Anomalous Zones

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Governments occasionally suspend fundamental norms within a territorially limited enclave in response to perceived necessity. Professor Neuman refers to such enclaves as "anomalous zones" and explains the denial of constitutional rights to Haitian and Cuban refugees detained at Guantánamo Bay Naval Base as an example of this phenomenon. He examines at length two other examples, the formalized toleration of prostitution in legal red light districts, and the disenfranchisement of the District of Columbia. He infers from these examples that anomalous zones unleash a subversive potential that extends beyond their designated boundaries and their original purposes. Viewing Guantánamo from this perspective provides further confirmation of the dangers of anomalous zones.

"The earth hath bubbles, as the water has . . . ."

William Shakespeare[1]

I. Introduction: Carnival at Guantánamo

The United States acquired its naval base at Guantánamo Bay, Cuba, as a consequence of the Spanish-American War of 1898. The aims of that war included the liberation of Cuba from Spanish oppression, but the United States also used the opportunity to appropriate significant portions of Spain's colonial empire, including the Philippines, Guam, and Puerto Rico. In the process of withdrawing its occupying forces and establishing self-government in Cuba in 1903, the United States negotiated the lease of the lands that now form the naval base. Although the United States is not sovereign over Guantánamo, it holds the territory under an unusual grant which provides that "the United States shall exercise complete jurisdiction and control over and within said areas" during the period of continuing occupancy.[2] This agreement was continued by a subsequent treaty in 1934, "[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations."[3] The United States has con-

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1. William Shakespeare, Macbeth act 1, sc. 3, l. 79 (Kenneth Muir ed., 7th ed., London, Methuen & Co. 1951).

2. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

3. Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, T.S. No. 866.

sistently taken the position that its agreement with Cuba shall continue indefinitely, unless terminated by mutual consent.[4]

The base encompasses considerable territory. Its total area exceeds forty-five square miles, thirty-one of them on land.[5] In 1988, one researcher observed that "[s]ome 6,500 people now live on the base, including about 2,500 military personnel, their dependents, and civilian employees of several nationalities. The base is entirely self-sufficient, with its own water plant, schools, transportation, and entertainment facilities."[6]

Recently, Guantánamo has been used as a refugee processing center and, from time to time, as a longer term refugee camp. This innovation began in the fall of 1991, after the overthrow of Haiti's President Jean-Bertrand Aristide. Haitians using boats to flee the ensuing violence were "interdicted" by the U.S. Coast Guard and held aboard vessels or deposited at the Guantánamo naval base.[7] After weeks of uncertainty as to what to do with the refugees, the United States adopted a policy of screening them to determine whether they could assert credible claims of persecution and repatriating Haitian refugees who failed the screening process.[8]

By early February 1992, thousands of Haitian refugees were being held in the makeshift refugee camp at Guantánamo. Florida lawyers sought access to the camp to advise the Haitians about U.S. refugee procedures and to assist them in presenting their claims, but the federal government denied access to the attorneys. The Eleventh Circuit rejected the attorneys' First Amendment claim asserting the right to communicate with prospective clients, and the Supreme Court denied certiorari.[9]

The federal government exploited its control over the flow of information to the Haitian refugees, as illustrated by articles in the camp's official newspaper, *Sa K'Pase* [*What's Happening*]. Published in Haitian Creole and French, with a translated English edition, the newsletter advocated the refugees' return to Haiti, insisting that repatriation was safe and that tales of persecution of

4. *See* State Territory and Territorial Jurisdiction: International Leases: Guantánamo Naval Station, 1979 DIGEST § 1, at 794-95 (citing agreements in force to justify the United States presence in Guantánamo); Robert L. Montague, III, *A Brief Study of Some of the International Legal and Political Aspects of the Guantanamo Bay Problem,* 50 KY. L.J. 459, 468-69 (1962).

5. *See* NAVY OFF. OF INFO., STATISTICAL INFORMATION, U.S. NAVAL BASE, GUANTANAMO BAY, CUBA 1 (Oct. 1985); Wayne S. Smith, *The Base from the U.S. Perspective, in* SUBJECT TO SOLUTION: PROBLEMS IN CUBAN-U.S. RELATIONS 97, 98 (Wayne S. Smith & Esteban Morales Dominguez eds., 1988). To place its size in perspective, the base's land area is roughly that of St. Thomas, U.S. Virgin Islands; it is larger than Manhattan, larger than St. John, U.S. Virgin Islands, and nearly half the size of the District of Columbia. These cover 32, 22, 20, and about 70 square miles, respectively. *See* THE NEW COLUMBIA ENCYCLOPEDIA 772, 1681, 2900-01 (William H. Harris & Judith S. Levy eds., 1975).

6. Smith, *supra* note 5, at 98-99.

7. *See* Barbara Crossette, *U.S. Transfers Haitians to Base in Cuba,* N.Y. TIMES, Nov. 21, 1991, at A3; Patrick E. Tyler, *U.S. Building Camp for Haitian Refugees,* N.Y. TIMES, Nov. 26, 1991, at A12.

8. Howard W. French, *U.S. Starts to Return Haitians Who Fled Nation After Coup,* N.Y. TIMES, Nov. 19, 1991, at A1; Harold Hongju Koh, *America's Offshore Refugee Camps,* 29 U. RICH. L. REV. 139, 143 (1995).

9. Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498 (11th Cir.), *cert. denied,* 502 U.S. 1122 (1992).

returnees were without foundation.[10] *Sa K'Pase* also emphasized a seasonal theme that February, by urging refugees to abandon hope of U.S. protection and to exchange the spartan conditions of the refugee camp for the pleasures of the imminent festival of Carnival. The newsletter warned that during "the week of 2 through 7 March . . . Port-au-Prince immigration will be closed due to Carnival celebration. People in other places may be working, and people here may be wondering what to do, but in Haiti there will be a magnificent Carnival. Where will you be?"[11] More bluntly, a later article stated: "We will only be able to send another 2,000 home in time for CARNIVAL. If you are screened out you must ask yourself the big question: Do I want to go home in time for Carnival or in time for Lent?"[12]

While Florida lawyers were arguing for the right to provide competent legal advice to the Haitian refugees, the newsletter dispensed inaccurate information about the legal requirements for political asylum. For example, in its summary of a recent Supreme Court decision, the newsletter claimed that "a refugee applicant must produce 'evidence so compelling that no reasonable fact-finder [immigration official] could fail to find the requisite [as defined by the Supreme Court] fear of persecution.' "[13] That heavy burden, however, is the standard for judicial *reversal* of an immigration official's decision against the applicant, not the standard by which officials must initially evaluate the asylum application. The newsletter also grossly mischaracterized the legal basis for the deportation of Irish nationalist Joseph Doherty, stating that "as he had entered the country illegally he was not eligible for political asylum."[14] In fact, Doherty had withdrawn his asylum application and his subsequent motion to reopen the proceedings was rejected as a matter of executive discretion.[15] Whether such errors in describing asylum law resulted from inadvertence or design, they cast a sinister light on the newsletter's paternalistic assurance con-

10. *See, e.g., Haitian Returns to Family, Gets Hero's Welcome,* SA K'PASE [WHAT'S HAPPENING], ENGLISH EDITION, (U.S. Naval Base, Guantánamo Bay, Cuba), No. 22, Feb. 8, 1992, at 1; *No Evidence of Persecution,* SA K'PASE [WHAT'S HAPPENING], ENGLISH EDITION, (U.S. Naval Base, Guantánamo Bay, Cuba), No. 27, Feb. 13, 1992, at 3; *Weekend of the Living Dead,* SA K'PASE [WHAT'S HAPPENING], ENGLISH EDITION, (U.S. Naval Base, Guantánamo Bay, Cuba), No. 35, Feb. 21, 1992, at 2.

11. *Port-Au-Prince Immigration Closed for Carnival,* SA K'PASE [WHAT'S HAPPENING], ENGLISH EDITION, (U.S. Naval Base, Guantánamo Bay, Cuba), No. 22, Feb. 8, 1992, at 3. The newsletter also called attention to preparations for Carnival in richer venues. *See Venice Carnival Sparks Protests Before it Opens,* SA K'PASE [WHAT'S HAPPENING], ENGLISH EDITION, (U.S. Naval Base, Guantánamo Bay, Cuba), No. 24, Feb. 10, 1992, at 2 (discussing the $2.5 million cost of Venetian celebration, and noting criticisms labeling it as too commercial).

12. *Status of Repatriation,* SA K'PASE [WHAT'S HAPPENING], ENGLISH EDITION, (U.S. Naval Base, Guantánamo Bay, Cuba), No. 35, Feb. 21, 1992, at 1.

13. *U.S. Supreme Court Redefines Asylum Requirements,* SA K'PASE [WHAT'S HAPPENING], ENGLISH EDITION, (U.S. Naval Base, Guantánamo Bay, Cuba), No. 12, Jan. 29, 1992, at 1 (discussing INS v. Elias-Zacarias, 502 U.S. 478 (1992)).

14. *U.S. Deports Irish Nationalist,* SA K'PASE [WHAT'S HAPPENING], ENGLISH EDITION, (U.S. Naval Base, Guantánamo Bay, Cuba), No. 35, Feb. 21, 1992, at 2.

15. *See* INS v. Doherty, 502 U.S. 314 (1992) (holding that Attorney General did not abuse his discretion in denying motion to reopen deportation hearing for purpose of reviving withdrawn asylum claim). Although the U.S. government may have wanted Haitian boat people to believe otherwise, illegal entry into the United States is not grounds for disqualification from asylum.

cerning Haitian refugee litigation: "We will keep you posted on the latest news of the legal maneuvers in this case."[16]

The Eleventh Circuit reinforced the U.S. government's ability to control access to both legal advice and news by concluding that Haitians at Guantánamo had no constitutional rights whatever.[17] The court accepted the stark argument that the Bill of Rights does not bind the federal government in its dealings with aliens at Guantánamo. To the court, the Florida lawyers' claim of a right to advise the refugees was therefore "nonsensical."[18] With little analysis, the court concluded that Guantánamo was "outside of the United States" and rejected the argument that aliens there have extraterritorial constitutional rights.[19]

Three years later, the Eleventh Circuit revisited the issue after the U.S. government had reconfigured Guantánamo to hold Cuban refugees.[20] In a longer discussion, the court mentioned and rejected a contrary view expressed in parallel litigation in the Second Circuit.[21] In that litigation, the courts had concluded that the United States' "complete jurisdiction and control" over the Guantánamo Bay Naval Base vested aliens with certain constitutional rights while on the base, by analogy with other geographical areas over which the United States had exercised complete governing authority without assuming actual sovereignty over the soil.[22] Examples of such geographical areas include the Panama Canal Zone, the Trust Territory of the Pacific Islands, and the American Sector of Berlin.[23] The Eleventh Circuit, however, adhered to its holding in *Haitian Refugee Center* that refugees at Guantánamo Bay Naval Base are without constitutional rights because the base is outside the United States.

For present purposes, I will assume that it really is true that an enclave exists over which the United States is all but sovereign, but within which aliens

16. *Supreme Court Refuses to Block Repatriation*, SA K'PASE [WHAT'S HAPPENING], ENGLISH EDITION, (U.S. Naval Base, Guantánamo Bay, Cuba), No. 27, Feb. 13, 1992, at 1 (reporting the Supreme Court's failure to stay the Eleventh Circuit's decision in *Haitian Refugee Center*).

17. Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1513 n.8 (11th Cir.), *cert. denied*, 502 U.S. 1122 (1992).

18. *Id.* at 1513.

19. *Id.* at 1513 n.8; *cf.* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that Fourth Amendment does not apply to search of nonresident alien's property in Mexico).

20. Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1424-25 (11th Cir.), *cert. denied*, 116 S. Ct. 299 (1995).

21. *Id.* at 1424-27. The Second Circuit cases discussed in *Cuban Am. Bar Ass'n* are: Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom.* Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 3028 (1993) and Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993) (vacated by Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994)). *See also* Huerta v. United States, 548 F.2d 343 (Cl. Ct.), *cert. denied*, 434 U.S. 828 (1977) (assuming that the Takings Clause of the Fifth Amendment applies to a Cuban contractor at Guantánamo).

22. *See McNary*, 969 F.2d at 1342-43; *Sale*, 823 F. Supp. at 1041.

23. *See Sale*, 823 F. Supp. at 1041 (citing United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979); Government of Canal Zone v. Scott, 502 F.2d 566 (5th Cir. 1974); Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977); and Nitol v. United States, 7 Cl. Ct. 405 (1985)).

have no constitutional rights.[24] Guantánamo may then be seen as an example of what I will call an "anomalous zone," a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended. To provide insight into these phenomena, Part II discusses the reasons for spatial variations in legal rules. Part III examines other examples of anomalous zones, concentrating on formalized red light districts and the District of Columbia. Part IV compares Guantánamo with the anomalous zones discussed in Part III, and concludes that like other anomalous zones created in response to perceived necessity, the anomaly of Guantánamo threatened a broader subversion of fundamental norms.

II. Spatial Variation Within a Legal System

Geographical uniformity is not an inevitable feature of a legal rule. There may be many reasons for governing the same subject by different legal rules at different locations within the same legal system. The reasons set out below may be neither comprehensive nor mutually exclusive, but they may assist us in probing the phenomenon of a rights-free zone at Guantánamo. I first discuss justifications for spatial variations, and then note two reasons why spatial variations might occur, independent of any objective justification.[25]

A. *Objective Local Conditions*

The perception that objective physical or social conditions vary from place to place may lead rulemakers to pursue a consistent overall policy by adopting different localized legal rules.[26] Varying physical conditions, for example, often call for different rules. The physical differences may be natural—like climate or terrain—or they may involve the built environment. Water laws appropriate for an arid region may differ from those appropriate for a region with abundant rainfall. Stricter controls on development may be required in flood plains, on eroding beachfronts, or near vanishing wetlands. The speed limit for open highways would be inappropriate for city streets.

Alternatively, policymakers may perceive that localized differences in behavioral patterns necessitate divergent methods for accomplishing an underlying purpose. For example, a lower speed limit would be appropriate in areas where children play near the road or where drivers tend to be inexperienced.

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24. Having written the brief amicus curiae on behalf of the International Human Rights Law Group in *McNary*, I should disclose here that I am not wholly impartial on this issue. Moreover, the Eleventh Circuit's position on the extraterritorial rights of aliens contradicts my analysis in Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909 (1991).

25. *See* text accompanying notes 44-46 *infra*.

26. The influence of climate on law was famously emphasized by Montesquieu. *See* Bernhard Grossfeld, *Geography and Law*, 82 Mich. L. Rev. 1510, 1511 (1984). Interestingly, however, Montesquieu argued that climate caused differences in human nature that made differences in law necessary. *See* Charles de Secondat, Baron de Montesquieu, The Spirit of the Laws 231-45 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans., 1989).

Curfews are sometimes temporarily imposed in areas where rioting has recently occurred.[27]

B. *Subjective Local Conditions: Preferences*

Sometimes the only relevant differences between locations may be the policy preferences of residents. These divergent preferences may be effectuated by independent local institutions, or a central institution may accommodate local preferences by adopting different, spatially limited rules.

1. *Local self-determination*

In the United States, federalism and local government provide autonomous institutions that generate their own local rules. States and cities have different scales, different constitutional status, and differing scopes of power, but each functions as a vehicle for local self-determination.[28]

Local government need not result in perfect individual self-determination, in the sense of subjecting each individual only to the rules she most prefers. Local populations rarely exhibit homogeneous preferences; residents typically find themselves in the majority on some issues and in the minority on others. Moreover, local government generally affords self-governance to local *residents*.[29] Nonresident travelers may be unable to avoid jurisdictions having rules inconsistent with their preferences.

One could debate how far local self-determination can proceed before it ceases to make sense to speak of a single legal "system." In the United States, the states share many commonalities, and federal legislation interacts pervasively with state legislation, reinforcing the impression of unity. In contrast, the United States has also governed overseas colonies, many having quite distinct legal traditions. Even on the mainland, the United States has extended its power over the "dependent sovereignty" of Indian nations.[30]

2. *Accommodation*

Rather than enable local residents to realize their preferences from the bottom up by means of local institutions, legal systems sometimes attempt to accommodate perceived local preferences from the top down. In local government law, for example, statutes with limited geographical scope are termed "special legislation"; such statutes are often, though not always,

27. This category differs from the next category because individuals' behavior may cause a change in the policymaker's chosen rule, even if such change is contrary to their preferences. Stricter laws may signal looser mores.

28. For simplicity, I use the word "cities" in reference both to cities and to other units of local government such as towns, counties, and special districts.

29. *But cf.* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1156-62 (1996) (discussing merits of proposals to extend the local franchise to nonresidents).

30. *See, e.g.*, Oklahoma Tax Comm'n v. Potawatomi Tribe, 498 U.S. 505, 509 (1991) (stating that Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (originating doctrine that Indian tribes are "domestic dependent nations").

designed to accommodate local preferences.[31] The federal government tailors policies to local preferences in several ways, including enacting geographically limited laws, implementing federal policies through cooperation with state agencies, and incorporating state law into federal law.

3. *Sorting*

Self-determination and accommodation are two methods for translating exogenous local preferences into law. Charles Tiebout's model of local government affords a different perspective: Policymakers offer geographically limited policies, and individuals sort themselves into the jurisdictions whose policies they prefer.[32] Although Tiebout's model involves local government units, with each offering a package of public goods and taxes to all its residents, a government might pursue the sorting strategy more generally. A larger governmental unit could offer a diverse array of territorially limited policy packages, and individuals could avoid or avail themselves of those policies by exercising mobility.

Generalizing the sorting strategy in this manner, however, stretches the Tiebout model beyond the context for which it was designed. The efficiency of the Tiebout model depends on several assumptions that are not always met in reality: that individuals have perfect information about government policies; that individuals have a large number of competing units from which to choose; that individuals have perfect residential mobility; that local governments fully internalize the costs and benefits of their own policies, limiting both to their own residents; and that local governments have incentives to respond to the exit and entry choices of their residents.[33]

The sorting justification for spatial variations raises at least three further issues. First, geographically limited laws often apply to all persons physically present within a given area, not only to residents. The ability of individuals to avail themselves of the benefits of local policies by simply being present in the jurisdiction, rather than actually residing there, may permit nonresidents to shift the cost of beneficial policies onto others.[34] Second, individuals are not perfectly mobile even on a temporary basis, as illustrated by the traveler who must pass through a jurisdiction having laws incompatible with her preferences. Third, when a single government offers different policy packages to different subregions, it may lack the incentive to respond efficiently to the sorting that does occur.

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31. Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination,* 135 U. PA. L. REV. 261, 332-34 (1987).

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

33. *Id.* at 419.

34. Residents of jurisdiction *A* ("*A*") who travel to jurisdiction *B* ("*B*") and avail themselves of *B*'s benefits may shift costs to the residents of *B,* through the use of a free public park in *B,* for example. Conversely, the enjoyment of benefits in *B* may impose costs on residents of *A,* when, for example, one spouse travels to *B* to obtain a quick divorce from the other spouse, who remains in *A.* For further examples, including interstate travel to circumvent abortion laws, see Colloquy, *Extraterritorial Regulation of Abortion,* 91 MICH. L. REV. 873 (1993).

C. *Separation of Incompatible Activities*

Some spatial variations in law reflect the desire to separate activities regarded as desirable in themselves but not compatible in the same place. Traditional "Euclidean" zoning[35] relies on this rationale. As Justice Sutherland explained in upholding such zoning practices, "[a] nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[36] Although Justice Sutherland's example assumes that the pig disturbs a preexisting parlor, activities may be separated without attribution of blame and without prior establishment of either activity in a particular location. The separation itself is often more important than the suitability of different zones to the particular activities.

D. *Diversification of Strategies*

Even without incompatibility, geographical separation may serve a diversified strategy for policy implementation. Policymakers may conclude that reliance on a uniform mode of implementation creates too great a risk of failure, and may therefore prefer to employ alternative methods in parallel. Sometimes spatial organization of activity facilitates such diversification, due to economies of scale or savings in administrative costs. For example, a government might license nuclear power plants in one region and coal-burning plants in another region in order to avoid total reliance on either energy source.

E. *Experimentation*

Governments sometimes pursue geographically divergent policies for the purpose of experimentation, with the intention of eventually adopting the best policy uniformly. Justice Brandeis famously praised federalism as creating the opportunity for local policy experimentation.[37] Some scholars, however, question the efficacy of locally initiated experimentation; individual state officials may not have adequate incentives to conduct rational experiments, evaluate them, and implement their findings.[38] Arguably, purposeful experimentation is more fruitfully conducted by a central government able to orchestrate trials among different subunits.[39]

F. *Impossibility*

Some legal rules by their very nature cannot apply uniformly throughout a jurisdiction. For example, a state may prohibit the disposal of toxic wastes within its borders. But if toxic wastes are produced within the state and cannot

35. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding a comprehensive zoning ordinance specifying permissible uses and building heights for all properties in the village).

36. *Id.* at 388.

37. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

38. *See, e.g.*, Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 923-26 (1994).

39. *See* Rubin & Feeley, *supra* note 38, at 925.

be exported,[40] then they must come to rest somewhere within the state's borders.[41] Thus, the government must permit an exception to the prohibition against disposal.

In some instances, the circumstances may clearly indicate the best location for the exception, and the policymaker's decision becomes relatively easy. In other instances, there may be no inherent reason why the exception should be made in one place rather than another. In this case, assuming that the exception will burden the affected location or its vicinity, the politics of selecting locations may be highly vulnerable to the NIMBY ("not in my backyard") phenomenon.[42] For example, the process of identifying disposal sites for radioactive and toxic wastes has been notoriously contentious.

G. *Unenforceability*

Even where uniform application is not technically impossible, enforcement problems may still make full compliance difficult to achieve. Policymakers may then attempt to channel noncompliance into legally regulated exceptions. These exceptions may apply to a specific type of activity, to persons obtaining permission through an individualized licensing scheme, or to activity taking place within certain limited enclaves. For example, drug control policy might involve legalization of "soft" drugs or exceptional dispensation of drugs by prescription; in addition, some European countries have experimented with zones within cities where drug use has been officially tolerated.[43]

H. *Mere Political Power*

Often, there may be no persuasive explanation for a geographical variation, apart from the exercise of unequal political power. For example, a majority may impose upon a geographically concentrated minority controls that it would not accept for itself; a group of producers may suppress competition by inducing the legislature to prohibit such production in areas where the group has not established a presence; or beneficiaries of prior development may successfully lobby for land use controls and effectively appropriate some of the value of undeveloped land in their vicinity.[44]

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40. With the permission of Congress, states may refuse to accept out-of-state waste. *See* New York v. United States, 505 U.S. 144, 173-74 (1992).

41. Although this conclusion may seem intuitively correct, a rigorous proof follows from Brouwer's fixed point theorem. If X is a connected polygonal region without holes, then any continuous mapping from X to itself must have a fixed point. *See* YU. A. SHASKIN, FIXED POINTS 33-37 (Viktor Minachin trans., 1991) (proving the theorem for a square); MAX K. AGOSTON, ALGEBRAIC TOPOLOGY: A FIRST COURSE 216-18 (1976) (proving the theorem for an n-dimensional disk, and generalizing it to any compact polyhedron homotopy equivalent to a point).

42. *See, e.g.*, Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1001-02 (1993).

43. *See, e.g.*, Roger Cohen, *Amid Growing Crime, Zurich Closes a Park It Reserved for Drug Addicts*, N.Y. TIMES, Feb. 11, 1992, at A10, *available in* LEXIS, News Library, Arcnws File.

44. WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 65-66 (1985) (noting that restrictive zoning may benefit the owners of already-developed land while decreasing the value of undeveloped land).

Usually, proponents of self-interested legislation put forward some justification, although sometimes even a disingenuous cover story is lacking. But, more often, categorization of the underlying rule of law as one resulting from mere political power depends on the observer's perspective, which may or may not match that of the prevailing political actors.

I. *Political Failure*

Sometimes geographical variations in law result less from any conscious desire for variation than from the sluggishness of the lawmaking process. Legislatures may assume responsibility for new territories, or new responsibilities for old territories, and not fulfill these responsibilities with adequate speed or care. Historically, this has proven a problem for the United States in the expansion of its national territory and its governance of federal enclaves.[45] Similarly, jurisdictional disputes or the absence of any recognized sovereign may obstruct the enactment of law for particular locales.[46]

III. Accounting for Anomalous Zones

Against this background, this Part investigates particular anomalous zones and their causes or justifications. Two examples will receive special attention, one involving the suspension of a norm limiting the behavior of private individuals—legal red light districts—and one involving the suspension of a norm of public law—the disenfranchised District of Columbia. Although the reader might hope for a single explanation applicable to all anomalous zones, such a hope will be disappointed. I will suggest that anomalous zones form a family with certain features and tendencies in common, not that they are a uniform phenomenon.

Consider, for example, an archetypal anomalous zone from medieval England: sanctuary areas in which fleeing offenders were legally immune from arrest. A principal causal factor for sanctuary in medieval England was the coexistence of ecclesiastical and secular jurisdictions. Unlike the benefit of clergy, an immunity defined by status, sanctuary was an immunity defined by location.[47] First, each individual church was a place where secular officials could not exercise force to arrest.[48] As a consequence of this privilege of common sanctuary, a felon who escaped to a church was entitled to remain there for forty days, to negotiate a settlement or to arrange to confess his crime and

45. *See, e.g.*, United States v. Press Publishing Co., 219 U.S. 1, 12-13 (1911) (describing gaps in jurisdiction over criminal offenses committed in federal enclaves prior to 1825); Sidney L. Harring, Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century 212-20 (1994) (describing legal gaps in Alaska in the early years of its incorporation into the U.S.); Michael J. Malinowski, Note, *Federal Enclaves and Local Law: Carving Out a Domestic Violence Exception to Exclusive Legislative Jurisdiction*, 100 Yale L.J. 189 (1990) (analyzing the potential gap in the applicability of domestic relations law to federal enclaves).

46. *See* Smith v. United States, 507 U.S. 197, 198 (1993) (holding the Federal Tort Claims Act inapplicable at a U.S. base in Antarctica, "a sovereignless region without civil tort law of its own").

47. J.H. Baker, *Introduction*, *in* 2 The Reports of Sir John Spelman 335 (J.H. Baker ed., 1978); 3 W.S. Holdsworth, A History of English Law 294 (3th ed. 1923).

48. Baker, *supra* note 47, at 326, 334.

accept exile in lieu of punishment ("abjuration of the realm").[49] More striking, however, were the greater privileges associated with "private sanctuaries," particular churches or abbeys empowered by royal grant to provide *permanent* refuge to felons who succeeded in reaching their boundaries.[50] These sanctuarymen (or women) submitted to the governance of the ecclesiastical authorities, and at certain locations could live ordinary lives, carrying on their former trades within the area defined by the grant.[51] Some private sanctuaries were so laxly governed that they "provided the professional criminal with an ideal base for his forays into the outside world."[52] Sanctuarymen risked arrest merely by leaving the bounds of the sanctuary, but if they successfully returned, the secular authorities could not lawfully reach them to punish further crimes; the ecclesiastical authorities could punish them, but might not.[53] Such abuses were long criticized, and contributed to the restriction and ultimately the abolition of private sanctuaries.[54]

The sanctuary example illustrates the peculiar character of anomalous zones. In a spatial analysis of law enforcement, one might view private sanctuaries as areas with especially low rates of enforcement (and not non-zero, since sanctuary was sometimes violated).[55] More precisely, one might view anomalous zones as areas where the government deliberately pursues a policy of low enforcement, and thus as one end of a spectrum defined by the intensity of enforcement efforts.[56] But sanctuaries were not merely neighborhoods where the laws were difficult to enforce, or subunits to which insufficient resources were allocated. They were sites where the law expressly authorized insuperable barriers to its own enforcement. The starkness of de jure anomalies, and the direct challenge they pose to the maintenance of legal norms, call for specific investigation.[57]

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49. *Id.* at 336.

50. *Id.* at 335, 341; *see* Isobel D. Thornley, *The Destruction of Sanctuary, in* TUDOR STUDIES 182, 183-84 (R.W. Seton-Watson ed., 1924) (explaining private sanctuaries as a conflation of ecclesiastical privilege and secular jurisdictional privilege).

51. Baker, *supra* note 47, at 341; *see* J. CHARLES COX, THE SANCTUARIES AND SANCTUARY SEEKERS OF MEDIAEVAL ENGLAND 144 (1911) (describing the town life at the large sanctuary at Beverley); Thornley, *supra* note 50, at 193.

52. Baker, *supra* note 47, at 340; *see also* Cox, *supra* note 51, at 80-82 (discussing the notorious sanctuary of St. Martin le Grand in London); Thornley, *supra* note 50, at 186, 188, 193 (emphasizing fraud and evasion of commercial regulation in addition to more violent crimes such as robbery and murder).

53. Baker, *supra* note 47, at 341 (noting that the church seemed unwilling or unable to punish abuses of sanctuary). On occasion, however, secular authorities violated the privilege of sanctuary. *See* Thornley, *supra* note 50, at 189, 192. *See generally* Cox, *supra* note 51.

54. Baker, *supra* note 47, at 345-46; *see also* Cox, *supra* note 51, at 326-29; *see generally* Thornley, *supra* note 50.

55. *See* note 53 *supra.*

56. *Cf.* NICHOLAS K. BLOMLEY, LAW, SPACE AND THE GEOGRAPHIES OF POWER 123-49 (1994) (analyzing spatial distribution of OSHA enforcement efforts).

57. This may be the appropriate place to comment on Professor Miller's fascinating observations. William Ian Miller, *Sanctuary, Redlight Districts, and Washington, D.C.: Some Observations on Professor Neuman's Anomalous Zones,* 48 STAN. L. REV. 1235 (1996). First, although his analogy between medieval sanctuary practice and the harsh treatment of refugees at Guantánamo is insightful, the reader should not jump to the conclusion that modern asylum law is equally severe. To the contrary, numerous provisions of the Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, facili-

A. *Red Light Districts*

Unlike many other western nations, the United States has criminalized prostitution down to the present day.[58] All states now prohibit prostitution, with the exception of Nevada, which, since the 1970s, has allowed its counties the option of permitting or prohibiting the activity.[59] At common law, the individual transaction for commercial sex was not itself a crime. Instead, the state punished the status of being a prostitute under the rubric of vagrancy, and the operation of a brothel under the rubric of maintaining a public nuisance.

Twentieth century policies toward prostitution were shaped in large part by the increased zeal for enforcement during the Progressive era. The impulse for reform during that period led citizens to demand more activist government intervention against social ills, including prostitution. The reform coalition attributed a variety of harms to prostitution, including threats to Christian moral values and the family, the spread of venereal disease, obstacles to women's emancipation, exploitation and degradation of poor women, municipal corruption, and the coercion of unsuspecting victims into "white slavery."[60] Reformers circumvented lax local governments by securing federal legislation such as the Mann Act, which prohibited interstate transportation of women for immoral purposes, and provisions for the deportation of aliens who had engaged in prostitution.[61] In numerous states, legislatures enacted "abatement" statutes, which expanded the availability of private enforcement actions to those seeking to close brothels.[62]

Nevertheless, the United States also has a long history of informally tolerated vice zones in which brothels, while technically illegal, have been permitted to flourish. The underlying illegality of activities in such zones, however,

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tate the extension of basic legal rights to recognized refugees, and the refugee provisions of U.S. law, 8 U.S.C. §§ 1157-1159 (1994), enable refugees and asylees within the United States to receive the full rights of ordinary immigrants after one year's residence. The Guantánamo regime may have revived medieval rigor, but it represents a departure from modern practice. Second, the reader should not assume from my silence that I endorse all of Professor Miller's interpretations of my arguments and reconstructions of my intentions. And finally, I leave it to the reading audience and to future authors to decide whether the concept of hypocrisy gives a better account of anomalous zones than those I provide here.

58. DAVID A.J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 91 (1982). The term "prostitution" will be used here to refer exclusively to commercial sex between women prostitutes and male customers because this category most interested U.S. regulators during the relevant period.

59. *See* NEV. REV. STAT. § 201.354 (1995) (declaring it unlawful for any person to engage in prostitution, except in a licensed house of prostitution).

60. *See* BARBARA MEIL HOBSON, UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION 140, 150-51 (1987); RUTH ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-1918, at 11-13 (1982).

61. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 899; MARK THOMAS CONNELLY, THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA 50-60 (1980).

62. HOBSON, *supra* note 60, at 151; THOMAS C. MACKEY, RED LIGHTS OUT: A LEGAL HISTORY OF PROSTITUTION, DISORDERLY HOUSES, AND VICE DISTRICTS, 1870-1917, at 124-32 (1987). The abatement acts lifted the traditional requirement of nuisance law that a person bringing a private action must show special, individualized damages. An Iowa statute, Act of April 16, 1909, ch. 214, 1909 Iowa Acts 196, was considered influential. *See also* text accompanying note 82 *infra* (discussing an early Texas statute).

left the actors subject to demands for bribes, arbitrary arrests, and the imposition of modest fines that arguably served as de facto licensing fees. These zones were subject to temporary suppression during recurrent waves of enforcement zeal. Proposals to replace this informal toleration with a regime of legalization and regulation of a kind then common in Europe were repeatedly rejected in the nineteenth century.[63] There was one actual experiment with legalized prostitution, a licensing system adopted in St. Louis in 1870. It immediately provoked moralist condemnation and was abolished in 1874 by the Missouri state legislature.[64]

Although less common in the United States, there have also been designated zones in which the business of prostitution was granted formal recognition. The most famous of such zones was Storyville, a neighborhood within the city of New Orleans, in which toleration of prostitution was so complete as to be tantamount to formal authorization. The district's nickname commemorated Sidney Story, the alderman who in 1897 promoted an ordinance that confined the city's brothels within narrow geographical limits. The centrally located district comprised roughly twenty city blocks alongside the French Quarter where unlawful prostitution already took place.[65]

In form, the ordinance did not expressly authorize brothels, but merely made it "unlawful for any public prostitute or woman notoriously abandoned to lewdness to occupy, inhabit, live or sleep in any house, room or closet situated" outside the district.[66] The character of the ordinance was soon debated in litigation brought by landowners claiming injury from the proximity of their property to the district. In upholding the ordinance, the Louisiana Supreme Court equivocated:

> It is urged, too, the ordinance is a license for vice, and hence illegal. Undoubtedly, the court should refuse its aid to any ordinance if of the character asserted by the argument. The vice, the subject of this ordinance, beyond the reach of penal statutes, is simply subjected by this ordinance to that restraint demanded by the public interest. The unfortunate class dealt with by the ordinance must live. They are not denied shelter, but assigned that portion of the city beyond which they are not permitted to establish their houses. Thus viewed, the ordinance cannot be deemed open to the objections that it either punishes or grants a license to vice beyond the competency of the council.[67]

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63. HOBSON, *supra* note 60, at 147-48.

64. *See id.*; MACKEY, *supra* note 62, at 249. The state supreme court had held that the city's charter authorized St. Louis to "regulate" as well as "suppress" brothels, notwithstanding other state laws. State v. Clarke, 54 Mo. 17, 33 (1873) (decided by a 3-2 vote). Opponents of the licensing scheme secured an amendment to the city charter in 1874 removing the city's power to "regulate," bringing the experiment to an end. *See* HOBSON, *supra* note 60, at 147-48; MACKEY, *supra* note 62, at 249.

65. *See* AL ROSE, STORYVILLE, NEW ORLEANS: BEING AN AUTHENTIC ILLUSTRATED ACCOUNT OF THE NOTORIOUS RED-LIGHT DISTRICT 20, 37, 72 (1974) (including maps).

66. New Orleans, La., Ordinance 13,032 (Jan. 29, 1897), *quoted in* L'Hote v. New Orleans, 177 U.S. 587, 588 (1900). In July 1897, the city expanded the district's boundaries slightly, giving rise to the L'Hote litigation.

67. L'Hote v. City of New Orleans, 24 So. 608, 609-10 (1898) (citation omitted), *aff'd*, 177 U.S. 587 (1900).

The case then proceeded to the United States Supreme Court, which emphasized the need for flexibility in the state's police power in managing "those vocations which minister to and feed upon human weaknesses, appetites, and passions."[68] Justice Brewer, writing for the Court, noted first that the ordinance had been challenged by adjoining landowners, not by any of the women who had been confined to the district.[69] He continued:

> Now, this ordinance neither prohibits absolutely nor gives entire freedom to the vocation of these women. It attempts to confine their domicile, their lives, to certain territorial limits. . . . May that not be one of the wisest and safest methods of dealing with the problem? . . . The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors. Because the legislative body is unable to protect all, must it be denied the power to protect any?[70]

Despite the equivocation by both courts, the New Orleans authorities treated prostitution in Storyville as legal.[71] It was openly documented and advertised.[72] Guidebooks informed customers about the racial gradations, sexual practices, and interior furnishings distinguishing the various brothels. The district offered other forms of entertainment auxiliary to its sexual business: drinking, gambling, dancing, and music were available in saloons, dance halls, and cabarets. The brothels themselves often supplied music, and some offered sexual performances for spectators.[73] Part of the legendary aura of Storyville is its association with early jazz greats, particularly Jelly Roll Morton.[74]

Apart from the 1897 ordinance that configured Storyville, New Orleans made various attempts to regulate activities within the district. The police arrested residents "on charges of disorderly conduct, theft, and the usual run of misdemeanors and felonies having no necessary connection with their professional activities."[75] The city attempted to prevent child prostitution, not always with success.[76] The city also enforced racial segregation within Storyville, requiring white and black women to occupy separate brothels, and prohibiting black men from patronizing either white women or the more luxurious of the black brothels.[77] The 1897 ordinance provided for a separate district several blocks to the north, but the city did not officially activate it until February

68. L'Hote v. New Orleans, 177 U.S. 587, 596 (1900).

69. *Id.* at 595 ("No woman of that character is challenging its validity; there is no complaint by her that she is deprived of any personal rights, either as to the control of her life or the selection of an abiding place. She is not saying that she is denied the right to select a home where she may desire, or that her personal conduct is in any way interfered with.").

70. *Id.* at 597-98.

71. ROSE, *supra* note 65, at 3 ("[L]iterally everyone in New Orleans concerned with law enforcement and kindred disciplines, including both proponents and opponents of Storyville, seems to have acted on the premise that prostitution as such was legal inside the District and illegal outside it.").

72. *See id.* at 125-46.

73. *Id.* at 84-85, 103-05. The Storyville ordinance gave the district a monopoly on the operation of "any cabaret, concert-saloon or place where cancan, clodoche or similar female dancing or sensational performances are shown." *Id.* at 193.

74. *Id.* at 103-24.

75. *Id.* at 3.

76. *Id.* at 64, 148-50 (narrative of woman who grew up in a Storyville brothel).

77. *Id.* at 67.

1917, when the city limited prostitutes "of the colored or black race" to the uptown district and reserved Storyville for prostitutes "of the Caucasian or white race."[78] Meanwhile, the uptown district operated as a locus of unlawful prostitution.[79]

How long Storyville could have survived in the face of changing social attitudes is unclear because the federal government preempted local initiative following the advent of World War I.[80] The war brought about an alliance among feminists, moralist reformers, and military authorities concerned about venereal diseases among troops.[81] The Department of the Navy ordered Storyville closed, invoking concerns about the district's proximity to a naval base. The New Orleans city council submitted under protest in October 1917.

Before its demise, however, the suspension of recognized norms in Storyville provided a model for formalized prostitution districts in other jurisdictions. For example, Texas also attempted to give formal recognition to red light districts after the turn of the century. In 1907, while affording a private nuisance remedy to citizens seeking to close down brothels, the state legislature added the following proviso:

> [P]rovided, that the provisions of this and the succeeding article shall not apply to nor be so construed as to interfere with the control and regulation of bawds and bawdy houses by ordinances of incorporated towns and cities acting under special charters and where the same are actually confined by ordinance of such city within a designated district of such city.[82]

Several Texas cities took advantage of this clause, adopting Storyville-like ordinances for districts within their borders. The Houston ordinance operated to relocate a preexisting informal district to an unpopulated area of the city.[83] Citizens had previously secured an injunction suppressing the informal district, but the brothels reemerged elsewhere. The Houston ordinance responded to this migration and to the consequent distress of the brothels' new neighbors. While reluctant to create the appearance of authorizing immorality, the City Commission explained:

> The successful and permanent exclusion of prostitution from the limits of a city the size of the city of Houston is impossible. It is a fact of general knowledge that the successful permanent exclusion of prostitution from any city of large size has never occurred in the history of the world. It might be apparently excluded for a time . . . but it would still exist in a quiet and more suppressed form, and should the city desist from bending all of its energies to the exclusion of this vice . . . it would be immediately back again, and under such attempted exclusion it would be scattered throughout the whole city and doing double injury to society by coming closer to the home and the young. We

78. *Id.* at 177, 194-95 (setting out the 1917 ordinance).

79. *Id.* at 168, 177.

80. *See id.* at 71, 167-69.

81. CONNELLY, *supra* note 61, at 136-50; HOBSON, *supra* note 60, at 166-72. The Supreme Court upheld such exercises of federal power as "designed to guard and promote the health and efficiency of the men composing the army." McKinley v. United States, 249 U.S. 397, 399 (1919).

82. TEX. REV. CIV. STAT. art. 4689 (1911).

83. MACKEY, *supra* note 62, at 318-21.

> therefore think no good can be accomplished by attempting what we believe is not capable of successful enforcement.[84]

Ultimately, the Texas courts ruled that cities lacked the power to legalize prostitution within a district.[85] The courts found that the cities had impermissibly suspended a criminal law. Texas law "expressly forbids bawds and bawdyhouses, was intended to extirpate them and absolutely prevent maintenance of them anywhere and everywhere within the borders of this state."[86] One lower court sharply condemned all attempts at local suspension of such morals legislation:

> The toleration and regulation of crime is giving it at least qualified approval, and is more disastrous in its effect upon the minds of the young than if no effort was made to denounce, control, or prohibit it. . . . We learn that in ancient times cities of refuge were erected to which those who had committed certain crimes could flee and obtain immunity and protection, but it remained for this age to erect places where vicious persons shall have the right to continually commit certain crimes and continually obtain immunity from punishment.[87]

The Texas Supreme Court reached the same result more narrowly, concluding that under the state constitution only the state legislature had the power of suspension. That power could not be delegated to a municipality.[88] The court left open the possibility that the state legislature itself could suspend a statute in an area defined by "an arbitrary standard which is not obnoxious to the Constitution itself."[89] The legislature had never directly exercised that power with respect to prostitution and has not done so subsequently.

How can we account for legal red light districts in turn-of-the-century America?[90] Different interpretations of the facts may yield different explana-

84. Houston City Commission Report of March 30, 1908, *reprinted in* MACKEY, *supra* note 62, at 399-400.

85. Brown Cracker & Candy Co. v. City of Dallas, 137 S.W. 342, 343 (Tex. 1911) (holding that a comparable Dallas ordinance violated the state constitution); *see also* Spence v. Fenchler, 180 S.W. 597, 602-03 (Tex. 1915) (upholding plaintiffs' right to injunction against bawdyhouse in El Paso's designated district); *see also* Baker v. Coman, 198 S.W. 141 (Tex. 1917) (same conclusion reached in Houston decision); Burton v. Dupree, 46 S.W. 272, 273 (Tex. Civ. App. 1898) (holding Waco ordinance invalid in action to recover rent for premises used as a brothel).

86. *Spence*, 180 S.W. at 605; *Brown Cracker*, 137 S.W. at 343 (Texas law "denounces the penalty of extermination against all such places and houses and practices . . . . The antagonism between the ordinance and the law is as emphatic as that between life and death."); *see also* City of San Antonio v. Schneider, 37 S.W. 767, 768 (Tex. Civ. App. 1896) ("to license, tax, or even regulate crime is something unknown to civilization").

87. McDonald v. Denton, 132 S.W. 823, 825 (Tex. Civ. App. 1910), *aff'd on other grounds*, 135 S.W. 1148 (Tex. 1911).

88. *Brown Cracker*, 137 S.W. at 343 (citing TEX. CONST. OF 1876, art. I, § 28); *Spence*, 180 S.W. at 606. The high court's state constitutional analysis was anticipated as early as 1898 by the intermediate appellate court. *See Dupree*, 46 S.W. at 272-73.

89. *Spence*, 180 S.W. at 606.

90. I emphasize that I am not offering a single accounting for the creation of restricted zones of lawful prostitution amid general bans on prostitution at all times and places. Indeed, even a single accounting for all such districts in the United States at the turn of the century may be too ambitious. I do, however, discuss these red light districts in order to seek more general insights into anomalous zones and their possible justifications and consequences.

In pre-Reformation England, for example, the exceptional licensing of brothels in the London suburb of Southwark resulted from the divergent preferences of the governing bodies. The bishop of

tions, but some are clearly insufficient. For example, the districts cannot be fully explained as resulting from local preferences[91] or objective local conditions.[92] Red light districts were doubly local; they were subregions of a city, configured by city policy as a result of local self-government within a state. But the city did not respond to a municipal preference for decriminalization of commercial sex and permit prostitution everywhere within its borders. Rather, the city created a restricted district, imposed particularized regulation, forced active prostitutes either to live in the district or risk punishment, and did not require other participants in the business, including customers, to live in the district in order to take advantage of its special character. Moreover, the district ordinances were not tailored to objective local conditions. The cities defined district boundaries without making findings that the particular locations were uniquely well suited to the enterprise.

Arguably, the red light districts were the products of traditional zoning, the separation of desirable but incompatible uses.[93] Most residents of cities that created the districts may have been more distressed by the proximity of brothels than by their existence. Brothels, like factories, impose externalities on their neighbors—noise, offense, the congregation of lawless individuals, unwanted examples for children—and residents may have wanted them to exist but preferred to have them isolated. Indeed, the districts had many supporters: brothel proprietors and landlords, customers, and providers of auxiliary services,[94] as well as reformers who sought to protect prostitutes from the dangers incidental to the illegality of their vocation.[95] Residents who lived near the projected

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Winchester had jurisdiction over that portion of Southwark. He followed Catholic Church doctrine in openly licensing brothels as a necessary evil, in contrast to the usual English practice of formal prohibition and wavering enforcement. *See* Ruth Mazo Karras, *The Regulation of Brothels in Later Medieval England, in* SISTERS AND WORKERS IN THE MIDDLE AGES 100, 111-12 (Judith M. Bennett, Elizabeth A. Clark, Jean F. O'Barr, B. Anne Vilen & Sarah Westphal-Wihl eds., 1989); RICHARDS, *supra* note 58, at 89-90. Henry VIII terminated the anomalous regime in Southwark in 1546; aside from a reversal of Reformation policies under his daughter Mary, the Southwark brothels remained formally illegal thereafter. *See* Karras, *supra*, at 112; *see also* E.J. BURFORD, BAWDS AND LODGINGS: A HISTORY OF THE LONDON BANKSIDE BROTHELS C.100-1675, at 125-27, 136-37, 147 (1976).

The famous Yoshiwara district of Edo (later Tokyo) is thought to have owed its origins in the early seventeenth century to the convergent interests of the shogunate and of leading brothelkeepers, who sought to suppress competition. Restricting the brothels to a closed quarter would facilitate the control over customers' access, the prevention of kidnapping into prostitution, and (not incidentally) the surveillance of wandering samurai. *See* CECILIA SEGAWA SEIGLE, YOSHIWARA: THE GLITTERING WORLD OF THE JAPANESE COURTESAN 20-23, 45-47 (1993); *see also* J.E. DE BECKER, THE NIGHTLESS CITY, OR THE HISTORY OF THE YOSHIWARA YUKWAKU 2-6 (reprint of 5th ed. 1971) (1905). Although its location moved, the Yoshiwara remained open through shifts in government policy between strict morals regulation and general tolerance of dissipation. *See* SEIGLE, *supra*, at 23, 155, 167-68, 204-05, 209-11.

91. *See* text accompanying notes 28-34 *supra*.

92. *See* text accompanying notes 26-27 *supra*.

93. *See* text accompanying notes 35-36 *supra*.

94. Geographic concentration would effectively bestow economic benefits on existing brothels if it suppressed competition and facilitated cooperation between brothels and establishments providing complementary vices or entertainments. Moreover, Judge Posner has speculated that red light districts would likely emerge even without zoning regulations, because clumping reduces search costs borne by consumers. RICHARD A. POSNER, SEX AND REASON 133 (1992).

95. While more common today, this attitude was less common at the turn of the century when moralists were divided between those who condemned prostitutes and those who were optimistic that prostitution could be entirely suppressed. *See* ROSEN, *supra* note 60, at 9-13; Barbara Milman, *New*

districts often opposed them, as did reformers ideologically opposed to prostitution.

This blasé account, however, does not fully harmonize with the public rhetoric of the period, which suggests a greater degree of regret. Judges and legislators asserted the necessity of channeling a traffic that government could not successfully suppress.[96] If prostitution would continue despite prohibitions, it was considered better to bring it into the open where it could be subjected to incidental controls. Geographical restriction was one such control, and was thought able to facilitate other controls that would prevent some of the most egregious abuses, like child prostitution and coercion.

At the same time, those who created restricted districts did not carry out any fundamental reforms in order to reconcile legalized prostitution with dominant values.[97] City officials continued to enforce laws against prostitution outside the designated district boundaries, while prostitutes within the districts continued to be socially stigmatized. A fortiori, permissive city ordinances did not rehabilitate prostitution in the eyes of the larger society.

The contradiction between prostitution and the values of the larger society led to the demise of the restricted districts. Prostitution in a major city like New Orleans could not remain merely a local phenomenon whose costs could be internalized by zoning. The legalized brothels attracted women from outside the city and served customers from outside the city. The effect on outsiders, as well as altruistic concerns for the fate of the prostitutes within the district, made the district a legitimate subject for state and federal attention. In New Orleans, the advent of war prompted federal intervention. In Texas, the state supreme court interpreted local government law as requiring a statewide resolution of the policy issue. The local solutions died out.

B. *The District of Columbia*

The anomalous character of the District of Columbia was recognized from the beginning. In a nation dedicated to the republican principle of self-government, the Framers of the Constitution created a national capital subject to the plenary legislative power of Congress but without its own representation in Congress. Its residents had no voice in national or local governance. During some periods, this contradiction of fundamental principles has been mitigated

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Rules for the Oldest Profession: Should We Change Our Prostitution Laws?, 3 HARV. WOMEN'S L.J. 1, 32-34, 47-48 (1980) (discussing arguments for decriminalization to protect prostitutes).

Conversely, legalization was not in the interest of those who derived benefit from the illegality of prostitution, including pimps and corrupt police.

96. *See* text accompanying notes 67, 70, & 84 *supra*.

97. Whether or under what conditions commercial sex could be conducted consistently with acceptable values remains controversial. *See generally* RICHARDS, *supra* note 58; Lars O. Ericsson, *Charges Against Prostitution: An Attempt at a Philosophical Assessment*, 90 ETHICS 335 (1980); Carole Pateman, *Defending Prostitution: Charges against Ericsson*, *in* FEMINISM & POLITICAL THEORY 201 (Cass R. Sunstein ed., 1990); Laurie Shrage, *Should Feminists Oppose Prostitution?*, *in* FEMINISM & POLITICAL THEORY 185 (Cass R. Sunstein ed., 1990); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1921-25 (1987).

by affording the District a subordinate home rule government,[98] and in 1961 the Twenty-third Amendment gave the District representation in the Electoral College.[99] But otherwise, the anomaly persists.

The U.S. Constitution gives Congress the power: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."[100] The traditional explanation for this clause invokes an adventure that befell the Congress of the Confederation in 1783. As Justice Story later recounted:

> [T]he congress, then sitting at Philadelphia, was surrounded and insulted by a small, but insolent body of mutineers of the continental army. Congress applied to the executive authority of Pennsylvania for defence; but, under the ill-conceived constitution of the State at that time, the executive power was vested in a council consisting of thirteen members; and they possessed or exhibited so little energy, and such apparent intimidation, that Congress indignantly removed to New Jersey, whose inhabitants welcomed them with promises of defending them.[101]

The incident supported arguments for giving the federal government exclusive control over the nation's capital, rather than relying on the assistance of the state in which the capital city might be located.

James Madison defended exclusive federal control in *The Federalist*, invoking the "indispensable necessity of complete authority at the seat of government."[102]

> Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government as still further to abridge its necessary independence.[103]

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98. *See* notes 110-117 and 124-131 *infra* and accompanying text for a discussion of the various periods of home rule.

99. *See* note 122 *infra* and accompanying text.

100. U.S. CONST. art. I, § 8, cl. 17. The clause continues: "and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

101. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1219 (5th ed., Boston, Little, Brown & Co. 1891). The "mutineers" were demanding their long-delayed pay. CONSTANCE MCLAUGHLIN GREEN, WASHINGTON: VILLAGE AND CAPITAL, 1800-1878, at 10 (1962). Another historian has argued that their real quarrel that day was with the Pennsylvania legislature, and that proponents of a stronger central government exploited the incident from the outset. KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C.: THE IDEA AND LOCATION OF THE AMERICAN CAPITAL 28-34 (1991).

102. THE FEDERALIST NO. 43, at 282 (James Madison) (Paul Leicester Ford ed., 1898).

103. *Id.*

Thus, the absence of federal jurisdiction over the capital would not only physically endanger the government, but would create the appearance or reality of excessive dependence on the host state.

To the Antifederalists' condemnation of the disenfranchisement of District residents, Madison replied that:

> [A]s the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them;[104]

their voluntary disenfranchisement would not be objectionable. Yet to the Antifederalists, voluntary surrender of republican participation signaled corruption—a political vice particularly dangerous when present at the seat of government.[105] Some Antifederalists also worried (or purported to worry) that immunity from state laws in the federal district would make it "the sanctuary of the blackest crimes."[106]

Notwithstanding the consequential loss of both land and jurisdiction, the states considered proximity to the national capital to be in their best interests. Those with plausible sites lobbied urgently for the privilege. A compromise ultimately resolved the competition—the southern states allowed the federal government to assume the states' Revolutionary War debts, and the northern states agreed to a southern capital.[107] Ten miles square were chosen and ceded, and a decade of construction began in preparation for federal occupation. During this period, Congress permitted Maryland and Virginia to exercise jurisdiction over their respective contributions, and residents of the future District continued to vote as Maryland or Virginia residents until Congress convened there in 1800.[108]

The towns of Alexandria and Georgetown already existed as incorporated cities with elective local governments before the District's creation.[109] Congress permitted these municipalities to retain their elective governments, and in

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104. *Id.*

105. BOWLING, *supra* note 101, at 81-83.

106. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 431 (J. Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (remarks of George Mason at Virginia ratifying convention); *see also Observations on the New Constitution and on the Federal and State Conventions by a Columbian Patriot, in* 4 THE COMPLETE ANTI-FEDERALIST 270, 282 (Herbert J. Storing ed., 1981) (attributed to Mercy Otis Warren, Boston, 1788) ("they wish for no *federal city* whose '*cloud cap't towers*' may screen the state culprit from the hand of justice; while its exclusive jurisdiction may protect the riot of armies encamped within its limits."). This argument took advantage of the technical defect that the Extradition Clause of Article IV by its terms applies only to states. *Cf.* Puerto Rico v. Branstad, 483 U.S. 219, 229 (1987) (statute makes it unnecessary to decide whether Extradition Clause applies to nonstates); Johnson v. Matthews, 182 F.2d 677, 680 (D.C. Cir.), *cert. denied,* 340 U.S. 828 (1950) (same); In re O.M., 565 A.2d 573, 583 (D.C. App. 1989), *cert. denied,* 494 U.S. 1086 (1990) (assuming Extradition Clause does apply to the District of Columbia).

107. BOWLING, supra note 101, at 182-207.

108. Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia: Historical Considerations and Home Rule,* 46 GEO. L.J. 207, 210, 223 (1957).

109. *Id.* at 217-18.

1802 incorporated the new city of Washington with an elective council.[110] Congress also divided the District into Washington County on the Maryland side and Alexandria County on the Virginia side, affording both appointed governments, as was traditional in Maryland and Virginia.[111]

Residents in the city and county of Alexandria, however, found that their needs were neglected by Congress, and that they did not receive the compensating benefit of federal spending because government functions were concentrated in Washington.[112] Anticipating no federal need for the land, Congress agreed to the retrocession of Alexandria County to the State of Virginia in 1846.[113]

The Civil War brought a substantial increase in the black population of the District, as slaves fled from both Virginia and Maryland.[114] In the following decade, shifting Congressional attitudes toward black suffrage affected the governance structure of the District. In 1867, Congress eliminated racial qualifications for voting in the District.[115] In 1871, however, Congress reorganized the government of the District. It merged Washington County and the cities of Georgetown and Washington into a single "territorial" government, with fewer elective features than the two cities had previously enjoyed. The people directly elected the legislative assembly, but the upper house of the legislature and the governor were appointed, as were the members of a new board of public works.[116] Unfortunately, the new local government undertook and mismanaged a grandiose program of public improvements, producing scandalous insolvency.[117] In response, Congress abolished the local government in 1874 and the residents of the District lost any electoral input into their governance for a century.

As one historian has observed, "[t]hat race-minded proponents of an appointed District commission used the Shepherd scandal as evidence that black suffrage in Washington had failed was bitterly ironic, since the city's black voters had no role in concocting the uproar that supposedly demonstrated their inadequacy."[118] This distortion reflected broader trends—the Reconstruction

110. *Id.* at 219-20. I gloss over the variations between indirect and direct election of the officers other than the council. In the city of Washington, the mayor was appointed by the President from 1802 to 1812, then indirectly elected, and from 1820 on directly elected. *Id.* at 220.

111. *Id.* at 215-16. On the other hand, in Maryland and Virginia the county officials were appointed by state governments in which the residents had a voice; the county officials in the District were appointed by the President. *Id.* at 222.

112. Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia: Retrocession and National Representation,* 46 GEO. L.J. 377, 379-80 (1958); *see also* Whit Cobb, *Democracy in Search of Utopia: The History, Law, and Politics of Relocating the National Capital,* 99 DICK. L. REV. 527, 557-60 (1995).

113. Franchino, *supra* note 108, at 219.

114. GREEN, *supra* note 101, at 272-77.

115. *Id.* at 297-301.

116. Franchino, *supra* note 108, at 220-21; *see also* GREEN, *supra* note 101, at 333-35. Like a territory, the District also had a nonvoting congressional delegate during this period. Franchino, *supra* note 108, at 221.

117. GREEN, supra note 101, at 339-60; ALAN LESSOFF, THE NATION AND ITS CITY: POLITICS, "CORRUPTION," AND PROGRESS IN WASHINGTON, D.C., 1861-1902, at 44-100 (1994); PHILIP G. SCHRAG, BEHIND THE SCENES: THE POLITICS OF A CONSTITUTIONAL CONVENTION 10-11 (1985).

118. LESSOFF, *supra* note 117, at 118.

era was coming to an end. In the years that followed, segregation increased in the District[119] and continued past the Second World War, even while African-Americans emerged as the District's majority.[120] Notoriously, a Supreme Court decision was required to prohibit the segregation of the District's public schools.[121]

In the post-war period, the civil rights struggle focused attention on the disenfranchised status of the District, with several results. First, the Twenty-third Amendment was proposed and swiftly adopted, giving the District representation in the Electoral College.[122] Citizen residents of the District thus became members of the presidential electorate. Second, in 1970 Congress authorized the election of a nonvoting Delegate to the House of Representatives.[123] Third, in 1973 Congress adopted a statute restoring home rule over most local issues by elected government in the District, though reserving superior legislative power for Congress.[124] Fourth, in 1978 Congress proposed and sent to the states an amendment that would have treated the District as a state for purposes of representation in Congress and the Electoral College.[125] In 1985, the seven-year time limit for ratification expired, with only sixteen of the necessary thirty-eight states having voted in its favor.[126]

Home rule does not constitute full autonomy. The local government must lay nearly all District legislation before the Congress for thirty days before it takes effect.[127] During that period, and generally afterwards as well, measures are subject to override by joint resolution or statute.[128] The District's budget must be affirmatively approved by Congress, even with respect to revenues

119. CONSTANCE MCLAUGHLIN GREEN, WASHINGTON: CAPITAL CITY, 1879-1950, at 210-23 (1963); SCHRAG, *supra* note 117, at 11-12.

120. SCHRAG, *supra* note 117, at 11-12.

121. Bolling v. Sharpe, 347 U.S. 497 (1954) (holding *Brown v. Board of Education* applicable to the federal government under the Fifth Amendment Due Process Clause).

122. U.S. CONST. amend. XXIII (proposed by Congress in 1960 and ratified in 1961). An 1888 Senate resolution would have given the District a single Senator, Representatives in accordance with population, and Electors in accordance with its membership in Congress (i.e., one fewer than if it were a state). Franchino describes this resolution as the first congressional proposal for a D.C. national representation amendment. Franchino, *supra* note 112, at 408.

123. D.C. Code Ann. § 1-401 (1981). The District previously had a congressional delegate during its "territorial" period, from 1871 to 1874. *See* note 116 *supra* and accompanying text. While the House permits the delegate to vote in committee, he or she cannot vote on the floor. Philip G. Schrag, *The Future of District of Columbia Home Rule,* 39 CATH. U. L. REV. 311, 322-23 (1990). In 1993, the House Rules were amended to enable the District's delegate (as well as the delegates from Guam, Puerto Rico, American Samoa, and the Virgin Islands) to cast largely symbolic votes in the Committee of the Whole, but the new Congress eliminated this procedure in 1995. *See* Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994) (upholding 1993 rule); Vernon Loeb, *House Strips D.C. Delegate of Symbolic Floor Vote,* WASH. POST, Jan. 5, 1995, at B1.

124. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973).

125. The proposed amendment is reprinted in 1 D.C. CODE ANN. 501 (1981). Pursuant to § 1 of the proposed amendment, the District would also have been treated as a state for purposes of the constitutional amendment process under Article V. *Id.*

126. *Time Runs Out for District of Columbia Proposal,* N.Y. TIMES, Aug. 22, 1985, at B13.

127. D.C. CODE ANN. § 1-233(c)(1) (1981). The period is extended to sixty days for matters affecting the District's criminal law. *Id.* at § 1-233(c)(2).

128. *Id.*; Schrag, *supra* note 123, at 328-29, 332-33. The 1973 act originally provided for legislative veto, but this was replaced by joint resolution in the wake of the Supreme Court's decision in INS v.

generated by the District itself.[129] The budget approval process has become a primary opportunity for Congress to reverse local policies by means of appropriations riders.[130] Congress has repeatedly used that power to take localized stands on political issues that have nothing to do with impairment of federal government operations.[131]

Dissatisfied with the operation of home rule, many District residents have sought the full protection of statehood. The statehood proposal would shrink the exclusively federal seat of government to the National Capital Service Area centered on the Mall.[132] The rest of the District would be admitted to the Union as a state. While certainly the smallest state in surface area, its population would exceed that of Wyoming.[133] A proposed constitution for the state of "New Columbia" was drafted by convention and ratified by a majority of voting residents in 1982.[134]

The goal of statehood has proved elusive. Instead, Congress further limited the District's autonomy in 1995. A worsening fiscal crisis coincided with the ascendance of a new Republican majority in the Congress and inspired new legislation. Congress has created a presidentially appointed Financial Responsibility and Management Assistance Authority for the District. This five-member board evaluates the District's budget before submission for congressional review, in an effort to ensure progress toward a balanced budget by fiscal year 1999.[135] The board exercises broad veto powers over District legislation having fiscal implications.[136]

How can the District's disenfranchisement in a nation supposedly dedicated to government "by the people" be understood? The Federalists originally claimed "indispensable necessity."[137] In a federal union of preexisting states, the new national government must either rule its own capital or be unduly influenced by the state where its capital was located. The equality of the states and the independence of the national government required a space outside the states, an Archimedean point from which Congress could rule unruled. This necessity, however, did not extend to the absence of municipal self-government

Chadha, 462 U.S. 919 (1983) (holding legislative veto unconstitutional). *See also* Louis Michael Seidman, *The Preconditions for Home Rule*, 39 CATH. U. L. REV. 373, 374 n.6. (1990).

129. Schrag, *supra* note 123, at 330.

130. *Id.*

131. Seidman, *supra* note 128, at 373; *see also* Schrag, *supra* note 123, at 355-70 (listing major appropriations riders for fiscal years 1975 through 1989).

132. Jamin B. Raskin, *Domination, Democracy, and the District: The Statehood Position*, 39 CATH. U. L. REV. 417, 423 (1990). Section 739 of the D.C. Self-Government & Governmental Reorganization Act defines the National Capital Service Area to include the principal Federal monuments, the White House, the Capitol Building, and the federal executive, legislative, and judicial office buildings adjacent to the Mall and the Capitol Building.

133. U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES 1994, at 27 (1993 figures). Three years earlier, in 1990, the District had a greater population than Vermont, Alaska, or Wyoming (607,000, 563,000, 550,000, and 454,000, respectively). In recent years, the District's population has declined while these states' populations have risen. *Id.*; *see also* JUDITH BEST, NATIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA 3-4 (1984) (discussing population trends).

134. *See generally* SCHRAG, *supra* note 117 (recounting the convention and ratification).

135. Pub. L. No. 104-8, §§ 101-102, 201-203, 109 Stat. 97 (1995).

136. *Id.* § 203.

137. *See* text accompanying note 102 *supra.*

under Congress's oversight, and *The Federalist* described this limited enfranchisement as self-evident.[138]

The Federalists also offered another defense of disenfranchising the District. The inhabitants would "find sufficient inducements of interest to become willing parties to the cession."[139] Indeed, once the relatively uninhabited Potomac site was chosen, most of the inhabitants were newcomers, presumably drawn by those inducements. In this light, disenfranchisement might be justified by a sorting argument.[140] Moving to the District revealed a preference for greater economic opportunities and fewer political rights. District residents were in fact reproached for this preference in 1808 by a New York Representative who wished to relocate the capital away from their unfinished city.[141] Chief Justice Marshall also asserted that the District had "voluntarily relinquished the right of representation, and [had] adopted the whole body of congress for its legitimate government," when he rejected the argument that District residents could not be taxed without representation.[142] Because consent arguments are frequently circular and justify whatever exists, the sorting account could extend to even greater disenfranchisement, such as the abolition of home rule in the District in 1874.

Viewing the issue of disenfranchisement in broader historical context complicates the search for explanations. The District was not the only region denied representation in the early United States. The Northwest Ordinance of 1787 created a framework for governing the territory north of the Ohio River ceded to Congress by the states.[143] The Ordinance contemplated an initial stage during which the territory would have no machinery of self-government. This disenfranchisement, however, was temporary, and was justified by the infeasibility of democratic governance in a dispersed frontier society. As settlement increased, the territories were promised representative government and eventual statehood.

Ironically, Chief Justice Taney elevated the promise of statehood to a constitutional principle in dicta in his Dred Scott opinion:

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138. *See* text accompanying note 104 *supra.*

139. THE FEDERALIST No. 43, at 282 (James Madison) (Paul Leicester Ford ed., 1898).

140. *See* text accompanying notes 32-34 *supra.*

141. *See* Cobb, *supra* note 112, at 547.

142. Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820). He also gave an optimistic estimate of the quality of virtual representation the District would receive from Congress, finding obvious "[t]he difference between requiring a continent, with an immense population, to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings," and the District's situation. He admitted that "in theory it might be more congenial to the spirit of our institutions, to admit a representative fro[m] the district," but "doubted whether, in fact, its interests would be rendered thereby the more secure." *Id.* at 324-25.

143. Although the Northwest Ordinance was originally enacted by the Congress of the Confederation, it was reenacted by the First Congress; the only change was vesting the appointment power in the newly created President. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (1789). *See generally* THE AMERICAN TERRITORIAL SYSTEM (John Porter Bloom, ed., 1973); JACK ERICSON EBLEN, THE FIRST AND SECOND UNITED STATES EMPIRES: GOVERNORS AND TERRITORIAL GOVERNMENT, 1784-1912 (1968); THE LAWS OF ILLINOIS TERRITORY 1809-1818 (Francis S. Philbrick ed. 1950).

> [N]o power is given to acquire a Territory to be held and governed permanently in that character.
>
> . . . The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority . . . .[144]

At the turn of the century, however, when forces within the United States felt the need to compete with European powers in the realm of colonial expansion, a new Supreme Court majority rejected even Taney's principle guaranteeing postponed representation. In *Downes v. Bidwell*,[145] the Court originated the Insular Cases doctrine: there could be territories not intended for statehood, to which the Constitution would not fully extend. Justice Brown dismissed the *Scott* dicta, finding it "sufficient to say that the country did not acquiesce in the opinion," and that the Civil War had "produced such changes . . . as to seriously impair the authority of this case."[146] Justice White's influential concurrence insisted that Congress had the full power to give a territory's inhabitants "such degree of representation as may be conducive to the public well-being, [or] to deprive such territory of representative government."[147] He invoked the analogy of the District of Columbia, explaining:

> [T]here is an instance which exemplifies the exercise of the power substantially in all its forms, in such an apt way that reference is made to it. The instance referred to is the District of Columbia, which has had from the beginning different forms of government conferred upon it by Congress, some largely representative, others only partially so, until, at the present time, the people of the District live under a local government totally devoid of local representation, in the elective sense, administered solely by officers appointed by the President, Congress, in which the District has no representative in effect, acting as the local legislature.[148]

Thus the disenfranchisement of the District of Columbia became the precedent for overseas colonialism.

The colonialism authorized in the Insular Cases, however, was not justified by either peculiar necessity or consent. The overseas territories did not threaten federal supremacy or interstate equality; nor were they underpopulated and therefore unready for representation. The territories did not consent to U.S. rule, and the Court did not invite their inhabitants to move to one of the states to gain political rights. The analogy to the District, therefore, was not sup-

144. Scott v. Sandford, 60 U.S. (19 How.) 393, 446-47 (1857). In Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820) (dictum), Chief Justice Marshall had justified the lack of national representation of the territories as arising from their being "in a state of infancy, advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained."

145. 182 U.S. 244 (1901); *see generally* Neuman, *supra* note 24, at 960-63.

146. 182 U.S. at 274 (opinion of Brown, J.).

147. 182 U.S. at 289-90 (White, J., concurring).

148. *Id.* at 290.

ported by the reasons that have purportedly explained the District's disenfranchisement.

Indeed, there is reason to believe that the District itself has outlived the conditions that might once have justified its status. The federal government is no longer so weak that it need fear the appearance or the reality of dependence on a component state.[149] Legally, technologically, and politically its powers have grown so that it can confidently maintain and protect its own infrastructure. In fact, the seat of government has already sprawled across the borders of the District into Maryland and Virginia.[150] If such sensitive governmental functions as those carried out by the CIA, the Pentagon, and the Atomic Energy Commission can be safely based in the surrounding states, it is difficult to see why the additional federal power over the District of Columbia is not redundant.

The consent defense can still be heard today,[151] but it rings hollow after generations have been born into the District. Moreover, the ancestors of many residents did not choose to relinquish voting rights by moving to the District; as African-Americans, they could not vote in their prior states, either. It is true that current residents may gain voting rights by moving out of the District (just as most American colonists could have gained voting rights by moving back to England). But significant barriers impede their mobility, illustrating well the standard limitations of the Tiebout hypothesis,[152] including proximity to employment, poverty, housing discrimination, and attachment to community.[153] United States constitutional and statutory law does not treat voting rights as an ordinary good subject to barter for other goods.[154] If relegating citizens to the

149. Peter Raven-Hansen, *The Constitutionality of D.C. Statehood,* 60 GEO. WASH. L. REV. 160, 174-75 (1991). Even Professor Best concedes this point. *See* BEST, *supra* note 133, at 66-67.

150. *See* Cobb, *supra* note 112, at 584-606 (describing the process of dispersal of government functions into Maryland and Virginia suburbs); Raskin, *supra* note 132, at 42.

151. *See* OFF. OF LEGAL POLICY, U.S. DEP'T OF JUST., REPORT TO THE ATTORNEY GENERAL ON THE QUESTION OF STATEHOOD FOR THE DISTRICT OF COLUMBIA 53 (1987) [hereinafter REPORT TO THE ATTORNEY GENERAL] ("Any adult resident of the District may participate in congressional elections by the simple expedient of moving across the District line."); Jeffrey Goldberg, *Marion Barry Confronts a Hostile Takeover,* N.Y. TIMES, Oct. 29, 1995, § 6 (magazine), at 39 (quoting Rep. James Walsh) (" 'They knew what the law was when they moved here,' Walsh says. 'I don't buy it. They knew the law.' ").

152. *See* text accompanying notes 32-34 *supra.*

153. *See* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory,* 90 COLUM. L. REV. 346, 420-24 (1990); L.F. Dunn, *Measuring the Value of Community,* 6 J. URBAN ECON. 371 (1979) (investigating quantitatively attachment to community as a barrier to mobility); Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity,* 92 HARV. L. REV. 1662, 1685 & n.48 (1979) (discussing exclusionary zoning, racial discrimination, and proximity to employment opportunities as barriers to mobility). Moreover, the Tiebout model of interjurisdictional competition does not support the disenfranchisement of a locality's residents by an unresponsive federal government. *Cf.* Robert C. Ellickson, *Cities and Homeowners Associations,* 130 U. PA. L. REV. 1519, 1548-54, 1558 (1982) (finding support in a Tiebout model for permitting local governments to deny voting rights to residents who rent housing, but not to resident landowners, and not in state or federal elections); Frank Michelman, *Universal Resident Suffrage: A Liberal Defense,* 130 U. PA. L. REV. 1581 (1982) (critiquing Ellickson's argument regarding local voting rights of tenants).

154. 18 U.S.C. § 597 (1994) (punishing offer or receipt of expenditure to influence voting); 42 U.S.C. § 1973i(c) (1994) (punishing anyone who "pays or offers to pay or accepts payment" for registering to vote or voting in elections including those for Senator, Representative, and Delegate from the District of Columbia); Brown v. Hartlage, 456 U.S. 45, 54 (1982) ("No body politic worthy of being

exercise of mobility were regarded as an acceptable response to disenfranchisement, then the Voting Rights Act need never have been passed.

The continued disenfranchisement of the District appears to result from some combination of political failure,[155] partisan politics,[156] racial distrust,[157] and a highly contingent form of impossibility.[158] The existing structure of governance obstructs solution of the problem, because reform must come either from Congress, in which the District lacks representation, or from constitutional amendment, which is dependent on state legislatures that have no interest in the District. The carving out of the District created a microstate with doubtful economic viability,[159] whose size—"sufficiently circumscribed to satisfy every jealousy"[160]—makes it an incongruous candidate for statehood.

Moreover, the Twenty-third Amendment may have aggravated the problem, by guaranteeing three electoral votes to any remaining federal district, even if most of the city were admitted to the Union as a state.[161] If the Seat of Government Clause is interpreted as conferring a power, and not a duty, on Congress to maintain an exclusively federal district, then it might well be consistent with the Twenty-third Amendment for Congress to abolish the District of Columbia altogether, retaining the National Capital Service Area as an enclave within the State of New Columbia like other enclaves in the other states. The purpose of the Twenty-third Amendment was not to contract Congress' power with respect to the District, but rather to modify the Electoral College in fairness to the District. Accordingly, the Amendment's mandate could be understood as contingent on the continued existence of the District. If, however, the Seat of Government Clause empowers Congress to shrink but not to abolish the federal district (as some argue),[162] or if Congress chooses to maintain the Service Area as a constitutionally enumerated federal district outside the new state, then the Twenty-third Amendment entitles the residents of the truncated district to presi-

called democracy entrusts the selection of leaders to a process of auction or barter."); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidating poll tax); Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System,* 80 VA. L. REV. 1455 (1994). Ellickson noted the inconsistency between existing constitutional law and his proposed Tiebout analysis of voting rights. Ellickson, *supra* note 153, at 1558-61; *see also* Briffault, *supra* note 153, at 416-17.

155. *See* text accompanying notes 45-46 *supra.*

156. *See* text accompanying note 44 *supra.*

157. Statehood advocates quote Senator Kennedy's diagnosis that the District is " 'too liberal, too urban, too black, or too Democratic' " to be welcomed as a state. Raven-Hansen, *supra* note 149, at 162 (citing Arlen J. Lange, *Full Representation for D.C.?,* WALL ST. J., Aug. 30, 1978, at A14 (quoting Sen. Edward Kennedy)). *But see* Orrin G. Hatch, *Foreword* to BEST, *supra* note 133, at vii-viii (claiming that this charge overlooks the principled character of opposition to representation for the District).

158. *See* text accompanying notes 40-42 *supra.*

159. *See* REPORT TO THE ATTORNEY GENERAL, *supra* note 151, at 63-66. *But see* Schrag, *supra* note 123, at 331 (arguing that permitting the District to impose a nonresident income tax would raise revenues that compare favorably with the annual federal subsidy).

160. THE FEDERALIST NO. 43, at 282 (James Madison) (Paul Leicester Ford ed., 1898).

161. *See* REPORT TO THE ATTORNEY GENERAL, *supra* note 151, at 25; *see also* BEST, *supra* note 133, at 71; Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation,* 60 GEO. WASH. L. REV. 475 (1992) (criticizing efforts to minimize the Twenty-third Amendment's impact on the District's bid for statehood).

162. *See* REPORT TO THE ATTORNEY GENERAL, *supra* note 151, at 19-23.

dential Electors. Only a dangerously loose interpretive methodology could justify disregarding that entitlement on the ground that the residents are too few to deserve representation, or that substitute protections satisfy the original purpose of the Amendment.[163] The alternative argument that Congress could ignore the Amendment because it is not self-executing is even more troubling.[164] Thus, the Framers' obsolete perception of the "indispensable necessity" of a federal district without national representation has led to a configuration of forces that greatly impedes a solution consistent with contemporary realities.

C. *The Subversiveness of Anomalous Zones*

The foregoing examples illustrate government's resort to geographically limited suspension of a policy it otherwise deems fundamental when it concludes that uniform implementation of the policy is impracticable or even impossible. In Storyville and other red light districts, the suspended rule governed the behavior of private individuals; in the District of Columbia, residents suffered the suspension of a fundamental norm of public law. In both cases, government professed allegiance to the suspended rule, yet justified its exceptional suspension in a limited area.

If we think of the creation of an anomalous zone as a containment strategy, an attempt to isolate the necessary suspension of a fundamental norm, we can then inquire after its success. We can ask whether such measures actually relieve pressure on the suspended value and enable its preservation elsewhere. We can also ask whether, within the zone, the necessary suspension led to other, unnecessary suspensions.

Turning first to Storyville, it was far more than a zone where a particular legal rule was suspended. In articulating the context of *L'Hote*, Justice Brewer (no pun intended) properly referred in the plural to "those vocations which minister to and feed upon human weaknesses, appetites, and passions."[165] Suspension of the ban against prostitution made the district an advertised marketplace for the satisfaction of socially disapproved desires. The proprietors encouraged indulgence in drink and gambling, as well as sex, and offered nongenteel entertainments for the eye and the ear. The jazz lyrics of Storyville were often unprintable, though cleaned up later for wider sale. Storyville also offered a parody of civic life, including an unofficial mayor (who from 1904

163. *See* Raven-Hansen, *supra* note 149, at 186 (arguing that extension of voting rights in State of New Columbia to residents of the National Capital Service Area would "give full effect to the purpose of the Twenty-third Amendment, while avoiding its literal terms").

164. Schrag, *supra* note 123, at 348-49; *see also* Raven-Hansen, *supra* note 149, at 187-89 (noting "potentially alarming civil rights implications" of this argument, but finding comfort in the possibility that no one would have standing to object). Nonjusticiability should not release Congress from its obligation to comply with constitutional mandates, even if it deprives Congress of the assistance of the judiciary in interpreting them. *See, e.g.*, Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

165. L'Hote v. New Orleans, 177 U.S. 587, 596 (1900).

until 1920 also served in the state legislature),[166] madams affecting royal titles,[167] and brothels with furnishings touted as cultural institutions.[168]

It is tempting to see in the permanent but geographically restricted indulgence of Storyville a spatial analogue to the temporal license of Carnival. Modern analysts of popular culture, following Mikhail Bakhtin, have emphasized Carnival as a time of "temporary liberation from the prevailing truth and from the established order; it mark[s] the suspension of all hierarchical rank, privileges, norms and prohibitions."[169] Carnival is characterized by excess, vulgarity, and mocking laughter, the privileging of body over mind, and the celebration of the grotesque.[170] Bakhtin, writing against the background of Stalinist Russia, idealized Carnival as a utopian force of popular resistance to governing dogmas.[171] Some later writers have stressed instead that an officially sanctioned suspension of hierarchy merely channels resistance into play and further entrenches the hierarchy.[172] A third approach combines both possibilities:

> It actually makes little sense to fight out the issue of whether or not carnivals are intrinsically radical or conservative, for to do so automatically involves the false essentializing of carnivalesque transgression. The most that can be said in the abstract is that for long periods carnival may be a stable and cyclical ritual with no noticeable politically transformative effects but that, given the presence of sharpened political antagonism, it may often act as catalyst and site of actual and symbolic struggle.[173]

The literature on the carnivalesque thus emphasizes that the experience of licensed deviation can relativize and undermine the suspended values beyond the period of their suspension. (While many of the writers in this tradition valorize this process as a means of liberation from the oppressive norms of an unjust social order, the description remains valid, regardless of the observer's attitude toward the suspended norms.)

In the case of red light districts, this subversive process affected a variety of persons: the prostitutes themselves, other participants in the industry, customers, and nonparticipating observers. Over the long term, women may have been drawn into the district, lived there, and departed, perhaps to continue as illegal prostitutes elsewhere.[174] But the prostitutes were obliged to reside in

166. ROSE, *supra* note 65, at 42-44.

167. *Id.* at 52, 80.

168. *Id.* at 144-45.

169. MIKHAIL BAKHTIN, RABELAIS AND HIS WORLD 10 (Helene Iswolsky trans., 1984) (1968); *see* KATERINA CLARK & MICHAEL HOLQUIST, MIKHAIL BAKHTIN 299-320 (1984); PETER STALLYBRASS & ALLON WHITE, THE POLITICS AND POETICS OF TRANSGRESSION 6-26 (1986).

170. STALLYBRASS & WHITE, *supra* note 169, at 8-9.

171. CLARK & HOLQUIST, *supra* note 169, at 307-11.

172. STALLYBRASS & WHITE, *supra* note 169, at 12-14 (citing others); *see* TERRY EAGLETON, WALTER BENJAMIN, OR, TOWARDS A REVOLUTIONARY CRITICISM 148-50 (1981).

173. STALLYBRASS & WHITE, *supra* note 169, at 14 (emphasis and citation omitted).

174. Historians have described a pattern in the trade of downward mobility over time. *See* ROSEN, *supra* note 60, at 100; *cf.* HOBSON, *supra* note 60, at 108 (agreeing that "there probably was some movement downward in the prostitution class system, especially for women who became diseased" but emphasizing mobility out of the trade for regulated prostitutes).

Storyville in order to participate in its legal regime; the customers were not. The customers could experience the suspension of the values theoretically governing outside the district at any time through an easy exercise of mobility. This illustrates the magnified subversive potential of an anomalous zone where outsiders can take advantage of the anomaly simply by entering the zone. In the end, however, this subversive potential proved unacceptable to the larger society, which closed the district altogether.[175]

The District of Columbia illustrates a different aspect of the subversive potential of anomalous zones. Although one could focus on the effect that the denial of national representation might have on the values of the District's residents,[176] the more interesting phenomenon is the effect of this disenfranchisement on those responsible for the District's governance. I would not go so far as to say that the District illustrates a *reverse Carnival*, a ruler's revelling in the release from all restraints on its power. An unsuccessful attempt was made to achieve this in 1805. In a criminal case argued before the Supreme Court, counsel for the prosecution contended that there were no constitutional limits on Congress' power over the District, as demonstrated by the fact that the District's form of government was not republican.[177] The Court has since held most constitutional limitations applicable to the District.[178]

Nonetheless, subjecting the District to the plenary power of a legislature in which it is not represented has at times seriously affected the governance of the District. The most glaring example is the abolition of municipal home rule from 1874 to 1973, which contradicted the assurance in *The Federalist* that "a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them."[179] That arrogant exercise of Congress' power bore

175. *See* note 81 *supra* and accompanying text.

176. This was a stated concern of the Antifederalists in their attacks on the Seat of Government clause. *See* BOWLING, *supra* note 101, at 81-83; *Letters from the Federal Farmer, in* 2 THE COMPLETE ANTI-FEDERALIST 214, 344-48 (Herbert J. Storing ed., 1981) (1788); *Essay by a Georgian,* GAZETTE ST. GA., Nov. 15, 1787, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 129, 133 (Herbert J. Storing ed., 1981); 2 ELLIOT'S DEBATES, *supra* note 106, at 402 (remarks of Thomas Tredwell at New York ratifying convention); 3 ELLIOT'S DEBATES, *supra* note 106, at 431 (remarks of George Mason at Virginia ratifying convention). They claimed that the District would corrupt its residents, or attract those already corrupted, and that the nonrepublican populace of the District would strengthen the tyrannical designs of the federal government. Echoes of this argument appear in the modern claim that the District is ineligible for statehood because its populace is too closely associated with the interests of the federal government. *See* BEST, *supra* note 133, at 74-77; REPORT TO THE ATTORNEY GENERAL, *supra* note 151, at 66-68.

177. United States v. More, 7 U.S. (3 Cranch) 159, 171 (1805) (argument of counsel) ("When legislating over the district of Columbia, congress are bound by no constitution. If they are, they have violated it, by not giving us a republican form of government."). The *More* case concerned the applicability of the Article III prohibition on diminution of judicial compensation to a justice of the peace for Washington County. Benjamin More was prosecuted for collecting fees that had been reduced by statute. The circuit court held, two to one, that the prohibition applied. *Id.* at 160 n.(b) (circuit court opinions). The Supreme Court judiciously dismissed the prosecution's writ of error for want of appellate jurisdiction.

178. *E.g.*, Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820) (expounding the applicability of the Constitution to the District).

179. THE FEDERALIST No. 43, at 282 (James Madison) (Paul Leicester Ford ed., 1898).

no relation to the claim of necessity that originally justified the anomalous treatment of the District.[180]

In the 1980s, despite the restoration of home rule, Congress repeatedly interfered with the District's policy regarding sexuality and abortion,[181] hardly matters in which local self-determination would threaten the operation of the federal government. Rather, as Philip Schrag has observed:

> By legislating for the District, members of Congress can take a highly visible stand without actually restricting the activities of any voters in their home districts. In particular, they can win the approval of their conservative constituents without incurring as much wrath from their liberal constituents as they would attract if those constituents were themselves being regulated.[182]

It is unsurprising that politicians today succumb to the temptation to exploit such opportunities. They are not subject to electoral discipline for such regulatory activities, and they are not flouting any longstanding convention of respect for local D.C. governance. Constitutional law, as related to the District, provides a model of anomalous congressional plenary power with no clearly defined boundaries for the legitimate exercise of that power.[183]

Because voting is normally linked to residence in our political system, the disenfranchisement of the District directly affects only its own residents, not travelers passing through. Indeed, many physical residents of the District maintain legal residence in a state, thereby preserving their right to representation in Congress (though not to representation in the D.C. local government).[184] Indirectly, however, the disenfranchisement of the District has more broadly subverted the United States' attachment to republican principles through the symbolic process of judicial reasoning. As previously discussed, analogies drawn between overseas territories and the District have been employed to justify the permanent disenfranchisement of those territories.[185]

Thus, the subversive force of an anomalous zone in public law may be felt beyond the boundaries of the sphere that originally motivated it. First, an anomaly may remove structures that ordinarily enforce respect for other values

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180. *See* text accompanying notes 102-103 *supra.*

181. Schrag, *supra* note 123, at 314-15; Seidman, *supra* note 128, at 377. Examples of congressional interference include a veto of the decriminalization of consensual adult sodomy, restriction of abortion funding (at first limited to use of federal funds and then extended to use of the District's own revenues), and exemption of church-related educational institutions from antidiscrimination laws with regard to persons "promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief." Nation's Capital Religious Liberty and Academic Freedom Act, Pub. L. No. 101-168, § 141, 103 Stat. 1284 (1989); *see also* Clarke v. United States, 886 F.2d 404, 406 (D.C. Cir. 1989) (declaring unconstitutional an earlier version of the Act, which conditioned District funding on the D.C. Council's enactment of such an exemption), *vacated as moot,* 915 F.2d 699 (D.C. Cir. 1990). For a detailed analysis of the first *Clarke* holding, see Seidman, *supra* note 128, at 379-405.

182. Schrag, *supra* note 123, at 314-15.

183. For example, critics often point out that Congress has intervened to prevent the District from installing meters in taxicabs, thereby preserving a fare structure that favors politicians. Schrag, *supra* note 123, at 314; *see also* Raskin, *supra* note 132, at 427-28. However, this criticism assumes that the District's taxi fares are within the domain of local police power rather than the domain of legitimate federal regulation of the federal city's infrastructure.

184. BEST, *supra* note 133, at 3.

185. *See* text accompanying notes 145-148 *supra.*

that were not originally suspended within the anomalous district. Second, a zone's already anomalous character may be invoked explicitly to justify further anomalies. Third, although the District does not illustrate the use of physical mobility to spread the effects of the zone, it does illustrate the potential for symbolic mobility of the zone's underlying justification.

IV. GUANTÁNAMO AS AN ANOMALOUS ZONE

In the light of the preceding examples, Guantánamo may be understood as an enclave that was transformed into a public law anomalous zone in response to a claim of necessity. Its anomalous character deepened with time and effected consequences beyond its own borders.

Prior to 1991, constitutional rights were thought to extend to Guantánamo. Its status had been analogized to the Panama Canal Zone and other similarly held territories where the United States exercised the powers of sovereignty while nominal sovereignty lay elsewhere.[186] The United States has employed hundreds of foreign nationals at Guantánamo, including Cuban exiles and Jamaicans,[187] and has respected their constitutional rights. For example, in 1971 the Court of Claims assumed that the Takings Clause of the Fifth Amendment applied to a Cuban contractor at Guantánamo.[188] The United States has exercised criminal jurisdiction over both citizens and aliens at Guantánamo, to the exclusion of Cuban law; in practice, civilian criminal defendants are brought to the United States for prosecution, and enjoy full constitutional protection.[189]

In 1991, however, the United States pressed Guantánamo into service as a refugee processing station for Haitians interdicted on the high seas. As even refugee advocates would admit, land-based facilities at Guantánamo afforded opportunities for better refugee screening than was possible aboard Coast

186. 35 Op. Att'y Gen. 536 (1929) (analogizing Guantánamo to Canal Zone); Canals: Panama Canal, 1977 DIGEST § 7, at 593-94 (analogizing Canal Zone to Guantánamo); Sedgwick W. Green, *Applicability of American Laws to Overseas Areas Controlled by the United States,* 68 HARV. L. REV. 781, 792 (1955) (noting that the status of Guantánamo was "in substance identical with that in the Canal Zone").

The Canal Zone, in turn, had been analogized to unincorporated territories of the United States, like Puerto Rico, Guam, and (formerly) the Philippines. In these latter areas, the United States *was* sovereign, but "nonfundamental" constitutional rights did not extend. *See, e.g.,* Canal Zone v. Yanez P. (Pinto), 590 F.2d 1344 (5th Cir. 1979) (indicating that nonfundamental aspects of the Sixth Amendment right to confrontation do not extend to the Canal Zone, as a territory not incorporated into the United States); Canal Zone v. Scott, 502 F.2d 566, 568 (5th Cir. 1974) (holding that the requirement of grand jury indictment does not extend to the Canal Zone, a territory not incorporated into the United States, because it is not a fundamental right); United States v. Husband R. (Roach), 453 F.2d 1054, 1057 (5th Cir. 1971) (describing the Canal Zone as unincorporated territory of the United States), *cert. denied,* 406 U.S. 935 (1972). Unincorporated territories are anomalous in their own way, but that anomaly has existed for nearly a century. *See* Neuman, *supra* note 24, at 957-64 (discussing creation of unincorporated territories doctrine in Downes v. Bidwell, 182 U.S. 244 (1901)).

187. *See* NAVY OFF. OF INFO., *supra* note 5, at 2; Smith, *supra* note 5, at 98-99 (describing the replacement of Cuban workers by Jamaican workers).

188. Huerta v. United States, 548 F.2d 343 (Cl. Ct.), *cert. denied,* 434 U.S. 828 (1977).

189. *See, e.g.,* United States v. Lee, 906 F.2d 117 (4th Cir. 1990) (Jamaican national tried in district court in Virginia); United States v. Rogers, 388 F. Supp. 298, 301 (E.D. Va. 1975) (U.S. citizen working at Guantánamo tried in district court).

Guard cutters. Nonetheless, using Guantánamo did not commit the government to providing the full statutory procedures available to asylum applicants on the mainland, because Guantánamo falls outside the statutory definition of "the United States" under the Immigration and Nationality Act.[190] The government therefore sought to streamline the screening process, dispensing with such complications as the assistance of lawyers, administrative appeals, and judicial review, to ensure swift repatriation of rejected applicants. Procedural due process doctrine would have accommodated the government's concerns—the constitutional law of immigration procedure has long responded to the fear that national sovereignty would be impaired by affording a strong foothold to entering aliens.[191] Rather than limit its defense to narrow procedural precedent, however, the government coupled claims of sovereignty and emergency with its unusual title to Guantánamo, arguing that aliens detained there had no constitutional rights whatsoever. The Eleventh Circuit, unlike the Second Circuit, accepted this argument in its broadest form.[192]

A rights-free regime at Guantánamo is certainly anomalous. No physical conditions require such a regime.[193] The social conditions at a military base adjoining the territory of a weak but unfriendly power deserve some consideration, but constitutional law already provides some accommodations to conditions unique to military bases.[194] Nor does the strategic environment of Cuba distinguish Guantánamo from other similar areas where aliens' constitutional rights have been recognized, including the Canal Zone,[195] where decades of tension with Panamanian sovereignty ultimately led to return of the zone, and occupied West Berlin, a "beleaguered island of freedom" in the midst of the former German Democratic Republic.[196]

190. 8 U.S.C. § 1101(a)(38) (1994) (defining "United States" as limited to the continental United States, Alaska, Hawaii, Puerto Rico, Guam and the Virgin Islands). This definition excludes not only Guantánamo, but also U.S. territories that have their own immigration controls, like American Samoa.

191. *See, e.g.*, Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 62-65, 76-77 (1984) (contrasting "classical" immigration law, which limited the government's substantive and procedural duties to aliens to those voluntarily undertaken, with lower courts' procedural innovations, which undermine the government's ability to enforce immigration controls); *see also* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 166-72 (1983) (predicting that the Supreme Court may reject lower courts' procedural innovations because their consequences are not manageable).

192. *See* text accompanying notes 17-23 *supra*.

193. Even assuming that there could be physical conditions so extreme as to justify a suspension of all constitutional rights—on a space station, perhaps?—a self-sufficient tropical enclave whose land area is larger than Manhattan and nearly half the size of the District of Columbia would appear not to possess them. *See* note 5 *supra*.

194. *See* United States v. Albertini, 472 U.S. 675, 687 (1985) (stating that even if a military base is made a temporary public forum, the commanding officer retains broad discretion to exclude particular civilians); Greer v. Spock, 424 U.S. 828, 838-39 (1976) (holding that a military base, otherwise open to visitors, may prohibit distribution of political campaign literature without prior approval).

195. *Cf.* National Bd. of Young Men's Christian Ass'ns v. United States, 395 U.S. 85, 89-90 (1969) (assuming that constitutional protections against government takings applied to petitioner in takings case arising from defense of Canal Zone against nationalistic riot).

196. United States v. Tiede, 86 F.R.D. 227, 228, 246-47 (U.S. Ct. for Berlin 1979) (holding that alien defendants had constitutional right to trial by jury in criminal proceeding for alleged diversion of Polish aircraft to West Berlin).

The divided character of sovereignty over Guantánamo evidently influenced the Eleventh Circuit, although the Canal Zone, West Berlin, and the Pacific Trust Territory also involved divided sovereignty. To characterize Guantánamo as extraterritorial misses the realities of governance there, as subsequent events confirmed. The United States exercises complete control over Guantánamo and is accountable to no one. In other instances of overseas processing, the United States has had to negotiate agreements with foreign governments.[197] For example, the government negotiated with Jamaica for the use of its port for shipboard processing of Haitians. The limited capacity of shipboard processing there, however, led the United States to reopen the camp at Guantánamo in July 1994.[198] Panama, going one step further, authorized the United States to detain Cubans on U.S. military bases in Panama for a six-month period. Rioting inside one of those camps caused Panama to refuse to renew that authorization. In response, the U.S. government cleared the Haitians detained at Guantánamo via forced repatriation, replacing them with the Cubans detained in Panama.[199] The United States has repeatedly made use of Guantánamo because it is, for practical purposes, the only sovereign there.

I should take a moment to emphasize that proximity to an international border does constitute an objective social condition that may sometimes justify variation in legal rules.[200] In U.S. constitutional law, for example, Fourth Amendment doctrine includes special rules applicable at or near international borders and their functional equivalents.[201] These rules do not, however, render border areas free of constitutional restraints with regard to either citizens or aliens, and they did not form the basis of the Eleventh Circuit's decision. It was not the government, but the plaintiffs who argued in favor of treating Guantánamo as the functional equivalent of a U.S. border. The Eleventh Circuit rejected the plaintiffs' argument.[202] Indeed, Guantánamo does not physically border the United States. Guantánamo serves as a functional gateway to

197. Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT'L L. 96, 102 & nn.5-6 (1995) (noting agreements with nations in the Caribbean region for U.S. establishment of processing centers and safe haven camps in their territories).

198. *See* T. Alexander Aleinikoff, *Safe Haven: Pragmatics and Prospects*, 35 VA. J. INT'L L. 71, 73 (1994) (noting that Guantánamo was reopened after a large outflow of Haitian refugees overwhelmed U.S. shipboard processing capabilities in Jamaica).

199. Nash, *supra* note 197, at 102; Larry Rohter, *U.S. Starts Evacuating Cuban Refugees From Camps in Panama*, N.Y. TIMES, Feb. 2, 1995, at A11; *see* Larry Rohter, *Backed by Panama Leader, U.S. Readies Camps*, N.Y. TIMES, Sept. 2, 1994, at A12; Eric Schmitt, *Cuban Refugees Riot in Panama*, N.Y. TIMES, Dec. 9, 1994, at A1.

200. Although international borders are often identifiable by physical structures (and may even follow natural features like rivers), the crucial objective phenomena are behavior at the border and differences in behavior on either side of the border.

201. United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (holding that Customs agents' "reasonable suspicion" of drug trafficking at international border satisfied constitutional requirements under the circumstances); *see* United States v. Ramsey, 431 U.S. 606 (1977) (recognizing "border search" exception to warrant requirement of Fourth Amendment, as applied to incoming international mail); United States v. Martinez-Fuerte, 428 U.S. 543, 560-64 (1976) (declaring routine stops at fixed checkpoints by border patrol personnel consistent with the Fourth Amendment).

202. Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1425 (11th Cir.), *cert. denied*, 116 S. Ct. 299 (1995); Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1509-10 (11th Cir.), *cert. denied*, 502 U.S. 1122 (1992).

the continental United States, to the extent that the U.S. government chooses to make it one, just like any other island territory. There is nothing unique about Guantánamo's spatial relation to the U.S. border that would justify an anomalous doctrine of rightlessness there.

Neither do other common reasons for spatial variation justify denying refugees at Guantánamo constitutional protections. The suspension of constitutional rights did not reflect a government policy of accommodating local preferences.[203] Nor did the government's actions separate incompatible uses.[204] If anything, it mingled them. The suspension of rights at Guantánamo cannot be explained as a policy experiment, without some further explanation of how the United States can freely experiment there with fundamental rights that cannot be suspended elsewhere.[205] For the same reason, the suspension of rights at Guantánamo cannot be explained as part of a diversified enforcement strategy.

As the examples of Storyville and the District of Columbia illustrate, anomalous zones may have subversive consequences beyond their immediate surroundings. Note first the special significance of spatial mobility: the Coast Guard freely patrolled the Caribbean, searching for Haitian (and later Cuban) refugees, interdicting them, and transporting them to Guantánamo. The government exploited its mobility to subject both Haitian and Cuban refugees, involuntarily, to the legal regime at Guantánamo.[206] In 1995, the U.S. government sent even Cubans seized in Florida territorial waters—where presumably the Eleventh Circuit would concede they had constitutional rights—to Guantánamo.[207]

Second, the government's asserted freedom from constitutional restraint extended beyond the procedural concerns that originally prompted the anomaly. The INS discovered that some of the refugees with credible asylum claims tested HIV-positive, and balked at admitting them to the United States. The government then converted part of the naval base at Guantánamo from a processing center into a camp for indefinite detention of medically excludable refugees. A federal judge later characterized the camp as "an HIV prison camp," whose inmates were told "that they could be at Guantánamo for 10-20

203. *See* note 31 *supra* and accompanying text.

204. *See* notes 35-36 *supra* and accompanying text.

205. *See* text accompanying notes 37-39 *supra.*

206. The government spoke of "rescuing" refugees, referring to the fact that many of the refugees were traveling in vessels of questionable seaworthiness. Admittedly, some flimsy craft were intended only to bring the refugees within the reach of the Coast Guard. The voluntary or involuntary character of the refugees' arrival at Guantánamo was thus a matter of degree, and varied with the circumstances. At a minimum, Guantánamo was not the first-choice destination of any refugee, and they were not free to leave.

207. *See* Laura Griffin & David Adams, *Surprise Landfall: 'Is this the U.S.?'*, ST. PETERSBURG TIMES, Feb. 15, 1995, at 1A (describing the interdiction of Cubans in U.S. territorial waters); Luisa Yanez, *Guard Returns Cubans: Refugees En Route to U.S. Navy Base,* FORT LAUDERDALE SUN-SENTINEL, Feb. 18, 1995, at 21A (describing transfer of interdicted Cubans to Guantánamo).

years or possibly until a cure for AIDS is found."[208] The government continued to claim the power to rule this camp without any constitutional limits.

The stage was thus set for a true reverse Carnival, a ruler's festival of uninhibited exercise of power. A refugee camp functions as a small society. As time passes, it will witness births, deaths, solidarity and conflict, illness and injury. Food must be supplied and human wastes removed. In contrast to Carnival, which celebrates the "grotesque body," dynamic in its "eating, evacuation, [and] sex,"[209] such bodily functions bore a grim emphasis at the Guantánamo refugee camp. Inadequate sanitation threatened the inmates' health, and eating a repetitive diet represented one of the few available activities. The government, meanwhile, feeling unconstrained by law, responded with more severity than sympathy to its unwelcome guests. The government surrounded the camp with razor barbed wire, set out camp rules, and punished infractions by confinement to the brig, after only the most rudimentary procedures.[210] The lodgings provided insufficient shelter from the heat and the rain. Although the government's own physicians warned against concentrating an immune-suppressed population, the government overrode their advice,[211] and also refused to evacuate those patients whose medical needs exceeded the capabilities of the local facilities. An INS spokesman dismissed concern for the detainees with the remark, "they're going to die anyway, aren't they?"[212]

Ultimately, the United States District Court for the Eastern District of New York concluded that the government had behaved with deliberate indifference to the needs of the refugees,[213] and entered an order that led to the closing of the camp in June 1993.[214] In subsequent litigation, the Eleventh Circuit rejected the legal basis of that order.[215]

Prior to that Eleventh Circuit decision, the U.S. government reopened Guantánamo in July 1994 as a "safe haven" for refugees. This time the intent was not to process applicants for asylum, but to offer indefinite physical protection, under austere conditions that would make processing superfluous.[216] In August 1994, in a startling development, President Clinton extended this approach to Cuban boat people, reversing three decades of special solicitude for Cuban refugees in U.S. law and policy.[217] The liberalization of Cuba remains a distant prospect, and the detention of Cuban refugees in the Guantánamo "safe

208. Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028, 1038, 1045 (E.D.N.Y. 1993) (vacated by Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994)).

209. CLARK & HOLQUIST, *supra* note 169, at 303.

210. *Sale*, 823 F. Supp. at 1037, 1044-45.

211. *Id.* at 1038.

212. *Id.*

213. *Id.* at 1044.

214. *See* Koh, *supra* note 8, at 151. Despite compliance with the order, the government filed an appeal, and the order was vacated pursuant to a settlement agreement. *Id.* at 151 n.55.

215. Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1424-25 (11th Cir.), *cert. denied*, 116 S. Ct. 299 (1995).

216. *See* Aleinikoff, *supra* note 198, at 73-74 (noting that safe haven "was likely to deter from the boat flow Haitians whose primary goal was simply to get to the United States"). The detention of the Haitians proved temporary, because the United States resolved the crisis in Haiti by threat of force in October 1994.

217. *Cuban Am. Bar Ass'n*, 43 F.3d at 1417-19; Aleinikoff, *supra* note 198, at 75-76.

haven" appeared permanent when the Eleventh Circuit upheld its constitutionality in early 1995. The court opined:

> While these migrants are faced with difficult conditions, the demonstrated concern of groups like the Cuban Legal Organizations and HRC and the goodwill of their military rescuers and caretakers will hopefully sustain and reassure them in their quest for a better life.[218]

The Eleventh Circuit's empty rhetoric ignores the incentives created by informing military and bureaucratic officials that their discretion need not be guided by fundamental legal norms.

The third consequence one might expect as a result of the anomaly at Guantánamo is symbolic mobility—the spread of the anomalous character of the zone by analogy. Thus far, this has happened only to a limited extent, and only within a statutory context. In 1993, the Office of Legal Counsel ("OLC") in the Department of Justice issued a legal opinion construing the Immigration and Nationality Act as permitting the summary removal of aliens interdicted in the territorial waters of the United States.[219] The OLC concluded that aliens entering the United States by sea had no procedural rights unless they had arrived at a port of entry before apprehension.[220] This extension of the fiction of extraterritoriality contradicted the INS's own interpretation of the statute.[221]

It remains to be seen whether the Eleventh Circuit's extraterritoriality rationale will confine the effect of the anomaly, or whether the fiction of extraterritoriality may someday be extended to areas proximate to land borders. The INS has recently employed its Guantánamo experience in conducting exercises to prepare for a potential mass influx of Mexicans fleeing across the southern border from some unspecified disaster.[222] Should that hypothetical disaster occur, the claim of necessity could be repeated on the soil of the continental United States. The instability of anomalous zones provides no confidence that the federal government would reject an analogy to Guantánamo.

V. CONCLUSION

The creation of geographical exceptions to policies otherwise regarded as fundamental is a dangerous enterprise. Anomalous zones may become, quite literally, sites of contestation of the polity's fundamental values. When an

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218. *Cuban Am. Bar Ass'n*, 43 F.3d at 1430. In a further policy twist, the United States announced in May 1995 that interdicted Cubans would be returned directly to Cuba rather than taken to Guantánamo, and that admissible Cubans already at Guantánamo would be slowly paroled into the United States. *Clinton Administration Reverses Policy on Cubans*, 72 INTERPRETER RELEASES 622 (1995). Cuba agreed to accept Cuban nationals at Guantánamo who were found ineligible for admission to the United States on such grounds as past criminal record or medical condition. *Id.* at 623. The camp was emptied and closed, for the second time, by January 31, 1996. Mireya Navarro, *Camps at Guantanamo Close as Last of Cubans Enter U.S.*, N.Y. TIMES, Feb. 1, 1996, at A1.

219. Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters, Op. Off. Legal Counsel, 1993 OLC LEXIS 7, at *5, *available in* LEXIS, Genfed Library, Usag File.

220. *Id.* at *10-12.

221. *Id.* at *4.

222. Sam Dillon, *U.S. Tests Border Plan In Event of Mexico Crisis*, N.Y. TIMES, Dec. 8, 1995, at A16.

anomalous zone is defined so that mere presence in the zone results in suspension of the rule, its subversive potential is magnified. In a sense, any exception to a rule tests the firmness of the rule. Exceptions may multiply, and even if they do not, the rule is only as strong as the barriers to bringing oneself within the exception. In the case of geographical exceptions, mobility may make those barriers particularly low. As Storyville illustrates, travel to the zone facilitates circumvention of the rule. Moreover, the experience of noncompliance may decrease voluntary compliance outside the zone. Meanwhile, within an anomalous zone, disrespect for one fundamental value may breed disrespect for others. Private individuals are not the only ones susceptible to these temptations—as the District of Columbia and Guantánamo examples illustrate, public officials can also succumb.