

# I

## AMERICA, THE GATED?

The Los Angeles suburb of Hidden Hills, a handful of Mediterranean- and ranch-style mansions scattered amid rolling, lightly wooded hills fifteen miles inland from Malibu, boasts one of the highest incomes per capita of any community in California. It is the kind of place where live-in gardeners and six-car garages are taken for granted and where bridle paths outnumber streets. The community is home to fabulously successful business executives and professionals as well as a curious collection of aging pop stars: Frankie Avalon, Neil Diamond, Tony Orlando, and John Davidson. It is also one of the nation's oldest gated communities, part of the vanguard of what has become a controversial national trend.

In 1961, however, ten years into its existence as a private enclave, Hidden Hills took a step that moved it well to the front of the vanguard. Even though, like other gated communities, it had a thriving, well-managed private homeowners association that oversaw many of its affairs, Hidden Hills incorporated itself as a full-fledged city but left its gates and private homeowners association in place. Ever since, Hidden Hills has been a city with two governments, one private, one public. "It is odd," says Fred Gaines, a lawyer from nearby Woodland Hills, "to have an entire city that's gated."<sup>1</sup>

Odder still is the way in which the two governments have divided their powers. In Hidden Hills, the city government, the public entity, carries out building inspections, provides security, issues licenses, and sponsors some

adult education programs, funding them all through property tax revenues; it also manages the local trash collection franchise. These are precisely the kinds of services that governments around the country, after decades of nagging by economists, are now rushing to fund through user fees or to privatize entirely. Meanwhile, the Hidden Hills homeowners association is very busy with other matters. In Hidden Hills, this private government controls the community's quintessentially public spaces and events—its parks, its roads and horse trails, even its annual Fourth of July parade.

There is one more oddity, perhaps the crowning one. In 1995, after thirty-four years of sharing a sleek wood-and-glass low-rise on Long Valley Road in the center of town, the two governments split up. Hidden Hills' public government moved to a renovated slate-roofed garage on Spring Valley Road, just twenty-five feet inside one of the community's three gates. Then the homeowners association moved the gate. Today, the city hall of Hidden Hills stands seventy-five feet outside the town's own gates.

There is method to Hidden Hills' various madneses. Consider, first, the advantage the town derives by publicly providing an array of easily privatized services. Residents can claim their property tax payments as deductions on their federal and state income tax returns. If these services were funded out of private homeowner dues, however, they would not get the same deductions.

It is not only the rich who have discovered the benefits of this arrangement. The few other private communities that have managed to replicate Hidden Hills' twin-governments trick have embraced the same financial logic. In suburban Pittsburgh, a 500-unit middle-class townhouse community called Pennsbury Village became, in 1977, the only private condominium complex in the United States ever to form its own municipality. After the bitterly litigated separation agreement with the local township was signed, borough manager Irv Foreman recalls, "We sat down, the condo association and the municipality, to divvy up powers, and for tax reasons we gave everything we might otherwise have purchased privately, such as trash collection, sewer, water, and animal control, to the municipality, to the public government."<sup>2</sup>

All this seems clear enough. But why, we might ask, has Hidden Hills placed its most public functions, including the Fourth of July parade, in the hands of its private government? Because if these things were furnished by the public government, paid for out of tax-deductible property taxes, they would have to remain open to all. They would have to be public, because, through the deductions, every American taxpayer would be contributing to their support. That would be anathema to the residents of this very exclusive private community.

There is only one public space that Hidden Hills could not privatize, could not fund and operate through its private government: city hall, the seat of its public government, an ineradicably public place where anyone from anywhere can legally demand to go. That is why it had to be moved outside the city's gates. "If people could get into town just by saying, 'We're going to city hall,'" explained city attorney Amanda Susskind, "then the residents of Hidden Hills could have no security."<sup>3</sup>

Hidden Hills' municipal building stands as an ironic counterpoint to a much better known town hall on the other side of the continent. There, in its model town of Celebration, Florida, the Disney Corporation has erected a splendid Philip Johnson–designed town hall smack in the middle of the community. But Celebration is a private community, with no intention of incorporating as a municipality. Its impressive town hall, as critics have pointed out, is nothing more than an architectural bauble; totally without political function, it serves as the administrative base for the private homeowners association. Both cases suggest that public buildings will find a place in private communities only if no public business is conducted in them.

Curious as it is, Hidden Hills may be pointing the way to some of the more fundamental dilemmas and conflicts of the American future. Americans today are caught in an array of forces pushing, at the grass-roots level, to redraw the boundary between public and private spaces. Gated communities are only the most obvious example. Public-private boundaries are also being redrawn in tens of thousands of ungated communities—planned developments, condominiums, cooperatives—managed by various kinds of private governments grouped under the rubric *homeowners associations*. Ill-equipped to form their own public governments Hidden Hills-style, many of these communities have begun demanding tax-deductible status for their private homeowner dues. They argue that they are privately shouldering an array of traditionally public sanitation, security, transportation, and recreation responsibilities—assuming burdens that municipal governments bore before the age of retrenchment.

Public-private borders are also being shifted in hundreds of poor and middle-class city neighborhoods, where aroused residents fighting crime, traffic, and blight are demanding to have their public streets barricaded or gated against drug dealers and other outsiders. Unable to totally privatize their streets, as Hidden Hills has done, they seek barriers that would impede public access without wholly prohibiting it. These efforts have provoked bitter debates. "Whose streets are these, anyway?" critics ask. And in more than a thousand American towns and cities, private downtown property owners have

banded together to form business improvement districts (BIDs), paying for and providing street cleaning, landscaping, security, and other services that were once the exclusive province of municipal governments.

Each of these trends grows out of eminently defensible political concerns. But each also raises difficult practical and philosophical questions about the public-private border. BIDs, for example, are in many ways an impressive response to the failings and financial straits of municipal governments. Many BIDs have worked wonders, rescuing entire urban cores from decay and bringing public streets back to life. Unlike the residential neighborhoods that seek gates and barricades on public streets, BIDs welcome the public—paying customers—to their domain. And unlike private residential communities, from which they have learned a lesson, BIDs insist that municipalities continue to provide a full complement of services, supplementing them with their own efforts rather than replacing them. But in preventing city governments from shifting scarce resources to needier neighborhoods, BIDs combine private advantage with their share of the public weal to make themselves privileged zones.

In key ways, today's border wars are confounding traditional political ideologies and coalitions. Among those leading the charge to allow residents of private communities to write off their homeowners association dues as income tax deductions, for example, are liberal Democrats, who see granting such tax breaks as a way of emphasizing that building parks and maintaining roads, two functions of the associations, are really public responsibilities. Among those most fiercely opposed to gating public streets are staunch libertarians, many of them local Republican politicians. They view public street barriers as infringements on their personal freedom.

Until now, most media and scholarly attention has focused on the rise of gated communities—"privatopias" that are said to herald a future "fortress America" in which the private simply secedes from the public.<sup>4</sup> These are cogent critiques, but a more complex reality is being forged by ungated private communities seeking quasi-public status for their expenditures, by public neighborhoods seeking quasi-private status for their spaces, and by business improvement districts seeking a role for the private in the midst of robust public expenditures *and* public spaces.

## BOOSTING PRIVATE COMMUNITIES

One of the stormier of these contemporary public-private border debates concerns whether residents of private communities should be allowed to deduct their homeowners association dues from their federal and state income taxes.

Around sixty million Americans live in such private communities, and their numbers are rapidly growing (at least seven million of these people live in gated communities).<sup>5</sup> Currently, residents are barred from deducting their association dues, as Yale law professor Robert Ellickson explains, “because it is assumed that the value of the association services they receive equals the value of the assessments they pay.”<sup>6</sup> Tax deductions are usually available only in situations in which there is no necessary equality between what one pays and the benefit one personally receives. Deductible expenditures have a public purpose or a redistributionist or altruistic cast. And until recently, it has generally been assumed that there is nothing altruistic or public spirited about paying for your own amenities through a private homeowners association.

But private communities have been challenging that view. In 1990 Robert Figeira, executive director of Woodbridge Village in Irvine, California—with 9,300 households, then the nation’s second-largest private community—made the case for deductions in his testimony before a California State Assembly committee: “We have open space areas . . . parks, roads, bicycle trails, [and] recreation programs,” Figeira told the committee. “We believe half of the people that enjoy [them] are from outside. . . . We maintain the lake and yet the people that live there get no credit for it. It’s just, again, part of their association dues, yet it’s all open to the public.” Assemblyman Gil Ferguson, a southern California Republican, drove home the point. “And you might explain to the committee that not one penny of that is deductible,” he said. “Not one penny, not one,” Figeira agreed.<sup>7</sup>

In its report the committee endorsed the notion that residents of private communities—the majority of them ungated in California—are indeed “private[ly] maintain[ing] a number of essentially public facilities.”<sup>8</sup> The legislature never acted. The argument, however, is certainly not implausible, and it continues to be a political lightning rod. “The politician who manages to capture this constituency, speak to its needs, and offer it a voice will be amply rewarded,” says Robyn Boyer Stewart, president of Common Interest Advocates, the California lobbying group for private communities.<sup>9</sup>

A self-described “Zen soldier” who carefully evokes her past association with progressive causes, Stewart offers a liberalism-tinged defense of tax-deductible homeowner dues. “By placing severe limits on government’s capacity to raise property taxes” when it was passed in 1978, Stewart says, California’s Proposition 13 “made it impossible for local governments to continue providing the basic kinds of public services they always had, and so they foisted the responsibility on new developments to privately maintain an array of new roads, parks, streetlights, medians, recreation facilities, all of which [where the

community remains ungated] the general public uses.” Many private communities in fact “don’t want to be doing this,” Stewart adds, “but they have had to because government is now so constrained in its capacity to provide services that broadly benefit the public.”

What particularly galls liberals on Stewart’s side of the issue was the sight, all through the 1980s, of California’s municipal governments insisting that their revenue initiatives were less like taxes than private assessments. Proposition 13 contained a loophole (closed by Proposition 218 in 1996) that allowed cities to raise money more easily if they could show that the levy was not a tax—defined as a revenue initiative devoted to broader public purposes—but a “benefit assessment,” designed specifically to improve the private property values of those paying. But if California’s public governments had come to protest that their main purpose was to look after private interests, while its private homeowners associations had begun claiming to pursue the public interest, it is easy to see why Stewart and other liberals might find themselves on the private side of the divide.

The drive to make private homeowner dues deductible would seem to run into obstacles when gated private communities try to join in. In a very few gated communities (and Hidden Hills happens to be one), private homeowner dues are apportioned on the basis of property values, much like deductible property taxes. In effect, this means that some kind of redistribution is going on behind the gates. Those with \$5 million estates, for example, are subsidizing the capacity of their poorer neighbors, those living in \$2 million homes, to enjoy the private equestrian trail. And this leads some residents in gated communities, even in Hidden Hills, to claim that their homeowner dues ought to be deductible.

In the vast majority of gated communities, however, each property owner pays an equal amount to maintain the common spaces, and no internal redistribution takes place. Instead, to justify deductibility residents of these communities must argue that their private expenditures somehow benefit the public beyond the gates. To see how they might do so, consider the dissenting opinion advanced by Judge Hiram Emery Widener Jr., a conservative Nixon appointee, in a 1989 tax case involving Flat Top Lake Association, whose members live in a gated, lakeside, white-collar community near Beckley, West Virginia.

The private dues paid by Flat Top’s homeowners “do benefit the public,” Judge Widener contended, because they protect “the public purse by performing activities which the taxpayer would otherwise have had to pay for.”<sup>10</sup> In other words, a single mother in nearby Beckley benefits from Flat Top’s

artificial lake, even though she cannot swim in it, because had Flat Top not been a private, gated community—had it been a development reliant on public infrastructure—she and other taxpayers would have had to help pay for it. By Judge Widener’s logic, the very fact that the lake is private is a public benefit: a gift (hence deductible) from Flat Top homeowners to the Beckley public. The rest of the court, however, found this argument a bit too metaphysical for its taste.

As in most other things, California is the cutting edge of the movement to make the dues paid by private homeowners deductible. This is not surprising, since these particular homeowners have the most to gain. Homeowner dues are comparatively high in California, partly because the state encompasses America’s wealthiest homeowners associations but also because its private communities have all had to make up for the effects of Proposition 13. Elsewhere, though, private dues are lower and property taxes higher. In states such as Connecticut, Maryland, and New Jersey, residents of private communities have been trying to win rebates of city or county property taxes instead of seeking deductions for their dues on their state and federal income taxes.

Like the western case for tax deductions, the eastern brief for tax rebates displays a certain cogency within bounds—especially when the community seeking them is not gated. Consider the argument for rebates advanced by Benjamin Lambert, an attorney whose firm has represented about forty New Jersey private homeowners associations: “Almost all municipal governments still tax local private community residents for whatever public services the municipality provides, whether it be trash collection, snow removal, hydrant repair, sewer maintenance, or street lighting. But many municipalities don’t supply those services to private communities, because private communities, through their homeowner dues, already provide them for themselves.”<sup>11</sup> Hence, Lambert concludes, “private community residents have been paying twice—through their dues and through their taxes—for services they get only once.”<sup>12</sup>

According to Doug Kleine, former head of the research arm of the Community Associations Institute (CAI), the national umbrella organization for private homeowners associations, rebaters believe that “the purpose of government is to give you back everything in services that you give it in payments, not to take your money and use it for the benefit of others.”<sup>13</sup>

In the mid-1980s Lambert and like-minded colleagues began asking New Jersey municipalities to rebate some fraction of property taxes to dues-paying private community homeowners. Things did not go well at first. The effort stirred opposition in a surprising quarter. Just as the cause of private communities found unexpected liberal support in California, so in New Jersey it stirred

the opposition of conservatives. The voters of Mount Laurel, the town made famous by its twenty-year fight against court orders requiring it to support low-income housing, rejected a mid-1980s referendum proposing rebates for the area's private communities. The United Taxpayers of New Jersey, a leading organization in the tax revolt that brought Governor Christine Whitman to power, also opposed rebates, which it saw as giveaways for the few instead of tax relief for the many.

Nevertheless, New Jersey's private homeowners associations pressed on and in 1990 pushed the Municipal Services Act through the state legislature. Under its provisions, those who pay homeowners association dues now get rebates on the property taxes they pay to support municipal trash collection, snow removal, and street lighting. In its first year, the act cost New Jersey's municipalities some \$62 million.

The rebate movement has not stopped there. The next step, says David Ramsey, former president of the New Jersey chapter of CAI, is for private communities to obtain rebates for the taxes they pay to maintain public roads, on the analogous grounds that they are already maintaining their own private roads. I asked Ramsey if there wasn't an important difference. After all, those who pay for their own trash removal don't use the public system, and so arguably should not have to pay for it. But those who pay for their own private residential roads still have to drive on public roads. Shouldn't they have to pay at least some property taxes for public road maintenance?<sup>14</sup>

"No," Ramsey said. "Private community residents may use public roads, but remember too that the general public can use most private roads, any that remain ungated. And since the general public doesn't pay even a cent toward the maintenance of any of the private roads they are able to use, there's no reason why private community residents should pay for the maintenance of the public roads they use." Rebates, Ramsey says, would simply "even the score."<sup>15</sup>

Whether that is true depends on whether the public actually uses private community roads as much as community residents use public roads. In some New Jersey locales where private community residents make up close to half the population, Ramsey's argument begins to acquire a certain plausibility. Where the demand for rebates becomes distinctly less plausible, however, is precisely where the quest for tax deductions gets shaky: where gated private communities try to get in on the act.

Consider, for example, the argument Maryland attorney Steve Silverman advances in favor of granting residents of gated communities rebates on the taxes they pay to maintain public roads. True, acknowledges Silverman, who represents homeowners associations in the Washington, D.C., area, the general



public cannot use gated private roads. But then again, residents of private communities actually never use most public roads, he claims, because the majority of these roads are not major thoroughfares but neighborhood crescents and cul-de-sacs.

“Most people tend to use the neighborhood streets where they live,” Silverman says. “You’re not going to drive on someone else’s public street unless you’re going to visit them. In which case they’ve invited you, so they should pay for your use of the public road in front of their place, just as, when you invite someone to visit you in your gated community, you pay for whatever wear and tear they inflict on your road.”<sup>16</sup>

Though the gated community resident may actually be the one driving along those public roads, Silverman in effect claims, it is really others—those whom that resident visits, buys from, works for—who are the beneficiaries, and they are the ones who should pay the freight. On this argument, however, a nation of citizens and publics risks becoming a nation of hosts and guests.

There is a striking resemblance between Silverman’s argument for rebates and Judge Widener’s case for deductions. In Silverman’s argument, a resident of a gated community does not benefit from a public road even though he drives on it; in Widener’s argument, a member of the outside public somehow benefits from a gated private lake even though she cannot swim in it. Because each case for tax breaks so radically severs the notion of personal use from personal benefit, neither cuts much ice. The arguments ungated private communities mount for deductions and those they assert for rebates, however, are each at least plausible when taken separately. The problem with them is that each argument undermines the other.

In essence, the Californians are saying that their homeowner dues underwrite services that benefit many others beyond themselves. Hence the altruistic tenor of deduction talk: we are providing public services well in excess of our own personal benefit, they say, and thus deserve tax deductions. What the eastern-based rebate advocates find outrageous, by contrast, is precisely that their property taxes do underwrite services that benefit others. Rebate talk has a distinctly self-interested twang: residents should get back any amount that goes beyond what they receive. You get rebates when you act as a consumer in the private market sphere and overpay for the value you get, not when you act as a citizen—a taxpayer in the public realm—where even if you do not use a service, you can legitimately be called upon to underwrite it.

This ambiguity allows public governments—municipalities—a couple of strong ripostes to private community complaints. Suppose, as California private communities argue, that their private homeowner dues should be

understood as altruistic, intended to purchase municipal services that in part benefit others. Then surely one's public tax payments must be so understood—in which case, what is the justification for the New Jersey rebate? Alternatively, suppose, as New Jersey private communities argue, that their public tax payments should be understood as self-interested private-market-style user fees for road repair and park maintenance, whereby one properly pays for no more than one gets. Then clearly one's private dues should be so understood—in which case, why should those dues, as Californians demand, be made deductible?

Conflicts between private communities and public governments, as they get reported in the press or portrayed by social critics, are traditionally depicted as straightforward incursions by the private realm into the public realm. They are represented as incursions of private homeowner associations, staking their claim on the private market right to look out for one's own and get what one pays for, into the public realm, with the one-for-all-and-all-for-one obligations it struggles to defend.<sup>17</sup>

But at another level, the private community movement relies equally on public sphere and private market values—values that are in tension with one another—and hence, to borrow Sandra Day O'Connor's famous description of *Roe v. Wade*, it is on a collision course with itself. Stewart of California's Common Interest Advocates views the eastern rebaters as dangerously "secessionist"; Jeff Olson, a California private community manager and supporter of tax deductions, told me he doubts that the rebate drive can get off the ground.<sup>18</sup> New Jersey rebater Ramsey takes the same view of the West Coast deduction forces. As they assemble their debating points, private community leaders have yet to make up their minds about some of the most basic questions a community can ask itself: Are the vital, commonplace acts of purchasing trash collection, parks, roads, and sewage services ones we undertake in our public or in our private roles? Do we perform them as citizens who have shouldered the broader public purposes of government, or as consumers who need look out only for ourselves?

## BARRICADING PUBLIC ROADS

Gates are appearing not only on the streets of exclusive private enclaves such as Hidden Hills. All over the country local residents are seeking to gate the public streets they live on, hoping to keep out gangs, drug dealers, traffic, and litter.<sup>19</sup> Nobody knows how many public streets have been restricted, but every year residents on thousands of public streets reportedly seek such controls.

There are important differences between barriers on public streets and those on private streets. Private gates enforce both inequality and exclusivity. They not only distinguish between insiders and outsiders but completely bar the outsiders. Barriers on public roads, by contrast, perform only one or the other function. In one common model, a gate or guardhouse allows local residents to pass through unimpeded while requiring nonresidents to explain themselves to a guard or else be photographed by a camera mounted on the gate. There is unequal treatment but no exclusivity. "In the final analysis," according to Tom Benton, manager of Miami Shores Village, a mostly Anglo upper-middle-class community of 2,500 households on the northern edge of Miami, "gates and guards will slow you up, but if you want to proceed, no one can stop you from going on a public street."<sup>20</sup>

The alternative to the gate is the barricade: a string of orange cans, a line of concrete cylinders, or a row of shrubs placed at the mouth of a public street, requiring the general public and residents alike to take a detour. This is the approach favored by Miami Shores, where Spanish-style mansions on Biscayne Bay give way by degrees to less exalted dwellings. Feeling threatened by rising crime, the community bankrolled professionally designed landscape plantings to close off several streets connecting it to some poor neighborhoods to the west. Barricades are exclusive; they block entry. But they are also egalitarian, blind to the difference between residents and the public at large. Indeed, they often work their greatest hardship on residents. In Oak Forest, an affluent suburb north of Miami, a barricade separated William Matthews's front door and his garage, requiring the 84-year-old retired restaurateur to drive a half mile to park his car after dropping off his groceries.

Each of these methods of limiting access to public streets thus manages to avoid one of the two most maligned features of private gates. Each offers a legally acceptable method of taking public streets some distance toward the private. Each has gained a certain measure of popularity in Dade County, Florida, where many of the twenty-eight municipalities, including Miami, not only continue the upkeep of public streets that have been restricted but have actually helped finance the construction of gates and barricades. In Dade the most powerful argument in favor of such barriers on public streets has been a kind of egalitarian one. "Why should the protection that gates provide from crime and traffic be available only for those who can afford private communities?" asks Silvia Unzueta, a local pro-barrier leader.<sup>21</sup>

Unzueta and others have been seeking barricades on the older, grid-patterned streets in the poorer north end of Coral Gables, a town of 42,000 immediately west of Miami. They point out that residents in the newer and

wealthier south end live largely on cul-de-sacs, which afford much the same kind of security as barricades. “Why should others be denied these basic public goods simply because of an inability to pay?” Unzueta asks. It is a theme that comes up repeatedly in pro-barrier arguments.

The notion that there are certain goods that government ought to provide more or less equally to all—health care, perhaps, or education, or police protection—grows a little forced when the list expands to include street barriers, the ultimate socially divisive mechanism. Many barrier opponents hold that barriers are less like education than they are like Cadillacs and caviar, market commodities that government has no obligation to provide. Monique Taylor, a property owner living just outside Miami Shores, represents a brand-new hybrid in local politics. She has absolutely no problem with private gated communities. “What people do with their own property is their own business,” she says. Yet Taylor is fiercely opposed to the gating and barricading of public streets, and for much the same reason: what people do with their property is their own business, and the public streets belong to everyone. “I have a right to drive my preferred route,” Taylor told me. “Barriers impinge on my freedom of travel, forcing me to go where I don’t want to go.”<sup>22</sup>

Taylor’s argument is echoed by other barrier opponents. Mike van Dyk, a Dade County Republican activist, is head of a private community homeowners rights group and a leading local opponent of barriers on public streets. “I pay for those streets,” van Dyk told me. “I don’t like someone telling me I can’t go on public property.”<sup>23</sup> Some barrier opponents, in a strange twist on a popular libertarian argument, have even spoken of public street barricades as a kind of “taking,” in which the state—simply by allowing the barriers—unconstitutionally deprives citizens of their property rights, albeit their rights to public rather than private property.<sup>24</sup>

Barrier advocates scoff at the idea that there are any great principles at stake. “What’s all the fuss? So you can’t always take your chosen route to get somewhere,” says Randall Atlas, a safety and security consultant who has studied the impact of barriers in some Dade municipalities and believes that they reduce crime. “You might, heaven forbid, have to go on a crowded street or around the block. . . . It’s about convenience, not freedom.”<sup>25</sup>

Like many barrier advocates, Atlas depicts his opponents as efficiency-driven neurotics who would be better off if they occasionally stopped and smelled the roses. This is an interesting critique, since barrier advocates just as often portray their foes in precisely the opposite terms: as aimless wanderers who have nothing better to do than drive through other people’s neighborhoods. “There are always oddball people coming in,” complains Carol Pelly, a

barrier advocate in Thousand Oaks, California, “and they don’t have any purpose here.”<sup>26</sup> A “big pastime” in Addison, Texas, says local realtor Mickey Munir, “is going out just gawking at [other people’s] houses. People [who want barricades] just don’t want gawkers looking at their houses, that’s all.”<sup>27</sup>

Ironically, the debate over public street barriers inverts the terms of the controversy over private gated communities. That controversy typically pits egalitarian gate critics against freedom-loving gaters, who cite their rights to do whatever they want with their own private property. On the public streets, however, the egalitarians favor gates and the more libertarian-minded oppose them.

Indeed, the egalitarian argument used to defend gating on the most modest of public streets can be turned around to attack gates at the ritziest of private enclaves. Several communities in suburban Dallas—Addison, Plano, Richardson, and Southlake—have shown how.<sup>28</sup> All four towns at one time or another decided to ban barriers on public roads, believing that they project the image of a divided city. But the towns went further. They also effectively banned or placed moratoriums on the construction of gated private communities. If residents on public roads are going to have to do without barriers, the towns concluded, it would be unfair to allow them in private communities. “I am offended,” Addison city manager Carmen Moran told me, “by the concept that some should take for themselves security that others don’t have.”<sup>29</sup> To be an egalitarian might dispose one to insist on gates for public streets, as it does Silvia Unzueta. But it can just as easily impel one to attack the gates erected by private communities, as it does Carmen Moran.

On a traditional understanding, the clash between gating advocates and opponents is a straightforward battle between the forces of privatization and the defenders of the public realm. Whether the streets are in public or private communities, to gate or barricade them—to inhibit what would otherwise be free public access—is to bring them a good distance into the private domain.

But at a deeper level, each side in fact rests its case equally on the assertion of both private market and public sphere values: the private market value of property rights, and the public sphere value of civic equality. Silvia Unzueta supports gating across the board because she applies a property rights norm to private streets—residents of private communities should be able to do what they want with their own property, including gating it—but a civic equality approach to public streets—if private communities are allowed to gate, then less-well-off public neighborhoods should be enabled to do so as well.

Carmen Moran, by contrast, opposes both forms of gating, because she applies a property rights norm to public streets—public streets are owned by

everyone and gating them is a form of taking—and then turns around and asserts a civic equality norm for private streets: private community residents should not be treated as first-class citizens, and so if public street residents are not allowed to gate, private community residents should not be either.

Understood in this way, each side appeals equally to two basic sets of values that are clearly divergent: the private market value of property rights (the right to do with one's possessions as one pleases), and the public sphere value of civic equality (the idea that those who are less able should be brought to a plane of equality with those who are more so). Where they differ, often passionately and sometimes bitterly, is over how to pair these two values with private streets and public roads.

In debates in which one side is seen as advancing only public sphere values and the other exclusively private market values—that is, in many debates as they are traditionally understood—any grounds for compromise would have to embrace—pay due homage to—both sets of values, public and private. But in the debate over gating, the reverse is the case. Each side rests its arguments equally on values drawn from both the public sphere (civic equality) and the private market realm (property rights). Accordingly, any compromise position would rest on only one of those two values, whether the public or the private, bringing together each side's usage of it. The position taken by Monique Taylor and Mike van Dyk represents such a compromise. Resting solely on the private market value of property rights that both sides—Silvia Unzueta's and Carmen Moran's—share, it splits the difference by holding that gates should be permitted on private but not on public roads. It is no surprise that this third force has emerged in the gating wars.

## BUSINESS IMPROVEMENT DISTRICTS

In a mid-1990s essay on community spirit in America, *Time* editor Richard Stengel claimed that neither “gated suburbs [nor] business improvement districts” could be “considered salutary for the republic.” Both, Stengel noted, “represent the secession of a smaller, more privileged community from the larger one.” Each is “in some respects driven by fear.” Neither, he said, is all that different from the “recently arrested Viper militia in Arizona.”<sup>30</sup>

Three weeks later, *Time* published an angry response from Andrew Heiskell, the magazine's former editor in chief and a former board member of New York's Bryant Park Restoration Corporation, a BID. Heiskell did not take the Viper militia comparison particularly well. Noting that Bryant Park itself had been rescued from a reign of drug dealers and vagrants and restored to its long-forgotten

status as a lively six-acre oasis in midtown Manhattan, he wrote that the “major BIDs in the New York area have vastly improved the quality of life” there.<sup>31</sup> Indeed, BIDs around the country can boast an impressive record of achievement: crime down 53 percent in the area served by Central Houston, Inc., and linear feet of graffiti down 82 percent in Philadelphia’s Center City District.<sup>32</sup>

Some of the districts have been so successful that their managers suspect local politicians of BID envy. At a meeting some years ago of BID directors, recalls Terry Miller, former chief financial officer for the Association for Portland Progress, in Oregon, “several of the most well-established and powerful directors acknowledged nascent tensions caused by mayors’ suspicions that they [the BID directors] somehow wanted to be mayor themselves.”<sup>33</sup>

To hear some BID managers talk, Stengel missed the mark as badly in comparing BIDs to gated communities as he did in comparing them to the Viper militia. “I don’t like gated communities,” Philadelphia BID director Paul Levy told me. “Private, gated communities want to keep people out; BIDs want to welcome them in,” he says. “Gated communities are devoted to private spaces; BIDs are dedicated to the improvement of public spaces.”<sup>34</sup>

True enough. But there is another and more important difference. The great fear BID founders had, Levy says, is that once their new organizations started to provide their own private security, street cleaning, and trash removal, municipal governments would begin withdrawing public services from the downtown, much as they have done in private residential communities. So nearly every BID in America negotiates a “baseline service” agreement with its city government, obliging the municipality to maintain the level of services it would have deployed regardless of how much extra the BID is able to provide privately. If the BID is paying for ten private security agents, this is understood to be in addition to the forty police officers the city would furnish anyway. Clearly this arrangement serves the interest of property owners, but it is also intended to ensure that they retain a stake in the public system and have no incentive to agitate for tax rebates. After all, as Times Square BID director Gretchen Dykstra says, the districts “continue to get their money’s worth from the city.”<sup>35</sup>

It is possible, BIDs seem to be saying, for a private government to lightly overlay an undiminished public sphere, a sphere of fully accessible public space and full-service public government, enhancing public life at no cost to the community. In this way, BIDs are different from restricted public streets and private communities that seek tax rebates.

Or at least in theory. In 1994 John Dyson, then New York’s deputy mayor for finance and economic development, called on the city council to rebate a portion of property taxes to dues-paying BID businesses. Dyson’s proposal

didn't go anywhere. It would have cost the city \$7.5 million annually, which even Dyson acknowledged it could ill afford. But the very fact that he could have made such a suggestion (and that some BID managers nodded in agreement when he did, as one told me) suggests that the baseline principle might not hold. For if a BID is sweeping its own sidewalks every two hours, what is really left for the city to do? If it fills its own potholes, scrubs its own graffiti, or reduces its own crime, what added value do the city department of public works and other municipal service agencies provide? And after a while, won't hard-pressed cities feel an irresistible urge to reduce services in areas where BIDs are flourishing? "I don't buy the baseline," New York city councilman Andrew Eristoff told me. "BID businesses are going to start asking 'What are we paying our taxes for?'"<sup>36</sup> "The baseline," says Dave Fogarty, coordinator of a BID project in Berkeley, California, is a "myth."<sup>37</sup>

But if the baseline is a myth, it is a double-edged one. While cities might sometimes trim services or fail to provide value for tax dollars within BID perimeters, they can also wind up putting even more resources into a BID than the area would have received had the district never been formed. Center City District, Philadelphia's BID, provides any municipal constable patrolling the area with free use of a radio, TV camera, pager, and other amenities. It also built a storefront police substation, on the principle of "If you build it, they will come." And they did: the Philadelphia Police Department began deploying thirty officers over and above what the Center City baseline required.<sup>38</sup>

There are other examples. Instead of paying for its own private graffiti removal, a prototype BID in San Francisco established a "graffiti hotline," which regularly contacts the public graffiti removal service to have freshly spray-painted scrawls and screeds removed. Public service to the area has "improved immensely," says a pleased Jim Flood, a local property owner and BID activist, because "nobody else is calling" the removal service.<sup>39</sup> BIDs were meant to use their wealth to supplement city services, but many are actually using it to become more adroit consumers of those services. "In my mind," Randall Gregson, director of the New Orleans Downtown Development District told me, "I am always trying to draw the line between what the BID should do and what the city should do."<sup>40</sup>

And understandably so, for if the BID experience offers one clear lesson thus far, it is that the notion that these private governments can lightly overlay the city's public government, each abiding peacefully by the baseline, is something of a chimera. Private government has a tendency either to repel or attract public government. It is not neutral. Either the businesspeople who belong to the BID will begin agitating for rebates, because they are getting a lower level of



public services than they should, or critics outside the BID will start attacking it, because it is enjoying a higher level of public services than it should.

But BIDs go beyond bringing a measure of instability to the relationship between private government and public government. They might actually lead the two to change places entirely.

For more than a century, judges have prohibited municipal governments from taxing or otherwise assessing federal government properties such as federal courthouses, post offices, and passport bureaus, for the street-cleaning, snow-removal, and other services that municipalities provide for these properties. The reason is that federal revenues must not be siphoned off to public purposes set by other levels of government. The question, though, is: What if those municipal services are provided by a BID?

BIDs raise similar questions for nonprofit organizations. Though they generally pay no municipal taxes, many hospitals and churches have begun making voluntary contributions to local BIDs. And when they don't, says BID consultant Larry Houstoun, the BID in certain cases should consider "taking them to court to challenge their nonprofit status."<sup>41</sup> Thus BIDs, business-controlled enterprises that enjoy nonprofit status, may find themselves in court energetically trying to depict other nonprofits as businesses.

As for BIDs' relationship with federal-government properties within their perimeters, David Barram, then administrator of the U.S. General Services Administration, the agency that manages all federal nonmilitary property, declared in early 1996 that the federal government would not pay anything to BIDs. By September of that year, however, after some vigorous internal debate (which revealed that federal managers in some cities were already contributing to BIDs), Barram reversed himself, announcing that the federal government would begin negotiating payment schedules.

If Barram found himself torn between these two different positions, it was understandable. Bob Jones, a member of the federal Empowerment Zone Task Force involved in helping to launch the District of Columbia's first BID, expected that critics might well claim that federal payments to BIDs "quack like a local property tax" and ought to be prohibited. Jones, though, had a reply. Federal payments to BIDs are less akin to taxes than they are to user fees for services. And, Jones says, government properties "pay private firms to fix our sidewalks or pick up our trash all the time."<sup>42</sup>

But if the BID is a private business taking fees for services rendered, don't federal regulations require the government to go through a process of competitive bidding? This problem initially caused concern for federal officials. What resolved it was the recognition that BIDs have no private competitors.

Municipal governments, in effect, grant BIDs local monopolies to provide certain kinds of services. Furthermore, BIDs do not generally charge property owners fee-like amounts commensurate with the services they render. Instead, they assess properties on the basis of their size or value. But doesn't that take us right back to square one, where BIDs once again look more like tax-levying public governments than fee-collecting businesses?

Business improvement districts traditionally get attacked as dangerous (or defended as welcome) encroachments of the private onto the public realm. And they do represent such an encroachment, but underlying both the attack and the defense is a simultaneous description of the BID's relationship with government as both a private market one and a public sphere one. For BID defenders, viewing the transaction through public lenses allows it to escape the requirement of competition; viewing it through private lenses allows it to evade the charge of violating sovereignty. For BID critics, the public framing delegitimizes the arrangement as an illegal tax, while the private framing delegitimizes it as a noncompetitive procurement contract. Government's payments to BIDs are like a vibrating cord alternating faster than the eye can see between public and private, never firmly fixed in one realm or the other.

## THE LURE OF HIDDEN HILLS

Decades ago, Hidden Hills achieved for itself the best of both worlds by securing tax support for whatever it chose to fund through its public government and total exclusivity for whatever it assigned to its private government. That tidy division is impossible for the vast majority of private communities, which provide their own municipal services but cannot form their own public governments. Nor is it a possibility for the vast majority of public neighborhoods that would like to exclude outsiders but cannot completely privatize their streets. And such a tidy division is not even a desire of BIDs, which say they want to carve out a role for private government in the midst of a vibrant public sphere, neither supplanting the existing public government's provision of municipal services nor excluding the public.

As Americans involved in each of these movements grope toward the promised land represented by Hidden Hills, trying after their own fashion to wring the best from both private and public, they find themselves having to navigate a daunting set of private-public contradictions and conundrums. At one and the same time, private homeowner associations classify their purchase of basic municipal services as a private market act that justifies a tax rebate and a public-spirited act that merits a tax deduction. Residents seeking to barricade

public streets argue that the private realm values of property rights justify gating on private streets and that the public realm values of civic equity should therefore require cities to pay for barricades on public streets. And BIDs, at one and the same time, must characterize the payments they get from federal properties as private market fees that escape being illegitimate taxes, and as public-style taxes that elude being noncompetitive fees.

On a traditional interpretation, all three—private communities, public street barricaders, and BIDs—present privatizing incursions into the public domain. But at a deeper level, they each rely on marshaling values and norms drawn equally from both the public and the private realms, as do their critics.

Hidden Hills was spared such conundrums because its political arrangements, self-serving though they may seem, still respect one of the fundamental distinctions between public and private: if a facility is going to be subsidized through the public tax system, then the public must, at least in some fashion, be able to enjoy its benefits. It must serve some public purpose. Conversely, if something is going to remain wholly private or exclusive, then no public tax support should be available to it or even be sought. There is no question that some of the more private communities that now pursue tax deductions and rebates, or the public neighborhoods that now seek to shore up their privacy, often test, tweak, or even blur this public-private distinction. But to their credit, none have flouted it utterly.

Yet even this last firewall has been showing signs of strain. In 1996 the Panther Valley Property Association, a gated private community near Hackettstown, New Jersey, transferred responsibility for its road maintenance to its own newly created special taxing district. Such districts are not full-fledged municipalities, but they are public entities nonetheless, with the right to tax residential properties for particular services, such as water, sewer, or, in this case, roads. Panther Valley homeowners now deduct what they spend for local road maintenance from their federal and state income tax returns. But those roads remain wholly closed to the general public. Any outsider seeking to drive on Panther Valley's public roads will be turned away.

Panther Valley, in effect, has moved beyond Hidden Hills. David Ramsey, the attorney who represented the Panther Valley homeowners, describes their agreement with the local township as a “unique settlement, the first of its kind.” That is almost exactly the same language that Peter Pimentel, executive director of the Northern Palm Beach County Improvement District, uses to characterize several nearly identical arrangements recently concluded in Florida. “It’s pathbreaking,” Pimentel says, although he adds that “no one wants to take this to the IRS, because they’re afraid of what they might say.”<sup>43</sup>

Pimentel defends the practice of using the tax system to support roads that are not open to all. After all, he says, municipal parking lots and toll highways are public facilities, but you cannot just waltz onto them as you please; you have to pay. The analogy, though, is misconceived. As long as you are willing and able to pay, public governments cannot bar you from such facilities just because you are not a local resident—as Panther Valley can. Nor, for that matter, as long as you are a local resident, can America's public governments bar you from voting simply because you are unwilling or unable to pay for a home or a piece of property—as Panther Valley can. Private governments have been turning both of these established principles of American public life on their heads. Until not long ago, in the struggle over the border between public and private space, some lines had yet to be crossed. Now they have been.