimember bodies.<sup>164</sup> The method helps to mitigate the winner-take-all nature of electoral systems that permit interest groups commanding fifty-one percent of the electorate to control 100 percent of the electoral seats.

Cumulative voting was first notably used in the United States in 1870s Illinois, when the state revised its constitution to require cumulative voting for the election of candidates to the lower house of the state legislature.<sup>165</sup> The chair of the constitutional convention's Committee on Electoral and Representative Reform (and editor of the *Chicago Tribune*), Joseph Medill, was influenced in his advocacy of cumulative voting by John Stuart Mill's recent writings on minority representation.<sup>166</sup> The convention subsequently proceeded to require cumulative voting for the election of directors of private corporations, at Medill's urging.<sup>167</sup>

Although cumulative voting did not become widespread in the public, legislative arena,<sup>168</sup> it did become quite popular in the corporate sector. According to Jeffrey Gordon, by 1880 seven states had followed Illinois in requiring corporations to elect their directors via cumulative voting; by 1900 a total of eighteen had such a requirement; and by 1945 twenty-two did.<sup>169</sup> In the 1950s, however, states began to switch from requiring cumulative voting for

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162. Briffault, *American Democracy*, *supra* note 159, at 432–34.

163. Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 *HOUSTON L. REV.* 1119, 1150 (1998) (citation omitted).

164. Becker, *supra* note 159, at 2027–28 (quoting LANI GURNER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* 258–61 (1998)).

165. Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 *COLUM. L. REV.* 124, 142 (1994) [hereinafter Gordon, *Cumulative Voting*]; see also Briffault, *American Democracy*, *supra* note 159, at 433 n.53 (describing Illinois use of cumulative voting as “the one major use of cumulative voting in American political history”).

166. Gordon, *Cumulative Voting*, *supra* note 165, at 142 n.44.

167. *Id.* at 142 n.45.

168. See Briffault, *American Democracy*, *supra* note 159, at 420 & n.14 (noting that semiproportional and proportional representation systems are “relatively unknown in political elections in the United States” and citing sources). In contrast, many countries outside the United States use electoral schemes that are semiproportional (like cumulative voting) or proportional. See, e.g., Briffault, *American Democracy*, *supra* note 159, at 428 (noting that “[m]ost democratic countries, and virtually all non-English-speaking democracies, use some form of semi-proportional or proportional representation that requires multi-member districts”).

169. Gordon, *Cumulative Voting*, *supra* note 165, at 143–45.

corporate directors to merely permitting it,<sup>170</sup> presumably since cumulative voting has the capacity to reduce the power of the shareholding majority. This shift reduced its usage.<sup>171</sup> By the early 1990s, only six states retained mandatory cumulative voting, while forty-three (plus the District of Columbia) permitted, but did not require, cumulative voting.<sup>172</sup>

Just as the pendulum swung against cumulative voting in the corporate arena, scholars began to call for its reintroduction on the American political scene. Most notably, Lani Guinier has advocated replacing the currently preferred method of electing legislators—majority-rule, single-member districting—with cumulative voting.<sup>173</sup> Historically, multi-member districts have been used effectively to disenfranchise American minority groups.<sup>174</sup> In a majority-takes-all system, diluting small minority enclaves into a large, majority-dominated, multi-member district essentially precluded minority candidates from ever being elected.<sup>175</sup> Dividing large, multi-member districts into smaller, single-member districts—as long as some districts were drawn to ensure a majority of minority voters—was seen as an effective remedy for the problem of minority vote dilution.<sup>176</sup>

Guinier has argued that using single-member districting in this way creates its own problems for minorities: reduced voter participation, reduced legislator responsiveness, and isolation of minority representatives.<sup>177</sup> She argues that cumulative voting would ameliorate these problems and increase the likelihood that minority groups would have “a fair chance to have their policy preferences satisfied.”<sup>178</sup>

Frug’s proposals regarding metropolitan elections appear to draw directly on Guinier’s advocacy of cumulative voting, although Frug does not explicitly identify his proposal as a cumulative voting scheme.<sup>179</sup> Like Guinier, Frug

170. *Id.* at 145.

171. *See, e.g.*, FRANKLIN A. GEVURTZ, CORPORATION LAW § 5.2.1 (2000).

172. Gordon, *Cumulative Voting*, *supra* note 165, at 145–46. The fiftieth state, Massachusetts, did not permit cumulative voting at all. *Id.*

173. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1136–40 & nn.288–301 (1991).

174. *Id.* at 1094.

175. *Id.*

176. *Id.* at 1081, 1098.

177. *Id.* at 1102, 1110–12, 1115–17.

178. *Id.* at 1136; *see also* Briffault, *American Democracy*, *supra* note 159, at 425.

179. In one respect, its reliance on the mechanism of limiting the number of votes cast per voter rather than on vote cumulation alone, Frug’s scheme resembles another form of semiproportional voting—limited voting—more than cumulative voting. Briffault provides a helpful discussion on the difference between these two forms of semiproportional voting: “Like cumulative voting, limited voting avoids districting. But instead of allowing voters to cumulate their votes, limited voting limits the number of votes a voter can cast to fewer than the number of seats to be filled in the election. This can prevent the same majority from dominating the election for every seat and can enable a sufficiently large and cohesive minority to win a seat.” Briffault, *American Democracy*, *supra* note 159, at 437 n.67.

recommends expanding the scope of the electorate eligible to fill local offices—in his case, to encompass the entire region.<sup>180</sup> In a manner similar to Guinier, Frug suggests giving voters multiple votes (five) to reflect the expanded jurisdiction, and permitting them to cast those votes as they choose, with cumulation of votes permitted.<sup>181</sup> Both share the goal of permitting voters to define for themselves what interests they wish to join with others to support, rather than leaving it to the lawmakers who draw district lines to define appropriate “communities of interest.”<sup>182</sup> One distinction between the two approaches is that Guinier’s proposal is firmly rooted in the context of increasing the representational effectiveness of people of color (although it clearly invites expansion to aid the representation of any type of minority), while Frug’s proposal is broad based from the start.

Frug is careful to state that he is not trying to produce ready-to-implement policy proposals, but simply to catalyze thinking about creative alternatives to current local government law.<sup>183</sup> Nonetheless, his voting proposal is defined in so little detail that it risks eliciting dismissive reactions rather than sparking imaginative brainstorming about such innovations. For example, in proposing to give each regional resident five votes to cast in whatever local elections she wishes, does Frug mean to decrease the relative voting power of some residents? Under traditional voting methods such as single-member districting, residents are entitled to vote for every elective office or body that has jurisdiction over them. The more elective offices or bodies that govern someone, the more voting opportunities she is entitled to have. Cumulative voting (unlike limited voting) does not change one’s number of voting opportunities; it simply affects the way that one exercises them.<sup>184</sup>

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180. FRUG, *CITY MAKING*, *supra* note 12, at 106–07. Frug suggests that the electorate for metropolitan-area elections could extend beyond the area itself. “There is . . . no reason to assume,” he muses, “that the constituency would be limited solely to those who live in the region.” *Id.* at 107.

181. *Id.* at 106–07. Because Frug’s proposal permits the cumulation of votes, it shares a defining trait of cumulative voting. Yet since the proposal contemplates limiting the number of votes a resident has to five, the resident could end up being able to vote in fewer elections—and thus have a say in the filling of fewer seats—than under current, nonproportional voting (not to mention cumulative voting). As Briffault notes, “[l]imited voting deprives voters of the opportunity to vote for a separate candidate for each seat to be filled. Cumulative voting, by contrast, gives voters options,” in that it grants as many votes as seats and allows voters to decide how to allocate them. Briffault, *American Democracy*, *supra* note 159, at 437 n.67. Thus, in granting potentially fewer votes than seats, Frug’s proposal resembles limited voting rather than cumulative voting.

182. Frug, *Decentering Decentralization*, *supra* note 13, at 330 n.329. Frug cites to Guinier’s *Triumph of Tokenism* article in *Decentering Decentralization*, the article from which his voting proposal is drawn, although he removed the citation in editing his footnotes for a nonacademic audience.

183. See FRUG, *CITY MAKING*, *supra* note 12, at 112.

184. For an explanation of the differences between cumulative and limited voting, see *supra* notes 179, 181.

Yet Frug's proposal to allocate an equal number of votes to every regional resident does not seem to account for the different numbers of jurisdictions to which different residents are subject. Some residents would end up having more relative power over their lives than others—any resident currently entitled to vote in more than five elections would suffer a reduction in voting power. On the other hand, because of the disparity in number of governing jurisdictions per resident, removing the limited voting aspect of Frug's proposal presumably would mean allocating each metropolitan resident as many votes as those residents governed by the highest number of jurisdictions. This step would engender its own injustice, by according an unfair advantage to residents governed by fewer authorities than the maximum, essentially granting them "extra" votes.

These problems could be remedied without abandoning the benefits of semiproportional voting by using Frug's region-wide voting scheme only for offices or bodies that all municipalities have in common, and exempting "excess" elections from the regional process; those elections could be conducted via intra-local cumulative voting.<sup>185</sup> Frug's analysis would have been more persuasive if he had addressed this complication, however.

In suggesting that his voting scheme be extended to areas outside a region,<sup>186</sup> Frug raises complications that he fails to address. In particular, it seems to violate basic principles of fairness if outsiders are permitted to vote in a region's elections but regional residents cannot vote in the outsider's jurisdiction. To elaborate on Frug's hypothetical,<sup>187</sup> it would not be fair if a resident of San Juan, Puerto Rico could vote in Yonkers, New York but a Yonkers resident could not vote in San Juan. Frug neither raises the issue of reciprocity nor suggests ways to resolve it. Ensuring reciprocity at the state level may be feasible, since a state legislature willing to authorize regional legislatures also may be willing to impose statewide semiproportional voting. Reciprocity between two or more states, however, raises issues of interstate compacts,<sup>188</sup> and federal action to mandate nationwide reciprocity might raise difficult questions concerning the scope of Congressional authority in this area. Although Frug does not provide specific examples of New Yorkers voting in Australia or Finns voting in Minnesota, his metric—that people be permitted to vote in those places where they "feel connected"<sup>189</sup>—would encompass such voting. Obviously, enforcing reciprocity on an international level presents enormous political as well as legal problems. Reciprocity on a state level in fact may be legally feasible,

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185. Conducting such elections on a local basis presumably would remove the need to impose a limit on the number of votes per resident, since residents of a single municipality generally are governed by the same number of jurisdictions.

186. See *supra* note 180.

187. See FRUG, CITY MAKING, *supra* note 12, at 107.

188. See, e.g., Briffault, *Boundary Problem*, *supra* note 7, at 1167.

189. FRUG, CITY MAKING, *supra* note 12, at 107.

but it would aid his argument to acknowledge the issue and the complications that it would produce above the state level.

The primary critique of Frug's voting proposal to date has focused not on the relative voting power or reciprocity issues, but rather on the fact that the expansion of a voting jurisdiction by semiproportional voting, at least as Frug proposes it, would permit extra-local voting. Briffault has argued that, as applied to a metropolitan area containing a central city surrounded by suburbs, Frug's proposal actually would harm the ability of minorities to achieve policy outcomes they favor, resulting in the exact opposite effect cumulative (or limited) voting is intended to have.<sup>190</sup> Because a central city generally has high visibility within its surrounding region, and because that city's policies in many areas (such as taxes on the city income of commuters) affect its entire region, suburban residents are likely to exercise their right to vote in city elections, according to Briffault.<sup>191</sup> Suburbanites, Briffault suggests, may vote down proposals (such as tax increases) needed to provide critical city services. In theory central city residents should be equally able to vote in suburbs on significant issues such as affordable housing, but the large number of suburbs makes determining each suburb's policies more time consuming, and means that attacking those policies takes substantial coordination and time.<sup>192</sup> The votes of lower income central city residents therefore may not be exercised at all in suburbs, or may be rendered ineffective due to lack of coordination. On balance, Briffault suggests, under Frug's cumulative voting proposal, disadvantaged metropolitan residents would give up more than they would gain.<sup>193</sup>

The force of Briffault's critique depends greatly on the demographics of the particular region for which metropolitan-wide cumulative voting is proposed. Briffault's argument holds the most sway in regions where minorities are heavily concentrated in central cities and reside hardly at all in the surrounding suburbs. Yet where minorities are more spread out, a cumulative or other semi-proportional voting scheme might provide real benefits because minorities outnumbered in their own suburbs could combine their votes with other scattered minorities and elect representatives of their choice.<sup>194</sup>

Which scenario more accurately reflects the empirical reality? There are still heavy minority concentrations in America's central cities, as recently released data from the 2000 census demonstrates.<sup>195</sup> Frug concedes this fact

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190. Briffault, *Boundary Problem*, *supra* note 7, at 1158–59. See Guinier, *supra* note 173, at 1136–40 & nn.288–301.

191. Briffault, *Boundary Problem*, *supra* note 7, at 1158–59.

192. *See id.* at 1158.

193. *Id.* at 1158–59.

194. *See, e.g.,* Powell, *supra* note 128, at 234 (observing that “[c]umulative voting in a metropolitan region would protect the political interests of people of color even when a mobility policy results in their geographic deconcentration”).

195. Two of the most influential studies that drew their latest data from the 1990 census indicated that African American residents were heavily concentrated in cities. *See, e.g.,* MASSEY &

from the beginning;<sup>196</sup> indeed, it is a key premise of his work. Frug also concedes that even when minorities live in suburbs, those suburbs themselves are often segregated.<sup>197</sup> Yet many people of color who can afford to do so have moved to the suburbs,<sup>198</sup> and not all suburbs where people of color live are wholly made up of minorities.<sup>199</sup> In addition, the concentration of poor people of color in central cities has depended to a degree on federal housing policy, which traditionally has favored warehousing minorities in segregated projects.<sup>200</sup>

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DENTON, *supra* note 84, at 61, 223 (asserting that “[b]y 1970, racial segregation in U.S. urban areas was characterized [by] a largely black central city surrounded by predominantly white suburbs,” and that little progress had been made through 1990); JARGOWSKY, *supra* note 84, at 65 (providing 1990 census data indicating that in all U.S. metropolitan areas of population 500,000 or more, at least fifty percent of blacks live in high poverty neighborhoods).

Although scholars are still analyzing census data from 2000, and differ as to how optimistically to view small declines in African American segregation, a consensus is emerging that a substantial number of people of color still live in highly segregated central city neighborhoods. See, e.g., Lewis Mumford Center, *Ethnic Diversity Grows, Neighborhood Integration Is at a Standstill*, at 20 (April 3, 2001), available at <http://www.albany.edu/mumford/census> [hereinafter *Ethnic Diversity*] (noting that 2000 census figures indicate that average black central city resident in 2000 lived in a neighborhood that was 59.8% black (versus 64.5% in 1990), 11.7% Hispanic (versus 8.7% in 1990), 3% Asian (versus 2.1% in 1990), and only 24.5% white (versus 24.3% in 1990)); Edward L. Glaeser & Jacob L. Vigdor, *Racial Segregation in the 2000 Census: Promising News*, at 4 (Brookings Institution Survey Series, April 2001) (observing that the “large number of American metropolitan areas with extremely high levels of segregation remains quite striking.”).

196. See, e.g., FRUG, *CITY MAKING*, *supra* note 12, at 130 (noting segregation of poor blacks in central cities).

197. See Cashin, *Middle Class Black Suburbs*, *supra* note 128, at 741–43 (describing recent growth in number of all black, middle class suburbs).

198. See, e.g., *Ethnic Diversity*, *supra* note 195, at 1 (observing that 2000 census figures reveal “substantial shift of minorities from cities to suburbs” in 1990s); David J. Dent, *The New Black Suburbs*, N.Y. TIMES, June 14, 1992, at § 6, at 18 (stating that “[i]n 1990, 32 percent of all black Americans in metropolitan areas lived in suburban neighborhoods”); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 143 (1987) (describing post 1960s “exodus” of black middle class and stably employed working-class residents from inner cities to higher income city neighborhoods and suburbs); GARREAU, *supra* note 69, at 144, 150 (asserting that substantial number of American blacks now live in suburbs).

199. See, e.g., *Ethnic Diversity*, *supra* note 195, at 20 (noting that 2000 census figures show average black suburbanite living in a neighborhood that is 47.6% white, 36.5% black, 11.4% Hispanic, and 3.5% Asian); Cashin, *Middle-Class Black Suburbs*, *supra* note 128, at 736, 769 (suggesting that “most black suburbanites locate in areas with a large number of whites,” although subsequent racial transition may reduce integration produced by this pattern).

200. See, e.g., Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 U. PENN. L. REV. 1351, 1357–60 (1995) (noting that federal government “intentionally established the public housing program on a *de jure* racially segregated basis,” that “[s]egregation in public housing and other federal [housing] programs continues,” and that “[r]acial discrimination in . . . federal housing programs [such as the Section 8 rental assistance voucher program] has helped to confine blacks to public housing”); MASSEY & DENTON, *supra* note 84, at 57 (averring that “[b]y 1970, after two decades of urban renewal, public housing projects in most large cities had become black reservations, highly segregated from the rest of society and characterized by extreme social isolation,” and that this “new segregation of blacks” was “the direct result of an unprecedented collaboration between local and national government”); ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO* 254–55 (1983) (asserting that “[w]ith the

In recent years, however, government housing policy has begun to favor dispersal rather than concentration of those needing housing.<sup>201</sup> Minority residents now, or in the not too distant future, may be more spread out than Briffault acknowledges, such that the benefits of region-wide semiproportional voting may be greater and the dangers less than he suggests.

Even with a segregated suburbia, semiproportional voting would benefit minorities in supralocal elections. Furthermore, to the extent that Frug's other proposals are implemented and do reduce regional segregation, semiproportional voting schemes such as cumulative voting would be necessary complements in order to ensure that the de-ghettoizing of minorities does not reduce their political efficacy.<sup>202</sup> Regardless of whether semiproportional voting would work in American cities as they are configured today, it may well work—and indeed, be necessary—in the not-so-distant future. Considering ways to implement such a system seems eminently sensible. Thus, although Frug overlooks some significant complications raised by his voting discussion, on balance his analysis makes a worthy contribution to the urban policy debate.

Finally, although Briffault makes an excellent point about the transaction costs of cross-border voting, those inefficiencies can operate in more than one direction. It may be that suburban voters would have an easier time becoming aware of and forming a desire to vote on central city affairs than city voters would with respect to suburban affairs, but we must not forget that under a cumulative or limited voting system, each time a suburbanite voted in a city election, she would forfeit one vote that otherwise could be used in her own community's elections. She may be faced with the choice between voting on her community's affordable housing ordinance and in the central city's mayoral election. She may be willing in theory to use her vote on the latter rather than on the former if confident that enough others will vote her way on the housing ordinance, but in practice she can never be sure. In short, the attempt to ensure suburbanites' preferred outcomes in metropolitan elections likely would entail its own collective action problems, including the cost of coordinating suburban voting to ensure desired pluralities in multiple jurisdictions and of preventing

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emergence of redevelopment, renewal, and public housing. . . government took an active hand not merely in reinforcing prevailing patterns of segregation but also in lending them a permanence never seen before").

201. See generally James E. Rosenbaum and Stefanie DeLuca, *Is Housing Mobility the Key to Welfare Reform? Lessons from Chicago's Gautreaux Program*, at 2 (Brookings Institution Survey Series, September 2000).

202. For example, Georgette Poindexter has observed that while the vast majority of America's poor live within metropolitan areas, forty-five percent of that group (presumably including a fair number of minorities) live outside the central city in the suburbs. Poindexter, *supra* note 67, at 71–72. It is difficult for the suburban poor to form effective political alliances, she asserts, because they are geographically separated from others like them, and their poverty separates them from their fellow townspeople. *Id.* at 68, 72. Such “[d]ilution mutes the voice of the suburban poor as they are scattered throughout the suburbs in pockets of poverty.” *Id.* at 68. As Powell has observed, a cumulative or other semiproportional voting scheme would help increase the voice of the poor and other minorities. See Powell, *supra* note 128.

defections from any such coordinated plan.<sup>203</sup> Because suburban and central city attempts to achieve desired outcomes through semiproportional, cross-border voting would involve similar costs, such voting likely poses less danger to lower income city dwellers than scholars have acknowledged.

### 3. *Need for Coalitions*

Frug's consultation of nonlegal sources—in this case, Iris Young's philosophy and Richard Sennett's writings on psychoanalysis—also leads him to develop the concept of community building. Of the several reasons Frug gives for promoting community building, perhaps the most significant is the notion that making people comfortable with those different from themselves will assist in producing a consensus around solutions to urban problems through negotiations in his regional legislature. Although the likely efficacy of his regional legislature is questionable, as discussed earlier, his instinct that improving metropolitan America will require the cooperation of heretofore disparate constituencies is accurate.

More than ever before, America is a suburban nation. In 1950 almost seventy percent of Americans lived in central cities; by 1990 more than sixty percent lived in suburbs,<sup>204</sup> and the 2000 census reflects an even greater degree of suburbanization. Those who live in more affluent suburbs are unlikely, on average, to welcome measures that negatively affect their bottom line—measures such as tax-base sharing, which may be viewed as redistributive, or affordable housing initiatives, which could bring in residents who use more in services than they contribute in taxes. Although city dwellers, particularly those of lower income who may have been most affected by resource-starved public schools and exclusionary zoning, may support such reforms, the proposals will not prevail in the political arena without, at a minimum, the endorsement of residents of less wealthy, inner suburbs. Since these suburban residents are unlikely to see eye to eye with central city dwellers on many issues, enhancing the ability of these different groups to find some common ground with one another is a necessary prerequisite for reform.

Minnesota state legislator Myron Orfield has written a book describing the potential for forming political coalitions between inner-suburban and central city constituencies in order to enact progressive legislation, a form of cooperation he has dubbed "Metropolitics."<sup>205</sup> In the early 1990s, Orfield was seeking ways to strengthen Minnesota's 1971 tax-base sharing plan for the Minneapolis-St. Paul

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203. See Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 604–05 (1996) (explaining that "precommitments by a like-minded group" of citizens to vote in a particular way would tend to "collapse because of collective action problems," including voter defection). Levmore suggests that voters seeking the benefits of coordinated voting could enter *ex ante* contracts to solve the defection problem, but he concedes that courts would be unlikely to enforce such contractual commitments. *Id.* at 606–10.

204. RUSK, CITIES WITHOUT SUBURBS, *supra* note 6, at 5.

205. ORFIELD, METROPOLITICS, *supra* note 6.

region<sup>206</sup> and to implement other regionalist measures, such as a fair share affordable housing statute for the Twin Cities region.<sup>207</sup> Undertaking extensive research, Orfield determined that a small sector of new, wealthy suburbs at the outskirts of the metropolitan area—a district he dubbed the “favored quarter”—was drawing a disproportionate share of new jobs and infrastructure development funds at the expense not only of the two central cities but also of the less affluent, inner-ring suburbs.<sup>208</sup> Recognizing that their constituents were being disadvantaged equally by this skewed pattern, state legislators representing the inner suburbs joined together with representatives of urban communities to enact Orfield’s legislative proposals, which they understood as serving the common economic interests of their respective communities. The reforms were thwarted only by Republican Governor Arne Carlson’s vetoes.

Frug’s suggestion that it takes the cooperation of several different groups—women, inner-suburbanites, the elderly, and African Americans—to provide a groundswell sufficient to implement New Urbanism-related reforms reflects perfectly Orfield’s findings and experience in Minnesota. Indeed, New Urbanism itself, a movement started by architects and town planners, has expanded into a phenomenon embraced by a range of groups, with its flagship organization, the Congress for the New Urbanism or “CNU,” serving as an all-purpose umbrella under which an eclectic variety of environmental, historic preservation, transportation equity, and other advocates have gathered with an interest in arresting suburban sprawl and improving central city wellbeing.<sup>209</sup> Orfield’s work demonstrates that it is possible to formulate the concept of coalition building without forays into philosophy and psychoanalytic theory. That said, Frug’s discussion of the importance of community building both reinforces and provides additional depth to Orfield’s ideas.

### B. *The Pitfalls of City Making*

Although Frug has used his interdisciplinary methodology to generate some valuable insights and useful proposals, not all of his ideas seem likely to advance his goals. First, his proposal for a regional legislature lacks clarity. On one hand, it is difficult to see how the proposal, on its face, would improve the fragmented metropolitan status quo given the realities of negotiating when there is a substantial imbalance of bargaining power among localities. On the other hand, if one interprets the proposal in a way that leads to improvements, it is difficult to see how the proposal differs from those advocated by the regional

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206. Metropolitan Fiscal Disparities Act, Exec. Sess., § 473F (Minn. 1971); see also *Burnsville v. Onischuk*, 22 N.W.2d 523 (1974) (upholding constitutionality of Metropolitan Fiscal Disparities Act); ORFIELD, *supra* note 6, at 87, 143–44.

207. ORFIELD, *supra* note 6, at 114, 137–39; see generally *id.* at 104–55.

208. *Id.* at 5–6, 8–9, 104–05; see also Margaret Weir, *Coalition Building for Regionalism*, in REFLECTIONS ON REGIONALISM, *supra* note 128, at 139.

209. See DUANY ET AL., *SUBURBAN NATION*, *supra* note 5, at 253–54 (describing founding of CNU).

government advocates from whom he emphatically tries to distinguish himself. Moreover, given the realities of the housing markets, Frug overlooks the New Urbanism movement's potential to cause gentrification and displacement in addition to, if not instead of, community building. Although he thoroughly documents the intellectual dynamics driving middle class residents out of central cities, Frug pays insufficient attention to the ideological and psychological "pull" factors of suburbanization. Finally, he never fully acknowledges how difficult it would be to change the world view of the millions of suburban dwellers he hopes to reform.

### 1. *Regional Legislature*

Frug uses his readings in political, psychoanalytic, and literary theory to generate one of his primary recommendations for reducing local selfishness and permitting decentralized power to coexist with distributional fairness: the establishment of a regional legislature responsible for determining the legal entitlements of local governments, such as how much of their property taxes localities could retain for their own school expenditures or whether they would be required to maintain a certain amount of affordable housing. To ensure that the legislature did not retain more power than would be conducive to fostering public freedom, Frug asserts that its mandate would not go beyond setting such entitlements; municipalities would be left to decide how to carry out duties or allocate benefits. Regional representatives would be elected either on the basis of neighborhood districts or region-wide cumulative voting, and would determine entitlements via "interlocal negotiations."

Because Frug does not spell out his proposal in any greater detail than this, several interpretations are possible. Under any interpretation, the state would have to act to some degree to carry out his proposal; under *Hunter*<sup>210</sup> and its progeny, localities simply cannot agree to form a regional legislature without state authorization.<sup>211</sup> Even if localities had the power to implement such an agreement as a contractual matter, the agreement could not be binding on dissenters without state enforcement. It is unclear, however, whether Frug intends for current entitlements to remain or for the state to step in and remove currently existing entitlements. It also is unclear whether by "negotiations" he literally means that the legislature could take action only by consensus, as is the case in contractual negotiations, or whether, after engaging in debate and compromise, the regional legislators would take action by majority vote, as in the traditional American legislature.

If entitlements remain the same and actions are taken purely by negotiation, the regional legislature would seem to favor those who most benefit from the status quo, since in the absence of consensus the status quo would remain. Frug

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210. 207 U.S. 161 (1907).

211. See *supra* note 134.

concedes that, under current local government law, localities are “entitled to walk away from . . . negotiations whenever it seems in their self-interest to do so.”<sup>212</sup> In the current metropolitan context, therefore, wealthier suburbanites would be the winners, since they could not be compelled to agree to redistributive measures sought by legislators from disadvantaged neighborhoods. Frug probably did not envision this scenario, but the vagueness of his proposal does lend itself to such an interpretation. Even if representatives of “favored quarter” neighborhoods acted altruistically in voting on matters that effectively redistributed wealth from their neighborhoods to less affluent ones, there is a strong likelihood that wealthy constituents might refuse to reelect representatives who “gave too much away.”

If entitlements remain the same and actions are taken by voting, then whether the creation of a regional legislature would ease metropolitan fragmentation or not would depend on the types of coalitions formed by legislators. Myron Orfield’s experiences in the Minnesota legislature provide some insight into how coalitions might form; legislators from central city and inner suburban neighborhoods might be able to outvote legislators from wealthier suburbs, particularly if Orfield is correct in his assertion that such suburbs form only roughly one-quarter of the average metropolis. If this scenario were accurate, implementing a regional legislature empowered to alter entitlements over regionally significant matters such as housing and school finance could improve region-wide equity. Frug’s determined attempts to distance himself from advocates of regional government, however, would seem unwarranted then, since this type of organization—a region-wide body with power to decide matters of regional but not local concern—is precisely the type that traditional regionalists wish to implement.<sup>213</sup>

Briffault suggests a third possible reading of Frug’s proposal—namely, that Frug intended his “interlocal negotiations” (with action taken by consensus, as in the first interpretation) to take place against a background from which all previously granted entitlements were removed. With legislators from the entire economic, ethnic, and racial spectrum of neighborhoods placed in what John Rawls would call their “original position,”<sup>214</sup> there would be more of an incentive to work out mutually acceptable entitlements since the “favored quarter” legislators would not have the preexisting entitlements of being

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212. FRUG, *CITY MAKING*, *supra* note 12, at 9.

213. *See, e.g.*, Briffault, *Boundary Problem*, *supra* note 7, at 1165–67 (advocating “limited regionalism” that, “[r]ather than consolidat[ing] all local government powers and responsibilities at the regional level,” would shift to regional institutions “only those functions necessary for metropolitan governance”); Powell, *supra* note 128, at 220 (advocating system of “federated regionalism” that “gives cities or communities a way to maintain appropriate control of their political and cultural institutions while sharing in regional resources and balancing participants’ concerns”).

214. *See* Briffault, *Boundary Problem*, *supra* note 7, at 1154; JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

permitted to retain all property tax revenues within local boundaries, or being able to retain exclusionary zoning regulations in the event that consensus fails.

As Briffault points out, however, only one entity has the power to remove entitlements: the state, and having the state exercise such power over localities is precisely the sort of centralization that Frug seems at pains to avoid.<sup>215</sup> Additionally, there is the enormous difficulty of determining what, if anything, would constitute an "original position" of municipal entitlements. One locality's lack of rights or positive obligations—not being able to retain all of its property tax revenues, not being able to use exclusionary zoning, having to build affordable housing—are simply the flip side of other metropolitan residents' entitlements—the right to use of other towns' property taxes, to be free from exclusionary zoning, or to have affordable housing in desirable suburbs. Certainly a state government could implement these changes in theory, but doing so in practice would be a politically charged move that would involve a substantial intrusion on local prerogative.

## 2. *New Urbanism*

Based on his concept of community building, which he developed in part from his readings of psychological and philosophical theory, Frug advocates greater implementation of New Urbanist urban planning methods in designing (and redesigning) metropolitan areas. Although Frug's forays from legal theory into the humanities and social sciences make him one of the earliest legal advocates of New Urbanism, and although the movement may have an intuitive appeal, the way its tenets have been followed in practice has sometimes been troubling. Frug alludes to the movement's problematic aspects only in passing; closer scrutiny of some of the New Urbanists' actual projects would have produced a more realistic portrait of New Urbanism's limitations.

Many New Urbanist principles seem eminently sensible. It is hard to fault New Urbanism's emphasis on using architecture to enhance residents' opportunities to interact with one another.<sup>216</sup> New Urbanism's commitment both to

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215. Briffault, *Boundary Problem*, *supra* note 7, at 1154–55. As demonstrated in his advocacy for a regional legislature, Frug skirts this issue by conceiving of the actor that is to implement his proposals as the abstract entity of "local government law." For instance, at one point he states, "local government law could replace this reliance on state power with rules that make intercity negotiation and compromise, rather than state control, the mechanism for curbing local selfishness." FRUG, *CITY MAKING*, *supra* note 12, at 63. Using "local government law" as an abstract proxy for the concrete institutions, such as state legislatures and courts, that actually implement change in that law, he glosses over entirely the entitlement-shifting problem highlighted by Briffault. This problem occurs throughout the book. See, e.g., *id.* at 8, 108 (referring to "local government law's privatized version of local autonomy"; and asserting that a "local government law based on a postmodern subjectivity . . . need not respect the current territorial boundaries of cities and towns"); *infra* note 258 and accompanying text.

216. For example, New Urbanist architects advocate such methods as placing dwelling walls as close as possible to the street edge and including front porches, all to increase residents' chances to interact informally. See *supra* note 117 and accompanying text.

reducing traffic congestion and to promoting alternatives to transportation by car certainly is praiseworthy,<sup>217</sup> and their belief in the importance of public space in municipal design is unassailable.<sup>218</sup>

In practice, however, New Urbanism has demonstrated less promise than would seem likely in the abstract. Although its adherents express genuine interest in reducing metropolitan class segregation, and advocate mixing multiple and single dwellings together and permitting above-garage apartments,<sup>219</sup> those New Urbanist communities that have been created—Kentlands, Maryland; Seaside, Florida; and Disney-sponsored Celebration, Florida, to name a few—tend to be upscale suburbs unaffordable to those of modest means.<sup>220</sup> To some degree, New Urbanism has come to resemble what Professor Vincent Scully has dubbed the “New Suburbanism.”<sup>221</sup> The limitations of New Urbanism seem inherent in the nature of the movement itself. Because New Urbanism advocates a comprehensive reshaping of the metropolitan fabric,<sup>222</sup> and because it is a movement in city planning in addition to individual architecture, its vision is most readily realized where communities are planned and built from the ground up, in formerly undeveloped areas.<sup>223</sup> Except in situations where municipalities are in a position to demolish entire neighborhoods (a position few have been in since the urban renewal days of the 1950s and 60s), newly built New Urbanist

217. The New Urbanist preference for using grid street patterns in residential neighborhoods rather than cul-de-sacs connected to a few main arterial roads is designed to reduce traffic congestion by providing multiple, alternative routes and to encourage mixing of uses in the city. See Duany & Plater-Zyberk, *supra* note 115, at xix; Moule & Polyzoides, *supra* note 117, at xxii. As a means of encouraging people to walk rather than drive, New Urbanist architects also support including sidewalks on all nonarterial streets and protecting pedestrians from moving traffic by permitting on-street parking. See CALTHORPE, METROPOLIS, *supra* 117, at 97; KUNSTLER, HOME FROM NOWHERE, *supra* note 5, at 120, 126–29; Moule & Polyzoides, *supra* note 117, at xxii. One New Urbanist, Peter Calthorpe, is known for making public transit stops the focal point of the communities he plans. See *supra* note 118 and accompanying text.

218. See *supra* note 120 and accompanying text.

219. DUANY ET AL., SUBURBAN NATION, *supra* note 5, at 43–49, 51–52 (advocating that neighborhoods include diverse housing types to serve range of income levels and encouraging use of “granny flats”); CALTHORPE & FULTON, THE REGIONAL CITY, *supra* note 5, at 46–47, 78 (same).

220. KUNSTLER, HOME FROM NOWHERE, *supra* note 5, at 150–52, 191 (noting that Seaside, Florida is a “resort town” by the ocean where lot and house prices have “soared astronomically” since they first went on sale, and that the resale value of homes in Kentlands, Maryland was high relative to home prices in rest of D.C. suburbs); ANDREW ROSS, THE CELEBRATION CHRONICLES: LIFE, LIBERTY, AND THE PURSUIT OF PROPERTY VALUE IN DISNEY’S NEW TOWN 32 (1999) (observing that average price of single-family home in Celebration, Florida was almost twice the median for a single-family home in the surrounding Orlando region).

221. See Vincent Scully, *The Architecture of Community*, in THE NEW URBANISM, *supra* note 114, at 221, 221.

222. Calthorpe, *The Region*, in THE NEW URBANISM, *supra* note 114, at xi.

223. *Id.* at xiv (although advocating that principles of New Urbanism should be applied to all areas in a metropolitan region, also indicating that aspects of New Urbanist communities, such as a “transit- and pedestrian-oriented” design, are more easily implemented in formerly undeveloped areas).

communities tend to be on the edges of metropolitan areas, and thus, by definition, are suburban.

New Urbanist communities also have been inaccessible to lower income residents because the New Urbanist vision itself is grounded in middle class, suburban assumptions. For example, New Urbanists suggest that developers replace cul-de-sacs with grid streets. The cul-de-sac street itself, however, is a phenomenon of the newer, outer suburbs; more often than not, central cities and inner suburbs where lower income residents are concentrated were built on the traditional grid pattern.<sup>224</sup> In addition, the advocacy of front porches and garage apartments presupposes single-family dwellings and lots large enough to contain freestanding outbuildings, elements that would tend to make housing unaffordable to lower income residents. Frug acknowledges only in a single paragraph the essential suburban orientation and potential elitism of New Urbanism, instead devoting far more attention to its perceived promise.<sup>225</sup> A more studied analysis would have made more of a contribution than his largely uncritical support does.

Where advocates have attempted to build lower income housing on New Urbanist principles, they have done so in ways that raise the twin specters of gentrification and displacement. In fairness, proponents of New Urbanism have been sensitive to charges of elitism, and the movement officially supports usage of its principles for "infill" development in central cities. Indeed, the CNU has a Development and Project Implementation Task Force which takes as one of its primary goals "ensur[ing] that development is equitable for a diverse demographic population, particularly in urban areas."<sup>226</sup> One of that task force's initiatives has been trying to examine "the kinds of policies and principles that are succeeding at bringing infill into existing neighborhoods around the country."<sup>227</sup> The initiative's aims include "add[ing] to the discussion of appropriate strategies for avoiding gentrification and displacement."<sup>228</sup> In another effort, CNU, in cooperation with the federal Department of Housing and Urban Development ("HUD"), has developed a set of guidelines for the design of central city housing.<sup>229</sup> HUD has drawn heavily on these guidelines, and on

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224. See DUANY ET AL., *SUBURBAN NATION*, *supra* note 5, at 34 (suggesting that curvilinear and cul-de-sac roads came to predominate in suburbs built in the past fifty years).

225. The paragraph is at FRUG, *CITY MAKING*, *supra* note 12, at 153-54.

226. Congress for the New Urbanism, *Task Forces: Development & Project Implementation Task Force*, at [http://www.cnu.org/aboutcnu/index.cfm?formAction=Development&task\\_force\\_id=2&CFID=1179560&CFTOKEN=45923729](http://www.cnu.org/aboutcnu/index.cfm?formAction=Development&task_force_id=2&CFID=1179560&CFTOKEN=45923729).

227. Congress for the New Urbanism, *Initiatives: Neighborhood Redevelopment Case Studies*, at [http://www.cnu.org/aboutcnu/index.cfm?formAction=initiative\\_detail&initiativeid=9&CFID=1179560&CFTOKEN=45923729](http://www.cnu.org/aboutcnu/index.cfm?formAction=initiative_detail&initiativeid=9&CFID=1179560&CFTOKEN=45923729).

228. *Id.*

229. CONGRESS FOR THE NEW URBANISM & U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *PRINCIPLES FOR INNER CITY NEIGHBORHOOD DESIGN* (2000).

New Urbanism generally, in designing a new public housing renovation program known as HOPE VI.<sup>230</sup>

The HOPE VI program (“HOPE VI”) has two goals: improving the design of public housing developments by applying the tenets of New Urbanism; and including onsite supportive services for public housing residents.<sup>231</sup> HUD implements the program by providing grants to applicants (generally local housing authorities) to help them achieve both elements. The supportive services aspect of HOPE VI seems an obvious benefit to residents of HOPE VI projects; the services typically offered, such as job training and child care,<sup>232</sup> can aid residents in obtaining employment, advancement, and ultimately, more desirable, private-market housing.

The benefits of rebuilding public housing along New Urbanist lines are more ambiguous. According to New Urbanist principles, the typical newer suburb should be more densely packed, yet the typical twentieth-century housing project of barren highrise towers is excessively dense and, according to many, should be replaced by lower density, more interaction-conducive row houses. This is precisely the model that HUD has been favoring with its HOPE VI grants.

Reducing the density per acre of public housing no doubt has its appeal. Three-story townhouses may be less alienating to residents than larger-than-life highrises, and often blend in better with surrounding private-market housing than highrises, reducing the stigma sometimes associated with living “in the projects.” Yet reducing the density of a project presents an enormous problem: It reduces the number of residents that can be housed and use the new supportive services there. This problem could be alleviated somewhat if the overflow of residents were accommodated at nearby developments with similar supportive services. Residents would still be inconvenienced, however, by being uprooted from their homes.<sup>233</sup> In addition, the evidence obtained so far suggests that in

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230. “HOPE” is an acronym for “Housing Opportunities for People Everywhere.” Charles C. Bohl, *New Urbanism and the City: Potential, Applications and Implications for Distressed Inner-City Neighborhoods*, 11 HOUS. POL’Y DEBATE 761, 762 (2000). When created by Congress in 1992, HOPE VI was formally titled the “Urban Revitalization Demonstration Program.” See Jerry J. Salama, *The Redevelopment of Distressed Public Housing: Early Results from HOPE VI Projects in Atlanta, Chicago, and San Antonio*, 10 HOUS. POL’Y DEBATE 95, 95–96 (1999). The program was provisional for its first few years, but in October 1988, Congress made it permanent through the Quality Housing and Work Responsibility Act. *Id.* at 96–97.

231. ARTHUR J. NAPARSTEK ET AL., HOPE VI: COMMUNITY BUILDING MAKES A DIFFERENCE 2 (2000). A third, implicit component of HOPE VI is the dispersal of minority populations from inner-city ghettos throughout metropolitan areas. A dispersal strategy is inherent in the HOPE VI program because the program contemplates the replacement of high-density public housing structures with low-density, New Urbanist-inspired housing, and intends those public housing residents for whom there is no room in the new public housing to find homes on the private market with the help of Section 8 housing vouchers. Salama, *supra* note 230, at 97–98, 105 n.12 (noting that dispersal of very poor public housing residents is apparent goal of HOPE VI).

232. NAPARSTEK ET AL., *supra* note 231, at 2, 5.

233. A recent survey of residents forced to move when HUD closed four highly distressed

many cases, overflow residents are simply diverted to the private market, and at best given Section 8 housing vouchers, thus depriving them of the benefit of HOPE VI's supportive services and undoubtedly displacing many people entirely from their neighborhoods.<sup>234</sup>

The fear of such displacement caused residents of Chicago's Cabrini-Green housing project to file suit in 1996 to stop the city's plan to knock down the development's notorious highrise towers and replace them with more aesthetically appealing New Urbanist-style lowrise townhouses. Residents were concerned not only that the new townhouses would not accommodate them all, but also that the city might change its plans and sell the land to be used for market-rate housing—a plan that would be very profitable for the city since the Cabrini-Green area lies within a short distance of Chicago's downtown Loop district. Even if the townhouses were built for the use of lower income residents as planned, unless the city expressly protected the townhouses as public housing, they probably would fall prey to the forces of gentrification and shortly become unaffordable to those of modest income.<sup>235</sup>

Another potential problem with the HOPE VI-New Urbanist approach to aiding lower income residents is that it focuses architectural and social service energies on existing (or remaining) inner-city populations rather than on dispersing concentrations of poor residents and helping them relocate to

developments and given Section 8 vouchers to assist their relocation revealed that, despite the poor conditions at their former homes, less than half of the residents stated that they were "happy to move." David P. Varady & Carole C. Walker, *Vouchering Out Distressed Subsidized Developments: Does Moving Lead to Improvements in Housing and Neighborhood Conditions?*, 11 HOUS. POL'Y DEBATE 115, 133 (2000).

234. See, e.g., Chester Hartman, Letter to the Editor, San Francisco Exodus, N.Y. TIMES, August 9, 2001, at A20 (noting the large number of low income housing projects in San Francisco torn down under Hope VI, and stating that, while "[t]he goal [of Hope VI] in principle is laudable. . . in city after city, San Francisco being only one example, the stock of low-rent housing is severely reduced in the process"). Hartman is the Executive Director of the Poverty and Race Research Action Council. See also Norman Lockman, *City's Displaced Poor Become County's Worry*, THE NEWS J. (Wilmington, Delaware), Aug. 15, 1999, at <http://www.delawareonline.com/newsjournal/opinion/lockman/08151999> (describing Wilmington, Delaware Housing Authority's plan to use HOPE VI grant to demolish 267 apartments, of which 193 were still in use, and replace them with ninety-five owner-occupied homes "made available to a broad income range" and eighty public housing rental units; and noting that at best, 113 families will likely be dispersed to "other public and Section 8 housing") (internal quotation marks omitted); Salama, *supra* note 230, at 105 n.12 (noting that, without new affordable housing construction, "households displaced by the demolition of public housing may face difficulties in finding alternative housing on the private market using Section 8 assistance").

235. One reason such gentrification is likely is that New Urbanist design is purposely quaintly traditional, a style that middle-class city dwellers often favor. See, e.g., Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 823-25 (1993) (arguing that affluent residents during the 1980s had a preference for "quaintness and subtle historical eclecticism" as an architectural style, and that gentrification was enhanced "as much wealthier and better educated residents began desiring neighborhoods with proper 'historical ambience'" and displaced former, poorer residents of such neighborhoods). In addition, the new dwellings' proximity to downtown would make them worth more, making them unaffordable to poorer residents.

wealthier communities. Advocates of “mobility” rather than “place-based” strategies argue that the key to fighting poverty is reducing the hyper-segregation of poor minorities in central cities<sup>236</sup> by dispersing such residents around the metropolitan region. James Rosenbaum and Stefanie DeLuca, for example, recently studied Chicago’s Gautreaux program,<sup>237</sup> which between 1976 and 1998 helped thousands of inner city, low income black families relocate to new neighborhoods, both elsewhere within the city and in the outlying suburbs. They found that although the families participating were receiving the most common welfare benefit, Aid to Families with Dependent Children (“AFDC”), at an equal rate at the start of their assignment to new homes, the families assigned to neighborhoods with more educated neighbors “were much less likely to be on AFDC at the end of the period” studied.<sup>238</sup> Thus, they concluded that “residential mobility programs have great potential for freeing people” from the negative influences of neighborhoods with high concentrations of poverty,<sup>239</sup> and “helping them to become self-sufficient.”<sup>240</sup> Work such as Rosenbaum and DeLuca’s suggests that New Urbanists and their followers may be misdirected in placing so much reliance on place-based design changes to transform inner city neighborhoods rather than focusing on mobility strategies.<sup>241</sup> As those scholars put it, “demolishing high-rise public housing may have minimal benefits if families merely move from high-rise vertical ghettos to less dense horizontal ghettos.”<sup>242</sup>

It may be tempting to discount potential problems with New Urbanism because of the obvious good intentions of its advocates, who plainly are fervently interested in helping to improve American society. We should not

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236. For a discussion of hyper-segregation, see generally MASSEY & DENTON, *supra* note 84.

237. The Gautreaux program resulted from a 1976 United States Supreme Court consent decree in a lawsuit brought on behalf of Chicago public housing residents against the Chicago Housing Authority and the United States Department of Housing and Urban Development, charging that the agencies had administered Chicago’s public housing in a racially discriminatory manner. See *Hills v. Gautreaux*, 425 U.S. 284 (1976).

238. Rosenbaum & DeLuca, *supra* note 201, at 4.

239. In support of their references to these negative influences, Rosenbaum and DeLuca cite William Julius Wilson’s well known work, *The Truly Disadvantaged*. Rosenbaum & DeLuca, *supra* note 201, at 1 & n.3, 5; see WILSON, *supra* note 198.

240. Rosenbaum & DeLuca, *supra* note 201, at 5.

241. It is true, as noted above, that the HOPE VI program implicitly contemplates a dispersal strategy, in the sense that those residents displaced from public housing due to HOPE VI-engendered downsizing by definition will have to leave the immediate area, and such displacement could be considered a form of mobility. However, HOPE VI places no emphasis on ensuring that residents displaced from public housing are able to use their Section 8 vouchers to relocate in more educated neighborhoods, rather than being forced to find homes in neighborhoods just as starved for social capital as the projects they came from. Indeed, a recent study of residents “vouchered out” of four condemned projects suggests that, unless offered extensive counseling like that available to Gautreaux families, residents will tend to move to homes in the same or nearby areas, and will not move to areas where they would be in the economic, racial, or ethnic minority. See Varady & Walker, *supra* note 233, at 115, 117, 154.

242. Rosenbaum & DeLuca, *supra* note 201, at 2.

forgot, however, that at least some of the architects and planners responsible for the now disdained public housing towers themselves had more than mere economic ambitions for their structures. For example, in a 1985 interview, Cabrini-Green Architect Lawrence Amstadter explained that “[w]e thought we were doing . . . a lot of innovative design things, like putting open galleries on each floor so kids could play right in front of their apartments. We didn’t force the kids throwing each other off them.”<sup>243</sup> Even the modernist architect Le Corbusier, reviled by some as a planning “Rasputin” because his “Radiant City” model was transmuted into monolithic glass skyscrapers and concrete slab housing projects,<sup>244</sup> appears to have based his advocacy of the tower-in-the-park building, at least to some degree, on utopian ideals.<sup>245</sup>

Why the gap between ideal and reality? First, as Keith Aoki has observed of Le Corbusier and Frank Lloyd Wright, “in the translation from ‘high’ architectural discourse to the ‘low’ marketplace, much of the progressive social vision underlying these schemes was lost.”<sup>246</sup> The same process may well be taking place in the case of New Urbanism. Second, there is a limit to how much design alone can change people’s lives; as David Harvey suggests, it is simplistic to suppose “that proper design and architectural qualities will be the saving grace not only of American cities but of social, economic, and political life in general.”<sup>247</sup> Advocates of New Urbanism should take care not to rely excessively on design changes where evidence indicates that improved access to social services and/or deconcentration of poverty may be at least as important in improving the lives of lower income metropolitan dwellers.

### 3. *Suburbanization Pull Factors*

As discussed in Part Two A.1. *supra*, Frug’s focus on the intellectual causes of metropolitan fragmentation provides a much needed supplement to the economic, social, and political approaches others have taken. Although he provides a penetrating analysis as to why cities have been accorded insufficient powers and why individuals have acted in ways that foster metropolitan fragmentation, his discussion is incomplete. In particular, despite the fact that he has provided persuasive ideological and psychological explanations for local

243. Blair Kamin, *The Latest Chapter in the Cabrini-Green Saga: Can Public Housing Be Reinvented?*, 185 ARCHITECTURAL RECORD 84, 84 (Feb. 1997).

244. HALL, *supra* note 1, at 5, 227–40; see also CALTHORPE, in THE NEW URBANISM, *supra* note 114, at xv (arguing that Modernist principles espoused by Le Corbusier and Frank Lloyd Wright have “compromised” towns’ “ability to evolve into vital communities”).

245. See Aoki, *supra* note 235, at 728–31 (describing Le Corbusier’s vision and noting that “[a]t the core of [his] unrealized utopia [ ] was a . . . faith in technology’s simultaneously creative and destructive power to transform society and the physical environment in the name of the ultimate social good”).

246. *Id.* at 735.

247. David Harvey, *The New Urbanism and the Communitarian Trap*, 1 HARV. DESIGN MAGAZINE 2, Winter/Spring (1997), available at [http://www.gsd.harvard.edu/research/publications/hdm/back\\_issues/1harvey.html](http://www.gsd.harvard.edu/research/publications/hdm/back_issues/1harvey.html).

selfishness and for why metropolitan residents tend to avoid cities, he has overlooked the intellectual reasons that draw city residents to the suburbs.

Others have noted missing elements in Frug's discussion of metropolitan fragmentation. For example, in commenting on the article that became Part III of *City Making*, "The Geography of Community," Vicki Been pointed out that a major reason wealthier metropolitan residents move from central cities to outer suburbs, and then attempt to discourage lower income residents from moving in, is that poorer residents tend to spend more municipal funds in the form of services than they pay in taxes.<sup>248</sup> Merely combating suburbanites' prejudices will not eradicate measures such as exclusionary zoning, Been suggests, when these residents support such measures for economic reasons as well.<sup>249</sup>

I agree with Been that Frug's analysis would have been more persuasive had he dug more deeply into the causes of metropolitan fragmentation. However, I believe that Been's analysis also stops short, in that neither she nor Frug acknowledge the ideological influences that play a significant role in getting city residents to migrate to the suburbs. Many other scholars have addressed the issue of how fiscal zoning has contributed to suburban sprawl and income segregation; what distinguishes Frug, as discussed in Part Two A.1. *supra*, is his attention to the often neglected questions of intellectual influences on metropolitan areas. Thus, it is less disappointing that *City Making* is not an in-depth economic analysis than that it only partially addresses the intellectual undercurrents behind metropolitan fragmentation. Specifically, it discusses several "push" factors behind suburban sprawl but no "pull" factors. Trying to conquer suburban sprawl and regional income segregation without a complete understanding of its causes obviously would be problematic; it is therefore important to examine fully the range of factors that lead so many Americans to aspire to life in suburban subdivisions.<sup>250</sup>

Americans today love nature. Every summer millions spend their vacations in mountains, at seashores, and at lakes, hiking, camping, fishing, and swimming. People enjoy the outdoors for varying reasons: for its beauty, its quiet, its fresh air, and other qualities. Many would live in rural areas permanently if they could, but cannot because their jobs are too far away. Others would miss the cultural attractions of being within commuting distance of a major city. Suburbs were invented to resolve this dilemma.<sup>251</sup> For those who

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248. Vicki Been, *Comment on Professor Jerry Frug's The Geography of Community*, 48 STAN. L. REV. 1109, 1110-11 (1996).

249. *Id.* at 1111 ("Fiscal motivations warrant more attention than Professor Frug gives them" because it is unclear that the solutions he offers "[fit] the problem of fiscal motivations.").

250. As Constance Perin has mused, "[c]omprehending the many meanings in American society of the single-family-detached house seems to me prerequisite to remedies for reducing discrimination and making new departures for improving both the availability and quality of living environments." PERIN, *supra* note 151, at x.

251. See JACKSON, *supra* note 3 (discussing the first suburbs in America); FISHMAN, *supra* note 3 (same).

prefer rural surroundings, a single-family home with a patch of lawn, a backyard, trees and flowers offers the next best thing: their own little piece of Eden. For those who appreciate nature and culture equally, suburbs are the perfect compromise as they are neither fully urban nor fully rural. The judges that upheld early twentieth-century zoning ordinances preserving single-family-only neighborhoods—the epitome of the suburban milieu—did so in language that indicated their reverence for the “pastoral ideal” of wilderness tempered by civilization,<sup>252</sup> an ideal held by many Americans since at least Thomas Jefferson’s time.<sup>253</sup> Americans’ enduring preference for suburbs suggests that the pastoral ideal still holds sway.<sup>254</sup>

To the extent that pastoral ideology still influences metropolitan residents, they are unlikely to warm to any plan that ignores their deep-seated preference for the “bourgeois utopia” of a detached house with a yard.<sup>255</sup> As in the case of the ideology of autonomy and the fear of otherness, it would behoove progressive urban reformers to be aware of and take into consideration the pastoral ideal when envisioning new approaches. Frug would have provided a greater service had he done more than dismissing the yearning for a bourgeois utopia as mere “sentimental pastoralism.”<sup>256</sup>

#### 4. *Underestimating the Difficulty of Changing Consciousness*

Although Frug admirably gives appropriate weight to the significance of suburbanites’ world view in perpetuating metropolitan divisions, he seems to underestimate the ease with which that consciousness may be changed.

A central thesis of his book is that it is possible for metropolitan dwellers to enjoy both public freedom—which requires decentralization—and social

252. Lees, *supra* note 157, at 421–24.

253. See LEO MARX, *THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* 73–75 (1964).

254. See, e.g., Emily Talen, *Sense of Community and Neighbourhood Form: An Assessment of the Social Doctrine of New Urbanism*, 36 *URBAN STUDIES* 1361, 1373 (1999) (noting that “New Urbanist ideology challenges longstanding suburban ideals, two centuries in the making, which are still widespread”); Peter Gordon & Harry W. Richardson, *A Critique of New Urbanism*, available at <http://rcf.usc.edu/~pgordon/urbanism.html> (stating that, according to Fannie Mae surveys over the years, “[r]egardless of income, race or current tenure status, 75–80 percent of households would prefer to live in a single family home with a private yard”).

255. See FISHMAN, *supra* note 3.

256. See FRUG, *CITY MAKING*, *supra* note 12, at 123–24. Although the concept of “sentimental pastoralism” may sound redolent of ideology, Frug appears to mean it negatively. He borrows the term from Leo Marx, who distinguishes sentimental pastoralism, which is characterized by a simplistic rejection of the city, from the pastoral ideal, which is “imaginative and complex.” MARX, *supra* note 253, at 5. Although Frug dismisses the widespread societal yearning for a house with a yard as simplistic sentimentalism, he also notes that “most [of his] family vacations have been taken in the same house in Westport, Massachusetts,” a suburban/rural town. FRUG, *CITY MAKING*, *supra* note 12, at 101; see Massachusetts Department of Housing and Community Development, Westport Bristol County, at <http://www.state.ma.us/dhcd/iprofile/334.htm> (describing Westport as “a town of farms, of beautiful scenery, of people who live from the water, of small businesses and of homes”).

justice—which necessitates some mechanism to prevent selfish behavior by more powerful localities vis à vis weaker ones. The typical proponent of regionalism argues that some exercise of state power is necessary; Frug contends that “local government law could replace this reliance on state power with rules that make intercity negotiation and compromise, rather than state control, the mechanism for curbing local selfishness.”<sup>257</sup> Although Frug obscures the identity of the actor that would “replace” the current “rules” by making the subject of his sentence simply the abstraction “local government law,”<sup>258</sup> that actor clearly would have to be the state legislature. In other words, a prerequisite for his proposed reform (the regional legislature) is state intervention.<sup>259</sup>

Yet as he himself has argued, state imposed solutions that are inconsistent with the ideology of autonomy can run into great difficulty: “[n]either state policy nor suburban consciousness is easy to change, as the difficulties in implementing *Mt. Laurel* demonstrate.”<sup>260</sup> Since many state legislators themselves are residents of neighborhoods benefiting from exclusion, they too are likely to buy into the ideology of autonomy and may refuse to enact reforms in the first place. As Briffault observed, there is a “‘chicken and egg’ conundrum at the heart” of efforts to rein in local selfishness through regionalization: “A metropolitan government is unlikely to be adopted without some prior sense of metropolitan community, but a sense of metropolitan community is unlikely to exist without some prior political definition of the area, that is, some metropolitan government.”<sup>261</sup>

To be fair, Frug does recognize to some degree the circularity of his arguments, noting that “[n]ot only is the experience of interdependence a prerequisite to changing legal rules but, paradoxically, changing legal rules is a prerequisite to creating the experience of interdependence.”<sup>262</sup> Beyond stating that “legal doctrine must recognize and break through this paradoxical structure,”<sup>263</sup> however, he offers little guidance as to how to do so.

As a matter of common sense, the only way to proceed, other than settling for the status quo, would be to alternate doctrinal change with intellectual change, in the hope that advances in each feed advances in the other.<sup>264</sup> In choosing which step to take first, reformers need to compare the feasibility of

257. FRUG, *CITY MAKING*, *supra* note 12, at 63.

258. As previously noted, Frug frequently implements this glossing device. *See supra* note 215.

259. *See supra* note 210 and accompanying text.

260. Frug, *Decentering Decentralization*, *supra* note 13, at 285 n.163; *see supra* note 154 and accompanying text.

261. Briffault, *Boundary Problem*, *supra* note 7, at 1169.

262. FRUG, *CITY MAKING*, *supra* note 12, at 80–81.

263. *Id.* at 81.

264. *See, e.g.*, Briffault, *Boundary Problem*, *supra* note 7, at 1169–70 (“Metropolitan community consciousness and metropolitan governance structures will have to develop in tandem, each reinforcing the other, each making the other more possible.”).

changing minds and hearts with that of obtaining the political majority necessary to enact progressive legislation. If Myron Orfield's research is illustrative, focusing on legislative change initially may be the most feasible approach. Given the issues Frug himself raises by focusing on the significance of world view, his discussion should have addressed such issues, and would have been substantially more satisfying had he done so.

#### CONCLUSION

As Vicki Been observed recently, all of Frug's work "is incredibly rich, drawing upon literatures and disciplines that all of us aspire to follow, but regrettably few of us do."<sup>265</sup> *City Making* is no exception to this assessment. Yet it is important to ask whether Frug's exploration of terrain that most local government and urban policy scholars skirt serves his goal of aiding "those interested in exploring alternatives to an America built on the separation of different kinds of people."<sup>266</sup> Is *City Making* more than a utopian dream, more than an ivory tower intellectual's desultory musings? Does its interdisciplinary methodology advance the debate in local government law and urban policy, or merely provide decoration for an already self-sufficient text?

While not a flawless work, *City Making* stands up quite well to these questions. By according an unusual amount of attention to the role of ideology and psychological factors in the lives of local residents, Frug highlights the significant influence that intellectual forces have on metropolitan development. Furthermore, although it is obviously possible to arrive at the conviction that progressive metropolitan change will require coalition building between central city residents and sprawl-weary suburban dwellers without consulting the work of philosophers and psychological theorists, Frug's examination of nonlegal, non-political science sources enriches the coalition building argument, and at a minimum, provides an added reason to pursue Orfield's "Metropolitics." In addition, his consultation of postmodern theory leads him to suggest regionwide semiproportional voting, a proposal that could hold promise in improving representational effectiveness for minorities, to the extent that their dispersion increases. Because Frug's interdisciplinary methodology makes contributions in all of these ways, his extralegal consultations can hardly be deemed "superfluous" or mere pretentious "clutter."<sup>267</sup>

Frug's missteps—his unrealistic proposal for a regional legislature, his insufficient attention to the potential pitfalls of New Urbanism, his underestimation of the difficulty of changing the suburban consciousness and of the ideological nature of the pastoral ideal—appear to result from over-optimism about the ease of converting theory into practice, and about the human capacity

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265. Been, *supra* note 248, at 1109.

266. FRUG, *CITY MAKING*, *supra* note 12, at 13.

267. See *supra* notes 34–35 and accompanying text.

for altruism. Yet even the flawed portions of *City Making* are thought provoking, and the more solid portions, as discussed above, provide urban policy progressives with blueprints for real, transformative change. Given the extent to which income, ethnic, and racial division and inequality persist today, the fact that Frug's catholic methodology generates any such contribution is something for which to be thankful.

