Local Fragmentation as Immigration Regulation

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ARTICLE

LOCAL FRAGMENTATION AS IMMIGRATION REGULATION

Rick Su*

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I. INTRODUCTION

In June of 2005, local officials representing the Town of Brookhaven and Suffolk County on Long Island initiated "Operation Firestorm," a massive sweep for housing code violations that led to the eviction of more than 100 men living in "overcrowded" homes built and zoned for single-family residency. All of the evictees were Hispanic immigrants; many worked as local day laborers, and, it was believed, most were present in this country, and thus the Town of Brookhaven, illegally.

Given that "Operation Firestorm" straddles two borders (the national and the local), two regimes of membership (national citizenship and municipal residency), and two legal frameworks (immigration and local government law), it should come as no surprise that much of the surrounding controversy centered on

4. See Valdez, 2005 WL 3454708, at *5 (noting that all evictees were Latino); Bruce Lambert, On L.I., Raid Stirs Dispute over Influx of Immigrants, N.Y. Times, June 26, 2005, at 25 (attributing the raid to local concerns about illegal immigrants).
whether to situate the incident in the realm of the national or the local. And given the fact that immigration law has been traditionally understood to be an exclusive national issue—and thus distinct and separate from the local focus of local government law—it is not surprising that attempts to reconcile these two regimes have largely focused on delving further into this divide. For some, the critical difference is one of legal jurisdiction and formal power. For others, a more meaningful delineation can be made on the basis of institutional capacity and bureaucratic expertise. In almost all cases, however, the focus is

5. On the one hand, many viewed the incident in terms of immigration: a local proxy battle over national immigration policy, the efficacy of federal enforcement, and the standing of immigrants who lack the entitlements of citizenship or the protections of legal status. See Frank Eltman, Long Island Town Is Battlefield in War Against Illegal Immigration, RECORD (N.J.), Aug. 7, 2005, at A4; Bart Jones, Border Patrol Debate Hits Home: Neighborhood in Conflict, the View from Farmingville, NEWSDAY, May 16, 2006, at A25. On the other hand, it was construed by others to be primarily a local dispute: one in which the issue of immigration was invoked simply to give a new rhetorical façade to familiar issues of community self-determination, neighborhood segregation, and the urban–suburban divide. See, e.g., Valdez, 2005 WL 3454708, at *2 (noting that the tenants in question were "forced to live in the only place they can afford that is available to them: non-owner occupied overcrowded rental housing"); Charisse Jones, Crowded Houses Gaining Attention in Suburbs, USA TODAY, Jan. 31, 2006, at A5; Sandra Peddie & Eden Laikin, Crowds of Illegal Homes, NEWSDAY, July 15, 2005, at A2 (citing residents' concerns regarding changes to the neighborhood).


on contrasting the boundary and membership controls at the
national level from those that exist at the local or community
level. But controversies like "Operation Firestorm" do not simply
present close cases for traditional modes of analysis. They also
suggest a more complex view of the relationship between
national and local controls and how they both contribute to our
country's immigration regime.

To that end, this Article proposes a new approach. Instead of
emphasizing the distinction between immigration and local
government regulations, it argues that boundary and
membership controls at the national and local level are
essentially joined. They are joined not simply because
immigration and local government laws occasionally intersect in
operation or effect, but rather, the connection also lies in the fact
that they can be understood as interdependent counterparts in
the same regulatory scheme. In short, the thesis of this Article is
that the legal structure responsible for the fragmentation of our
lived environment into segregated neighborhoods and
differentiated communities can be understood as a second-order
immigration regulation. 8 It is a mechanism that allows for finer
regulatory controls than those that can be implemented with the
 crude tools of boundary and membership controls at the national
level. It also serves as a means by which, in the absence of a
national consensus, the competing interests surrounding
immigration can still be negotiated and reconciled on the ground.

To appreciate this connection requires us not only to reframe
the national–local divide, but also to expand the scope of our
analysis beyond the sensational but relatively infrequent
instances of direct local involvement in immigration regulation or
enforcement. 9 Instead, I focus here on what I consider to be a
more pervasive aspect of the immigration–localism relationship:
the degree to which everyday organization of neighborhoods and
communities at the local level supplements immigration laws at
the federal level. To show this, Part II begins by tracing the
doctrinal and historic commonalities that local spatial controls

8. See Adam B. Cox & Eric A. Posner, The Second-Order Structure of Immigration
Law, 59 STAN. L. REV. 809, 819 (2007) (defining second-order immigration regulation as
the process of sorting immigration applicants to actively exclude undesirable candidates
and retain desirable candidates).

9. See, e.g., Rick Su, A Localist Reading of Local Immigration Regulations, 86 N.C.
exploit federal immigration laws without impeding federal enforcement efforts); see also infra
notes 183–87 and accompanying text (noting the use of local regulations, such as
housing codes, to discourage immigrant presence).
like zoning, and local membership controls like residency, have with their national counterparts’ regulation of immigration and citizenship.

Building upon this, Part III posits a complex interdependence between national and local by rejecting the common view that the use of local regulatory controls of space and community is a result of limitations or failures in federal regulations, or that local regulatory controls are simply imperfect substitutes for more extensive or effective federal restrictions. Rather, I argue that in a system plagued by ambivalence—in which few can agree on the purpose of immigration or the role of immigrants in our economic or democratic order—the finer distinctions that local divisions make possible play a unique role that cannot be filled otherwise. In other words, the subtle interplay between the local and the national with regard to immigration should be seen less as a struggle over jurisdiction and power and more as a careful negotiation of which site is the most appropriate point of openness and closure.

Part IV then explores some of the intriguing possibilities and difficult questions that this reorientation raises. Intriguing because understanding the national and the local as an integrated and complementary system suggests that direct engagement with local mechanisms of spatial and community control may offer another means by which policy objectives or concrete federal reforms can be effectuated. Yet difficult because it suggests that, rather than simply another regulatory tool in the toolbox, local controls are not as straightforward as many now believe, and untangling their relationship with immigration prompts us to question our own complex relationship with the issue of immigration as well. And as this Article demonstrates, these questions are all the more important because there is no neutral baseline upon which we can rely; regardless of how we feel about the promise or dangers of employing internal fragmentation as a part of our immigration regime, it is already a significant part. In other words, it is too late to simply deny or ignore this aspect of our legal response to immigration.

II. THE INTERSECTION OF IMMIGRATION AND LOCAL GOVERNMENT LAW

Describing our immigration regime exclusively from a national perspective is too limited a scope to describe how we select immigrants and incorporate them into the American mainstream. Rather, as this Part argues, we must conceive of our immigration regime as one both developed and operated in the
shadow of an extensive and pervasive structure of internal regulations of space and community, which fragments the social, political, and economic space of American society along an intricate system of internal boundaries and jurisdictions. In this light, the formal rules that govern who is permitted to enter our country or naturalize as citizens are but one component of this nation’s broader immigration policy. Our continuing history of regional fragmentation and the local government policies that have been developed to make that possible constitute an often hidden, but equally important, secondary component in the nation’s attempt to balance the competing aims of our immigration regime.

Here, I draw upon the work of local government scholars who argue that the organization of our local communities, and the consequences of this structure, cannot be wholly explained as a product of individual preference or market dynamics.\textsuperscript{10} Like the immigration regime, subnational boundaries are also the product of legal frameworks that empower communities to organize themselves in particular ways and to skew market incentives in favor of the building of walls, both figurative and literal.\textsuperscript{11} Indeed, as many urban scholars have long recognized, municipal boundaries can sometimes be just as difficult to penetrate as national borders.\textsuperscript{12} Similarly, whether one has residence on one side or the other can have profound effects on the availability of valuable social and economic resources, not to mention a basic sense of safety and stability.\textsuperscript{13} Seen in this manner, the immigration regime is neither an exceptional nor singular regime of regulatory control. Rather, it is better understood as one point along an expansive spectrum of

\textsuperscript{10} See, e.g., Gerald E. Frug, City Making 3 (1999) (stating that urban landscapes are shaped by both individual choices and government policies); Constance Perin, Everything in Its Place 174 (1977) (noting the contribution of cultural preferences and social rules to population distributions).


\textsuperscript{12} See, e.g., Richard C. Schragger, The Limits of Localism, 100 Mich. L. Rev. 371, 416–20 (2001) (positing that controls used to maintain the character of a community impede the entrance of new residents who do not fit that community).

\textsuperscript{13} The “political geography” of local communities—in short, “the position and function of jurisdictional and quasi-jurisdictional boundaries”—creates much of the “separate and unequal distribution of political influence and economic resources” that characterizes our society. Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1841, 1844 (1994); see also Douglas S. Massey & Nancy A. Denton, American Apartheid 149 (1993) (“Where one lives—especially, where one grows up—exerts a profound effect on one’s life chances.”).
legal techniques by which we demarcate, define, and enforce the role of space and community in American society.

A. Space, Immigration, and the Internalization of Boundary Controls

One way of reexamining the federal–local relationship is to approach it along the axis of space. This approach offers certain advantages. Space provides a natural continuum upon which the recursive boundaries and overlapping jurisdiction of immigration and local government law can be mapped. It also highlights the common ground upon which these two regimes of territorial control interrelate.

Here, I set out this spatial continuum by comparing the regulatory regimes that influence the admission of immigrants into certain neighborhoods with those that determine their initial entry into this country. Namely, I focus on two particular aspects of this relationship: the legal and historic ties between local land use regulations and federal immigration laws. Before turning to this, however, we begin by considering how spatial issues are commonly understood in the immigration context by examining the contested role of the immigrant enclave.

1. The Multiple Significance of Spatial Fragmentation. As geographers Mark Ellis and Richard Wright explained: "Where immigrants live matters."14 Of course, acknowledging this is only the beginning of the inquiry; how and why it matters depends a lot on how we define the role and meaning of space in American society. Indeed, the geography of immigrant settlement can tell us not only about its residents or their life chances, but also about the different identities that get attached to physical spaces. This is one reason for the persistent controversy surrounding immigrant enclaves, a space often described as being simultaneously foreign and domestic.

The duality of the immigrant enclave is, in large part, intentional. From the perspective of immigrant residents, the enclave is an important form of spatial negotiation that allows them to mitigate the transformative and disorienting consequences of crossing one boundary through the creation of another. The cultural, social, and economic niches that enclaves provide serve as a crucial bridge between the old country and the new, and in so doing offer a measure of negotiating power to

immigrants trying to grapple with the positive and negative aspects of immigration. Of course, enclaves carry the potential for exploitation as well as protection. But for many recent arrivals, they are unique in being able to offer access to the benefits of immigration without the need to endure all of its tremendous costs. In this respect, immigrant settlement is inextricably connected to the process of immigration itself; like the push factors that compel immigrants to leave and the pull factors that guide their resettlement, local spatial negotiations through enclaves are also a crucial factor that determines the direction and rate of immigration flows.

At the same time, it is precisely because of this duality that enclaves often cause alarm among receiving nations. Much of this is because immigrant concentration traditionally underlies some of the most intense fears associated with immigration: territorial separatism and demographic balkanization. This fear is not new. Nor is it outdated, as the contemporary warnings of Patrick Buchanan and Samuel Huntington suggest. To be sure, cultural and ethnic differences presented by immigrant (and other minority) groups have long been considered to be potential sources of discomfort. Nevertheless, it is often when these differences are grafted upon demarcated spaces that fears about national disintegration begin to form.

15. See, e.g., ROGER WALDINGER, STILL THE PROMISED CITY? 23-26 (1996) (observing that these enclaves provide privileged access to jobs and other commercial opportunities); Alejandro Portes & Robert D. Manning, The Immigrant Enclave: Theory and Empirical Examples, in COMPETITIVE ETHNIC RELATIONS 47, 61-65 (Susan Olzak & Joane Nagel eds., 1986) (contending the physical concentration of enclaves can meet all of newcomers' physical needs).

16. Peter Kwong, Manufacturing Ethnicity, 17 CRITIQUE OF ANTHROPOLOGY 365, 366 (1997) (observing that the ethnic solidarity in New York's Chinese community “has increasingly been manufactured by the economic elite,” most of whom do not live in the community itself, “to gain better control over their co-ethnic employees”); Jimy M. Sanders & Victor Nee, Limits of Ethnic Solidarity in the Enclave Economy, 52 AM. SOC. REV. 745, 763 (1987) (“Employers typically draw on ethnic solidarity to enforce and maintain sweatshop conditions . . .”).

17. See BENJAMIN FRANKLIN, Observations Concerning the Increase of Mankind, Peopling of Countries, Etc., in 3 THE WORKS OF BENJAMIN FRANKLIN 63, 72-73 (Albert Henry Smith ed., 1905) (expressing fears that Anglo-American cultures would be displaced by those of other races, such as Germans or Africans).


For these two reasons, residential mobility takes on a unique significance with regard to immigrant residents. Indeed, this mobility can often be seen as an extension of the original act of immigration. This is particularly evident in what is now commonly known as the spatial assimilation model of immigrant incorporation. Because local territorial space provides the framework upon which fears of separatism are based, the ability to transcend neighborhood and municipal boundaries serves as a measure of an immigrant group's assimilation into mainstream American society. And since Ernest Burgess linked cultural and social assimilation to the ubiquitous metropolitan form by describing an immigrant journey as beginning in the inner-city ghettos and ending when they reach the outer zones, residential mobility (and, more often than not, residential mobility into white Anglo suburbs) has served as a significant measure of immigrant assimilation.

The development of our formal immigration laws has not been blind to the nuances behind this geography. Indeed, some of the earliest instances of federal involvement in immigration were due precisely to these concerns. In his speech before Congress in 1903, President Roosevelt warned that whether immigration was of the "right" or "wrong" kind depended not just on the characteristics of the potential immigrants, but also the geography of their residency once they arrived. This view,

the tendency of land claims to fuel violent nationalist conflicts between competing groups). It is therefore no surprise that in the early twentieth century, the Supreme Court upheld state restrictions against immigrant ownership of real property by repeatedly linking the issue directly to the security and existence of the state. See Terrace v. Thompson, 263 U.S. 197, 221 (1923) ("The quality and allegiance of those who own, occupy and use the farm lands within [state] borders are matters of highest importance and affect the safety and power of the State itself"); cf. Huntington, supra note 18, at 221 (labeling the recent wave of Mexican immigration to the Southwest as a "reconquista" of territories that were either annexed or lost to America during the mid-nineteenth century).


21. Ernest W. Burgess, The Growth of the City: An Introduction to a Research Project, in THE CITY 47, 56–62 (Robert E. Park, Ernest W. Burgess & Robert D. McKenzie eds., 4th impression 1967). Some have characterized this assimilation not simply as a process of becoming American, but as a process by which European immigrants, who were initially construed as racially distinct, were recruited and assimilated into "whiteness" in part to protect neighborhoods from other racial minorities, especially blacks. DAVID R. ROEDIGER, WORKING TOWARD WHITENESS 176 (2005).

22. See Wright & Ellis, supra note 14, at 200 (noting that the vast majority of the assimilation research still assumes that access to white suburbs is central to minority group assimilation).

23. 38 CONG. REC. 2–3 (1904). In his address before the Fifty-ninth Congress, Roosevelt's concern about the distribution of immigrants was even more explicit. He
however, was hardly new; congressional and executive responses to immigration had long reflected these concerns. The nineteenth-century Homestead Act\(^4\) and the federal effort to promote noncitizen voting in frontier states were not only attempts to encourage immigration, but also to direct these flows to rural destinations and away from the urbanizing eastern seaboard.\(^5\) Similarly, the literacy requirement that dominated the immigration debates in the following decades reflected not just a general and growing aversion to immigration, but also the belief that “the immigrants who would be excluded by the illiteracy test” were the ones who “do not go out into the Western and Southern States, where immigration is needed, and become an agricultural population, but remain almost entirely in the Atlantic States, and in the great centers of population where the labor market is already overcrowded.”\(^6\) Proactive efforts were initially taken at the administrative level to channel immigration flows and influence their initial settlement.\(^7\) Eventually, however, fueled by the perception that the immigrants arriving at the turn of the century were unlike the “old” immigrants of earlier decades whose assimilation was thought to have been “facilitated by their widespread distribution and by their settlement on the land as well as in the cities,”\(^8\) comprehensive immigration legislation was passed that severely curtailed all immigration in accordance to specific quotas based on national origin.\(^9\)

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26. S. REP. NO. 290, at 23 (1896), quoted in U.S. IMMIGRATION COMM’N, IMMIGRATION LEGISLATION, S. DOC. No. 61-758, at 47 (3d Sess. 1911); see also Form New Bureau to Handle Aliens, N.Y. TIMES, Oct. 13, 1920, at 27 (quoting Immigration Commissioner Frederick A. Wallis’s complaint about the “evils” associated with the “congestion of immigrants in the cities”).

27. See, e.g., Immigrants to Have Chance to Own Land, N.Y. TIMES, Mar. 15, 1921, at 14 (detailing coordination of several federal agencies “to divert immigrants from the cities [and] to place the newcomers on small farms”); Sorting Out the Americans of the Future, N.Y. TIMES, Nov. 17, 1907, § 5 (Magazine), at 7 (describing the problem of concentration and detailing some administrative initiatives to disperse the immigrant population).


Yet if the quota legislation of the 1920s was based in part on the residential patterns of immigrants already present, that it took this draconian form was also the result of early doubts about the federal government's ability to address the residential patterns of immigrants in a more direct and deliberate fashion. Indeed, the very grounds upon which the federal government's expansive power over immigration was justified also served to limit the manner and purpose to which its regulations can be applied. For example, in *Gegiow v. Uhl*, a unanimous Supreme Court held that the likelihood of becoming a public charge in a particular city, on account of the labor conditions of that city, could not be used as a basis for excluding the entry of an immigrant altogether.30 Focusing on the statutory authorization in question, the Court concluded that federal authorities are limited to "exclu[sions] on the ground of permanent personal objections accompanying [the arriving immigrants and] irrespective of local conditions." 31 The Court's statutory interpretation, however, was also interwoven with reservations about the federal government regulating in this manner at all. Not only did the Court refer to the federal immigration officials' assertion that local labor conditions can be used to exclude immigrants by referring to it as "an amazing claim of power," but more importantly, it opined that "as officers of the General Government, they would seem to be more concerned with [the nation as a whole] than with the conditions of any particular city or State."32

The details surrounding the peculiar relationship between federal power and immigrant geography has evolved since then, but many aspects of this delicate balance remain the same. The federal immigration debate is as concerned as ever about the local spatial residency of immigrants. At the same time, most direct federal attempts to regulate or even influence the geography of immigrant settlement have faded from view. The only area where the federal government attempts to exert any appreciable influence is with respect to the initial settlement of overseas refugees, a decision made with the counsel of religious and other charitable organizations.33 Moreover, since *Uhl*, courts have routinely interpreted federal silence with respect to the

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31. *Id.* at 10.
32. *Id.*
relevance of local conditions to suggest that free domestic mobility is an explicit federal privilege guaranteed by admission.\textsuperscript{34} Thus, to the extent that residential patterns of immigrants are still a concern, it appears to be one that may be taken into consideration when formulating admission and removal criteria, but not one that is tinkered with directly.

2. The Joint Construction of Spatial Fragmentation. Although federal immigration laws have largely abandoned any sustained or substantial effort to regulate the spatial dimensions of immigrant residency, it does not necessarily follow that our nation's immigration regime, broadly understood, leaves this area unregulated. Nor is it necessarily the case that, just because space is used by immigrants to negotiate the effects of immigration, enclaves are entirely the product of individual choice or exist solely to serve immigrant interests. Residential geography is also controlled in large part by a different set of background legal rules,\textsuperscript{35} and considering how effectively geography is used by immigrants to balance the various trade-offs of immigration, it is not surprising to see local spatial controls as an aspect of how we negotiate the competing concerns of our immigration regime.

To be sure, entrance controls at the local level do differ in significant ways from federal immigration regulations. One is usually not required to petition for authorization to enter or live in a particular community,\textsuperscript{36} nor do localities ordinarily possess the power to forcefully remove unwanted visitors or residents.\textsuperscript{37} From this perspective, it is not difficult to see why immigration scholars often contrast the ostensible "indifference" of local space with the heavily regulated borders that demarcate nation-states.\textsuperscript{38}

\textsuperscript{34} See, e.g., Truax v. Raich, 239 U.S. 33, 39 (1915) (stating that immigrant entry into the United States confers the privilege of entry and residence in any state).

\textsuperscript{35} Cf. Robert E. Park, Immigrant Heritages, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK 492, 494–96 (1921) ("One reason immigrants live in a colony is that they cannot get out . . . . (The immigrant) lives in a colony of his own people because, under ordinary circumstances, that is the only place he can live at all."); see also David J. Barron & Gerald E. Frug, The Census as a Call to Action, 29 FORDHAM URB. L.J. 1387, 1390 (2002) (observing that immigrant preferences are confined to the type of communities that the existing local government structure encourages and permits).

\textsuperscript{36} See PAUL E. PETERSON, CITY LIMITS 26 (1981).


\textsuperscript{38} See MICHAEL WALZER, SPHERES OF JUSTICE 37 (1983) (describing nineteenth-century political economists' belief that "[i]nternational society . . . should take shape as a
Upon closer inspection, however, it is not clear that the distinction is all that stark. The fact is, movement across our metropolitan regions, especially movement associated with local residency, is far from frictionless. Scholars have carefully documented the obstacles to regional mobility and how they fracture our lived environment into distinct spatial districts. For most of us, however, personal experience and everyday observations are more than sufficient to make that fact seem painfully clear. It is not simply that our metropolitan regions are “divided into districts that are so different from each other they seem to be different worlds,” but also that we often know too well where we do and do not belong, and where we can and cannot live. And despite a number of social and legal reforms, evidence shows that segregation, especially involving race, ethnicity, or class, remains a staunch feature of American society.

Thus, even if in most instances no fence delineates the boundaries that separate our local communities, it is clear that a host of pressures effectuate a similar fragmentation on the ground.

The causes for this are many, and it is not my intention here to discount the various social, structural, and technological explanations. For the purposes of our comparison, however, it is important to recognize that legal regulations also play a role. Legal restrictions offer both the mechanisms and incentives for particular forms of spatial organization. Moreover, they impart and help harden the meaning and identity that is often


41. But see GARY J. MILLER, CITIES BY CONTRACT 87–91 (1981) (describing the incorporation of the City of Rolling Hills coterminous with the gated community (and the Community Association) of Rolling Hills).

42. See NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS 54–55 (1994) (discussing the role of racial and ethnic prejudice); TOM MARTINSON, AMERICAN DREAMSCAPE 54–55 (2000) (discussing the value of personal space); MASSEY & DENTON, supra note 40, at 109–10; JON C. TEAFORD, CITY AND SUBURB 10 (1979) (“[The] political process of fragmentation into segregated units thus reflected the cultural and economic fissures in the nation.”).

43. See MASSEY & DENTON, supra note 40, at 96–100 (examining systematic steering by realtors).


associated with space in American society. And of all the relevant legal mechanisms, few have attracted as much attention as local land use controls, especially the practice of zoning.

Part of the reason for the interest in zoning is the pervasive effect that many commentators attribute to its continued and widespread use. Working through technical restrictions like setback and frontage requirements, its influence on regional organization is often indirect. But the consequences are extensive and enduring. By imposing zoning restrictions that prohibit apartments or other multi-family development, or requirements that impose minimum lot sizes or square footage, communities have used carefully crafted zoning policies to drive up housing costs and limit housing selection, with the added consequence of pricing out low- and sometimes moderate-income residents. Moreover, the now-common practice of zoning in such a way so as to foreclose all viable development on vacant land, and only rezoning to make land available after a particular developer has presented concrete plans for approval, gives communities even finer control than zoning provides for directly. In addition, housing codes that limit the number or type of individuals permitted to share a given residence, or how existing structures can be used, further ensure that these spatial controls are insulated from creative living arrangements or changing use. Like the physical characteristics that they target, zoning regulations are often justified with respect to physical effects like noise, traffic congestion, or aesthetic “fit.” Nevertheless, the fact that many of these effects are also associated with “the wrong

46. See Ford, supra note 13, at 1856–57 (noting that space “grounds both governmental and associational entities”).

47. See Dowell Myers, Demographic Futures as a Guide to Planning: California’s Latinos and the Compact City, 67 J. AM. PLANNING ASS’N 383, 393 (2001) (warning that the “housing construction of today will have a very long legacy”).

48. See, e.g., Michael N. Danielson, The Politics of Exclusion 74–76 (1976) (“Whether formal or informal, suburban controls on residential development contribute to the rising cost of housing, and consequently reduce housing opportunities.”).

49. See Snyder v. Bd. of County Comm’rs, 595 So. 2d 65, 72–73 (Fla. Dist. Ct. App. 1991) (describing the original intent of zoning undeveloped land as a “wait and see” approach, placing the burden of zoning on the landowner rather than the government).

50. See Planning & Zoning Comm’n v. Synamon Found., Inc., 216 A.2d 442, 443–44 (Conn. 1966) (questioning the application of the term “family” used in the zoning ordinance); City of Brookings v. Winker, 554 N.W.2d 827, 831 (S.D. 1996) (noting that the imposition of an ordinance allowing persons related by blood or law to live together but not allowing unrelated persons to live together was irrational for the purpose of controlling population density).

51. See Danielson, supra note 48, at 50–51 (explaining that the specific aim of zoning is to protect public health and safety).
kind of people” is often intentional.\textsuperscript{52} In the words of one commentator, it is no mere coincidence that seemingly benign requirements such as those mandating that “single-family homes should prevail over two-family homes or apartments, or that one-acre lots [are] to be required instead of quarter-acre lots” would have “powerful social repercussions in a society of mixed population and markedly unequal distribution of family income.”\textsuperscript{53}

To be sure, the widespread legitimacy of zoning that is now taken for granted was not always so clear.\textsuperscript{54} However, in the decades that followed the Supreme Court’s embrace of comprehensive zoning in the landmark case of \textit{Village of Euclid v. Ambler Realty Co.},\textsuperscript{55} legal support for zoning continued to strengthen, especially as its use became more prominent. As a result, when the second wave of zoning challenges reached the Court in the mid-1970s on the basis of the Court’s new equal protection jurisprudence, the underpinnings of \textit{Euclid} continued to hold. Finding no constitutional infirmity with a local housing ordinance that banned households with more than two unrelated individuals in \textit{Village of Belle Terre v. Boraas}, the Court remarked on zoning’s importance in creating “zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”\textsuperscript{56} Similarly, although the Court acknowledged in \textit{Arlington Heights v. Metropolitan Housing Development Corp.} that a nearly-white\textsuperscript{57} Chicago suburb’s denial of a zoning variance for multi-family construction would likely have racially disparate impact, and recognized that community concerns about racial integration played a role, the Court pointed confidently to the Village of Arlington Heights’ longstanding and “undeniabl[e] commit[ment] to single-family homes as its dominant residential land use” in support of its finding that no racially discriminatory intent could be discerned.\textsuperscript{58} Indeed, through these and other decisions, the Court appeared committed to maintaining lines of division even while (or precisely because) others were being dismantled. Thus, it wasn’t surprising that the unprecedented desegregation effort undertaken by courts following \textit{Brown v. Board of Education}\textsuperscript{60}
was functionally abandoned after *Milliken v. Bradley*, in which the Supreme Court insulated urban–suburban segregation from federal judicial scrutiny in large part out of deference to municipal boundaries and local control.  

Described in this manner, it is not difficult to see how local spatial controls like zoning parallel our national immigration regime. Both rely on geographic jurisdictions and physical boundaries, and both act as organizational tools that create and maintain social and physical geography. To be sure, as the description above makes clear, the manner in which local spatial controls operate is limited; they act mainly with regard to certain kinds of movement (those associated with residency) and against certain types of individuals (primarily on the basis of class, though in ways that are inextricably intertwined with race and ethnicity). But despite the multitude of accounts about the hardening of our national borders, it is important to note that, under even our most restrictive immigration regimes, they too operated in much the same way. While strict prohibitions limit the transnational movement of some, broad concessions are provided to accommodate the mobility of others. Moreover, the individuals who tend to be restricted at our national borders also tend to be ones most likely to face barriers and obstacles at the local and neighborhood level. In this respect, the two systems complement and map onto one another.

Nor are the similarities between immigration and local land use controls limited to their like effects. Notwithstanding the radically different legal standing of localities and the nation, deference to their respective borders have imbued both with analogous political identities and legal constructions. Commenting on the extent to which localities “act in their own self-interest, cooperate with others on their own terms, and cause harm to those who disagree with them,” Jerry Frug emphasized the link between the legal construction of the locality with that of the individual and the nation by referring to all three as “centered subjects.” And the manner in which the courts have

61. See *Milliken v. Bradley*, 433 U.S. 267, 280–82 (1977); see also Ford, *supra* note 13, at 1875–76 (contending the *Milliken* Court “may have allowed the historical segregation to become entrenched” by severely restricting the scope of the remedy).


63. See, e.g., AiHwa Ong, *Flexible Citizenship* 6 (1999) (arguing that certain classes of individuals in today's globalizing economy are able to, with the encouragement of states, travel freely between nation-states and shift fluidly from one social-political context to another).

treated extraterritorial effects at the national and local level bears these accounts out. Thus, just as the prospect of indefinite detention famously faced in *Shaughnessy v. Mezei* was understood by the Court in the immigration context not as a deprivation of liberty but as a regrettable yet unintended side-effect of the nation's sovereign right to exclude, the isolation created by racial segregation, concentrated poverty, and their attendant effects are all too often construed in the local government context as an unfortunate yet inadvertent consequence of local legal autonomy and the sanctity of municipal boundaries. Similarly, to the extent that cases like *Landon v. Plasencia* suggest that the breadth of the immigration power can be seen as a consequence of the limited standing of immigrants outside the nation to challenge denials of admission, cases like *Warth v. Seldin* show that in spite of common bonds of state and national citizenship, the standing of those outside a given locality to challenge land use regulations with similar exclusionary effects are often construed as lacking in the same way.

3. *The Shared History of Spatial Fragmentation.* That immigration and zoning regulations would share such striking similarities in doctrines and effect is no mere coincidence. Aside from the doctrinal connections, the two also share deep historical roots. Indeed, it can be argued that immigration and local spatial controls were envisioned as counterparts of a broader regulatory regime from the very start. To see this, we must turn to the


68. Rejecting a challenge led primarily by poor minority residents of Rochester and their “representatives” against the exclusionary zoning policies of the nearly all-white suburb of Penfield, the *Warth* Court emphasized their tangential relationship to their neighboring community by noting that none had “interest in any Penfield property; none is himself subject to the [zoning] ordinance’s strictures; and none has ever been denied a variance or permit by respondent officials.” *Warth v. Seldin*, 422 U.S. 490, 504–07 (1975). The catch-22 is palpable: “if they could afford to become residents of Penfield, they would have standing to sue but no grievance; conversely, because they could not afford to become residents of Penfield—the gravamen of their complaint—they did not have standing to sue.” Schragger, *supra* note 12, at 419.
circumstances surrounding the rise of comprehensive immigration and zoning regulations during first decades of the twentieth century.

As Constance Perin observed, “The social movements favoring zoning and immigration restriction each culminated in legislation in the 1920s. Zoning was being promulgated by social reformers and real estate interests during the same years that the country was for the first time debating its policy of open immigration.” This near-simultaneous emergence makes sense when one considers the timeline of preceding events: not only did the decades leading up to this period mark one of the most significant and contentious influx of immigrants in American history, but it was also a time when the social and spatial geography of the United States was undergoing fundamental transformations ranging from the settlement of the western frontier to the rapid urbanization taking place in “whirlpool cities” scattered across the Northeast and the Midwest.

That the issue of immigration would be so closely tied to both the settlement of the western frontier and the urbanization of America was, of course, due in no small part to the fact that immigrant presence and labor played a major, if not decisive, role in both. Nevertheless, this close link also meant that immigration became inseparable from a host of spatial issues associated with these events. The presence of immigrants in the country’s newly settled territories along the western frontier challenged the comforting assurances of manifest destiny with difficult questions about national identity and collective territorial ownership. At the same time, the foreign stock whose increasingly urban presence dominated nearly all the country’s fast-growing cities gave rise to serious doubts about America’s democratic foundations, especially as it was becoming increasingly clear that “the twentieth century city [would] be decisive of national destiny.”

69. PERIN, supra note 10, at 194.


71. See SCHLESINGER, supra note 70, at 29 (describing the conflicted perception of the West as at once the most foreign and most distinctly “American” part of America).

72. See DELOS F. WILCOX, THE AMERICAN CITY 5–6 (1904) (analogizing America to a club whose new members lack knowledge of its original purpose). Indeed, this doubt was echoed a lot earlier. E.g., ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 399–401 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf, Inc. 2001) (1835) (citing rapid population growth and the influx of immigrants in western states as a threat to American democracy).

73. JOSIAH STRONG, THE TWENTIETH CENTURY CITY 32 (Arno Press 1970) (1898); accord WILCOX, supra note 72, at 22 (“The city problem is a national problem, and there is
for social control and market stability, the free-for-all of the frontier states and the old "private" city were giving way to an era of municipal planning, institutional reform, and an "ecological" outlook on urban development.74 And where land use controls alone could not be used to guarantee such stability, mobile residents and the developers who catered to them quickly turned to the periphery, where spatial distance could be exploited to produce a similar effect through isolation.75

Indeed, because of the strong link between immigration and what many perceived to be the problems associated with western settlement and urbanization, the battles over the organization of local spaces were, for many people, inseparable from concerns over entrance controls at the national level.76 It was not just that the rationale supporting local spatial controls shares commonalities with those undergirding our nation’s immigration powers. Rather, much of the early attempts at local spatial organizing through techniques like zoning complemented federal immigration controversy by targeting immigrants specifically and were fueled by many of the same sentiments that prompted federal restrictions at our national borders.77 In other words, the immigration dilemmas of the day were not being discussed solely through the lens of federal immigration restrictions; reformers looked to local spatial controls as well and often conceived of the national and local components as parts of a comprehensive regulatory regime.

To be sure, land use regulations were far from the only means through which attempts were made to influence the residency of immigrants on the ground. Violence and intimidation were extensively and effectively used, especially against the Chinese immigrants along the west coast who, as a result, were at times confined to certain quarters78 or expelled

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74. See Martin Bulmer, The Chicago School of Sociology 89 (1984) (noting the emerging scientific "ecological" approach to determine how expansion affects the "metabolism" of the city); Sam Bass Warner, Jr., The Private City 4 (1968).

75. Fishman, supra note 70, at 118–19.

76. See Edward C. Banfield & James Q. Wilson, City Politics 141 (4th ptg. 1967) (noting that in cities like Boston, "many leaders of [municipal] reform were leaders of the Immigration Restriction League"); Teaford, supra note 42, at 84–85 (describing the ethnic rifts and heightened immigration that brought about the demands for restrictions on entry to the country).

77. See Teaford, supra note 42, at 84 ("The advent of zoning ordinances between 1910 and 1930 added legal imprimatur to the segregation of earlier decades.").

78. As one observer wrote in the early 1900s, Chinese "families would much prefer to live outside of Chinatown but they cannot get quarters elsewhere at any price, no matter how wealthy they may be nor how quiet and cleanly." Mary Roberts Coolidge, Chinese Immigration 437–38 (Arno Press 1969) (1909); see also Victor G. Nee & Brett
entirely from particular communities. Private contractual devices such as racial restrictive covenants also played an important role in stifling integration and were utilized decades later by federal and private mortgage standards advising lenders against servicing traditional immigrant communities and “newer neighborhoods if they were ‘infiltrated’ by the wrong people.” In many ways, regulatory mechanisms like land use controls can be understood as an extension of these extralegal or private arrangements. But like immigration controls, they advanced these divisive and exclusionary aims with the added imprimatur of legal legitimacy.

It is noteworthy then, as Seymour Toll observed in his extensive history of municipal zoning in America, that “the immigrant is in the fiber of zoning.” Indeed, some of the earliest land use restrictions to be employed at the local level were those enacted “to keep Chinese out of ‘American’ neighborhoods.” The facts behind cases like *Yick Wo v. Hopkins* and *Soon Hing v. Crowley* demonstrate how early municipal licensing and labor requirements for laundries were often imposed for the “purpose of compelling the subjects of China to quit and abandon their business and residence in the city and county and State.” Other

DE BARY NEE, LONGTIME CALIFORN’ 60 (1973) (“The sense of being physically sealed within the boundaries of Chinatown was impressed on the few immigrants coming into the settlement by frequent stonings which occurred as they came up Washington or Clay Street from the piers.”).

79. See JEAN PFAELZER, DRIVEN OUT, at xv–xvi (2007) (describing the expulsion of hundreds of Chinese immigrants from communities); see also ALEXANDER SAXTON, THE INDISPENSABLE ENEMY 209 (1971) (describing how, through the use of both legal measures and mob violence from 1885 to 1886, a rash of Chinese expulsions from cities like Seattle and various other western towns “work[ed] decisive changes in the social geography of the West”). Because many of the expelled were sent directly to San Francisco, it was estimated that as a result of this campaign, the Chinese population in San Francisco’s Chinatown increased by 20,000 in a matter of three months. This was a radical increase, as the number of Chinese residents in all of California was approximately 75,000 during that time. See id. at 209–10. Of course, the Chinese were hardly unique in being so treated. See, e.g., LAWRENCE HAROLD LARSEN & BARBARA J. COTTRELL, THE GATE CITY 165–66 (1982) (describing the Greek Town Riot in 1909 that led to the expulsion of the entire immigrant Greek community from the city of Omaha, Nebraska).

80. Indeed, one of the very first racial restrictive covenant cases concerned a deed requiring that the buyer “shall never, without . . . consent . . . rent any of the buildings or ground owned by [him] . . . to a Chinaman or Chinamen.” Gandolfo v. Hartman, 49 F. 181, 181 (C.C.S.D. Cal. 1892).

81. DOUGLAS W. RAE, CITY: URBANISM AND ITS END 266, 272–74 (referring to the Home Owners’ Loan Corporation standards proposed and enacted as a part of the New Deal).

82. SEYMOUR I. TOLL, ZONED AMERICAN 29 (1969); WARNER, supra note 44, at 28 (“The standard zoning ordinance of American cities was originally conceived from a union of two fears—fear of the Chinese and fear of skyscrapers.”).


84. Soon Hing v. Crowley, 113 U.S. 703, 706 (1885); see also Yick Wo v. Hopkins, 118 U.S. 356, 362–63 (1886).
efforts, however, were more direct. Because Chinese launderers often lived in or above their shops, concern about laundries was often inseparable from alarm over Chinese residents.\textsuperscript{85} It is with this in mind that Los Angeles passed ordinances that regulated or outright prohibited the operation of laundries in certain districts, while Modesto, also in California, quite literally relegated them to the “wrong” side of the tracks.\textsuperscript{86} Foregoing proxies altogether, the regulatory escalation peaked in San Francisco with the passage of the Bingham Ordinance, which specifically forbade any Chinese resident from locating, residing, or carrying on a business anywhere outside of a designated district.\textsuperscript{87}

Despite the persistence of municipal officials, few of these early restrictions survived judicial review; overt animus and explicit targeting made them vulnerable under the emerging equal protection jurisprudence.\textsuperscript{88} But the confluence of immigration and the development of local spatial controls did not end with these efforts. More recognizable forms of land use zoning, which had initially sprouted in the West and with an emphasis on land- and development-oriented restrictions, blossomed in the urban centers of the eastern seaboard and the burgeoning Midwest.\textsuperscript{89} Moreover, concerns about foreign immigration continued to be an important motivation.

Take, for example, the ordinance that is most often identified as the first comprehensive municipal zoning regime: a 1916 zoning plan passed by New York City that divided the city into several districts and imposed various height and use restrictions in each.\textsuperscript{90} Although concerns about the availability of sunlight for pedestrians and skylight for office buildings played a role, it was motivated in large part by alarm over the presence of immigrant factory workers in “native” districts.\textsuperscript{91} In other words, intimately tied to the concerns about skyscrapers was an “even more explosive land-use battle” between the retail merchants and

\textsuperscript{85} See Gordon Whitnall, History of Zoning, \textit{Annals Am. Acad. Pol. & Soc. Sci.}, May 1931, at 1, 9 (“[T]he regulation was unquestionably a move towards racial segregation.”).

\textsuperscript{86} MEL SCOTT, \textit{AMERICAN CITY PLANNING SINCE 1890}, at 75 (1969).


\textsuperscript{88} See, \textit{e.g.}, \textit{In re Lee Sing}, 43 F. 359, 361 (C.C.N.D. Cal. 1890) (“That this ordinance is a direct violation, of, not only, the express provisions of the constitution of the United States, in several particulars, but also of the express provisions of our several treaties with China, and of the statutes of the United States, is so obvious, that I shall not waste more time, or words in discussing the matter.”).


their suppliers on Fifth Avenue, where the "garment trades' newest manufacturing-loft buildings arose close enough to the department stores to threaten retail property values and offend the stores' carriage-trade clientele, especially at the noon hour, when immigrant workers flooded the shopping district." Thus, for the Fifth Avenue Association that formed to lobby for comprehensive zoning in New York, concerns about factories and specific types of land use were never far from their concerns that their sidewalks were "becom[ing] increasingly jammed with immigrant, lower-class, foreign-speaking workers."

Similar concerns can also be seen in the rise of the suburbs, and the subsequent inter-municipal fragmentation that became the basis of the modern metropolitan form. By the turn of the twentieth century, immigrants were already disproportionately concentrated in the central city. And notwithstanding the promise of zoning in dividing neighborhoods, it was clear that "as American cities swelled with a new immigrant population, the single-class elite residential district" that many natives sought were increasingly "incompatible with the urban core." As a consequence, not long after zoning was first introduced with the endorsement of the National League of Cities and the federal government, local spatial controls like zoning were not only embraced for its ability to parse an existing community into separate districts with the hopes of buffering "native" neighborhoods from immigrants; when applied broadly and uniformly across an entire community, it could serve to stifle inter-municipal migration as well.

Indeed, although incorporating and moving into new communities at the edge of the central city offered an immediate escape, it was zoning that ensured its long-term viability. Thus, notwithstanding Robert Fishman's initial impression that early demographic "division[s] did not correspond to any political boundary," municipal borders, and the legal regime that accompanied them, played a crucial role. Many suburban communities were incorporated specifically to secure the power to zone, and many saw this as a means by which the political

93. Johnson, supra note 91, at 37; see also Warner, supra note 44, at 30.
94. Jackson, supra note 45, at 70 ("Although only one-third of all Americans lived in cities in 1890, two-thirds of all immigrants did. By 1910, about 80 percent of all new arrivals at Ellis Island were remaining in cities, as were 72 percent of all those "foreign born.").
95. Fishman, supra note 70, at 120.
96. Id. at 151.
boundaries of peripheral communities could be turned into physical limitations on the spillover effects of the central cities. Establishing a distinct political unit through incorporation allowed groups to accomplish politically and collectively what private contractual devices could achieve only through substantial negotiations and coordinated action. In other words, when it was clear that anti-immigration laws would do little to "overcome the problem of the immigrant population already in the cities..." as the elitist political alternative to urban democracy. And with the legal tools to support these motivations, it was not surprising that municipal and neighborhood boundaries began to harden. As the noted urban historian Sam Bass Warner observed, because of the proliferation of "financial, racial, and ethnic limitation[s]" at the local level, "Italians were held at bay in Boston, Poles in Detroit, blacks in Chicago and St. Louis, Jews in New York." All of this took place before a backdrop of congressional and popular debates over the merits of immigration and the need for added restrictions. Just five years before New York City adopted its comprehensive zoning ordinance, a special congressional committee widely known after its chair as the Dillingham Commission issued a cautionary forty-one-volume report on the racial characteristics and living conditions of immigrants around the country and recommending more immigration controls. And five years after New York's comprehensive zoning, Congress followed the city's conservationist scheme by enacting the nation's first comprehensive immigration law, the Emergency Quota Act, which not only established admission quotas based on national origin, but eventually, in its 1924 iteration, fixed those quotas to the national demography of an earlier

98. See ROEDIGER, supra note 21, at 172–73 (describing the difficulty of establishing what a local newspaper described as the "marvelous delicately woven chain of armor" made of racial covenants in Hyde Park, Chicago).
99. SIDNEY PLOTKIN & WILLIAM E. SCHEUERMAN, PRIVATE INTEREST, PUBLIC SPENDING 121 (1994); see also FISHMAN, supra note 70, at 142 (describing the suburbs as "a protected place where the true American family could prosper and reproduce itself" and, in doing so, "hold off the alien invasion"); Briffault, supra note 66, at 364 (noting that many of these efforts were the result of the growing tension between older stock Americans living in outlying areas and the poor immigrants who filled into many central cities and secured urban political power).
100. WARNER, supra note 44, at 32.
102. Emergency Quota Act, ch. 8, 42 Stat. 5 (1921).
In other words, the immigration debates over the national demography were being played out at the same time zoning and other mechanisms of spatial controls were being implemented to protect the demographic composition and "ethnic and social purity" of existing neighborhoods and newly incorporated communities. Moreover, the fact that in cities like Boston "many leaders of [municipal] reform were leaders of the Immigration Restriction League" shows that the catalysts behind both movements were intrinsically intertwined, if not often one and the same.

As Constance Perin observed, "The premise of both social movements was that it was legitimate and important as part of the public business to make fine discriminations among the attributes of social groups and social space." Reflecting on this history, it is worth noting that the concurrent rise of comprehensive immigration legislation and the rapid spread of land use controls should not be reduced to a narrative of anti-immigrant sentiment and the overarching politics of avoidance. Not only did they operate on different scales, but what is unique about their near-simultaneous emergence was the fact that they were both mutually reinforcing and mutually contingent. The concentric districts to which zoning and other spatial controls gave legal and institutional shape, and which early social scientists observed, drew upon immigration distinctions to become a naturalized and ecological form of social organization. While at the same time, understood in this regard not only as a barometer through which immigration incorporation can be measured, but also as a gauge of our nation's assimilationist capacity, this spatial geography formed the basis


104. Teaford, supra note 42, at 11–12. As Teaford noted, while social and economic segregation were rare in the early nineteenth century, the rift became increasingly spatially apparent when "middle-class urban dwellers . . . grew increasingly isolated from America's poor as they used the streetcar to commute far from the abberrent Irish and their saloons, the Germans and their beer gardens, and the alien Slavs." Id. at 11. It was for this reason that Oak Park, a suburb of Chicago and populated with "upper-middle-class, Protestant, American-born residents," decided in the early 1900s to "incorporate independently, severing governmental ties with the increasing number of foreign-born, working-class Roman Catholics in [now neighboring] Cicero." Id. at 23.


106. Perin, supra note 10, at 196; see also Frug, supra note 64, at 254 (critiquing the traditional "modeling of cities on the autonomous individual and the nation-state," resulting in "all three entities [having] the same kind of subjectivity [and] a centered sense of self").
for federal action and further efforts at finer delineations, which not only rationalized these local divisions, but also encouraged their proliferation. This is not to say that lines of ethnicity, class, or religion would not exist except through these institutional constraints. To the contrary, these delineations indicate that various institutional structures shape the contours and significance of these divisions, while at the same time buttress one another from the inside. And the fact that immigrant enclaves continue to attract such attention, even while American society as a whole continues to fragment along traditional and increasingly more refined lines, shows the extent to which the constitutive relationship between immigration and local geography remains.

Of course, that spatial and boundary controls can lead to new delineations among individuals or elevate identifiable differences to new significance alludes to the communal identifications that institutional divisions can engender. It is to this that we now turn.

B. Community, Immigration, and the Internalization of Membership Controls

Spatial jurisdictions, once defined, also serve as the basis for defining communities and the criteria and significance of membership in those communities: “[B]oundary lines not only determine which public resources are ours and which are theirs, but help to define who ‘we’ and ‘they’ are.” Of course, just as this nation is fractured spatially, it is also subdivided in terms of collective sentiments and public obligations. As this Section illustrates, the interplay between these political and legal institutions of community and membership reflect another aspect of the immigration-localism relationship.

My focus here is on the legal and historic ties between the local and national definitions of membership and community—namely, the relationship between the institution of national citizenship and local residency. Again, before reaching this, we begin by looking at how these issues have traditionally been understood in the immigration context.

1. The Multiple Significance of Community. Membership and community have long been bedrock issues in the immigration discourse. If “[t]he primary good that we distribute
to one another is membership in some human community,"¹⁰⁹ then it is no surprise that the distributional consequences of our immigration and naturalization laws regularly rank among the nation's most pressing and contentious concerns. For all their importance, however, recognition of the role of community and membership has been relatively limited; in most instances "membership" is equated with national citizenship, and the only relevant "community" is assumed to be the national polity.¹¹⁰ To be sure, significant efforts have been made in recent decades to move beyond the nation-state model by looking "up" and "out" in the direction of the global and transnational.¹¹¹ Yet even in a world of increasing migration and transnational exchange of capital, commodities, and culture, there remains a sense that the grand visions of the global village or cosmopolitan citizenship fail to capture how immigration is understood by migrants and natives alike.¹¹²

Indeed, a rich narrative can also be told by looking "down" and "within." With respect to its target and beneficiaries, the foundation of immigration controls is inextricably tied to the institution of citizenship and the nation-state. But the complexities surrounding immigration specifically (and mobility more generally) have long bolstered the need for intermediate affiliations that lie between the archetypes of the citizen and the alien. Thus, although the Supreme Court held to the citizen-noncitizen divide of the former by famously noting in Mathews v. Diaz that “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens,” the case was ultimately decided on the basis of the latter—with respect to the spectrum of intermediate positions between those two poles and Congress's ability to take into account the changing "character of the relationship between the alien and this country" and respond differently “as the alien's tie grows stronger.”¹¹³ That the

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¹⁰⁹. WALZER, supra note 38, at 31.
¹¹⁰. See Alexander Aleinikoff, Aliens, Due Process and "Community Ties": A Response to David Martin, 44 U. PITT. L. REV. 237, 239–46 (1983) (recommending a shift from the usual focus on national community and polity to a focus on community ties).
competing interests and values at stake in the regulation of immigration would compel increasingly detailed attention to be paid to other semblances of membership has not gone unnoticed; numerous commentators have traced the role of affiliations intermediate between the stark dichotomy of citizens and noncitizens that permeate immigration law and policy.\footnote{114} These affiliations, of course, are not entirely abstract. Indeed, in many instances, they are located in the relationships and practices associated with communal life in neighborhoods, towns, and cities across the country. To be sure, as we saw in the discussion of the spatial assimilation model, not all communities are held up or privileged in the same way.\footnote{115} Nor has local attentiveness translated into formal decentralization of power, as is the case in other countries.\footnote{116} But our nation's immigration policy has long been construed as a means of protecting local communities. Writing about urbanism in an increasingly transnational world, Michael Peter Smith critiqued the tendency of urban scholars to embrace an idealized and often simplified vision of local communities—one that presents them as the stable domestic core of a nation that is at once detached from transnational influences and flows, and thus in need of protection from globalization's destabilizing effects.\footnote{117} However, this is precisely the view that is often taken with respect to immigration regulations. We saw this approach in our discussion of Chinese exclusion and the rise of the plenary power doctrine in the latter half of the nineteenth century. And it continues to be relevant today: as a recent Senate Judiciary Committee report explained, our immigration law revolves around whether Americans are willing to accept “aliens into their day-to-day life experiences,” and strives to only admit nationally those newcomers whose subsequent admission “to a community do not excessively disrupt or change the attributes of the community which make it familiar to its residents and uniquely their ‘home.’”\footnote{118}

\footnote{114} See Motomura, supra note 25, at 80–95; Peter H. Schuck, Citizens, Strangers, and In-Betweens 21, 76–80 (1998); Aleinikoff, supra note 110, at 244; David A. Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. Pitt. L. Rev. 165, 230 (1983).

\footnote{115} See supra note 22 and accompanying text.

\footnote{116} See, e.g., Jeffrey G. Reitz, Canada: Immigration and Nation-Building in the Transition to a Knowledge Economy, in Controlling Immigration 123 (Wayne A. Cornelius et al. eds., 2d ed. 2004) (describing the strong provincial role with respect to immigration in Canada); see also Uta Harnischfeger, Swiss to Decide on Whether Local Secret Votes on Citizenship Are Final, N.Y. Times, June 1, 2008, at A19 (describing the requirement of local community approval for naturalization in Switzerland).

\footnote{117} Smith, supra note 112, at 102–06.

But if the local community has been invoked as a reason for immigrant exclusion in policymaking, its actual role with respect to immigration is more than balanced by the manner in which local membership and affiliation have also served as substitutes for citizenship on the ground. Arguing that local membership and its focus on the relations of everyday life are inherently more inclusive as a basis for community than the detached institution of national citizenship, Professor Aleinikoff maintains that progressive activists would do better to reframe the immigration debates around a local perspective. Similarly, Professor Rodriguez concludes that, because of its unique capacity, the local role with respect to immigration is particularly suited for the important task of integration. Though presented for the most part as normative proposals, it is not difficult to find traces of these accounts in our immigration laws as well. Community ties and local affiliations have influenced how legal lines have been drawn for the purposes of due process in immigration proceedings. Also notable is the role that community ties and local affiliations have historically played with respect to discretionary relief from deportation, which often turned on assessments of the standing of a potential deportee in his community. The most prominent example today, however, is the emergence of the so-called local “sanctuary” movement. Spurred in part by the sense that resident immigrants,


120. See Rodriguez, supra note 7, at 581.

121. See, e.g., Landon v. Plasencia, 459 U.S. 21, 32 (1982) (describing how the development of ties of residency changes the constitutional status of immigrants for the purpose of due process); see also Motomura, supra note 25, at 102–03 (discussing the effect of affiliational ties on the procedural due process rule in Kwong Hai Chew v. Colding, 344 U.S. 590 (1953)).

122. See Linda S. Bosniak, Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law, 1988 Wis. L. Rev. 955, 983 n.113. Compare Villena v. INS, 622 F.2d 1352, 1357 (9th Cir. 1980) (“The Board [of Immigration Appeals] should consider Villena’s contribution to his community in ruling on his application.... [H]is involvement in such projects does support his allegation that he has become integrated into the American culture.”), with Carnalla-Munoz v. INS, 627 F.2d 1004, 1007 (9th Cir. 1980) (finding no “extreme hardship” because “petitioners speak primarily Spanish, and they have presented no evidence of involvement in community affairs... or other evidence of integration into American culture”).

123. See Santana-Figueroa v. INS, 644 F.2d 1354, 1357 (9th Cir. 1981) (reversing denial of discretionary relief in part because of agency’s failure to consider the fact that “the petitioner regularly attended church for at least ten years, had close friends here, and... [h]is priest wrote that he had been ‘an asset to [the] church and community’”), superseded by statute, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.
irrespective of their legal status, are nevertheless a part of their community, and by concerns with the fiscal and social costs of immigrant enforcement, some localities have promulgated policies instructing local officials not to cooperate with federal immigration authorities in certain circumstances, while others have expressed opposition more informally through protests against federal raids and other disruptive enforcement efforts.

Focusing on the sanctuary movement, however, reveals another facet of the role of local communities and local membership that is not often acknowledged. In turn, it also uncovers an aspect of local affiliations that is frequently overlooked. Noting that sanctuaries “share a lot of features with prisons,” one commentator opined that “[s]anctuaries are not generally liberating; they shelter the body of the seeker at the price of his liberty and freedom of movement.”

Echoes of this can be heard in the words of a Guatemalan migrant insulated in part by the sanctuary policy of Los Angeles: “A visa or green card is required to leave the Los Angeles area. . . . If you are illegal, you don’t have freedom of movement.” This remark illuminates the tension inherent in the idea of sanctuary. It is also recognition of the fact that sanctuary policies do not emerge from communities defined by interpersonal relations and communal sentiments. Rather, they are governmental policies espoused by localities with defined jurisdictional boundaries and specific criteria of membership. In other words, if sanctuary policies illustrate how subnational membership can protect one from national exclusion, it also illustrates how the bounds of subnational membership can limit one’s scope of association. In this respect, local communities and local citizenship are not unlike the institutions which they supplement: as an intermediate “inside” between the binary of citizenship, local membership also forms the basis for an intermediate “outside”; as an alternative basis for inclusion, it also serves as another ground for exclusion. Thus, to the extent the availability of “sanctuary” depends on how community ties and intermediate affiliations are channeled through membership in local

124. See generally Pham, supra note 7, at 1381–95 (2006).
125. See, e.g., Jessie Mangaliman, Police Practice Questioned in Lawsuit, OAKLAND TRIB., Apr. 9, 2007, available at 2007 WLNR 6797915 (“At least five Bay Area cities—San Jose, East Palo Alto, San Francisco, Richmond and San Rafael—have passed city resolutions in recent months denouncing federal agents’ sweeps to round up illegal immigrants in northern California.”).
communities, we must once again consider the legal aspects of this organization.

2. The Consequences of Local Membership. One need not probe too far beneath the surface of our nationalistic ideals to find ways in which the traditional duality of nation-state citizenship and noncitizenship is complicated by other nuanced markers of belonging in American society. Divisions of race, class, gender, religion, and sexual orientation, to name a few, fracture our sense of national affiliation and personal identification. At the same time, one need not go too far down the institutional structure of this nation to find legal criteria of membership that enable, expand, and complicate these divisions in interesting ways. Throughout history, the significance of intermediate legal statuses (like state citizenship\textsuperscript{128} and tribal membership\textsuperscript{129}) have ebbed and flowed. Of particular note here is the institution of local citizenship, which has steadily gained importance even while its prominence has receded in an increasingly mobile world.

In some ways, local citizenship is less permanent and more fluid than other markers or institutions of belonging. Membership in local communities often requires no more than residency. Thus, relinquishing or acquiring such membership can often be effectuated with a simple change of one’s home. At the same time, its organizing role is significant. Membership at the local level is complicated by social and legal restrictions to inter-municipal mobility, such as those examined previously. Moreover, notwithstanding the relatively informal manner by which local membership is acquired, consequences of gaining such legal status can be quite transformative. Taxes, quality of life, and access to valuable services like education all depend on the community of which one is a resident and thus a member. This is especially true given that localities have traditionally been afforded substantial power to distinguish between residents and nonresidents, and treat differently those who are legally a part of the community from those who are merely present.\textsuperscript{130} Of


\textsuperscript{130} See Martinez v. Bynum, 461 U.S. 321, 328–29 (1983) (“A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents... A bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residents.”).
course, courts in the past have at times been unwilling to elevate local membership to the level of a personal or associational right, especially against the state. But changing social contexts have also led to changing judicial tones, and recent decisions have increasingly sounded a more deferential orientation to arguments based on communal cohesion and local self-determination.

On the one hand, the "feeling of belongingness, oneness, solidarity, and affective connection" that local membership instills should not be underestimated. Though at times described as an administrative classification, the legal status of local membership also conveys and reinforces a strong sense of personal and communal identity. This is not to say that in today's world, legal membership in a local community accurately captures the whole or even bulk of our communal attachments; for most of us, labels like "friends" and "strangers" describe individuals on both sides of the municipal line, and interpersonal relations and communal experiences arise just as regularly in surrounding communities as our own. But too often the law's fixation on residency encourages regional relationships, like those between cities and suburbs for most of the twentieth century, to be cast through the lens of "us" and "them." Indeed, many have commented on the particular "consciousness" that membership in a particular segment of a fragmented metropolis brings about.

On the other hand, it is important to recognize that the transformative consequences of local membership also extend beyond mere feelings. In a world where communal sentiments form the basis for not only the allocation of individual rights and personal entitlements, but also mutual responsibilities and collective obligations, such feelings play an important role in the

131. See, e.g., Hunter v. City of Pittsburgh, 207 U.S. 161, 176–79 (1907) (rejecting claim that residency is a personal contractual right that can be exercised against the state).


133. FRUG, supra note 10, at 57.


135. See JACKSON, supra note 45, at 272–73, 277–78.

distribution of valuable material\textsuperscript{137} and social\textsuperscript{138} resources. As Walzer explains: "Membership is important because of what the members of a political community owe to one another and to no one else, or to no one else in the same degree."\textsuperscript{139} Translated into practice, divisions of local membership have not only been invoked to sanction the widespread practice of restricting access to public goods like local public schools to those who are not members of the community,\textsuperscript{140} but also to justify unequal educational funding structures in order to avoid interlocal redistribution or the loss of local control.\textsuperscript{141} Indeed, along with schools, access to public goods and services like police protection, health and social services, and other public amenities, and the tax base from which funding for these can be derived, have been described as the "value" of having residence, and thus membership, in a given community.\textsuperscript{142} To use the language of one such service, membership rules define, in effect, who is being policed and for whom there is policing.\textsuperscript{143}

As the basis for communal sentiments and as a mechanism for collective redistribution, it is not surprising that background legal rules governing the structure of local communities and the significance of acquiring membership have tilted communal organization toward a system of fragmented homogeneity. As far back as \textit{Euclid}, Justice Sutherland defended the rise of zoning restrictions prohibiting apartment housing by describing apartments as "parasite[s], constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of [a] district."\textsuperscript{144} Today, concerns about residential "free riders" who pay less than they

\begin{itemize}
  \item \textsuperscript{137} See \textit{Burns}, supra note 42, at 4–9 (explaining the role of local governments in providing services to citizens).
  \item \textsuperscript{138} See Xavier de Souza Briggs, \textit{Brown Kids in White Suburbs: Housing Mobility and the Many Faces of Social Capital}, \textit{9 Housing Pol'y Debate} 177, 179–80 (1998) (describing effect of residency on the amount and type of social capital that is available).
  \item \textsuperscript{139} \textit{Walzer}, supra note 38, at 64.
  \item \textsuperscript{141} See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) (holding inequitable local school funding constitutional); Belier v. Wilson, 147 P. 355, 356 (Colo. 1915) (striking down effort to redistribute local taxes for educational funding on state constitutional grounds).
  \item \textsuperscript{142} See \textit{William A. Fischel, The Homevoter Hypothesis} 45–46 (2001) (noting that a wide range of local characteristics and policies are capitalized in the price of housing).
  \item \textsuperscript{143} See Angela P. Harris, \textit{Gender, Violence, Race, and Criminal Justice}, \textit{52 Stan. L. Rev.} 777, 797 (2000) (stating that police often understand their job to mean protecting the "'nice' neighborhoods" and the "'decent' people").
  \item \textsuperscript{144} Village of \textit{Euclid} v. Ambler Realty Co., 272 U.S. 365, 394 (1926).
\end{itemize}
receive in local goods and thus fail to properly internalize those costs. They have placed a high premium on development policies that successfully segment communal membership to limit redistributive effects and cluster those who seek similar services. The result is that while federal and state governments are increasingly looked upon as institutionally situated to engage in collective action and progressive redistribution, local governments have been oriented in the opposite direction.

In this respect, the legal and ideological institution of local membership shares many of the hallmarks of national citizenship and its role in our system of immigration controls. The oneness and belonging associated with citizenship constitute an important aspect of how immigration policies are crafted. In addition, immigration debates are never far from more materialist concerns such as how a nation’s “bounty” is to be shared. Indeed, whether understood as a relic of “feudal privilege” or a necessary foundation of modern society, the incentive structure created by the global order of citizenship explains much of the features and organizational structure of nation-states in ways that mirror those of our more intimate lived environments.

But the connection between national and local citizenship is also more direct. This is particularly true with respect to the actual concerns being raised in today's immigration debates. Some of the strongest and most accepted arguments are over the costs and benefits of immigration, especially those focused “almost single-mindedly on immigrants as a tax burden.” These fears center on a few specific areas: overcrowded schools and the cost of educating immigrants and their children; overcrowded prisons and the cost of policing immigrant communities; and overcrowded emergency

145. See Robert J. Dilger, Neighborhood Politics 71 (1992) (defining free riders as those who “make full use of the goods and services without paying for them”).
147. See Burns, supra note 42, at 80 (positing that, in the course of three and a half decades, “new cities changed from being providers of services to being providers of lower taxes”).
149. See Kent A. Ono & John M. Sloop, Shifting Borders 29–32 (2002) (stating that the argument most commonly made by the mainstream media concerning Proposition 187 involved the cost of undocumented immigrants to California’s economy).
rooms and the cost of providing health care to uninsured immigrants.161 It is interesting then that although federal solutions are sought, many of the services at issue are provided primarily by local government entities from local property tax receipts or state aid and in accordance with state law.152

The point of highlighting this is not simply to say, as many in the immigration debates now trumpet, that "the positive fiscal impact [of immigration] tends to accrue at the federal level, while net costs tend to be concentrated at the state and local level."153 Rather, it is to recognize that because local jurisdictions are primarily responsible, local community and membership rules exempt many individuals from these burdens, while concentrating the cost of this responsibility in the hands of others. Thus, even if national boundary and membership rules determine the immigrants who are entitled to share in our "bounty," and the "bounty" to which they are entitled, local community controls ultimately decide which individuals are primarily responsible by defining the "community" from which these obligations arise and what membership in such communities entails. Again, this is not an unexpected byproduct of our system of local governance. Rather, it is a fundamental component of our definition of local membership.

3. The Shared History of Community Fragmentation. Again, beyond similarities in their logic and operations, the relationship between national and local conceptualization of community and membership can also be found in their historic development. Not unlike the spatial analysis above, the turn of the twentieth century is a pivotal era for our inquiry. Common roots in the communal context, however, can arguably be traced back even further.


Indeed, some of the earliest immigration enforcement efforts after this country’s founding emerged from attempts to organize and maintain distinct communal spheres of membership at the local level and avoid having to support another community’s resident. As Professor Burns observed, early American towns possessed broad powers to determine which newly arrived resident in their community would be formally recognized as an inhabitant under “settlement laws” and other regulatory measures.\textsuperscript{154} The review processes involved were quite extraordinary—requiring at times that applicants supply written references from leaders in their previous community in their application to gain settlement in a new community.\textsuperscript{155} The operative concerns, however, are quite familiar: fear of social disorder and redistributive obligations prompted vigilance against “straggling and indigent persons” in Delaware, “diverse idle and disorderly persons” in North Carolina,\textsuperscript{156} and anyone who “may prove chargeable to the town” in Massachusetts.\textsuperscript{157}

Of particular note was the fact that removal for lack of settlement was employed for the same reasons and in the same manner regardless of whether it involved “individuals from neighboring towns, other colonies, [or] places ‘beyond sea.’”\textsuperscript{158} Thus, of the 1,039 individuals that were “warned out” of Boston in 1791, 740 came from other towns in Massachusetts, 62 from other states, and 237 from foreign countries.\textsuperscript{159} The underlying logic was overtly communal in nature—the question of entry was directly tied to the question of membership.\textsuperscript{160} But state and national citizenship had little relevance in this local determination. Indeed, this particular view of belonging was quite typical up to this time and by no means restricted to the colonial experience: “Historical evidence indicates clearly that, well into the nineteenth century, people routinely regarded as ‘foreign’ those from the next province every bit as much as those who came from other ‘countries.’”\textsuperscript{161}

\textsuperscript{154} Burns, supra note 42, at 45–46.
\textsuperscript{155} Id. at 45; see also Douglas Lamar Jones, The Strolling Poor: Transiency in Eighteenth-Century Massachusetts, 8 J. Soc. Hist. 28, 42–43 (1975).
\textsuperscript{156} Burns, supra note 42, at 45.
\textsuperscript{157} Id. at 35–36 (quoting Sumner Chilton Powell, Puritan Village 94 (1963)).
\textsuperscript{158} Kunal M. Parker, State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts, 19 L. & Hist. Rev. 583, 588 (2001).
\textsuperscript{159} Id. at 597–98.
\textsuperscript{161} Tim Cresswell, On the Move 13 (2006).
It is often assumed that this early emphasis on regulating local settlement faded with the increasing prominence of the state and later federal governments, especially as they became more involved in social and economic policies. As exemplified by T.H. Marshall's famous evolutionary account of citizenship, not only does nation-state citizenship come to dominate the narrative of political membership, but the overwhelming emphasis is often on its slow but steady expansion. To be sure, the nature of local citizenship did change with the increasing significance of state and, more importantly, national citizenship. But it is not clear that its role or utility diminished. Rather, it can be said that the confluence of developments central to the birth of America as a modern nation-state were also instrumental in reinventing and reinvigorating the significance of local membership at a time when the ease of mobility and pace of transformation should have rendered it obsolete. One such development is now familiar: the great wave of immigration that peaked in the early twentieth century. Another, which we have only touched upon, was the expansion of municipal services, programs, and infrastructure being provided and funded at the local level.

Massive urbanization in the late nineteenth century led cities across the country to begin undertaking public projects and providing public services that became possible with their improved economies of scale and necessary to maintain and accommodate their economic and demographic growth. At first, like the process of urbanization itself, this trend had a strong centralizing effect. The availability of city amenities, especially sewer, water, and later electricity, encouraged developing suburban communities at the central city's periphery to seek consolidation to gain access. As city services expanded to include more social programs like public education and policing, however, and as suburban communities gained independent means to access the services that they desired, the trend slowly began to turn the other way. Maintaining a separate communal identity meant that certain public goods in neighboring communities may be unavailable. But it also meant that the responsibility for providing other goods need not be shared. And

164. See Burns, supra note 42, at 47; see also Jon C. Teaford, The Unheralded Triumph 217–19 (1984).
166. See Teaford, supra note 42, at 82.
with the increasing number of states changing their laws to facilitate the incorporation of new communities at the edge of existing cities, and the resistance to annexation after becoming an independent entity, institutional avoidance of this sort became a legally viable response.\textsuperscript{167}

Of course, the institutional separation of the urban and the suburban did not erase their functional interdependence. The fact that suburban residents depended on the central city for crucial "amenities" like work, commerce, and recreation meant that these divisions were, in many respects, artificial.\textsuperscript{168} The practical consequences of this strategy, however, were quite real. The new suburban residents "understood that by separating themselves into distinct political jurisdictions they could monopolize the benefits of urban capitalism, benefits produced by the city's giant working populations, while excluding the social costs of reproducing labor, costs of public education, sanitation, transportation, housing, fire, and police."\textsuperscript{169} In other words, "suburbanites could work and get their income from the city, avoid the city's property taxes that paid for things like public schools and public baths for immigrants and other poor people, and devote the suburbs' property taxes exclusively to benefits for the relatively affluent and primarily white suburbanites."\textsuperscript{170}

The controversy surrounding the annexation efforts of the City of Boston during the 1880s typifies this transition. Throughout much of the nineteenth century, Boston had steadily and successfully annexed its surrounding towns, many of which sought the services and amenities that only the central city could offer at that time.\textsuperscript{171} When a series of legislative and technological changes enabled similar services to be delivered to smaller suburban communities without the need for political consolidation, the balance changed. As Sam Bass Warner explained, with the "motive of services having been withdrawn, there remained only the idea of community."\textsuperscript{172} This idea,

\textsuperscript{167} See Briffault, supra note 66, at 358–59.
\textsuperscript{168} Cf. Fishman, supra note 70, at 26 ("Every true suburb is the outcome of two opposing forces, an attraction toward the opportunities of the great city and a simultaneous repulsion against urban life.").
\textsuperscript{169} Plotkin & Scheuerman, supra note 99, at 123–24; see also Burns, supra note 42, at 62; Jackson, supra note 45, at 150–51.
\textsuperscript{170} Alan Rabinowitz, Urban Economics and Land Use in America 62 (2004); see also Hall, supra note 44, at 293. This is further complicated by the fact that many of the start-up costs of suburbanization, such as capital expenditures related to local services, were often subsidized by the city dwellers who did not move to the edge. See Jackson, supra note 45, at 130–32 (describing how such costs were paid by the city as a whole).
\textsuperscript{172} Id. at 164.
however, proved to be both an inclusive and exclusive concept. Those who advocated for continued annexation appealed to the idea of “one great city where work and home, social and cultural activities, industry, and commerce would be joined in a single political union.” Nevertheless, for many middle-class suburbanites who had moved to these outlying communities from Boston precisely to avoid the city, this unifying theme fell on deaf ears. More persuasive were the annexation critics, who “point[ed] out that the high level of city services maintained by Boston meant higher taxes, and ... that independent suburban towns could maintain native American life free from Boston’s waves of incoming poor immigrants.”

It is not surprising that the influx of poor immigrant laborers into the urban centers was an important reason why native-born Americans sought the refuge of suburban communities and then began to staunchly resist incorporation into the central city through annexation. But it is also interesting to note that much of the rhetoric surrounding suburbanization as a form of communal negotiation, with respect to social and economic resources, echoed similar motivations in the crafting of our immigration laws, especially those that viewed immigration as a mechanism for importing readily available labor without the associated cost of having to grow it domestically. Both can be looked upon as means by which communal identities served as tools for internalizing and externalizing various costs and benefits of social and economic life. In this regard, the various scales on which we define membership and community were not simply one way by which we managed the costs and benefits of immigration, but also an example of how we sought to redefine these costs and benefits entirely. Indeed, if it is true, as many economists posit, that immigration benefits the nation by increasing the supply of labor and imposes costs primarily in public sector goods like education, public benefits, and other community services and resources, then it is noteworthy that from a very early stage, community controls were fashioned to disproportionately concentrate these costs among certain subsets of the population—often upon the immigrants themselves—without unduly limiting access to their labor or services to other segments of the nation.

173. Id.
175. See PERIN, supra note 10, at 200 (“Today, the pervasive belief among most suburban communities, buttressed by cost-revenue analyses, is that new arrivals cost more in public services than do old-timers. These are the Dillingham Commission reports of today.”).
C. The Continuing Legacy of Joint Controls

Much has changed in the years following the history of space and membership recounted above. For one, although the legal roots of the fragmentation of American society can be found in the response to foreign immigration, they truly matured in response to a different wave of migrant newcomers: rural blacks participating in the Great Migration from the South.\textsuperscript{176} With the near cessation of immigration following the "closing" of our borders in the 1920s and the Great Depression in the 1930s, the tainted legacy of local spatial and community controls is best observed in the ubiquitous black ghetto rather than any lingering immigrant enclaves. It is also important to acknowledge the degree to which the urban–suburban divide has evolved in more recent decades as well. Whether discussed from the perspective of race, class, or function, the line between suburbs and the central city are no longer clear: urban neighborhoods are gentrifying,\textsuperscript{177} many inner-ring suburbs are in rapid decline,\textsuperscript{178} and several peripheral communities are becoming independent nodes of commercial and industrial development while abandoned industrial zones in the urban core are now being converted for residential use.\textsuperscript{179}

At the same time, it can be argued that much is the same. The impetus to differentiate that gave rise to land use controls and communal fragmentation continues to garner political and legal support, especially when justified, as it is increasingly today, in the "neutral" language of local control, consumer preference, or market efficiency. The relationship between the center and the periphery may be changing in some areas,\textsuperscript{180} but interlocal conflicts, including those between old and new suburbs, remain strong.\textsuperscript{181} Moreover, with the reopening of our door to

\textsuperscript{176} CHARLES ABRAMS, THE CITY IS THE FRONTIER 55 (1965) (noting that when "the Negro had been a small and docile minority in the North, it was the European immigrant, not the Negro, against whom the established whites would spend their resentments," but that the influx of black residents following the cessation of immigration caused the outcry from natives and former immigrants to be redirected to this new flow).

\textsuperscript{177} See Rebecca R. Sohmer & Robert E. Lang, Downtown Rebound, in 1 REDEFINING URBAN AND SUBURBAN AMERICA 63, 63–64 (Bruce Katz & Robert E. Lang eds., 2003) (analyzing data from the 2000 census).


\textsuperscript{180} For example, Minneapolis is actually redistributing funds out of the city to the suburbs under regional revenue sharing. See ELISE M. BRIGHT, REVIVING AMERICA’S FORGOTTEN NEIGHBORHOODS 40 (2003).

immigration in the 1960s, echoes of an earlier era of spatial and community segmentation can be seen once again in the residential geography of the newest immigrant groups and its legal significance. Although the incidence of segregation of recent Hispanic and Asian immigrants still falls short of that experienced by blacks today, measures for these new groups are trending upwards even while those for blacks are (slowly) moving in the opposite direction. As some commentators have already observed, the “segregation levels experienced by a new cohort of recent immigrants [are] remarkably similar to those observed in 1910” at the height of the first wave of immigration.\textsuperscript{182} Moreover, instead of just being divided into different neighborhoods, increasingly this fragmentation is translating into membership in different communities, and thus distinct pools of public obligation and collective action altogether.

It is not difficult to see the spate of state and local responses to immigrant residency in recent years, especially with respect to those deemed to be illegally present, as being a big part of this ongoing narrative. Traditional local regulations, and traditionally local interests, are being invoked once again to address the contemporary immigration crisis, with housing code sweeps like those in “Operation Firestorm” aimed at expelling immigrant residents\textsuperscript{183} and anti-loitering ordinances in communities like the Village of Mamaroneck targeting congregations of immigrant day laborers.\textsuperscript{184} Popularized by the example of the City of Hazleton in Pennsylvania, other communities have sought to go even further by incorporating federal immigration laws directly into local business licensing regulations, landlord-tenant ordinances, or local eligibility requirements for public goods and services.\textsuperscript{185} State governments have been active as well, particularly with respect to whether driver’s licenses or in-state tuition should

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\item[183.] See Lambert, \textit{supra} note 3 (describing mass evictions in an area with suspected illegal overcrowding).
\item[184.] See Fernanda Santos, \textit{Day Laborers’ Lawsuit Casts Spotlight on a Nationwide Conflict}, \textit{N.Y. TIMES}, Sept. 17, 2006, at 38 (discussing the effect of increased police presence on immigrant day laborers congregating at unofficial hiring sites).
require proof of legal residency. Nor has the federal government been entirely resistant to these developments, even taking steps to incorporate local enforcement efforts into the federal enforcement apparatus by recruiting the assistance of local officials or formally training and deputizing them as federal immigration enforcement agents.

But, as the preceding sections have sought to demonstrate, this is only a small part of a much bigger story. Indeed, even more telling than the communities that have explicitly responded in innovative ways to immigration inflows are those that have not. The fact is that the subnational immigration responses that have received the most attention are limited battles at the margins—merely the most perceptible element of a structure of existing spatial controls. Because of exclusionary zoning and related regulatory mechanisms, most communities today are already insulated from the most controversial of immigration flows—namely, the poor immigrants who are most likely to be regarded as a threat to upper- and middle-class norms and pocketbooks—while those neighborhoods in which new arrivals tend to congregate have long been open but isolated havens produced in large part by the concerted exclusion of neighboring locales. To the extent that local government law supplements the spatial controls of our immigration regime through finer calibrations on the ground, its effect is primarily in the stable spatial organization reinforced by existing local government structures that we often take for granted. It is no surprise then that those communities that have responded in the most sensational manner are those whose particular situations render the traditional toolbox of spatial and community controls difficult to implement. Thus, the real story about the recent local


187. See 8 U.S.C. § 1357(g) (2006) (authorizing the federal government to permit designated officers in state and local law enforcement agencies to perform immigration enforcement functions pursuant to a memorandum of understanding).

188. See, e.g., Ken Belson & Jill P. Capuzzo, Towns Rethink Laws Against Illegal Immigrants, N.Y. TIMES, Sept. 26, 2007, at A1 (depicting struggling towns whose surplus of abandoned residences and storefronts made traditional land use controls both ineffective and unattractive); Laura Rose-Feder, A Slice of Prices, NEWSDAY, July 13, 2000, at C6 (describing suburban towns like Brookhaven, with more modest and affordable homes relative to its Long Island neighbors, many of which are responsible for the regional demand for immigrant labor); Devan Malore, Editorial, The Decline of Main Street, ROANOKE TIMES, Dec. 13, 2006, at B11 (describing former industrial community whose efforts to reverse its decline by encouraging the development of business and industrial parks to lure companies from nearby cities also led to an influx of residents from those cities seeking jobs and affordability).
response to immigration is not the communities that have adopted controversial immigration-related ordinances, but rather the vast number of communities that, relying on existing structural protections, do not have to.

III. THE INTERDEPENDENCE OF IMMIGRATION AND LOCAL GOVERNMENT CONTROLS

To overcome the prevailing view of their dissimilarity, our exploration of the intersection of immigration and local government law thus far has focused on highlighting the commonalities among spatial and community controls at the local and national level. We have looked at similarities in their legal reasoning and effect. We have also traced the shared history of how doctrines specific to immigration and local government law have arisen. The manner in which the local government structure operates as a component of our immigration regime, however, is as much a function of their differences as it is of their likeness—differences that make them each uniquely useful in certain contexts and for certain purposes. Emphasizing these differences does not undermine the overarching claim that local spatial and community controls should be considered a component of our broader immigration regime. Rather, as I demonstrate here, it offers further support by illustrating how we rely on local controls to achieve results that cannot be realized through traditional immigration regulations alone.

A. The False Choice Between National and Local Control

To be sure, this is not the way that the difference between national and local control is usually understood. One reason for this is the tendency among commentators and policymakers to treat national and local controls affecting immigration as essentially interchangeable. From this perspective, local immigration-related controls are understood as either a partial substitute for nonexistent or ineffective immigration policies at the federal level, or vanguard efforts aimed at eventual federal adoption. Another reason is the dominance of the preemption issue. Indeed, considering that the issue of preemption lies at the heart of the judicial origins of the federal immigration power, it

189. See, e.g., Kobach, supra note 7, at 181 (advocating for local enforcement because it aids federal enforcement).

is not surprising that disputes about the breadth and limitations of federal supremacy dominate the conversation with respect to local immigration-related activities. As a result, instead of seeing national and local controls as complementary parts, it begins with the assumption that the relationship is one of competing powers.

Taken together, these approaches recall Walzer’s suggestion that the development of an immigration policy can be understood as a choice between national closure and neighborhood closure, between a unified nation and a nation of petty states. But the mechanics of this choice also oversimplify this relationship. We have always relied on aspects of both to negotiate the competing interests that we hold with regard to the practice of immigration or the presence of immigrants. And the reason that both play an important role, and often do so simultaneously, is that they are each situated to address different aspects of immigration. As a result, one can argue that the choice that Walzer presents and many commentators seem to embrace is a false one. It is never as simple as whether we want national control or local control, or whether we would rather have open borders or open neighborhoods. The choice lies in the multitude of configurations that controls on the local and national can be deployed.

One way of understanding the false choice between national and local controls is to focus on the ways in which local spatial and community controls are employed not as substitutes for federal immigration restrictions, but to effectuate a finer calibration of its effects. This is especially true in circumstances where outright national exclusion is not the most ideal outcome.

Consider, for example, the segregated Jewish neighborhood in sixteenth-century Venice from which the term ghetto is derived. The forced confinement of Jewish residents to one district of the city is without doubt condemnable. At the same time, the fact that Venice reversed long-standing admissions policies to accept Jewish residents at all, especially when most of Europe had up until that point excluded altogether or subjected them to more extreme persecution is significant. Indeed, the Venetian relationship with its Jewish residents was marked by an ambivalence that is common in immigration debates. Although spatially and forcefully segregated from the rest of the city, its residents were not excluded from playing a role in the

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191. **Walzer, supra note 38, at 36–39.**
192. **See Benjamin J. Kaplan, Divided by Faith 294, 299–300 (2007) (“From the perspective . . . of the preceding period, [the ghettos] brought advantages and even improvements in the conditions of Jewish life.”).**
economy in which they lived and worked: they left the ghetto each morning to transact business in Venice, returning to the ghetto only in the evening, and were an essential part of the Venetian economy.\textsuperscript{193} From this perspective, the fact that Venice allowed Jewish residents to enter and live in Venice during this period, but excluded them both spatially and communally from Venetian society, appears less the result of outright exclusionary animus, but rather a crude negotiation of the city's simultaneous economic dependence on, and cultural and religious rejection of, these "foreigners."\textsuperscript{194} The creation of the ghetto (and additional districts for other foreign nationals) was not a substitute for Venice's lack of border controls. Rather, it was a complement to Venice's desire to keep its borders relatively open.

In this respect, the historically common but now antiquated practice of referring to immigrant communities as "immigrant colonies" takes on a new significance.\textsuperscript{195} As Professor Marcuse forcefully argues in his typology of segregated spaces, "colonies are linked to the colonizers, the masters have an interest in, profit from, the work of the subject peoples."\textsuperscript{196} Marcuse uses this description to explain how the severance of the economic relationship between blacks and whites led to the increasing isolation of black communities and the rise of what he refers to as the "outcast" ghetto.\textsuperscript{197} The colonizer–colonized framework, however, also shines light on the relationship between native and immigrant communities. Exclusionary sentiments run high, but it is buttressed by the strong economic reliance that our society has for the economic value, and sometimes cultural amenities, that immigrants bring. It is also for these reasons that only in the most extreme cases do racist or nativist backlash lead to wholesale exclusion at the national level.

\textsuperscript{193} RICHARD SENNETT, FLESH AND STONE 231–37 (1994); see also KAPLAN, supra note 192, at 297–98 (describing the incomplete segregation of Jewish ghettos).

\textsuperscript{194} See KAPLAN, supra note 192, at 296, 318 ("[T]oler[ation of Jewish residents] was . . . a way to reconcile religious impulses with economic needs."). Jewish residents were not the only group of "foreigners" who were segregated in the city. Foreign quarters were established for a number of other groups, all of which were needed as trading partners but rejected as fellow residents. See id. at 303–05 (explaining how Muslims flocked to Venice for trade but, like the Jews, were segregated in separate quarters).

\textsuperscript{195} See DAVID WARD, POVERTY, ETHNICITY, AND THE AMERICAN CITY, 1840–1925, at 95 (1989) (describing the early use of the term "colonies" to describe immigrant quarters before moving to the term "ghetto").

\textsuperscript{196} Peter Marcuse, The Shifting Meaning of the Black Ghetto in the United States, in OF STATES AND CITIES 109, 126 (Peter Marcuse & Ronald van Kempen eds., 2002).

\textsuperscript{197} See id. ("Those in today's black ghettos are not productive for their masters; their masters get no benefit from their existence.").
This offers one explanation for why New York City's effort to zone out immigrant laborers working on Fifth Avenue at the turn of the twentieth century was not intended as an effort to stop immigration, and thus never translated into a broader campaign for immigration restrictions. Indeed, notwithstanding the tension between the Fifth Avenue store owners and the immigrant garment workers they sought to exclude, they also shared a unique relationship: the livelihood of the former depended on the labor and goods supplied by the latter. Thus, unlike the broad stroke of federal immigration reform, municipal zoning offered Fifth Avenue storeowners a finer brush with which to balance their need for immigrant labor and aversion to their presence. And there are signs that a similar negotiation is at work today. The controversy over immigrant residency in suburban enclaves can be seen as an attempt to utilize local boundaries to navigate their ambivalent relationship with immigrants as neighbors and immigrants as workers due to the fact that “the new immigrants challenge the suburban image while their labor helps to preserve and enhance it.”

Conversely, one can also see the interdependence of national and local controls at play during times when national closure has been invoked. Examples where state and local ordinances filled the gap of national boundary or citizenship laws by accelerating or multiplying the effects of national exclusion have been extensively documented. Even more interesting, however, are instances where local measures are used to fine-tune the broad and sometimes indiscriminate effects that national exclusion entails.

An early twentieth-century effort to preserve San Francisco's Chinatown can be understood in this light. Whereas Chinatown had long been viewed as a threatening space of vice, disease, and cultural difference that resisted the great assimilating force of mainstream American society, as the city of San Francisco strived to position itself as a major metropolitan center, Chinatown began to be viewed as an important cultural asset. Thus, less than a generation after San Francisco sought to both isolate and expel its Chinese residents, the city turned to similar organizational techniques to reconstitute its fading Chinatown precisely because it was becoming less “Chinese” and its

198. Indeed, the persistent need for immigrant labor may explain why most of the earliest immigrant protections recognized by the Supreme Court concerned limits on access to their labor. See Truax v. Raich, 239 U.S. 33, 41-42 (1915) (striking down statute that restricted employment of aliens).

199. ROSALYN BAXANDALL & ELIZABETH EWEN, PICTURE WINDOWS 240 (2000).
residents more “assimilated.” 200 Local business leaders stepped in to vigorously promote the use of Asian-inspired architectural designs to demarcate Chinatown as an identifiable space, and city leaders promoted fairs and festivals that showed off their city’s Chinese heritage. 201 In addition, entrepreneurs of Chinese descent were encouraged to participate in this preservation effort, including dressing up in traditional Chinese garb during city celebrations. 202 Of course, this embrace of immigrant space shares much with the exclusionary policies that took place before: the efforts to maintain this space of ethnicity essentially “amounted to an informal zoning policy that delineated separate spaces within the city” though for the purposes of “offering distinctive attractions to visitors.” 203 Yet rather than being a reaction to Chinese immigration, it was a response to its precipitous decline.

A third way of describing the false choice between national and local is to recognize that national-level exclusion also provides alternative means of tackling spatial and community concerns that local controls are unsuited to address. For this, it is worth considering the noted differences between the historic hypersegregation of the black community and the less extreme concentration that defined many immigrant enclaves. To be sure, the extent to which immigrant groups in the past have been able to align themselves with “whiteness,” 204 or capture urban political power and the employment that came with it, 205 contributes to the divergence between these two types of communities. An alternative explanation, however, can be drawn from the fact that mechanisms other than physical segregation and community exclusion are sometimes available with respect to immigrants in ways that were not applicable to others; namely, the possibility that they can be compelled to leave the country entirely. From this perspective, the segregation and concentration of impoverished blacks actually shows the limits of the exclusionary capabilities of local controls. In other words, the fact that similarly marginalized immigrant groups avoided this fate was

201. See id. at 71–72, 74.
202. See id. at 72.
203. Id.
204. See ROEDIGER, supra note 21, at 8 (characterizing twentieth-century American immigration as “assimilation to whiteness”).
205. See WALDINGER, supra note 15, at 103–05, 209–11 (chronicling the English-speaking Irish immigrants’ dominance in government employment as contrasted with other ethnic groups).
in some ways, ironically, due to the fact that the possibility of
cross-border flow provided a more permanent resolution. To be
sure, at times, the option to leave is invoked more or less
voluntarily by the immigrants themselves, such as the spike in
the return migration during economic downturns. In other
instances, however, national exit is brought about by more
coercive means. In both cases, it can be argued that
transnational mobility and immigration regulations allow for the
externalization of perceived "costs" in ways that local controls
can shift but not eliminate.206

A good example is the massive repatriation of Mexican
immigrants and their descendents from Los Angeles and Chicago
in the 1930s. Indeed, if the Great Depression set the cornerstone
for the creation of the contemporary black ghetto by excluding
them from white neighborhoods and job opportunities, it also led
to the wholesale dissolution of several Mexican and Mexican-
American barrios by casting many of their inhabitants out of the
country entirely.207 Blurring the distinction between the national
border and municipal boundaries, joint task forces involving local
and federal officials initiated massive raids of these
neighborhoods in theory to seize those eligible for deportation,
but in practice rounding up American citizens and legal residents
alike.208 After the federal raids, however, "cities and counties
across the country intensified and embarked upon [their own]
repatriation programs, conducted under the auspices of either
local welfare bureaus or private charitable agencies."209

Discrimination with respect to services and relief at the local and
national level were implemented to encourage those not netted to
repatriate "voluntarily." In addition to these sticks, carrots of
sorts were also provided: counties like Los Angeles operated a
series of repatriation trains to transport indigent Mexican
families as far as central Mexico.210 In the end, an estimated one

206. See CHARLES ABRAMS, FORBIDDEN NEIGHBORS 55 (1955) (describing this
arrangement as a form of "internal colonialism" where the "colonial natives are kept with
us within distance when we want them—and then driven out of the community when no
longer needed").

207. See generally FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF
BETRAYAL (1995) (chronicling the wave of deportation and repatriation efforts aimed at
Mexicans in America during the Great Depression); Kevin R. Johnson, The Forgotten
"Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror," 26
PACE L. REV. 1 (2005) (comparing the treatment of Mexicans during the Great Depression
to the treatment of Arabs and Muslims after the attacks of September 11).

208. See BALDERRAMA & RODRIGUEZ, supra note 207, at 55–60.

209. ABRAHAM HOFFMAN, UNWANTED MEXICAN AMERICANS IN THE GREAT
DEPRESSION 83 (2d prtg. 1976).

210. Id. at 86–87.
million Mexican and Mexican-American residents were removed nationwide, with Los Angeles alone repatriating as much as one-third of its Mexican population, particularly those from undesirable neighborhoods, in just six months.\textsuperscript{211}

These examples serve to demonstrate the complex relationship between spatial and community controls at the local and national level. By understanding them in conjunction, we see how these regulatory tools form, in a sense, our nation's true immigration regime. It is precisely the differences of scale that allow the two to pursue complementary goals from different perspectives and often by employing contrasting policies.

B. The Case of Plyler v. Doe

Of all the contemporary immigration cases, \textit{Plyler v. Doe} remains one of the most controversial and widely discussed decisions in the Supreme Court's doctrinal canon.\textsuperscript{212} Among its supporters, it is widely "viewed as the ultimate aliens' rights decision."\textsuperscript{213} Among its critics, \textit{Plyler} represents judicial activism and doctrinal confusion at its worst.\textsuperscript{214} Regardless of the various views on \textit{Plyler}, however, it is almost uniformly recognized as "mark[ing] a fundamental break with classical immigration law's concept of national community and of the scope of congressional power to decide who is entitled to the benefits of membership."\textsuperscript{215}

The facts of the case illustrate why questions of community and membership are so central to this decision. One of the earliest cases to deal with the issue of contemporary illegal immigration, the \textit{Plyler} Court was asked to decide whether the Equal Protection Clause prevents the state of Texas from denying illegal immigrants the right to obtain a free public education in its local schools.\textsuperscript{216} In rejecting the plaintiff's call for strict scrutiny, the Court refused to recognize access to free public education as a fundamental right and declined to accept illegal status as a suspect classification.\textsuperscript{217} Nevertheless, in a divided 5–4 decision, the Court still struck down this provision of

\begin{itemize}
  \item \textsuperscript{211} See \textit{id. at 126}; GEORGE J. SÁNCHEZ, \textit{BECOMING MEXICAN AMERICAN} 12 (1993).
  \item \textsuperscript{212} Plyler v. Doe, 457 U.S. 202 (1982).
  \item \textsuperscript{213} Bosniak, \textit{supra} note 111, at 1120.
  \item \textsuperscript{216} Plyler, 457 U.S. at 205.
  \item \textsuperscript{217} Id. at 223.
\end{itemize}
the Texas Educational Code as unconstitutional. Noting the relative innocence of the undocumented children involved in this case who, unlike their parents, had no direct control over their presence in this country, and the importance of education in ensuring that no permanent under-caste develops in our egalitarian constitutional order, the Court applied heightened scrutiny and found the state's justifications for its prohibition lacking.

The Plyler decision is traditionally seen as an attempt to negotiate the confusion that dominates the judicial and political debates over the issue of illegal immigration. On the one hand, in refusing to treat undocumented immigrants as a suspect class, it reinforces the importance of legal statuses in a nation governed by the rule of law. On the other hand, the Court was well aware of the fact that undocumented immigrants are embedded in the social and economic fabric of our society, and will likely remain a part indefinitely. As a result, the Court's decision was both pragmatic and idealistic—it employed traditional doctrinal standards, but did so in a controversial manner to realize broader constitutional norms: "The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. . . . The existence of . . . an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." Thus, in rejecting the state's effort to preserve its "limited resources for the education of its lawful residents," Plyler stands as an affirmation of the membership of illegal immigrants in our overarching community and the responsibility that we all have to ensure an educational opportunity for all our children.

But how extensive is this obligation? And, more importantly, how extensive is the "we"? Standing alone, Plyler seems to signify a high watermark for both immigrant protections and the anti-caste principles of the Equal Protection Clause. Yet Plyler was not the first time that the Court addressed a constitutional challenge to provisions of the Texas Education Code. Eight years earlier in San Antonio Independent School District v. Rodriguez, the Court denied an equal protection challenge against the state's education funding scheme, which contributed to dramatically uneven funding outcomes for schools located in

218. Id. at 203, 208–09, 230.
219. Id. at 219–22, 230 (requiring a showing that denial of free public education to undocumented children "further[ed] some substantial state interest").
220. Id. at 213, 219.
221. Id. at 227.
Nor was Plyler the last. Just one year later, the Court in Martinez v. Bynum denied a challenge to a provision of Texas's Education Code that denied free public education to children whose parents did not have residency in the local school district and whose presence in the district was for the primary purpose of attending school. Seen alongside Rodriguez and Bynum, Plyler appears neither as promising as many of its advocates celebrated, nor as costly as its critics contended. Indeed, what these cases illustrate is that even while the Court was willing to undermine the symbolic sanctity of the national polity by extending its scope to include those who have been purposefully excluded, it was only willing to do so after preserving the divisions across local communities.

Consider first how the holding of Rodriguez complicates both the promise and the principles of Plyler. In Rodriguez, Mexican-American parents initiated a class action on behalf of poor students residing in communities with low property tax bases. The challenge asserted that the public school funding structure set out by the Texas Education Code, which favors communities with high property values, violated the Equal Protection Clause by inequitably distributing educational funding. It is worth noting that property taxes were not the sole source of revenue for local school districts. Texas provided a foundation grant based primarily on student enrollment to every district for the purpose of ensuring that a minimum level of education is provided across the state. As plaintiffs demonstrated, however, because the rest of a school district's education budget was culled from local property tax receipts, the foundation budget did not prevent stark disparities from arising. Comparing Edgewood Independent School District with that of Alamo Heights, both of which were located in the San Antonio Metropolitan Region, the Court noted that whereas the former could only spend $356 per pupil with a local property tax rate of $1.05 per $100, the latter was able to spend $594 per pupil at a lower tax rate of $0.85 per $100. Moreover,

225. Id. at 15–16.
226. Id. at 24, 45.
227. Id. at 12–13. The per-pupil spending reflects the state's foundation grant, which was $222 per pupil for both districts, as well as funding from federal sources. The rest was made up of local tax allocations, of which Edgewood only contributed $26 per pupil compared to Alamo Heights's $333. The Court noted preliminary figures reflecting a recent foundation grant greatly increased state aid to Edgewood. But notably, this led
although both districts were relatively the same geographic size, Edgewood educated more than 22,000 students, of which approximately 90% were of Mexican-American descent, compared to the “predominantly ‘Anglo’ student population of 5,000 served by Alamo Heights. Nevertheless, the Court found much of these statistical comparisons irrelevant. Rejecting plaintiffs attempt to portray the case as one about discrimination against the “poor” or an identifiable suspect class, and holding that access to education is not a fundamental right, the Court dismissed the equal protection challenge in a divided 5-4 decision that found the state’s funding scheme to be rationally related to a compelling state interest.229

Like Plyler, Rodriguez has been the subject of extensive commentary since it was decided, much of which has been critical of the opinion’s reasoning or result.230 What is of interest here, however, is not the decision itself, but the degree to which it both intersects with and tempers Plyler. If the holding of Plyler secured the right of alien children to receive free public education irrespective of their status, Rodriguez ensured that they have no claim upon any community outside of the local political jurisdiction in which they reside. Similarly, if an underlying message of Plyler was that the importance of education to our republic obligates us as a polity to collectively provide such a service as a public good, even to those who do not have formal membership in such a polity, Rodriguez affirms the practice of

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228. Id. at 11–13. It is interesting to note that the Rodriguez majority appears to justify the disparities in part based on the fact that, although the districts are of the same physical size, Edgewood has more than four times the number of students than Alamo Heights. Id. at 13 n.33. As the Court explained, “If Alamo Heights had as many students to educate as Edgewood does...its per-pupil expenditures would...have been considerably lower.” Id. As discussed in the previous Section, the fact that Alamo Heights’s student population (indeed, total population) is restricted in this manner is no coincidence. Exclusionary zoning ensures larger property tracts, higher property values, and lower numbers of students. More importantly, municipal boundaries and the significant municipal residency ensure that such an arrangement creates fiscal advantages.

229. Id. at 28–29, 37, 55.

230. See, e.g., Richard Briffault, The Role of Local Control in School Finance Reform, 24 CONN. L. REV. 773, 775 (1992) (claiming that the Court used local control “as a shield, to ward off claims that the state has an obligation to revamp the existing school finance system”); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212, 1218 (1978) (arguing that the Court’s analysis “support[s] the underenforcement of the equal protection clause by the federal courts”); Joan C. Williams, The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law, 1986 WIS. L. REV. 83, 107–09 (criticizing the Rodriguez majority for framing the issue as one concerning local, rather than state, autonomy).
avoiding such obligations by defining oneself as being a part of a separate community, albeit on the local level.

In other words, it is not just that Rodriguez recognized the use of municipal and school district boundaries as tax havens, where rich residents can provide their children with quality education and low tax rates by ensuring that local revenues are not redistributed to other children. It is also that to the extent that in states like Texas where immigration is both a foundation and a threat to the state's economic system, "other children" are more often than not also associated with alienage and immigration status. Thus, while race and ethnicity served as a foundation for the plaintiff's equal protection claim in Rodriguez, by the time the Court heard Plyler, it was clear that the issue of immigration was inseparable from the local fragmentation at the heart of the challenged disparities. Edgewood was not only predominately Mexican-American, but it also served a larger immigrant population than the predominately Anglo school district of Alamo Heights.231 The influx of immigrant children, including those who are undocumented, had a disproportionate effect on certain school districts over others.232 Similarly, because of the spatial organization of communities in the state, Texas's attempt to deprive state educational funding for undocumented students had a much greater impact on schools that were already disadvantaged under its funding scheme than those that had been able to insulate their district, and thus their tax base, from those unable to contribute their "fair share." Thus, the state was able to defend the undocumented children prohibition as an effort to support poor school districts in the lower court, prompting the district judge to remark that "any spectator watching the state's presentation of evidence might easily have mistaken it for a retrial of the Rodriguez case, with the State of Texas acting as amicus curiae for plaintiffs, emphasizing the plight of the property-poor border school districts under the state's educational financing scheme."233

What is interesting about Plyler and Rodriguez is that both deferred to the traditional concept of local residency as a marker

of membership and embraced the sanctity of local boundaries. In Rodriguez, local control emerged as one of the compelling rationales articulated for Texas’s funding scheme.\(^{234}\) From the Court’s perspective, the challenge was asking the Court to question the “State’s judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests.”\(^{235}\) As Professor Barron explained, in the eyes of the Court, the funding structure was an attempt by the state to “facilitate, rather than to limit, local efforts to enhance the educational interests of their residents because it authorized local school districts to make additional financial contributions to supplement the state’s funds.”\(^{236}\) The same can be said of Plyler.

At first blush, the orientation of the Plyler Court appears to be in the opposite direction. It held unconstitutional a state educational system that not only deprived local school districts foundational grant money for undocumented children, but also empowered localities to refuse to admit undocumented children into their schools at their discretion. But like Rodriguez, the Court invoked the tradition and sanctity of municipal residency to strengthen its position. Thus, when the state argued that Texas’s prohibition against illegal immigrants can be read as a test of local residence, which has traditionally been used as a requirement for being granted access to schools in a particular district, the Court rejected this argument by noting that it failed to conform to “established standards by which the State historically tests residence” in local communities.\(^{237}\) And in so doing, the Plyler Court reified the importance of municipal membership and local boundaries, which undermined the broad, collective vision of community to which it is often attributed in the immigration context.

Of course, Rodriguez is only one of Plyler’s bookends. The other, decided one Term after Plyler, was Martinez v. Bynum.\(^{238}\) In Bynum, Roberto Morales, a student born in McAllen, Texas, to immigrant parents, sought admission to a local school administered by the McAllen Independent School District. Unlike other students living in McAllen, however, he resided there with his sister, who assumed the role of custodian but “[was] not—and d[id] not desire to become—his guardian,” while his parents, who

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235. Id. at 40.
were not American citizens, resided in Mexico.\footnote{Id. at 322–23.} Claiming that Morales was present in the school district “for the primary purpose of attending the public free schools,” the school district sought to deny his enrollment on the ground that he was not a local “resident” under section 21.031 of the Texas Education Code and thus not entitled to attend its school.\footnote{Id. at 323.} In response, a suit was filed alleging that the provision was unconstitutional.\footnote{Id. at 324.} Finding the challenged provisions to be a bona fide residency requirement—indeed, one more generous than traditional residency requirements—the Court held that prohibiting Morales from attending school in McAllen, or any other district in the state, did not violate the Equal Protection Clause.\footnote{Id. at 325.}

At one level, Bynum echoes Rodriguez in affirming the degree to which local communities are not only allowed, but expected to prefer its residents over the claims of outsiders. As the Bynum Court held, a “bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided by residents are enjoyed only by residents.”\footnote{Id. at 324.} In the Court’s view, to ignore or reject this interest not only impinges on state and local autonomy, but “there can be little doubt that the proper planning and operation of the schools would suffer significantly.”\footnote{Id. at 325.} At another level, however, the Court’s ruling on local residency in Bynum is directly tied to issues at the heart of Plyler. Because of Morales’s unique situation, the Court’s decision was not simply about the integrity of the boundaries around the McAllen school district, or even that of the state of Texas. At issue was also the effect that this local residency requirement has on transnational migration and the rights and privileges of national citizenship.\footnote{Id. at 326.} Indeed, the challenged provision in Bynum was a part of the same immigration-stemming efforts at issue in Plyler. As the district court found, “[a]t least one of the legislative purposes behind Section 21.031(d) was to inhibit the migration of persons residing in

\begin{itemize}
\item \footnote{Id. at 322–23.}
\item \footnote{Id. at 323.}
\item \footnote{Id. at 324.}
\item \footnote{Id. at 332–33.}
\item \footnote{Id. at 328.}
\item \footnote{Id. at 329.}
\item \footnote{Id. But see id. at 333 (Brennan, J., concurring) (stating that because the case was presented as a facial challenge, the constitutionality of the statute as applied to “Roberto Morales, a United States citizen whose parents are nonresident aliens,” was not implicated and suggesting that a “different set of considerations would be implicated” if that situation were before the Court).}
\end{itemize}
Mexico to attend schools in the United States, and the Supreme Court specifically quoted the district court’s finding that the adverse impacts of invalidating Section 21.031(d) would not only be “overcrowded classrooms and related facilities,” but also because it would require the “expansion of bilingual programs.”

Read alongside Plyler, the result in Bynum appears surprising. Under Plyler, an undocumented child with no legal right to reside in the country and subject to removal cannot be denied free access to a public school in the jurisdiction where he and his parents reside. Under Bynum, however, an American citizen child can be foreclosed from attending any public school in the United States because his parents are unable to secure residency in a local community. Indeed, the import of Bynum can be seen as going even further than just the deprivation of educational opportunities; because of the vital role that education plays in American society and the almost universal adoption of similar residency requirements in localities across the nation, this deprivation could be seen as constituting a de facto exclusion of an American citizen from residing in the United States altogether.

But if we begin, as we did here, with Rodriguez, the result of Bynum is not so much an affront to the commitments of Plyler or the guarantees of citizenship, but rather an important clarification of their limits. And once again, those limits involve the interplay of immigration with the institution of local citizenship and the meaning of local boundaries. Thus, despite the Plyler Court’s attempt to distinguish the rights of the child from the conduct and status of his parent, Bynum affirms that in the local context, the ability of one’s parent to acquire residence in a given neighborhood not only affects the type of education that one will receive, but also whether one is able to be educated in the United States at all. The Court specifically

246. Arredondo v. Brockett, 482 F. Supp. 212, 216 (S.D. Tex. 1979), aff’d, 648 F.2d 423 (5th Cir. 1981), aff’d sub nom. Bynum, 461 U.S. 321; see also Jackson v. Waco Indep. Sch. Dist., 629 S.W.2d 201, 205 (Tex. App.—Waco 1982, no writ) (explaining that Section 21.031(d) “was enacted in response to litigation regarding the rights of alien children to attend Texas schools” (emphasis added)).


248. See Plyler v. Doe, 457 U.S. 202, 227 n.22 (acknowledging that state school districts are “as free to apply to undocumented children established criteria for determining residence as they are to apply those criteria to any other child who seeks admission”).

249. See id. at 220 (stating that the children “can affect neither their parents’ conduct nor their own status”).

250. See Bynum, 461 U.S. at 332; see also id. at 336 n.3 (Marshall, J., dissenting)
rejected Texas's argument in *Plyler* that it can deny free public education to undocumented students in order to save limited state resources for "its" residents. At the same time, the ability of localities to favor residents over outsiders was embraced as one of the primary reasons why the McAllen school district's denial of admission was permissible.

In short, *Plyler* alone tells only one part of the overall story. It reveals only a small slice of how local government laws were structured to target immigrants and regulate immigration, and it provides only a small window of the overall immigration regime at work. When *Plyler* is seen alongside *Rodriguez* and *Bynum*, however, the reach and consequence of the Court's decision is put into proper context. The important point is that, in the end, all three cases were essentially about the same thing: controlling cross-border and cross-community flows. To be sure, some of the efforts were directed at the national border while others were directed at local boundaries, and consequently the Court employed different adjudicatory tools in their analysis. Nevertheless, seen in the context presented above, it is not entirely clear that one is as conceptually or legally different from the others as is commonly assumed.

IV. THE IMPLICATIONS OF LOCAL FRAGMENTATION AS IMMIGRATION REGULATION

Our immigration regime involves not only the ways in which our nation maintains its physical or political boundaries, but also the ways in which we enable and maintain the fragmentation of our local communities. This was the finding of Part II, which demonstrated the doctrinal and historic relationship between federal immigration laws and the legal organization of local communities. The reason for this organization, I have suggested in Part III, is that it allows for finer negotiations of the disparate interests underlying immigration and a more targeted calibration of its diverse effects. But like all structures, there are implications for relying on local fragmentation in this manner.

Returning to the claim that initiated our inquiry—the essential connectedness of local and national forms of spatial and community controls—the next two sections will look at the

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(citing an example where a child who had attended McAllen schools was denied admission to the school after her parents divorced and moved away, and she now lived with her brother).


252. See *Bynum*, 461 U.S. at 328–29 ("A bona fide residence requirement . . . furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents.").
futility of the national–local divide and the consequences of relying on fragmentation, respectively. This Part is, then, at its most basic level, an account of how seeing local fragmentation as a part of our immigration regime provides additional contexts to certain aspects of immigration law. But beyond this, it also suggests that the doctrinal and historic reorientation asserted thus far raises even broader questions with respect to our understanding of the role of immigration regulations and potential implications for immigration policies going forward.

A. The Futility of the National–Local Divide

The foregoing analysis of Plyler illustrates what is omitted when our view of immigration is drawn too narrowly, when local contexts such as those described by Rodriguez and Bynum are deemed irrelevant to our nation’s complex and often multi-tiered negotiation of immigration. But even if courts and commentators directly confronted this connection, would it help produce a more coherent formulation of the national–local divide than we have now? Considering the role of this divide at the center of the plenary formulation of the immigration power, it is not surprising that this question continues to garner such widespread attention. And for those on the front lines of the local turn in our nation’s immigration response, the stakes are often more than academic. The lesson of seeing local fragmentation as part of our immigration regime, however, may actually be the futility of searching for this divide. At the very least it is because the tools that we have for drawing the necessary lines simply fail to address many local aspects of the immigration regime described here. But it is also because the endeavor misconstrues the role of immigration regulations in a more fundamental way.

The fact is that how immigration is experienced and understood by most Americans does not fit easily into the mold of immigration regulations cast by established laws and deep-seated doctrine. The intimate, local context where the effect of immigration is the most immediate and transparent (the inscrutable signs on Main Street, the new sports leagues in the neighborhood park, the unfamiliar languages heard in familiar congregations) not only informs, but profoundly shapes how the issue and regulation of immigration is perceived. As a result, the regional and neighborhood struggles that shape our lived environment—the informal turf wars, the contentious zoning hearings, the endless search for the right neighborhood and good schools—cannot help but be seen by most as intertwined with the national conversation over immigration quotas and border
enforcement. I do not mean to deny the added importance that immigration poses for how we define our nation as a whole. But if the nation is, as Benedict Anderson so famously described, an “imagined community,” then it is not surprising that it is the local context that so often serves as the reference point from which our individual version of this collective narrative is formed. From this perspective, local players and backdrops like those involved in recent immigration controversies like “Operation Firestorm,” or more famously in Hazleton, are not a new setting for today’s border wars, as some have suggested. Rather, they are in some sense, the only scale on which border wars can truly take place.

Recognizing this duality complicates how the national–local divide factors into policy disputes over immigration policy going forward. Thus, irrespective of what position we assume as participants in the immigration debates, difficult questions still remain with respect to the role that local boundary and membership rules should or should not play. As a conceptual matter, emphasizing the interactions and relationships between mechanisms of control and across different institutional scales casts doubt on treating local disputes as mirror images of national battles. This is especially true when we are faced with the possibility that our current system of immigration admission may not be as welcoming as it is today if the means of local differentiation examined earlier did not exist, or conversely, that it may be more welcoming if additional measures of local protectionism were available.

On a more immediate level, reorienting the national–local divide in this manner confronts us with the extent to which we are willing to accept the local consequences of what may be required to achieve our national immigration goals. Indeed, for those of us who champion the anti-caste goals of Plyler on principle, support may not be as easily offered if the caste-like privileges guaranteed by Rodriguez and Bynum—privileges we often work hard to make sure that our children enjoy—are also on the line. Though I pose this issue rhetorically, about-faces

253. To be sure, local communities are often no less an imagined community than nation-states. See Frug, supra note 64, at 262–63 (quoting BENEDICT ANDERSON, IMAGINED COMMUNITIES 15 (1983)).

254. See FARMINGVILLE (Camino Bluff Productions 2004) (promoting documentary movie about the hamlet in Brookhaven where Operation Firestorm took place with the tagline, “Welcome to the suburbs, home of the new border wars”).

255. Cf. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49 (1973) (“The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all
when policy questions are presented in this manner are not unheard of. Take, for example, early supporters of a Colorado ballot measure to ban bilingual education in public schools. Although supporters of the proposal were initially critical of bilingual education for giving special treatment to immigrants and discouraging their assimilation, they later balked en masse when a controversial ad campaign suggested that the abolition of bilingual education would mean the integration of "those" kids into the classrooms of their children.\footnote{Recent Legislation, \textit{Colorado Voters Reject an English Immersion Ballot Initiative}, 116 HARV. L. REV. 2709, 2712–13 (2003).}

Despite best efforts, the traditional tools with which the national–local relationship is adjudicated largely fail to capture this reality. As a result, the current emphasis on how the doctrine of preemption or the principle of federalism should be applied to local involvement in immigration may not be as central as normally believed.\footnote{See supra notes 6–7 and accompanying text (noting the erosion of federal plenary power over immigration regulations and the rise of more localized controls).} At the most basic level, it is because these legal frames of adjudication are simply inapplicable to many aspects of the immigration regime described here—aspects that are a part of how we respond to and negotiate the impact of immigration as a nation, but lie squarely at the foundation of our system of localism. Preemption offers the promise of clear, bright lines deduced through a delineated process, and it offers an easy route to tackle many of the seemingly novel local responses that have arisen. As it is currently implemented, however, boundary and membership controls like zoning and residency requirements simply fall outside of preemption's limited scope. Substantive balancing of federalism principles, as many now advocate, provides a robust and flexible counterpart to categorical preemption. But in addition to being itself a contested and evolving framework,\footnote{See, e.g., ROBERT W. HOFFERT, \textit{A Politics of Tensions} xi (1992) (noting that the meaning of federalism is endlessly contested); EDWARD A. PURCELL, JR., \textit{Originalism, Federalism, and the American Constitutional Enterprise} 161–77 (2007) (discussing the evolution of federalism in the United States).} in emphasizing distinct spheres of autonomy, it is less likely to acknowledge and more likely to ignore or deny the essential connection between national and local posited here.

At a deeper level, however, the problem with preemption and federalism lies in the fact that they ascribe to assumptions that
are fundamentally at odds with how immigration flows and their diverse impacts are negotiated. Preemption and federalism apply at recognized points of conflict and often in such a manner that admits of only one “winner.” In doing so, it often runs the risk of oversimplifying the relationship of centralization and decentralization as concepts locked in a zero-sum game in which one gains only at the expense of the other. Nevertheless, the story of the co-development of comprehensive schemes of spatial and communal organization at the national and local level belies this simplicity. The mutual interdependence at the heart of this story suggests a cooperative structure of federalism and localism that is not easily captured by how federalism is usually invoked in court. But more importantly, the concurrent rise of what has now become the doctrinal foundations of immigration and local government law suggests a mutually constitutive view of centralization and decentralization in which, rather than being competing forces, the expansion of one may actually depend on the expansion of the other. Arguing along these lines, Richard Ford describes how, in addition to the conventional story that centralization requires the imposition of uniformity and suppressing of local differences, there is also the opposite: “typology, sorting, differentiation to an ever more 'precise' and infinitesimal degree,” from which “localism in all its particularity and difference” can be seen as “the child, rather than the enemy, of the modern state.” Taking stock of the local influence on the formal centralization of immigration authority, or federal efforts to promote local fragmentation at a time when the nation was wrestling with the diverse impacts of foreign immigration and other migratory flows, the development of our nation’s immigration regime seems to be one part of this overarching story.

I do not mean to underestimate the difficulties that this reorientation poses to immigration activists. Considering the complexities that it introduces, I am not surprised that many refer to the multiple institutional scales on which the battle over our immigration regime is being waged as either signs of a broken system in need of comprehensive reform, or as examples


of the needless and irrational disputes that local involvement provokes.\textsuperscript{261} Nor do I overlook the simplicity promised by the traditional federal-oriented model. Maintaining an exclusive sphere of federal control makes reform efforts much easier to achieve; rather than fighting battles in all fifty states, or the thousands of counties, cities, and towns, centralization offers a single concentrated target upon which pressure can be exerted, and a designated forum where policy disputes can be reconciled. There is also reason to believe that an exclusive national policy vindicates norms of uniformity while ensuring, as much as possible, a well-informed and well-reasoned debate insulated from parochial bias or local incompetence.\textsuperscript{262}

The problem is that I am not so sure that the kind of centralization typically envisioned in the immigration discourse is accurate or even desirable. From the vestiges of colonial settlement laws to the imposition of Chinese exclusion, we saw a regulatory system that began with the premise that national and local concerns were inextricably intertwined. And as national quota legislation divided the world in ways not unlike what zoning and local government fragmentation sought to achieve in America’s new settlements and emerging metropolitan regions, we saw how local and national mechanisms of control were connected in an effort to define nested boundaries and negotiate layers of belonging. Considering the historical account set forth here, the multi-tiered approach may in fact be the centralized scheme that we, as a nation, have long settled on. At the very least, I believe that continued adherence to federal exclusivity simply ignores the regime that we currently have, or belies the fact that most people do not see it as a conflict to maintain different views on how we should respond to immigration as a nation versus how we should respond as a community or as individuals.

Moreover, considering how the impact of immigration is felt on the ground, the limitations of federal mechanisms of control, and the vast diversity of competing views, it is arguable that we

\textsuperscript{261} See, e.g., Editorial, The Border Deal, NEWS & OBSERVER (Raleigh, N.C.), Apr. 3, 2006, at 8A (“The trouble is that neither local nor state leaders can resolve the problem of illegal immigration. It’s a job for Congress, one that North Carolinians should be impatient to see national leaders tackle.”); Stella M. Hopkins, N.C., S.C. Targeting Illegal Workers, CHARLOTTE OBSERVER, May 13, 2006, at 1A (“But states can’t solve a national problem piecemeal. Immigration is a federal issue, and Congress needs to act, in part to provide illegal immigrants already here with a path to citizenship.” (quoting Michele Waslin, director of immigration policy research for the National Council of La Raza)).

settled upon this national–local structure for good reason. Indeed, the varied and sometimes inconsistent positions taken at the national and local level may be what have lent such relative stability to how our country has negotiated what is often understood to be an intractable and destabilizing issue. In this respect, the mantra that comprehensive federal reform is the silver bullet for all immigration ills may be illusory, especially as no consensus exists over what form such reform should take and for what reason. Maintaining a strict national–local divide will not necessarily eliminate national–local conflicts, or reduce the instances of questionable enforcement strategies, as has been the case with recent federal raids and other such practices that have drawn ire and condemnation from the communities in which they have taken place.  

Nor would renewed emphasis on centralization mean that sub-federal governments will somehow be spared from having to wrestle with the impact of immigration or, more importantly, the impact of federal action with respect to immigration. Congress has shown itself willing, in the name of exercising its power over immigration flows, to impose drastic and substantial social and financial costs on state and local governments, as it did with the dramatic curtailment of federal means-tested benefits for legal immigrants in 1996. But given that the deplorable actions of some communities are usually celebrated as grassroots mobilization by others, are we willing to give up on the alternative routes to reform that local involvement assures as a consolation to national dismissal or federal paralysis?

So why do we insist on reinserting a rigid separation of national and local in our conversations about immigration if it does not comport with how most people understand the issue and cannot be adequately addressed by existing legal doctrines? We do so, I believe, because it is easy. It is easy because it drastically simplifies policy debates when immigration is invoked. It is also

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263. See, e.g., Nina Bernstein, Officials Protest Antigang Raids Focused on Immigrants, N.Y. TIMES, Oct. 2, 2007, at B3 (describing a raid that officials claimed was designed to arrest suspected gang members, but which others argued was simply a raid on illegal immigrants); Jennifer Medina, Arrests of 31 in U.S. Sweep Bring Fear in New Haven, N.Y. TIMES, June 8, 2007, at B1 (describing an illegal immigrant raid that occurred in New Haven and the inhabitants' resulting fear).

easy because in a contentious debate like immigration characterized as having strange bedfellows, consensus can usually be built around scapegoating the local—to dismiss local responses by referring to stereotypes about local officials (e.g., corrupt, incompetent, unprofessional) or particular local communities (e.g., coastal big city, southern small town, exclusive white suburb). The national–local divide then is both a cause and symptom of the extreme and polarizing posture that has gripped the immigration debates.

Reorienting the national–local relationship gives proper recognition to the fact that immigration is not itself exceptional as a practice or a field of legal regulation. In addition, it explains the enduring significance of neighborhoods and communities even, or especially, as issues are increasingly described in national or global terms. I do not mean to suggest that the approaches described here answer more questions than they raise. But in doing so within the local context, it carries the potential of offering grounded and manageable means of engagement, and the possibility of finding alliances and commonalities not present before.

B. Assessing Fragmentation

By positing local fragmentation as a component of our immigration regime, we have come to a more expansive vision of how different tiers of regulatory controls interact in the context of immigration. But this fragmentation describes a particular form of spatial, communal, and institutional organization. Thus, at this point, a normative question still remains: What are we to make of this specific arrangement? When law is invoked to regulate spatial geography or manage communal and institutional membership at the local level, the impact on our immigration regime is not always incidental or indirect. Oftentimes, it goes directly to not only the balance of our system of immigration regulations or how immigration policy is made, but also how the issue of immigration is understood. And in this respect, the contexts in which the desirability of local

265. With the questions posed in this manner, the response that I offer below echoes earlier arguments that I have made suggesting local government reform as a solution to certain immigration dilemmas. See Su, supra note 9, at 1681–83. But whereas my previous analysis was limited to the phenomenon of local immigration regulations, which I presented as a product of localism rather than a consequence of immigration policy, I approach this question here from the alternative framework developed in this Article, in which localism is understood as a part of our country's immigration regime and thus a critical factor in that regime's development.
fragmentation is at issue are many and unavoidable: when zoning boards decide where to site affordable housing or whether to permit them at all, when localities set housing standards governing the relation and number of people who can occupy a given residence, when states decide who may attend what schools and how those schools are funded, when government authorities determine where roads and public transportation routes should go and who should be served,266 and when families take into consideration the resulting organization to determine where to buy their house and what neighborhood to call home.

Throughout this Article, effort has been made to challenge preconceptions about this fragmentation by incorporating the broader debate over immigration. Thus, in the face of legitimate concerns about its exclusionary or balkanizing effects, I have at times suggested that as a critical part of how we have historically balanced the competing interests of immigration, local differentiation may be what has made our immigration regime, and the broader structure of inclusion that it makes possible, both palpable and workable here in the United States. In some ways, this trade-off raises concerns about exploitation, especially the way it has enabled us to import labor without necessarily importing neighbors. But as our discussion about immigrant enclaves has shown, the mediating effects of fragmentation arguably offer benefits to both immigrants and natives alike. In short, in setting forth the view of local fragmentation as a critical component of our immigration regime, I have tried to present a nuanced and balanced view of the role of the particular type of fragmentation that has been employed.

There are, however, consequences to using fragmentation in this manner, and we would do well to recognize some of these in considering the role of fragmentation in immigration policies going forward. Indeed, for all that it pays off by enabling short-term compromises, it also extracts in long-term costs. We certainly cannot ignore, for example, the problems current local inequities of resources and opportunity will bring about down the road. The dangers of what many now refer to as segmented assimilation have long troubled social scientists,267 just as many

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266. See Cutler, Glaeser & Vigdor, supra note 182, at 489–91, 494 (attributing contemporary immigrant–native segregation in part to disparities in the availability of public transportation).

of America’s longstanding domestic dilemmas can be attributed to the multiplier effect of concentrated poverty and racial segregation. In this respect, those in the immigration discourse should take heed of the volume of literature on the consequences of fragmentation on immigrants, their family, and our communities. It is also worth noting, however, how the availability and use of local fragmentation shapes, in a more direct though sometimes unconventional manner, the context in which immigration controversies arise, how we set about to resolve it, and the very nature of how the issue of immigration is understood.

First, it is important to recognize that opposition to immigration is often as much a distributional issue as it is one of prejudice or cultural anxiety. What I mean is that alongside the native-immigrant conflict, or even the national-local divide, there is also an interlocal dimension centered on how the relative benefits and burdens of immigration are allocated among communities, many of which view each other as both neighbors and competitors. It is no wonder then that tensions most often arise in inner-city neighborhoods or poor rural towns, many of which feel that they have the most to lose and the least options to accommodate or withstand change relative to what they perceive to be their peers. Indeed, even when opposition coalesces in more affluent suburban communities, it often arises from feelings that their community is being asked to absorb the impact of immigration to a degree that is disproportionate from what is being asked of even more exclusive neighbors in the region. Some of the most forceful arguments against immigration have been in the name of protecting what many perceive to be the most vulnerable communities. Yet this inequitable distribution of benefits and burdens is not only the very basis upon which our immigration regime may have been set up, it is also a direct consequence of how local fragmentation has been orchestrated through the use of legal and social mechanisms of control. In this respect, to the extent that fragmentation stifies opposition to immigration in certain respects, it is also responsible for exacerbating interlocal tensions that in turn produces other grounds for opposition that are directly tied to the differentiation that fragmentation employs.


Second, local fragmentation has implications for how we assess the promise of assimilation. At the most basic level, it is because the exclusion and insularity that fragmentation breeds stifles the interpersonal interactions and institutional exposure that is often associated with the assimilation process. But it is also because local fragmentation itself sets up an internal tension in the very idea of assimilation itself that is hard to unravel. Assimilation, however defined, requires a model—a particular target toward which assimilation is directed. The fact that this model is malleable and varies over time has led many to see assimilation as a historical process involving not only changes among immigrant groups, but also concurrent shifts in how the dominant “culture” is defined. But the “target” of assimilation also varies across space; certain communities as opposed to others are often considered to be more exemplary, more mainstream, more “American.” And that privilege is maintained not only by the characteristics of that community itself or of those who reside there, but also how that community holds itself in opposition to neighboring localities or even alternatives that have yet to be realized. Thus, if fragmentation stifles assimilation by drawing dividing lines, those lines also define the parameters of what we consider to be successful assimilation—parameters in which the end-goal of assimilation in the spatial context may necessarily be that which is defined by exclusion and thus cannot legitimately be reached. This is not to say that immigrants do not assimilate, or that the American mainstream has not been subject to revisions. But it does illustrate one reason why, even if assimilation appears to be fluid and inevitable from a historical perspective, the process always appears to be on the brink of collapse at any given time. Whereas space is effaced through the luxury of hindsight, its destabilizing role is brought into stark focus when we assess the state of the process looking forward.

Third, the effect of local fragmentation on local decisionmaking has direct consequences for how national decisions over immigration are reached. Of the many controversial arguments that Peter Brimelow makes in Alien Nation, his now famous exhortation of American immigration policy, the one he emphasizes the most is his claim that our

270. See ALBA & NEE, supra note 20, at 282 (“Assimilation has reshaped the American mainstream in the past, and it will do so again, culturally, institutionally, and demographically.”).

271. See Schragger, supra note 12, at 459 (“The definitional work of ‘community’ is accomplished interstitially—at the borders between places.”).
current system is undemocratic. On this general point, I agree. Where we diverge is that while Brimelow takes it as a given from simplistic polling data that the vast majority of Americans simply wants less immigration, I believe the actual sentiment on the ground is a lot more diverse and fractured. The "undemocratic" nature of fragmentation then is that although it allows for a certain degree of negotiating these competing interests, as an institutional structure it is ill-suited to foster the type of broad-ranging discourse that immigration, in all its layered complexity, requires. It is not that participatory democracy is not viable or useful in small-scale settings of fractured communities. Rather, it is that the manner in which we have structured the relationship between these communities, especially the emphasis placed on boundaries and membership, fosters a defensive posture centered on avoidance and nonconfrontation rather than genuine engagement, however cautious or reluctant that may be. Stated in the language of Albert Hirschman's seminal study of organizations, the type of fragmentation that now typifies American society is structured around "exit" rather than "voice." And as a pivotal basis of our nation's overall response to immigration, it is not surprising that the effect of this manner of organizing our lived environment is also reflected in how we define the imaginary community of the nation-state through our immigration policies.

In short, just as ignoring or denying the relevance of the local leads to an incomplete picture of our immigration regime, broadly denouncing or wholly accepting the role of fragmentation is also too cursory an approach. How it influences immigration is multifaceted and complex, and thus the manner in which we address fragmentation as an immigration issue should be equally aware and refined. Fragmentation of some sort may prove too valuable or useful an organizing tool to jettison wholesale. But we need not accept the particular form of fragmentation that has arisen either. Just as it is the case with our formal admission criteria and removal standards, any approach to our fragmentation policy will ultimately lie in the details: how we address the exclusionary consequences of fragmentation while

273. E.g., PERIN, supra note 10, at 106 ("I speculate that suburbanites resort to spite fences because, unlike city dwellers, they are accustomed to using walls but not rules."); see also ABRAMS, supra note 206, at 281–83 (arguing that a homogenous pattern of housing development promotes group conflict and breeds anxiety and frustration).
274. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 106 (1970) ("The United States owes its very existence and growth to millions of decisions favoring exit over voice.").
enabling communities of distinction and self-determination; how we balance desires for efficiency and proficiency with a genuine commitment to participatory democracy; and how we ensure a measure of distributive justice while giving effect to individual choice. The fact that a great deal of possibilities lies in how we define the significance of space and membership, and the institutional consequences of dividing lines, provides much room for innovative proposals. From a solely local outlook, reforms ranging from regional councils and interlocal proportional voting aimed at transforming individual perception and affiliation on the one hand, to large-scale county consolidation and neighborhood-level decentralization targeting distributional inequalities and institutional responsiveness on the other, have been proposed. If, as suggested here, neither the role of the local nor, more particularly, the purpose of fragmentation lends itself to easy characterization, then we would do well to incorporate similar efforts in the broader discourse on the slow and continuous process of immigration reform as well.

V. CONCLUSION

A little more than a year after “Operation Firestorm” forced dozens of immigrant residents out of the Town of Brookhaven, other residents in the “hamlet” of Farmingville, located in and formally a part of Brookhaven, are seeking an exit of sorts as well. A certain segment of the community is taking the well-worn steps toward secession and independence: “Farmingville, or at least the more affluent half of it, where few if any of the new immigrants live, would have itself be known instead as the village of Oak Hills.”

So it would appear that when attempts to differentiate people and space prove less than adequate, efforts to define communities and partition institutions are still available. Traditional immigration analysis has thus far struggled with how to reconcile these spatial and community controls with the


276. See Frug, supra note 64, at 294–99, 328–34 (discussing possible reforms such as regional legislatures or proportional voting).

277. See, e.g., MILTON KOTLER, NEIGHBORHOOD GOVERNMENT 104–05 (1969) (explaining that cities are writing new charters to gain more power and arguing that communities must convene local assemblies in neighborhoods to deliberate and debate community issues); DAVID RUSK, INSIDE GAME OUTSIDE GAME 4–11 (1999) (suggesting ways that “highly fragmented regions” can “act as one”).

national components of our immigration regime; if not too unrelated, they are perceived as too local. What our inquiry has revealed, however, is that rather than strangers, adversaries, or awkward companions, local government law and the fragmentation that it has produced may be a critical and arguably necessary component of our nation’s immigration regime.

Realizing this means that local fragmentation cannot be easily condemned, nor can the local role in immigration be outright dismissed. It does not mean, however, that we must accept the delicate yet deliberate balance that has been struck between spatial and community controls on the national and local level. Their interdependence suggests that we understand the broad and sometimes hidden effects that reform at any given point can have on the regime as a whole. Yet the national–local reorientation described here also reveals the myriad options and possibilities that are available. Bringing this structure to light is thus an important step in realizing how competing interests over immigration can be reconciled and negotiated going forward.