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Don't Fence Us Out: The Municipal Power to Ban Gated Communities and the Federal Takings Clause

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Notes

DON'T FENCE US OUT: THE MUNICIPAL POWER TO BAN GATED COMMUNITIES AND THE FEDERAL TAKINGS CLAUSE

I. INTRODUCTION

Residential real estate developers are selling a new lifestyle to American homebuyers today—a sense of community and security in a private neighborhood surrounded entirely by walls and gates.[1] The rapid rise in the number of these communities indicates that Americans are, in fact, buying.[2] The appeal is evident in the developers' advertisements: promises of a sense of community that "provides the foundation for a true neighborhood experience;"[3] recreational amenities, including a clubhouse that will become the "social center of your life;"[4] carefully manicured settings;[5] and gates that provide security and feelings of remoteness and privacy.[6]

The gating phenomenon is not without costs, however. Sociologists and civic leaders are becoming increasingly wary of the social and legal harms presented by gated communities, including erosion of the overall sense of community in the surrounding municipality, withdrawal from civic participation, abusive searches by private police forces, and the hindrance of free speech and association.[7] A number of cities now tightly restrict these developments, and some have already banned them completely.[8]

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[1] *See* Jerry Adler, *Paved Paradise*, NEWSWEEK, May 15, 1995, at 42 (discussing market demand for security and community); Lois M. Baron, *The Great Gate Debate*, BUILDER, Mar. 1998, at 92.

[2] *See infra* Part II.B.

[3] *The Sanctuary: An Environmentally Planned Residential Community* (Oct. 17, 1999) *available at* http:// www.crosbydevelopment.com/Sanctuary.

[4] *River Landing* (Oct. 17, 1999) *available at* http://www.navigator.com/riverlanding/la.htm.

[5] *Vinehaven* (Oct. 17, 1999) *available at* http://www.vinehaven.com/info.html.

[6] *Cross Creek Plantation* (Oct. 17, 1999) *available at* http://www.crosscreekgolf.com/main.html.

[7] *See infra* Part III.

[8] EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA 156-60 (1997). The authors examine the debates over gates that have taken place in an increasing number of cities across the country, and note that much of the initial conflict has centered around proposals

Given the growing popularity of gated enclaves and the increasing recognition of their social costs, municipalities across the country face the question of how to handle these communities. Some local governments may embrace them because they do not require public funds to build and maintain their private infrastructures.[9] Others may fear the potential negative consequences to the community as a whole, and choose to prohibit or restrict gated developments.[10]

If a municipality chooses to ban gates within its borders, and the ban is challenged in court, what would be the legal result? Opponents would argue that the ban is an unlawful intrusion on the private property rights of the landowners, no different than if the government were to forbid an individual homeowner from excluding strangers from his land. This Note argues, however, that a ban on new gated communities falls within the legitimate police power of local governments, and that such a ban would withstand a constitutional challenge based on takings law.[11] Section II of this Note discusses the

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to privatize public streets and then gate them. *Id.* Several cities have adopted restrictive policies on gated communities, including San Diego, California, Portland, Oregon, and Plano, Texas. *Id.* Local consensus against gates makes them very difficult to get approved in Minneapolis. Baron, *supra* note 1. Burbank, California, recently rejected a proposal for gates on a new development, based on concerns over police and fire access and the general sense of exclusion that would result. Andrew Blankstein, *Burbank Rejects Plan to Make Local Project a Gated Community*, L.A. TIMES, Mar. 26, 1998, at B5. The city council of La Habra Heights in southern California enacted a formal ban on gated communities, citing their divisiveness and harm to the community. Howard Blume, *La Habra Heights Shuts the Gates*, L.A. TIMES, Sept. 20, 1990, at J7. The ban was enacted despite threats of legal action by developers and residents, who viewed it as a violation of their property rights. *Id.* The suburban communities of Cary and Carrboro in North Carolina have also formally banned gates, in response to the exclusive and unfriendly nature of the barriers. Alan Scher Zagier, *'Gated' Living Inspires Debate*, THE NEWS AND OBSERVER, June 7, 1998, at A1. Residents of Camas, Washington, recently debated a proposed ban on gated communities in their city. Anne Hart, *Testimony Split on Gated Communities in Camas*, THE COLUMBIAN, Jan. 25, 2000, at B3. City and regional planners in Flagstaff, Arizona, included a ban on gated communities in their proposed comprehensive land use plan. *Flagstaff Area Regional Land Use and Transportation Plan*, Policy HN2.4 (Jan. 14, 2001) *available at* http://www.flagstaff.az.gov/regionalplan. Developers in Southlake, Texas, are prohibited from making requests to build gated communities; only residents may initiate such requests. A. Lee Graham, *Straddling the Fence*, DALLAS MORNING NEWS, Aug. 7, 1999, at 1N.

[9] *See infra* note 29 and accompanying text.

[10] *See supra* note 8.

[11] This Note argues that a ban on *new* gated communities is constitutionally permissible; a municipality would encounter significant difficulties if it attempted to eliminate an existing gated community. *See infra* note 197 and accompanying text. Moreover, the Note focuses on the power to prohibit gates around new *private* neighborhoods; municipalities already have considerable control over public streets, and they may not easily privatize a public street. OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 612-13 (1982)

gated communities phenomenon, detailing their explosive growth and the causes of their popularity.[12] Section III reveals the potential hidden dangers of gates, from the serious sociological harm imposed on the surrounding community to possible constitutional harms to non-members.[13] Section IV provides an overview of municipal legislative power, as well as the constitutional limits on this power imposed by the Fifth Amendment Takings Clause.[14] Finally, Section V provides model judicial reasoning that would uphold a ban on gates, demonstrating that the ban falls within the legitimate police power objectives of local government, and is not an unconstitutional taking of private property given the current state of the law.[15]

II. THE RISE OF GATED COMMUNITIES

Section A below defines gated communities and examines how they are governed.[16] Section B details the rapid growth of these communities throughout the country.[17] Finally, Section C explores the reasons why gated living has become so popular in the United States.[18]

("Even if the locality has fee ownership of the street-land, it holds this property in trust for the public, and lacks power to change the use unless express legislative authority from the state is given."). *See, e.g.*, Citizens Against Gated Enclaves v. Whitley Heights Civic Ass'n, 23 Cal. App. 4th 812, 821 (Cal. Ct. App. 1994) (holding that the city lacked express legislative authority to withdraw streets from public use without a determination that the streets are no longer needed for vehicular traffic); City of Lafayette v. County of Contra Costa, 91 Cal. App. 3d 749, 754 (Cal. Ct. App. 1979) (holding that, in the absence of legislative authority to the contrary, a city may not restrict the right to travel upon one of its streets to certain residents). Finally, this Note does not focus on the clear power of municipalities to regulate gates in order to ensure adequate police and fire access, a literal public safety concern. As cities across the country have found ways to address these concerns without prohibiting gates, it is difficult to argue that gates should be banned solely for reasons of police and fire access. *See, e.g.*, Mary Lou Pickel, *Cobb Ready to Set Rules for Gated Communities*, ATLANTA CONST., Mar. 28, 2000, at C3 (discussing Cobb County's new rules requiring police and fire access to gated communities); *Rules Would Affect Gated Communities*, SUN-SENTINEL FT. LAUDERDALE, Oct. 10, 1999, at 1 (reporting ordinance that would require all gated communities to install remote control gate openers for police, fire, and ambulance access in an emergency); Graham, *supra* note 8, at 1N (discussing use of remote control devices by police and firefighters to gain emergency access to gated communities).

[12] *See infra* Part II.

[13] *See infra* Part III.

[14] *See infra* Part IV.

[15] *See infra* Part V.

[16] *See infra* notes 19-29 and accompanying text.

[17] *See infra* notes 30-42 and accompanying text.

[18] *See infra* notes 43-59 and accompanying text.

A. The Definition of Gated Communities

Gated communities are residential areas with restricted access, designed to privatize normally public space.[19] Typically, restricted access means fences and walls, with some form of manned guardhouse or electronic gate designed to prevent entry by nonresidents.[20] The normally public space enclosed within these private communities includes streets, sidewalks, and often parks, beaches, rivers, trails, and playgrounds.[21] Although the popular image of gated communities is that of new, upper class suburban enclaves, gates are increasingly common in middle and lower class areas, including inner city neighborhoods that have decided to wall themselves off from surrounding urban blight.[22]

Gated communities are governed by homeowner associations, the private entities established by the covenants, conditions, and restrictions found in the deeds issued by the developer.[23] A homeowner becomes a member upon purchasing a home in the community and then receives a vote in association decisions.[24] Members own their lots entirely, subject

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[19] BLAKELY & SNYDER, *supra* note 8, at 2. For an excellent history of gated communities, see *id.* at 3-15. Blakely and Snyder are leading researchers on the gated community issue, and their work is cited frequently by scholars and journalists. *See, e.g.*, John B. Owens, *Westec Story: Gated Communities and the Fourth Amendment*, 34 AM. CRIM. L. REV. 1127, 1127 n.1 (1997); Kellie Patrick, *Separation Issues: Gated Communities Spark Talks on Trend*, SUN-SENTINEL FT. LAUDERDALE, Feb. 15, 1998, at 1A.

[20] BLAKELY & SNYDER, *supra* note 8, at 2.

[21] BLAKELY & SNYDER, *supra* note 8, at 2.

[22] BLAKELY & SNYDER, *supra* note 8, at 2, 100-02; Owens, *supra* note 19, at 1128, 1132. *See, e.g.*, Steve Nicely, *Suburbia's Walls Arrive in Urban KCK*, KANSAS CITY STAR, Aug. 9, 1999, at A1 (reporting on the recent installation of walls in redeveloped Kansas City neighborhoods in order to secure them from the surrounding urban blight and crime); Penelope McMillan, *Keepers of the Gates: Are Neighborhood Barriers Balkanizing Los Angeles?*, L.A. TIMES, Feb. 2, 1992, at B1 (examining the installation of gates by various inner city neighborhoods). *See also* 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, 828-29 (1999) (proposing legislation that would allow already developed, public neighborhoods to establish neighborhood associations and become private).

[23] Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: "The State Will Make the Call,"* 30 VAL. U. L. REV. 509, 518 (1996); David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 762 (1995); BLAKELY & SNYDER, *supra* note 8, at 20. Associations may also be known as community associations, residential community associations, or common interest developments. *Id.* at 20 n.28. Gated communities are governed by homeowner associations, but not all homeowner associations are gated. *See infra* note 31.

[24] BLAKELY & SNYDER, *supra* note 8, at 21. There is great variety in the governing procedures of homeowner associations. In some associations, homeowners' votes are

to the restrictions in their deed, and share ownership of the streets and other common areas.[25] They are bound by the private rules found in their deed or promulgated by their homeowner association, and commonly face restrictions on such things as landscaping, color and outside design of the house, number and size of pets, noise level, parking, holiday decorations, and satellite dishes.[26] Developers favor homeowner associations because they protect property values by ensuring uniformity and preventing interference from local government.[27] These features attract buyers interested in protecting their investment.[28] Local governments tend to favor this type of private development as well, because the infrastructure is paid for by the developer, who then passes the cost on to the homebuyers.[29]

B. The Growing Popularity of Gated Communities

Gated communities are rapidly growing in popularity, and their number has risen significantly in recent years.[30] Though exact numbers are unavailable, a leading source estimates that eight million Americans lived in gated communities as of 1997.[31] The growth is expected to

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weighted to the value of their property. *Id.* Others provide one vote per member, regardless of property value. *See* Rishikof & Wohl, *supra* note 23, at 518.

[25] BLAKELY & SNYDER, *supra* note 8, at 20; Rishikof & Wohl, *supra* note 23, at 517.

[26] BLAKELY & SNYDER, *supra* note 8, at 21-23. Other common restrictions include prohibitions on young children or any children at all, size and type limits for trees, shrubs, and flowers, design of fences and decks, and prohibitions on hanging laundry outside, leaving garage doors open, posting political or commercial signs, and hanging basketball hoops. *Id. See* Rishikof & Wohl, *supra* note 23, at 514; Kennedy, *supra* note 23, at 762-63.

[27] BLAKELY & SNYDER, *supra* note 8, at 20.

[28] Kennedy, *supra* note 23, at 766; BLAKELY & SNYDER, *supra* note 8, at 20.

[29] BLAKELY & SNYDER, *supra* note 8, at 20. In fact, the dire fiscal condition of municipalities in the 1970's and 1980's prevented many of them from offering municipal services to new developments; developers were often required to arrange for private delivery of services. Nelson, *supra* note 22, at 832.

[30] BLAKELY & SNYDER, *supra* note 8, at 1, 3, 5, 7; Owens, *supra* note 19, at 1132-33; Rishikof & Wohl, *supra* note 23, at 512; Mary Massaron Ross et al., *The Zoning Process: Private Land Use Controls and Gated Communities, The Impact of Private Property Rights Legislation, and Other Recent Developments in the Law*, 28 URB. LAW. 801, 802 (1996). *See also* Kennedy, *supra* note 23, at 764-65 (detailing "explosive" increase in homeowners associations, of which gated communities are one type); Rebecca J. Schwartz, *Public Gated Residential Communities: The Rosemont, Illinois Approach and its Constitutional Implications*, 29 URB. LAW. 123, 124 (1997) (estimating that the number of gated communities will double in the next five years).

[31] BLAKELY & SNYDER, *supra* note 8, at 3 n.1. The statistic is calculated from information obtained in surveys of the Community Association Institute's (CAI) member community associations. *Id.* Approximately 19% of CAI member communities indicated they had gates. *Id.* As a precursor to their 1997 book, Blakely and Snyder issued a report in 1995 estimating that four million Americans lived behind gates. EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA: GATED AND WALLED COMMUNITIES IN THE UNITED

continue as part of the overall trend toward private control in response to the problems of cities and the "general degradation of the urban social order."[32] Gated communities were initially popular in resort and retirement areas such as Florida and southern California.[33] Today, they are found throughout the country and cater to all income levels, including working class citizens.[34]

The growth statistics are particularly staggering in trend-leading California. In Orange County, approximately half of the 40,000 housing units in unincorporated areas are gated.[35] Of the 153 housing units for sale in January, 1999, sixty-eight percent were gated.[36] One California construction company indicated a demand for gated communities three times greater than that for nongated communities,[37] and fifty-four percent of southern California homebuyers in a 1990 survey desired a home in a gated community.[38]

Developers are now taking the trend even further by offering gated communities complete with hotels, retail services, and schools.[39] A number of gated communities have seceded from their surrounding environs and become completely private, incorporated cities.[40] Scholars

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STATES 1 (Lincoln Institute of Land Policy No. WP95EB1, 1995). Numerous publications have cited this statistic. *See* Owens, *supra* note 19, at 1129; Ross et al., *supra* note 30, at 802; Timothy Egan, *Many Seek Security in Private Communities*, N.Y. TIMES, Sept. 3, 1995, at A1.

[32] BLAKELY & SNYDER, *supra* note 8, at 3. *See infra* Part II.C. for a discussion of the motivation behind the gated community trend.

[33] BLAKELY & SNYDER, *supra* note 8, at 5. Gated communities emerged first in popular resort and retirement areas in response to the growing number of Americans able to afford vacation and winter homes. *Id.* at 46-49.

[34] *Id.* at 6. Lower income communities are as concerned about security as their middle and upper income counterparts. *Id.* at 102.

[35] Ray Tessler & David Reyes, *2 O.C. Gated Communities Are Latest to Seek Cityhood Government*, L.A. TIMES, Jan. 25, 1999, at A1.

[36] *Id.*

[37] Jim Carlton, *Behind the Gate: Walling Off the Neighborhood Is a Growing Trend*, L.A. TIMES, Oct. 8, 1989, at I3. *See* Patti Roth & Tom Lassiter, *Residents Feel Secure Behind Gates, Guards*, SUN SENTINEL FT. LAUDERDALE, Mar. 13, 1994, at B1 (indicating strong market preference for gates).

[38] David W. Myers, *Today's Home Buyers Older Than in 70s*, L.A. TIMES, June 17, 1990, at K2.

[39] *See* Owens, *supra* note 19, at 1133.

[40] BLAKELY & SNYDER, *supra* note 8, at 26; Tessler & Reyers, *supra* note 35. Leisure World, a predominantly elderly gated community in Orange County, California, recently voted to incorporate as a city. Ray Tessler & Chris Ceballos, *Leisure World Votes for Cityhood*, L.A. TIMES, Mar. 3, 1999, at B4. It is now the fourth entirely gated city in California. *Id.* Bermuda Run, a gated community near Winston-Salem, North Carolina, recently became the state's second official gated city. Stuart Leavenworth, *Fenced Towns: Security, Exclusivity, and now Taxing Power*, THE NEWS AND OBSERVER, May 30, 1999, at B1.

and developers alike predict a continued proliferation of gates throughout the country,[41] and some have envisioned metropolitan areas composed almost entirely of private enclaves connected only by the web of freeways.[42]

C. *The Motivations Behind Gated Living*

Fear is the primary reason Americans choose to live in gated communities.[43] Fear of crime and the security offered by gates is a major

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[41] Oscar Newman, president of the New York-based Institute for Community Design Analysis, predicted in 1995 that the number of gated communities would double in five years. Sue Ellen Christian, *Tiny Rosemont Puts Its Guard Up: Gated Enclaves Stir Controversy*, CHICAGO TRIBUNE, June 23, 1995, at A1. Edward Blakely and Mary Gail Snyder, in their book *Fortress America*, examined the burgeoning growth of homeowner associations and noted that approximately one in five were gated. BLAKELY & SNYDER, *supra* note 8, at 24, 180 n.1. Homeowner associations are now the fastest growing form of new housing in the United States, and approximately 50% of all new homes built in major metropolitan areas are in homeowner associations. Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After* Marsh v. Alabama, 6 WM. & MARY BILL RTS. J. 461, 469 (1998); CLIFFORD TREESE, 1999 COMMUNITY ASSOCIATIONS FACT BOOK (Community Associations Institute 1999) *available at* http://www.caionline.org/about/facts.cfm. An estimated 42 million Americans live in condominium, cooperative, and homeowner associations, and the Community Associations Institute forecasts a growth of 6000 to 8000 associations per year. *Id.* at 23. In 1986 the California Supreme Court took judicial notice of the fact that a "rapidly growing share" of California residents were living in various homeowner associations. Frances T. v. Vill. Green Owners Ass'n, 723 P.2d 573, 578 n.9 (Cal. 1986). As the trend continues, homebuyers will have fewer and fewer housing options that are not in private residential communities. Owens, *supra* note 19, at 1135-36.

[42] In the suburbs of Los Angeles, the urban future can already be read into the landscape: "vast, sprawling clusters of gated communities are connected to one another and to fortress buildings, enclosed malls, and sports stadiums by a web of freeways and interchanges. Urban dwellers learn to negotiate the labyrinth of walls like rats in a maze." Dennis R. Judd, *The Rise of the New Walled Cities, in* SPATIAL PRACTICES 144, 162 (Helen Liggett & David Perry, eds., 1995) (quoted in Rishikof & Wohl, *supra* note 23, at n.78). *See also* EVAN MCKENZIE, PRIVATOPIA 176-77 (1994) (quoting Department of Interior economist who predicts private governments may eventually replace municipalities); McMillan, *supra* note 22, at 1. For a fascinating account of what the future may look like, *see* Neil Shouse, *The Bifurcation: Class Polarization and Housing Segregation in the Twenty-First Century Metropolis*, 30 URB. LAW. 145 (1998). Shouse describes a world dominated by large, privately owned regions, tightly controlled by private management and completely independent from the remaining public areas. *Id.* at 145-47. Citizens are allowed to purchase a home in the private region if the pass the intense scrutiny of the admissions committee; otherwise, they are destined to remain in the disintegrating public. *Id.* at 153.

[43] Kennedy, *supra* note 23, at 765-67 (discussing fear of crime, lack of faith in the ability of government to protect property, and a desire for racial and economic homogeneity as the motivation behind gated communities); Owens, *supra* note 19, at 1136. *See generally* BLAKELY & SNYDER, *supra* note 8, at 99-124 (describing the mentality of fear that leads neighbors to shut themselves off from the rest of the community).

selling point for developers[44] as Americans have become more paranoid about the perception and reality of a society disintegrating around them.[45] "Whether or not the gates are actually effective, they make people feel safer. And feeling safe is a very important thing for quality of life," explains a leading researcher on the subject.[46] Security companies themselves are aware of this perception and use it in selling their services to developers.[47]

Factors such as economic uncertainty, income polarization, increasing diversity and mobility, and changes in the family structure are contributing to a broader sense of instability and uncertainty that extends beyond crime.[48] People have an escalating suspicion and

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[44] Owens, *supra* note 19, at 1136.

[45] BLAKELY & SNYDER, *supra* note 8, at 18, 29-30, 99-100:

> The home is of central psychological value, and it represents most families' single largest investment, their most important source of financial security for the future. For the home to be safe, a lock on the door is not enough. The streets of the neighborhood around it, and the city and region of which it is part, should also be safe.

Kennedy, *supra* note 23, at 767. *See also* Schwartz, *supra* note 30, at 124-25 (discussing fear of crime as the primary motivation for gates, the increased peace of mind and reduced crime rates afforded by gates, and the irony that gated communities are often built in areas that already have very low crime rates).

[46] Patrick, *supra* note 19, at 1 (quoting Mary Gail Snyder). As would be expected, the increasing popularity of homeowner associations and gated communities mirrors the rapid growth in private police forces in the United States. Owens, *supra* note 19, at 1129. Since 1980, the ranks of private security guards have risen 64%, to 1.6 million, and they outnumber public police offers by a ratio of three to one. *Id. See* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1165-70 (1999) (describing the growth of private police forces and lamenting the lack of scholarly attention to the potential problems these forces present).

[47] *See, e.g., Private Community Security Consultants* (Oct. 17, 1999) *available at* http://www.gatedcommunity.com ("The public's perception of vulnerability has created a dramatic increase in the number of gated residential-resort communities."). Statistics from 1999 indicated that crime rates reached a 27-year low that year, with a substantial drop in the number of robberies, rapes, and serious assaults over the previous six-year period. *Crime Rates are Down, and Campaign Interest Too*, USA TODAY, Aug. 29, 2000, at 14A. The drop in the crime rate may be leveling off, however, as statistics from the first half of 2000 indicate almost no decline, or even slight increases. Kevin Johnson, *'Party is Over" as Decline in Crime Hits Bottom*, USA TODAY, Dec. 19, 2000, at 1A.

[48] BLAKELY & SNYDER, *supra* note 8, at 30. One researcher presented evidence that America is actually better off than it has been in the past, and yet the country is riddled with a pervasive anxiety about our state of affairs. REYNOLDS FARLEY, THE NEW AMERICAN REALITY 334-40 (1996). The author discusses continuing problems in the area of declining earnings, changing family arrangements, poverty, government policies and spending, racial inequality, gender inequality, and a growing economic inequality. *Id.* at 340-54. He attributes much of the anxiety to the fact that America has "never before simultaneously

mistrust of those who are racially, socially, or economically different, and seek safety and reassurance among those who are the same.[49] Thus, people seek control over their "growing sense of vulnerability and insecurity" by surrounding themselves with gates and walls.[50] Residents in one gated community voted overwhelmingly to prohibit the building of a public elementary school within their gates, because they feared that the neighborhood would be threatened by allowing the public inside the gates.[51] Full-blown gated cities in California locate their city offices outside the gates to avoid unwanted contact from those conducting official city business.[52]

An additional reason for the growth of gated communities is the desire for prestige and exclusivity.[53] Status is important to most people, and an expensive home in an exclusive neighborhood is a powerful status symbol.[54] One developer explained, "It's 'I'm better than you are because I'm on the other side of this fence or wall and you are not.'

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experienced both a fundamental economic restructuring and a basic shift in family life." *Id.* at 354.

[49] Rishikof & Wohl, *supra* note 23, at 514-15. "There is still, to this day, a very important concern for security. But not in the sense of keeping out the bad guys. Instead, people want to surround themselves with people like themselves." Kevin Wiatrowski, *Homebuyers Turn Toward Security, Seclusion of Gated Communities*, THE SUN NEWS, Apr. 25, 1999 (quoting Kim Fox, marketing manager for a gated community). *See* Kennedy, *supra* note 23, at 766 (noting that residential associations "provide a potent means of retreating into homogeneous enclaves undisturbed by the undesirably different"); Egan, *supra* note 31, at 1 ("A random encounter is the last thing people here want.").

[50] Rishikof & Wohl, *supra* note 23, at 514. Robert Bork describes gated communities as a reaction by some to the growing cultural and social decadence in our society. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 334 (1996). "Gated communities and the home-schooling movement are the beginning of such responses . . . . The creation of enclaves to preserve the virtues that the West has so assiduously cultivated, until now, is not a solution to be despised." *Id.* "Viewed from the standpoint of the past, gated communities start to look like the logical outcome of a half-century of mass suburban outmigration: When you cannot go any farther away . . . you raise the bulwarks against the demographic flux raging outside." Tom Vanderbilt, *The Suburban Century and Beyond*, NEWSDAY, Dec. 2, 1999, at A51.

[51] Tina Nguyen, *Coto de Caza Residents Say No to School Within Gates*, L.A. TIMES, Mar. 4, 1999, at B1. Interestingly, residents in a different gated community demanded that public school buses enter their private community so their children would not have to walk to unsafe bus stops on public streets. Larry Barszewski, *School Buses Will Enter Gated Areas: Parents, Board Cite Safety Concerns*, SUN-SENTINEL FT. LAUDERDALE, Oct. 26, 1995, at B4.

[52] Tessler & Reyers, *supra* note 35, at A1.

[53] BLAKELY & SNYDER, *supra* note 8, at 74-75.

[54] *Id.* (citing a survey that revealed, inter alia, that 60% of Americans earning more than $400,000 a year felt that living in an exclusive neighborhood was important).

People are willing to pay for that."[55] Others are motivated to live in gated communities by a desire for certain lifestyle amenities, such as golf courses or leisure activities for retirees.[56] The community may even offer a "complete living experience," with recreational facilities, parks, schools, and commercial developments.[57]

Finally, many citizens are simply turning to private government in general, with or without gates, out of frustration with local governments' inability to preserve property values or provide the desired level of services.[58] The tight restrictions on home design and maintenance, and the overall conformity required by homeowner associations, tends to preserve the character of the community and enhance the value of the property.[59] Despite their popularity with individual homebuyers, however, gated communities are raising concern among many sociologists, planners, and community leaders over the negative effects they may have on the surrounding community and society as a whole.

III. PROBLEMS WITH GATED COMMUNITIES

Commentators, sociologists, and city leaders are concerned with both the negative social implications of gated communities, as well as their potential threat to the legal rights of those who live outside the gates. Section A below examines the possible social harms resulting from gated living.[60] Section B explores the potential hazards of gated communities to the legal rights of non-members.[61]

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[55] Patrick, *supra* note 19, at 1A (quoting Anthony Trella, a consultant for developers, builders, and investors).

[56] BLAKELY & SNYDER, *supra* note 8, at 46-49.

[57] *Id.* at 47.

[58] Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 205 (1992) ("Developers and residents employ residential associations to correct the deficiencies and abuses, as they perceive them, of public governments."); Kennedy, *supra* note 23, at 766; Owens, *supra* note 19, at 513. *See also* John D. Hull et al., *The State of the Union: As Clinton Reports to the Congress, Citizens are Busy Remaking America*, TIME, Jan. 30, 1995, at 52 (discussing citizen frustration with government services and the resulting trend toward privatization).

[59] Kennedy, *supra* note 23, at 766. One study in St. Louis found that, within a 20-year period, properties inside gated communities sold for almost 17% more than similar properties outside the gates. *Gated Status: It's Not an Open and Shut Case*, ORLANDO SENTINEL, Dec. 17, 2000, at J23.

[60] *See infra* notes 62-81 and accompanying text.

[61] *See infra* notes 82-99 and accompanying text.

A. The Harmful Social Impact of Gated Communities

Critics are increasingly wary of proliferating gates and what they mean for our society.[62] They charge that gates fragment neighborhoods and erode the overall sense of community.[63] They are also concerned that gates will reduce the civic involvement of those living behind them.[64]

1. Erosion of the Sense of Community

Although the precise meaning of "community" is elusive and varies widely depending on the source, the definition will usually describe some process of interaction, association, or shared experience.[65] The sense of community, of free association and shared experiences, is essential to the health of a society, and is particularly vital to the American experiment in democracy.[66] Appropriately, our legal tradition consistently recognizes the importance of this free interaction and association.[67]

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[62] *See, e.g.*, Baron, *supra* note 1, at 92 (discussing the potential harm of gates from the developer's perspective); Patrick, *supra* note 19, at 1A (discussing in detail an upcoming conference on the impact of gated communities); Sacha Pfeiffer, *Fence Called a Barrier to Community*, BOSTON GLOBE, Nov. 8, 1998, at B1 (reporting the formation of a community group in Worcester, Massachusetts, dedicated to raising awareness of the dangers of gated communities).

[63] *See infra* notes 65-75 and accompanying text.

[64] *See infra* notes 76-81 and accompanying text.

[65] BLAKELY & SNYDER, *supra* note 8, at 32; Rishikof & Wohl, *supra* note 23, at 520. Webster's Dictionary defines community as "a unified body of individuals; the people with common interests living in a particular area . . .; an interacting population of various kinds of individuals in a common location. . . ." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 267 (9th ed. 1991). *See also* BLAKELY & SNYDER, *supra* note 8, at 35 (defining community as "more than a set of local social relationships in America. It is also a political building block and a set of social ideals, formed within a place, a territory.").

[66] Rishikof & Wohl, *supra* note 23, at 521. "The constitutional guarantee that citizens have access to public streets, sidewalks, and parks in order to speak and assemble has been and remains of paramount importance to the existence of a free and vibrant democratic culture in this country." Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 151 (1998). *See also* JAMES HOWARD KUNSTLER, THE GEOGRAPHY OF NOWHERE 26-27 (1993) (criticizing extremist notions of individualism in property ownership as tending to "degrade the idea of the public realm, and hence of the landscape tissue that ties together the thousands of pieces of private property that make up a town").

[67] The concurring opinion of Justice Roberts in *Hague v. Committee for Industrial Organization* embodies this principle:

According to some critics, the gating phenomenon threatens this vital foundation of our nation, as fear of crime and fear of a changing world leads Americans to wall themselves off from the rest of society.[68] Demographic trends in the United States reveal a dividing nation, as Americans are becoming even more spatially fragmented by race, class, and property value.[69] Gated communities represent the ultimate manifestation of our insecurities about the changing world around us: in the words of one critic, they are "the final act of secession from the wider community and a retreat from the civic system."[70]

Arguably, gates promote and solidify our tendency toward fragmentation,[71] and stand as a permanent form of separation by class,

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> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

307 U.S. 496, 515-16 (1939) (Roberts, J., concurring). The case arose after union members were barred from picketing, assembling, and distributing leaflets in public places. *Id.* at 501-02. The thrust of the Roberts concurrence was soon adopted by the Court in *Jamison v. Texas*, 381 U.S. 413, 415-16. (1943).

[68] *See supra* Part II.C, explaining that fear is the primary motivation behind the gating trend. Prestige, exclusivity, and dissatisfaction with local government are also motivating factors. *See supra* Part II.C. Gated communities are not necessarily utopias, however. *See, e.g.*, Rishikof & Wohl, *supra* note 23, at 524-25; Kevin Davis & Cindy Elmore, *Behind the Walls: Crime Hits as Hard*, SUN SENTINEL FT. LAUDERDALE, Aug. 28, 1994, at 1B (reporting on crime problems in gated communities); George Wilkens, *Attempted Rape of Jogger Shakes Suburban Security*, TAMPA TRIBUNE, Feb. 13, 1999, at 8 (reporting on the attempted rape of a jogger in a gated community). For a thorough discussion of the link between land use regulation and basic issues of freedom and community, see DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 6, 19-20 (1993).

[69] BLAKELY & SNYDER, *supra* note 8, at 146-52. *See* Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, §6 at 16 ("People with high incomes live, shop, and work within areas of cities that, if not beautiful, are at least esthetically tolerable and reasonably safe; precincts not meeting these minimum standards of charm and security have been left to the less fortunate.").

[70] Tessler & Reyes, *supra* note 35, at A1, quoting Edward Blakely, dean of the School of Urban and Regional Planning at USC and author of *Fortress America*. *See supra* Part II.C, discussing insecurity and fear resulting from a changing society.

[71] Kennedy, *supra* note 23, at 778, n.95. Peter Muller, an urban geographer and chairman of the geography department at the University of Miami, explained "You end up with metropolitan areas . . . with all these communities, each home to a different lifestyle, different income. What you get is the fragmentation of society." (quoted in Roth & Lassiter, *supra* note 37, at 1B). *See* Chris Kanaracus, *Don't Fence Us Out*, WORCESTER PHOENIX, Nov. 27-Dec. 4, 1998, *available at* http://www.worcesterphoenix.com/archive/features/98/11/27 (reporting on an anti-gate protest group's assertion that gates fragment and isolate); Amy Dorsett & Stephen J. O'Brien, *Special Report: Gated Communities*, PLANO

race, and lifestyle.[72] Though high-priced suburban neighborhoods have often been criticized as vehicles for tacit discrimination, one scholar explained the greater danger associated with private, gated communities:

> It might be argued that residential associations simply embody in design what high-priced suburbs achieve in practice. Yet while expensive housing markets may prevent certain individuals from living in certain areas, residential associations have the additional power to prevent such individuals from even entering these areas. This distinction is roughly equivalent to the difference between the steering of minority homebuyers away from certain neighborhoods and outright Jim Crow-type laws.[73]

Though this separation is not necessarily illegal, it is not without ill social effects.[74] The fragmentation embodied by gates challenges our ability to promote economic and social opportunity among the less fortunate, build a healthy society, and meet the future problems facing our communities.[75]

STAR-COURIER, Nov. 24, 1996, *available at* http://www.hhen.com/news/1996/1124.html (featuring professor of planning and real estate at the University of Texas at Arlington in a discussion of the segregation effect of gated communities); Blume, *supra* note 8, at J7 (reporting the argument by a city councilman that gates are divisive and break up the community). *But cf.* Marge Colborn, *Gate Keepers*, DETROIT NEWS, Sept. 23, 1995 (quoting residents who claim they are not isolated from the larger community); Tom Gorman, *The Community of Canyon Lake Appears to Have It All*, L.A. TIMES, Aug. 25, 1996, at A16 (quoting residents who claim they are not recluses and are involved in the surrounding community).

[72] Kennedy, *supra* note 23, at 771; Rishikof & Wohl , *supra* note 23, at 515. *See* MCKENZIE, *supra* note 42, at 74-78 for an in-depth discussion of the ability of homeowners associations to practice racial and economic discrimination. *See also* Adler, *supra* note 1, at 42 (discussing suburban sprawl in general: "Success for a development lies in freezing for eternity the social and economic class of the original purchasers.").

[73] Kennedy, *supra* note 23, at 771. "Gates are a visible sign of exclusion, an even stronger signal to those who already see themselves as excluded from the larger mainstream social milieu." BLAKELY & SNYDER, *supra* note 8, at 153.

[74] The Supreme Court ruled in *San Antonio Independent School District v. Rodriguez* that discrimination on the basis of class is not unconstitutional. 411 U.S. 1, 28-29 (1973). The Court held that a school finance plan resulting in educational disparities between wealthy and poor districts was not a violation of the Fourteenth Amendment. *Id.* at 54-55. Class discrimination in housing is often a proxy for racial discrimination. MCKENZIE, *supra* note 42, at 78; BLAKELY & SNYDER, *supra* note 8, at 153.

[75] Kennedy, *supra* note 23, at 777. Gated communities create a barrier to interaction among people of different races and classes and hinder the formation of social networks that lead

2. Reduced Civic Involvement

Even more tangible than the broad problem of fragmentation and isolation is the risk that those behind gates will withdraw from participation in the greater community. For example, gated residents, and homeowner association members in general, are susceptible to the mentality that they should not have to pay taxes to support public services, because they are already paying for private services in their private neighborhood.[76] This argument ignores the fact that gated community members benefit from the public infrastructure when they venture outside their private community, but the public is excluded from using the privately maintained infrastructure in gated communities.[77] Thus, the threat remains that gated community voters will oppose the use of their tax dollars for causes that benefit the public as a whole.[78]

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to economic and social opportunity. BLAKELY & SNYDER, *supra* note 8, at 3, 153. Sociologist William Julius Wilson writes that "the lack of contact or of sustained interaction with individuals and institutions that represent the mainstream society . . . makes it much more difficult for those who are looking for jobs to be tied into the job network." WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 60 (1987).

> Heterogeneous cities offer a form of human association, other than the family and voluntary associations, that can help shape who we are. They offer an opportunity to expand our capacity to understand, cope with, and hopefully, enjoy the variety of people who live in America—capacities that I think are vital if political solutions are to be found for the divisiveness that now characterizes America's metropolitan areas.

Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 36 (1998).

[76] MCKENZIE, *supra* note 42, at 196. Thus, as the logic goes, the private community residents have fulfilled their obligation to what they consider the community to be; this line of thought is "an extension of the unique idea of citizenship promoted in [homeowners associations], in which one's duties consist of satisfying one's obligations to private property." *Id. See Government by the Nice, for the Nice*, ECONOMIST, July 25, 1992, at 25 ("[If] affluent Americans choose to live in private communities which raise their own taxes but do not redistribute them outside their walls, they are likely to vote to cut spending on public services that they do not use, ignoring the needs of people who cannot afford to go private."); *see also* Kennedy, *supra* note 23, at 774-76 (detailing efforts by homeowners associations to obtain tax deductions for their membership fees).

[77] MCKENZIE, *supra* note 42, at 196.

[78] Kennedy, *supra* note 23, at 777-78; Ross et al., *supra* note 30, at 803. Former Orange County supervisor William Steiner laments the parochial approach to issues brought on by gated communities: "There needs to be in communities programs to serve the disenfranchised and poor. If [we] circle the wagons to protect our quality of life, it would not be democratic or productive." Tessler & Reyes, *supra* note 35, at A1. Former Labor Secretary Robert Reich notes that "[i]n many cities and towns, the wealthy have in effect withdrawn their dollars from the support of public spaces and institutions shared by all and dedicated the savings to their own private services." Reich, *supra* note 69, at 16. Commentator Michael Kinsley echoes the same theme: "Increasingly . . . affluent

The withdrawal extends beyond financial issues, and may include diminished civic participation in general, such as reduced voter participation, reduced volunteerism, and apathy toward solving the problems of the greater community.[79] The end result is a weaker surrounding community, left to fend for itself without the talents and resources of those who perceive their responsibility to go no further than their gate.[80] One commentator summarized the problem: "It's a gang way of looking at life, an institutionalization of turf. And if it goes on indefinitely, and gets intensified, it practically means the end of civilization."[81]

Americans do provide their own social services, such as schools and security and even roads in gated communities, while the general level of such services in society is allowed to deteriorate." Michael Kinsley, *Love It or Leave It*, TIME, Nov. 28, 1994, at 96. His comments appear in an essay criticizing a small movement of wealthy Americans who are renouncing their citizenship and moving abroad in order to avoid American taxes. *Id.* "One of the pleasures of membership in an advanced society like ours is precisely the knowledge that certain mundane aspects of life are shared by all. This gives a daily reality to the otherwise abstract democratic ideal." *Id.*

[79] BLAKELY & SNYDER, *supra* note 8, at 60-61. Gerald Frug, professor of local government at Harvard Law School, contrasted gated communities with the traditional village of the American past:

> The village was open to the public. The village did not have these kinds of restrictions. The village had poor people, retarded people. Somebody could hand you a leaflet. These private communities are totally devoid of random encounters. So you develop this instinct that everyone is just like me, and then you become less likely to support schools, parks or roads for everyone else.

Egan, *supra* note 31, §1 at 1. A recent staff report by the Local Agency Formation Commission in California raised the concern that "[g]ated communities carry with them the potential for withdrawal from large-scale public discussions." Tessler & Reyes, *supra* note 35.

[80] Michael Grunwald, *Gateway to a New America: Illinois Community Defends Its Barricade to 'Unwelcome' Outsiders*, BOSTON GLOBE, Aug. 25, 1997, at A1 (discussing the relation of a new gated community to the troubling trend of a declining civic spirit and the middle class retreat from public institutions); Edward Blakely, *Am I My Brother's Gatekeeper? The Fortressing of Private Communities Contributes to the Increasing Fragmentation of American Society*, DAILY NEWS OF L.A., Mar. 1, 1998, at V1 ("When public services and even local government are privatized, when the community of responsibility stops at the subdivision gates, what happens to the function and the very idea of democracy?").

[81] David Dillon, *Fortress America*, PLANNING, June 1994, at 10 (quoted in Kennedy, *supra* note 23, at 778).

> The gated community, still thriving amid conditions of comparative social peace, seems bound to endure as a more permanent feature of our domestic landscape. It represents a failure not only of community building and urban design, but of democracy itself-- part of a vestigial frontier ethos that is neither tenable nor desirable. In its retreat toward an ever-more privatized and controlled vision of individual

B. The Harmful Legal Impact of Gated Communities

In addition to the social problems discussed above, gated communities may pose a threat to the constitutional rights of non-members. The following subsections will explore some concerns of commentators and scholars regarding the legal rights of those who live outside the gates.[82] For example, citizens may be subject to invasions of privacy and unreasonable searches by the private police forces that man the gates.[83] Additionally, citizens are restricted in their exercise of free speech as more and more traditionally open places become private and off limits to outsiders.[84]

1. The Impact on Fourth Amendment Rights

A principal concern of legal scholars centers around the potential conflict between the private police forces that guard gated communities and the Fourth Amendment rights of nonresidents.[85] Though private police forces already outnumber the public police,[86] the application of the Fourth Amendment to these private security forces depends on the unresolved question of whether they are considered state actors.[87]

> proprietorship, suburbia turns its back not only on its neighbors, but on the future.

Vanderbilt, *supra* note 50, at A51.

[82] The subsections that follow are not intended to be a complete legal analysis of the constitutional issues in question; rather, they demonstrate potential additional harms of gated communities that might factor into a municipality's decision to prohibit gates.

[83] *See infra* notes 85-90 and accompanying text.

[84] *See infra* notes 91-99 and accompanying text.

[85] *See generally* Owens, *supra* note 19. *See* Rishikof & Wohl, *supra* note 23, at 516; Schwartz, *supra* note 30, at 128-37 (analyzing the use of public police at the gates in Rosemont, Illinois, and concluding that the intrusions are reasonable under the Fourth Amendment). The Fourth Amendment to the Constitution declares that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[86] *See supra* note 46 (detailing the rapid growth of private police forces and the fact that they outnumber public police officers by a ratio of three to one).

[87] Owens, *supra* note 19, at 1130-31. *See* Kennedy, *supra* note 23, at 764 (arguing that homeowners associations should be treated as state actors); Siegel, *supra* note 41, at 461, 471-73 (advocating a comprehensive and systematic state action analysis for homeowners associations). *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 113 (1984) (holding that search of a package by a Federal Express employee did not violate the Fourth Amendment, as the employee was a private individual not acting as an agent of the government or with participation or knowledge of any government official); Debroux v. Virginia, 528 S.E.2d

Currently, the private security guards who serve as gatekeepers are free to subject people to intrusive searches that would otherwise be unconstitutional under the Fourth Amendment.[88] The residents of gated communities may have consented to these intrusions by virtue of their choice to live in the private community, but visitors have not.[89] Guests of residents, construction crews, housekeepers, maintenance workers, delivery personnel, and employees of commercial enterprises located behind the gates forfeit their right to be free from intrusive and intimidating searches.[90]

2. The Impact on First Amendment Rights

An additional concern of legal scholars is the impact of gated communities on First Amendment rights.[91] Generally, the First Amendment only restricts the activities of government actors.[92] However, somewhat murky Supreme Court jurisprudence has left the door open for the idea that private areas serving a traditionally public function, such as shopping malls and streets in private towns, must adhere to speech protections in state constitutions.[93] Though this

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151, 154 (Va. Ct. App. 2000) (upholding general rule that private security guards are not state actors, even when registered with the state); New Mexico v. Murillo, 824 P.2d 326, 329 (N.M. Ct. App. 1991) (recognizing that most states refuse to apply the Fourth Amendment uniformly to private security guards, though private security guards performing traditional police functions may be considered state actors).

[88] Owens, *supra* note 19, at 1134. For an overview of current Fourth Amendment jurisprudence, see Schwartz, *supra* note 30, at 129-134; WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2d ed. 1987).

[89] Owens, *supra* note 19, at 1135.

[90] *Id.* Private police responsible for securing mass private property like a gated community necessarily are more concerned with preventing crime before it happens, rather than reacting to a crime after the fact. *Policing for Profit: Welcome to the New World of Private Security*, THE ECONOMIST, Apr. 19, 1997. The result is likely more intrusive than traditional policing: "a different model of policing is emerging in which the balance between enforcement and surveillance has been tilted dramatically towards surveillance." *Id.* The surveillance-oriented nature of the private police may expand the potential for abuse. *See, e.g.*, Michael Sandler, *Guard Charged with Burglary*, ST. PETERSBURG TIMES, Nov. 19, 2000, at 8 (reporting the arrest of a private security guard who refused to open the gate for a female teenage resident, and then made verbal sexual advances and attempted to enter her vehicle).

[91] The First Amendment to the Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[92] Frank Askin, *Free Speech, Private Space, and the Constitution*, 29 RUTGERS L.J. 947, 947 (1998).

[93] *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81-84 (1980); *see also* Askin, *supra* note 92, at 948-52; Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66

rationale currently requires the private area in question to be open to the public at large,[94] the speech protections may find their way into gated communities as courts re-examine their traditional state action analysis in light of the massive societal transformation represented by restricted-access living.[95] Regardless of the eventual legal outcome, gated communities by their very nature hinder the ability of outsiders to communicate with gated residents.[96] The trend toward privatizing streets and towns runs contrary to the tradition of free speech and openness recognized as healthy for our democracy.[97]

Of course, not all critics agree that gated communities have a harmful impact on the rest of society, and many gated residents ardently defend their way of life.[98] Nevertheless, the issue of gated communities

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N.Y.U. L. REV. 633-36 (1991) (reviewing Supreme Court jurisprudence and state court reaction in this area).

[94] Siegel, *supra* note 41, at 476.

[95] Askin, *supra* note 92, at 956. Thus far, litigation challenging free speech restrictions in gated communities is rare. *Id.* at 957. One early case in California resulted in a victory for the owner of a newspaper who wished to distribute his free paper within a gated residential community. Laguna Publ'g Co. v. Golden Rain Found. of Laguna Hills, 131 Cal. App. 3d 816 (Cal. Ct. App. 1982). The court held that the restriction was a violation of free speech rights guaranteed under the California Constitution, because the gated community was unfairly creating a captive audience for its own in-house newspaper. *Id.* at 830. Similarly, a court in New Jersey required a condo association to allow outsiders to distribute campaign material inside the condominium building, because the association itself actively distributed material on behalf of its preferred candidates and foreclosed any adequate substitute for door to door communication by other political speakers. Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condo. Ass'n, 688 A.2d 156, 159 (N.J. Super. Ct. Ch. Div. 1996).

[96] Askin, *supra* note 92, at 960-61. Askin lauds the decision in *Guttenberg* as offering new hope for the causes of those who cannot afford access to the increasing number of forums now in private control. *Id.*; *see also* Berger, *supra* note 93, at 636 (arguing that when a land's configuration and the activity it attracts begins to resemble that of a public forum, the owner's property interest must yield to the increased need of channels for grass roots political activity).

[97] "At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring). Gated communities inherently threaten this principle by excluding outsiders from the places where more and more Americans live and gather. Askin, *supra* note 92, at 960-61; *see Hague*, 307 U.S. at 500-18 (Roberts concurrence discussing the value and importance of open streets and forums for members of the public).

[98] *See* Kennedy, *supra* note 23, at 764; Nelson, *supra* note 22, at 865 (referencing the debate over how to treat gated communities); Ross et al., *supra* note 30, at 803 (outlining the argument of proponents who see gated communities as efficient alternatives to local government that "enhance the opportunities for neighborliness among like-minded people"); BLAKELY & SNYDER, *supra* note 8, at 160 (agreeing that the motives behind gated communities, such as safety, protecting property values, and better control over services

is increasingly on the radar of sociologists, civic leaders, and city planners, and more municipalities may soon feel compelled to act.[99]

IV. THE MUNICIPAL POLICE POWER AND ITS LIMITATIONS

Local governments across the country are beginning to recognize the potential social consequences of gated communities, and several have acted to ban or discourage the construction of gates.[100] This Section first analyzes the nature and extent of the municipal power to enact such regulations.[101] It then examines the limitations imposed on this power by the Fifth Amendment Takings Clause and state takings law.[102]

A. The Local Government Police Power

The police power is the inherent power of government to regulate for the protection of the public health, the public morals, and public safety.[103] In the United States, the police power is retained by the states via the Tenth Amendment, and in turn is often delegated to local governments through state legislation.[104] Though incapable of precise

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and infrastructure are legitimate). *See also* JOHN A. HALL & CHARLES LINDHOLM, IS AMERICA BREAKING APART? 3-4 (1999) (arguing that the fear of a fragmented America is unfounded, and that the country remains a safe and strong community of interacting individuals). Residents of gated communities often praise the sense of security and neighborliness they feel behind the gates. Paul Ciotti, *Forbidden City Communities*, L.A. TIMES, Feb. 9, 1992, at B3; Patrick, *supra* note 19, at 1A; *Gated Living Popular Trend*, MONTGOMERY ADVERTISER, Jul. 13, 1999, at 1A.

[99] *See supra* note 8.

[100] *See supra* note 8.

[101] *See infra* notes 103-129 and accompanying text.

[102] *See infra* notes 130-164 and accompanying text.

[103] Mugler v. Kansas, 123 U.S. 623, 661 (1887). The police power is "incident to and part of government itself. . . ." Chi., Burlington, & Quincy Ry. Co. v. Illinois, 200 U.S. 561, 588 (1906). "[The police power] is understood to be a State's inherent power to regulate for the health, safety, morals, and welfare of its citizens. It clearly is a broad power and its sweep is vast." GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT 23 (1998).

[104] *Chi., Burlington, & Quincy Ry. Co.*, 200 U.S. at 584; SIDNEY PLOTKIN, KEEP OUT: THE STRUGGLE FOR LAND USE CONTROL 67 (1987). The Tenth Amendment to the U.S. Constitution reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Municipalities remain "creatures of the state," and are often subject to considerable control by state government. RUTHERFORD H. PLATT, LAND USE AND SOCIETY 142-44 (1996). Several states have enacted home rule laws, granting local governments the power to perform functions as long as they were not in conflict with state statutes or the state constitution. *Id.* at 144. A well-established guideline known as "Dillon's Rule" is used frequently by courts in determining the scope of local government power. *Id.* The rule allows municipalities to exercise power granted in express words, power necessary or incident to the express grant, and power essential to the accomplishment of the declared

definition, the police power is broad.[105] In a prominent early case, *Mugler v. Kansas*,[106] the Supreme Court upheld the right of the state to ban liquor production because they deemed it harmful to the public health and welfare.[107] The ban was upheld even though Mugler's property, a brewery, was significantly devalued as a result.[108] In *Chicago, Burlington, & Quincy Railway Co. v. Illinois*,[109] the Court declared that the police power "embraces regulations designed to promote the public convenience or the general prosperity," in addition to promoting the public health, morals, and safety.[110] The Court confirmed in *Bacon v. Walker*[111] that the police power went beyond prohibiting things harmful to society, but was an affirmative power the legislature could use to promote "the greatest welfare of its people."[112] Examples of police power actions include provision of police and fire protection, promotion of tourism, public recreation, and local taxation.[113]

The police power has received similarly broad treatment in the context of land use regulation, the sphere most relevant to gated communities.[114] In 1926, the Court upheld the validity of a zoning ordinance in *Euclid v. Ambler Realty Co.*,[115] establishing zoning as a legitimate exercise of the police power.[116] Thus, local governments could

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purposes of the incorporated body. *Id.* The rule is flexible, though, and allows for substantial judicial discretion. *Id.*

[105] Berman v. Parker, 348 U.S. 26, 32-33 (1954). *See infra* notes 120-124 and accompanying text for a more complete discussion of the holding in *Berman*.

[106] 123 U.S. 623 (1887).

[107] *Id.* at 675.

[108] *Id.* at 668-69.

[109] 200 U.S. 561 (1906).

[110] *Id.* at 592. The Court upheld the imposition on the railway of the expense of rebuilding a bridge, necessitated by the local government's decision to widen and deepen the underlying channel. *Id.* at 587-88.

[111] 204 U.S. 311 (1907).

[112] *Id.* at 318. The Court found no abuse of power in a state law prohibiting the grazing of sheep on the public domain within two miles of a dwelling house, even though other animals were not so restricted, and sheep on private lands were not restricted. *Id.* at 318-20.

[113] REYNOLDS, *supra* note 11, at 140, 142-44, 289-90.

[114] Note, *The Legitimate Objectives of Zoning*, 91 HARV. L. REV. 1443 (1978); COYLE, *supra* note 68, at 43-44.

[115] 272 U.S. 365 (1926).

[116] *Id.* at 397. Euclid's zoning plan was authorized by the state's zoning enabling act, based on the Standard Zoning Enabling Act devised by the U.S. Department of Commerce in 1926 and widely adopted by the states. PLATT, *supra* note 104, at 234. Subdivision controls are also valid activities of municipalities; they govern the division of land for new development, and regulate such things as the design standards of streets and utilities, the physical layout of the subdivision, and other infrastructure considerations. ROBERT MELTZ

allow or disallow certain uses of land in certain areas, as long as the classification plan was designed to promote the "public health, safety, morals, or general welfare" and was not arbitrary or capricious.[117] The Court recognized that zoning regulations may not have been upheld in the past, but the great increase and concentration of population associated with modern urban life required additional restrictions on the use of private lands in urban areas.[118] Thus, the police power is flexible, and will expand or contract to meet changing conditions.[119]

In the 1954 case of *Berman v. Parker*,[120] the Court expanded the land use police power to include intangible concerns as well as concerns directly related to health, safety, morals, and welfare.[121] The Court upheld an urban redevelopment plan in a blighted Washington D.C. neighborhood, allowing the condemnation of the plaintiff's department store even though it was not in itself harmful to the public health.[122] The Court would not second-guess the legislature's desire to redesign the whole blighted area, instead of eliminating individually harmful structures.[123] In oft-quoted language, Justice Douglas declared that:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of

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ET AL., THE TAKINGS ISSUE 230-31 (1999). Local governments frequently condition approval of a subdivision on the developer's willingness to offset the impacts of the development by paying for or providing street improvements, parks, and other infrastructure costs. *Id.* at 231. Conditions that go too far, however, may be challenged by the developer as a taking of private property. *See infra* Part IV.B.1.

[117] *Euclid*, 272 U.S. at 395. The ordinance at issue in *Euclid* classified Ambler Realty's land as residential, preventing them from developing it more profitably as an industrial use. *Id.* at 384-85. The exclusion of an industrial use from a residential district is related to the public health and safety, in that residents are protected from heavier traffic, contagion, disorder, and the other negative side effects of industrial and commercial development. *Id.* at 391.

[118] *Id.* at 386-87. "Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." *Id. See* MELTZ ET AL., *supra* note 116, at 4-5 (chronicling the correlation between an expanding urban society and an increased need for government regulation).

[119] *Euclid*, 272 U.S. at 387. ("[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.").

[120] 348 U.S. 26 (1954).

[121] *Id.* at 32-33. *See also* PLOTKIN, *supra* note 104, at 73 (referencing *Berman v. Parker's* expansion of the police power).

[122] Berman v. Parker, 348 U.S. 26, 34-36 (1954).

[123] *Id.* at 34.

> the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[124]

The Court took a similar approach twenty years later in *Village of Belle Terre v. Boraas*,[125] upholding a village ordinance that prohibited more than two unrelated persons from living together in single-family dwellings.[126] The village passed the ordinance in order to preserve a traditional family atmosphere in the community, thus eliminating boarding, fraternity, and multi-family housing from the entire village.[127] The Court was satisfied with the village's motivation, and declared that the police power encompassed the authority to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[128] Thus, the federal judiciary is clearly not in the practice of limiting zoning and land use regulations to literal notions of public health, safety, and welfare.[129] The

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[124] *Id.* at 33. To clarify, the case concerned the proper scope of the government's eminent domain power; the government was condemning the property and paying for it, not merely regulating it. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW §15.13 (3d ed. 1999). The decision essentially extended the permissible scope of eminent domain to that of the police power. *Id.* "The significance of the *Berman* opinion is that it confirms that the public use limitation of the Fifth and Fourteenth Amendment is as expansive as the due process police power test." *Id.*

[125] Belle Terre v. Boraas, 416 U.S. 1 (1974).

[126] *Id.* at 7-8.

[127] *Id.* at 2, 9.

[128] *Id.* at 9. In upholding the exercise of police power, the Court first considered and dismissed claims that the ordinance violated other Constitutional protections, such as equal protection or a fundamental right of association. *Id.* at 7-8. Three years later, the Court struck down a family-only ordinance in East Cleveland that forbade Moore's grandsons from living with her, because they were related to each other as cousins rather than brothers. Moore v. East Cleveland, 431 U.S. 494, 505-06 (1977). The ordinance was too narrow in its definition of family, interfering with the fundamental right of freedom in matters of family choice. *Id.* at 499. Hence, government may regulate individuals unrelated by blood or marriage, but crosses the line when it interferes with the family relationship. *See* COYLE, *supra* note 68, at 170. For a more thorough discussion of Constitutional limitations on the police power, see *infra* Part IV.B.

[129] *See* Note, *supra* note 114, at 1448-52 (discussing the influence of *Berman v. Parker* on state courts and the resulting trend toward a broad interpretation of the zoning power); COYLE, *supra* note 68, at 44 (referring to *Euclid* and *Berman*, "[t]he implicit message of the Court throughout this era of acquiescence was that in land use regulation, the king can do no wrong."). *See also* Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values."); Int'l Paper Co. v. Town of Jay, 928 F.2d 480, 485 (1st Cir. 1991) (finding courts are "obliged to give governments wide latitude in creating social and economic legislation . . . : 'the federal courts do not sit as arbiters of the wisdom or utility of these laws.'"); Maher v. City of New Orleans, 516 F.2d 1051, 1060 (5th Cir. 1975)

police power is not unlimited, however, and in the context of land use, it frequently conflicts with certain Constitutional provisions.

B. Limitations on the Police Power

The Supreme Court consistently recognizes that the police power is legislative in nature, and has given great deference to legislative bodies in the shaping of their laws and regulations.[130] The expansive power to define and pursue what's best for the public was perhaps stated most dramatically by Justice Douglas in *Berman v. Parker*, when he declared that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[131] Legislatures are therefore generally free to draw lines as they see fit, whether deciding at which street a particular zoning classification should end,[132] or that no more than two unmarried people may live together in a single-family zone.[133] Furthermore, legislatures need not be absolutely certain of the factual basis for their decisions, as long as their actions are not clearly arbitrary or unreasonable.[134] Despite

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("Proper state purposes may encompass not only the goal of abating undesirable conditions, but of fostering ends the community deems worthy.... [The police power] is more generous, comprehending more subtle and ephemeral societal interests.").

[130] *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 662 (1887) ("If, therefore, a state deems the absolute prohibition of... [intoxicating liquor] to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives."); Mutual Loan Co. v. Martell, 222 U.S. 225, 234 (1911) ("We certainly cannot oppose to the legislation our notions of its necessity, and we have expressed 'the propriety of deferring to the tribunals on the spot.'"); Euclid v. Amber Realty Co., 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

[131] Berman v. Parker, 348 U.S. 26, 32 (1954).

[132] *See Euclid*, 272 U.S. at 388-89. The Court granted the legislature a reasonable margin in making its determinations, as in some cases "the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." *Id.* at 389.

[133] *See* Belle Terre v. Boraas, 416 U.S. 1, 8 (1974).

[134] *Euclid*, 272 U.S. at 395. The proposition is stated clearly in *Paris Adult Theatre v. Slaton*, in which the Court upheld Georgia's regulation of adult theaters based on their allegedly harmful effects. 413 U.S. 49, 60-63 (1973). Though plaintiffs for the adult theater argued there was no conclusive proof of the harmfulness of obscene material, the Court refused to overturn the legislature's judgment on the matter. *Id.* at 60. The Court cited a long list of cases in which it upheld legislation based on "unprovable assumptions." *Id.* at 61-62 (citing cases). Referring specifically to Georgia's reasoned conclusion that obscene material was harmful, the Court declared that "[n]othing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." *Id.* at 63. As part of its reasoning, the Court made an analogy to the assumptions used by local governments in their land use regulation,

this strong deference to the legislative branch, the police power is subject to a number of limits found in the federal and state constitutions.[135] The discussion below will focus on perhaps the most important limitation on the power of local government to regulate land use: the Constitutional prohibition against taking private property for public use without just compensation.[136]

1. Private Property Rights and Federal Takings Jurisprudence

The American legal community, including the Supreme Court, has adopted a "bundle of rights" conception of property.[137] The bundle has no fixed core, but consists of a variety of rights that may be individually expanded or diminished, without destroying or taking the property as a whole.[138] These various "strands" of the bundle include such things as the right to use, the right to exclude, the right to transfigure, the right to alienate, and the right to devise upon death.[139]

The police power extends to the regulation of property, and property owners may be prohibited from using their property in ways that the legislature has determined are harmful to the public health, safety, or

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discussing their prerogative to consider the environmental impacts of a new highway even though the exact ramifications are unclear. *Id.* at 62. In *Dolan v. City of Tigard*, the Supreme Court altered this traditional deference to legislatures when development exactions are concerned. 512 U.S. 374, 391 (1994). When a government requires a property owner to agree to certain conditions before granting permission to develop, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. Thus, governments have a greater burden when attempting to impose an exaction affecting property rights under the Fifth Amendment Takings Clause. MELTZ ET AL., *supra* note 116, at 253.

[135] *Mugler*, 123 U.S. at 663 (declaring that the legislative police power is subject to the authority of the Constitution).

[136] *See infra* note 141 and accompanying text.

[137] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) (citing cases). *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 737-38 (1998).

[138] Merrill, *supra* note 137, at 737. The Court upheld a federal statute on this basis in *Andrus v. Allard*, 444 U.S. 51 (1979). The statute barred the sale of bald eagle feathers, but not their use or possession. *Id.* at 54. The Court held that denying one traditional property right was not always a taking. *Id.* at 65. "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66. *But cf.* Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 MARQ. L. REV. 9, 14-16 (1997) (discussing some inconsistency in the Supreme Court's willingness to segment property rights for the purposes of takings analysis).

[139] Merrill, *supra* note 137, at 741. *See also* United States v. General Motors Corp., 323 U.S. 373, 378 (1945) (describing rights in property as the rights "to possess, use and dispose of it").

welfare.[140] However, if a regulation goes "too far" in terms of its intrusiveness on the bundle of rights, it will be considered a taking under the Fifth and Fourteenth Amendments to the Constitution, and the government will be required to pay compensation.[141] The vagueness of the "too far" standard has led to very mixed jurisprudence in this area, and the Supreme Court has shifted over the years in the degree of protection it will afford property owners.[142] In the last two decades, the Court has become more likely to side with the property owner in takings disputes.[143]

There are few absolutes in federal takings jurisprudence.[144] Government must pay compensation if it physically appropriates or invades property.[145] Also, the government must compensate if its

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[140] *Mugler*, 123 U.S. at 668-69. Property is acquired subservient to the right of the government to enact police regulations. Chi., Burlington, & Quincy Ry. Co. v. Illinois, 200 U.S. 561, 588 (1906).

[141] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The final clause of the Fifth Amendment reads "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This prohibition was made applicable to the states via the due process clause of the Fourteenth Amendment. *See Chi., Burlington, & Quincy Ry. Co.*, 200 U.S. at 580-81. The requirement of a public use has not proven to be a serious limitation, as the government may still take private property for essentially any purpose it chooses as long as it provides just compensation where required. Berman v. Parker, 348 U.S. 26, 32 (1954); COYLE, *supra* note 68, at 44. Naturally, though, the cost of compensation will dissuade most governments from recklessly enacting confiscatory regulations. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 340 (1987) (Stevens, J., dissenting) (discussing the chilling effect on local officials of awarding damages for temporary regulatory takings); Barbara J. Hall, Note, Eldridge v. City of Palo Alto: *Aberration or New Direction in Land Use Law?* 28 HASTINGS L.J. 1569, 1597 (1977) (arguing that courts should award only injunctive relief in regulatory takings cases, because the threat of unanticipated liability will chill strict or innovative planning measures).

[142] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (admitting the inability of the Court to develop any "set formula" for determining when economic injuries caused by public action must be compensated); COYLE, *supra* note 68, at 3-4, 44-45; PLOTKIN, *supra* note 104, at 75-76 (summarizing the contentious changes in property law throughout history); JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 417 (1998) ("The Supreme Court's opinions dealing with the question of when land use regulations constitute takings have not set a clear course, and no doubt some would consider that description to be overly kind."). *See also* BERNARD SIEGAN, PROPERTY AND FREEDOM 75-77 (1997).

[143] *See generally* COYLE, *supra* note 68, Ch. 6; SIEGAN, *supra* note 142, Ch. 5; Charles H. Clarke, *Harmful Use and the Takings Clause in the Eye of the Beholder:* Lucas v. South Carolina Coastal Council, 41 CLEV. ST. L. REV. 31, 32 (1993).

[144] *See, e.g.*, SIEGAN, *supra* note 142, at 176 (discussing lower courts' changing interpretations of recent pro-property rights Supreme Court decisions); MELTZ ET AL., *supra* note 116, at 105 (describing the various factors that make takings jurisprudence so uncertain).

[145] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982). The Court invalidated a New York statute requiring landlords to allow the cable company to install

regulation deprives a property owner of *all* economically beneficial use of his land.[146] Outside of those two situations, the result becomes less certain.[147] If a government regulation deprives a property owner of *some* economically beneficial use of his land, the compensation question depends on a balancing of the economic impact on the owner and the importance of the government interest involved.[148] If the government requires an impact fee or dedication of property from the land owner in return for permission to develop, the government purpose must be legitimate, and there must be a nexus, or logical connection, between the government purpose and the requirement imposed.[149] Moreover, the requirement must be roughly proportional to the impact of the

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cable equipment on the landlord's rental property. *Id.* at 441. Compensation is required even when the intrusion is minimal. *Id.* at 430. *See also* SIEGAN, *supra* note 142, at 157 (describing the holding in *Loretto* as a solid rule in takings jurisprudence). The bar against actual, physical appropriations of property stems from the earliest cases in this area. *See Mugler*, 123 U.S. at 668-69 (defining a taking as a government action that disturbs actual ownership of the property, thus validating a regulation which forced a brewery out of business but did not physically take it).

[146] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992). The Court ruled that a South Carolina law barring any development on an environmentally sensitive coastline, passed after Lucas had obtained the property for development purposes, would constitute a taking if the state court found that Lucas was truly deprived of all economically beneficial use of his land. *Id.* at 1007, 1019. A taking would not occur, however, if the state could have achieved the ban through common law nuisance principles. *Id.* at 1027.

[147] *See Lucas*, 505 U.S. at 1015 (recognizing the lack of a set formula for resolving most takings questions, except in cases of a physical invasion or a complete deprivation of all economically beneficial use). Obviously, the textual discussion here is very general. For a more thorough analysis of the law surrounding takings, *see generally* SIEGAN, *supra* note 142; MELTZ ET AL., *supra* note 116.

[148] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124-25 (1978). Penn Central was denied permission to develop a 55-story office tower in the space above Grand Central Terminal, because the rail station was designated a landmark under the city's Landmark Preservation Law. *Id.* at 117-18. The law allowed city officials to prohibit changes to the exterior of a designated landmark. *Id.* at 111-12. Thus, Penn Central was denied one profitable use of its property. *Id.* at 136. In upholding the law, the Court engaged in an ad hoc, factual inquiry, considering such factors as the economic impact on the owner, the extent to which the regulation interfered with investment backed expectations, and the character of the government action. *Id.* at 124-25. *See* SIEGAN, *supra* note 142, at 138. These *Penn Central* factors are typically used by courts to analyze whether a regulatory taking has occurred. MELTZ ET AL., *supra* note 116, at 132. For a more detailed description of the factors, see *id.* at 132-36.

[149] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987). The commission attempted to force the Nollans to grant a public easement across their beach in return for permission to build a house, but the Court invalidated the requirement because it was not related to and would not alleviate the commission's stated concerns over the impact of the development. *Id.* at 838-39. The requirement of a legitimate government purpose is satisfied by a "broad range of governmental purposes and regulations." *Id.* at 834-35.

development on the community.[150] If either the nexus or the rough proportionality is lacking, the government has imposed an "unconstitutional condition" on the landowner.[151]

As illustrated by the strong rule against physical invasions by the government, the Supreme Court singles out the right to exclude for heightened protection in takings disputes.[152] A permanent occupation of property by the government "chops through the bundle" of property rights, including "one of the most treasured strands," the right to exclude.[153] The loss of the property owner's power to exclude someone or something from using his space is particularly offensive to property ownership, and almost always requires compensation.[154]

Furthermore, the Supreme Court defines a forced public right of access to private property as a permanent physical occupation.[155] The proposition arose most recently in *Nollan v. California Coastal Commission,*

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[150] Dolan v. City of Tigard, 512 U.S. 374, 390-91 (1994). The city granted permission for Dolan to enlarge her store and pave her parking lot, on the condition that she dedicate part of the property to the city for use as a bike path and floodplain (undeveloped / natural area). *Id.* at 379-80. The city asked for the dedication out of concern for new traffic congestion and potential flooding caused by the enlarged store and paved parking lot. *Id.* at 381-82. However, the Court determined that the dedication was too great a requirement (i.e., not "roughly proportional") in light of the minimal impact of the development on traffic congestion and loss of floodplain. *Id.* at 394-95.

[151] *Id.* at 385. "[T]he government may not require a person to give up a constitutional right--here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.* Legislatures face heightened scrutiny when imposing development exactions on individual property owners. *See supra* note 134. *See also* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702-03 (1999) (limiting the *Nollan/Dolan* analysis to development exactions, as opposed to general denials of development); MELTZ ET AL., *supra* note 116, at 143-44, 256-58 (elaborating on the "unconstitutional conditions" doctrine, and explaining that it is currently limited to situations in which the government seeks a dedication of land (thereby abridging the right to exclude) from the property owner seeking to develop).

[152] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (describing the property owner as having "lost one of the most essential sticks in the bundle of rights that are commonly characterized as property--the right to exclude others"). *See also* Merrill, *supra* note 137, at 730-31 (explaining the importance of the right to exclude, and arguing that "the right to exclude others is a necessary and sufficient condition of identifying the existence of property"); MELTZ ET AL., *supra* note 116, at 27 ("[T]he right-to-exclude-others 'strand' has been elevated to superstar status under the Fifth Amendment.").

[153] Loretto v. Teleprompter CATV Corp., 458 U.S. 419, 435 (1982).

[154] *Id.* at 435-36; *Dolan*, 512 U.S. at 394.

[155] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987); *Kaiser Aetna*, 444 U.S. at 179-80 (forcing a private marina owner to allow public access to the lagoon is a physical invasion in the form of an easement, and must be compensated).

in response to an argument that the required easement across the plaintiff's property was a mere restriction on the plaintiff's use, rather than a taking of a property interest.[156] The Court reasoned otherwise, equating the resulting public easement with a permanent physical occupation; even though no single individual could occupy the space continuously, the right of the public to pass was permanent.[157]

2. Limitations at the State Level

The discussion thus far has centered exclusively on federal jurisprudence regarding the municipal police power and its limitations. The federal law is often only a floor for state governments, however, and states may provide more protection to the private property owner than is provided by federal law.[158] Furthermore, states may differ in the amount of power they delegate to municipalities.[159] The end result is great variation among the states in terms of the extensiveness of local government regulation.[160] California is widely regarded to be at one end of the spectrum, extremely deferential to local land use regulation, while states such as Pennsylvania and Illinois are much more favorable to private property rights.[161]

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[156] *Nollan*, 483 U.S. at 831.

[157] *Id.* at 832. A permanent physical occupation occurs when "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.*

[158] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (precedents do not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); Askin, *supra* note 92, at 950; COYLE, *supra* note 68, at 47-48. Coyle notes that by 1985, over 250 state court decisions "relied on state constitutional provisions to go beyond Supreme Court constitutional standards." *Id.* Nevertheless, a large portion of the state constitutions simply track the language of the Fifth Amendment to the U.S. Constitution, either literally or by judicial interpretation. MELTZ ET AL., *supra* note 116, at 20-21. *See generally id.* at 19-23 for a discussion of state takings law and the possible advantages of pursuing a takings claim in state court.

[159] *See supra* note 104. *See also* Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907) (describing supremacy of states over local governments).

[160] DANIEL R. MANDELKER, LAND USE LAW 11-13 (2d ed. 1988); PLATT, *supra* note 104, at 345.

[161] MANDELKER, *supra* note 160, at 11; COYLE, *supra* note 68, at 11. Coyle discusses the near impossibility of cataloging the various state attitudes toward land use regulations; in many instances, it is impossible to determine whether a particular case turns on a property rights issue. *Id.* at 10-11. Instead, he asked experts for their assessment of which states were most and least protective of private property rights. *Id.* at 11. The experts overwhelmingly chose California as the state least likely to protect property rights, and Pennsylvania and Illinois were most frequently cited as strongly protective of property rights. *Id.* Coyle then

Many states have become more aggressive in protecting property rights in recent years, enacting their own legislation to guard against government takings of private property.[162] However, in the area most pertinent to the discussion of gated communities below, the U.S. Supreme Court already demands the maximum level of protection for private property owners: all physical invasions of private property are considered takings, and must be compensated by the government.[163] As such, the variations in overall property rights jurisprudence among the states are not consequential to the forthcoming analysis. The analysis does presume, though, that the city enjoys a typically broad grant of the police power.[164]

V. DON'T FENCE US OUT: A CITY SUCCEEDS IN BANNING GATES

Assume that a community-minded city or township, acting within the police powers conferred on it by the state, enacts an ordinance that forbids any new residential development from using gates to block the access of outsiders. The ordinance is aimed primarily at the large-scale private communities that are becoming increasingly popular throughout the nation, and is motivated by concerns that allowing gates on such developments is harmful to the overall sense of community and civic involvement in the city.

A large developer, who owns a sizable tract of land in the city, had been planning to submit a proposal for a private gated community. His market research indicates a demand for gates in the area because homebuyers are eager to protect themselves from crime and other social ills. He is upset that he can no longer feature gates in the marketing for his development, and he has lost the ability to profit from the willingness

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proceeded with an in-depth analysis of property rights jurisprudence in California and Pennsylvania. *See generally id.* at 53-165.

[162] JUERGENSMEYER & ROBERTS, *supra* note 142, at 451-455. Takings legislation at the state level is primarily of two types. *Id.* at 451. Impact or assessment laws require state agencies to consider whether their proposed action would result in a taking, the potential costs of having to pay compensation, and whether there are less intrusive alternatives to their action. *Id.* at 451-53. Less prevalent are compensation laws, entitling landowners to compensation if a state action has devalued their property by a specified percentage. *Id.* at 453-55. *See* Robert C. Ellickson, *Takings Legislation: A Comment*, 20 HARV. J.L. & PUB. POL'Y 75 (1996); Ross et al., *supra* note 30, at 808-09 (analyzing the impact of Florida's private property rights legislation).

[163] *See supra* note 145 and accompanying text.

[164] PLATT, *supra* note 104, at 142-43. "Municipalities . . . are authorized by state laws and home rule doctrines to exercise a wide variety of legal powers affecting the health and welfare of their citizens." *Id.* at 142. "Local municipal governments since the 1920s have been the front line of public response to private land use initiatives." *Id.* at 215.

of buyers to pay extra for the security and exclusivity of a restricted access community. The city is willing to approve his project if he removes the gates from the design. The developer agrees for the sake of moving forward with the development. In the meantime, he decides to sue the city, claiming that the ban on gates essentially forces him to allow the general public to access what will be an entirely private development with private roads. He claims he should be compensated by the city for the resulting public easement across his private property. The court must now decide if the city's action is a valid exercise of the police power, and whether it constitutes a taking of private property without just compensation.

A. The Police Power Analysis

Courts should recognize that the potential social harms associated with gated communities are sufficient to fall within the reach of the police power. The Supreme Court consistently approves broad exercises of the police power in the context of land use, validating both traditional regulations concerned with the actual physical health and welfare of the public, to less traditional regulations aimed at the character and spirit of the community.[165] In *Euclid v. Ambler Realty*, the Court upheld the classification of land for certain uses, through zoning ordinances; in *Berman v. Parker*, the Court validated an urban redevelopment program based on spiritual and aesthetic considerations; and in *Belle Terre v. Boraas*, the Court allowed the village to regulate for the preservation of "family values, youth values, and the blessings of quiet seclusion. . . ."[166] Clearly, local governments have considerable control over the character of their communities and neighborhoods.[167]

Surely, then, a city may use its power to prohibit new developments with physical barriers between neighborhoods that may contribute to divisiveness and fragmentation in the community.[168] It might seek to promote civic involvement, rather than risking its demise by allowing residents to completely wall themselves off from the rest of the community.[169] It may find that the public interest is not served by gates that restrict traditional grass roots political speech, or gatekeepers free to

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[165] *See supra* Part IV.A.
[166] *See supra* Part IV.A.
[167] *See* Note, *supra* note 114, at 1450-52.
[168] *See supra* Part III.A.1.
[169] *See supra* Part III.A.2.

conduct searches outside the bounds of the Fourth Amendment.[170] Because gated communities are a relatively new phenomenon, their potential social harms may not have been the subject of government concern in the past.[171] Nevertheless, the police power is by definition flexible, and will expand to meet changing conditions in society.[172] Likewise, the city need not be absolutely certain of the negative effects of gated communities in order to regulate or ban them; the question is legislative, and should be resolved legislatively rather than judicially.[173] Legislative discretion is supreme in these matters: the public interest is whatever the democratically elected leaders of the city declare it to be.[174]

B. The Takings Analysis

Conditioning approval of a new development on the absence of gates is not a violation of the takings clause. If a government regulation becomes too intrusive on the private property rights of a landowner, the government has "taken" the property and must pay compensation to the landowner.[175] Though federal takings jurisprudence is somewhat unsettled,[176] there are essentially four situations in which the government might be required to pay compensation.[177] First, the government must pay compensation when it physically appropriates or invades property.[178] Second, the government must pay compensation

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[170] *See supra* Part III.B. Banning gates may not eliminate all of these problems, as private residential communities may still restrict solicitation, and private security guards may still be on duty. Also, private communities without gates may tend to isolate themselves in the same way that gated communities allegedly do. Nevertheless, a city is not required to solve all its problems at once; it may act incrementally to combat the various problems it faces.

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (citations omitted). And it may decide the mere presence of gates is detrimental to the public interest in a symbolic sense. *See supra* note 73 and accompanying text.

[171] *See supra* Part II.B., discussing the rapid rise in popularity of gated communities.

[172] *See supra* note 119 and accompanying text.

[173] *See supra* note 134 and accompanying text.

[174] *See supra* note 131 and accompanying text.

[175] *See supra* note 141 and accompanying text.

[176] *See supra* note 142 and accompanying text.

[177] *See supra* notes 144-51 and accompanying text.

[178] *See supra* note 145 and accompanying text.

when it deprives a property owner of *all* economically beneficial use of his land.[179] Third, if the government regulation deprives the property owner of only *some* economically beneficial use of his land, the obligation to compensate depends on a balancing of the economic impact on the owner and the importance of the government interest involved.[180] Fourth, if the government requires an impact fee or dedication of property from the land owner in return for permission to develop, the government purpose in imposing the requirement must be legitimate, there must be a nexus between the purpose and the requirement imposed, and the requirement must be roughly proportional to the impact of the development on the community.[181]

The second and third situations are not implicated by a ban on new gated communities. Regarding the second situation, the city has not deprived the developer of all economically beneficial use of his land. The developer may still use the land for other profitable purposes, including, conceivably, the exact same development without gates.[182] As for the third situation, the city has not reduced the value of the property to such a degree that compensation is required; courts require a very severe diminution in value before compensation will be awarded under this analysis.[183] Forbidding gates may reduce the value of the

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[179] *See supra* note 146 and accompanying text.

[180] *See supra* note 148 and accompanying text.

[181] *See supra* notes 149-51 and accompanying text.

[182] The *Lucas* Court found a deprivation of all economically beneficial use when the government regulation essentially barred any development whatsoever, forcing the developer to leave his land in substantially its natural state. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018 (1992). Other courts, in following *Lucas*, find no deprivation of all economically beneficial use when the developer retains an economically viable use of the land. *See, e.g.*, District Intown Props. Ltd. P'ship v. District of Columbia, 23 F. Supp. 2d 30, 36 (D. D.C. 1998) (finding that a ban on construction of new buildings on plaintiff's land did not leave the property as a whole valueless, because plaintiffs retained ownership of an existing structure that produced rental income and had market value); K & K Constr., Inc. v. Dep't. of Natural Resources, 575 N.W.2d 531, 539 (Mich. 1998) (finding that denial of permission to fill in a wetlands area did not leave the property as a whole valueless, because plaintiffs could still develop the remaining portions of their property).

[183] *See supra* note 148 and accompanying text (discussing the factors from *Penn Central* to be considered when a regulation deprives property of *some* value). Lower courts require a very severe diminution in value before compensation will be awarded under the *Penn Central* analysis. MELTZ ET AL., *supra* note 116, at 132-33 ("Turning to the question of economic use, modern courts have generally held that it is only the elimination of *all* (or nearly all) beneficial use of property that is a taking."). *See, e.g.*, Bowles v. United States, 31 Fed. Cl. 37, 50 (Fed. Cl. 1994) (holding that a loss in value of 91.8% was severe enough to require compensation); Midnight Sessions v. City of Philadelphia, 945 F.2d 667, 677 (3d Cir. 1991) (holding that a loss in value from three million dollars to two million dollars was not a taking); Outdoor Systems v. City of Mesa, 997 F.2d 604, 617 (9th Cir. 1993) (holding

developer's land to some degree, as he cannot profit from the premiums that homebuyers will pay for security and exclusivity, but the reduction in value is almost certainly not significant enough to constitute a taking.[184] The fact that the property is deprived of what is arguably its most beneficial use does not make the city's action unconstitutional.[185]

A combination of the first and fourth situations are, however, involved in a proposed ban on new gated communities. In most cases, a ban on gates essentially means the city is insisting on a right of access to private property for nonresident pedestrians and drivers.[186] This right of access takes the form of a public easement, and is considered a permanent physical occupation by the government.[187] It therefore violates a hard and fast rule of takings law: any physical intrusion onto private property by the government is a taking, and must be compensated.[188]

However, the city would still have discretion to deny the gated development as a whole, using the same broad police powers to avoid the same risks, without a physical intrusion onto the developer's property; instead of insisting on a public right of access, the city may

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that the loss of a nonconforming billboard was "de minimis," and was insufficient to constitute a taking where the rest of the land was still economically viable); Pace Resources Inc. v. Shrewsbury Township, 808 F.2d 1023, 1031 (3d Cir. 1987) (holding that a loss in value from $495,600 to $52,000 was not a taking, because the property "retains a substantial value that establishes the existence of residual economically feasible uses").

[184] *See* Baron, *supra* note 1 (discussing the increased cost of a home in a gated community); Ted Roelofs, *Closed Encounters*, GRAND RAPIDS PRESS, Mar. 15, 1998, at D4; and *see* Julie Titone, *More People Live in a World Apart: Gated Communities Increase, Along with Challenges*, SPOKESMAN REVIEW, Feb. 28, 2000, at A1 (quoting developers who declare that houses in gated communities sell at a premium price). *But cf.* BLAKELY, *supra* note 8, at 16-17 (finding no consensus among developers and realtors that housing in gated communities commands a premium, or that the presence of gates helps or maintains property values). As to whether this possible diminution in value constitutes a taking, *see supra* note 183.

[185] Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) (holding that denial of the most profitable use of the property was not a taking); Andrus v. Allard, 444 U.S. 51, 66 (1979) (holding that a regulation preventing the most profitable use of the plaintiff's property was not a taking).

[186] If a city were only interested in banning actual physical gates, the ban would be meaningless except in a symbolic sense. The private community could still post guards or no trespassing signs at the entrance and refuse access to outsiders. Though banning gates for symbolic purposes is still a valid exercise of the police power, this analysis presumes an insistence that the public be allowed to freely enter the private community.

[187] *See supra* notes 155-57 and accompanying text.

[188] *See supra* note 145 and accompanying text.

simply deny the whole project.[189] If the city could legitimately deny the whole project, could it not condition approval on the elimination of the particular element that would cause the denial? The Supreme Court addressed this exact issue in the *Nollan* case, and found that the power to deny the whole project includes the power to condition approval upon certain concessions by the property owner, even a concession of property rights.[190] The California Coastal Commission was concerned, among others things, with the obstruction of the ocean view that would be caused by the Nollan's new beach house.[191] The Commission could have denied permission to build based on this concern, but instead agreed to allow construction if the Nollans would grant a public easement across part of their property, so the public could freely traverse the beachfront area.[192] The Court found that imposing a condition in service of the same interests that could lead to an outright denial of the whole project, even though that condition is a physical intrusion in the form of a public easement, would be constitutional.[193]

It is crucial that the government's condition serve the same interest as an outright denial; the condition imposed on the Nollans was invalid in the end, because it was not related to protecting visual access to the

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[189] *See supra* notes 130-34 and accompanying text (discussing broad police power); MELTZ ET AL., *supra* note 116, at 255 (noting that a municipality stills retains the option to deny the whole project). The takings implications of a denial of the whole development would be analyzed as a deprivation of some or all economically viable use, the second and third takings categories discussed above. *See supra* note 146 and 148 and accompanying text. As previously argued, however, it is unlikely that a court would find a taking under either scenario in the gated community context. *See supra* notes 182-85 and accompanying text.

[190] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987).

[191] *Id.* at 828-29.

[192] *Id.* at 836.

[193] *Id.* at 836. "If a prohibition designed to accomplish that purpose [protecting the ocean view] would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." *Id.* at 836-37. The Court's earlier decision in *Kaiser Aetna* seems to reach a different conclusion. There, the Court held that forcing a private marina owner to allow public access to a lagoon was a physical invasion in the form of an easement, and must be compensated. Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979). The case is distinguished, however, because the government actor in *Kaiser Aetna* initially approved the dredging project that connected the lagoon to the public waterways, and then later insisted that the public be allowed access, *after* the property owner had completed his development plans. *Id.* Thus, the holding indicates that government must act prospectively, before the "fruition... of expectancies" on the part of the property owner. *Id.* at 179. *See* Shouse, *supra* note 42, at n.18 (discussing *Kaiser Aetna* and the government's need to act prospectively in order to avoid paying compensation). *Kaiser Aetna* is further distinguished because the Court's reasoning was influenced by traditional doctrines regarding navigational servitudes. *See Nollan*, 483 U.S. at 832 n.1.

ocean.[194] Here, a city's condition that a new residential development be open to the public serves the exact same interest as a denial of permission to develop at all: preventing the social harms associated with gated communities. The requirement of no gates also meets the test that development conditions be roughly proportional to the impact of the development on the city.[195] The harmful impact the city is seeking to avoid is the negative social effects of a gated community. The barrier between the gated neighborhood and the rest of the community *is* the harm, and insisting on its absence is certainly not an exaggerated response to the risks.[196]

Therefore, a city's power to prevent the gated development as a whole includes the lesser power to allow the development on the condition there be no gates. Under this reasoning, a city could not insist that an existing private residential community grant a public right of access to its streets, unless it compensated the property owners, because the city is no longer utilizing the lesser included power of a broader, valid police power exercise.[197] Nevertheless, cities retain considerable power to shape the future development of their community, and this

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[194] *Id.* at 837-39.

[195] *See supra* note 150 and accompanying text.

[196] *Nollan* and *Dolan* require heightened scrutiny of a city's decision to impose a condition in return for permission to develop. *See supra* note 134. Here, the argument is logically straightforward: a ban on gated communities directly addresses the harms caused by gated communities, and insisting on a public right of access is certainly a proportional response to the feared impact of the gated community (in fact, it matches the extent of the harm exactly). *See supra* notes 194-95 and accompanying text. In light of their heavier burden, however, a city implementing a ban on gated communities would be wise to develop findings in support of its contentions regarding the "essential nexus" and "roughly proportional" requirements. Incidentally, this heavier burden may not be applicable at all in the case of the general ordinance at issue here. Some lower courts have found the entire *Nollan/Dolan* analysis inapplicable to broad-based legislative enactments such as city ordinances. JUERGENSMEYER & CONRAD, *supra* note 142, at 430 (citing cases). They contend it only applies when the local government is making an individual, adjudicative determination that affects a single property owner, and is designed to even out the bargaining power between the local government and the lone property owner. *Id.* Property owners may contest broad enactments, such as ordinances, at the legislative level. *Id.*

[197] *Nollan*, 483 U.S. at 836; Shouse, *supra* note 42, at n.18 Shouse reaches this same conclusion in his review of the Court's decision in *Kaiser Aetna*, 444 U.S. at 179-80. *Id.* Under the Court's reasoning, the government could condition approval of a project on the landowner's granting of a public right of access, but could not impose the right of access on an existing development without paying compensation. *Id.* Thus, as most local governments cannot afford to pay compensation on a large scale, the power is primarily prospective. *Id.*

power includes the ability to ban new gated communities without violating the takings clause.

VI. CONCLUSION

Local governments have the power to prevent the widespread proliferation of gated communities within their borders. Many may not exercise the power, finding no harm in the exclusive private communities, and perhaps enjoying the added tax base without the need to provide the full range of municipal services. The leaders of other cities, however, may fear for the health of their community, as they find themselves increasingly excluded from the places where their neighbors live and see less of their neighbors at public meetings, parks, and gathering places. These leaders may decide to look beyond the immediate allure of gated enclaves, see the long-term risks of this new way of life, and vote to prohibit the use of gates on new private communities. The democratic process will run its course, and at the very least prompt a healthy debate about the future character of the community. Regardless of the eventual decision, the power to confront this new and growing social phenomenon remains in the hands of the elected local government.

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