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THE LIMITS OF LOCALISM

*Richard C. Schragger**

"I am thankful for boundaries. I am fond of having the lines drawn around me."[1]

INTRODUCTION

In *Chicago v. Morales*,[2] the Supreme Court struck down Chicago's Gang Congregation Ordinance, which barred "criminal street gang members from loitering with one another or with other persons in any public place."[3] The stated purpose of the ordinance was to wrest control of public areas from gang members who, simply by their presence, intimidated the public and established control over identifiable areas of the city, namely certain inner-city streets, sidewalks, and corners.[4] The ordinance required that police officers determine whether at least one of two or more persons present in a public place were members of a criminal street gang and whether these persons were loitering. Loitering was defined as "remain[ing] in any one place with no apparent purpose."[5] According to the Supreme Court, "the [Chicago] police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance" in a three-year period.[6]

The ordinance's defeat was, in some ways, preordained. Over twenty-five years earlier the Supreme Court had struck down similarly broad local vagrancy and loitering statutes as void for vagueness in a

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1. SAUL BELLOW, RAVELSTEIN 185 (2000).

2. 527 U.S. 41 (1999).

3. *Id.* at 45-46.

4. *See id.* at 46-47.

5. *Id.* at 47 & n.2

6. *Id.* at 49.

series of opinions culminating in *Papachristou v. City of Jacksonville.*[7] These decisions, combined with the earlier constitutionalization of "street law" by the Warren Court, dramatically curtailed police authority to "move along" undesirables and informally discipline disorderly conduct.[8]

Indeed, the ordinance at issue in *Morales* appears to be a straightforward case of police overreaching, an uncontroversial case for Court intervention. At least according to proponents, however, the Gang Congregation Ordinance had significant support in the minority, high-crime, inner-city neighborhoods in which it was implemented. Advocates argue that these communities should have substantial autonomy to adopt norms that are responsive to local conditions. State and federal courts should defer to such norms, even when they deviate from constitutional guarantees, because local residents are in a better position to balance liberty and order in light of local circumstances.

The case has thus generated an examination of the role of rights in minority communities, and of the conflict between individual rights

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7. 405 U.S. 156 (1972). Those decisions include *Palmer v. City of Euclid*, 402 U.S. 544 (1971), *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), and *Thornhill v. Alabama*, 310 U.S. 88 (1940).

Relying on these precedents, Justice Stevens, writing for the plurality, held that the term "loitering" as defined by Chicago's ordinance was unconstitutionally vague because it violated the " 'requirement that a legislature establish minimal guidelines to govern law enforcement.' " 527 U.S. at 60 (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983)). Noting that the ordinance could be applied to all kinds of harmless activity, Stevens found that the standards for enforcement of the ordinance were inherently subjective and thus failed to cabin police discretion in any meaningful way. In addition, two Justices — Souter and Ginsburg — agreed with Justice Stevens that the statute did not provide adequate notice so as "to enable the ordinary citizen to conform his or her conduct to the law," *id.* at 58, because the definition of loitering as remaining in one place for "no apparent purpose" and the standards for obeying an order "to disperse and remove [one]sel[f] from the area," "were impossible to obey." *Id.* at 60. Three Justices — Breyer, O'Connor, and Kennedy — concurred in the judgment, leaving open the notice issue addressed in Part IV of Stevens's plurality opinion. Kennedy also did not join in Part IV of Stevens's opinion, but in his short concurrence he expressed "many of the same concerns [Stevens] expresses in Part IV with respect to the sufficiency of notice under the ordinance." *Id.* at 69. Justices Scalia and Thomas, and Chief Justice Rehnquist, dissented.

Justice O'Connor's concurring opinion expressed concern for the "consequences of gang violence," and indicated that a statute that defined "loiter" to mean "to remain in any one place with no apparent purpose than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities" would "avoid the vagueness problems of the ordinance." *See id.* at 68 (O'Connor, J., concurring). In February 2000, the Chicago City Council passed a new antigang loitering ordinance following O'Connor's suggestion that required that loiterers "remove themselves from within sight and hearing" of a designated spot for at least three hours. *See* Dirk Johnson, *Chicago Council Tries Anew with Anti-Gang Ordinance,* N.Y. TIMES, Feb. 22, 2000, at A14.

8. *See* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165, 1202-19 (1996) [hereinafter Ellickson, *Controlling Chronic Misconduct*] (discussing history of street disorder and the constitutional revolution of street law); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 COLUM. L. REV. 551, 606-07 (1997) (discussing the historical context leading up to the Court's decision in *Papachristou*, and its impact on policing).

and community norms — a conversation that often seems to flounder on competing definitions of rights.[9] The discussion surrounding *Morales* echoes other debates that appear to pit community-specific needs against constitutional norms.[10] This debate is structured as a clash between a (minority) community's efforts to solve pressing local problems and the liberal abstractions of due process imposed by (majority) outsiders, as a choice between community autonomy and paternalism. The conventional story has only two possible endings: either the wider political community respects the decisions of local people to adopt laws that are responsive to local conditions or it imposes a norm by force that the affected community does not share. The alternatives — respect or force — do not provide much of a choice.

This Article challenges the structure of a debate that presents only the alternatives of respect or force, autonomy or paternalism, by examining the coherence of the concept of community on which arguments on behalf of local autonomy are based. In this way, the Article reflects local government law scholarship's preoccupation with how local governance comes into being.[11] Localism depends on the creation and maintenance of smaller-than-state associations marked off in geographical space by a definable (and often, defensible) perimeter. Yet, while boundaries create citizens (or aspire to do so), they must also, by definition, create noncitizens, and therefore they are invariably destructive of the ideal of a wider community. Localism tends to sacrifice

9. The debate has taken place in a number of forums. *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; Tracey L. Meares & Dan M. Kahan, *Black, White, and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245, 245-47 [hereinafter Meares & Kahan, *Black, White, and Gray*]; Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197 [hereinafter Meares & Kahan, *Antiquated Procedural Thinking*]. The debate also found its way into the *Boston Review* with an article by Tracey Meares and Dan Kahan entitled *When Rights Are Wrong*, with responses by Alan M. Dershowitz, Jean Bethke Elshtain, Joel F. Handler, Carol S. Steiker, Wesley G. Skogan, Margaret Burnham, Franklin Zimring, Jeremy Waldron, Bernard E. Harcourt, Anthony Paul Farley, and Richard H. Pildes. *See* URGENT TIMES: POLICING AND RIGHTS IN INNER CITY COMMUNITIES (Tracey L. Meares & Dan M. Kahan eds., 1994) [hereinafter URGENT TIMES], *available at* http://bostonreview.mit.edu/BR24.2/Meares.html (last visited Sept. 25, 2001).

10. The debate over single-sex African-American schools is one example. *See, e.g.*, John A. Powell, *Black Immersion Schools*, 21 N.Y.U. REV. L. & SOC. CHANGE 669 (1995) (discussing all-male black academies and arguing for an interpretation of constitutional precedents to allow African-American communities to opt out of an integrationist, colorblind, or gender-neutral norm).

11. Questions concerning the scope and nature of local power are at the heart of local government law. *See, e.g.*, Frank Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977).

inclusion for the possibilities of citizenship. This "boundary problem"[12] of local government law can be stated as follows: The creation of a place for meaningful self-government (in space and in politics) for those inside the (metaphorical and sometimes literal) gates always affects (and often injures) those who are outside the gates.[13] The boundary problem in local government law thus is the problem of pluralism.

A central thesis of this Article is that in deciding whether a particular community's norm is entitled to respect, we are deciding both whether the community exists and who gets to be included within it. In other words, localism does not just happen. Before one can assert local autonomy in the name of community, one needs a theory of insiders and outsiders that justifies the exercise of autonomy in its name. This Article tells an alternative story of *Morales*: a story about how local autonomy — and the corresponding rhetoric of community — is deployed to instantiate a politically and geographically entitled localism in the first place.

I argue that this "boundary-creating" role of local norms can be understood by conceiving of the Gang Congregation Ordinance at issue in *Morales* as a form of zoning. Zoning, prosaically understood, is the primary tool of land use, a mechanism by which local governments regulate the placement and distribution of the components of our built environment. Zoning is a means by which groups can encourage uses of physical spaces that they like and discourage uses they do not like, a powerful instrument for instituting and transmitting norms of behavior spatially. Chicago's Gang Congregation Ordinance can be understood as a form of exclusionary zoning: a mechanism for discouraging uses of the public street (loitering by gang members and their associates) that many (though not all) Chicagoans apparently did not like.

Approaching *Morales* as a zoning case brings together two disparate bodies of legal scholarship — criminal procedure and local government law — both of which point toward the decentralization of norms "down" the chain of governance to neighborhoods and other local institutions. Indeed, a burgeoning call for the radical decentralization of constitutional norms down to the city, neighborhood, and even block level increasingly asserts the rights of small-scale, territori-

12. *See* Richard Briffault, *Surveying Law and Borders: The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996) (employing the terminology, though not this formulation).

13. Gregory Alexander offers a comparable account of the "inside/outside" problem, as do other scholars. *See* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1990); *see also* Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1377 (1994); Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L.J. 1, 3 (1995); Glen O. Robinson, *Communities*, 83 VA. L. REV. 269 (1997); Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

ally defined jurisdictions to govern themselves. Thus, proponents of the Gang Congregation Ordinance support Chicago's inner-city neighborhoods' decision to defend themselves as do many wealthy, suburban neighborhoods: by excluding (through zoning or otherwise) undesirable uses of space, and, by extension, undesirables. The theoretical bases for local autonomy that ground the inner-city residents' claims to govern are similar to those that ground the "rights" of suburban municipalities, gated communities, homeowners associations, and business improvement districts to exclude, police, and regulate themselves.

This Article objects to grounding local autonomy in the rhetoric of community. Local norms cannot be understood outside the context of a dynamic between localities, between neighborhoods within a city, and between city and suburb. I argue for a shift from a discourse of localism, which takes territorially defined communities as a given, to a discourse of alternative localisms, which understands communities as products of contested political norms, arising simultaneously with the borders that define them. Instead of a refuge of like-minded individuals bound in a collective pursuit of the good life, community is an explicitly political body that exists in relation to (and to the exclusion of) other, equally plausible alternative communities. Instead of asking whether particular residents should be permitted to waive constitutional rights to respond to the exigencies of "their" community, we need to ask whether a particular zoning regime is a justifiable (and desirable) means for creating a community — with all the normative force that term implies — out of a collection of people who live next door to one another.

My intention is to undermine the naturalness with which we characterize the places where people happen to live as communities, and to question the legal power and implications of that assumption. In doing so, I want to shift the legal focus from issues about the relationship between the center and the periphery to issues about the relationship between neighboring and alternative localisms — from questions concerning the proper exercise of vertical power, authority, and responsibility to questions concerning the proper exercise of horizontal power, authority, and responsibility.

Part I begins by placing *Morales* in the context of two streams of legal thought: a criminal justice literature that emphasizes the role of informal norms of behavior in controlling criminality and a local government literature that champions decentralized lawmaking in smaller-than-state settings. It then develops three accounts of community — contractarian, deep, and dualist — that provide the most common theoretical grounds for the robust localism that emerges at the confluence of these two streams.

Part II critically considers these accounts using *Morales* and three other cases reimagined in zoning terms. I argue that the Gang Con-

gregation Ordinance is based on a land use model of controlling deviance that is prevalent throughout our metropolitan areas. The fact of zoned space introduces a spatial dimension to the generation of local norms, a dimension that localism arguments often overlook. Local norms are literally and legally boundary creating; norms are not simply the product of pre-existing communities, but are instead constitutive of them. The rules governing the terms of inclusion in and exclusion from a community form a normative wall between "us" and "them" by marking us in legal, social, and literal space as insiders or outsiders, members or nonmembers, shareholders or nonshareholders, citizens or noncitizens.[14] This definitional work is often invisible because we see ourselves and "our community" from only one side; the "shape" of the normative world "differs depending on which side of the wall our narrative places us on."[15] Any celebration of the local must account for the contingency of community, the effect on "who we are" of a robust localism that relies on building high normative walls in demarcated space.

Part III returns to the dichotomy between respect and force that characterizes arguments urging deference to local norms. I argue that this dichotomy is a false one; the difficult choices are not vertical — between respect for the local or the force of a competing higher-level norm — but horizontal — between the force of alternative localisms. Expanding on Part II, Part III explores how law institutes one particular version of the local to the exclusion of multiple possible alternatives. These alternatives often come in the form of a plaintiff's "claim of belonging" masked as a (usually poorly fitting) assertion of constitutional right. This Part addresses the limitations of rights talk in articulating these kinds of claims of belonging and suggests ways in which such claims turn on how local government law defines insiders and outsiders. I conclude with a brief discussion of how it may be possible to imagine alternative localisms, returning to the *Morales* case with some final observations about the relationship between boundaries and a substantive conception of local citizenship.

I. NEIGHBORHOOD CONSTITUTION-MAKING

Chicago v. Morales sits at the intersection of two large-scale structural developments in law and public policy. The first development is

14. On this account, law is constitutive of both social relations and social space. *See* David Delaney et al., *Preface: Where is Law?*, *in* THE LEGAL GEOGRAPHIES READER xiii-xxi (Nicholas Blomley et al. eds., 2000); Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L REV. 843, 846-55 (1999); *cf.* Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59 (1984) (discussing constitutive nature of legal relations).

15. Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 31 (1983).

the ascendancy of a new approach to policing and criminology that emphasizes informal norms of behavior as opposed to formal sanctions in controlling criminal behavior. Advocates of this approach to criminal justice emphasize the law enforcement potential of social norms and champion policies that attempt to encourage the transmission of such norms through the informal channels of the street, the neighborhood, and the community.[16] The second development is the popularity of more decentralized forms of political organization, and the migration of government "down" to increasingly local institutions. This form of localism constitutes both an approach to specific problems of government policy and a political theory informed by a desire to decentralize political and social power.[17]

This Part describes how these two movements coalesce in *Morales*, and more widely in an emerging legal scholarship that advocates the devolution of fundamental constitutional norms to the neighborhood level. This is an admittedly unusual approach to *Morales*; most commentators read *Morales* from "inside" the criminal procedure literature without emphasizing its devolutionary implications. For ease of discussion, I call this general devolutionary impulse "neighborhood constitutionalism." Grounded in theories of local autonomy, neighborhood constitutionalism looks to decentralized institutions as sites for norm generation in general, and for constitutional norm generation in particular. This Part then sketches three accounts of community that ground arguments for local autonomy. Together, they suggest a picture of a beneficent localism that provides a powerful justification for permitting neighborhoods to depart from background constitutional norms. In the next Part, I will challenge that portrait.

A. *The New Policing and the New Devolution*

The first large-scale structural trend at work in *Morales* is a new policing geared toward fostering norms of order in public spaces. The

16. *See, e.g.*, Ellickson, *Controlling Chronic Misconduct*, *supra* note 8; Dan Kahan, *Social Influence, Social Meaning and Deterrence*, 83 VA. L. REV. 349 (1997) [hereinafter Kahan, *Social Influence*]; Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998) [hereinafter Kahan, *Social Meaning*]; Livingston, *supra* note 8; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

17. Decentralization has been defined as "a form of political organization that permits local units to exercise wide discretion over what they do or how they do that which is required of a higher authority." Royce Hanson, *Toward a New Urban Democracy: Metropolitan Consolidation and Decentralization*, 58 GEO. L.J. 863, 893 n.79 (1970). This commonsense definition tells us little about the possible forms and purposes of decentralization. *Cf.* Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 254-55 (1993) (questioning the "liberal" conception of decentralization as modeling local power on a "centered sense of the [local] self"). This definition also assumes that the "local unit" is easily defined and identified, a view that this Article seeks to problematize.

new policing has developed primarily in response to crime and the breakdown of public order in urban neighborhoods and the concomitant failure of traditional policing methods to affect it. Led by cities like New York and Chicago, localities have adopted law enforcement measures aimed at the quality of life in the city in general and order in public spaces more specifically. The ordinance at issue in *Morales* is one of a genus of policing tools directed toward controlling low-level misconduct in public spaces by enforcing norms of behavior and civility rather than by attempting to police specific criminal acts. In an effort to address what are often described as "quality of life" crimes, many local governments have either passed or increased enforcement of antiloitering ordinances, juvenile curfews, and ordinances prohibiting panhandling, unlicensed street vending, public drunkenness, urination in public places, graffiti, and sleeping on public benches or in parks.[18] Cities have also sought judicial remedies against street gangs as public nuisances, obtaining, in some cases, injunctive relief instituting adult curfews and forbidding conduct as varied as loitering in abandoned buildings, carrying a baseball bat in a public place, climbing over fences, or standing on rooftops.[19]

These approaches to policing the urban "commons"[20] reflect the ascendancy of a new theory of crime control based in large part on variations of the popular "broken windows" thesis.[21] This thesis asserts

18. *See* NATIONAL LAW CTR. ON HOMELESSNESS AND POVERTY, NO HOMELESS PEOPLE ALLOWED (1994) (describing measures); Ellickson, *Controlling Chronic Misconduct*, *supra* note 8, at 1168, 1217-19 (same); Dirk Johnson, *Chicago Council Tries Anew with Anti-Gang Ordinance*, N.Y. TIMES, Feb. 22, 2000, at A14 (reporting that Annapolis, Md., has approved a measure that bars convicted drug dealers from loitering in designated areas, and Grand Prairie, Tex., has adopted an ordinance that allows the police to scatter loiterers if officers suspect drug dealing); Steve Miletich, *Sidewalk Law is Posted*, SEATTLE POST-INTELLIGENCER, May 19, 1994, at A1 (discussing Seattle camping and public urination ordinances); Michael Ybarra, *Don't Ask, Don't Beg, Don't Sit*, N.Y. TIMES, May 19, 1996, § 4, at 5 (reporting that cities throughout the country have put limits on where panhandlers can beg). The Ohio Supreme Court recently struck down a Cincinnati ordinance that mandated the "civil banishment" from "drug exclusion zones" of any person arrested or taken into custody for any drug abuse-related activity. *See* Ohio v. Burnett, 755 N.E.2d 857, 858-60 (Ohio 2001).

19. *See* Matthew Mickle Werdegar, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 415 (1999); *see also* Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2264 (1998); Stephanie Smith, Note, *Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements?*, 67 U. CHI. L. REV. 1461 (2000). In *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997), the California Supreme Court held that the state's public nuisance law permits courts to enjoin gang activities that constitute a "public nuisance."

20. Ellickson, *Controlling Chronic Misconduct*, *supra* note 8, at 1173.

21. *See* William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL'Y 447, 448-50 (1995); James Q. Wilson & George A. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31-32; *see also* Brief for the Petitioner at 15, *Chicago v. Morales*, 527 U.S. 41 (1999) [hereinafter Petitioner's Brief] ("The 'Broken Windows' thesis is that crime is most effectively combated when the police can address signs of visible disorder — including loi-

that low-level public disorder left unchecked (such as an unrepaired broken window) can disrupt a neighborhood's social fabric. The combined effects of minor misconduct contribute to the deterioration of community norms generally and thus to increased criminal activity of a more serious nature.[22] A persistent theme sounded by proponents of the broken windows thesis is that the preservation of accessible, open, safe, and inviting public spaces is essential to the ongoing viability of urban neighborhoods and the liberty and security of their residents.[23]

What is common to these types of quality of life ordinances is that they seek to control the aggregate effects of small individual acts of misbehavior in order to effect an overall change in the way certain urban spaces are used and viewed. The individual panhandler is not, in and of himself, a danger to the community. According to proponents of quality of life measures, however, repeated aggressive panhandling by a number of individuals can soon make the street unpleasant, and, more important, create an image of disorder that is threatening to law-abiding people.[24] The strategy is to project a sense of orderliness and cleanliness on the street. Orderliness will invite law-abiding people to use the street more often, which will make the street still safer by increasing the number of informal "eyes" on the street and the sense that it can and should be used.[25] More important, law-abiding people will come to see the street as orderly and expect it to be so, contributing to further enforcement of the informal norms of civil street be-

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tering — that destabilize communities and stimulate the commission of more serious crimes."). For a discussion of the "broken windows" thesis, see Livingston, *supra* note 8, at 578-91.

22. *See* Kahan, *Social Influence*, *supra* note 16, at 370-76; Wilson & Kelling, *supra* note 21, at 32.

23. *See* Ellickson, *Controlling Chronic Misconduct*, *supra* note 8, at 1174 ("Rules of proper street behavior are not an impediment to freedom, but a foundation of it."); Petitioner's Brief, *supra* note 21, at 14 ("[B]y moving gang members along, police officers can restore order to the streetscape and stop crime before it occurs. . . . And by enabling the police to demonstrate control over the streetscape and the most lawless elements in the community, loitering laws make people feel safer, thereby invigorating neighborhoods."); *see also* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 76-167 (1997) (arguing that order maintenance policing often protects minority residents who are disproportionately victims of minority lawbreaking).

24. *See* WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 48 (1990) ("Visible physical and social disruption is a signal that the mechanisms by which healthy neighborhoods maintain themselves have broken down. If an area loses its capacity to solve even seemingly minor problems, its character becomes suspect.").

25. Jane Jacobs's THE DEATH AND LIFE OF GREAT AMERICAN CITIES 24-34, 29-112 (1961) offers the original "eyes on the street" thesis. Her work is often cited by proponents of order maintenance policing, *see, e.g.*, Ellickson, *Controlling Chronic Misconduct*, *supra note* 8, at 1171; Livingston, *supra* note 8, at 558-59, despite her professed wariness of managed public spaces, *see* JACOBS, *supra*, at 41.

havior.[26] As stated by the City of Chicago in its brief defending the Gang Congregation Ordinance: " 'Norms of order are critical to keeping social influence pointed away from, rather than toward criminality; the spectacle of open gang activity, vandalism, aggressive panhandling, and other forms of disorder transmits signals that cause both lawbreakers and law-abiders to behave in ways conducive to crime.' "[27] The individual panhandler is thus more dangerous than he might initially seem because he represents the first in a cascade of broken windows.[28]

The second large-scale structural trend at work in *Morales*, though less directly, is the increasing insistence on and institutionalization of local control over local environments. Like the new policing, this localism has been precipitated in part as a response to urban disorder and the problems of urban governance generally. In addition, the last decade saw a reinvigorated suspicion of centralized government, or at least the political harnessing of a dissatisfaction with its workings, as well as a renewed call for decentralizing power to increasingly local institutions.[29] These broader calls for decentralization have been ac-

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26. Sociologists note that anxiety of disorder itself may lead to a breakdown of social control mechanisms that can prevent crime regardless of whether the anxiety is realistic. "In response to fear, people avoid one another, weakening [social] controls." Wilson & Kelling, *supra* note 21, at 33.

27. Petitioner's Brief, *supra* note 21, at 15 (quoting Kahan, *Social Influence*, *supra* note 16, at 391); *see* Livingston, *supra* note 8, at 580 (quoting Wilson & Kelling, *supra* note 21, at 32) ("[S]igns of disorder — abandoned property, accumulating litter, inebriates slumped on the sidewalk, and teenagers loitering or fighting in front of the corner store — prompt fearful residents to use the street less often and avoid involvement in matters that occur there. '. . . Though it is not inevitable, it is more likely that here, rather than in places where people are confident they can regulate public behavior by informal controls, drugs will change hands, prostitutes will solicit, and cars will be stripped.' ").

28. For critiques of what has variously been called "order maintenance policing," "norm enforcing policing," "quality of life policing," and the "new discretion," see David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1083-87 (1999); Bernard E. Harcourt, *Reflecting on Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Toni Massaro, *The Gang's Not Here*, 2 GREEN BAG 2d 25 (1998); Dorothy Roberts, *Foreword: Race, Vagueness, and the Social Order of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 790-99 (1999).

29. *See, e.g.*, NEWT GINGRICH, TO RENEW AMERICA 9 (1995) (" 'Closer is better' should be the rule of thumb for our decision making; less power in Washington and more back home, our consistent theme."). The devolutionary impulse is not new. *See* Harry N. Scheiber, *Redesigning the Architecture of Federalism — An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y REV. 227, 239-40 (1996) (describing the "federalism creed" of the late nineteenth century when "most American political leaders regularly paid lip service to the idea that smaller government was better than larger" and that power should reside in the states). Indeed, the ideology of localism is deeply embedded in the intellectual, cultural, and constitutional history of the United States, though not always politically emergent. Thomas Jefferson was the " 'first and also the foremost, advocate of local self government.' " Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 105-06 (quoting A. SYED, THE POLITICAL THEORY OF AMERICAN LOCAL GOVERNMENT 38

companied by the proliferation of sublocal governmental or quasi-governmental institutions that replace or supplement the existing array of local governments.[30] These institutions, which include residential community associations (commonly known as homeowners associations), downtown business improvement districts, and special districts, often provide those services that traditional local governments either do not normally undertake or cannot undertake because they are overwhelmed, incompetent, unresponsive, or all of these.[31]

The arguments on behalf of decentralized local governance are various and overlapping, but some highlights can be noted here.[32] Advocates of decentralization to the neighborhood level argue that local governments are more responsive to the specific needs of unique communities and that local institutions can provide better and increased services. Neighborhood-level governments can tailor their policies and allocate resources more efficiently than can larger governments.[33] They also provide increased opportunities for political par-

(1966)). Jefferson advocated the division of counties into "wards," each of which would function as a "little republic." Jefferson conceived of these wards as places in which the yeoman farmer would play a personal part in the administration of public affairs. *See id.* Alexis de Tocqueville similarly argued that small-scale municipal institutions allow citizens to "practice the art of government in the small sphere within . . . [their] reach." ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA, at 61, 68 (Phillips Bradley ed., 1945) (1835). The Jeffersonian legacy can be found in contemporary articulations of the civic republican tradition. *See, e.g.*, MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 202 (1996).

30. *See* Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 521-33, 534 (1997) (discussing the development of sublocal structures like business improvement districts, enterprise zones, tax increment finance districts, and special zoning districts, and noting that though these institutions may lead to improved municipal service provision, they may also exacerbate intralocal service inequalities).

31. *See id.* at 508-24; Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982) [hereinafter Ellickson, *Cities*] (arguing that homeowners associations can provide local public goods more efficiently than municipalities in many cases); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 79-89 (1998) [hereinafter Ellickson, *New Institutions*] (proposing that cities create new block improvement districts ("BLIDs") modeled on the homeowners association and the business improvement district in order to provide block-level goods).

32. The strands of localism tend to cut across traditional political and scholarly lines. For example, Richard Briffault observes that the arguments on behalf of local power are a "striking harmonization of the otherwise divergent values of the free market, civic republicanism and critical legal studies." Richard Briffault, *Our Localism Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990). Despite this convergence, there are serious disagreements among advocates of decentralization. For example, even those who agree that participation in collective governance in small-scale settings is a positive good of decentralization do not agree on the proper character of the institutions in which such governance should take place, who gets to participate, or the structure of that participation. *Compare* Ellickson, *Cities*, *supra* note 31, at 1519-20, *with* Gerald Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589 (1982).

33. *See* Ellickson, *Cities*, *supra* note 31; Ellickson, *New Institutions*, *supra* note 31, at 79-89. The law and economics model of local government is primarily a legacy of Charles Tiebout's *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956), which developed a marketplace theory of municipal competition in which "rivalry among local govern-

ticipation and thus offer venues for individual engagement in collective governance, which is a positive good for the individual and for the wider political community.[34] Indeed, neighborhoods may be our most central and resilient sites for civic involvement, the best loci of community and fellowship that we have in an increasingly fractured metropolitan area and an increasingly globalized society.[35]

The new policing and the reinvigorated localism end up in the same place. Scholars and policy-makers have increasingly advocated the proliferation of lawmaking authority down to the neighborhood and block level. A burgeoning literature calls for deference to local decisions addressing the quality of life on streets and in particular neighborhoods, and suggests that norms of street (and other) behavior be set locally. Indeed, the strongest advocates of quality of life ordinances, including Chicago's Gang Congregation Ordinance, argue that to a significant degree " 'police activity on the street should be shaped, in important ways, by the standards of the neighborhood rather than by the rules of the state.' "[36] This is a claim that communities — not at the level of the state, region, municipality, or even town, but at the level of the neighborhood — not only can but *should* effect basic changes in the fundamental rules that govern relations between the state and the individual, as well as among individuals.

Neighborhood governance is not new to urban planners and local government scholars;[37] however, advocacy of the power of neighbor-

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ments [for residents] is analogous to rivalry among firms" in fostering efficiency in the provision of public goods. VINCENT OSTROM, ET AL., LOCAL GOVERNMENT IN THE UNITED STATES 206 (1988).

34. *See* Ellickson, *New Institutions*, *supra* note 31, at 84 & n.35 (arguing that block-level institutions are "well scaled to strengthen individual members' involvement and skills in collective governance"). The argument that localities are centrally important sites for collective self-governance, and therefore should be structured in order to promote participatory governance in small-scale settings, is most associated with Gerald E. Frug's influential article, *The City As a Legal Concept*, 93 HARV. L. REV. 1057 (1980). His recent book, CITY MAKING: BUILDING COMMUNITIES WITHOUT WALLS 11 (1999) [hereinafter FRUG, CITY MAKING], expands on that project, developing an "ideal of city life" on which to base a localism premised on creating forums for collective governance among strangers. David Barron has recently joined those advocates of decentralized local government who argue that "our towns and cities are . . . important political institutions that are directly responsible for shaping the contours of 'ordinary civic life in a free society.' " *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 490 (1999) (quoting Romer v. Evans, 517 U.S. 620, 631 (1996)).

35. *See, e.g.*, Michael Sandel, *America's Search for a New Public Philosophy*, THE ATLANTIC MONTHLY, at 57, 72-74 (March 1996). For a cogent summary of "the case for localism," see Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 15-18 (2000) [hereinafter Briffault, *Localism and Regionalism*].

36. Livingston, *supra* note 8, at 560 (quoting Wilson & Kelling, *supra* note 21, at 34).

37. *See, e.g.*, HOWARD W. HALLMAN, NEIGHBORHOOD GOVERNMENT IN A METROPOLITAN SETTING 12 (1974) (advocating that "[n]eighborhood government should be established in the larger cities of the United States [as it] would contribute to improved urban governance"); DAVID MORRIS & KARL HESS, NEIGHBORHOOD POWER: THE NEW LOCALISM 5, 99 (1975) (discussing neighborhood governance). In Los Angeles, for instance,

hoods to generate fundamental (constitutional) norms is something more recently devised.[38] Proponents of this devolutionary approach employ the language of community autonomy and democracy in defending policies that would normally be considered violative of constitutional guarantees. Proponents of community standards do not defend these policies using the traditional language of rights. Instead, they mount a territory-based offensive grounded in a robust conception of community self-determination: territorially defined communities should be permitted to depart from background constitutional norms under certain circumstances. Neighborhood constitutionalism constitutes the devolution of norm creation down to the local and sublocal level, a constitutional rights discourse with localism at its center.

B. *Three Accounts of Community*

A number of scholars have taken up the call for community standards, for the decentralization of norms down to the neighborhood

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calls for neighborhood governance have been a constant refrain. *See* Donald G. Hagman, *Regionalized-Decentralism: A Mode for Rapprochement in Los Angeles*, 58 GEO. L.J. 901, 927-931 (1970) (suggesting a two-tier structure that simultaneously decentralizes city government to neighborhood-level "boroughs" while providing for a city-county revenue sharing metropolitan area government). Hagman noted when he was writing thirty years ago that the "desire for a decentralized Los Angeles is not novel." *Id.* (describing history of decentralization movements in Los Angeles, and citing proposals for neighborhood governance). Los Angeles's most recently enacted city charter institutionalizes neighborhood councils, though they operate in an advisory capacity only. *See* Los Angeles City Charter § 900 (July 7, 2000). For a discussion of the debates concerning neighborhood governance in Los Angeles, and one City Charter Commissioner's change of heart concerning the powers of neighborhood councils, see Erwin Chemerinsky, *On Being a Framer: The Los Angeles Charter Reform Commission*, 2 GREEN BAG 2d 131, 142-44 (1999) (describing how Professor Chemerinsky initially supported empowered neighborhood councils but changed his mind and eventually opposed granting councils strong governing powers, particularly any powers over land use).

38. The distinction between neighborhood involvement in local governance and neighborhood norm generation can be illustrated by the difference between community policing and order maintenance or quality of life policing. The former is an organizational strategy that seeks to improve the effectiveness of current law enforcement by decentralizing command structures and increasing local input into police priorities and practices. *See* WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE 5-9 (1997) (identifying four principles of community policing: (1) organizational decentralization; (2) a broadly focused, problem-oriented policing; (3) responsiveness to the public's setting of priorities; and (4) a commitment to helping neighborhoods solve crime problems through their own local organizations). The latter refers to a policing based in a social norm theory of deviance and to those substantive legal regimes designed to prevent deviance by enforcing norms of civility and order. Though sometimes used interchangeably, community policing can be employed to enforce existing norms and need not be accompanied by the adoption of local order maintenance norms. Indeed, Chicago has instituted an extensive community policing regime that has been used as a model of decentralized, community-centered policing. *See id.* at *passim*. Though the line between community norm generation and community input can be fine, it is important to recognize the distinction between arguments in favor of a decentralized chain of command and arguments on behalf of neighborhood or local political sovereignty.

level. For example, Debra Livingston has argued that policing be targeted to the norms and requirements of specific streets.[39] Professor Livingston contends that courts should defer to community-set behavioral standards that "make a community's public life possible."[40] Robert Ellickson similarly suggests that cities use geographically specific norms to police what he calls "chronic street nuisances" in public places, like aggressive panhandling and bench squatting.[41] He, too, argues for establishing community standards as the basis for police action, defining a chronic street nuisance as persistent action in a public space that violates "prevailing community standards."[42] Mark Rosen advocates an even broader decentralized constitutionalism, claiming that courts should permit "geographical variations of constitutional requirements in the aid of community."[43] Professor Rosen argues that rights should be context sensitive: neighborhoods, like the residents of Chicago's public housing projects, should be able to adopt constitutional norms that differ substantially from background norms where that adoption might be crucial to their survival.[44]

Professors Dan Kahan and Tracey Meares have provided the most forceful argument in favor of constitutional nonuniformity. Indeed, they were the principal authors of an amicus brief submitted on behalf of a number of neighborhood organizations in support of Chicago's Gang Congregation Ordinance.[45] Amici did not principally argue that the ordinance was constitutional as set against the Court's current doctrinal standards. Instead, they argued that courts "should adjust the level of constitutional scrutiny applied to a policing technique based on the breadth of its impact on liberty within the community."[46] The amici claimed that the Court should defer to communal norms that limit individual freedom where those norms are generated by the

39. Livingston, *supra* note 8, at 560-62.

40. *Id.* at 562.

41. Ellickson, *Controlling Chronic Misconduct*, *supra* note 8, at 1167-76.

42. *Id.* at 1185.

43. Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEXAS L. REV. 1129, 1130-39 (1999) ("[T]he Illinois Supreme Court overlooked geographical non-uniformity in *City of Chicago v. Morales*, when it struck down a gang antiloitering law."). *But cf.* Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 264-65 (1987) (arguing that territorial discriminations should not be exempt from equal protection analysis and that deference should be limited to "truly exceptional" cases).

44. *See* Rosen, *supra* note 43, at 1193-94.

45. *See* Brief Amicus Curiae on Behalf of the Chicago Neighborhood Organizations in Support of Petitioner at 4, *Chicago v. Morales*, 527 U.S. 41 (1999) [hereinafter Amicus Brief].

46. *Id.*

community and the "community itself is sharing in the burden that the law imposes on individual freedom."[47]

Invoking this same shared burdens theory, Professors Kahan and Meares have defended the Chicago Housing Authority's policy authorizing warrantless searches of public housing apartments.[48] After waves of shootings at the Robert Taylor Homes and the Stateway Gardens public housing projects, the Chicago Housing Authority adopted a policy of authorizing police to search public housing apartments without first obtaining a warrant and in the absence of exigent circumstances. A federal district court in Chicago struck down the policy, despite the residents' apparent overwhelming support for the measure.[49] Kahan and Meares have argued that the court should have considered the context of the policy, the purpose of its enactment, and the direction of its burdens before overriding the residents' decision. The building search policy, like the Gang Congregation Ordinance, "was enacted not to oppress the City's minority residents; rather it sprang from the grievances of those very citizens, who demanded effective action to rid their neighborhoods of drive-by shootings, fighting, and open-air drug dealing."[50] In both cases, "we think that the residents of Chicago's high-crime, minority neighborhoods . . . are the citizens entitled to determine whether the . . . law reasonably balances liberty and order."[51]

These scholars' call for community standards rests upon a powerful argument for community self-determination premised upon a conception of the individual as a normatively entitled person, a person whose judgment in "balanc[ing] liberty and order"[52] is entitled to the wider political community's moral respect. For advocates of this form of decentralization, community autonomy is a normative imperative that vindicates the individual's freedom of choice and thus "allows for the fullest expression of self."[53] But the idea that the neighborhood is a

47. *Id.*; *see* Meares & Kahan, *Antiquated Procedural Thinking*, *supra* note 9, at 209-10.

48. *See* Meares & Kahan, *When Rights Are Wrong*, *in* URGENT TIMES, *supra* note 9, at 1.

49. *See* Pratt v. Chicago Hous. Auth., 848 F. Supp. 792 (N.D. Ill. 1994).

50. Meares & Kahan, *When Rights Are Wrong*, *in* URGENT TIMES, *supra* note 9, at 5. Erik Luna calls Kahan and Meares' shared burdens theory a "neo-political process theory of criminal procedure," because it requires that courts assess whether a given law is an instrument for oppressing a traditionally insular minority or an instrument of political and social empowerment adopted by that minority. *See* Erik Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 812 (1999). This characterization is accurate, though I argue that there is an independent devolutionary impulse — an argument about the appropriate scale for decision-making — that underlies the shared burdens theory as well.

51. Meares & Kahan, *Black, White and Gray*, *supra* note 9, at 258-59.

52. *Id.* at 258.

53. Georgette Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 622 (1997).

place that fosters individual freedom can be contrasted with a tradition that views the neighborhood as a threat to individual liberty. For James Madison writing in Federalist No. 10, the conventional wisdom that republican government required a circumscribed territory containing a relatively small number of (like-thinking) citizens was mistaken.[54] Indeed, such a republic would be more susceptible to the "mischiefs of faction" — the ready creation of oppressive majorities. In contrast, if you

> extend the sphere . . . you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and act in unison with each other.[55]

Madison's community of heterogeneous citizens ranging over a wide territory contrasts with the neighborhood constitutionalists' community of homogeneous neighbors living in close quarters. And indeed, these two images map onto two compelling American political visions. On the one hand, the Madisonian vision is concerned with factions and tyranny, the political process gone awry. On the other hand, the pluralist vision that animates neighborhood constitutionalism is concerned with the moral worth that we as other actors in the political system attach to individuals engaged in collective decisionmaking. Thus, for Kahan and Meares, the "real questions" are: "Why can't we trust residents of the inner city to decide for themselves . . . ? Shouldn't these individuals be allowed to determine whether this is the most sensible way to improve *their* lives?"[56] The question "Why don't we trust them?" is an implicit denunciation of perceived moral, intellectual, and political superiority, a charge that we are not treating "these" people and "their" community with equal concern and respect.

The question "Why don't we trust them?" also presumes a "them" — a community of entitled decisionmakers. Yet, though rarely addressed, how community is defined is a central and difficult issue. In the following sections, I separate out three accounts of community that are often invoked in parallel, taking advantage of political and legal theory to help construct my own particular and stylized models. These models — I call them contractarian, deep, and dualist accounts of community — each provide different and often competing bases for identifying normatively entitled decisionmakers. I treat them in detail here in order to make explicit the foundations for the moral claims being asserted by advocates of decentralization on behalf of neighbor-

54. THE FEDERALIST PAPERS 81-84 (Clinton Rossiter ed., 1961) (1788).

55. *Id.* at 83.

56. Meares & Kahan, *When Rights Are Wrong*, *in* URGENT TIMES, *supra* note 9, at 6 (emphasis in original).

hood decisionmakers. *Morales* is a useful vehicle for this enterprise because it nicely illustrates how the rhetoric of community hides a set of overlapping (and oftentimes contradictory) understandings of what a community *is*. Indeed, it is quite striking how the language of community is deployed in legal rhetoric to take advantage of all three accounts, despite the fundamental differences in how each account understands the nature of the individual and, in turn, the nature of community.

These accounts of community are both descriptive and prescriptive, at once describing who belongs in the community and accounting for the legitimacy of the community's lawmaking. This section illustrates how the descriptive and prescriptive are linked (and often conflated) when we talk about community, and particularly when we try to translate membership into legal authority.

1. *Contractarian*

The contractarian account of community derives collective autonomy from individual autonomy. On this account, community is a product of individual acts of voluntary association, an outcome of individuals who have consented to join in a group. The contractarian account of community represents a "liberal"[57] theory of the group in that the group's authority to act on behalf of its members is understood as an extension of the individual's authority to act for herself by associating with others. Group autonomy is an instrument of individual autonomy.

The foundational premise of the contractarian account is consent. At its simplest, we should defer to the Gang Congregation Ordinance and other kinds of local norms if and when those norms are freely chosen by those who are affected by the norms' operation.[58] When local norms are the product of choice and not either a product or an instrument of oppression, they should be deemed legitimate. To consider such norms otherwise is to coerce individuals who do not share our values to abandon theirs.

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57. *See* ALEXANDER M. BICKLE, THE MORALITY OF CONSENT 3-6 (1975). The contractarianism of the liberal tradition begins with Locke and Rousseau, *see generally* SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU (1962), and has been refined more recently by John Rawls, *see generally* JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, POLITICAL LIBERALISM (1993). This descriptive account does not suggest a normative theory of the just society premised on the heuristic of a "primal contract," but has the more modest goal of describing a model of association that is premised on individual autonomy.

58. Of course, determining whether norms are "freely chosen" by "those affected" is no easy task, which is why contractarianism often relies on constitutions to do the work of defining the relevant polity, determining how the polity will aggregate preferences, and describing what kinds of decisions will be out of bounds. *See* Sheldon Wolin, *Fugitive Democracy, in* DEMOCRACY AND DIFFERENCE 33-34 (Seyla Benhabib ed., 1996).

A contractarian community may be narrowly drawn for instrumental purposes (the chess club) or it may embrace more comprehensive religious, political, and moral doctrines (the religious commune). The depth or quality of communal attachments is not important as long as the group is based in an uncoerced compact, which can take the form of either an explicit agreement setting the terms of membership or a tacit agreement to live by the membership's practices. The contractarian account of community does not distinguish among groups on the basis of substantive practices, beliefs, or purposes; it is, in the familiar parlance of political philosophers, "neutral" towards competing conceptions of the good life.[59] Thus, the commune, the residential community association, and the neighborhood are all "communities" whose distinctive practices are deserving of respect when those practices arise out of an uncoerced agreement.

The important distinction for contractarians is between associations and aggregates — that is, between groups formed out of the pursuit of a common goal or interest and individuals who happen to share a common characteristic.[60] The former type of group can exercise legitimate authority over its membership because it is grounded in consent, while the latter's authority would constitute a highly questionable exercise of coercion.

Indeed, the legal treatment of groups that are understood as associations of like minds differs substantially from the legal treatment of groups that are understood as aggregates of strangers. Judicial deference to the exercise of extra-property regulation by homeowners associations stems from the fact that individual residents have entered into agreements to live there and be subject to the association's norms.[61]

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59. Michael Sandel, *Introduction*, *in* LIBERALISM AND ITS CRITICS 3-4 (Michael Sandel ed., 1984).

60. Iris Young discusses the difference between aggregates and associations in JUSTICE AND THE POLITICS OF DIFFERENCE ch.2 (1990).

61. Courts tend to review the actions of boards of directors of homeowners associations (residential community associations) using a mixture of the business judgment rule and a reasonableness standard. *See, e.g.*, Buckingham v. Weston Vill. Homeowners Ass'n, 571 N.W.2d 842 (N.D. 1997) (holding that, in general, decisions by boards of directors will be reviewed under the business judgment rule to ensure that those decisions are made in good faith and in furtherance of the legitimate interests of the condominium, and do not involve fraud, self-dealing, unconscionability, or other misconduct; however, actions adversely affecting a minority of owners will be reviewed under a reasonableness standard whereby a court must consider: (1) whether the decision or rule is arbitrary; (2) whether the decision or rule is applied in an even-handed or discriminatory manner; and (3) whether the decision or rule was made in good faith for the common welfare of the owners and occupants of the condominium).

Increasingly, courts have favored the fairly open-ended reasonableness standard because it protects "minorities from the tyranny of the majority." *Id.* at 844. For example, in California, reasonableness review is a statutory requirement: "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development." CAL. CIV. CODE § 1354 (West Supp. 1994). The reasonableness rule holds that, although the

Some commentators claim that courts should be even more deferential than they already are, arguing that homeowners associations accurately reflect the preferences of their residents and that courts should allow for the most extensive exercise of private associational ordering possible.[62] Deference to acts of private "constitution-making" reflects respect for individual autonomy.[63]

Some might object that the homeowners association is "private" and thus entitled to enforce norms of behavior that "public" cities and neighborhoods would not be permitted to enforce. But the private/public distinction fails to answer the question of what makes a homeowners association different from a neighborhood. Both homeowners associations and neighborhoods contain spaces — streets, parks, sidewalks — set aside for the common use of their members/citizens. Of course, in a homeowners association, the common spaces may be "owned" and governed by a private government; title of common areas may be in the collective or in a corporation governed by a coop board. In a city, the common spaces are owned and governed by a public government. But this definition is tautological: the

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condominium's governing body has broad authority to regulate the internal affairs of the development, this power is not unlimited, and any rule, regulation, or amendment to the declaration or bylaws must be reasonable. Under the reasonableness test, a rule that is unreasonable, arbitrary, or capricious is invalid. *See* Worthington Condominium Unit Owners' Ass'n v. Brown 566 N.E.2d 1275, 1277 (Ohio Ct. App. 1989); *see also* Ridgely Condominium Ass'n v. Smyrnioudis, 681 A.2d 494, 498 (Md. 1996); Scudder v. Greenbrier C. Condominium Ass'n, 663 So. 2d 1362, 1369 (Fla. Dist. Ct. App. 1995); Bluffs of Wildwood Homeowners' Ass'n v. Dinkel, 644 N.E.2d 1100, 1102 (Ohio Ct. App. 1994); O'Buck v. Cottonwood Vill. Condominium Ass'n, 750 P.2d 813, 817 (Alaska 1988); Johnson v. Hobson, 505 A.2d 1313, 1317 (D.C. 1986).

Some courts have sought to distinguish between restrictions contained in the governing documents of an association and subsequent board-passed regulations. For example, under Florida law, the former are akin to covenants that run with the land and "will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right." Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637, 639-40 (Fla. 1981). Such restrictions are "clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed." *Id.* In contrast, board-passed rules are tested for reasonableness. *See id.*; *see also* Pines of Boca Barwood Condominium Ass'n v. Cavouti, 605 So. 2d 984 (Fla. Dist. Ct. App. 1992) (describing the two standards of review and validating restriction on pets contained in association's governing declaration).

62. These scholars argue that "reasonableness review" is too broad a standard and enables courts to override association actions far too readily. *See* Ellickson, *Cities*, *supra* note 31, at 1519-30; *see also* Richard Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 926 (1988) (arguing that "[t]he system of private governance on balance works pretty well," and that the doctrine of changed conditions should "not become the entering wedge of a large-scale system of judicial control over private homeowners' associations"); *cf.* Gillette, *supra* note 13, 1441 (1994) (defending homeowners associations as a "mechanism for sorting that is no more invidious than we allow through the creation of more formal jurisdictions (municipal corporations) and that is more responsive than those institutions to the desires of residents").

63. *See* Ellickson, *Cities*, *supra* note 31, at 1519-30; *cf.* Epstein, *supra* note 62, at 907 (describing the mutual covenants in homeowners associations as "mini-constitutions").

most useful difference that can be gleaned from this distinction is that private groups are governed by private governments and public groups are governed by public governments.

Instead, in important ways, the private/public distinction on the contractarian account turns on whether a particular group of people is, in our view, an association of like minds or an aggregation of strangers. The publicness of the city is a function of the fact that cities are "imperfectly voluntary" groups.[64] A city's residents only partially choose with whom they want to live. In contrast to the aggregate of strangers, the homeowners association (or the religious commune) is understood as a perfectly voluntary group.[65] These groups consist of residents/believers who contracted/covenanted to a certain way of life, and who could leave if they came to disagree with the governance of the community. The association's lawmaking — whether residential community association's or religious commune's — is deserving of deference because it is an expression of the individual's right to enter into and break contracts to join or dissolve a community.

In other words, the whole (the community) is the sum of its parts (the individuals). The now-familiar model of municipal competition advanced by Charles Tiebout reflects this contractarian account of community.[66] According to Tiebout, under ideal conditions, multiple, decentralized local government leads to competition between localities that results in better local service provision at a cheaper cost for all taxpayers and consumers of municipal services. Institutions with the attributes of government (whether "private" like homeowners associations or "public" like municipalities[67]) provide venues for the pursuit of various (and competing) bundles of municipal services and amenities. This competition allows individuals and firms to express their preferences among service packages by continually selecting where to locate. Consumer-voters register their preferences by "voting with their feet" — by moving into or out of the locality. Indeed, localities are best understood as mechanisms for distributing preferences in a municipal services market that disciplines poorly performing, nonresponsive localities with the threat that unhappy residents or firms will exit in favor of a more responsive neighboring jurisdiction. This market, absent barriers to entry and repaired for market flaws,[68] results in

64. Frank Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1167 (1977).

65. Ellickson, *Cities*, *supra* note 31, at 1522-23.

66. *See* Tiebout, *supra* note 33, at 416.

67. *See* Gillette, *supra* note 13, at 1388-402 (applying Tiebout's public goods model to homeowners associations).

68. Tiebout assumed certain conditions, including perfect information, mobility, the absence of externalities, and substantial choice among localities. *See* Tiebout, *supra* note 33.

neighborhoods of voluntary association, freely chosen by those who share a preference to live there.

The argument on behalf of local power is thus grounded in individual choice. Decentralized government allows for a wider array of forms of association, thereby vindicating individual autonomy and the efficiency and responsiveness of government in general. In order for such a regime to function, localities must be able to dictate the terms and conditions of membership in the community, to exclude those who do not wish to abide by the community's terms, and to coerce rule-breakers to conform.

Thus, as one would expect, it was very important for advocates of the Gang Congregation Ordinance to emphasize that the residents of inner-city Chicago overwhelmingly favored the ordinance — that it was not imposed upon them as an instrument of oppression, but was instead a product of individual choice exercised through a legitimate, recognized, and open political process.[69] The important point for these advocates is that the residents of high-crime Chicago neighborhoods expressed a preference for a norm that constrained their own behavior. State intervention to override such local constitution-making is dangerous because it threatens individual autonomy. This intervention is particularly paternalistic when applied to minority and poor individuals whose autonomy is regularly discounted by the state. State intervention is also inefficient because it effectively dismantles a powerful sorting mechanism for individual preferences, a mechanism that enhances overall social welfare by allowing residents to exercise their preference for certain amenities or norms by choosing where and how to live. On this account, the city of Chicago is losing the municipal service competition to the suburbs because Chicago cannot provide safe streets as part of its service package. By restricting Chicago's ability to do so, the Court ensures that the city will never be able to compete for residents, most of whom would prefer safe streets to violent ones.

Of course, the contractarian does not ignore possible dissenters, in this case, presumably the gang members themselves. They too have preferences, which can be fulfilled in two ways. They can exercise their

69. Proponents argued that the fact that the minority representatives of the minority residents of inner-city Chicago supported the measure differentiated it from measures that the Court struck down thirty years before when minorities did not have meaningful access to the political process. *See* Amicus Brief, *supra* note 45, at 5, 14-16 ("[T]he Ordinance is not a tool of repression being used by white majorities to reinforce the exclusion of minorities from the community's political and economic life. . . . Unlike the public order provisions scrutinized by this Court in the 1960's, the Ordinance was not imposed on minorities by an alien political establishment. . . . In short, any suggestion that the Ordinance was adopted as a cover for harassing minority youths is completely misguided."); *see also* Meares & Kahan, *When Rights Are Wrong*, *in* URGENT TIMES, *supra* note 9, at 8; Meares & Kahan, *Black, White and Gray*, *supra* note 9, at 251.

option to exit[70] the neighborhood (which is in part exactly what the ordinance intended), or they can challenge the ordinance by invoking a constitution to which the residents have previously bound themselves and to which they (residents and gang members alike) have arguably also consented.[71] Recourse to this latter option, however, needs to be balanced against the strong presumption that associational preferences should be accommodated — if possible — through the former. Thus, though the contractarian does not ignore conflicting preferences, the usual solution to conflict inside a voluntary association is separation — the exiting of the dissenting member from the group. If you do not like the chess club's rules, you can leave and join another club.

This is why describing Chicago's inner-city residents and their neighborhoods as "communities" is a useful rhetorical move. Community implies an association of like minds collectively pursuing a common end — a voluntary association. The normative intuition is to lessen distrust of norms when those norms are characterized as the outcome of collective, voluntary decisionmaking by like-minded individuals. Associations of like minds are different from the Madisonian majorities that create and enforce community norms against minorities. Associations govern through covenants that extend the individual's autonomy, allowing the individual to order relations with others of a similar persuasion in order to alter the terms of social life by joining together in a group. Aggregates govern through a politics limited by rights that protect individual autonomy from group encroachment. In the former, the group enables a particular pursuit of the good life; in the latter, the group is a threat to a particular pursuit of the good life. By denying the effect of the Gang Congregation Ordinance, the Court essentially coerced residents of the inner city to live by norms with which they do not agree and from which they cannot escape except by leaving the neighborhood.

In short, the more the neighborhood looks like a homeowners association or a commune (the more it looks like a product of choice), the more its norms are worthy of deference (because overriding such norms will increasingly look like coercion). Indeed, for some commentators, local governance is *only* legitimate where it is premised on the contractarian foundation of consent. As Georgette Poindexter writes:

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70. For a discussion of the concept of "exit," see ALBERT O. HIRSCHMAN, EXIT, VOICE & LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 22-25 (1970).

71. Such a constitution can take the form of a mythical contract, establishing the terms of the social order and the conditions of justice behind Rawls' "veil of ignorance" where we do not know if we are the gang members or the other residents of the neighborhood, *see* JOHN RAWLS, A THEORY OF JUSTICE (1971), or it can take the form of a set of rights codified in a historically bound text, such as a city charter, a state constitution, or the Constitution of the United States.

"The Lockean requirement of voluntary association for a legitimate government when used as a premise for . . . neighborhoods, will insure that . . . all parties have consented by joining the final product."[72] For Professor Poindexter, the standard for local government is whether it "validate[s] consumers' individualism and revealed choice by dissolving legal impediments to the full and free expression of their choice."[73] The neighborhood is a tool for the realization of individual autonomy. Once legal structures that permit the "fullest expression of self"[74] are put into place, communities (whether communes, homeowners associations, neighborhoods, towns or cities) should be permitted to self-govern because such local governance maximizes the individual's freedom of choice.

2. *Deep*

According to the deep[75] account of community, describing the community as a voluntary association is too thin a characterization of human experience and an insufficient basis for local constitution-making. The deep account of community reverses the direction of individual and community. It rejects the idea that the individual can exist or be sustained outside of, and prior to, his or her relationships with others, prior to a community that infuses individual choices and experiences with meaning.[76] Instead, the deep account of community conceives of the individual as always operating "within the discursive forms of a community that engages its members in an integrated view of their place in the cosmos, their history, their culture, and the meaning of personal experiences."[77] Human beings are never wholly stripped of their communal identities, nor can they be. As Michael Sandel writes: "[C]ommunity describes not just what they have as fellow citizens but also what they are, not a relationship they choose (as

72. Poindexter, *supra* note 53, at 653.

73. *Id.* at 609.

74. *Id.* at 622.

75. The term "deep" is borrowed from Seymour Mandelbaum, *Open Moral Communities*, *in* EXPLORATIONS IN PLANNING THEORY 86 (Mandelbaum et al. eds., 1996) (discussing the concept of "deep moral communities") [hereinafter Mandelbaum (1996)]. For an extended version of Mandelbaum's article, see SEYMOUR MANDELBAUM, OPEN MORAL COMMUNITIES chs. 3-5 (2000) [hereinafter MANDELBAUM (2000)].

76. *See, e.g.*, Michael Sandel, *supra* note 59. For a summary of the legal and philosophical literature that reflects the "constitutive conception of the self," see FRUG, CITY MAKING, *supra* note 34, at ch.4.

77. Mandelbaum (1996), *supra* note 75, at 86. Others have used the term "affective communities" to describe "the reciprocal consciousness of a shared culture." ROBERT P. WOLFF, THE POVERTY OF LIBERALISM 187-92 (1968); *see also* Roderick M. Hills, Jr., *Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers*, 1999 SUP. CT. REV. 277, 312-14 (defining "affective communities" as culturally homogeneous communities united by deep affective ties).

in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity."[78] Group autonomy is thus required for the individual's realization of his or her own psychological and moral place in the world.

The deep account of community asserts that, while some human associations are intentional, many of the most important ones are not. Family, church, neighborhood, and nation have aspects of intentionality, but are oftentimes imposed.[79] Indeed, voluntary association is a weak thread with which to stitch together community. Community involves shared experiences, deep attachments, mutual affection, and a sense of belonging. While it may be created or maintained through contract, community cannot be reduced to the mere coming together for mutual advantage that the contractarian account implies. The contract between self-seeking individuals at the heart of the contractarian account of community is at best an imperfect foundation on which to base a robust community; at worst, it destroys it.

Foregoing the social contract, the deep account of community relies instead on concepts of mutuality and reciprocity — a sense of connection that inheres in social creatures. The amici who defended the Chicago ordinance call this "linked fate."[80] According to the amicus brief submitted on behalf of area neighborhood organizations, supporters of the Chicago ordinance are "the mothers and fathers, the sisters and brothers, and the neighbors and friends of the youths subject to the law."[81] The inner-city residents, argued proponents of the ordinance, are linked by strong social and familial ties to the gang member against whom the ordinance is enacted, are members of "communities that individuals can create and maintain through social networks."[82] The residents' deep social connections and shared experiences situate them in a common narrative that gives their particularized constitution-making its authoritativeness.[83]

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78. MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 150 (1982).

79. Group affiliation "has the character of what Martin Heidigger calls 'throwness': one finds oneself as a member of a group, which one experiences as always already having been." IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 43 (1990).

80. Amicus Brief, *supra* note 45, at 5, 16-17.

81. *Id.* at 2-3.

82. Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 669 n.1 (1998). Meares describes "linked fate" as "the empathy that people have with family and friends," though she argues that African Americans' experience with race in America also creates "critical bonds" between even African Americans who are strangers to one another. *Id.* at 682-83.

83. *See* Amicus Brief, *supra* note 45, at 5 ("The residents of those communities . . . are linked by strong social and familiar ties to the gang members against whom the Ordinance is enforced. It is precisely because they care so deeply about the welfare of these persons that residents favor the relatively mild gang-loitering law as an alternative . . . The pervasive sense of "linked fate" between the majority of these communities' residents and the youths affected by the Ordinance provides a compelling reasons to respect the community's deter-

Unlike the contractarian account of community, the deep account does not turn on what Michael Walzer calls "the right of rupture or withdrawal."[84] Community is not premised on the ability to exit, but on the presence and quality of social attachments. Indeed, the fact that the residents of Chicago's poor, minority, inner-city neighborhoods may not have made a meaningful choice to live there in the first place or may not easily exit lends their claims for autonomy additional force. The residents' normative authority stems in part from the reality that they — and not a federal judge — are faced with violence and crime everyday that they cannot meaningfully avoid. Unlike the contractarian account, in which the residents' authority to depart from constitutional norms is grounded in individual consent, on the deep account, the residents' normative entitlement to balance liberty and order as they see fit is a function of their deep social and familial ties to the neighborhood and their personal experiences living there.[85] The "linked fate" of the residents of the inner-city neighborhood transcends the usual aggregate nature of a group of people who happen to live next door to one another.[86]

The complex web of social and familial relations can make a neighborhood into something approaching a communal order — a constitutive community. Regardless of how the neighborhood initially came to be created, a neighborhood of friends, relatives, and neighbors can adopt norms that are consistent with, or essential to, preserving a certain "way of life" that constitutes their collective and individual identities. In contrast to the contractarian account, which sets the private/public line at the point of contract, the deep account sets the private/public line at the point of constitutiveness. We are wary of norms that aggregates of strangers impose on other aggregates of strangers. We are less wary of norms that "family" and "friends" impose on each other. The intuition is that the former kind of rule-making is "public" and needs to be tested against suspicions of bad faith and self-interest, while the latter is "private," and thus is mediated by fellow-feeling.[87] The description of supporters of the ordinance as family and friends is no mere rhetorical flourish. The measure of a

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mination that such measures enhance rather than detract from liberty in their communities.").

84. Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 21 (1990).

85. *See* Amicus Brief, *supra* note 45, at 5.

86. *See id.* at 16 ("Nor can it credibly be maintained that those citizens who supported the Ordinance did so to oppress minorities within their own neighborhoods. . . . After all, those who were subject to the Ordinance were not 'outsiders'; they were the sons and daughters, brothers and sisters, and friends and neighbors of the community's own residents.").

87. *See id.* ("Individuals in these communities tend to evaluate whether a policy benefits them individually by considering its impact not just on themselves but also on members of the groups to which they belong.").

neighborhood's autonomy is the thickness of its communal attachments.

The deep account of community sets the community in opposition to the state. On the contractarian account, the state threatens the individual by its failure to recognize the individual's associational commitments and defer to the individual's choices. The deep account conceives of the state as a threat to community qua community. Deep communities are at risk from the monopolizing and centralizing tendencies of the state apparatus and its universalizing norms. *Wisconsin v. Yoder*,[88] which affirmed the right of a member of the Old Order Amish to refuse to send his fifteen-year-old daughter to school after she completed the eighth grade, is an example. In *Yoder*, the Court stated that the Amish way of life "is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[89] Compulsory school attendance laws therefore carry with them "a very real threat of undermining the Amish community and religious practice."[90] The Court's opinion reflects a deep account of community, specifically an account of the deep community as exceedingly fragile.

It is not a surprise that *Yoder* involved children and their socialization into a particular way of life, a point of extreme vulnerability for a deep community. The deep community often can survive only through the intergenerational transmission of a specific normative and cultural tradition.[91] At risk in *Yoder*, advocates claimed, is the very survival of

88. 406 U.S. 205 (1972).

89. 406 U.S. at 216.

90. *Id.* at 218.

91. This same claim of community and cultural self-defense was asserted (this time unsuccessfully) in *Board of Education of Kiryas Joel School District v. Grumet*, 512 U.S. 687 (1994), by a Hasidic religious community that sought to establish a separate school district providing special education for Hasidic Jewish children. As in *Yoder*, the claim by the *Kiryas Joel* petitioners that they had a right to teach their children in a separate and protected environment was asserted against the backdrop of a deep account of community. Robert Cover calls "paideic" a teleological community that shares a common body of precept and narrative that is transmitted through a collective corpus. Cover, *supra* note 15, at 13-14. The risks to such communities are particularly visible in disputes over educational issues, because the public school curriculum invariably comes into conflict with the parents' transmission of paideic norms. *Cf. Yoder*, 406 U.S. at 241-49 (Douglas, J., dissenting) (arguing that the state should allow Amish children an opportunity to be heard before allowing their parents to keep them out of school because being kept out of school "forever bar[s] [the child] from entry into the new and amazing world of diversity that we have today . . . . If he is harnessed to the Amish way of life . . . his entire life may be stunted and deformed"). Another example is *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), in which fundamentalist parents charged that teaching their children diverse viewpoints in a tolerant and objective manner threatened the survival of their fundamentalist way of life. *See id.* (holding that school board was not required by the Free Exercise Clause to permit children of fundamentalist Christian parents to opt out selectively from reading certain texts or participating in a certain offending "secular humanist" curriculum); Stolzenberg, *supra* note 13, at 627-28 (discussing *Mozert* and the tension between cultural pluralism and assimilation). For an argument that advances an assimilationist reading of the Constitution, see

a particular community. Amici in *Morales* invoked similar arguments, asserting that the Gang Congregation Ordinance was intended to protect the community against a continuing cultural, social, and literal decay (far worse, it could be argued, than the possibility of cultural extinction that faced the Amish in *Yoder*): the criminalization of entire ethnic neighborhoods, the incarceration or murder of generations of young African-American and Latino men, and the deterioration of inner-city, minority neighborhoods whose most robust members continue to abandon their streets and their homes.[92] An alternative to the wholesale warehousing of young black men, argued amici, is a loitering ordinance that stems the drug and gang trade before it results in the death or long-term incarceration of its youngest members or in the abandonment of formerly thriving neighborhoods by the majority of its law-abiding residents.[93]

The argument for allowing local deviation from constitutional norms is thus both an affirmative and a preservationist one. The continued existence of deep communities is a good in itself, both because our humanity is a function of our communal attachments and because the multiplicity and diversity of particularized normative communities is a distinct human and societal value.[94] On the contractarian account, the empowered voluntary association extends individual autonomy and allows for individual preference formation. It thus reinforces the self-interested and instrumental nature of human interactions as opposed to emphasizing the human interconnectedness that true community provides. The deep account of community looks for ways to remove the impediments to connection and to provide groups spaces in which to create their own moral worlds. Local government law vindicates the community (whether it be a commune, neighborhood, town, or city) by treating it as its own "extensive moral entity"[95] and by requiring that political boundaries be drawn to ensure that the community has sufficient powers to define and to protect itself.[96]

Christopher Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87 (1996). Eisgruber believes that *Kiryas Joel* was rightly decided by a Court concerned with cabining separatism. Abner Greene disagrees. *See* Abner Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 43-51 (1996).

92. *See* Amicus Brief, *supra* note 45, at 17-18.

93. *See id.* at 20-24.

94. *See* Alexander, *supra* note 13, at 31-34 (collecting arguments); *see also* Cover, *supra* note 15, at 68; Greene, *supra* note 91, at 15-17.

95. Mandelbaum (1996), *supra* note 75, at 87.

96. *Cf.* WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 188-90 (1989) (arguing that we should protect insular minority cultures by "redrawing the boundaries of political units, and redistributing powers between levels of government, so as to ensure that a minority culture controls a political unit which has sufficient powers to protect the community").

3. *Dualist*

The deep account thus presents an organic notion of community that is very different from the highly intentional account offered by the contractarian. Yet, neither may be wholly sufficient to capture human experience. The thinness of the contract and the thickness of the constitutive community are two extremes; we sometimes do not recognize either as reflecting our experience of community as both chosen *and* unchosen. The third set of arguments that ground local autonomy, which I label "dualist," partakes of both the contractarian account's emphasis on the intentionality of group life and the deep account's emphasis on the constitutive qualities of community.[97] The dualist account understands community formation as *both* highly intentional and highly immanent in human relationships. On the dualist account, the self neither fully chooses community nor is it fully embedded in it; it is — in the words of political theorists — neither fully atomistic nor fully situated. Community is instead always in the process of being negotiated and renegotiated against a background of a "shifting and amorphous field"[98] of social relations. Thus, the dualist account emphasizes the individual's engagement in a process of collective self-governance. The individual is constituted by his or her engagement in the dialogue that occurs during acts of collective decisionmaking. Group autonomy makes the exercise of deliberation that is essential to human flourishing and freedom a meaningful one.

For dualists, "[g]enuine community requires dialogue, robust and continuous."[99] The dualist account rejects the bland impersonality of the contract and the fearful nomic insularity of the deep. Intentionality is expressed through participation: self-government occurs in face-to-face settings. The ideal is a participatory practice whereby individuals arrive at shared values by engaging in dialogue with each other. The ongoing negotiation between and within groups for social space occurs in a consciously public sphere.[100] This public sphere is understood as a

97. *Cf.* Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1217-18 (1994) (offering an account of the self based on social roles in an effort "to avoid both an individualistic and a collectivist reductionism" by treating "individuals and collectivities as equally primary and irreducible entities").

98. Mandelbaum (1996), *supra* note 75, at 89.

99. Alexander, *supra* note 13, at 61. For that reason, some would call this community "dialogic." *See* WOLFF, *supra* note 77, at 192-93; *see also* JURGEN HABERMAS, A THEORY OF COMMUNICATIVE ACTION 275-330 (Thomas McCarthy trans., 1984).

100. The Habermasian concept of the "bourgeois public sphere" as an institutional space between state and economy that emerged during the seventeenth and eighteenth centuries is more disciplined than my more general use of the term here. *See* JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., MIT Press 1993) (1962). My use of the term is closer to Seyla Benhabib's. Selya Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 58,

place for conversation, in which individuals can engage in negotiation about the quality and reach of collective norms and, by extension, the individual's own commitments to his or her multiple, overlapping identities. Thus, the dualist account mediates the contractarian and deep accounts of community through a process of deliberation.[101]

A central debate waged by those on either side of Chicago's Gang Congregation Ordinance concerned the quality of the political process that resulted in its passage.[102] On one level, this debate was about whether the winners and the losers were fairly represented, that is, whether the system for picking winners and losers in a world where the majority wins actually worked. That question goes to the efficacy

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67-87 (discussing the idea of a "public sphere of deliberation about matters of mutual concern" and a "public sphere of opinion-formation, debate, deliberation, and contestation among citizens, groups, movements, and organizations in a polity"). For a guide to Habermas's concept of the public sphere, see CRAIG CALHOUN, *Introduction*, *in* HABERMAS AND THE PUBLIC SPHERE 1 (Craig Calhoun ed., 1999) (noting that "bourgeois society produced a certain form of public sphere" separate from the state and from the private realm); William E. Forbath, *Habermas's Constitution: A History, Guide and Critique*, 23 LAW & SOC. INQUIRY 969, 981 (1998) (noting the emergence of "institutions of sociability" as a "social space in which the Enlightenment and liberal constitutionalism were forged").

101. *Cf.* IRIS YOUNG, INCLUSION AND DEMOCRACY 4-10 (2000) (contrasting deliberative democracy from aggregative democracy). According to Young, on the deliberative model, democracy is a form of practical reason:

> Democratic process is primarily a discussion of problems, conflicts, claims of need or interest. Through dialogue others test and challenge these proposals and arguments. Because they have not stood up to dialogic examination, the deliberating public rejects or refines some proposals. Participants arrive at a decision not by determining what preferences have greatest numerical support, but by determining which proposals the collective agrees are supported by the best reasons.

Id. at 10.

Joshua Cohen, another theorists who writes in this tradition, describes the enterprise in these terms:

> Not simply a form of politics, democracy, on the deliberative view, is a framework of social and institutional conditions that facilitates free discussion among equal citizens — by providing favorable conditions for participation, association, and expression — and ties the authorization to exercise public power (and the exercise itself) to such discussion — by establishing a framework ensuring the responsiveness and accountability of political power too it through regular competitive elections, conditions of publicity, legislative oversight, and so on.

Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 58, at 99.

The literature that arguably fits under the umbrella of deliberative democracy is varied and has been given a number of names, such as proceduralist-deliberative democracy, participatory democracy, communicative democracy, and civic republicanism. A sampling includes: BENJAMIN BARBER, STRONG DEMOCRACY (1984); JAMES BOHMAN, DELIBERATION AND DEMOCRACY (1996); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

102. *Compare* Meares & Kahan, *Antiquated Procedural Thinking*, *supra* note 9, *with* Alschuler & Shulhofer, *supra* note 9, *and* Meares & Kahan, *Black, White, and Gray*, *supra* note 9.

of the democratic process as a mechanism for expressing individual preferences; it thus reflects a contractarian concern. The debate also reflects, however, a dualist concern about whether the residents of Chicago's inner-city, minority neighborhoods had an opportunity to engage in deliberation regardless of who won or lost. At stake is not only who engaged in the conversation but its quality — not merely whether the channels for political participation were open, but whether the participation that resulted was robust. On the dualist account, a norm is not legitimate merely because it is the outcome of a full and fair vote; that vote has to be accompanied by a true conversation among decisionmakers (ideally face-to-face) in a small enough setting to enable each stakeholder to be heard. A norm's bindingness is a function of its being the outcome of a deliberative process, the public formation of shared values.

The argument for local governance in *Morales* can therefore be understood in dualist terms as an argument about the appropriate scale for the face-to-face interactions necessary for true political community. Proponents of the ordinance declared that the relevant decisionmakers were the residents of the neighborhoods and specific blocks in which gang activity occurs every day. Opponents countered that the state (speaking through its courts) was the appropriate decisionmaking unit or, alternatively, that the appropriate decisionmaker was "We, the People," speaking through constitutional guarantees. Implicit in the proponent's argument was the dualist notion that the kind of dialogue that occurs between neighbors is superior to the kind of dialogue that occurs between representatives at the state or federal level. This dialogue is superior because it allows individuals to "interact with each other as concrete, not abstract, personalities,"[103] and because it invigorates a wider democratic politics. Indeed, by respecting the norms of smaller scale decisionmakers — the neighbors across the fence — the wider polity fosters the kind of civic engagement that is both central to human flourishing and crucial for revitalizing civic life in the larger polity as well.[104]

The dualist account of community emphasizes the individual's public role as citizen: community involves participation in the decisions of the day. Amici in favor of the Gang Congregation Ordinance invoked this image of the public-regarding citizen, portraying the residents of Chicago's inner-city neighborhoods as taking the reins of government after the police, the city, and the larger political community had failed to repair — or had been unwilling to address — the

103. Alexander, *supra* note 13, at 48.

104. De Tocqueville is often invoked as the standard-bearer for this view. "A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty." DE TOCQUEVILLE, *supra* note 29, at 68; *see* SANDEL, *supra* note 29, at 202.

problems of inner-city gang violence.[105] Residents would literally "take back" their streets. In this way, the dualist account provides not only a general justification for local self-government but a justification for the Gang Congregation Ordinance in particular. By freeing the public streets from the terrorizing effects of gang violence, the ordinance would foster the face-to-face interaction required for true collective decisionmaking. The ordinance would make the community's "public life possible"[106] by securing the forums in which the interpersonal connections necessary for public life transpire — namely the streets, parks, and corners where people meet, interact, and participate in public life.[107]

On the dualist account, community does not just happen; it has to be fostered by appropriate policies in particular public environments. Unlike the contractarian and the deep accounts, which set the state in opposition to the individual and community respectively, the dualist account views the state as uniquely positioned to encourage civic attachments in local settings through appropriate legal regimes. State intervention can help to create the arenas and spaces in which collective action will more likely arise.[108] The dualist account thus allows the government a more aggressive role in engaging in citizen-making activities, activities that may sometimes clash with other kinds of community norms.[109]

This sense that the government has to take active steps to define and defend a robust public life is implicit in the arguments made by advocates of the Gang Congregation Ordinance. The residents of inner-city Chicago wanted to govern themselves and to have the space in which to govern themselves into the future, to make their public life

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105. *See* Amicus Brief, *supra* note 45, at 17-18.

106. Livingston, *supra* note 8, at 562.

107. *See* Amicus Brief, *supra* note 45, at 25-26.

108. *See* Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 58, at 113 (advocating the creation of new "deliberative arenas" that can serve as "schools of deliberative democracy").

109. For example, the state may have an interest in promoting a public school curriculum that emphasizes democratic values, such as tolerance, deliberation, and dialogue. This is the tenor of Judge Cornelia Kennedy's concurring opinion in *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), in which she rejected fundamentalist Christian claims for an opt-out from the public school curriculum on the basis that critical thinking is essential for "citizenship in a Republic," because it prepares students for "self-government" and helps "avoid[ ] religious divisiveness." *But cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that classroom-imposed, compulsory flag salute violated First Amendment rights of children of Jehovah's Witnesses). Both Cover and Stolzenberg have noted the fine line between a mandated curriculum and a mandated flag salute. *See* Cover, *supra* note 15, at 60-62; Stolzenberg, *supra* note 13, at 605-10, 642-43. The paradox of liberal education — illustrated by Justice Douglas's dissent in *Yoder* — is that it must champion tolerance, diversity, and accommodation, but its substantive program may put some (insular or intolerant) groups outside the bounds of tolerance, diversity, and accommodation.

possible.[110] The ordinance constitutes an example of the former and a means of ensuring the latter. Localism, on this account, rests on the thesis that civic engagement can only meaningfully take place within the contours of some form of a circumscribed jurisdiction, in forums where citizens can meet face-to-face. Local government law vindicates the community by providing venues for participation in small-scale democratic governance and by defending the spaces in which public reasoning can take place.

The dualist account can therefore be characterized as a more "positive" account of state-group relations ("help us self-govern by making our streets safe") in contrast to the "defensive" stance taken by the deep account ("allow us to defend ourselves against cultural genocide") and the more "neutral" stance taken by the contractarian ("leave us alone to make our own choices"). These respective postures correspond to different visions of group vulnerability. On the contractarian account, groups are only vulnerable to the extent that the individual is vulnerable. The state's role is limited to creating a background regime in which individual choices can be honored and not suppressed, either by the government or by other groups. Once voluntariness is guaranteed, the state does not have any further role in determining the substance of group life. In contrast, on the deep account, groups are always vulnerable to the force of state orthodoxy. The state must be mindful of its destructive capacities, which may require it to accommodate (or even sponsor) deep communities' alternative lawmaking or risk their elimination. The state thus has a negative role (as representing the omnipresent threat of a norm that will hurt or destroy the group) in structuring group life. Finally, on the dualist account, the state can foster community by creating fora for self-government. Group life is vulnerable to an enforced individualism which the state can counteract by affirmatively supporting collective engagement. The creation of small-scale governments is thus a positive act that the state can perform: encouraging decentralization should be an affirmative state policy.

On all three accounts, community is threatened by, on the one side, an enforced atomism and, on the other, an enforced statism. The wider polity should defer to those norms that are genuinely community-directed, that is, those norms chosen by individuals whose weighing of liberty and order are entitled to moral respect. The decisions made by the shareholder of the residential association are entitled to moral respect because she has entered into a contract by

110. Livingston, *supra* note 8, at 667 (describing the void for vagueness doctrine as applied to local order maintenance policing as "democracy foreclosing" if used "in such a way as to prevent communities from regulating in a given sphere" and arguing that "[w]hen . . . public order laws do not appear aimed at the exclusion of some from full participation in a community's public life, but rather at the articulation of behavioral standards that may facilitate the common use of public spaces . . . courts should not invalidate them for vagueness").

choosing to live there. The decisions made by the neighbor living in the neighborhood of linked fate are entitled to moral respect because she is "one of us." And the decisions by the citizen living in the neighborhood as little republic are entitled to moral respect because they are a result of a reasoned deliberative dialogue. All three accounts thus contribute to a defense of local autonomy in the name of community. In the first, the community standard is self-imposed by legal operation. In the second, the community standard is self-imposed by sociological fact. In the third, the community standard is self-imposed because it is the outcome of a participatory process.

II. INTERROGATING COMMUNITY

Though the three accounts of community offer widely divergent rationales for deferring to local constitution-making — individual choice, community preservation, civic engagement — each shifts the burden of justifying encroachment on local norms to the encroacher. The rhetoric of community is an effective tool in this debate. No one can be against community. To the contrary, we seek to preserve it, build it, foster it. Indeed, the debate over local constitution-making is structured as a choice between community and coercion; all efforts are directed toward mediating the effects of higher-level or universalized norms on lower-level or particularized communities. From this vantage, our choice is either respect for a local norm or the force of a superior authority.

This Part argues that the choice between respect and force is a false one. I show that community itself is a result of forceful acts of literal and figurative boundary creation, the drawing of lines between insiders and outsiders. Robert Cover's description of how law constitutes an "integrated world of obligation and reality"[111] from which the rest of the world is perceived, is useful here.

> At that point of radical transformation of perspective, the boundary rule — whether it be contract, free exercise of religion, property or corporation law — becomes more than a rule: it becomes constitutive of a world. . . . A world is turned inside out; a wall begins to form, and its shape differs depending upon which side of the wall our narrative places us on.[112]

Cover associated this (metaphorical) process with the law-generating activities of (mainly) insular religious groups, but I want to use his description of the process of boundary creation to understand how local autonomy is constructed by norms operating in geographical space. This account shares with legal geographers the view that space itself is

111. Cover, *supra* note 15, at 31.

112. *Id.*

a social production, and that law is as constitutive of social geographies as it is of social institutions.[113] The geography of the metropolitan region is as much a product of legal rules as are the social relations of husband, citizen, and debtor the outcome of the legally constituted forms of family, state, and market.[114]

This Part cautions that localism claims — claims that certain groups should be permitted to make law for themselves — must be understood as acts of legal and spatial construction.[115] Community describes an act of demarcation, involving the complex social, legal, political, and psychological activities of joining, leaving, belonging, exiling, excommunicating, embracing, defining — the whole range of social practices of inclusion and exclusion. The shape of localism is contingent on how the walls between neighborhoods are built and conceived. Shifting our lens to the origins of communities in space reveals the crucial horizontal relationship between competing conceptions of the local.

The walls that form between neighborhoods are both legal and literal. This Part demonstrates how important conceptions of demarcated space — in the form of the zoned spaces of the metropolitan region — are to the creation and maintenance of the concept of community. I begin by describing the Gang Congregation Ordinance as a zoning device, and proceed to describe the function of boundary-creating norms in delineating social spaces in the built environments of the city. The concept of zoned space then informs a critique of the contractarian, deep, and dualist accounts of community. This critique employs three very different cases, involving standing, the Establishment Clause, and voting rights, respectively. Each case concerns a central preoccupation of this Article: how the legal rules for incorporating

113. The intersection of law and geography has been the focus of a group of scholars who have sought to look at the "spatiality of human life" through the lens of the law. *See* Edward Soja, *Afterward*, 48 STAN. L. REV. 1421, 1423 (1996) (describing the general "spatial turn" in critical thinking and the ways in which legal scholars have begun to engage in this critical spatial perspective). Legal geographers ask how geography shapes law and, more important, how law shapes geographies, both real and virtual. *See id.* at 1426-27; NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER xi-xiv (1994). The recently published LEGAL GEOGRAPHIES READER, *supra* note 14, collects some representative works.

114. *See* David Delaney et al., *Where is Law?*, *Preface* to THE LEGAL GEOGRAPHIES READER, *supra* note 14, at xv.

115. *Cf.* BLOMLEY, *supra* note 113, at 43 (quoting Henri Lefebvre, *Reflections on the Politics of Space*, ANTIPODE May 1976, at 31) ("Space is not a scientific object removed from ideology or politics; it has always been political and strategic. If space has an air of neutrality and indifference with regard to its contents and thus seems to be purely formal, the epitome of rational abstraction, it is precisely because it has already been occupied and used, and has already been the focus of past processes. . . . Space has been shaped and moulded from historical and natural elements, but this has been a political process. Space is political and ideological. It is a product literally filled with ideologies.").

or excluding others generate a community's identity *and* the community's claims to self-govern.

The Gang Congregation Ordinance at issue in *Morales* can be understood as a mechanism for defining the space in which community takes place. The introduction of literal and legally demarcated space undermines any straightforward notion of local autonomy; indeed, it calls into question the idea of the "local" altogether and the rhetoric of community that is often used to describe and prescribe it.

A. *Zoning Deviance: Land Use and Social Control*

I begin with two claims — one descriptive, the other definitional. The descriptive claim is that the Gang Congregation Ordinance is a zoning regime. The definitional claim is that zoning regimes are boundary-creating norms, norms that demarcate physical and social space. Zoned space is the geographically describable reality of local government. For the local government scholar, community is not an abstraction but is instead the outcome of political and legal actions embedded in a particular geography, tied to a particular place.[116]

Zoning laws define and differentiate the built environment, separating favored uses of land from disfavored uses. This differentiation of the built environment has profound effects on the way we live, but this power is often taken for granted, thought of as background rules relevant to builders and real estate agents and of little importance to our day-to-day experience. Yet zoning is one of the primary powers of local governments in this country; indeed, as Richard Briffault points out, towns have incorporated simply to gain the power to zone.[117] This zoning power is a central mechanism for controlling entrance into a community, establishing norms of order there, and transmitting those norms to its residents. Though land use lawyers tend not to think of zoning as an instrument of policing and criminal law scholars often fail to make the explicit link between land use and deviance,[118] it should

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116. Lea Vandervelde observes:

> One of the noteworthy characteristics about zoning law is that the social construction of local governance is coupled with the physical construction of bricks and mortar. A city's physical structure provides graphic evidence of the effect, or lack of effect, of legal constraints. What a city or neighborhood *is, or what it will become*, depends to a significant degree on its physical structure.

Lea S. Vandervelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057, 1063 (1990) (emphasis added).

117. *See* Briffault, *supra* note 32, at 39.

118. James Lorenz, *Planning for the City's Deviants*, 1 PORTIA L.J. 143 (1965), is an exception. It asks how land use planning can or cannot serve as an "adjunct to the criminal law." *Id.* at 145. Neal Katyal has also drawn a direct link between the built environment and crime control in his recent article. *See* Neal Kumar Katyal, *Architecture as Crime Control* (draft 2001, on file with author).

come as no surprise that land use regimes are important mechanisms for controlling and ordering social life through the spatial differentiation of behaviors and persons. Land use regimes are powerful instruments of social control.

Consider Robert Ellickson's hypothetical proposal for public space urban zoning, which makes the link between social control and spatial differentiation explicit.[119] Professor Ellickson asks his readers to consider a city that sincerely desires to create a welcoming environment for all its citizens but which is beset by marauding teenagers, aggressive panhandlers, and other public disorders that make life on the street unpleasant and even untenable. The city decides to institute rules of conduct for different urban spaces divided into three color-coded zones — Green, Yellow, and Red — in an effort to control and cabin these antisocial activities.[120] These zones indicate the level of official tolerance of various types of behavior on the public street and in public places. In Green Zones, the city strictly enforces anti-panhandling ordinances, congregation ordinances, and other quality of life ordinances regulating a whole range of disruptive conduct. The Green Zone is a place of "refuge for the unusually sensitive," like children and the elderly.[121] In Yellow Zones, the city strikes a balance to create a "lively mixing bowl."[122] In Yellow Zones, the police regulate aggressive panhandling and some forms of loitering and congregation, but perhaps not occasional panhandling, limited loitering, and other kinds of congregation. The idea would be to "curb street misbehavior enough to make the great majority of citizens willing to enter these spaces without hesitation."[123] Finally, in Red Zones (consistent with the concept of Red Light Districts), the city tolerates more noise and rowdiness and does not regulate panhandling, loitering, or other deviant behaviors at all. Red Zones would be "safe harbors for people prone to engage in disorderly conduct."[124]

Ellickson offers this hypothetical "public-space zoning" scheme to control what he calls "chronic misconduct in public spaces," which is defined with reference to "prevailing community standards of behavior."[125] His proposal specifically addresses "chronic street nuisances,"

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119. *See* Ellickson, *Controlling Chronic Misconduct*, *supra* note 8, at 1219-22.

120. *See id.*

121. *Id.* at 1221.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1185. Professor Ellickson's zoning proposal is meant to bring attention to what I think is his first priority: permitting police the discretion to force panhandlers and vagrants to "move along" specifically and allowing law-enforcement authorities in cities a great deal of leeway in controlling deviance in public spaces generally. *See id.* at 1185-89. Ellickson is decidedly opposed to what he sees as the Warren Court's unnecessary and im-

like aggressive panhandling and bench squatting, but it could easily apply to the conduct outlawed in the Chicago ordinance, loitering as defined as "remaining in one place with no apparent purpose." Indeed, Ellickson would make all sorts of conduct that is currently legal — such as dog walking or playing a radio — illegal in Green Zones.[126]

Like the Gang Congregation Ordinance and other public order laws, Ellickson's proposal is thoroughly grounded in the new policing that emphasizes quality of life issues: the concern for the vitality of the street, the emphasis on the responsibilities of those who use the public ways, the sense that small disorders will aggregate into larger ones, and the belief that informal norms of civility enable urban life to flourish.[127] His approach targets specific uses of public space in an effort to increase ones we like (walking/strolling) and to decrease ones we do not like (panhandling/loitering). Less delicately, the purpose of urban zoning is to force undesirable uses to go somewhere else (into Red Zones). Ellickson argues for the return to the days of Skid Rows, when the Bowery was an informal Red Zone for the "down" and "out" in New York City.[128] His goal is to recreate such neighborhoods in our central cities.[129] Like ordinances that ban shopping carts from the streets, camping in public parks, sitting on the sidewalk, lingering on a highway median, or rummaging through trash, public space zoning is intended to force the loiterer and the panhandler to " 'find someplace else to go' " on the theory that " 'if there's no good fishing in the lake, you find another lake.' "[130]

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proper constitutionalization of street law. His proposal thus embodies a federalism concern as well. *See id.*

126. *See id.* at 1222.

127. *See id.* at 1177-78.

128. *See id.* 1167, 1171-72.

129. *See id.* De facto zones are already at work in certain cities. *See* MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 232-33 (1990) (describing how Los Angeles "promotes the 'containment' (official term) of the homeless in Skid Row along Fifth Street east of the Broadway," a strategy that "by condensing the mass of the desperate and helpless together in such a small space, and denying adequate housing" has "transformed Skid Row into probably the most dangerous ten square blocks in the world").

130. Evelyn Nieves, *Growing Number of Homeless Defy Cities' Drives to Move Them*, N.Y. TIMES, Dec. 7, 1999, at A1 (quoting Mark Siemens, Marysville, Md., City Administrator). In Santa Ana, California, it is illegal to sit in the civic center with belongings that occupy more than three cubic feet. *See id.* At the extreme, it has been reported that town officials in Sacramento give homeless people one-way tickets out of town. *See id.* Other tactics to rid downtowns of the homeless and panhandlers include designing street furniture such as the barrel-shaped bus bench and installing outdoor sprinklers and spikes on flat concrete surfaces to discourage sleeping on and around the street, and placing fences around garbage or locking up trash receptacles to prevent the homeless from accessing them. *See* DAVIS, *supra* note 129, at 233-34. For a collection of urban policies designed to control public space, including laws against sleeping in public, sitting on sidewalks, and laws requiring the licensing of panhandlers, see Don Mitchell, *The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States*, *in* THE LEGAL GEOGRAPHIES READER, *supra* note 14, at 6, 8-9. Jeremy Waldron has argued that such controls effectively

In this way, public-space zoning, like all zoning regimes, operates by discouraging and excluding undesirable uses of land and encouraging and attracting desirable uses. When combined with a criminology emphasizing the effect of low-level disorder in promoting more serious criminal behavior, a land use approach to crime control emerges. This approach views deviance through the lens of space and place: land use regimes, broadly conceived, deter crime by deterring or isolating disorderly uses of public and private space.

Chicago's Gang Congregation Ordinance is a good example. As advocates argued, the ordinance's purpose was to prevent gang members from gathering on sidewalks, corners, and parks before they engaged in serious crimes, to create norms of order on the street in order to deter further criminal activity. The Chicago police did not patrol the entire city looking for loitering gang members. Instead, the police specifically targeted certain blocks and corners of the city and, essentially, zoned them as no-gang loitering areas.[131] The fact that the Chicago police implemented the ordinance in this manner was one of the city's defenses of its constitutionality.[132] Echoing constitutional defenses to the zoning of adult theaters and bookstores and other undesirable venues, the city argued that the ordinance was a permissible regulation of the streets because the regulations implementing the ordinance provided adequate alternative areas in which gang members could gather "with no apparent purpose."[133] Ellickson defends his urban zoning against constitutional attack on the same grounds, arguing that public-space zoning does not make particular behaviors illegal but only makes them the equivalent of "nonconforming uses" in certain

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deny homeless persons the only legal space in which they can exercise certain basic human freedoms, such as sleeping or washing. *See* Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 296, 315 (1991)

131. *See* Petitioner's Brief, *supra* note 21, at 27-28 ("Under General Order 92-4, the gang loitering ordinance is not enforced throughout Chicago, but only in those limited areas designated by police district commanders as 'areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community.' ").

Similarly, Cincinnati's recently invalidated "drug exclusion zone" ordinance required that persons who had been arrested or taken into custody within any designated drug exclusion zone for drug abuse or any drug abuse-related activities could not be present in the zone for ninety days following their arrest. *See* Ohio v. Burnett, 755 N.E.2d 857, 858-60 (Ohio 2001). Excluded persons were permitted to file for a variance from the chief of police for reasons related to their health, welfare, or well-being, or for drug abuse-related counseling services, if they were bona fide residents of the drug exclusion zones, or if they were bona fide owners or employees of places of lawful employment within the zones. *Id.* Transient occupants of hotels or motels were not bona fide residents under the ordinance. *Id.*

132. *See* Petitioner's Brief, *supra* note 21, at 28.

133. *See id.* ("[T]here remain many — indeed innumerable — opportunities available to gang members to express their ideas and associate with others."). Of course, for obvious reasons, the areas selected for enforcement of the ordinance were only known to members of the police department's Gang Crime Section and other designated personnel and were not made known to the general public. *See id.* at 5-6.

areas of the city.[134] In a Chicago with a functioning anti-gang loitering ordinance, congregating with gang members on certain specified blocks or corners is simply a nonconforming use subject first to a warning and then, if not corrected, to arrest.

Though rarely applied so directly to specific types of disorder, this land use model of crime prevention is not a new one. The theory that the physical conditions in which people live can contribute to criminality was present at the inception of the discipline of urban planning.[135] Indeed, in 1926, at the time the Supreme Court first addressed the constitutionality of a comprehensive zoning regime, it was accepted wisdom that "crime and vice increase in the blighted districts where general conditions are more promotive of sickness and delinquency."[136] Thus, the Court in *Village of Euclid v. Ambler Realty Co.*[137] could validate zoning as a means of protecting the "health, safety, and morals of the community."[138] Advocates of zoning, with its attendant building codes, tenement restrictions, sanitary regulations, and mixed use limitations, could refer to the "well documented facts that slum clearance and the provision of sanitary low-rent housing decrease danger of epidemics, raise general public health, reduce crime, cut juvenile delinquency, reduce immorality . . . and prevent the cancerous spread of the slums to uninfected areas."[139] As the President's Committee on Natural Resources stated in 1937: "[I]nadequate housing conditions are causally connected with . . . [a] high incidence of delinquency. Likewise, there is a close coincidence between poor housing conditions and social disorganization."[140]

Zoning was initially justified both as a means of rehabilitating and, in the case of the *Village of Euclid*, of preventing the formation of en-

134. *See* Ellickson, *Controlling Chronic Misconduct*, *supra* note 8, at 1232-39. For an extended critique of this defense and of Ellickson's proposal in general, see Steven R. Munzer, *Ellickson on Chronic Misconduct in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers*, 32 HARV. C.R.-C.L. L. REV. 1, *passim* (1997).

135. *See generally* James G. Coke, *Antecedents of Local Planning*, *in* PRINCIPLES AND PRACTICE OF URBAN PLANNING 7 (William Goodman & Eric C. Freund eds., 4th ed. 1968). New York City enacted legislation regulating tenements in 1867. Larger cities followed with sanitation and building codes for new construction. In 1916, New York City adopted its first comprehensive zoning ordinance that addressed the type, location, and use of buildings. *See* James C. Nicolas, *State and Regional Land Use Planning: The Evolving Role of the State*, 73 ST. JOHN'S L. REV. 1069, 1070 (1999).

136. *See* Brief for Appellant at 66, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (No. 31).

137. 272 U.S. 365 (1926).

138. *Id.* at 395.

139. Myers S. McDougal & Addison A. Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L.J. 42, 47-48 (1942).

140. NATIONAL RESOURCES COMMITTEE, OUR CITIES: THEIR ROLE IN THE NATIONAL ECONOMY 67 (1937).

vironments that would foster delinquency and deviance.[141] Land use regimes quickly took on the broader defensive role of preventing overcrowding, noise, pollution, and traffic: the harbingers of the fearful urban blight characteristic of the decaying city.[142] Justice Sutherland, writing for the *Euclid* Court, held that zoning "increase[s] the safety and security of home life; greatly tend[s] to prevent traffic accidents, especially to children . . . decrease[s] noise and other conditions which produce or intensify nervous disorders; [and] preserve[s] a more favorable environment in which to rear children."[143] As suburbia came to dominate America's social and cultural life, zoning took root as a mechanism protective of home and family, reinforcing the contrast between the "dangerous city" and the "bucolic suburb."[144]

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141. *See* Lorenz, *supra* note 118, at 169. It also had implicit racial overtones. *See* CONSTANCE PERIN, EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA 193-209 (1977) (describing how fear of immigrants are "in the fiber of zoning"); Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 603-14 (2001) (describing how the "polite" public health rhetoric of *Euclid* was a code for "ugly" racial imagery).

142. *See* Peter L. Abeles, *Planning and Zoning*, *in* ZONING AND THE AMERICAN DREAM 122, 127-29 (Charles M. Harr & Jerold S. Kayden eds., 1989).

143. 272 U.S. at 394.

144. A host of factors are at play in the construction of this dichotomy. Professors Jerry Frug and Keith Aoki note the origin of suburbia in a sentimental pastoralism. *See* FRUG, CITY MAKING, *supra* note 34, at 143-44. The anti-urban, Arcadian aesthetic of urban planners and architects of the nineteenth century and the utilitarian strand of urban planning that developed in the early to mid-twentieth century combined to produce a distribution of space "strictly segregated along economic, social cultural, and racial lines." Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 700-01 (1993).

Others have examined the role of the "cult of domesticity" in constructing suburban space. *See* NANCY COTT, THE BONDS OF WOMANHOOD: 'WOMAN'S SPHERE' IN NEW ENGLAND, 1780 – 1835, 199-203 (1977); DOLORES HAYDEN, THE GRAND DOMESTIC REVOLUTION: A HISTORY OF FEMINIST DESIGNS FOR AMERICAN HOMES, NEIGHBORHOODS, AND CITIES 28-29 (1981). A primary role of zoning is the spatial separation of home and work. The cordoning-off of a social space for the family emerged in part from the separate spheres ideology of the 1800s. *See* CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 26-36 (1980); Cott, *supra*, at 5.

Professor Cott argues that the "contradistinction of home to world had its roots in religious motives and rhetoric." Cott, *supra*, at 64. By creating a separate sphere protected from the contagion of money and the amorality of work, women's "self-renunciation remedied men's self-alienation." *Id.* at 64. Thus, the division of work from family arose from a conscious need to "save" virtue in an increasingly unmediated, stained public world. *See id.* This separation of male and female spheres was also reflected in the spatial design of the isolated family home, with whole rooms set aside for entertainment, living, sleeping, and eating. Dolores Hayden argues that some early feminists sought to define urban space to reflect not the isolation of the family, but its interdependence. *See* HAYDEN, *supra*, at 6, 33. Coming out of the material feminist tradition, these early utopians envisioned a collective urban residential space in which women could share housework, and collaborate on domestic chores. By the 1970s, however, Hayden argues, "both anti-feminists and feminists accepted the spatial design of the isolated home." *Id.* at 290.

Racism also played a significant role. It is well-documented that suburban development was explicitly racialized not only by private actors but also by the federal government. *See id.* at 198-99; Abeles, *supra* note 142, at 132, 137; *see also* KENNETH JACKSON, CRABGRASS

This is still the case. As Richard Briffault points out, local government's power over land use is the central tool in an arsenal of local powers intended "to protect the home and family — enabling residents to raise their children in 'decent' surroundings, servicing home and family needs and insulating home and family from undesirable changes in the surrounding area."[145] Almost fifty years after *Euclid*, Justice Douglas, writing in *Village of Belle Terre v. Borass*,[146] affirmed that a "quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs."[147]

The contemporary version of the land use model of controlling deviance shares elements of the "dangerous city" ideology, though it has shifted slightly from an emphasis on the physical infrastructure of the city neighborhood (e.g., overcrowding) and its sociological implications for crime to a more direct emphasis on and recognition of the sociological infrastructure of the city neighborhood itself. Instead of focusing primarily on the physical characteristics of dwellings and public spaces,[148] the new criminal justice scholarship focuses on the quality of "community-level structures"[149] that keep norms of order pointing away from criminality. Advocates argue that high-crime, urban neighborhoods often lack the social networks and informal monitoring structures that can support the private norm enforcement necessary to deter crime by preventing the low-level disorders that can lead to crime.[150] The lack of community-level structure — akin to the lack of sanitary facilities or the problems of overcrowding in the era of slum clearance — results in dangerous neighborhoods.

From this vantage, public order norms can be understood as the next generation of land use planning targeted at specific behaviors. Zoning is employed to create and maintain the proper "environment"

FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985) (discussing how federal mortgage-backing agencies redlined black neighborhoods). For example, predominantly black Camden did not have a single FHA-backed mortgage in the 1950s and '60s, while suburban, white Mount Laurel had hundreds. *See* DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA 1-8, 16 (1995). In the suburban-shaping years between 1930 and 1960, fewer than one percent of all mortgages in the nation were issued to African Americans. *See id.* at 7.

145. Richard Briffault, *Our Localism Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 382 (1990); *see* ROBERT FISHMAN, BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA 3-4 (1987).

146. 416 U.S. 1 (1974).

147. *Id.* at 9.

148. I emphasize "primarily" because the "broken windows" thesis is also concerned with the physical characteristics of neighborhoods.

149. *See* Meares, *supra* note 82, at 669-70 ("[T]he structure of the community in which an individual lives interacts in important ways to either facilitate or retard an individual's criminal or delinquent behavior.").

150. *See id.* at 669-77.

and "structures" for discouraging rather than encouraging law breaking, to shore up "weakly organized communities" and "structurally weak communities."[151] The thread running through slum clearance, comprehensive zoning plans, the Gang Congregation Ordinance, and other forms of public-space zoning is the idea that deviance occurs at the intersection of norms and place: the built environment is both a source of norms and norm-enforcing.

Thus, the direct connection drawn by the early advocates of zoning between physical disorder and social disorder has been further refined and specified. The zoning of particular property uses is employed as an instrument for policing particular behaviors. In turn, policing particular behaviors has consequences on the types of persons who will use the space.[152] This sorting is couched in the language of Tieboutian preferences, but this rhetoric masks and reinforces existing spatially maintained barriers throughout the metropolitan region.

Indeed, Ellickson's hypothetical public-space zoning is a microcosm of the entire metropolitan region, with its informal but easily recognizable Green, Yellow, and Red Zones. Suburban "Green Zones" have limited meaningful public space and limited accessibility to public transportation. Suburban developments (increasingly structured as homeowners associations) are designed with cul-de-sacs and single entryways (accessible only by cars) that create an air and a reality of exclusivity. Suburban zoning regimes ban or discourage mixed-used developments, isolating residences from commercial and business districts. Isolating residential uses on large lots tends to limit the venues for denser foot traffic — for the spaces in which anyone, especially teenagers, might congregate.[153] The low density and differentiation of commercial and residential space forces residents to find other venues aside from the suburban street to congregate, such as the local shopping mall. The traditional public spaces of the neighborhood are re-

151. *Id.* at 677-84, 693. Meares argues for a "roadmap" to "construct . . . 'norm highways' " necessary for "social organization improvement." *Id.* at 695. It is not a surprise that the metaphors are infrastructure oriented.

152. *See* J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 763.

153. Suburban design not only restricts the movement of children and teenagers, it isolates the elderly and women as well. *See* FRUG, CITY MAKING, *supra* note 34, at 155-61; Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 144 U. PA. L. REV. 705, 715-24 (1995).

The "New Urbanists" — a group of planners, theorists, and architects who favor increased density and the development of towns that reduce the reliance on the automobile — have been vocal in criticizing the spatial separation of residence and work, and are the leading proponents of a new residential architecture promoting mixed uses. *See* ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM 187-92 (2000). The goal of creating the car-less city faces an uphill climb. *See* Alan Ehrenhalt, *Suburbs with a Healthy Dose of Fantasy*, N.Y. TIMES, July 9, 2000, at 15 (discussing America's car culture and the New Urbanists' attempts to create new mixed-use walking developments in the face of regional infrastructures that still depend on the car).

placed by private commercial spaces, regulated by developers and policed by private security guards.

Homeowners associations assert even greater control over their internal environments. An association can ban children and establish proper uses of commonly held space, including limiting the number of persons permitted to congregate in one place.[154] The association may enforce an "orderly" aesthetic by preventing residents from repairing automobiles in driveways, parking trucks on the street, putting signs on their lawns, or painting their houses or mailboxes an unapproved color.[155]

These design elements are accompanied by more direct barriers to entry or access. For example, suburban neighborhoods often zone out affordable housing through minimum lot size regulations, square-footage requirements, prohibitions on multifamily housing, bedroom restrictions, or prohibitions on mobile homes and the like.[156] These regulations bar high-density housing, in effect preventing poorer people or large families from moving into the area, as well as the unemployed or the transient. Not incidentally, these favorable uses are also protective of property values. A chief reason for exclusionary zoning in the suburbs is to maintain or increase property values, by excluding high-density residential uses that contribute to lower property values and higher costs of municipal services. Not surprisingly, the city of Chicago repeatedly cited the protection of property values as one of the chief purposes of the Gang Congregation Ordinance.[157]

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154. *See, e.g.*, White Egret Condominiums, Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979) (affirming validity of restrictive covenant prohibiting children under age of twelve from living in condominium complex but holding that the covenant was unenforceable because the association had failed to enforce it in a uniform manner against all residents); Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 181-82 (Fla. App. 1975) (upholding validity of an association rule that prohibited the consumption of alcoholic beverages in common areas, and stating that "[i]t appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property," and that "[c]ondominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization").

155. *See* Gillette, *supra* note 13, 1384-85 (collecting cases). Regulations generally include rules regarding use of common areas, ownership and care of pets, posting of signs, disposal of garbage, and parking of automobiles. *See* CURTIS C. SPROUL & KATHERINE N. ROSENBERRY, ADVISING CALIFORNIA CONDOMINIUM AND HOMEOWNERS ASSOCIATIONS 609 (app. C) (1991). One student note has reported even more specific restrictive covenants. *See* Carl Kress, Note, *Beyond* Nahrstedt*: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837, 883 n.12 (1998) (citing a restriction that "[n]o Barry Manilow records, tapes or CDs may be owned or played on the premises," a restriction banning pornography in owners' bedrooms, and a prohibition against carnivorous plants).

156. *See* Briffault, *Localism and Regionalism*, *supra* note 35, at 18-20 (discussing barriers to entry that prevent mobility between localities).

157. *See* Petitioner's Brief, *supra* note 21, at 10, 14, 27, 44.

The metropolitan region also has its Yellow and Red Zones. A yellow zone may be a shopping district — but not just any shopping district. The wealthy mall up the highway is a Green Zone; the poorer one downtown is a Yellow or Red Zone. Red Zones tend to be those inner-city neighborhoods and poor suburbs that people avoid. The shadings of class and race are remarkably refined. "Everyone knows which parts of the metropolitan area are nice and which are dangerous. Everyone knows where they don't belong."[158]

Most significantly, the segregation of the built environment has been successful in segregating crime. Crime is not equally distributed throughout the city or the metropolitan region, but instead is concentrated in what one commentator has called "deviancy areas":[159] neighborhoods with high concentrations of poverty, unemployment, and social breakdown. As those "deviancy areas" threaten "normal areas," neighborhoods seek out more creative ways to wall them off and prevent their spread.[160] Neighborhoods create speed bumps and close off through-streets to prevent access.[161] Homeowners associations put up literal walls. Others hire private security forces.[162]

In this way, the Gang Congregation Ordinance and other forms of public-space zoning borrow a central tool of a successful crime-prevention strategy from the suburban playbook: boundary-creating

158. Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1048 (1996).

159. Lorenz, *supra* note 118, at 146. These deviancy areas are also called "hot spots" by criminologists. *See* Philip B. Heyman, *The New Policing*, 28 FORDHAM URB. L.J. 407, 423-24 (2000); Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 CRIMINOLOGY 1 (1989); *cf.* Meares, *supra* note 82, at 695 ("[W]e must adopt a place-centered vision of law enforcement . . . [that] keep[s] racial distribution of law enforcement effects in mind . . . within a spatial context.").

160. Amy Mandelker notes that "[t]he very idea of city planning is axiologically conflicted: the utopian intentions of a rationally structured city are deconstructed in the unplanned, dystopian shanty towns, mean streets, and back alleys . . . . [W]hile the city is viable, it is characterized by the displacement of undesirable social elements to the periphery or to regions that Michel Foucault termed heterotopoi: the madhouse, the prison, the "red light" districts, the bowery." Amy Mandelker, *Writing Urban Spaces: Street Graphics and the Law as Postmodern Design and Ordinance*, 3 WASH. U. J. LAW AND POLICY 403, 407-08 (2000).

161. *See, e.g.*, Derek Ali & Jim Bebbington, *Five Oaks May Hire Security — Neighbors at Odds over Need for Guards*, DAYTON DAILY NEWS, April 22, 1999, at 1 (reporting debate over hiring of private security guards to patrol exclusive neighborhood that had already installed gates across its streets); Miles Corwin, *Guns for Hire: A Growing Crop of Private Cops Is the First Line of Defense for Our Homes and Shops — But at a Price*, L.A. TIMES MAG., Nov. 28, 1993, at 24 (describing explosion of private security services in public and private developments); Matt Schwartz, *HUD Labels Dian Street Gate Discriminatory, Asks Removal*, HOUSTON CHRON., Oct. 15, 1998, at 25 (reporting five-year battle over gate placed in street that linked the predominantly white, middle-class Timbergrove Manor area of the city with the surrounding poor and minority neighborhood of Clark Pines).

162. *See generally* DAVIS, *supra* note 129, at 221-64 (describing Los Angeles security apparatus); Trevor Boddy, *Underground and Overhead: Building the Analogous City*, *in* VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE 125-28 (Michael Sorkin ed., 1992) (describing how infrastructure improvements in cities are often designed for security purposes).

legal regimes that serve to limit access to, and the types of behaviors in, particular geographically defined spaces.[163] Ellickson's hypothetical zones illustrate the dominant land use model of crime control that is already at work on a large scale throughout the metropolitan region. That defensive strategy — to separate out zones of deviance and zones of normalcy and then create legal and physical walls to prevent them from intermingling — continues to be the instrument of choice for increasing numbers of metropolitan-area residents fearful of crime.[164]

B. *Community in Zoned Space*

Ellickson's Red-Yellow-Green Zones make explicit the fact that communities operate in zoned space. Boundary-creating norms place us in social, legal, and physical space. The spatial quality of local norms helps reveal a tautology: If community standards are understood as mechanisms for spatial differentiation (as a means for defining community in the first place), rather than as outcomes of community self-determination (as a product of some existent entity known as community), then localism claims quickly become circular. Boundary-creating norms are justified as exercises of local autonomy while creating the community that asserts autonomy in its name.[165]

By drawing out the implications of a localism that is invariably dependent on the erection of walls between "us" and "them," this sec-

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163. Anti-panhandling and loitering laws are often specifically targeted at certain populations (gang members, teenagers, the homeless). Urban spaces may also bar entry and cordone off undesirables through the design of the streetscape. *See* DAVIS, *supra* note 129, at ch.4 (describing how in "Fortress L.A." public space has been privatized or designed in such a way as to discourage its use by panhandlers and the homeless); *see also* Boddy, *supra* note 162, at 125-53 (arguing that the development and construction of extensive networks of raised pedestrian bridges, people movers, and tunnels in major cities like Dallas, Montreal, Minneapolis, and Charlotte has closed off large portions of the city to lower socioeconomic classes); Maria Foscarinis et al., *Out of Sight — Out of Mind? The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 162-64 (1999) (discussing the criminalization of homelessness and order maintenance ordinances).

164. *See* FRUG, CITY MAKING, *supra* note 34, at 196, 201 ("In America, the predominant strategy individuals employ to deal with crime is to isolate themselves from it," a strategy that "in an important sense . . . has worked."). The same was observed over forty years ago: "Today, the suburbs remain tight little islands, protected against the city. Unsuccessful and irrelevant at times to the problems of deviancy, zoning has been very relevant in one respect: it has kept poverty and crime exactly where it was situated fifty years ago, in the heart of the city." Lorenz, *Planning*, *supra* note 141, at 170. Of course, this strategy is already failing as suburbs begin to experience the same problems of deviance and crime as the cities and the amount of available land for further expansion and isolation decreases. *See, e.g.*, MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 124-25 (1997) (proposing a regional alliance between the inner city and the older inner-ring suburbs, many of which will — or are — facing the same social and economic problems that beset the urban core).

165. Richard Ford makes a similar argument about the "tautology of community self-definition." Richard Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1860 (1994).

tion critiques the contractarian, deep, and dualist accounts of community. This localism is premised on some initial or ongoing act of exclusion: the displacement of nonconforming uses to some other place, the excommunication of those who will not abide by the norms of the community, or the exiling and disenfranchisement of those who are politically disfavored. In each case, the possibility of an alternative localism is masked by the invocation of community standards. These standards do all the work necessary to define insiders and outsiders — those individuals who are and who are not normatively entitled to make decisions on behalf of a community that now exists by function of the disputed norm.

1. *The Critique of the Contractarian Account:* Warth v. Seldin *and the Geographically Exclusive Conception of Local Government*

a. The Problem of Exclusion

Recall that the contractarian account understands community as the outcome of individual acts of voluntary association. Localism is an instrument for efficient individual preference allocation; local autonomy vindicates individual associational choice. Community is a product of voluntary association, which can take the form of either an explicit agreement setting the terms of membership or a tacit agreement to live by a community's practices. The immediate difficulty with this account is that it assumes that individuals are sufficiently mobile — that they can readily join or leave neighborhoods if they so choose — when the reality may be just the opposite. One might want to live in Beverly Hills (or, more important, one may desperately want not to live in Compton), but one may literally have no choice.

That is not to say that individuals do not make choices about where to live — they do. Purchasing housing on the housing market, however, is quite different from joining a voluntary association. Thus, the term "community" as used to describe the residents of Chicago's poor, crime-ridden neighborhoods stumbles over an initial descriptive problem. Community implies an association of like minds, but the fact is that a residential neighborhood is generally an aggregate of strangers who happen to live next door to one another. Though clearly some neighbors are friends and family, in general, neighborhood residents simply share a common geography, which they may not have chosen had they the means to go elsewhere. The voluntarist justification for deferring to local norms like the Gang Congregation Ordinance is certainly less powerful where residents' ability to exit the community (and enter a safer one) is restricted by life circumstances, in particular one's ability to afford housing elsewhere. We should be wary of as-

suming that community norms are somehow a result of collective choice where individual residents have limited power over entry and exit, as might be the case in poor urban neighborhoods. As at least one commentator has asked: Can the desperate acts of crime-ridden neighborhoods to reduce constitutional rights really be considered a voluntary "choice" to balance liberty and order?[166]

Questioning the voluntariness of a poor neighborhood's local norms, however, runs up against an uncomfortable paternalism: Does this mean that only the wealthy, who can choose to live in privatized enclaves or the suburban equivalent, are empowered to adjust constitutional norms as they see fit? This seems objectionable. The fact of residential exclusion/segregation should not prevent the poor from contracting into a chosen form of governance by consenting to norms in the neighborhoods in which they happen to live. To deny local control to those with less means because they have been excluded from other neighborhoods only adds insult to injury.

But how do we avoid the appearance, if not the reality, of coercion brought on by desperate circumstances? The answer, for those committed to a contractarian account, is to save localism by eliminating barriers to entry between communities. Efforts are directed to increasing mobility by enforcing antidiscrimination laws or other individually targeted residential consumer legislation (such as prohibiting redlining), or by redistributing wealth to allow individuals a wider choice of where to live.[167] The solution is to increase individual choice

166. *See* Carol S. Steiker, *More Wrong Than Rights*, *in* URGENT TIMES, *supra* note 9, at 49. A useful analogy is the plea bargain. Courts look to the state of mind of the defendant when he or she makes the choice to waive constitutional rights to ensure that such a waiver is "intelligent and voluntary." Boykin v. Alabama, 395 U.S. 238, 242 (1969). Critics of plea bargaining argue that this inquiry is far too narrow and fails to take into account that decisions to waive constitutional rights are "the product of a seriously flawed bargaining structure." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910 (1992). For critics of plea bargaining, consent is not enough to justify waiver of fundamental rights; a separate inquiry is necessary to ensure that the process itself is structured to protect the "dignity" and "autonomy" of the citizen. Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 700 (1975). *Cf.* Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 424-28 (1985) (challenging the idea that consent is sufficient to establish the morality of a legal regime or of the choices offered to individuals within that regime).

167. I understand this to be the tact taken by Georgette Poindexter, who argues for a federative tier of government that would be responsible for region-wide wealth redistribution while promoting the autonomy of local neighborhoods as mechanisms for the realization of individual choice. *See* Poindexter, *supra* note 53, at 658-64. The goal of "opening up" the suburbs by attacking suburban exclusionary zoning by forcing localities to take their "fair share" of lower income residents also represents this kind of approach. *See, e.g.*, John Charles Boger, Mount Laurel *at 21 Years: Reflections on the Power of Courts and Legislatures to Shape Social Change*, 27 SETON HALL L. REV. 1450 (1997) (discussing New Jersey's attempt to institute a "fair share" regime after the seminal New Jersey Supreme Court's *Mount Laurel* decisions). Fair share regimes, however, have had limited success in creating low-income choices in the suburbs. *See* Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of* Mount Laurel *Initiatives: An Analysis of the Characteristics of Applicants and Occupants*,

for everyone, ensuring that every neighborhood is based on a voluntarist model. This is both a moral imperative and a requirement for efficient preference formation.[168]

These solutions to the problem of exclusion, however, do not solve the central conceptual defect with the voluntarist account of localism. No matter how robust the individual's mobility, an account of local autonomy based in voluntary association is conceptually flawed because it requires that neighborhoods be allowed to enforce boundary-creating norms that themselves undermine the outsider's ability to contract in. On the contractarian account, exclusion is not simply a byproduct of local autonomy (that we can solve), but a condition of local autonomy. What may look like consent-based, voluntarist local governance is actually the result of legal and political choices favoring one kind of resident over another.

The Supreme Court's decision in *Warth v. Seldin*[169] amply illustrates this point. In *Warth*, low and moderate income residents of the city of Rochester (along with nonprofit organizations, developers, and Rochester taxpayers) sought to challenge the neighboring suburb of Penfield's exclusionary zoning laws.[170] The Court assumed (for purposes of the appeal) that the ordinance had the purpose and effect of excluding persons of low and moderate income (many of whom happened to be minorities) from residing in the town in violation of their constitutional and statutory rights.[171] The Court noted that the zoning ordinance allocated 98% of Penfield's vacant land to single-family detached housing on large lots and only 0.3% of Penfield's vacant land for multifamily structures, and that these limits, combined with setback restrictions and floor area and habitable space requirements, increased the cost of single-family housing beyond the means of the petitioners.[172] The Court held, however, that the petitioners did not have standing to challenge Penfield's zoning regime because they did not assert a present interest in "any Penfield property": "[N]one is himself

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27 SETON HALL L. REV. 1268, 1304-06 (1997) (concluding that, while *Mount Laurel* did result in increasing the amount of low-income housing in urban areas, it failed to provide housing opportunities in the suburbs or to ameliorate racial and ethnic residential segregation). Indeed, many conclude that New Jersey's efforts at opening up the suburbs have failed. *See, e.g.*, Florence Wagman Roisman, *The Role of the State, the Necessity of Race-Conscious Remedies, and Other Lessons From the* Mount Laurel *Study*, 27 SETON HALL L. REV. 1386, 1387-89 (1997). This is not surprising. As I argue below, efforts to expand individual "choice" do not challenge the spatial biases of local government law and therefore will only be minimally effective in fostering racial, ethnic, and socioeconomic integration. *See infra* text accompanying notes 194-200.

168. *See* Poindexter, *supra* note 53, at 658-64.

169. 422 U.S. 490 (1975).

170. *See id.* at 493.

171. *See id.* at 502.

172. *See id.* at 495.

subject to the ordinance's strictures; and none has ever been denied a variance or permit by respondent officials."[173]

The Court treated the boundary between Penfield and Rochester as immutable. Because petitioners did not live in Penfield or have a current interest in property in Penfield, they did not have the standing to challenge the zoning ordinance regardless of its effect on their ability to become future residents of Penfield. As Justice Brennan's dissent pointed out, the Rochester petitioners found themselves in a Catch-22: if they could afford to become residents of Penfield, they would have standing to sue but no grievance; conversely, because they could not afford to become residents of Penfield — the gravamen of their complaint — they did not have standing to sue.[174]

The Court did not recognize the impossibility of the situation of its own making. Instead, the majority appeared to reject the petitioners' entire theory of the case out-of-hand (despite formally accepting the petitioners' allegations as true), stating that "petitioners' descriptions of their individual financial situations and housing needs suggest . . . that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts."[175] In effect, the Court presumed that the residents of Penfield and Rochester lived in their respective towns because they had made *the choice* to do so. The Rochester petitioners were expressing nothing more than a "preference" to live in Penfield, which, like all preferences (to own a Ferrari, to live in a big house), was subject to the limitations of petitioners' finances and not cognizable under Article III.[176]

In so doing, however, the *Warth* majority privileged the Penfield residents' preferences for large lots and single-family housing over the Rochester residents' preferences for living in Penfield, with its arguably better schools and lower tax rates. The result was the exclusion of the Rochester petitioners, a result that the Penfield respondents would surely argue was necessary to maintain their particular pastoral way of life, their property values, and the health and welfare of their residents.

The important point is not that the Court made a choice among competing preferences or that it did so without identifying the values

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173. *Id.* at 504. The Court denied standing to the nonprofit organizations and the developers on essentially the same grounds. *See id.* at 512 (nonprofits), 516 (developers). The Court also denied standing to the class of Rochester tax-paying plaintiffs whose claim was not that they were denied access to Penfield, but that Penfield's exclusionary zoning laws injured them as taxpayers because those laws had the effect of raising property tax rates in Rochester. *See id.* at 509-11; *infra* text accompany notes 181-187.

174. *See id.* at 523 (Brennan, J., dissenting)

175. *Id.* at 506.

176. *See id.* at 505.

underlying that choice — though both are true. What is important is that the contractarian account is unable to tell us which preference — the Rochester petitioners' preference to be let in or the Penfield residents' preference to keep out — should receive priority. Both are assertions of individual choice: the former, a choice to live in a particular town; the latter, a choice to live in a particular way.

In other words, the mobility that is so central to the contractarian account is continuously undermined by the necessity for entrance controls that maintain the character and nature of the community in the first instance. Because the Court had to choose one or the other preference, it could not possibly honor the contractarian requirement that neighborhoods be based on voluntary association for both: the individual autonomy of either the Penfield residents or the Rochester residents had to be sacrificed. But instead of facing this stark alternative, the Court pretended that it was honoring everyone's "choices" (within the limits of their means), while granting no one's "preferences."

b. The Geographically Exclusive Conception of Local Government

Of course, the fact that the *Warth* Court privileged the preferences of Penfield's current residents over those of its potential residents (currently living in Rochester) was not surprising, given that local government law is structured to favor current residents over potential residents. Indeed, the residence-based franchise is the primary feature of a local government law regime that is structured in numerous ways to prefer residents over nonresidents. This strong identification of interests with residence is taken for granted: we have come to accept that existing residents of a particular geographically defined area have a stronger claim to govern within a particular territory than do nonresidents.[177]

177. *Warth* is one of a series of Burger Court decisions that had the effect of constitutionalizing current residents' preferences on the basis of local autonomy. *See* Williams, *supra* note 29, at 83-84, 105-15. Land use-related cases include *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (establishing rigorous standard in order for a plaintiff *with* standing to prove discriminatory intent in violation of the Fourteenth Amendment from locality's adoption of exclusionary zoning ordinance); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (holding that provision in city charter providing that land use changes must be approved by majority vote in a referendum does not violate Due Process Clause); *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974) (upholding zoning ordinance excluding student households); and *James v. Valtierra*, 402 U.S. 137 (1971) (upholding referendum requirement that permitted majority of residents to veto low-rent housing projects regardless of zoning requirements unless racial discrimination could be shown). Two school cases also reified the jurisdictional line between neighboring localities, enforcing in language and in deed that local amenities such as schools are for the use and enjoyment of local residents. Thus, in *San Antonio v. Rodriquez*, 411 U.S. 1 (1973), the Court rejected a challenge to Texas's school financing system that was based on the local property tax and that resulted in significant inter-local inequalities in per-pupil expenditure.

Yet, this geographically exclusive conception of local governance has not gone unchallenged. Some local government scholars have charged that the privileging of residence in distributing voice — linking residence and local governance — is flawed, both descriptively and conceptually.[178] As a descriptive matter, residence-based local governance fails to recognize the complicated reality of life in metropolitan regions. People no longer live and work in one locality with which they identify entirely. Instead, people move multiple times over the course of their adult lives and conduct their lives across various political and social communities everyday, working in one, playing in another, going to school in another, sleeping in another, and voting in another. The geographically exclusive conception of local government assumes that individuals are more concerned, competent, and aware of issues that relate to their homes. Yet, a Stamford, Connecticut, resident without children who commutes to New York everyday may have a stronger interest in decisions made by the city of New York than in the decisions made by the Stamford school board.

As a conceptual matter, then, this residence-based account of local governance is overdetermined. Why should a person's residence and not her interests decide her community? The linking of residence and franchise results in the identification of political issues in terms of where people buy or rent a home. Local governance is thus premised on a narrow sort of neighborhood identification, limited by territorial designations that mean little to contemporary persons living in metropolitan areas with numerous overlapping jurisdictions.[179]

More important, the geographically exclusive conception of local government effectively reinforces an exclusionary idea of community. In allowing prior-in-time residents to adopt norms that restrict access to "their" neighborhood, as Penfield's residents did, the Court simultaneously affirmed Penfield residents' individual autonomy while denigrating the Rochester petitioners'. It thus adhered to a construction of localism that privileged insiders without ever questioning how those insiders got to be there. This only increases the irony of the Court's suggestion that the Rochester petitioners look to the "normal democratic process"[180] in seeking to alter Penfield's exclusionary zoning laws. The Court failed to recognize that in order even to participate in the making of Penfield's local zoning ordinances, the Rochester petitioners would have to become residents there. But then the match would be over: the outsiders would have become insiders, at

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And in *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court reversed a district court order that required busing of inner-city children to suburban schools as part of a Detroit-area desegregation remedy.

178. *See* Frug, *supra* note 17, at 320-35; Ford, *supra* note 165, at 1909-10.

179. *See* Frug, *supra* note 17, at 316-17.

180. *Warth*, 422 U.S. at 508 n.18.

which point the game is already won (for Rochester residents) or lost (for Penfield residents).

The key here is that the geographically exclusive conception of local government obscures the effects of local decisions on "outsiders" primarily by defining them as such. Once the border between Penfield and Rochester is assumed, the Rochester residents' lack of standing appears obvious, and any spillover effects can be easily discounted as "incidental," as the *Warth* majority claimed.[181] But these spillover effects are not incidental, they are structural. The zoning regime serves as an entrance control; it is inherent in the concept of a jurisdictional border between Penfield and Rochester. Without such an entrance control, the border would *itself* be incidental. Indeed, if Penfield could not keep out the residents of Rochester, there would be no border, no Penfield and no Rochester.

The relevant externality *is* exclusion, which is embedded in the structure of local government. Exclusionary zoning not only alters (or preserves) the environment for Penfield, it also causes the displacement and concentration of less desirable (from a municipal finance perspective) persons into more limited localities. These limited localities, like Rochester, are beset by the combination of increasing costs of municipal services and an ever-shrinking tax base, while wealthy localities, like Penfield, use entrance controls to defend their tax base. "As a result, a locality with a more ample per capita tax base can provide better services at a lower tax rate without having to support services in other localities, while poorer localities have to tax themselves at higher rates but generate revenues sufficient only to fund relatively inferior local services."[182] The poor get poorer: exclusionary zoning regimes lead to the concentration of poor people in specific localities where they are afflicted by higher tax rates and receive inferior services. As the New Jersey Supreme Court stated in waging its twenty-five year battle to open the New Jersey suburbs, fiscal zoning "prevent[s] various categories of persons from living in the township because of the limited extent of their income and resources."[183] "Almost every [municipality] acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base."[184]

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181. *Id.* at 509.

182. Briffault, *supra* note 12, at 1136.

183. S. Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 717 (1975) [hereinafter *Mount Laurel I*]; *see also* S. Burlington County NAACP v. Township of Mount Laurel, 510 A.2d 621 (1986); S. Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (1983). For an historical account of the *Mount Laurel* litigation, see KIRP ET AL., *supra* note 144.

184. *Mount Laurel I*, 336 A.2d at 723. This includes competition for low-cost commercial ratables. *See* Sheryll Cashin, *Middle Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 758 (2001).

These concentration effects may be exacerbated by the perceived identification of costly municipal service users with race. As Richard Ford has pointed out, the existence of racially identified spaces in the metropolitan region is a product of the frequent correlation of race and income.[185] Even absent the existence of discriminatory motivation, claims Ford, wealthier (usually white) residents have strong incentives to avoid and exclude poorer and often black residents as a matter of local finance. Racially identified spaces become self-perpetuating as whites come to view blacks as placing increasing burdens on municipal finances. Whether blacks actually impose higher burdens becomes irrelevant as spaces become increasingly racially identified, with whites fleeing what they perceive to be costly blacks in an effort to maintain property values. This flight may itself lead to the depression of property values regardless of the incomes of the blacks moving in. Ford describes the local government finance system based on boundaries as a " 'tax' on integration"[186] — one that perpetuates a segregated metropolitan geography even in the absence of overt discriminatory actions by municipalities.[187]

The *Warth* Court may have been more sympathetic to these spatial spillover effects if it had understood them temporally. Once we begin to think of the Rochester petitioners as potential or future residents of Penfield instead of as residents of a neighboring municipality, our sense of which interests are entitled to normative respect shifts (because our sense of the relevant "community" shifts). Future residents of a locality are affected by any number of policies pursued by current residents, including those policies made in the recent and not-so-recent past by residents who may no longer live in the jurisdiction but that have adversely affected newer entrants. This widespread temporal disjuncture is built into the ideology of American mobility and the close identification between where one lives and one's place in the social order. For millions of Americans, "making it" has meant moving

("All localities in the fragmented American metropolis are in a vigorous horizontal competition with each other for a limited commercial tax base.") Cashin observes that white suburban communities tend to out-compete not only predominantly black urban areas, but also suburbs with majority black populations. *See id.*

185. Ford, *supra* note 165, at 1849-57.

186. *See id.* at 1853-54.

187. *See id.* at 1856-57. The segregation and concentration of African Americans in the inner city not only harms African Americans as a matter of municipal finance, but it also has a measurable impact on individual access to employment and overall social mobility. *See generally* Bruce Wienberg, *Black Residential Centralization and the Spatial Mismatch Hypothesis*, 48 J. URBAN ECON. 110-34 (2000); David Cutler & Edward Glaeser, *Are Ghettos Good or Bad?*, 112 Q.J. OF ECON. 827 (August 1997). Concentration effects are significant factors in exacerbating black poverty. *See generally* DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED (1987); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS (1996).

up and out. Current residents buy "up" (and move up the social ladder) by moving out of the city to the suburbs and out of the inner suburbs to more distant suburbs as the older suburbs become less desirable, leaving those who cannot move up to grapple with the results of past local decisions.[188] Many current residents of a locality may not have to live with the consequences of local government decisions because of the ready availability of new localities in which to reconstruct the American dream after they have cashed in or gotten out.

These temporal spillover effects of local decisionmaking are often overlooked. What does local autonomy mean in a mobile society where changes in the make-up of local populations occur over the span of years as opposed to decades or longer?[189] Who exactly is the accountable local decisionmaker? Potential residents, like the Rochester petitioners, bear the economic and social brunt of exclusionary land use policies that contribute to increased property values for all Penfield residents, including current residents whose properties were less valuable before the exclusionary regime was put into place. Being in the mobility market, the potential resident will feel the impact of certain local policies, particularly those that affect the cost of housing, more strongly than nonresidents or even current residents. Indeed, it is arguable that the one group of plaintiffs that was *most* affected by Penfield's exclusionary zoning regime was the Rochester home-seeking petitioners. When thought of as an injury across time, the class of potential residents incurs the most devastating harm.

c. Internalizing Displacement

The contractarian account of community can attempt to take these extra-territorial and extra-temporal effects into account by adopting a limiting principle that demands that localities internalize the spillover effects of their acts of self-government, particularly acts of exclusion. In fact, numerous local government law scholars have argued over the years that the only way to internalize the extraterritorial effects of local government policies is by extending the locality's boundaries to include all affected persons.[190] Local government scholars and policy-

188. The realization that this process is becoming untenable has resulted in the recent unprecedented popular concern with the problems of sprawl, though this concern has generated few effective antisprawl measures. *See* William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 136 (1999) (concluding that "key sprawl decisions are likely to continue to be made by largely unaccountable local, state, and federal officials" and therefore "sustained and effective anti-sprawl measures . . . have been and are likely to remain a rarity").

189. The average American moves every six years. *See* DUANY ET AL., *supra* note 153, at 44 (citing U.S. Census Bureau's 1997 Report on Geographical Mobility).

190. *See, e.g.*, VICTOR JONES, METROPOLITAN GOVERNMENT (1942) (urging creation of general purpose local governments at the metropolitan level); Briffault, *supra* note 12, at 1164-71 (advocating metropolitan-wide regional government with significant powers over

makers have offered various formulations of regional government, necessitated by the parochial actions of neighboring localities.[191] In manipulating jurisdictional boundaries by expanding them outward, advocates of these proposals have given up on local governance in many instances altogether, basically acknowledging that any limiting principle on local autonomy eventually swallows local government altogether.[192]

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land use, revenue collection, and regional infrastructure); Robert L. Lineberry, *Reforming Metropolitan Governance: Requiem or Reality?*, 58 GEO. L.J. 675, 697-711 (1970) (discussing problem of externalities and advocating various forms of metropolitan-area government).

191. For the more recent literature on this subject, see ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA (1994); MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY (1997); NEAL R. PIERCE, CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD (1993); DAVID RUSK, CITIES WITHOUT SUBURBS (1993); and DAVID RUSK, INSIDE GAME, OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA (1999). *See also* Briffault, *supra* note 12, at 1164-71; Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2046-47 (2000) (advocating a regionalist system of local governance); Lineberry, *supra* note 190, at 697-711; Poindexter, *supra* note 53, at 660-63 (advocating a redistributive tier at the regional level to effect region-wide wealth redistribution).

In the 1960s, some metropolitan areas experimented with a "federative" structure (such as Miami-Dade County) or with city-county consolidation (such as Indianapolis-Marion County, Nashville-Davidson County, and Jackson-Duvall County). *See* Lineberry, *supra* note 190, at 698-706. More recent moves towards regionalism have been spurred by the problems of suburban sprawl and the traffic congestion, air pollution, and loss of open space that accompanies it. For example, in Atlanta, a new metropolitan authority, the Georgia Regional Transportation Authority, has the power to build or veto roads and transit systems and to control growth by denying permits to tie into the road system. The purpose is to control the massive sprawl in the Atlanta region that has resulted in average commuting times of eighty minutes. *See* David Firestone, *Suburban Comforts Thwart Atlanta's Plans to Limit Sprawl*, N.Y. TIMES, Nov. 21, 1999, at 22. For a discussion of the institutional politics of sprawl, see Buzbee, *supra* note 188, at 136.

192. *See, e.g.*, Briffault, *supra* note 12, at 1164-71; John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685, 1711 (1998) (advocating that states "reclaim the delegated zoning power from the gaggle of fragmented, parochial municipalities and either exercise the power itself, redelegate it to new state or regional planning agencies, or redelegate it to municipalities subject to tighter standards"). *But see* Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190,190-97 (2001) (advocating decentralized governments and suggesting inter-local bargaining as an alternative to regionalism); Edward A. Zelinksy, *Metropolitanism, Progressivism, and Race*, 98 COLUM. L. REV. 665 (1998) (reviewing DAVID RUSK, CITIES WITHOUT SUBURBS (1993); NEAL R. PEIRCE, CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD (1993); & DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA (1995)) (rejecting calls for regional or metropolitan-wide government as unworkable and unlikely to alter the current racial, economic, and spatial distribution of metropolitan areas).

Another possible mechanism for forcing localities to internalize the costs of their decisionmaking is to allow the affected local government legal standing to challenge the decisions of a neighboring or adjacent local government unit. *See, e.g.*, City of Cleveland v. City of Shaker Heights, 507 N.E.2d 323 (Ohio 1987) (holding that Cleveland had standing to challenge neighboring Shaker Heights' decision to close and barricade certain streets which diverted traffic and inconvenienced residents of the city but sustaining Shaker Heights' decision); *cf.* Robert C. Ellickson, *Public Property Rights: A Government's Rights and Duties When Its Landowners Come into Conflict with Outsiders*, 52 S. CAL. L. REV. 1627, 1627-30 (1979) (advocating creation of public intergovernmental rights and duties to internalize spillovers of local and state governmental decisions).

Efforts to prevent spillovers *without* expanding boundaries are difficult, however. Any proposed limiting principle on local power must differentiate between local decisions to exclude and local choices to instantiate a way of life, which are often one and the same. The question "Why don't we trust them to decide for themselves?" can be asked of the resident of Park Avenue who is tired of aggressive panhandlers, the resident of Penfield who wants to protect her pastoral lifestyle by banning low-income housing, and the business owner who has joined other business owners to create a business improvement district downtown that enforces a curfew for teenagers. Any proposed anti-exclusionary limiting principle becomes untenable in the face of the powerful thrust of local autonomy based on the consent of the residents of an already territorially defined locality.

Indeed, like Chicago's Gang Congregation Ordinance, zoning regimes are almost always portrayed as defensive measures intended to protect existing residents, who, it is again assumed, have a particular normative entitlement to that protection. Residents use terms like "community character" and "way of life" to defend mechanisms that exclude or discourage undesirable uses in their neighborhood. The rhetoric of community is thus employed to defend norms that construct the community in their image as they are simultaneously justified as emanating from that community.

Consider again Ellickson's proposal for Red-Yellow-Green Zones. Ellickson begins with public order norms, deployed to create definable and defensible perimeters between neighborhoods, newly conceived of as "zones" for certain specified behavior. The Green, Yellow, and Red Zones do not exist prior to defining the uses of land that are appropriate in each. Indeed, the whole purpose of Ellickson's regime is to create standards of behavior and impose them on a grid of the city, allocating certain percentages of land to the various norm zones with an eye toward a proper distribution of functions to create an overall attractive city. Thus, Ellickson suggests that Green Zones would constitute approximately 5% of the city's public space, while Yellow Zones would constitute 90%, and Red Zones the remaining 5%.[193]

Yet, at the same time, Ellickson defends his newly constructed public space zones by invoking "prevailing standards of community behavior," as if such prevailing standards exist prior to the construction of the Red, Yellow, and Green Zones — prior to the imposition of nonconforming uses. Thus, he argues that a zoning regime that permits adoption of neighborhood-specific street norms allows the various neighborhoods within the city to decide what kind of street life they wish to have.[194] Mirroring claims made by proponents of the

193. Ellickson, *Controlling Chronic Misconduct*, *supra* note 8, at 1221-22.

194. *See id.* at 1220.

Gang Congregation Ordinance, Ellickson argues that communities should be permitted to experiment with norms that may be important to preserving a way of life or a particular community character. In other words, zoning public space "adds to the richness and diversity of urban life"[195] by increasing the variety of options available to the city dweller, who can pick and choose among those options by voting with his or her feet. Under Ellickson's proposal, panhandling, bench squatting, and other forms of "chronic street nuisance" are activities one can choose. If I want to panhandle or bench squat, I can choose the particular zone where that activity is permitted by "voting" with my feet. In the same way, I can also choose whether I want to associate with people who engage in these activities.

Of course, this is the same kind of "choice" that the *Warth* Court asserted was being exercised by the Rochester residents — indeed, no real choice at all. And yet, as in *Warth*, the community *looks like* a product of choice because it is spatially defined. First, the norms serve as entrance controls that encourage desirable uses and outlaw undesirable ones, thereby defining the perimeters of the relevant community. The particular behaviors and persons targeted by quality of life or exclusionary zoning ordinances will not disappear; they will just go somewhere else, to increasingly marginalized, coerced, and isolated spaces. In the case of public order norms, panhandling and other "chronic street nuisances" are almost universally considered undesirable uses except by panhandlers or bench squatters themselves. The result, of course, is that all the undesirable uses are displaced into the Bowery. These undesirable uses are excluded from a community that *now exists* by function of that act of exclusion.

Second, the formal boundaries of regimented zoned space — the Green, Yellow, and Red Zones — disappear from the picture, becoming invisible as the norms take hold in the space, enforced through informal means of monitoring, and, most important, because violators of the norms are weeded out. "Space does the initial work of defining the community or association and imbues the latter with an air of objectivity, and indeed, of primordiality."[196]

Displacement is thus the central birth act of community. How does a community "internalize" the initial and ongoing displacement of individuals to other communities? How does one recognize the difference between facially exclusionary policies and polices intended to enable a particular neighborhood to flourish when these policies are invoked by everyone?[197] Rather than asking how much mobility par-

195. *Id.*

196. Ford, *supra* note 165, at 1860.

197. Consider again the arguments for devolving constitutional norms to the neighborhood level. Advocates recognize that not all neighborhood norms are valid; an anti-exclusionary limiting principle or "hypernorm" is required. *See* Poindexter, *supra* note 53, at

ticular individuals need in order to create truly consenting neighborhoods across all our cities and suburbs, we might ask how much exclusion we will countenance in order to have truly consenting neighborhoods anywhere. The real question is not whether the inner-city neighborhoods of Chicago are voluntary associations, but whether *any* of our neighborhoods are really voluntary associations.

It bears repeating — returning again to *Warth* — that Penfield does not exist unless it can exclude the residents of Rochester. Indeed, Penfield's ability to exclude the residents of Rochester is its defining feature. Our intuition that Penfield should be entitled to govern itself is less plausible when this displacement role of entrance controls is made explicit — when we realize that entrance controls in Green Zones also coerce others (by default or purposefully) into particular Red Zones. When combined with the residence-based franchise, which restricts formal political governance to individuals who reside in the jurisdiction, these boundary-creating norms are constitutive of neighborhoods that assert self-government in their defense, defended as associations of like minds, allegedly made up of individuals "freely choosing" where — or, if not where, how — to live.[198]

636-38. Professor Livingston, for example, notes that that courts should invalidate public order laws if they are "facially aimed at rendering some people, like racial minorities, transients, and the poor, outsiders to the community." Livingston, *supra* note 8, at 594. Echoing Livingston's call for a limiting principle, Professors Meares and Kahan claim that a public order law is not likely to constitute an attempt at excluding certain groups from public life (and the political process) if the community as a whole has "internalized" the "coercive incidence of a particular policy." Meares & Kahan, *Antiquated Procedural Thinking*, *supra* note 9, at 209; *see also* Meares & Kahan, *Black, White and Gray*, *supra* note 9, at 251, 254-55. By shouldering the burdens of the policy, crime-ridden minority neighborhoods could be said to have sufficiently taken responsibility for their acts of self-government.

Livingston, like Kahan and Meares, acknowledges that application of her version of the anti-exclusion principle is context-specific — that it depends in part on how the average citizen is affected by the law and whether that citizen's support of the law is entitled to moral respect. *See* Livingston, *supra* note 8, at 667-71; Meares & Kahan, *Black, White and Gray*, *supra* note 9, at 258-59. Even taking context into consideration, however, it is not at all clear what a public order law "facially aimed at rendering some people . . . outsiders to the community" looks like. An ordinance banning gang members from collecting on the street looks like a facial ban on gang members participating in community life. Nor is it clear what the community has to do to internalize a particular coercive policy. Simply being subject to the same standard as a gang member — or, in the case of a zoning regulation, all the other residents of a town — does not mean the members of the community have internalized the coercive impact of the law. The Gang Congregation Ordinance is particularly asymmetrical in that it does not even require non-gang members to meet the same standards of conduct: there are no constraints on non-gang member loitering. Presumably, the anti-exclusion limitation prevents the community from passing laws explicitly motivated by racial discrimination, or by the desire to rid the community of particular types of persons (panhandlers or gang members), though, in truth, the limitation cannot prevent localities from using proxies for that purpose.

198. This rhetoric of choice is deeply resonant despite its conceptual flaws because it clothes itself in the vocabulary of individual freedom and community identification. Thus, for example, the Nixon administration's opposition to busing (a position that helped Nixon win a second term and that was vindicated by the Court in *Milliken v. Bradley*, 418 U.S. 717 (1974)) was premised on a voluntarist argument that emphasized individual mobility and the benefits of pluralism. Nixon argued:

But minority residents of high crime neighborhoods do not benefit from a localism based in the language of consent. As an initial matter, the power to zone enables the neighborhood to displace further an unwanted group (gang members) to a neighboring community, a probably limited and short-lived success.[199] More important, by reinforcing the notion of community as a voluntary association, the contractarian account justifies the policies that led to the creation of racially identified Red Zones in the first place. The result is to reinforce the isolation of inner-city, minority neighborhoods in their particular geography — a geography of diluted rights and racially identified space[200] — and to mask the reality that those spaces are the product of an existing regime of community self-definition. The outcome is something that we may already recognize: a metropolitan region of spatially differentiated individuals, segregated into racial and socioeconomic enclaves that are justified as the product of individual choice and community self-determination. Indeed, proponents of localism structure their arguments as a quest for community autonomy in the pursuit of individual conceptions of the good life. According to this argument, such autonomy, though often stymied by federal judges, may be required by liberalism. By implying that inner-city neighborhoods are associations of like minds, the language of community transforms a less-than-ideal housing option into a conscious commitment to a neighborhood and an unconstitutional standard into a choice of a "way of life."

"We cannot be free and at the same time be required to fit our lives into prescribed places on a racial grid — whether . . . by some mathematical formula or by automatic assignment. . . . An open society does not have to be homogeneous, or even fully integrated. There is room within it for communities. . . . [I]t is natural and right that members of those communities feel a sense of group identity and group pride. In terms of an open society, what matters is mobility: the right and the ability of each person to decide for himself where and how he wants to live, whether as part of the ethnic enclave or as part of the larger society — or, as many do, share the life of both."

THEODORE H. WHITE, BREACH OF FAITH: THE FALL OF RICHARD NIXON 334-35 (1975) (quoting a 1970 Nixon state paper).

199. Often the result of targeted policing efforts is to displace crime from one neighborhood to another. *See* Geoffrey Barnes, *Defining and Optimizing Displacement*, *in* CRIME AND PLACE 95 (David Weisburd ed., 1995). Robert Helsley and William Strange have constructed an economic model that supports their argument that gated communities always divert crime to other communities, and may actually increase overall crime rates under certain circumstances. Robert W. Helsley & William C. Strange, *Gated Communities and the Economic Geography of Crime*, 46 J. URBAN ECON. 80 (1999).

200. These neighborhoods would be true "anomalous zones," Gerald Neuman's term for "a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended." Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996). Neuman offers an additional argument against permitting local deviations from background constitutional norms. He argues that such deviations threaten a "broader subversion of fundamental norms" because they can easily jump barriers, or leak into the broader legal and political culture and increase the acceptability of more significant exceptions to those norms. *Id.* Neuman thus highlights a different kind of spillover effect that cannot be easily internalized by neighborhoods that depart downward from existing constitutional standards.

2. *The Critique of the Deep Account: The Cartography of Normative Entitlement and* Smith v. Community Board No. 14

a. Essentializing the Neighborhood

The voluntarist premise of the contractarian account can never be fully realized; the spillover effect of exclusion cannot be internalized without undermining localism altogether. Yet, it may be that we are willing to tolerate the spillover effects of local decisions if those decisions are made on behalf of communities that we value highly or that are highly valued by their members because they are intrinsic to individual identity. The deep account of community is not based in voluntary association and therefore does not fail because some affected individuals cannot consent or because they fall outside the ambit of consent. Instead, community is defined by a web of reciprocal and reinforcing social, familial, and cultural ties. Communities are constitutive of the individual; in the case of the Gang Congregation Ordinance, proponents argue that the poor, minority neighborhoods of Chicago's inner city are bound by "linked fate," the ties of sociability that make their lawmaking particularly worthy of deference by those who do not share those ties.[201] This lawmaking is more than a mere choice to live a certain lifestyle; it is essential to the identity and survival of a unique community.

The descriptive difficulty with the deep account is determining the contours of such a community. The debates surrounding the extent of the inner city's political support of the antigang ordinance illustrate the difficulty of determining the relevant membership of a community of linked fate formed out of a neighborhood.[202] Amici in favor of the ordinance were described as twenty "civic, religious, and other community associations from throughout Chicago . . . [who] played a critical role in the design of the gang-loitering ordinance."[203] These amici, asserted their brief, are the "mothers and fathers, the sisters and brothers, and the neighbors and friends of the youths subject to the law."[204] Amici opposing the ordinance were self-described as "grassroots membership groups, and other Chicago and national organiza-

201. *See* text accompanying notes 75-96, *supra*.

202. On one side were those who argued that Chicago's African-American community and its representatives widely supported the ordinance. On the other side were those who argued that the ordinance was railroaded through the Chicago City Council despite African-American opposition. *Compare* Meares & Kahan, *Antiquated Procedural Thinking*, *supra* note 9, *and* Meares & Kahan, *Black, White and Gray*, *supra* note 9, *with* Alschuler & Shulhofer, *supra* note 9, *and* Roberts, *supra* note 28.

203. Amicus Brief, *supra* note 45, at 1.

204. *Id.* at 2.

tions dedicated to serving the needs of inner-city residents."[205] These amici, asserted their brief, consist of the "representatives from [all of] Chicago's major neighborhood-safety organizations"[206] except one.

The perception of these two groups of the same ordinance could not have been more different. Amici in favor argued that the ordinance protected their community as a "form of policing that secures order without destroying the lives of community youth who find themselves enmeshed in the complex social and economic forces that fuel gang criminality."[207] Amici on the other side disputed this characterization. Asserting that twelve of the eighteen African-American alderman on the city counsel opposed the ordinance, these amici argued that the ordinance would be "divisive of communities along racial and generational lines."[208] The opponents of the ordinance quoted one African-American alderman opposed to the ordinance who alleged that the law was " 'drafted to protect the downtown area and the white community' at the expense of innocent blacks."[209] Moreover, both sets of amici disagreed about who they were representing. At times, they seemed to be speaking on behalf of the neighborhoods or the city. Still at other times, the amici invoked the entire African-American community as the relevant "we" entitled to a say in the ordinance's operation.

The fact of disagreement among the residents of Chicago's inner-city African-American communities is not surprising. The "black community's" ambivalence toward black criminal behavior and the dominant ("white") justice system has been well documented. As Regina Austin writes:

> [T]here is typically no unanimity within 'the community' on these issues. For example, some blacks contend that in general the criminal justice system is working too well (putting too many folks in prison), while others maintain that it is not working well enough (leaving too many dangerous folks out on the street).[210]

This ambivalence is reflected in recent polls showing that many African Americans are highly skeptical of police and concerned about police brutality yet would welcome more effective police action to combat crime in their neighborhoods. "It is like straddling a fence,"

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205. Brief Amicus Curiae on Behalf of Chicago Alliance for Neighborhood Safety et al., at 1, *Chicago v. Morales*, 527 U.S. 41 (1999) [hereinafter Amicus Brief in Opposition].

206. *Id.* at 1 n.4.

207. Amicus Brief, *supra* note 45, at 2.

208. Amicus Brief in Opposition, *supra* note 205, at 1.

209. *Id.* at 4-5.

210. Regina Austin, *The "Black Community," Its Lawbreakers, and the Politics of Identification*, 65 S. CAL. L. REV. 1769, 1770 (1992) (citation omitted). Randall Kennedy is one respected scholar who believes that the police are not doing enough to protect black communities. *See* KENNEDY, *supra* note 23, at 29-76.

said one Bronx resident in a recent interview. "I am worried about the police on one side and the criminals on the other."[211]

This is not to say that disagreement among members alone is sufficient to undermine a "deep" community's claim to be permitted to self-govern. Recall that on the deep account, the neighborhood is entitled to deference for internal decisions however they are made. The proper inquiry is the nature of the community and the moral authority of its membership, not the process by which the community comes to a decision. A neighborhood of family and friends, linked by bonds of mutual affection or shared experience, is something more than a political community defined by jurisdictional lines. A community of linked fate deserves deference not because individual members are politically entitled to a say in a particular jurisdiction, but because they are (collectively) normatively entitled to make decisions for each other. Such a neighborhood does not engage in lawmaking exclusively (or at all) through the standard majoritarian political processes, but also, in part or in whole, through the transmission of communal, nonpositivistic, and often nondemocratic norms.[212] For amici, the neighborhood is an extension of the family, and the gang loitering ordinance is a form of tough love dispensed by parents and neighbors; it is therefore on the private side of the private/public line.[213]

Mapping the normative concept of "community" onto the descriptive and territorial concept of neighborhood, however, exposes one to the perils of essentialism that come with any invocation of the "black community," the "inner-city community," the "minority, high-crime community," or, for that matter, the "white, suburban community."[214]

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211. Blaine Harden, *On Edge but Optimistic, Blacks Offer Complex Views in Poll*, N.Y. TIMES, June 28, 2000, at B1 (reporting that 89.3% of New York City blacks polled reported that police brutality is a serious problem and that 45% rate the police as excellent or good in being helpful and friendly). Richard Brooks has analyzed survey data concerning minority perceptions of policing and criminal justice. *See* Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219 (2000). He found that the majority of African Americans believe that the American legal system treats blacks unfairly, but that, compared to their wealthier counterparts, poor blacks are more likely to view the American legal system as fair. *See id.* at 1223-24. He concludes, however, that the data "do not suggest that poor urban blacks are prepared to waive constitutional rights in order to reduce crime." *Id.* at 1227

212. For example, civility and respect may be enforced through shaming penalties, not through formal sanctions. *See* Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1860-71 (1999).

213. *See supra* text accompanying notes 86-87. In other words, mere disagreement among "family" is not enough to justify state intervention.

214. Of course, like residents of any neighborhood, residents of minority, high-crime neighborhoods may share a particular set of overlapping interests and concerns. In our metropolitan regions, race, residence, and crime tend to overlap. These interests, as well as convenience of administrability, may justify identifying residents of these neighborhoods as an appropriate unit of political decisionmaking in a hierarchy of units. Indeed, this might justify obscuring the fact that residents of minority, high-crime neighborhoods (or any neighborhood) are individuals with overlapping but oftentimes competing interests. Though linking

As with all essentializing terms, "community" is both over- and underinclusive. This is certainly so where — in place of a person-by-person assessment of the decisionmaker's normative authority — one uses proxies for membership in the community. In the case of the Gang Congregation Ordinance, this proxy is residence and, by extension, race and socioeconomic status.

Membership in the community is, in turn, a proxy for individual moral worth. The assertion that certain neighborhoods have a normative entitlement to govern requires a determination of the relevant membership of the community, which in turn requires an assessment of individual claims of belonging. Those claims of belonging involve determining who does not belong. This is the notion that some who may live among us do not count, and that those who do not live among us are not part of "our" community.

Recall that linked fate turns on a normative judgment concerning whether an individual is sufficiently connected to the community so as to be able to speak on its behalf. The implication is that the white business owner who is losing business because minority youth are congregating outside her store and intimidating shoppers does not have a respectable normative claim for redress. Even though she may live with the consequences of gang activity everyday, she cannot properly balance liberty and order because she does not (it is assumed) happen to be a neighbor or a friend of any gang members. She is therefore not entitled to speak on their behalf. The African-American resident of the wealthy suburb who wants to defend his neighborhood from roving gangs also cannot properly balance liberty and order because he does not share in the connection that comes with living in a poor, inner-city neighborhood and is not a neighbor of those for whom he

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government and race/residence may erase important differences in individual opinion, it may still be in each individual's interest to be defined for political purposes with reference to a larger community. This is a reason for creating minority-majority electoral districts. It is also the argument that animates movements by predominantly African-American neighborhoods to incorporate as separate, self-reliant municipalities. *See* Ankur J. Goel et al., *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker Than* Brown, 23 HARV. C.R.-C.L. L. REV. 415, 417-18 (1998) (arguing that African Americans should pursue incorporation of predominantly African-American neighborhoods as a means of empowering minority neighborhoods); Russel M. Lazega & Charles R. Fletcher, *The Politics of Municipal Incorporation in South Florida*, 12 J. LAND USE & ENVTL. L. 215, 227-29 (1997) (discussing strategy of incorporation used by the predominantly African-American community of Destiny in Dade County in response to dissatisfaction with inequitable municipal service provision).

The deep account of community, however, turns on a stronger argument than representation. The argument is not that it is a good idea for residents of high-crime, minority neighborhoods (or any neighborhood) to be defined as a political entity because residents share similar interests, understandings, or competencies, and those interests are not addressed by the larger community because of a lack of interest or a lack of political clout. Instead, the argument is that residents of high-crime, minority neighborhoods (or any neighborhood) have a *right* to self-govern *if* (normatively) they constitute *communities*, a group of individuals with overlapping moral authority to speak for each other.

arguably speaks. And the resident of a predominantly white, lower-class neighborhood who wants to stop loitering drug dealers (of whatever race) in her neighborhood has no right to adopt constitutionally suspect norms in her community, because she does not have the requisite standing. She, too, does not share a particular proxy that makes her "part of the community," linked by the social ties that would make her lawmaking worthy of deference.

How do we recognize the difference between neighborhoods that are deeply constitutive of their residents and thus entitled to deference for norms that contribute to their survival and neighborhoods that simply provide amenities for a particular lifestyle and whose norms are masks for convenience or exclusion? How do we distinguish between exclusionary zoning employed to defend a suburban community and the gang loitering ordinance employed to defend an inner-city community?

It is not that arguments cannot be made to distinguish these kinds of norms; indeed, it would be difficult to contend that the values underlying fiscal zoning in the suburbs are no different than the values underlying gang zoning in the inner city. The problem is determining in advance which communities are "deserving"[215] of deference and which are not, and why. The deep account of community requires making sociological determinations about the depth of communal attachments to a particular territorially defined space.[216] These accounts tend to devolve into competing and unverifiable claims about the benefits to residents of living in particular neighborhoods among particular neighbors.[217] Indeed, there is little to constrain localism — if it

215. MANDELBAUM (2000), *supra* note 75, 18-19.

216. Indeed, the deep account of community counsels against limiting the normative entitlement to balance liberty and order to those within a territorially-defined neighborhood or region, unless that community has isolated itself to such a degree and with such concentration that its territorial definition and social definition are coterminous, as may be the case with the Amish of *Yoder* or the Satmars of *Kiryas Joel*. Regina Austin argues persuasively that the "black community" as a whole should engage in the ongoing conversation about black lawlessness, and that the community as a whole has a stake in a politics of identification that rejects a strict lawless/law-abiding dichotomy when it comes to the black lawbreaker. *See* Austin, *supra* note 210, at 1815-17. The concept of linked fate, at least as described by Tracey Meares, also indicates that African Americans outside of Chicago's inner-city communities should have a say in the norms that that community adopts because they also share a linked fate with those residents. *See* Meares, *supra* note 82, at 682-83.

217. For example, the question of whether homeowners associations should enjoy ample autonomy to govern often seems to turn on whether we believe that such associations are "thick" communal enterprises, that is, whether they represent a valuable form of "deep" association to those on the inside or just a particular amenity package. *See* Gillette, *supra* note 13, at 1379-81 (observing that often liberals and communitarians are less tolerant of homeowners associations, which tend to provide particular amenities, than they are of "highly distinct subcultures" like the Amish or Orthodox Jews, when the assertions of self-government by both can be understood as crucial to their respective pursuits of a particular version of the good life).

is to have any force at all — if the test of the legitimacy of a norm is its contribution to a unique community's preservation.

b. Reinforcing the Cartography of Normative Entitlement

The kinds of distinctions drawn between entitled and nonentitled persons are a result of conflating the normative concept of community with the descriptive concept of neighborhood. The melding of the normative and descriptive has far-reaching implications. First, such a conception serves to reinforce the walls of separation between neighborhoods. When membership in the deep community is determined primarily by residence, where one lives takes on a transformative significance. Simply by moving into a neighborhood (or choosing to remain there) a resident becomes a person entitled to balance order and liberty and becomes subject to norms that other equally entitled persons may invoke on behalf of the community. The stakes if the neighborhood (conceived of as a deep community) becomes too permeable are always very high. At risk (from the members' perspective) are the very connections between its members essential to the survival of its way of life.

When the stakes are that high, the walls between neighborhoods must be even higher. Consider the vehemence of suburban defenses of exclusionary zoning regimes.[218] The tenacity of such regimes cannot merely be attributed to the fact that suburban residents are defending a preference. The contractarian account of community would predict that some residents would sell out if the price was right and find other acceptable forms of association, and that others who were indifferent would stay instead of fleeing in the face of lower-income arrivals. A better explanation is that the walls that suburbs build constitute a defense of a perceived holistic order — a perception of itself as a deep community — that is itself premised on spatial differentiation.[219]

This brings us to the second consequence of conceiving of neighborhoods as deep communities and justifying deference to local norms on that basis: attaching normative weight to where one resides reinforces a social order that already marks the inner-city neighborhood as normatively suspect. The *moral mapping* of the metropolitan region reinforces rather than subverts a social order that is spatially maintained. This is a social order that places a high cultural value on single-

218. The narrative account of the Mount Laurel litigation aptly recounts the intensity of an entire state's opposition to low-income housing. *See*, KIRP ET AL., *supra* note 144, at 1-10. This vehemence extended not just to lower-income arrivals, but to residents who had lived in Mount Laurel all their lives. As Bill Haines, the former mayor of Mount Laurel, once told a church full of poor, African-American residents of the town, "If you people . . . can't afford to live in our town, then you'll just have to leave." *Id.* at 2.

219. *See infra* text accompanying notes 223-229.

family-detached homeownership, on suburban as opposed to urban life.[220] As the Court's defense of suburban zoning reveals,[221] these spaces have moral valences even before they are inhabited. The suburb signals stability, family, privacy, children, and community; the city signals transience, work, publicity, danger, strangeness, and foreignness.[222] The city/suburb dichotomy is a function of a localism invested in rigorous boundary maintenance between the safe and the dangerous, the familiar and the foreign, the family and the outside world.[223]

Thus, the metropolitan region already represents a cartography of normative entitlement that divides suburbs and cities, white space from black space, rich space from poor space. Ellickson's Red-Yellow-Green Zones make explicit what sociologists and anthropologists have long understood: that social order is maintained spatially. The zones of the metropolitan region are crucially important cultural signs used to evaluate one's wealth, progress, intelligence, morals, children and educational attainments. We talk about "good," "bad," and "transitional" neighborhoods and understand exactly what that neighborhood says about the person who lives there. As Constance Perin writes in her anthropological account of American land use law, *Everything in its Place: Social Order and Land Use in America*, land use regimes reflect and reinforce cultural conceptions of "transition, citizenship, honor, marginality, success, and self-esteem."[224]

> The technicalities of defining zoning districts in terms of their permitted and forbidden buildings and activities, classifying parts of cities and sub-

220. *See* PERIN, *supra* note 141.

221. *See supra* text accompanying notes 135-147.

222. These moral valences have been amply mined by sociologists and other theorists. *See, e.g.*, FISHMAN, *supra* note 145, at 3-17 (arguing that suburban residents' conception of themselves rests in large part on their perception of cities as violent, anarchic, and corrupt and of the suburbs as a haven from the city's corruption); JOHN R. STILGOE, BORDERLAND: ORIGINS OF THE AMERICAN SUBURB, 1820-1939 (1988) (discussing the cultural distinction between the "sinful" urban life and the "virtuous" rural life that underlies the development of the suburbs); ROBERT C. WOOD, SUBURBIA: ITS PEOPLE AND THEIR POLITICS (1958) (arguing that the suburbs were constructed on an ideal of small town life and on a rejection of "turmoil" and the corrupt politics of the city, and noting that privacy and fraternity are two of suburbia's animating values); *see also* M.P. BAUMGARTNER, THE MORAL ORDER OF A SUBURB 30-36 (1988) (noting that social conflict in the suburbs is muted, externalized and medicalized); HERBERT J. GANS, THE LEVITTOWNERS: WAYS OF LIFE AND POLITICS IN A NEW SUBURBAN COMMUNITY 33, 39 (1967) (observing that the foremost concern of buyers of Levittown was "more space," "comfort and roominess," and "privacy and in owned home"); JOHN R. SEELEY ET AL., CRESTWOOD HEIGHTS: A STUDY OF THE CULTURE OF SUBURBAN LIFE (1956) (observing that suburban communities are built around schools and children).

223. *See* PERIN, *supra* note 141, at 108-28. Whether these typologies reflect the reality of suburban life, which is increasingly beset by the ills of overcrowding, congestion, sprawl, drugs, and crime, home ownership in a suburban setting remains the dominant cultural expression of American mobility. The distinction between city and suburb remains a primary cultural artifact despite the fudging of those borders in real space.

224. PERIN, *supra* note 141, at ix.

> urbs by housing types and levels of population density, arranging the layouts of subdivisions: these also express our taken-for-granted understandings of what social order is and how it is best obtained. Whatever governs relationships among land uses I take to be as well organizing principles for relationships among land users.[225]

Perin observes how our placement in social space reflects our attainments in social time and how those social categories result in marking us normatively by where we happen to live. One of Perin's central insights is that the "correct chronology of life is one major organizing principle in the system of land use."[226] A deeply ingrained cultural assumption is that as individuals move into adulthood they will progress towards maturity, stability, and financial security. A leading indicator of this progress is the move from renting to homeownership, a singularly important event in American cultural consciousness. For many Americans, being a renter is a transitional state, a step on the way to adulthood and homeownership. The transitional figure is a threat to social order: "What matters is that transitional social categories are defined, and then they are subject to a subsidiary axiom: that all transitional categories should be collected together, for spreading such anomalies in space (and in social time) will be disturbing to social safety."[227]

Land use regimes thus demarcate the boundaries between the transitional and the stable both in time and in space. Many suburbs' resistance to mixed use developments, to apartments, and to low-income housing can be explained in part by the central role of spatial differentiation in cultural conceptions of the self. Not only are the people who will live in such developments often of a different race[228] than "we" are (which creates fear and anxiety in and of itself), they are — if permitted to move into the neighborhood — now members of the community ("one of us") — requiring a radical redefinition of who "we" are, as progressing or transitioning, as marginal or successful persons along the "ladder of life."[229]

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225. *Id.*

226. *Id.* at 109.

227. *Id.* at 114.

228. The lack of multifamily housing impacts African Americans disproportionately because blacks are more likely to be renters than whites. The 1999 American Housing Survey for the United States shows that approximately 26% of white (non-Hispanic) households are renters, compared to nearly 54% of blacks. *See* U.S. DEP'T OF COMMERCE & U.S. DEP'T OF HOUS. AND URBAN DEV., AMERICAN HOUSING SURVEY FOR THE UNITED STATES (1999), at 42.

229. Perin, *supra* note 141 at 32-80.

c. The Problem of Insularity

This is the danger of an account of local autonomy that turns on claims of normative entitlement based on "belonging." In such a world, where the cost to the community of not being able to protect itself by adopting norms for its defense is so high (as proponents of the Gang Congregation Ordinance assert), battles over demarcated space are battles over social meaning. Thresholds become crucially important markers of normative entitlement. Jurisdictional lines are more than neutral mechanisms for distributing local preferences; they become normatively electrified fences between "us" and "them" that are often impossible to cross.[230] The vocabulary of threshold is meant to invoke the idea of an entrance control with normative power, a mark that defines insiders and outsiders, and to conjure up the threats, risks, and rewards of crossing.

Take for example, *Smith v. Community Board No. 14*.[231] In *Smith*, neighborhood residents challenged local officials' granting of a permit to Orthodox Jews to construct an eruv in the neighborhood.[232] An eruv is a defined space, the boundaries of which are demarcated by existing man-made or natural barriers (such as fences or hedgerows) or by stringing a barely visible wire normally across existing telephone or other poles to create an enclosed area, sometimes a few blocks wide, other times town-wide.[233] Under Jewish law, the eruv serves as a symbolic and physical extension of the "private domain" and thus enables religiously observant Jews to do acts that would normally be only permitted inside such a domain, like carrying or pushing, without violating the proscription against doing work on the Sabbath.[234] By creating "the fiction of a communal 'private' domain,"[235] the eruv draws a new public/private line that has religious legal significance: carrying is forbidden in the public domain, but is not forbidden in the private

230. Belonging is expressed in spatial terms. Consider what happens when one enters (usually accidentally) the "wrong" neighborhood, moving across an invisible threshold from a place where one belongs to a place where one emphatically does not belong. *See* David M. Engel, *Law in the Domains of Everyday Life: The Construction of Community and Difference*, *in* LAW IN EVERYDAY LIFE 123 (Austin Sarat & Thomas R. Kearns eds., 1993). Not knowing where those spatial boundaries are can be life threatening. At the extreme are literal fences manned by guns and guards. *See* Renato Rosaldo, *Foreword*, 48 STAN. L. REV. 1037, 1037-39 (1996) (discussing, in Foreword to symposium entitled *Surveying Law and Borders*, the U.S.-Mexico border and the social construction of the identities of those on either side).

231. 491 N.Y.S.2d 584 (1985); *see also* ACLU v. City of Long Branch, 670 F.Supp. 1293 (1987).

232. *See Smith*, 491 N.Y.S.2d at 584-85.

233. *See id.*; *see also* Eyal Weisman & Manuel Herz, *Between City and Desert*, AA Files #34 (Autumn 1997) (on file with author) (defining and describing eruvs).

234. *See Smith*, 491 N.Y.S.2d at 584-85.

235. *Id.*

domain. The eruv primarily makes it possible to carry books or push baby carriages between home and synagogue or between homes, and thereby enables observant Jews more easily to visit one another and attend synagogue on Friday nights and Saturdays.[236]

In *Smith*, non-Orthodox residents challenged the construction of the eruv on First Amendment grounds, charging that, even though the eruv was almost invisible (consisting as it did of existing fences and virtually invisible alterations to existing structures), it had a "metaphysical impact on the area" that violated the claimants' First Amendment rights.[237] The court rejected this claim, holding that the eruv was not a violation of the First Amendment.[238]

Consider the competing claims to community made in *Smith* by the two sets of residents living in the same town. It is easy to question the depth of the non-Orthodox residents' "metaphysical" objections to the eruv, especially in light of the fact that the town was not asked to spend any money for its construction. The Jewish community paid for the eruv, mostly by repairing existing structures. The claim of community on behalf of the Orthodox seems particularly strong here; religiously based groups are presumed to have a certain linked fate. In contrast, the claim of community on behalf of the non-Orthodox residents looks fairly shallow. The eruv did nothing to alter how non-Orthodox residents used the public spaces in the town, nor did it demonstrably alter how observant Jews used the public spaces. (The eruv did not create an explicitly religious space, just a space in which to do normally mundane activities like walking and carrying bags, activities that all residents of the town undertook every day of the week.) The opposition to the eruv can easily be seen as an excuse for exclusion, the asserted metaphysical injury as a way for non-Orthodox residents to express a fear that the town was becoming "too Jewish" or would, because of the eruv, "attract more Jews" to the area.[239]

But as Glen Robinson points out, the residents' complaint can also be couched in more sympathetic, less exclusionary, and more deeply constitutive terms: "The undeniable effect of creating the eruv was not simply to make it more convenient for Orthodox Jews to observe the Sabbath; it was also to give the neighborhood an identity as a Jewish community."[240] The demarcation — even figuratively — of the neigh-

236. *See id.*

237. *Id.* at 585.

238. *See id.* at 585-88.

239. The fear of a neighborhood becoming "too Jewish" is the subject of an article by Samuel G. Freedman aptly entitled *The Jewish Tipping Point*, N.Y. TIMES MAG., Aug. 13, 2000, at 42-47. Opponents often worry that an eruv will attract additional Orthodox residents who will change the nature of the community in other ways. For example, in neighborhoods dominated by Orthodox Jews, stores are often closed on Friday evenings and Saturdays during the Jewish Sabbath.

240. Robinson, *supra* note 13, at 298.

borhood's public spaces as Jewish communal space could lead non-Orthodox residents (taking their metaphysical claim at face value) to "the perception that they could no longer enjoy a collective identification with the neighborhood because it has been 'taken over' by an exclusive group, a 'community' to which they cannot belong."[241] Whether or not this is a cognizable injury in First Amendment terms (the court found it was not), we should not underestimate the social meaning of the eruv's marked boundaries. The eruv is a literal boundary regime that requires (on the deep account) the redefinition of the community's insiders and outsiders, a redefinition of who the residents of the town "are."[242] The space within the eruv takes on social meaning: it becomes religiously identified, normatively "restricted" space.[243]

Smith highlights the conflicting impulses of belonging and exclusion inherent in community and the difficulty of sorting out competing claims of deep community. In an America in which residence is so powerful a cultural signal, controlling one's border is a central mechanism for controlling one's identity and the identity of others. Indeed, *Smith* is a literal example of how the meaning of community happens at borders between communities, not solely (or even primarily) inside them. The eruv literally attaches normative weight to jurisdictional lines; it represents the rare situation in which the normative community is coextensive with the descriptive neighborhood (as defined by the limits of the eruv). The boundaries of the normative community are physical. Thus, an act of pushing or carrying something outside the eruv's demarcated lines (by a member of the Orthodox community) in

241. *Id.* at 298-99.

242. One opponent to the building of an eruv in a North London neighborhood reportedly argued that "[a] ghetto atmosphere would be imposed where integration of different cultures would no longer occur." Another claimed that "[t]he proposal would implant on all people in the area pronouncements going back some three to four thousand years." A third argued that "[a] varied harmonious community would break down into selfish, embittered, fragmented portions with strong suspicion, bitterness and hatred." Weisman & Herz, *supra* note 233. For additional discussion of the North London eruv and an argument about how its construction threatened the underlying territorial monopoly of the nation-state, see Davina Cooper, *Out of Place: Symbolic Domains, Religious Rights, and the Cultural Contract*, *in* THE LEGAL GEOGRAPHIES READER, *supra* note 14, at 42-51.

The turf battles that erupt over eruvs are similar to those that erupt over other signs that a particular religious group is "taking over." In the case of eruvs and other religious institutions, these battles sometimes pitch secular Jews against Orthodox Jews. *See, e.g.*, SAMUEL G. FREEDMAN, JEW VS. JEW: THE STRUGGLE FOR THE SOUL OF AMERICAN JEWRY (2000) (describing the opposition to construction of an elaborate Orthodox religious campus in a Cleveland suburb whose residents were eight-three percent Jewish, and relating how all six members of the town's Planning and Zoning Commission — all of whom were Jewish — voted against the project).

243. Indeed, that is the eruv's primary purpose. For Orthodox Jews the eruv is a "portable, dynamic, private space." Weisman & Herz, *supra* note 233. "The city . . . is transformed by the eruv on the Sabbath into a representation of the Temple and thus from the public into the private domain." Thus, "entering the eruv becomes a holy act." *Id.* "By redefining the space, the eruv redefines the behavior which is permissible within it, earning it the nickname of the 'magic schlepping circle.' " *Id.*

violation of the proscription against working on the Sabbath has the effect of putting the transgressor "outside" the limits of the community in two senses: the transgression that puts her figuratively outside the community (because she is a lawbreaker) also puts her literally beyond the zone of community protection.

Smith illustrates how boundaries serve as easy means of defining insiders and outsiders and, by extension, law-abiders and lawbreakers. Zoning gang members is, on the deep account of community, a necessary exiling or excommunication, because gang members are literally and figuratively not "who we (the inner-city neighborhoods of Chicago) are" because they have transgressed the rules of the community. This serves a definitional purpose, linking obedience to the norms of the community with membership in it. The Gang Congregation Ordinance, like the eruv, is a literal threshold; crossing the boundary is crossing into a different normative zone.

Indeed, an implicit argument made by proponents of the Gang Congregation Ordinance was essentially an argument about who controls the definition of the black lawbreaker.[244] The argument asserts that the dominant (white) society has defined these (mostly) black young men as ultraviolent and unredeemable arch-criminals through a culture of fear reinforced by draconian criminal penalties imposed on primarily black lawbreakers. To the "black community," these "arch-criminals" are nothing of the sort; they are instead the community's sons and brothers and neighbors. The benefit of the Gang Congregation Ordinance is that it gives the black lawbreaker an opportunity to be saved. An arrest and conviction for loitering does not result in long-term incarceration for the young black offender, but may get him off the street before he is injured in a gang-related incident or before he commits a more serious offense that will result in extensive jail time.[245] The ordinance also gives the "black community" and the legal system a middle way to define gang members as deviant without accepting the portrait of the criminal black male imposed by society — a choice somewhere between arch-criminal and law-abiding citizen.[246] This middle way provides an escape from the law-abiding/lawbreaking dichotomy that forces minority communities to choose either solidarity with their youth against an often oppressive legal regime or agreement

244. *See* Austin, *supra* note 210, at 1774-75 (discussing different versions of the black lawbreaker and how the "black community" identifies or ostracizes him or her).

245. *See* Amicus Brief, *supra* note 45, at 2 (arguing that the "mothers and fathers, the sisters and brothers, and the neighbors and friends of the youths subject to the law . . . support the Ordinance because it is a form of policing that secures order without destroying the lives of community youth who find themselves enmeshed in the complex social and economic forces that fuel gang criminality").

246. *See* Amicus Brief, *supra* note 45, at 16 ("Indeed, residents who supported the Ordinance did so precisely because they saw it as an acceptably moderate way to steer their children and their neighbors' children away from the gang life.").

with their youths' outright criminalization by that regime.[247] This allows the "black community" to indicate the limits of community protection, but to be able to choose something less than excommunication for every transgression, to allow for the possibility of the black lawbreaker's redemption.[248]

Of course, many commentators and community members dispute this characterization of the Gang Congregation Ordinance as a "middle way," seeing it as more of the same white oppressiveness and as reinforcing the same old black criminal portraits.[249] Perhaps a better understanding is that the ordinance (assuming it is supported by an identifiable "black community") serves *both* as a mechanism for community self-definition *and* as a further instrument of oppression.

Consider how a localism premised on the deep account of community derives its force from what Cover calls "a narrative of insularity,"[250] a story about how the community is uniquely situated in relation to the wider world. Linked fate is such a story. This assertion of difference also contains the obvious seeds of isolation; it both empowers those on the inside and isolates them from those on the outside.[251] As *Smith* illustrates, difference can be a means of estrangement from one's neighbors. This is the separatist, anti-integrationist, parochialist edge of a localism premised on a deep account of community, a localism that rests upon a concept of normatively restricted space. As Cover writes: "communities whose members believe themselves to have common meanings for the normative dimensions of their common lives [must] maintain their coherence . . . by expulsion and exile."[252] The community of linked fate cannot simply regulate its mem-

247. *Cf.* Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877, 886 (discussing the "difference/deviance divide," which puts black women into the position of distinguishing themselves by participating in "the broader societal put down of other black women").

248. *See* Amicus Brief, *supra* note 45, at 18 ("In sum, the residents of poor, minority communities favor 'middle ground' solutions to crime — ones that furnish a reasonable prospect of relief from crime without severely disrupting their communities."). The vocabulary of redemption itself implies a deep community. *Compare* Austin, *supra* note 210, at 1815-17 (advocating a politics of identification that increases the black lawbreakers chances for redemption), *with* Cover, *supra* note 15, at 34-35 (describing a "redemptive constitutionalism" as connoting the "saving or freeing of persons").

249. *See, e.g.*, Roberts, *supra* note 28, at 779-81, 834-35.

250. Cover, *supra* note 15, at 34-35.

251. *Cf.* Ford, *supra* note 14, at 909, 926 (arguing that "often the subordinate group unwittingly conspires in its own continued subordination and participates in its own quarantine" and warning against the "compulsory provincialism" that accompanies an "empowered" minority whose territorial autonomy is both "a haven and a prison for its residents").

252. Cover, *supra* note 15, at 15-16; *see id.* at 16 n.41 (citing the expulsion of Roger Williams and Anne Hutchinson from the Massachusetts Bay Colony as an example). "The other side of membership is, of course, exclusion and difference. A community that does not distinguish between members and strangers cannot construct or sustain a moral order and

bers' conduct; it must, at a certain point, turn its face away from members who disobey.

Thus, in considering the public housing apartment search policy invalidated by the district court in *Pratt v. Chicago Housing Authority*,[253] we can accept *both* that the court's allowance of such a policy would have affirmed the residents' power to define the reach of the Fourth Amendment *and* that it would further estrange those residents from the wider political community by demarcating public housing as someplace where "other" people live and where baseline constitutional rules do not apply. Like *Smith*, *Pratt* entailed an attempt by residents to redefine public and private space. In *Pratt*, the public housing residents invited the police into their homes by adopting a regulation that allowed police to enter apartments without warrants and absent exigent circumstances.[254] In essence, residents sought to define their normally private space as public for Fourth Amendment purposes. In *Smith*, the Orthodox Jewish residents did the opposite, literally demarcating a public space that would, for purposes of Jewish law, essentially be treated as an extension of the private, religious domain. Both manipulations of the private/public line created boundary regimes that defined the internal membership of the community, but also estranged that newly defined community from its neighbors.

This brings us back to the moral mapping of the metropolitan region. The estrangement of the inner city is already demarcated in the social space of the inner city, in what outsiders perceive as the "no-go" (Red) zones of the metropolitan region. Deviance from constitutional norms reinforces the public housing residents' normative and social isolation in the context of a metropolitan region that deems them to be normatively suspect anyway. This suspicion is itself a product of envisioning residential neighborhoods as deeply constitutive of the self and of grounding the autonomy of the neighborhood in such a conception. The deep account of community used to justify the exercise of will on the part of inner-city residents reinforces the normative zones of entitlement that are already spatially, temporally, and culturally dictated. In attempting to assert control over its own meanings by waiving constitutional rights, the inner-city neighborhood invariably reaffirms its place in the social order.

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loses its identity. Its borders are dissolved, its discipline ended." MANDELBAUM (2000), *supra* note 75, at 10.

253. 848 F. Supp. 792 (N.D. Ill. 1994).

254. *See id.*

3. *The Critique of the Dualist Account:* Kessler v. Grand Central Management Association, Inc., *and the Construction of the Public*

a. Problematizing Participation

The deep account of community reinforces the moral mapping of the metropolitan region, with its corresponding suspicion and spatial isolation of inner-city residents. The goal of the dualist account is to decrease estrangement. On the dualist account, community is the name we give to a process of civic engagement. On this account, community occurs in appropriately scaled settings for face-to-face participatory governance. These settings can be entirely artificial — unattached to any claims of communal experience, history, or identity. Indeed, small-scale democratic participation is intended to transcend parochial communal (sectarian) attachments; a goal of participatory democracy is to create a political community of citizens out of individuals who would otherwise be strangers.

The neighborhood, it is argued, is the ideal scale for the face-to-face interactions necessary for true democratic dialogue. These interactions constitute a genuine form of democratic governance, one missing from the highly centralized and impersonal forms of government most living in metropolitan regions currently experience. By characterizing the Gang Congregation Ordinance as a neighborhood initiative, proponents lay claim to a powerful image of local decision-making. The neighborhood is infused with democratic possibilities that the state should allow to develop. These arguments can apply to a whole range of emerging sublocal institutions that may hold out the promise of a renewed civic empowerment.[255] These small-scale republics are touted as forms of government that energize the citizen both in his or her immediate neighborhood and in the larger expanses of American society.

Yet, the participatory defense of localism presents two difficulties. First, the spillover effects of neighborhood decisions (for example, the forcing of gang members into other — perhaps less politically powerful — neighborhoods) undermine the premise of the participatory account: that individuals will have a voice in the decisions that affect them. The difficulty is getting all the stakeholders (neighbors *and* adjacent neighborhoods) together in one place without losing the scale that is necessary for true dialogue. The spillover effects of local decisions undermine localism not because those outsiders who are affected

255. *See, e.g.*, Ellickson, *New Institutions*, *supra* note 31, at 84 (discussing advantage of proposed block improvement districts (BLIDs) in fostering skills of collective governance).

have not contracted into the norms (as on the contractarian account), but because those outsiders who are affected have not been included in the democratic process that preceded adoption of those norms.[256]

Second, decisions about who should be counted as a decisionmaker are often based on arguments about who has the most to lose. These kinds of arguments rarely favor the disenfranchised or the marginal; indeed, the disenfranchised and marginal are almost never considered members of any community. They are, by definition, "nonvoters" — often literally so because they are transient or have no home or are not of voting age. The already marginal are also often considered ineligible to vote because they are not imagined as stakeholders in the political community. Creating smaller sites for participatory democracy will do little to alter the contours of the current moral mapping of the metropolitan region unless that site creation crosses more traditional neighborhood, socioeconomic, and racial lines. An emphasis on participation may in fact reinforce the current link between residence and political power, further entrenching the deep suspicion of outsiders borne of protecting one's turf.

Thus, the notion that little republics at the sublocal level can provide new arenas for public life is theoretically attractive but politically unstable. Indeed, enforcing a public, democratic form of sublocal governance requires forceful intervention on the part of the state. Otherwise, sublocal institutions can easily become instruments for the private management of civic life, captured by powerful interest groups who enforce a particular conception of public life to the exclusion of other competing conceptions.

Consider, for example, *Kessler v. Grand Central District Management Association, Inc.*[257] In *Kessler*, the Second Circuit considered an equal protection challenge by tenant-shareholders residing within the territorial limits of the Grand Central Business Improvement District ("BID"), a semi-autonomous sublocal government encompassing 337 properties over seventy-five blocks in midtown Manhattan.[258] The Grand Central BID is one of over forty business improvement districts established in New York City pursuant to New York State's business improvement district act.[259] BIDs increase the level of services provided in particular city areas in an effort to promote and spur in-

256. Carol Gould writes: " 'Who has a right to participate not only in deliberation but in the decisionmaking itself?' The answer 'everyone affected by the decision' will not work for any practical or real-world context." Carol C. Gould, *Diversity and Democracy: Representing Differences*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 58, at 177.

257. 158 F.3d 92 (1998).

258. *See id.* at 95.

259. *See* Richard Briffault, *A Government For Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366-67 & n.1 (1999) [hereinafter Briffault, *Government*]. Briffault notes that estimates of the number of BIDs operating in the United States range from between 1000 and 2000. *Id.* at 336 n.1.

creased commercial and economic development, and are typically funded through an assessment on real property within the BID that goes towards improving the public property within the district.

The tenants charged that the composition of the Grand Central BID's governing board violated the "one-person, one-vote" requirement of the Fourteenth Amendment's Equal Protection Clause.[260] Of the fifty-two members of the challenged governing board, at the time of the lawsuit, thirty-one were elected by the 242 owners of real property in the district, sixteen were elected by commercial tenants, and one each was appointed by the mayor, the city comptroller, the Manhattan Borough president, and the city council member of the relevant council district. Only one representative was elected by the approximately 930 residential tenants of the BID.[261]

The Second Circuit, in a 2-1 decision, upheld the district court's determination that the equal protection requirement of one-person, one-vote did not apply to the Grand Central BID. Analogizing the BID to the water districts that the Supreme Court held in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*[262] and *Ball v. James*[263] did not have to comply with one-person, one-vote, the Second Circuit found that the Grand Central BID's limited purposes and powers made it a "special purpose district" that disproportionately affected property owners.[264] The majority held that the BID had a limited purpose (devoted to promoting business and commercial activity in the district), that its role and responsibilities in providing sanitation, security, and social services were secondary to the City's (and over which the City had significant control), and that the BID could not impose income or sales taxes or enforce laws "governing the conduct of persons present in the district," and thus lacked the kinds of sovereign powers a municipal corporation might exercise.[265]

The court also held that, because the mandatory assessment was paid by property owners "and only property owners,"[266] the weighted voting system favoring property owners bore a reasonable relationship to the purposes of the BID:

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260. *See Kessler*, 158 F.3d at 93-94; *see also* Reynolds v. Sims, 377 U.S. 533, 565-67 (1964); Avery v. Midland County, 390 U.S. 474, 484-85 (1968).

261. *See Kessler*, 158 F.3d at 116-17 (Weinstein, J., dissenting).

262. 410 U.S. 719 (1973).

263. 451 U.S. 355 (1981).

264. *See Kessler*, 158 F.3d at 104-07. The court applied the two-prong test of *Salyer* and *Ball* for determining whether a local government is exempt from the one-person, one-vote requirement: Does the government serve a "special limited purpose," and does it "disproportionately affect" those who are enfranchised? *See id.*

265. *See id.* at 104.

266. *Id.* at 107.

> Projects such as the improvements to land in the district, the sweeping of streets, and the provision of additional security personnel are projects that redound to the benefit of many property owners; but for that very reason, these are projects that no owner would likely undertake individually. The []BID allows property owners to pool their resources to accomplish mutually beneficial projects to increase the attractiveness of district property for commercial purposes.[267]

Of course, each of the projects mentioned by the court are classically governmental. Indeed, government is often justified and described in these very terms as a mechanism for undertaking projects that individuals would not otherwise undertake on their own, that is, as an institution for solving collective action problems. Moreover, the court's description of the BID as nongovernmental — as just another, in the words of the appellee's brief, "private, non-profit entity"[268] — rings hollow in light of the BID's authority. For example, the BID was authorized to construct capital improvements that "included the renovation of sidewalks and crosswalks, the planting of trees, the installation of new lighting, street signs, bus shelters, news kiosks, and trash receptacles," and the renovation of Grand Central terminal.[269] The BID also had the power to "include any services required for the enjoyment and protection of the public and the promotion and enhancement of the District" including security, sanitation, tourist information, social services for homeless persons, special maintenance and repair, public events, and retail improvements.[270] In fiscal year 1994-95, the Grand Central BID expended twelve million dollars raised from assessments on real property owners. As of 1995, it employed more than sixty security guards and three dozen sanitation workers, and it financed capital improvements by issuing over thirty-two million dollars of bonds.[271]

In short, as Judge Weinstein's dissent pointed out, the Grand Central BID engages in a full range of " 'municipal' services" funded by a special "municipal 'tax' " collected by the city of New York for that purpose.[272] In both actions and description, the Grand Central BID constitutes a government.[273]

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267. *Id.* at 108.

268. *Id.* at 127 (Weinstein, J., dissenting).

269. *See Kessler*, 158 F.3d at 95.

270. *Id.*

271. *Id.* at 113-14 (Weinstein, J., dissenting).

272. *See id.*

273. *See also* Briffault, *Government*, *supra* note 259, at 437 ("BIDs engage in . . . the classic activities of urban government.").

Thus, *Kessler* shows how the line between private (special district) and public (municipality) can be easily manipulated.[274] More significantly, *Kessler* shows how that line is manipulated in the service of a propertied conception of citizenship. As in *Smith*, *Kessler* involved adjudicating competing conceptions of community. And, as in *Warth*, the *Kessler* court rejected appellants' claims for inclusion in favor of appellee's assertions of autonomy. The court justified favoring the interests of property owners (who constituted less than one-third of the number of residential tenants) over tenants because only landowners were required to contribute the mandatory assessment for the upkeep of the BID. This rigorous application of the inverse taxation-representation principle (no representation without taxation) discounted the fact that tenants would pay the price of increased assessments in their rents.[275] Yet, like the increase in the cost of the housing for nonresidents that the Supreme Court discounted in considering Penfield's exclusionary zoning laws in *Warth*, the Second Circuit treated the increased rental cost passed onto the tenant as an incidental burden, more tied to "factors such as rental market conditions, the terms of individual leases, or City and State rent control and rent stabilization regulations" than to the assessment.[276]

Even if the tenants' rents were not affected by BID assessments, their lives surely were. Certainly the BID's construction of sidewalks and other public accommodations and its provision of private security forces, social outreach services, and sanitation services altered the daily lives of the people who lived there, arguably more so than the daily lives of the often-absentee property owners. The court's privileging of the property owners' investments over the quality of life of the residents, who may live, work, and sleep within BID limits, can only be justified if we accept that BID activities actually had a de minimis impact on residents compared to overall city service provision.

This may also explain why the court did not even consider the possibility that residents of New York City who lived or owned property outside the BID's territorial lines should have a say in BID governance, even though, as the dissent pointed out, BID polices could have

274. *See id.* at 437 ("[T]he very attempt to classify governments along a public/private continuum according to the nature of the services they provide lacks analytical rigor and leads to arbitrary results.").

275. *See* Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc., 158 F.3d 92, 123 (1998) (Weinstein, J., dissenting); *cf.* Blaine Harden, *Summer Owner Wants a Vote in Both Houses*, N.Y. TIMES, June 1, 2001, at B1 (describing Hampton voting rights lawsuit by summer resident of East); Blaine Harden, *Summer Residents Want Year-Round Voice*, N.Y. TIMES, May 30, 2000, at A1 (describing how property tax-paying, nonresident property owners of seasonal vacation homes are agitating for the right to vote on local matters, arguing that because "they foot the bills" they should have a say in how the money is used).

276. *Kessler*, 158 F.3d at 107.

a demonstrable effect on the provision of municipal services elsewhere in the city. Nor did the court consider that those disenfranchised users of the streets, such as the homeless, street vendors, and panhandlers — the very target of BID policies — should be entitled to representation.

In fact, one direct result of BID activities that affected both constituencies was the displacement of panhandling and other undesirable uses to neighboring areas of the city through aggressive private security enforcement — the creation of a BID-enforced "Green Zone." The Grand Central BID engaged in aggressive "outreach" to panhandlers and the homeless within BID limits, which housing advocates charged was simply a means to force the homeless to go somewhere else.[277]

More troubling to the dissent was the possibility that the proliferation of BIDs, particularly on the scale of the Grand Central BID, would make the provision of city services dependent on where one lived, with BID residents receiving increased city services because of their political clout and ability to pay.[278] This would not only have the consequence of increasing city services for those with means, but would lead to a decrease in city services for those without means. BIDs may increase the pressure on the city to reduce city-wide tax rates and to delegate service provisions to private "special purpose" governments. The idea of a city-wide government in which tax revenues are redistributed throughout a large territory comes under strain as BID members demand that their tax assessments stay in the BID's particular geographical area and that those assessments go to pay for services that benefit them.[279]

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277. *See* Briffault, *Government*, *supra* note 259, at 402 (noting that BID programs dealing with the homeless grow out of a desire to maintain public order "rather than a desire to provide social services per se," and that BIDs "aim to prevent panhandling and the sense of 'social disturbance' attributable to the presence of the homeless"). Critics charged that the Grand Central BID employed "goon squads" that assaulted the homeless in order to force them out of BID-controlled areas. An investigation did not find "credible evidence" of this claim but did find that the BID's homeless outreach was "flawed in its design." *Id.* at 402-03; *see also* Foscarinis et al., *supra* note 163, at 162-64 (suggesting alternative strategies BIDs can undertake that will address the economic conditions of homelessness as opposed to restricting access to public space by "sweeping" the homeless with targeted removal strategies); Nieves, *supra* note 130, at A1 (quoting head of the Downtown Sacramento Partnership, which represents 550 businesses and employs twenty "guides" to patrol sixty-five city blocks, as saying: "we need to continue to make clear that downtown is not going to be a place where panhandling and other negative activity is tolerated").

278. *See Kessler*, 158 F.3d at 131-32 (Weinstein, J., dissenting).

279. *See id.*; *see also* David J. Kennedy, Note, *Restraining the Power of Business Improvement Districts: The Case of the Grand Central Partnership*, 15 YALE L. & POL'Y REV. 283, 324-25 (1996) (discussing the concern that BIDs exacerbate existing social divisions and encourage the flight of the successful into enclaves of privilege protected territorially). In response to this assertion, Clayton Gillette acknowledges that "[l]egal doctrine may exacerbate the problem by giving those with the capacity to opt for higher levels of service incentives to constrain governmentally provided services at artificially low levels," though he argues that there "exist countervailing incentives that might deter both officials and those who

The *Kessler* majority did not address these internal or city-wide effects. The court instead redescribed the BID's powers as essentially aesthetic; in short, it justified the limited franchise by imagining the BID as an organization that picks up the trash, paints a few storefronts, and cleans-up graffiti. Drained of any substantive norm generating powers[280] and with a scope of activities "quantitatively dwarfed by those [performed by] the City,"[281] the BID was rendered — like water districts — harmless by the court.[282] By rendering the BID harmless at least in theory, however, the Second Circuit missed an opportunity to imagine the Grand Central BID as a forum for more substantive local governance and to develop an account of local democracy to go along with it.

b. Reinforcing Propertied Power

Although the Second Circuit evaded the question about representation by portraying the BID's activities as virtually insignificant in the lives of New Yorkers, it adopted a default norm of a property-based franchise that has a long pedigree. The presumption that property owners are more invested in a community than are non-property owners is ongoing theme in the American political order.[283] The New York

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could opt out from artificially limiting the scope of public services." Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENVER U. L. REV. 1185, 1209-10 (1996). Among these incentives are the interests of budget-maximizing bureaucrats and residents' desires to avoid reductions in property values. *See id.* at 1210-11. Gillette also argues that allowing some to opt-out of public provision could reduce costs for those who remain by limiting congestion and overcrowding. *See id.*

280. *See Kessler*, 158 F.3d at 104-05 (stating that the BID "performs no inspections in matters of health and safety . . . [has no] power to issue citations for violations of City building or zoning codes . . . in short, [it] cannot meaningfully alter the conduct of persons present in the district"). The court's finding that the BID "cannot meaningfully alter the conduct of persons" is belied by the fact that the BID clearly does "discourage" (and even polices) panhandling and other street conduct, such as street vending. *See also infra* text accompanying notes 291-302.

281. *Kessler*, 158 F.3d at 105.

282. The dissent pointed out that even water districts are not so harmless, noting that the disproportionate voting scheme upheld in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), allowed "[o]ne corporation [to] cast a majority of the votes as a result of its huge landholdings," which allowed it to "disadvantage . . . . smaller landholders and residents by preventing flood control measures that might interfere with its activities outside the water district." *Kessler*, 158 F.3d at 126 (Weinstein, J., dissenting).

283. For example, though acknowledging that arguments in favor of property and poll-tax qualifications for voting "ring hollow on most contemporary ears," and "are not in accord with current egalitarian notions of how a modern democracy should be organized," Justice Harlan nevertheless dissented in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), which struck down Virginia's poll tax as unconstitutional. Harlan contended that states should be permitted to establish qualifications for the franchise, including property qualifications and poll taxes, arguing that they "have been a traditional part of our political structure":

statute requiring property owners to select a majority of the BID board is consistent with most state homeowner association statutes, which normally do not allow voting rights to be allocated on the basis of residence but only on the basis of property share.[284] Recall the positive moral valence exerted by property ownership and the spatial differentiation in our metropolitan regions between (stable) homeowners and (transient) renters. Indeed, civic republicanism draws on a tradition that holds that property ownership is a prerequisite for citizenship, providing the needed independence and stability for the pursuit of civic virtue.[285] An assumption of classical republican thought was that non-property owners would either be irresponsible with the affairs of the state or would be easily corrupted or both.[286] These assumptions are implicit in the majority's holding, which appears to accept the appellee's premise that tenants will be irresponsible with other people's money. The assumption is that the kinds of physical improvements to a neighborhood that BIDs often undertake (such as repairing sidewalks, painting over graffiti, removing junked cars, and

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> Most of the early Colonies had them; many of the States have had them during much of their histories; and, whether one agrees or not, arguments have been and still can be made in favor of them. For example, it is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay $1.50 or thereabouts a year for the exercise of the franchise. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.

Id. at 684-85 (Harlan, J., dissenting).

284. *See* Ellickson, *Cities*, *supra* note 31, at 1543 (discussing this limitation on possible voting regimes and arguing that associations should be able to select among voting regimes (including the residence-based franchise) and that cities also should be able to select among voting regimes (including the property-based franchise)).

285. *See, e.g.*, James Harrington, *The Commonwealth of Oceana*, *in* THE POLITICAL WORKS OF JAMES HARRINGTON 170 (J. Pocock ed. 1977) (advocating the wide distribution of property in order to increase opportunities for citizenship). For a current proposal based in this tradition, see BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 12 (1999) (proposing that Americans receive an $80,000.00 "stake" when they reach adulthood, and stating that "[t]his is the time to make economic citizenship a central part of the American agenda . . . to enable all Americans to enjoy the promise of economic freedom that our existing property system now offers to an increasingly concentrated elite").

286. *See* JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S 1-20 (1984). There were some at the Constitutional Convention who favored a freehold qualification for federal elections. The proposed amendment was defeated, however, in part because it was thought voting qualifications were best left to the states. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 201-10 (Farrand ed., 1911). Madison's views are described at follows:

> Whether the Constitutional qualification ought to be a freehold, would with him depend much on the probable reception such change would meet with in States where the right was now exercised by every description of people. In several of the States a freehold was now the qualification. Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty.

Id. at 203.

planting flowers) will not be supported by non-property owning tenants, who will instead redirect BID funds to lowering their rents or throwing block parties.[287] Only landowners, who will pay for and reap the long-term benefits of higher property values, will have the correct incentives to spend BID monies on truly "community-directed" projects.

I have my doubts that a nonresident property owner's ownership interest in his or her "fungible" (in Professor Radin's terms) real estate investment creates better incentives to improve upon it than does a resident's nonownership interest in his or her "personal" home.[288] Nor is it obvious that the franchise should turn on such a test. Regardless of where the incentives lie, however, the lesson here is that there is a strong chance that sublocal institutions will disenfranchise the unpopular or less politically powerful. Thus, the dualist account requires a higher-level authority that can aggressively umpire internal decisionmakers to ensure a baseline of equal rights of participation. Dualism therefore points *away* from the kind of local autonomy that

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287. *See* Ellickson, *New Institutions*, *supra* note 31, at 93-95 (defending property-based franchise for BLIDs on grounds that tenants will tend to favor short-term (and wasteful) projects that do not add value to property in the BLID). *But cf.* Los Angeles City Charter § 906 (July 7, 2000) (requiring that neighborhood council membership be open to all "stakeholders" — everyone that "lives, works, or owns property in the area"). For an attempt to explicate a link between homeownership and citizenship values empirically, see Denise DiPasquale & Edward Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?*, 45 J. URB. ECON. 354-84 (1999) (finding that the relationship between homeownership and investment in social capital "may be causal," but that there is evidence that any connection may be attributable to lower mobility rates for homeowners as opposed to homeownership per se).

288. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 988-89, 991-96 (1982) (proposing a property rights regime that links the degree of property rights protection to the relationship of the object to the person on a continuum from "fungible" to "personal," and arguing that the residential tenancy is a "personal" property right and therefore should receive enhanced property rights protection). If Radin's personality theory of property is correct, then non-property owning residents of a neighborhood have a strong incentive to undertake long-term neighborhood improvements because their homes and the immediate environment are, in part, constitutive of their person. But even putting aside Radin, Ellickson's assumption that residential tenants normally have short-term interests and that property owners normally have long-term interests — even if true in terms of length of tenure — begs the question of whose interests (in time) should take precedence. Nonresident property owners may not share an interest in community-directed projects because their interest is in obtaining the maximum return on their investment. Landlords will thus use BLID funds to favor *potential* (higher rent-paying) residents over *current* residents. In the absence of rent-control mechanisms, landlords will favor those "improvements" that lead to increased property values that will, in turn, lead to the ouster of current lower-income tenants. Thus, the landlord's "long-term" interest in the value of his property is in direct conflict with the tenant's "short-term" interest in staying in his home. In the presence of rent control, landlords may have little incentive to make any improvements considering that any monies that they expend may not be recouped. On the other hand, landlords who believe that any further investment in a residential neighborhood would be wasted (i.e., those who are "milking" current dilapidated housing by failing to invest in it) might instead simply redistribute the monies from the BLID back to themselves or to other kinds of development projects — for example, projects that seek to replace residential tenants with commercial tenants.

mandates that the federal government defer to local deviations from constitutional norms. In fact, as *Kessler* shows, dualism requires a more rigorous and far-reaching enforcement of federal norms than current doctrine anticipates (at least as interpreted by the Second Circuit) and requires special vigilance where unpopular groups seem to be placed outside the political process.

Such vigilance is precisely what proponents of the Gang Congregation Ordinance oppose in the name of fostering civic values. Yet, the Gang Congregation Ordinance can be seen as a positive act of civic engagement only by leaving out a particularly crucial constituency: the individual gang members who are targeted by the ordinance. While not literally disenfranchised, gang members are excluded from being full participants in the community; they are nonpersons in the informal, everyday public and civic life of the neighborhood.[289] Of course, community standards are always enforced by some majority against a noncomplying minority — in this instance, gang members. The dualist account thus always begs the important question: How do we define the citizens whose voices are entitled to respect?

c. The Contraction of Public Space and the Rise of the Managed Public Sphere

Local control in small-scale settings does not, in and of itself, lead to increased civic engagement on the part of neighborhood residents. Indeed, a reduction in the territorial scale of government may actually result in an overall contraction of the public sphere. *Kessler* illustrates how the proliferation of neighborhood-scaled institutions like BIDs can result in the disenfranchisement of significant portions of the urban population. Not only might these institutions literally restrict individual citizens' participation in a political process, but they might also reduce the willingness of the individuals that live inside them to consider themselves part of a larger polity. Neighborhood governance may be accompanied by neighborhood myopia, a reduction in the citizen's scope of interests down to his or her immediate concerns for who moves in next door.[290] The risk is that small-scale territorial units at

289. The police in Denver, Colorado, compiled a list of suspected gang members that contained the names of two out of three African-American youths in the entire city between the ages of twelve and twenty-four. *See* STEVEN DONZIGER, THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 110 (1996). Consider the impact on the public life of Denver neighborhoods if two-thirds of African-American youth were subject to an antiloitering ordinance.

290. The Not In My Backyard ("NIMBY") attitude taken by many neighborhoods when it comes to siting regional infrastructure needs, landfills, waste plants, low-income housing, halfway houses, or other unpopular but regionally necessary services already shifts such unpopular services to poorer and less politically powerful neighborhoods. *See, e.g.*, Michael Weeler, *Negotiating NIMBY: Learning from the Failure of the Massachusetts Siting Law*, 11 YALE J. ON REG. 241 (1994) (discussing the failure of Massachusetts's "innovative new land

the neighborhood level will actually narrow the public sphere, both in terms of who is included and how it is used.

Recall that public order norms (like the Gang Congregation Ordinance) are often defended on the ground that they enable community life to flourish by securing the public arenas in which neighborhood residents gather, interact, and converse. The primary services undertaken by BIDs — sanitation, street maintenance, and public security — share the same goals, though with a more commercial focus. BID projects are often intended to make the street more inviting, to encourage the use of urban public spaces by making them cleaner, more user friendly, and more pleasant.[291] Thus, BIDs share the same concern for the quality of the public street and for enforcing norms of civility as does the order maintenance approach to policing and Ellickson's Red-Yellow-Green Zones. This approach adheres to a rigid public/private line that emphasizes regulation of public decorum over control of private lawbreaking. Order maintenance policing targets street crime and the indications of street crime — unruliness in public, loitering, graffiti, abandoned cars. It is less concerned with lawbreaking in private spaces, and thus, by definition, it is less concerned with those places in which street disorder is controlled by other means, such as in suburban neighborhoods.[292]

Yet the emphasis on street disorder reflects a particular cultural conception of public and private space and the role of order in public spaces. Order maintenance policing is itself invested in maintaining a rigid public/private line. Deviant behavior is often behavior that seems to cross or fudge this line. Camping, sleeping, or urinating on the street are the most dramatic examples,[293] but fixing one's car in the street or putting living room furniture on one's porch[294] are also signs of disorder. Moreover, deviance from accepted standards of private and public behavior is itself disorderly. Thus, talking loudly out-of-

use law to end costly NIMBY deadlocks over siting hazardous waste treatment plants"). This same problem of NIMBY attitudes at the neighborhood level led Professor Chemerinsky to oppose granting neighborhood councils power over local land use decisions in the proposed Los Angeles City Charter. *See* Chemerinsky, *supra* note 37, at 142-44.

291. Ellickson includes BIDs as an important mechanism for enforcing "street decorum," noting that "[a]lthough BIDs also engage in sanitation and business promotion, the control of disorderly street people has emerged as one of their central functions." Ellickson, *Controlling Chronic Misconduct*, *supra* note 8, at 1199.

292. *See supra* text accompanying notes 160-164.

293. Localities are particularly keen about preventing these kinds of activities. *See* DAVIS, *supra* note 129, at 221-65.

294. *See, e.g.*, Charles Osgood, *North Carolina Town Looks to Clean up Porches*, CBS NEWS: SUNDAY MORNING, 1999 WL 16204113, (June 20, 1999) (reporting how town of Wilson, N.C., has outlawed the use of non-outdoor furniture on front porches); Alan D. Miller, *Athens Jumps on Couches: Housing Code Overhaul Would Ban Porch Sofas*, THE COLUMBUS DISPATCH, Nov. 17, 1998, at 1A (describing a college town's attempt to ban the use of living room furniture on front porches, a ban aimed primarily at students).

doors or at the movies,[295] using one's stoop as an extension of one's living room, or playing in the fire hydrant on the street on a hot day can all be signs of public and private normative decay.

Disorder in public spaces is seen as threatening. Professor Austin has described how efforts at maintaining an ordered public sphere with well-defined lines between private and public activities have affected black leisure and commercial activity by defining those leisure and commercial activities as disordered, and then regulating them.[296] Austin notes that black leisure, which often finds expression in communal gatherings in publicly accessible venues, is regularly associated with threats to public health, safety, and welfare.[297] Common responses to the perceived threat of black gatherings range from privatizing public spaces, to enforcing curfews, to shutting down venues that attract predominantly black patrons. Black entrepreneurial commercial activity in the form of street vending or scavenging is also associated with the breakdown of public order.[298] The broken windows thesis is often utilized to justify shutting down such activities. In effect, the public street is regulated to cabin black "disorder" and enforce a "privatized" and, in Austin's words, "white" conception of leisure and economic activity.[299]

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295. *See* Regina Austin, *"Not Just for the Fun of It!": Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667, 702 (1998) [hereinafter Austin, *Restraints*] (describing African-American cultural tolerance of speaking in movie theaters and white dismay at the practice); *cf.* JACOBS, *supra* note 25, at 41 (expressing concern about the formalized management of public space and public leisure).

296. *See* Austin, *Restraints*, *supra* note 295, at 695-712; Regina Austin, *"An Honest Living": Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2125 (1994) [hereinafter Austin, *Vendors*].

297. *See* Austin, *Restraints*, *supra* note 295, at 707-12.

298. *See* Austin, *Vendors*, *supra* note 296, at 2125. Austin's thesis finds support in Mitchell Duneier's recent ethnographic study of street vendors, panhandlers, and scavengers on Sixth Avenue in New York City. *See* MITCHELL DUNEIER, SIDEWALK (1999). Duneier describes how the Grand Central BID's influence was crucial in the city's passage of an ordinance that restricted sidewalk vending in the district, seriously limiting the ability of black street vendors operating on the lines between the formal and informal economy to make a living. *See id.* at 231-52. He notes that BIDs have erected planters and other sidewalk furniture intended to prevent vendors from setting up their tables on the street. *Id.* at 317. In addition, BID security guards, in cooperation with police, often harass vendors, panhandlers, and the homeless by destroying their merchandise or possessions. *See id.* at 231-54.

299. Another term might be "suburban." In fact, BIDs are explicitly modeled on the suburban shopping mall and the theme park, both of which create a managed environment that is supposed to be clean, safe, and orderly. *See* Briffault, *Government*, *supra* note 259, at 424-29. The BID reflects an attempt to create "urban centers suffused with suburban values." *Id.* at 428. BIDs are part of an overall "suburbanization of downtown," one of the "most important urban processes of the 1990s," which includes BIDs, the creation of pedestrian malls in downtown streets, and skyways and tunnels that link shopping with work with transportation in controlled environments. Boddy, *supra* note 162, at 150. Referring to the "malling of America," William Kowinski wonders, "What happens . . . when the chief community centers of our time are such willfully artificial distortions of reality?" WILLIAM

What makes public life possible for one neighborhood, however, is different from what makes public life possible for another. The emphasis on cleanliness, order, and security that is implicit in the Gang Congregation Ordinance and other order enforcing laws (such as curfews, anti-cruising, and anti-vending laws), reflects a particular account of public life, which may be foreign and even destructive to the way minority neighborhoods experience public life.[300] Instead of making public life possible in these neighborhoods, the Gang Congregation Ordinance and other public order norms may actually disable it by limiting associations in the only public venues available to urban dwellers without providing real alternatives.[301] Opponents of the ordinance would not be surprised at this outcome; they claim that this was the very intention of an ordinance designed to protect white property owners from black youth.[302]

It is also not a surprise that the *Kessler* court would restrict the franchise to landowners in the Grand Central BID, considering that the BID's primary purpose was to control, clean up, and secure the sidewalks and other public spaces within BID territory. Ordered public space favors landowners much more than other kinds of residents, who may need to use public places because they have nowhere else to go. Thus, the court is correct in fearing that the BID's mission would change if residents or other interested constituencies were permitted a greater voice in its governance. The court is incorrect, however, when it minimizes the political and social effects of public street maintenance "BID-style." The Grand Central BID, through its control of the

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KOWINSKI, THE MALLING OF AMERICA: AN INSIDE LOOK AT THE GREAT CONSUMER PARADISE 204 (1985).

300. Here I am echoing critiques (by feminist theorists and others) of the theoretical concept of a unitary public sphere as a place of deliberative, rational, logical, and reasoned debate. As one commentator states:

> It follows that public life in egalitarian, multicultural societies cannot consist exclusively in a single, comprehensive public sphere. That would be tantamount to filtering diverse rhetorical and stylistic norms through a single, overarching lens. Moreover, since there can be no such lens that is genuinely culturally neutral, it would effectively privilege the expressive norms of one cultural group over others, thereby making discursive assimilation a condition for participation in public debate.

Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* THE PHANTOM PUBLIC SPHERE 17 (Bruce Robbins ed., 1993).

301. *See* Austin, *Restraints*, *supra* note 295, at 692. Indeed, order maintenance policing and public order policies tend not to distinguish among different kinds of "disorder." For example, Duneier argues that there is little empirical support for expanding the broken windows thesis from the control of physical disorder (such as abandoned cars) to the control of social disorder in general (loitering, vending). DUNEIER, *supra* note 298, at 288-89. He finds that the Sixth Avenue venders, scavengers, and panhandlers have developed economic roles, complex work, and mentors who have given the normally "down-and-out" encouragement to try to "live better lives." *Id.* at 312-17. This order-enforcing aspect of black street vending is often overlooked by proponents of broken windows, particularly by police, who often associate disorder with blackness. *See id.*; *see also* Roberts, *supra* note 28, at 790-811.

302. *See* Amicus Brief in Opposition, *supra* note 205, at 4-5.

public street, is engaged in defining and delineating the contours of public space itself. This is far from being engaged in a mere aesthetic enterprise.

Consider if Chicago, instead of drafting the Gang Congregation Ordinance, had created Green Zones in which certain normally legal activities would not be permitted, including congregating with two or more persons with no apparent purpose; or alternatively if Chicago allowed particular neighborhoods to create neighborhood associations whose members could hire private security guards to patrol the streets or to close them altogether in the evening.[303] These proposals, even more than the Gang Congregation Ordinance, would devolve standards of street behavior down to the neighborhood level. They also present in stark relief the question of what constitutes public space and, by extension, what kind of public life and public norms the built environment should foster.

Indeed, the Supreme Court's treatment of the Gang Congregation Ordinance may have had more to do with its conception of the public character of Chicago city streets than with any individual rights to loiter or travel the public way, which, as a practical matter, do not exist in the vast majority of places that make up the metropolitan region. Justice Stevens cited a number of urban activities that could be reached by the ordinance, such as standing on the street corner talking to friends, hailing a taxi, waiting for a telephone call, or waiting outside the ballpark for an autograph.[304] These activities are rarely seen on suburban streets where there are few cabs, no public telephones, and certainly no ballparks (except those surrounded by a vast sea of parking lots). In metropolitan regions in which homeowners associations are the most popular new form of development (decidedly Green Zones), it is becoming increasingly difficult to identify spaces anywhere outside of the central cities that are publicly accessible or utilized in the way that the streets of Chicago are.[305]

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303. *See supra* text accompanying notes 159-162. Under current Supreme Court doctrine, neighboring residents would not be able to challenge street closings except by showing racially discriminatory intent. *See* City of Memphis v. Green, 451 U.S. 100 (1981) (holding that absent discriminatory intent, African-American residents of city were foreclosed from challenging street closings as a violation of the Equal Protection Clause). In *City of Memphis*, the residents of an all-white enclave, Hein Park, sought to close a street to traffic heading toward a predominantly African-American neighborhood. The city argued that the street closing would reduce traffic flow, increase safety to children, and diminish "traffic pollution." One thousand citizens presented a petition to the city council in opposition to the street-closing proposal. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 306 (1997).

304. *See* Chicago v. Morales, 527 U.S. 41, 56-60 (1999).

305. One commentator has described as an "attack" on downtown streets the networks of raised pedestrian bridges, people movers, and tunnels that allow individuals to avoid the city street altogether when moving from their car to their office to the mall and back to their cars. *See* Boddy, *supra* note 162, at 150. Boddy observes that these skyways and tunnels have created an "analogous city" that allows predominantly middle-class whites to avoid "the last

Green Zones, like BIDs and other controlled spaces, are not public, if public means something more than who owns the street. Public space implies access, a sense that the streets and sidewalks are, as Carol Rose writes, places in which the people can assert "collective public rights."[306] Streets and sidewalks are valuable because they are used by "indefinite and unlimited numbers of persons — by the public at large"[307] and are not managed (as Green, Yellow, and Red Zones would be) by the government, or (as BIDs and private streets are) by a nongovernmental or quasi-governmental association. Inherently public space is space that "lends itself to activities that are somehow sociable or socializing — activities that allow us to get along with each other."[308] A democratic, pluralist city needs these loci of interaction, the places for bumping up against people that are different from us. In contrast, the Red-Yellow-Green Zoned city — where we all live among people who agree with us — does not. In that associational city, we do not need to get along with each other because we already live in neighborhoods of like minds, sorted by invisible boundary lines that create and define the spaces in which we live.

It is difficult to call these zoned spaces a success for participatory self-government, to hold them up as exemplars of civic-minded localism. There is an increased distance between neighbors and between neighborhoods, as is illustrated by the popularity of gated communities, homeowners associations governed in every detail by prearranged contracts, and BIDs that take over city services and ensure territorial security. These institutions indicate an alienation from, as opposed to an enabling of, civic life. The well-defined lines between "us" and "them" in zoned space indicate the failure of old-fashioned local governance, the inability for individuals to solve disputes or govern each other at close quarters, and the atrophying of the social competencies of the neighbor.

The dualist account of community welcomes the construction of little republics. The vitality of these little republics as true loci for participatory governance, however, requires robust state intervention of

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zone of physical contact" between people of diverse ethnic and racial backgrounds — the public street. *Id.* at 150-51. Boddy further states:

> Precisely because downtown streets are the last preserve of something approaching a mixing of all sectors of society, their replacement by the sealed realm overhead and the underground has enormous implications for all aspects of political life. Constitutional guarantees of free speech and of freedom of association and assembly mean much less if there is literally no peopled public place to serve as a forum in which to act out these rights.

Id. at 125.

306. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 774 (1986).

307. *Id.*

308. *Id.* at 776.

the kind that is unlikely to materialize and that, if it did materialize, would undermine the very localism that it seeks to foster.

III. ALTERNATIVE LOCALISMS

We conceive of localism in vertical terms, as describing a set of progressively nested authorities and the relationships between them. Yet, as this Article has argued, the definitional work of "community" is accomplished intersticially — at the borders *between* places. The legal rules for incorporating or excluding others generate both a community's identity and its claims to self-govern. From this vantage, localism describes the formation of neighboring communities and the horizontal relationships between them. If it is the case that community (as a normative concept) and communities (as a descriptive one) are products of contested boundary-creating norms in demarcated space, then the choice for courts and policy-makers is not between respect for the local or the force of the universal, but between the competing force of alternative localisms.

The local is an entrance control, a threshold that may or may not require a normative ticket to be crossed. How the issue is framed is quite important. The vertical question — "In which forum should this decision be made?" — is vastly different from the horizontal question — "What kinds of entrance controls are appropriately employed to create a community?" The current doctrine asks the first question, which produces answers that depend on the vertically defined unit of government one happens to trust at a given historical time. A coherent answer to the latter question requires a new vocabulary, one that explicitly recognizes law's role in constituting social space and the reciprocal relationship between space and community.

Here I offer some conceptual guideposts in thinking about this new vocabulary. First, I argue that the language of individual rights is an inadequate means of addressing the problems of exclusion and community formation. The contest over the boundaries of community is obscured when claims of belonging are translated into individualized assertions of constitutional right. Second, I suggest a prominent role for an anti-exclusion principle that is attentive to the spatial effects of local entrance controls. This principle looks back to a time when it was possible for a court to strike down the types of zoning regimes we now take for granted because they served "to classify the population and segregate them according to their income or situation in life,"[309] and it

309. Ambler Realty Co. v. Vill. of Euclid, 297 F. 307 (D.C. Ohio 1924).

looks forward to the formation of new doctrinal tools that can begin to dismantle the superstructure of segregated space.[310]

A. *From Rights to Belonging*

The dichotomy of respect/force, deference/paternalism is a product of a vertical conception of localism. There are only two possible exercises of centralized power in relation to a locality conceived of as an inferior rung on a ladder of authorities. The central power can either defer to local norms or override them. Proponents of the Gang Congregation Ordinance demanded the first exercise of federal power, charging that the federal courts should not have interfered with the norms adopted by the residents of Chicago's inner-city neighborhoods, but instead should have deferred to the neighborhoods' lawmaking.

Perhaps surprisingly, localism arguments are not federalism arguments, though the themes sounded by those in favor of broader state's rights are often articulated as a general suspicion of centralized power. Neighborhood constitutionalism does not look primarily to the Constitution's structure for support, but instead draws upon substantive theories of the benefits of decentralized authority, local autonomy, and community self-determination. Indeed, the substantive defense of localism strongly implies not only that federal power should not interfere with local norms, but also that federal power should be used to prevent other centralized governments from interfering as well. Despite the fact that local governments do not have any official constitutional status,[311] a substantive localism requires that federal power be employed to prevent states from overriding municipal norms or even to prevent cities from overriding neighborhood norms.[312] The logic of

310. For a post-integrationist theory based on the concept of racially identified spaces, see Richard T. Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1388-92 (1997).

311. The standard view is that municipal corporations are "instrumentalities of the state," *see* EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 1.58 (3d ed. rev. 1987), and have no sovereign status independent of the state. Thus, the state legislature could alter or eliminate municipalities at any time, like any other agency of the state. The view that local governments are instruments of the state is traced to John F. Dillon's 1872 *Treatise on Municipal Corporations*, in which Dillon asserted that "[a]ll corporations, public and private, exist and can exist only by virtue of express legislative enactment, creating or authorizing the creating of the corporate body." JOHN F. DILLON, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 52 (1872). "Municipal corporations are created by legislative act." *Id.* at 95. What has become known as "Dillon's Rule" — that state enabling statutes are to be strictly construed, *see id.* at 101-03 — is the accepted wisdom today.

312. David Barron has recently made a related argument in the context of state-city relations. *See* Barron, *supra* note 34, at *passim*. Barron suggests that *Romer v. Evans*, 517 U.S. 620 (1990), which struck down a Colorado constitutional referendum that prevented the state's localities from enacting antidiscrimination ordinances protecting gays and lesbians, can be read in the context of a line of cases in which the Court has struck down state attempts to control the political discretion of towns and cities in the service of enforcing constitutional norms. *See id.* at 492-93.

neighborhood constitutionalism requires that states defer to city norms, that cities defer to neighborhood norms, and that neighborhoods defer to block-level norms as long as the criteria for deference are met.[313]

The standard counter to the assertion of local autonomy is the "rights response." Federal and state power should be used to override local laws when they conflict with constitutional rights. Thus, opponents of the Gang Congregation Ordinance repeatedly argued that "bedrock" constitutional rights cannot be waived by majorities at any level of government.[314] Rights, guaranteed and enforced by a vertically higher unit of government, protect the individual from oppressive local regimes. The state should defend individuals from local majorities that have turned tyrannical. The archetypal image of the rights response to the assertion of localism is of the African-American child attending a Little Rock high school flanked by United States marshals and federal troops.

Proponents of the Gang Congregation Ordinance have reversed this image, arguing that because the normally oppressed minority community is now the local community, federal power in *Morales* is on the wrong side. In this instance, localism is being used as what Joan Williams calls a "forum shifting" strategy.[315] The proponents of the ordinance argue for increased deference to local decisionmaking, shifting the forum for regulation of the public street to the neighborhood and away from federal courts because the federal government can no longer be trusted to protect minority neighborhoods.

The rights response presupposes a localism conceived of as the relationship between nested vertical authorities. The debate is joined at a point of conflict, between deference to local norms and the force of a universalized right. But this response already concedes too much. By asserting the individualist trump, the rights response has in fact already accepted the challenge of working out the terms of deference to the community even if it ultimately results in no deference at all. If we take a step back, prior to this conflict between community and individual, we see that the initial forceful legal act is not the overriding of local norms by a federal power protecting individual rights, but the

313. Thus, proponents of the Gang Congregation Ordinance do not invoke principles of federalism, but something closer to the *opposite* of federalism: the Supreme Court should have reversed the Illinois Supreme Court (which had held that the ordinance was unconstitutional) because the constitutional dictates of the *federal* polity *require* that certain kinds of local communities be granted autonomy to adopt norms that differ from the state at whatever level. Mark Rosen's argument that "liberalism demands that certain communities be given powers to self-govern of the sort that would require some constitutional nonuniformity," Rosen, *supra* note 43, at 1190, certainly implies this position.

314. *See* Alschuler & Shulhofer, *supra* note 9.

315. Williams, *supra* note 29, at 87-90 (describing "forum shifting" in the local government context as shifting political power among different levels of government).

adoption of a particular localism to the exclusion of other possible alternative localisms. The hardest questions are not *vertical* — choosing between respect of the local or the force of the national (or universal) — but rather *horizontal* — choosing between one iteration of the community and numerous other possible iterations of the community.

Warth is a good example both of this choice of localisms and the limits of the rights response as a counter to the assertion of local autonomy. The Court's holding that Rochester residents did not have standing to contest Penfield's adoption of an exclusionary zoning regime relied on the conclusion that the Rochester petitioners had no interest in Penfield because as nonresidents they were not subject to or affected by Penfield's zoning laws. By extension, they also had no say in the adoption of Penfield's zoning laws. By rejecting the Rochester petitioners' standing claims, the Court was not simply embracing an existing status quo; it was defining the appropriate community of normatively entitled persons. It was engaging in the forceful act of privileging one localism among many, a localism predicated on naturalized jurisdictional boundaries.

But what if the Court conceived of the relevant community as more than just the territorially defined residents of Penfield? What if the Court imagined a localism that was not defined in terms of a geographically defined territory but in terms of substantive interests, in this instance in terms of a temporally defined space? In granting standing to potential residents of Penfield (who now live in Rochester), the Court could have created a jurisdiction across time (encompassing current and future residents of Penfield) instead of reifying the jurisdiction that it presumed existed across a particular space (residents of Penfield).

This temporal conception of what constitutes the relevant locality for standing purposes is one possible version of an interest-based localism that is actually more "local" in light of the cross-border and cross-temporal impact of Penfield's exclusionary policies. That is, it more accurately reflects local interests — the interests of those individuals most directly affected by the particular regulation. The Court need only have reconceived the relevant standing community as slightly more encompassing than the existent territorially defined community.

This conception of a localism of interests is one of the animating ideas behind proposals for cross-border voting in local elections.[316] Under a cross-border voting regime, residents of each locality in a region have a number of votes that they can cast cumulatively in any local election in a metropolitan region.[317] The purpose of cross-border

316. Professors Frug and Ford are the leading advocates of such proposals. *See* Frug, *supra* note 17, at 324-25; Ford, *supra* note 165, at 1909-10.

317. *See* Frug, *supra* note 17, at 324-25.

voting is to reorient the local around interests, to make local government boundaries less rigid and more "permeable."[318] For example, a cross-border voting regime would allow potential residents of Penfield who want to move to Penfield to allocate their votes to Penfield office seekers who promise to eliminate exclusionary zoning laws. If exclusionary zoning in Penfield is not an important issue to Rochester residents, then they might allocate only one vote to a Penfield office seeker and their remaining votes to a Rochester office seeker who might be promising, for example, better schools in Rochester. Each individual in the region would have a say not only in what norms should have priority, but also to which locality of interests each wanted to belong.

Cross-border voting is problematic for a variety of reasons and likely a political nonstarter.[319] But the proposal highlights an intriguing alternative to the current assumptions about the relevant local political community, a thorny issue that the *Warth* Court avoided by assuming it away. By including the potential residents of Penfield in its conception of who counted as a member of the relevant political community, the Court had an opportunity to define a localism of interests. The relevant local jurisdiction could be termed "Penfield plus those who want to live in Penfield" or "Penfield and Rochester minus those who do not want to live in Penfield." Again, because the impact of local exclusionary zoning regimes fall most heavily on those in the mobility market,[320] this alternative localism would actually better reflect the values of local control by affirming the power that those most affected by norms should have to adopt, challenge, and change those norms.

I am not suggesting that we manipulate borders to give all interested persons in a region the franchise, nor that we restructure local governments on a regional scale by moving geographical boundaries outward. What I am arguing is that the current vertical conception of localism structures the choice for courts as one between the "local" and the "central," when in fact the relevant community is always an

318. *See* Ford, *supra* note 165, at 1909.

319. There are obvious problems implementing cross-border voting regimes, not least of which is the resistance of voters and candidates to think in cross-border terms. A further drawback is the possibility that cross-border voting will merely move the relevant battles over the distribution of local entitlements to the regional level. There is little evidence that regional bodies will be more responsive to the distributive consequences of local government entitlements. *See* Zelinsky, *supra* note 192, at 665-68 (arguing that regional and state institutions have shown little willingness to alter the distribution of local government entitlements). Indeed, even fundamental shifts of local entitlements top-down by courts or state legislatures may have little effect on resistant local governments. *See, e.g.*, Boger, *supra* note 167, at 1450 (discussing suburban localities' resistance to the New Jersey Supreme Court's Mount Laurel decision invalidating local exclusionary zoning laws); Roisman, *supra* note 167, at 1387-89 (same).

320. *See supra* text accompanying notes 187-189.

explicit political choice that exists in relation to (and to the exclusion of) other equally plausible alternative communities. I am therefore suggesting that when courts are faced with a choice among alternative localisms they do not accept the default of jurisdictional boundaries, as if those boundaries are neutral. Rather, courts should recognize that the boundary-creating norm at issue creates the relevant local community. It is not enough to say that one favors the local; all the work is still to be done in defining *which local.* In a world in which the local is based on interests rather than on territory, the Rochester plaintiffs in *Warth* would be allowed at least to state a claim that they are part of the relevant community, if not make it to a jury on that question.

Obviously, the *Warth* Court did not approach the case through a localism lens. The Rochester petitioners did not assert what could be called a horizontal claim — a claim that they *belonged* to the relevant community and thus should have a say in the norms that the community adopted. Rather, they asserted a vertical claim — that their rights as members of a more encompassing political community trumped the local norm. This was the best they could do to make their claims legally cognizable, but it put the Court in the position (as all rights responses do) of choosing between respect for local laws or the force of federal rights.

Because the rights response does not contest the assertion of community — it simply asserts a superior normative claim backed by a more powerful political authority — it is seriously limited as a response to assertions of local autonomy. It cannot articulate harms that inhere in the definition of the community itself, that is, harms that spill over the boundaries of a neighborhood but that are caused by norms that technically do not apply outside the jurisdiction's lines. And the rights response is easily defeated, as it was in *Warth*, with the simplest of standing questions: How can an individual's rights be violated if that individual is not subject to the laws of the jurisdiction? The problem for the Rochester petitioners is that they could never articulate a specific individual harm sufficient to override the local norm embedded in a local government geography that put them on the wrong side of the jurisdictional line. That is because the injury complained of was that the boundary-creating norm itself — exclusionary zoning — put them there in the first place.

A "claim to belong" is not readily cognizable. Yet, the language of belonging is meant to focus attention on the formation and definition of community in the first instance. In contrast to the rights response, which conceives of rights as trumps deployed on behalf of the individual from a place conceptually "outside" the community, a claim of belonging challenges the implicit opposition between community and individual — and between inside and outside — by redescribing the community. A claim to belong challenges the contours of the relevant political community and the entrance controls used to define it.

Warth nicely illustrates how a claim to belong is incoherent when translated into the language of rights as trumps, and how demands for inclusion in the relevant political community look like "mere" preferences to join. The lesson can be applied to *Kessler* and *Smith* as well. In *Kessler*, the Second Circuit faced an explicit choice between alternative localisms in the form of a voting rights claim brought by the non-property owning residents of the Grand Central BID. As in *Warth*, the issue for the court was framed in terms of a choice between deference to a local rule and the force of federal power employed in the vindication of individual rights. The real choice, however, was between alternative localisms, the simplest being a localism in which the non-property owning residents were included by being granted equal voting rights. Other alternative localisms might grant the franchise (and thus membership status) to employees who work full-time in the BID zone, regardless of where they live, or to all New Yorkers who have an interest in the BID. These localisms are equally as plausible as the one the Second Circuit panel chose.

By restricting the franchise to property owners, the court chose a localism that required it to interpret the BID's powers as insubstantial, unobtrusive, and inconsequential to practically anyone, inside or outside BID lines. The court adopted this emaciated version of sublocal governance as a way of cabining the effects on outsiders of the drawing of BID territorial lines — "outsiders" who would, if affected enough by BID policies, become "insiders." The court's decision was therefore informed by a privatized, managerial model of the BID that masked any alternative localism that would include these heretofore outsiders. These alternative localisms are only visible if the BID is viewed as a potential site for genuine collective governance, and if BID activities are understood as not just occurring in public but as *creating* the public.

Again, the harm done to the non-property owning residents in *Kessler* cannot be sufficiently expressed in terms of individual rights; the claim to belong is a collective harm, an assertion of a countercommunity. In contrast to the right to vote, a right to belong is incoherent. Such assertions of belonging are, as the *Warth* Court found, mere preferences to be included, not rights that a court can vindicate.

The same can be said of the "metaphysical" harm asserted by the plaintiffs in *Smith* from the construction of an eruv in their neighborhood. The eruv harmed the plaintiffs by demarcating social space in such a way as arguably to eliminate or overwhelm an alternative community with which the plaintiffs identified and belonged, one without a religious "aura" or "designation." Of course, the two emergent alternative localisms — non-religiously identified and religiously identified — did not come into view until the Orthodox Jewish community attempted to define a social space for themselves. The choice between alternative localisms was not even apparent to residents of

the neighborhood until the boundary-creating norm literally and figuratively demarcated the social space in which they lived. Indeed, the demarcated space of the eruv comes into view only if one shares in the normative commitments of the observant Jewish community.

The eruv is an invisible space, but no more invisible than jurisdictional lines defined territorially through zoning or conceptually through limitations on the franchise. Like the exclusionary zoning regime in *Warth* and the property qualification in *Kessler*, the eruv creates a wall — a jurisdictional boundary where territorial defense and community definition are perceived of as coextensive. The eruv territorializes by defining a particular geography as normatively significant. It emphatically constitutes an act — albeit small — of jurisdictional arrogation.[321] Of course, the eruv is much more permeable than the boundaries in *Warth* and *Kessler*. In fact, it can be said in *Smith* that two boundary regimes coexist in one space: an Orthodox Jewish, religiously identified regime demarcated by the eruv, and a secular, nonreligiously identified regime demarcated by the jurisdictional boundaries of the town.[322]

Which brings us back to *Morales*. The battles over turf in the inner-city neighborhoods of Chicago are equally battles over authority and conflicts over space.[323] In *Smith*, the non-Orthodox residents' fear of being crowded out is real, just as in *Morales*, the nongang residents' fear of being crowded out is being realized. And, in both cases, there are valid claims on the part of the minority that its use of the same space is entitled to respect. Once again, assertions of individual rights fail to capture the nature of the conflict. In *Morales*, competing claims to belong cannot be resolved with reference to one or the other's

321. Davina Cooper notes that the North London eruv was destabilizing to area residents in part because "it resituated religious law within public decision making, and constituted religious law as a legitimate basis for public action." Cooper, *supra* note 242, at 50. *But cf.* Weizman & Herz, *Between City and Desert*, *supra* note 233 ("It would be wrong to suggest that the eruv constitutes a form of signifactory imperialism, for, paradoxically, it is only imperialism which insists that an object can mean only one thing, and that a boundary must be observed by everyone. In the polyglot, multicultural city, readings of space and place do not have to be linked to territory and urban organization; the act of communal interpretation brings to the urban fabric an increase of meaning, rather than a reduction. At the heart of this problem is not the question of imposing upon urban space an obscure religious practice, but rather the willingness of city authorities to sanction the city as the site of multiple readings.").

322. *Cf. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (striking down on Establishment Clause grounds a statute creating special school district for religious enclave of Satmar Hasidim, practitioners of strict form of Judaism). In *Kiryas Joel*, unlike in *Smith*, the school district boundary and the religiously infused boundary were coextensive, not merely overlapping. Perhaps that accounts for their differing legal treatment under the Establishment Clause.

323. For an interesting account of an analogous conflict over space and territory between college students and nonstudents in Boulder, Colorado, see Lynn A. Staeheli & Albert Thompson, *Citizenship, Community, and Struggles for Public Space*, PROF. GEOGRAPHER, Feb. 1997, at 28-38.

claim to be legitimate. Yet, our current localism, so strongly tied to a defensible territory, is preoccupied with the drawing of jurisdictional and literal boundaries that define "us" on one side of the geographical line and "them" on the other side. The individual rights framework and its corresponding doctrine ultimately fails to capture what is at stake.[324]

B. *Toward a Doctrine of Local Citizenship*

The capacity to imagine alternative localisms is hampered by the absence of a doctrinal framework for analyzing entrance controls on the one hand and claims to belong on the other. What does a doctrine of local citizenship look like? A hint can be found in another opinion authored by Justice Stevens and handed down one month before *Morales*. In *Saenz v. Roe*,[325] the Court, in a 7-2 decision, struck down a California statute that limited the amount of welfare benefits newly arrived families in the state could receive. For one year after his or her relocation to California, a newcomer's benefits would be limited to the amount he or she would have received in the state of prior residence. The Court held that the statute violated the respondents' constitutionally protected right to travel by creating an impermissible discriminatory classification based on length of residence in the state. Holding that the right to travel "embraces the citizen's right to be treated equally in her new State of residence," the Court forcefully affirmed the right of "[c]itizens of the United States, whether rich or poor . . . to choose to be citizens of the State wherein they reside."[326]

Saenz holds that states cannot erect entrance controls that serve as barriers to entry for certain kinds of residents, namely poor newcomers. The right to travel, wrote Justice Stevens,

> embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like any other citizens of that State.[327]

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324. In *Morales*, this doctrine is a vagueness analysis that appears to be both unrealistically expansive and yet easily circumvented. Indeed, despite the seemingly powerful reach of the plurality's vagueness analysis and the expansive rhetoric of Stevens's opinion, Justice O'Connor seemed to have little trouble drafting revised language that could — at least for her purposes — avoid any future vagueness concerns. As indicated above, O'Connor's language was adopted by the city council in a subsequent version of the ordinance. *See supra* note 7.

325. 526 U.S. 489 (1999).

326. *Id.* at 505, 510-11 (internal quotations omitted).

327. *Id.* at 500.

Reinvigorating the long-dormant Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment, the Court held that those clauses were the source for a citizen's right to "go to and reside in any State he chooses" and to enjoy the full privileges of citizenship afforded to all residents.[328] The Privileges and Immunities Clause " 'does not provide for, and does not allow for, degrees of citizenship based on length of residence.' "[329]

Contrast *Saenz*'s articulation of the right of the citizens of the United States to choose their state of residence with *Warth*'s holding that the citizens of the several states do not have standing to assert a right to choose their locality of residence. In *Saenz*, the choice to move from one state to another is not merely a preference, but a right that cannot be burdened even by a slight differential in welfare benefits for a period of one year. In *Warth*, however, the Rochester residents' assertion of a right to be able to choose to live in Penfield is consigned to the pile of mere "preference;" the complete absence of a choice (let alone a minimal burden on that choice) is not a cognizable injury under Article III.

What is quite stunning is the radical disjuncture between *Saenz*'s rigorous attack on a statute that would make it marginally less attractive for poor residents from other states to move to California and *Warth*'s equally rigorous defense of an exclusionary zoning regime that makes it virtually impossible for poor residents from a nearby town to move into Penfield. Both California's "waiting period" welfare statute and Penfield's fiscal zoning operate as entrance controls that deter poorer newcomers from entering the jurisdiction. In both cases the boundary regime favors current residents over potential residents. Yet in *Saenz* the Court articulates a powerful right on behalf of potential citizens to choose to enter — to be included — while in *Warth* the Court articulates an equally powerful right on behalf of current residents to eliminate the possibility of entrance — to exclude.[330]

Doctrinally, *Saenz* and *Warth* can coexist because local governments do not have any articulated constitutional status, let alone the kind of status that states have in the federal system. Whereas the newcomer welfare recipients in *Saenz* can invoke a constitutional relation-

328. *Id.* at 502 (internal quotations omitted).

329. *Id.* at 506 (quoting Zobel v. Williams, 457 U.S. 55, 69 (1982)).

330. Roderick Hills might argue that the difference between *Saenz* and *Warth* can be explained by the Court's unease with allowing states to act like "affective communities." *See* Hills, *supra* note 77, at 312-14 (arguing that it is appropriate for the Court to reject state discriminatory policies against newcomers if those policies are intended "to perpetuate the state's current demographic composition for the sake of social or cultural cohesion"). On Hills's theory, the concept of national citizenship is threatened if the states are allowed to behave as affective communities, though not if neighborhoods or local governments are. *See id.* Hills does not explain, however, what happens if a state is entirely constituted of affective communities that enforce entrance controls up to the state's borders.

ship between the states and the federal government that arguably requires a right to entry for citizens of the United States into each of the several states, the Rochester petitioners in *Warth* have no such relationship to invoke and thus must wedge their claims to be included into the poorly fitting framework of the Equal Protection Clause, with its rigorous intent requirement.[331] The default of local entrance controls can be taken for granted by the *Warth* Court because there is no constitutional doctrine of local citizenship. Localities are all but invisible to the Constitution;[332] the irony is that this very invisibility provides them with a power to exclude that even states — at whose sufferance localities are said to exist — cannot exercise.

The Court's treatment of California's state-wide entrance control provides one possible model for local citizenship. Indeed, the *Saenz* Court's suspicion of entrance controls at the state level should also hold for those entrance controls that operate at the local level. *Saenz* is animated in part by an objection to the creation of multiple levels of citizenship tied to one's status as a newcomer, a system that turns both on one's relative level of poverty and on one's length of stay in a place. The vocabulary of caste infuses the opinion, as does the counter-vocabulary of citizenship.[333] That counter-vocabulary emphasizes that

331. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); City of Memphis v. Green, 451 U.S. 100 (1981).

332. This argument shares Professor Williams's view that local government is "constitutional[ly] vulnerable." Williams, *supra* note 29, at 87-90. Williams argues that local government is "vulnerable" because there has never been a "thoughtful discussion in American law about the role of cities qua cities [in my terms: "localities qua localities"] within the federal structure." *Id.* at 152. Because our constitutional doctrine has failed to articulate the role of localities in the federal system, the contours of local power are defined by which other power in the federal system — municipal, state, or federal — we want or do not want to constrain. Thus, Williams argues that judges and commentators have used the status of local government throughout history as a kind of cipher to express their beliefs about government power in general. For example, Williams argues that the competing views of municipal power offered in the nineteenth century — Thomas Cooley's "inherent local government sovereignty" and John Dillon's "local government as creature of the state" — reflected those thinkers' distrust of state power (Cooley) and municipal power (Dillon). *See id.* at 87-100. Williams also argues that the Burger Court's "quasi-constitutional" doctrine of local autonomy articulated in *Warth* (which, like Cooley's, embodies an idea of local sovereignty) reflected that Court's distrust of federal power, and that Justice Brennan's doctrine of municipal liability reflected Brennan's fears of government power in general. *See id.* at 121-38. Similarly, it could be argued that the proponents of the Gang Congregation Ordinance have adopted a form of localism that sees neighborhoods as autonomous entities in order to constrain federal and state power because that power is preventing realization of certain policy goals, namely the development of street-level norm enforcing policing.

333. *See* 526 U.S. at 503-04 (quoting Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394 (1872) (Bradley, J., dissenting)) (" 'The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses. . . . He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.' "); *id.* at 506-07 (stating that the Privileges and Immunities Clause does "not tolerate a hierarchy of 45 subclasses of similarly situated citizens based on the location of their prior residence."); *id.* at 507 (stating that "the State's legitimate interest in saving money provides no justification for its decision to discriminate among

one's status as belonging to a community should not turn on whether one's family has been here for generations or for only a day. It is a decidedly immigrant-friendly and integrationist vocabulary that rejects the idea that jurisdictional lines defining prior-in-time residents should be accompanied by entitlements to exclude. In short, *Saenz* rejects the idea that there is — or should be — an "us" and a "them" defined by state jurisdictional boundaries.

Of course, the right to travel is an unsatisfying articulation of this more general geographical anticaste principle.[334] The injury in *Saenz* — like all boundary-created injuries — is insufficiently captured by the rights response. Instead, the injury can be described as the injury of outsider status — as a claim to belong. This injury should be a familiar one. It has been at the center of this country's struggle with slavery, a basis for the challenge to Jim Crow, and a foundation for civil rights.

Yet, despite these advances, the problem of the color line has not been solved; it has instead recoalesced as the problem of differentiated space.[335] Invisible jurisdictional lines now do the work of de jure segregation.[336] Indeed, outsider status is the central achievement of the successfully zoned metropolitan region. The Red-Yellow-Green Zones of the metropolitan area are a literal manifestation of how boundary-creating norms invariably define community in opposition to some other place where "they" do not share "our values" or "our way of life."

The process of imagining alternative localisms must begin with the recognition that what is called "local" is always "interlocal." The norms of community are a result of a complex social, political, legal, and spatial dynamic between localities and one's placement in social

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equally eligible citizens."); *id.* at 511 ("The States . . . do not have any right to select their citizens.").

334. *Cf.* Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT 257, 258 (1996) (grounding the Court's decision in *Romer v. Evans*, 517 U.S. 620 (1990), in an anticaste principle). The rhetoric of *Romer* is similar to the rhetoric of *Saenz*, particularly the notion that a state "cannot . . . deem a class of persons a stranger to its laws," nor "make them unequal to everyone else." It is "not within our constitutional tradition' to enact laws "declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government." *Romer*, 517 U.S. at 625. Justice O'Connor's "endorsement test" in the Establishment Clause context also embodies what Farber and Sherry call the "Pariah Principle." *See* Farber & Sherry, *supra*, at 258. In Justice O'Connor's view, the government can neither "send a message to nonadherents [to a particular religion] that they are outsiders, not full members of the political community," nor "mak[e] adherence to religion relevant to a person's standing in the political community." *See* Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

335. *See* John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1233-40 (1995); Ford, *supra* note 165, at 1844; Ford, *supra* note 310, at 1388-92.

336. *See* Ford, *supra* note 310, at 1392.

space indicates one's status as an insider or outsider, stakeholder or nonstakeholder, citizen or noncitizen. We should be skeptical of local autonomy when it is asserted in defense of exclusion and backed by state power, and when it serves the purposes of metropolitan area-wide segregation. Thus, a doctrine of local citizenship would assess all entrance controls for their caste-creating and -enforcing propensities. As in *Saenz*, territorial discriminations that function to create degrees of citizenship should receive careful judicial scrutiny. Enforcing a substantive claim not to be excluded from vast parts of the metropolitan region would go a long way toward dismantling the existing spatial order.

CONCLUSION

This Article has sought to place the Gang Congregation Ordinance in the context of that spatial order and to challenge it. *Morales* is a provocative case because it defies the usual assumptions about who benefits from decentralized government. It is also a hard case: there is no question that gang violence requires a powerful response from the state.

The wise response to the complex social problems afflicting our inner-cities, however, is not to mimic and reinforce the zoned spaces of the metropolitan region by adopting the same version of local autonomy that allows these spaces to flourish. The answer to the problem of gang violence in the inner city is not "more localism," but rather a rethinking of how that localism has already been deployed to reinforce existing distributions of crime, municipal resources, and social, economic, and symbolic capitol. The neighborhoods of inner-city Chicago have already lost the metropolitan-area spatialist game, and they will continue to do so as long as localism is equated with territorial defense.

We live in a society that relies heavily on boundaries. The Gang Congregation Ordinance is the unfortunate outcome of — and is modeled on — this boundary-creating impulse. Instead of an inclusionary concept, community has become a mechanism for building high normative and literal walls in legal, social, and physical space. The rhetoric of community has been employed to defend the current allocation of resources, and for the most part that rhetoric has been extremely successful for those who live in the vast Green Zones outside the inner city. Indeed, the arguments for local power to depart from constitutional norms merely serve to reinforce the separation and isolation of the inner-city community and to stigmatize it — an actual undermining of the rule of law which, as Robin West writes, oper-

ates as a "bulwark against our human tendency" to claim that "some but not others are members of our community of equals."[337]

That is not to say that the problem of the "local" in society has an easy solution. Local government theorists, like many legal and political theorists, have sought ways to reconcile our need for existing within groups of our own making with our obligations to a wider citizenship, to reconcile the requirements for maintaining community in the "little platoons"[338] to which we belong and the requirements for maintaining community within the larger society. This project is not likely to be completed soon. Indeed, the boundary problem of local government law — the problem of pluralism — has no ready answer.

The purpose of this Article has been to try to imagine something other than the current platoons to which we are attached in a particular spatial and temporal place — the metropolitan areas of the postmillennial United States. Existing assumptions about the foundations of local government prevent us from imagining ourselves on the other side of the normative wall, from understanding that "our" community could be otherwise. A lack of imagination characterizes the apparent opposition between the city and suburb in *Warth*, between religious and nonreligious residents of the same town in *Smith*, and between property owners and non-property owners in *Kessler*. This same lack of imagination characterizes the oppositions between all neighborhoods, however defined, in a city that would require one particular neighborhood to waive (or contemplate waiving) its constitutional rights because it has no alternative. By examining the thresholds between these communities and by beginning to debate the doctrinal criteria for assessing them, the law can better approach a solution to the troubling harms of the lines we draw around us.

337. Robin West, *Is the Rule of Law Cosmopolitan?*, 19 Q.L.R. 259, 276 (2000).

338. Robinson, *supra* note 13, at 269, 343 (quoting Edmund Burke).