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Article

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As a matter of federal constitutional law, what are the maximal powers of self-governance that can be extended to tightly knit communities living in largely homogeneous enclaves? This Article suggests that under the federal Constitution such communities can be accorded far greater powers to govern themselves than is generally thought.

To better appreciate what is at stake, consider two vignettes. The religious group known as the Rajneesh appear to have believed that incorporating a city was necessary for the practice of their religion. In their view, attaining spiritual perfection demanded separation from general society, so as to be freed from society's influences, and extensive powers of self-government, which the Rajneesh deemed to be a core aspect of worship. The group consequently purchased a 64,229 acre parcel of land

in rural Wasco County, Oregon and took the steps required under state law to incorporate as a municipality about two thousand acres of the parcel.[1] Shortly thereafter a federal court in *Oregon v. City of Rajneeshpuram*[2] determined that the incorporation of a city inhabited solely by, communally owned by, and controlled by members of a particular religion would violate the Establishment Clause.[3]

Consider next the experience of residents of public housing owned by the Chicago Housing Authority. In response to rampant criminal activity, the Housing Authority adopted a policy authorizing its police to search apartments in public housing, without first obtaining warrants and in the absence of exigent circumstances, after the occurrence of certain types of violent incidents (such as random gunfire).[4] Although eighteen of nineteen local advisory council presidents (who themselves were public housing residents) and five thousand other housing residents supported the policy and stated that, in their view, it did not violate their constitutional rights,[5] a federal district court in *Pratt v. Chicago Housing Authority*[6] found that the policy likely violated the Fourth Amendment and enjoined implementation of the policy.[7]

The cases of the Rajneesh and the Chicago public housing residents raise an important question that arises in numerous contexts: To what extent can communities govern themselves, or allow themselves to be governed, as they believe to be necessary?[8] This issue can be broken down into two parts: as a normative matter, to what extent should communities be permitted to govern themselves, and as a descriptive matter, to what extent can such communities govern themselves consistent with the Constitution?

With respect to the normative question, elsewhere I have critiqued the *Rajneeshpuram* court's holding and argued that liberal political theory compels the conclusion that communities like the Rajneesh, whose members believe self-governance to be necessary for their full self-actualization, be permitted to opt out of general society and govern themselves subject

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1. *See* Janice L. Sperow, Note, *Rajneeshpuram: Religion Incorporated*, 36 HASTINGS L.J. 917, 926-27 (1985).

2. 598 F. Supp. 1208 (D. Or. 1984).

3. *Id.* at 1211.

4. *See* Pratt v. Chicago Hous. Auth., 155 F.R.D. 177, 178 (N.D. Ill. 1994).

5. *See id.* at 180.

6. 848 F. Supp. 792 (N.D. Ill. 1994).

7. *Id.* at 796.

8. This issue also arises, for example, in the law governing residential associations, municipalities, Native Americans, and in much First Amendment jurisprudence. *See* Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1063-89 (1998).

to only minimal constraints.[9] In a similar spirit, Professors Tracy Meares and Dan Kahan recently have sharply criticized the *Pratt* court's decision insofar as it may have interfered with the residents' preference to be governed by the Housing Authority's search policy.[10]

This Article does not further pursue these normative arguments (or similar arguments on behalf of other communities), but instead focuses on how self-governance of the sort sought by the Rajneesh and the Chicago public housing residents can be implemented in a manner consistent with the Constitution. It is important to direct attention to issues of implementation even if one does not believe that the normative question has been definitively resolved because the view that contemporary constitutional doctrines bar such self-governance has led commentators largely to ignore the normative question of whether such self-governance is desirable. By showing that the Constitution is not necessarily a bar to such self-governance, this Article hopes to reinvigorate deliberation concerning the normative question.

One of two strategies is typically taken to show that a normatively attractive policy is constitutional. The preferred approach is to show that the activity in question is fully consistent with applicable precedent. Although frequently viable, this first method does not always hold much promise, as would appear to be the case with respect to the Rajneesh and the Chicago public housing residents. The fallback approach is to advocate abandoning contemporary constitutional doctrines that appear to stand in the way of community self-governance.[11]

Another method is available, however. Rather than signaling the need to scuttle the contemporary doctrinal rubric, a doctrine's poor fit with a community's needs may indicate that although the activity at issue is properly deemed unconstitutional in most locales, it is constitutional in the community at issue. The third method, in short, is to identify a self-governance activity as a legitimate "geographical constitutional nonuniformity."[12]

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9. *See id.* at 1132-34.

10. *See* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1167-69 (1998) (attacking the *Pratt* court's assumptions that the public housing residents had little power in relation to the law-enforcement community and that the residents systematically undervalued threats to their individual liberty).

11. *See, e.g.*, *id.* at 1153, 1171 (arguing in favor of "the imminent death of certain prominent doctrines of criminal procedure," including the Fourth Amendment doctrines that underlied the *Pratt* holding, on the grounds that these doctrines do a "disserv[ice] in today's social and political context" and create "practical embarrassments").

12. As discussed *infra* Part I, "geographical constitutional nonuniformity" refers to the phenomenon that a single constitutional provision may be held to proscribe a particular governmental activity in most places but not in all. In short, constitutional provisions may have differing applications across varying locales.

This third approach generally is overlooked because many consider unthinkable the possibility that federal constitutional requirements and proscriptions might vary from place to place. The district court in the *Pratt* decision, for example, considered geographically nonuniform constitutional requirements the first step in gutting everyone's constitutional rights. As the *Pratt* court noted, "The erosion of the rights of people on the other side of town will ultimately undermine the rights of each of us."[13] Similarly, in *Poodry v. Tonawanda Band of Seneca Indians*,[14] in response to the argument that due process protections of Native Americans against tribal governments are different from the due process protections of non-Native Americans in general American society, the United States Court of Appeals for the Second Circuit recently replied that "there is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations."[15]

Notwithstanding this widely accepted view, geographical nonuniformity of constitutional requirements and proscriptions is a mainstay of American constitutionalism. Contrary to what the Constitution has been construed to require or proscribe in most jurisdictions, governments in some locales are constitutionally permitted to do such things as: flatly ban political speeches by citizens,[16] impose prior restraints with regard to petitions to government officials,[17] prohibit legislators from using vulgar speech in public to uphold the legislature's dignity,[18] and disallow defendants at risk of incarceration from having counsel.[19] Of relevance to the *Pratt* court's decision, millions of American citizens have voluntarily elected to live in locales where the government is constitutionally permitted to conduct warrantless searches absent exigent circumstances.[20]

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13. Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 796 (N.D. Ill. 1994).

14. 85 F.3d 874 (2d Cir. 1996).

15. *Id.* at 900-01.

16. *See* Greer v. Spock, 424 U.S. 828 (1976) (holding that military regulations banning political speeches by citizens on military bases were constitutional); *see also infra* notes 127-32 and accompanying text (discussing *Spock*).

17. *See* Brown v. Glines, 444 U.S. 348, 353-58 (1980) (holding that military regulations requiring approval of petitions before circulation do not violate the First Amendment); *see also infra* notes 85-89 and accompanying text (discussing *Glines*).

18. *See* Brandon v. Tribal Council for the Confederated Tribes, 18 Indian L. Rep. 6139, 6149 (Grande Ronde Tribal Ct. 1991) (holding that a tribal provision prohibiting council members from using vulgarity in public did not violate free speech guarantees under the Indian Civil Rights Act); *see also infra* notes 151-53 and accompanying text (discussing *Brandon*).

19. *See* Middendorf v. Henry, 425 U.S. 25 (1976) (holding that military personnel have no right to counsel in summary court martial proceedings); *see also infra* notes 187-99 and accompanying text (discussing *Henry*).

20. Military police on military installations have this power, *see* United States v. McCarthy, 38 M.J. 398, 401-03 (C.M.A. 1993), and approximately 3.5 million persons live on military installations, *see* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 361 (117th ed. 1997).

Illuminating to the *Rajneeshpuram* court's holding, there are locales in this country that not only are communally owned and controlled by members of a particular religion, but where citizenship in the locale is deemed by the local government as being both civil and religious in nature.[21] And flatly contrary to the Second Circuit's conclusion, the due process, equal protection, and other "basic rights" of Native Americans against tribal governments *do* differ from the basic rights enjoyed by non-Native Americans against the federal, state, and local governments.[22]

To be clear, I do not mean to suggest that every community's wants should be indulged by means of constitutional nonuniformity; undoubtedly, a poor fit between constitutional doctrine and a community's desires sometimes, if not frequently, is a reflection of the fact that the community's will should *not* be respected. But when there are persuasive normative reasons to respect a community desire that appears discordant with contemporary constitutional doctrine, accommodating the community's will can be accomplished by means other than discarding the generally applicable doctrinal rubric. In short, a poor fit between constitutional doctrine and community desires can mean one of three things: that the community's desires need reshaping, that contemporary constitutional doctrine needs reshaping, *or* that constitutional nonuniformity is appropriate.

The interests of comprehensiveness demand that all three possibilities receive careful consideration. But courts and commentators often overlook the third option of constitutional nonuniformity due to widespread unawareness that it is even a possibility. This Article strives to be a first step in correcting this oversight. The Article assembles and analyzes the case law upholding geographical constitutional nonuniformity and shows how geographical constitutional nonuniformity can be utilized to grant certain communities greater powers of self-governance than are generally thought possible. The Article's aim is not to argue that any particular community's desires should be accommodated, but to show that the Constitution is not an absolute bar to accommodation. Careful analysis of the case law suggests that constitutional nonuniformities are created so as to allow the norm-generation that itself is indispensable to creating and sustaining communities that are deemed to be significant to the interests of general society. The Article also seeks to show that awareness of geographical

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21. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 332 (3d ed. 1998) (noting that Pueblo tribal government and religious authorities are wholly intertwined). The existence of established churches in Indian country is instructive with regard to our society's capability for tolerating divergent practices within discrete enclaves, but it is not directly doctrinally analogous to *Rajneeshpuram* insofar as the Establishment Clause does not apply in Indian country and neither the ICRA nor any other federal statute bars Indian tribes from establishing churches. *See infra* note 32.

22. *See infra* notes 40-54 and accompanying text.

constitutional nonuniformity brings enhanced analytical clarity to much constitutional case law.

The Article is in five Parts. The first shows that courts and commentators systematically ignore, or are hostile to, geographical constitutional nonuniformity. The next two Parts attempt to show that, notwithstanding this conventional wisdom, geographical nonuniformity indeed is a well-entrenched part of our country's constitutional jurisprudence. Part II describes the two institutional settings in which geographical nonuniformity is created: ordinary federal courts and Native American tribal courts. This part also discusses the three judicial interpretive methods that are employed to generate geographical constitutional nonuniformity: Tailoring, Re-standardizing, and Re-targeting. Part III surveys many instances in which courts have used geographical constitutional nonuniformity to enable communities to endure in circumstances in which these communities might have been destroyed by the application of constitutional doctrines developed for general society. Part IV illustrates how geographical constitutional nonuniformity could be deployed to solve several contemporary issues in community self-governance and identifies the parameters that determine whether utilization of nonuniformity is constitutionally appropriate. Part IV also seeks to show that awareness of geographical nonuniformity provides clarity concerning the appropriate scope of much case law. Part V provides a brief conclusion.

I. The Conventional Wisdom Concerning Geographical Constitutional Nonuniformity

This Article employs the term "geographical constitutional nonuniformity" to refer to variations across geographical locations as to what activities are permitted, required, or proscribed under the federal Constitution. (For ease of reference, the Article sometimes refers to this simply as "geographical nonuniformity.") Geographical nonuniformity is not inconsistent with the maxim that like cases should be decided alike. Rather, geographical nonuniformity reflects a determination that the presence of a homogeneous community with special needs in a locale can be a legally significant factor such that two cases identical except for the locus of the activities are not "alike" and accordingly may be treated differently under the Constitution.

Little judicial or scholarly attention has been directed to geographical constitutional nonuniformity as such.[23] When nonuniformity is given

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23. Bob Ellickson is perhaps the only commentator who has explicitly contemplated geographical constitutional nonuniformity. *See* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1219, 1219-22 (1996) (asserting that the Constitution should be construed to allow cities to "spatially differentiate their street

consideration, moreover, it for the most part has been summarily dismissed as repugnant to the very notion of constitutionalism. The *Pratt* court's dismissive characterization of geographical nonuniformity, that "[t]he erosion of the rights of people on the other side of town will ultimately undermine the rights of each of us,"[24] and the Second Circuit's dicta in *Poodry*, that "there is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations,"[25] are two examples. Justices Brennan and Stevens likewise have suggested that although "[c]ommunities vary . . . in many respects . . . , such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. . . . It is, after all, a national Constitution we are expounding."[26] Similarly, in the words of Larry Alexander and Frederick Schauer, nonuniformity is problematic because "a constitution exist[s] partly because of the value of uniform decisions on issues as to which people have divergent substantive views and personal agendas."[27]

Most of the time, however, unawareness of, or hostility to, geographical constitutional nonuniformity is an unspoken assumption rather than a forthrightly discussed proposition. Consider the words of the New Jersey Supreme Court in the context of state constitutional jurisprudence, for example:

> [W]e proceed cautiously before declaring rights under our state Constitution that differ significantly from those enumerated by the United States Supreme Court in its interpretation of the federal Constitution. Our caution emanates, in part, from our recognition of the general advisability in a federal system of uniform interpretation of identical constitutional provisions.[28]

If a court is reluctant to differentially construe language that emanates from different legal sources—state and federal constitutions—it follows *a fortiori* that the court must believe that the language from a single legal source—the federal Constitution—does not permit differential interpretations. For this

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policies" in such a way that behavior such as panhandling could be constitutionally prohibited in some zones while permitted in other areas). Writing with respect to nonconstitutional law, Gerald Neuman has addressed—and sharply criticized—what he has labeled as "anomalous zones" where ordinary norms are suspended. *See* Gerald N. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1124-28 (1996) (concluding that suspension of a norm in limited geographical areas undermines the norm elsewhere).

24. Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 797 (N.D. Ill. 1994).

25. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 900-01 (2d Cir. 1996).

26. Jacobellis v. Ohio, 378 U.S. 184, 194-95 (1964) (Brennan, J., joined by Goldberg, J.), *quoted in* Smith v. United States, 431 U.S. 291, 312-13 n.5 (1977) (Stevens, J., dissenting).

27. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1376 (1997).

28. Right to Choose v. Byrne, 450 A.2d 925, 932 (N.J. 1982) (citations omitted).

reason, this Article's documentation of the existence of geographical nonuniformity in the interpretation of federal constitutional provisions undercuts the very logic of the New Jersey Supreme Court's reasoning.

Unqualified hostility to geographical nonuniformity also runs through the writings of the legal scholars who have sought to define the scope of the Exceptions Clause, the constitutional provision that grants Congress the power to make exceptions to the Supreme Court's appellate jurisdiction.[29] One camp of scholars expressly grounds its position on unqualified hostility to constitutional nonuniformity. These scholars posit that as a matter of constitutional law any exceptions created by Congress cannot destroy the "essential role of the Supreme Court in the constitutional plan,"[30] which includes ensuring the uniformity of federal law. Nonuniformity is antithetical to the very concept of constitutionalism in the view of these scholars:

> The Constitution makes us one nation. It is the symbol of our shared purposes. If interpretation of that overriding document, which manifests our agreement on long term associational values, varies from state to state, respect for and confidence in the document is undermined. The nature of our governmental structure and its implications for all citizens becomes indistinct. Uncertainty and discontent proliferate.[31]

A second group of Exceptions Clause scholars argues that, as a matter of raw power, Congress can make virtually any exception to the Court's appellate jurisdiction it desires.[32] But the second group shares the first group's normative perspective that Congress ought not to create exceptions on the grounds that exceptions to the Court's appellate jurisdiction would lead to "differing interpretation of constitutional norms . . . which would

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29. *See* U.S. CONST. art. III, § 2 (stating that the Supreme Court has "appellate Jurisdiction . . . with such Exceptions . . . as the Congress shall make").

30. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

31. Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 941 (1982). Although Ratner has phrased his argument in terms of nonuniformity "from state to state," *id.*, the logic of his argument compels the conclusion that constitutionalism by its nature requires uniformity because the values Ratner identifies as being metonymic with our Constitution would appear to be undermined regardless of the governmental level at which nonuniformity were permitted.

32. *See, e.g.*, Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038-39 (1982); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 908-10 (1984); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965). According to Gunther, the only limitations on Congress's powers arise from constitutional constraints that are "external" to the Exceptions Clause such as equal protection, which would disallow exceptions on the basis of "racially (and otherwise arbitrarily) discriminatory devices." Gunther, *supra*, at 921.

subvert the value of uniformity."[33] Both camps of Exceptions Clause scholars, in short, are unqualifiedly hostile to constitutional nonuniformity.

Perhaps the best way to appreciate the legal community's consistent oversight of geographical constitutional nonuniformity, however, is by observing the countless times courts have failed even to consider the possibility of utilizing geographical nonuniformity to resolve difficult problems concerning community self-governance. The district courts in the *Rajneeshpuram* and *Pratt* decisions neglected to consider geographical nonuniformity as a means of honoring the Rajneesh community's desire to govern their own city and the Chicago public housing residents' apparent support of warrantless searches to fight criminal gangs. The Supreme Court failed to consider the use of geographical nonuniformity in the case of *Board of Education of Kiryas Joel Village School District v. Grumet*,[34] in which it struck down the state of New York's creation of a special school district for the handicapped children of Kiryas Joel, a village composed entirely of members of the Satmar Hasidic sect.[35] And the Illinois Supreme Court overlooked geographical nonuniformity in *City of Chicago v. Morales*[36] when it struck down a gang antiloitering law on the grounds that it was void for vagueness.[37] Lack of appreciation for geographical nonuniformity also is well illustrated by the converse instances in which courts have sought to make general jurisprudential points in reliance on case law concerning special locales where nonuniformity had been held to be important. The Supreme Court was a victim of this very confusion in *Employment Division, Department of Human Resources v. Smith*,[38] the notorious case that largely rewrote our country's free exercise jurisprudence.[39] All these cases will be analyzed through the lens of geographical constitutional nonuniformity in Part IV.

II. Methods by Which Geographical Constitutional Nonuniformity Is Created

Under contemporary American law, geographical constitutional nonuniformity is created in ordinary federal courts. A second type of

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33. Gunther, *supra* note 32, at 911; *see also* Bator, *supra* note 32, at 1039 (arguing that the Constitution is predicated on the notion that there should be "uniform and authoritative rules of federal law").

34. 512 U.S. 687 (1994).

35. *Id.* at 690 (holding that creating a special school district violated the Establishment Clause because such an act is "tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality towards religion").

36. 687 N.E.2d 53 (Ill. 1997), *cert. granted*, 118 S. Ct. 1510 (1998).

37. *Id.* at 63.

38. 494 U.S. 872 (1990).

39. *Id.* at 885 (holding that heightened scrutiny is inapplicable in free exercise of religion challenges despite previous applications of strict scrutiny to laws that impacted free exercise); *see also infra* note 338.

instructive nonuniformity, which might be labeled quasi-constitutional, arises from special locale-based tribunals that are free to construe constitution-like statutory provisions without federal court review. Within each of these two institutional settings, judges create nonuniformity by employing one or more of three tools of legal analysis.

A. The Two Institutional Settings

The first institutional setting within which nonuniformity is created is ordinary federal courts. The bulk of nonuniformity explored in this Article emerges from this setting.

The second institutional setting for the creation of geographical nonuniformity (albeit of a quasi-constitutional character) is special locale-based tribunals in Indian country[40] over which ordinary federal courts have virtually no judicial review.[41] Although most federal constitutional provisions do not apply to tribal governments,[42] Congress has imposed statutory obligations on tribal governments in the Indian Civil Rights Act of 1968 (ICRA)[43] that, with only a few exceptions, track verbatim the language of the Bill of Rights.[44] For example, under the ICRA "[n]o Indian tribe in exercising powers of self-government shall . . . make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances,"[45] "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law,"[46] or undertake "unreasonable search and seizures."[47] As explained later in this subpart, the distinction between constitutional provisions and statutory provisions

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40. "Indian country" is a statutory term denoting places of tribal jurisdiction. *See* 18 U.S.C. § 1151(a) (1994).

41. *See infra* note 48.

42. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (recognizing that tribes, as sovereigns existing before the Constitution, historically have been exempt from the constraints of constitutional provisions aimed at limiting federal and state authority); Talton v. Mayes, 163 U.S. 376, 384 (1896) (explaining that the Fifth Amendment does not apply to local legislation of the Cherokee nation); Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134-35 (10th Cir. 1959) (stating that the First Amendment did not apply in a challenge to a tribal council's ban on the use of peyote in religious ceremonies); CANBY, *supra* note 21, at 72, 327-30 (explaining that the Bill of Rights and the Fourteenth Amendment have traditionally been held to be inapplicable to tribal governments).

43. 25 U.S.C. §§ 1301-1303 (1994).

44. *See id.* § 1302; *Martinez*, 436 U.S. at 62-63. The Bill of Rights provisions not statutorily applied against tribes are the prohibition concerning the establishment of religion as well as the requirements of jury trials in civil cases and appointment of counsel for indigents in criminal cases. *See Martinez*, 436 U.S. at 63.

45. 25 U.S.C. § 1302(1).

46. *Id.* § 1302(8).

47. *Id.* § 1302(2).

like those of the ICRA is of no consequence with respect to present purposes.

Tribal courts are in effect the exclusive arbiters of the meaning of the ICRA's protections. Ordinary federal courts have only very limited subject matter jurisdiction to hear claims under the ICRA, with the result that virtually all ICRA claims are litigated in tribal courts.[48]

Furthermore, tribal courts need not construe the ICRA's provisions as federal courts have interpreted the ICRA's sister terms in the federal Constitution, but instead may interpret due process, equal protection, and the like in light of tribal needs, values, customs, and traditions.[49] Indeed, *each tribe* is allowed to develop its own interpretation of the ICRA's terms in light of its unique needs, values, customs, and traditions.[50] As a consequence of these circumstances, the tribal courts have doctrinally

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48. Under *Martinez*, federal court subject matter jurisdiction over ICRA claims exists only when the plaintiff is in detention. *See Martinez*, 436 U.S. at 70. As a result, virtually all claims under the ICRA must be heard in tribal courts. Furthermore, apart from circumstances in which a federal court has subject matter jurisdiction due to a plaintiff's detention, appellate review by federal courts is not available; the federal courts of appeals lack jurisdiction over ICRA claims as the lower federal courts are without subject matter jurisdiction, and no special statute granting appellate jurisdiction exists. *See* 28 U.S.C. § 1291 (1994) (setting forth the limited jurisdiction of the federal courts of appeals). Likewise, despite the fact that the ICRA is federal law, no jurisdictional statutes appear to grant the Supreme Court jurisdiction to review tribal court decisions that are not already subject to federal appellate court review. *See id.* §§ 1253, 1254, 1257-1259. In any event, the question of whether the Supreme Court can review such tribal decisions has never been presented, and since *Martinez* the Court has not heard any challenges to tribal courts' interpretations of the ICRA's substantive provisions.

In *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), the Tenth Circuit created a narrow exception to *Martinez*'s doctrine, holding that a federal court can hear an ICRA claim brought by a non-Indian if no tribal court forum exists. *See id.* at 685. Other courts have refused to follow *Dry Creek*, *see, e.g.*, Whiteco Metrocom Div. of Whiteco Indus. v. Yankton Sioux Tribe, 902 F. Supp. 199, 202 (D.S.D. 1995) (questioning *Dry Creek* and distinguishing *Dry Creek* from the case at bar), and the Tenth Circuit itself has narrowed *Dry Creek* to its facts, *see* Enterprise Management Consultants v. United States, 883 F.2d 890, 892 (10th Cir. 1989). Hence, virtually any ICRA claim not brought by a plaintiff in detention must be brought in the tribal courts. Furthermore, as an empirical matter, very few ICRA claims in which the plaintiff is in detention are brought in federal courts. A Westlaw search of the district court cases reported only five attempts to bring habeas claims under the ICRA in federal district court since *Martinez* was decided in 1978. Search of Westlaw, DCT Database (Feb. 4, 1999) (search for records with a date after 1977 and with "Indian Civil Rights Act" in the same paragraph as either "Habeas" or "1303").

In short, because of the limited jurisdiction of federal trial and appellate courts over ICRA claims, the federal court system hears only a tiny fraction of all claims brought under the ICRA. As a result, following the Supreme Court's holding in *Martinez*, nearly all ICRA jurisprudence has been created by tribal courts.

49. *See Martinez*, 436 U.S. at 71 (suggesting that questions of interpretation under the ICRA "will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts"); Tom v. Sutton, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976) (noting that the ICRA provisions should be interpreted "with due regard for the historical, governmental and cultural values of an Indian tribe. As a result, these [provisions] are not always given the same meaning as they have come to represent under the United States Constitution").

50. *See, e.g.*, Rave v. Reynolds, 22 Indian L. Rep. 6137, 6139 (Winnebago Tribal Ct. 1995) (noting that other tribes' holdings are "not binding on this court").

developed the meaning of virtually all of the ICRA's substantive provisions. Further, *each tribe's* courts have been free to develop their own notions of due process,[51] equal protection,[52] search and seizure,[53] and the like in light of their tribe's unique needs and values.

The ICRA thus constitutes a regime of geographical quasi-constitutional nonuniformity in which each tribal community is its own authoritative interpreter of federal provisions that impose requirements of due process, equal protection, and other provisions analogous to the Bill of Rights on tribal governments. What makes it "quasi-constitutional" is that the tribal courts construe federal statutory rather than federal constitutional provisions. Tribal court ICRA jurisprudence nonetheless is still instructive to this Article's present purposes because, as we shall see,[54] tribal courts, for the most part, create nonuniformities by means of the same doctrinal techniques (with only one exception) that federal courts utilize when they create constitutional nonuniformities.[55] The tribal court case law accordingly helps to show the operation and benefits of these doctrinal techniques for creating nonuniformity.

B. Three Judicial Tools for Creating Nonuniformity

Courts employ three tools to create constitutional nonuniformity. Clarifying each tool is important for several reasons. For one, each is capable of producing a distinct range of nonuniform outcomes. Relatedly,

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51. *See, e.g.*, Johns v. Leupp Schs., Inc., 22 Indian L. Rep. 6039, 6039-40 (Navajo 1995) (construing due process's notice requirement in light of the Navajo custom of encouraging input from many perspectives before making governmental decisions).

52. *See, e.g.*, Daly v. United States, 483 F.2d 700, 705 (8th Cir. 1973) (upholding a blood quantum requirement to hold office in the Crow Creek Sioux tribe, which was higher than that required for membership in the tribe, on the grounds that the equal protection clause of the ICRA differs from that of the Fourteenth Amendment because of the tribe's "sufficient cultural interest"); Bennett v. Navajo Bd. of Election Supervisors, 18 Indian L. Rep. 6009, 6012 (Navajo 1990) (recognizing Navajo tradition and custom as relevant factors in construing equal protection provisions under Navajo law).

53. *See, e.g.*, Hopi Tribe v. Kahe, 21 Indian L. Rep. 6079, 6079-80 (Hopi Tribal Ct. 1994) (holding that the probable cause standard for unreasonable search and seizures is to be determined by reference to consideration unique to the Hopi Tribe); *see also* text accompanying notes 142-150 (discussing *Kahe*).

54. *See infra* notes 65-77 and accompanying text.

55. In fact, tribal court experience with the ICRA might be even more instructive. As I hope to discuss in a future article, the Exceptions Clause might provide a doctrinal method for creating special locale-based tribunals for non-Native Americans that could be empowered to construe federal constitutional provisions independently from the Supreme Court's interpretation of these provisions. Such special locale-based tribunals thus would be functionally equivalent to the ICRA regime insofar as both tribunals would have the power to authoritatively interpret provisions such as due process or equal protection unconstrained by precedent or review. In light of this, it would matter not at all that the tribal courts construe statutory rather than constitutional provisions. What would be relevant are the lessons the ICRA teaches about the benefits and operation of a legal regime in which select communities are permitted to interpret constitutional language through the lens of their community's distinctive values and needs. But, alas, that project must await another day.

each poses distinctive potential costs. Finally, to date not all tools have been invoked by ordinary federal courts.

1. Background.—The three tools for creating nonuniformity can best be appreciated in relation to a simple model of constitutional adjudication. Understanding the model, in turn, requires appreciation of the distinction between "rules" and "standards."[56] "Standards" are legal edicts that articulate the antecedent triggering the legal consequent in abstractions that refer to the ultimate policy or goal animating the law.[57] "Rules" are legal edicts that articulate the antecedent by reference to concrete factual particulars or by language that is otherwise determinate within a community.[58] All other things being equal, rules require less of an interpretive act than do standards in determining if the antecedent triggering the legal consequent has been satisfied.[59]

With these concepts in mind, we now can turn to the model. Virtually all constitutional provisions, particularly those outside Articles I and II, take the form of standards that require active interpretation to identify concretely the actions that are required, permitted, or proscribed in particular circumstances. The interpretive process can be usefully conceptualized as involving two or three steps. First, the constitutional text is translated to an abstract "Goal" that, generally, is somewhat more particularized than the text itself. Second, courts will create a "Legal Test" that is intended to determine whether the identified Goal is met. The test usually includes one or more standards and sometimes also includes

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56. There is a long lineage of scholarly literature that discusses rules and standards. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 104 n.35 (1991) (suggesting that the distinction commonly made in legal literature between rules and standards cannot accurately be captured merely by reference to specificity and vagueness); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (offering an economic rationale as to whether certain legal edicts should be promulgated as rules or standards); Mark D. Rosen, *What Has Happened to the Common Law? Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1162, 1162-63 (discussing themes in American jurisprudence on the question of whether "legal statements should be expressed in terms of fact-specific rules or abstract principles"); Kathleen M. Sullivan, *Foreward: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 57, 57-69 (1992) (describing the "rules and standards debate in a nutshell").

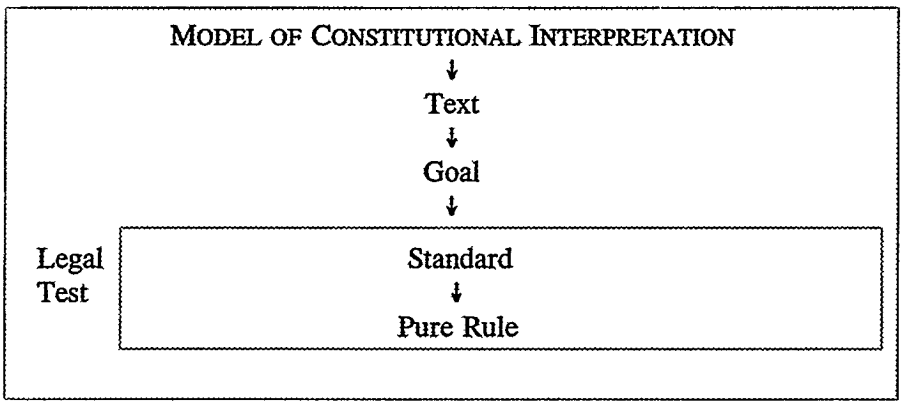
57. *See* Sullivan, *supra* note 56, at 58, 57-69 ("A legal directive is 'standard'-like when it tends to collapse decisionmaking back into a direct application of the background principles or policy to a fact situation.").

58. *See* SCHAUER, *supra* note 56, at 23 (recognizing that rules contain a consequent that prescribes what will happen when the conditions specified in the factual predicate occur); Sullivan, *supra* note 56, at 58, 57-69 ("A legal directive is 'rule'-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts.").

59. *See* Sullivan, *supra* note 56, at 63, 57-69 ("[R]ules promote economies for the legal decisionmaker by minimizing the elaborate, time-consuming, and repetitive application of background principles to facts.").

identifiable factual predicates that, in effect, are rule-subcomponents of the Legal Test. (For ease of exposition, I will refer to any Legal Test containing standards as a "Standard," even if the test also contains rule-subcomponents). The third step in the development of constitutional doctrine, though one not ordinarily taken, is the evolution of the Legal Test over time from a Standard to a "Pure Rule." In a Pure Rule, the antecedents triggering the legal consequent are all clearly and uncontroversially identifiable predicates that require no interpretive act at all.[60]

This simple model of constitutional interpretation can be graphically depicted as follows:



As one proceeds down the chart the constitutional provision's requirements become more particularized.

For example, the Eighth Amendment proscribes "cruel and unusual punishment."[61] But, as a concrete matter, what activities does this require and prohibit? Does it, for example, impose duties on prison guards to protect prisoners from other inmates? In *Farmer v. Brennan*[62] the Supreme Court identified as part of the Eighth Amendment's Goal that there be "humane conditions of confinement."[63] The Court in that case

60. Although a Pure Rule so defined likely is an ideal type that does not fully exist in reality, it represents the end-point in the model's continuum that serves a heuristic function and accordingly is useful to speak about. For an illuminating discussion concerning ideal types, see Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 5 n.21 (1997) (suggesting that although ideal types do not exist in reality, they can be "approached or approximated").

61. U.S. CONST. amend. VIII.

62. 511 U.S. 825 (1994).

63. *Id.* at 832.

developed a Legal Test to determine when this Goal is violated: when there has been a "prison official's deliberate indifference to a substantial risk of serious harm to an inmate."[64] In the language of the model, *Farmer*'s Legal Test is properly called a Standard, for it is far from a wholly self-executing rule with clear factual predicates; "deliberate indifference," "substantial risk," and "serious harm" themselves each are standards. Nonetheless, the Standard more concretely identifies required and proscribed activities than does the Goal and, hence, is a step in making more particularized what activities the Constitution requires.

2. The Three Tools.—Each tool for creating nonuniformity corresponds to a different step in the model of Constitutional interpretation presented above.

A court employs the first tool when it adopts the Supreme Court's Standard, but applies it in a highly context-sensitive manner that reflects appreciation of a discrete community's distinctive needs or values. Such context-specific applications of the Standard may well require or proscribe actions that vary from what is required or proscribed in other localities. Let this tool be called "Tailoring." An illustrative example of Tailoring can be found in *Rave v. Reynolds*,[65] in which a tribal court determined that due process's requirement of notice was satisfied in a Native American community by a method not deemed sufficient in most other places. The court held that "notice by publication or posting in a very small, geographically compressed community . . . may sometimes afford better notice than individualized mailed notices."[66] Similarly, the Supreme Court has held that the ordinary First Amendment Standard justifies prior restraints on Air Force bases because of the military community's compelling interest to maintain discipline.[67] As these two cases indicate, Tailoring has been employed by courts in both institutional contexts.

Courts employ the second judicial tool to create nonuniformity when they adopt the Supreme Court's statement of the constitutional Goal but reject the Supreme Court's Standard with respect to a discrete community. Call this method "Re-standardizing." For example, in *Hopi Tribe v. Lonewolf Scott*,[68] the Hopi tribal court accepted that the Goal of due

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64. *Id.* at 828.

65. 23 Indian L. Rep. 6150 (Winn. Sup. Ct. 1996).

66. *Id.* at 6169.

67. *See* Brown v. Glines, 444 U.S. 348, 353-58 (1980); *see also infra* notes 85-91 and accompanying text (discussing *Glines*). Permitting prior restraints runs counter to ordinary First Amendment jurisprudence. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559, 556-59 (1976) ("The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.").

68. 14 Indian L. Rep. 6001 (Hopi Tribal Ct. 1986).

process's void-for-vagueness doctrine is to ensure that persons have fair notice of what conduct is criminally sanctionable.[69] But instead of deploying the ordinary Standard—an objective test that looks to the mere "possibility of discriminatory enforcement" and lack of notice[70]—the court applied a subjective test and analyzed how the Native American community in question understood the ordinance and how the tribal authorities had applied it.[71]

Re-standardizing also has been employed by ordinary federal courts. For example, at issue in *Weiss v. United States*[72] was whether military judges are constitutionally required to have fixed terms of office.[73] The Supreme Court embraced the widely understood Goal that the "basic requirement of due process" is "a fair trial in a fair tribunal,"[74] but rejected the Standard ordinarily employed to determine whether due process is satisfied. Concluding that the due process balancing framework established in *Mathews v. Eldridge*[75] was inapplicable to the military context, the Court instead adopted a different Standard for the military. Under it, the Legal Test was "whether the factors militating in favor of [a fixed term of office] are so extraordinarily weighty as to overcome the balance struck by Congress."[76] Applying this new Standard, the Court ultimately found that, although due process ordinarily requires that judges have fixed terms, fixed terms are not constitutionally required in military courts.[77]

Courts employ the third tool for creating nonuniformity when they discard the Goal identified by the Supreme Court as animating the constitutional principle and replace it. Call this "Re-targeting." An example of Re-targeting can be seen in *Downey v. Bigman*,[78] in which the Navajo

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69. *Id.* at 6005.

70. Gentile v. State Bar, 501 U.S. 1030, 1082 (1991) (O'Connor, J., concurring); *see also id.* at 1076-78.

71. *See Lonewolf*, 14 Indian L. Rep. at 6005.

72. 510 U.S. 163 (1994).

73. *Id.* at 165.

74. *Id.* at 178.

75. 424 U.S. 319 (1976).

76. *Weiss*, 510 U.S. at 177-78; *see also* Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986) (citing the need for deference to military standards of conduct and applying a far more lenient Standard than the then-applicable *Sherbert v. Verner*, 374 U.S. 398, 406-08 (1963), Standard to a First Amendment challenge to regulations prohibiting the wearing of a yarmulke); Rostker v. Goldberg, 453 U.S. 57, 67, 67-70 (1981) (holding that "when it acts in the area of military affairs. . . . Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context," citing the need for deference, and refusing to apply the generally applicable equal protection standard).

77. *See Weiss*, 510 U.S. at 178 (finding that "although a fixed term of office is a traditional component of the Anglo-American civilian judicial system, it has never been a part of the military justice tradition").

78. 22 Indian L. Rep. 6145 (Navajo 1995).

Supreme Court decided that the Goal of the jury right was not only to preserve *litigants'* rights, but also to advance the tribal *community's* interest in "participatory democracy," that is, participation in law-making and law-application.[79] This represents a Re-targeting because the Supreme Court's stated Goal behind Sixth and Seventh Amendment jury rights concerns the rights of the litigant and the integrity of the legal system, not the rights of jurors to participate in government.[80] Re-targeting of the jury right led the tribal court to create a new jury procedure whereby the jury was empowered to direct questions to witnesses.[81] To date, Re-targeting only has been invoked in the institutional context of the tribal courts.[82]

To summarize, the three tools for creating nonuniformity can be mapped onto the model of constitutional interpretation as follows: "Tailoring" is situated above the "Pure Rule" in the chart because there can be no Tailoring of a Pure Rule; legal edicts that define antecedents triggering the legal consequent in perfectly self-executable factual predicates leave no room for Tailoring.[83]

As mentioned above, the three judicial tools for creating nonuniformity have not been used in both institutional settings. The interaction between institutional setting and available tools can be depicted as follows:

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79. *Id.* at 6146.

80. *See, e.g.*, Lewis v. United States, 518 U.S. 322, 335 (1996) (Kennedy, J., concurring) ("The primary purpose of the jury in our legal system is to stand between the accused and the powers of the State."); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge."); Colgrove v. Battin, 413 U.S. 149, 157 (1973) ("[T]he purpose of the jury trial in criminal cases [is] to prevent government oppression and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues . . . ." (citation omitted)).

One doctrinal consequence of not conceptualizing the jury right as including the community's right to participate in government via the jury is that peremptory challenges on the basis of gender and race have been struck down as violative of defendants' equal protection rights rather than potential jurors' Sixth or Seventh Amendment rights. *See* Batson v. Kentucky, 476 U.S. 79, 86, 97-98 (1986) (noting that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure" and applying this logic to strike down racially based peremptory challenges); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145-46 (1994) (relying on *Batson*'s logic to strike down peremptory challenges based on gender). Interestingly, Akhil Amar has argued that Sixth and Seventh Amendment jury rights historically were conceptualized as including jurors' rights to participate in politics, *see* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1187 (1991), an approach that was overlooked by the United States Supreme Court but that animated the Navajo Supreme Court's holding in *Downey*.

81. *Downey*, 22 Indian L. Rep. at 6146.

82. In a future work I hope to examine the question of whether Re-targeting can ever be appropriate outside the tribal court context. For now, it suffices merely to note the universe of doctrinal tools for creating nonuniformity.

83. *See supra* note 58.

MODEL OF CONSTITUTIONAL INTERPRETATION		TOOLS FOR CREATING NONUNIFORMITY
Text ↓ Goal	→	*Re-targeting*
↓ Standard	→	*Re-standardizing*
↓ Pure Rule		*Tailoring*

Judicial Tools

Institutional Setting	Tailoring	Re-standardizing	Re-targeting
Ordinary courts	✓	✓	Not to date
Tribal courts	✓	✓	✓

3. Comparing the Three Tools.—Of the three tools, Re-targeting has the potential for creating the most radical departures from ordinary constitutional requirements. After all, both Tailoring and Re-standardizing accept the Goal identified by the Court as representing the animating force behind the constitutional provision. What drives Tailoring and Re-standardizing is simply the view that realizing the Goal in the context at hand requires a deviation from behaviors that ordinarily are constitutionally required, permitted, or proscribed. Re-targeting, by contrast, reformulates the Goal as currently understood by the Supreme Court with respect to the discrete community and thereby broadens the range of possible nonuniformity.

Nevertheless, Tailoring and Re-standardizing still have the potential to create significant nonuniformity. This potential can be most dramatically illustrated by considering Tailoring, the method most limited in its potential for generating deviations from ordinary constitutionalism on account of the fact that it involves the smallest rejection of general

precedent.[84] The magnitude of nonuniformity that Tailoring can produce depends on the character of the Standard and on the extent to which a court is willing to Tailor that Standard to meet the needs of a specific community. If the Standard itself contains broad standards and the court does a highly context-sensitive analysis, Tailoring can produce breathtaking nonuniformity.

For example, the Supreme Court in *Brown v. Glines*[85] employed Tailoring in deciding that prior restraints within military enclaves do not violate the First Amendment. At issue was the constitutionality of Air Force regulations that required service persons to obtain supervisory approval before distributing petitions.[86] The Court adopted the ordinary First Amendment Standard and explained why the regulations in question satisfied it. The regulations "protect a substantial government interest unrelated to the suppression of free expression," said the Court.[87] Notably, the substantial government interest was highly contextualized to the military: inculcating "'a respect for duty and a discipline'" that "ensure[s] that [soldiers] always are capable of performing their mission promptly and reliably."[88] Furthermore, the Court explained that the regulations met the second element of the ordinary free speech standard because they "restrict speech no more than is reasonably necessary to protect the substantial government interest."[89]

The two essentials to the holding in *Glines* thus were that the ordinary First Amendment Standard contains a standard ("substantial government interest") and that the Court utilized a highly community-specific application of the Standard.[90] In fact, the Court defined the substantial government interest in the military context in a manner that completely cut against what is generally understood to be the core First Amendment value of protecting the exchange of political expression[91] when it held that the military's need for the inculcation of "duty" and "discipline" justifies censorship of ideas that challenge patriotism and orthodoxy. For the same

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84. By "rejection" I mean a determination that the ordinary teachings of case law are not applicable to the context at hand, not a determination that the case law as decided upon its facts was incorrect.

85. 444 U.S. 348 (1980).

86. *Id.* at 349-50 (citing Air Force Reg. 30-1(19) (1977); Air Force Reg. 30-1 (9) (1971); Air Force Reg. 35-15(3)(a) (1970)).

87. *Id.* at 354.

88. *Id.* at 354 (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)).

89. *Id.* at 355.

90. *See id.* at 354-56.

91. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); Roth v. United States, 354 U.S. 476, 484 (1957) (noting that the First Amendment provides protection for speech and press to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

reasons the Court, in an earlier case, upheld the punishment of a military doctor opposed to the Viet Nam War who told African-American soldiers why, in his view, they should not voluntarily go to combat.[92] The substantial government interest *in the context of the military* thus has been the basis for upholding regulations in the military context that sharply undercut the protections afforded by the First Amendment in general society. In short, as illustrated by these cases in the military context, the highly context-specific use of Tailoring can generate profound geographical nonuniformity. And this only underscores the range of potential nonuniformities insofar as Re-standardizing and Re-targeting allow for even more radical departures from ordinary constitutional requirements than does Tailoring.

III. Geographical Constitutional Nonuniformity in the Aid of Community: The Case Law

Courts have created geographical constitutional nonuniformity by means of Tailoring, Re-standardizing, and Re-targeting. The case law suggests that two conditions typically are present when courts create geographical constitutional nonuniformity. First, nonuniformity is deemed to be necessary to permit the creation or preservation of the norms that constitute the particular community. Second, general society has significant interests in the particular community's existence. This Part documents some of the instances in which courts have utilized geographical constitutional nonuniformity in the aid of community.

A. Nonuniformity to Accommodate the Values of Different Communities Across the Country: The Community Standards Doctrine in Obscenity Cases

The community standards doctrine is a paradigmatic example of the use of Tailoring to create geographical constitutional nonuniformity. By design and in effect it shapes constitutional requirements to the needs and values of particular communities.

The community standards doctrine is part of the First Amendment law of obscenity. "Obscene" material receives no First Amendment protection.[93] Material is "obscene" if, taken as a whole, it (1) "appeals to the prurient interest," (2) "depicts or describes" sexual conduct in "a patently offensive way," and (3) "lacks serious literary, artistic, political, or scientific value."[94] The first two prongs of the obscenity test are

92. *See* Parker v. Levy, 417 U.S. 733, 737 (1974).
93. *See* Roth v. United States, 354 U.S. 476, 485 (1957).
94. Miller v. California, 413 U.S. 15, 24 (1973).

determined on the basis of "community standards," meaning that a "juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes."[95] In this respect the community standards doctrine is an exemplar of Tailoring: It creates constitutional nonuniformity on the basis of geography by tailoring the particularized requirements of constitutional Standards ("prurient interest" and "patently offensive") to the community in question.

It is noteworthy that in adopting the community standards doctrine the Supreme Court specifically rejected the position that obscenity should be determined on the basis of a single, national standard.[96] A national standard is inappropriate, said the Court, because

> [i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. *People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.*[97]

Courts have recognized that geographical constitutional nonuniformity is the natural result of the community standards doctrine. The Sixth Circuit has noted that "material may be proscribed in one community but not in another" as a matter of constitutional law.[98] Likewise, the Fifth Circuit has noted that the doctrine's point is to "permit different levels of obscenity regulation in such diverse communities as [rural] Kerrville and [metropolitan] Houston, Texas."[99] And the Supreme Court has acknowledged that the doctrine "'may well result in material being proscribed as obscene in one community but not in another.'"[100] This nonuniformity is the inevitable byproduct of accommodating different communities:

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95. Hamling v. United States, 418 U.S. 87, 104 (1974). The Court has not required as a constitutional matter that community standards be determined on the basis of a fixed geographical area. *See id.* States, however, are permitted to "impose a geographic limit on the determination of community standards by defining the area from which the jury could be selected in an obscenity case." Smith v. United States, 431 U.S. 291, 303 (1977); *see also infra* notes 237-47 and accompanying text.

96. *See Hamling*, 418 U.S. at 106 ("[W]hen the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard . . . ." (brackets in original) (quoting Jacobellis v. Ohio, 378 U.S. 184, 200-01 (1964) (Warren, C.J., dissenting))).

97. *Miller*, 413 U.S. at 32-33 (emphasis added) (citations and footnote omitted).

98. United States v. Peraino, 645 F.2d 548, 551 n.1 (6th Cir. 1981).

99. Hoover v. Byrd, 801 F.2d 740, 742 (5th Cir. 1986).

100. *Hamling*, 418 U.S. at 107 (quoting *Jacobellis*, 378 U.S. at 200 (Warren, C.J., dissenting)); *see also* United States v. Linetsky, 533 F.2d 192, 201 (5th Cir. 1976) (rejecting the argument that "there be some recognizable uniformity of decision throughout this Fifth Circuit" and holding irrelevant the fact that materials in this case were "far less explicit and less graphic" than materials held not to be obscene in another case).

"'[C]ommunities throughout the Nation are in fact diverse, and it must be remembered that . . . the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.'"[101] In short, federal courts have held that preserving local community culture is important and have understood that not permitting geographical constitutional nonuniformity may undermine local community culture.

In practice, the community standards doctrine has tailored the First Amendment's obscenity Standard to meet the needs of both morally liberal and conservative communities. *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*[102] well illustrates the former. In a nonjury trial the district court took into account the community mores of New York City and found that although the materials at issue were "'unpleasant, uncouth, tawdry and undeniably pornographic,'" they nonetheless were "'not patently offensive'" in view of New York City norms.[103] On appeal, the Second Circuit affirmed the dismissal, noting that the trial court's determination that the materials were not "patently offensive" to New York City's community standards was "in accordance with the 'present critical point in the compromise between candor and shame at which the community may have arrived here and now.'"[104] Judge Thomas Meskill's concurring opinion underscores the fact that the community standards doctrine results in efficacious Tailoring. Judge Meskill expressed dismay at the notion that the pornographic material would not be "patently offensive" to New York City community standards:

> New York City may be the most sophisticated and cosmopolitan community in the nation, but I cannot imagine its residents to be indifferent to what I witnessed in the screening room. If these articles are acceptable to and tolerated by the average member of the community, I wonder if any form of pornography can be lawfully seized . . . . Measured against the community standards with which I am familiar, these articles are obscene; they offend my sense of decency and insult the standards of the community that I know.[105]

Notably, however, notwithstanding these strong sentiments, Judge Meskill ultimately deferred to the judgment of the district court because of its superior knowledge of the relevant community:

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101. *Hamling*, 418 U.S. at 107 (quoting *Jacobellis*, 378 U.S. at 200-01 (Warren, C.J., dissenting)).

102. 709 F.2d 132 (2d Cir. 1983).

103. *Id.* at 132, 137 (Meskill, J., concurring in the result).

104. *Id.* at 137 (quoting United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913) (L. Hand, J.)).

105. *Id.* at 138 (Meskill, J., concurring in the result).

> However, I am not a resident of nor as well acquainted with New York City as is [the district court judge] . . . . Had this case originated in the District of Connecticut, in a community whose standards are familiar to me, I would not hesitate to reverse; but it did not. I reluctantly concur.[106]

Illustrative of Tailoring to accommodate conservative communities is the Seventh Circuit case of *United States v. Langford*.[107] The defendant in *Langford* operated a photography laboratory in Wisconsin and was accused of sending obscene materials through the mail to parties in New York City and Philadelphia.[108] At issue on appeal was whether the district court erred in instructing the jury to apply the community standards of the sending jurisdiction, that is, Wisconsin, rather than the receiving jurisdictions.[109] In upholding the conviction, the Seventh Circuit ruled that sending jurisdictions have an interest in ensuring that they "not become the platform and a staging center for the sale and/or the distribution for sale of obscene materials. . . . [C]itizens of Wisconsin cannot be required to accede to the community standards of New York, Minnesota or Pennsylvania merely because Wisconsin is the sending jurisdiction."[110] In other words, Eastern liberal morals do not trump Wisconsin's Midwestern sensibilities with regard to activities that take place within Wisconsin. As the Seventh Circuit noted, "The use of local community standards reinforces the right of citizens to keep their respective communities free of obscene materials by allowing the residents of a community to decide for themselves what will or will not be considered obscene in their local community."[111]

B. Nonuniformity to Accommodate the Needs of the Military Community

Although constitutional provisions are applicable to the military,[112] "the different character of the military community and of the military mission requires a different application of [constitutional] protections."[113] "[F]undamental necessit[ies]" of the military "may render permissible within the military that which would be constitutionally impermissible

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106. *Id.* (Meskill, J., concurring in the result).
107. 688 F.2d 1088 (7th Cir. 1982).
108. *Id.* at 1089.
109. *Id.* at 1091.
110. *Id.* at 1095-96.
111. *Id.* at 1096.
112. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 67 (1981).
113. Parker v. Levy, 417 U.S. 733, 759 (1974); *see also* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.").

outside it."[114] Thus, in contrast to the free speech protections afforded civilians, in the military context the Court has upheld the ban of political speeches by civilians,[115] the imposition of prior restraints,[116] and the punishment of speech that is merely "intemperate, . . . disloyal, contemptuous and disrespectful."[117] Unlike their civilian counterparts, members' "indecent" speech is not constitutionally protected.[118] Thus identical constitutional language—"free speech," in these cases—has been given nonuniform applications as between civilian and military societies. Because the nonuniformity is largely limited to select geographical zones,[119] military law accordingly is another example of geographical constitutional nonuniformity.

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114. *Parker*, 417 U.S. at 758.

115. *See* Greer v. Spock, 424 U.S. 828, 837-38 (1976).

116. *See* Brown v. Glines, 444 U.S. 348, 358-61 (1980) (upholding an Air Force regulation requiring members of the service to obtain approval from commanders before circulating petitions on Air Force bases); *Spock*, 424 U.S. at 838 (upholding a ban on political speeches by civilians on a military base).

117. *Parker*, 417 U.S. at 739.

118. *Compare* United States v. Moore, 38 M.J. 490, 492-93 (C.M.A. 1994) (stating that indecent speech by a military officer is not protected because the need for obedience and discipline justifies a different application of the First Amendment in a military context), *with* Reno v. ACLU, 117 S. Ct. 2329, 2354 (1997) (noting that adults have a First Amendment right to make and obtain indecent speech).

119. Military law may sometimes apply to military members when they are outside military enclaves. *See, e.g.*, Solorio v. United States, 483 U.S. 435, 439 (1987) (holding that a serviceman may be tried by court-martial for alleged criminal conduct occurring in the serviceman's private, off-base residence). This fact, however, does not undercut the point made in the text. That a political community has distinctive geographical borders does not mean that the community's laws will not apply to its members when they are outside the community's borders; contemporary approaches to conflicts of law, which almost all reject purely territorial methods to determine which state's laws should apply, reflect this understanding. *See, e.g.*, Symeon C. Symeonides, *Choice of Law in the American Courts in 1995: A Year in Review*, 44 AM. J. COMP. L. 181, 193-203 (1996) (noting that all but 10 states have rejected purely territorial approaches to conflicts in tort law). Thus, despite the fact that New York law may apply to New York citizens' activities undertaken in Canada, *see, e.g.*, Babcock v. Johnson, 191 N.E.2d 279, 283-85 (N.Y. 1963) (holding that a lawsuit between two New York residents arising out of an automobile accident in Ontario could proceed under New York law when the suit would have been barred by application of Ontario law), this is in no way inconsistent with the notion that New York State is a geographically-defined political community.

Similarly, the fact that military law sometimes applies to military personnel outside military enclaves is not inconsistent with the fact that the military is a geographically-defined community and that constitutional nonuniformities are largely limited to the military enclaves. For the most part, in any event, the constitutional nonuniformities governing the military community are applicable to military members only when they are within military enclaves, as most such nonuniformities empower the governing authorities and governmental processes localized to the enclave rather than impose limitations on service members. *See, e.g.*, Middendorf v. Henry, 425 U.S. 25 (1976) (holding that military personnel have no right to assistance of counsel in certain military tribunal proceedings that can result in the military equivalent of incarceration); *see also infra* notes 187-99 and accompanying text (discussing *Henry*). Indeed, most of the nonuniformity cases concern the constitutionality of regulations that do not even purport to apply outside the military enclave. See, for example, *Goldman v. Weinberger*, 475 U.S. 503 (1986), which is discussed *infra* notes 133-40 and accompanying text, and *Greer v. Spock*, 424 U.S. 828 (1976), which is discussed *infra* notes 127-32 and accompanying text.

Federal courts have relied on Tailoring and Re-standardizing to create geographical constitutional nonuniformity in the domain of military law. Such nonuniformity typically is justified as necessary for the idiosyncratic but valuable "community" of the military to survive.[120] It is not mere happenstance that the Supreme Court refers to the needs of the military *community* when it creates nonuniformities. This is because the nonuniformities are deemed to be necessary to inculcate the distinctive norms that lead members of the military to think and act in the common ways that constitute the military into a group that merits the appellation of "community."

The case of *United States v. McCarthy*[121] illustrates the use of Tailoring to create a nonuniformity deemed by the military community to be vital to its very continuation. In that case the United States Court of Military Appeals held that a warrantless entry into the defendant's two-person barracks in the middle of the night did not violate the Fourth Amendment.[122] In explaining its holding, the court observed that "[c]onstitutional protections sometimes take on a different application in a military context."[123] The court then adopted the ordinary "reasonable expectation of privacy" Standard, but employed Tailoring to determine that "a military member's reasonable expectation of privacy in the barracks is limited by the need for military discipline and readiness."[124] The court elaborated, noting that "'an intrusion that might be unreasonable in a civilian context not only [may be] reasonable but [may be] necessary in a military context.'"[125]

The military appeals court's subsequent analysis underscored the importance of Tailoring to the maintenance of the military community:

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120. *See, e.g.*, *Parker*, 417 U.S. at 758 (referring to the "different character of the military community"); Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian"); *see also* Chappell v. Wallace, 462 U.S. 296, 301 (1983) (referring to the "military community" (citing *Orloff*, 345 U.S. at 93-94)).

121. 38 M.J. 398 (C.M.A. 1993).

122. *Id.* at 400-04. The holding cannot be explained on the grounds that the facts of the case were extraordinary, for they were not. The search occurred after several reported assaults on female service members, which provided virtually identical detailed descriptions of the assailant, including that he had worn a ski mask and had identified himself as "Barry." *Id.* at 399. A security police patrol supervisor decided to walk through the military dormitories in an effort to locate the assailant. On one door he found a note that had been signed by one "Barry McCarthy." *Id.* He knocked on the door and asked the occupant to describe Barry McCarthy. When the occupant's description matched that of the assailant, the supervisor requested and was given the room number of Barry McCarthy. The supervisor then went to the Charge of Quarters, who had a key to McCarthy's room, and called an Air Force Investigator. *Id.* At what was then the "wee hours" of the night, the three entered McCarthy's room, finding him sleeping. McCarthy's physique and clothing matched the description, and a mask was tucked into his waistband. The clothes and materials were seized and McCarthy was arrested. *Id.*

123. *Id.* at 401.

124. *Id.* at 402.

125. *Id.* (quoting United States v. Thatcher, 28 M.J. 20, 22 (C.M.A. 1989)).

> Military authorities have a relationship with and responsibility for persons and property unlike anything in civilian life. A military commander is not only responsible for the barracks building and its contents; he is also responsible for the welfare of its occupants. . . . What happens in a barracks affects the unit. What is tolerated in a barracks sets the level of discipline in the unit.[126]

In short, according to the military court, the rule that military members can have no reasonable expectation of privacy in the barracks was vital to maintaining the unit's discipline, a *sine qua non* of the military community.

To provide yet another example of Tailoring in the military context, Justice Powell, in a concurring opinion, relied on Tailoring to uphold blanket exclusions of political speeches by civilians on a military base in *Greer v. Spock*.[127] The complainants were alternative party candidates for the President and Vice President of the United States who wished to distribute campaign literature and meet with service personnel and their dependents on a military base.[128] The Court held that regulations barring the candidates from distributing campaign literature did not run afoul of the Constitution.[129] In his concurrence, Justice Powell applied the ordinary free speech standard that "First Amendment rights are not absolute under all circumstances. They may be circumscribed when necessary to further a sufficiently strong public interest."[130] But he applied this Standard with close attention to the particular character of the military community, understanding that the distinctive needs of the community translate into a need for constitutional nonuniformity. According to Justice Powell, the military is "the enclave of a system that stands apart from and outside of many of the rules that govern ordinary civilian life in our country."[131] Justice Powell then concluded that there is no First Amendment protection for activities that have "functional and symbolic incompatibility with the 'specialized society separate from civilian society'" that is the military community.[132]

Federal courts also have utilized Re-standardizing to enable the military community to endure. An example of such Re-standardizing occurred in *Goldman v. Weinberger*,[133] in which the Supreme Court considered whether Air Force regulations prohibiting the wearing of yarmulkes

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126. *Id.* at 403.

127. 424 U.S. 828 (1976). Although not completely clear, the majority opinion appears to have based its holding in *Spock* on the Preamble ("to provide for the common defence") to the Constitution. *See id.* at 837 & n.8.

128. *Id.* at 832-33.

129. *Id.* at 840.

130. *Id.* at 842-43 (Powell, J., concurring).

131. *Id.* at 843 (Powell, J., concurring).

132. *Id.* at 844 (Powell, J., concurring) (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)).

133. 475 U.S. 503 (1986).

by Orthodox Jews violated the First Amendment's Free Exercise Clause. The Court rejected the complainant's argument that the regulations should be reviewed under the then prevailing standard for Free Exercise violations,[134] which provided that restrictions on religious practice had to be justified by a compelling state interest.[135] Instead of applying this generally applicable Standard, the Court instead Re-standardized. According to the Court, "review of military regulations challenged on First Amendment grounds *is far more deferential than constitutional review of similar laws or regulations designed for civilian society.*"[136] Under this context-specific Standard, the military only had to show that its regulations were "reasonabl[e] and evenhanded[]."[137]

The holding was justified on the ground that such nonuniformity was necessary to create the military community. "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."[138] The Court further justified the need to Re-standardize on the basis that courts are not institutionally capable of anticipating how their decisions will impact the military community: "'[C]ourts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest'"[139] because courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[140] In short, the court recognized that nonuniformity was necessary if the norms that themselves constitute the distinctive and vital military community are to be propagated.

C. *Nonuniformity to Accommodate the Values and Needs of Native Americans*

Tribal courts have employed Tailoring, Re-standardizing, and Re-targeting[141] to create constitutional nonuniformity. This nonuniformity

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134. *Id.* at 506.

135. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

136. *Goldman*, 475 U.S. at 507 (emphasis added).

137. *Id.* at 509-10. Accordingly, the testimony of expert witnesses that the restriction of yarmulkes would not detract from discipline and esprit de corps was legally irrelevant. *See id.* at 509. The judgment of military officials that yarmulkes would detract from the uniformity sought by dress regulations alone satisfied the reasonableness requirement, which the Court held was all that was demanded by the First Amendment in the military context. *See id.* at 509-10.

138. *Id.* at 507.

139. *Id.*

140. *Id.* at 507-08 (quoting Chappell v. Wallace, 462 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962))).

141. This subpart, however, only discusses tribal courts' use of Tailoring and Re-Standardizing. For an example of Re-targeting, see *supra* notes 78-82 and accompanying text.

has permitted constitutional values to be expressed in a manner that preserves tribal values and accommodates tribal needs.

The case of *Hopi Tribe v. Kahe*[142] well illustrates Tailoring to preserve the distinctive values of a Native American community. A person who had not seen his neighbor Kahe for more than a day and was concerned about his well-being asked the tribal police to look out for Kahe. Pursuant to this request, tribal police stopped Kahe's vehicle for a "welfare check."[143] Though the stop had not been prompted by concerns of criminal conduct, the police demanded to see Kahe's license and search his car.[144] At issue in the case was whether the stop and search violated the Indian Civil Rights Act's (ICRA) prohibition against unreasonable searches and seizures.[145] The court employed Tailoring, adopting the federal standard of "probable cause" to determine if the stop and search were lawful, but determining the content of "probable cause" by reference to considerations unique to the Hopi tribe.[146] The court determined that the welfare check was lawful but that the demands to see the driver's license and search the car were not.[147] Whether there was probable cause had to be determined by taking

> into consideration customary and traditional ways of the Hopi people. Because of the extended family system, Hopi people look out for and take care of each other. It is Hopi to be concerned about the welfare of your family and neighbors and to make sure that they are okay.[148]

The court concluded that the tribal police had probable cause to stop the vehicle because "when someone makes a request of the police to check on the well-being of a person it is expected that police officers have the responsibility and obligation to make the welfare check."[149] But concern for not construing the law of search and seizure in such a way as to undermine Hopi values also led to the court's second holding that the tribal police's request to see the defendant's license and search his car was unlawful: "[T]his court wants to encourage the principle behind welfare stops. It does not want to discourage calls from concerned family members with the threat that those individuals will immediately be subject to arrest."[150]

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142. 21 Indian L. Rep. 6079 (Hopi Tribal Ct. 1994).
143. *Id.* at 6079.
144. *Id.*
145. *See* 25 U.S.C. § 1302(2) (1994).
146. *Kahe*, 21 Indian L. Rep. at 6080.
147. *Id.*
148. *Id.* at 6079.
149. *Id.*
150. *Id.*

Another fine example of Tailoring to accommodate community values can be seen in *Brandon v. Tribal Council for the Confederated Tribes*.[151] At issue was whether the ICRA's free speech guarantee was violated by a tribal code provision that sought to maintain the respect and dignity of the tribal council by prohibiting council members from using vulgar speech in public.[152] The court adopted the ordinary First Amendment Standard, which requires that there be a compelling interest to regulate such speech, but assessed what constituted a compelling interest in light of the tribe's distinctive values:

> Grand Ronde Tribe has a vested interest in protecting its reputation throughout the community. It thus has a compelling reason to have enacted a provision in its tribal codes prohibiting tribal council members from involving themselves in actions or activities that may bring discredit or disrespect on the tribe . . . . [The community] has the right to expect its council members to conduct themselves in public with dignity and respect.[153]

In addition to Tailoring, tribal courts have employed Re-standardizing to advance important community values. In *Rough Rock Community School v. Navajo Nation*,[154] for example, a tribal court struck down on due process grounds an ordinance that limited the field of school board candidates to persons who had a "demonstrated interest, experience and ability in Educational Management."[155] The court determined that tribal customs and traditions guaranteed a "political liberty" to participate in government, concluded (by means of Tailoring) that this political liberty was a protected due process liberty under the ICRA, and held that by imposing conditions on holding office the election ordinance implicated political liberty.[156] The court then engaged in Re-standardizing, deciding that ordinances affecting liberties protected by the ICRA must have "ascertainable standards" or that they otherwise violate due process.[157]

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151. 18 Indian L. Rep. 6139 (Grand Ronde Tribal Ct. 1991).

152. *Id.* at 6140-41.

153. *Id.* at 6141.

154. 22 Indian L. Rep. 6162 (Navajo 1995).

155. *Id.* at 6163 (emphasis omitted).

156. *Id.* at 6164-65.

157. *Id.* at 6165. Looking to tribal traditions, the *Rough Rock* court held that the need for "objective" and "ascertainable standards" expressed fundamental Navajo values because the absence of "objective" standards "delegate[s] unregulated discretion which could lead to manipulation and abuses of authority. Navajo thought deplores abuses of authority because of the consensual and egalitarian principles of governance." *Id.* This need for "objective" and "ascertainable standards" created a wholly new substantive test and accordingly constituted an instance of Re-standardizing. The federal-law doctrine most similar to the test adopted by the tribal court, the void-for-vagueness doctrine, employs a less strict test that voids civil statutes only if a statute is "so vague and indefinite as really to be no rule or standard at all." Boutilier v. INS, 387 U.S. 118, 123 (1967) (quoting A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 239 (1925)). Legislation affecting "fundamental rights"

D. *Nonuniformity in the Public Schools to Create the American Political Community*

Public schools are yet another context in which location-specific constitutional nonuniformity in the aid of community has been adopted. Thus "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,'" it is well established that children's constitutional rights "are different in public schools than elsewhere."[158] Although constitutionally proscribed in virtually every other location, for example, state actors in public schools may categorically "prohibit the use of vulgar and offensive terms in public discourse"[159] and impose corporal punishment without the administrative safeguards of prior notice and a hearing.[160]

The needs of community—in this case, creating national political community—are among the grounds regularly relied on to justify nonuniformity in constitutional requirements as between public schools and elsewhere. In *Bethel School District No. 403 v. Fraser*,[161] for example, the Court held that speakers in public schools do not enjoy the same freedom enjoyed by speakers in other public places to express political opinions in terms that are highly offensive but not obscene.[162] The Court's justification rested on the need to create the national political community: "'[P]ublic education must prepare pupils for citizenship in the Republic . . . [.] It must inculcate the habits and manners of civility as values . . . indispensable to the practice of self-government in the community and the nation.'"[163] The "essence" of the "objective of public education" is the "inculcation of fundamental values necessary to the maintenance of a democratic political system."[164] Among these "fundamental values" is "teaching students the boundaries of socially appropriate behavior."[165] Accordingly, the Court adopted a constitutional nonuniformity that permitted the school to "disassociate itself" from the

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under substantive due process—the other analogous doctrine—is reviewed under strict scrutiny. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992). The strict scrutiny Standard is also different from the *Rough Rock* court's requirement of "objective" and "ascertainable standards."

158. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995) (omission in original) (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).

159. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

160. *See* Ingraham v. Wright, 430 U.S. 651, 682 (1977).

161. 478 U.S. 675 (1986).

162. *Id.* at 692; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (noting that the speech at issue in *Fraser* was "'sexually explicit' but not legally obscene" (quoting *Fraser*, 478 U.S. at 685)).

163. *Fraser*, 478 U.S. at 681 (alteration and first omission in original) (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

164. *Id.* (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

165. *Id.*

speech in such a manner that would demonstrate to others that such speech was "wholly inconsistent with the 'fundamental values' of public school education."[166]

To be sure, unlike the nonuniformities created under the community standards doctrine and in the military and Native American contexts, constitutional nonuniformities in public schools are generated for the purpose of building the national community, not a distinctive subfederal community. What is instructive for present purposes, however, is that the Supreme Court in the public schools cases has understood that permitting constitutional nonuniformities is necessary to allow for the norm-creation requisite to creating community. Creating the national political community is of great importance to society, and this important interest has provided the predicate to create geography-bound constitutional nonuniformities. Thus, if it is the case that accommodating other communities rises to a similar level of important societal interest,[167] then the public schools cases also provide precedent for the proposition that geography-based constitutional nonuniformity is a plausible approach to creating the norms necessary to create and sustain the community in question.

In the context of public schools, as elsewhere, federal courts have relied on Tailoring and Re-standardizing to create constitutional nonuniformity. The case of *Vernonia School District 47J v. Acton*[168] well illustrates the use of Tailoring to create constitutional nonuniformity. In that case, the Supreme Court upheld a school policy that required student athletes to provide urine for drug testing absent not only probable cause but also individualized suspicion of wrongdoing.[169] The Court invoked the ordinary "reasonable expectation of privacy" Standard, but defined it by reference to the very particular context of the public high school.[170] In virtually every other context the Fourth Amendment has been understood as prohibiting blanket searches that dispense with the requirement of individualized suspicion.[171] In *Acton*, however, the Court tailored the ordinary Standard to the context of public schools and held that "'students within the school environment have a lesser expectation of privacy than members of the population generally.'"[172] Student athletes have even lesser privacy

166. *Id.* at 685-86.

167. *See, e.g.*, Rosen, *supra* note 8, at 1089-1106, 1126-27.

168. 515 U.S. 646 (1995).

169. *Id.* at 664-65.

170. *Id.* at 656-57, 665.

171. *See id.* at 674 (O'Connor, J., dissenting) (noting that "'"some quantum of individualized suspicion"' is 'usually required' under the Fourth Amendment" before concluding that a search is reasonable (quoting Skinner v. Railway Labor Executives' Ass'n, 389 U.S. 602, 624 (1989) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976)))).

172. *Id.* at 656-57 (quoting New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring)); *see also id.* at 656 ("For their own good and that of their classmates, public school

expectations than other students, continued the Court, as shown by the additional school regulations (such as pre-season physical exams) to which they subject themselves.[173] With respect to the nature of the governmental concern, the Court again engaged in Tailoring as it focused on drugs' powers to "disrupt[]" the "educational process" and the "'role model' effect of athletes' drug use."[174]

The case of *Hazelwood School District v. Kuhlmeier*[175] exemplifies the use of Re-standardizing to create constitutional nonuniformity for the purpose of helping to inculcate particular community-creating values in the public schools. In that case the Supreme Court upheld a principal's censorship of the school newspaper for "potentially sensitive topics" and unacceptable viewpoints.[176] Unlike the strict Standard of review ordinarily applied to such censorship efforts, the *Hazelwood* Court determined that school officials were "entitled to regulate the contents" of the school newspaper "*in any reasonable manner.*"[177] This Re-standardization was justified because of the need to socialize children so that they can be assimilated into the dominant culture. According to the Court, schools must have the power to

> refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order . . . . *Otherwise, the schools would be unduly constrained from fulfilling their role as a "principal instrument in awakening the child to cultural values . . . .*"[178]

This need to inculcate children with the values of the dominant culture thus justified Re-standardizing to create a unique Standard with respect to the censorship of student publications.

E. Nonuniformity to Create Distinctive Institutions of Dispute Resolution for Special Communities

General society, the military, and Native American communities all have recognized that special community-based institutions of dispute resolution play vital roles in maintaining special communities. Geographical constitutional nonuniformity has been utilized to implement novel judicial

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children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases.").

173. *Id.* at 657.

174. *Id.* at 662-63.

175. 484 U.S. 260 (1988).

176. *Id.* at 276.

177. *Id.* at 270 (emphasis added).

178. *Id.* at 272 (emphasis added) (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).

procedures in specialized tribunals that cater to these communities, so as to ensure the well-being of each unique community.

The distinctiveness of the military community, coupled with general society's unfamiliarity with its norms and values, has prompted Congress to create a separate military judicial system with many attributes of constitutional nonuniformity.[179] For example, in *Chappell v. Wallace*,[180] military personnel claimed that their superior officer had discriminated against them on account of their race in violation of their constitutional rights.[181] The plaintiffs sought to bring a claim in federal court in reliance on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[182] the case that found a cause of action for damages for individuals deprived of constitutional rights by federal officials.[183] In deciding that military personnel do not have access to *Bivens* actions, the Court stated that "[t]he need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion."[184] A distinct system of military justice is necessary to enable the military community to flourish because nonmilitary courts are without "'competence'" to make what are "'essentially professional military judgments'"[185]—a euphemistic way of saying that civilian courts' unfamiliarity with military society's norms and values disables them from reliably adjudicating military disputes. For these reasons, Congress "has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure."[186]

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179. *See* Weiss v. United States, 510 U.S. 163, 166-69 (1994).

180. 462 U.S. 296 (1983).

181. *Id.* at 297.

182. 403 U.S. 388 (1971).

183. *Id.* at 397.

184. *Wallace*, 462 U.S. at 300.

185. *Id.* at 302 (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).

186. *Id.*; *see also* United States v. Stanley, 483 U.S. 669, 684 (1987) (finding no *Bivens* remedy when the injuries "'arise out of or are in the course of activity incident to service'" (quoting Ferens v. United States, 340 U.S. 135, 146 (1950))). *Chappell* and *Stanley* are examples of constitutional nonuniformity insofar as the existence of some form of effective relief for constitutional violations may be constitutionally required, *see* ERWIN CHEMERINKSY, FEDERAL JURISDICTION § 9.1.2, at 530-31 (2d ed. 1994), and in neither *Chappell* nor *Stanley* did the Court predicate its holding on the availability of alternative remedies. For a case in the habeas corpus context that was animated by the same policy objective that general courts not interfere with the special military community, see *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953). In that case the court stated:

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be . . . scrupulous not to interfere with legitimate Army matters . . . .

Id.

The Supreme Court also has recognized that the idiosyncratic needs of the military community demand different judicial procedures than are applicable in general society's courts. Frequently these idiosyncratic procedures are instances of constitutional nonuniformity. At issue in *Middendorf v. Henry*,[187] for example, was whether persons who stand trial at summary courts-martial (one of four types of judicial proceedings under the military justice system) have a right to counsel under either the Fifth or Sixth Amendments.[188] The Court recognized that summary courts-martial have the power to impose the "military equivalent of imprisonment."[189] The Court also acknowledged that only four years earlier in *Argersinger v. Hamlin*[190] it had ruled that the Sixth Amendment's provision for the assistance of counsel extends to misdemeanor prosecutions in civilian courts because such convictions could result in imprisonment.[191] But the Supreme Court in *Middendorf* nonetheless decided that counsel was not required.[192] In explaining its holding the Court stated, "The summary court-martial proceeding here is . . . different from a traditional trial in many respects, *the most important of which is that it occurs within the military community*."[193] The summary court-martial, according to the Court, is designed to exercise justice promptly under a simple form of procedure and, to accomplish this, "[t]he presiding officer acts as judge, factfinder, prosecutor, and defense counsel."[194] The military community is governed by codes of conduct that impose penalties for offenses unknown in civilian society,[195] and that community requires a streamlined dispute resolution system that can quickly mete out the appropriate punishment.[196] The Court hypothesized that the

> presence of counsel [would] turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried.[197]

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187. 425 U.S. 25 (1976).
188. *Id.* at 32-35.
189. *Id.* at 35.
190. 407 U.S. 25 (1972).
191. *Henry*, 425 U.S. at 34.
192. *Id.* at 42.
193. *Id.* at 38 (emphasis added).
194. *Id.* at 32.
195. *Id.* at 50 n.1 (Powell, J., concurring).
196. *Id.* at 45-46 ("Such a lengthy proceeding is a particular burden to the Armed Forces because virtually all the participants . . . are members of the military whose time may be better spent in possibly protracted disputes over the imposition of discipline.").
197. *Id.* at 45. Analogous constitutional nonuniformity permitting accelerated dispute resolution methods deemed necessary for a particular context can be found in the constitutional jurisprudence

Giving "particular deference"[198] to the determination of Congress, the Court held that the specific needs of the military community justify an inquisitorial judicial proceeding that may result in imprisonment.[199]

As in military law, in the Native American context the Supreme Court has understood that insulating tribal courts from undue federal court interference is necessary to assure the continuation of tribal communities. This realization animated the seminal decision of *Santa Clara Pueblo v. Martinez*,[200] the case in which the Court held that the only ICRA claim that can be brought in federal court is a special habeas corpus claim arising when a plaintiff is in detention.[201] The Court's justifications mirrored the concerns expressed in the military context that general federal courts are not competent to adjudicate disputes in the special community and that adjudicating such disputes in general courts accordingly would threaten the community's well-being. The Court explained in *Martinez* that federal courts should not interfere with tribal courts' adjudication of tribal matters because of the tribal courts' unmatched knowledge of the tribal community: "[R]esolution of statutory issues under [the ICRA] . . . will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts."[202] As a result, "efforts by the federal judiciary to apply [the ICRA] . . . *may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity*."[203]

Tribal courts have utilized constitutional nonuniformity to establish judicial procedures that reflect tribal values and help to sustain their communities. For example, consistent with tribal interests in maintaining

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concerning public schools. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 680 (1977) (holding that due process does not require a hearing before the "use of corporal punishment as a disciplinary measure"); Goss v. Lopez, 419 U.S. 565, 582 (1975) (finding that due process does not require a "delay between the time 'notice' is given and the time of the hearing" to determine if a child is to be suspended from school).

198. *Henry*, 425 U.S. at 43.

199. *Id.* at 45-48. Many other examples of constitutional nonuniformity account for the unique character of military tribunals. For example, defendants in courts-martial do not have a right to a jury as is guaranteed nonmilitary persons under the Constitution. *See Ex parte* Quirin, 317 U.S. 1, 40 (1942) (holding that Article III, § 2, cl. 3, and the Fifth and Sixth Amendments do not create a right to a jury trial when such a right would not have existed at common law, as in the case of a military court-martial); United States v. Gray, 37 M.J. 751, 755 (A.C.M.R. 1993) (rejecting a claim that the defendant was entitled to a jury trial). Nor do military defendants have a right to a representative cross-section of the community on the jury panels assembled in a military tribunal. *See Gray*, 37 M.J. at 755; United States v. Santiago-Davila, 26 M.J. 380, 389 (C.M.A. 1988).

200. 436 U.S. 49 (1978).

201. *Id.* at 65-66. The Court held that the ICRA's unique habeas corpus provision, *see* 25 U.S.C. § 1303 (1994), was the only basis for federal subject matter jurisdiction. *Martinez*, 436 U.S. at 66-68.

202. *Martinez*, 436 U.S. at 71.

203. *Id.* at 72 (emphasis added).

community-wide goodwill, many tribal courts have ruled that due process requires that virtually anyone be allowed the opportunity to have her views heard in court in relation to any litigation.[204] Further, the value shared by many Native American tribes that dispute resolution be fast and streamlined (to accelerate reconciliation and thereby to help maintain goodwill among community members) has led tribal courts to dismiss delayed actions on due process grounds[205] and to be strict in granting continuances.[206] Similarly, due to the large number of pro se litigations in Native American communities, trial judges are permitted to assume such inquisitorial functions as examining witnesses, propounding legal theories, helping the litigants develop applicable legal theories, and even making ex parte communications with potential witnesses.[207]

Constitutional nonuniformity also has been utilized to create novel judicial institutions that facilitate what has been labeled as the value of "participatory democracy," that is, the people's direct participation in their governance. Facilitation of participatory democracy was important to the decision of *Downey v. Bigman*, in which the Navajo Supreme Court examined the contours of the "fundamental right" of trial by jury.[208] The court grounded its holding in a Re-targeted Goal for the right to a jury trial. The Goal behind Sixth and Seventh Amendment jury rights, according to the Supreme Court, relates to the rights of the litigants and the integrity of the legal system, not to the rights of jurors to participate in government.[209] According the *Downey* court, by contrast, the jury right protects not only the interests of the litigants but also the *community's* interest in "community participation in the resolution of disputes through

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204. For example, in *Johns v. Leupp Schools, Inc.*, 22 Indian L. Rep. 6039, 6039 (Navajo 1995), the Navajo Supreme Court held that a

> broad scope of inquiry is in keeping with the general Navajo common law rule of due process . . . . "The Navajo people have an established custom of notifying all involved parties in a controversy and allowing them, and even other interested parties, an opportunity to present and defend their positions."
>
> All perspectives are important for a court to hear when making discretionary rulings.

Id. (quoting Begay v. Navajo Nation, 15 Indian L. Rep. 6032 (1988)). *Compare id.* and *In re* Estate of Tasunke Witko v. Heileman Brewing Co., 23 Indian L. Rep. 6104, 6108 (Rosebud Sioux 1996) (en banc) (referring to "traditional Lakota notions of due process that provide everyone the opportunity to be heard before making a decision"), *with* FED. R. CIV. P. 24 (setting forth the limited circumstances that allow for intervention in federal courts).

205. Suquamish Indian Tribe v. Purser, 21 Indian L. Rep. 6090, 6091-92 (Suq. Ct. App. 1992) (dismissing delayed case).

206. *See, e.g.*, Plummer v. Plummer, 17 Indian L. Rep. 6151 (Navajo 1990) (refusing to grant continuance).

207. *See* Miner v. Banley, 22 Indian L. Rep. 6044, 6046 (Cheyenne River Sioux 1995).

208. Downey v. Bigman, 22 Indian L. Rep. 6145, 6146 (Navajo 1995).

209. *See supra* note 80.

deliberation and consensus."[210] This Re-targeted Goal led the *Downey* court to adopt strict limits on a trial court's ability to overturn a jury verdict.[211] It also led the court to create a novel jury procedure under which juries may "ask questions of the witnesses during trial" so that the jury would be "more reflective of Navajo participatory democracy."[212]

In short, courts have understood that the idiosyncratic needs of the military and Native American communities require that each have distinct dispute resolution mechanisms and that general society's courts not unduly interfere in their operation. Geographical constitutional nonuniformity has permitted both military and tribal tribunals to create novel judicial procedures in their dispute resolution institutions that help sustain their respective communities.

IV. Applications

Appreciation of the existence of geographical constitutional nonuniformity in contemporary constitutionalism yields many practical lessons. The most fundamental lesson is that courts already possess doctrinal tools for accommodating idiosyncratic but valuable communities. This Part shows that Tailoring and Re-standardizing can be utilized to extend the powers of self-governance to various other communities that are not currently beneficiaries of constitutional nonuniformity. Whether Tailoring and Re-standardizing are properly invoked as a constitutional matter turns on a set of policy considerations enumerated below. This Part also shows how the tools of Tailoring and Re-standardizing can provide analytical clarity to much case law. This Part concludes by identifying factors that should be taken into consideration in deciding when and to what extent additional nonuniformity in the aid of community should be created.

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210. *Downey*, 22 Indian L. Rep. at 6146-47. The court stated that its holding was intended "to comply with participatory democracy and to preserve an individual's right to a jury trial." *Id.* at 6147. Consulting tribal tradition, the court noted that juries are a "modern expression of our longstanding legacy of participatory democracy," that is "the ability of the people as a whole to make law." *Id.* at 6146. The court explained further:

> Navajo participatory democracy guarantees participants their fundamental right to speak on an issue, and discussion continues until the participants reach consensus. In this sense, decisions are a product of agreement among the community rather than a select few. Status, wealth and age are not determinants of whether a person may participate in the decision-making process. Furthermore, no one is pressured to agree to a certain solution, and persuasion, not coercion, is the vehicle for prompting decisions.

Id.

211. *See id.* at 6146 (finding that the judge cannot become a "thirteenth juror" and that overturning a "decision made by consensus" is "an authoritarian practice," permissible only when "the evidence is insufficient, as a matter of law, to support the finding . . . or when the jury is confused").

212. *Id.* The court also decided that "[t]o maintain impartiality, all the questions will be channeled through the judge, whose authority to permit or forbid the question is discretionary." *Id.*

A. Tailoring

Understanding the technique of Tailoring sheds light on missed opportunities to accommodate community needs and provides analytical clarity to much case law.

1. Tailoring Overlooked.—Courts can employ Tailoring to fit the application of constitutional Standards to different communities. As shown above, courts frequently utilize Tailoring. But many courts overlook it. The availability of Tailoring means that community self-governance can be upheld to a greater degree than is frequently recognized. The determination of whether Tailoring is constitutionally appropriate is based on considerations that include general society's normative commitments and the practical implementability of recognizing a nonuniformity.

a. Pratt*: Searches absent exigent circumstances in public housing.*—The district court opinion in *Pratt v. Chicago Housing Authority*, the case discussed above holding the Chicago Housing Authority's "sweep" search policy to be unconstitutional,[213] is an excellent illustration of judicial oversight of Tailoring. In explaining its decision, the district court in *Pratt* quoted language from a Supreme Court decision to the effect that preventing "unreasonable governmental intrusion" in the "home" stands at "the very core" of the Fourth Amendment's protection.[214] From this, the district court concluded that "a warrantless police search inside a home is presumptively unconstitutional" and that the presumption can be overcome only upon a showing of both probable cause and exigent circumstances.[215] Finding neither, the district court held that the policy likely violated the Fourth Amendment and enjoined its implementation.[216]

The court in *Pratt*, however, did not appear to recognize that the policy could have been upheld by means of Tailoring. Accordingly, the district court failed to make the normative and pragmatic inquiry of whether the applicable Fourth Amendment Standard should have been Tailored to the community at issue.[217] Under well established case law,

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213. Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 796 (N.D. Ill. 1994).

214. *Id.* at 795 (quoting Payton v. New York, 445 U.S. 573, 589-90 (1980) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))).

215. *Id.*

216. *Id.*

217. As mentioned above, this Article identifies the relevant inquiry that should have been undertaken, but does not make the normative and policy arguments in support of extending geographical constitutional nonuniformity to any particular community. *See supra* text accompanying notes 9-11. For an argument that the Housing Authority's policy should have been upheld, see Kahan & Meares, *supra* note 10, at 1166-77. For views to the contrary, see Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 216-17.

a search violates the Fourth Amendment's prohibition against unreasonable searches only if the occupant of the searched premises had "a legitimate expectation of privacy in the invaded place."[218] It may well be the case that most people in most places in the United States have an expectation of privacy in their homes. But that does not mean that the residents of public housing in *Pratt* were of the same view. And if they did not have such an expectation of privacy (and it is worth recalling that there was evidence that the people affected by the Authority's search policy largely supported it and specifically did not believe that it violated their constitutional rights), then the district court could have found that the Authority's policy was not unreasonable under the Fourth Amendment Standard.[219]

As a doctrinal matter, nothing in the law precludes courts from undertaking this degree of community-specific tailoring of Standards. Indeed, the court in *United States v. McCarthy*,[220] the case that upheld warrantless searches of military barracks, undertook this very type of community-specific Tailoring when it held that military persons do not have a legitimate expectation of privacy in their living quarters because of the demands of military life.[221] In the context of public schools, the Supreme Court in *Vernonia School District 47J v. Acton*[222] similarly focused on "the scope of the legitimate expectation of privacy"[223] of students, decided that "Fourth Amendment rights . . . are different in public schools than elsewhere,"[224] and upheld a policy strikingly similar to that at issue in *Pratt*—a school policy that authorized state officials to conduct sweep searches without individualized suspicion.[225] More

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218. Rakas v. Illinois, 439 U.S. 128, 143 (1978); *see also* California v. Ciraolo, 476 U.S. 207, 211 (1986) (noting that the "touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy'" (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring))); Smith v. Maryland, 442 U.S. 735, 740 (1979) (holding that the application of the Fourth Amendment depends on claiming an invasion by the government into an area in which the subject of the search would have possessed a justifiable expectation of privacy).

219. *See supra* note 5 and accompanying text. As a doctrinal matter, this does not require that *all* residents have subjectively had such an expectation, as the case of *United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993), shows. *Id.* at 403 (revealing that the appellant, a member of the military community, clearly had a subjective belief that the search in question violated his Fourth Amendment rights). Rather, the fact that a large majority of the residents did not believe the policy to be unconstitutional would be probative of what constituted the legitimate expectations of the community as an objective matter.

220. 38 M.J. 398 (C.M.A. 1993).

221. *Id.* at 401-03.

222. 515 U.S. 646 (1995).

223. *Id.* at 656.

224. *Id.* at 658.

225. *See id.* at 665 (upholding a public school's random drug testing of students). To be sure, *Vernonia* is importantly different from *Pratt* insofar as the searches in *Vernonia* were not performed in the context of criminal law enforcement.

generally, many courts have held geographical location to be a relevant factor in applying the Fourth Amendment's legal test.[226]

It might seem paradoxical that the expectations of the majority of the community apparently can diminish the constitutional rights of the minority; after all, it might be asked, is not the very point of constitutional guarantees to protect the rights of the minority against the wishes of the majority? The answer to this, I believe, is two-fold. First, a Standard that looks to legitimate expectations defines the protected rights in terms of expectations such that what is not expected is not protected in the first place. Second, the fact that community expectations can be a component of a constitutional provision's Legal Test shows that the paradigm that constitutional rights protect the minority against the majority is importantly incomplete. Specifically, built into the constitutional doctrine, here and elsewhere, are community expectations, values, and needs. As such, constitutional rights are defined in part on the basis of community expectations and considerations.

The *McCarthy* and *Vernonia* cases provide guidance as to which factors the *Pratt* court should have looked at in determining whether highly community-specific Tailoring to uphold the Housing Authority's policy was appropriate. First, in both *McCarthy* and *Vernonia* powerful normative arguments existed for nonuniformity; each case involved a valuable community with distinctive needs whose well-being would have been threatened if the community had been subjected to ordinary constitutional doctrines.[227] Second, employing nonuniformity was administrable in each case because the communities seeking special treatment were each located within discrete boundaries that could demarcate relatively clearly the operation of ordinary doctrines from the nonuniform. Determining whether the circumstances in *Pratt* satisfy these conditions is beyond the scope of this Article. The point for present purposes is that because the *Pratt* court mistakenly believed the type of self-governance at issue to be flatly foreclosed by the Constitution, the court overlooked the policy

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226. *See, e.g.*, United States v. Rucker, 138 F.3d 697, 700 (7th Cir. 1998) (finding it relevant to probable cause that the police knew the location of the search to be a "high drug trafficking area"); United States v. Wadley, 59 F.3d 510, 512 (5th Cir. 1995) (finding it relevant to a probable cause determination that a particular location "was a high crime area"); *see also* United States v. Orozco, 982 F.2d 152, 154 (5th Cir. 1993) (using the fact that the location was known as a common drug trafficking area as a factor in establishing probable cause); Tom v. Voida, 963 F.2d 952, 957 (7th Cir. 1992) (establishing reasonable suspicion of criminal activity by the presence of a bicycle in a high crime neighborhood); United States v. Anderson, 923 F.2d 450, 455-56 (6th Cir. 1991) (finding as one factor in probable cause the fact that an area had recently experienced a rash of burglaries).

227. *See supra* notes 121-26 and accompanying text (discussing *McCarthy*); *supra* notes 168-74 and accompanying text (discussing *Vernonia*). Both *McCarthy* and *Vernonia* justified the nonuniformities in part on the nonuniformities' necessity in respect of generating the norms that helped constitute each respective community. *See supra* notes 125-26 and accompanying text (discussing *McCarthy*); *supra* note 174 and accompanying text (discussing *Vernonia*).

questions that constituted the case's core: whether the factors of normative attractiveness and administrability justified Tailoring the Fourth Amendment's Standard to the community of public housing residents and accordingly inquiring as to what were the residents' legitimate expectations of privacy.

b. Obscenity.—Although obscenity law's community standards doctrine appears to clearly justify Tailoring, courts do not always recognize that the community standards doctrine calls for Tailoring. In *United States v. Cutting*,[228] for example, the Ninth Circuit explained that "[t]he purpose of the 'community standards' instruction is not to distinguish attitudes in one area from those in another, but rather to distinguish personal or aberrant views from the generalized view of the community at large."[229] In so holding, the *Cutting* court misconstrued the community standards doctrine's import: as explained by the Supreme Court, the doctrine reflects the fact that

> [i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. . . . People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.[230]

The recent Sixth Circuit opinion in *Keaton v. Stanforth*[231] also appears to miss the point of the community standards doctrine. The trial court in that case instructed the jury to take account of "[w]hether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest" and "depicts or describes in a patently offensive way, sexual conduct."[232] During deliberation the jury asked the judge, "What is the definition of community as it is used in the law? Does it mean in the country, in the state, the county or city?"[233] The trial court responded that "it could not provide further instruction as to the meaning of 'community.'"[234] Without explanation, the Sixth Circuit decided that the court's response was not of "constitutional dimension" and affirmed the conviction.[235] The Sixth Circuit's affirmance of the trial court's refusal to define the

228. 538 F.2d 835 (9th Cir. 1976).
229. *Id.* at 841.
230. Miller v. California, 413 U.S. 15, 32-33 (1973).
231. 117 F.3d 1420 (6th Cir. 1997) (mem.), *unpublished opinion available at* 1997 WL 369447.
232. *Keaton*, 1997 WL 369447, at *1.
233. *Id.* at *2.
234. *Id.*
235. *Id.*

scope of the community at issue in that case is flatly incorrect because, at the very least, the case law makes clear that the relevant community is *not* to be determined on a country-wide basis.[236] Rather, the doctrine calls for Tailoring on the basis of subnational communities.

But at what subnational political division ought "community" be defined for purposes of the community standards doctrine? The precedent admittedly does not speak in a single voice on this point. A considered look at the case law suggests, however, that the answer properly turns on the size of the geographical area in which the concept of "community" is meaningful for purposes of the doctrine to the extent that such an approach is administratively feasible. States are permitted under the Supreme Court precedent of *Smith v. United States*[237] to "impose a geographic limit on the determination of community standards by defining the area from which the jury could be selected in an obscenity case."[238] Such geographical limitations make sense with respect to the doctrine, which is intended to "allow[] the residents of a community to decide for themselves what will or will not be considered obscene in their local community."[239] In states that have not designated such geographical areas, however, the default rule is that the relevant community is to be defined on the basis of judicial districts.[240] This approach seems hopelessly arbitrary. What is the likelihood, after all, that the Southern District of New York, which covers the "rural areas of Rockland and Dutchess Counties together with the urban sections of Manhattan and the Bronx,"[241] corresponds to a single community having a meaningful norm as regards obscenity? Fortunately, many courts have recognized the inappropriateness of the judicial district and instead look to smaller geographical areas when determining the relevant community for purposes of the doctrine.[242]

The foregoing discussion suggests that, consistent with the Court's approach in *Smith* and the acknowledged purpose of the community standards doctrine, it would be best to draw jurors from the community whose standards are at issue in an obscenity case.[243] But even when a jury has

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236. *See supra* notes 96-97 and accompanying text.

237. 431 U.S. 291 (1977).

238. *Id.* at 303.

239. United States v. Langford, 688 F.2d 1088, 1096 (7th Cir. 1982).

240. *See* Hamling v. United States, 418 U.S. 87, 105-06 (1974).

241. United States v. Various Articles of Obscene Merchandise, Schedule No. 1303, 562 F.2d 185, 191 (2d Cir. 1977).

242. *See, e.g.*, Hoover v. Byrd, 801 F.2d 740, 742 (5th Cir. 1986) (explaining that community standards appropriately may vary from city to city); United States v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132, 137 (2d Cir. 1983) (finding that even though venue was proper anywhere in the Southern District of New York, it was not an abuse of discretion for the district court to limit the community standards inquiry to the relevant standards of New York City).

243. *Cf.* United States v. Peraino, 645 F.2d 548, 553 (6th Cir. 1981) ("There is serious doubt . . . that a jury of one district could properly determine the standards of another community solely on the basis of expert testimony.").

members from outside the relevant community, it makes more sense to treat the relevant community and its mores as questions of fact for the jury than to simply assume that the relevant community is coterminous with the judicial district. To be sure, this prescription does not translate into a single geographical unit or political subdivision, due to wide variations in the size of political subdivisions and the geographical layout of communities. But it does provide a benchmark against which case law can be analyzed. For example, this approach suggests that the Sixth Circuit in *Keaton* should have held that the jury should have been instructed that it was for them to decide what geographical area defined the relevant community.[244] Similarly, this approach suggests that the Fourth Circuit acted hastily in *Eckstein v. Melson*,[245] a case involving the prosecution of a bookseller for violating the federal obscenity statute, when it rejected without explanation the argument that the First Amendment requires that jurors be drawn from a geographic area that reflects the community standards where the defendant's sales activities are located.[246]

At the very least, the peremptory rejection of Tailoring in cases like *Keaton* and *Eckstein* reveals a reflexive, unexamined discomfort with Tailoring. Such unqualified opposition is inappropriate in light of the fact that, as shown in Parts II and III, Tailoring is an integral part of American constitutionalism. Determining the appropriate level at which to Tailor should be based on a forthright analysis of two factors: (1) normative considerations regarding how much society values advancing the concerns of local communities[247] and (2) practical considerations of administrability.

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244. This is not to say that the Sixth Circuit's disposition necessarily would have changed. If the defendant's counsel neglected to make this argument below the matter would have been reviewed under the plain error standard, which conceivably could have led the *Keaton* court to uphold the jury verdict. *See* United States v. Sassanelli, 118 F.3d 495, 499 (6th Cir. 1997) (noting that an appellate court will reverse based on an erroneous instruction when the defendant failed to object before the district court only when there is a plain error that affected the defendant's substantive rights and the failure to correct the error "seriously affected the fairness, integrity or public reputation of judicial proceedings" (quoting United States v. Olano, 507 U.S. 725, 732 (1993) (citations omitted))).

245. 18 F.3d 1181 (4th Cir. 1994).

246. *See id.* at 1187.

247. This normative question is enormously complicated with respect to the community standards doctrine by virtue of the fact that there likely are "dissenters" within most every local community who, due to the way local communities typically are populated, likely did not knowingly assent to tying the scope of their legal rights to the norms of their neighbors. By contrast, there are stronger reasons to respect the claims of spontaneous communities, such as the Rajneesh, who seek to create new, homogeneous enclaves where all inhabitants have consented to abiding by their community's norms and where dissenters are free to exit. *See generally* Rosen, *supra* note 8, at 1131-32. That the community standards doctrine approves of Tailoring in even the more complex context of nonhomogeneous communities underscores the constitutional weight that the Court accords to community considerations.

c. Why Tailoring is frequently overlooked.—The *Pratt* decision and the three obscenity cases critiqued above—*Cutting*, *Keaton*, and *Eckstein*—suggest two reasons why Tailoring frequently is not given serious consideration but instead is peremptorily rejected or altogether overlooked. First, courts frequently are inattentive to, or uncomfortable with, performing context-specific inquiries when they apply Standards. Instead, courts frequently prefer to consider the needs and values of the "general" American community. Emblematic of this inattentiveness to local community needs, the *Pratt* court failed to consider that the policy at issue applied to a discrete community with distinctive needs and desires; the court's analysis instead drew upon the values of the larger "American" community.[248] The three obscenity cases likewise gave short shrift to the perspectives of the particular communities at issue. Second, there is a tendency in American jurisprudence for "facts to harden into law."[249] That is to say, American lawyers and judges tend to favor inductive reasoning from already decided cases over deducing concrete requirements from legal rules or standards in matters of first impression. As a result, the facts of decided cases tend to play a very strong role in identifying the applicable law and frequently crowd out fresh applications of standards.[250] In this vein, the district court in *Pratt* relied on decisions in other cases identifying the home as the locus of reasonable expectations of privacy instead of turning to the constitutional Standard and asking whether its requirements were met in the specific context of the community of public housing residents.

These two tendencies that lead courts to miss Tailoring—the inclinations to invoke generalized communities and to rely heavily on the facts of past decisions and ignore the applicable Standard—are judicial habits rather than legal duties. Indeed, the many instances of Tailoring discussed in Part III show that the law does not preclude community-specific Tailoring. Judicial awareness of Tailoring accordingly can help overcome these two tendencies so that courts are not blinded to Tailoring in the circumstances in which it is appropriate.

2. Analytical Clarity of the Case Law: The Example of Antigang Measures and Void-for-Vagueness.—The concept of Tailoring provides

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248. *See, e.g.*, Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 796-97 (N.D. Ill. 1994) (asserting that "all Americans are bound together in law and in fact" and the erosion of one community's rights would lead to a gradual erosion of the rights of all citizens).

249. Barry Nicholas, *Introduction to the French Law of Contract*, *in* CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS 12 (Donald R. Harris & Denis Tallon eds., 1989).

250. *Cf.* Rosen, *supra* note 56, at 1145, 1147-48 (discussing the reluctance of American legalists to disregard case law and rely solely on statutory language).

analytical clarity that can help to make sense of case law that otherwise can appear irreconcilable. Consider, for example, two void-for-vagueness cases from Illinois and California. In *City of Chicago v. Morales*[251] the Illinois Supreme Court struck down on void-for-vagueness grounds an ordinance prohibiting gang members from "loitering."[252] The California Supreme Court, by contrast, in *People ex rel. Gallo v. Acuna*[253] upheld against a void-for-vagueness challenge injunctive relief against members of an alleged criminal street gang that proscribed gang members from "confronting, intimidating, annoying, harassing, threatening, challenging, [or] provoking" others.[254] Challengers in both actions claimed that the relevant provisions failed to define with sufficient clarity the proscribed conduct. Similarly, both courts understood the relevant Standard: provisions that may lead to criminal convictions must "be sufficiently definite so that it gives persons of ordinary intelligence a reasonable opportunity to distinguish between lawful and unlawful conduct."[255]

What accounts for the two courts' different outcomes? Tailoring is the answer: The California Supreme Court Tailored while the Illinois Supreme Court did not. Even though the Illinois Supreme Court recognized that criminal street gangs were commonplace in Chicago, the court at no point asked whether a prohibition against "criminal street gang member[s] loitering in any public place with one or more other persons"[256]—the language held to be fatally vague—was sufficiently definite to persons living in a city thick with street gangs.[257] The court instead entertained seriously the possibility that the ordinance could be applied to innocents who were "waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower."[258]

By contrast, the California Supreme Court engaged in Tailoring by applying the Standard with keen attentiveness to the factual context at hand. The court opened its analysis with the principle that "[a] contextual application of otherwise unqualified legal language may supply the clue to a law's meaning, giving facially standardless language a constitutionally sufficient concreteness."[259] The court decided that the injunction's terms that had been held to be "irretrievably vague" by the court of

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251. 687 N.E.2d 53 (Ill. 1997), *cert. granted*, 118 S. Ct. 1510 (1998).

252. *Id.* at 63.

253. 929 P.2d 596 (Cal.), *cert. denied*, 117 S. Ct. 2513 (1997).

254. *Id.* at 613, 613-14.

255. *Morales*, 687 N.E.2d at 60 (construing Kolender v. Lawson, 461 U.S. 352, 357 (1983)); *accord Acuna*, 929 P.2d at 611-12 (providing a similar formulation).

256. *Morales*, 687 N.E.2d at 58.

257. *Id.* at 64.

258. *Id.* at 61.

259. *Acuna*, 929 P.2d at 612.

appeals[260]—prohibitions against "confronting," "annoying," "provoking," "challenging," or "harassing"[261]—"are simply not [unconstitutionally vague], at least in the constitutional sense, when the objectives of the injunction are considered and the words of the provision are read in [the] context" of the local needs that led to the injunction.[262] The court then recounted numerous incidents in which gang members threatened or inflicted damage on residents. In light of "the particular context," concluded the court, there is "little doubt as to what kind of conduct the decree seeks to enjoin," and accordingly the court upheld the injunction.[263]

Nothing in the law precludes the context-sensitive Tailoring chosen by the California Supreme Court. Indeed, numerous examples exist in other contexts in which courts similarly have engaged in situation-specific Tailoring in void-for-vagueness challenges. Sometimes this Tailoring has led to the striking down of ordinances that elsewhere may have survived challenge. In *Bennett v. Navajo Board of Election Supervisors*,[264] for example, to determine whether an "ordinary" person could understand a statute for purposes of void-for-vagueness analysis, the tribal court looked to the "ordinary Navajo person, who very often will be bilingual, with English as a second language."[265] The court acknowledged that its construction of the vagueness doctrine may "create[] severe problems for statutory drafting because many Navajos would have a difficult time easily comprehending the terms and usages"[266] of statutory provisions, but the court still struck down the ordinance on vagueness grounds.[267] Other times Tailoring has allowed the challenged provision to be upheld. As approvingly noted by the Supreme Court in *Parker v. Levy*,[268] for example, the Court has long "recognized that the longstanding customs and usages of the [military] services impart accepted meaning to the seemingly imprecise standards" of the military code provisions authorizing court-martial for "conduct unbecoming an officer and a gentlemen" and "conduct of a nature to bring discredit upon the armed forces."[269] In upholding these provisions, one early case quoted with favor by the *Parker* Court explained that "[n]otwithstanding the apparent indeterminateness of such

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260. *Id.* at 613.
261. *Id.*
262. *Id.*
263. *Id.*
264. 18 Indian L. Rep. 6009 (Navajo 1990).
265. *Id.* at 6012.
266. *Id.*
267. *Id.*
268. 417 U.S. 733 (1974). As noted below, however, the Court in *Levy* ultimately engaged in Re-standardizing rather than Tailoring. *See infra* note 278 and accompanying text.
269. *Levy*, 417 U.S. at 746-47.

a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army."[270]

In short, the law does not predetermine how community-specific the Tailoring of Standards must be. That being the case, which court—the Illinois Supreme Court in *Morales* or the California Supreme Court in *Acuna*—was correct? Stated more generally, what determines as a normative matter how context-specific a Standard should be Tailored? As discussed above,[271] and developed further below,[272] the guiding considerations should be normative attractiveness from the perspective of general society—would not permitting nonuniformity threaten the well-being of a valuable community?—and administrability. A detailed discussion of whether the legal edicts in the two cases satisfy these criteria is beyond the scope of this Article.[273] What matters for present purposes is that the concept of Tailoring brings clarity to the case law, shows that precedent does not preclude upholding community-specific measures such as gang antiloitering ordinances, and identifies the inquiry that courts ought to make when confronted with questions of community self-governance.

B. Re-standardizing

Another important lesson from the foregoing analysis in Parts II and III is that ordinary courts can engage in Re-standardizing to accommodate communities. Re-standardizing can expand the scope of potential nonuniformity beyond what Tailoring can accomplish. This is because Re-standardizing permits a greater scope of precedent to be identified as not relevant to the community at hand than does Tailoring; Re-standardizing, after all, allows for rejection of the Standard that Tailoring accepts as governing. But just as importantly, Re-standardizing can be an alternative route to arriving at the same point that Tailoring can reach.[274] Re-standardizing is useful in this respect because it affords flexibility to accommodate a particular community while limiting the degree to which the generally applicable Standard is Tailored, thereby allowing for greater uniformity of application in the places where the ordinary Standard is applicable. In other words, a desire to maintain a relatively uniform legal culture across most jurisdictions may provide a reason to resist highly contextualized Tailorings of Standards. Re-standardizing is a method to

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270. Dynes v. Hoover, 61 U.S. (20 How.) 65, 82 (1857), *quoted in Levy*, 417 U.S. at 747.

271. *See supra* text accompanying notes 226-227.

272. *See* discussion *infra* subpart IV(C).

273. *See supra* text accompanying notes 9-11.

274. For example, highly community-specific Tailoring of an objective legal test where there is a uniform community-wide understanding is functionally identical to Re-standardizing the legal test to a subjective test. *See infra* note 299 and accompanying text.

preserve general uniformity while still accommodating a few communities' needs for nonuniformity.

Two factors typically are present when courts Re-standardize, and not infrequently a third circumstance also prevails. The first two factors parallel those discussed above that trigger Tailoring:[275] the presence of a community in which differing rules are normatively justifiable on the basis of its distinctive needs and administrable on account of the beneficiaries' geographic insularity, which provides relatively clear boundaries that demarcate operation of ordinary constitutional doctrines from the nonuniform.[276] In the public school setting, for example, the Supreme Court has justified Re-standardizing on the basis that without it, "the schools would be unduly constrained from fulfilling their role."[277] The Court has also justified Re-standardizing in the military on the basis of the "factors differentiating military society from civilian society."[278] A third factor frequently, though not invariably, is present when courts Re-standardize. Courts are apt to Re-standardize when the policy affecting the community has been formulated by experts who understand the idiosyncratic community's distinctive needs in a way that federal judges cannot. In the military context, for example, the Court has Re-standardized on the ground that courts are not institutionally capable of making judgments concerning the relative importance of competing considerations in respect of furthering the military community's goals.[279] Courts accordingly must "give great deference" to the judgment of military officials even when those judgments implicate constitutional values;[280] such "great deference" is metonymic with Re-standardizing when the ordinary Standard is some

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275. *See supra* note 227 and accompanying text.

276. This is not to suggest that the geographical borders are wholly impervious in this regard. *See supra* note 119.

277. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988). In *Kuhlmeier*, the Supreme Court allowed Re-standardizing in the context of public schools, explaining that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns*." *Id.* at 273 (emphasis added).

278. Parker v. Levy, 417 U.S. 733, 756 (1974). Similarly, in the context of prisons, the Court has Re-standardized on the grounds that ordinary Standards are "not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons," Thornburgh v. Abbott, 490 U.S. 401, 410 (1989), that there must be "sufficient sensitivity to the need for discretion in meeting legitimate prison needs," *id.*, that the "'problems of prisons in America are complex and intractable,'" Turner v. Safley, 482 U.S. 78, 84 (1987) (quoting Procunier v. Martinez, 416 U.S. 396, 404-05 (1974)) (justifying Re-standardizing in the First Amendment context), and that there must be "due regard for the inordinately difficult undertaking that is modern prison administration," *Abbott*, 490 U.S. at 407 (quoting *Turner*, 482 U.S. at 85).

279. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (noting that review of military regulations challenged on First Amendment grounds is more deferential than review of similar challenges to civilian laws or regulations).

280. *Id.*

form of intermediate or heightened review insofar as constitutional Standards, at their core, are tests for determining how much deference courts should give to the determinations of the coordinate branches of government.[281]

1. Re-standardizing Overlooked: Antigang Measures and Void-for-Vagueness Revisited.—Military and Native American law both provide an instructive deployment of Re-standardization in the context of the void-for-vagueness doctrine. Each is a viable alternative to the approaches discussed above[282] taken by the California Supreme Court, which in *Acuna* employed Tailoring to uphold an antigang injunction against a void-for-vagueness challenge, and the Illinois Supreme Court, which did not Tailor and found unconstitutional a gang loitering ordinance in *Morales*.

In *Parker v. Levy*,[283] the Supreme Court heard a void-for-vagueness challenge lodged against Articles 133 and 134 of the Uniform Code of Military Justice.[284] Article 133 provides that "[a]ny commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."[285] Article 134 states that "all disorders and neglects to the prejudice of good order and discipline in the armed forces [and] all conduct of a nature to bring discredit upon the armed forces . . . shall be punished at the discretion of [the military] court."[286] The Supreme Court in

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281. *See, e.g.*, Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 594 (1994) (noting that "courts use different standards of review as a means of applying different degrees of deference to the decisionmaker whose determination is under review" and that different standards of review "invoke different substantive rules for establishing violations of the equal protection guarantee, which often leads to different substantive conclusions"); Mark D. Rosen, *Defrocking the Courts: Resolving "Cases or Controversies," Not Announcing Transcendental Truths*, 17 HARV. J.L. & PUB. POL'Y 715, 718-19 (1994) (arguing that once the "presumption of constitutionality . . . was reversed in the selected contexts of equal protection and due process," the Court "shift[ed] the burden-of-proof from constitutionality to unconstitutionality, forcing the government to show that policies that implicate protected classes or fundamental rights are constitutional").

In a show of deference similar to that given the military, in the prison context the Supreme Court has Re-standardized the applicable First Amendment jurisprudence and reviewed regulations that limit what publications prisoners are permitted to receive from the outside under a reasonableness inquiry rather than strict or heightened scrutiny. *See Abbott*, 490 U.S. at 409 (noting that the standard of review "focuses on the reasonableness of prison regulations" and is not "a standard of 'strict' or 'heightened' scrutiny"). The Court justified this Re-standardizing on account of "the expertise of [prison] officials and [the fact] that the judiciary is ill equipped to deal with the difficult and delicate problems of prison management." *Id.* at 407-08.

282. *See supra* section IV(A)(2).

283. 417 U.S. 733 (1974).

284. *Id.* at 740-41.

285. Uniform Code of Military Justice, art. 134, 10 U.S.C. § 933 (1994), *quoted in Levy*, 417 U.S. at 738 n.3.

286. *Id.* § 934, *quoted in Levy*, 417 U.S. at 738 n.4.

Parker noted that the court of appeals decision below had "found little difficulty in concluding that 'as measured by contemporary standards of vagueness applicable to statutes and ordinances governing civilians,' the general articles 'do not pass constitutional muster.'"[287] The *Parker* Court nevertheless reversed. Explaining that "the military is, by necessity, a specialized society separate from civilian society,"[288] the Court Re-standardized and ruled that "the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs."[289] Under this modified Standard, "'statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. . . . Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.'"[290] Relevant to ascertaining whether the new substantive Standard was met, ruled the Court, was the fact that the United States Court of Military Appeals and other military authorities had construed the Articles in question "in such a manner as to at least partially narrow [their] otherwise broad scope."[291] The Court also noted that "[f]urther content" of the proscribed activities "may be supplied . . . by less formalized custom and usage."[292] In the end, "even though sizable areas of uncertainty as to the coverage of the articles may remain," the Court held that the void-for-vagueness challenge failed under the applicable new Standard.[293]

The tribal court in *Hopi Tribe v. Lonewolf Scott*[294] likewise Re-standardized in rejecting a void-for-vagueness challenge to a tribal ordinance.[295] Eschewing the ordinary Standard based on objective criteria, under which statutes may be void for vagueness when there is the mere "possibility of discriminatory enforcement" and objective lack of notice,[296] the tribal court substituted a Standard that assessed to what extent, as a subjective matter, the Hopi community understood the ordinance that was the subject of the challenge.[297] The court held that "[i]t

287. *Levy*, 417 U.S. at 741 (quoting Levy v. Parker, 478 F.2d 772, 793 (3d Cir. 1973)).

288. *Id.* at 743.

289. *Id.* at 756.

290. *Id.* at 757 (citations omitted) (quoting United States v. National Dairy Prods. Corp., 372 U.S. 29, 32-33 (1963)).

291. *Id.* at 752-53.

292. *Id.* at 754.

293. *Id.*

294. 14 Indian L. Rep. 6001 (Hopi Tribal Ct. 1986).

295. *Id.* at 6005.

296. Gentile v. State Bar, 501 U.S. 1030, 1082 (1991) (O'Connor, J., concurring); *see also* Kolender v. Lawson, 461 U.S. 352, 361 (1983) (holding that due process requires meaningful, objective standards for criminal statutes in order to pass the vagueness test).

297. *Lonewolf*, 14 Indian L. Rep. at 6005.

seems theoretic conjecture that the defendants claim that they did not understand the plain language of the statute."[298] Interestingly, as the Supreme Court did in *Parker*, the Hopi tribal court relied on the fact that the ordinance, in point of fact, had been construed by the Hopi courts; that, in point of fact, its scope was unclear neither to citizens nor police; and that, in point of fact, the ordinance had not been inappropriately invoked by police or the courts.[299]

Unlike the Re-standardization in *Parker*, the tribal court's Re-standardization in *Lonewolf* was in essence an alternative route to highly contextualized Tailoring. This is so because there is little if any difference between deploying a subjective test (as the Hopi tribal court did) and using an objective test Tailored to a discrete and specific community. *Parker*, by contrast, represents an example of Re-standardizing that expands the scope of nonuniformity beyond what Tailoring could accomplish by actually extending the range of permissible vagueness in the military context.

There are, however, some fundamental commonalities between the *Parker* and *Lonewolf* Re-standardizations. Both courts Re-standardized the void-for-vagueness doctrine so that challenged provisions would be struck down only if, in fact, the proscribed conduct was not understood by the community or had been abusively deployed by the governing authorities.[300] Such common-sense approaches to the void-for-vagueness doctrine are sensible only in relatively small communities where one plausibly can speak of a concept such as communal understanding. Re-standardizing of this sort thus is inapplicable in most circumstances. But when an ordinance or statute affects only a discrete, relatively homogenous community with distinctive needs, there is precedent and appeal for such Re-standardizations.

Applying the approaches adopted by *Parker* and *Lonewolf* to the cases of *Morales* and *Acuna* requires that five questions be asked. There are three threshold questions: (1) whether the legal edicts in question, the gang antiloitering ordinance in *Morales* and the injunction in *Acuna*, primarily

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298. *Id.*

299. *Id.* As the *Lonewolf* court explained,

> [t]he Hopi courts have properly limited the application of this statute so as to not overstate the criminal sanctions imposed on a defendant. *Its meaning and application is clear to the police, prosecutors, and the reservation communities.* There have been no episodes of capricious or arbitrary arrests based on [the ordinance] and the Hopi courts have applied this criminal statute in a uniform, consistent, and limited manner . . . .

Id. (emphasis added).

300. *See* Parker v. Levy, 417 U.S. 733 (1974) (holding that a finding of void-for-vagueness requires a determination that the military code provision is unconstitutional only if "'one could not reasonably understand that his contemplated conduct is proscribed'" (quoting United States v. National Dairy Prods. Corp., 372 U.S. 29, 32-33 (1963))); *Lonewolf*, 14 Indian L. Rep. at 6005.

impact discrete communities; (2) whether these communities merit nonuniform treatment;[301] and (3) whether the policies at issue were shaped by experts familiar with the communities' needs. The threshold inquiries thus include two largely empirical determinations—whether the legal edict primarily affects discrete communities and whether experts were involved in shaping the policies—and the normative question of whether these communities' needs should be accommodated.[302] If the answer to any of these threshold questions is no, Re-standardizing is inappropriate. If the answer to all three is in the affirmative, however, two questions remain.

First, is there, in fact, a communal understanding concerning the meaning of the relevant provisions? Under the *Parker* Court's approach, the appropriate question to ask is whether a person in the community "could not reasonably understand that his contemplated conduct is proscribed," and statutes are not unconstitutionally vague "simply because difficulty is found in determining whether certain marginal offenses fall within their language."[303] Under the *Lonewolf* court's approach, the appropriate question to ask is whether the community subjectively understood the conduct to be proscribed.[304] Under either *Parker*'s or *Lonewolf*'s approach, the fact that "persons of ordinary intelligence may maintain a common and accepted meaning of the word 'loiter'"[305]—which was acknowledged by the *Morales* court—might be enough to satisfy this second prong. At the very least, one of the principal arguments adopted by the Illinois Supreme Court in *Morales*—that the ordinance's proscription against a person "reasonably believe[d] to be a criminal street gang member [from] loitering in any public place with one or more other persons" could be understood to apply to "a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower"[306]—likely would have been a nonissue had the Illinois court asked this question.

The second question is whether authorities had abusively deployed the legal edict in question or were likely to do so in the future. This is an empirical question that was neglected by the Illinois Supreme Court. Under *Parker*, of relevance to ascertaining this second prong is whether courts or other authorities have interpreted the legal edict "in such a

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301. *See supra* note 227 and accompanying text.

302. As mentioned above, the merits of this normative question are beyond the scope of this Article. *See supra* text accompanying notes 9-11.

303. *Parker*, 417 U.S. at 757.

304. *See Lonewolf*, 14 Indian L. Rep. at 6005.

305. City of Chicago v. Morales, 687 N.E.2d 53, 61 (Ill. 1997), *cert. granted*, 118 S. Ct. 1510 (1998).

306. *Id.* at 60-61.

manner as to at least partially narrow its otherwise broad scope."[307] The gang loitering ordinance in *Morales* in fact had been narrowed by the authorities. Although the Illinois Supreme Court noted that "police are given complete discretion to determine whether any members of a group are gang members" under the ordinance, the court acknowledged that a general police order from the Chicago police department went "to great lengths to define criminal street gangs."[308] The Illinois court, however, appears to have dismissed the relevance of the police order, holding that "lawmakers may not abdicate their responsibilities for setting the standards of the criminal law" and "establish[ing] minimal guidelines to govern law enforcement."[309] A court that Re-standardized in accordance with *Parker* would treat a police department order differently. Even if some ambiguity remained, there can be little question that the Chicago police department order, at the very least, "partially narrowed" the ordinance's scope.[310] Under the *Parker* approach, this is highly relevant to determining if, in fact, the provision is unconstitutionally vague.

2. *Analytical Clarity of the Case Law.*—The recognition that courts engage in Re-standardizing can clarify the appropriate scope of case law. Re-standardizing in essence is a determination that some factor, such as the presence of distinctive, geographically-based communities with idiosyncratic needs, renders the circumstance at hand fundamentally different from ordinary conditions such that distinctive legal tests may be employed. Viewed in this light, Re-standardizing is part of the ordinary jurisprudential process of identifying the appropriate scope of precedent; that is, for determining when holdings arising from other contexts do and do not reach the circumstances under consideration in a particular case. Understanding the phenomenon of Re-standardizing provides two important lessons. First, case law from general contexts may not provide the appropriate Standards with respect to distinctive communities. The second lesson is the converse of the first: case law dealing with distinctive communities may not provide the appropriate Standards in the context of general society.

a. Limited applicability of case law from general society: Kiryas Joel *and* Rajneeshpuram.—Case law arising from the context of general society[311] may not provide the appropriate Standard with respect to

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307. *Parker*, 417 U.S. at 752.

308. *Morales*, 687 N.E.2d at 63-64. Although the regulations did not clarify the meaning of "loiter," the term may have been sufficiently clear for the reasons discussed above. *See supra* note 305 and accompanying text.

309. *Morales*, 687 N.E.2d at 64.

310. *Parker*, 417 U.S. at 752.

311. By "general society" I mean any context in which reasons of either normativity (the group does not merit differentiated treatment) or administrability (no clear boundaries exist that allow for the

distinctive, geographically limited communities. Consider, for example, the question of the appropriate scope of the holding in *Larkin v. Grendel's Den, Inc.*,[312] in which the Supreme Court struck down as unconstitutional a Massachusetts statute that gave any church in the state the power to veto liquor license applications for businesses located within five hundred feet of the church. In striking down the ordinance, the *Grendel's Den* Court applied the tripartite test first articulated in *Lemon v. Kurtzman*.[313] Under that test statutes must (1) have a secular goal, (2) must not have the "primary effect" of advancing or inhibiting religion, and (3) "must not foster 'an excessive government entanglement with religion.'"[314] The Supreme Court in *Grendel's Den* found that the statute failed both the "primary effect" and "excessive entanglement" requirements of this test. The "primary effect" requirement was not satisfied because there was no way to guarantee that the power delegated to the churches would "'be used exclusively for secular, neutral and nonideological purposes'" and because "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."[315] The prohibition against excessive entanglement was also not satisfied, the *Grendel's Den* Court concluded, because the statute in question "enmeshes churches in the exercise of substantial governmental powers" by giving them a veto power of applications submitted to Massachusetts's Alcohol Beverage Control Commission.[316]

Grendel's Den was the case primarily relied upon by the district court in *Oregon v. City of Rajneeshpuram*,[317] the case examined above that held that incorporation of the Rajneesh's city violated the Establishment Clause.[318] Although the Rajneesh church was not the delegee of state power, the district court held that the "existence of the City of Rajneeshpuram gives the appearance of a joint exercise of legislative authority by church and state" due to the interrelationship between the for-profit corporations that owned the City property and the religious corporation that in turn owned the for-profit.[319] For these same reasons

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demarcation of the ordinary from nonuniform doctrines) counsel against the application of geographical constitutional nonuniformity.

312. 459 U.S. 116 (1982).

313. 403 U.S. 602 (1971).

314. *Id.* at 612-13 (citations omitted) (quoting Walz v. Tax Comm'r, 397 U.S. 664, 674 (1970)).

315. *Grendel's Den*, 459 U.S. at 125-26 (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973)).

316. *Id.* at 126.

317. 598 F. Supp. 1208 (D. Or. 1984).

318. *Id.* at 1214-15 (discussing *Grendel's Den*, 459 U.S. at 125-26); *see also supra* text accompanying notes 1-3 (discussing *Rajneeshpuram*).

319. *Rajneeshpuram*, 598 F. Supp. at 1214-15.

the Court noted that, "the nature and extent of potential or actual control by religion over the government of the City raise[d] serious entanglement problems."[320]

Grendel's Den also was the case relied upon by four members of the Supreme Court in *Board of Education v. Grumet*[321] to invalidate a statute that created a special school district that coincided with the borders of the Village of Kiryas Joel. Kiryas Joel is a village created by a group of Satmar Hasidim in 1977 for the express purpose of establishing a political subdivision comprised entirely of members of the Satmar Hasidic community. The village was created pursuant to a state law that permitted almost any group of residents the power to form a village within a town.[322] Virtually all Satmar children attended private religious schools within Kiryas Joel, but the Village could not afford the staggering costs associated with educating its handicapped children.[323] Kiryas Joel residents, however, did not wish to send their disabled children outside the Village due to "'the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different.'"[324] The New York legislature responded by passing a statute that delegated the civic powers to constitute a school district to the "'qualified voters of the village of Kiryas Joel.'"[325] As a result, Kiryas Joel was allowed to have a publicly financed school for handicapped children located within the Village.[326]

In a six to three decision, the Supreme Court held that the statute constituting the special school district violated the Establishment Clause. As in the *Rajneeshpuram* case, the delegee of state power in *Kiryas Joel* was not a synagogue. But the difference between delegation to churches in *Grendel's Den* and the delegation to a homogenous group of co-religionists who are the delegees owing to their religious identity, concluded a plurality of the *Kiryas Joel* Court, "is one of form, not substance."[327] Four members of the Court accordingly restated *Grendel's Den* as standing for the proposition that "a State may not delegate its civic authority to a group chosen according to a religious criterion" and further explained that this "group chosen according to a religious criterion" could

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320. *Id.* at 1215.

321. 512 U.S. 687 (1994).

322. *Id.* at 690. In particular, under New York law a territory with a population of at least 500 and of not more than 5 square miles may be incorporated upon the petition of at least 20% of the voting residents of the territory or by the owners of more than 50% of the territory's real property. *See* N.Y. VILLAGE LAW § 2-200 (McKinney 1995).

323. *Kiryas Joel*, 512 U.S. at 691-92.

324. *Id.* at 692 (quoting Board of Educ. v. Wieder, 527 N.E.2d 767, 770 (N.Y. 1988)).

325. *Id.* at 698 (quoting 1989 N.Y. LAWS 748).

326. *Id.* at 693-94.

327. *Id.* at 698.

refer to a collection of religious *individuals* such as "the 'qualified voters of the village of Kiryas Joel.'"[328]

Both the district court in *Rajneeshpuram* and a plurality of the Supreme Court in *Kiryas Joel* thus concluded that the *Grendel's Den* holding had direct relevance to their respective cases. But this is not necessarily so. Rather than focusing on the fact that the delegees of governmental authority in *Rajneeshpuram* and *Kiryas Joel* were individuals rather than religious bodies—the distinction that the Court ultimately rejected and that occupied much of the attention of the plurality and dissenting Justices in *Kiryas Joel*[329]—it is significant to recognize that the delegation in *Grendel's Den* was made to *all* churches and synagogues in the state. The city of Rajneeshpuram and the village of Kiryas Joel, by contrast, present situations in which the state delegated power to discrete, substate enclaves where homogeneous, tightly knit, geographically limited communities sought to govern themselves in unusual ways. Three sets of cases surveyed above—the community standards doctrine and case law from the military and public schools contexts—provide analogous precedents for permitting constitutional nonuniformity that would uphold the delegation of powers to religious authorities within select zones while prohibiting a delegation to all churches throughout a state of the sort that occurred in *Grendel's Den*. In each of the three aforementioned circumstances, the Supreme Court has justified creating constitutional nonuniformities in the First Amendment context on the basis that nonuniformity was necessary to create or preserve the distinctive norms that were the *sine qua non* of the communities involved.[330] To be sure, the constitutional nonuniformities were allowed because each community's well-being was deemed vital to the interests of general society. But if the well-being of the Rajneesh and Satmar communities approaches a similar level of importance with respect to the interests of general society,[331] and if the Rajneesh's and Satmar's efforts to self-govern were similarly driven by the good faith view that such powers were necessary for the creation and

328. *Id.* (quoting 1989 N.Y. LAWS 748).

329. *See id.*; *id.* at 736-37 (Scalia, J., dissenting).

330. *See supra* subparts III(A), (B), (D).

331. For an argument that our country's foundational liberal commitments compel the conclusion that it is in general society's interest that communities like the Rajneesh (and perhaps the Satmar Hasidim) be allowed to flourish, see Rosen, *supra* note 8, at 1140-41. This Article, however, leaves aside the normative question of which groups should be the beneficiaries of nonuniformity and seeks only to showcase the doctrinal tools that permit the creation of nonuniformity. *See supra* text accompanying notes 9-13. The analysis that follows in the text assumes an affirmative answer to the normative question only for the purpose of illustrating how Re-standardizing might operate outside the contexts of the community standards doctrine, the military, and public schools. As such, the analysis's usefulness to this Article does not turn on how the normative question ultimately is answered with respect to the Rajneesh or Kiryas Joel.

preservation of the norms that were essential to sustain their respective communities, then the Rajneesh and the Hasidim of Kiryas Joel also represent communities suited to geographical constitutional nonuniformity.

Re-standardizing is an apt tool for generating the geographical nonuniformity that could accommodate the Rajneesh and the Satmar Hasidim in Kiryas Joel. According to *Lemon*, the Goal of the Establishment Clause—whose language does "not simply prohibit the establishment of a state church or a state religion," but instead commands that there should be "no law *respecting* an establishment of religion"—is to preclude a law "'respecting' the forbidden objective while falling short of its total realization . . . . A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."[332] In short, the Clause includes a prophylactic. But the danger of establishing either Rajneesh or Hasidism, both tiny minority sects, as a state religion is quite remote. Furthermore, the need to accommodate religion—a normative commitment[333] that itself may rise to a constitutional duty under the Free Exercise Clause[334]—is greater the smaller and less powerful the religious group. Taken together, these two factors justify employing a Standard different from *Lemon* and its progeny for minority religious sects that pose little risk of being established as a state religion.

The substance of the new Standard should be determined on the basis of identifying what test, given the unique circumstance demanding Re-

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332. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (emphasis in original). Although the *Lemon* Court ruled that "*every* analysis in [the Establishment Clause context] must begin with consideration" of the three tests it thereafter pronounced, *id.* (emphasis added), the Court frequently analyzes Establishment Clause cases without invoking the *Lemon* test, *see, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-400 (1993) (Scalia, J., concurring) (documenting the sporadic use of the *Lemon* test in Establishment Clause jurisprudence). *Rajneeshpuram* and *Kiryas Joel* may be additional instances in which *Lemon*'s tripartite test is ill-suited to realize the Goal of the Establishment Clause. In part because of this, it is unclear whether and to what extent the *Lemon* test remains the applicable doctrinal rubric for analyzing Establishment Clause claims. *Compare Kiryas Joel*, 512 U.S. at 718-21 (O'Connor, J., concurring) and *id.* at 750-51 (Scalia, J., dissenting) (both arguing that the *Lemon* test should be abandoned), *with id.* at 710 (Blackmun, J., concurring) (arguing that *Lemon* is still "general[ly] valid[]"). At the very least, the discussion in the text provides an example of what Re-standardizing could look like in the Establishment Clause context.

333. *See, e.g.*, County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 589 (1989) (recognizing that early sectarian differences among various Christian denominations gave rise to a tradition of religious tolerance); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (noting that government accommodation of religions "follows the best of our traditions").

334. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."); Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("[The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions and forbids hostility toward any.").

standardization, is appropriate to realize the Goal of the Establishment Clause. One modest proposal would be to apply the rule of *Grendel's Den* differentially depending upon the subject. In particular, although the functional test of the sort adopted by the *Kiryas Joel* plurality that collapses the distinction between delegations to religious bodies and religious persons may be appropriate with respect to delegations of power to individuals that permit them to exercise the power across large polities (such as states) that are inhabited by a heterogeneous population, delegations to individuals rather than religious bodies should be permitted when the delegation permits individuals to exercise power in small enclaves across a willing, homogeneous population and the delegation is in good faith understood by the community as being necessary for the community's very survival. While explicit delegation to churches even in enclaves may pose too great a risk to core Establishment Clause concerns, a more flexible prophylactic that gives formal effect to the distinction between delegations to religious bodies and individuals may be appropriate in light of the minuscule risk posed by communities such as the Rajneesh and the Satmar Hasidim and their correspondingly heightened needs for accommodation.[335]

b. Limited general applicability of case law pertaining to distinctive communities: Employment Division, Department of Human Resources v. Smith.—The second lesson arising from the recognition of Re-standardizing is that case law concerning distinctive communities may have limited or no application to general society. Consider in this regard the notorious case of *Employment Division, Department of Human Resources v. Smith*,[336] in which the Supreme Court held that strict scrutiny is applicable to free exercise claims only when governmental action is not neutral or generally applicable, when the claimant has been denied unemployment benefits, or when another liberty, such as free speech or parental autonomy, is asserted in conjunction with the free exercise claim.[337] In the eyes of many,[338] *Smith* dramatically rewrote First

335. A plausible alternative specialized Standard would be an ordinary heightened scrutiny test for analyzing Establishment Clause claims asserted with respect to small, homogeneous communities. The first prong of the test would ascertain whether there are compelling normative reasons to support accommodation. For a suggestion of what constitutes compelling societal reasons to accommodate particular communities, see Rosen, *supra* note 8, at 1089-1106. The second prong would ascertain whether the type of political power the community sought was narrowly tailored to their needs. In the case of the Rajneesh, for example, the relevant question would be whether the creation of a municipality, as opposed to (say) a residential association, was necessary for their community's survival, as judged by the community's good faith understanding of what its needs were.

336. 494 U.S. 872 (1990).

337. *Id.* at 878-84.

338. *See, e.g., id.* at 891 (O'Connor, J., concurring) ("In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence . . . ."); James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 91 (1991) (noting that the *Smith* decision "dramatically

Amendment jurisprudence by displacing the generally applicable strict scrutiny Standard that had been articulated in the decision of *Sherbert v. Verner*.[339] An important component of the *Smith* Court's reasoning was that "[i]n recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all."[340] To support this proposition, the Court cited to four earlier decisions, but two of the cases relied upon by the Court were clear instances of Re-standardization on behalf of idiosyncratic communities.[341] As such, they do not constitute evidence of a general trend away from using *Sherbert*.[342] They are, if anything, just the opposite: They are *Re-standardizations* in relation to the Standard that was the *Sherbert* test.

One of the cases the *Smith* Court cited was *Goldman v. Weinberger*,[343] the case concerning the Air Force prohibition on the wearing of yarmulkes. *Goldman*'s holding was grounded on the unique needs of the military community. The Court noted that, in contrast to

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narrowed" the protections afforded by the Free Exercise Clause); Douglas Laycock, *The Remnant of Free Exercise*, 1990 SUP. CT. REV. 1, 1-2 (criticizing the *Smith* decision as a radical departure from the earlier strict scrutiny Standard); Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 BYU L. REV. 73, 73 (referring to "the fundamental change [*Smith*] worked on our understanding of the Free Exercise Clause"); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1113 (1990) (noting that the *Smith* holding reconsidered the free exercise standard); Kenneth Marin, Note, Employment Division v. Smith*: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1431 (1991) (contending that *Smith* severely limited the Free Exercise Clause).

339. 374 U.S. 398 (1963).

340. *Smith*, 494 U.S. at 883.

341. The two instances of Re-standardization occurred in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), and *Goldman v. Weinberger*, 475 U.S. 503 (1986). In the third case cited by the *Smith* Court, the Supreme Court had held that the First Amendment was not even implicated; as such, there was no need to summon *Sherbert*'s tripartite test, which balances various interests to determine if free exercise has been violated in cases when the First Amendment is potentially an issue. That case, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), concerned a free exercise claim to enjoin the government from building a road or harvesting timber on publicly owned land. Free exercise was not remotely at issue, ruled the Court, because it "'affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.'" *Id.* at 448 (quoting Bowen v. Roy, 476 U.S. 693, 700 (1986)). The second holding of the fourth case, *Bowen v. Roy*, 476 U.S. 693 (1986), supported the *Smith* Court's assertion. *Bowen*'s second holding rejected a First Amendment claim that related not to the government's internal procedures but to a governmental requirement that fell upon citizens. *See id.* at 708 (declining to apply the *Sherbert* principles in upholding the government's right to condition welfare aid on the recipient furnishing her social security number to the applicable state agency even if doing so is contrary to the applicant's religious beliefs). But as careful analysis shows only one case in support, the Court's claim in *Smith* that there had been a general trend toward not invoking *Sherbert* is sharply undercut.

342. Justice O'Connor made this point in her concurrence. *See Smith*, 494 U.S. at 900-01 (O'Connor, J., concurring) (noting that *Goldman* and *Shabazz* "are distinguishable because they arose in the narrow, specialized contexts in which we have not traditionally required the government to justify a burden on religious conduct by articulating a compelling interest").

343. 475 U.S. 503 (1986).

general society, "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."[344] The Court further justified the need to Re-standardize on the basis that courts are not institutionally capable of anticipating how their decisions will impact the military community. It noted that "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular interest" because courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[345] Any doubt as to whether *Goldman*'s holding was intended to have applicability beyond the military was dispelled when the Court formulated the applicable Standard: "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[346] The Court's very formulation clearly shows that the Court viewed the "more deferential" approach it was adopting as a legal test that stood *in contrast* to the Standard (given by *Sherbert*) that was applicable to "civilian society."

A second case relied upon by the *Smith* Court, *O'Lone v. Estate of Shabazz*,[347] concerned the prison context. That case, like many other prison cases,[348] also involved a Re-standardization. "To ensure that courts afford appropriate deference to prison officials," the Court noted, "we have determined that prison regulations are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights."[349] The Re-standardization was justified on account of the distinctive needs of prisons: "This approach ensures the ability of corrections officials 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration . . . .'"[350]

In short, attentiveness to the phenomenon of Re-standardization facilitates analytic clarity regarding the true scope of precedent. Unmindful of Re-standardization, the majority opinion in *Smith* erroneously relied upon constitutional nonuniformity arising from the context of idiosyncratic communities to make a general jurisprudential point.

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344. *Id.* at 507.

345. *Id.* (quoting Chappell v. Wallace, 462 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962))).

346. *Id.*

347. 482 U.S. 342 (1987).

348. *See supra* notes 278, 281.

349. *Shabazz*, 482 U.S. at 349.

350. *Id.* (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

C. *Policy Considerations*

As Parts II and III of this Article have shown, American law already accommodates several communities by means of geographical constitutional nonuniformity. This subpart overviews generic factors that should be considered when deciding whether to create additional instances of constitutional nonuniformity. The subpart proceeds by identifying the benefits and risks that attend geographical constitutional nonuniformity. Left for the future are the questions of which communities should be accommodated and with respect to which constitutional doctrines some geographical nonuniformity can be foregone.

It is virtually tautological that geographical constitutional nonuniformity can extend the range of individuals and communities that can flourish under American law. This is a normative good because there may be idiosyncratic communities whose existence we as a society value, but that, due to these communities' distinctive needs and values, may not be able to survive in the event ordinary constitutional doctrines were applied to them. The military and Native American communities are two such examples; surely there could be more.[351] Indeed, a compelling argument can be mounted that liberalism demands that certain communities be given powers to self-govern of a sort that likely would require some constitutional nonuniformity.[352] The danger that nonmainstream communities will be squelched absent nonuniformity has only grown over time,[353] as doctrines such as selective incorporation have subjected state and local governments to virtually all the constraints that are applicable to the federal government, thereby limiting the range of laws and governing institutions that can be implemented at the level of local government.[354]

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351. For a framework to identify suitable communities, see Rosen, *supra* note 8, at 1089-1106.

352. *See id.* at 1089 (arguing that the best instantiation of liberal political commitments is a political structure that permits select communities significant powers of self-governance).

353. *Cf.* Donald B. Kraybill, *Preface and Acknowledgements* to THE AMISH AND THE STATE at ix, ix (Donald B. Kraybill ed., 1993) ("[T]he Old Order Amish have stirred a remarkable array of controversies with the state in the twentieth century.").

354. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 772-74 (2d ed. 1988) (listing the rights the Court has held to have been incorporated by the Fourteenth Amendment). Selective incorporation constitutes a historic sea-change, for prior to about fifty years ago the subfederal sovereigns of states and municipalities were almost entirely unconstrained by the federal Constitution. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833) (observing that the Bill of Rights "contain[s] no expression indicating an intention to apply [the Bill of Rights provisions] to the State [or local] governments"). As a consequence, great diversity existed among state and local laws and governmental structures. For example, some states and localities had established churches while others did not. *See, e.g.*, MASS. CONST. of 1780, Declaration of Rights, art. III (1780) (amended 1833) (mandating the funding of church activities). Similarly, many states and localities actively legislated "ethics, good manners, respectable habits, and standards of decency." WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 149 (1996). Much diversity in subfederal governance disappeared, however, with the advent of selective incorporation and other related doctrines. For example, no states or localities today may have established churches, *see*

Geographical constitutional nonuniformity thus can ensure that the progressive homogenization of government serves its beneficial purpose without becoming a straitjacket.

The danger of constitutional nonuniformity is that it potentially can undermine the very institution of constitutionalism. Professor Leonard Ratner has identified several risks posed by nonuniformity that go to this point:

> The Constitution makes us one nation. It is the symbol of our shared purposes. If interpretation of that overriding document, which manifests our agreement on long term associational values, varies from state to state, respect for and confidence in the document is undermined. The nature of our governmental structure and its implications for all citizens becomes indistinct. Uncertainty and discontent proliferate.[355]

Ratner's observation can be broken down into three constitutive elements: nonuniformity implicates the Constitution's ability to (1) define the basic political values that join the country together as a single political community, (2) earn the respect of citizens, and (3) identify governmental obligations and citizens' rights in a predictable manner that gives certainty to citizens. To this we might add the risk that (4) certain citizens will not receive protections from government overreaching that are deemed to be essential.

Although these are very important concerns, the fact that American constitutionalism already allows some geographical constitutional nonuniformity shows that nonuniformity does not necessarily entail the collapse of constitutionalism.[356] And this makes sense. The Constitution's provisions for the most part are highly abstract general principles, and there is no reason *a priori* why constitutionalism demands that the provisions be given identical detailed specifications in every jurisdiction.[357] A common commitment to due process, for example, can

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Everson v. Board of Educ., 330 U.S. 1, 15 (1947), and the jurisprudence of due process has sharply impeded state and local governments' pursuit of public morality, *see* NOVAK, *supra*, at 170-71.

355. Ratner, *supra* note 31, at 941. Although Ratner has phrased his argument in terms of nonuniformity "from state to state rather than in select geographically discrete enclaves," *id.*, its gist is that constitutionalism by its nature requires uniformity. The necessity of uniformity presumably would be undermined regardless of the governmental level at which nonuniformity were permitted.

356. In fact, it could well be argued that the "long term associational values" and "shared purposes" of the political community created by the Constitution include the liberty to self-actualize in accordance with one's views of what self-actualization requires to the extent that one does not interfere with others' exercise of the same liberty. *See* Rosen, *supra* note 8, at 1091-1106. Nonuniformity on behalf of select communities may, therefore, advance the goals of the national political community.

357. It might be objected that Re-targeting is inconsistent as an *a priori* matter with constitutionalism's attribute of "mak[ing] us one nation," Ratner, *supra* note 31, at 941, insofar as Re-targeting involves the displacement of the Court's understanding of the foundational principle animating

suffice to "make[] us one nation," even though due process in some jurisdictions requires notice by mailing whereas in others it is satisfied by a posting on a community bulletin board. More generally, the fact that a constitutional provision may entail different concrete requirements or restrictions depending upon location should neither undermine the national political community nor citizens' respect for the Constitution as long as good reasons exist for treating the different cases differently. Predictability is not a serious problem when there are only a limited number of geographical nonuniformities and when the boundaries demarcating nonuniformity—be they fences enclosing the military enclave, Indian country, or the public school—are clear. Nor need nonuniformity lead to the undermining of fundamental protections. This is particularly apparent in the first institutional context, when ordinary federal courts, fully familiar with basic constitutional values, are the progenitors of the constitutional nonuniformity and such courts' rulings are subject to appellate review by other federal courts. Nor is it the case that fundamental rights perforce will be undermined in the second institutional setting of tribal courts, as both the omnipresent risk that Congress can amend or repeal the legislation that empowers the courts to be independent and authoritative interpreters of ICRA as well as the judges' direct accountability to the affected communities provide checks against abuse by such tribunals.[358]

Creating new areas of constitutional nonuniformity, therefore, would not necessarily undermine the essential aspects of constitutionalism. In deciding whether to create new beneficiaries of constitutional nonuniformity, two predominant factors would have to be taken into account so as to ensure that there would not be unwanted consequences in respect of constitutionalism. First, there could only be a limited number of beneficiaries of nonuniformity. Although it is impossible to specify the number in advance, it is likely that the Constitution's capability of generating a national political community and engendering citizens' respect

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a given constitutional provision. This objection founders on two shoals. First, a Re-targeting might be important to the community but have no practical effect *vis-a-vis* making us "one nation"; consider, for example, the Navajo Supreme Court's Re-targeting of the jury right to include the principle of the community's interest in participatory democracy. *See* Downey v. Bigman, 22 Indian L. Rep. 6145 (Navajo 1995); *see also supra* notes 208-12 (discussing *Downey*). Second, as a practical matter, small numbers of nonuniformity likely will not undermine that national political community. In any event, a full discussion of Re-targeting must await another day.

358. The mere differential application of constitutional principles need not undermine fundamental rights because, as this Article has sought to show, there may be good constitutional reasons for permitting constitutional nonuniformities. The point here is that permitting special tribunals to create such nonuniformity need not lead to the evisceration of fundamental protections inasmuch as there are incentives that keep the special tribunals in check. In an upcoming work I hope to provide a comprehensive empirical study that suggests that tribal courts indeed have created a workable body of law that protects basic rights by means of nonuniformities that help to preserve and foster the tribes' distinctive political communities.

would be endangered in the event that, for instance, every municipality were to be a beneficiary of significant amounts of constitutional nonuniformity.[359] Second, the concerns that citizens' respect for the Constitution not be undermined and that minimal protections not be disregarded would be threatened if the wrong communities benefited from or were deprived of constitutional nonuniformity. Principled, constitutional criteria must be used to select nonuniformity's beneficiaries. A sound way to limit the quantum of nonuniformity may be to permit it only with respect to those communities whose existence or creation is not otherwise incompatible with a well-ordered liberal society[360] if such communities' well-being would be threatened were they subjected to ordinary constitutional doctrines that were developed in the context of, and for, general society.

V. Conclusion

Geographical constitutional nonuniformity—geographical variations of constitutional requirements and prohibitions—are a mainstay of American constitutionalism. Such nonuniformity is created in ordinary federal courts, and an instructive form of quasi-constitutional nonuniformity is created by tribal courts, by means of three tools of legal analysis: Tailoring, Re-standardizing, and Re-targeting. Each of these tools is capable of generating breathtaking nonuniformity.

Geographical constitutional nonuniformity generally is used to enable idiosyncratic but valuable discrete communities to endure. The concern animating the creation of nonuniformity is that to subject such communities to the ordinary doctrines that have been developed for general society would be to destroy them. Across a variety of contexts—including the community standards doctrine, the military, and public schools—the Supreme Court has understood that constitutional nonuniformities may be necessary to permit the norm-generation that itself is indispensable to constituting communities deemed to be vital to general society's interests. In essence, geographical constitutional nonuniformity in the aid of community reflects the determination that geography and its concomitant—a tightly bound community with special needs—can render otherwise identical circumstances sufficiently different to merit differentiated legal treatment. The community's need is the core normative reason for distinctive treatment, and the community's common geography—which provides

359. Although the issue is ultimately an empirical matter, intuition suggests that limited amounts of even highly community-specific Tailoring, as in the community standards doctrine, would not necessarily be problematic.

360. For a fuller treatment of the criterion of well-orderedness and other important considerations, see Rosen, *supra* note 8, at 1089-97.

relatively bright-line boundaries that demarcate the operation of ordinary doctrines from the nonuniform—makes differential treatment administrable.

Recognizing the existence of geographical constitutional nonuniformity and understanding the mechanics by which nonuniformity is generated sheds light on overlooked potential solutions to many difficult problems concerning community self-governance in a large, pluralistic society. Significant community self-governance is not flatly foreclosed by the Constitution, and determining whether uniformity is constitutionally appropriate demands a weighing of normative and practical considerations. The concept of geographical constitutional nonuniformity also provides enhanced analytical clarity to much case law.

In the end, determining what communities and constitutional provisions are appropriate candidates for nonuniformity and identifying the outer limits of nonuniformity in such provisions are important and relevant projects that must await another day. Although much thus remains to be done before we as a society self-consciously create new instances of geographical constitutional nonuniformity, I hope that this Article has laid some important groundwork. Indeed, that the above projects *are* important and relevant is one of the most important implications of this Article's effort to uncover what heretofore has been a largely submerged theme of our constitutionalism.