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THE BOUNDARIES OF RACE: POLITICAL GEOGRAPHY IN LEGAL ANALYSIS

Richard Thompson Ford

TABLE OF CONTENTS

ARTICLE

THE BOUNDARIES OF RACE: POLITICAL GEOGRAPHY IN LEGAL ANALYSIS

*Richard Thompson Ford**

American jurists and legal scholars often assume that local governments are mere administrative conveniences that exist at the pleasure of state legislatures, and that local boundaries are entirely arbitrary and largely inconsequential. At the same time, the same people often treat local governments as if they were sacrosanct, "natural" entities. In this Article, Professor Ford exposes the equivocation that underlies the American law of local government, and traces it back to a tension between two opposing conceptions of "political space."

This conceptual equivocation is more than an academic embarrassment — it has profound consequences for race relations in America. Drawing on an economic model, Professor Ford demonstrates that, in a world in which racism had been eliminated, institutional inattention to the political character of space would result in the perpetuation of racial segregation with all of its attendant problems. What follows is a detailed discussion of the Supreme Court's local-government jurisprudence, from which it appears that the Justices' inability to sort out their conceptions of political space has a very real, and disturbing, impact on the life of the nation. Nor is the problem confined to the courts — it is also reflected in the normative political principles that inform judicial decisionmaking. But though the legal situation is troubled, Professor Ford is hopeful that it is not beyond repair. He identifies legal precedent for a sophisticated approach to the complexities of political space that could go some way toward solving the problem. The Article concludes with a series of proposals intended to show how the courts and the country might begin to chart a course toward the ideal of a racially desegregated society.

> During the 1970s and 1980s a word disappeared from the American vocabulary. . . . The word was segregation.
>
> DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID[1]

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[1] DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 1 (1993).

INTRODUCTION

It is now passé to speak of racial segregation. In an America that is facing the identity crisis of multiculturalism, where racial diversity seems to challenge the norms and values of the nation's most fundamental institutions, to speak of segregation seems almost quaint. The physical segregation of the races would seem to be a relatively simple matter to address; indeed many believe it has already been addressed. Discrimination in housing, in the workplace, and in schools is illegal. Thus it is perhaps understandable that we have turned our attention to other problems, on the assumption that any segregation that remains is either vestigial or freely chosen. But even as racial segregation has fallen from the national agenda, it has persisted. Even as racial segregation is described as a natural expression of racial and cultural solidarity, a chosen and desirable condition for which government is not responsible and that government should not oppose, segregation continues to play the same role it always has in American race relations: to isolate, disempower, and oppress.

Segregation is oppressive and disempowering rather than desirable or inconsequential because it involves more than simply the relationship of individuals to other individuals; it also involves the relationship of groups of individuals to political influence and economic resources. Residence is more than a personal choice; it is also a primary source of political identity and economic security.[2] Likewise, residential segregation is more than a matter of social distance; it is a matter of political fragmentation and economic stratification along racial lines, enforced by public policy and the rule of law.

Segregated minority communities have been historically impoverished and politically powerless. Today's laws and institutions need not be explicitly racist to ensure that this state of affairs continues — they need only to perpetuate historical conditions. In this Article, I assert that political geography — the position and function of jurisdictional and quasi-jurisdictional boundaries[3] — helps to promote a racially separate and unequal distribution of political influence and economic resources. Moreover, these inequalities fuel the segregative effect of political boundaries in a vicious circle of causation: each condition contributes to and strengthens the others. Thus, racial segregation persists in the absence of explicit, legally enforceable racial

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[2] "Housing denotes an enormously complicated idea. It refers to . . . a specific location in relation to work and services, neighbors and neighborhood, property rights and privacy provisions, income and investment opportunities . . . ." HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 3 (Roger Montgomery & Daniel R. Mandelker eds., 2d ed. 1979).

[3] By "quasi-jurisdictional boundaries" I mean the boundaries that define private entities that perform "governmental" functions. These entities, which exercise all the relevant power of governments, constitute an important part of political geography. *See infra* pp. 1880–85.

restrictions. Race-neutral policies, set against an historical backdrop of state action in the service of racial segregation and thus against a contemporary backdrop of racially identified space — physical space primarily associated with and occupied by a particular racial group — predictably reproduce and entrench racial segregation and the racial-caste system that accompanies it. Thus, the persistence of racial segregation, even in the face of civil rights reform, is not mysterious.

This Article employs two lines of analysis in its examination of political space. The first demonstrates that racially identified space both creates and perpetuates racial segregation. The second demonstrates that racially identified space results from public policy and legal sanctions — in short, from state action — rather than being the unfortunate but irremediable consequence of purely private or individual choices. This dual analysis has important legal and moral consequences: if racial segregation is a collective social responsibility rather than exclusively the result of private transgressions, it must either be accepted as official policy or be remedied through collective action.

Part I argues that public policy and private actors operate together to create and promote racially identified space and the racial segregation that accompanies it. In support of this assertion, I offer a hypothetical model to demonstrate that even in the absence of individual racial animus and de jure segregation, historical patterns of racial segregation would be perpetuated by facially race-neutral legal rules and institutions. I conclude the discussion in Part I by arguing that the significance of racially identified political geography escapes the notice of judges, policymakers, and scholars because of two widely held yet contradictory misconceptions — one that assumes that political boundaries have no effect on the distribution of persons, political influence, or economic resources, and another that assumes that political boundaries define quasi-natural and prepolitical associations of individuals. As we shall see, these two assumptions lead jurists and policymakers to believe that segregated residential patterns are unimportant to the political influence and economic well-being of communities, and that such residential patterns are beyond the proper ambit of legal and policy reform. These beliefs are often unstated, but they inform judicial decisions and the political and sociological analyses that underlie those decisions.

Part II demonstrates how racially identified space interacts with facially race-neutral legal doctrine and public policy to reinforce, rather than to eliminate gradually, racial segregation. Legal analysis oscillates between two contradictory conceptions of local political space, which correspond to the two misconceptions of space described in Part I. One regards local jurisdictions as geographically defined delegates of centralized power, administrative conveniences without autonomous political significance. The other treats local jurisdictions

as autonomous entities that deserve deference because they are manifestations of an unmediated democratic sovereignty. The first account avoids examination of the potentially segregated character of local jurisdictions by denying them any legal significance; the second, by reference to their democratic origins, or by tacit analogy to private property rights, or both. Thus, legal authorities that subscribe to either of these accounts never confront the problems posed by the many jurisdictions that are segregated or that promote racial segregation and inequality.

Two competing normative analyses mirror the doctrinal oscillation between the conception of local governments as agents of state power and the conception of local governments as self-validating political communities. One holds that local governments are powerless creatures of the state and prescribes greater autonomy for them. The other insists that local governments are powerful autonomous associations and advocates bringing the "crazy quilt" of parochial localities under centralized control.

The private law discussion in Part II explores parallels between cities and large, privately controlled concentrations of property. Because private as well as public institutions create and maintain racially identified spaces, and because both do so through the coercive power of government, it is impossible to segregate the "public" inputs, or state action, from the "private," or non-governmental, factors. A comprehensive policy of desegregation must confront both so-called "public" and "private" structures of racialized space.

Part III offers a provisional "map" or vision of a racially desegregated city and society. The Part first examines two competing theoretical perspectives on democracy in an effort to provide a normative framework for the legal analysis examined in Part II. One, which I will label "interest group pluralism," argues that democracy should be conceived of as a conflict between groups that compete for power in a political marketplace. The other, "republicanism," argues that democracy should be a forum in which citizens come together to debate ideas and ultimately to reach consensus.

Part III also returns to the original focus on race relations and suggests that the characteristic oscillation in local government doctrine informed by democratic theory is related to a particularly American conflict between the goals of racial and cultural assimilation on the one hand and separatism on the other. Neither assimilation nor separatism is fully acceptable, and race-relations theorists tend to waver between the two. The reification of political space thus mirrors a reification of race in American thought: either race is assumed to be irrelevant, merely the unfortunate by-product of an ignoble American past and a retrograde mentality, or it is assumed to be natural and primordial, a genetic or biological identity that simply is unamenable to examination or change.

Finally, Part III attempts to mediate the characteristic conflicts between local parochialism and centralized bureaucracy, pluralist competition and republican dialogue, and racial assimilation and racial separatism. In Part III, I sketch a few concrete reforms that might serve as the foundation of a racially desegregated society, and argue that the location of the politics of difference must be the metropolis, the political space in which the majority of Americans now reside, work, and enjoy recreation, and in which individuals confront racial, cultural, and economic differences. Against the nostalgia of the whole and the one, the "pure" homogeneous community, we should strive for the achievable ideal of the polyphonous democratic city.

I. CONCEPTIONS AND CONSEQUENCES OF SPACE

A. The Construction of Racially Identified Space

> Segregation is the missing link in prior attempts to understand the plight of the urban poor. *As long as blacks continue to be segregated in American cities, the United States cannot be called a race-blind society.*
>
> DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID[4]

This Article focuses primarily on residential segregation and on the geographic boundaries that define local governments. Although these are not the only examples of racially identified space, they are so intimately linked to issues of political and economic access that they are among the most important. Residence in a municipality or membership in a homeowners association involves more than simply the location of one's domicile; it also involves the right to act as a citizen, to influence the character and direction of a jurisdiction or association through the exercise of the franchise, and to share in public resources. "Housing, after all, is much more than shelter: it provides social status, access to jobs, education and other services . . . ."[5] Residential segregation is self-perpetuating, for in segregated neighborhoods "[t]he damaging social consequences that follow from increased poverty are spatially concentrated . . . , creating uniquely disadvantaged environments that become progressively isolated —

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[4] MASSEY & DENTON, *supra* note 1, at 3 (emphasis added).

[5] Rachel G. Bratt, Chester Hartman & Ann Meyerson, *Editors' Introduction* to CRITICAL PERSPECTIVES ON HOUSING at xi, xviii (Rachel G. Bratt, Chester Hartman & Ann Meyerson eds., 1986) (quoting Emily P. Achtenburg & Peter Marcuse, *Towards the Decommodification of Housing: A Political Analysis and a Progressive Program*, *in* AMERICA'S HOUSING CRISIS 202, 207 (Chester Hartman ed., 1983)).

geographically, socially, and economically — from the rest of society."[6] Local boundaries drive this cycle of poverty.

Both public and private actors laid the groundwork for the construction of racially identified spaces and, therefore, for racial segregation as well. Explicit governmental policy at the local, state, and federal levels has encouraged and facilitated racial segregation. The role of state and local policies in promoting the use of racially restrictive covenants is well known; less well known is the responsibility of federal policy for the pervasiveness of racially restrictive covenants. The federal government continued to promote the use of such covenants until they were declared unconstitutional in the landmark decision *Shelley v. Kraemer*.[7] Federally subsidized mortgages often *required* that property owners incorporate restrictive covenants into their deeds.[8] The federal government consistently gave black neighborhoods the lowest rating for purposes of distributing federally subsidized mortgages.[9] The Federal Housing Administration, which insured private mortgages, advocated the use of zoning and deed restrictions to bar undesirable people and classified black neighbors as nuisances to be avoided along with "stables" and "pig pens."[10]

Not surprisingly, "[b]uilders . . . adopted the [racially restrictive] covenant so their property would be eligible for [federal] insurance,"[11] and "private banks relied heavily on the [federal] system to make their own loan decisions . . . . [T]hus [the federal government] not only channeled federal funds away from black neighborhoods but was also responsible for a much larger and more significant disinvestment in black areas by private institutions."[12] Although the federal government ended these discriminatory practices after 1950, it did nothing to remedy the damage it had done or to prevent private actors from perpetuating segregation until much later.[13]

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[6] MASSEY & DENTON, *supra* note 1, at 2; *see also* ROBERT STAPLES, THE URBAN PLANTATION: RACISM & COLONIALISM IN THE POST CIVIL RIGHTS ERA 203–09 (1987) (arguing that segregation in ghettos is responsible for black poverty and despair).

[7] 334 U.S. 1 (1948).

[8] *See* CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 234–35 (1955).

[9] Federal mortgage underwriters were more concerned about racial demographics than they were about any other demographic trend. *See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 198–99 (1985); MASSEY & DENTON, *supra* note 1, at 52.

[10] ABRAMS, *supra* note 8, at 231; *see also* MASSEY & DENTON, *supra* note 1, at 50–53 (describing the practice of redlining).

[11] Martha Mahoney, Note, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251, 1258 (1990).

[12] MASSEY & DENTON, *supra* note 1, at 52.

[13] *See* MARK I. GELFAND, A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933–1965, at 221 (1975).

Racial segregation was also maintained by private associations of white homeowners who "lobbied city councils for zoning restrictions and for the closing of hotels and rooming houses . . . [,] threatened boycotts of real estate agents who sold homes to blacks . . . [, and] withdrew their patronage from white businesses that catered to black clients."[14] These associations shaped the racial and economic landscape, and implemented what might well be described as public policies, by private fiat. Thus, private associations as well as governments defined political space.

B. The Perpetuation of Racially Identified Spaces: An Economic/Structural Analysis

The history of public policy and private action in the service of racism reveals the context in which racially identified spaces were created. Much traditional social and legal theory imagines that the elimination of public policies designed to promote segregation would eliminate segregation itself, or would at least eliminate any segregation that can be attributed to public policy and leave only the aggregate effects of individual biases (which are beyond the authority of government to remedy).[15] This view fails, however, to acknowledge that racial segregation is embedded in and perpetuated by the social and political construction of racially identified political space.

1. Trouble in Paradise: An Economic Model. — Imagine a society with only two groups, blacks and whites,[16] differentiated only by morphology (visible physical differences).[17] Blacks, as a result of

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[14] MASSEY & DENTON, *supra* note 1, at 36.

[15] *See, e.g.*, 2 U.S. COMM'N ON CIVIL RIGHTS, ISSUES IN HOUSING DISCRIMINATION 4 (1986) (reporting the suggestion of Richard F. Muth, Chairman of the Department of Economics at Emory University, that the main cause of residential segregation is "that whites are willing to pay more for the occupancy of real property provided they reside in the vicinity of other whites").

[16] Although this Article's primary focus is on the position of blacks within a racially segregated political geography, much of the analysis herein will also be applicable to other racial minority groups. Nonetheless, black segregation is far more pronounced than the segregation of any other racial group. *See* Douglas Massey & Nancy Denton, *Trends in Residential Segregation of Blacks, Hispanics and Asians: 1970–1980*, 52 AM. SOC. REV. 802, 823 (1987). Moreover, racial segregation is an especially important factor in contributing to the concentration of poverty among blacks in particular. *See* Douglas S. Massey & Mitchell L. Eggers, *The Ecology of Inequality: Minorities and the Concentration of Poverty, 1970–1980*, 95 AM. J. SOC. 1153, 1185–86 (1990). Therefore my analysis will be of the greatest significance to black segregation.

This Article will use terms such as "racial minority" or "people of color" when its analysis has broader applicability, and will use more limiting terminology when the empirical or historical context is limited to a particular group. The goal throughout is to limit the object of the analysis whenever necessary and to leave open the possibility of broad applicability whenever appropriate.

[17] Race, in this hypothetical, is probably best thought of as caste: differences between whites and blacks, although immediately recognizable, are founded purely on socio-economic distinc-

historical discrimination, tend, on average, to earn significantly less than whites. Imagine also that this society has recently (during the past twenty or thirty years) come to see the error of its discriminatory ways. It has enacted a program of reform that has totally eliminated legal support for racial discrimination and, through a concentrated program of public education, has also succeeded in eliminating any vestige of racism from its citizenry. In short, the society has become color-blind. Such a society may feel itself well on its way to the ideal of racial justice and equality, if not already there.

Imagine also that, in our hypothetical society, small, decentralized, and geographically defined governments exercise significant power to tax citizens, and use the revenues to provide certain public services (such as police and fire protection), public utilities (such as sewage, water, and garbage collection), infrastructure development, and public education.

Finally, imagine that, before the period of racial reform, our society had in place a policy of fairly strict segregation of the races, such that every municipality consisted of two enclaves, one almost entirely white and one almost entirely black. In some cases, whites even reincorporated their enclaves as separate municipalities to ensure the separation of the races. Thus, the now-color-blind society confronts a situation of almost complete segregation of the races — a segregation that also fairly neatly tracks a class segregation (because blacks earn, on average, far less than whites, in part because of their historical isolation from the resources and job opportunities available in the wealthier and socially privileged white communities).

We can assume that all members of this society are indifferent to the race of their neighbors, co-workers, social acquaintances, and so forth. However, we must also assume that most members of this society care a great deal about their economic well-being and are unlikely to make decisions that will adversely affect their financial situation.

Our (hypothetical) society might feel that, over time, racial segregation would dissipate in the absence of de jure discrimination and racial prejudice. But let us examine the likely outcome under these circumstances. Higher incomes in the white neighborhoods would result in larger homes and more privately financed amenities, although public expenditures would be equally distributed among white and black neighborhoods within a single municipality. However, in those municipalities that incorporated along racial lines, white cities would have substantially superior public services (or lower taxes and the same level of services) than the "mixed" cities, because of a higher

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tions, not on cultural or linguistic divisions. Of course, race as caste is a simplification, but not so gross a one that it does not provide a useful analogy.

average tax base. The all-black cities would, it follows, have substantially inferior public services or higher taxes as compared to the mixed cities. Consequently, the wealthier white citizens of mixed cities would have a real economic incentive to depart, or even secede, from the mixed cities, and whites in unincorporated areas would be spurred to form their own jurisdictions and to resist consolidation with the larger mixed cities or all-black cities. Note that this pattern can be explained without reference to "racism": whites might be color-blind and yet prefer predominantly or entirely white neighborhoods on purely economic grounds, as long as the condition of substantial income differentiation obtains.

Of course, simply because municipalities begin as racially segregated enclaves does not mean that they will remain segregated. Presumably blacks would also prefer the superior public service amenities or lower tax burdens of white neighborhoods, and those with sufficient wealth would move in; remember, in this world there is no racism and there are no cultural differences between the races — people behave as purely rational economic actors. One might imagine that, over time, income levels would even out between the races, and blacks would move into the wealthier neighborhoods, while less fortunate whites would be outbid and would move to the formerly all-black neighborhoods. Hence, racial segregation might eventually be transformed into purely economic segregation.

This conclusion rests, however, on the assumption that residential segregation would not itself affect employment opportunities and economic status. But because the education system is financed through local taxes, segregated localities would offer significantly different levels of educational opportunity: the poor, black cities would have poorer educational facilities than the wealthy, white cities. Thus, whites would, on average, be better equipped to obtain high-income employment than would blacks. Moreover, residential segregation would result in a pattern of segregated informal social networks; neighbors would work and play together in community organizations such as schools, PTAs, Little Leagues, Rotary Clubs, neighborhood-watch groups, cultural associations, and religious organizations. These social networks would form the basis of the ties and the communities of trust that open the doors of opportunity in the business world.[18] All other things being equal, employers would hire people

[18] *See* Philip Kasinitz, *The Real Jobs Problem*, WALL ST. J., Nov. 26, 1993, at A8 ("The primary reason for ghetto unemployment is . . . the absence of social networks that provide entry into the job market."). Recently, scholars have begun to study and to refer to the value of social networks, under the name "social capital." Professor Robert Putnam describes social capital as "ties, norms, and trust transferable from one social setting to another. . . . [A] vigorous network of indigenous grassroots associations can be as essential to growth as physical investment, appropriate technology, or . . . 'getting prices right.'" Robert D. Putnam, *The Prosperous Community: Social Capital and Public Life*, AM. PROSPECT, Spring 1993, at 35, 38.

they know and like over people of whom they have no personal knowledge, good or bad; they would hire someone who comes with a personal recommendation from a close friend over someone without such a recommendation. Residential segregation would substantially decrease the likelihood that such critical social connections would be formed between members of different races. Finally, economic segregation would mean that the market value of black homes would be significantly lower than that of white homes; thus, blacks attempting to move into white neighborhoods would, on average, have less collateral with which to obtain new mortgages, or less equity to convert into cash.[19]

Inequalities in both educational opportunity and the networking dynamic would result in fewer and less remunerative employment opportunities, and hence lower incomes, for blacks. Poorer blacks, unable to move into the more privileged neighborhoods and cities, would remain segregated; and few, if any, whites would forego the benefits of their white neighborhoods to move into poorer black neighborhoods, which would be burdened by higher taxes or provided with inferior public services. This does not necessarily mean that income polarization and segregation would constantly increase (although at times they would), but only that they would not decrease over time through a process of osmosis. Instead, every successive generation of blacks and whites would find itself in much the same situation as the previous generation, and in the absence of some intervening factor, the cycle would likely perpetuate itself. At some point an equilibrium might be achieved: generally better-connected and better-educated whites would secure the better, higher-income jobs and disadvantaged blacks would occupy the lower status and lower-wage jobs.

Thus, even in the absence of racism, race-neutral policy could be expected to entrench segregation and socio-economic stratification in a society with a history of racism. Political space plays a central role in this process. Spatially and racially defined communities perform the "work" of segregation silently. There is no racist actor or racist policy in this model, and yet a racially stratified society is the inevitable result. Although political space seems to be the inert context in which individuals make rational choices, it is in fact a controlling structure in which seemingly innocuous actions lead to racially detrimental consequences.

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[19] *See* STAPLES, *supra* note 6, at 204–05 ("[A] house in a predominantly black neighborhood is devalued by thousands of dollars . . . . [B]lacks receive 1.2 percent of their income from property, compared with seven percent for whites."); Scott Minerbrook, *Blacks Locked out of the American Dream*, BUS. & SOC'Y REV., Sept. 22, 1993, at 26 ("In 1988, the U.S. Census Bureau concluded that white families had ten times the wealth of blacks in America. Crucially, 40 percent of that difference was the lack of home equity between black and white families.").

2. Strangers in Paradise: A Complicated Model. —

> [Even u]nder the best of circumstances, segregation undermines the ability of blacks to advance their interests because it provides . . . whites with no immediate self-interest in their welfare. [Furthermore,] a significant share [of whites] must be assumed to be racially prejudiced and supportive of policies injurious to blacks.
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> DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID[20]

If we now introduce a few real-world complications into our model, we can see just how potent the race/space dynamic is. Suppose that (only) half of all whites in our society are in some measure racist or harbor some racial fear or concern, ranging from the open-minded liberal, who remains somewhat resistant, if only for pragmatic reasons, to mixed-race relations (Spencer Tracy's character in *Guess Who's Coming to Dinner*[21]) to the avowed racial separatist and member of the Ku Klux Klan. Further suppose that the existence of racism produces a degree of racial fear and animosity in blacks, such that (only) half of blacks fear or distrust whites to some degree, ranging from a pragmatic belief that blacks need to "keep to their own kind," if only to avoid unnecessary confrontation and strife (Sidney Poitier's father in *Guess Who's Coming to Dinner*), to strident nationalist separatism.[22] Let us also assume that significant cultural differences generally exist between whites and blacks.

In this model, cultural difference and socialization would further entrench racial segregation. Even assuming that a few blacks would be able to attain the income necessary to move into white neighborhoods, it is less likely that they would wish to do so. Many blacks would fear and distrust whites and would be reluctant to live among them, especially in the absence of a significant number of other blacks. Likewise, many whites would resent the presence of black neighbors and would try to discourage them from entering white neighborhoods in ways both subtle and overt. The result would be an effective "tax"

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[20] MASSEY & DENTON, *supra* note 1, at 160.

[21] GUESS WHO'S COMING TO DINNER (Columbia Pictures 1967).

[22] I choose the "mild" ends of the continuum with some purpose: I suspect that the optimism reflected in *Guess Who's Coming to Dinner* is shared by very few members of contemporary America. Although the attitudes of the young couple's parents were portrayed as outdated and perhaps a bit ignoble, I imagine that many parents faced with the prospect of their child entering a mixed marriage would experience similar concerns today. It seems impossible to separate purely pragmatic concerns (the strife that the couple will experience in both white and black communities, and the fear that the attraction of one or both parties may be based on fetishism rather than love) from racist prejudices (blacks' mistrust of, and feelings of moral superiority to, whites, and whites' feelings of moral and social superiority to blacks, as well as cultural misunderstanding and otherness).

on integration. The additional amenities and lower taxes of the white neighborhood would often be outweighed by the intangible but real costs of living as an isolated minority in an alien and sometimes hostile environment. Many blacks would undoubtedly choose to remain in black neighborhoods.[23]

Moreover, this dynamic would produce racially *identified* spaces. Because our hypothetical society is now somewhat racist, segregated neighborhoods would become identified by the race of their inhabitants; race would be seen as intimately related to the economic and social condition of political space. The creation of racially identified political spaces would make possible a number of regulatory activities and private practices that would further entrench the segregation of the races. For example, because some whites would resent the introduction of blacks into their neighborhoods, real estate brokers would be unlikely to show property in white neighborhoods to blacks for fear that disgruntled white homeowners would boycott them.[24]

Even within mixed cities, localities might decline to provide adequate services in black neighborhoods, and might divert funds to white neighborhoods to encourage whites with higher incomes to enter or remain in the jurisdiction. Thus, although our discussion has focused primarily on racially homogeneous jurisdictions with autonomous taxing power, the existence of such jurisdictions might affect the policy of racially heterogeneous jurisdictions, which would have to compete with the low-tax/superior-service homogeneous cities for wealthier residents. This outcome would be especially likely if the mixed jurisdictions were characterized by governmental structures that were resistant to participation by grassroots community groups or that were otherwise unresponsive to the citizenry as a whole. A dynamic similar to what I have posited for the homogeneous jurisdictions would occur *within* such racially mixed jurisdictions, with neighborhoods taking the place of separate jurisdictions.

Each of these phenomena would exacerbate the others, in a vicious circle of causation.[25] The lack of public services would create a

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[23] *See* John O. Calmore, *To Make Wrong Right: The Necessary and Proper Aspirations of Fair Housing*, *in* THE STATE OF BLACK AMERICA 1989, at 77, 99 (Janet Dewart ed., 1989) (reporting that 85% of blacks preferred a neighborhood that was at least half black, and only 3% preferred a "mostly white" neighborhood).

[24] Real estate brokers accused of steering prospective black buyers away from white neighborhoods consistently cite fear of reprisal by white property owners as the reason for the practice. *See* J. Linn Allen, *Civil Wrongs; As Blacks Go House Hunting, Too Often the Door Is Closed*, CHI. TRIB., Nov. 14, 1993, § 16, at 1 (recounting the experience of a real estate agent who was ordered to steer a black couple away from housing by the developer); J. Linn Allen, *Signs of Change; Real Estate Industry Tackles Entrenched Racism*, CHI. TRIB., Nov. 21, 1993, § 16, at 3 (reporting a realtor's argument that "real estate agents can be victims of buyer or seller bias as well as participants in discriminatory acts").

[25] *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN

generally negative image of poor, black neighborhoods: inadequate police protection would lead to a perception of the neighborhoods as unsafe; uncollected trash would lead to a perception of the neighborhoods as dirty, and so forth. Financial institutions would redline black neighborhoods — refuse to lend to property owners in these areas — because they would be likely to perceive them as financially risky. As a result, both real estate improvement and sale would often become unfeasible.[26]

3. Strangers in a Strange Space. — One might object that our model has ignored the existence of private developers who would find it profitable to build affordable housing in the white jurisdictions. These developers would be able to sell or to lease housing to blacks who would then reap the benefits of the higher tax base of their new jurisdiction. Developers would find such a venture profitable because blacks would be willing to pay a "premium" for such housing on account of the lower taxes or superior public services that come with it. Developers would have access to sufficient funds to purchase property in white neighborhoods although the individual blacks to whom they eventually sell or lease might not. The developers would indirectly pool the resources of many blacks, thereby taking advantage of an economy of scale.[27]

This mechanism might succeed in integrating localities and neighborhoods but for one additional real-world complication: the zoning power. Localities with the power to regulate land uses might limit the construction of multi-family housing and moderately priced detached units to certain areas of town, or might even exclude such development altogether.[28] Localities would have a strong incentive to exclude such uses to keep lower-income individuals from diluting the

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DEMOCRACY 642–44 (1944) (describing the connection between black segregation and unequal economic opportunity and political influence); *cf.* Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429, 432–37 (1986) (noting social segregation and financial poverty as two of the compounding obstacles to minority lawyers seeking academic appointment).

[26] Lending discrimination is rampant in contemporary America despite its illegality. *See, e.g.*, Paulette Thomas, *Blacks Can Face a Host of Trying Conditions in Getting Mortgages*, WALL ST. J., Nov. 30, 1992, at A1, A8–A9 (presenting empirical data that reveals a consistent racial bias in lending, regardless of the income, credit history or geographic location of prospective borrowers). Moreover, if redlining were done on the basis of class instead of race, it would not violate any of the racially neutral laws in our hypothetical society.

[27] Similarly, blacks might pool their money in order to establish cooperative housing in the white neighborhood. The private developer is, however, more likely to attempt such a project because of transaction costs and the difficulties blacks face in obtaining financing.

[28] *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977) (holding that a village could zone to prohibit multi-family housing within its borders despite disparate racial impact); *see also infra* pp. 1872–74.

municipal tax base.[29] Again, a purely economic motivation would result in the exclusion of blacks from the municipality.

4. Conclusion: The Implications for Racial Harmony. — Empirical study confirms the existence of racially identified space.[30] The foregoing economic model demonstrates that race and class are inextricably linked in American society, and that both are linked to segregation and to the creation of racially identified political spaces. Even if racism could be magically eliminated, racial segregation would be likely to continue, as long as we begin with significant income polarization and segregation of the races. Furthermore, even a relatively slight, residual racism severely complicates any effort to eliminate racial segregation that does not directly address political space and class-based segregation.

One might imagine that racism could be overcome by education and rational persuasion alone: because racism is irrational, it seems to follow that, over time, one can argue or educate it away.[31] The model shows that even if such a project were entirely successful, in the absence of any further interventions, racial segregation would remain indefinitely.[32]

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[29] *See* Harold A. McDougall, *Regional Contribution Agreements: Compensation For Exclusionary Zoning*, 60 TEMP. L.Q. 665, 669 (1987) (arguing that exclusionary zoning provides an economic benefit to the wealthier jurisdictions of a metropolitan area); *cf.* Note, *Equalization of Municipal Services: The Economics of* Serrano *and* Shaw, 82 YALE L.J. 89, 106–08 (1972) (noting that individual movement between jurisdictions creates fiscal externalities, due to the difference between the individual's tax contribution and her consumption of local resources).

[30] As Massey and Denton report:

> The intense isolation imposed by segregation has been confirmed [by a study of poor blacks.] . . . [O]ne theme consistently emerged in the narratives: poor blacks had extremely narrow geographic horizons. Many . . . had never been into . . . the city's center and a large number had never left the immediate confines of their neighborhood. . . . [T]his racial isolation 'is at once real, in that movement outside the neighborhood is limited, and psychological, in that residents felt cut off from the rest of the city.' . . . [R]esidents of hypersegregated neighborhoods . . . rarely travel outside the black enclave and most have few friends outside the ghetto.

MASSEY & DENTON, *supra* note 1, at 161. In 1980, 10 U.S. cities had segregation indices in excess of 80, meaning that "the average black person in these cities lived in a neighborhood that was at least 80% black." *Id.* at 160.

[31] *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 772–75 (describing the "integrationist" position as in line with the "liberal" belief in the power of rational thought to overcome irrationality, and the corresponding belief that racism will be eliminated in the crucible of rational education and debate).

[32] Moreover, there are good reasons to believe that the continued existence of segregation threatens the project of anti-racist education in at least two ways. First, the perpetuation of racially identified spaces with impoverished tax bases might be taken to provide evidence that black neighborhoods are inherently bad places to live and, by extension, that blacks must be bad neighbors. This perception can be expected to thwart the liberal project of education by providing "evidence" that perhaps racist beliefs are justified, that black culture is somehow inherently inferior or dysfunctional, or that blacks are incapable of managing their affairs. Second, because segregated localities are generally responsible for administering education, it is

Contemporary society imposes significant economic costs on non-segregated living arrangements. In the absence of a conscious effort to eliminate it, segregation will persist in this atmosphere (although it may appear to be the product of individual choices). The structure of racially identified space is more than the mere vestigial effect of historical racism; it is a structure that continues to exist today with nearly as much force as when policies of segregation were explicitly backed by the force of law. This structure will not gradually atrophy because it is constantly used and constantly reinforced.

C. Toward a Legal Conception of Space

> A whole history remains to be written of *spaces* — which would at the same time be the history of *powers* (both these terms in the plural) — from the great strategies of geo-politics to the little tactics of the habitat, . . . passing via economic and political installations.
>
> MICHEL FOUCAULT, THE EYE OF POWER[33]

There is no self-conscious legal conception of political space. Most legal and political theory focuses almost exclusively on the relationship between individuals and the state. Judges, policymakers, and scholars analogize decentralized governments and associations either to individuals, when considered vis-à-vis centralized government, or to the state, when considered vis-à-vis their own members, but consider the development, population and demarcation of space to be irrelevant. Space is *implicitly* understood to be the inert context *in* which, or the deadened material *over* which, legal disputes take place.

Legal boundaries are often ignored because they are imagined to be either the product of aggregated individual choices or the administratively necessary segmentation of centralized governmental power. This representation of boundaries, and hence, of politically created space, allows us to imagine that spatially defined entities are not autonomous associations that wield power. At the same time, space also serves to ground both governmental and associational entities. We imagine that the boundaries that define local governments and private concentrations of real property are a natural and inevitable function of geography and of a commitment to self-government or private property. These two views of political geography justify judicial failures to consider the effect of boundaries and space on racial segregation.

However, the development, population, and demarcation of space — those characteristics that must be considered irrelevant in order for

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reasonable to assume that the perspective of blacks will rarely, if ever, be voiced in the education of white children.

[33] MICHEL FOUCAULT, *The Eye of Power*, *in* POWER/KNOWLEDGE 146, 149 (Colin Gordon ed., Colin Gordon, Leo Marshall, John Mepham & Kate Soper trans., 1980).

space to be seen as merely the aggregation of individual choices or the organizing medium of centralized power — are precisely the characteristics that distinguish spaces politically and economically. Localities define spaces as industrial, commercial, or residential. Homeowners associations define spaces according to density and type of development. Zoning and covenanting prescribe who can occupy certain spaces. This spatial differentiation is what I mean by the "political geography of space." Features such as these — features that are not primordial or natural, but at the same time *are* inherently spatial because they distinguish one space from another — are the product of collective action structured by law.

1. A Brief History of Space. — We often imagine that cities develop naturally[34] in a space that is naturally present, and are then "discovered" by the law. Although cities are the product of human volition, we see their evolution in space as a phenomenon that results from "natural" forces: economies of scale and market forces, aggregated individual preferences, and physical space itself — topography and distance. As a result of this naturalizing view of political geography, "theories are constructed which always seem to mask social conflict and social agency, reducing them to little more than the aggregate expression of individual preferences . . . . Lost from view are the deeper social origins of spatiality, its problematic production and reproduction, its contextualization of politics, power, and ideology."[35]

One manifestation of the naturalizing view is a (mis)conception of political geography[36] as "opaque": we cannot "see inside" political space to perceive the social institutions that define and comprise it.[37] Rather than a recognition that political geography is itself defined by political struggles and social forces, this view produces the belief that geography can anchor or legitimate an otherwise contested or indeterminate community or political entity. But, just as modern physics has challenged the rigid Newtonian conception of space, so too a

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[34] The "naturalizing" that I identify as an element of the dominant misconceptions of space is not necessarily primordial (although it may be). It can also include such socially "natural" forces as economic market forces and the supposedly inevitable thrust of legal reasoning. Economics and preferences are reified and naturalized in the context of political geography even though few theorists today believe that they are natural, and indeed most take pains to avoid the mistake of reification in other contexts.

[35] EDWARD W. SOJA, POSTMODERN GEOGRAPHIES 123–24 (1989).

[36] I will use the terms "political space" and "political geography" more or less interchangeably throughout this Article.

[37] On the opaque conception of political space, "space in the general or abstract sense [is thought to] represent the objective form of matter . . . . This essentially physical view of space has . . . tended to imbue *all things spatial* with a lingering sense of primordiality and physical composition, an aura of objectivity, inevitability, and reification." SOJA, *supra* note 35, at 79 (emphasis added).

modern study of political geography should reject the assumption that space is determinate in political geography. Space, as we experience it, is in many ways the product, and not the fixed context, of social interactions, ideological conceptions, and of course, legal doctrine and public policy. "Space in itself may be primordially given, but the organization, and meaning of space is a product of social translation, transformation, and experience."[38]

The tacit understanding of political space as "opaque" — inert, primordial, natural, and therefore having a natural or prepolitical meaning — stands in contrast to the opposite misconception of space as "transparent": we "see through" political geography, failing to see its political salience. In this alternative view, "[s]patiality is reduced to a mental construct alone, a way of thinking . . . in which the 'image' of reality takes epistemological precedence over the tangible substance and appearance of the real world."[39] Transparent space is understood to be irrelevant, both superseded in importance by the modern technologies of transportation and communication, and insignificant and without consequences of its own.

The critique of the opaque conception of space is, in part, a critique of the *reification* of political space — treating an abstract concept as if it were a tangible thing in the world. Thus, although political space is a function of our idea of boundaries, we imagine that those boundaries are natural, that they are something other than and prior to our idea of where they should be. The reification of political space is the product, not of a false theory that is articulated in case law and policy analysis, but of the failure to examine political space at all. The critique of the transparent conception of space reveals the opposite error. Rather than reification, here the mistake is to assume that our ideological constructs have no tangible consequences, that they are "just ideas." We imagine that political boundaries do not affect anything in the material world, that they are simply lines on a map. It is important to keep both criticisms in mind: it is wrong to assume that geographic boundaries are natural or inevitably reflect objective phenomena in the world, but it is equally wrong to ignore the consequences of those boundaries once they are established.

So we have not one, but two tacit conceptions of space — space as opaque and space as transparent. On the one hand, we often implicitly see political space as natural and fixed. On the other hand, and often at the same time, we see political space as irrelevant. Doctrine and policy often assume both that particular political aspects of a spatial entity are the inherent property or immediate consequences of the space that defines the entity and are therefore beyond dispute,

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[38] *Id.*

[39] *Id.* at 125.

and also that the shape and location of the spatial entity are of no real consequence and therefore need not be examined or justified.

2. The Tautology of Community Self-Definition. — Space, as a salient characteristic of political entities, masks the often inherently segregated nature of these entities even as it entrenches that segregation. In order to understand why this is so, consider an association that is not spatially defined. Such an association must be defined by particular criteria that can be examined, criticized, and challenged. These criteria also distinguish the association from the mere aggregation of individual member preferences. Even if members are empowered to alter the criteria through a democratic process, the initial selection of membership will affect the outcome of subsequent elections. Thus, although the governance of such an association may be democratic in form, it may well not be democratic ("of the people") in substance if the initial selection of members was highly exclusive. If those excluded from the association claim a right to join, the association cannot justify their exclusion on the basis of democratic rule. Nor can the justification for such an association be that it has a right to self-definition, because the "self" that seeks to define is precisely the subject of dispute.

This tautology of community self-definition is masked when a group can be spatially defined: "We are (simply) the people who live in area *X*." Space does the initial work of defining the community or association and imbues the latter with the air of objectivity, and indeed, of primordiality. But the tautology is *only* masked, it is not resolved: why should area *X* be the relevant community, when area *X* plus *Y* might provide an equally or more valid definition of community? The answer cannot appeal to the right of community self-determination: if the people in area *Y* claim to be part of a larger community, *X* plus *Y*, then should their opinion not be considered as well as that of the people in area *X*? It is the question how communities are and should be defined that concerns us here. Close attention to spatial construction will help us to break free of established but untenable definitions of political community and thereby to open new avenues for combatting entrenched structures of residential segregation. I begin by examining the construction of political space and the consequent construction of racially identified space in both public and private law.

II. The Doctrinal Context of Political Space

A. The Consequences That Space Hides: Racial and Class Segregation in Public Policy

Doctrine involving local governments oscillates between transparent and opaque conceptions of political space, which correspond to

particular conceptions of local governments. The conception of space as transparent corresponds to a view of local governments as mere delegates of state power, without autonomy or independent political significance. The conception of space as opaque corresponds to a view that sees local governments as autonomous sovereigns, or that analogizes local governments to private citizens, regarding them as unproblematically unified and self-validating entities, with rights against both outsiders and centralized authority. Local government is significant for our examination of racial segregation because an important source of segregation and of the isolation and oppression of minorities that accompany it, is the autonomous municipality that forms a racially homogeneous jurisdiction.[40]

This section demonstrates that contemporary local government law perpetuates the historically imposed segregation of the races: local boundaries, once established, are difficult to alter; segregated localities form autonomous political units whose internal political processes tend to replicate existing demographics; wealthier localities have strong economic incentives to enact policies of exclusionary zoning to maintain homogeneity of class and therefore of race; and, each of these factors tends to reinforce the others.

A central and recurring conflict in our discussion of the political geography of race is that between the values of community control (which plays out in the notion of a local political community and also in the private right to association), individual autonomy (which plays out in geography through the private property right), and majoritarian rule.[41] As the tautology of community self-definition demonstrates,

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[40] Academics have noted the critical role that suburban incorporation plays in perpetuating segregation:

> In the suburbs surrounding places such as Newark and Detroit, white politicians are administratively and politically insulated from black voters in central cities, and they have no direct political interest in their welfare . . . . Because suburbanites now form a majority of most state populations — and a majority of the national electorate — the 'chocolate city–vanilla suburb' pattern of contemporary racial segregation gives white politicians a strong interest in limiting the flow of public resources to black controlled cities.

MASSEY & DENTON, *supra* note 1, at 158.

[41] Similarly, legal theory is characterized by two views: one of local government as the proper location of a responsive, citizen-based democracy, and the other of local government as the site of parochialism, bigotry, and fragmentation that threaten the public good and the stability of the republic. The first portrays local government as powerless and calls for greater local autonomy, while the second depicts local government as too powerful and proposes centralization of control in the hands of state or regional administrations. Those who adhere to the first view focus on the formal status of local governments and on their inability to shape and to control their future. *See, e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062–73 (1980) (arguing that local governments are so powerless under state and federal law that they are unable to resolve their internal problems on a local level). Those who adhere to the second view focus instead on local power to ward off external forces of change, be they other localities, the state, or market forces. *See, e.g.*, Richard Briffault, *Our Localism: Part II*

the autonomy of a political community cannot be justified by appeal to either individualism[42] or majoritarianism (unless the community is coextensive with the relevant universe of citizens). One significant way in which the law seeks to reconcile majoritarianism with community autonomy is through the creation of a space for decentralized authorities,[43] both public and private. This space is conceptual — in the context of the right to association and the law of corporations — and also physical — in the context of local governments and private property rights. But the grant of local power and the location of jurisdictional boundaries cannot, on pain of circularity, be justified by appeal to local autonomy. Thus, the law often tacitly seeks to justify local power and local boundaries by reference to geography itself — reflecting a view of local political geography as natural and legitimating, or in other words, as opaque.

The legal status of local governments is non-circularly validated by reference to the constitutionally established state government: the official status of local government is that of a mere delegate of the state. However, the view of local government as delegate cannot provide local governments with any true autonomy. If local government is only a delegate, then all local concerns are really state concerns, all local policies really state policies, all local citizens really only state citizens, and all local elections really sub-state elections. Citizens can have no right to reside in a particular locality (or any locality at all), and they can have no right to control their locality's character. If citizens are deprived of local citizenship or local autonomy, their only recourse is to urge the state, from which local authority flows, to address them. Thus, this transparent view of local political space, while saving local government from a circular justification and a reified self-conception, sacrifices the very goal to which local government aspires: to provide relief from the tyranny of majoritarianism

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— *Localism and Legal Theory*, 90 COLUM. L. REV. 346, 435–54 (1990) (arguing that local power exacerbates the tension between cities and suburbs and that state governments should exercise greater control over administration and fiscal resources).

[42] The institution of private property has historically been justified as a mechanism for safeguarding individual autonomy from a potentially coercive state. *See* Frank Michelman, *Possession v. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1329 & n.60 (1987) (asserting that early American political theorists believed that "an unquestionably secure base of material support was viewed as indispensable if one's independence and competence as a participant in public affairs was to be guaranteed"); *cf.* Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 977–79 (1982) (arguing for a conception of property that is linked to personal autonomy).

[43] It may occasionally seem that I use the terms "decentralized power," "spatial association," and "autonomous" or "local power" (and other combinations thereof), interchangeably. This is inevitable because a central sub-thesis of this essay is that private associations exercise governmental power and, conversely, that the legally recognized sites of decentralized power (primarily local governments) are often understood (if not best understood) and legitimated by analogy to private associations. *See infra* pp. 1880–81.

through the creation of spaces in which concerns and lifestyles that would lose out in the arena of mass politics can be vindicated.

The following discussion examines the public law that shapes political geography. Legal political geography consists of three primary elements: first, the jurisdictional boundaries that define a government or entity; second, the power and/or rights of the entity vis-à-vis land and individuals within its boundaries; and third, the system of internal governance or administration of the government or entity. I begin by examining the mechanisms by which local boundaries can be established and altered. I then proceed to examine the Supreme Court's doctrine regarding distribution or "delegation" of power to, and within, local governments. Next, I examine the internal democracy of local governments, shaped by the residency requirement for exercise of the franchise, and devote special attention to the influence that the other two elements of political geography — boundaries and powers — have on the nature of local democracy. These first three doctrinal explorations demonstrate that law creates political geography even as legal doctrine denies its relevance through the oscillation between opaque and transparent conceptions of political space.

I then demonstrate the racially segregative effects of legal political geography, discussing the issue of racially exclusionary zoning and its implications for voting rights within the context of segregated localities. Finally, I examine the economic consequences of reified local boundaries in the context of school district financing and school desegregation.

1. Local Boundaries: Annexation, Secession, and Consolidation. — Jurisdictional boundaries are the first component of political geography. Most state laws concerning local home rule and municipal annexation and secession allow parochial enclaves to define themselves in ways that are, potentially, politically and economically opportunistic and to defend themselves against influence from neighboring communities, which become defined as "outsiders." The states have developed a wide range of incorporation, annexation, secession, and consolidation procedures. For example, most states provide for a local initiative procedure by which property owners and residents living on unincorporated land can form a local government if they can persuade a minimum number of their neighbors to agree.[44] In fact, few standards govern how new local boundaries are drawn. Even in those states that require a "community of interest" as a condition of incorporation, the courts have accepted the almost tautological assertion that a "common demand for municipal services" is itself evidence of

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[44] In some states a municipality can be incorporated by as few as 75 residents. *See* Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 74 & n.314 (1990).

such a community or have found a sufficient "community of interest" even when the community seeking to be incorporated was only a small part of a larger "community."[45] And once established, local boundaries are very difficult to alter.[46] Moreover, as we shall see,[47] these jurisdictions, under the banner of local autonomy, are generally free to exclude outsiders who do not conform to the locality's self-image or who might erode its tax base.

2. The Validation of Local Power: The City as Delegate and the City as Autonomous. — Local government exists in a netherworld of shifting and indeterminate legal status. Although local government is officially defined as a mere delegate of state authority, at times the law treats local governments as autonomous "city-states" with rights against outsiders and against centralized authority. These conflicting conceptions of local government have important consequences for democratic citizenship. The view of the locality as delegate implies that, as between citizenship in the locality and in the larger polis of the state, only state citizenship matters. The view of the locality as autonomous implies not only that citizenship in a particular locality is an important part of democratic participation, but also that the basis for local power is as unambiguous as that for the power of the state.

Local citizenship does matter, but it is neither uncomplicated nor unambiguous. The distribution of political power to localities is a key element in the creation of political geography, as an examination of the agency, or "delegation," theory of local government and of the residency requirement for local citizenship demonstrates. In both of these examples, legal doctrine oscillates between the transparent and the opaque conceptions of political space, but each doctrinal position tends to reflect one view or the other. Thus, the doctrine of local government as delegate implies that citizenship in a locality is unimportant — an example of the transparent conception of political space. Further, the problematic nature of delegation of power *within* localities demonstrates that the delegation of power to localities cannot be the inconsequential or uncomplicated matter that the notion of local government as delegate assumes. The residency requirement, by contrast, implies that local governments are semi-autonomous, that the local boundaries that define residence are natural or inevitable, and

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[45] *See id.* at 76.

[46] *See id.* at 78–79; *see also* JACKSON, *supra* note 9, at 152 ("[A]ffluent suburbs . . . were able to move state legislatures away from the doctrine of forcible annexation. . . . [I]t is now commonly held that annexation . . . must gain the approval of the residents of an affected area. [Moreover,] rigorous procedural and substantive requirements block the way . . . ."); Briffault, *supra* note 44, at 78 n.333 ("[I]n the twentieth century no state legislature has ordered a major consolidation of local governments without also making provision for a local referendum. Because of suburban resistance, voter approval requirements are generally fatal to consolidation proposals." (citation omitted)).

[47] *See infra* pp. 1870–74.

that the internal democratic process can be validated by those geographic borders — an example of the opaque conception of political space.

(a) Delegation, Citizenship, and the Transparency of Space. — *Hunter v. City of Pittsburgh*[48] established that local governments are merely administrative agencies of the state that can be altered by the state legislature without constitutional consequences.[49] In *Hunter*, citizens of the Town of Allegheny, Pennsylvania, opposed the consolidation of their town with the City of Pittsburgh. Under Pennsylvania law, a simple majority of the voters in a proposed new city could accomplish consolidation even if a majority of voters in one of the smaller, preconsolidation cities — in this case Allegheny — opposed it. The plaintiffs argued that their citizenship in the municipality created an implied contract between the citizens and the Town of Allegheny that precluded consolidation with Pittsburgh.[50] The Court rejected this contention, and reasoned that cities "are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them" and therefore are subject to change by whatever process the state establishes.[51]

Hunter articulates the position of cities and city residents in relation to the states in the context of federal law. As far as the Federal Constitution is concerned, cities have no independent status or rights. According to the *Hunter* Court, local jurisdictional boundaries are politically insignificant and fungible. This view must assume that the shape of local political geography is not important to the fulfillment of citizenship and democratic participation; here, local political space becomes transparent.

It follows from *Hunter*'s conception of local political geography that states cannot justify their failure to review local government policies on the grounds that local governments are autonomous, because local government policies, are, for constitutional purposes, state policies. For example, if the states are not free to establish a system of segregated schools, they should not be allowed to accomplish the same objective by delegating state power to segregated localities. However, as we shall see, *Hunter*'s logic has not driven the constitutional analysis in the Court's desegregation decisions.[52]

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[48] 207 U.S. 161 (1907).

[49] *See id.* at 178–79.

[50] *See id.* at 166.

[51] *Id.* at 178.

[52] *See infra* p. 1875. The states themselves have generally provided in their individual constitutions for some degree of local autonomy. Local "home rule," as it is called, historically conceived of the locality as a state within a state (*imperium in imperio*) with control over local matters. *See, e.g.*, CAL. CONST. art. XI, § 6; *see also* Kenneth E. Vanlandingham, *Municipal*

(b) Residence, Citizenship, and the Opacity of Space. — The residency requirement for exercise of the franchise defines the nature of the local system of democratic governance — an important element of local political geography. The Supreme Court has insisted that the franchise be extended to all "bona fide residents" of a locality. At issue in *Holt Civic Club v. City of Tuscaloosa*[53] was the extraterritorial exercise of the city's police power over an unincorporated community. The residents of the unincorporated community brought due process and equal protection challenges that demanded either that they be allowed to vote in municipal elections or that the exercise of Tuscaloosa's police power over them be invalidated.[54] The *Holt* decision, reduced to its essentials, held that the community that must be enfranchised is defined by the geographic borders of the locality. The Court reasoned that just as every resident must be enfranchised, by the same principle every non-resident could be disenfranchised.[55] The *Holt* Court rejected the claim that Tuscaloosa's extraterritorial exercise of its police power required a corresponding extension of the franchise to those non-residents affected, and reasoned that any "city's decisions inescapably affect individuals living immediately outside its

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Home Rule in the United States, 10 WM. & MARY L. REV. 269, 283–90 (1968) (detailing the origins of home rule). Modern home rule provisions, modeled after a proposal by the National League of Cities, grant to the locality all powers not specifically denied by the state legislature. *See, e.g.*, MONT. CONST. art. XI, § 6; *see also* Kenneth E. Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 2–5 (1975) (describing the National League of Cities model).

Although these home rule provisions attempt to fix the authority of local governments, they suffer from ambiguities. For instance, the *imperium in imperio* model attempts to draw a distinction between local and state matters, a distinction that proves untenable in practice. The *imperium* model requires courts to determine whether the matter in question is a local or a state one by balancing the costs and benefits associated with each option. In effect, many state constitutional provisions for local sovereignty simply transfer the responsibility for resolving the tension inherent in decentralized power to the judicial branch. The judiciary must reinvent local democracy in every case. *See* Michael E. Libonati, *Reconstructing Local Government*, 19 URB. LAW. 645, 657–58 (1987) (demonstrating that courts decide what is or is not a local matter and that local-sovereignty provisions do not constrain judicial decisionmaking in this regard). The National League of Cities model, by contrast, provides no real protection for local autonomy; it simply creates a geographic sphere of influence in which local government may act unless and until the state decides to take over. Neither the *imperium in imperio* nor the National League of Cities model provides a clear principle to control, or even to guide, decisions about the scope of local autonomy.

[53] 439 U.S. 60 (1978).

[54] *See id.* at 63–65.

[55] *See id.* at 68–70; *see also* Cipriano v. City of Houma, 395 U.S. 701, 702 (1969) (holding that a law that limited the franchise to property taxpayers in revenue-bond-issuance elections violated the Equal Protection Clause); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632–33 (1969) (holding unconstitutional a voter-qualification scheme that limited the vote in school district elections to otherwise qualified voters who either owned or leased taxable real property in the district, were married to people who owned or leased taxable property, or were parents or guardians of children enrolled in a local school district).

borders. . . . Yet no one would suggest that [such] nonresidents . . . have a constitutional right to participate in the political processes bringing it about."[56]

The *Holt* Court held that, ultimately, it was not local power being exercised, but state power, delegated to Tuscaloosa "as [a] convenient agenc[y] for exercising such of the governmental powers of the State as may be entrusted to [it]."[57] The majority in *Holt* argued, on that basis, that the restriction of the franchise to Tuscaloosa residents was a routine application of the bona fide residency requirement.[58] But, as the dissent pointed out, the reason for allowing localities to restrict the franchise to residents — indeed, the principle that supports the very existence of semi-autonomous local government — is "'the basic conception of a political community.'"[59] The notion of political community belies the conception of local government as a delegate of the state and instead conjures up the notion of a state within the state. According to the dissent, in determining that the political community of Tuscaloosa ended with the line between Tuscaloosa proper and the unincorporated area bringing the challenge, the majority "cede[d] to geography a talismanic significance."[60]

But perhaps the dissenting Justices had talismans of their own. In foreclosing the possibly sweeping implications of its logic, the dissent argued for a "crystal-clear distinction between those who reside in Tuscaloosa's police jurisdiction . . . and those who reside in neither the city nor its police jurisdiction and who are thus merely affected by the indirect impact of the city's decisions."[61] Both the majority and the dissent employed an opaque conception of political space. Both assumed that residence within some geographically defined area was a necessary prerequisite to exercise of the franchise, the only difference being that the majority chose the corporate boundaries and the dissent chose the police jurisdiction. On both accounts, the limited scope of local citizenship was justified as a self-validating consequence of the space in question. Neither the majority nor the dissent exam-

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[56] *Holt*, 439 U.S. at 69.

[57] *Id.* at 71 (quoting Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907)). The Court argued that the disgruntled non-Tuscaloosans were not subject to an exercise of power without representation because they had the opportunity to influence Tuscaloosa's government indirectly as Alabama citizens: "this Court does not sit to determine whether Alabama has chosen the soundest or most practical form of internal government possible. Authority to make those judgments resides in the state legislature, and Alabama citizens are free to urge their proposals to that body." *Id.* at 73–74.

[58] *See id.* at 68–69.

[59] *Id.* at 82 (Brennan, J., dissenting) (quoting Dunn v. Blumstein, 405 U.S. 330, 334 (1972)).

[60] *Id.* at 81. The dissent described the local political community as a "reciprocal relationship between the process of government and those who subject themselves to that process by *choosing* to live within the area of its authoritative application." *Id.* at 82 (emphasis added).

[61] *Id.* at 87.

ined how the boundaries that they advocated were established. Rather, both assumed local boundaries to be a fact of the case rather than a subject of the dispute and a proper object of the law.[62]

3. Delegation and the Franchise Within the Autonomous City. — Although the Court has presented the view that local government is a mere delegate of the state as a coherent and unproblematic theory of local power, delegation of power in fact raises a host of thorny questions. The legitimacy of power residing in one democratically governed body does not guarantee the legitimacy of that body's delegation of power to another body, especially if the delegate is a narrow sub-part of the body originally holding power. The Court has recognized this fact in the context of delegation of power *within* local governments, but has ignored it in the context of delegation *to* local governments. This recognition suggests that local power cannot be justified as a simple delegation of state power — it challenges the transparent conception of local political geography, which allows delegation to appear to be uncontroversial.

In *City of Eastlake v. Forest City Enterprises*,[63] shifting conceptions of political geography were invoked to legitimate the delegation of the police power. The Eastlake city charter was amended to require the approval of fifty-five percent of the electorate in a referendum before any zoning variance could take effect. After a variance to allow the construction of multi-family housing was passed by the City Planning Commission but rejected by the electorate in a referendum, the respondent challenged the referendum provision as an unconstitutional delegation of power from Eastlake's elected government to the electorate.[64] The Ohio Supreme Court sustained the challenge and held that the referendum provision "lack[ed] standards to guide the decision of the voters, [and thereby] permitted the police power

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[62] The dissent took the Tuscaloosa police jurisdiction as given, just as the majority did the corporate jurisdiction. If living within a jurisdiction's established boundaries is seen as a matter of simple choice, individuals who reside in Tuscaloosa's police jurisdiction could simply choose to move if they wished either to vote in Tuscaloosa's election or to avoid Tuscaloosa's police power. It is only if one recognizes that the decision to move involves costs and is thus not always a realistic choice that the Alabama scheme is revealed as problematic. But if moving is not a matter of pure choice, then the dissent's assumption that citizenship is a matter of choice is especially troublesome. If a community of non-residents affected by a neighboring municipal government wished to consolidate with that municipality and share both the burdens and privileges of residence, is it as free to do so as the "choice" model of residency implies? Our discussion of the laws of annexation and consolidation suggests that the answer is no. "Choice," on the dissent's model, means the freedom to move into a pre-established geographic locality (whose borders have unexplained, talismanic significance for the dissent), and not, apparently, to expand the local boundaries to encompass one's current abode.

[63] 426 U.S. 668 (1976).

[64] *See id.* at 670–71.

to be exercised in a standardless, hence arbitrary and capricious manner."[65]

The Supreme Court overruled. To do so, it had to distinguish two prior cases that had struck down delegation provisions. One of those earlier cases, *Eubank v. City of Richmond*,[66] had struck down an "ordinance which conferred the power to establish building setback lines upon the owners of two-thirds of the property abutting any street."[67] The other, *Washington* ex rel. *Seattle Title Trust Co. v. Roberge*,[68] had invalidated an "ordinance which permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of the owners of two thirds of the property within 400 feet of the proposed facility."[69] In distinguishing *Eubank* and *Roberge*, the Court asserted that "the delegation of legislative power, originally given by the people to a legislative body, and in turn delegated by the legislature to a *narrow segment* of the community [and] not to the people at large" is to be distinguished from "a referendum procedure such as we have in this case[;] the standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* . . . is not to be equated with decisionmaking by the people through the referendum process."[70]

The *Eastlake* Court accepted local boundaries as defining a discrete and autonomous "people," and saw the referendum provision, not as a delegation, but as the unmediated exercise of popular sovereignty. This reasoning appears to contradict *Hunter*'s view that localities are themselves agents of the state and that local power is thus a delegation of state power. If the state is free to delegate power to localities, a narrow segment of the state-wide community, it is difficult to understand why localities cannot also delegate power to a narrow segment of the local community, especially when it is the segment that is most directly affected by proposed development.[71] Stated as the reverse corollary, if the delegation of local power to spatially defined "dele-

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[65] *Id.* at 672.

[66] 226 U.S. 137 (1912).

[67] *Eastlake*, 426 U.S. at 677; *see Eubank*, 226 U.S. at 144.

[68] 278 U.S. 116 (1928).

[69] *Eastlake*, 426 U.S. at 677; *see Roberge*, 278 U.S. at 122–23.

[70] *Eastlake*, 426 U.S. at 677–78.

[71] As Professor Michelman points out:

> Since no one need be concerned about the existence or location of a setback line or rest home except the owners and residents in the immediate vicinity, the decentralization schemes have the seemingly desirable effect of maximizing the direct influence in each such decision of the individuals directly affected by it.

Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 167 (1977–1978).

gates" is unconstitutionally arbitrary and capricious in the absence of standards to guide the delegate, why is the standardless delegation of state power to localities, here achieved through the medium of the referendum process, not also unconstitutional?[72]

The willingness of the *Eastlake* Court to accept the delegation of power through referendum, and indeed of courts generally to accept the idea that *all* local power is delegated from the state, reflects the oscillation between a transparent and an opaque conception of political space. Delegation can be regarded as politically inconsequential because of a transparent conception of political space; local governments are seen as *parts* of the state rather than as separate entities with autonomous concerns. But this view contradicts the *Eastlake* Court's view (and the view that underlies judicial deference to local democracy in general) that local governments represent the people "at large" — a view that must assume that local jurisdictional boundaries define a democratic polis that is self-validating or validated by geography itself, and that thereby reifies local political space as opaque.

4. Exclusionary Zoning and Local Democracy: The Racial Politics of Community Self-Definition. — Along with historical de jure segregation, racially exclusionary zoning introduces the racial element into local political geography and thereby creates a structure of racially identified space. Further, the now-familiar oscillation between opaque and transparent conceptions of political space informs the doctrine surrounding exclusionary zoning cases: the zoning power is justified by reference to an internal local political process; hence the polis that votes on local zoning policy is defined and legitimated by an opaque local geography. At the same time, the effect of this political exclusion for the excluded racial group is considered insignificant: the very local geography in question in the challenged zoning policy is rendered transparent.

"Exclusionary zoning" is a generic term for zoning restrictions that effectively exclude a particular class of persons from a locality by restricting the land uses those persons are likely to require. Today, exclusionary zoning takes the form both of restrictions on multi-family housing and of minimum acreage requirements for the construction of single-family homes ("large-lot" zoning). Exclusionary zoning is a mechanism of the social construction of space. Local space is defined as suburban, family-oriented, pastoral, or even equestrian by zoning

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[72] It does not necessarily follow that the outcomes either of *Eastlake* or of *Eubank* and *Roberge* are in error. There may be reasons for preferring local boundaries to sub-local boundaries, or for preferring fixed boundaries to boundaries that shift with particular controversial land uses. But the Court did not give any such reasons to justify its different treatment of localities and neighborhoods. *Eastlake* was decided as if local autonomy were natural and prelegal, and *Eubank* and *Roberge* were decided on the basis that sub-localities are illegitimate because they represent only a narrow group of the people in whom power was originally vested.

ordinances. The ordinances are justified in terms of the types of political spaces they seek to create: a community that wishes to define itself as equestrian may enact an ordinance forbidding the construction of a home on any lot too small to accommodate stables and trotting grounds, or may even ban automobiles from the jurisdiction. The desire to maintain an equestrian community is then offered as the justification for the ordinance. Courts have generally deferred to the internal political processes of the locality and upheld such exclusionary ordinances.

Such a construction of space has a broader political impact than the immediate consequence of the ordinance. By excluding non-equestrians from the community, a locality constructs a political space in which it is unlikely that an electoral challenge to the equestrian ordinance will ever succeed.[73] The "democratic process" that produces and legitimates exclusionary zoning is thus very questionable: in many cases, the only significant vote that will be taken on the exclusionary ordinance is the first vote. After it is enacted, exclusionary zoning has a self-perpetuating quality.[74]

(a) Community Character. — The zoning power is most frequently justified by the principle that a community should be able to determine its character through exercise of the police power and thereby avoid the vicissitudes of the marketplace. In the seminal zoning case, *Village of Euclid v. Ambler Realty Co.*,[75] the Supreme Court upheld a zoning ordinance that restricted multi-family housing and industrial and commercial uses of land.[76] The *Euclid* Court found that the zoning power was properly employed to maintain a particular community character, which would be destroyed by the construction of apartment houses or the entry of industrial enterprises.[77]

Inherent in *Euclid*'s holding is the idea that the local democratic process legitimates the exercise of the police power. Thus, the Su-

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[73] Moreover, because most state constitutions provide for local home rule, there is frequently no basis upon which to challenge such an ordinance in state courts. *See supra* note 52.

[74] This is merely one example of the tautology of community self-definition. *See supra* p. 1860. One must decide who is a member of the community before one can inquire as to the community's opinion of itself, whether that inquiry takes the form of a judicial determination, an election, or a referendum.

[75] 272 U.S. 365 (1926).

[76] *See id.* at 379–84, 396–97.

[77] *See id.* at 394–95. In the lower court decision, overruled by the Supreme Court, the district court articulated the competing concern that the zoning power was employed, not simply to preserve neighborhood character, but to create class-identified local spaces:

> [The purpose of the ordinance] is to *classify the population and segregate them according to their income or situation in life*. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, . . . or why some live in a well-kept apartment and others in a tenement, is primarily economic.

Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924) (emphasis added).