Michigan Law Review

Volume 97 | Issue 4

1999

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Recommended Citation

Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999).
Available at: <https://repository.law.umich.edu/mlr/vol97/iss4/2>

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LAW'S TERRITORY (A HISTORY OF JURISDICTION)

*Richard T. Ford**

Pop quiz: New York City. The United Kingdom. The East Bay Area Municipal Utilities District. Kwazulu, South Africa. The Cathedral of Notre Dame. The State of California. Vatican City. Switzerland. The American Embassy in the U.S.S.R. What do the foregoing items have in common?

Answer: they are, or were, all territorial jurisdictions. A thesis of this Article is that territorial jurisdictions — the rigidly mapped territories within which formally defined legal powers are exercised by formally organized governmental institutions — are relatively new and intuitively surprising technological developments. New, because until the development of modern cartography, legal authority generally followed relationships of status rather than those of autochthony. Today jurisdiction seems inevitable, but, like death, it is “a habit to which consciousness has not been long accustomed.”¹

Surprising? We *are* now accustomed to territorial jurisdiction — so much so that it is hard to imagine that government could be organized any other way. But despite several hundred years of acclimation, people continue to be disoriented, baffled, and thrilled by the consequences of jurisdictional legality. We are filled with sometimes grudging admiration when the latest Esmeralda evades the territorial reach of the pursuing constable. Examples abound, both

* Professor of Law, Stanford University. A.B. 1988, Stanford; J.D. 1991, Harvard. — Ed. I presented earlier versions of this Article and received useful comments thereon at: the Dighton Writers Workshop, sponsored by the Graduate Program of Harvard Law School; the Howard Rolapp Distinguished Visiting Scholars Lecture Series at the University of Utah College of Law; The Reach of Law: Law and Humanities at the University of California at Berkeley, and the American Association of Geographers Annual Meeting in Boston, MA. I received especially valuable and in-depth comments from Tony Angie, Nick Blomley, Paul Brest, Dan Danielson, Karen Engle, Barbara Fried, Jerry Frug, Tom Grey, Janet Halley, Mark Kelman, David Kennedy, Duncan Kennedy, Mitch Lasser, Jayne Lee, Michael McConnell, Illeana Poraas, Peggy Radin and Kendall Thomas. My research assistants, Madhavi Sunder and Albert Yoon contributed as much in insight as in research legwork. The staff of the Stanford Law School library was characteristically excellent beyond what any scholar could expect. Thanks to the staff of the *Michigan Law Review* for diligent and thoughtful editing. This project received generous research support funding from Stanford Law School. Thanks to my colleagues for creating the atmosphere in which this unconventional project was encouraged and supported.

1. JEAN BAUDRILLARD, FORGET FOUCAULT 23 (1987).

historical and fictional (or perhaps syncretic). Consider the trek of the musically gifted von Trapps to the safety of neutral Switzerland,² the bootlegger's run of Burt Reynolds's "Bandit" who stopped just over the county line long enough to thumb his nose at "Smokey" Sheriff Buford T. Justice,³ the heroic and desperate journey on the fugitive slave's underground railroad, the once heroic, now demonized, pregnant foreigner who struggles over the border in time to give birth on American soil and thereby guarantees her child American citizenship.

This last example illustrates another thesis of this Article. Territorial jurisdiction produces political and social identities. Jurisdictions define the identity of the people that occupy them. The jurisdictional boundary does more than separate territory; it also separates types of people: native from foreign, urbanites from country folk, citizen from alien, slave from free.

To some extent, jurisdictional identities are chosen; in some cases, an individual can move between jurisdictions and thereby adopt the identity of her new location. Many commentators have suggested that this type of mobility makes territorially based relations akin to voluntary contracts. The mobile individual "shops" for a jurisdiction just as a suburban shopper roams the mall looking for the right Christmas gift.⁴ But in important ways territorial identities cannot be freely chosen. Even if physical presence alone will establish membership, one is forced to accept a "bundle" of jurisdictionally linked items. I cannot live in San Francisco while paying Los Angeles taxes and receiving Los Angeles's package of services, nor can I pick and choose among the San Francisco services I wish to receive and pay for. While economic markets generally resist bundling, the jurisdictional "market" always bundles.

More importantly, many territorial "locations" are simply not "for sale." One cannot, for instance, become a British subject simply by deciding to move to the United Kingdom. And even within a nation-state, mobility is limited by legal rules that restrict the availability of housing in certain jurisdictions, often for the explicit purpose of controlling in-migration.⁵ These types of restrictions are

2. See the enchanting, if treacly, *THE SOUND OF MUSIC* (Twentieth Century Fox 1965).

3. See that classic of late 1970s low brow decadence, *SMOKEY AND THE BANDIT* (Universal 1977).

4. See, e.g., Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

5. See, e.g., *Ambler Realty v. City of Euclid*, 297 F. 307, 316 (1924) (upholding zoning ordinance that restricted multi-family housing, writing "[The purpose of the zoning ordinance] is to classify the population and segregate them according to their income or situation

justified as necessary to maintain community character — a rationale somewhat at odds with the aspiration that membership in jurisdictions be freely chosen. Hence, territorial identities are in an important sense remnants of the era before the modern hegemony of contractual social relations chronicled by Sir Henry Maine.⁶ Like the social positions of the family, they are largely involuntary relationships of status.

The word “remnants” is somewhat misleading: it suggests that these territorial identities are survivors of a bygone era. To the contrary, this Article will suggest that territorial identities were recently invented and grew in importance just as other status relationships were in decline — in fact, in some instances, territorial identities *displaced* other statuses. Territorial identities developed and matured along with the advance of modern, scientific cartography. Once cartography made the production of precisely demarcated legal territories possible, territorial relationships quickly became dominant. The territorialization of social relations served important institutional purposes more effectively than did the older status relationships. Hence the famous historical shift from status to contract was accompanied by an equally significant shift from status to *locus*.

Jurisdictions define both national and sub-national territories. This Article will primarily deal with sub-national jurisdictions. It is fairly obvious that the creation of national territories and national identities has been a major project of national governments. Nation building is commonly understood as, in part, the process of national institutions asserting control by destroying smaller territorial divisions and affiliations. But the production of sub-national territories and identities has also been an important part of national development. The centralization of formal power in national governments is not necessarily inconsistent with the existence of sub-national territorial divisions. In fact, this Article will argue that the *production* of local jurisdictions and local cultures was and is often a by-product of the centralization of political power. Indeed, the production of local difference can be an effective strategy for consolidating and maintaining centralized power. Therefore, this

in life.”), *overruled by* Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding zoning ordinance that prohibited cohabitation by three or more persons unrelated by blood or marriage).

6. See generally HENRY SUMNER MAINE, ANCIENT LAW 165 (Univ. of Ariz. Press 1986) (1864) (“[T]he movement of the progressive societies has hitherto been a movement from Status to Contract.”).

Article will interrogate and disrupt a facile but misleading opposition between centralization and local autonomy.

Part I of this Article will discuss territorial jurisdiction as a spatial structure and as a "governmental technique"⁷ as then-Associate Justice Rehnquist once referred to it. It will introduce two opposed rhetorical descriptions of territorial jurisdiction — organic and synthetic — both of which correspond to a distinct type of political subjectivity.

Part II will present a partial history of territorial jurisdiction, tracking the emergence and development of legal territories in several socio-historical contexts. This history calls into doubt the common intuition that territorial jurisdiction is a timeless feature or foundation of government. Instead, jurisdiction was invented at a specific historical moment and deployed to advance certain identifiable projects. Jurisdiction transformed both the way government operated and, ultimately, the structure of government itself.

Part III will argue that jurisdiction establishes a form of status identity. Specifically, it will explore in greater detail the territorial construction of political subjectivity that occurs through jurisdiction. It will argue that even seemingly natural or organic territorial communities are often the products of larger governmental strategies that produce a hierarchy of political subjectivities. This gives us reason for caution when tempted to assert territorial group solidarity in order to obtain autonomy for minority groups. Too often the mirage of autonomy hides the bleak reality of social quarantine.

Part IV will argue for a theory of jurisdiction that treats jurisdictional arrangements as the architecture of government. It will argue that such a theory of jurisdiction would allow us to see many contemporary legal conflicts in a new light.

Part V is a short conclusion.

I. THE BOUNDARIES OF DEMOCRACY

A. *Space Oddity*⁸: *A Tale of Two Jurisdictions*

I would like to introduce territorial jurisdiction in the context of a relatively mundane legal dispute.

Holt is a small, largely rural, unincorporated community located on the northeastern outskirts of Tuscaloosa . . . Alabama. Because the community is within the three-mile police jurisdiction circumscribing

7. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 72 (1978).

8. Apologies to Stanley Kubrick, *see* 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer 1968), and David Bowie, *see* DAVID BOWIE, SPACE ODDITY (Mercury Records 1969).

Tuscaloosa's corporate limits, its residents are subject to the city's "police [and] sanitary regulations." Holt residents are also subject to the criminal jurisdiction of the city's court, and to the city's power to license businesses, trades, and professions [The Holt residents] claimed that the city's extraterritorial exercise of the police powers over Holt residents, without a concomitant extension of the franchise on an equal footing with those residing within the corporate limits, denies [them] rights secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁹

Holt Civic Club v. City of Tuscaloosa presents a seemingly intractable problem: what non-tautological justification exists for any particular limitation of the franchise? A typical answer is that the geographical limits of the jurisdiction in which the elected body is authoritative provide a justification. But, as *Holt* demonstrates, this simply displaces the problem. Rather than expressing the conflict in terms of the franchise, one could as easily describe it in terms of the jurisdictional boundaries. Why, in this instance, should the boundary of the City of Tuscaloosa not include the residents of the community of Holt?

The specificity of the jurisdictional question is highlighted in *Holt* precisely because there is little else at stake. Although the community of Holt is "governed" by Tuscaloosan institutions, it seems that few of these institutions make controversial substantive decisions. Local courts and police enforce *state* law while sanitary and business regulations are relatively technical in nature and are not generally a source of political conflict. Thus, rather than focusing on a substantive harm, *Holt* centers on the definition of political community. *Holt* raises a vexing problem for normative democratic theory, akin to the dilemma of forced annexation and minority secession: taking the principle of majority rule as a given, how are we to define the limits of the community within which a majority will rule?

At first glance there would seem to be only two possibilities: the relevant political community either includes the residents of Holt as well as those of Tuscaloosa, or it only includes the residents of Tuscaloosa.

There are in fact three possible answers.

Answer One: The political community is the *police* jurisdiction of Tuscaloosa, including Holt. The exercise of even limited police power over the residents of Holt is determinative — those subject to a direct exercise of the police power must be enfranchised to

9. *Holt*, 439 U.S. at 61-63 (second alteration in original) (internal citations omitted).

control that power. This answer is appealing. After all, what legitimate reason could Tuscaloosa have for excluding the residents of Holt from the political process? The risk that the residents of Holt may, on average, hold different views from those of Tuscaloosa and therefore alter the outcomes of political contests does *not* seem to be a legitimate reason for excluding them. The democratic process is designed to resolve differences between people of different views.

But on reflection it is not clear that disagreement is always a bad reason to exclude a group from a political community. A primary reason for multiple and distinct territorial jurisdictions is inescapably to separate distinctive groups of people with distinctive views and desires. Why have several European nation-states as opposed to a United States of Europe? Ask any British gent, German *fräulein* or French *mademoiselle* and you'll likely be told: "Because we are so different, each nation. *Our* way of life would be destroyed if we constantly had to compromise with foreigners." Why do we insist on maintaining fifty separate state governments, with their inconsistent and cumbersome state laws, state bureaucracies, flags, license plates, mottoes and state birds? An important reason is that many Americans think that the states have separate characters worth preserving and that the citizens of each state are different from those of the others and should, at least for certain purposes, be able to act based only on the views of insiders. Why do we have separate local governments, defining city and suburb, rich and poor, racial and religious communities? Again, many people think that these jurisdictions define political groups or communities that have some moral weight. If territorial groups do have moral weight, sometimes we must restrict the franchise to such a select group.

In fact, the word "sometimes" is misplaced. We *always* restrict the franchise to a select group; the question is how such a group is defined. The institution of jurisdiction is one significant mechanism for defining the boundaries of the political community and hence the limits of the franchise.

Answer Two: The political community is the corporate jurisdiction of the City of Tuscaloosa (excluding Holt). Tuscaloosa's exercise of control over residents of unincorporated Holt is immaterial. As the majority opinion points out, any "city's decisions inescapably affect individuals living immediately outside its borders. . . . Yet no one would suggest that nonresidents . . . have a constitu-

tional right to participate in the political processes bringing [them] about."¹⁰

One might object that Holt residents are *directly* affected by Tuscaloosa's regulations. But this does not distinguish those living in Holt from a host of other non Tuscaloosans who may own property in Tuscaloosa or enter Tuscaloosa to work, shop, visit friends, etc. They too are subject to Tuscaloosa's police power. They may pay Tuscaloosa's property taxes and be subject to its land use planning; drive through Tuscaloosa streets, subject to arrest by its police officers; patronize Tuscaloosa's business and indirectly pay its business taxes and benefit from and bear the costs of its regulations; and yet they are denied the right to influence its government through the ballot box. Local decisions affect outsiders because people trade and socialize across jurisdictional lines. "But . . . the fact that people trade with one another rather extensively does not mean that they care to be brought together in a more solemn association, as citizens in a common polity. Nor does it suggest that it would be good for them to be joined in that way."¹¹

Perhaps the Court could have held that local autonomy, the constitutional recognition of a solemn political union, justified the jurisdictional arrangement at issue in *Holt*. But there is no constitutional principle of local autonomy. For constitutional purposes, local governments are not solemn political associations but rather subdivisions of state government. No constitutionally recognized value protected the integrity of Tuscaloosa's boundaries. The state could expand the corporate jurisdiction to include the citizens of Holt or reduce the police jurisdiction to coincide with the corporate jurisdiction with or without the consent of the government or the people of Tuscaloosa.

This brings us to the improbable but dispositive . . .

Answer Three: The political community is neither the corporate, nor the police jurisdiction of Tuscaloosa, but rather the jurisdiction of the state of Alabama. The *Holt* majority ultimately concludes: "[T]his Court does not sit to determine whether *Alabama* has chosen the soundest or most practical form of internal

10. *Holt*, 439 U.S. at 69.

11. HADLEY ARKES, *THE PHILOSOPHER IN THE CITY* 325 (1981). Of course the residents of Holt do more than trade with Tuscaloosa; they are actually governed by Tuscaloosa in their place of residence. But to assert that residence is the distinguishing characteristic is tautological. It only follows that the residents of Holt are also residents of the political community of Tuscaloosa if one already accepts the premise that the political community must include anyone subject to the governmental power in their place of residence. But this is precisely what is at issue in the case.

government possible. Authority to make those judgments resides in the state legislature, and Alabama citizens are free to urge their proposals to that body.”¹²

Note the dual move. First, the *Holt* Court describes the local jurisdiction not in terms of political community or local solidarity, but instead as a “form of internal government,”¹³ “[a] convenient agenc[y] for exercising such of the *governmental powers of the State* as may be entrusted to [it].”¹⁴ Local government boundaries are simply another set of state laws, subject to the state political process. Second, it then follows that the only relevant political process occurs at the statewide level. All Alabama citizens, Holt residents and Tuscaloosans alike, are equally entitled to vote in Alabama elections and can “urge their proposals”¹⁵ to change the local jurisdictional arrangement at that level of government. If the Holt residents lose in the statewide political process, too bad; they have no constitutional claim to a different outcome.

The right to vote — which state government could not deny its citizens absent a compelling justification — simply does not apply to Holt residents who wish to vote in Tuscaloosa’s elections. It is well understood that a bona fide residency requirement for exercise of the franchise in a territorial jurisdiction is a constitutionally permissible limitation on the right to vote.¹⁶ The desire to limit the vote to residents of the jurisdiction is, *ipso facto*, a compelling justification; the state need not offer a compelling justification, or indeed any justification, for the location of any particular set of boundaries.

But how, one may ask, can limiting the vote to residents be a compelling justification for abridging a fundamental — perhaps the most fundamental — constitutional right when the criteria for the limitation (the location of the boundaries that define residence in the jurisdiction) are never justified? The court does not address this question.

Nor could it. The boundaries that define territorial jurisdictions are a legal paradox because they are both absolutely compelling and hopelessly arbitrary. In one sense, all jurisdictional boundaries are arbitrary: that separating France from Germany or the United

12. *Holt*, 439 U.S. at 73-74 (emphasis added).

13. *Holt*, 439 U.S. at 74.

14. *Holt*, 439 U.S. at 71 (emphasis added).

15. *Holt*, 439 U.S. at 74.

16. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Pope v. Williams*, 193 U.S. 621 (1904).

States from Canada as much so as that separating Holt from Tuscaloosa. Yet, at the same time, an unwavering faith in the necessity and legitimacy of those boundaries would seem to be not only a foundation of our government, but a precondition of any government. Our reaction to the formality of jurisdictional arrangements is not that snide condescension or righteous outrage that we direct at malleable human institutions (the IRS for example, or the United Nations) but rather something akin to the reverence and awe we reserve for natural phenomena beyond our control or comprehension. When the von Trapps reach Switzerland, only the simplest child dares to ask, "Why don't the Nazis just cross the border to get them?" It is simply understood by those with a jurisdictional frame of mind (and how quickly we develop it, tutored by such compelling stories!) that they *can't* cross the line, that if they do their authority will vanish like Cinderella's carriage at the stroke of midnight. The logic of government *is* the logic of jurisdiction — question it and all that is solid melts into air.

Holt is instructive because embedded within this rather pedestrian conflict are the discursive elements that are common to many, perhaps all, jurisdictional conflicts. We will see these arguments many times again as we explore the history of jurisdiction. On the one hand we have a conception, advanced by the *Holt* dissent, of jurisdiction as a self-validating and foundational unit of government, the political community that is premised on the "reciprocal relationship between the process of government and those who subject themselves to that process by choosing to live within the area of its authoritative application."¹⁷ Although the *Holt* majority rejects this conception of jurisdiction for local government, it tacitly employs it for the political process of the *state* government. On the other hand we have a diametrically opposed conception, advanced by the *Holt* majority in its description of Tuscaloosa, of jurisdiction as a "governmental technique,"¹⁸ a simple policy tool no different than any other agency created by law and vindicated by the political process.

Both of these common understandings of jurisdictional subdivisions foreclose any consideration of territorial jurisdiction itself as a governmental institution. The jurisdiction is either an arm of the state, of no particular interest except as a matter of narrow administrative technique (is it "efficient"?), or it is an organic political com-

17. *Holt*, 439 U.S. at 82 (Brennan, J., dissenting).

18. *Holt*, 439 U.S. at 72 (describing the extraterritorial exercise of municipal power).

munity, a self-validating form of democratic self-rule. *Holt* is disquieting because it upsets these easy ideological descriptions;¹⁹ the hybrid Tuscaloosa police jurisdiction, this dangerous jurisdictional supplement, foregrounds the significance of jurisdictions for democratic ideals.²⁰

B. *Mapping Jurisdiction*

For our purposes, several characteristics define the modern territorial jurisdiction. These characteristics are not typical, but prototypical. This definition will necessarily be extreme as compared to actual jurisdictions in practice.

(1) A territorial jurisdiction categorizes the elements over which authority is to be exercised primarily by area, and secondarily, if at all, by type. It may also refer to several specific types of things, or be defined much more broadly. It will always, however, be defined by area. An entity could, in theory, have authority over "all oil, wherever it is found." Such an entity would not be a jurisdiction but an authority of another kind. A jurisdiction is territorially defined.

(2) It is definitely bounded. The boundaries are not ambiguous or contested except in anomalous cases or in times of crisis or transition. If ambiguity arises, it is usually a source of concern and embarrassment and is settled as quickly as possible. The geographic

19. *Holt* may seem aberrational, but it does not deal with an aberrational form of government. At the time of the decision, 35 states allowed municipal governments to exercise extra-territorial jurisdiction. See *Holt*, 439 U.S. at 72.

20. This opposition between jurisdiction as foundational and jurisdiction as "mere technique" is closely related to the distinction that the *Holt* opinion makes between those jurisdictions that are thought inherently to possess sovereignty and those jurisdictions that are thought only to exercise power derived from a greater sovereign entity. In *Holt*, the majority opinion is premised on the established legal principle that local governments do not exercise independent power but only the power that state governments allow them to exercise. This is the necessary implication of the majority's suggestion that disgruntled Alabamans may "urge their proposals" to limit Tuscaloosa's extraterritorial jurisdiction to the state legislature. See *Holt*, 439 U.S. at 74.

For the most part, this Article will focus on jurisdictions that are formally subordinate to larger sovereigns. But we must not overstate the distinction. A sharp distinction between sovereign and subordinate jurisdictions is overly formalistic and misleading. For instance, we may intuitively believe that nation-states are sovereign jurisdictions while the subdivisions of the nation-states are subordinate. But in those nations, like the United States, where representation in federal government is determined by jurisdictional subdivisions, one could assert that the combination of subdivisions is sovereign. It is often difficult to determine whether a sovereign jurisdiction chronologically or normatively precedes its jurisdictional subdivisions, or whether it is simply the sum of its subdivisions.

Further, many "subordinate" jurisdictions are explicitly modeled as minor sovereigns rather than as instruments of larger jurisdictions. For example, despite their formally subordinate status, a common conception of American local governments is that of "imperium in imperio": a sovereignty within a sovereign.

boundaries of a jurisdiction are a "bright line" rule, never a flexible standard.

(3) It is abstractly and homogeneously conceived. Rather than defining the relevant territory according to concrete factors such as population, resources or other elements susceptible to narrative explication, jurisdiction refers to an abstract area. By abstract I mean simply that the space of a jurisdiction is conceived of independently of any specific attribute of that space. Alabama law does not give Tuscaloosa police jurisdiction over Holt specifically. Instead it gives Tuscaloosa jurisdiction over everything within three miles of its corporate borders; the specifics are not enumerated.²¹

This empty space is a conception that is facilitated, if not made possible, by the modern, areal map.²² The map is the primary representation of abstract space. A typical map of New York City's five boroughs shows us little of significance about life in the Big Apple, but it definitively establishes the areal limits of each borough. Of course, other representations of abstract space are possible, but most refer to maps, such as the notation in a treaty between nations that refers to a cartographic grid of latitude and longitude, or the language in a property title that refers to an official chart of plots.

(a) One consequence of this abstract presentation of space is that it *eliminates the need for the specific enumeration and classification by kind*.²³ When novel or unpredictable circumstances arise, we do not suffer "gaps" or "conflicts" of authority while decision makers decide who is in control. One need not ask whether the municipal government of New York City has authority over immi-

21. See *Holt*, 439 U.S. at 61 n.1. Alabama's extraterritorial jurisdiction statute reads, in relevant part:

The police jurisdiction in cities having 6,000 or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than 6,000 inhabitants and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town.

Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof shall have force and effect in the limits of the city or town and in the police jurisdiction thereof and on any property or rights-of-way belonging to the city or town.

Holt, 439 U.S. at 61 n.1.

22. Contrast the concrete, lived space of a physically bounded structure, such as a building or walled city. There, the space defined by walls is physically transformed, it is experienced as a distinct place. In most cases, specific attributes of the space account for the decision to place it within the physical barrier. A mapped space, by contrast, can be defined before any settlement has taken place, indeed before the territory in question has even been visited by the cartographer. A mapped space may offer no clue as to its boundaries. It is experienced not in person, but only through the map.

23. See ROBERT DAVID SACK, *HUMAN TERRITORIALITY: ITS THEORY AND HISTORY* 32 (1986).

grants who arrive in its territory because it has authority over all people within the jurisdiction. We need not ask whether the state of Texas may tax or regulate newly discovered oil deposits within the territory of Texas, because it has the authority to tax and regulate all land uses within its jurisdiction.

(b) A close corollary of the above is that jurisdictional space may serve to obscure social relations and the distribution of resources. General purpose jurisdictions such as municipal governments, counties, states and nation-states govern such a wide range of activities that it is impossible to list them all, much less uncover the reasons for their control by a particular governmental institution. Similarly, even limited or single-purpose jurisdictions are established with multiple purposes — electoral districts are drawn to facilitate or thwart certain political parties, social groups, geographic interests, etc. — that are never enumerated and are impossible to uncover.

(c) Another aspect of abstraction is that jurisdiction tends to *present social and political relationships as impersonal*.²⁴ Rather than define authority according to status relationships such as caste, race, religion or title, jurisdiction seems to level and equalize social relations, at least within the jurisdictional space. Everyone who buys something in the jurisdiction of New York City pays city sales taxes, not only “peasants” or Protestants or “people who voted for Ruth Messenger.” As we shall see, this impersonal leveling is often more illusory than real. Nevertheless, it is a significant ambition of jurisdiction to render political relationships impersonal and objective.

(d) Finally, jurisdictional space is *conceptually empty*. Although any number of specific things and social relationships — wildlife habitats, informal communities, Native American settlements — may be present in, and even in part defined by, the space in question, jurisdiction tends to reduce space to an empty vessel for governmental power.

(4) Jurisdictional divisions tend to produce “gapless” maps of contiguous political territories. The modern world is divided into jurisdictions. Gaps or zones of unclaimed or ambiguously apportioned territory are anomalous.

24. See *id.* at 33.

C. *Performing Territory: Jurisdiction as a Social Practice*

It is tempting to examine jurisdiction solely in terms of its material/spatial attributes, as if it were simply an object or a built structure. But jurisdiction is also a discourse, a way of speaking and understanding the social world. Much of what is fascinating and vexing about territorial jurisdiction is that it is simultaneously a material technology, a built environment and a discursive intervention. These elements cannot be neatly severed. Further, no one level is foundational and the others epiphenomenal. Instead, all three levels are equally essential. To properly understand jurisdiction we must reject the way of thinking that neatly severs fact from representation or "the material" from "the discursive."

1. *Jurisdiction as a Bundle of Practices*

[Mapping] became a lethal instrument to concretize the projected desire on the earth's surface. . . . Communication theory and common sense alike persuade us that a map is a scientific abstraction of reality. A map merely represents something which already exists objectively. [But at times] this relationship was reversed. A map anticipated a spatial reality, not vice versa. In other words, a map was a model for, rather than a model of, what it purported to represent.²⁵

Perhaps it is best to think of territorial jurisdiction as *a set of social practices*, a code of etiquette. Social practices must be learned and communicated to others. They exist in the realm of discourse, they are *representations* of approved behavior as well as the behavior itself. For example, the social practice called "the Tango" is a combination of the diagram that "maps" the steps and the actual movement of individuals in rhythm (hopefully) and to music: "When dancing the tango, the man leads and the lady follows, each partner should move according to the diagram." These representations have material consequences; they determine who leads and who follows as well as where one places one's feet. It is both an actual spatial practice and the graphical representation of that practice. One could learn to dance the Tango just by watching people actually dance, but the diagrams standardize the learning process and thereby in a real sense define the dance itself. Note that it would be absurd to describe dance notation as "ideology" or "legitimation" as if it misled us as to the nature of the practice. Yet it would also be incomplete to think of it as an innocent description,

25. THONGCHAI WINICHAKUL, *SIAM MAPPED: A HISTORY OF THE GEO-BODY OF A NATION* 129-30 (1994).

as if the graphical representation only describes and has nothing to do with *perpetuating and regulating* the “actual practice.”

Similarly, jurisdiction is a function of its graphical and verbal descriptions; it is a set of practices that are performed by individuals and groups who learn to “dance the jurisdiction” by reading descriptions of jurisdictions and by looking at maps. This does not mean that jurisdiction is “mere ideology,” that the lines between various nations, cities and districts “aren’t real.” Of course the lines are real, but they are real because they are constantly being *made* real, by county assessors levying property taxes, by police pounding the beat (and stopping at the city limits), by registrars of voters checking identification for proof of residence. Without these practices the lines would not “be real” — the lines don’t preexist the practices.

Of course each of these practices can be described as “responding” to the lines or working within the lines rather than making them. When we think of the practices as happening “within the lines” and imagine that the boundary lines exist independently of the practices that give them significance, we think of jurisdiction in the abstract, removed from any particular social content. We imagine that jurisdiction *is* the space drawn on a map, rather than a collection of rules that can be represented graphically as a map.

For many purposes, this way of thinking about jurisdiction is perfectly reasonable; sometimes everyone understands the jurisdictional dance and knows where to step. At these times the map does seem to precede the practices. Indeed, the representation of jurisdictional space may at times precede the actual practices that give a jurisdiction life and meaning. Nevertheless, we must not treat jurisdiction as a thing that precedes practice. Lines on a map may anticipate a jurisdiction, but a jurisdiction itself consists of the practices that make the abstract space depicted on a map significant. Moreover, when the stakes of a jurisdiction are in question, as they were in *Holt*, one cannot simply refer to lines on a map. In order to understand the significance of jurisdiction as an institution, we must constantly remind ourselves that *jurisdiction is itself a set of practices*, not a preexisting thing in which practices occur or to which practices relate.

2. *The Forbidden Dance: Jurisdiction as Production of Status Identity*

The Tango, like many dances, establishes quite specific roles for the individual dancers. There is a male and a female role, quite

assertively marked by costume (suits for the gents, glamorous and often aggressively sexy dresses for the ladies) as well as by the requirements of the dance steps. The male "leads" and the female "follows." There is a set of prescribed actions that rely on the assumed superior physical strength of the person occupying the male position and the assumed diminutive size and gracefulness of the person occupying the female position. These positions can be seen as simple reflections of a preexisting reality. There is a distinction between men and women based in biological nature which corresponds to a number of characteristics such as strength, size, assertiveness and gracefulness. The dance just reflects these facts. Because men are more assertive they lead while the more submissive women follow.

But this way of thinking too easily assumes a relationship of cause and effect. It may be, on the contrary, that hundreds of social practices, of which the Tango is one, construct these gendered roles and encourage people to conform to them. A physically strong, tall and assertive woman will not be offered the "male" position, even if she is naturally well suited for it. She will be encouraged by dance instructors, parents, potential partners and friends to conform to the female role: learn to accept the guidance of the male, develop grace at the expense of strength.

Notice that it may become very difficult to distinguish between "coerced" and "voluntary" conformity to the status roles. Our strong and assertive woman will find it easier to conform to the female role than to attack the Tango's structure. No one need force her in the sense of establishing formal punishment for assertive women. Instead, the *status quo* effectively sanctions her assertiveness by depriving her of acceptable roles in which she can be assertive. Her friends will sanction her by telling her that she could get a date easily if she were a bit "nicer" or "more feminine." Men will silently punish her by refusing to ask her to dance. If she wants to dance, she will conform. Over time conformity will become "second nature." Our now accomplished dancer will remember her assertive past as an "awkward phase" that she grew out of, as a butterfly emerges from a cocoon. At that point the status will have also become her identity.

To some extent, the dance is a highly stylized context in which gender identity and gender status is performed. The Tango teaches us that men and women have different statuses because they have different natures. It builds a status and simultaneously justifies that status as a biological or natural fact. It provides its own evidentiary

justification: men and women in fact behave differently while dancing; they demonstrate by their own actions that the premise of the gendered dance is accurate.²⁶

Similarly, jurisdiction constructs *legal* statuses. The meaning of Tuscaloosa's police jurisdiction is that some citizens have the status of "voting resident" while others have the status of "nonvoting person subject to regulation in their place of residence" (perhaps the choreographic analogy would be "dancer" versus "wallflower"). It is also true that jurisdiction constructs statuses or identities based on the type of jurisdiction with which one is associated: one's jurisdictional position is analogous to the gendered positions in the choreographed dance. When we perform these jurisdictional roles often enough they too become "second nature."²⁷ But this type of "second nature" is the product of social practices that are enforced by social custom and, more importantly, by law.²⁸

D. *The Sacred and the Profane: Speaking Jurisdiction*

What follows in this section is a description of a discourse or a set of understandings about jurisdictions. In legal and political discourse, jurisdictions are described through a dialogical opposition: they are either organic/authentic or synthetic/convenient. This descriptive opposition is a central part of the jurisdictional performance, just as the opposed male and female roles are indispensable to the performance of the Tango. The opposition informs our thinking about a given jurisdiction at a given moment. But the description does not necessarily define any given jurisdiction in a permanent sense. Nor is it an innocent description of a preexisting reality. Instead, the same jurisdiction may be understood as "organic" in one context and "synthetic" in another. For instance, the city of Tusca-

26. I owe this line of analysis regarding gender to Judith Butler. See generally JUDITH BUTLER, *GENDER TROUBLE* (1990). Note that it is not necessary to deny the existence of biological differences between the sexes in order to question the thoughtless conflation of these biological differences with a host of *social* differences.

27. Consider the plaintiffs in *Holt*: their objection was not to the substance of any particular regulation that the city of Tuscaloosa imposed, but rather to the mere fact of being subject to Tuscaloosa's *extraterritorial* regulation. See *Holt*, 439 U.S. at 62. If the state of Alabama had subjected the community of Holt to identical regulations we would most likely react with indifference, although the effect on Holt residents would be almost identical. In both cases, the option available to Holt residents who wished to change the regulations would be the same: attempt to lobby the state legislature.

28. In no way do I wish to suggest that because it produces statuses, jurisdiction — much less the Tango! — should be abolished. Nor is the answer to replace structured practices with fluid ones that allow individuals autonomy — all dance must be modern interpretive dance! Down with choreography! At this point, I simply wish to draw attention to an aspect of territorial jurisdiction that has been overlooked and to suggest that this aspect is not accidental, but instead a central and indispensable function of the jurisdiction.

loosa was thought of as an "organic" political community by the dissenting justices, and as a "synthetic" governmental technique by the majority. This section will focus, not on the truth or falsity of either description of jurisdiction, but instead on the terms of the debate.²⁹

1. *Organic Jurisdictions*

Organic jurisdictions are the natural outgrowth of circumstances, conditions and principles that, morally, preexist the state. They are, in Durkheim's terms, *Gemeinschaft* communities.³⁰ They are defined socially rather than metrically, concretely rather than abstractly. The space of an organic jurisdiction is personal, authentic, encumbered, sacred. An organic jurisdiction is legitimated by its pedigree.

For example, a local government may be understood as a natural outgrowth of a social and economic community — a town or agricultural collective — that preexists state intervention and would exist with or without such intervention. An organic community may be united primarily by economy or by culture. For example, certain jurisdictions may be thought to be the outgrowth of certain geographically-based economic interests — trading or manufacturing, maritime or landlocked, cotton producing or wheat harvesting — while others may be thought to reflect the cultural particularities of their inhabitants. Many of course, combine both economic and cultural foundations. The Amish of Pennsylvania, for instance, are distinct in both economic and cultural dimensions.

The ideological foundation of nation-states is primarily that of organicism; nations are thought to represent "a people" who are both distinctive and relatively homogeneous. The French are united not only by language but by something called "culture": a set of practices, significant artifacts, beliefs, styles, a certain *je ne sais quoi*.

29. Hence this Article will employ the terms "organic (or synthetic) conception" and "organic (or synthetic) description" interchangeably to mean the mode of discourse that presents the given jurisdiction as organic (or synthetic). Further, the terms "organic jurisdiction" and "synthetic jurisdiction" refer, not to the essence of the jurisdiction in question, but instead to the way that it is understood and perceived. This perception will, of course, affect the material nature of the jurisdiction and the nature of the social relations of its inhabitants. The term "organic (or synthetic) jurisdiction" is meant to refer to such effects as well as to the rhetorical representation of the jurisdiction, but it is not meant to assert a core ontological status.

30. See FERDINAND TÖNNIES, *COMMUNITY & SOCIETY* 12-14, 277 n.27 (Charles P. Loomis ed. & trans., 1957).

Organic jurisdictions appear as matters of right and are defended against attack in terms of autonomy, self-determination and cultural preservation. Organic jurisdictions are understood as both natural facts and as the outgrowth of principles. The combination of the two serve to imbue jurisdictions with an air of the inevitable. For instance, it is assumed to be a relatively prepolitical fact that there exists a French culture or a lifestyle of the American South. Liberal societies cherish the principle that social groups should be allowed to exist and flourish, free of governmental interference. The conclusion seems inevitable: the jurisdictions that "house" and protect such social groups are natural and must be respected and preserved.

Moreover, the organic conception posits an organic relationship between such groups and the territory they occupy. It is not simply that the groups themselves are of primary importance, but also that the groups' identities depend on their control over a particular territory, a significant and culturally encumbered *place*. It follows that nonjurisdictional means of providing such a group with power and security will not suffice. Indeed, in the most extreme examples, even a substitute territory will not do — the land and the people are one. Imagine, for instance, the reaction of the Mormons if asked to move *en mass* from Salt Lake City to another city where they would enjoy comparable power, or consider the relationship of Palestinians and Israelis to Jerusalem.

In terms of political representation the organic jurisdiction has moral weight independent of its citizens. It is not simply a container of citizens. For example, the American states are equally represented in the Senate, regardless of their population: as a formal matter Alaska is the equal of California. An organic territory is thought to define a cohesive entity with united and unique interests.

2. *Synthetic Jurisdictions*

Synthetic jurisdictions, by contrast, are created by some institution in order to serve *its* purposes. They do not define a prepolitical social group, but are instead imposed on groups of people from "outside" or "above." In one sense, the group defined by the synthetic jurisdiction is itself created by government. If such groups have a "culture" at all, it is an institutional culture, a culture of bureaucracy perhaps. Rather than reflecting authenticity, synthetic jurisdictions exist for the sake of convenience. In Durkheim's

terms, they are *Gesellschaft* communities.³¹ A government may create a jurisdiction in order to facilitate enforcing the law, collecting taxes, gathering statistical data or providing services. Synthetic jurisdictions may have some degree of formal autonomy to make decisions and alter arrangements, but such autonomy is granted only in order to advance a goal of the central government, such as responsiveness to changing circumstances or efficiency.

Synthetic jurisdictions exist for the convenience of the institutions that they serve. There is no independent reason for their existence; hence no one speaks of rights when and if they are altered or eliminated. Nor can one object to them on the basis of rights. One may have a rights-based claim against the governmental institution that created or altered the jurisdiction, but such a claim would take the form of an attack on the policy or procedure by which subdivisions are created, not an attack on the existence or shape of a particular jurisdiction *qua* jurisdiction. (For instance, one might attack redistricting because it is racially discriminatory but could not assert a right to any particular district.)

The synthetic jurisdiction assumes that the individual is the primary agent in political life and that territory serves strictly instrumental purposes. Synthetic territory is fungible. Its occupants are mobile and rootless; they are rational profit maximizers and technocratic modern citizens. The group defined by the synthetic jurisdiction has no moral relevance; it is the lonely crowd.³²

The electoral district is perhaps the epitome of the synthetic jurisdiction. A synthetic jurisdiction is represented as a territorial container of individuals. Hence, electoral districts must be periodically reapportioned to conform to the equipopulosity requirement. Such reapportioning serves political equality because the morally significant entity is the individual and not the jurisdiction. Not only is it necessary that every citizen's vote be equally weighted, but altering the jurisdiction without her consent is not problematic — citizens understand that the synthetic jurisdiction is the servant of the state; it is a medium for the administration of the franchise and nothing more.

3. *Thinking Jurisdictionally*

The opposed representations of territorial jurisdiction — “organic” and “synthetic” — are employed by various actors as argu-

31. See *id.*

32. See DAVID RIESMAN, *THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER* (1950).

ments for or against a given controversial action. For instance, a jurisdiction may be described as synthetic by someone who wishes to change the jurisdiction against the wishes of affected parties, while the same jurisdiction may be described as "organic" by those who wish to assert "rights" to the jurisdiction.

The dialogical opposition serves other purposes as well. The two poles of the opposition each correspond to a type of political identity. The deployment of the organic jurisdiction corresponds with *the production of the local*. The creation of a jurisdiction that is understood to be "organic" defines a local community that will appear to be distinctive both in itself and in its relationship to the territory that defines it. By deploying the organic description, government and other bureaucracies can plausibly define the group occupying the jurisdiction as a prepolitical social fact, as authentic, spontaneous and uncontaminated by government in its composition and culture. The rhetorical power of the organic mode encourages any group that wishes to establish a jurisdiction to present itself as an "organic" social group with distinctive cultural norms and values that demand the protection and autonomy that a jurisdiction provides. The organic jurisdiction safeguards tradition and legacy.

The deployment of the synthetic description corresponds with *the regularization of the body politic*. By this I mean that the creation of an avowedly synthetic jurisdiction encourages citizens to understand themselves as rational and objective utility maximizers and to conform to a set of activities that facilitate the free alienability of land, individual freedom of action, and geographic and social mobility. The synthetic mode tends to devalue claims of incommensurability and uniqueness in favor of fungibility and market exchange. Social relations are seen as rationally administered through bureaucratic policy and arms length bargains: people can be "made whole" for the disruption of settled social expectations, either by alternative arrangements of equal value, by offsetting benefits of mobility or by cash payments. Those inhabiting the synthetic jurisdiction sacrifice the security that autonomy might provide in favor of the freedom of action facilitated by socio-spatial arrangements that can change easily to meet new circumstances. The synthetic jurisdiction is justified by its instrumental convenience. It stands for progress and efficiency.

At this point I must emphasize that the opposition described above is a conceptual distinction between jurisdictions. The opposition exists in the realm of rhetoric and discourse. It guides our perceptions and our actions, and may be more or less accurate as a

way of describing the world. More importantly, its usefulness may depend less on its descriptive accuracy and more on its effectiveness as an epistemological filter. The dyad may not describe what we experience. Rather, it may influence how we think about what we experience.

There are several tempting but incorrect ways of understanding the function of this opposition. Most obviously, one may conclude that the opposition is simply an accurate reflection of reality: jurisdictions are in fact either organic or synthetic, just as people are in fact either male or female. This approach must be rejected not because there is "no such thing" as an organic or a synthetic jurisdiction, but because there are too many ambiguous cases to allow for such a sharp bi-polar division. Taking the opposition on its own terms, few jurisdictions actually conform to the prototypical descriptions — most are a hybrid of the two. Yet in practice we tend to force the actual, messy, ambiguous jurisdictions into the Procrustean bed of one of the two prototypes. In *Holt*, the city had to be either a "political community" or a "mere technique." It is obvious that it fit neither model well — that was the problem — yet legal discourse had no approach that could take account of that reality.

Another misleading temptation is to see the opposition as subterfuge, a trick that blinds us to the truth. One might say: "Yes! The discourse does not reflect reality; therefore, whenever a jurisdiction is described as synthetic, it may *really* be organic. Likewise, whenever we are told it is organic, look out! It is probably synthetic. The hegemonies will try to undermine real communities by describing jurisdictions as synthetic and thereby deny the communities' control over them. Meanwhile, the elite will set up their own jurisdictions for their own sinister purposes and claim that these newly minted creations are products of the organic soil, as if the Trojan horse were flesh and blood." This way of thinking is equally problematic. It accepts the terms of the discursive opposition as truth and questions only the motives of the speaker and the accuracy of the description.

The opposition does not simply reflect reality, but neither does it create an illusion or a lie. Instead it tells us what to look for, what to consider, how to organize our thinking. It constructs reality, not in the sense of creating an illusion, but in the sense of acting as a lens that sharpens certain features and blurs others.

At this point, one might think that although the opposition between synthetic and organic jurisdiction does not describe a pre-political reality, at least the opposition offers tradeoffs among the

effects predictably associated with the two conceptions. But the deployment of this jurisdictional discourse does not have simple, straightforward or easily predictable social consequences. It is not true that once one has accepted a particular conception, one is "committed to its logical consequences." The conceptions do not have "logical consequences"; instead they have narrative effects that are multiple, malleable and even contradictory.

For instance, I suggested above that the synthetic conception encourages technocracy, mobility and fungibility while the organic conception encourages the recognition of "thick" group identities that are culturally distinct from larger political and social institutions. It seems to follow that if one accepts that a particular community is organic, that person is committed to respect its autonomy.

But the organic community can also be described as one of several organic components of a larger unity. Here the organic nature of the parts serves to justify the natural unity of the whole and perhaps the natural subordination of some parts to others. This use of the organic jurisdiction is suggested by the root of the word "organic": organ. Each of the organs of the body is naturally distinct from the others, but all are also naturally a part of a larger whole. The organs are useful to the whole not despite, but *because* of their distinctiveness. A body could not function with several hearts but no lungs. The fact that the organs are distinct in no way suggests that they are or should be autonomous. To the contrary, their distinctiveness is evidence of their interdependence. Organic jurisdictions can be represented as *organs of the state*, whose very distinctiveness is necessary to their function as servants of a larger whole. Hence, one might insist on the organic distinctiveness of a jurisdiction, not to support its autonomy, but to insure its subordination.

Similarly, we might imagine that the discursive strategy by which a central government would secure its integrity would be to insist on the synthetic nature of its component parts: "Each of the provinces of the nation are but the creations of the Crown; each is normatively inconsequential in and of itself; each exists only to serve the nation." But an equally effective centralization tactic might be to assert the distinctiveness and uniqueness of its subparts, but only in order to subsume them under a greater whole: "Each of the provinces of the nation is unique, precious and therefore an indispensable part of the nation; we must control you because your uniqueness is necessary to the greater good."

As we shall see, this discourse in which communities or territories are defined as organically distinct but also as parts of a larger organic whole is a very common dynamic in the history of jurisdiction.

4. *Ideology and Covert Status*

As the *Holt* case demonstrates, jurisdiction presents a problem for liberal ideology. The rights and duties of citizens vary depending on their membership in a jurisdiction. Yet such disparities are not easily justified. Membership in a jurisdiction is not entirely voluntary: the community of Holt could not simply elect to become residents of Tuscaloosa. Nor are jurisdictional distinctions obviously justified on other grounds. As the *Holt* court admits, jurisdictional lines are "arbitrary."³³ Therefore, jurisdictions would appear to undermine liberty, equality and justice. Jurisdictional distinctions seem no more just than distinctions based on accident of birth; the established right of residency seems no better than the divine right of kings. In a sense, jurisdictional distinctions are simply a different form of these more obvious status distinctions.

The dialogical opposition between organic and synthetic jurisdictions serves an important ideological function in this context. Recall that each pole of the opposition suggests a distinct and opposite relationship to government, bureaucracy and the state. The organic jurisdiction is defined as prepolitical. It is the codification of a relationship between people and soil that precedes centralized government or state planning. If the organic jurisdiction creates inequalities, these inequalities can and perhaps must be tolerated because they are not created by the state; instead they are the product of nature. Nature need not exclude human agency — here, nature is opposed not to man, but to artifice or to government. A concern for individual liberty and a respect for nature come together in the idea of a "human nature" that political institutions must respect. For instance, the rural town is often described as something that occurs without state intervention. It reflects nature — a natural communion of people who work a common soil and rely on each other. Perhaps it is natural for people of "like minds" to gather together, so the decision of people of one religion or one ethnic group to form an exclusive community is also "natural" because it reflects "human nature." Even if such jurisdictional divisions pro-

33. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, ____ (1978).

duce inequalities that are normatively troubling, the inequalities appear inevitable.

The synthetic jurisdiction, by contrast, is the product of government; it is created with governmental policy in mind. It does not have the justification of nature but, instead, the justification of neutrality. According to the conventional alibi, the synthetic jurisdiction does not create significant social divisions. It is simply the medium for the administration of some policy of central government. This is how the *Holt* majority treated Tuscaloosa: the boundaries were beyond justification, they were as just as a lottery. The synthetic jurisdiction does not reflect systematic bias but rather good and bad luck: "We had to draw the line *somewhere*." Moreover, because the jurisdiction is synthetic it can, by definition, always be described as normatively inconsequential so long as its opponents have recourse to the government that created it.

As long as the two poles of the opposition describe *all* of reality, territorial jurisdiction is not normatively problematic. If all important jurisdictions are organic and therefore natural and all artificial jurisdictions are synthetic and therefore inconsequential or at least perfectly random, then jurisdiction does not create a new form of status inequality or hierarchy. But if the opposition does not hold — if many jurisdictions fall between the two poles — then the spectre of jurisdiction as involuntary status reemerges. By presenting a world in which all jurisdictions cluster at one of the two poles, the dialogical opposition forecloses the possibility that jurisdiction creates a type of involuntary status.

This dialogical opposition between organic and synthetic jurisdictional "types" is a central feature of modern jurisdiction. It is impossible to sever the dialogical representation of jurisdiction from its material consequences. As the historical examples in Part II will show, a central and indispensable feature of jurisdiction is its ideological function.

II. A HISTORY OF JURISDICTION

This section will develop three hypotheses about territorial jurisdiction.

First hypothesis: Jurisdiction is not an ahistorical fixture of political organization. Territorial jurisdiction may appear to be as natural and inevitable as the ground we stand on, a natural outgrowth of the very existence of government. But instead, the emergence of jurisdiction is the product of the coincidence of two innovations, one technological — the science of cartography — and

one normative — the ideology of rational, humanist government. Each development was necessary. Cartography created the conceptual space of jurisdiction, while the aspirations of rational government provided the incentive to direct the ordering potential of the map inward — toward national consolidation and the administration of government — as well as outward — toward defense and conquest. Therefore we can speak of jurisdiction as a technology that was “invented” or “introduced” in a given social setting at a particular time.

Second hypothesis: We can tie certain historical developments in the art of government to the availability of jurisdiction as a tool, just as we can tie certain developments in the art of war to the availability of gunpowder. When jurisdiction emerged, it advanced a set of identifiable social projects. It disrupted existing social relations based on personal status and replaced them with a set of social relationships based on territorial location. To use the terms of private law, it initiated a shift from statuses *in gross* or *in personam* to statuses bound to political territory. Further, jurisdiction produced a new set of governmental institutions and helped to construct a type of political subjectivity that was amenable to a new and more comprehensive form of institutional knowledge, management and control.

Third hypothesis: Centralization of power and jurisdictional subdivision are not antithetical. Territorial jurisdiction was deployed through a rhetorical strategy that described some territories as simply administrative districts — in other words, synthetic jurisdictions — and described others as the territories of distinctive social groups — in other words, organic jurisdictions. Both descriptions were indispensable and both were used by a number of different social actors with different normative aspirations and practical projects. The emerging national governments needed to assert the sameness and uniformity of all their subjects and therefore deployed the synthetic description to downplay regional or local difference. But at the same time they needed to emphasize local distinctiveness because such distinctiveness helped to distinguish one *nation* from another. They used the organic description for this purpose. Meanwhile local elites needed to become part of the national system in order to avoid being eliminated altogether by superior national powers. But at the same time they needed to assert their distinctiveness in order to avoid complete assimilation by national bureaucracies. Thus both national and local elites oscillated

between the synthetic and organic conception of sub-national jurisdictions.

These are historically specific hypotheses, not claims of a universal social "logic." Below are several historical examples that lend support to these hypotheses. Of course, there are many historical contexts that I have not addressed. These hypotheses are designed to inaugurate a long-term, systematic study of jurisdiction. What follows is only a modest beginning of an ambitious project.

A. *From Status to Locus*

Nineteenth-century Thailand, then called Siam by English speakers, provides a striking illustration of the historical emergence of jurisdiction. The history of Thailand is one of rapid transition from a non-bounded, fluid and ambiguous notion of territory to a system of strictly delimited and objectively defined national and sub-national jurisdictions.

The Thai example is convenient because of an especially sophisticated and detailed study of the history of Thai national geography produced by Thongchai Winichakul.³⁴ According to Winichakul, the Thai state did not develop a concept of territorial jurisdiction until the latter part of the nineteenth century. Until then, Siam had none of the characteristics of jurisdictional authority. It did not control a contiguous territory defined by fixed and objective borders. Instead, it controlled a set of specific, non-adjacent places according to their proximity and usefulness to Bangkok; it controlled specific resources, trade routes or populations. It did not conceive of its authority in terms of territory. Instead, political authority operated by status hierarchy, with the elites in Bangkok at the top and various minor rulers occupying tiers in a dynastic pyramid. Hierarchical relations between various rulers and subjects, not control over continuous territory, defined Siam.

In the existing system of provincial control, which was based on the hierarchical network of lordship among local rulers under the nobles in Bangkok, a small town could request a change of dependence on one lord to another The new lord might be the ruler of a town which was not adjacent to it. The domain of a regional lord could even be discontinuous.³⁵

Territory that was neither occupied nor the source of valuable resources was simply not "claimed" by any authority — in effect, there was nothing to rule. Even the border between the bitter ene-

34. See WINICHAKUL, *supra* note 25.

35. *Id.* at 120.

mies Siam and Burma was not sharply defined in areal terms. "[B]oth sides regarded the [border] towns as rich sources of food and manpower for fighting"³⁶ Boundaries were defined by concrete landmarks or in narrative terms rather than in the abstract cartographic terms of a coordinate grid. As a result, boundaries were not thin demarcating lines but rather substantial regions or zones. Moreover, boundaries were indeterminate, even potentially mobile: "[One] boundary was identified . . . by teak forests, mountains upon mountains, muddy ponds where there were three pagodas, Maprang trees, three piles of stones, the space between the White Elephant (?) and the Nong River"³⁷

This state of affairs persisted until the end of the nineteenth century when Siamese rulers began to negotiate with the British and French colonial powers, who insisted on definite jurisdictional boundaries. In the course of negotiation and conflict with the European colonial powers, the Bangkok elites came to understand that political territorialism was a powerful tool. The map set the terms of negotiation and of conflict; cartography became the very language in which power and resources were described.³⁸ As the significance of the geographical border grew for the rulers in Bangkok, the regime supplanted its narrative, concrete understanding of its realm with a jurisdictional one. "[T]he transition from a time when the frontier towns were known by name to a time when they were known by a map. . . . took place in a rather short period: the final two decades of the nineteenth century."³⁹

Bangkok needed territorial control and coherence, in order both to guard against external threats and to serve the internal needs of a rapidly modernizing society. Externally, the British insisted on a strict demarcation and centralization of authority in order to negotiate binding trade agreements,⁴⁰ while the French threatened to take control of ambiguously held towns in the northern Mekong region by force.⁴¹ As the Siamese elites employed European cartographic technologies they increasingly understood their government in jurisdictional terms:

36. *Id.* at 62.

37. *Id.* at 70.

38. *See id.* at 129 ("[Modern cartography was] a new geographical 'language' by which information originated and the new notion of the realm of Siam was conceived. It became a framework for thinking, imagining, and projecting the desired realm.").

39. *Id.* at 119-20.

40. *See* Peter Vandergeest & Nancy Lee Peluso, *Territorialization and state power in Thailand*, 24 *THEORY AND SOCIETY* 385, 396 (1995).

41. *See* WINICHAKUL, *supra* note 25, at 109-12, 121.

For the first time the [Thai] regime was attempting to know the units which comprised the realm in territorial terms. Undoubtedly, this was a consequence of the new vision created by the modern geographical discourse of mapping. Mapping was both a cognitive paradigm and a practical means of the new administration. It demanded the reorganization and redistribution of space to suit the new exercise of administrative power on a territorial basis.⁴²

The Siamese elites remade the regime, changing it from a state based on an aspatial network of local rulers linked to their subjects and to the center (Bangkok) by status obligations, to a government organized by technical expertise and by mapped territory.⁴³ The birth and hardening of the Siamese administrative state followed hard on the heels of the first comprehensive survey and definitive mapping of Siamese territory. The abstract space created by modern cartography, what we will call territorial jurisdiction, was the midwife of the administrative state.

Although this may be difficult for modern readers to grasp, before the modern map an areal conception of space simply did not exist — instead one had this or that village, trade route, forest, rice field. There was no representation of these various specific entities that would allow for grouping them together into regions. At the same time, typological administration was impractical due to the distance between things of the same type — several days journey might separate two villages or two rice fields — and because without a synoptic conception of space, there was no way to coordinate the administration of things of similar type. The emergence of an abstract, mapped conception of the national space facilitated the reorganization of the state along both territorial and functional lines.

Once the nation was mapped, it was divided into regions which could be administered by agents of the state who reported back to Bangkok.⁴⁴ The sharing of information that resulted allowed for functional specialization, a governmental division of labor.⁴⁵

Further, territorial administration facilitated the collection of revenue in money form or in goods rather than in labor obligations.

42. *Id.* at 120.

43. *See id.* (“[T]he whole country began to shift from the traditional hierarchical relationships of rulers to the new administration on a territorial basis.”); Vandergeest & Peluso, *supra* note 40, at 398.

44. *See* WINICHAKUL, *supra* note 25, at 398-99.

45. *See* Vandergeest & Peluso, *supra* note 40, at 398 (“Bangkok ministries were reorganized by functional specialization . . . the Ministry of Interior and . . . the Ministry of Finance. New functional Ministries (Agriculture, Education, Defense, Public Works, and others) were also created.”).

This allowed Bangkok to participate more effectively in trade as well as to eliminate the last vestiges of the older system of patronage obligations. Local elites, once referred to with honorific titles denoting status were transformed into positions such as "the commander protecting territorial integrity."⁴⁶ In this way the regime transformed itself into a modern, administrative state defined by territorial boundaries and organized by functional divisions:

Income from [trade] monopolies and tax farms allowed the monarchy to eliminate its reliance on serf obligations and slavery [incidents of the older system of patronage and status rule] almost entirely The monarchy in effect transformed layers of nobles and local lords into salaried officials. Bangkok ministries were reorganized by functional specialization . . . the principalities outside of Bangkok were incorporated into the administrative hierarchy of the Ministry of the Interior. The lords of the principalities were displaced by provincial governors who took over local administration.⁴⁷

Although "[t]he tempo, tactics, problems, and solutions varied from place to place. . . the final outcomes were the same: the control of revenue, taxes, budgets, education, the judicial system, and other administrative functions by Bangkok . . ." ⁴⁸ Modern cartography thus ushered in a new type of government, an administrative state animated by the ideals of synoptic knowledge and competent management of its domain.

This new government was both more centralized *and* more differentiated than its predecessor. More centralized because it attempted to centralize detailed knowledge of its territorial attributes through surveying and mapping. More differentiated because, for the first time, it created sharply delineated territorial subdivisions in order to organize the collection of data and the administration of state policy.

In order to create a territorial identity the Thai government described its tributaries as parts of Thailand rather than as allies, affiliates or even subordinates. For example, during the late 1880s, in the midst of territorial conflict with colonial France, Bangkok sought to establish a sovereign relationship over its loosely allied tributaries in the Lao region. In order to secure the loyalty of the tributaries, the Thai government, for perhaps the first time, asserted a territorial and racial identity — one that included the Thai and its tributaries but excluded the Europeans.

46. See WINICHAKUL, *supra* note 25, at 106.

47. Vandergeest & Peluso, *supra* note 40, at 398.

48. WINICHAKUL, *supra* note 25, at 102.

[T]he Thai and Lao belong to the same soil. . . . France is merely an alien who looks down on the Lao race as savage. . . . Although the Lao people habitually regard Lao as We and Thai as They when only the two people are considered, comparing the Thai and the French, however, it would be natural that they regard the Thai as We and the French as They.⁴⁹

In the next phase of jurisdictional metamorphosis the Thai governmental elites reinterpreted the local identities as attributes of a larger national identity, as organs of the territorial state or, in Winichakul's terms, "geo-body."⁵⁰ As Winichakul notes: "[T]he losers [in the process of territorialization] were those tiny chiefdoms along the routes of both the Siamese and the French forces. Not only were they conquered . . . but they were also transformed into integral parts of the new political space defined by the new notions of sovereignty and boundary."⁵¹ Although the tributaries were subordinated to Bangkok, they were also given a territorial identity they had not known before. Territorial jurisdiction transformed political relationships from a logic of status to one of location.

In Thailand, the birth of jurisdiction was the birth of synoptic, universal planning initiated by centralized government and carried out through jurisdictional division. It was also the birth of local territorialism accomplished through bureaucratically recorded and typologized territorial "localities." The ultimate result was a transformation to a new type of political subjectivity: Siam became *Thailand*.

B. *Nation as Empire: The Mapping of Europa*

Until at earliest the tenth or eleventh century and perhaps as late as the fifteenth century, European conceptions of political space were much like those of pre-modern Siam. Space was understood only in concrete terms or in relation to the plan of the divine. In pre-modern Europe, what appear to modern eyes to be territorial communities were in fact simply groups united by kinship, common interests and customs. As Sir Henry Maine notes:

[T]he double proposition that "sovereignty is territorial," *i.e.* that it is always associated with the proprietorship of a limited portion of the earth's surface, and that sovereigns *inter se* are to be deemed not *paramount*, but *absolute* owners of the state's territory [is assumed to be]

49. *Id.* (translating CHIRAPORN SATHAPANAWATTHANA, WIKRITTAKAN 411-12) (first alteration in original).

50. *Id.* at 129-40.

51. *Id.* at 129.

founded on principles of equity and common sense . . . capable of being readily reasoned out in every stage of modern civilisation [sic]. But this assumption . . . is altogether untenable so far as regards a large part of modern history. . . . It is . . . not true that the territorial character of sovereignty was always recognised [sic]⁵²

Instead, Maine asserts, early modern European sovereignty was split into two conceptions, neither territorial. On the one hand, there was what Maine calls "tribe sovereignty"⁵³ practiced by nomadic peoples. These groups "based no claim of right upon the fact of territorial possession, and indeed attached no importance to it whatever."⁵⁴ Instead, the ruler of a nation was king of a *people*, not a territory. On the other hand, a ruler with greater ambitions would claim imperial or universal dominion: "[T]he precedent which suggested itself for his adoption was the domination of the Emperors of Rome. . . . The chieftain who would no longer call himself King of the tribe must claim to be Emperor of the world."⁵⁵

Modern territorial sovereignty was an offshoot of feudalism. With the accession of the Capetian dynasty in France,⁵⁶ the title of the sovereign evolved from *King of the Franks* (a people) to *King of France* (the territory).⁵⁷ At that point, the sovereign stood "in the same relation to the soil of France as the baron to his estate, the tenant to his freehold" ⁵⁸ In England, the Norman conquerors imitated their Frankish cousins and initiated the first truly territorial sovereignty in that area. According to Maine, "[e]very subsequent [European] dominion which was established or consolidated was formed on the latter [territorial] model."⁵⁹

Territorial sovereignty had to await the arrival of its technological midwife, modern cartography. Although cartography in ancient civilizations may have been fairly sophisticated, modern scientific cartography was not practiced in Europe until, at earliest, the fifteenth century. Some system of coordinate geography and cartographic projection was developed by the celebrated ancient Greek astronomer Ptolemy, but it is not clear that Ptolemy himself produced maps. Neither is it clear how much of the work attributed to

52. MAINE, *supra* note 6, at 98-99.

53. *Id.* at 100.

54. *Id.*

55. *Id.* at 101.

56. The Capetian dynasty ruled France from 987-1328. See 9 *ENCYCLOPÆDIA BRITANNICA* 702 (1970).

57. See MAINE, *supra* note 6, at 103-04. See also 9 *ENCYCLOPÆDIA BRITANNICA* 702-03.

58. MAINE, *supra* note 6, at 103-04.

59. *Id.* at 104.

Ptolemy was in reality the innovation of the Byzantine scholars who preserved and published his work until the closing years of their Empire.⁶⁰ Although ancient Rome must have produced maps for practical endeavors such as travel, conquest and the cultivation of land, surviving maps are not drawn to a consistent scale and do not conform to a system of coordinates or to the rules of any geometric projection.⁶¹ Even after the capture of Greece, it appears that the Romans had little regard for Greek intellectual accomplishments in cartography.⁶²

In any event, much of ancient cartography, like much of the knowledge of the ancients in general, was lost to the West during the middle ages. Medieval world maps depicted the world as a flat disc crudely divided into climatological zones or continents. They contained little or no detail and did not even aspire to topographical accuracy. Other medieval maps of smaller areas were of two types. The *strip map* recorded the distances between various points on a route; it depicted the route as a straight line, ignoring directional orientation. The *cadastral map*⁶³ defined the extent of settled or cultivated land, although surveys of settled land were generally recorded in prose form until well into the fourteenth century.

The earliest known English example of a pictorial map of territory was drawn in about 1300. Medieval maps were crude and pictorial by modern standards; the surveyor's tools consisted of a measuring rod, or "metewand," and a device for laying off right angles. Maps did not depict territory according to geometric principles or consistent scale; instead they were drawn in perspective or bird's eye view, and conspicuous objects such as buildings were drawn in elevation.⁶⁴

Before the fifteenth century there were few maps of entire countries. European seafarers developed fairly accurate *portolan charts* by the early fourteenth century, but these charts depicted only coastal outlines in significant detail, and they had no grid of longitude and latitude. Instead they were developed by measuring the distance between two points and the direction one must sail to

60. See LEO BAGROW, HISTORY OF CARTOGRAPHY 33-34 (1964).

61. See *id.* at 37-38.

62. See *id.* at 38.

63. The cadastral map served to designate taxable land holdings in order to facilitate tax collection. See JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 3, 24 (1998).

64. See *id.* at 143.

move between them. The portolan charts were graphic depictions of "'catalogue[s] of directions to follow between notable points.'"⁶⁵

In short, the types of maps prevalent in the pre-modern and early modern eras were not conducive to the creation of territorial jurisdictions. Road maps and itineraries depicted distances between points and in some cases direction. They did not depict territory. Cadastral maps depicted territory, but only relatively small territories. They used crude techniques of measurement that could not be compared easily to surveys conducted at other times and in other places. The inaccuracies of such surveying techniques were tolerable where small areas were concerned and in a context in which memory and custom could supplement the survey. But those same inaccuracies would be compounded exponentially if larger territories were mapped, an undertaking that would require the coordination and compilation of multiple surveys.

The cartographic grid was introduced to Europe in the fourteenth century when the ancient Greek manuscript Ptolemy's *Geographia* came to Italy after the fall of Byzantium.⁶⁶ The system of longitude and latitude was refined resulting in ever more accurate and detailed maps. The development of modern cartography — and territorial jurisdiction — was thereafter marked by steady progress and periodic milestones.

The first comprehensive national survey was completed in France in 1789. It took 121 years to complete and entailed the compilation of a network of 400 surveys that encompassed the entire country.⁶⁷

1. *The French Connection: Liberté, Égalité, Fraternité*

The Thai example illustrated the conditions and consequences of the birth of jurisdiction. The study of revolutionary era France will illustrate the development of jurisdiction in a thoroughly centralized national government. Moreover, the French case exemplifies the link between normative political ideology and jurisdictional development. France, more than any other European nation, lays bare the collision of cartography and political ideology that produced the modern jurisdiction. Unlike the Thai history presented

65. David Turnbull, *Cartography and Science in Early Modern Europe: Mapping the Construction of Knowledge Spaces*, 48 *IMAGO MUNDI* 5, 10 (1996) (quoting MICHEL MOLLAT DU JOURDIN & MONIQUE DE LA RONCIÈRE, *SEA CHARTS OF THE EARLY EXPLORERS: 13TH TO 17TH CENTURY* (1984)) (alteration in original).

66. See BAGROW, *supra* note 60, at 77. But see Turnbull, *supra* note 65, at 14 (asserting that the *Geographia* reached Europe in the thirteenth century).

67. See Turnbull, *supra* note 65, at 14-18.

above, what follows may be understood as the transformation of jurisdiction, rather than its birth. But alternatively, it is the birth of a modern, technocratic and ideologically laden jurisdiction.

France is also exemplary, if not unique, because of the popular association of centralization with the development of its national institutions. For most observers, the French nation-state epitomizes a modern trend toward the centralization of political power. Indeed, in an elite Encyclopedia under the entry for France, we find the following astonishing statement: "The whole history of France is a movement toward centralization and unification."⁶⁸ Nothing in this section will challenge this conventional view, but it will suggest that even in France, centralization of power and culture was accomplished in surprising, perhaps even paradoxical, ways. Here, as in Siam, the centralization of power also intensified local territorialism. The assertion of local territorial distinctiveness did not, in the end, undermine French centralization. In fact, local territorialism seems to have been a by-product of comprehensive centralization.

French cartographers of the late 1600s and 1700s performed the first scientific national map surveys, employing geometrical methods to produce geodetically accurate maps. The national survey was a huge undertaking, requiring the coordination and compilation of hundreds of individual surveys. French scientists, bureaucrats and governmental officials were fascinated with accuracy, not only in service of the enlightenment ideal of truth, but also for specific administrative and political purposes. Geodetically accurate maps allowed for coordinated infrastructural projects performed simultaneously in different regions of the French territorial "hexagon."

The obsession with geodetic accuracy elevated certain truths at the expense of others. The early scientific maps emphasized the metrical properties of abstract space while suppressing the "detail" of topographical texture and local settlement. "The abstract quality of the maps, therefore, desacralized space and [therefore] depersonalized society."⁶⁹

The image of France as an empty and homogeneous space appears to have influenced revolutionary jurisdictional reform. A proposal for a new system of administrative jurisdictions, which called for the creation of ninety jurisdictions of equal area, was influenced by the national survey maps of the early eighteenth cen-

68. 9 ENCYCLOPÆDIA BRITANNICA 697 (1970).

69. Josef W. Konvitz, *The Nation-state, Paris and Cartography in Eighteenth- and Nineteenth-Century France*, 16 J. OF HIST. GEO. 3, 4 (1990).

ture.⁷⁰ The new jurisdictional arrangement was to serve several revolutionary and ideological purposes. *Liberté*: the new jurisdictions would facilitate the uniformly correct application of law throughout the nation, subordinating local prejudice, hierarchy and oppression to nationally guaranteed ideals. *Egalité*: the new jurisdictional map superseded local differences and customary law. The new divisions, unlike the old, were neutral, homogeneous and egalitarian. *Fraternité*: the new territorial divisions would not threaten to fracture into autonomous entities, and they would suppress the older divisions that might so threaten. Answering to the metropole, the administrative deputies would apply metropolitan justice. Therefore "the redrawing of France's administrative boundaries was a moral act inspired by and symbolizing the highest political ideals; it reified the unity of the nation and of civic virtue."⁷¹

Alas, the lofty ideals of the revolution had to negotiate with the legacy of the *ancien régime* on the ground. Ultimately, eighty-three jurisdictional departments were created, and a variety of criteria were considered, including respect for topographical features and prerevolutionary units. But the end result bears more than an accidental resemblance to the earlier proposal.

The French creation of territorial departments served to unify the nation-state, just as conventional history insists. But this unification paradoxically also hardened local differences. It transformed vague, fluctuating and discontinuous ethnic settlements into territorially precise regions and provinces. It presented as a unified and territorially bounded local culture what had been at best the loosely similar and in some cases quite dissimilar practices of numerous rural villages.

Consider, for example, the famous national effort to displace local languages with French. To be sure, the typical story of governmentally imposed uniformity is true. The government of the First Republic was concerned about ideological effects of linguistic fragmentation:

"Reaction speaks Bas-Breton" insisted the Jacobins. "The unity of the Republic demands the unity of speech Speech must be one, like the Republic." [Others] called for the elimination of "the diversity of primitive idioms that extended the infancy of reason and prolonged obsolescent prejudices."⁷²

70. See *id.* at 4-5.

71. *Id.* at 6.

72. EUGEN WEBER, *PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870-1914*, at 73 (1976).

Until the Third Republic, however, the French government was unable to develop an effective policy to promote linguistic unity. As late as 1891, the Minister of the Interior feared that local dialect "may endanger French unity."⁷³ In the late nineteenth century "familiarity with French in the countryside was still cause for comment. . . . In 1879 a folklorist could still publish a parable of the prodigal son in 88 different patois."⁷⁴

Ultimately, French linguistic unity indeed destroyed local cultures and local idioms — the idiosyncratic speech of rural villages and towns. But it did not, by and large, displace flourishing *regional* languages and cultures. Many of the so-called regional languages that were supposedly destroyed by the hegemony of French were, in the late nineteenth century, still in fact collections of mutually incomprehensible village patois:

Nor was Breton one tongue, or Limousin, or the so-called langue d'Oc [all "regional languages"]. Vannetais was incomprehensible to most other Bretons; men from Léon found it hard to understand those from Guingamp. The old dialectical world was fragmented in the extreme. Dialect might change from one valley to another, from high ground to low, from one riverbank to the next, if physical barriers made communications difficult.⁷⁵

Organic, day-to-day social connections gave rise to *local dialects*, not *regional languages*. The conception of a bounded territorial region itself, much less of a regional language or culture, was in a sense a product of the national project of self knowledge accomplished through the census and the map. The government of the Third Republic tracked and typologized the language patterns of its citizens in terms of the jurisdictional *departments* developed just after the revolution.⁷⁶ The grouping together of these myriad local

73. *See id.* at 74, 301-38.

74. *Id.* at 75-76. Compulsory education under the Third Republic is commonly and rightly credited with the rapid advance in *French* literacy at the expense of the local dialects. But other, less programmatic factors facilitated the nationalization effort, most notably the simple fact that the provinces were no longer isolated from each other. Improved highways, industrialization, national publications and national institutions such as the military brought people from previously isolated villages into contact with each other. *See id.* at 301-38. These social interactions required the diverse population to abandon local dialects: "French had to be used as a *lingua franca*." *Id.* at 78.

The local dialects were indeed "organic": they were part of the historical practice of people in their day to day lives. But so was the shift to French, a shift that could not have occurred through state coercion alone. "The factors that worked against French in the old isolated world, self-sufficient in far more realms than mere subsistence, turned against local idioms as that world changed. [A local dialect] was useless beyond a certain area that had once seemed vast but became increasingly limited in the perspective of the modern world." *Id.* at 86.

75. *Id.* at 86.

76. *See id.* at 75-77.

dialects into regional languages is an act of intellectual interpretation, the work of cartographers and lexicographers, not nature or history.⁷⁷ The languages that "belonged" to these regions were also projections which gave a diversity of local practices a common pedigree they neither earned nor desired. Intellectuals and activists reacting to the Third Republic's project of centralization created regional literary traditions when for centuries there had been only the spoken patois of rural life, different from village to village:

In 1854 a group of young poets and intellectuals concerned for the preservation of the speech and literature of Oc founded the Félibrige To revivify their native language, the Félibres sought to *create* a literature. But literature needs a reading public, and such a public was hard to find. The country people, when they learned to read, learned to read in French Furthermore, people who used forms of speech that were highly localized and in constant evolution found it hard to understand a literary language that was often archaic [The Félibres] address[ed] country people in literary Provençal and [were] met with uncomprehending stares.

In fact, the Félibrige seems to have been a political reaction initiated on a plane several removes away from ordinary people, and from their concerns.⁷⁸

Of course Provençal did *exist*; it was spoken and written in what is now Southern France as early as the twelfth century. But by the fourteenth century it had fragmented into a multitude of local dia-

77. To be sure, the lexicographers were describing something when they catalogued French regional languages. Most notably, there was a linguistic divide between northern France and the Midi (south). The Midi — which was thoroughly Romanized earlier than the rest of Gaul and was less affected by Germanic and Frankish influences in the Middle Ages — developed dialects that remained closer to Latin than those of Northern France. This is responsible for the linguistic split between northern French and the *langue d'oc* ("oc" being the term for "yes" in the Midi dialects, as compared to "oil" and later "oui" in the north).

The term "Provençal," or "*langue d'oc*," is used in two separate ways, often conflated. In strictly linguistic terms, it refers to all of the southern dialects which retain the greater Latin influence. Provençal is commonly divided into at least three broad languages: Provençal proper, Auvergnat and Limousin, and Gascon. Each of these is in turn divided into scores of local dialects.

In literary terms, Provençal refers to the standard language of the troubadour poets of the twelfth, thirteenth and early fourteenth centuries. This literary language was standardized and used widely throughout the Midi before the incorporation of that area under Frankish rule. But it is doubtful that literary Provençal — as opposed to local idiom — was ever employed as a spoken language beyond a rarefied literary elite. Moreover, literature was written and performed in literary Provençal outside the Midi, in Northern Spain and Italy where nobles held it in high esteem. It was less a regional language than an inter-regional literary language. In any event, the demise of Provençal began in the 13th century when war ruined the southern nobles who patronized the troubadours — long before the Third Republic and its project of centralization. Thus long before the eighteenth century, high Provençal was no longer spoken nor written in the Midi: the *langue d'oc* had become a collection of local dialects. See 18 *ENCYCLOPÆDIA BRITANNICA* 680-82 (1970).

78. WEBER, *supra* note 72, at 80 (emphasis added). Again, this is not to deny the historical existence of literary Provençal. See *supra* note 77.

lects. And it was not a territorial language that competed with and was displaced by French, at least not until the nineteenth century. The emergence of common languages that were both universally written and spoken in territorially bounded regions required the coordination of translations, prohibitions and disciplines on a scale that was impossible without the organization of the centralized state, the textual multiplication of the Guttenberg press and the synopticism of the modern map.⁷⁹ And we can surmise that the world was knowable in terms of bounded regions only after the metropolitan project of synoptic mapping. Before the metropole and its maps, local culture was experienced "on site" as the culture of a certain village settlement. Regions, if they were conceived of at all, blurred at the margins, one into another.

The limited regionalism of nineteenth century France can be seen as a kind of failed nationalism. It mirrored the nationalist strategy of producing a synthetic homogeneity within a precise, mapped territory. The threat of a very real centralization project produced a reaction in the form of a "defense of the local." This reaction was itself thoroughly caught up in the metropolitan discourse of the map. The guardians of local culture did not think, perhaps could not think, to defend the local except on the terms and with the weapons with which it was being attacked: these were territorial terms and territorial weapons. The provinces were led to defend, not organic local life but an image of the organic that was itself an artifact of the centralization effort they opposed. Far from destroying regional culture, centralization in this sense created it.

2. *The British Invasion: Jurisdictional Centralization and the Common Law*

The birth of English jurisdiction went hand in glove with the consolidation of the English common law. Thus, the history of English jurisdiction illuminates the critical link between territory and legal practice that is a defining characteristic of the modern jurisdiction.

Although the common law was said to unify and to some degree define England, both historically and territorially, until the seven-

79. See, e.g., BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM* at 40-42, 77-79 (1983). Anderson notes that early modern languages-of-state in Europe were just that: languages used by and for the administrative state. There was no attempt to impose them on the subject populations who went on speaking local dialects. There was a systematic attempt to impose national languages in Europe only in the 19th century, the same period of time that, according to Anderson, the very idea of the nation-state matured.

teenth century it did neither. The common law was fractured and inconsistent. The common law competed with, and likely borrowed from, a collection of other practices: "Roman civil law, canon law and a bewildering variety of local customary law."⁸⁰ This legal cornucopia was not administered by a unified and coordinated system of justice but instead by "national, regional and local courts, ecclesiastical and secular courts, courts occasional and permanent . . . courts of considerable antiquity and courts newly erected or asserted, courts swamped with business and courts moribund for lack of suitors."⁸¹ Until the fifteenth century, ecclesiastical courts presided over matters such as marriage, succession, heresy and any dispute involving a member of the clergy or the property of the church. Commercial transactions were administered through separate mercantile courts.⁸² Feudal lords retained the right to hold court over their subjects as an incident of property ownership.⁸³

The legal system was also fractured territorially. The pre-Norman local divisions of the "shire" and "hundred" not only survived the Conquest, but also continued to administer justice with separate courts of overlapping jurisdiction.⁸⁴ These were the closest medieval England had to territorial jurisdictions, but they had few of the qualities we associate with jurisdictions today.

Most notably, they did not have definite territorial boundaries. Prior to the fifteenth century, modern surveying was not practiced in England.⁸⁵ As a result, maps were schematic rather than geodetic. Often the only description of an estate or territory was a written narrative.⁸⁶ Measures were fluid, locally varied and approximate. Land "rights were sometimes marked by the cast of a hammer; the boundary between the shires of Cambridge and Huntingdon ran in some of the meres 'as far a man might reach with his barge-pole to the shore'; the day's journey and the morning's ploughing were other convenient units."⁸⁷

80. WILFRID PREST, *THE PROFESSIONS IN EARLY MODERN ENGLAND* 65 (1987).

81. *Id.*

82. See 6 *ENCYCLOPÆDIA BRITANNICA* 163 (1970).

83. In support of uncontroversial and accepted facts of canonical English history, I will cite the account provided in the *Encyclopædia Britannica*. See 8 *ENCYCLOPÆDIA BRITANNICA* 549 (1970).

84. See NICHOLAS K. BLOMLEY, *LAW, SPACE, AND THE GEOGRAPHIES OF POWER* 77-78 (1994).

85. See BAGROW, *supra* note 60, at 143-44, 165.

86. See *id.* at 143.

87. H.C. DARBY, *The Agrarian Contribution to Surveying in England*, 82 *GEOGRAPHICAL JOURNAL* 529, 530 (1933).

Many early English towns⁸⁸ were autonomous entities that were not legally recognized at all. During the Norman period, propertied lords established towns on their lands in order to take advantage of the benefits of commerce.⁸⁹ In some cases, the lord would obtain a royal charter to establish a market and the settlement would follow.⁹⁰ In other cases, settlers established autonomous institutions in the form of guilds which were granted the privilege of regulating the important trades and crafts within the cities. The guilds took on many of the functions that we associate with government today.⁹¹ Jurisdiction in these localities was an incident of status, property or commercial monopoly, not a subdivision of centralized government.

Even those cities that were formally recognized were not territorial jurisdictions. During the feudal period many cities were collective enterprises⁹² within the system of feudal estates administered by the Crown.⁹³ The medieval borough did not exist as a separate entity; it was simply the association of its individual burgesses.⁹⁴ Residence was not a criterion for membership; many nonresidents were citizens and most residents were not citizens.⁹⁵ Rights to citizenship were hereditary and in some municipal corporations membership could be purchased.⁹⁶

Cities did exercise what we today think of as legal, if not territorial, jurisdiction. They established their own courts, selected jurors from their members and elected their own sheriffs.⁹⁷ But cities were not the only entities to exercise jurisdiction. Since the entity exercising jurisdiction was formally an atterritorial corporate group, there was no reason that other corporations could not exercise ju-

88. Although there were formal distinctions between cities, towns and villages, these distinctions changed over time and the terms seem to have been used inconsistently. As a result, many historical commentators use the terms interchangeably.

89. See MAX WEBER, *THE CITY* 133 (1958); *THE ENGLISH MEDIEVAL TOWN: A READER IN ENGLISH URBAN HISTORY, 1200-1540*, at 5 (Richard Holt & Gervase Rosser eds., 1990) [hereinafter *MEDIEVAL TOWN*].

90. See *MEDIEVAL TOWN*, *supra* note 89, at 5.

91. See *id.* at 9, 12; see also SIR PERCIVAL GRIFFITHS, *A LICENSE TO TRADE: THE HISTORY OF ENGLISH CHARTERED COMPANIES 4-7* (1974).

92. Terminology can be confusing in this regard. For instance, although practically speaking, municipal corporations may have existed as early as the reign of Edward I (1272-1307), the first charter granting incorporation seems to have been issued in 1343. See JENNIFER LEVIN, *THE CHARTER CONTROVERSY IN THE CITY OF LONDON, 1660-1688, AND ITS CONSEQUENCES* 63 (1969).

93. See WEBER, *supra* note 89, at 135.

94. See LEVIN, *supra* note 92, at 64.

95. See WEBER, *supra* note 89, at 134-35.

96. See *id.* at 136.

97. See *id.* at 133-34, 135-36.

jurisdiction over territory as well. Jurisdiction was often an attribute of the trade monopolies that were common in the mercantile period. Because local government evolved from the commercial relationships of the guilds, the power of sovereignty was understood as an incident of the regulation of trade. For example, many of the American colonies were established and governed by chartered corporations.⁹⁸ As late as the 1770s Edmund Burke complained that the East India Company “‘did not seem to be merely a Company formed for the extension of the British commerce, but in reality a delegation of the whole power and sovereignty of this kingdom sent into the East.’”⁹⁹

The centralization of legal authority required imposing a single legal system and coordinating territorial jurisdictions. English common law potentially supplied the former. The word “common” denotes not only the customary origins, but also the universality of English case law. The ideology that emerged with the writings of Sir Edward Coke in the early seventeenth century presented the common law as the unified law of England from “time out of mind.”¹⁰⁰ After his dismissal from the King’s Bench in 1616, Coke joined the antiroyalists. Largely through his interpretive efforts, the common law became a significant source of power that could operate autonomous of the Tudor Crown and its royally controlled courts, such as the chancellor’s court of equity and the infamous Star Chamber.¹⁰¹ Against the expansion of centralized royal power through the “Prerogative Courts,” Coke and the common lawyers argued for the jurisdiction of the common law.

But Coke did not favor a return to the decentralized patchwork of local courts and courts of specific categorical jurisdiction. Coke instead wished to ensure the *centralization* of legal authority in the common law courts. For Coke, the common law defined England as a nation; it distinguished the sceptered isle from the continent, with its Latin and Justinian codes.¹⁰² As such, it had to be both distinct from the laws of the continent and also uninterrupted within England. It had to either encompass or supersede all local

98. See generally MICHAEL KAMMEN, *EMPIRE AND INTEREST: THE AMERICAN COLONIES AND THE POLITICS OF MERCANTILISM* (1970); RUDOLPH ROBERT, *CHARTERED COMPANIES* 94-120 (1969).

99. See GRIFFITHS, *supra* note 91, at 99 (quoting 5 *THE CAMBRIDGE HISTORY OF INDIA* 182 (1929)).

100. See 6 *ENCYCLOPEDIA BRITANNICA* at 164 (1970); BLOMLEY, *supra* note 84, at 73.

101. See BLOMLEY, *supra* note 84, at 73, 75-77.

102. See BLOMLEY, *supra* note 84, at 74.

custom. It had to be coterminous with the history of England, co-extensive with English territory, and common to all of England.¹⁰³

These needs were at loggerheads. On the one hand, the "common law" that served England since time immemorial was local, fragmented and historically discontinuous. It was not uniquely English, nor did it encompass all of English practice. Instead, it was a bricolage of local customs, autonomous courts, independent legal practices and foreign imports. On the other hand, the comprehensive, consistent and conclusive common law that Coke masterfully expounded was a creation of the genius of his own era. To be sure, Coke's common law drew on the ancient traditions of the shire and hundreds courts, the manorial courts and the justice of the cities, but it necessarily drew on them selectively. Perhaps every part of the common law Coke advanced had been practiced *somewhere* in England at some time in its history, but no part was practiced everywhere, nor was all of it practiced anywhere.

In order to establish the comprehensiveness of the common law, Coke and the common lawyers had to deny the distinctiveness of local institutions and customary law. Yet at the same time they had to assert that very distinctiveness in order to give the common law the organic connection to England that would distinguish it from Roman or Justinian law. The effacing of local custom was therefore, "an ambiguous move . . . the local customs [that were to be effaced] . . . were [also] those that supposedly provided the 'communal' underpinnings to the common law."¹⁰⁴

The contest between the common law and the royal Prerogative Courts was not, then, a contest between centralization and decentralization of power, but instead between different projects of centralization. One project employed the positive authority of the Crown to create new institutions. The other sought to assimilate the older institutions, rationalizing them and bringing them under a comprehensive organization, while at the same time retaining and exploiting the legitimacy of their antiquity and organic pedigree.

The latter strategy produced the more resilient institutions. The Prerogative Courts were later abolished and the Chancery, which administered the law of equity, only barely survived.¹⁰⁵ The assertion of the local and the organic was a part of a successful strategy of centralization.

103. *See id.* at 75.

104. *Id.* at 76.

105. The chancellor's courts were later absorbed into the common law courts in 1873. *See* 6 *ENCYCLOPÆDIA BRITANNICA* 165 (1970).

The consolidation of English territorial jurisdiction mirrored Coke's construction of the common law. In a process remarkably similar to the jurisdictional modernization of Siam, the post-Conquest regimes brought the multiplicity of autonomous institutions into the service of a national government. Pieces of the previously autonomous institutions were enlisted as organs of the centralized nation:

[M]any local institutions . . . began to change from an element within a localized and relatively autonomous set of legal institutions and practices to a component within a national system. They became, for the first time, component parts of the "local state," charged with the "bottom-up" task of collecting spatial information on crime and disorder, and the "top down" task of administering central law. . . . [T]heir new location [was] within a "vertical" system of spatial surveillance and administration.¹⁰⁶

Towns and cities first became corporations limited by the terms of their charters and, later, simply governmental subdivisions.

The older territorial institutions were subordinated to the national government, but they were not always stripped of their uniqueness. Instead, their distinctive attributes were sometimes used to define the identity of English government. For instance, the majority of the members of the British House of Commons were drawn from the "ancient" local boroughs (rather than districts of equal population) until 1884.¹⁰⁷ Such a recognition of local jurisdictions is commonly seen as an antidote to the power of centralized government. But the political recognition of organic jurisdictions can also serve as a vehicle for the projects of centralized government.

Consider, for example, the extension of the organic conception of jurisdiction found in the English political theorist and statesman Edmund Burke's idea of "virtual representation." Until reform in the late nineteenth century, representation in the British House of Commons was not apportioned according to population. Instead, various local jurisdictions had the right to send members. Representation was *ad hoc*. Some cities had representation while others did not, and those cities with representation varied greatly in size and importance.¹⁰⁸ This understandably led to agitation for the extension of the franchise to the unrepresented towns. Although Burke supported the extension of the franchise in some cases, he rejected the familiar conception of political representation that

106. BLOMLEY, *supra* note 84, at 78.

107. See 17 *ENCYCLOPÆDIA BRITANNICA* 383 (1970).

108. See *id.*

holds that every citizen must have an equally weighted vote. According to Burke, good parliamentary representation should guarantee that all of the *interests* of the people were represented, not all of the people themselves. Burke surmised that any community would be well represented in government as long as *any* representative shared its *interests*: "Although the city of Birmingham elects no members to Parliament, it can still be virtually represented there because Bristol sends members; and these are really representatives of the trading interest, of which Birmingham, too, is a part."¹⁰⁹ Birmingham would be "virtually represented" by the Bristolite.

It was unobjectionable, in Burke's scheme, that while Bristol and Birmingham "shared" a representative, another jurisdiction may have a representative all to itself. It was equally unobjectionable that another jurisdiction may be far smaller in population and yet have the same number of representatives. The entity represented was to be the jurisdiction, or more precisely, the interest, not the individual.¹¹⁰

One commentator complained that, in Burke's scheme, one did not need elections at all. "If a citizen does not need a vote to be well represented, why should any citizen have votes?"¹¹¹ Perhaps this criticism is unfair. We may conclude that some actual representation is necessary to ensure that the popular House has access to, and an incentive to act on, accurate information about the needs and preferences of the people as a whole.¹¹² But one may well ask: "Why represent separate jurisdictions?" Burke tacitly assumed an organic fusing of territory and a specific, easily defined interest. Although Burke envisioned that many jurisdictions could share an interest — Bristol and Birmingham are both "trading cities" — Burke's virtual representation seems to exclude the possibility that many interests may compete within one jurisdiction, or that interest and jurisdiction may not coincide at all. Since Burke is concerned with representing conceptually defined interests — not places — Burke's representational scheme must consider geography a proxy for interest.

So why assume, as Burke does, that the salient interests are arranged territorially? Nothing in his idea of virtual representation

109. See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 174 (1967).

110. See, e.g., EDMUND BURKE, *Letter to Sir Hercules Langrishe*, in 4 *THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE* 241, 293 (Boston, Little, Brown and Co. 1869) (1792); PITKIN, *supra* note 109, at 174-75; see also SACK, *supra* note 23, at 131.

111. Robert M. Hutchins, *The Theory of Oligarchy: Edmund Burke*, in 5 *THE THOMIST* 61, 65 (1943).

112. Indeed this is Burke's response. See PITKIN, *supra* note 109, at 177-78.

requires the representation of boroughs *as boroughs* and much counsels against it. If it is *interests*, and not individuals, that are to be represented, would it not be better simply to elect a representative of the particular *interest* in question — a representative of trading interests rather than a representative of Bristol who “virtually represents” Birmingham? A Burkean may object that we cannot, in advance, identify the interests that should be represented. Perhaps not, but that is precisely what Burke’s virtual representation requires us to do. How else are we to know which jurisdictions can be virtually represented and by whom?¹¹³

In Burke’s scheme, the organic jurisdiction functions as a technique of the central government. Virtual representation does not *discover* the relevant political interests, but instead must *define* them. But geography does serve an important *ideological* function in Burke’s scheme: it makes the represented interests appear objective, natural and hence uncontroversial. Imagine the popular reaction if, rather than selecting the boroughs to be represented in the House of Commons, parliament were to have explicitly decided that certain *interests* were worthy of representation and others were not, or that certain interests deserved a greater say than others. Because the boroughs preexisted Burke’s scheme — some were called “ancient” — the interests he identified also seemed of ancient pedigree and status. Behind Burke’s description of political interests lies the implication that a given interest self evidently belongs to a given jurisdiction or number of jurisdictions. The subtle suggestion that geography itself defines the interests in question makes Burke’s scheme rhetorically palatable.

The division of the body politic into organic territorial jurisdictions, then, can be seen as a part of a highly centralized scheme of political control — a scheme that recognizes particular interests and fails to recognize others and that defines and organizes groups through political territories. No matter how well intentioned and sincere the attempt to define the interests and their territories, the attempt is anything but neutral or apolitical. Similarly, the idea of organic jurisdiction — a territorially defined organization that is also defined by specific interests — can be a conceptual abstraction and a governmental technique, no less so than the abstract space of the synthetic grid.

113. See *id.* at 174-75.

C. *Common Law, Common Themes*

In the divergent national contexts of Thailand, France and England the evolution of territorial jurisdiction exhibited some common features. In all three cases the centralization of power was accompanied by the creation of local jurisdictional subdivisions. And in each case the national elites seem to have confronted local difference with ambivalence. Local difference threatened national solidarity. But in some cases the nationalists actually produced and emphasized local difference through territorialism. They, like the European nationalists described by Thomas Heller, were

primarily *bricoleurs* They pasted together national communities from selected bits of the familiar social order and cautious allusions to putatively natural distinctions they found in the popular consciousness. The pre-modern nongovernmental order of church, class, guild, corporation, and family . . . *were defended and established by the nation-state as the defining features of national identity*. State resources financed their growth and reproduction. State powers were delegated to them to assure and, in many cases, increase their continuing relevance. . . . [T]heir particular roles in governance and the organization of everyday life were the stuff from which national communities of character and obligation were articulated.¹¹⁴

On the one hand, autonomous local institutions based on experience and proximity were being replaced with or transformed into capillaries of the national government. But at the same time, these institutions had to retain certain elements of the local and the organic. Their surveillance function was more than simply that of the spy or imperial mole, an agent who stands apart from what it records. Instead, the local jurisdiction bore witness to its *own* identity. Rather than surveillance and reporting, the function was that of confession and autobiography.

D. *Jurisdiction American Style*

During the past century, local society has become part of a national economy; its status and power hierarchies have come to be subordinate parts of the larger hierarchies of the nation.¹¹⁵

It is commonly asserted that American political history is characterized by the progressive centralization of power at the expense of locally distinctive political communities such as the states and

114. Thomas C. Heller, *Modernity, Membership, and Multiculturalism*, 5:2 STAN. HUMAN. REV. 3, 48 (1997).

115. C. WRIGHT MILLS, *THE POWER ELITE* 39 (1956).

local governments.¹¹⁶ Often implicit in this analysis is an understanding that territorial control is primarily exercised through homogenization and the assimilation of local difference. As we have seen, the relationship between centralized power and local political territorialism was more complicated in other national contexts. The same is true in the United States. Of course, a good deal of centralization did take place, as the typical view supposes. But centralization and the repression of local difference is only part of the story. Simultaneously, local difference was being produced and enshrined, not only as an act of resistance to centralized power, but also as a mechanism of the centralization of power.

American jurisdictional development differed from that of both Thailand and Europe in significant ways. In the United States a much weaker state bureaucracy and national elite was overshadowed in importance by a mobile, free market oriented and culturally anarchic civil society.¹¹⁷ Communal relationships were understood as private rather than as within the domain of the state.¹¹⁸ National culture was fractured and national citizenship was thin. In this context, the "centralization" of jurisdictional control entailed the disruption of local communal power in favor of individual mobility and the dominance of the private economic market. The same American republicanism that rejected the Anglo mercantile corporation also distrusted its cousin, the municipal corporation.¹¹⁹ This ideology sought to control local government by narrowing its influence on social life and by subordinating it to

116. This assertion is common to many discussions of postwar American society. American federalism and the self-styled "communitarian" movement decry the "loss of community" in American society. See, e.g., AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN AGENDA* (1993); ROSABETH MOSS KANTER, *COMMITMENT AND COMMUNITY* 169-75 (1972) ("Developing a distinctive culture . . . is much more difficult today than in the nineteenth century.") MILLS, *supra* note 115; Phillippe Aries, *The Family and the City in the Old World and the New*, in *THE CHANGING IMAGES OF THE FAMILY* 29 (Virginia Tufte & Barbara Myerhoff eds., 1974) (arguing that the city "lost its vitality" when the state "wiped out . . . frontiers" with the result that governmental "scrutiny and control extend . . . into every sphere of activity"). Some authors go further and claim that modern society generally is characterized by the centralization of numerous aspects of social and political life including the economic (through global capitalism), the cultural (through the mass media), and the political (through the national bureaucratic state) realms. See, e.g., MANUEL CASTELLS, *THE CITY AND THE GRASSROOTS* 318-31 (1983).

117. See, e.g., DUNCAN KENNEDY, *Radical Intellectuals in American Culture and Politics or My Talk at the Gramsci Institute*, in *SEXY DRESSING ETC.* 1, 19-20; Heller, *supra* note 114, at 15-18.

118. See generally Heller, *supra* note 114.

119. See MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT* 123-50 (1996). Sandel notes that cities and European mercantilism were virtually synonymous in the republicanism of Madison; the two worked hand in glove and both threatened to erode the civic virtue of the American people. *Id.* at 137.

larger units of government with correspondingly thinner social commitments.

1. *A Synthetic Social Fabric*

American jurisdictional development was marked by synthetic sub-national jurisdictions. These synthetic jurisdictions served both to strengthen the federal government and perhaps more importantly, to support the homogenizing influence of industrial capitalism. Even the states are at times understood as synthetic territories. Despite constitutional protections¹²⁰ and the representation of states as states in the Senate — suggesting an organic conception in which each state is unique and primary — the states are generic in status. The Constitution names no specific states, and Article IV, Section 3 allows for the addition of new states, reflecting the self-image of a growing, dynamic and mobile nation, a nation of *Gesellschaft* communities and convenient jurisdictions.

Further evidence of the synthetic nature of American jurisdictions appears in the Northwest Ordinance of 1787, passed under the Articles of Confederation. Based in part on Thomas Jefferson's 1784 plan for governance of the Western Lands ceded by Virginia to the federal Congress, the plan for the Northwest Territories established the grid as the spatial template for jurisdictions:

[T]he territories in the Northwest were expected to be subdivided according to lines parallel to those of longitude and latitude, and these were to form components of the states' boundaries when feasible and the boundaries for practically all of the county, township, and private parcels of land. This rectangular land survey system was to be used subsequently through much of the West.¹²¹

This conception of jurisdiction was only possible through the intersection of modern cartography and political liberalism. Without the synoptic conception of space provided by the map it would have been impossible to anticipate the creation of jurisdictions years before any known settlement took place in territory that no English speaker had even seen. But more importantly, it would have been impossible to conceive of jurisdictions in advance of actual settlement without an *abstract and generic conception of jurisdiction*, a conception in which any jurisdiction can be thought of abstractly, as like any other. Generic jurisdictions are not designed to serve spe-

120. See, e.g., U.S. CONST. art. IV, § 3, cl. 1 (states must consent to be divided or merged); U.S. CONST. amend. X (all powers not specifically granted to the federal government are reserved to the states).

121. SACK, *supra* note 23, at 150; see also MARK MONMONIER, *DRAWING THE LINE, TALES OF MAPS AND CARTOCONTROVERSY* 112-15 (1995).

cific social groups or further specific local interests. Instead, they are designed to serve a mobile population of individuals who will form generic and fluid communities, each morally equivalent and fungible. Each jurisdiction provides more or less the same services and each is in more or less the same relationship to individual citizens and to centralized government.

In revolutionary France, a proposal to create administrative jurisdictions of equal *population*, as opposed to equal area, was rejected on the ground that it would require the constant redrawing of districts as the population changed.¹²² The nameless French jurisdictional visionary who advanced the idea would perhaps be gratified to learn that, almost 200 years later, his proposal was adopted in the nation that inspired the French revolution.

Of course I refer to the reapportionment of American congressional districts. The epitome of the synthetic jurisdiction is found in territorial divisions designed to facilitate elections. Although nothing in the text of the Constitution requires states to elect their representatives through equipopulous electoral jurisdictions, most of the original thirteen colonies had strict districting requirements designed to equalize population as early as 1780.¹²³ Moreover, the Constitution mandates reapportionment of representatives according to population every ten years.¹²⁴ Both of these facts suggest that the American conception of jurisdiction was similar to that of the French in at least one crucial respect: jurisdiction was designed to mediate between the individual citizen and the national government and to reflect the principle of individualism and egalitarianism. It was the individual first and foremost that was to be represented; the jurisdiction had no moral weight of its own.¹²⁵

Although many states had equipopulosity requirements for electoral districts, as the nation grew some states sacrificed equal populosity in order to achieve other goals such as the representation of existing subdivisions and regional interests, and after the enfranchisement of African Americans, the division or dilution of the vote based on race.

122. See Konvitz, *supra* note 69, at 6.

123. See SACK, *supra* note 23, at 149; D. Lutz, *The Theory of Consent in Early State Constitutions*, 9 *PUBLIUS* 11, 25 (1979).

124. See U.S. CONST. art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several states . . . according to their respective Numbers The actual Enumeration shall be made . . . within every subsequent Term of ten Years.").

125. See Gerald E. Frug, *The City as a Legal Concept*, 93 *HARV. L. REV.* 1057, 1076 (1980).

At times, these goals led decision makers to produce electoral districts of radically unequal size. In the companion cases *Westberry v. Sanders*¹²⁶ and *Reynolds v. Simms*,¹²⁷ the Court held that at least roughly equipopulous congressional districts were required by Article I, section 2 and by the Equal Protection Clause of the Fourteenth Amendment. Four years later, in *Avery v. Midland County*,¹²⁸ the Court held that the equipopulosity requirement applied to elections held for general purpose municipal governments. And in *Board of Estimate v. Morris*,¹²⁹ the Court reinforced its earlier holding, striking down the legislative body that had served the five boroughs of New York City since its incorporation on the ground that its members were elected from jurisdictions of unequal population.

Board of Estimate v. Morris, one of the latest in the line of "one-person, one-vote" Supreme Court decisions, is also the most striking example of the judicial embrace of what one might call the synthetic jurisdictional grid. From 1907 — nine years after the incorporation of New York City — until its Court-ordered demise in 1989, the Board of Estimate served as the primary legislative body in New York City. The Board of Estimate reflected an organic conception of borough jurisdiction. Composed of one member elected from each borough and three city-wide members, it allowed each borough member an equally weighted vote, regardless of the population of the borough. *Morris* effectively mandated the transformation of greater New York City, from a metropolitan confederation government that institutionalized the uniqueness of its five constituent boroughs, to a fully consolidated municipality in which the boroughs were reduced to inconsequential units of convenience.

These decisions illustrate the synthetic conception of jurisdiction. In each instance, an organic conception of jurisdiction would have justified representative jurisdictions of unequal size. Organic social groups may vary in size but deserve equal representation as groups. Yet in each instance, the Court decided to sacrifice the notion of organic group representation in favor of individually oriented regularization. These decisions rejected the idea that groups of unequal population may deserve representation on equal footing *as groups*. They subordinated group representation through or-

126. 376 U.S. 1 (1964).

127. 377 U.S. 533 (1964).

128. 390 U.S. 474 (1968).

129. 489 U.S. 688 (1989).

ganic jurisdictions altogether in favor of the representation of *individuals* through convenient jurisdictions.

This would seem to be strong evidence for the centralization narrative. Arguably, one important consequence of the centralization of power is the destruction of sub-national affiliations that might interfere with fostering national patriotism and the needs of a national economy. The synthetic mode of jurisdictional formation reflected in reapportionment requires citizens to express their political concerns and ambitions in terms of the isolated and autonomous subject. Activity as a member of an enduring political community or group and even long-term alliances are fractured by arbitrary borders that may be periodically redrawn. No affiliation is so important that it cannot be destroyed in the next reapportionment. Although it is occasionally recognized that groups, not individuals, elect representatives and influence public policy,¹³⁰ the synthetic mode of jurisdictional formation endeavors to render such groups transitory, ephemeral and random. It seeks to reduce political groups and group-based identification with territory to episodic occurrences or instrumental tactics.

In this sense, the synthetic jurisdiction constructs a particular type of political subjectivity: a subject whose primary affiliations are either much smaller or much larger than the local community. It encourages privatism — the inward-looking orientation toward self, home and immediate family — and nationalism — the broader-looking affiliation with the nation. The nation, then, is the political entity that the synthetic mode insists is of primary importance. In short, the synthetic mode discourages affiliations that intermediate between the individual (or family) and the state.¹³¹ Moreover, the synthetic jurisdiction regularizes the relationship between individuals and the central government. By insisting that each jurisdiction is morally equivalent, the synthetic mode facilitates a regular and mechanical administration of policy that need not consider the specifics of community or place.

The “one-person, one-vote” rule reflected more than a simple vindication of liberal individualism. It also formalized a strictly synthetic conception of representative jurisdictions, the doctrinal counterpart of a regimented jurisdictional grid.

Evidence of governmental centralization is also found in the history of “general purpose” jurisdictions, such as the states and local

130. See *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., dissenting).

131. *Accord Frug*, *supra* note 125, at 1076, 1089.

governments. From the beginning, many American colonies were synthetic jurisdictions, defined by abstract, metrical space. For instance, "[t]he first charter of Virginia . . . established a jurisdiction over a territory carved out by lines of latitude, between 34° and 45° North and up to 100 miles off shore."¹³² Other American charters were similarly abstract in their definition of territory. Although many charters allowed for experimentation and flexibility in the creation of jurisdictional subdivisions (often granting the founder absolute power to subdivide as he saw fit), others established elaborate jurisdictional schemes that mapped out subdivisions on paper before a single colonist had set foot in the territory.¹³³ For example, the 1669 plan for Carolina¹³⁴ anticipated the revolutionary subdivision of France in its almost mathematical conceptualization:

The whole province shall be divided into counties; [forming squares] each county shall consist of eight signiories, eight baronies, and four precincts; [and] each precinct shall consist of six colonies Each signiory, barony, and colony shall consist of twelve thousand acres . . . so that in setting out and planting the lands, the balance of the government may be preserved.¹³⁵

Such a comprehensive jurisdictional blueprint was not the only possible way to delegate political power. One might have waited for actual settlements and empowered them as jurisdictions as they emerged and grew. In fact, other colonial jurisdictions did emerge in response to organic social settlement. Early New England towns, for instance, were closed societies, often comprised of a single religious group. "The New England town was a parish with civil authority grafted on."¹³⁶ Town lands belonged initially to the founding settlers, and newcomers had to be approved by the townsmen before they could settle in the community and hold land. Some towns required that local magistrates approve new settlers, others required the blessing of the Church. Most early New England towns forbade the sale of land to unapproved outsiders. In 1636, Boston enacted regulations limiting the stay of guests to fourteen days unless leave to remain was thereafter granted by local officials.¹³⁷ These requirements were designed to police the mem-

132. SACK, *supra* note 23, at 134.

133. *See id.* at 134-38.

134. The plan was possibly drafted by John Locke. *See id.* at 136.

135. 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 2772 (F.N Thorpe ed., 1909), *quoted in* SACK, *supra* note 23, at 136 (final alteration added).

136. SACK, *supra* note 23, at 140.

137. *See id.* at 141.

bership in an organic community. Local groups wished to exclude individuals with incompatible beliefs and limit local charity to insiders.¹³⁸ Accordingly, membership was presumed denied unless expressly granted.

As the population of New England grew larger and more mobile, this insular system of local membership became unworkable. In order to provide social services for a mobile population and to spread the burdens of poverty relief, local governments established a presumption in favor of permanent residency for individuals settled in the community for three months. Those individuals not "warned out" — discovered and expelled or found to be nuisance — would become permanent community members. This presumption was maintained and strengthened in the 1672 Articles of Confederation,¹³⁹ and eventually matured into the contemporary constitutional "right to travel" standard which eliminated durational residency requirements altogether for the receipt of local benefits and exercise of the franchise.¹⁴⁰ This evolution away from local control over residency reflects a profound shift away from a conception of organic, concrete, associational jurisdictions to one of synthetic, abstract, convenient jurisdictions whose function is primarily to provide a generic set of services to a mobile population.

The subsequent evolution of American local government law only continued the trend.¹⁴¹ In the early twentieth century, the American legal theorist John Dillon advocated a synthetic conception of local government.¹⁴² For Dillon, local governments were the convenient agents of state power, they had no status independent of the states of which they were a part. A state could "erect, change, divide, and even abolish [municipal corporations], at pleasure, as it deems the public good to require."¹⁴³ Against Dillon, others argued for a right to local self government based on the pre-legisla-

138. *See id.* at 141-42.

139. *See id.* at 142.

140. *See* *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (invalidating state law requiring one year's residence in a county for eligibility for nonemergency indigent medical care); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating state law requiring three months residence for exercise of the franchise in county election); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating state law that limited welfare benefits to those residing in jurisdiction for at least one year).

141. I owe this description of the evolution of Dillon's Rule to Gerald Frug. *See* Frug, *supra* note 125, at 1109-15.

142. John Dillon was the author of the first treatise on local government law and of the now canonical "Dillon's Rule" which calls for strict construction of local government charter powers. *See* JOHN DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* (1872).

143. *Id.* § 30, at 72.

tive status of local governments as organic communities and voluntary associations. They asserted that "local self-government does not owe its origin to constitutions and laws. . . . [I]t is a part of the liberty of community, an expression of community freedom, the heart of our political institutions."¹⁴⁴

Dillon won. In 1907 the Supreme Court in *Hunter v. City of Pittsburgh*¹⁴⁵ held that the federal Constitution provided no protection for local autonomy and no right to local self-government:

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers . . . as may be entrusted to them. . . . The state, therefore, at its pleasure, may modify or withdraw all [local] powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area . . . repeal the charter and destroy the corporation. All this may be done . . . with or without the consent of the citizens, or even against their protest.¹⁴⁶

Although the debate continued for several years, by 1912 the synthetic nature of local government advocated by Dillon was, "so well recognized that it [was] not . . . open to question."¹⁴⁷

2. *The Return of the Repressed: Organic Jurisdiction in American Government*

As we have seen, the history of American jurisdictions was, in many ways, the history of the centralization of power and the assimilation of difference. But the organic conception of local jurisdictions did not die. Instead it receded, only to emerge again in a mutated and resistant form. As early as the late nineteenth century, the advocates of local autonomy advanced amendments to state constitutions designed to protect localities from intrusive state legislatures.¹⁴⁸ The "home rule" movement attempted to provide localities with a *state* law guarantee of the right to self government that was rejected as a matter of federal constitutional law in *Hunter*.¹⁴⁹ Moreover, while the formal federal constitutional status of local governments remains that articulated in *Hunter*, localities have secured significant federal constitutional protection against federal and state level intrusion through seemingly inconsequential

144. 1 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 268, at 680-81 (2d ed. 1928).

145. 207 U.S. 161 (1907).

146. *Hunter*, 207 U.S. at 178-79.

147. WILLIAM B. MUNRO, *THE GOVERNMENT OF AMERICAN CITIES* 53 (1912).

148. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 150 (1985); Frug, *supra* note 125, at 1116-17.

149. See Frug, *supra* note 125, at 1116-17.

but actually dispositive dicta¹⁵⁰ and through tangentially related constitutional doctrines such as the private right to association.¹⁵¹ As Part III will demonstrate, the organic jurisdiction has been of pivotal importance in American political and social life.

III. JURISDICTION AS COVERT STATUS: IDEOLOGY AND HIERARCHY

I suggest that we think of liberalism as a certain way of drawing the map of the social and political world. The old, preliberal map showed a largely undifferentiated land mass, with . . . no borders. . . . Society was conceived as an organic and integrated whole. . . . Confronting this world, liberal theorists . . . drew lines, marked off different realms, and created the sociopolitical map with which we are still familiar. . . . Liberalism is a world of walls, and each one creates a new liberty.¹⁵²

The general juridical form that guaranteed a system of rights that were egalitarian in principle was supported . . . by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines. . . . The 'Enlightenment,' which discovered the liberties, also invented the disciplines.¹⁵³

Territorial jurisdiction is a foundational technology of political liberalism. It defines one of two essential units or "selves" of liberalism. The liberal concept of "self-government" collapses the formal power of a group (perhaps a "community") to control government with the marginal power of an individual to influence government: the two sovereign selves are the atomistic self of the individual and the communal self of civil society. Liberalism divides the royal body of medieval political theology in two: in the myth of Arthur, "the land and the King are one." In modern liberal

150. The most obvious example of such "stealth doctrine" is the consistent valorization of local control of public schools. Although local governments continue to be arms of the states as a matter of explicit constitutional law, they are implicitly semi-autonomous jurisdictions whose interest in self government can override the protection of constitutional rights of equal protection. See, e.g., Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1875-76 (1994) [hereinafter Ford, *The Boundaries of Race*] (discussing the tacit support for local autonomy in school desegregation case and school financing); Richard T. Ford, *Geography and Sovereignty: Jurisdictional Formation and Race Segregation*, 49 STAN. L. REV. 1365, 1382-83 (1997) [hereinafter Ford, *Geography and Sovereignty*] (discussing same in a different context); Joan Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 110 (describing the emergence of a "quasi-constitutional principle of local sovereignty").

151. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

152. Michael Walzer, *Liberalism and the Art of Separation*, 12/3 POL. THEORY 315, 315 (1984).

153. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 222 (1979).

ideology the body of the individual citizen is distinct from, but mirrored by, the body politic.

Just as liberal institutions such as individual rights help to define the boundaries of the liberal citizen, so the institutions of jurisdiction define the body politic. These walls of liberalism do in fact define liberty, but they do much more than this — they create the very entity that is to enjoy liberty. Both individual rights and the formal rules of jurisdiction are “technologies of the self”; they are discourses and concrete acts that define political selfhood and provide the model for biological individuals to “perform themselves” as (autonomous, rational, profit-maximizing, god fearing, desiring, willful, raced, sexed) selves.

This very process of self construction also facilitates, perhaps even requires, the covert, insidious side of the Enlightenment project: the institution of discipline. Like liberty, discipline also defines the self, but discipline defines informally. By conditioning behavior, it produces self identity through habituation. For example, recall the Tango analogy introduced earlier in this Article. The individual has a formal liberty to dance in any position or not to dance at all. This liberty partially defines the individual as free and self-made. But the individual is also disciplined and conditioned to accept the position to which her gender corresponds. The Tango imposes no formal injunction, but the process of self definition — the definition of the self, but not entirely *by herself* — occurs nevertheless.

Through both liberty and discipline a “wall” is built to define the individual and shape her behavior. Liberty and discipline both contain elements of “choice” and of “coercion.” The walls that define the subject create liberties and also facilitate social disciplines. In this way, the jurisdictional art of separation simultaneously creates “the liberties [and] . . . the disciplines.”

A. *Jurisdiction as the Production of Political Subjectivity*

*Territorial sovereignty defines peoples' political identities as citizens and forms the basis on which states claim authority over people and resources within those boundaries. . . . [And] modern states have increasingly turned to territorial strategies to control what people can do inside national boundaries.*¹⁵⁴

The foregoing pages amply support the proposition that jurisdiction is a tool of government. Jurisdiction was developed for the

154. Vandergeest & Peluso, *supra* note 40, at 385.

purposes of nation-building, for the coordination of governmental projects in geographically disparate areas, for the collection and organization of data, and for the legitimation of public policy. Yet governments need more than jurisdictions. They also need citizens: people who understand themselves as connected to governmental institutions in specific ways. Territorial jurisdiction functions to produce such citizen-subjects by encouraging people to behave and to think of themselves in particular ways and discouraging other modes of behavior and self-knowledge.

Territorial jurisdictions construct political subjectivity. The organic description constructs political subjects who understand themselves as — and in this sense in fact *are* — intimately connected in groups that are defended by territorial autonomy. This discourse encourages individuals and groups to present themselves as organically connected to other people and to territory in a way that requires jurisdictional autonomy. It requires that citizens assert, emphasize and even exaggerate their organic connections if they are to present a compelling claim for the creation and protection of their jurisdiction. The synthetic description, by contrast, encourages citizens to understand themselves as rational, highly mobile, modern individuals whose connections to land are instrumental and fungible. Legal discourse to some extent *creates* these dialogically opposed modes of human selfhood, such that an attack on a given jurisdictional arrangement can become an attack on the very subjectivity of the individuals who are invested in that arrangement.¹⁵⁵

The relationships so created are relationships of political status. Political theorists traditionally view status relationships as antithetical to liberal society; the displacement of status relationships by contractual relationships is a defining feature of political liberalism in particular and modernity in general.¹⁵⁶ But territorial identities serve as new types of status. They come with a set of rights and responsibilities that cannot be well understood as either voluntary or natural. To take an extreme but illustrative example, we do not believe that blacks living in the Jim Crow south volunteered for

155. This personhood type claim is evident, for instance, in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), in which the assertion that Satmar children were persecuted in majority Gentile schools was considered strong evidence in favor of the claim for a separate jurisdiction. It is no less powerfully evident in cases such as *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), in which the normative principle of "local control" was invoked to defeat an equal protection attack on the unequal distribution of public resources.

156. The classic assertion of this idea comes from Sir Henry Maine. See generally MAINE, *supra* note 6.

their subordinate condition "by choosing to live within the area of its authoritative application."¹⁵⁷ Nor, to take a contemporary example, is it plausible to describe the jurisdictionally wrapped bundle of inferior public services and high taxes that confront the ghetto poor as chosen. Even middle-class suburbanites only nominally choose the consequences of their residency in a jurisdiction. In tight housing markets people take what they can find and afford, while in weak housing markets people scramble for property that will hold its value. These economic constraints are overwhelming for most people.

Nor are the attributes of jurisdictional residence "natural." No particular set of rights and responsibilities naturally comes with residence in a given territory, and the boundaries of the territory itself are not natural.¹⁵⁸

The closest analogy to this type of "covert status" relationship is the contemporary nuclear family. Family relationships are generally presented as either voluntary contracts (marriage and adoption) or as natural and prepolitical (the "biological" bond between parent and child). Yet neither of these descriptions is satisfactory. Marriage has historically been a relationship of status. It continues

157. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 82 (1978) (Brennan, J., dissenting).

158. Three possible objections to my characterization of jurisdiction as status are worthy of note. First, perhaps not only *jurisdictional* relationships, but all social relationships in societies with entrenched social hierarchies are characterized by unwanted bundling. For instance, not only the home in a segregated jurisdiction, but also the lunch at a segregated counter must be understood as unwanted bundling. If I want the house, or the lunch, I have to take the segregation and the stigma. The critical point, however, is that jurisdictional statuses supplement or even replace many of the more overt types of status. In contemporary American social policy, one notion that justifies a good deal of illegitimate social hierarchy is that people choose their circumstances by moving to a particular jurisdiction. Through jurisdictional fragmentation, formally neutral laws can easily produce entrenched social hierarchy. See, e.g., Ford, *The Boundaries of Race*, *supra* note 150, at 1849-52.

Second, one may argue that bundling is not unique to jurisdictional relationships but is characteristic of many contractual relationships. For instance, markets are regularly characterized by captive submarkets. If I want the ball game or the movie I have to accept being captive to the lousy concession stand, etc. I would argue that the extent of bundling that occurs in jurisdictions is far greater than that in most other markets.

Finally, one could argue that the factor that accounts for increased bundling is, again, not jurisdiction, but land in general. Here one might argue that the natural spatial constraints of distance and proximity make bundling inevitable. If I want the house I have to take the easement or the covenant because the only way my neighbor can get the bundle he wants is for me to be stuck with the corresponding obligations. This objection does not undermine my larger point. Jurisdiction evolved from property relationships and so it is not surprising that the two bear a family resemblance. See discussion of Maine, *supra* section II.B. I do not wish to argue for a sharp distinction between jurisdiction and other territorial relationships that implicate governmental power (as property relationships undeniably do, see, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11-14 (1927) (recognizing private property rights as a form of sovereignty)). In fact, this Article has explicitly argued that jurisdiction is a social practice that involves both public and private institutions. See *supra* section II.C.

to be so at least to the extent that many terms of the standard arrangement are nonwaivable or intentionally made very difficult to waive. The traditional marriage imposed gendered positions within a hierarchy that could not be bargained around. And today, the marriage relationship is not a contract that any two otherwise competent parties can adopt. The status of spouse is unavailable to those who choose a partner of the same sex; those who wish to attain the *status* of spouse are required to choose a partner of a different sex.

Nor can the most important legal consequences of parenthood be explained by the bare fact of biological connection. There is nothing natural about the presumption that biological parents have custody over their offspring even against the will of the offspring themselves. Indeed the very notion of custody seems derived from a property relationship that is thoroughly legally constructed. There is nothing natural about the right of parents to control the religious and ideological upbringing of their children even against the wishes of neighbors, local communities and society at large — indeed such a right was probably unthinkable in the close knit communities that characterized most of human civilization until quite recently.

Likewise, the status of resident comes with a host of nonwaivable terms. Like marriage, it can be withheld depending on one's choice of personal associations.¹⁵⁹ And like the parent/child relationship, few of the legal implications of residence follow naturally from "the facts" — in this case physical presence or domicile in the jurisdiction.¹⁶⁰

1. *From the Great Strategies of Geo-Politics to the Little Tactics of the Habitat*

Of course jurisdiction, unlike the family, is a public institution. But many jurisdictions produce seemingly private social identities. Because American society was historically dominated by private social institutions, the development of American jurisdictions took on

159. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2, 9 (1974) (upholding local ordinance that prohibits cohabitation by more than two person not related by blood, adoption or marriage).

160. For example, because one lives in a jurisdiction, it does not follow that one should have to support the education of children in that jurisdiction, and only children in that jurisdiction. If the rationale is that residents will benefit from an educated population, such a benefit does not logically begin or end at the boundaries of the jurisdiction. If the rationale is a more general moral obligation as a member of a political community, then it is unclear why the obligation should end at the "necessarily arbitrary" borders of the local jurisdiction, rather than extending to the nation as a whole, or even beyond.

what we would today consider a distinctly private cast. This privatism — the promotion of individual mobility and contractual/market relationships — complemented the creation of territorial statuses. Private social groups used jurisdiction in order to maintain status hierarchies based on race and national origin, and because the groups were not a part of a formal state apparatus, the practices were defended as free association and the exercise of the right of contract.¹⁶¹ But governmental bureaucracies were actively involved in the creation of new jurisdictionally defined statuses. Government encouraged and facilitated the nominally private actions and expertly catalogued the social demographics that resulted. For example, federally subsidized home mortgages encouraged and even required homeowners to enter into racially restrictive real covenants. Federal officials catalogued neighborhoods according to their racial composition as part of an explicit policy to prohibit the use of mortgage subsidies in black or integrated neighborhoods.¹⁶²

Both the formal state and private social groups acted in concert as “government” in this respect. Not only did private actors draw on the power of the state to enforce status hierarchies through contract and property, but—more importantly perhaps—private actors and state institutions acted in tacit collusion to perpetuate a racial/territorial status hierarchy. Private actors supplied the content that would have been constitutionally impermissible if developed by the state, while the state supplied the coercive force of law, unavailable to private individuals. Therefore, rather than discuss the state defined in opposition to civil society, I will proceed with an analysis of government, understood to include both public and private actors that have a formal legal status or systematically exercise state derived power.

We could think of a continuum between larger and smaller territorial institutions, with the family at one pole and the nation-state

161. Racially restrictive zoning practices were constitutional until the landmark decision in *Buchanan v. Warley*, 245 U.S. 60 (1917). After that, private restrictive covenants were quietly encouraged by the federal, state and local government as an effective substitute and remained so at least until 1948, when they too were struck down in *Shelley v. Kraemer*, 334 U.S. 1 (1948). Incorporation of new municipalities also served to promote status segregation and hierarchy. See JACKSON, *supra* note 148, at 150-51 (asserting that the desire to avoid recent immigrants in the inner cities was one of the most important motivations for suburban incorporation); Richard F. Muth, *The Causes of Housing Segregation*, in ISSUES IN HOUSING DISCRIMINATION 3, 8 (1986) (noting the importance of restrictive zoning in “maintain[ing] segregation of suburban areas”).

162. See CHARLES ABRAMS, *FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING* 229-37 (1955).

at the other. Understood as government,¹⁶³ these institutions are homologous and continuous rather than sharply divided:

[W]hereas the doctrine of the prince and the juridical theory of sovereignty are constantly attempting to draw the line between the power of the prince and any other form of power . . . [it is] the art of government . . . to establish a continuity [A] person who wishes to govern the state well must first learn how to govern himself, his goods and his patrimony [and] when a state is well run, the head of the family will know how to look after his family, his goods and his patrimony [T]he central term of this continuity is the government of the family, termed *economy*.¹⁶⁴

Hence the jurisdictional plan of straight-sided territories established for the Western states mirrored the grid created for governmental homestead land grants and the gridiron plan of the American metropolis. Similarly, the identity of blood and race established in the family, the private identity of local membership and the public identity of national citizenship are continuous. Each is accomplished through a blend of voluntary and involuntary relations, each is anchored in a territory — home, locality, nation —

163. There is a risk that this use of the term "government" can slip into tautology. If government is understood too broadly, to become synonymous with "culture" or "society," then the assertion that "government mirrors society" becomes: "society mirrors itself." On the other hand, government in Foucault's sense denotes more than the formal institutions of the state. Foucault means to describe a broader set of institutions — of which those of the formal state may not even be the most important — that all operate in similar ways to produce a similar form of social control, discipline and organization. Foucault's most consistent examples are the school, the prison, the criminal justice system, the medical clinic, the military and the family. Each of these institutions encourages a particular type of regimentation, of which we consider the military and the prison to be paradigmatic. To take only one example, behavioral control is established through routine, repetition and surveillance. Social ritual is taught nightly at the family dinner table ("use the correct fork"); school teaches children through drills and repetitive exercises; both the prison and the military regiment daily activity to "reform" or "remake" the rank and file; even medical therapy generally involves establishing physical or mental routines. Each of these social practices is designed to produce and instill normal and habitual behavior — the prescribed activity becomes "second nature." See generally FOUCAULT, *supra* note 153; MICHEL FOUCAULT, *THE BIRTH OF THE CLINIC* (A.M. Sheridan Smith trans., 1973) (1963).

At this point, a brief discussion of "structuralism" is relevant. "Governmentality" could be interpreted as "deep structure" that lies beneath the institutions it describes. One might read Foucault to mean that the "logic" of governmentality secretly informs all institutions of the society, in each case producing the same inevitable result. This interpretation, while plausible, is unnecessary. Various institutions that operate in a given society or milieu may borrow techniques and practices from each other and may build on the techniques and practices of each other. For instance, the aircraft industry of World War II borrowed assembly line techniques from Ford Motors and thereby also produced workers who were good at assembly line work and who understood the division of labor. This in turn made other businesses more likely to model their practice on the division of labor. We may call this mode of production "Fordism." Nothing in this narrative suggests a "deep structure," but it does suggest more than coincidence or uncoordinated individual choices and something other than what we normally understand as coercion.

164. Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT* 87, 91-92 (Graham Burchell et al. eds., 1991).

and each is inexorably linked to a type of government — head of household, territorial local government, national sovereignty.

2. *Residence and Domicile: The Metaphysics of Territorial Presence*

All well and good, one may respond, but an institution like the family is primarily concerned with personal membership or status — territory is of secondary importance. In the case of public institutions this priority is reversed. Governments are defined by territory — personal membership is a side-effect of territorial dominion. Governments simply govern whoever happens into their territory.

On this view, jurisdiction is a simple relationship between government and physical territory: the goal of jurisdiction would be to establish dominion over a particular physical space. But this explanation, while partially accurate, is incomplete. Jurisdiction in fact defines a relationship between the government and individuals, mediated by space. Territory acts as a medium of governmental power as well as its primary object. Territory is, in this sense, a container that holds a bundle of individuals and resources, just as fee simple ownership of real property consists of a bundle of rights.

Moreover, the relationship between a territory and the individuals and resources it “holds” is not a natural or necessary correspondence. It is not a relationship of empirical fact but one of positive design. The first year student of property law learns that a subterranean gas reservoir “belongs” to a given piece of property only due to a set of contingent legal rules. The resources can be severed from ownership of the land on the surface and its status as property may depend on factors other than the status of the land immediately above it.

The contingency of the relationship between individuals and territory is much more pronounced. Individuals move more easily than most subterranean resources. An individual may occupy several cities within the course of a day and own property in several states or nations or “do business” in a number of jurisdictions. The assertion that an individual “belongs” to a particular jurisdiction for a particular purpose relies on a host of potentially controversial premises and arrives through scores of leaps of faith and logic.

In short, when we say that a particular resource or person is “present” in a jurisdiction, we mean both more and less than physical presence. It may be that the legally present individual is physically absent (as in the case of the fugitive from justice or the absentee voter), or that the physically present individual is legally

absent (as in the case of the homeless person without formal domicile or the undocumented alien). Jurisdictional presence is not physical but *metaphysical*. It is a relationship that refers to the physical and is analogous to the physical, but is something other than physical.

Legal presence does not simply follow from physical presence. For instance, in the United States, for the purposes of taxation, voting and access to most public services, the metaphysical presence at issue is formally defined as domicile or residence. One is metaphysically present in the jurisdiction of her domicile, even when she is actually walking the streets of a foreign city. Her presence in the place of residence is real for legal purposes. The physical location of her body is irrelevant. The notion of residence operates by analogy to physical presence. We assume that people are usually at home, that they care most about home, that they identify with home, and therefore we "find" them at home for legal purposes, even if they are physically somewhere else. It is as if a New Yorker were always in New York — where she resides — even when she is physically in Los Angeles.

The principle that the franchise and many other local rights and privileges may be limited to residents of a jurisdiction establishes a jurisdictional status or identity. The theory of residence is premised on a correspondence between residence and membership in a political community. But as a matter of political theory there is no reason that these two must correspond. The meaning of residence is overdetermined. Residential presence may indicate a decision to join a political community but it may also reflect a fungible investment in property; it may reflect agreement with the values and priorities currently dominant in the jurisdiction or a desire to intervene in changing those values and priorities.

Residence does not reflect natural connections between individuals, groups and territory. Nor does it simply formalize the voluntary choices of autonomous individuals. Instead, residence is a concept that stabilizes, by fiat, a necessarily uneasy relationship between mapped territories and an increasingly mobile and unknowable population. And it does more than this. By tying the individual to a stable referent — a fixed place — it creates for her a political *identity* that is only nominally chosen. The status of residence requires the citizen to accept a limited number of jurisdictionally "bundled" rights and responsibilities. Moreover, it requires the citizen to identify territorially, to define herself according to her relationship to territory.

B. *The Jurisdiction of "Local Knowledge"*

This section will explore the relationship between jurisdiction, political subjectivity and the assertion of local particularity. Specifically, it will respond in more detail to the belief that centralized power is exercised primarily by repressing local differences in favor of homogeneity and uniformity. It will argue that territorial power is exercised not only through repression or exclusion of difference and centralization, not only through homogenization or assimilation to a mean, but also through the *production* of difference.

The argument of this section parallels that of Michel Foucault in the classic *The History of Sexuality: An Introduction*.¹⁶⁵ Foucault argued against the common understanding that the institutions of bourgeois society from the Victorian era to the present have operated to repress the natural and authentic sexuality of individuals (the "repressive hypothesis"). Instead, Foucault argued, the Victorians were obsessed with sexuality, they saw it everywhere, they constantly discussed it, insisted on its relevance and deployed it as a description of many forms of human behavior. They *produced* sexuality by defining human behavior in terms of sexuality, defining individuals as sexed in various ways, and cataloguing and constructing sexual typologies. Far from repression, this *production* of sexuality was, according to Foucault, what defined the Victorian attitude toward sex, and this *production* of sexuality was a means of control. It was a technology that defined the self according to its sexuality, and thereby kept individuals under a type of sexual surveillance. Further, if anything repressed authentic eroticism — a term whose ontological status is, for Foucault, questionable at best — it was the incessant production of sexuality that limited the possibilities of erotic expression by imposing upon individual eroticism a narrow universe of sexual types.

Now let us turn to jurisdiction. Contemporary discussions of ethnic and cultural diversity characteristically involve a struggle between "universalism" or "common values" on the one hand and "cultural diversity" or "respect for difference" on the other. In the national context, those who favor "universalism" — actually nationalism — lament the fracturing of the nation into antagonistic factions, ethnic enclaves and oppositional subcultures.¹⁶⁶ They advocate a "return" to a common identity, a common purpose and a

165. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION* (Robert Hurley trans., 1978) (1976).

166. See generally ETZIONI, *supra* note 116; JOHN KENNETH GALBRAITH, *THE CULTURE OF CONTENTMENT* (1992); TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY*

common culture. By contrast, those who fear cultural homogeneity insist that cultural differences reflect the true and authentic expressions of organic social groups and that failure to respect these differences is a form of tyranny.¹⁶⁷ They advocate a strategy of resistance to cultural hegemony through the assertion of difference.

When the question of political territoriality is introduced into this debate, the consequences are predictable. Those in favor of solidarity seek to prevent the formation of culturally defined jurisdictional subdivisions, wrongly imagining that such divisions would be new and unprecedented and fearing that such divisions would hasten the fracturing of the nation.¹⁶⁸ Those who favor difference embrace jurisdictional "autonomy" as a means of protecting minority cultures from hegemonic oppression and compulsory assimilation.¹⁶⁹

In this conversation, the "repressive hypothesis" is that Power is exercised exclusively by those who would censor and repress cultural difference and impose a unitary and repressive common culture. But the analytic mistake that underlies this repressive hypothesis is shared by both sides of the debate. Both sides assume that there is an inevitable opposition between common identity and the assertion of difference. The universalists argue that the myopic assertion of difference stands between "us" and meaningful solidarity. Meanwhile, the champions of difference insist that the repressive project of solidarity must yield to respect for authentic cultural difference.¹⁷⁰

AMERICA IS WRACKED BY CULTURE WARS (1995); MICHAEL LIND, *THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION* (1995).

167. In the more shrill version of this position one hears terms such as "cultural genocide" and "fascism" employed with disturbing obliviousness to their historical referents.

168. See, e.g., *Shaw v. Reno*, 517 U.S. 899 (1996) (describing a North Carolina redistricting plan as analogous to racial segregation); *Miller v. Johnson*, 515 U.S. 900, 910-12 (1995) (striking down Georgia redistricting as racial gerrymandering).

169. See generally, e.g., WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989) (arguing that liberalism requires the accommodation of certain culturally distinctive groups through the creation of separate territories).

170. This local repression hypothesis takes on many forms. For example the "new federalism" involving the resurgence of support for "state's rights" implicates similar concerns. The supporters of expanded state autonomy argue for respect for state (and at times local) cultures, while the opponents stress the need for common values and national coordination. It is rarely noted that many of the strongest supporters of state's rights are members of the federal legislature. Few of these supporters embrace state autonomy consistently. Instead, they hope to reverse or block particular policies that are popular at the federal level — gun control, abortion rights, civil rights, environmental protection — by shifting the relevant forum to the state level. The supporters of national uniformity are no more consistent in this regard. The same people who insist on national uniformity in the context of civil rights for racial minorities will champion state's rights when it comes to gay marriages. Much of the new federalism amounts to rhetorically sophisticated forum shopping. The debate over

This section will critique the uncritical embrace of difference that characterizes a good deal of contemporary left or postmodern multiculturalism. I focus on this side of the debate for two reasons. One, I am personally allied with left multiculturalism and sympathetic to many of its goals. I hope to advance those goals in some small way by helping to defeat a bad strategy based on misconceptions, dogma and cant. Two, I hope that I have something new to say about the fetishism of difference, while most of what I would say against the "universalistic" — usually covertly nationalist — project (and I would say a good deal against it) has already been quite well put by others, to whom I am greatly indebted.

The *production* of difference was and is often a critical part of nationalist hegemony. Not only does nationalism require the well-chronicled production of differences among nation-states, but it also requires the production of difference *within* the national community. As we have seen, internal local distinctiveness often provides the cultural content that distinguishes one nation-state from another; in many cases, the national culture is more or less the sum of its local parts. Further, a nativist identity can be forged in opposition to internal foes as easily as against external enemies. National institutions are built and strengthened on the basis of reaction to internal sedition or cultural degeneration. History is full of nationalist wars against domestic enemies, both real and imagined. As proof, one need only name the Star Chamber, the Gulag, the House Committee on Un-American Activities. And as D.W. Griffith's notorious film reveals, racial *division* played the midwife's role in the *Birth of a Nation*.¹⁷¹

These examples demonstrate that national hegemony is not inconsistent with the assertion of sub-national difference. They should shame those who, while advocating new projects of national solidarity, blame the familiar racial or culturally defined victim for national decline. They should also warn racial and culturally defined groups that the language of difference and autonomy may be a trap.

The institution of jurisdiction does its most important work, not by repressing local difference, but by *producing* it, by dividing society into distinctive local units that are imposed on individuals and groups. The discourse of the organic jurisdiction encourages minority groups to seek out territorial autonomy as a means to resist the

state's rights rhetorically pits national uniformity against state autonomy, but, practically speaking, it concerns a number of ideological conflicts that cut across jurisdictional divisions.

171. THE BIRTH OF A NATION (David W. Griffith Corp. & Epoch Producing Corp. 1915).

power of an often hostile government and the hegemony of the majority culture. But separate territorial status rarely delivers on its promise of autonomy. Often, the subordinate group unwittingly conspires in its own continued subordination and participates in its own quarantine. A subordinate group may insist that it only wishes to attain the type of "autonomy" that members of the majority enjoy. But the position of security that the dominant group enjoys requires the subjugation of a subordinate group. No group can entirely control its own fate without also controlling other groups around it. The coveted position in question is not autonomy, but *hegemony* — a position that, by definition, everyone cannot occupy. Autonomy is a false promise because it promises access to a *space outside of power*, a safe haven from the threat of subjugation, control or influence by outsiders. Such a space does not exist.

1. *The Centralization Hypothesis*

It is often said that the history of modernity, the ideological history of something called "liberalism," is the history of centralization.¹⁷² According to this account, the modernist project was the project of rationalization, universalism, uniformity, order. Neighborhood businesses and artisans' guilds gave way to national and international conglomerates. Cottage industry gave way to economies of scale and the Fordist division of labor.¹⁷³ The clan yielded place to the province, which in turn was supplanted by the nation-state.¹⁷⁴ Landscapes and communities that were once varied and opaque became regimented and transparent to the eye of power: the Norman Conquest unified the tribes of England,¹⁷⁵ Baron Haussmann forced the labyrinth of medieval Paris to yield to the Grand Avenues of the modern city of light.¹⁷⁶

This account holds that the modern state struck out against local culture and particularity in every possible respect. It imposed national languages governed by uniform grammatical rules to smother local dialects and idioms.¹⁷⁷ It routinized the collection of taxes to crush local fiefdoms and supplant provincial clientelism. It eliminated local territories in order to facilitate the smooth application of justice and the free alienation of land. It prohibited the varie-

172. See *supra* note 116.

173. See DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* 125-40 (1989).

174. See generally Anderson, *supra* note 79.

175. See *supra* section II.B.2.

176. See, e.g., HARVEY, *supra* note 173, at 16-17.

177. See *supra* section II.B.1.

gated customs of dispute resolution in favor of uniform justice and universal rights. Each of these projects required centralization: a single sovereign, a uniform standard of measure, a common tongue, a common law. So the history of the modern era is the history of the centralization of authority, of economy and of culture. It is the story of the birth of the universal everyman and the suppression of the particular personality. It is the narrative of uniformity, homogeneity, the celebration of the one and the censorship of difference.

This, anyway, has become the standard account of things in disciplines as varied as human geography, ethnic studies and the history of law. It is an easy story to tell, if only because it coincides so well with such a variety of ideological precommitments. For the right, the death of localism is a product of the tyranny of intermeddling government, a Frankenstein's creation of liberal social engineering that defined the New Deal, the Warren Court and the Great Society. For the old left, the destruction of local particularity is nothing other than a symptom of industrial capitalism: the centralization of political authority serves the centralization of the means of production; a uniform and fungible political subjectivity follows the reduction of human labor to fungible capital and the reduction of human needs to fungible commodities. Meanwhile, the social movements of the new left lament an inexorable centralization of power as the active repression of (counter) cultural difference and subversive identities; Washington, D.C. represents the repressive injunction to adopt the voice of "middle America" and the establishment, to accept the disciplinary image of the "reasonable man," the men in gray suits, or simply, "the man."

Historically, modern cartography played a critical role in this relentless governmental centralization: "Cartography became inseparable from the affirmation of monarchic power The king could now sit in his chamber and 'without troubling himself greatly, see with his eye and touch with his finger' the expanse *and diversity* of his territory — without having to travel at all."¹⁷⁸

Diversity? But wasn't this diversity precisely what was wiped out, crushed, assimilated? This passage suggests that centralization tells only part of the story. Always buried within these narratives of inexorable, unmediated, unmodified centralization, one finds a glimpse of its opposite: an explosion of differentiation, the production of ever new categories that are represented as "merely descrip-

178. Jacques Revel, *Knowledge of the Territory*, 4 *SCI. IN CONTEXT* 133, 150-51 (1991) (quoting R. HERVÉ, *L'OEUVRE CARTOGRAPHIQUE DE NICOLAS DE NICOLAY ET D'ANTOINE DE LAROL (1544-1619)* (1956)) (emphasis added).

tive" mappings. No doubt, there was a trend toward centralization that characterized a significant program of modern government; universalism was imposed, difference was punished and censored. But there was also, and to a significant extent, the opposite phenomena: typology, sorting, differentiation to an ever more "precise" and infinitesimal degree, a carving up into distinct parts. This too is the legacy of modernity and of liberal democracy.

This paradoxical differentiation cannot be fully understood as "resistance." The point is not that the members of organic social groups managed, by their tenacity, to cling to local customs despite the imposition of the common law and central courts,¹⁷⁹ it is not that villages and provinces stubbornly continued to speak dialect in the face of sanctions for failure to speak the language of the state,¹⁸⁰ it is not that villages and townships retained their unique character in the face of urban consolidation. Alongside these well acknowledged acts of resistance, but hidden in the shadows, was the active *production* of localism, the creation of territorially structured differentiation through the institutions of modern government: the state, the corporation, the university and the jurisdiction.¹⁸¹

Thus it may be said that localism itself, localism in all of its particularity and difference, was the child, rather than the enemy, of the modern state.¹⁸² Alongside the well chronicled attempt to stamp out local particularity, we also have the production, creation, definition and interrogation of the local in its territorially located specificity. "The local" as a concept, as a category, as a significant object of concern, is the product of a governmental discourse whose goal was to catalogue, define and manage a territory by dividing it into knowable and distinct parts.

2. *Localism as Discursive Effect*

[The Great Khan owns an atlas where all the cities of the empire and the neighboring realms are drawn]

"I think you recognize cities better on the atlas than when you visit them in person," the emperor says to Marco, snapping the volume shut.

And [Marco] Polo answers, "Traveling, you realize that differences are lost: each city takes to resembling all cities, places exchange their form, order, distances, a shapeless dust cloud invades the continents.

179. See *supra* section II.B.2.

180. See *supra* section II.B.1.

181. It is no accident that all of these institutions at one time answered to the same name: corporation. See, e.g., RICHARD SENNETT, *FLESH AND STONE* 202-03 (1994).

182. Though to be sure children are known to rebel against their parents.

Your atlas preserves the differences intact: that assortment of qualities which are like the letters in a name."¹⁸³

It is true that the conditions of everyday life that are offered as evidence of "local culture" existed chronologically prior to any inquiry by a central government. But *conceptually*, these conditions did not preexist government inquiry — they did not exist as objects of study or interest. They were context and background, taken for granted or simply ignored. Rather than the defining characteristics of a localism that was celebrated or condemned, these conditions were simply the conditions of existence for some group of people at a given moment in time. They were facts, but facts without meaning in the absence of context. For instance, it is a "fact" that as I write these words I am wearing a black suit, but this probably "means" very little to you. If, on the other hand, you were to hypothesize that a black suit symbolized something, like "black power," "post modernist artisto-symp," "reservoir dog," or "federal agent," then the suit would have *acquired* meaning through your act of interpretation. You might then write a magazine article about "the real men in black" which would provide additional data: "Cynical postmodern thirty-something technofetishist with a penchant for mid-century modern design and style." My black suit would have been transformed from a mere fact into a *characteristic*, a fact imbued with social meaning that identifies or defines a social group.

Although my black suit preexists the magazine article chronologically, the *meaning* of the suit as a uniform of the "real men in black" does not preexist the media disquisition. I may well only know my "community" through the media's construction. Suddenly I "realize" that I wear a black suit, not because black is flattering and doesn't show coffee stains, but because I am a member of a local culture that favors black suits. At that point, other "facts" about my life might fall into a profile: a love of mid-century jazz becomes part of a penchant for cultural and aesthetic modernism, the Apple Powerbook that contains this Article becomes a symptom of technofetishism. Add a territorial classification, "these *noir* clad neo-modernists hail from Northern California," and you have a full blown local culture.¹⁸⁴

183. ITALO CALVINO, *INVISIBLE CITIES* 137 (1972).

184. Note that the local culture can absorb a wide range of new and even inconsistent facts: smoking is a retro-hip affectation (rather than an addiction), not smoking demonstrates that one is "beyond hip" (rather than simply health conscious); ownership of a mobile telephone is evidence of technophilia and links to the fast paced communications grid, non-ownership of the cell phone is evidence of a hyper cool disdain for technological overload, an

This is "the discursive production of localism."¹⁸⁴ "Discursive production" is different from "social production." Social production simply means that the object of study is not naturally occurring but is instead the product of a particular society. While localism is socially produced, such an observation is uninteresting — no one thinks otherwise. "Discursive production" denotes something more: that localism generally — the idea of localism, and any given local "culture" or locality — may be an artifact of some observer who identifies it, records it and interrogates it *for some purpose of the observer's*. Localism on this account is not itself an attribute, but is instead a *process*, a process that turns a set of attributes into characteristics of a type, elements in a taxonomy.¹⁸⁵ The representational medium through which governments record and categorize locality is the map; the legal mechanism by which governments create and manage locality is the political jurisdiction.

C. Racism's Borders: Jurisdiction as Social Quarantine

"Good racial government" . . . requires information about racial nature: about character and culture, history and traditions, that is, about the limits of the Other's possibilities. . . . *[The Other] may be employed but only as informant The spaces of the Other* — the colonies, plantations, reservations, puppet governments and client states, the villages and townships, or the prisons, ganglands, ghettos, and crowded inner cities — *become the laboratory in which these epistemological constructs may be tested*. . . . Knowledge, accordingly, is socially managed. . . .¹⁸⁶

The organic jurisdiction appears to recognize the uniqueness of various social groups, and their connection to a territorial homeland, a sphere of cultural belonging, a place. This has led many to celebrate the construction of organic jurisdictions and to articulate claims for social justice in terms of separation and jurisdictional au-

aesthetic decision to simplify one's lifestyle, a super-elite nonchalance ("someone else handles your calls") rather than a limited budget.

185. Michel Foucault makes a similar point regarding the social sciences in general using the "Chinese Encyclopedia" of Borges's imagination, in which "animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from along way off look like flies." MICHEL FOUCAULT, *THE ORDER OF THINGS* xv (1973). The simple point is that such a taxonomy, so different from any that we recognize as logical, could, in a vastly different social milieu, exist. The categories, although strange, are "true" — they "can be assigned a precise meaning and a demonstrable content What transgresses the boundaries of all imagination, of all possible thought, is simply that alphabetical series . . . which links each of those categories to all the others." *Id.* at xv-xvi.

186. DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* 150-51 (1993) (emphasis added).

tonomy. Even in the highly urban, industrialized and culturally polyglot societies of the Western capitalist democracies, the assertion of organic cultural community is appealing. Evoking a fairly direct analogy to a historical or mythical homeland or place of origin, the desire for a safe space of jurisdictional autonomy resonates with the often understandable desire for cultural nationalism and ethnic autarchy.

But the organic jurisdiction can be as much the product of centralized power as the synthetic: each serves a unique purpose in the structure of government. Organic jurisdiction divides society into groups that need no further justification. The explanation for the character of the group may be nature, culture or voluntarism, but the effect is to justify the uneven treatment of individuals by the state.

1. *The Jurisdiction of Apartheid*

The most notorious example of the oppressive production of difference is the apartheid of mid- to late-twentieth century South Africa (what I will call "late apartheid," to separate it from the cruder policies of the earlier twentieth-century regime).¹⁸⁷ What separates late apartheid from the Jim Crow laws of the American South is the intricacy of the former in both the architecture of the physical separation and its legitimation. In both its material and its ideological aspects, the separatist regime of South Africa was as marked an advance over American Jim Crow as the gas chamber is over the hangman's noose. These "advances" were primarily the result of jurisdictional production. In both its material and ideological effects, late apartheid marked a conspicuous expansion of jurisdictional strategies.

The pass laws that enforced a rigorous separation between white urban areas and black shanty towns are the globally notorious symbols of apartheid. More insidious was the elaborate system of ethnic homelands created by the South African government. These homelands or *bantustans* were both a material and an ideological program. The bantustans marked the formalization of South African racism and its translation into the language of natural "recogni-

187. It bears noting that the South African government did not itself refer to its new, improved version of racial separatism as "apartheid" but rather, in the manner of any good marketer, coined new terms for its noxious product: "separate development," "multinationalism," and the strikingly disingenuous "self-determination." See Anne McClintock & Rob Nixon, *No Names Apart: The Separation of Word and History in Derrida's "Le Dernier Mot du Racisme,"* in "RACE," WRITING, AND DIFFERENCE 339, 341 (Henry Louis Gates Jr. ed., 1986) (an excellent essay in its own right, but a failure as a response to Derrida).

tion" and, therefore, of inevitability. The *bantustan* policy effected the expulsion of black South Africans from developed urban areas — except on limited terms of benefit to whites — and from some eighty-seven percent of all land in the nation, including all of the most fertile and mineral rich property.¹⁸⁸ Black "citizenship" was imposed in the bantustans, with the logical consequence that blacks were stripped of the rights of citizens in the newly constructed white South Africa:

As the Minister of Bantu Development put it in a 1978 speech: "if our policy is taken to its full logical conclusion as far as the black people are concerned, there will not be one black man with South African citizenship." Since 1960, the government has forcibly resettled 3.5 million Africans and effectively deprived 8 million of their citizenship by means of statutes carefully worded to avoid defining citizenship on racial grounds.¹⁸⁹

Ideologically, late apartheid functioned by naturalizing racial difference and segregation. It accomplished this through the construction of a knowledge of the local. The homelands were both synthetic and organic jurisdictions: the Nationalist government deployed the technology of jurisdiction to *create* a set of "natural" territorial tribal divisions within the nation-state. Late apartheid marshaled a regulatory apparatus that was necessarily also a statistical apparatus, a social scientific apparatus and a cartographic apparatus. The apartheid state struggled to study, know, catalogue and map the races. This effort culminated in the construction of separate jurisdictional spaces that appeared to be their own justification.

The ethnic bantustans, comprised of eighty-one scattered homelands, entrenched, expanded and justified apartheid. Now forced segregation was rhetorically transformed into respect for difference. The domination of the few became a democratic confederacy:

[T]he bantustan system . . . serv[ed] the ideological purpose of justifying Nationalist claims that their policy is no longer one of racial discrimination but of safeguarding the sovereignty of distinct "nations." . . . By pointing to the ten bantustans, the government can claim that "numerically the White nation is superior to all other nations in South Africa. . . . It demonstrates the folly of saying that a minority government is ruling others in South Africa."¹⁹⁰

In late apartheid South Africa, each tribal nation was recognized, even celebrated, for its distinctiveness.

188. *See id.* at 348.

189. *Id.* at 350 (internal citations omitted).

190. *Id.* at 351 (final alteration in original).

Apartheid's use of the organic jurisdiction was not designed primarily to separate or even to exclude blacks from white South Africa. Blacks entered white areas on a daily basis in order to perform manual labor. The effect of the organic discourse was not to exclude, but to define and control. The claim was not that the bantustans were separate nation-states, but that they were separate nations *within one state*: the state of South Africa. They were organs of the state. The organic nationalism of late apartheid did not even offer the intuitively natural trade off: autonomy but at the cost of isolation. Instead it enforced subordination through the production of a structurally subordinate identity. Each organ occupied its natural place on a hierarchy, with whites at the top (naturally).

2. *American Apartheid?*

South African apartheid was unique in its comprehensiveness, its ruthlessness and the sophistication of its jurisdictional strategy. Nevertheless, it is not without parallel. In the United States, terms such as "urban poor" are almost synonymous with racial minority groups, particularly blacks. The "chocolate city/vanilla suburb" pattern is dominant in the popular consciousness, if not in the increasingly complex reality of contemporary metropolitan demographics. Not only is the "inner city" identified with African Americans, but particular jurisdictions are known to be "black cities": major urban centers such as Detroit, Washington, D.C., St. Louis and Oakland, but also smaller cities such as Chelsea, Massachusetts and East Palo Alto, California. There are also "Asian cities" such as Monterey Park, California and "Latino cities" such as Miami, Florida.

Of course no one literally is forced into any of these jurisdictions. In fact, in many cases people fought hard to establish them as minority enclaves.¹⁹¹ The hope was to create a safe space in which the minority group could flourish and enjoy autonomy. But "local autonomy" has not served historically subordinated groups well. Because local government autonomy is not constitutionally protected, these ethnic enclaves do not provide true autonomy. For instance, majority-black Chelsea, Massachusetts was placed into receivership against the will of its residents by the Massachusetts legislature — its elected representatives were stripped of all but

191. See, e.g., Michael Coakley, *Black Secessionists Hope Separate Means Equal*, CHI. TRIB., Oct. 19, 1986, at § 1, at 5; *Incorporation of Coast Town Divides Community*, N.Y. TIMES, Aug. 17, 1983, at A18.

ceremonial power and the affairs of the city were taken over by a state administrator.¹⁹² A similar fate has befallen Washington, D.C.¹⁹³

Minority jurisdictions must bear the responsibility of autonomy despite being denied the power the term implies. The discourse of the organic jurisdiction in particular gives rise to the view that the separate jurisdictions are independent, self-contained, autonomous and therefore exclusively responsible for their condition. The proper relationship between organic communities is that of arms-length bargainers who owe no obligation of compassion or altruism to each other. Ironically, while the synthetic jurisdiction seems to promote ruthless atomism amongst individuals, the organic jurisdiction promotes a similarly ruthless atomism at the level of the putative organic social group. Hence "local control" of public schools is advanced as a rationale to block the desegregation of schools that were segregated by explicit state policy¹⁹⁴ and as a justification for the radically unequal distribution of public funds.¹⁹⁵ "Local responsibility" is invoked to forestall and fracture effective remedies to discrimination that occurred on a regional and statewide scale.¹⁹⁶ Within the community the ethos may be sharing, but among communities it is "every group for itself."

Moreover, when a jurisdiction is racially defined, racial identity also subtly becomes jurisdictionally defined. For instance, the decision of the middle class to leave economically troubled inner cities is called "white flight." The none-too-subtle implication is that whites are fleeing black-dominated cities and the problems that black dominance has wrought. Not only are those blacks "left behind" in inner cities understood to be responsible for their condition, but the condition of the black-dominated inner cities serves as a concrete commentary on the people who live there, and by extension, on all black people. The organic nature of the connection between people and the jurisdiction means that the jurisdiction can be seen as an extension of the people.¹⁹⁷

192. See *Powers v. Secretary of Admin.*, 587 N.E.2d 744 (Mass. 1992) (upholding the reversion of the city of Chelsea, Massachusetts).

193. See, e.g., David A. Vise, *D.C. Rescue Agreement Strips Barry's Power: White House, Hill Leaders Settle on Plan That Puts Control Board in Charge of Most of City Government*, WASH. POST, July 31, 1997, at A1.

194. See *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Milliken v. Bradley*, 418 U.S. 717 (1974).

195. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

196. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

197. See also GOLDBERG, *supra* note 186, at 198-200.

This use of the organic jurisdiction was pivotal in undermining the constitutional mandate of desegregation established in *Brown v. Board of Education*.¹⁹⁸ Less than twenty years after *Brown*, the most important implications of the landmark decision were repudiated by the Supreme Court in *Milliken v. Bradley*.¹⁹⁹ It is no exaggeration to say that *Brown's* contemporary relevance is largely symbolic. The cultural meaning of the *Brown* decision is so profound as to prevent the Court from directly overturning it, but as effective legal precedent it has been reduced to irrelevance.

The demise of *Brown v. Board of Education* is a sad story, quickly told. In 1971, a federal district court held that Detroit's public schools were racially segregated, in violation of the Fourteenth Amendment. The district court found that because Detroit's entire school district was already predominantly black, "relief of segregation in the Detroit public schools cannot to be accomplished within the corporate geographical limits of the city."²⁰⁰ Accordingly, the court devised a desegregation plan that included the surrounding suburbs of Detroit. Affirming, the Sixth Circuit Court of Appeals noted that "[i]f we [were to] hold that school district boundaries are absolute barriers to a Detroit school desegregation plan, we would be opening a way to nullify *Brown v. Board of Education*."²⁰¹

Apparently unafraid of blazing such a trail, the Supreme Court reversed. In *Milliken*, the majority held that because "[t]he record . . . contain[ed] evidence of *de jure* segregated conditions only in the Detroit schools"²⁰² only Detroit could be required to remedy the segregation — even though it was conceded that Detroit alone could not do so.

Significantly, Justice Stewart argued in concurrence that "the mere fact of different racial compositions in contiguous districts does not itself imply or constitute a violation . . . in the absence of a showing that such disparity was imposed, fostered, or encouraged by the State or its political subdivisions."²⁰³ Stewart asserted that segregation was caused by "unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumula-

198. 349 U.S. 294 (1954).

199. 418 U.S. 717, 748 (1974).

200. *Bradley v. Milliken*, 345 F. Supp. 914, 916 (E.D. Mich. 1972).

201. *Bradley v. Milliken*, 484 F.2d 215, 298 (6th Cir. 1973).

202. *Milliken*, 418 U.S. at 745.

203. *Milliken*, 418 U.S. at 756 (Stewart, J., concurring).

tive acts of private racial fears.”²⁰⁴ Leaving aside the “unknown and the unknowable,” how could the factors that Stewart actually lists cause inter-jurisdictional racial segregation? What do they have to do with each other?

A plausible interpretation of Stewart's factors might be as follows: Black *in-migration* to Detroit from the southeastern United States²⁰⁵ combined with higher than average *black birth rates* led to a growing black population which, combined with *economic* decline fueled the *private racial fears* of whites and led to white flight from Detroit to its suburbs — and in some cases the creation of separate jurisdictions which could protect themselves from the threat of more black in-migration. In this narrative, the emergence of segregated jurisdictions has nothing to do with the state that created the jurisdictions — instead, each jurisdiction is the result of private associational decisions. Moreover, far from being perpetrators of segregation, the white suburbanites are *victims*, forced to flee from the alien hordes. To make them participate in desegregation would be like sending the Von Trapps back to Austria.

This interpretation yields a narrative of white flight from racial persecution that has become a central concept in the racial identification of jurisdictions. It is so accepted in fact, that the Supreme Court can take judicial notice of this innocent white flight in order to effectively overturn the factual finding of trial courts. In *Missouri v. Jenkins*,²⁰⁶ the latest in a line of post-*Milliken* cases, the Court struck down a desegregation order that did not *require* movement across jurisdictional lines, but only attempted to encourage such movement through the creation of magnet schools. The lower court found that, because white flight from the central city schools was a direct result of the segregative practices of Kansas City,²⁰⁷ the city was obliged to remedy the resulting segregation. The Supreme Court, however, rejected the lower court's factual findings as “inconsistent with the typical supposition”²⁰⁸ that white flight is a response, not to *de jure* segregation, but to remedial desegregation policies.

Here I am less interested in the disposition of the case than in the evolution of the “white flight from persecution” narrative. In

204. *Milliken*, 418 U.S. at 756 n.2 (Stewart, J., concurring).

205. See generally JACKSON, *supra* note 148, at 150; NICHOLAS LEHMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1994).

206. 515 U.S. 70 (1995).

207. See *Jenkins v. Missouri*, 11 F.3d 755, 767 (8th Cir. 1993).

208. *Jenkins*, 515 U.S. at 95.

Jenkins, Justice Stewart's white flight narrative is modified; the liberal courts that imposed mandatory desegregation are now catalyzing white racial fears and white flight. In the *Jenkins* narrative, liberal courts create the jurisdictional segregation that stands as a barrier to a legal remedy. The implication is clear — white flight is a natural response of organic groups to state sponsored attempts to disturb their solidarity. Further, any harm suffered by racial minorities isolated in impoverished inner cities is either (1) their own fault — after all, who else is around to blame? — or (2) the fault of liberal do-gooders who try to change human nature.

Nowhere in this narrative is it acknowledged that the state is responsible for creating local governments, that local jurisdictional formation is, as Justice Rehnquist put it in *Holt*, a "governmental technique."²⁰⁹ To say that desegregation remedies are responsible for white flight is to confuse a catalyst with a cause. It may be that desegregation makes the cities less attractive to whites who, for whatever reason, prefer segregation. But the creation of autonomous suburbs — suburbs that, thanks to the Court's decision in *Milliken*, are isolated from economic or social responsibility for the inner cities — makes white flight possible and attractive. It is the state that has given "fearful" whites somewhere to fly to.²¹⁰

As for the proposition that racial segregation is "natural" one should respond "only as natural as racism is." After all, it's no secret that many whites would prefer not to participate in racially integrated institutions — that's why we need civil rights laws and constitutional protections in the first place. But the white flight narrative enshrined by the *Jenkins* Court as the "typical supposition" suggests that the human nature perpetuating racial segregation is causally prepolitical. *Jenkins* is premised on the belief that white flight is not itself conditioned by state action.

This narrative of white flight from persecution is deceptively compelling on a number of levels. It resonates with a great many historical narratives of territorial community: a crowd is formed into a people through the collective experience of trial, flight and finally redemption in a new promised land.²¹¹ The bonds of community, so lacking in the new world, are supplied by a common foe;

209. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 72 (1978).

210. My argument here is far from novel. The Court made precisely this argument when considering the decision of a school district to divide a county wide jurisdiction into two separate systems: one for the city and one for the county. See *Wright v. Council of Emporia*, 407 U.S. 451 (1972).

211. The most obvious prototype for this narrative comes from the Judeo-Christian religion, but there are several new world variants, some much less laudable, such as that classic

the connection of a people to the soil arises, not from primordial legacy, but out of the collective struggle for autonomy. In other contexts, this narrative has had justifiable, even salutary effects. But in the context of the contemporary United States, this narrative suggests that racial minorities are to blame for racial segregation, an inversion of historical responsibility that would make all but the most brash of revisionists squirm.

D. *The Interrogation of the Local*

A good deal of contemporary normative social theory identifies the greatest threat of oppression with the imposition of homogeneity. We are told that we have a moral obligation to recognize difference and to embrace plurality and polyphony. But the "recognition" (meaning both passive acknowledgement and active affirmation; notice the two faces of this word, how it claims to exclude the possibility of the very value judgment it requires) of difference can *itself* be an inquisition. "Difference" is an empty vessel and the object of the discourse of difference can never control the meaning of the differences that are recognized. Distinctive cultural practices become Moynihan's "culture of poverty" with a change in inflection; group solidarity becomes clannishness or belligerence by moving a few commas. The forum for those who would speak truth to power is also the interrogation chamber, the "right to be heard" extracts a confession.

This fetishism of difference and particularity sees with one eye closed. Although compulsory homogeneity is a threat, the other, unglimped side of governmental power is the incessant production of difference, the creation of categories, the explosion of particularities, the making of the Other. To press for the recognition of difference as an abstract principle is to embrace this process of compulsory differentiation and to comply with the distancing and social hierarchy it so often entails. The organic conception of jurisdiction facilitates the production of group differences by asserting that some territorial identities are natural and must be respected, whatever their social consequences. It encourages us to abandon pragmatic decisionmaking in favor of deductions from "first principles" — for example, "always respect organic social groups and their need for separation and autonomy." We should reject this sterile paradigm and confront the moral ambiguity of difference:

example of modern cinematography and racism, D.W. Griffith's *THE BIRTH OF A NATION*, *supra* note 171.

differences are constructed as well as repressed, they are imposed as well as ignored, they are chains as well as wings.

IV. TOWARD A THEORY OF JURISDICTION

A whole history remains to be written of *spaces* — which would at the same time be the history of *powers* (both these terms in the plural) — from the great strategies of geo-politics to the little tactics of the habitat. . . .²¹²

Jurisdictional boundaries help to promote and legitimate social injustice, illegitimate hierarchy and economic inequality. This is not to argue that jurisdictional borders are the sole cause of social injustice such that a different jurisdictional system would eliminate illegitimate hierarchy or the evils of poverty. Nor is it to argue that promoting and legitimating inequality and social injustice are the primary purposes or practical effects of territorial jurisdiction in general, or of any jurisdiction in particular. It is to argue that jurisdiction plays an important role in shaping our social and political world and our social and political selves.

Group territorial identification must be understood as part of the status quo. The concentration of social groups in formally defined jurisdictions is a discipline that creates a predictable and easily manageable social order. Territorial identification encourages particular types of political and interpersonal subjectivity while discouraging others. Therefore, we should consciously weigh the pros and cons of territorial identification. We should ask: what aspects of human flourishing are discouraged or excluded and, more importantly, what identities and subjectivities are produced, encouraged, sanctioned or imposed?

The recent Supreme Court decision in *Romer v. Evans*²¹³ is instructive. In *Romer*, the Court found that a Colorado ballot initiative that forbade the state or its subdivisions from enacting civil rights protections for homosexuals was constitutionally invalid. But the Court did not find that homosexuality was a constitutionally protected classification. Nor did it overturn its earlier decision in *Bowers v. Hardwick*,²¹⁴ which upheld the *criminalization* of homosexual sodomy against a due process challenge. Therefore, the paradoxical effect of *Romer* would seem to be that a state can outlaw

212. MICHEL FOUCAULT, *The Eye of Power*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977*, at 146, 149 (Colin Gordon ed. & Colin Gordon et al. trans., 1980).

213. 517 U.S. 620 (1996).

214. 478 U.S. 186 (1986).

homosexual conduct under *Bowers* but must allow its localities to protect such conduct with antidiscrimination ordinances.

Romer is subject to several interpretations, but none entirely resolve this conceptual paradox.²¹⁵ Here I will advance an interpretation based on jurisdictional design. The analysis that follows is not a proposal; I do not wish to suggest that the Court *should* adopt the interpretation I am about to advance. Nor do I claim to tease out the "true meaning" of this tortured and conflicted opinion.²¹⁶ Instead this interpretation provides a partial account of the motivations that would move the Court to invalidate the initiative at issue in *Romer* while allowing the state to criminalize homosexual sodomy, as it did by leaving *Bowers* intact.

Suppose the principle established in *Romer* is that the state may not attempt to selectively disempower *localities*, in which homosexuals or any other statewide minority may enjoy a majority of political support, through an initiative passed at the *state* level where those locally favored minorities are overwhelmed by a hostile majority. This principle acknowledges that the state can, by selectively extending the jurisdictional sphere, effectively deny certain minority groups the ability to influence government even at the local level where they may have majority support.

On this interpretation, *Romer* is instructive because it highlights the significance of *jurisdictional* architecture in creating group statuses. *Romer* protects minority groups, but only when they concentrate in "discrete and insular" jurisdictions. This rationale turns

215. On the one hand, without the jurisdictional distinction (state v. local law) *Romer* must stand for the proposition that neither the state nor its subdivisions can foreclose the ability of *any* disfavored minority (since homosexuals are not members of a protected class) to petition government for favorable or protective laws. But it is difficult to understand how the Constitution could deny states the power to foreclose state and local protection for conduct that they can *criminalize* under *Bowers*. Accord Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 376-81 (1997).

One could argue that *Bowers* allows criminalization of conduct, while *Romer* protects malicious distinctions based on status, but such a status/conduct split is largely semantic: the state could simply reword the unconstitutional law to prohibit protective legislation for homosexual conduct. Then, despite the existence of laws protecting homosexual status, any actor who wished to discriminate could claim to do so on the basis of the conduct or suspected conduct of the victim, rather than his or her *status* as homosexual. The attempt to "take the sex out of homosexuals," as Janet Halley aptly puts it, is unlikely to succeed in protecting them as homosexuals. See Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429, 433 (1997) (emphasis in original).

216. This interpretation is therefore entirely unlike the many post-*Romer* disquisitions which tried to "make sense" of the opinion. See, e.g., Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 222 (1996) (arguing for a "clear, strong, unbroken analytic and rhetorical thread" in *Romer*); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257 (1996); Grey, *supra* note 215, 375-76. Improving judicial opinions through (re)interpretation is certainly a noble endeavor, but it is not mine here.

James Madison's argument for the extended sphere²¹⁷ on its head. It, in effect, holds that any state-wide minority group has a *right* to its victory in a *local* political process free of interference from a hostile majority in the extended sphere of state politics.

Of course, it follows that the minority group has no protection from a hostile *local* majority. So held the Sixth Circuit in *Equality Foundation of Greater Cincinnati v. City of Cincinnati*.²¹⁸ In *Equality Foundation*, a decision upholding a Cincinnati city charter amendment that forbids "special rights" for homosexuals was remanded by the Supreme Court for reconsideration in light of *Romer*. The Cincinnati charter amendment was substantially identical to the amendment at issue in *Romer*.²¹⁹ Both forbade civil rights protections for homosexuals. Both were enacted by voter initiative. Both amended the foundational document of the jurisdiction — the state constitution in *Romer*, the city charter in *Equality Foundation* — and were for that reason especially difficult to reverse through the normal political process. The primary difference between the cases was that *Romer* involved a law of statewide applicability while *Equality Foundation* involved an initiative of local applicability.²²⁰ On remand, the Sixth Circuit held that *Romer* did not apply:

217. See THE FEDERALIST NO. 10 (James Madison).

218. 128 F.3d 289 (6th Cir. 1997).

219. Amendment 2, at issue in *Romer*, reads:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Romer v. Evans, 517 U.S. 620, 624 (1996).

Issue 3, the charter amendment at issue in *Equality Foundation* reads:

NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Equality Foundation, 128 F.3d at 291.

220. The state versus local distinction flies in the face of decades of established law which hold that the states may not do through their subdivisions what the constitution prohibits them from doing directly. See, e.g., *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 361 (1992) ("[A] State . . . may not avoid the strictures of the Commerce Clause by [acting] through subdivisions of the State, rather than through the

[Colorado Amendment 2] deprived a politically unpopular minority, but no others, of the political ability to obtain special legislation at every level of state government, *including within local jurisdictions having pro-gay rights majorities*

. . . .
 . . . [U]nlike Colorado Amendment 2, which interfered with the expression of *local* community preferences in that state, the Cincinnati Charter Amendment constituted a *direct expression of the local community will* [It was] designed in part to preserve community values and character²²¹

In order to distinguish the anti-gay legislation at issue in *Romer* and the nearly identical Cincinnati charter amendment, the Sixth Circuit offered a paradigmatic defense of the organic local jurisdiction: "Unlike a state government, which is composed of discrete and quasi-independent levels and entities such as cities, counties, and the general state government, *a municipality is a unitary local political subdivision or unit* comprised, fundamentally, of the territory and residents within its geographical boundaries."²²²

In this light, the *Romer* court needed to overrule *Holt*, not *Bowers*. In *Romer*, a crucial issue was the difficulty of obtaining gay-friendly legislation at the state wide level. By denying gay-friendly groups the ability to advance favorable legislation at the local level, Amendment 2 left available only the arduous route of lobbying for reform at the state level. The Court noted that under Amendment 2 gay citizens could "obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution."²²³ Similarly in *Holt*, Tuscaloosa's extraterritorial jurisdiction denied residents of the disenfranchised police jurisdiction the possibility of local influence, leaving only the possibility of an

State itself."); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). To borrow the logic of Justice Rehnquist in an analogous context, on the *Equality Foundation* rationale taken to is extreme, the state legislature "need merely divide the State in half," passing one antigay ordinance for the Northern half of the state and one for the Southern half. "The law would be immune from [*Romer*] scrutiny simply because it was not phrased in terms of *state* citizenship." See *United Bldg. & Constr. Trades Council of Camden City v. Camden*, 465 U.S. 208, 217 n.9 (1984).

221. *Equality Foundation*, 128 F.3d at 297 (emphasis added).

222. *Equality Foundation*, 128 F.3d at 298 n.9 (emphasis added). If this idea sounds familiar, it should. It is more or less one idea that underlies the Voting Rights Act. See 42 U.S.C. § 1973 (1995). By, in some cases, mandating majority-minority electoral districts the Act is designed to protect for racial minorities a sphere of jurisdictional influence free from interference by hostile majorities at the state level. See 42 U.S.C. § 1973(c). The difference between *Romer* and the Voting Rights Act in this regard is that the Act envisions a conscious political process for designing electoral districts, while *Romer* treats jurisdictional boundaries as given. Therefore the Act seeks to alter the jurisdictional boundaries themselves, while *Romer* only protects the local majorities that happen to emerge.

223. *Romer*, 517 U.S. at 631.

arduous statewide campaign for reform. In both *Romer* and *Holt* the complaint was that a select group of citizens was denied the ability to influence government at the local level while others were able to do so. And in both cases the response was that the group was on equal footing with all other citizens at the level of state government.

The jurisdictional architecture at issue in *Romer* and *Equality Foundation* illustrates several points. One point is fairly obvious but often overlooked: territorial identification cuts both ways. Local autonomy may protect gay rights ordinances in Aspen and Denver, but it would also allow antigay laws in more conservative jurisdictions such as Cincinnati. At best, we have a normative principle of compulsory provincialism:²²⁴ minority sub groups can expect favorable treatment only when they accept social isolation and only within the boundaries of "their" jurisdiction. In the broader public culture, social assimilation is required (don't ask, don't tell).

The social landscape this anticipates is one of fragmented, even antagonistic quasi-autonomous jurisdictions. Each political territory becomes both a haven and a prison for its residents. As in the medieval walled city, freedom within the friendly city's walls yields to tyranny outside those walls. Just as the medieval serf who lived outside the city was subject to the whip of the feudal lord or the law of the highwayman, so too the homosexual who lives in a hostile local environment has no defense against local prejudice. Compulsory provincialism forces marginal sub groups into a limited number of well identified enclaves. Those who refuse to or cannot retreat to these "safe havens" are understood to have accepted their fate on the outside.

This is the best we can expect from territorial autonomy. But even this impoverished autonomy is far from certain. For what counts as respect for local difference from one perspective is the disproportionate power of a faction from another. For instance, in *Romer* Justice Scalia puts Madison back on his feet, complaining in dissent:

[B]ecause those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, *they possess political power much greater than their numbers*, both locally and statewide. . . .

. . . .

224. See Ford, *Geography and Sovereignty*, *supra* note 150, at 1401-07, 1417-18 (describing the emergence of a judicially enforced territorial provincialism).

... [Amendment 2] sought to counter both the geographic concentration and the *disproportionate political power of homosexuals* It put directly, to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no.²²⁵

Local difference is easily recast as factionalism and the courts toggle back and forth between the two perspectives. Sometimes local decisions are lauded because they supposedly reflect an organic lifestyle deserving of respect. At other times local decisions are denigrated as the result of the disproportionate and concentrated influence of a faction. Territorial identification thus provides no guarantee of autonomy, no safe haven from outside influence. It can just as easily facilitate stereotyping and targeting an unpopular group.

Finally, jurisdiction is not a neutral slate on which a preexisting and authentic identity can be inscribed. The choice to adopt a territorial self definition necessarily alters the nature of the self that is so defined.²²⁶ Scalia understands homosexual identity as an urban and elite identity, a sort of decadent, sybaritic indulgence of the effete upper classes.²²⁷ My suggestion is that many homosexuals are pushed into — and are complicit in — such an identification by the compulsory provincialism that the *majority* in *Romer* offers. Justice Scalia may play the harp but Justice Kennedy, the author of the majority opinion, called the tune. The problem here is not simply that homosexuals who don't fit the model are denied protection of *any* kind. What about rural homosexuals or those in smaller suburbs? The problem is also that those urban, well-to-do homosexuals whom *Romer* ostensibly protects are forced into a fairly narrow range of identities.²²⁸ This is not to say that their authentic selves are being repressed but instead that their authentic selves — at any

225. *Romer*, 517 U.S. at 645-46 (Scalia, J., dissenting) (emphasis added) (internal citations omitted). Another example of the view that minority controlled jurisdictions are illegitimate factions is found in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1990), a decision that implicitly described minority controlled cities as factions that required constitutional surveillance against "reverse discrimination" and in-group political patronage.

226. See Ford, *Geography and Sovereignty*, *supra* note 150, at 1416-17 (observing that identity formation will be affected by territorial arrangements).

227. Scalia chides: "When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains — and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's members are drawn." *Romer*, 517 U.S. at 652 (Scalia, J., dissenting).

228. Accord K. Appiah, *Race, Culture, Identity: Misunderstood Connections*, in *COLOR CONSCIOUS* 30, 99 (K. Appiah & Amy Gutmann eds., 1996) ("What demanding respect for people as *blacks* or as *gays* requires is that there be some scripts that go with being an African-American or having same sex desires. There will be proper ways of being black and gay It is at this point that someone who takes autonomy seriously will want to ask whether we have not replaced one type of tyranny with another."). My point here is simply that group-identified jurisdictions help to map out such compulsory scripts.

rate the only selves they're going to get — are being *built* in part by this process of concentration and territorial identification.

We should ask whether the identities and territories produced through compulsory territorialism are the type of identities that can contribute to a healthy and just society. We should also ask whether such identities contribute to the human flourishing of those who, however freely or unwillingly, adopt them. Finally, we should ask, along with Anthony Appiah, whether these are identities that we will want to live with in the long run.²²⁹ Because I fear the answer to these questions is no, I believe we should reject territorial provincialism and begin designing the legal and social geographies of the future.²³⁰

We are building the jurisdictions of the future today. A self-conscious theory of territorial jurisdiction — which would also be a theory of the spatial organization of the political, the economic and the social — would better allow us to do so. A theory of jurisdiction would draw on a wide range of sources: the analysis developed by James Madison and the American federalists, the judicial opinions involving the commerce clause and the privileges and immunities clause of the Constitution, the field of international law, the study of urban development and the built environment (including urban planning and architecture), and recent developments in the study of the spatiality of social institutions²³¹ and everyday life.²³² A theory of jurisdiction might be developed in law schools, planning departments, schools of government and policy, departments of political philosophy and schools of design and architecture. The site of such study is less important than the recognition that it is badly needed. A failure to study the politics and legalities of space is a failure to map law's territory.

V. CONCLUSION: FEAR AND LOATHING IN THE JURISDICTION OF THE FUTURE

Already the Great Khan was leafing through his atlas, over the maps of cities that menace in nightmares and maledictions: Enoch, Babylon, Yahooiland, Butua, Brave New World.

229. *See id.*

230. I hope it is clear that this discussion applies to many social groups, not just homosexuals. I use *Romer* because so many have (in my view mistakenly) hailed the decision as a victory for gay rights. *Romer* may well be part of an unarticulated governmental project of territorial sorting — one that I fear will not end well for any of the groups so sorted.

231. *See, e.g.,* HARVEY, *supra* note 173; EDWARD W. SOJA, *POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY* (1989).

232. *See, e.g.,* MICHEL DE Certeau, *THE PRACTICE OF EVERYDAY LIFE* (1984).

He said: "It is all useless, if the last landing place can only be the infernal city, and it is there that, in ever-narrowing circles, the current is drawing us."

And Polo said: "The inferno of the living is not something that will be; if there is one, it is what is already here, the inferno we live every day, that we form by being together. There are two ways to escape suffering it. The first is easy for many: accept the inferno and become such a part of it that you can no longer see it. The second is risky and demands constant vigilance and apprehension: seek and learn to recognize who and what, in the midst of the inferno, are not inferno, then make them endure, give them space."²³³

So is jurisdiction something to be feared, loathed, condemned? Is it the product of some sinister plot, born of medieval tyrants, developed by mercurial mercantilists, refined in the academies of empires, and finally perfected behind the closed doors of the military and in the high towers of Capital (and who is to say these two aren't joined, by interest, by structure, by subterranean tunnels reaching deep into the bowels of the earth, "like worms in the entrails of a naturall man)?"²³⁴

This would make for interesting reading, no doubt. But the story I have offered, though not as dramatic, is, I hope, as fascinating in its own way. What I have argued is that territorial jurisdiction — something that seems timeless, natural and indeed inevitable — is in fact an *invention*, an invention as essential to the development of the modern world as the tungsten filament.

Territorial jurisdiction is nothing less than the map of the law's interaction with society. It embodies the deepest tensions and conflicts in our aspirations for human civilization. If territorial jurisdiction seems inevitable, it is because the aspirations and fears it embodies are inevitable. The organic jurisdiction vindicates our aspiration for community, social harmony, oedipal completion, the nostalgia of the whole and the one. Yet it also evokes our terror at suffocation, the destruction of the unique ego, totalitarianism. The spirit of community threatens to become the mentality of the mob; group culture bleeds into the groupthink of the cult. The synthetic jurisdiction is the child of our desire for mastery of an alien world, for order, rationality, utility, the universal. Yet it also conjures the horror of alienation, isolation, the ghostless controlling machine, a bloodless world in which interpersonal connection is limited to the arms-length bargain, in which the only meaning is the agnostic logic

233. CALVINO, *supra* note 183, at 164-65.

234. THOMAS HOBBS, *THE LEVIATHAN* 375 (C.B. Macpherson ed., Penguin Books 1968) (1651).

of exchange. Little wonder then that we oscillate between extremes, each of which is equivalent to our most passionate desire and our deepest phobias.²³⁵ "Institutional fetishism" is literally accurate to describe our relationship to jurisdiction.

This conflict is intractable, at least in the terms in which our contemporary institutions force it upon us. And so I fear that I must violate your expectations that we will end with some hopeful prediction, better yet some prescription that will help us to overcome the difficulties that this Article has described, like the hero that arrives in the nick of time. Instead, the approach this Article suggests is pragmatic, but pragmatic in the tragic, continental tone rather than the more familiar optimistic tone of the Americans James, Pierce and Dewey. The conflicts that haunt legal analysis in general and our understanding of jurisdiction in particular may resist logical resolution. The faith that reform or even revolution can resolve these contradictions — unifying the severed psyche and banishing alienation — may only deliver us all the more quickly into their grasp. We may be doomed to reproduce the same tensions in different form, over and over again. The meaning of history may not be the heroic story of progress and perfection, nor the epic of decline, rebirth and redemption, but the blank tragedy of meaningless repetition.

It is this realization that demands constant vigilance, with no guarantee of safety, that demands we make the effort and take the risk to find and nurture that which may be more noble than it is familiar. The history of space and spaces offers a rogues' gallery of cartographers, imperialists, merchant adventurers, medieval rulers, town constables, urban visionaries, architects, judges and jurists. But in all of these there are only protagonists, no heroes. The heroes and heroines, perhaps, are yet to come.

235. See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211-13 (1979).