
Municipal Identity as Property

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Abstract

Detroit is bankrupt, and very little of the theorizing and editorializing about this watershed event has contemplated municipal boundary law as a contributing factor. To the extent that it has, the analysis fails to grasp how essential municipal boundaries are to the creation of economic and social value in the modern metropolis. It has been almost 20 years since Richard Briffault, Gerald Frug, and Richard Ford released their path-breaking scholarship on the municipal boundary problem, yet metropolitan regions continue to fragment in much the same way Detroit did throughout the twentieth century.

The persistent fragmentation evident in many metropolitan areas raises familiar questions about the meaning and function of municipal boundaries and how local government law should respond. At the center of the contemporary metropolitan boundary problem are the localist ambitions of the cityhood and annexation movements. Their appeal underscores the extent to which the politics around metropolitan area location, autonomy, and identity (specifically in relation to the suburbs) are understood, expressed and defended by laymen and courts alike in the rhetoric and logic of property rights. The relationship between private property rights and the perceived right to autonomous local government has taken on popular meanings that, while not always grounded in actual law, do have a real impact on politics. That perceived entitlement forms the ideological basis for what is essentially a socially constructed property right in municipal identity. Municipal identity as property is largely a reflection of the high-stakes nature of contemporary

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suburban identity. Suburban residents feel particularly threatened by the prospect of being swallowed up by their metropolitan area central city, or, even worse, ending up in an unincorporated, undervalued location. The extent to which residing in a particular municipality is understood as highly consequential for wealth building, quality of life, family security, and status is a key feature of the contemporary suburban identity and experience. Battles over municipal boundaries reveal the ways in which suburban residents express what amounts to a deeply felt entitlement to separate government.

While notions of municipal identity as property reflect the cumulative weight of twentieth-century social and economic developments, the courts have played a role as well. Legal rhetoric and legal reasoning are essential components of the property rights expectations that municipal identity fosters. This Article explores how municipal boundary law, social developments, and jurisprudence have bolstered a perceived property right in municipal identity and its role in shaping the modern metropolis.

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I. INTRODUCTION

The imaginary line defining a city's corporate limits cannot corral the influence of municipal actions. A city's decisions inescapably affect individuals living immediately outside its borders.¹

1. Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 69 (1978).

[M]uch in modern America depends on where you draw boundaries, and who's inside and who's outside.

Who is included in the social contract? If "Detroit" is defined as the larger metropolitan area that includes its suburbs, "Detroit" has enough money to provide all its residents with adequate if not good public services, without falling into bankruptcy. Politically, it would come down to a question of whether the more affluent areas of this "Detroit" were willing to subsidize the poor inner-city through their tax dollars, and help it rebound. That's an awkward question that the more affluent areas would probably rather not have to face.²

The municipal boundary problem presented by legal scholars almost a generation ago continues to be a persistent regulating force in local government law and metropolitan life.³ Some have argued that metropolitan fragmentation is at the root of the city of Detroit's bankruptcy filing.⁴ Quite possibly no other metropolitan region in the United States offers as compelling of a window into the consequences of metropolitan fragmentation than Detroit. While there are differing

2. Robert Reich, *Detroit, and the Bankruptcy of America's Social Contract*, INST. FOR NEW ECON. THINKING (Aug. 1, 2013), <http://bit.ly/1lAyHtp>.

3. See Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 390–97 (1993) [hereinafter Briffault, *Who Rules at Home?*] (discussing the roles of boundary change for local government voting rights); Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 852–54 (1999). See generally Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996) [hereinafter Briffault, *Local Government Boundary Problem*]; Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002).

4. See Bob Kleine, *Bankruptcy Won't Fix Detroit*, HUFFINGTON POST (July 26, 2013, 11:18 AM), <http://huff.to/1at6ekp>. Kleine stated:

A fourth option [to avoid bankruptcy] would be tax base sharing or regional government. This is done in many other states, and Governor Milliken proposed a tax base sharing program back in the 1970s, that if enacted would probably have prevented bankruptcy. Michigan's archaic annexation laws encourage rent-seeking from those who use the city's services for business or pleasure, but choose to live outside the city and pay lower or no taxes.

Id.; see also Reich, *supra* note 2. Reich noted:

[T]here's a more basic story here, and it's being replicated across America: Americans are segregating by income more than ever before. Forty years ago, most cities (including Detroit) had a mixture of wealthy, middle-class, and poor residents. Now, each income group tends to live[sic] separately, in its own city—with its own tax bases and philanthropies that support, at one extreme, excellent schools, resplendent parks, rapid-response security, efficient transportation, and other first-rate services; or, at the opposite extreme, terrible schools, dilapidated parks, high crime, and third-rate services. The geopolitical divide has become so palpable that being wealthy in America today means not having to come across anyone who isn't.

Id. But see Alec MacGillis, *The Four Dumb Things People Are Saying About Detroit*, NEW REPUBLIC (July 19, 2013), <http://bit.ly/1fHzwLX> (arguing that too much territory, not a lack of tightly drawn boundaries, led to Detroit's unsustainable infrastructure costs).

opinions about the relative impact of municipal boundary formation and reformation on Detroit's fiscal woes, it is hard to dispute that these forces have played a key role in the city's current fiscal challenges. Moreover, it is hard to ignore the links between emerging developments in metropolitan areas and the influence of state boundary law.

The municipal boundary problem, however, neither begins nor ends with the story of Detroit's bankruptcy. It has much broader implications for metropolitan life than are captured in issue of municipal insolvency. The municipal boundary problem and its impact on metropolitan development, governance, and society is illustrated in the anti-annexation and cityhood movements that have recently animated politics in several metropolitan regions across the country. As the logic of privatization and anti-statism increasingly color the sociocultural context within which individuals and groups are conceptualizing notions of community, there is a diminishing appetite for the redistributive obligations of sharing municipal territory with dissimilarly situated others.

There has emerged a sense of entitlement, urgency, and heightened awareness of risk avoidance within communities seeking separate municipal identity. These sentiments have been building for a few decades now but are often viewed as related to local politics rather than indicative of something deeper in the national culture. Something deeper is at play, however, and it is illustrated in the tenor and tone of local boundary battles over the past two decades. For instance, in the mid-1990s Houston's annexation of the bedroom suburb of Kingwood ignited a boundary battle that ultimately changed Texas boundary law. Kingwood residents saw the annexation as a losing proposition and after the annexation became effective, some Kingwood residents reported that higher fees for services offset the drop in their property taxes.⁵ They filed a lawsuit alleging that the annexation deprived them of voting rights, due process, and equal protection under the law.⁶ A state legislator characterized the issue as related to the "fundamental rights of self-determination and consent of the governed[.]"⁷ Kingwood ultimately lost the legal fight and relations between Houston and Kingwood officials became even more contentious.⁸ Motorists in the area sported "Free Kingwood" bumper stickers and described the community as "occupied territory" to the Houston Chronicle.⁹

5. See Peter S. Canellos, *Land Grab: Outraged Residents of Houston Suburb Fight City's Annexation*, CHI. TRIB., Aug. 16, 1997, <http://bit.ly/1gMxRrh>.

6. See generally *Harris v. City of Hous.*, 151 F.3d 186 (5th Cir. 1998).

7. Canellos, *supra* note 5.

8. See *Harris*, 151 F.3d at 190–91.

9. See Julie Mason, *Kingwood Municipal Utility Districts Must Surrender Assets to the City*, HOUS. CHRON., Apr. 30, 1997, at A23. For a broader discussion of the

More recently in North Carolina, a years-long effort successfully rewrote that state's annexation laws.¹⁰ Cloaked in the rhetoric of fundamental rights, self-determination, and the Constitution, organized groups of North Carolinians fought against the ability of metropolitan area central cities to extend their boundaries over the objection of property owners residing in the areas proposed for annexation.¹¹ For many, the state's annexation laws came to be viewed with hostility and contempt, and the sentiments of ordinary citizens provided a telling window into how critical many view boundary control.¹² One resident remarked about the state's former involuntary annexation laws, "Most communities expect rational discussion where their voice matters . . . [but] [t]hey drag them in kicking and screaming."¹³

Annexation battles are not the only site of the municipal boundary problem. Over the past few years, "cityhood"¹⁴ movements have threatened to alter the governance structures in metropolitan areas such as Atlanta and Baton Rouge, Louisiana. A cityhood movement has developed in metropolitan Atlanta's Fulton and DeKalb counties consisting of citizen-led nonprofit organizations raising money to study municipal incorporation options for communities in unincorporated areas.¹⁵ While concerns over service delivery and amenities in unincorporated areas of the county are a driving force, county residents are also aware that incorporating as a city will redirect and concentrate their tax dollars on only the citizens within the new boundaries. In characterizing the logic behind the burgeoning cityhood movements, a news article on the relationship between Atlanta's suburban communities and the unincorporated areas used the analogy that "[i]f [one community] is Croatia and [another] is Slovenia, you don't want to end up as Kosovo."¹⁶

Kingwood annexation controversy and involuntary annexation in Houston, see also Christopher J. Tyson, *Localism and Involuntary Annexation: Reconsidering Approaches to New Regionalism*, 87 TUL. L. REV. 297, 318–25 (2012).

10. See Tyson, *supra* note 9, at 313.

11. See *id.*

12. See Judith Welch Wegner, *North Carolina's Annexation Wars: Whys, Wherefores, and What Next*, 91 N.C. L. REV. 165, 168–69 (2012); Rob Christensen, *Many Hail North Carolina Annexation Law*, NEWS OBSERVER (Mar. 27, 2011), <http://bit.ly/1fuTKpU>.

13. Christensen, *supra* note 12.

14. The term "cityhood" applies to actions by bands of citizens seeking to incorporate territory into another municipality as a way of achieving separate governmental autonomy, typically relative to a nearby central city within an existing metropolis.

15. See Scott Henry, *Land Rush Continues for Proposed New DeKalb Cities*, ATLANTA MAG. (June 24, 2013, 4:33 PM), <http://bit.ly/1fuUgnL>.

16. *Id.*

Regionalists, new regionalists, urbanists, and many others have long warned of the pitfalls of a fragmented metropolis.¹⁷ A handful of governments have taken heed and pursued approaches to regionalize metropolitan governance through annexation, inter-regional agreements, or other governance innovations.¹⁸ Increasingly, however, ordinary citizens want their own separate governments. While they embrace metropolitan life by moving to metropolitan areas, they simultaneously reject it with demands for separate local government autonomy within the metropolis. This identity crisis is not as much of a non sequitur as it seems. When viewed within the context of how property, location, and identity are intertwined, it is plausible to reconcile these seemingly divergent forces under a guiding logic organized around selective redistribution and an almost paranoid regard for property values.

People care about property. They also care about where they live. Indeed, the regard for property is inextricably related to the regard for location. Whether through resisting annexation or calling for new municipal incorporations, local interest groups often use the tool of local government boundary law to express what they perceive as a fundamental right to protect their property values and express individual or collective self-determination through forming or moving to (or preventing their being subsumed by) a separate location or territorially based identity. The risk of annexation by a metropolitan area central city or failure to incorporate as a suburban jurisdiction is often conceptualized and expressed in terms that imply that something fundamental is being threatened by state or local government action. This sense of contingency colors common perceptions about the range of available options for metropolitan organization and their impact on individual life chances.

Characterizing an annexed area as “occupied territory,” as in Kingwood, or analogizing an unincorporated community to war-torn Eastern Europe, as in Atlanta, is pretty hyperbolic. But the invocation of these metaphors speaks to the perceived high stakes of an action or inaction in choosing a location in the metropolis. If the stakes are perceived to be high, not only must extraordinary action be taken to

17. For a discussion of regionalism, new regionalism, and metropolitan fragmentation, see generally Tyson, *supra* note 9. Metropolitan fragmentation is a controversial issue and many scholars have long made the case for increased fragmentation. This Article is grounded in an anti-fragmentation frame and argues from that normative position. For a discussion of the virtues of fragmentation, see generally Charles Tiebout, *A Pure Theory of Local Public Expenditure*, 64 J. POL. ECON. 416 (1956) (arguing that regional fragmentation promotes inter-municipal competition and provides options for highly mobile consumer-voters). See also generally PAUL E. PETERSON, *CITY LIMITS* (1981).

18. See Tyson, *supra* note 9, at 303–25.

protect the rights at risk, but preemptive actions are also necessary to mitigate against future risks.

In another article, *Localism and Involuntary Annexation: Reconsidering Approaches to New Regionalism*,¹⁹ I introduced the idea of municipal identity as property as an essential underpinning of the popular and political backlash to involuntary annexation.²⁰ The term “municipal identity” refers to all of the devices of local government law that allow territorially defined groups to establish formal or quasi-governments that ultimately demarcate separate territory, establish separate and often oppositional identity, formalize autonomous governance structures, and limit the redistributive impact of their tax dollars.²¹ The notion of municipal identity as property, however, is not limited to controversies over the relatively rare involuntary annexation regimes that are highlighted in that article. Rather, it reflects broad currents in contemporary society related to property, territory, identity, economics, and local politics.

“Municipal identity as property” metaphorically characterizes the ways in which the desire for separate local government has come to be popularly understood as a fundamental right. This extends beyond the availability of municipal incorporation under state law—it is something more existential. Increasingly, metropolitan area residents are driven to deploy state boundary law in service of very provincial, privatized aims to the detriment of exploring more regionalized, collective options for managing community in metropolitan space. Scholars have explored the

19. Christopher J. Tyson, *Localism and Involuntary Annexation: Reconsidering Approaches to New Regionalism*, 87 TUL. L. REV. 297 (2012).

20. *Id.* at 301. “Municipal” here is used broadly to encompass not only general purpose local governments, but also the increasingly dominant special governments, quasi-cities, and common interest communities. For purposes of this Article, I collapse these governance structures to explore municipal identity as their treatment in this Article largely addresses the manner in which they impact traditional understandings about property law and identity formation.

21. In addition to actual suburban governments, the term also encompasses the growing reality of common interest communities where local government factors are prioritized in a way that fragments metropolitan territory. The rise in common interest communities is not addressed in this Article. Common interest communities often are created inside existing cities or suburban municipalities, but in many cases do attempt to opt out of the municipalities’ services, such as policing, sewage, and sanitation. Of the 126 million housing units in the United States in 2006, approximately 23 million were located in common interest communities, and of the total resident population of 298 million people, approximately 57 million lived in those communities, or 18% of the housing units and 19% of the population. For more information on the rise of common interest communities, see WAYNE S. HYATT & SUSAN F. FRENCH, COMMUNITY ASSOCIATION LAW: CASES AND MATERIALS ON COMMON INTEREST COMMUNITIES 3–6 (2d ed. 2008).

municipal boundary problem in considerable depth.²² Municipal identity is a big deal. Its increasing importance is driven by how individuals and groups conceptualize location risk and respond to the zeitgeist that suggests that wealth creation and life chances are tied to location in extremely consequential ways. Municipal identity as property provides a useful frame for examining the manner in which social developments and the law have reified and legitimated broadly held expectations about the ability of individuals and groups to withdraw from the redistributive obligations and legacy burdens of cities.

In both theory and jurisprudence, the law has been instrumental in providing the context for notions of location risk. Property is fundamentally about establishing relationships between people with regard to things. Municipal boundaries, in many states, function in a manner that establishes relationships between metropolitan residents with regard to metropolitan territory. Cities, and the metropolitan regions they make up, operate in large measure to facilitate connections and the redistribution of resources across a defined territory. While everyone within the metropolis has generally unfettered access to all of the territory, not all benefit or benefit equally from how the territory is legally defined and ordered.

Furthermore, the notion of municipal identity as property underscores the tension between a private or ownership view of property and a social or community view of property.²³ It ultimately undermines any opportunity to reconceptualize metropolitan governance in a manner that acknowledges and accounts for the interdependence of the various communities and constituencies within a metropolitan area. If the right to municipal location has, in the public's consciousness, developed into a constructive set of property rights, then it follows that the corresponding sociopolitical context and legal meaning require it be afforded the most important and exalted constitutional protection—or something close to it. When we understand municipal identity in this manner, we can understand clearly the lengths to which individuals and society as a whole are willing to go to protect and preserve what is perceived to be a set of property rights. We can also recognize how courts have

22. See generally Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931 (2010); Briffault, *Local Government Boundary Problem*, *supra* note 3; Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Frug, *supra* note 3; Christopher J. Tyson, *Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital*, 73 U. PITT. L. REV. 505 (2012).

23. See generally ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* (2003); Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75 (2010).

incorporated this thinking into decisions affecting the course of metropolitan development.

Here, the discussion started in *Localism and Involuntary Annexation* is continued with an exploration into the how the law and culture have created a set of expectations around location that have emerged as a social and political force driving a reordering of metropolitan space. This Article will explore how municipal identity is formed and reinforced through sociopolitical processes, legal rhetoric, and legal reasoning. Part II of this Article will present a brief history of the role of municipal boundaries in shaping the spatial, social, political, and economic character of the modern metropolis. This Part presents the history of jurisdiction, municipal incorporation, and boundary disputes as both the result and expression of power relationships mapped onto territory. Part III will tie municipal identity to the law and rhetoric of property rights. This Part will unpack how municipal identity has been filtered through property rights frames and the consequences of that for metropolitan governance; it will also explore the links between property, location, and identity formation.

Part IV will explore how over time courts have fueled concerns over location risk and bolstered property-esque expectations in municipal identity through legal rhetoric and legal reasoning. Specifically, this Part examines the U.S. Supreme Court's decisions in *Village of Belle Terre v. Boraas*²⁴ and *Milliken v. Bradley*.²⁵ This Part will explore how these cases bolster notions of municipal identity as property through their cavalier construction of alternate histories and alternate normative conceptions of the meaning and consequences of municipal boundaries and location construction. These cases and others lend additional support to my contention that the social and jurisprudential framings of location risk have reinforced the notion of municipal identity as property.

Part V will conclude by returning to the case of Detroit's bankruptcy and hypothesizing on whether the history of the state's municipal boundary policy and its impacts can be considered in a municipal bankruptcy proceeding.

II. BOUNDARIES AND MUNICIPAL INCORPORATION

The history of municipal boundary formation and reformation in the twentieth century provides context for the essential role municipal boundary law has played—and continues to play—in shaping the sociology, politics, and economics of contemporary metropolitan life. State laws typically afford many more powers to incorporated

24. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

25. *Milliken v. Bradley*, 418 U.S. 717 (1974).

municipalities than to the unincorporated areas of a county.²⁶ Unlike county boundaries, which are set by the state for the purpose of carrying out state administrative objectives, municipal boundaries are locally driven.²⁷ Municipal boundaries reflect much more than just the reality of managing statewide territory in a manner that allows for the delivery of certain state-mandated functions and policy directives. They reflect organic processes of community formation, group identification, and sociocultural expression occurring on the ground. They give a territorial dimension to local politics, culture, and economics. They delimit the range of a community's legal authority to regulate the social, economic, and spatial character of its citizens' lives.

The evolution in the meaning and management of municipal boundaries is evident in various contemporary controversies. Moreover, the geography of urban poverty is shifting to the suburbs and once declining inner cities are booming. Consequently, suburban residents are threatened by the very real possibility of stagnating or declining home values and demographic change from the entrance of racially mixed and lower socioeconomic classes into what were once sanctuaries for white, middle-class America.²⁸ Ultimately our conception of the role of municipal boundaries in a time of perceived rising location risk requires wrestling with a normative vision of the future city, its biology, and why municipal boundaries exist in the first place.

A. *A Brief History of the Role of Boundary Formation in Shaping the Modern Metropolis*

Most explorations of cities, urban life, the development of the suburbs, and sprawl focus on the forces pushing human settlements

26. See DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 20–21 (7th ed. 2010).

27. See Wegner, *supra* note 12, at 178. According to Wegner:
[T]he designation county is applied to units of government with widely varying degrees of scope and function from the New England region in which the county was subordinate to the town and confined to primarily judicial and recordkeeping tasks to the Southern region in which the county is often the most important unit of general purpose government, especially in rural areas Because of the proliferation of special legislation, powers exercisable at a county's option, and minutely differentiated categories of classification according to population, the titles of county officers, the duties performed by county government, and the structure of county government have presented a bewildering kaleidoscope of form and function, even in one state jurisdiction.
Id. at 179 (omission in original) (internal quotation marks omitted) (quoting John Martinez, LOCAL GOVERNMENT LAW § 2:13, at 55 (2012)).

28. See generally LEIGH GALLAGHER, THE END OF THE SUBURBS: WHERE THE AMERICAN DREAM IS MOVING (2013).

further and further away from some defined center.²⁹ The coincident impacts of density and scale on the built environment have long operated to produce a sprawl that remakes the rural into the suburban and then into the urban in an ongoing process that both drives and is driven by the social, political, economic, and cultural milieu of American life. The metropolis necessarily has a center and an edge. Consequently, boundaries matter. Their development and evolution are part of a seldom-told story of cities.

Territorial jurisdiction categorizes land, gives precise definition to the beginning and end of governmental authority, and casts territorial community in concrete and homogeneous terms.³⁰ But territorial jurisdiction must be examined beyond its spatial aspects; scholar Richard T. Ford has called jurisdiction “a discourse, a way of speaking and understanding the social world.”³¹ It constructs legal status with regard to the reach of law enforcement, the extension of the right to vote in a municipality’s elections, and who is subject to the levying of the municipality’s property taxes.³² Richard Briffault has elaborated further on the essential role of municipal boundaries in shaping the character of metropolitan governance. He cites the role of boundaries in demarcating the multiple governmental entities providing local services in the metropolis, facilitating the internalization of the costs and benefits of local decision-making, and making taxpayer exit possible by providing an outer limit to the revenue-raising and regulatory reach of the locality.³³

While many regard boundaries as inevitable and pre-historical, history shows otherwise. The invention of public space and public property required the rhetoric and techniques of both cartographic expression and extensive formal and informal regulation. The early American colonies and towns were jurisdictionally defined either by broad, abstract directional markers or by reference to a concentration of a particular identity group—religious, ethnic, or otherwise.³⁴ Entrepreneurial colonial citizens created bounded town governments “to

29. For a definition and discussion of sprawl, see Wayne Batchis, *Suburbanization and Constitutional Interpretation: Exclusionary Zoning and the Supreme Court Legacy of Enabling Sprawl*, 8 STAN. J. C.R. & C.L. 1, 6–11 (discussing the history of sprawl through the nineteenth and twentieth centuries when the first suburban communities began to form on the edges of cities like Boston and New York). See also Henry R. Richmond, *Sprawl and Its Enemies: Why the Enemies are Losing*, 34 CONN. L. REV. 539, 539–40 (2002) (discussing the deconcentration of land and the industrialization and urbanization of America).

30. See Ford, *supra* note 3, at 852–54.

31. See *id.* at 855.

32. See *id.* at 858.

33. See Briffault, *Local Government Boundary Problem*, *supra* note 3, at 1125–26.

34. See Ford, *supra* note 3, at 893–95.

improve land, create spaces for commercial development, and control the entrance of unwanted others[.]”³⁵ During the nineteenth century, as the connective infrastructure of the young nation was in the embryonic stages of development, cities and towns were separately incorporated for the purpose of providing scale-appropriate mechanisms for regulating new public properties and facilitating the development of a national economy.³⁶ Local leaders established the terms for inclusion in the local community, many of which hinged on durational residency requirements.³⁷ Real estate developers also desired incorporated municipalities, which increased land values and spurred land speculation.³⁸

Exclusionary motivations for creating new cities were present from the early colonial settlements into the nineteenth century. As these communities grew, however, the requirements of local membership became unworkable.³⁹ The colonial government of Massachusetts was the first to pass a “Town Act,” establishing what is regarded as the first municipal corporation.⁴⁰ By the time the Articles of Confederation were established in 1672, local control over residency had given way to a more modern “right to travel” that forced a transition to a concept of jurisdiction based in the abstract, convenient, and apolitical need to provide a generic set of services to a mobile population.⁴¹

By the late nineteenth century, states had extended municipalities’ taxation powers to pay for services, infrastructure, public safety, and education.⁴² A burgeoning progressive movement advocated for more

35. NANCY BURNS, *THE FORMATION OF AMERICAN LOCAL GOVERNMENTS* 46 (1994).

36. See WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 117–18 (1996) (discussing how the incorporation of cities and towns was a necessary component of the development of a legal tradition of police regulation in public properties). Novak illustrates the common law lineage of public rights in property and their influence on nineteenth-century municipal governance and city life. See *id.* at 115–48. To say that public space is “invented” is underscored by the state’s ability to create legal and policy justifications for the redistribution of private space, property, and power to the public for the purposes of developing national infrastructure. See *id.*

37. See Ford, *supra* note 3, at 895.

38. See, e.g., BURNS, *supra* note 35, at 32–34 (discussing the role of real estate developers in pushing for the incorporation of new cities as western territories were opened for settlement in the early nineteenth century).

39. See *id.* at 46–47.

40. See Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 412–13 (1985) (discussing the historical roots of municipal incorporation in colonial New England and the early construction of municipal power).

41. See Ford, *supra* note 3, at 895.

42. See, e.g., BURNS, *supra* note 35, at 47–48 (“These new services changed the structure and consequences of institutional collective actions dramatically. They increased developers’ interest in some forms of local government. They increased

technocratic management capabilities for cities and the professionalization of city management as a counter to rising immigration, cronyism, city bosses, and rampant corruption.⁴³ The progressive movement was less influential in the Southern states, however, where the post-Civil War economic and social realignments fueled a preference for centralized state power over municipal governance as a method of ensuring white political power.⁴⁴ Further complicating the reach of the progressive movement in the South was the reality that wealthy landowners and commercial leaders, as opposed to the ethnic political bosses of the North, controlled Southern cities.⁴⁵ Regional differences aside, the late nineteenth century saw the development of laws spelling out the procedures by which citizens could create their own municipalities, lowering the cost of forming new governments.⁴⁶

There emerged during this period a vibrant academic debate about the legal status of cities in relation to the states. Two dominant viewpoints arose: Dillon's Rule and the Cooley Doctrine. Former Iowa Supreme Court Justice John Dillon argued that local governments were creatures of the states and therefore were entirely subject to state authority.⁴⁷ Conversely, former Michigan Supreme Court Chief Justice Thomas Cooley argued that, while the state may mold local institutions, local government was a matter of absolute right that the state could not take away.⁴⁸ This ideological divide over the nature of state and local power was settled in the U.S. Supreme Court's decision in *Hunter v. City of Pittsburgh*,⁴⁹ which effectively constitutionalized state plenary power over local subdivisions. It established that local governments were subordinate to their states and that there was no right to local self-government.⁵⁰ The Court settled the notion that there is not any federally protected right to local self-government and solidified the status of cities as mere creatures of state law.

The 1907 *Hunter* decision came at the dawn of a century that would see the emergence of the modern metropolis and all of its technological,

citizens' interest in creating new local governments. And they set the stage for heightened concerns about local taxes.").

43. See, e.g., STEVEN J. DINER, *A VERY DIFFERENT AGE: AMERICANS OF THE PROGRESSIVE ERA* 20–24 (1998).

44. See BURNS, *supra* note 35, at 50–52.

45. See *id.*

46. See *id.* at 52.

47. See JOHN F. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* 138–40 (2d ed. 1873).

48. *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 108 (1871) (Cooley, J., concurring).

49. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

50. See *id.* at 177–78.

sociological, and economic innovation. Industrialization, growing social diversification, and the increasing complexity of the metropolitan economy produced a backlash to constitutional city powerlessness that manifested itself most forcefully in the home rule movement.⁵¹ Home rule statutes and constitutional amendments in the states devolved block grants of power to local governments in a manner that freed them from having to seek state legislative approval for the myriad of initiatives and policy prerogatives that were uniquely local.⁵² Home rule had begun in the late nineteenth century, but calls for greater local autonomy increased in the early decades of the twentieth century.⁵³ The home rule movement forced a reconsideration of the institutional role of cities in the American federal system. As states devolved power to local governments through home rule, the courts affirmed the principle that a local government's authority was derived from its ability to use its police power to safeguard the health, safety, and morals of the local community.⁵⁴

Central to the notion of home rule and local power is the question of who sets the boundaries of the local community and the conditions under which those boundaries are allowed to change. As social, spatial, political, and economic developments spurred dramatic and constant change in American cities throughout the twentieth century, local interest groups began to demand unfettered authority to incorporate new municipalities as a way to not only express the self-determination of their respective communities, but also to escape those facets of city life they found undesirable, threatening, and unworthy of their support.⁵⁵ Liberalizing boundary formation and reformation policy coincided with home rule movements to counter the relative powerlessness of cities under *Hunter*.⁵⁶ Landowners on the outskirts of cities desired control over the extent to which they were taxed and the purposes for which they were taxed. Municipal incorporation laws were essential to facilitating

51. See MANDELKER ET AL., *supra* note 26, at 133; see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062–67 (1980) (discussing city powerlessness).

52. See Frug, *supra* note 51, at 1116–17.

53. See *id.* at 1115–16.

54. See MANDELKER ET AL., *supra* note 26, at 133–76.

55. See Tyson, *supra* note 9, at 336–38 (discussing the devolution of boundary policy to local governments and the concurrent sociopolitical context for related shifts in the boundary policy of many states).

56. See, e.g., Tyson, *supra* note 22, at 535–36 (discussing the notion of city powerlessness and the theory that, due to their constitutional status as instrumentalities of the states, cities are incapable of fully controlling their economic destinies and managing the challenges produced by their dependency on attracting mobile capital).

their self-determination amidst an expanding, diversifying, and modernizing metropolis.⁵⁷

The result of liberalizing municipal incorporation laws was an explosion in the number, size, and character of suburban municipalities in the twentieth century. At the turn of the century there were a handful of suburban municipalities surrounding cities like Chicago, Los Angeles, and Detroit. By the end of the twentieth century, that number had increased over 100 percent in some cases, reflecting the extent to which suburban landowners incorporated territory on the fringes of major cities.⁵⁸

Calls for greater local autonomy, specifically concerning boundaries, are in many ways logical and predictable responses to the challenges of managing service delivery within a rapidly expanding metropolis. But there are other motivations that reflect an institutionalized resistance to the race and class dynamics that have defined American society since its inception. For instance, concerns about the location of the poor influenced the early incorporation of towns in colonial New England. The founding documents of Watertown, Massachusetts, in the late 1630s expressed “[the] hope[] that there would be no poor, and [that] Watertown had made special provisions to exclude them.”⁵⁹ The town’s creators wanted to ensure that higher taxes would not result from the town’s obligation to support poor residents.⁶⁰ In 1887, white businessmen in Atlanta made an effort to create a separate city for African Americans along Atlanta’s southern border with the plan of relocating the city’s black population to the new municipality.⁶¹

Countless other examples of race and class motivations for creating new municipalities clarify the exclusionary functions municipal boundaries served and the early conceptions of location risk tied to a community’s relative demographic composition as well as proximity to marginalized and subordinated groups.⁶² Race and class motivations continued throughout the twentieth century and were a primary driver of suburban municipal incorporations as the dismantling of facially

57. See Richmond, *supra* note 29, at 555 (discussing how weak boundary laws from the nineteenth century made incorporation easy in the settlement of the West and caused an explosion of tiny new cities around the nation’s old central cities).

58. See *id.* at 555 tbl.3.

59. BURNS, *supra* note 35, at 35 (quoting SUMNER CHILTON POWELL, PURITAN VILLAGE: THE FORMATION OF A NEW ENGLAND TOWN 92 (1963)).

60. See *id.* at 36.

61. See *id.*

62. See *id.* at 35–37; see also Briffault, *Local Government Boundary Problem*, *supra* note 3, at 1141–43.

discriminatory policies in public accommodations, housing, and schooling spurred a retreat from central cities to the suburbs.⁶³

The construction of boundaries—municipal and otherwise—were a central feature in the marginalization of African Americans and other disfavored minority groups out of the mainstream of American economic life at a time of considerable economic expansion and government-subsidized individual and family wealth creation. The Home Owners Loan Corporation, which provided low-interest, long-term mortgage loans to financially struggling families, employed a neighborhood rating system which deliberately redlined predominately black neighborhoods and denied loans to families living in those areas.⁶⁴ These residential security maps literally drew new boundaries around black neighborhoods and were regularly used by private banks to guide their lending practices. The Federal Housing Administration (“FHA”) and the Veterans Administration (“VA”) embraced these practices when they were founded in 1934 and 1944, respectively.⁶⁵

It is impossible to overstate the extent to which racial segregation and, consequently, the removal of African Americans from the mainstream of the massive federal underwriting of home ownership were integrated into every facet of housing policy. Accordingly, contemporary notions of metropolitan area location risk can be traced directly to the racialized design and administration of housing finance policy. For years, the FHA’s underwriting manual classified African Americans as “adverse influences” on property values and warned against the “infiltration of inharmonious racial or nationality groups” in otherwise racially homogenous all-white neighborhoods. The FHA warned land developers and realtors that “[i]f a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes.”⁶⁶

63. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES*, 195–203 (1985).

64. *Id.*; see also Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 136–37 (2013).

65. See *id.* at 203–04.

66. Kevin Fox Gotham & James D. Wright, *Housing Policy*, in *THE HANDBOOK OF SOCIAL POLICY* 401, 406 (James Midgley & Michelle Livermore eds., 2d ed. 2009) (alteration in original) (quoting FED. HOUS. ADMIN., *UNDERWRITING MANUAL* 233 (1936)); see also Paul Boudreaux, *Homes, Rights, and Private Communities*, 20 U. FLA. J.L. & PUB. POL’Y 479, 487 (2009) (quoting EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 64–65 (1994)). The extent to which federal policy spurred suburban development and the decline of central cities cannot be overstated. Federal spending to aid urban development was a relatively small \$30 million during the New Deal era of the early 1930s. Robert Waste, *Urban Development Policy*, in *THE HANDBOOK OF SOCIAL POLICY*, *supra*, at 524, 525. By the 1960s annual spending averaged about 8% of all federal spending and rose to “a historic

The real estate industry encouraged the use of racial covenants to secure white exclusivity in neighborhoods. Neighborhood improvement associations and businesses saw the covenants as a necessary tool to safeguard white supremacy through social distance and through the systematic removal of African Americans from the housing market—the largest wealth-creating vehicle for ordinary Americans.⁶⁷ The manner in which ownership in real property and the social stigma of black neighborhoods reinforce the racialized allocation of locational equity is ultimately transferred intergenerationally and its impact is cumulative.

The research on housing discrimination by race illustrates well the intersections between location and social identity. The National Association of Real Estate Boards published *Fundamentals of Real Estate Practice* in 1943, wherein it explained:

The prospective buyer might be a bootlegger who would cause considerable annoyance to his neighbors, a madam who had a number of Call Girls on her string, a gangster who wants a screen for his activities by living in a better neighborhood, *a colored man of means who was giving his children a college education and thought*

high of 16% of all national government spending by 1980.” *Id.* That level fell to 11% during the Reagan and Bush years, rising again to 14% in the Clinton years. *Id.* The 1934 National Housing Act (the “Act”) “created a Federal Housing Administration (FHA) to create government-insured home mortgages to prop up the failing home building industry[.]” *Id.* at 526. The Act also created the Federal Savings and Loan Insurance Corporation to insure the savings of individual depositors in the aftermath of the banking failures of the Great Depression. *Id.* These early legislative acts began a trend of directing federal assistance toward home building, banking, and only indirectly to central cities. *See id.* “The Federal Housing Act of 1949 created the Urban Renewal Agency and signaled the beginning of a decade of urban renewal in center cities.” *Id.* This effort became known as “Negro Removal,” as it set in motion a response to poverty and blight that added a spatial dimension to the state-sanctioned racial discrimination that defined that era. *Id.* “From 1950 to 1960, urban renewal funds were spent to raze over 120,000 substandard center-city housing units, which, in turn, were replaced with fewer than 30,000 new housing units.” *Id.* The new units were mostly consolidated in low-income housing complexes, which ultimately became the embodiment of the perceptions of government’s dysfunction and cultural or behavioral explanations for persistent poverty that dominated the politics of the 1980s and 1990s. *See id.* The post-World War II GI Bill of Rights and the VA Home Loan Program also spurred the development of suburban housing, which also received a boost from the unprecedented era of freeway construction promoted by the Highway Act of 1956. *Id.* These federal policy devices and the heavily institutionalized race and class discrimination of the time led to a boom in suburban housing development that could legally only benefit the white working class. *See id.* at 527. By the time the War on Poverty policies of the 1960s attempted to address the isolated inner city black poor, the suburban identity had calcified in a manner that made location and boundaries all the more consequential. *Id.*

67. *See, e.g.,* RICHARD H. CHUSED, CASES, MATERIALS, AND PROBLEMS IN PROPERTY 492–94 (3d ed. 2010) (discussing *Shelley v. Kraemer* and the impact of racial covenants in limiting the market for housing, removing African-American homebuyers from the mainstream of housing market activity and, ultimately, eliminating African Americans’ potential to create wealth through home ownership).

they were entitled to live among whites. . . . No matter what the motive or character of the would-be purchaser, if the deal would instigate a form of blight, then certainly the well-meaning broker must work against its consummation.⁶⁸

When the U.S. Supreme Court declared racially restrictive covenants unconstitutional in its 1948 decision *Shelley v. Kraemer*,⁶⁹ zoning law emerged as the a key tool in the exclusionary architecture of local politics. Early proponents and skeptics of zoning saw it as a plausible substitute for deed restrictions. They recognized the potential for racial exclusion through the implementation of architectural, spatial, and aesthetic restrictions that limited entry for certain classes of citizens.⁷⁰ There is an extensive body of research documenting the extent to which exclusionary zoning and other policies intentionally and systematically divested African Americans and other disfavored minorities from full participation in the government-sponsored and subsidized housing market throughout the entirety of the twentieth century.⁷¹

The confluence of these forces substantially redefined the meaning and experience of American life in a manner that transformed metropolitan regions by promoting, provoking, and facilitating an initial wave of white flight and a subsequent wave of multiracial, middle-class flight that has decimated the tax base and urban core of metropolitan region central cities.⁷² This flight is quantifiable: in 1950, almost 70 percent of the population of 168 metropolitan regions lived in 193 central cities; by 2000, over 60 percent of the population of 331 metropolitan regions lived in suburbs. Over the same period, population densities in the largest urbanized areas were effectively cut in half.⁷³ But flight is not

68. See BURNS, *supra* note 35, at 55 (omission in original) (quoting HERMAN H. LONG & CHARLES S. JOHNSON, *PEOPLE VS. PROPERTY: RACE RESTRICTIVE COVENANTS IN HOUSING* 58 (1947)).

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

70. See BURNS, *supra* note 35, at 56–57.

71. See, e.g., Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 17–21 (2006) (discussing the public policies supporting private racism in the development, marketing, and sale of residential real estate and the impact on the psychology of the broader real estate market).

72. See, e.g., STEPHEN GRANT MEYER, *AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS* 218 (2000) (providing opinion poll research from 1978 and 1996 showing white resistance to residential integration and support for laws explicitly enforcing racial segregation).

73. For a discussion of the causes and consequences of white suburban flight, see George C. Galster, *White Flight from Racially Integrated Neighborhoods in the 1970s: The Cleveland Experience*, 27 URB. STUD. 385, 391 (1990) (presenting econometric research indicating that segregationist sentiment was a primary driver in white emigration from racially integrated neighborhoods); Christopher J. Tyson, *At the Intersection of*

the only manifestation of the manner in which race and class animus has been mapped on to territory; patterns of racial discrimination have also led to racial minorities being drawn out of cities and left in unincorporated areas where county governments typically provide an inferior level of services.⁷⁴ Much of the history and character of municipal organization can be explained by these discriminatory motives.

These racial and class exclusionary effects are not just descriptive facets of municipal boundary law's impact—they are essential characteristics to the work municipal boundaries perform and their resilience as the logic driving the organization and methodology of metropolitan politics. Municipal boundary law facilitates exit and consequently has worked to reproduce race and class-based disparities in a manner that grows cumulatively over time. These particular dimensions of municipal boundaries have added stigma to residence and place, signaling to the market areas for both investment and isolation.⁷⁵ Annexation and municipal incorporation law are central to these processes and have in effect given a geographic character to race and class-based politics.⁷⁶

B. *Municipal Incorporation Today*

States establish general standards for municipal incorporation. These standards include requirements for minimum population, minimum density, or the devotion of a significant portion of land within

Race and History: The Unique Relationship Between the Davis Intent Requirement and the Crack Laws, 50 HOW. L.J. 345, 366 n.76 (2007) (citing Kyle Crowder, *The Racial Context of White Mobility: An Individual-Level Assessment of the White Flight Hypothesis*, 29 SOC. SCI. RESOURCES 223, 223 (2000)) (“[P]resenting research that indicates that the likelihood of Whites leaving a neighborhood increases significantly with the size of the minority population in the neighborhood and that Whites are especially likely to leave neighborhoods containing combinations of multiple minority groups[.]”).

74. See Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1101–02 (2008).

75. See, e.g., Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1208–09 (2008) (discussing the exclusionary ethos of constitutionalizing zoning laws and the manner in which municipalities gained power chiefly for the purpose of shaping their demographic make-up through exclusionary practices).

76. Additionally, past motives for annexation have often intentionally served to reproduce existing race and class inequality, resulting in metropolitan regions carved into racially and socioeconomically defined local government units. Scholars have addressed the processes of municipal under-bounding, i.e., annexation practices in which cities grow around or away from low-income minority communities in an effort to exclude them from municipal services and curtail their voting rights. See generally, e.g., Anderson, *supra* note 74.

the proposed municipality to residential, commercial, industrial, or related uses.⁷⁷ Some states also address whether an area has a need for a new government or the resources to support it. This involves a substantive inquiry into the operational costs of providing a base level of infrastructure and services.⁷⁸

The rules and threshold requirements that states attach to municipal incorporation are designed to have an inhibiting effect on incorporation activity, to ensure that new municipalities are able to provide the requisite public services and infrastructure, and to guarantee that they have the capacity for self-government. While incorporation standards in some states can place a high burden on those endeavoring to create a new city, in most states it is relatively easy to incorporate, and while several legal prerequisites may need to be satisfied, incorporation is generally available.⁷⁹

A majority of states allow for relatively easy incorporation of new municipalities and prevent central cities from unilaterally annexing new territory without the consent of the residents within the territory proposed for annexation.⁸⁰ Consequently, in most states, individual property owners control municipal boundary formation and reformation. The municipal incorporation law of the majority of states reflects and reinforces the long-standing associations between individual property rights, self-determination, and local government autonomy.⁸¹

Many unincorporated areas become annexation targets before they are capable of incorporating as separate municipalities. The story of Kingwood, Texas, shared earlier is one of the more dramatic tales of boundary strife, but it is certainly not the only one. Clashes over municipal incorporation and annexation continue today and are at the center of local political battles in several states.⁸² For instance, several failed attempts to create a break-away school district in a portion of Baton Rouge, Louisiana, have fueled calls for the incorporation of an entirely new city within the city's home parish, East Baton Rouge Parish.⁸³ Louisiana law provides that residents of any unincorporated

77. See RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 197–98 (7th ed. 2009).

78. See *id.*

79. See Platon N. Rigo & Charles J. Spindler, *Municipal Incorporation and State Statutes: A State-Level Analysis*, 23 ST. & LOC. GOV'T REV. 76, 77 (1991).

80. See MANDELKER ET AL., *supra* note 26, at 81–87.

81. See *id.*

82. See, e.g., Tyson, *supra* note 9, at 303–25.

83. See Rebekah Allen, *New City Sought for School District*, ADVOC. (June 24, 2013), <http://bit.ly/1c7Gc16>; Margaret Newkirk, *Baton Rouge's Rich Want New Town to Keep Poor Pupils Out: Taxes*, BLOOMBERG (Feb. 6, 2014, 12:00 AM), <http://bloom.bg/LTlBaO>; Rob Quinn, *Latest Secession Seeker: Baton Rouge's Richer Side*, USA TODAY (Dec. 2, 2013, 10:56 AM), <http://usat.ly/1hUIEOL>.

area with a population in excess of 200 inhabitants may propose the incorporation by first delivering a petition for annexation signed by 25 percent of the electors residing in the area.⁸⁴ State law then provides that the Governor reviews the petition for compliance and, if approved, the matter proceeds to a vote of the electors residing in the area proposed for incorporation.⁸⁵

Calls for a new city called St. George, Louisiana, followed the 2005 creation of the City of Central, also in East Baton Rouge Parish.⁸⁶ That city was created in large measure as a response to calls for a separate school district. The relatively new city of Central, Louisiana, offers minimal services due to its ability to either contract with the larger city-parish system in East Baton Rouge Parish or its close proximity to all of the amenities located in the center city. Central leaders promised no new taxes in their campaign to incorporate a new city and are frank about why they are able to keep taxes low to this day. According to the head of the incorporation effort, “When you start to add extra services—if you ever decide to build a performing arts center or something—that’s when you start to pay more[.]”⁸⁷ Central’s location near the center city but relative distance from the challenges and redistributory obligations of the central city’s operations is essential to the character of government and taxing structure it is able to offer its citizens.

St. George proponents are also motivated by school-district-related issues. If created, St. George would be the fourth largest city in the state of Louisiana and one of the wealthiest. By some estimates, it would leave what was left of Baton Rouge with a \$53 million budget shortfall.⁸⁸ One way to undermine the breakaway effort is for Baton Rouge to invite landowners in the unincorporated areas of the parish to petition to be annexed into the city proper. Louisiana’s annexation laws require the consent of property owners; there is no unilateral annexation option for the city. Property owners who voluntarily petition for annexation would diminish the potential tax base of any proposed new city.⁸⁹ The politics that these annexation and incorporation battles produce, however, are reflective of perceived location risk and vested rights in municipal identity. A supporter of the push for a new city cited that the effort would allow those pushing for a new city to “control [their] own

84. See LA. REV. STAT. ANN. § 33:1 (West, Westlaw through 2013 Reg. Sess.).

85. See *id.* § 33:3.

86. See Steven Ward, *Central Blazed Trail for St. George Incorporation Effort*, ADVOC. (Mar. 6, 2014), <http://bit.ly/1n3qfn2>.

87. See Ward, *supra* note 86.

88. See Elizabeth Crisp, *No Clear Leader for St. George Opposition*, ADVOC. (Dec. 23, 2013), <http://bit.ly/1b5ZVnp>.

89. See Rebekah Allen, *LSU Mulls Annexation into City of Baton Rouge*, ADVOC. (Feb. 26, 2014), <http://bit.ly/1k99mWb>.

destiny.”⁹⁰ Similar efforts are afoot throughout the nation, most of them driven by a desire for independent or breakaway school districts.⁹¹

All incorporation or annexation battles raise concerns about demographics, taxation, and government spending. A cursory examination of recent municipal incorporation efforts reveals a common set of ambitions, criticisms, and concerns. The incorporation of Semmes, Alabama, in 2010 was driven in part by concerns about taxation after the Semmes area came under the police jurisdiction of the city of Mobile and was faced with a 2.5 percent sales tax and oversight by Mobile’s Planning Commission.⁹² Estero, Florida, sought to defensively incorporate itself to avoid a feared annexation by its neighbor, Bonita, Florida.⁹³ Also in Florida, residents of North Central Miami-Dade County pursued incorporation as a means of preventing the “cherry-pick[ing]” of the unincorporated land in their area by other county municipalities looking to expand their territory through annexation.⁹⁴ A Miami-Dade County resident described the decision to incorporate the area as “remaining as you are or having your own self-determination.”⁹⁵

The Miami-Dade incorporation of the area would create one of the state’s largest predominately African-American- and Latino-populated cities, and the race and class undertones of the annexation effort are visible in the statements of proponents of the incorporation effort. One observer who expressed frustration over the lack of “economic diversity” initiatives introduced and implemented by the area’s county commissioners directly addressed a narrow land use agenda. “All they do is affordable housing,” she remarked.⁹⁶ These examples and others are evidence that municipal incorporation is still a live issue and is tied to the growth of metropolitan regions. The simultaneous movement to cities and desire for separate territorial autonomy underscores the need for further exploration of municipal identity in the modern metropolis.

90. See Allen, *supra* note 83.

91. See Newkirk, *supra* note 83.

92. See David Ferrara, *Semmes Voters Approve Incorporation Almost 3 to 1*, AL.COM (Aug. 18, 2010, 5:00 AM), <http://bit.ly/1cC86Zv>; Robert McClendon, *Semmes Incorporation Would Come at Mobile’s Expense*, AL.COM (Aug. 15, 2010, 7:45 AM), <http://bit.ly/LCcuKA>.

93. See Chris Umpierre, *Estero Pushes for City Status*, NEWS-PRESS.COM (July 12, 2013), <http://newspr.es/1g755x1>.

94. See Jose Perez, *Residents Push Plans for New City*, S. FLA. TIMES (June 27, 2013), <http://bit.ly/Mvv6g5>.

95. See *id.*

96. See *id.*

C. *A Positive Theory of the Metropolis*

Inequality and economic stratification are managed in metropolitan areas. Metropolitan area governments are chiefly responsible for addressing the imbalances and mal-distributions of a market economy and the legacy of race, class, and gender-based economic marginalization. The metropolis is fundamentally an exercise in the redistribution of wealth, social power, and cultural capital. Scale, proximity, density, and jurisdiction all support and shape these redistributory functions.

Municipal fragmentation operates to limit the scope of wealth redistribution within the broader metropolis. Municipal boundaries have functioned to reinforce existing racial and class-based systems of privilege and disadvantage; thus, notions of the benefit and value to be derived from the formation of municipalities involve assessments about the race and class identity of the residents within those boundaries and the potential impact their presence within the municipal community might have on real or perceived property values.

State boundary policy separates groups of people in the metropolis who would otherwise receive public goods and services from the same source. This separation leads to the uneven distribution of metropolitan area benefits and burdens and renders the freedom and self-determination gains produced by liberal boundary policies a very costly endeavor.⁹⁷ There is a great deal of irrationality that goes into these decisions as well. Narrative, imagination, and the perception of risk are all highly irrational forces that have as much influence on metropolitan ordering as does the need for connections and information.

The specter of incorporation battles and the growing intensity of the provincialism they evidence reflect an ideology of hostile privatism that undermines the potential of interconnected and interdependent metropolitan communities.⁹⁸ This ideology prioritizes the preservation of property values above any other social goals. Property values are correlated in large measure with the value of the human beings occupying the property as opposed to any other basis. Preserving property values implicitly involves the maintenance of existing patterns of race and class stratification and geographic isolation. Municipal

97. See Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 GEO. MASON L. REV. 637, 647 (2012) (discussing how the Tiebout-style gains that flow from the population sorting that occurs in highly fragmented metropolises is offset by the efficiency losses for regional governance).

98. See EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 18–19 (1994) (coining the phrase “ideology of hostile privatism”).

boundaries are a crucial feature of the legal architecture facilitating the pursuit of such aims.

In her scholarship on municipal annexation law in North Carolina, Judith Wegner has called for the examination of the process of expanding municipal boundaries as part of the broader “ecology of local governmental and quasi-governmental activities.”⁹⁹ It is this notion of the governance and administrative ecology of the modern metropolis that is essential to the development of a coherent theory of the role of boundaries in the modern metropolis.¹⁰⁰ For American metropolitan regions, the fundamentally redistributive ethos of urbanity is an essential feature; its reality and the various public responses to it have existed since the founding of the nation’s early settlements.

Richard Briffault aptly deduced:

[T]he fundamental feature of contemporary metropolitan governance is the operation of locally bounded fiscal and regulatory autonomy in regions where economic and social activity transcends local boundaries. Each local government has an economic incentive to pursue its own local goal of attracting new tax base contributors while excluding net service cost demanders.¹⁰¹

The ecology of local government boundary law involves the range of forces impacting how municipal boundaries are perceived in the public’s consciousness and how they respond socially and politically to that perception. This ecology operates on at least two dimensions. In one dimension there is the need for the efficient and reliable delivery of basic and essential public services. The metropolis is designed to fulfill many roles that are purely functional. Metropolitan areas cluster people within a territorial expanse in a way that facilitates the delivery of public goods and services. These not only include utilities and infrastructure but also the experience of democracy and participatory government. Scale significantly impacts the cost of service delivery, the ratio of spatial proximity to democratic expression, and the ratio of spatial proximity to community experience all factor into the equation of how local government functions on behalf of its citizens. Service provision and delivery is fundamentally a redistributive exercise since not

99. See Wegner, *supra* note 12, at 171.

100. For a discussion of various and competing theoretical visions of the city or the metropolis, see, for example, Hoi Kong, *Toward A Federal Legal Theory of the City*, 57 MCGILL L.J. 473, 475 (2012); Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 483–90 (1993); Thomas Poole, *Proportionality in Perspective*, 2010 N.Z. L. REV. 369; A. Dan Tarlock, *City Versus Countryside: Environmental Equity in Context*, 21 FORDHAM URB. L.J. 461 (1994).

101. See Briffault, *Local Government Boundary Problem*, *supra* note 3, at 1136.

everyone contributes to the ecological system in the same manner or to the same degree.

The other dimension relates to identity; it functions to solidify the bonds of common interest, mutual benefit, and linked fate across the dominant social and political connections of the day. The community identity dimension of metropolitan life links territory to group identity, culture, and history. This fosters an emotional, personal investment in localism. The sense of linked fate within a community necessarily has a limit—a discernable endpoint beyond which that sense of common interest does not extend. The solidarity and oppositional identity forged from that experience require that territory be exclusive and safeguarded through a provincial and inward-looking consciousness.

Municipal incorporation and annexation law has evolved, in significant measure, to suit the diminishing appetite for redistribution and the specific race, class, and other identity prisms through which systems of wealth and resource redistribution are politically and culturally understood. Municipal incorporation law is too often deployed to bolster principles of privatization, consumer choice, and a high-stakes, zero-sum culture of location risk mitigation, which undermines the redistributive ethos of metropolitan life. A positive theory of the metropolis must involve the resurrection of a communitarian ethic that views this redistributory ethos as a necessary social and cultural good. It must seek to limit the extent to which boundaries facilitate exit from a social contract forged on interdependence and linked fate across identity lines. Finally, it must vigorously interrogate the antisocial theory at the core of normative conceptions of property values and resist its continued promotion.

III. LOCATION, PROPERTY, IDENTITY, AND THE METROPOLIS

The identity component of municipal identity refers simultaneously to the legal identity of the territory and the identity of the people living there. Over time municipal boundaries fuse with individual and group identity, forging an existential investment in jurisdictional boundaries that is often expressed and understood in profoundly personal and deeply felt ways. Municipal identity fundamentally exposes the inseparable nature of individual and group identity and territory where the modern metropolis is concerned. Just as individuals create value in property by using property law to determine their relationship with others vis-à-vis the land, so too do individuals create value in a location by using local

government law to determine their relationship with others vis-à-vis the metropolis.¹⁰²

The desire to exit the central city or incorporate a new one is complicated and cannot be completely explained through an analysis of the institutional decisions that are the focus of this Article. There are conditions on the ground in every community that reflect specific, unique dynamics impacting location choice, sometimes just as much as the historical and institutional considerations presented herein. Not all suburban dwellers exit the central city as a conscious move to avoid its taxing power or out of race or class animus. Furthermore, there are perfectly valid and legitimate reasons individuals and families seek the outskirts of the city.

Less density, larger and more affordable homes, more open space, shorter commutes to work (if work is located in the suburbs), and newer construction and infrastructure are all relatively apolitical reasons for moving out of a central metropolitan area. There is also the reality that there are many suburban dwellers who became so not because they fled the city, but because the city eventually encroached into their otherwise rural, unincorporated domain and transformed its physical character into that of a suburb.¹⁰³ Their ties to the territory where they reside—the territory subsequently subsumed into a suburban municipal identity—may be entirely organic, pre-political, and a natural outgrowth of a social and economic community that existed before state intervention.¹⁰⁴ Their desire to live in close proximity to the city but not actually in the city can simply be a lifestyle choice borne out of personal needs and desires.

In critiquing the excesses and deficiencies of suburban municipal identity, it is important not to underestimate the moral weight of the connections that groups of people have to territory independent of the politics of metropolitan fragmentation or urban sprawl.¹⁰⁵ Suburbanites

102. See, e.g., Stahl, *supra* note 75, at 1208–09 (discussing the exclusionary ethos of constitutionalizing zoning laws and the manner in which municipalities gained power chiefly for the purpose of shaping their demographic make-up through exclusionary practices).

103. This is an important observation in any discussion about the central city and its environs. The reality of sprawl is not just a story of suburban growth on the outskirts of central cities, but also of the sprawling development of central cities that have expanded to turn once rural areas into suburban ones. This has been explored in nuisance law in cases such as *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970), and *Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972).

104. See Ford, *supra* note 3, at 859–60 (discussing organic jurisdiction as one of the descriptions of jurisdiction that operates in legal and political discourse).

105. See *id.* Ford's discussion of organic jurisdiction presents both national and subnational examples of the organic relationship between groups and the territory they occupy. See *id.* at 845. Ford's presentation of the jurisdiction discourse is relevant for a full understanding of the complexities of assessing suburban municipal identity.

not only cherish the sovereignty available through a separately bounded territorial community—their vision of self-determination, personal wealth creation, and physical and psychological security depends on it. The self-determination and sovereignty associated with local government are understood as the natural order in the same way that commonly held notions of property are.

Not everyone in the suburbs is at odds with the central city. But the aforementioned possibilities for suburban motive do not reflect the mainstream of the suburban identity. Generally speaking, suburbanization and the suburban identity are organized around the notion of exit—the decision to leave the formal boundaries of the city for the purpose of relocating on its outskirts. In too many cases, individuals and families end up in suburban jurisdictions as a result of very deliberate, calculated decisions. There, residents can access the benefits of the city without having to pay for those benefits or the associated burdens of city life. Most suburban residents chose to exit their metropolitan area central city in name only—their communities are part of the metropolitan identity and experience that is anchored by the central city.

The growing focus on jurisdiction and boundaries represents an evolution in the contemporary suburban identity. Municipal identity's emergence at the center of a high-stakes game of location risk mitigation begs an examination of the underlying forces of identity, location, and the property-esque right to a separate municipal identity that have captured the contemporary suburban imagination. Municipal identity relies on the mythology of property to validate the pursuit of individual freedom, group identity, and prosperity in exclusive ways. It is the result of the manner in which identity, property, and location are constructed through experiences and linkages both imagined and real. Furthermore, the notion of municipal identity as property distorts the civic republican ideal of the role of property ownership as providing the necessary foundation for civic virtue and the pursuit of the common good.¹⁰⁶ It

106. See Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 286 (1991). During the early years of the nation, many believed that property provided not just a stake in the action but also a sense of responsibility, a concern about the stability of government, and a lack of dependence on others that were essential for an intelligent voting population. Land ownership was tied to civic identity—the right to vote and hold elected office were tied to property ownership, which is the essence of civic republicanism. Civic republicans believed that property ownership provided the necessary foundation for virtue, enabling citizens to pursue the common welfare. Parts of this theory began to break down in the early years of the nineteenth century, particularly those parts dealing with the political rights of non-landholding men. See, e.g., CHUSED, *supra* note 67, at 17–19. Municipal identity as property occurs as a distortion of the civic republican ideal of the role of property ownership.

devalues the notion of the common good by over-focusing on *who* constitutes the common than with *what actions* constitute the good.

Interestingly enough, municipal identity as property incorporates both the communitarian ironies at the center of localism and the manner in which notions of the individual and collective self are expressed through the social and legal construction of ownership over place and territory. Ultimately, the notion of municipal identity as property confers upon a community the legal legitimation of expectations of power and control that have been enshrined in state law without regard for the impact of that power.¹⁰⁷

A. *Identity and Location*

Location is everything. The value of one's home, the social value attached to one's networks, and the political value assigned to one's neighborhood are all impacted by one's location in the metropolis. Many Americans regard the decision of where to purchase or rent a home to be highly consequential and linked with other decisions that ultimately impact quality of life, wealth creation, social status, political power, and perceived safety and well-being. Location decisions incorporate presumptions about wealth, privilege, poverty, disadvantage, status, and stigma. They facilitate both wildly esoteric and painfully tangible distinctions between communities that translate into market value, political power, and social worthiness. Social and consumer behavior within metropolitan regions responds to these dynamics. Moving to one regional locality versus another is not just about choosing between local governments or taxing structures; it is about choosing an identity.

When contemplating the roots of the social investment in municipal identity and its relationship to both the individual and community, it is also necessary to explore the role of imagination. Imagination has been broadly defined as the "capacity to conceive of objects or experiences not presently available to the senses" and implicates a range of mental activities.¹⁰⁸ In *Imagination and Choice*,¹⁰⁹ Anne Dailey argued that adult reasoned decisionmaking in American law implicates the foundational skill of imagination.¹¹⁰ This perspective is instructive for understanding not only the development of municipal identity in

107. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (discussing the role whiteness as property plays in legitimizing expectations of racial power and control).

108. Anne C. Dailey, *Imagination and Choice*, 35 LAW & SOC. INQUIRY 175, 177 (2010).

109. Anne C. Dailey, *Imagination and Choice*, 35 LAW & SOC. INQUIRY 175 (2010).

110. See *id.* at 178.

suburbia, but also the personal investment in municipal identity and its relationship to real and perceived risk.

Boundaries are legal constructs with deep, sociopolitical meanings. Unless the line between city and suburb is marked by a natural feature like a river or a change in the terrain, few metropolitan residents know the exact boundaries separating one metropolitan area municipality from the other. The actual location of the boundary matters little. It does not affect the day-to-day experience of living in a metropolitan area. Therefore, imagination plays a role in constructing the social and legal meaning of municipal boundaries. Metropolitan residents imagine that their municipal identity—arbitrarily propped up through invisible boundaries—is the arbiter of status and opportunity. Consequently, municipal boundary law, like zoning, functions as a method of social control in the metropolis.¹¹¹

How place is imagined is impacted by how connections to it actually form. Scholars have examined the links between individual identity formation and place.¹¹² Physical settings, human activities, architectural and development patterns, and social history all impact how one location is viewed in relation to another and ultimately in relation to the individual.¹¹³ At a very fundamental level people have a need to attach themselves to their physical environment—what scholars call “place attachment.”¹¹⁴ One of the dimensions of place attachment focuses on the manner in which people use their identification with a place in order to distinguish themselves from others.¹¹⁵ If this identification is reinforced by the social position and historic patterns of resource allocation, it can strengthen or diminish individual and group self-esteem. In either case, the investment in place is intense; it validates one’s relative privilege or can be offered to explain one’s relative disadvantage.

Place attachment is connected to a host of real and perceived risks to individual and family security and prosperity. It implicates issues of goal support and temporal and personal continuity.¹¹⁶ And in the current

111. Scholars have long dissected the role of zoning in regulating development and social relations in cities. While I do not disagree, I would argue that boundaries are an underappreciated force in the broader consideration of local governance. For a discussion of how zoning is a tool for social control, see generally, for example, J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761.

112. See Janne Lindstedt, *Place, Identity and the Socially Responsible Construction of Place Brands*, 7 PLACE BRANDING & PUB. DIPL. 42, 44–45 (2011) (citing E. RELPH, *PLACE AND PLACELESSNESS* (1976)).

113. See *id.* at 44.

114. See *id.* at 45 (citing Leila Scannell & Robert Gifford, *Defining Place Attachment: A Tripartite Organizing Framework*, 30 J. ENVTL. PSYCHOL. 1 (2010)).

115. See *id.* at 47.

116. See Scannell & Gifford, *supra* note 114, at 5.

commercialized, consumerist moment, it directly impacts wealth creation and maintenance. The factors impacting place attachment are also in sync with the ways in which attachments to real property are developed and socially reinforced. Consequently, as people are developing deeply psychic connections and investments in their respective locations, they are also forming property-esque expectations that, while not always constitutionally based, have social, political, and economic meaning.

Individuals have a need to attach themselves to their environments and therefore need to be able to link certain kinds of meanings to their environments.¹¹⁷ Accordingly, place attachment is connected to place branding. The former focuses on the individual's attachment to place. The latter focuses on the group's promotion of place. Of the several definitions of place branding, the one emphasizing a social approach defines it as "the means both for achieving competitive advantage in order to increase inward investment and tourism, and also for achieving community development, reinforcing local identity, and identify[ing] . . . the citizens with their city and activating all social forces to avoid social exclusion and unrest."¹¹⁸ The rise in cityhood and anti-annexation movements suggest that any commitment to the social approach is being overshadowed by the desire for competitive advantage in an inter-metropolitan quest for property value maximization. Place branding is usually a tool deployed in a zero-sum game for economic development positioning and provincial, inward-focused wealth creation.¹¹⁹

The scholarly discourse on place attachment cites globalization, increased mobility, and environmental problems as destabilizing forces for the places to which people become attached.¹²⁰ Metropolitan fragmentation is another threat that destabilizes the sense of community that ties the metropolis together. The desire to carve out exclusive, separate locations within the modern metropolis underscores the extent to which metropolitan location has been commodified and propertized. In an increasingly consumer-oriented society, the private residence and the community within which it is located are in many ways viewed as just another commodity—property worthy of the utmost protection. As these consumer-focused principles increasingly influence common perceptions of community, belonging, and the self, where one resides

117. See, e.g., Lindstedt, *supra* note 112, at 45 (citing Scannell & Gifford, *supra* note 114).

118. *Id.* at 44 (quoting Michalis Kavaratzis, *From City Marketing to City Branding: Towards a Theoretical Framework for Developing City Brands*, 1 PLACE BRANDING & PUB. DIPL. 58, 70 (2004)).

119. For a broader discussion of inter-municipal competition for economic development and mobile capital, see generally Tyson, *supra* note 22.

120. See Scannell & Gifford, *supra* note 114, at 1.

occupies a heightened position in the existential components of his or her identity. As urban leaders increasingly adopt branding techniques once the domain of commercial products and services to cities, so too does the individual relate her location with her real and aspirational self-image.¹²¹

B. Property Rights and Municipal Identity

Municipal identity is not a recognized species of property in any traditional sense. Jurisdiction and the municipal entities that formalize jurisdiction are creatures of state law, enabled by each state's land use and municipal boundary management regime. While local sovereignty is not recognized in our constitutionalism and accordingly does not constitute any protected set of property rights,¹²² there has emerged a species of property rights borne of human experience. Legal scholars have theorized the manner in which several social constructs, identities, and institutions have acquired the characteristics of property with regard to their social meanings.¹²³ "Municipal identity as property," therefore, is a metaphor that characterizes the social and political meanings that attach to municipal identity and the corresponding legal expectations it fosters in individuals and communities.

"Municipal identity as property" is also intended to highlight the ways in which municipal identity performs both the theoretical and functional work that occurs in a property rights system. Theoretically, municipal identity defines and reinforces social relations, clarifies relationships between people in relation to territory, and facilitates personal and group identity development. Functionally, municipal

121. See Bill Baker, *Foreword to CITY BRANDING: THEORY AND CASES*, at xiii, xiv (Keith Dinnie ed., 2011).

122. See *supra* text accompanying notes 49–50 (discussing the Supreme Court's decision in *Hunter v. City of Pittsburgh*, which settled the notion that there is not any federally protected right to local self-government). *Hunter* and the developments in local government law that followed marked a considerable shift in the legal conception of both the city and the suburb in American urban policy. See, e.g., Wayne Batchis, *Enabling Urban Sprawl: Revisiting the Supreme Court's Seminal Zoning Decision Euclid v. Ambler in the 21st Century*, 17 VA. J. SOC. POL'Y & L. 373 (2010) (discussing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and its impact on the development of suburban sprawl and the historical nexus between suburban development and center city decline); Stahl, *supra* note 75 (discussing the historical relationship between cities and the socioeconomic and political factors fueling the development of the twentieth-century suburb); Wegner, *supra* note 12, at 180–85 (discussing municipal incorporation and providing a contemporary overview of the power dynamics between state legislatures and municipal leaders).

123. See generally, e.g., Harris, *supra* note 107 (exploring the development of whiteness as a property right and presenting a framework for how property rights are socially constructed even if not formally recognized in law); Goutam U. Jois, Note, *Marital Status as Property: Toward a New Jurisprudence for Gay Rights*, 41 HARV. C.R.-C.L. L. REV. 509 (2006).

identity allows groups to essentially “own” territory and govern it in a manner that not only allows them to exclude dissimilarly situated others, but also confers upon them status and reputational benefits which translate into market value.

The property rights implicated primarily operate in rhetoric—both popular rhetoric and legal rhetoric. Their rhetorical foundations do not diminish their material significance, however; widely held notions of property rights, entitlements, and vested interests form the basis for citizen-led movements to codify those notions in public policy and law. The increase in citizen-led movements for separate jurisdiction is not simply a function of the availability of easy, relatively low-cost municipal incorporation or property-owner driven annexation regimes. Municipal identity has emerged as a status and right that many feel significantly impacts their lives and therefore warrants the utmost government protection. These individuals and groups frequently deploy property rights rhetoric to express what they view as a fundamental right. Conceptualizing municipal identity, therefore, requires conceptualizing how a separate jurisdiction becomes property in the minds of metropolitan residents who increasingly band together to zealously pursue it.

It is first necessary to explore the meaning of property rights and how they relate to the governance of territory in the modern metropolis. Historically, there are a number of theoretical frames for understanding property rights, including first possessor rules, the creation of value, Lockean labor theory, personality theory, utilitarian theory, and the community or social view of property.¹²⁴ Classical views of property rights emphasize the natural character of property and its relationship to the individual freedom. Property rights encompass an array of rights and privileges exercised by persons and enforced by the state. A property rights regime necessarily draws boundaries and creates and enforces structures of power. Furthermore, property law creates and manages expectations of power over things and over people in relation to things. It is concerned with the maintenance of order upon which individual and group expectations can rely. Society as a whole benefits when individuals possess reasonably secure entitlements in the things necessary to generate wealth and prosperity.¹²⁵ These expectations

124. See, e.g., Harris, *supra* note 107 at 1725–26 (reviewing the theoretical basis of differing views of property). See also generally ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND (2007) (presenting the social view of property).

125. *Id.* at 19 (discussing the misconception of property rights as chiefly concerned with individual rights rather than collective rights).

constitute the basis for social stability, which is the lynchpin of America's capitalist democracy.

The relationship between our existing system of property rights, the public perception of what a property right is, and municipal identity is best understood through the social view of property. The social theory of property posits that the benefits derived from a property rights system are noteworthy not for how they enable individual rights, but rather for how they facilitate broader social goals such as the organization of rights in the land. The focus on the rights of persons in relation to things often obscures the fact that our property rights system is a legal mechanism chiefly focused on regulating land use. Land use regulations reflect social relationships and the desire to order the landscape according to shared, socially oriented goals. The extent of the social welfare foundations undergirding our property rights system is often overshadowed by the individualist frame within which property rights are popularly understood.¹²⁶ But scholars are increasingly injecting socially driven analyses into the property rights discourse.¹²⁷ There is a social obligation norm in property that runs through traditional doctrine and operates to promote community and human flourishing.¹²⁸ In considering the property features of municipal identity—how municipal identity works to reinforce property-esque notions of rights and risk related to territory—it is important to begin with the social foundations of property rights and the social ethos of life in the metropolis.

The social features of our property rights systems are the most informative for understanding municipal identity as property. In *The Community Aspect of Private Ownership*,¹²⁹ Nadav Shoked examined the community aspect of private property as a way of exploring the depths to which private property rights and value in private property are socially constructed and highly dependent on constantly shifting and evolving social meanings.¹³⁰ Shoked's exploration of the social or communitarian aspects of private property largely centers on the ways in which contemporary property rights regimes over-focus on individual rights and under-appreciate the social aspects of property. For instance, Shoked contends that contemporary property rights protect the right of an individual to stay in her home but do not protect her from the

126. See generally *id.*

127. See Rosser, *supra* note 64, at 110–11.

128. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 760–73 (2009) (discussing human flourishing and the social obligations of ownership).

129. Nadav Shoked, *The Community Aspect of Private Ownership*, 38 FLA. ST. U. L. REV. 759 (2011).

130. See generally *id.*

neighborhood itself changing and, in doing so, fundamentally alter the foundations upon which the value of her home is based.¹³¹ Shoked's example illustrates how individual identity and social position impact notions of value, community, and group identity. Ultimately, his observations highlight the centrality of the communitarian or social view in the ways in which property rights actually function.

It is evident in the politics of contemporary cityhood and anti-annexation movements that the community aspects of property rights are in play but notably distorted. These movements elevate notions of collective property rights conceptualized as serving important social goals: self-determination, participatory democracy through scale-sensitive jurisdiction (small government), and a sense of linked fate. But those goals are fundamentally exclusive in nature—they are predicated upon normative conceptions of who is a part of the community and who is not. They are often pursued in antisocial ways and seek to limit the definition of who constitutes community and, accordingly, who is worthy of sharing in the redistribution of a community's resources. Municipal identity, therefore, simultaneously affirms and undermines the community aspect of private property. It highlights both the positive and negative dimensions of the community interest in private property rights and the creation of property values.

The idea of municipal identity extends the mythology of absolute rights in property to local jurisdiction.¹³² Through the collective action facilitated through local government law, communities have the ability to exercise control over territory just as individuals exercise control over private property.¹³³ The manner in which municipal identity has evolved to be understood as something akin to a property right exposes the inherent contradictions between the traditionally liberal individualist conception of property rights at the core of suburban localism and the communitarian foundations also essential to the suburban identity. Confronting this fundamental contradiction invites an opportunity to explore the social obligations of property in a manner that destabilizes the sense of entitlement and exclusivity that is rooted in traditional notions of property rights and that has expanded into common understandings about territory, jurisdiction, and community in the modern metropolis.

131. See *id.* at 792–94 (discussing personhood and property rights).

132. See Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 281–82 (1998).

133. This contradiction between the grouping function of municipal identity and the ability to be insulated from social obligations as facilitated by achieving separate jurisdiction has been explored in the context of common interest communities. See, e.g., Rosser, *supra* note 64, at 159–61.

IV. MUNICIPAL IDENTITY AS PROPERTY AND THE COURTS

Legal rhetoric and legal reasoning are essential components of the property-rights expectations that municipal identity fosters. The manner in which the courts have adjudicated land use cases and, most importantly, the rhetoric and reasoning deployed in those decisions, have reinforced the high stakes of location risk. There are no generally accepted judicial principles for reviewing whether a particular local government ought to exist, what the geographic dimensions ought to be, or whether a particular territory ought to be in one local government or the other.¹³⁴ These matters are rarely litigated, for the nature of local government law—specifically, the systematic devolution of boundary power to locals—has rendered many of these disputes either predetermined by statute or reduced to minor squabbles over ministerial actions. The question of whether a municipality should exist or whether a central city can annex new territory is typically spelled out clearly in state law long before a dispute occurs.¹³⁵

As the modern American middle class developed around home ownership, considerable wealth was created in private residences and the communities where they were located. This wealth had to be protected from the perceived threat of proximity to neighboring communities of

134. Briffault, *Who Rules at Home?*, *supra* note 3, at 395.

135. The supremacy of state law over local interests in relation to the formation and reformation of municipal boundaries, while subject to certain limitations, remains a defining tenant in local government law. The highest profile cases dealing specifically with municipal boundaries are *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). In *Gomillion*, the Court held unconstitutional an act of the Alabama legislature that altered the boundaries of the city of Tuskegee, Alabama, in a manner that disenfranchised the majority of black voters from the city's governance. The Court stated:

According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.

Gomillion, 364 U.S. at 347. In *Holt*, the Court held constitutional state statutes that created a “statewide system under which Alabama cities exercise extraterritorial powers[.]” *Holt*, 439 U.S. at 64, and under which a state “may legitimately restrict the right to participate in its political processes to those who reside within its borders[.]” *id.* at 68–69. The *Holt* Court reaffirmed the supremacy of the state legislature in setting the terms for municipal boundary formation and reformation, stating that “a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power. . . . [Hunter v. Pittsburgh] continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them.” *Id.* at 71.

lesser valued property and lesser valued people. As scholars have pointed out, the role of law in these broader social and economic developments tied local government law to the protection of the home.¹³⁶ It is therefore possible to conceptualize how the courts were poised to construe social developments that were perceived to threaten the home as worthy of legal intervention.

As has been recognized by Gregory Alexander in his article *Takings, Narratives, and Power*,¹³⁷ there are narratives of power relationships between the parties to a lawsuit that operate below the abstract doctrinal matters.¹³⁸ To paraphrase Alexander, land use and local government law is generated as much by doctrinal considerations as it is by pictures and metaphors used by judges to establish normative conceptions about whose vision of neighborhood and community deserves judicial sanction and protection.¹³⁹ With the demands of a new economic order built around home ownership and the recognition of the municipality's police power as sufficient to give local governments dominion over land use decisions within their borders, there was considerable context for the development of a legal rhetoric to give the utmost legitimacy to certain actions.

Rhetoric in the law operates to give practical meaning to concepts of justice and injustice. This generally involves appeals to a set of common understandings. At its best, legal rhetoric concretizes abstract concepts through compelling illustrations of the implications of one course of action over another.¹⁴⁰ It is impossible to fully comprehend the import of the evolution of local government law with respect to municipal boundaries without acknowledging the extent to which courts have given legal sanction to highly subjective norms about what constitutes value in a location. Through legal rhetoric, courts have played an active role in adding legal meaning to location and, consequently, played a role in the popular conceptions of location risk.

A number of cases illustrate how the courts have adapted to the economic and social imperatives of location risk in the metropolis. Whether expanding common law property interpretations to facilitate suburbanization, gratuitously and unnecessarily opining about normative visions of land use goals in dicta, or displaying deliberate indifference to

136. See Briffault, *Who Rules at Home?*, *supra* note 3, at 395–96.

137. Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988).

138. See *id.* at 1752–53.

139. See *id.*

140. For a broader discussion of the role of rhetoric in the law, see David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 658–61 (citing James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 685 (1985)).

the excesses of territorially based patterns of protracted race and class-based discrimination, courts have participated in the making of a culture that views municipal identity as a property right.

A. *Land Use Law and Location Risk*

Over the course of the twentieth century, property law evolved to suit the market realities of suburban development as well as its social dimensions. One example of this evolution is found in the development of the law of real covenants. Covenants allowed early twentieth-century residential subdivision developers to bind future property owners within a development to certain affirmative duties and acts as well as control who could live in the development, its architectural and spatial character, and how these guidelines would be enforced.¹⁴¹ But early in the residential subdivision boom there emerged questions about the legal basis for enforcing homeowner association dues on successive property owners. Specifically, such a covenant was alleged to not satisfy the “touch and concern” requirement in the common law of covenants.

The Court of Appeals of New York addressed this issue in the 1938 case *Neponsit Property Owners’ Association, Inc., v. Emigrant Industrial Savings Bank*.¹⁴² In *Neponsit*, a developer sought to create a covenant that would require successive purchasers to pay dues to the neighborhood association.¹⁴³ In other words, the covenant required a covenantor to perform the affirmative act of “pay[ing] money for use in connection with, but not upon, the land which it is said is subject to the burden of the covenant.”¹⁴⁴ The issue arose as to whether such a “public purposes” covenant can be said to “touch and concern” the land, a requirement of the common law of servitudes and real covenants.¹⁴⁵ The court held that “the test [of a covenant] is based on the effect of the covenant rather than on technical distinctions[,]” specifically in reference to the interpretation of the touch and concern requirement.¹⁴⁶

The court’s decision to liberally construe the “touch and concern” requirement and hold that the law of covenants should be driven by the effect of the covenant rather than its technical distinctions directly

141. See Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to Village of Euclid v. Ambler Realty Co.*, 51 CASE W. RES. L. REV. 617, 618 (2001).

142. *Neponsit Prop. Owners’ Ass’n v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793 (N.Y. 1938).

143. See *id.* at 794.

144. *Id.* at 795.

145. *Id.*

146. *Id.* at 796.

impacted the course of suburbanization.¹⁴⁷ This stretching of the meaning of the touch and concern requirement was necessary to create residential communities where property owners could control the actions of their neighbors beyond the limits of nuisance law and, most importantly, restrict access to the neighborhood to those with the ability to pay for such a regulating regime.

The Neponsit neighborhood development was established to be, among other things, a “highly restricted, well kept and properly maintained suburban home community[.]”¹⁴⁸ During that time, other developers were building upscale communities with deed covenants binding the homeowners to pay maintenance fees to a homeowner

147. See *Neponsit*, 15 N.E.2d at 795. The court remarked:

There can be no doubt that Neponsit Realty Company intended that the covenant should run with the land and should be enforceable by a property owners association against every owner of property in the residential tract which the realty company was then developing. The language of the covenant admits of no other construction. Regardless of the intention of the parties, a covenant will run with the land and will be enforceable against a subsequent purchaser of the land at the suit of one who claims the benefit of the covenant, only if the covenant complies with certain legal requirements. These requirements rest upon ancient rules and precedents. The age-old essentials of a real covenant, aside from the form of the covenant, may be summarily formulated as follows: (1) it must appear that grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one “touching” or “concerning” the land with which it runs; (3) it must appear that there is “privity of estate” between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant. . . .

The covenant in this case is intended to create a charge or obligation to pay a fixed sum of money to be “devoted to the maintenance of the roads, paths, parks, beach, sewers and such other public purposes as shall from time to time be determined by the party of the first part [the grantor], its successors or assigns.” It is an affirmative covenant to pay money for use in connection with, but not upon, the land which it is said is subject to the burden of the covenant. Does such a covenant “touch” or “concern” the land? These terms are not part of a statutory definition, a limitation placed by the State upon the power of the courts to enforce covenants *intended* to run with the land by the parties who entered into the covenants. Rather they are words used by courts in England in old cases to describe a limitation which the courts themselves created or to formulate a test which the courts have devised and which the courts voluntarily apply. In truth such a description or test so formulated is too vague to be of much assistance and judges and academic scholars alike have struggled, not with entire success, to formulate a test at once more satisfactory and more accurate. “It has been found impossible to state any absolute tests to determine what covenants touch and concern land and what do not. The question is one for the court to determine in the exercise of its best judgment upon the facts of each case.”

Id. (alteration in original) (citations omitted).

148. *In re Pub. Beach*, 199 N.E. 5, 8 (N.Y. 1935).

association.¹⁴⁹ While interesting and significant as a doctrinal matter, the decision's import was to expand the bounds of property law to accommodate a covenant regime that would allow land developers to control the character of a residential development beyond the point of subdivision and transfer. This control was essential for the mass production of tract housing developments and the guarantee of a stable neighborhood character and locational value.

The U.S. Supreme Court's land use cases represent the legal rhetoric upon which contemporary notions of location risk and municipal identity as property are based. Since its seminal decision in *Village of Euclid v. Ambler Realty Co.*,¹⁵⁰ the Court has deployed legal rhetoric about the nature and consequences of land development and location in ways that have given a sense of urgency and grave consequence to who lives where.

The *Euclid* decision constitutionalized zoning, which many local governments were experimenting with in some form or another by the time the Court took up the matter in 1926.¹⁵¹ In *Euclid*, the majority opinion addressed whether the prohibition of various land uses is permissible under a municipality's police power.¹⁵² This was a watershed moment for the promotion of land use planning throughout the nation. But the *Euclid* Court went beyond just sanctioning zoning; the Court specifically opined about the types of development it felt were most conducive to the development of healthy, valuable communities.¹⁵³

The *Euclid* Court stated that the crux of the zoning-enabling legislation at issue was the validity of residential districts "from which business and trade of every sort, including hotels and apartment houses, are excluded."¹⁵⁴ The Court cited with approval state court decisions opining that the exclusion of buildings from residential zones promoted the health and safety of children, fire safety, and street traffic regulations.¹⁵⁵ The Court specifically addressed zoning provisions for apartment homes by citing expert research from the time showing that apartments retarded the development of detached housing and were "a mere parasite constructed in order to take advantage of open space and

149. See Stewart E. Sterk, Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank, in *PROPERTY STORIES* 301, 303–04 (Gerald Korngold & Andrew P. Morriss eds., 2004).

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

151. See MANDELKER ET AL., *supra* note 26, at 129.

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

153. See *id.* at 394–95.

154. *Id.* at 390.

155. See *id.* at 391.

attractive surroundings created by the residential character of the district.”¹⁵⁶ The *Euclid* Court remarked:

[T]he coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.¹⁵⁷

In a decision concerned with the line between reasonableness and arbitrariness, the Court’s critique of multi-family housing is quite, well, arbitrary. The Court considered apartment houses nuisances in residential districts designed for single-family detached housing.¹⁵⁸ The Court took what essentially amounts to a design issue and treated it as a substantive planning issue. This decision infused the Court’s sanctioning of zoning with highly subjective value judgments, which ultimately set the stage for the housing development trends behind *Neponsit* and which parallels the logic behind the race and class-based exclusionary zoning that would develop later in the century.¹⁵⁹

The Supreme Court’s decisions in *Euclid* in 1926 and in *Nectow v. City of Cambridge*¹⁶⁰ in 1928 were the last land use decisions rendered by the Court for almost 50 years before its decision in *Village of Belle Terre v. Boraas*¹⁶¹ in 1974.¹⁶² In the intervening years, the entire American landscape was transformed by suburban development. As was discussed earlier, local government law enabled this transformation with the devolution of boundary policy from the state down to the local level.¹⁶³ As central cities began to sprawl outward and as new

156. *See id.* at 394.

157. *Euclid*, 272 U.S. at 394.

158. *See id.*

159. *See, e.g.*, Batchis, *supra* note 29, at 5–6 (discussing how the U.S. Supreme Court’s description of apartment housing in *Village of Euclid v. Ambler Realty Co.* and its land use jurisprudence in general contributed to the development of suburban sprawl).

160. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

161. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

162. It is important to clarify that several important takings cases were decided between the *Euclid* and *Belle Terre* decisions. While certainly within the ambit of land use, these takings cases are beyond the scope of this Article.

163. *See generally* Tyson, *supra* note 22 (discussing the history of municipal boundary policy).

municipalities developed on their outskirts, locals began to demand greater control over the incorporation or annexation of new territory. Furthermore, the devolution of boundary policy from the state to the local level empowered those seeking to stem the tide of racial progress that characterized twentieth-century social relations and politics.

The growth of suburbs throughout the early twentieth century was in large measure about creating a separate, protected space for individuals and families who conformed to certain social and cultural norms. As a matter of federal and state policy, the white, traditional, middle-class family was the idealized suburban resident. The 1974 *Belle Terre* decision involved the legality of the municipality's definition of "family" for the purpose of limiting who could occupy housing under its zoning code.¹⁶⁴ The case essentially involved a quiet bedroom community taking action to prevent college students from overrunning its neighborhoods. The ordinance at issue in *Belle Terre* prohibited groups of more than two unrelated persons, as distinguished from groups consisting of any number of persons related by blood, adoption, or marriage, from occupying a residence within the confines of the township.¹⁶⁵

In reaching its decision, the Court deployed language and imagery similar to that in *Euclid* in service of sanctioning the restrictive zoning ordinance. The Court understandably acknowledged that in deferring to the legislative judgment of what constitutes a family in the zoning ordinance, it was drawing a line that was vulnerable to criticism as arbitrary.¹⁶⁶ This rather humble acknowledgment is overshadowed, however, by the Court's curious assessment of what constitutes an urban problem and what is required to address it. The Court stated:

The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds. A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.¹⁶⁷

164. See *Belle Terre*, 416 U.S. at 2–3.

165. See *id.* at 2.

166. See *id.* at 8 n.5.

167. *Id.* at 9.

The *Belle Terre* decision is essentially about homeowners not wanting to live next to apartment houses full of raucous college students and whether it is constitutionally permissible for a municipal zoning ordinance to make the distinctions in family composition necessary to prevent fraternity houses or other collegiate residential developments from ending up in their neighborhoods. Who wouldn't support that? The question becomes whether an ordinance can be drafted narrowly enough to address this problem without unnecessarily discriminating against legitimate housing consumers. These were the tightly drawn bounds within which the Court had to rule on an issue many might regard as remarkably unremarkable. But the Court's invocation of "urban problems" incorporated something beyond the facts of the case; it went beyond what was required to address whether Belle Terre's zoning code was narrowly tailored fall within its legitimate police power.

Boarding houses do not necessarily create "urban problems." The extolling of wide yards, few people, and restricted transportation flow implies infrastructure costs that inevitably limit the market of potential residents who can afford to pay for such land use patterns. The majority deploys this particular illustration to uphold a traditional family ordinance. In doing so, it introduces subjective, intangible standards that are most likely to be interpreted and understood in ways that reinforce the social-control mechanisms that, in a broader sense, zoning is designed to serve.¹⁶⁸ Through this rhetoric, however, the Court is once again fueling the specter of location risk in a time of increasing "urban problems" and white suburban flight.

The *Belle Terre* Court's idealized view of local government and suburban land use arrangements not only supports the restrictive goals of the family composition ordinance, but it also enlists judicial support for fundamentally ideological and contingent normative conceptions of spatial organization and the relative risks associated with a given location.¹⁶⁹ While the notion of location risk and the culture of location risk mitigation that has driven racist, elitist, environmentally harmful, and fragmentation-producing development certainly predates the *Belle Terre* decision, as this Article has shown, the measure of judicial sanction and constitutional cover it receives through the majority's opinion is a stunning example of how legal rhetoric has furthered the forces that fuel a notion of municipal identity as property.

The *Belle Terre* decision casts a long shadow over local government law, and it continues to serve as precedent for similar disputes involving

168. See Richards, *supra* note 111, at 776–77.

169. See Richards, *supra* note 111, at 778 (discussing the ideological foundations of traditional family zoning ordinances).

the codification of specific family norms. State courts have split on adopting the reasoning of *Belle Terre* when deciding whether restrictive definitions of family in land use ordinances violate their state constitutions.¹⁷⁰ In *Ames Rental Property Ass'n v. City of Ames*,¹⁷¹ another ordinance defining a “family” was challenged as violating the equal protection clause of the U.S. Constitution. The city of Ames, the home of Iowa State University, passed a zoning ordinance that permitted single-family dwellings only in certain areas of the city. The ordinance defined a “family” as any number of related persons or no more than three unrelated persons.¹⁷²

The Iowa Supreme Court held that, as in *Belle Terre*, Ames had a legitimate interest in promoting and preserving neighborhoods that are conducive to families.¹⁷³ The court found that Ames articulated several bases for the zoning ordinance, including “‘promot[ing] a sense of community, sanctity of the family, quiet and peaceful neighborhoods, low population, limited congestion of motor vehicles and controlled transiency.’”¹⁷⁴ The *Ames* court took inventory of the obvious counterarguments to their stated rationale for upholding the ordinance.¹⁷⁵ The court was somewhat dismissive of these concerns, however, stating that “[c]ertainly this ordinance is imprecise and based on stereotypes. Nevertheless, it is a reasonable attempt to address concerns by citizens who fear living next door to the hubbub of an ‘Animal House.’”¹⁷⁶

Richard Briffault aptly analyzed the import of the *Belle Terre* decision and others like it in observing that it fosters a suburban view of local government that sees local government not as an agent of the state but rather as an agent of local families.¹⁷⁷ *Belle Terre* is still good law, and cases like *Ames* illustrate the enduring quality of its reasoning, the manner in which it constitutionalized a particular conception of the family, and how the landscape and local governance should be ordered around it.

170. See Katia Brener, Note, *Belle Terre and Single Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. L. REV. 447, 454–63 (1999).

171. *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255 (Iowa 2007).

172. See *id.* at 257.

173. See *id.* at 260.

174. See *id.* (alteration in original).

175. See *id.* at 260–63.

176. See *Ames*, 736 N.W.2d at 262.

177. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 382 (1990) (explaining the suburban model of local government).

B. Location Risk Beyond Land Use

Land use cases are not the only site of the courts' willingness to give legal cover and sanction to a culture of location risk mitigation. The notion of suburbs as exclusive retreats from inner cities and, more specifically, inner city public schools, was essentially given constitutional protection in *Milliken v. Bradley*.¹⁷⁸ By the 1970s, Detroit was municipally hyper-fragmented, and its constellation of school districts illustrated the extent to which the metropolitan area was balkanized. Historians have written considerably about the economic and social drivers of this fragmentation, and race is indisputably at the center. Quite possibly no other metropolitan area's growth trajectory and territorial expansion is better explained through the prism of mid-twentieth-century race and class conflict than Detroit's. Issues of location risk, the relationship between social identity and territory, and the perceived life chance consequences of proximity to the socially undesirable are on heightened display in Detroit's metropolitan history.¹⁷⁹

The *Milliken* Court posited that a finding of past de jure segregation by a city in its public schools could not justify remedies imposing duties on surrounding suburban jurisdictions, even if the noninclusion predictably would result in greater de facto segregation in the city's schools.¹⁸⁰ The Court was clear that absent a finding that the boundary lines of any affected school district were established for racially discriminatory purposes, a federal court could not impose a multi-district remedy.¹⁸¹ It ultimately struck down a federal court-imposed, inter-district remedy to address racially segregated schools.¹⁸²

Milliken offered the Court an opportunity to weigh in on the role of municipal boundaries and their legal significance. In doing so, the Court specifically rejected the District Court's characterization of school district boundaries as "simply matters of political convenience" by asserting that the "deeply rooted" tradition of local control of schools meant that school district lines could not be casually ignored.¹⁸³ The Court reiterated its statement from *San Antonio School District v. Rodriguez*¹⁸⁴ that "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the

178. *Milliken v. Bradley*, 418 U.S. 717 (1974).

179. See generally, e.g., THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (2005).

180. See *Milliken*, 418 U.S. at 748–49.

181. See *id.* at 748–50.

182. See *id.* at 752–53.

183. See *id.* at 739, 741–42.

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

structuring of school programs to fit local needs, and encourages experimentation, innovation, and a healthy competition for educational excellence.”¹⁸⁵ While the Court was careful to clarify that district lines are not sacrosanct and can therefore not operate in ways that violate constitutional rights, it is clear that the Court was willing to give broad deference to the line drawing that produced the existing boundaries and, by extension, the racially segregated conditions at issue.¹⁸⁶

Justice Marshall’s dissent in *Milliken* provided a nuanced view of the role of boundaries in enfranchising local communities with the ability to enact legislation that ultimately produces outcomes offensive to Constitutional liberties. Justice Marshall argued that the school district lines at issue are “flexible and permeable for a wide variety of purposes,” underscoring the contingent and political nature of municipal boundaries.¹⁸⁷ He then detailed the many state legislative actions which systematically shifted funding to Detroit-area suburban municipalities and suburban school districts and away from the central city.¹⁸⁸ He also clarified that, under Michigan law, school districts are not separate, autonomous entities, contrary to how the majority characterizes them.¹⁸⁹ This is particularly important given the majority’s invocation of the “deeply rooted” tradition of local control of schools. Justice Marshall aptly pointed out that the Supreme Court of Michigan has explicitly defined education as a matter of statewide concern.¹⁹⁰

Justice Marshall’s dissent illuminates the fact that, even in the face of statutory and jurisprudential guidance to the contrary, the majority was determined to construe Michigan’s school boundaries in a manner that bolstered the power of local interests and the line drawing that gave those interests legal legitimacy. Here, legal reasoning is marshaled in support of the inviolable interest in municipal identity even when the law says otherwise. Michigan law clearly established that education was a matter of statewide concern, from which it is possible to deduce that a metropolitan-area education scheme would be permissible. The Court, however, drew on a “deeply rooted” tradition in spite of statutory and jurisprudential guidance to the contrary. *Milliken* illustrates in stark detail the lengths to which the Court was willing to go to construct a history and culture of local control potent enough to trump the legitimacy

185. See *Milliken*, 418 U.S. at 742 (internal quotation marks omitted) (citing *Rodriguez*, 411 U.S. at 50).

186. See *id.* at 744.

187. See *id.* at 783 (Marshall, J., dissenting).

188. See *id.* at 791–92.

189. See *id.* at 793–94.

190. See *Milliken*, 418 U.S. at 794–95 (Marshall, J., dissenting) (citing *In re Sch. Dist. No. 6, Paris & Wyoming Twps., Kent Cnty.*, 278 N.W. 792, 797 (Mich. 1938)).

of the inter-district, boundary splitting school segregation remedy mandated by the District Court.

The *Milliken* Court gave constitutional sanction to the fragmented, balkanized consequences of localism and heightened the perception of risk that justified exiting the school district and city of Detroit in the first place. The location risk Detroit's exiters imagined was made real by the disinvestment and insolvency that defined Detroit in the years since their exit.¹⁹¹ In his dissenting opinion, Justice Marshall wrote, "[I]t may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people ultimately will regret."¹⁹² Marshall's dissent essentially charged the majority with deliberately denying the race and class drivers of fragmentation in metropolitan Detroit.

That *Milliken* and *Belle Terre* were decided in the same Supreme Court term and therefore considered by the same Justices and law clerks also adds texture to their role in forging a notion of municipal identity as property. On the one hand, the *Belle Terre* decision suggests not only that boundaries imbue those who lie within the legitimate power to express their social fears and biases through the law, but also that the Court was comfortable with the broader local government and urban development context within which those decisions are made. The Court was not only uncritical of the implications of its decision in this regard; it also took the opportunity to offer its own thoughts about what urban development norms should be.

The *Milliken* majority avoided opining on race in the same cavalier manner as it treated urban development in *Belle Terre*. By 1974, it was becoming unfashionable to openly question policies to remediate the effects of racial discrimination, and Chief Justice Burger's tenure was marked by a number of decisions which in many ways ushered in a new period of race-blind rhetoric and thinking on the Court.¹⁹³ Therefore the Court had to read into Michigan law a tradition that Justice Marshall showed simply did not exist. The Court was likely more comfortable writing extensive dicta about subjective judgments on the sociology of land development. There, too, Justice Marshall's dissent operates to expose the holes in the Court's logic and the normative implications of its thinking. While the *Milliken* majority is more timid in its rhetoric than the *Belle Terre* majority, the import of its logic and the overall

191. See generally SUGRUE, *supra* note 179.

192. *Milliken*, 418 U.S. at 815 (Marshall, J., dissenting).

193. See Tyson, *supra* note 73, at 358–59 (exploring how the race-neutral approaches and discourses of the immediate post-civil rights period are reflected in the race-neutral logic of decisions like *Washington v. Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)).

implications of the opinion are no less reinforcing of the specter of location risk that has led to contemporary notions of municipal identity as property.

Both the *Belle Terre* and *Milliken* decisions illustrate the Court wrestling with the capacity for communities to be sovereign. In *Belle Terre*, the Court reasoned down to sovereignty—local government is sovereign because of its specific right to protect the welfare of the community and the stability of its property values through zoning law as it sees fit. The Court’s logic in this instance required that it construct a meta-narrative for local autonomy over spatial organization and urban development, even if doing so required enlisting the most subjective of judgments and assumptions. In *Milliken*, the Court reasoned up to sovereignty—local government is sovereign because of an undeniable tradition of local control over local schools. The Court’s logic in this instance required that it construct a tradition and custom where one did not exist statutorily or jurisprudentially. In both decisions, the Court wanted to protect local sovereignty in big, consequential ways. It wanted to ensure that boundaries are respected and that the expectations of power they prop up are immune from attack.

This denial continued in decisions that followed. For instance, in *Goldsboro City Board of Education v. Wayne County Board of Education*,¹⁹⁴ the U.S. Court of Appeals for the Fourth Circuit rejected a plan to merge the county and city school systems for the purpose of achieving racial desegregation.¹⁹⁵ The court justified its holding by stating:

The plaintiff has a problem. Yet, its problem is one beyond our power, in the present state of the law, to correct. The plaintiff’s problem is the result of movement from city to suburbs seen throughout the United States and the abandonment of public schools by white, city residents seen in many communities where desegregation has occurred. We are not at present charged with a responsibility to remedy problems caused by *demography* and private racism.¹⁹⁶

In addition to its recognition of demography, the court could have very well included cartography as being in association with private racism and the metropolitan area problems that flow from the confluence of those forces. Furthermore, the court essentially acknowledged that the municipal boundary problem is the result of private racism beyond the

194. *Goldsboro City Bd. of Educ. v. Wayne Cnty. Bd. of Educ.*, 745 F.2d 324 (4th Cir. 1984).

195. *See id.* at 333.

196. *Id.* (emphasis added).

law's power to reach and to which the law must submit. This stands in contrast to *Belle Terre's* willingness to enlist municipal boundaries to protect and sanction other biases.¹⁹⁷

All of these cases deploy legal rhetoric and legal reasoning that give legitimacy and constitutional cover to the imagined location risk that, through the behavior that these cases and other social developments encourage, becomes a real risk with real consequences. This perceived and made-real notion of location risk bolsters the notion of municipal identity as property. Municipal identity as property elevates the right to separate location through municipal boundaries to a right akin to that of a property right. Property rights rhetoric is then deployed to express and defend that right. The associated discourse and meanings shift the burden of remedying the harm caused by this idea from those expressing such rights to those negatively affected by them.

V. POST-SCRIPT ON BOUNDARIES AND DETROIT'S FISCAL CRISIS

Bankruptcy filings by municipalities under Chapter 9¹⁹⁸ of the Bankruptcy Code are rare.¹⁹⁹ Municipalities in financial distress can file for a Chapter 9 bankruptcy and receive immediate relief from creditor collection efforts. Chapter 9 bankruptcy provides a framework within which municipalities can negotiate a restructuring of their debt obligations.²⁰⁰ Chapter 9 automatically triggers a stay against creditor collection efforts.²⁰¹ A municipality can continue to provide basic public services while negotiating a debt adjustment plan with its creditors.²⁰²

197. Richard Ford criticizes this logic in *Milliken* by exposing the flawed public/private distinction upon which the logic relies. See Richard T. Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1388 (1997). He calls the description of privately chosen racism an abandonment of the responsibility to remedy past discrimination and asserts that, as a matter of causation, one cannot neatly sever private choice from government imposition since government helps to create the context within which the private choices occur. *Id.* Ford characterizes the jurisdictional structure established by *Milliken* as allowing for a convenient exit option that is the background rule that created white flight. *Id.* He rightly asserts that this structure is not a neutral space within which people make private choices; rather, it is an active government policy that encourages segregation and undermines desegregation efforts. *Id.*

198. See 11 U.S.C. §§ 901–946 (2012).

199. See Frederick Tung, *After Orange County: Reforming California Municipal Bankruptcy Law*, 53 HASTINGS L.J. 885, 886 (2002).

200. See 11 U.S.C. § 922 (2012); see also Hannah Heck, Comment, *Solving Insolvent Public Pensions: The Limitations of the Current Bankruptcy Option*, 28 EMORY BANKR. DEV. J. 89, 102 (2011).

201. See 11 U.S.C. § 922 (2012); see also Heck, *supra* note 200, at 101.

202. See *id.* at 893.

Detroit's Chapter 9 bankruptcy filing of July 18, 2013, makes it the largest American city to ever file for municipal bankruptcy.²⁰³ The \$18 billion Detroit owes also makes this filing the largest municipal bankruptcy in American history in terms of debt.²⁰⁴ Michigan Governor Rick Snyder stated that the decision to file for bankruptcy came in the wake of 60 years of decline for the city, a period in which reality was often ignored.²⁰⁵

Many factors contributed to Detroit's fiscal crisis, including a shrinking tax base, overwhelming health care and pension costs, managing debt by borrowing, five consecutive years of annual deficits in the city's operating budget, and dysfunctional city services.²⁰⁶ There are so many factors that it is difficult to single out or prioritize one over the others. As of this writing, it is still unclear how the city will be able to resolve its long-running insolvency.

Years of suburban flight also loom large in this narrative, however, and Michigan's policies on municipal incorporation and annexation have systematically led to one of the most fragmented metropolises in the nation.²⁰⁷ As the bankruptcy proceedings unfold, it doesn't appear that the Court will consider the impact of state boundary law on Detroit's fiscal crisis and bankruptcy. Just as Chapter 9 provides a tool for the adjustment of a municipality's ongoing contractual obligations, it might also be possible for the Bankruptcy Code to include methods of redress for state boundary laws that unfairly and unnecessarily lead to central city financial instability. Given the recent bankruptcies of municipal counties and urban centers alike, certain conditions would likely have to apply in order to determine which situations would warrant a reconsideration of state boundary law. But given the strong linkages between boundary elasticity, municipal incorporation activity, and municipal fiscal strength, it may be necessary to consider boundary policies in the course of a municipal bankruptcy.²⁰⁸

Such an inquiry would require treatment in a separate article, but it underscores the consequential nature of boundary law and the fiscal

203. See Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles into Insolvency*, N.Y. TIMES, July 18, 2013, <http://nyti.ms/1ldROpx>.

204. See Davey & Walsh, *supra* note 203; Matthew Dolan, *Record Bankruptcy for Detroit*, WALL ST. J., July 19, 2013, <http://on.wsj.com/1o4RWKq>; Michael A. Fletcher, *Detroit Goes Bankrupt, Largest Municipal Filing in U.S. History*, WASH. POST, July 18, 2013, <http://bit.ly/1lM1POu>.

205. Nancy Kaffer et al., *Detroit Files for Bankruptcy Protection*, USA TODAY, July 18, 2013, <http://usat.ly/LIDok3>.

206. See Fletcher, *supra* note 204.

207. See generally Tyson, *supra* note 22.

208. See *id.* (discussing the correlation between municipal bond ratings and boundary elasticity).

health of the metropolis. As Detroit's bankruptcy continues to unfold, these and other questions will likely dominate critical thinking on the matter.

VI. CONCLUSION

It is impossible to disconnect the present experience and enjoyment of the metropolis from the past and current injustices which fueled the logic of its organization. The assertion of any fundamental right to separate community (and the support of statutory changes to make forming separate communities easier) is essentially a defense of those injustices. The guiding logic of the metropolis should seek territorial organization principles that vigorously promote shared social obligations and linked fate. State laws must change to do just that. The notion of municipal identity as property weakens any conception of local government in the metropolis as a collective as opposed to a privatized enterprise. The deep psychosocial investment many have in municipal identity threatens to undermine the benefits of the metropolis. Municipal boundaries implicate interests that are too fundamental to the fate of communities, the environment, and the distribution of resources within metropolitan regions to be left to the self-interest driven ethos of localism.

"Property rights serve human values."²⁰⁹ Likewise, municipal boundary policy is the lynchpin in the expression of human values through spatial organization and redistributive government. Just as property law has long embraced the inherent tension between individual liberty and collective liberty in regulating property, localism must yield to statewide boundary policies that seek governance regime uniformity over the largest territorial footprint reasonably possible to ensure that the redistributive impact of local government taxing policy and power is equitably shared.

209. *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).