

Local Government, “One Person, One Vote,” and the Jewish Question

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Enlightenment thinkers were transfixed by “the Jewish Question” — how to incorporate the manifestly unassimilated Jewish community into a modern nation-state predicated on the idea of a uniform and homogenous citizenry. Their solution was to strip the Jewish community of its collective political character and recapitulate the Jews as abstract citizens of the state. Each Jew was henceforth to be “a man on the street and a Jew at home.”

*American constitutional law has confronted its own version of the Jewish question in the problematic position of local governments. Like the Jewish ghettos of feudal Europe, cities historically were autonomous corporate entities that stubbornly resisted the sovereign authority of the state. Thus, just as the Enlightenment purported to resolve the Jewish question by formally abolishing the Jewish community as a corporate body, our jurisprudence has sought to assimilate municipalities into the state by conceptualizing them as mere aggregations of individuals rather than as collective political entities. For example, in the landmark decisions of *Reynolds v. Sims* and *Avery v. Midland County*, the United States Supreme Court mandated that states and local governments, respectively, apportion voting power in accordance with the principle of “one person, one vote,” thereby ensuring that only individuals, and not collectivities, would be admitted to the political sphere.*

*This Article argues, though, that while *Reynolds* and its progeny have presumed to emasculate local governments, those decisions have had exactly the opposite impact. Under the guise that local governments have been rendered inert, courts surreptitiously permit municipalities to exercise a substantial degree of autonomy. The “one person, one vote” rule provides local governments with a veneer of legitimacy that enables courts to rationalize self-serving local behavior as the effectuation of a grand public interest. This seeming inconsistency in the courts’ treatment of local governments reflects an uneasy compromise between the Enlightenment dream to dissolve groups such as the Jewish community into the abstract “rights of man” and a pragmatic realization that group identity is ineradicable. This is a troubling compromise, I argue, because it enables those with sufficient political or financial power to retreat into insulated enclaves under the aegis of state neutrality, while foreclosing recompense for those excluded from such enclaves by deploying the fiction that they still retain their abstract rights. The Article concludes accordingly that the egalitarian promise of the “one person, one vote” jurisprudence rings hollow.*

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INTRODUCTION

Although far less heralded than the new iPhone, Apple recently unveiled a mobile phone “app” that promised to settle scores of bar fights: “Jewish or not Jewish.”¹ As its name implies, the app helps users instantaneously ascertain whether a particular celebrity has Jewish heritage. Despite its usefulness as a balm for idle curiosity, the app’s lifespan proved short, at least in its native France. Apple pulled *Juif-ou-pas-Juif* from its French app store after being advised that it is a violation of French law even for private parties to gather information about individuals in a manner that categorizes them by ethnic or religious affiliation.²

¹ *Apple Pulls “Jew or Not a Jew?” from App Store*, CBSNEWS.COM (Sept. 14, 2011, 5:26 PM), <http://www.cbsnews.com/stories/2011/09/14/scitech/main20106262.shtml>, archived at <http://www.perma.cc/0pYdhpgwX2j>; Devorah Lauter, *iPhone App ‘Jewish or Not Jewish’ Removed from French App Store*, JTA.ORG (Sept. 14, 2011, 3:26 PM), <http://www.jta.org/news/article/2011/09/14/3089388/iphone-app-jewish-or-not-jewish-under-fire>, archived at <http://www.perma.cc/0PV9vBxcwYT>; Eugene Volokh, *Is Publishing a List of Famous Jews a Crime in France?*, THE VOLOKH CONSPIRACY (Sept. 15, 2011, 12:30 PM), <http://volokh.com/2011/09/15/is-publishing-a-list-of-famous-jews-a-crime-in-france>, archived at <http://www.perma.cc/0E3TfKsPgPK>.

² Lauter, *supra* note 1.

The law was passed in the aftermath of the Holocaust, but its origins, much like France’s controversial legislation barring Muslim girls from wearing headscarves in schools, can be traced to the legacy of the Enlightenment, the French revolution, and the birth of the modern nation-state.³ In short, the dream of reformers and revolutionaries to create a uniform French national identity out of a highly fragmented and decentralized feudal society required the abolition of the many idiosyncratic local traditions that comprised that society.⁴

Interestingly, in light of the iPhone controversy, the problem of how to incorporate this multitude of subgroups into the modern state was often framed by Enlightenment thinkers within the context of one particularly thorny manifestation: the so-called “Jewish question.”⁵ Cities throughout Europe contained discrete and unassimilated Jewish communities that typically lived apart in insular ghettos and bore distinct legal and political identities that marked them as separate from the surrounding society.⁶ How were these communities to be incorporated into a state rooted in the notion of a single sovereign authority ruling over a uniform populace? The French Revolution attempted to resolve the Jewish question by adopting an abstract conception of citizenship that affirmed the universal “rights of man,”⁷ ensuring the Jews (as well as everyone else) equal rights under the law as individuals but demanding in return that particular group affiliations such as membership in the Jewish community be reconstituted as matters of private choice with no legal or political incidents; in the pithy expression of one Jewish advocate of the Enlightenment reforms, each Jew must strive to become “a man in the street and a Jew at home.”⁸ As the recent controversy attests, French national identity remains sufficiently fragile that challenges to

³ See generally JOHN R. BOWEN, *WHY THE FRENCH DON’T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE* (2007) (discussing headscarf controversy and its origins in French history).

⁴ See, e.g., JAMES C. SCOTT, *SEEING LIKE A STATE* 30–33 (1998) (discussing how French nation-building after the Enlightenment and French Revolution entailed displacement of local standards with uniform measurements and feudal estates with abstract citizenship).

⁵ See generally JACOB KATZ, *OUT OF THE GHETTO: THE SOCIAL BACKGROUND OF JEWISH EMANCIPATION, 1770–1870* (1973) (discussing Enlightenment efforts to resolve the legal and political status of Jews). On the Jewish question as a metaphor for the broader subgroup question, see Martha Minow, *The Constitution and the Subgroup Question*, 71 *IND. L.J.* 1 (1995).

⁶ See Nomi Maya Stolzenberg & David N. Myers, *Community, Constitution and Culture: The Case of the Jewish Kehilah*, 25 *U. MICH. J.L. REFORM* 633, 634 (1991–1992) (discussing legal status of Jewish community, or *kehilah*, in feudal European society); see also KATZ, *supra* note 5, at 9–27 (describing characteristics of Jewish ghetto prior to emancipation). The classic sociological treatment of the ghetto, though now considered somewhat dated, is LOUIS WIRTH, *THE GHETTO* (1928).

⁷ On the Enlightenment reforms, see KATZ, *supra* note 5, at 161–75; and Stolzenberg & Myers, *supra* note 6. For a more ironic perspective on the rights of man, see HANNAH ARENDT, *ON REVOLUTION* (1962); and HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 290–303 (2d ed. 1958). I take up Arendt’s critique of the rights of man more fully in the text accompanying notes 245–257 *infra*.

⁸ See Stolzenberg & Myers, *supra* note 6, at 644.

its notion of a uniform and homogenous citizenry are met with the force of law.

In the United States, where there has been no feudal tradition to push back against nationalist fervor and the assimilation of new immigrant classes has been a pressing concern in just about every generation, the Enlightenment legacy has had a very strong influence.⁹ We have no shortage of laws designed to enforce a uniform national identity. The Constitution's religion clauses prohibit the government from classifying citizens based on their membership in particular religious groups.¹⁰ Common law doctrines like the fee tail, designed to reinforce fixed status inequalities in feudal England, have been abolished by virtually every American state.¹¹ And perhaps the high water mark of our law's effort to enforce a norm of abstract citizenship has been the Supreme Court's landmark decision in *Reynolds v. Sims*,¹² which mandated that state legislative elections apportion votes according to a principle of "one person, one vote." In declaring that "legislators are elected by voters, not farms or cities or economic interests,"¹³ the Court affirmed that the state must apprehend its citizens as formally equivalent individuals, not as members of particular groups.¹⁴ In the years since *Reynolds*, courts have been vigilant to ensure that legislative districts are not crafted to give direct voice to group interests.¹⁵

This Article shows, however, that the American judiciary's commitment to the Enlightenment legacy has been far more equivocal than the foregoing account suggests. This equivocation is nowhere more evident than in courts' application of the "one person, one vote" rule to local governments. As *Reynolds*' dismissive treatment of "cities" intimates, a particularly important component of the modern state's effort to assert uniform control over a population of formally equal individuals has been the subjection of local govern-

⁹ See generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955) (arguing that lack of feudalism made America fertile ground for a "liberal" political tradition favoring individual freedom and formal equality); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1074-127 (1980) (on liberal tradition).

¹⁰ On the Enlightenment roots of the Establishment Clause, see, for example, ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 3-31 (1990); and MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 6-11 (1965).

¹¹ On the fee tail and its abolition in America, see JESSE DUKEMINIER ET AL., *PROPERTY* 198-201 (Aspen Publishers 7th ed. 2010).

¹² 377 U.S. 533 (1964).

¹³ *Id.* at 562.

¹⁴ *Id.* at 561 ("[T]he rights allegedly impaired are individual and personal in nature.").

¹⁵ See, e.g., *Shaw v. Reno*, 509 U.S. 630, 647-49 (1993) (invalidating two oddly shaped legislative districts drawn to ensure elections of minority representatives); see also *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring) (stating that race-conscious districting is "nothing short of a system of 'political apartheid'" (quoting *Shaw*, 509 U.S. at 647)); cf. *United Jewish Orgs. v. Carey*, 430 U.S. 144, 153 (1977) (rejecting contention that Hasidic Jewish community was deprived of voting rights by apportionment plan that diluted community's voting strength, treating Hasidic Jews as members of white population rather than as a distinct community).

ments to state authority. Like the Jewish communities in feudal Europe, cities historically were autonomous corporate entities that governed themselves under a unique body of urban law and jealously resisted sovereign incursions into their affairs.¹⁶ It has accordingly been a leitmotif of modern local government law scholarship that the rise of the modern state has required the steady disempowerment of local governments in favor of a universal state that treats all individuals equally, without regard to local distinctions.¹⁷ Thus, much as the “rights of man” stripped the Jewish community of its collective political character so that the state could have an unmediated relationship with formally equal individual citizens, “one person, one vote” likewise banished collective entities such as cities from direct participation in the political sphere and affirmed that the individual was the only relevant political unit. After establishing this principle with *Reynolds*, the Supreme Court quickly reinforced it in a series of cases beginning with *Avery v. Midland County*,¹⁸ which held that the “one person, one vote” formula was applicable not only to elections for state government but to local governments as well — hence, local governments could not give recognition in their electoral schemes to sublocal entities such as neighborhoods or boroughs.¹⁹

If *Reynolds* and *Avery* represent the Enlightenment promise that individual equality would not be compromised by local diversity, however, that promise has been entirely unfulfilled. Consider a simple example. A study of public school financing for 2004 reported that school districts in the poorest communities spent approximately \$825 less per student than school districts in the wealthiest communities.²⁰ The major reason for this disparity is simple: the local property tax is a major source of public school financing in most states, so a community’s ability to finance public schools varies

¹⁶ See Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1193–94 (2008); Frug, *supra* note 9, at 1083–90.

¹⁷ See Frug, *supra* note 9, at 1067, 1074–127 (arguing that liberalism sees city power as frustrating “national political objectives by local selfishness and protectionism”). Nicholas Blomley, reviewing the work of Frug and others, labels their work as part of a “centralization narrative,” in which “[l]egal interpretation becomes less the function of place-bound interpreters, and more the prerogative of legal professionals who work assiduously to expunge the ties of context and community. The appeal of place gives way to the aspatial language of order, equality, and the homogenous rule of law.” NICHOLAS K. BLOMLEY, *LAW, SPACE AND THE GEOGRAPHIES OF POWER* 106–11 (1994).

¹⁸ 390 U.S. 474, 485–86 (1968); *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50 (1970); *see also infra* section I.A.

¹⁹ See *Bd. of Estimate of N.Y. v. Morris*, 489 U.S. 688, 695 (1989) (invalidating, as violating “one person, one vote” principle, New York City scheme weighting voting power in zoning and budget authority so as to provide each of five boroughs with equal voting power); *infra* text accompanying notes 93–94 (discussing *Morris*).

²⁰ See Ross Wiener & Eli Pristoop, *How States Shortchange the Districts that Need the Most Help*, in *FUNDING GAPS* 2006, at 5–7 (2006), <http://www.edtrust.org/sites/edtrust.org/files/publications/files/FundingGap2006.pdf>, archived at <http://www.perma.cc/0gNS9Tc719h>.

based on the taxable resources located within its geographic borders.²¹ Notwithstanding *Reynolds*, the Supreme Court has emphatically held that this form of interlocal inequality is permissible, for it is simply “inevitable that some localities are going to be blessed with more taxable assets than others.”²²

Of more direct relevance for this Article, the *Reynolds/Avery* doctrine itself has become riddled with exceptions that appear to undermine the doctrine’s commitment to formal equality. Although there is one doctrinal line, following *Avery*, that insists on rigid application of the “one person, one vote” rule to local governments, in a second strand of cases involving so-called “special purpose” municipal districts, the Court has permitted the apportionment of votes based on land ownership.²³ The direct correlation between voting rights and property interests marks a stark departure from the Enlightenment ideal of abstract citizenship and an apparent recrudescence of feudal status relationships.²⁴ In yet a third group of cases, the Court has permitted municipal entities to allocate votes based on individuals’ presence within a particular locality, undermining *Reynolds*’ decree that “cities” are entitled to no normative weight in state voting schemes.²⁵ Unsurprisingly, scholars have bemoaned the incoherence of the three strands of the “one person, one vote” doctrine and the Court’s failure to articulate any principled basis for determining the applicability of the “one person, one vote” rule to local governments.²⁶

²¹ See *id.* at 8–9 (“Because wealth and property value are so unequally distributed, using local taxes as the primary resource for schools inherently gives wealthier communities an advantage in providing better educational opportunities.”).

²² See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54 (1973).

²³ See *Ball v. James*, 451 U.S. 355, 356 (1981); *infra* section I.B.

²⁴ See ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 157 (1970) (“The structuring of government in terms of clearly defined interests . . . raises the specter of the corporate state, or of the medieval state, which classified people by status, and held them to the status in which they were classified.”).

²⁵ See *Holt v. City of Tuscaloosa*, 439 U.S. 60 (1978); *Town of Lockport v. Citizens for Cmty. Action at the Local Level*, 430 U.S. 259 (1977); *infra* section I.C.

²⁶ See, e.g., Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 370 (1993) [hereinafter Briffault, *Who Rules at Home?*] (arguing that the doctrine is “analytically unsound”). Public choice theorists have also expressed displeasure with the “one person, one vote” jurisprudence, particularly the *Avery* line. Under the well-known “Tiebout model,” urban residents are often thought to be highly mobile “consumer-voters” who have a wide variety of municipalities in which to settle or invest and can thus express their pleasure or displeasure with municipal policies by “voting with their feet.” See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956); see also Vicki Been, “Exit” as a Constraint on Land Use Exactions: *Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 507–08 (1991) (explaining that not only do consumers “‘shop’ for a particular level and combination of public goods,” but municipalities may also “compete for residents by trying to offer a desirable package of services at the lowest cost” (footnote omitted)); Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 400 (1990) [hereinafter Briffault, *Our Localism: Part II*] (“The multiplicity of localities assures a range of choices and increases the likelihood that one locality will approximate the mobile consumer-voter’s preferences.”). Robert Ellickson argues that individuals may weigh competing values such as efficiency, redistribution, and participation in different ways, and given the choices available to

It is my thesis that although the "one person, one vote" jurisprudence appears conceptually incoherent, it actually contains an inner logic that reflects the ambiguous legacy of the Enlightenment in this country. In short, while *Reynolds* and its progeny have presumed to disable local governments and suppress interlocal inequality, their impact has been exactly the opposite: under the guise that local governments have been rendered inert, courts surreptitiously permit local governments to exercise a substantial degree of autonomy. The "one person, one vote" rule, for example, provides local governments with a veneer of legitimacy that enables courts to rationalize self-serving local behavior as the effectuation of a grand public interest. As a result, substantial interlocal inequalities are allowed to persist under the guise that local governments are constrained by Enlightenment abstractions such as "one person, one vote."

I establish this thesis in two parts. Initially, the Article demonstrates that the three strands within the "one person, one vote" doctrine are all superficially consistent with the Enlightenment conception of abstract individual identity embodied in the resolution of the Jewish question. I then show how these Enlightenment abstractions have actually legitimized interlocal inequality. Throughout, the Jewish question serves as a useful metaphor to probe the still unresolved status of local governments within the modern nation-state.

I do not take the position that the pattern I identify represents a deliberate subterfuge by the courts. Rather, as the Article concludes, the perpetuation of interlocal inequality under the cover of the Enlightenment's unifying abstractions represents an uneasy compromise in our jurisprudence between the Enlightenment promise to consolidate the power of the nation-state by destroying the vestiges of local distinctiveness and the practical reality that local distinctiveness is ineradicable. In short, American jurisprudence has not uncritically accepted the Enlightenment ideal of the "rights of man," but has sought to balance it with the pragmatic recognition that rights are dependent upon territorial sovereignty for meaningful protection. This compromise proves problematic, however, for it enables local inequality to persist under the soothing illusion of Enlightenment universality, and thereby suppresses candid debate about how to overcome that inequality.

Part I following this Introduction reviews the three strands of the "one person, one vote" jurisprudence and the conventional view that they are ir-

them under the Tiebout model, they should be free to select the municipality with the voting regime that best suits their preferences. See Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1539–63 (1982); see also ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 403–08 (2005) (arguing that *Avery* rule is inefficient because "one person, one vote" rule encourages interest group conflict and pressure for redistributive legislation). Although more sympathetic to the voting structures in *Salyer* and *Ball* that allocate voting power based on economic interest, Ellickson observes that the Court "has yet to identify a persuasive reason for this exception [to "one person, one vote"]" and that the Court apparently "does not have a consistent theory for why local electoral systems should follow particular paradigms." Ellickson, *supra*, at 1543.

reconcilable. Part II then argues that the three strands actually fit neatly within a popular narrative in modern local government scholarship that has been dubbed the “centralization narrative.” According to the centralization narrative, the post-Enlightenment state is characterized above all by the persistent disabling of local governments in favor of a universal state that is divorced from all local diversity and idiosyncrasy.²⁷ Geographer Nicholas Blomley writes that the centralization narrative purports to chronicle the displacement of a regime in which law is a contingent product of and uniquely applicable within particular places or territories (e.g., “You can’t do that *here*”) by one of “formally placeless legal norms” with universal applicability.²⁸ I argue that each of the three strands reinforces centralized state control and disables local distinctiveness by creating a standard for political participation that rigidly screens out territorial distinctions so that those distinctions are rendered politically irrelevant, leaving only the universal, despatialized state to act upon geographically disembodied actors.

For example, the *Reynolds/Avery* doctrinal strand — which strictly applies the “one person, one vote” rule to local governments — apprehends voters as formally equal and precisely identical individuals, without regard to particular territorial affiliations such as one’s residence in a particular locality. I call this the “abstraction of citizenship,” because each voter is imagined to be a homogenous, abstract individual — a citizen — who has no “place” other than as a subject of the state. The second doctrinal strand, which exempts certain “special purpose” districts from the “one person, one vote” rule, similarly diminishes territorial power and enhances state centralization through a different abstraction: the abstraction of *money*. The courts empower special purpose districts to deviate from “one person, one vote” only after assuring themselves that these districts exercise no territorial control at all but are simply mechanisms for transforming real property from a bundle of ineffable local characteristics into a market commodity judged solely by the universal standard of money. Finally, the third group of cases, which allows the weighting of votes based on locality of residence under

²⁷ See BLOMLEY, *supra* note 17, at 107. According to centralization narrative:

“[T]he geography of legal evolution has been one of continued disembedding of legal practice and legal knowledge from the locality, and a centralization of legal authority, in step with the formation of national state structures. . . . The appeal of place gives way to the aspatial language of order, equality, and the homogenous rule of law.”

Id.; see also Richard Thompson Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 888–89 (1999).

²⁸ See BLOMLEY, *supra* note 17, at 106–11; see also Robert Sack, *Human Territoriality: A Theory*, 73 ANNALS ASS’N AM. GEOGRAPHERS 55, 59 (1983) (describing attributes of territorial sovereignty, using “You may not do this here” as an example). Sack refers to the former type of legal regime as a regime of “territoriality,” which he defines as “the attempt to affect, influence or control actions and interactions (of people, things and relationships) by asserting and attempting to enforce control over a geographic area.” *Id.* at 55. On the meaning of territory and territoriality, see also DAVID DELANEY, *TERRITORY: A SHORT INTRODUCTION* 13–16 (2005).

certain circumstances, adopts the abstraction of *territory* or *cartography*: the Court affirms the state’s ability to assign every voter to a municipality for voting rights purposes without regard to whatever social, cultural, economic, or sentimental interest a voter may have in that jurisdiction’s governance. In this way, the Court divorces territory from its traditional association with a broad suite of particular interests so that territory may become a plastic administrative tool of the central state. In sum, all three groups of cases are consistent with the centralization narrative insofar as each enshrines an idealized form of civic identity that is purified of all particular territorial affiliations, thereby neutralizing the capacity of local governments to interfere with state hegemony.

Part III then problematizes this account. Scholars in the burgeoning field of “legal geography” have cast doubt in recent years upon the validity of the centralization narrative, arguing that the apparent evisceration of territory by the universal state functions as a guise under which courts enable local diversity to flourish.²⁹ I draw on the legal geography literature to show that the subjection of local difference to state centralization witnessed in the “one person, one vote” jurisprudence is in fact an illusion. The various centralizing abstractions project a façade of universality that enables local governments to exert control over particular spaces. The landmark case of *City of Eastlake v. Forest City Enterprises*³⁰ serves as an exemplar of this phenomenon. There, the Supreme Court upheld a fairly typical instance of local land use regulation: a voter referendum in a small suburban community that altered the community’s procedures for addressing land use changes after the city council approved the siting of an affordable housing complex that members of the community preferred to exclude. The Court approved the referendum by lionizing the right of “the people at large” to determine “the public interest.” As I demonstrate, the Court was able to rhetorically transform a quotidian act of suburban parochialism into an effectuation of a grand “public interest,” and a small municipality of 20,000 into an abstract “people at large,” only by refracting the referendum through the prism of “one person, one vote”: the fact that the village of Eastlake is required to apportion votes according to this principle confers upon the village the aura

²⁹ See Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1365 (1997) (arguing that courts permit racial discrimination in the creation of local governments by using a rhetoric of neutrality that makes such discrimination appear as the product of voluntary choice rather than state action); cf. BLOMLEY, *supra* note 17, at 122–49 (challenging centralization narrative by showing the subtle deployment of spatial analysis in court rulings and legal analysis concerning worker safety under the Occupational Safety and Health Act); DELANEY, *supra* note 28, at 18 (territory makes power seem “self-evident” and “non-problematic”); Ford, *supra* note 27, at 892 (arguing that centralization narrative is undermined by several Supreme Court rulings in which the Court legitimizes local diversity); Sack, *supra* note 28, at 59 (“[T]erritoriality appears as a general, *neutral*, essential means by which a place is made, or a space cleared and maintained, for things to exist.”). I discuss some of this legal geography literature at greater length in section II.D.

³⁰ 426 U.S. 668 (1976).

of universality, under cover of which it is free to engage in brazenly self-regarding behavior. In the remainder of Part III, I demonstrate how a number of other cases similarly use the guise of universality provided by the Enlightenment abstractions of citizenship, money, and territory to legitimize the entrenchment of local territorial enclaves.

Part IV explains that the tension between the apparent homogenization and the underlying fragmentation of space in these cases reflects an uneasy compromise between the Enlightenment ideal of the abstract “rights of man” and a pragmatic realization that territorial sovereignty is a precondition to securing human rights. This compromise, I argue, has troubling consequences: it enables those with sufficient political or financial power to retreat into insulated enclaves under the aegis of state neutrality, while foreclosing redress for those excluded from such enclaves by deploying the fiction that they still retain their abstract rights.

Throughout, I return to the Jewish question to illuminate the trajectory of local governments under “one person, one vote.” As we have already seen, the Jewish question has long served as a template for a broad suite of concerns about the role of spatial particularity in the modern state. It was in the context of attempting to resolve the Jewish question that Enlightenment reformers and apparatchiks of the emerging nation-state first conjured the abstraction of citizenship via the “rights of man,” and we will see in Part II that the abstractions of money and territory were likewise tied to the resolution of the Jewish question. As Part III peels away the mask of universality to reveal a clandestine assertion of territorial particularity, the Jewish question again proves relevant: it will become clear that something is amiss with the Enlightenment abstractions when we see how the Supreme Court authorized a municipality, under the cover of state universality, to literally revive the Jewish ghetto in upstate New York. Finally, Part IV explores the disastrous consequences of fictitiously resolving the Jewish question through abstractions. This discussion will shed light on the problematic nature of using state neutrality to cover for an entrenchment of local government power.

I. AN INCOHERENT DOCTRINE?

There are three distinct and apparently irreconcilable strands within the Supreme Court’s “one person, one vote” jurisprudence, as it relates to local governments. The first strand holds simply that local governments are required to allocate votes in accordance with the “one person, one vote” principle. The second strand exempts certain districts from the “one person, one vote” rule on the grounds that they are “special purpose” rather than “general purpose” local governments. The principle upon which the general/special distinction rests, however, has been justly decried as analytically unsound. Finally, a third strand of cases holds that the “one person, one vote” rule is inapplicable even to general purpose local governments under certain circumstances because local governments are mere creatures of the

state. This reasoning draws into question whether local governments should ever be subject to the “one person, one vote” rule; yet, in its most recent pronouncement on the subject, the Supreme Court has affirmed that “one person, one vote” does still apply to general purpose local governments. In short, the doctrine is a mess, or so it would appear. This Part provides a brief overview of the jurisprudence and the conventional assessment that the jurisprudence is incoherent. In what remains of the Article, I will challenge that assessment and show that the doctrine in fact contains some significant common threads.

A. “One Person, One Vote”

In the landmark decision of *Reynolds v. Sims*, the Supreme Court held that the Equal Protection Clause required that voting rights for elected state government officials be apportioned in accordance with the principle of “one person, one vote.”³¹ Subsequently, in *Avery v. Midland County*, the Court held that the same principle applied to local governments.³² While acknowledging that state legislatures exercised substantial control over local governments, the Court found that “the States universally leave much policy and decisionmaking to their governmental subdivisions.”³³ It concluded that “[t]he actions of local government *are* the actions of the State,”³⁴ and thus that local governments are bound by the terms of the Equal Protection Clause to the same extent as the state itself.

The *Avery* Court took note that the entity at issue, a commissioners court, performed a number of functions that generally affected the residents of the area, including the imposition of countywide property taxes and the administration of welfare services.³⁵ The Court stated that while “one person, one vote” was clearly applicable to local governments exercising such “general governmental powers,”³⁶ it might not apply in a future case to “a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents.”³⁷

Nevertheless, the Court followed *Avery* with a series of decisions that cast doubt upon the applicability of this hypothetical exception, finding the “one person, one vote” rule applicable in circumstances that would appear to disproportionately impact a particular group of constituents. In *Kramer v. Union Free School District No. 15*,³⁸ the Court held that local school board

³¹ 377 U.S. 533 (1964).

³² 390 U.S. 474, 485–86 (1968).

³³ *Id.* at 481.

³⁴ *Id.* at 480.

³⁵ See *id.* at 484 (noting that commissioners court maintained buildings, administered welfare services, determined school districts, and imposed taxes on all property within the county).

³⁶ *Id.* at 485.

³⁷ *Id.* at 483–84.

³⁸ 395 U.S. 621 (1969).

elections could not be restricted to property taxpayers and parents of school-aged children in the jurisdiction,³⁹ despite the board's argument that the enfranchised individuals were substantially more interested in the outcome of school board elections than individuals such as the plaintiff, a childless bachelor who lived in the school district but paid no taxes.⁴⁰ In *Hadley v. Junior College District of Metropolitan Kansas City*,⁴¹ the Court held that a consolidated junior college district formed by the combination of eight separate school districts performed "important governmental functions"⁴² and exercised powers that were "general enough and have sufficient impact throughout the district" to demand the application of the *Avery* rule.⁴³ Finally, in *City of Phoenix v. Kolodziejski*,⁴⁴ the Court held that municipal elections to authorize the issuance of bonds to finance a variety of municipal improvements could not be limited to owners of real property in the municipality, notwithstanding that the bonds' debt service was to be paid through property tax revenues and the bonds were to be secured by the municipality's power to tax property, because the Court found that non-property owners had a substantial interest in whether the bonds were issued.⁴⁵ Taken together, these cases seemingly made clear that the Court would tolerate no deviation from the *Avery* rule.

B. Special Purpose Districts

The Court soon began to reverse course. In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*⁴⁶ and *Ball v. James*,⁴⁷ the Court exempted certain local government entities from *Avery* on the grounds that they performed specialized functions that disproportionately affected particular individuals.⁴⁸ Both cases involved water districts, the operations of which were financed, at least in part, by mandatory assessments imposed on landowners who received water from the districts. The size of the assessment in both cases was based on the benefit each parcel of land was deemed to receive, and voting rights for the directors of the water districts were allocated based on either the assessed valuation of the land (in *Salyer*) or the acreage of land

³⁹ *Id.* at 622.

⁴⁰ *See id.* at 631.

⁴¹ 397 U.S. 50 (1970).

⁴² *Id.* at 51–52.

⁴³ *Id.* at 53–54.

⁴⁴ 399 U.S. 204 (1970).

⁴⁵ *Id.* at 209–11; *see also* *Hill v. Stone*, 421 U.S. 289, 307–08 (1975) (holding that limiting elections on assumption of municipal debt to property owners who have "rendered" property to the municipality for taxation violates "one person, one vote" principle); *Cipriano v. Houma*, 395 U.S. 701, 702, 705 (1969) (holding that bond election to authorize issuance of revenue bonds, which are secured and paid by the utilities they finance, may not be limited solely to property owners).

⁴⁶ 410 U.S. 719 (1973).

⁴⁷ 451 U.S. 355 (1981).

⁴⁸ *Ball*, 451 U.S. at 371; *Salyer*, 410 U.S. at 728.

owned (in *Ball*). The voting schemes in the two cases were challenged for violating the “one person, one vote” rule, but the Court held that *Avery* was inapplicable. In both cases, the Court held that the water districts served only the limited purpose of providing water and disproportionately impacted the landowners who paid the assessments and whose land received the benefit of water provision. The Court reached this conclusion notwithstanding the fact that the water district in *Ball* included almost half the population of the state of Arizona, including the entire Phoenix metropolitan region, and that it generated and sold electric power in addition to its water management functions, thus making the district a significant factor in the overall development of an arid region. The Court found that the district did not administer “such normal functions of government as the maintenance of streets, the operations of schools, or sanitation, health, or welfare services.”⁴⁹ Furthermore, the district’s weighted voting structure was legitimate because the landowners empowered to vote were the principal beneficiaries of the district and bore the principal burden of financing the district’s operations through the mandatory assessments.⁵⁰

As scholars have been quick to point out, it is difficult at best to reconcile the *Avery* line of cases with *Salyer* and *Ball*. As an analytical matter, the distinction between a “general” governmental entity that affects the public at large and a “special” or “limited purpose” governmental entity that disproportionately affects a particular subset of the public is unsound, and even circular.⁵¹ With regard to “disproportionate impact,” it makes little sense to say that the property owners who were to finance the municipal bonds in *Phoenix* were any less disproportionately impacted than the property owners whose assessments financed the districts in *Salyer* and *Ball*. Rather, as Richard Briffault notes, the Court simply applied different conceptions of local government to these cases. It viewed *Avery* and *Phoenix* through a “democratic” model that assumed government activity has a broad impact on the public at large, whereas it viewed *Salyer* and *Ball* through a “proprietary” model that assumed the impacts of governmental activity were primarily limited to those who bear the economic burdens and benefits.⁵² This is backwards, Briffault asserts, because the courts are supposed to *first* determine whether governmental activity in fact has a disproportionate impact on landowners before deciding whether the governmental body is a democratic or proprietary entity.⁵³ Likewise, the “general” versus “special” government distinction is completely arbitrary. How can a junior college district

⁴⁹ *Ball*, 451 U.S. at 366.

⁵⁰ *Id.* at 371.

⁵¹ See Briffault, *Who Rules at Home?*, *supra* note 26, at 370 (arguing that the distinction is “analytically unsound,” that the “disproportionate impact” criterion is “circular” and that the “limited purpose” criterion is “arbitrary”). Briffault notes that *Salyer* and *Ball* have induced “confusion” among the lower courts. See *id.*

⁵² *Id.* at 370–71.

⁵³ See *id.* at 371.

that serves a limited constituency be a “general” governmental entity while a district that provides vitally important utilities like water and power to half the state of Arizona be considered a “limited function” entity? As Briffault explains, the Court has never even tried to explain or rationalize this distinction, instead uncritically providing a “laundry list of powers and ‘normal functions of government.’”⁵⁴ In fact, the laundry list itself changes to meet the desired result. The *Salyer* Court listed the provision of “utilities” as a general governmental function,⁵⁵ but “utilities” is absent from the list in *Ball*,⁵⁶ which of course involved a district that provided utilities. *Ball*, in turn, mentioned the “maintenance of streets” and “sanitation” as general governmental functions,⁵⁷ but a later case involving the maintenance of streets and sanitation services omitted these from its list of “general” governmental functions (although “utilities” somehow reappeared).⁵⁸

As if matters were not already sufficiently confusing, the Supreme Court has relieved local governments from the “one person, one vote” rule even in some cases clearly involving “general” governmental entities. Specifically, in cases involving the structuring of local governments, courts have deferred to state determinations about how to apportion voting rights.

C. Local Government Structuring

In *Town of Lockport v. Citizens for Community Action at the Local Level*,⁵⁹ the Court upheld a New York State scheme that permitted a county government to change its governing structure only if the change were approved by a referendum of voters living within cities in the county and a separate referendum of voters living outside the cities in villages and towns.⁶⁰ Under this scheme, Niagara County’s proposed new charter was defeated because it did not obtain a majority of non-city voters, even though it did obtain a clear majority of total county votes, with the majority of support coming from the more populous cities.⁶¹ The Court upheld the scheme against a “one person, one vote” challenge, noting that courts have typically given states “wide discretion . . . in forming and allocating governmental tasks to local subdivisions,”⁶² and reasoning that the state of New York could legitimately find that city and non-city voters have “distinctive

⁵⁴ *Id.* at 373.

⁵⁵ *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 729 (1973) (listing schools, housing, transportation, utilities, and roads).

⁵⁶ *Ball v. James*, 451 U.S. 355, 366 (1981) (listing maintenance of streets, operation of schools, and sanitation, health and welfare services).

⁵⁷ *Id.*

⁵⁸ See *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92, 104 (2d Cir. 1997) (listing schools, housing, hospitals, jails, firefighting, transportation, utilities, and zoning). I discuss *Kessler* extensively *infra* at text accompanying notes 119–139.

⁵⁹ 430 U.S. 259 (1977).

⁶⁰ *Id.* at 272–73.

⁶¹ See *id.* at 262.

⁶² *Id.* at 269.

interests” in restructuring county government, as counties often have far greater impacts on non-city than city voters.⁶³

The Court reached a similar result in *Holt Civic Club v. City of Tuscaloosa*.⁶⁴ There, the state of Alabama conferred on the city of Tuscaloosa substantial regulatory powers over a neighboring, unincorporated area called Holt, but residents of Holt were not empowered to vote in municipal elections within Tuscaloosa. A group of Holt residents asserted that this scheme violated the “one person, one vote” rule. The Court held, however, that states may legitimately restrict the franchise to those who physically reside within the relevant governmental entity, in this case Tuscaloosa. Requiring that the franchise be extended to all those affected by a municipality’s actions, regardless of residence, would be unworkable given that municipal actions have innumerable diffuse impacts on areas outside their borders. In any event, the Court held, states have “extraordinarily wide latitude” in “creating various types of political subdivisions and conferring authority upon them.”⁶⁵

In concluding that courts should defer broadly to state structuring of local political entities, both *Lockport* and *Holt* drew upon the foundational local government case of *Hunter v. Pittsburgh*,⁶⁶ decided by the Supreme Court in 1907. *Hunter* itself involved a question of whether a consolidation of two municipalities required separate consents of the voters in each constituent municipality, where state law provided that the consolidation could take place if the aggregate majority of voters in the two cities approved the change. The Court held that states had broad power to dictate the terms of municipal boundary change. In sweeping dicta, the Court said that local governments were nothing more than conveniences created by the state to effectuate its own purposes, and thus that states had plenary power with regard to the formation, empowerment, and abolition of local governments.⁶⁷

The invocation of *Hunter* by *Lockport* and *Holt* to authorize deviations from the “one person, one vote” rule in matters of general governmental power, based on a local government’s status as a mere instrumentality of the state, conflicts sharply with *Avery*. *Avery* held that local governments *are*

⁶³ See *id.* at 268–72.

⁶⁴ 439 U.S. 60 (1978).

⁶⁵ *Id.* at 71.

⁶⁶ 207 U.S. 161 (1907).

⁶⁷ See *id.* at 178–79. The Court stated:

“Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.” *Id.*

the state for purposes of the Equal Protection Clause, and thus appears to require that the municipal franchise be extended to all individuals directly and substantially affected by a local exercise of power (a principle not challenged, and perhaps even reinforced by *Salyer* and *Ball*). By contrast, *Holt* holds that even individuals who are so affected may be barred from the franchise if the state simply defines them as nonresidents of the municipality. Taken as a whole then, *Salyer*, *Ball*, *Lockport*, and *Holt* could be seen as seriously eroding, if not completely burying, the older *Avery* line of cases.

In its most recent decision regarding the applicability of the “one person, one vote” rule to local governments, however, the Court made clear that *Avery* is still alive and well. In *Board of Estimate of City of New York v. Morris*,⁶⁸ the Court struck down New York City’s scheme for apportioning votes for the Board of Estimate, an entity that exercised wide-ranging zoning and budgeting powers. Three members of the board were elected citywide, and the other five were the elected Presidents of the five boroughs comprising New York City. The borough presidents each had equal voting power on the board notwithstanding wide disparities of population among the five boroughs. The City defended the scheme against a “one person, one vote” challenge on the grounds that the board “accommodates natural and political boundaries as well as local interests.”⁶⁹ Nevertheless, the Court struck down the scheme, finding under *Avery* and its progeny that the board exercised a sufficiently “general” set of functions to warrant the application of the “one person, one vote” rule.⁷⁰

II. STATE CENTRALIZATION AND THE UTILITY OF ABSTRACTIONS

The applicability of the “one person, one vote” rule to local governments is, it appears, a complete muddle, a disjointed mass of cases unified by no clear analytical principle. This Article challenges that conclusion. In short, I argue that the cases just reviewed all utilize an Enlightenment ideal of homogeneity and centralization to, ironically, legitimize interlocal inequality. Initially, this part demonstrates that the three lines of cases are all consistent with the Enlightenment ideal of centralization, or what scholars have dubbed the “centralization narrative.” In the next Part, I will then show how the centralization narrative has perversely abetted the perpetuation of interlocal inequality.

According to the centralization narrative, the rise of liberal democracy has entailed the consolidation of central state power and the eradication of intermediate corporate entities that resisted centralization.⁷¹ As the Introduction mentioned briefly, and this Part takes up in greater detail, a key turning

⁶⁸ 489 U.S. 688 (1989).

⁶⁹ *Id.* at 702.

⁷⁰ *See id.* at 692–96.

⁷¹ Richard Ford describes the centralization narrative as follows: “American political history is characterized by the progressive centralization of power at the expense of locally dis-

point in the centralization narrative was the modern state’s resolution of the Jewish question. The formerly distinct and unassimilated Jewish community was drained of its political character as Enlightenment reformers formulated an abstract, individualized conception of political identity that was divorced from corporate affiliations — hence, the notion that each Jew should become “a man in the street and a Jew at home.”⁷²

As this Part shows, the Jewish question is a useful metaphor for understanding how courts have used the “one person, one vote” rule to incorporate local governments into a nation-state premised on centralized state control over atomized individuals. Like the Jewish community, local governments historically were legally and politically autonomous corporate entities, and as such resisted sovereign control with equal stubbornness.⁷³ Local governments were especially threatening to the state because their authority was rooted in and tailored to the unique characteristics of the particular spaces they governed, and were thus incapable of being supplanted by a central administration lacking the acquired knowledge of local conditions.⁷⁴

Just as the Jewish question was resolved by banishing the particularities of Jewish identity from the political sphere, leaving only the abstract “man” to confront the state, the related “local government question” has been resolved in a similar manner: by creating idealized standards for political participation that filter out all parochial territorial affiliations so that the state may act directly upon a homogenized, “aspatial” citizenry.⁷⁵ For instance, prior to *Reynolds* and *Avery*, it was customary for states and local governments to apportion votes in a way that gave specific territories — cities, boroughs, neighborhoods — a direct voice in government. The “one person, one vote” rule, however, ensures that only individuals, and not localities, provinces, or territories, are represented in the political sphere.⁷⁶ This enables the state to imagine its voters as precisely equal, identical individuals, “abstracted” from their particular cultural and territorial associations, and thus disables local governments from asserting an independent right to control any particular territory. I call this the abstraction of *citizenship*.

The special-purpose district cases, while rejecting “one person, one vote,” nevertheless involve a similar abstraction: the abstraction of *money*. Historically, as just mentioned, local governments were able to safeguard

tinctive political communities such as the states and local governments.” Ford, *supra* note 27, at 888–89.

⁷² See *supra* notes 1–8 and accompanying text.

⁷³ On the legal status of cities, see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 357–403 (1983); Stahl, *supra* note 16, at 1193–94; and Frug, *supra* note 9, at 1083–90. On the legal status of the Jewish *kehillah*, see Stolzenberg & Myers, *supra* note 6, at 636–40.

⁷⁴ See SCOTT, *supra* note 4, at 316–19 (discussing ways in which practical knowledge was peculiarly local and thus resistant to centralized authority); *infra* notes 87–89 and accompanying text.

⁷⁵ See BLOMLEY, *supra* note 17, at 106–11.

⁷⁶ See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[L]egislators are elected by voters, not farms or cities or economic interests.”).

their autonomy through the inscrutability and incommensurability of the territories they controlled. The modern nation-state, accordingly, sought to dilute local autonomy by transforming territory from an opaque matrix of locally contingent interests into an exchangeable commodity measured by the uniform standard of money. The special-district cases, I argue, facilitate this trend by conceptualizing the special district as a mechanism for enhancing the exchange value of real property; indeed, the cases rationalize the confinement of the franchise to landowners on the ground that the special district's sole *raison d'être* is to make landowners' property more economically valuable. In doing so, the cases not only hasten the conversion of land into a commodity, but also the transformation of the municipality itself (here, the special district) from a jurisdiction exercising territorial authority into a mere "conceptual medium"⁷⁷ for the commodification of real property. Both land and locality are thus separated from their roots in a particular territory and recapitulated as geographic abstractions so that they may be more effectively subjected to state authority.

Finally, leaving *Lockport* aside temporarily, I show that *Holt* deploys a third abstraction: the abstraction of *territory*. In *Holt*, unlike the first two sets of cases, territory unquestionably matters — voting rights are determined according to one's presence within a particular jurisdiction. But *Holt* redefines the meaning of territory to suit the state's centralizing agenda. The Court makes clear that a voter's degree of interest in the governance of any particular local government is immaterial; all that matters is whether the voter resides within the relevant municipality as determined by the state's jurisdictional map. Territory is thus stripped of all parochial associations and rendered as an abstract geometric representation in the service of state administration. In sum, despite the divergent results in these cases, they all effectively utilize abstractions in order to drain local governments of their territorial contingency so that they may be homogenized and assimilated as organs of the administrative state.

In the next Part, this "centralization narrative" will begin to unravel. As it turns out, the abstractions of citizenship, money, and territory are rhetorical devices that courts actually use to legitimize the entrenchment of local territorial authority. They do so, as I further elaborate, in order to mediate between the Enlightenment ideal of abstract citizenship and the practical reality that sovereignty is territorially contingent.

Before complicating the centralization narrative, however, we must first establish its basic lineaments. The common thread running through the "one person, one vote" jurisprudence, as I have just outlined, is the use of abstractions to divorce local governments from their territorial underpinnings and

⁷⁷ See *S. Cal. Rapid Transit Dist. v. Bolen*, 822 P.2d 875, 883 (Cal. 1992) (describing special assessment district as "little more than formalistic, geographically defined perimeters whose *raison d'être* is to serve as the conceptual medium for the recognition of economic benefits conferred and the imposition of a corresponding fiscal burden").

subordinate them to the state. This ingenious practice has its roots in the Enlightenment, when the modern state first arose and discovered the threat posed by corporate entities like local governments and Jewish communities. It was in response to this threat that the Enlightenment ideal of abstract political identity was formed, an ideal that we will then be able to trace through the entirety of the “one person, one vote” jurisprudence.

A. *The Abstraction of Citizenship*

1. *The Jewish Question.*

As the modern state emerged in Enlightenment Europe and asserted its claim to create a unitary, national political culture, it ran up against the existing character of feudal society. That society was clumped into a multitude of stubbornly autonomous subgroups — guilds, religious organizations, estates, corporations — each of which claimed political authority over individuals within its jurisdiction under its own idiosyncratic set of laws. The political and legal order of the day saw society as composed of groups, not individuals, and these groups were considered “autonomous social, religious, and legal entit[ies],” with collective rights and duties.⁷⁸ The fate of these subgroups in the emerging nation-state was a pressing issue for Enlightenment thinkers, an issue that was often distilled into one particularly vexing quandary: the “Jewish question.” Jewish communities in Western European nations were corporate entities that exercised collective political and legal authority over their constituents and thoroughly resisted state intervention into their internal affairs.⁷⁹ More than that, the Jews were seen as a demonstrably unassimilated and perhaps inassimilable subgroup who observed a unique set of religious practices, lived apart in a clearly demarcated territorial ghetto, followed a body of religious laws applicable only to themselves, spoke their own language, and even maintained distinct dietary and grooming practices.⁸⁰ As such, the Jewish community posed the most striking challenge to the nation-state’s ambitious claims to authority.

⁷⁸ See Stolzenberg & Myers, *supra* note 6, at 636–40.

⁷⁹ See KATZ, *supra* note 5, at 9–27 (describing characteristics of Jewish ghetto prior to emancipation); Stolzenberg & Myers, *supra* note 6, at 636–40.

⁸⁰ On the distinctiveness of the Jewish community and its challenge to the idea of the liberal nation-state, see Minow, *supra* note 5, at 4–8; and Stolzenberg & Myers, *supra* note 6, at 636–40. While Jews were, of course, required to live in ghettos under the laws of most European nations for many generations, Louis Wirth notes that the Jews voluntarily isolated themselves in ghettos long before it was required, WIRTH, *supra* note 6, at 18–27, and that “the forcible confinement within ghetto walls merely served to give the community a more definite geographical expression on one hand, and to intensify the self-consciousness of the members of the community on the other,” *id.* at 51. The modern sociological definition of a ghetto appears to track Wirth’s analysis. According to a recent essay by Loïc Wacquant, the ghetto is a “*Janus-faced institution*” in that the central government sees it as a means for confining and controlling a subordinate group but the subordinate group sees it as a “*protective and integrative device*” because it “fosters consociation and community building within the constricted

For many thinkers, the Jewish question became a platform for wrestling with the broader issue of how to resolve the relationship between the nation-state and the many subgroups that comprised the feudal society. One of the most insightful and famous, and in some ways infamous, musings on this problem was an essay written in 1843 by the young Karl Marx, entitled *On the Jewish Question*.⁸¹ As Marx conceived it, the liberal state's answer to the question of the subgroup was to erect a dividing wall between the private realm of civil society, in which particularistic distinctions based on wealth, religion, geography, and the like would still persist, and a public realm of political activity, from which such distinctions would be banished. This separation would leave the state alone to reign supreme over a populace conceived as indistinct, formally equal individual citizens. As an example of this practice, Marx noted an early progenitor of the "one person, one vote" rule: the policy in several American states of prohibiting property qualifications for voting. Of this, Marx writes, "The state abolishes, after its fashion, the distinctions established by *birth, social rank, education, occupation*, when it decrees that birth, social rank, education, occupation are *non-political* distinctions; when it proclaims, without regard to these distinctions, that every member of society is an *equal* partner in popular sovereignty."⁸²

According to Marx, then, when the state eliminated property ownership as a prerequisite to the franchise, it thereby created an abstraction, the *citizen*, an "unreal" individual who existed only within the political sphere.⁸³ The state imagined this unreal citizen as a blank slate, divorced from his "real" parochial affiliations and precisely identical to every other citizen under the state's jurisdiction. This innovative solution, Marx writes, left subgroups intact, but only as private, voluntary organizations, not as corporate legal or political entities exercising collective rights and duties. In the political sphere, the state acted directly upon atomized, homogenous individuals, without the intermediation of subgroups.⁸⁴

The Jewish question was likewise resolved, for the time being anyway, by reducing Jewishness to a matter of private, individual choice rather than

sphere of intercourse it creates." Loïc Wacquant, *A Janus-Faced Institution of Ethnoracial Closure: A Sociological Specification of the Ghetto*, in *THE GHETTO: CONTEMPORARY GLOBAL ISSUES AND CONTROVERSIES* 1, 10 (Ray Hutchison & Bruce D. Haynes, eds., 2011). By no means do I wish to romanticize the ghetto. My purpose here is only to demonstrate the conceptual difficulty the ghetto posed for Enlightenment reformers.

⁸¹ Karl Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER* 26 (Robert C. Tucker ed., 1978). The essay's title appears to have a double meaning. The first part of the essay is a response to an essay by Bruno Bauer entitled *The Jewish Question*. Thus, Marx's title may be read either to mean that it is a commentary on Bauer's essay, *The Jewish Question*, or as a more general commentary on "the Jewish question." For further commentary on the essay, stressing its broader implications for the "subgroup question," see Minow, *supra* note 5, at 1–2.

⁸² Marx, *supra* note 81, at 33 (emphasis in original).

⁸³ See *id.* at 34 ("In the state . . . man is the imaginary member of an imaginary sovereignty, divested of his real, individual life, and infused with an unreal universality."). I discuss this passage at greater length *infra* at notes 201–213 and accompanying text.

⁸⁴ Marx, *supra* note 81, at 45 (discussing dissolution of feudal subgroups).

an immutable collective identity. Jews were granted political emancipation (i.e., equal rights with other citizens) in exchange for surrendering their claims to corporate autonomy.⁸⁵ With respect to the state, Jews were to be conceived as abstract individuals who were formally identical to all other individuals within the society. Jewish reformers agreed that each Jew must be "a man in the street and a Jew at home,"⁸⁶ that is, a Jew in his private life and an abstract, homogenous "man" in his relationships with the world. This is what I have called "the abstraction of citizenship."

2. *The Local Government Question.*

As profoundly as this new Enlightenment abstraction affected the Jews, it had an equally revolutionary impact on another feudal subgroup: the city. Cities, as I have noted, were among the principal antagonists of the newly minted nation-state. Like the Jewish communities, cities were stubbornly independent collectivities that exercised sovereign political authority, resisted efforts by the state to interfere in their affairs, and operated according to their own body of urban law.⁸⁷ One of the factors that assured the city's independence was the nature of the urban space itself. Most cities were not designed in accordance with some formal plan, but evolved organically according to the practical needs of the populace. The apparent disorder of the cityscape posed no difficulty for locals familiar with the terrain from repeated experience, but it proved impenetrable to outsiders who lacked such familiarity. The "illegibility" of urban spaces made it exceptionally difficult for centralized authorities without local knowledge to assert control over cities, and was thus "a reliable source for [urban] political autonomy."⁸⁸ This autonomy, of course, posed a considerable threat to the nation-state's ambitions.

The "local government question," as it were, was resolved in much the same way that the related Jewish question had been. Because the principal impediment to the political emancipation of the Jew was precisely his Jewishness, the solution was to remove Jewish identity from the political sphere, leaving only the abstract "man." Likewise, because the major obstruction to the assimilation of local governments into the nation-state was the illegibility of the urban terrain, the solution was to divorce local residents from their particular territorial milieus and conceptualize them as abstract citizens without any territorial affiliations. As Gerald Frug has explained, jurists in both

⁸⁵ See KATZ, *supra* note 5, at 161–75 (discussing legal steps to emancipate Jews in European countries); MINOW, *supra* note 5, at 7; STOLZENBERG & MYERS, *supra* note 6, at 640–47.

⁸⁶ See STOLZENBERG & MYERS, *supra* note 6, at 644. One French Jewish reformer argued that Jews must "divest [them]selves entirely of that narrow spirit, of corporation and Congregation, in all civil and political matters, not immediately connected with our spiritual laws, in these things we must absolutely appear simply as individuals, as Frenchmen." MINOW, *supra* note 5, at 7.

⁸⁷ See, e.g., BERMAN, *supra* note 73, at 393–99; FRUG, *supra* note 9, at 1090–98.

⁸⁸ See SCOTT, *supra* note 4, at 53–56.

Europe and the United States masterfully deployed the public/private distinction identified by Marx to eviscerate the city's legal and political autonomy and implement a direct relationship between the central state and atomized individuals.⁸⁹

This process reached its apex with the adoption of the "one person, one vote" principle in the 1960s. The dissenters in *Reynolds v. Sims* argued forcefully that state legislative apportionment schemes should be permitted to take account of territorial associations — by, for example, weighting voting power according to one's place of residence so as to give specific territories a direct political voice. According to Justice Harlan, "[L]egislators can represent their electors only by speaking for their interests — many of which do reflect the place where the electors live."⁹⁰ For the *Reynolds* majority, however, the state represents individuals *qua* individuals, not as members of particular interest groups, territorial or otherwise.⁹¹ As Marx presciently foretold, *Reynolds* insists that distinctions based on wealth, history, or geography be abolished from the political sphere of the state. "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."⁹² The only politically relevant relationship is that between the individual and the state. *Reynolds* does not, of course, outlaw farms or cities or economic interests, but simply declares them inadmissible to the political sphere, which is "emancipated" from these parochial entities. The citizen is conceived as an abstraction, an individual formally identical to every other citizen and released from the particular associations of the private sphere.

Avery takes *Reynolds* a step further. Not only must the state itself ignore the particular geographic interests that compose it, but the state's subdivisions, including cities, must do likewise. *Morris* makes this plain. New York City offered a host of justifications for the Board of Estimate's "one borough, one vote" policy, including that it accommodated natural, historical, and political boundaries that preexisted the consolidation of those areas

⁸⁹ See generally Frug, *supra* note 9, at 1074–80 (discussing incompatibility of city autonomy with liberal ideal of state sovereignty and individual freedom); *id.* at 1099–109 (discussing jurists' use of public/private distinction to subordinate cities to the state). In the initial footnote of his classic article, Frug lists *On the Jewish Question* as one of his principal sources. See *id.* at 1059 n.1. This footnote inspired me to draw out the connections between Marx's essay and local government law.

⁹⁰ *Reynolds v. Sims*, 377 U.S. 533, 623–24; see also *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 749 (1964) (Stewart, J., dissenting) ("Representative government is a process of accommodating group interests . . ."); *id.* at 750 ("Legislators do not represent faceless numbers. They represent people, or more accurately, the majority of the voters in their districts — people with identifiable needs and interests which require legislative representation, and which can often be related to the geographical areas in which these people live.").

⁹¹ *Reynolds*, 377 U.S. at 561 ("[T]he rights allegedly impaired are individual and personal in nature.").

⁹² *Id.* at 562.

into New York City.⁹³ The Court’s decree that New York move from a “one borough, one vote” to a “one person, one vote” system effectively abolished the boroughs as political entities and substituted atomized individuals in their place. According to Richard Ford, “*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.”⁹⁴

The combined effect of *Reynolds* and *Avery*, therefore, is to remove local territorial distinctiveness from the political sphere, leaving only the abstraction of individual citizenship.

B. The Abstraction of Money

In contrast to *Reynolds* and *Avery*, the “special purpose district” cases (*Salyer* and *Ball*, principally) authorize the disproportionate allocation of voting power in certain types of local governments based on property ownership. At first glance, then, these cases appear to be at odds not only with *Reynolds* and *Avery* but also with Marx’s hypothesized dividing wall between the political realm of the state and the private realm of civil society. *Salyer* and *Ball* expressly equate private wealth distinctions (i.e., property ownership) with political distinctions.⁹⁵ Furthermore, by grounding political participation in real property ownership, these cases suggest that territory is a salient political characteristic — voting rights hinge on the relationship between a voter and a particular plot of land.

On closer inspection, this apparent contradiction yields to a larger continuity. *Salyer* and *Ball*, no less than *Avery*, effectively wield an abstraction to reinforce the supremacy of the nation-state and disable territorial subgroups as bases of political power. In these cases, however, it is not the abstraction of *citizenship* but the abstraction of *money* that accomplishes this result. An important post-Enlightenment trend, as we will see, has been the use of money — a universal medium of exchange — to displace land’s idiosyncratic local value. Money thus obviates the need for local knowledge of particular territories, and because, as the previous section discussed, municipal autonomy was historically rooted in just such local knowledge,⁹⁶ the

⁹³ For a comprehensive list of the arguments the city advanced, see Briffault, *Who Rules at Home?*, *supra* note 26, at 402.

⁹⁴ Ford, *supra* note 27, at 892.

⁹⁵ Indeed, in the definitive study of the applicability of the “one person, one vote” rule to local governments, Richard Briffault argues that the *Avery* line and the *Salyer-Ball* line represent opposed models of local government, with the former standing for the proposition that local governments are “democratic” entities — essentially political bodies affiliated with the state — and the latter for the proposition that local governments are “proprietary,” essentially private business enterprises affiliated with the realm of civil society. See Briffault, *Who Rules at Home?*, *supra* note 26, at 345–84.

⁹⁶ See SCOTT, *supra* note 4, at 53–56.

universality of money thereby undermines local autonomy. As we shall see, *Salyer* and *Ball* are consistent with this trend because they hold that the validity of apportioning votes based on land ownership is contingent upon land's conceptualization as an impersonal, fungible commodity measured by a uniform dollar value, rather than an inscrutable web of relations deeply embedded in the social fabric of a locality. Likewise, *Salyer* and *Ball* depict local governments as enervated servants of the universal power of money. By emphasizing that the special districts at issue exercised limited functions that disproportionately affected landowners, the cases make clear that the Court apprehends the districts as mere devices for hastening the transformation of land into a market commodity, rather than as autonomous territorial jurisdictions pursuing their own prerogatives. Thus, just as "one person, one vote" separates individual voters from their particular territorial affiliations so that voters can be conceived as placeless, homogenous citizens of the universal state, money reduces local governments, as well as the land contained within them, to despatialized abstractions that serve state centralization.

1. *The Jewish Question and the Emancipatory Power of Money.*

The Jewish question, again, nicely illustrates how the abstraction of money mutes local difference. In *On the Jewish Question*, Marx writes that the Enlightenment preoccupation with "emancipating" the Jews from the ghetto — figuratively speaking — by stripping them of their particular corporate identities and incorporating them as abstract citizens of the universal state, contained a deep irony: at the very moment this "Jewish question" was being debated, the rise of a capitalist economy had enabled the Jews to achieve a practical form of emancipation insofar as the basis of this new economy was money and it was the Jews who controlled the money.⁹⁷ Here, of course, Marx is trafficking in classic anti-Semitic tropes about the relationship between Jews and money.⁹⁸ He goes on: rather than Jews being assimilated into the universality of citizenship, the wider Christian society was in fact being incorporated into the Jewish value system of capitalism by internalizing money as its universal standard. Marx writes:

The Jew has emancipated himself in a Jewish manner, not only by acquiring the power of money, but also because *money* has become, through him and also apart from him, a world power, while

⁹⁷ Marx, *supra* note 81, at 48–49. The association between Jews and money was a long-standing motif in European political thought, rooted in the historical fact that Jews were generally prohibited from engaging in any occupations except trade involving money. See KATZ, *supra* note 5, at 18. As a result of these legal disabilities, the rise of capitalism and the nation-state did enhance opportunities for Jewish social mobility. See *id.* at 15, 28–29.

⁹⁸ The essay's translator notes that Marx used a play on words with an archaic German term "Judentum," which had the double meaning of "Judaism" and "commerce," to reinforce the equation of Jews and money. Marx, *supra* note 81, at 50 n.6.

the practical Jewish spirit has become the practical spirit of the Christian nations. The Jews have emancipated themselves in so far as the Christians have become Jews.⁹⁹

Money thus leveled particular distinctions as surely as did the abstraction of citizenship, not only by liberating the Jews from the confines of the ghetto, but also by reducing all things in society to a single measurement: their market exchange value. As Marx writes, "Money is the universal and self-sufficient *value* of all things."¹⁰⁰

2. *Money, the State, and the Commodification of Land.*

While the anti-Semitic overtones of Marx's analysis should not be overlooked (and I return to the subject of anti-Semitism in the Conclusion), neither should Marx's remarks simply be dismissed as anti-Semitic ravings. In fact, Marx's analysis anticipates important insights in modern urban sociology about the ways the rise of a money economy diminished the significance of territorial attachments.¹⁰¹ This will prove relevant for the present discussion because once money was elevated to a political value in cases such as *Salyer and Ball*, it became, like citizenship, a useful mechanism for removing territorial particularity from the political sphere.

Thus, in a celebrated essay often considered the foundation of modern urban sociology, the pioneering University of Chicago sociologist Robert Park made a connection between the emancipation of the Jews by money and the broader displacement of territorial interests by the rise of capitalism.¹⁰² Park writes:

The "Wandering Jew" acquires abstract terms with which to describe the various scenes which he visits Reared in intimate association with the bustle and business of the market place, con-

⁹⁹ *Id.* at 49.

¹⁰⁰ *Id.* at 50. Georg Simmel, a later German Jewish sociologist who was influenced by Marx, elaborated on the more general point about money: "Money is concerned only with what is common to all; it asks for the exchange value, it reduces all quality and individuality to the question: How much?" Georg Simmel, *The Metropolis and Mental Life*, in CLASSIC ESSAYS ON THE CULTURE OF CITIES 47, 49 (Richard Sennett ed., 1969); see also DAVID HARVEY, CONSCIOUSNESS AND THE URBAN EXPERIENCE, at xi (1985) (writing that capitalism "reduces all aspects of social, cultural, and political (to say nothing of economic) life to the pure homogeneity and universality of money valuations").

¹⁰¹ In an insightful essay addressing the "subgroup question," Martha Minow notes that some critics see *On the Jewish Question* as evidence of Marx's own anti-Semitism, while others see it as "a powerful exploration of the general tension or even contradiction between abstract citizenship and membership in private subcommunities like religions." Minow, *supra* note 5, at 1-2.

¹⁰² Park was a doctoral student of Georg Simmel in Germany, and his thought was heavily influenced by Simmel. See, e.g., FRED MATTHEWS, QUEST FOR AN AMERICAN SOCIOLOGY: ROBERT E. PARK AND THE CHICAGO SCHOOL 34, 42-56 (1977). Simmel often wrote of the Jew's status as the paradigmatic "stranger" in modern society. See Georg Simmel, *The Sociological Significance of the "Stranger,"* in INTRODUCTION TO THE SCIENCE OF SOCIOLOGY 322, 322-27 (Robert E. Park & Ernest W. Burgess eds., 1921).

stantly intent on the shrewd and fascinating game of buying and selling, in which he employs that most interesting of abstractions, money, *he has neither opportunity nor inclination to cultivate that intimate attachment to places and persons which is characteristic of the immobile person.*¹⁰³

Formerly confined to the ghetto, the “wandering Jew” becomes for Park the paradigmatic figure of a mobile society, and money is the medium that liberates the Jew from parochial territorial attachments “characteristic of the immobile person.”¹⁰⁴

If Marx saw the Jewish question as a metaphor for the rise of the nation-state, Park and his colleagues in the famed Chicago School of Urban Sociology saw it as a metaphor for the trajectory from a feudal, corporate society rooted in the land to a modern, capitalist society peopled by mobile individuals with only fleeting territorial associations. Park’s colleague Louis Wirth, for example, spoke of the “physical footlooseness,” the great “social mobility,” the impersonality and standardization that accompanied the rise of the money economy in the modern city.¹⁰⁵ One especially significant manifestation of this phenomenon was the way that the ascendance of money caused the transformation of land from the sentimental foundation of a sedentary society into a readily exchangeable market commodity.¹⁰⁶ Once land’s value was expressed through the universal medium of money, stripped of its local particularities, it could be easily bought and sold in the market by impersonal, absentee investors with no connection to the soil.¹⁰⁷

¹⁰³ Robert E. Park, *The City: Suggestions for the Investigation of Human Behavior in the Urban Environment*, in *THE CITY* 1, 18–19 (Robert E. Park et al. eds., 1925) (emphasis added).

¹⁰⁴ In other works, Park expanded upon his view that the wandering Jew was the archetype of the mobile, cosmopolitan modern individual. See, e.g., Robert E. Park, *Human Migration and the Marginal Man*, 33 *AM. J. SOC.* 881, 891–93 (1928) (“The emancipated Jew was, and is, historically and typically the marginal man, the first cosmopolite and citizen of the world.”). These writings, like Marx’s, undoubtedly contain anti-Semitic overtones, and it has been suggested that Park harbored anti-Semitic attitudes. See, e.g., Hasia R. Diner, *Introduction to the Transaction Edition*, in WIRTH, *supra* note 6, at xxx. I address the subject of anti-Semitism, as it relates to the Jewish question, in the Conclusion. For the present, it is sufficient to note that both Marx’s and Park’s analysis, whatever their flaws, have been enormously influential in the study of modern urban political life. As a simple example, consider how the term “ghetto,” originally used in specific reference to the Jewish ghetto, has been used to refer generally to the phenomenon of a spatially segregated community, especially the inner-city black neighborhoods of American cities. See generally Wacquant, *supra* note 80.

¹⁰⁵ Louis Wirth, *Urbanism as a Way of Life*, in *CLASSIC ESSAYS ON THE CULTURE OF CITIES* 143, 157 (Richard Sennett ed., 1969).

¹⁰⁶ According to sociologist Everett Hughes, one of Park’s colleagues at the University of Chicago, “[t]he more nomadic the city dweller, the more the real estate agent flourishes. His success is commensurate with the degree to which he can remove from land the halo of sacred sentiment and put into its place the secular value of money.” EVERETT C. HUGHES, *THE CHICAGO REAL ESTATE BOARD: THE GROWTH OF AN INSTITUTION* 16 (1931); see also Sack, *supra* note 28, at 67 (“Capitalism helps make place into commodities.”).

¹⁰⁷ See David Harvey, *Money, Time, Space and the City*, in *CONSCIOUSNESS AND THE URBAN EXPERIENCE*, *supra* note 100, at 1, 13–14 (“Where the land market is dominated by money power, the democracy of money takes charge. Even the largest palace can be bought and

The uniformity of money was obviously conducive to a capitalist market system, which requires a standardized medium of exchange to facilitate transactions. Much like universal citizenship, however, money also proved useful to the centralizing agenda of the burgeoning nation-state. As anthropologist James C. Scott has written, in order for the modern state to exercise formal, centralized control, it needed the capacity to penetrate and render “legible” the jumble of preexisting local traditions and customs that it confronted within feudal society. The state thus sought to implement a number of abstractions that would cut across the various local peculiarities and unify them under a single standard — a uniform system of timekeeping, of weighing and measuring, of naming individuals (groups with distinctive naming practices, like the Jews, were required to adopt surnames), a uniform language, and a uniform mechanism for market exchange (money).¹⁰⁸ The movement toward standardized measurements was, Scott notes, closely linked to the homogenization of citizenship.¹⁰⁹ All citizens had the right to be *measured* equally, regardless of their geographic location within the kingdom.

A uniform system for reliably determining the exchange value — and hence the taxability — of land was especially valuable for the state given both the historic resistance of territorially based subgroups to state control and the fact that land was a major potential source of tax revenue. Reducing land to a clear exchange value diminished the power of subgroups to utilize territory to maintain their autonomy, and made it easier for the state to collect taxes in an efficient and even-handed manner, reducing administrative costs and discontent among the citizenry about unequal treatment.¹¹⁰

Accordingly, the state has played an active role in transforming land into a market commodity under the power of money. One of the earliest and most enduring mechanisms the state has used for this purpose is zoning — particularly, the strict separation of land uses into single-use districts. From its origins in the early twentieth century until today, one of zoning’s major purposes has been to stimulate investment in real property by stabilizing property values against unpredictable declines that can occur if an otherwise homogenous neighborhood is invaded by an incompatible land use.¹¹¹ Zoning thus limits a landowner’s right to *use* her property in order to enhance the

converted into office or slum building. The land market sorts spaces to functions on the basis of land price and does so only on the basis of ability to pay.”).

¹⁰⁸ See SCOTT, *supra* note 4, at 25–33, 64–73.

¹⁰⁹ *Id.* at 30–33 (“The simplification of measures . . . depended on that other revolutionary political *simplification* of the modern era: the concept of a uniform, homogenous citizenship.”).

¹¹⁰ See *id.* at 29–30 (explaining state concerns about inefficiencies in tax collection without uniform measurement systems); *id.* at 33–52 (discussing state efforts to unify and simplify land tenure system to make tax collection more efficient).

¹¹¹ See HUGHES, *supra* note 106, at 94 (“Zoning rests upon the principle that values accrue to a certain level and are stabilized by uniformity of use within a certain area.”); Fred P. Bosselman, *The Commodification of “Nature’s Metropolis”: The Historical Context of Illinois’ Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527, 565–72 (1991–1992) (describing how

landowner's ability to treat the property as an object of *exchange*.¹¹² Everett Hughes, a sociologist and colleague of Robert Park at the University of Chicago, wrote of zoning that "sentiment has been taken from the notion of individual property rights" for the sake of "making real estate a commodity."¹¹³ Modern commentators have echoed this observation. Historian Christine Boyer writes that the adoption of zoning represented the ascendancy of "the economic need to create exchangeable parcels of land, marked and coordinated by the universal application of a zoning law."¹¹⁴ At the end of the day, "Nothing was left of the spatial quality and uses of land in the American city except that which could be defined as common and characteristic to each circulating and marketable parcel."¹¹⁵ Zoning, in other words, deploys state power to reduce land to an aspatial commodity measured solely by the uniform value of money.¹¹⁶

3. *The Business Improvement District: A Case Study in the Abstraction of Money.*

The use of money to abstract land from its "spatial quality" so that it may be subordinated to the state's centralizing agenda is perhaps apotheosized in the special district cases. This occurs in two ways, as this subsection demonstrates. First, as conceived by the courts, special districts facilitate the transformation of land from its idiosyncratic value as a particular place (often called "use value") to a universal market "exchange

uncertainty over property values led to early zoning ordinances in turn-of-the-century Chicago).

¹¹² The distinction between the use and exchange value of land, initially noted by Marx, has been usefully explored in modern work on the political economy of the city, much of which is itself influenced by Marx. See, e.g., MANUEL CASTELLS, *THE CITY AND THE GRASS-ROOTS* 319 (1983); JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 17–49 (1987). The dichotomy between "use" and "exchange" value is, however, in some sense a false one. Any land use policy can be viewed as enhancing either use or exchange value, or both at the same time. For example, Gerald Frug and David Barron note that a city with strong historical preservation laws could be seen as protecting the use value of existing buildings for current owners, or protecting exchange values by making the area more amenable to tourists. See GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 26 (2008). This ambiguity is precisely what makes the dichotomy useful and interesting for this Article. As we will see in section III.C, courts deploy the *rhetoric* of exchange values to confer a veneer of universality on land use policies that are actually much more ambiguous in their impacts. In a related vein, Robert Sack channels Marx and argues that capitalism uses territory to obfuscate class conflict by making territory appear as a fluid object of exchange. See Sack, *supra* note 28, at 67.

¹¹³ See HUGHES, *supra* note 106, at 101.

¹¹⁴ M. CHRISTINE BOYER, *DREAMING THE RATIONAL CITY* 154 (1986).

¹¹⁵ *Id.*

¹¹⁶ As observed in note 112 *supra*, whether zoning really does reduce land to an "aspatial commodity" is ambiguous. As we will see in section III.C, courts *perceive* zoning as enhancing a placeless exchange value, and that perception legitimizes zoning's significant impact on urban space (i.e., "use values") by, for example, enabling the exclusion of undesirable people from those spaces. This is part of my thesis that courts use the rhetoric of spatial neutrality to covertly rationalize local control over territory.

value.”¹¹⁷ It is for this reason that the districts are permitted to confine the franchise to those who benefit from land’s commodification, as opposed to those who have an interest in actually using the specific spaces governed by the districts. Second, the cases emasculate local governments by conceptualizing them as little more than aspatial devices for facilitating the commodification of land in service to the state, thus depriving local governments of their historical ability to leverage territorial distinctiveness to ensure local autonomy.¹¹⁸

To illustrate, this subsection examines an influential decision by the United States Court of Appeals for the Second Circuit that applied *Salyer* and *Ball* to an increasingly important urban governance device, the “business improvement district” (“BID”). *Kessler v. Grand Central District Management Ass’n*¹¹⁹ addressed the constitutionality of a voting scheme for the board of directors of the Grand Central District Management Association (“GCDMA”), a BID that governed the area surrounding the historic Grand Central terminal in New York City. Like most BIDs, the GCDMA’s central function was to assess a mandatory charge upon real property within a territorially bounded district, and then use the assessment to furnish services, such as sanitation, security, maintenance, and street signage, within that area for the benefit of the assessed property. As is common for BIDs, city law allocated voting power for the GCDMA board of directors in a way that ensured property owners had the ability to elect the majority of the board, thus raising a “one person, one vote” issue.¹²⁰ Citing *Salyer* and *Ball*, the *Kessler* court found the GCDMA exempt from the “one person, one vote” standard. The court held that the district had the limited purpose of promoting business within the area, performed a narrow set of functions, lacked regulatory authority, and was subject to substantial governmental oversight.¹²¹ Furthermore, the GCDMA’s operation had a disproportionately greater effect on the assessed property owners than on others. “The principal economic benefit from GCDMA’s activities . . . plainly accrues to the property owners, who will enjoy an increase in the value of their property.”¹²²

Thus, according to *Kessler*, limiting the franchise to landowners is legitimate because the BID’s fundamental purpose is to maximize the value of

¹¹⁷ On the tension between use and exchange value, see, for example, LOGAN & MOLOTCH, *supra* note 112, at 17–18 (noting that places are “idiosyncratic” and thus difficult to reduce to commodities, because “[p]laces have a certain *preciousness* for their users that is not part of the conventional concept of a commodity”); *id.* at 23–29 (describing efforts by economists to turn land into a commodity despite its idiosyncrasies); and *id.* at 31–49 (describing conflict between those who desire to maximize exchange value and those who desire to maximize use value, and how it is manifested in political terms in urban governance).

¹¹⁸ See *supra* notes 87–89 and accompanying text (describing how local knowledge fostered local autonomy).

¹¹⁹ 158 F.3d 92 (2d Cir. 1998).

¹²⁰ See *id.* at 97.

¹²¹ See *id.* at 104–07.

¹²² *Id.* at 108.

real property for the benefit of landowners. In this respect, the BID's *raison d'être* is closely analogous to that of zoning.¹²³ Both zoning and the BID attempt to maximize the value of real property by managing the problem of local "externalities."¹²⁴ In the absence of zoning, property values are uncertain because any individual landowner is free to use her land in a manner that is profitable to herself, even if it imposes costs (such as diminished property values) on neighboring landowners. This is so because those costs are borne entirely by the neighbors and not at all by the developing landowner.¹²⁵ This is a "negative" externality (the landowner "externalizes" the costs of her activities upon the neighbors). A "positive" externality problem besets the owners of real estate in downtown areas where BIDs operate.¹²⁶ If the owner of one downtown shopping center, for example, attempts to induce shoppers to the area by hiring street performers, other neighboring businesses will also benefit from the increased foot traffic in the area. The introduction of this beneficial change to the area, much like the introduction of a negative land use change by an inconsiderate neighbor, is likely to be "capitalized" into property values.¹²⁷ The problem here is that the landowner whose business decision benefits her neighbors cannot charge those neighbors for the benefit they receive, and attempting to obtain a voluntary contribution from them is unlikely if the neighbors calculate that they can take a free ride on the individual landowner's decision. The landowner who initially hired the street performers may then decide to cease employing them if the costs outweigh the benefits to her personally, even if the area as a whole would see an increase in property values by retaining the perform-

¹²³ On the connections between zoning and BIDs, and particularly the ways in which both attempt to resolve externality problems for the benefit of landowners, see Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 947–57 (2013).

¹²⁴ On the concept of externality, and its significance to land use regulation, see, for example, DUKEMINIER, *supra* note 11, at 46–50; and ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 43–45, 110–11, 174–76 (Pearson Addison Wesley 5th ed. 2007). On externalities and the related issue of "public goods," see KENNETH A. SHEPSLE, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 306–48 (W.W. Norton & Company, Inc. 2d ed. 2010).

¹²⁵ See, e.g., Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 840–41, 844–45 (1999) (explaining how zoning is used to coercively overcome the externality problem). This holdout problem was recognized early on. Commenting on Chicago's early zoning ordinance in the 1930s, sociologist Everett Hughes wrote: "While the right to use property as one wishes may facilitate the sale of an occasional piece of property, it may jeopardize the market for the rest of the locality." HUGHES, *supra* note 106, at 90.

¹²⁶ On "positive" and "negative" externalities, see SHEPSLE, *supra* note 124, at 325.

¹²⁷ See, e.g., WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 45–46 (2001) (detailing extent of capitalization phenomenon); see also Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 92, 96, 98 (1998) (arguing that provision of local "public goods" such as street lights or improved security will cause property values in the area to rise).

ers.¹²⁸ Without a coordinated effort by landowners to maintain the common areas they share, everyone’s property values suffer.

Zoning resolves the negative externality problem by coercively restricting property owners’ land to uses that are compatible with neighboring land, thus stabilizing property values for all the landowners in the area.¹²⁹ Business improvement districts, likewise, are hailed for solving the free-rider problem by coercing all landowners whose land is presumptively benefitted by local improvements to pay a mandatory assessment to an association, which then uses the assessed funds to provide services within the BID in order to benefit all of the assessed landowners.¹³⁰ BIDs accordingly trumpet themselves, and are hailed by their advocates, as essentially private enterprises whose purpose is solely to enhance the cash value of property for the benefit of landowners.¹³¹

In both cases, the stabilization of property values is designed to enhance the exchange value of the landowners’ property holdings without regard to the use value of the physical space. BIDs, in fact, are often rationalized with a “public choice” logic that presumes urban landowners are mobile and indifferent to particular urban spaces, and will therefore exit to the suburbs at relatively low cost unless the exchange value of their land can be maximized.¹³² Likewise, BID advocates justify the limitation of the franchise to landowners on the grounds that all the benefits from the BID will accrue to the landowners in the form of higher property values, and will therefore have minimal impacts on users of the space.¹³³

The *Kessler* decision internalizes the public choice logic that land within the BID’s jurisdiction is an impersonal financial investment, an object

¹²⁸ This problem is the central concern of Richard Musgrave’s classic work on public finance, RICHARD MUSGRAVE, *THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY* 42–57 (1959).

¹²⁹ See, e.g., Nelson, *supra* note 125, at 828, 840–41, 844–45 (explaining how zoning coercively overcomes holdout problem, and proposing mechanisms by which homeowners associations can be created by less than unanimous consent, essentially coercing dissenting landowners to join).

¹³⁰ See, e.g., Ellickson, *supra* note 127, at 93 (explaining how BIDs overcome free-rider problem by requiring all benefitted owners to pay assessments, regardless of consent).

¹³¹ See Richard Briffault, *A Government for Our Time: Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 372, 471 (1999) (collecting encomiums describing the BID as bringing “the virtues of the private sector” and the “spirit of ‘private enterprise’” to urban governance); Douglas Feiden, *Midtown Bonds Spark BID Controversy*, CRAIN’S N.Y. BUS., Apr. 6, 1992, at 1 (reporting that president of the GCDMA openly described himself as “a paid employee only of property owners” (internal quotation marks omitted)), quoted in *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92, 116 (2d Cir. 1998) (Weinstein, J., dissenting).

¹³² See, e.g., Richardson Dilworth, *Business Improvement Districts and the Evolution of Urban Governance*, 3 DREXEL L. REV. 1, 6–7 (2010) (describing model of BIDs that sees them as a response to competition from suburbs for mobile urban landowners).

¹³³ See Ellickson, *supra* note 127, at 92–93 (advocating for “block-level institutions” modeled on BIDs that will provide localized public goods, and endorsing exclusive franchise for property owners because landowners are the primary beneficiaries via capitalization); cf. Thomas W. Merrill, *Direct Voting by Property Owners*, 77 U. CHI. L. REV. 275, 294 (2010) (“[T]he value of local collective goods is capitalized in the price of homes.”).

of exchange, rather than a *place* that may have social, cultural, or other sentimental value. The very purpose of the BID, *Kessler* asserts, is to “attract and keep businesses by assisting property owners to achieve the remunerative use of” commercial space.¹³⁴ Implicitly, landowners have a choice of jurisdictions in which to invest and will only be “attracted” to urban spaces if their property can be made sufficiently “remunerative.” Those individuals with an interest in a particular urban space beyond its remunerative exchange value, such as long-term residents who may be displaced by higher rents as property values increase, or homeless individuals whose presence undermines the area’s attractiveness for business, are disregarded because their interests are not quantifiable in monetary terms.¹³⁵ This explains the court’s conclusion that the GCDMA may constitutionally deviate from “one person, one vote” and weight votes based on property ownership because “[t]he principal economic benefit from GCDMA’s activities . . . plainly accrues to the property owners, who will enjoy an increase in the value of their property.”¹³⁶ Thus, in the same way that the abstraction of citizenship exalts the despatialized “unreal” citizen as the state’s formal political standard while banishing “real” territorial associations to the nonpolitical realm of civil society, here the abstraction of money establishes land’s spatially disembodied exchange value as a threshold for political participation while rendering its territorially contingent use value politically irrelevant.

There is more. BIDs do not simply transform land into a commodity; in doing so, they are themselves transformed from territorial entities into mere vehicles for effecting state centralization through the universality of money. The *Kessler* court is satisfied that those with an interest in the governance of urban space are unaffected by the BID because the BID’s character as a jurisdiction exercising power over territory is only an adjunct to its central function of converting land into a mobile commodity measured by its monetary value. As the court sees it, the GCDMA has no appreciable impact on anyone other than the landowners because its only function is to maximize property values for the benefit of landowners. The court emphasized that BIDs had few of the powers and none of the autonomy of traditional local

¹³⁴ 158 F.3d at 104; *see also* 2nd Roc-Jersey Assocs. v. Town of Morristown, 731 A.2d 1, 13 (N.J. 1999) (accepting that “special improvement district” (SID) was necessary to enable declining city to compete with nearby suburbs for mobile businesses).

¹³⁵ This is an instance in which, per Sack, capitalism is able to use territory to obfuscate class conflict by making territory appear as a placeless exchange value. *See* Sack, *supra* note 28, at 67. For more on the particular users of urban space and the way their interests may come into conflict with the BID, *see generally infra* section III.C.

¹³⁶ *Kessler*, 158 F.3d at 108. The court also states that landowners are disproportionately interested in BID governance because they are the ones who pay the mandatory assessment that finances the BID’s operation. *See id.* at 107. The hornbook rule on special assessments is that the assessment charged to each landowner may not exceed the particular benefit that landowner receives. Thus, the legitimacy of the assessment is directly tied to the anticipated increase in property values from overcoming the collective action problem.

governments.¹³⁷ BIDs, as the California Supreme Court has declared in dismissing a “one person, one vote” challenge to similar special-purpose entities, are “little more than formalistic, geographically defined perimeters whose *raison d’être* [is] to serve as the conceptual medium for the recognition of economic benefits conferred and the imposition of a corresponding fiscal burden.”¹³⁸ In other words, the BID is fundamentally a device for converting land to the universality of money, and it is that fact alone that enables it to deviate from “one person, one vote.”

Kessler thus uses the abstraction of money just as *Avery* used the abstraction of universal citizenship to subordinate local territorial particularities to state centralization. This happens in a dual way. Money “abstracts” real property from its inscrutable spatial dimension and reduces it to a taxable commodity that can be easily manipulated by the state, but money also converts the BID itself into a despatialized abstraction that exists only to advance the state’s objective of commodifying real property. Both land and locality are thus drained of their spatial qualities and subjected to the authority of the state.¹³⁹

C. *The Abstraction of Territory*

If the *Avery* line can be reconciled with the *Salyer-Ball-Kessler* line, what about *Lockport* and *Holt*? These cases reject *Avery*’s conception of abstract citizenship, instead permitting states to weight voting power based on where individuals reside. They also seemingly repudiate the abstraction of money by affirming that the state has plenary power to assign voting rights without regard to any particular interest. Finally, these cases expressly make territory — one’s physical place of residence — the basis of political distinctions, in opposition to both the *Avery* line and the *Salyer-Ball-Kessler* line. Here, though, *territory* itself becomes a form of abstraction. Territory is enshrined as a political standard only once it is divorced from local idiosyncrasies and rendered as a malleable, homogenous tool of

¹³⁷ See *id.* at 104–07 (stressing BID’s limited purpose, lack of sovereign power, limited responsibility, and subjection to city authority).

¹³⁸ S. Cal. Rapid Transit Dist. v. Bolen, 822 P.2d 875, 883 (Cal. 1992) (describing special assessment districts used to finance rail transit in Los Angeles).

¹³⁹ The reader may wonder at this point why, if BIDs and special purpose districts are essentially analogous to zoning, municipalities exercising the zoning power are not also permitted to allocate voting power based on land ownership. See *State of Washington ex rel. Seattle Title & Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928) (holding municipal delegation of power over certain zoning matters to proximate landowners was unconstitutional); *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912) (same); see also Stahl, *supra* note 123 (raising, but not resolving, question as to why courts distinguish BIDs and special purpose districts from landowner-controlled zoning districts). I address this point in greater detail *infra* in notes 228–232 and accompanying text. To state the case here briefly, because zoning expressly dictates permissible uses of physical spaces, it is too deeply imbricated in the control of space for money to hide its territorial aspect. Special purpose districts regulate space only indirectly, and thus preserve the fiction of universality that money projects.

the state.¹⁴⁰ This is accomplished through a device no less ingenious than money: the areal map.¹⁴¹ With the map, the Court is able to represent territory as an arbitrary geometric configuration to be deployed and reconfigured at the state's pleasure, rather than a suite of impenetrable interests.

The use of the map as a tool for abstracting territory from its local particularities originated in the need of the modern state and the capitalist economic system to standardize real property holdings so they could be more effectively commodified and hence taxed. We have already seen that money served this function admirably, but realizing money's full potential required that the correlation between money and real property be charted in a simple, synoptic fashion that would be easily "legible" to central bureaucrats as well as impersonal investors.¹⁴² This correlation was established by the cadastral map, a comprehensive survey of landholdings throughout the realm. The cadastral map depicted abstract parcels of land devoid of all embellishment except the identification of the individual landowner responsible for paying the taxes. According to James Scott, the cadastral map deliberately "considered only the dimensions of the land and its value as a productive asset or as a commodity for sale. Any value that the land might have for subsistence purposes or for the local ecology was bracketed as aesthetic, ritual, or sentimental."¹⁴³ The map was, in other words, an abstraction that erased the particular characteristics of the real estate it described, "a geometric representation of the borders or frontiers between parcels of land. What lies inside the parcel is left blank — unspecified — since it is not germane to the map plotting itself."¹⁴⁴ Any reference to aspects of real property aside from those needed for the tax collector's purposes would "needlessly complicate a straightforward administrative formula."¹⁴⁵

Holt extends the logic of the cadastral map from land to local government, and from taxes to voting rights.¹⁴⁶ The appellants, residents of an unincorporated area called Holt neighboring the incorporated city of Tuscaloosa, Alabama, argued that they were entitled to vote in Tuscaloosa's municipal elections because Tuscaloosa exercised substantial police powers over Holt. They rested their argument principally upon the case of *Kramer v. Union Free School District No. 15*.¹⁴⁷ *Kramer*, drawing on the authority

¹⁴⁰ In his fascinating discussion of territory and territoriality, Sack writes that territory can be a useful tool for a central bureaucracy insofar as it helps to "make relationships impersonal." See Sack, *supra* note 28, at 59, 66 (emphasis omitted).

¹⁴¹ Cf. Ford, *supra* note 27, at 853 (noting that *Holt*'s depiction of space as "abstractly and homogenously conceived" is rooted in the "modern, areal map," the "primary representation" of which is "abstract space.").

¹⁴² See Scott, *supra* note 4, at 35 ("Indeed, the very concept of the modern state presupposes a vastly simplified and uniform property regime that is legible and hence manipulable from the center.").

¹⁴³ *Id.* at 47.

¹⁴⁴ *Id.* at 44.

¹⁴⁵ *Id.* at 47.

¹⁴⁶ I discuss the rather different implications of *Lockport* in section III.A.1.

¹⁴⁷ 395 U.S. 621 (1969).

of *Avery*, struck down a state law that limited the franchise in local school board elections to local residents deemed presumptively most interested in school affairs — taxpayers and parents of school-age children. The *Kramer* Court held that the state could not reasonably presume that individuals outside of these classes were insufficiently interested to warrant a vote; indeed, the Court noted that a childless bachelor who lives within the school district but pays no property taxes, such as the plaintiff, could indeed be quite interested in school affairs.¹⁴⁸ The appellants in *Holt* accordingly claimed that they could not be denied voting rights in the city of Tuscaloosa because, given that Tuscaloosa had significant governing powers over Holt, residents of Holt surely had as substantial an interest in the governance of Tuscaloosa as the plaintiff in *Kramer* did in the governance of a local school district.¹⁴⁹

The Court did not dispute that the residents of Holt had a substantial interest in the governance of Tuscaloosa, but simply found “interest” itself to be irrelevant. According to the Court, *Kramer* does not require that all individuals who are “interested” in the subject matter of an election be accorded a vote; it only requires that all *residents* within the geographical jurisdiction of the entity in question be enfranchised.¹⁵⁰ Correlating voting rights with “interest” would be administratively unworkable, the Court held, because municipal activities have so many diffuse impacts outside their borders that determining with precision who is sufficiently “interested” to warrant a vote would be impossible.¹⁵¹ The Court accepted residency as a standard not because it was a superior or more weighty type of interest than that claimed by the appellants, but because it was a readily available and easily administered rule that had no necessary correlation with “interest” at all.

With this move, the Court cast territory as abstract and neutral, divorced from the particularities of economic or historical “interest.” Voting rights follow residency, which is a neutral proxy because it is unaffiliated with any particular interest. And how is residency to be determined? The dissent argued, in essence, that in light of Tuscaloosa’s extensive power over Holt, residents of Holt should be considered *de facto* residents of Tuscaloosa.¹⁵² The Court rejected this contention, deferring to the state’s preroga-

¹⁴⁸ See *id.* at 630–31.

¹⁴⁹ See *Holt v. City of Tuscaloosa*, 439 U.S. 60, 66–68 (1978).

¹⁵⁰ See *id.* at 68–69.

¹⁵¹ See *id.* at 69–70 (“The imaginary line defining a city’s corporate limits cannot corral the influence of municipal actions. A city’s decisions inescapably affect individuals living immediately outside its borders.”); cf. Sack, *supra* note 28, at 59 (“The influence and authority of a city, though spreading far and wide, is ‘legally’ assigned to its political boundaries.”).

¹⁵² See *Holt*, 439 U.S. at 82 (Brennan, J., dissenting) (arguing that residency 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”).

tive to draw the boundaries of its own municipal subdivisions.¹⁵³ The state's jurisdictional map, in other words, is decisive.

The jurisdictional map exalted in *Holt* is a logical extension of the abstract cadastral map. Just as the cadastral map drained land of all characteristics save the identification of its owner in order to ease state administration (i.e., tax collection), the jurisdictional map in *Holt* ignores all factors other than residency because taking account of those factors would, as Scott said of the cadastral map, "needlessly complicate a straightforward administrative formula."¹⁵⁴ The obvious fact that individuals often have significant interests in the governance of municipalities in which they do not reside — such as the municipalities in which they work or recreate, or municipalities that exert extraterritorial regulation over their residences — is dismissed as unduly burdening the state's easily legible administrative scheme, thereby enabling the jurisdictional map to function as an abstracted, synoptic snapshot of the territory controlled by the state. The jurisdictional map, like the cadastral map, highlights the single criterion that is relevant for administration and ignores everything else.

More importantly, just as the cadastral map reduces land to a taxable commodity, the jurisdictional map reduces the jurisdiction itself (that is, the municipality) to a mere adjunct of state authority, bereft of social, cultural, or political significance. Shorn of its association with a particular territorial milieu, the municipality loses its historical *raison d'être* as an embodiment of peculiarly local interests and becomes an empty vessel to be manipulated however the state sees fit.¹⁵⁵ As such, the Court confidently asserted that a municipality is a mere "administrative convenience" of the state, and thus that residents of Holt have suffered no real injury by being excluded from Tuscaloosa. The Court emphasized that the appellants had a full political voice at the *state* level, which is of course the only jurisdiction that really matters.¹⁵⁶

¹⁵³ See *id.* at 69–70 (rejecting the "Austinian notion of sovereignty" under which residents of Holt would be considered residents of Tuscaloosa).

¹⁵⁴ SCOTT, *supra* note 4, at 47. Richard Ford notes the law's preoccupation with assigning individuals to particular places — most often the place of residence — for purposes of state administration and control. See Ford, *supra* note 27, at 904–05 ("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.").

¹⁵⁵ See also Ford, *supra* note 27, at 853 (noting that in *Holt*, space is "abstractly and homogeneously conceived"); Sack, *supra* note 28, at 59 (noting that one function of territory is to make space conceptually empty).

¹⁵⁶ See Ford, *supra* note 27, at 850–51 (interpreting *Holt* to mean that the relevant "political community is neither the corporate, nor the police jurisdiction of Tuscaloosa, but rather the jurisdiction of the state of Alabama"); *id.* at 866 (suggesting that where jurisdiction is conceived as an artificial creation of central government, it can "always be described as normatively inconsequential so long as its opponents have recourse to the government that created it").

Holt thus uses the abstraction of territory just as *Avery* used the abstraction of citizenship and *Kessler* used the abstraction of money to subordinate local territorial diversity to state centralization.

D. *The Critique of the Centralization Narrative*

My interpretation of the three major doctrinal lines fits neatly within what some critics have dubbed the “centralization narrative,” a conventional critical assessment of the rise of the nation-state and liberal democracy in the United States. According to this narrative, “American political history is characterized by the progressive centralization of power at the expense of locally distinctive political communities such as the states and local governments.”¹⁵⁷ A key tool of this enterprise is the “homogenization and the assimilation of local difference,”¹⁵⁸ as inscrutable, territorially contingent local practices are supplanted by “formally placeless legal norms” that are easily legible to central administrators.¹⁵⁹

As I have read the various strands of the “one person, one vote” jurisprudence, they are all consistent with this narrative: *Avery* and *Morris* disable local difference by forcing all local governments into the mold of “one person, one vote” (the abstraction of citizenship); *Salyer*, *Ball*, and *Kessler* conceptualize local governments as disembodied mechanisms for reinforcing real property’s exchange value (the abstraction of money); *Holt* homogenizes municipalities by depicting them as formally equivalent geometric representations on a map (the abstraction of territory). The purpose in each case appears to be to weaken territorial diversity’s capacity to impede the goals of state centralization.¹⁶⁰

¹⁵⁷ *Id.* at 888–89. According to centralization narrative, “the geography of legal evolution has been one of continued disembedding of legal practice and legal knowledge from the locality, and a centralization of legal authority, in step with the formation of national state structures. . . . The appeal of place gives way to the aspatial language of order, equality, and the homogenous rule of law.” BLOMLEY, *supra* note 17, at 107.

¹⁵⁸ Ford, *supra* note 27, at 889.

¹⁵⁹ See BLOMLEY, *supra* note 17, at 109–10.

¹⁶⁰ The “centralization narrative,” interestingly, may trace its origins directly to Karl Marx. As the Marxian geographer David Harvey writes, Marx was given to “dismissing the question of geographic variation as an ‘unnecessary complication.’” See Harvey, *supra* note 100, at xiii. Marx had spoken famously of the “annihilation of space by time”; capitalism required that productive processes be subjected to cost-saving standardizations in order to reduce prices for consumers (“time is money”) as well as to discipline labor, which had historically followed its own artisanal rhythms rather than the capitalist’s time-clock. See *id.* at 15 (discussing “annihilation of space by time”). Distances were no longer expressed in terms of the amount of terrain traversed between points A and B, which had little significance for capitalism, but in terms of the time required to travel from one to the other. The priority that Marx gave to centralizing abstractions over space is certainly evident in *On the Jewish Question*, which argued that the dual abstractions of citizenship and money had effectively destroyed the local guilds and corporate entities of feudal society. See *supra* section II.A.1. It was inconceivable to Marx that local entities could still survive within the nation-state as intermediaries between the state and the individual. Nevertheless, as we will see in section

This could be the end of the story — courts utilize abstractions to further state centralization and minimize local diversity. In recent years, however, legal geographers such as Richard Ford and Nicholas Blomley have offered an important critique of the centralization narrative. They argue that the state does not simply obliterate local differences in the name of centralization, but actively creates and exploits those differences, either as a means of maintaining social control¹⁶¹ or in order to highlight the distinctiveness of each particular nation-state vis-à-vis the others.¹⁶² This presents a dilemma: recognizing local difference in this way is inconsistent with the Enlightenment project to purge and equalize the various provinces, because difference means not only variety but *inequality* — local borders often demarcate disparities in local tax bases, municipal services and infrastructure, school quality, population density, siting of undesirable land uses, and so forth, and these disparities are closely correlated with differences in racial composition and median income across local boundaries.¹⁶³

Courts attempt to resolve this dilemma, Ford argues, by disguising interlocal inequality with a rhetoric of neutrality. As *Holt* illustrates, for example, territory is a useful tool with which the state can obfuscate power and inequality because geographic distinctions just seem so natural — according to Robert Sack's classic discussion, "legal and conventional assignments of behavior to territories" are "so important and well understood in the well-socialized individual that one often takes such assignments for granted and thus territory appears as the agent doing the controlling."¹⁶⁴ Hence, we can simply classify people by place without inquiring as to why they should be so classified or why there are inequalities between those places.¹⁶⁵ And

III.B, Marx's analysis provides considerable insight into the continuing importance of territorial particularity in the nation-state.

¹⁶¹ See Ford, *supra* note 27, at 911 ("'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.").

¹⁶² See *id.* at 908 (arguing that nation-state requires the production and exploitation of local difference because "internal local distinctiveness often provides the cultural content that distinguishes one nation-state from another"). Ford, indeed, sees territory as a creation of the modern nation-state. As should be evident by now, I do not share this view. As I have argued, territory was a key attribute of autonomous feudal collectives like cities and Jewish communities. The modern nation-state, however, changed the nature of territory so that it could serve the state's bureaucratic purposes. See Sack, *supra* note 28, at 65–67 (contrasting use of territory by premodern and modern societies).

¹⁶³ See, e.g., NORMAN I. FAINSTEIN & SUSAN S. FAINSTEIN, *RESTRUCTURING THE CITY: THE POLITICAL ECONOMY OF URBAN REDEVELOPMENT* 2–3 (1986) (noting that class and racial inequality is expressed geographically, with affluent classes assuming control of more desirable locations); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1136–37 (1996) (discussing interlocal inequality); see also Sack, *supra* note 28, at 55 (describing territoriality as "a strategy for establishing differential access to things and people").

¹⁶⁴ Sack, *supra* note 28, at 59.

¹⁶⁵ See *id.* at 58 (writing that territory is an efficient system of classification because "[w]e need not stipulate the kinds of things in place that are ours or yours"). Recall the Supreme Court's reasoning in *San Antonio Independent School District v. Rodriguez* that interlocal inequalities between school districts were legitimate because it is "inevitable that

courts can easily rationalize interlocal inequalities as *a priori* and thereby deflect state responsibility for affirmatively creating those inequalities.¹⁶⁶

The next Part draws on these insights to arrive at the Article’s core thesis: In the “one person, one vote” jurisprudence, the abstractions of citizenship, money, and territory all permit local governments to assert dramatic control over territory, and thus to entrench interlocal inequality, by concealing it beneath a veneer of universality that causes territory to appear irrelevant. Specifically, courts authorize municipalities to exclude economically and socially disadvantaged classes from their jurisdictions by conferring upon local governments an aura of neutrality that makes such exclusionary practices appear natural and self-justifying.

In establishing this thesis, an intriguing convergence materializes between the “one person, one vote” jurisprudence and the aforementioned Jewish question. In the case of *Board of Education of Kiryas Joel Village School District v. Grumet*,¹⁶⁷ the Supreme Court confronted an effort by a group of Satmar Hasidic Jews to maintain their distinctiveness by establishing their own local governments.¹⁶⁸ Drawing on Richard Ford’s pathbreaking analysis, I argue that *Kiryas Joel* demonstrates the highly ambiguous way in which our courts have followed through on the Enlightenment promise to quash territorial particularity. In short, rather than dispelling parochial territorial identifications from the public sphere, liberal jurisprudence has sought to accommodate them within that sphere.¹⁶⁹ Because such accommodation rests uneasily alongside the Enlightenment dream of abstract identity, however, courts use the rhetoric of universality to disguise their accommodation of particularity. That is the subject of the next Part.

some localities are going to be blessed with more taxable assets than others.” 411 U.S. 1, 54 (1973). I return to discuss *Holt* in more detail in section III.D.

¹⁶⁶ See David Delaney, *The Boundaries of Responsibility: Interpretations of Geography in School Desegregation Cases*, in *THE LEGAL GEOGRAPHIES READER* 54, 55 (Nicholas Blomley et al. eds., 2001) (arguing that the Supreme Court used supposed neutrality of geography to justify *de facto* segregation in *Milliken v. Bradley*, 418 U.S. 717 (1974)); see also Ford, *supra* note 29, at 1365 (arguing that courts permit racial discrimination in the creation of local governments by using a rhetoric of neutrality that makes such discrimination appear as the product of voluntary choice rather than state action).

¹⁶⁷ 512 U.S. 687 (1994).

¹⁶⁸ *Id.* at 690–92.

¹⁶⁹ Many theorists have thought the central problem of the modern liberal state to be the question of how to accommodate subgroups that seek to retain their particularism in the face of the state’s commitment to liberal universality. See, e.g., WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1991) (attempting to reconcile claims of minority subgroups to recognition with universal ideal of the liberal state); Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 12–14 (1983) (using Jewish law to draw contrast between “universalist” liberal values and “culture-specific designs of particularist meaning”).

III. THE “UNREAL UNIVERSALITY” OF LOCAL GOVERNMENT

A. *The Pervasiveness of Interest in Municipal Boundary Change*

1. *Two Views of Boundary Change.*

In all of the “one person, one vote” cases we have reviewed so far, local government has taken on the appearance of a neutral, aspatial construct, removed from all territorial particularity: in *Avery*, local government is the universal state in miniature; in *Kessler*, it is an innocuous conceptual medium for the commodification of land; and in *Holt*, it is an empty container of homogenous individuals. Another look at these cases through the lens of legal geography reveals that, although the courts depict territory as essentially irrelevant, they also surreptitiously fetishize it under that guise. The sheen of universality confers a normative stature on local governments that enables them to deploy territory for their own parochial benefits, thereby privileging those with the economic means to insulate themselves within territorial enclaves.

This becomes evident when we look closely at the question of municipal boundary formation. As *Holt* demonstrates most clearly, all of these cases assign great significance to where and how boundary lines are drawn, and who is placed on which side of that line. Voting rights are strictly correlated with such boundaries: in *Avery* and *Holt*, only *residents* within local borders may vote; in *Salier*, *Ball*, and *Kessler*, only those who own property contained within those same borders may vote. To preserve the idea of universality and neutrality, then, the cases must assume that the creation of local governments is itself a neutral process in which lines are drawn without regard to particular interests. Only then can we be assured that municipalities are, like the parcels on the cadastral map, homogenous, abstract, and conceptually empty. Indeed, just such a neutral process of line drawing was prevalent at the time of our nation’s founding. The Northwest Ordinance of 1787 required that newly acquired territories take a rigid rectangular shape, and further mandated that “practically all of the county, township and private parcels of land” within those territories assume the same geometric clarity.¹⁷⁰ As Richard Ford notes, this homogenized, abstracted conception of space was designed to create “generic and fluid communities, each morally equivalent and fungible.”¹⁷¹

Modern American law, however, does *not* require that municipalities be formed in this abstracted manner. Instead, courts liberally permit local self-interest to pervade the process of municipal boundary formation. Take *Lockport*, for example. In that case, we recall, the Court held that the state could legitimately require separate consents of city and non-city voters to a county

¹⁷⁰ See Ford, *supra* note 27, at 890.

¹⁷¹ Ford, *supra* note 27, at 891.

reorganization on the grounds that city and non-city voters may have “distinctive interests” in restructuring county government.¹⁷² In an interesting dictum, the Court analogized the county reorganization to a municipal boundary change, such as “the structural decision to annex or consolidate.”¹⁷³ The Court stated that, in annexation proceedings, states may constitutionally take account of the distinct *interests* of the different constituent units in the proposed annexation by requiring separate consents of both the annexing municipality and the territory to be annexed, notwithstanding the “one person, one vote” rule.¹⁷⁴ Under *Lockport*’s authority, states have wide discretion in how they arrange their municipal subdivisions, and in practice, states usually defer to the desires of small local groups with regard to municipal borders.¹⁷⁵ Communities are free to incorporate for parochial reasons such as the protection of their local tax base or the prevention of unwanted growth.¹⁷⁶ Annexation efforts are usually driven by an annexing municipality’s desire to increase its tax base, while unincorporated territories resist annexation in order to avoid redistribution of their tax revenue and the placement of undesirable land uses in their communities.¹⁷⁷ This is hardly the kind of neutral boundary-drawing process envisioned by the framers of the Northwest Ordinance.

2. Boundary Change and the Jewish Question.

As Ford explains, the Supreme Court has surmounted this problem in an ingenious way — it shrouds the parochial nature of local boundary change under a rhetorical veil of neutrality.¹⁷⁸ It is here that the local government jurisprudence converges again with the Jewish question. In *Board*

¹⁷² See *Town of Lockport v. Citizens for Cmty. Action at the Local Level*, 430 U.S. 259, 268–72 (1977).

¹⁷³ *Id.* at 271.

¹⁷⁴ See *id.* (“The fact of impending union alone would not so merge [the two territories to be joined in a single municipality] into one community of interest as to constitutionally require that their votes be aggregated in any referendum to approve annexation.”).

¹⁷⁵ See, e.g., *City of Tucson v. Pima Cnty.*, 19 P.3d 650, 659 (Ariz. 2001) (citing *Lockport* and holding that state can constitutionally require consent of proximate municipalities to incorporation of new city); *Bd. of Supervisors of Sacramento Cnty. v. Local Agency Formation Comm’n*, 838 P.2d 1198, 1205–07 (Cal. 1992) (citing *Lockport* and holding that state could constitutionally restrict vote on incorporation of new city to the voters residing within the territory to be incorporated). The *Sacramento* court noted that “the essence of this case is not the fundamental right to vote, but the state’s plenary power to set the conditions under which its political subdivisions are created.” 838 P.2d at 1206; see also Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 73–77 (1990) (“The principal criterion for deciding whether a municipality will be incorporated is whether the local people want it.”).

¹⁷⁶ See Briffault, *supra* note 175, at 76 (noting that incorporations “may be based on the desires of ethnic or economic groups to separate themselves politically from their neighbors, to wield planning and zoning authority, to control the pace of growth and to restrict local taxable wealth for their immediate uses”).

¹⁷⁷ See generally GARY J. MILLER, *CITIES BY CONTRACT* (1981) (using Los Angeles County as a case study to explore motivations of parties to annexation proceedings).

¹⁷⁸ See Ford, *supra* note 29, at 1383–86.

of *Education of Kiryas Joel Village School District v. Grumet*, a group of Hasidic Jews affiliated with the Satmar sect had established a religious commune, called Kiryas Joel, in the city of Monsey in upstate New York.¹⁷⁹ Because Monsey's zoning scheme did not accommodate the Satmars' practice of maintaining relatively high population densities, the Satmars formed a new village within Monsey, encompassing only the land owned and occupied by the Satmars. Under New York state law, "almost any group of residents who satisfy certain procedural niceties" is permitted to form such a village.¹⁸⁰ Although the village had its own sectarian schools, those schools did not provide any special services for disabled children. Kiryas Joel could send its disabled children to an existing public school for disabled children attended by other, non-Satmar children, but the members of the commune did not want their children associating with children from outside the group.¹⁸¹ Thus, the Satmars successfully lobbied the New York state legislature to pass a special piece of legislation specifically enabling the village of Kiryas Joel to establish a school district for disabled children. The Court held that the creation of the school district was an unconstitutional establishment of religion because the state had singled out a religious group for special, preferential treatment. As Ford notes, however, the Court distinguished the process by which the school district was created from the process by which the village itself was created.¹⁸² The Court observed that, unlike the school district, the village was incorporated under a "neutral state law designed to give almost any group of residents the right to incorporate."¹⁸³

Ford accordingly interprets *Kiryas Joel* as an exemplar of a strain of jurisprudence in which courts will defer to local political boundary arrangements that appear to result from the voluntary choices of individuals residing within those boundaries, whatever their parochial motivations, provided that the state itself remains at a safe remove from the boundary formation pro-

¹⁷⁹ *Id.* at 691.

¹⁸⁰ *Id.*

¹⁸¹ As Christopher Eisgruber notes, the Satmars did not seek to segregate their children in order to provide a religious education, but solely in order to prevent them from interacting with non-Satmar children. See Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87, 94 (1996).

¹⁸² See Ford, *supra* note 29, at 1385.

¹⁸³ *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 n.7 (1994).

cess.¹⁸⁴ The *state's* neutrality, in other words, legitimizes local government parochialism.¹⁸⁵

It is an interesting coincidence that *Kiryas Joel* of course involved an effort by a community of Hasidic Jews to recreate the lifestyle of the Jewish ghetto in Europe. In other words, the village of Kiryas Joel represented a recrudescence of the insularity of the old-world feudal Jewish community and a rejection of the secular cosmopolitanism of Park's "wandering Jew." By itself, that fact is unremarkable. It simply proves that the inexorability of assimilation to a liberal ideal is not universally accepted. The remarkable fact is that Kiryas Joel was granted permission to *incorporate* as a local government, thereby allowing the Jewish ghetto to take on an explicitly political character. The introduction of parochial territorial identity into the political sphere was, of course, precisely the outcome that was supposedly prohibited by the Enlightenment resolution of the Jewish question.¹⁸⁶ The Court papered over this problem with the simple declaration that local government is irrelevant because it is really the *state's* neutrality that matters. This assertion, however, rests rather uneasily alongside *Avery*, which does not distinguish between municipalities and the state but rather considers municipalities *to be* the state itself.¹⁸⁷

The foregoing analysis suggests that the Jewish question was never really resolved in the manner that the Enlightenment reformers promised; indeed, it intimates that the Enlightenment ideal of universality has been twisted to serve as a cover for the continued assertion of parochial territorial identifications. If this interpretation is correct, it has major implications not only for the Jewish question but for the related local government question as well. Local governments were not simply assimilated as organs of the administrative state; they have been permitted to flourish and to assert provincial territorial prerogatives under the guise of universality. This is amply revealed in all three strands of the "one person, one vote" jurisprudence. To

¹⁸⁴ See Ford, *supra* note 29, at 1386 ("My thesis is that the Court's treatment of the Village of Kiryas Joel represents an emerging jurisprudence that allows government to sanction and facilitate segregation that appears to originate in voluntary association."). Ford's qualification that *Kiryas Joel* represents an *emerging* jurisprudence is important, as the previous landmark case of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), which held that drawing local government boundaries to exclude blacks violated the Fifteenth Amendment, could be interpreted to mean that local government formation is subject to constitutional constraints. Ford nevertheless argues persuasively that *Gomillion* is distinguishable from *Kiryas Joel* on numerous grounds. See Ford, *supra* note 29, at 1386 n.84.

¹⁸⁵ For other interesting perspectives on the *Kiryas Joel* case, see Eisgruber, *supra* note 181, at 94 (defending result in *Kiryas Joel* for preventing segregation that would contravene Constitution's assimilationist ideal); Abner Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 28 (1996) (arguing that liberal ideal is unattainable and that Court should have permitted "voluntary" segregation by Satmar group); and Minow, *supra* note 5, at 8–17 (viewing case as raising question of how to incorporate distinct subgroups into the state).

¹⁸⁶ See *supra* section II.A.1 (discussing Enlightenment resolution of the Jewish question).

¹⁸⁷ *Avery v. Midland Cnty.*, 390 U.S. 474, 480 (1968) ("The actions of local government are the actions of the State.").

begin, the next section shows how the Court has wielded the Enlightenment ideal of citizenship enshrined in *Reynolds*, *Avery*, and *Morris* to rationalize and obscure an assertion of local parochialism.

B. City of Eastlake v. Forest City Enterprises: *The Abstraction of Citizenship and the Resurgence of Territory*

In *City of Eastlake v. Forest City Enterprises*,¹⁸⁸ a developer proposed to site a multifamily apartment building in the City of Eastlake, Ohio, a suburb of Cleveland with a population of approximately 20,000. Shortly thereafter, the voters of Eastlake amended their city charter to provide that all zoning changes be approved by a referendum of city voters. The developer challenged the constitutionality of voter referenda on zoning changes, citing two cases from the early twentieth century in which the Court held that cities may not constitutionally delegate land use decisions to a referendum of landowners in proximity to a proposed land use change, absent standards to guide the discretion of the landowners. The *Eastlake* Court nevertheless upheld the charter amendment, and found the earlier cases, *Eubank v. City of Richmond*¹⁸⁹ and *State of Washington ex rel. Seattle Title & Trust Co. v. Roberge*,¹⁹⁰ distinguishable on the grounds that the challenged ordinances in those cases delegated power to a “narrow segment of the community, not to the people at large,”¹⁹¹ and could not “be equated with decisionmaking by the people through the referendum process.”¹⁹² As affirmed by the Court, a citywide referendum represents “far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters — an exercise by the voters of their traditional right . . . to [determine] what serves the public interest.”¹⁹³

How does the Court conclude that Eastlake represents “the people at large,” whereas the blockfront groups at issue in *Eubank* and *Roberge* represented merely a “narrow segment” of the people at large? In terms of size, to be sure, a city of 20,000 is substantially larger than the blockfront groups empowered to exercise the zoning power in *Eubank* and *Roberge*. But Eastlake itself is simply a “narrow segment” of a metropolitan region consisting of several million, which will somehow have to absorb the need for affordable housing that Eastlake refuses to accommodate.¹⁹⁴ Furthermore, it

¹⁸⁸ 426 U.S. 668 (1976).

¹⁸⁹ 226 U.S. 137 (1912).

¹⁹⁰ 278 U.S. 116 (1928).

¹⁹¹ *Eastlake*, 426 U.S. at 677.

¹⁹² *Id.* at 678.

¹⁹³ *Id.* at 677 (quoting *S. Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291, 294 (9th Cir. 1970)).

¹⁹⁴ Shortly before the ruling in *Eastlake*, the New Jersey Supreme Court issued an important decision in which it held that municipalities were required to take account of the regional need for affordable housing in their zoning decisions. See *S. Burlington Cnty. NAACP v. Mount Laurel*, 336 A.2d 713, 726–28 (N.J. 1975).

is nonsensical to describe the blockfront schemes in *Roberge* and *Eubank* as involving “ambiguously founded neighborhood preferences,” while characterizing Eastlake’s referendum procedure as implicating a noble “public interest.” Eastlake’s blatantly exclusionary referendum scheme rested on no concept of the public interest, but was instead a fairly typical instance of a suburban municipality acting selfishly to protect its own wealth by excluding a land use project that threatened to increase the local tax burden and lower property values.¹⁹⁵

If there is a relevant distinction between *Eastlake* and *Roberge/Eubank*, it must be that Eastlake is, as the Court says, “the city itself,” whereas the blockfront groups in *Roberge* and *Eubank* were simply constructs created for the exercise of a particular zoning power.¹⁹⁶ But what normatively distinguishes an incorporated “city” from a mere blockfront group? As the previous section discussed, neither courts nor state legislatures confine the privilege of incorporation to genuine political communities, but permit any congeries of private interests to do so without regard to size or motivation.¹⁹⁷ Most incorporated municipalities today are small suburbs of fewer than 5000 people,¹⁹⁸ and many of these municipalities are, like the blockfront groups in *Eubank* and *Roberge*, nothing more than constructs created to accomplish particular, self-regarding goals. In some instances, such as *Kiryas Joel*, a group may incorporate in order to effectuate ideological or religious principles. More often, groups incorporate for economic purposes such as control-

¹⁹⁵ Cf. Briffault, *supra* note 163, at 1133–41 (discussing political economy that causes suburban municipalities to exclude undesirable uses like affordable housing). I discussed the contrast between *Eastlake* and the blockfront consent cases in a previous article. See Stahl, *supra* note 123, at 1003–08. It may be overly harsh to call Eastlake’s actions “selfish.” The way in which states have structured local governments — requiring them to finance services out of the local tax base while giving them little means of raising revenue, but at the same time endowing them with substantial land use powers — is practically a recipe for them to act selfishly and exclude land uses such as affordable housing. See, e.g., FRUG & BARRON, *supra* note 112, at 31–43, 99–111 (discussing ways in which state structuring of local governments creates perverse incentives for municipalities).

¹⁹⁶ In a classic article, Frank Michelman distinguishes *Eastlake* from *Eubank* and *Roberge* using just this logic. See Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977–1978). According to Michelman, *Eastlake* should be read to mean that a neighborhood zoning referendum, in which an “immediately interested person” participates in a “one-time blockfront decision,” does not create the necessary background conditions to awaken in the individual the “special citizen’s motivational mode of sympathy and responsibility for all equally.” *Id.* at 184. When, by contrast, the referendum is placed before the entire city, “which maintains a continuing salience in [the voter’s] consciousness of political life,” the appropriate signal is sent to each voter that the time has come for public-minded political action rather than normal self-regarding action. *Id.* at 185. As the text points out, however, this begs the question of what makes a city normatively distinguishable from a blockfront group. For a discussion of Michelman’s article, see Stahl, *supra* note 123, at 956–57, 961–62, 979–80, 1006–07.

¹⁹⁷ See Briffault, *supra* note 175, at 75–76 (noting that courts liberally sustain municipal incorporations without regard to whether the area to be incorporated represents a “community of interest”).

¹⁹⁸ *Id.* at 77.

ling their own tax base or land use.¹⁹⁹ Indeed, there are numerous instances of suburban areas incorporating “defensively” in order to defeat a proposed land use siting or annexation, or to seize control of a revenue-generating entity.²⁰⁰

In truth, however, there is *something* that normatively distinguishes a municipality like Eastlake from the blockfront groups in *Eubank* and *Roberge*: “one person, one vote.” Under *Avery*, all municipalities exercising general governmental power (which includes zoning) are subject to the “one person, one vote” rule, whereas the neighborhood-consent schemes at issue in *Eubank* and *Roberge* allocated votes based on land ownership in proximity to a proposed land use change. How can “one person, one vote” convert what would otherwise be selfishly parochial action into the “public interest?” Let us again consider Marx’s analysis in *On the Jewish Question*. As we recall, Marx argues that the modern nation-state resolved the subgroup problem by erecting a clear dividing line between the realm of the state, which banished particularistic wealth distinctions, and civil society, within which such distinctions could hold sway.²⁰¹ But Marx goes on. While the state thereby “emancipates” itself from the predations of civil society, the emancipation is in some sense a fiction, because it creates the illusion of a society in which sectarian distinctions have been abolished while, under this cover, such distinctions continue to reign unabated in the realm of human affairs. Marx writes:

The state abolishes, after its fashion, the distinctions established by *birth, social rank, education, occupation*, when it decrees that birth, social rank, education, occupation are *non-political* distinctions; when it proclaims, without regard to these distinctions, that every member of society is an *equal* partner in popular sovereignty But the state, none the less, allows private property, education, occupation to *act* after *their* own fashion, namely as private property, education, occupation, and to manifest their *particular* nature. Far from abolishing these *effective* differences, it only exists as far as they are presupposed; it is conscious of being a *political state* and it manifests its *universality* only in opposition to these elements.²⁰²

Thus, Marx concludes:

¹⁹⁹ See Briffault, *supra* note 163, at 1141–42 (“Local boundary lines have often been drawn in order to take advantage of the opportunity local government law provides incorporated communities to control local land use and to escape from the fiscal burdens of the surrounding metropolitan region.”).

²⁰⁰ See, e.g., Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1848–49 (2003) (providing several examples of “defensive” incorporations).

²⁰¹ See *supra* text accompanying notes 82–86.

²⁰² Marx, *supra* note 81, at 33.

Where the political state has attained to its full development, man leads . . . a double existence — celestial and terrestrial. He lives in the *political community*, where he regards himself as a *communal being*, and in *civil society* where he acts simply as a *private individual*, treats other men as means, degrades himself to the role of a mere means, and becomes the plaything of alien powers. . . . In the state . . . man is the imaginary member of an imaginary sovereignty, divested of his real individual life, and infused with an unreal universality.²⁰³

Eastlake’s distinction of *Roberge* and *Eubank*, as refracted through the *Avery* doctrine, represents the implicit differentiation of the “celestial” sphere of the state from the “terrestrial” realm of civil society. The municipality, once applying the “one person, one vote” rule, assumes the “celestial” universality of the state itself. As *Avery* says, “The actions of local government are the actions of the State.”²⁰⁴ *Avery*’s equation of the municipality with the universal state enables, in *Eastlake*, a small city of 20,000 to transcend its “terrestrial” confines and become simply “the people,” an abstracted entity removed from all spatial particularity.

The blockfront groups in *Roberge* and *Eubank*, by contrast, could not lay claim to the state’s universalism because they did not adhere to “one person, one vote.” Those cases involved the empowerment of “a narrow segment of the community, not [] *the people* at large,”²⁰⁵ and therefore cannot “be equated with decisionmaking by *the people* through the referendum process.”²⁰⁶ Indeed, in the latter cases, the Court expressed concern that the decisionmakers “are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily”²⁰⁷ and may act “solely for their own interest, or even capriciously.”²⁰⁸ The franchise having been correlated with land ownership, the Court was suspicious that the voters would act out of their own self-interest. Because, by contrast, the City of *Eastlake* allocated votes based on a principle of “one person, one vote,” the Court could confidently assert that *Eastlake*’s referendum represented the “public interest” rather than an “ambiguously founded neighborhood preference.”²⁰⁹ Indeed, the legitimacy of *Eastlake*’s referendum is reinforced by the exaggerated contrast with the blockfront referenda in the earlier cases; in Marx’s terms, *Eastlake* “is conscious of being a *political state* and it manifests its

²⁰³ *Id.* at 34.

²⁰⁴ *Avery v. Midland Cnty.*, 390 U.S. 474, 480 (1968).

²⁰⁵ *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 677 (1976) (second emphasis added).

²⁰⁶ *Id.* at 678 (emphasis added).

²⁰⁷ *Washington ex rel. Seattle Title & Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928).

²⁰⁸ *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912). The Court’s phrasing eerily echoes Marx’s description of the individual in civil society, who is “wholly preoccupied with his private interest and act[s] in accordance with his private caprice.” Marx, *supra* note 81, at 43.

²⁰⁹ *Eastlake*, 426 U.S. at 677.

universality only in opposition to” the evident parochialism condemned in *Roberge* and *Eubank*.²¹⁰

As Marx stresses, however, Eastlake’s universality is an “unreal universality” that masks its underlying particularism. The city’s normative stature as “the people” or “the state” conceals its *real* nature as a tiny municipality acting in its own parochial self-interest, protecting its turf from invasion by outsiders. Eastlake’s strategic maneuver to prevent low-income housing from being erected within its borders is recapitulated as the effectuation of a grand “public interest,” rather than an act of territorial assertion.

Under the authority of cases like *Eastlake*, municipalities have been freed to engage in all manner of self-regarding behaviors.²¹¹ Today, cities of whatever size enjoy *carte blanche* to dictate their own land use and fiscal policies. The proliferation of small incorporated municipalities has generated a virulent competition for tax revenue and a concomitant “fiscalization” of land use, in which each municipality exercises the land use power based on its anticipated contribution to the municipal tax base rather than on regional needs for particular land uses.²¹² The result is a zero-sum game in which every municipality zones for its own interests, producing a patchwork of inconsistent land use practices, poor regional planning, a shortage of suitable locations for regionally necessary but locally undesirable land uses, and de facto segregation between rich and poor communities.²¹³

Eastlake thus applies a Marxian sleight of hand to transform municipalities from parochial, self-interested territorial enclaves into despatialized standard bearers of an abstract public good. *Avery* provides a veneer of universality that legitimizes and obscures a practice of aggressive spatial deployment.

C. *The Abstraction of Money and the Resurgence of Territory*

If *Eastlake* deploys the universality of citizenship to cover for a clandestine assertion of territorial particularity, *Salyer*, *Ball*, and *Kessler* all use the universality of money for the same end. Reconsider the business improvement district. As we recall, the *raison d’être* of the BID is to maximize property values for the benefit of landowners, thereby reinforcing the trans-

²¹⁰ Marx, *supra* note 81, at 33.

²¹¹ For a critical assessment of *Eastlake*, see, for example, Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1420–23 (1978).

²¹² See Jonathan Schwartz, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 S. CAL. L. REV. 183, 184–86, 198–202 (1997) (discussing the “fiscalization” of land use); see also FRUG & BARRON, *supra* note 112, at 150–51 (describing municipal incentives to use land-use powers for fiscal purposes).

²¹³ See Briffault, *supra* note 163, at 1133–41 (discussing numerous problems resulting from current system of local government, in which tiny municipalities have complete autonomy to govern themselves without consideration of the regional impacts of their actions).

formation of land into an abstractly conceived commodity.²¹⁴ The *Kessler* court accordingly ruled that because the district’s primary purpose was to enhance property values, landowners within the BID were disproportionately interested in the district’s governance, thus justifying disproportionate voting power. Casting the BID as principally affecting the monetary interests of landowners enabled the court to dismiss the possibility that individuals who resided in or used the urban areas governed by the BID, but did not own property there, might have a substantial interest in the BID’s governance.²¹⁵

The conceptualization of the BID as a medium for the conferral of spatially disembodied economic benefits obscures the fact that the BID is fundamentally a tool for the management of *territory*. I explained above that the BID is typically justified, much as zoning is, based on its ability to overcome the collective action problem that results when landowners have an incentive to free ride on services that other landowners may provide — security, sanitation, and the like. As Robert Ellickson argues, however, perhaps the most significant free-rider problem that BIDs exist to address is the overuse of public space by undesirable street people. According to Ellickson, downtown spaces present a “tragedy of the commons” situation in that each individual user of the space is free to maximize her use of it without regard to the impact of that usage on others.²¹⁶ Panhandlers and homeless individuals have an incentive — and arguably a need — to use such spaces for sleeping, eating, panhandling, and other activities, and because the spaces are open to the public at no charge, little disincentive to do so.²¹⁷ However, these individuals’ “overuse” of a space deters other members of the public from using it because people are wary of entering spaces that have become overrun with bench squatters and mendicants.²¹⁸ Furthermore, while the public as a whole may strongly desire to rid the public space of the disturbing individuals, no particular member of the public has a strong enough incentive to confront those individuals directly.²¹⁹ As a result, the public generally ignores street people, allowing them to monopolize public space to the point that it becomes effectively inaccessible to everyone else.

The BID, Ellickson explains, overcomes this collective action problem by coercing the payment of a mandatory assessment from all landowners in

²¹⁴ See *supra* text accompanying notes 119–139.

²¹⁵ See *supra* text accompanying notes 134–139.

²¹⁶ See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1174 (1996) (referring to “tragedy of the agora”); *id.* at 1168–69.

²¹⁷ See Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 299–301 (1991) (observing that because homeless, by definition, have no private property where they have a right to be, they require access to *public* spaces in order to fulfill basic life functions that are normally considered appropriate only for private spaces).

²¹⁸ See Ellickson, *supra* note 216, at 1178 (describing “compassion fatigue” that may overcome even sympathetic observers given street people “overusing scarce public space”); *id.* at 1169.

²¹⁹ See *id.* at 1196–98 (arguing that most individual users of public space have little incentive to enforce informal norms of street order by confronting aggressive panhandlers).

proximity to a particular public space, and then using the assessed funds to finance security services tasked with managing the population of street people so as to make the space more accessible to the general public.²²⁰ Ellickson argues, indeed, that “the control of disorderly street people” is one of the BID’s “central functions.”²²¹ Undoubtedly, one of the more controversial aspects of BID governance has been the relationship between BIDs and the homeless population. Several BIDs, including the Grand Central District Management Association (“GCDMA”) involved in *Kessler*, have been accused of using “goon squads” to harass and intimidate the homeless.²²² While many of these allegations have proven to be unfounded,²²³ there is a clear conflict of interest between the desire of homeless and other disadvantaged individuals to use public space for their basic daily needs and the desire of BIDs to make the space attractive for business and tourism.²²⁴

BIDs’ control of public space extends well beyond their management of street people. They act aggressively against street vendors, food trucks, adult businesses, or any other use of space deemed inconsistent with the BIDs’ central goal to increase property values — and BIDs have vigorously lobbied city governments for favorable zoning changes and the enforcement of existing zoning laws.²²⁵ Richard Schragger accordingly argues that the GCDMA in *Kessler* was actively engaged in “defining and delineating the contours of public space itself.”²²⁶

That the BID is fundamentally a territorial jurisdiction managing access to public space is nowhere to be seen in the *Kessler* decision, which depicts the GCDMA as engaged in mostly aesthetic functions like sanitation and maintenance.²²⁷ The reason the court neglects the BID’s territorial aspect is that the GCDMA’s assertive control of public space is effectively disguised by the abstraction of money. As *Kessler* sees it, landowners pay monetary

²²⁰ See *id.* at 1198–1200.

²²¹ *Id.* at 1199.

²²² *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92, 122–23 (2d Cir. 1997) (Weinstein, J., dissenting) (citing instances in which BID “goon squads” were alleged to have harassed homeless individuals); see also Briffault, *supra* note 131, at 401–02 (discussing efforts by BIDs in Portland, Baltimore and Philadelphia to deal with the homeless population).

²²³ See Briffault, *supra* note 131, at 402–03 (dismissing allegations that “goon squads” employed by the Grand Central BID systematically assaulted homeless individuals but recognizing tension between BIDs and homeless population).

²²⁴ See Don Mitchell, *The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States*, in THE LEGAL GEOGRAPHIES READER, *supra* note 166, at 7 (arguing that the desire to transform public spaces into a “playground” that will attract mobile global elites necessarily requires that public spaces be cleansed of “those left behind by globalization,” such as the homeless).

²²⁵ See Briffault, *supra* note 131, at 406–07, 427–28.

²²⁶ Richard Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 457 (2001); see also Stahl, *supra* note 123, at 973–76, 993–94 (discussing BIDs’ de facto control of public space).

²²⁷ See *Kessler*, 158 F.3d at 104–07 (describing functions such as bagging trash, street-sweeping, and other “area-beautification projects”); Schragger, *supra* note 226, at 449–50 (arguing that the *Kessler* court ignored significant impacts of GCDMA on non-landowners by describing the BID’s powers as “essentially aesthetic”).

assessments to the BID, and those assessments are then returned to landowners in the form of the increased monetary value of their property.²²⁸ Money in equals money out. Therefore, *Kessler* confidently asserts that landowners are uniquely benefitted and burdened by the BID.²²⁹ But *Kessler*'s syllogism elides something critical. Between the input of a monetary assessment and the output of increased property values is the use of the assessment to exercise vigorous authority over the territory within the BID's borders, which, by making the space more attractive for tourists and shoppers, presumably accounts for the boost in property values. It is precisely where the BID exercises its territorial authority, of course, that it profoundly impacts individuals other than landowners, such as street vendors, adult businesses, and the homeless.

This territorial authority is obscured, however, because it is exercised not through explicit control over land-use (such as zoning) but the more indirect means of a monetary assessment. Because the assessment is not a direct form of land-use control but merely a fungible cash payment that can in theory be used to hire jugglers or mimes as easily as barricades or "goon squads," it is a short step for courts and BID advocates to characterize the BID's activities as merely aesthetic. It is the rare slipup indeed for a BID official to actually acknowledge that the BID exercises territorial control at all, such as when the president of the Union Square BID justified providing assistance to the city police in erecting barricades to keep out the homeless during the summer of 1994 by saying "We're just trying to protect our own turf."²³⁰ These unusual candid moments aside, the fact that BIDs extract a mere payment of money rather than directly controlling the use of space helps to abstract BIDs from their exercise of territorial authority so that they may appear as aspatial "conceptual medium[s]" for the conferral of purely economic benefits.²³¹

²²⁸ See *Kessler*, 158 F.3d at 107–08 (noting that landowners alone pay assessments, and that those assessments are used to provide benefits exclusively for landowners).

²²⁹ See *id.* at 107 (stating that "principal burden" of the BID, the mandatory assessment, falls directly and solely on property owners); *id.* at 108 (stating that "principal economic benefit" accrues to property owners "who will enjoy an increase in the value of their property").

²³⁰ See SHARON ZUKIN, *NAKED CITY* 145 (2010).

²³¹ See *S. Cal. Rapid Transit Dist. v. Bolen*, 822 P.2d 875, 883 (Cal. 1992) (describing special assessment district as "a conceptual medium for the recognition of economic benefits conferred and the imposition of a corresponding fiscal burden"). The neutrality of the monetary assessment is, ultimately, what distinguishes *Kessler* from cases like *Eubank* and *Roberge*, discussed in the preceding section. Although *Roberge* and *Eubank*, like *Kessler*, similarly empowered landowners within a territorially defined jurisdiction to approve or disapprove changes to their neighborhood environment, the blockfront consent schemes at issue there gave landowners *direct* control over the zoning power, and therefore exposed in a way that could not be casually denied that the underlying construct was rooted in the deployment of a particular plot of space for the parochial ends of the landowners rather than the universal abstraction of money. In the case of the BID, by contrast, the deployment of space is far more subdued. BIDs have no formal powers of exclusion, or indeed any regulatory powers at all aside from the ability to collect a mandatory assessment, a fact the *Kessler* court made a point of emphasizing. See *Kessler*, 158 F.3d at 104–05. In a previous article, I used public choice

Thus, just as *Eastlake* uses the abstraction of citizenship to legitimize the exclusion of affordable housing under the guise that it represents “the people” effectuating “the public interest,” *Kessler* uses the abstraction of money to mask the exclusion of undesirables from urban public spaces by portraying the BID as an innocuous device for enhancing the exchange value of property.²³²

D. *The Abstraction of Territory and the Resurgence of Territory*

As we have seen, *Holt* is similar to *Avery* and *Kessler* in that it also appears to eradicate territorial particularity through an abstraction, in this case territory rather than citizenship or money. *Holt* rejects the assertion that those with a particularly intense interest in the governance of a municipality are necessarily entitled to a vote, holding instead that *Avery* requires only that *residents* within the borders of a municipality designated by the state’s jurisdictional map be given an equal vote. Territory is thus exalted as a standard only after it is strictly differentiated from “interest” and rendered as an abstract, neutral tool of state administration.

As in *Eastlake* and *Kessler*, however, *Holt*’s assertion that territory is neutral enables a surreptitious deployment of territorial particularity. In short, no matter how hard the Court tried to cleanse territory of its association with interest, the fact is that territory is *not* neutral at all, but is actually a strong proxy for interest. Indeed, the standard that *Holt* exalted as value-neutral, residency, is itself suffused with particular interests. As Richard Briffault writes, restricting participation in local government to residents, as most states do, imbues local politics with a highly parochial character:

With issues related to work and the economy off the agenda, the focus of local public life in most autonomous residential localities is on issues of residence — land use, schools and property taxes. These questions are usually addressed primarily in terms of their implications for the residents’ private lives — their homes, families, privacy, and personal security, the preservation of personal

theory in an attempt to distinguish *Eubank* and *Roberge* from *Kessler*, but found it wanting. See Stahl, *supra* note 123. Legal geography apparently performs the task more effectively.

²³² The distinction between *use* and *exchange* value favored by some Marxian theorists is a slippery, perhaps false one, because what appears as the advancement of exchange value can also be perceived as furthering use value, and vice versa. The slipperiness of this distinction was a key component of the Enlightenment equivocation over the place of territory in the modern nation-state, because the universal rhetoric of (aspatial) exchange value can obfuscate a practice that impacts (territorial) use value. See *supra* notes 112, 116. This section should make clear how the court in *Kessler* legitimized a regulatory apparatus that dramatically affected use value by disguising it under the rhetoric of exchange value. It should also reinforce Sack’s point about how capitalism makes territory appear fluid and placeless in order to deflect attention from class conflict. See Sack, *supra* note 28, at 67.

wealth and the creation and maintenance of an atmosphere conducive to the individual consumption of consumer goods.²³³

In a case like *Eastlake*, for example, the politics of residence practically assured that a low-income housing project would be rejected by voters, all of whom were *residents* of Eastlake, because for residents, the most important considerations are the impacts of a new entrant on their property values, their local schools, and their local tax base. Residents often worry that affordable housing will crowd local schools and diminish property values while adding to the tax burden of existing residents.²³⁴ If employers, workers, shoppers, or recreators in Eastlake also had a vote, they might have chosen to permit a project that could ease the regional affordable housing burden or lower local labor costs by enabling low-wage workers to live close to their places of employment.

For this reason, it has often been argued that territory is inextricably linked with particular interests. Indeed, many early commentators on the *Reynolds* decision believed that, because the Court insisted that legislators represent voters and not interests, *Reynolds* effectively required the abolition of geographic voting districts and the implementation of at-large or proportional voting systems.²³⁵ This was so, the commentators argued, because territory is necessarily correlated with interest, such that any voting system that recognized geographic districts would implicitly give some voice to interests.²³⁶ An at-large or proportional voting system, by contrast, would carry out *Reynolds*' mandate to ensure that only individual voters, and not interests, attained legislative representation.

The commentators, however, proved to be wrong: in the years since *Reynolds*, federal courts have favored geographic districts and disfavored at-large voting systems, because the latter often have the effect, intended or not, of diluting the voting power of geographically concentrated minority populations.²³⁷ Geographic districts, unless obviously gerrymandered, have appeared to the courts as the more neutral alternative to at-large voting

²³³ Briffault, *Our Localism: Part II*, *supra* note 26, at 440.

²³⁴ See generally Schragger, *supra* note 200, at 1834–52 (critiquing political economy of the suburbs in which homeowners have incentives to exclude undesirable uses such as affordable housing).

²³⁵ The *Reynolds* dissenters themselves made this point. See *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 750 n.12 (1964) (Stewart, J., dissenting) (asking why the Court's rule "does not require the abolition of districts and the holding of all elections at large").

²³⁶ See *Lucas*, 377 U.S. at 750 (Stewart, J., dissenting) ("The very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests."); Phil C. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 277 ("Districting serves various purposes but important among them is giving representation to interests which would be submerged by majorities in larger groupings of voters.").

²³⁷ See *White v. Regester*, 412 U.S. 755, 769 (1973) (invalidating at-large voting scheme for diluting minority voting strength).

schemes.²³⁸ Territory, as Richard Ford explains, has an aura of naturalness and neutrality that appears to transcend interest, and thus disguises the fact that territory is in fact indivisible from interest. Ford elaborates on this point in his discussion of the idea of “virtual representation,” advanced by the great British Parliamentarian Edmund Burke.²³⁹ Burke argued that government should represent all of the people’s interests, not necessarily all of the people. For as long as all of the relevant interests are represented, then even those people who have no representative of their own are “virtually represented” by those who share their interests. Yet, Burke also believed that representatives should be drawn from geographic districts, because such districts were clearly correlated with particular interests. If Burke’s major concern was with ensuring interest representation, however, Ford asks why he did not support the election of representatives directly from those particular interests, rather than using territory as a proxy for interest. Ford answers: “[G]eography does serve an important ideological function in Burke’s scheme: it makes the represented interests appear objective, natural, and hence uncontroversial.”²⁴⁰

That territory causes interest to appear neutral is evident in *Holt*. Once voting rights were keyed to residency, the case became a simple matter of looking at the map. As the Court concluded: “The line heretofore marked by this Court’s voting qualifications decisions coincides with the geographical boundary of the governmental unit at issue, and we hold that appellants’ case, like their homes, falls on the farther side.”²⁴¹ The Court did not even need to explain its deference to Tuscaloosa’s “geographical boundary” because it was self-evident that the line separating Tuscaloosa from Holt was an arbitrary administrative simplification with no normative significance.²⁴² The fact that municipal boundaries, after cases like *Lockport* and *Kiryas Joel*, are often drawn specifically to encapsulate and entrench particular interests warranted no comment. The Court’s summation of the case thus made territory appear bloodless and neutral, even as it bolstered the particular suite of interests bound up with residency. Like the abstraction of citizenship in *Eastlake* and the abstraction of money in *Kessler*, here the

²³⁸ *Shaw v. Reno*, 509 U.S. 630 (1993), was the rare case in which the Court struck down a geographic district. In that case, the state of North Carolina had created an oddly shaped congressional district in order to maximize the number of African Americans within the district. The Court found that the district’s unusual shape, lacking compactness and contiguity, was strong evidence that the district was drawn according to the nonneutral criterion of race. By inference, had the district been drawn according to the seemingly more neutral criterion of geographic compactness and contiguity, it would have been sustained. Indeed, according to Abner Greene, “the Court repeatedly insisted that evidence of compactness and contiguity could help dispel the inference that a district was based on race.” Greene, *supra* note 185, at 46.

²³⁹ See Ford, *supra* note 27, at 885–87.

²⁴⁰ See *id.* at 887.

²⁴¹ *Holt v. City of Tuscaloosa*, 439 U.S. 60, 70 (1978).

²⁴² On the apparent neutrality of geography, see *supra* notes 164–166 and accompanying text.

abstraction of territory is a useful rhetorical device for masking the entrenchment of territorial particularity.

IV. CONCLUSION: TERRITORIAL SOVEREIGNTY AND THE RIGHTS OF MAN

The lingering question at this point is *why* courts champion universality with one hand while undermining it with the other. The critical legal studies tradition furnishes one possible answer: law's purported neutrality is a façade behind which courts surreptitiously reproduce the existing class structure.²⁴³ As discussed here, local governments are able to use their control over territory to exclude downtrodden economic classes — low-income families, panhandlers, the homeless — courtesy of a jurisprudential architecture that disguises the assertion of territory under the purported neutrality of citizenship, money, and territory.

This account, while forceful, is somewhat overly cynical. *Reynolds* and *Avery* cannot be written off as part of an elaborate ruse to cement economic privilege under a neutral guise. Both of these cases were attempts to rectify a long legacy in which minority voting power was being severely diluted by malapportioned electoral districts and local government structures.²⁴⁴ How, then, did we arrive at the point where these cases, which harbored such egalitarian aspirations, have been turned into a means by which societal elites are able to insulate themselves against redistributive demands within territorial enclaves?

The answer has to do with the ambiguous legacy of the Enlightenment in this country. The Introduction pointed out that *Reynolds* and *Avery* adhere to an Enlightenment ideal of abstract citizenship, the same ideal captured by the French prohibition on gathering information about individuals' religious affiliations. In truth, however, American law has had a far more equivocal commitment to that ideal than its zealous French counterpart. As Hannah Arendt argues, the Enlightenment conception of abstract citizenship, embodied in the French Revolution's *Declaration of the Rights of Man*, was based on the fiction that rights were given by nature to all individuals regardless of nationality, and therefore obscured the need for some form of sovereign territorial entity to actually enforce those rights.²⁴⁵ Arendt's critique draws on Edmund Burke, who famously rejected the French Revolution's abstract

²⁴³ See, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 23 (1991) (arguing that "concepts such as race neutrality and nonrecognition can be thought of as legal fictions which serve to legitimate racial subordination").

²⁴⁴ See, e.g., Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 83–84 ("[The central issue in 'one person, one vote' cases] was pervasive legislative malapportionment throughout the South — and parts of the North — that dramatically overrepresented rural whites at the expense of underrepresented urban and rural blacks.").

²⁴⁵ See ARENDT, *THE ORIGINS OF TOTALITARIANISM*, *supra* note 7, at 290–302; *id.* at 291 ("From the beginning the paradox involved in the declaration of inalienable human rights was that it reckoned with an 'abstract' human being who seemed to exist nowhere . . .").

"rights of man" in favor of the rights of *Englishmen*, that is, the rights secured by membership within a territorially contingent sovereign state.²⁴⁶ Rather than "nature," Burke argued that tradition and heritage assured these rights "as an entailed inheritance derived to us from our forefathers . . . as an estate specially belonging to the people of this kingdom, without any reference whatever to any other more general or prior right."²⁴⁷ As Arendt interprets it, this passage signifies Burke's commitment to a "feudal concept of liberty" rooted in "title and land," presumably with all the status inequalities that such a feudal conception entails.²⁴⁸ Arendt goes on to argue that the American Revolution followed Burke in rejecting the "rights of man," insisting instead on the rights guaranteed by territorial sovereignty. Where the *Declaration of the Rights of Man* was "meant to spell out primary positive rights, inherent in man's nature, as distinguished from his political status," the amendments in our Constitution's Bill of Rights "were meant to institute permanent restraining controls upon all political power, and hence presupposed the existence of a body politic and the functioning of political power."²⁴⁹ In other words, we have seemingly understood the practical reality that rights are contingent upon territorial power, and cannot be guaranteed by egalitarian abstractions.

And yet, those egalitarian abstractions continue to exert a powerful influence. Ever since the American Revolution, this country has rejected the "entailed inheritance" of feudalism. As Alexander Bickel writes in an early discussion of the "one person, one vote" jurisprudence, "The structuring of government in terms of clearly defined interests . . . causes unease" because "[i]t raises the specter of the corporate state, or of the medieval state, which classified people by status, and held them to the status in which they were classified."²⁵⁰ At a broader level, the very idea of the nation-state, as we have seen, is based on creating a unified nation by transcending the purely local territorial identifications of a corporate, feudal society.

As a result, rather than rejecting Enlightenment abstractions, we have reached an unsettling middle ground between the universal and the particular in which we permit the particular to run amok under the guise of the universal. Indeed, Bickel describes geographic districting in just these terms, as a "compromise . . . between our symbolic needs" to believe that we are part of a polity that transcends particular interests and "a most exigent practical necessity" to ensure that interests are heard in the political arena.²⁵¹ As our discussion of *Holt* makes clear, territory is at once a clear proxy for interest

²⁴⁶ This was the theme of Burke's famous tract, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (Conor Cruise O'Brien ed., Penguin Books 1968) (1790).

²⁴⁷ See ARENDT, *THE ORIGINS OF TOTALITARIANISM*, *supra* note 7, at 176.

²⁴⁸ See *id.*

²⁴⁹ ARENDT, *ON REVOLUTION*, *supra* note 7, at 108; see also *id.* at 148-49 (discussing American Revolution's rejection of "rights of man" and preference for territorial sovereignty).

²⁵⁰ BICKEL, *supra* note 24, at 157.

²⁵¹ *Id.* at 158.

as well as an apparently value-neutral standard, and thus can admirably straddle the line between the universal and the particular. Even Burke himself, who so forcefully rejected the abstraction of the rights of man, could not avoid hedging his bets in this regard. As we have seen, Burke's theory of virtual representation utilized the neutral abstraction of territory to disguise the brazen assertion of feudal "interest" politics.²⁵²

Coupling the abstract "rights of man" with a clandestine policy favoring the assertion of territory has significant and dangerous consequences, however. I return, one final time, to the Jewish question. According to Arendt, the great irony of the *Declaration of the Rights of Man* was that at the same time the French Revolutionaries were declaring the equality of all men regardless of nationality, they were simultaneously establishing a thoroughly French nation-state. Arendt believed that in doing so, the French were implicitly recognizing that natural rights could not be guaranteed in the abstract, but required a territorial state to enforce those rights.²⁵³ The problem this posed for national minorities like Jews was that, because they did not have their own state, they became dependent on the largesse of foreign authorities like the French for protection and unable to claim political rights for themselves *as Jews*. When Europe was carved into a series of nation-states after World War I, hordes of refugees and national minorities were thereby created with no state to call their own, and nothing but "natural rights" to protect them against hateful prejudice. Left alone with "the abstract nakedness of being human,"²⁵⁴ these stateless minorities became easy prey for the machinations of totalitarian regimes.²⁵⁵ The failure of the Enlightenment ideal of natural rights became clear when the Nazis declared their intention to implement a "final solution" to the "Jewish question."²⁵⁶

For Arendt, then, the Enlightenment abstraction of the "rights of man" legitimized passivity in the face of persecution by purporting to shelter all under its egalitarian banner while, in reality, only those lucky enough to be

²⁵² See *supra* text accompanying note 239.

²⁵³ See ARENDT, *THE ORIGINS OF TOTALITARIANISM*, *supra* note 7, at 272 ("[T]he fact that the French Revolution had combined the rights of man with national sovereignty" indicated French belief that "true freedom, true emancipation, and true popular sovereignty could be attained only with full national emancipation."); *id.* at 291 ("The whole question of human rights, therefore, was quickly and inextricably blended with the question of national emancipation; only the emancipated sovereignty of the people, of one's own people, seemed to be able to insure them.").

²⁵⁴ *Id.* at 299.

²⁵⁵ *Id.* at 293 ("The Rights of Man, supposedly inalienable, proved to be unenforceable — even in countries whose constitutions were based upon them — whenever people appeared who were no longer citizens of any sovereign state.").

²⁵⁶ See Minow, *supra* note 5, at 2 (quoting Herman Goering) ("[S]ubmit to me as soon as possible a plan showing the measures already taken for the execution of the intended *final solution* of the Jewish question.") (emphasis in original). For a discussion of Arendt and the problem of stateless minorities, see RICHARD J. BERNSTEIN, *HANNAH ARENDT AND THE JEWISH QUESTION* 71–87 (1996).

able to shield themselves behind territorial walls enjoyed any real protection.²⁵⁷

The “one person, one vote” cases present a similar paradox, albeit on a far less tragic scale. In *Ball* and *Holt*, for example, the Court treated local autonomy as though it were basically irrelevant because the voters disenfranchised at the local level were, pursuant to *Reynolds*, “equal participants in the election of state legislators” who draw local boundaries.²⁵⁸ This assertion is at odds, however, with *Avery*’s frank recognition that local governments exercise such significant powers that they must be considered the equivalent of the state itself for voting rights purposes. In *Eastlake*, likewise, the Court claimed that a voter referendum procedure signified the will of “the people” even as the very purpose of the referendum was to exclude undesirable “people” from local borders. *Kessler*, finally, glossed over the BID’s assertive control of space by presenting the BID as a virtual nonentity that had no appreciable impact on non-landowners. In this way, the egalitarian abstractions that define the “one person, one vote” jurisprudence legitimize and obscure the entrenchment of local territorial enclaves while leaving those excluded from such enclaves with nothing more than the hollow assurance, easily rebutted by experience, that territory is immaterial.

Some would argue that the solution to this problem lies in tearing down the walls that enclose privileged enclaves like *Eastlake*, thus vindicating the promise of the Enlightenment reformers.²⁵⁹ Others would say that those excluded should go and do likewise, erect walls around their own communities.²⁶⁰ This is an important question, but the search for an answer has been foreclosed by a jurisprudence that invites us to suppose we can have our Enlightenment ideals and our territorial sovereignty too. The bankruptcy of that approach must be exposed before we can have a frank debate about the way forward for local governments in our nation-state.

²⁵⁷ This explains why Arendt became a Zionist for a period of time, prior to her becoming disillusioned with Zionism over its treatment of the native Palestinian population. See BERNSTEIN, *supra* note 256, at 101–22.

²⁵⁸ *Ball v. James*, 451 U.S. 355, 371 n.20 (1981); *Holt v. City of Tuscaloosa*, 439 U.S. 60, 73–74 (1978) (noting that residents of *Holt* had the ability to lobby state legislature for changes to local boundaries).

²⁵⁹ See ANTHONY DOWNS, *OPENING UP THE SUBURBS* (1973) (advocating variety of mechanisms for providing more affordable housing in the suburbs); CHARLES M. HAAR, *SUBURBS UNDER SIEGE* (1996) (defending aggressive judicial efforts to curtail municipal exclusionary zoning practices and ensure more affordable housing in the suburbs).

²⁶⁰ See Greene, *supra* note 185, at 54 (arguing that voluntary separation should be permissible because “the core of liberal democracy is fractured in an irreparable way”); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 791–802 (critiquing liberal idea of integration and asserting virtues of racial separatism).