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Mending Wall: Playing the Game of
Neighborhood Ordering

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“Something there is that doesn’t love a wall,” something there is fundamental in human nature and the American ideal, something there is at odds with rigid separation between neighbors. And yet something there is that compels neighbors to continue erecting fences and walls. In Robert Frost’s *Mending Wall*, nature rises up against the division wall built by the neighbors the year before, “frozen-ground-swell . . . spill[ing] the upper boulders in the sun,” but the fence-menders pretend their efforts might conquer the forces of gravity and wind. In unspoken agreement, they appeal to magical spells as they balance boulders in wall-form, briefly preventing them from tumbling back into their natural state of repose. “Good fences make good neighbours” the neighbor repeats without requiring practical reasons for the fence or considering costs of maintaining the boundary wall. “Something there is . . . that wants [the wall] down,” the narrator contemplates pointing out, yet says nothing and continues mending.

The “good fences make good neighbours” refrain, popularized by Frost’s poem, has been proverbialized by American posterity. Politicians and lawmakers, in particular, make reference to this poem to validate adherence to rules as integral to social order. In referencing the ‘good fences’ adage, lawmakers fail to recognize the irony and sadness that color Frosts’ depiction of the unthinking neighbor who moves in a state of intellectual “darkness” and can only repeat his father’s words. *Mending Wall* language so often seized by politicians seeking justification for wall-making enterprises, suggests, though inapt application, the degree to which they have missed Frost’s point. While the narrator questions the legitimacy of his neighbor’s insistence on maintaining this seemingly unnecessary barrier, politicians have missed the poem’s nuance.

Instead of considering the narrator's subtle questions, politicians appeal to ordering elements within the neighbor's view, and apply "good fences make good neighbours" idea support construction of material boundaries and adherence to law as the metaphorical "fences" of our society.¹

If, as *Mending Wall* suggests, something doesn't love a wall, why does the historical ubiquity of material and metaphorical walls suggest otherwise? Even with the growing sense that the "something" so hostile to wall-making may be right, the *Mending Wall* narrator persists in "set[ing] the wall between [himself and his neighbor] once again," failing to actually end the tradition of wall-building between neighbors. Throughout the world, societies continue to erect fences and walls, repeating after their forefathers and following their traditions "like [] old-stone savage[s] armed." Perhaps something doesn't love a wall, but something else, something perhaps more powerful does.

The endurance of the fence-making tradition, however, does not necessarily legitimate either neighbor's claim. In fact, patterns that emerge across community fence practices reveal distinctions in fence-making that are based upon specific characteristics of the community and suggest that good fences may mark, but do not make, good neighbors. Good neighbors, however, may make good fences. And making good fences requires good neighbors. Tautological? Perhaps, but understanding the language of fences may explain why neighborly divisions have endured and why these structures of division may actually be unifying. The title of *Mending Wall* suggests that the subject of this poem is not the wall itself, but instead the act of 'mending wall.' Understanding the poem in the context of fencing practice explains the long-held reverence for

¹ "[L]ocal laws serve as the "good fences" that help define the boundaries between the rights of individuals and those of the community as a whole. By adhering to these rules, we all become better neighbors—and help build a much friendlier and more peaceful community." CITY OF GARFIELD HEIGHTS, OHIO, "QUALITY OF LIFE" ORDINANCE (2005).

Mending Wall as a paradigmatic poem of America and allows the reader to align boundary structures within the historical narrative of American identity.

This paper identifies various ways in which fences function and explores how fence practice has interacted with a dynamic narrative of national identity. It then sets out an interpretive framework in which fences may be read and demonstrates how this language may be a tool for enhancing communication between neighbors.

Part I: What do fences do?

Before mending wall, the narrator wonders what purpose walls serve and whether his wall fits those functions. A fence is “a structure serving as an enclosure, a barrier, or a boundary, usually made of posts or stakes joined together by boards, wire, or rails.”² It is a “humanly erected barrier between two divisions of land, used to mark a legal or other boundary, to keep animals or people in or out, and sometimes as an ornament. In newly settled lands, fences are usually made of materials at hand, e.g., stone, earth, or wood.”³ “A fence demarcates boundaries, keeps out human and animal trespassers, and keeps in the fencebuilder's own animals.”⁴ While some “perceive[] the sole benefit of a fence to be the reduction of trespass damages to crops. In fact, [others] enclose their lands largely to prevent damage to their own livestock.”⁵ One poet, defining it in terms of social meaning, describes a fence as “a masterpiece, [that] will shut off the rabble and all vagabonds and hungry men and all wandering children looking for a place to play. Passing through the bars and over the steel points will go nothing except Death and the Rain and

² ANNE H. SOUKHAVOV ED., *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE*, 671 (3d. ed. 1996).

³ BARBARA CHERNOW & GEORGE VALLASI EDS., *COLUMBIA ENCYCLOPEDIA*, SIXTH EDITION, COLUMBIA UNIVERSITY PRESS, 934 (6th ed. 2000).

⁴ Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *STAN. L. REV.* 623, 640 (1986) (internal footnote omitted) [hereinafter Ellickson, *Of Coase and Cattle*].

⁵ *Id.*

Tomorrow.”⁶ The New York Supreme Court offered perhaps the clearest description in an indefinite definition: “the purpose of a fence is to keep people “out,” not to invite them in. Conversely, prison guards may view the purpose of a fence as structure to keep people “in,” rather than to invite them out.”⁷ The functions of a fence, it seems, are many, but depend, in large part, on where the viewer standing.

Fences Protect Property

“Why do they make good neighbors? Isn’t it
Where there are cows?”

Fences are fundamental to protect labor and livelihood in agricultural societies, enclosing livestock and exclude intrusions that could destroy crops. In early writings on rural life and literature on fence practices, basic conceptions of fences rested on their ability to ensure livelihood;⁸ in agrarian societies, enclosure mechanisms are essential to retain possession of livestock and mark the limits of crops to be harvested.⁹ An early treatise on English husbandry describes the monetary gain from fencing in farmland, “if an acre of land be worth Sixpence before it is enclosed, it will be worth Eightpence when it is enclosed.”¹⁰ Fence regulation in English and America common law reveals a utilitarian valuation of fences and broad-based recognition of their crucial role in economic development that spanned social strata.

Even amidst an early American culture that celebrated the expansive frontier as representative of unlimited opportunity, American society relied on fences in many of the same ways as did their European ancestors. Like the surge of development in fence technology that

⁶ CARL SANDBURG, *A Fence*, in CHICAGO POEMS 32 (1916).

⁷ *Wedlock v. Troncoso*, 712 N.Y.S.2d 328, 339 (N.Y. Sup. 2000).

⁸ James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003) (referencing J.A. YELLING, *COMMON FIELD AND ENCLOSURE IN ENGLAND 1450-1850* (1977)).

⁹ See generally THE LEGAL FENCE, app. (Notes on English Fencing) (Worcester, Mass., Washburn & Moen Manufacturing Co. 1880) [hereinafter THE LEGAL FENCE].

¹⁰ *Id.* (quoting SIR A. FITZHERBERT, *BOOK OF HUSBANDRY* (1532)).

followed the Enclosure Acts in England, the 1.5 million land grants allocated by Congress galvanized technological development in fence materials. Although American literature prized the unsettled West as emblematic of American freedom of opportunity and democratic social structure, the rapidity with which the American population put fences and written deeds into practice to document land claims suggests a countervailing national desire for settlement and boundary. In fact, the immediate incorporation of barbed wire fencing, which was invented in 1874 and sold 120 million pounds in the first ten years, suggests that the previously open frontier may have retained its open character longer than society would have allowed, were the cost of pre-barbed wire fences not so prohibitory.¹¹ Even in a society ideologically committed to freedom and romantically attached to the notion of wilderness, the fence has been a crucial element in establishing personal property and contributing to the national economy.¹²

Fences Enclose and Exclude

“Before I built a wall I’d as to know
What I was walling in or walling out....”

Common, perhaps prevailing, contemporary conceptions of fences regard them as enclosures that ensure internal privacy and security against external dangers. The right to exclude the public, however, was not necessarily implicit in original conceptions of land ownership, as demonstrated by the widespread common practices of hunting, fishing, foraging, and migratory grazing practices.¹³ Incorporating the right to exclude into the fundamental set of property rights began with the English Enclosure Movement, which was actually a series of movements undertaken by various government actors to create unambiguous divisions in land use and social

¹¹ JOHN TUSKA, VICKI PIEKARSKI, & PAUL J. BLANDING, eds., *THE FRONTIER EXPERIENCE: A READER'S GUIDE TO THE LIFE AND LITERATURE OF THE AMERICAN WEST* (1984).

¹² See *infra* pp.7-9 for discussion on how protection of private property accords with American ideals.

¹³ Eric Freyfogle, *The Enclosure of America* 6 (ILL. PUB. LAW, RESEARCH PAPER NO. 07-10) (2007).

classes.¹⁴ In medieval England, common field ownership was largely regulated by customs of allocation. While the exclusionary effect of the Enclosure Movement has been much criticized, early village customs also adhered to a strict customary code of exclusion that prohibited use of community resources by ‘foreners.’¹⁵ Some descriptions of the English Enclosure Movement claim it was prompted by a desire for increased property protection or the increased burden that technological advances placed on collective decision-making.¹⁶ The historical context of the Movement, which was concurrent with other class-segregating measures like the English Poor Laws, suggests that a major motivation behind these policies was, in fact, a desire to prohibit title-less citizens from partaking in common resources.¹⁷ Karl Polyani, whose influential writing portrayed this movement away from community property as a social tragedy, characterized the legislation as “a revolution of the rich against the poor.”

The lords and nobles were upsetting the social order, breaking down ancient law and custom, sometimes by means of violence, often by pressure and intimidation. They were literally robbing the poor of their share in the common, tearing down the houses which, by the hitherto unbreakable force of custom, the poor had long regarded as theirs and their heirs’.¹⁸

Despite American colonists’ disavowal of principles of feudal entitlement, the English Enclosure Movement influenced the American Enclosure Movement both ideologically and

¹⁴ “Although we refer to it as “*the enclosure movement*,” it was actually a series of enclosures that started in the fifteenth century and went on, with differing means, ends, and varieties of state involvement, until the nineteenth century.” Boyle, *supra* note 8, at 33.

¹⁵ See Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131,137 (2000).

¹⁶ See *id.*, at 160.

¹⁷ See William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millennium Resemble English Poor Laws of the Middle Ages*, 9 STAN. L & POL’Y REV. 101, 103, 107 (1998). (explaining that the early laws forced the poor to work by threatening imprisonment. “Poverty was perceived not as a social or economic problem but as an individual problem. Lack of adequate compensation or employment or someone to provide childcare was not a recognized reason not to work. The law was simple: poor people worked or they went to jail. The responsibility for making sure people worked was placed upon the local authorities, as was the responsibility for assisting those poor who could not work and who were legal residents.” In addition, they “explicitly called for the limitation of relief to locals and the expulsion of nonresident poor people.”).

¹⁸ KARL POLYANI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 35 (1957).

practically. Although American revolutionaries objected to the English application of law, there was no objection to form or system and many structural and procedural customs survived.¹⁹

“Inherit[ing] the common law and institutions of the mother country”²⁰ however, may explain the ease with which early Americans tended to lapse into similar thought and administrative patterns of their forefathers.

American Enclosure Acts initially protected certain customary uses of land from vulnerability to a landowner’s right to exclude the public. In many cases, the statutorily granted power to exclude the public affronted longstanding customs of public use of common resources.²¹ Even technological advances in fencing were not necessarily sufficient to induce immediate relinquishment of longstanding customary use norms.²² When statutory private property protections developed sufficiently diverged from customary practice and formal law such that clarification became necessary, Oliver Wendall Holmes explained the scope of the right to exclude from private land by acknowledging customary public use as licensed by common law while prioritizing a landowner’s legal right to exclude at will. The landowner’s superior right, however, would be recognized when the landowner made their assertion of that right known to the public.²³ While Holmes’ decision expanded the ways in which a landowner could assert their desire to exclude, it protected the requirement that the landowner produce some cognizable

¹⁹ Boyle, *supra* note 8, at 33.

²⁰ JAMES ALLEN SMITH & SEWARD C. STROUT, *THE SPIRIT OF AMERICAN GOVERNMENT* 12 (Harvard Univ. Press 1965) (1907).

²¹ Some scholars claim that the right to exclude triumphed over customary rights of use largely for want of a usable legal vocabulary to express that right. Eric Freyfogle, for example, has suggested that the American enclosure movement succeeded over competing interests in public access to space for lack of legal argument against the private-property protections in English common law (on which our early courts relied). This account may partially explain the paucity of legal challenge, but neglects to recognize the way in which communities may have crafted the fences of increasingly enclosed land to function so as to allow them to create the communities in which they, collectively, wanted to live. See Freyfogle, *supra* note 13.

²² “It is common, but incorrectly assumed that barbed wire... revolutionized fencing on the prairie in short order... however, old attitudes and practices relative to fencing persisted.” Leslie Hewes, *Early Fencing on the Western Prairie*, 79 *ANNALS OF AM. GEOGRAPHERS* 499, 513 (1981) (discussing a generalized disinclination amongst Midwestern settlers to fencing in property and livestock).

²³ Freyfogle, *supra* note 13, at 8 (discussing *McKee v. Graetz*, 260 U.S. 127, 136 (1892)).

signifier that that they wish to exclude. Holmes' attempt to harmonize law and custom required the landowner to communicate their desire to exclude in a way comprehensible to the surrounding community.

The great American 'fence in' or 'fence out' debate that pitted cowboys' right to herd cattle against ranchers' right to exclude them, offers a picturesque context for rumination on enclosure and exclusion practices in America. "In particular, and contrary to English common law wherein the owners of animals were strictly liable for their animals' trespasses, in the early stages of colonization and settlement of any given area, the responsibility for preventing incursion of animals on crops was assigned to farmers."²⁴ Fence out laws were dominant throughout the United States through the early nineteenth century.²⁵ "Eventually, however, as population density increased, land values rose and agriculture expanded, and there was a general reversal to the English common law tradition," requiring that owners of animals fence the herds in or in some way constrain them.²⁶ In the end, a 'legal fence' was adjudicated in terms of fence-in laws that imposed liability for trespass against intrusion onto privately owned land, and protecting private property took precedence over customs that permitted public access to land

Fences Celebrate

In some contexts, walls are built to be visible commemoration of people or ideas we wish to honor and preserve. In instances of monument walls, the physical structure acts as a different kind of national unifier, drawing people together culturally instead of cartographically. The Vietnam Wall, for instance, offers America a physical site and sight to come together, grieve,

²⁴ Nicolas Sanchez & Jeffrey B. Nugent, *Fence Laws vs. Herd Laws: A Nineteenth-Century Kansas Paradox*, 76 LAND ECON. 518, 519 (2000).

²⁵ See Ellickson, *Of Coase and Cattle*, *supra* note 4, at 600 n.9 ("Nineteenth century treatises on fence law reveal, however, that in that era, "fencing out" was the dominant rule in the United States, particularly in the *Northern* states, followed by twenty-one states (in contrast to the thirteen states that followed the English "fencing in" rule, in the owner of livestock is strictly liable for trespass damage.").

²⁶ Nicolas Sanchez & Jeffrey B. Nugent, *supra* note 4, at 519.

and pay tribute to soldiers that died in service of a national cause. Solid and somber, the stone wall, engraved with names of the dead, evokes emotion and remembrance in the viewer regardless of divisive political views on the substantive issue. The American Immigrant Wall of Honor, on Ellis Island, likewise unifies community settlement, though constructed in celebratory commemoration. In this case, the stone monument offers physical evidence of the nature of the American people as a multicultural nation of immigrants and pays tribute to those “whose hard work and high ideals made this country great.”²⁷ While the truthfulness of the underlying ideal may be challenged as hypocritical²⁸, the wall expresses this ideal as a hope for, if not the reality of, America. Functionally, this type of wall is better analogized to a statute or memorial, and speaks to the psychological effect of the physical structure. Though they do not mark bounds of real property, walls of commemoration are relevant to the *Mending Wall* inquiry as evidence of the emotional impact that physical structures possess and exert within a community.

Fences Unify Communities

“I let my neighbour know beyond the hill;
And on a day we meet to walk the line....”

America’s internal walls have served to unify and unite diverse citizens. When settlers of the nascent democracy depended upon one another for survival and subsisted by taking from a common resource pool, the walls they constructed enclosed the entire community unit as one. As the population swelled and increasingly limited common resources eventually limited an individual’s ability to prosper, settlers staked claims further and further into the western frontier. Fences sprang up across the plains, enclosing farm animals and crops and ensuring basic needs

²⁷ Judith Smith, *Celebrating American Immigration History at Ellis Island*, 44 AM. Q. 82, 85 (1992) (quoting a description of the wall in Lee Iaococca’s fundraising letter).

²⁸ “Ellis Island became important as a symbol of open immigration [as] ... new 1965 laws limited immigration from Western Hemisphere countries for the first time in U.S. history. The official celebration of open access ... mask[ing] the ways that its bureaucracy has consistently opposed the interests of ... immigrants.” *Id.* at 85.

for newly settling communities that depended on agricultural output they could produce and retain. The Homestead Acts granted citizens land claims in the Western states at twenty-five cents per acre and conferred the right to fence-in newly appropriated land; these federal grants induced settlers to establish interlinking communities across the frontier, which allowed the nation to coalesce in document and maps. Border lines of the 1.5 million tracts of frontier land allocated through the Homestead Act and the Cultivation and Graduation Acts strung together wilderness and settlements, creating America as a unified entity that spanned the continent.

Although, in some ways, fencing and land claims' effect of tying person to property appears to contradict early American ideals of frontierism,²⁹ a national desire for a cohesive identity made possible a subtle shift in the national story. The multiplicity of voices within the new nation also made America particularly susceptible to fictions that “conveniently cohere a gigantic culture of vistas.”³⁰ The notion of liberty, previously conceived as individual autonomy, could be retained as an ideal for the national collective by refocusing the subtext of land appropriation to mean staking a claim in a “celebration of national culture, language, and destiny.”³¹ In this way, fencing land claims served as a mechanism for collective self-definition, creating a narrative that complemented the existing narrative of Americans as frontiers-people that forged past the boundaries of civilization's “withering and moribund” institutions and the “dead hand” of European ancestors.³²

²⁹ But see Brian Harding, *The Myth of the Myth of the Garden*, in *AMERICAN LITERARY LANDSCAPES: THE FICTION AND THE FACT* 44, 46-47 (Ian F.A. Bell & D.K. Adams, eds. 1989) (explaining frontierism as capitalizing on the openness of opportunity and subduing (rather than celebrating) the wilderness, making Western agrarianism a natural first step to capitalism and commercialism).

³⁰ Eric Mottram, *Thought is Always Prior to Fact*, in *AMERICAN LITERARY LANDSCAPES: THE FICTION AND THE FACT* 9, 15 (Ian F.A. Bell & D.K. Adams eds., 1989).

³¹ TERRY H. PICKETT, *INVENTING NATIONS: JUSTIFICATIONS OF AUTHORITY IN THE MODERN WORLD* 3 (1996).

³² Mark Busby, *The Significance of the Frontier in Contemporary American Fiction*, in *THE FRONTIER EXPERIENCE AND THE AMERICAN DREAM* 95, 95 (David Mogen, Mark Busby, & Paul Bryant eds., 1989).

Reconciling Competing Ideologies of American Identity: Commons, Frontierism, and Enclosure

Creating an American national identity required a way to understand the geographic space the new nation sought occupy and create. As the nation cohered around political ideologies and national goals, models of property ordering may have taken on different characteristics, but has maintained certain underlying similarities that unify temporal iterations of American identity.

America: The Democratic Commons

America became America, in large part, by reacting against anti-democratic policies like the English Poor Laws and Enclosure Acts, which denied title-less individuals a share of what had previously been common resources. American colonists celebrated the continent's openness as an unclaimed commons that was ripe for use by enterprising pioneers. As practical evidence of an egalitarian society, the democratic allocation of American communal resources offer an apt contrast to the exclusive use policies of English resources. Individual state constitutions evidence early protection of individual opportunity to partake in then-common resources, regardless of who acquired the deed to the land.³³ Public ownership of land, water, and other natural resources during the early settlement of the western United States may have been possible due to their seemingly unlimited quantities.³⁴ The fact that states did not opt to protect this common-use right by legally prohibiting private ownership of land suggests that this divided conception of property rights consciously recognized both the ideological need for democratically allocated resources and the practical need for incentives related to private ownership. In fact, subsequent

³³ Many state constitutions, including Virginia and Pennsylvania, explicitly protected the right to hunt, fish, and fowl on unenclosed lands. Freyfogle, *supra* note 13, at 28

³⁴ Carol Rose discusses the "plenteous goods" exception to private and exclusive property ownership in *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 717 (1986).

iterations of American self-hood demonstrate that both forces were likely informing these property-use decisions.

America: The Limitless Frontier

Frontierism, as an ideological rationale for American expansion, presented a distinct conception of America as a dynamic nation. Frontier settlement began when “seventeenth century settlers pushed inland from the Atlantic coast to utilise ‘free land,’” setting in motion a “process of civilisation [that] proceeded from the Cumberland Gap in Maryland to South Pass in the Rocky Mountains.”³⁵ The ideas of property-as-access and need-based land use declined as the Eastern states moved towards private property protection, but Westward expansion continued appropriating and settling land.³⁶

“Frontierism,” as a cohesive phenomenon with a unique set of character traits and motivations, was first conceived in Frederick Jackson Turner’s 1893 retrospective study of the Westward movement. His “frontierism thesis” posited that engaging with frontier conditions *created* a national character, which was marked by

coarseness and strength combined with acuteness and inquisitiveness; that practical turn of mind, quick to find expedients; that masterful grasp of material things, lacking in the artistic, but powerful to effect great ends; that restless nervous energy, that dominant individualism and withal that bouyance[sic] and exuberance which comes with freedom.³⁷

The concept was generally discredited until the twentieth century, when America gained recognition as a world power and the frontier thesis made romantic the idea of further expansion.

³⁵ MARGARET WALSH, *THE AMERICAN WEST: VISIONS AND REVISION 2* (2004).

³⁶ Freyfogle *supra* note 13, at 30.

³⁷ WALSH, *supra* note 35, at 2.

That this thesis was not widely accepted until after the national story shifted such that it was convenient, further evidencing the limited relationship between frontierism the ideology and actual settler life on the frontier.

To many, Frederick Jackson Turner included, the widespread movement to fence in land signaled destruction of the American frontier. To be sure, hostile disputes between ranchers and cowboys certainly marked the end of unenclosed Western land. Frontier mythology, from its inception, contained elements of its own demise. The ‘call of the wild’ attracted rugged trailblazers and entrepreneuring spirits eager to subdue and profit from the untapped wilderness. Images that have remained symbolically attached to the movement illustrate how, with bowie knives, compasses, and eventually fences, American frontierists imposed order on the West. While this explanation may seem a harsh indictment of frontierist motivation, consider, for example, the lasting symbols of frontier life: Lewis and Clark, the cowboy, and the bowie knife. Though cowboy songs wax poetic about the open range, the fables that endure recount the conquest of man over wild and narrative Lewis and Clark’s mapping of the territory. One Texas historian explains the cultural meaning of frontier imagery, “[t]he bowie signifies a spirit of individualism, aggression, and resourcefulness, of adventure and an inflamed sense of honor... the fierce blade of the bowie knife is a souvenir of the merging of civilized society with the wild frontier and of the westward march of history that drew many of us here in the first place.”³⁸ Fences, in the settlement movement, were as much a tool to complete the conquest of the Western frontier as a threat to frontier ideology.

The lyrical plea not to “fence me in,” so often considered representative of frontier ideology, in fact reflects only one aspect of frontierist desire; the veneration of open space does not represent the full scope of frontierist motivations within American identity. Idealization of

³⁸ Susan Chadwick, *The Bowie Knife*, Texas Monthly, May 2008.

open resources was only part of the frontier-theology, which relied upon this promise of open opportunity to incentivize the second crucial element of American frontierism: the ensuing conquest of that open space. The related property-ordering system of maps, fences, highways, and roadways were actually as crucial to American frontierism as images of “land under of starry skies above,”³⁹ open trails, and expansive deserts. The juxtaposition of “the rugged western landscape and the transcontinental railroad” shows the dual frontierist ambitions as “complementary forms of the sublime that dramatized an unfolding national destiny.”⁴⁰

Turner’s anxiety about a concurrent loss of national identity is rendered unnecessary by modern incantations of the frontier as a spirit of inventiveness and enterprise. The assertion that “frontiers breed frontiers,”⁴¹ has proven apt, as each newly conquered wilderness has brought into view another open space on our national horizon. This description likewise characterizes American messaging of expansion as a collective movement to appropriate a space, which has given rise to a new wave of “frontierism” that makes palatable our appropriation of once-open spaces.⁴² “The frontier spirit is alive and well as Americans continue to pioneer “intellectual, social, and political” frontiers.”⁴³ As new commons appear in the American field of view, each in turn becomes the new frontier, leading to the conclusion that our national tendency towards the unenclosed frontier is less to cherish the unimproved space but instead to appropriate it. Once land became less integral to American prosperity, Turner’s ideal of the frontier remained, but

³⁹ Though “Don’t Fence Me In” was based on a cowhand’s poem, this song was not quite the widespread trail song it seems. It was actually created as a firm score for “Adios Argentina,” a 1934 cowboy musical, and popularized by “Hollywood Cowboy,” a 1944 Warner Brothers film. CHARLES SCHWARTZ, *COLE PORTER: A BIOGRAPHY* 150 (1977).

⁴⁰ Catherine Gouge, *The American Frontier: Rhetoric, History, Concept*, AMERICANA: J. AM. POP CULTURE (2007) (quoting DAVID NYE, *AMERICAN TECHNOLOGICAL SUBLIME* 76 (1994)).

⁴¹ ARCHER BUTLER HULBERT, *FRONTIERS: THE GENIUS OF AMERICAN NATIONALITY* (1929).

⁴² Modern waves of appropriation that have invoked “frontierism” as a characteristic of American identity and national tradition include the Cold War-era expansion of democracy, expansion into space, and current attempts to claim property rights in the intellectual property realm. WALSH, *supra* note 35, at 5,6.

⁴³ ARCHER BUTLER HULBERT, *FRONTIERS: THE GENIUS OF AMERICAN NATIONALITY* 246 (1929).

was retained as a more abstract concept that envisioned open space in terms of expansive intellectual resources ripe for use by entrepreneuring spirits.”⁴⁴

America: Land of Private Prosperity

The democratic commons model and the open frontier model may be understood as an evolving, albeit distinct, conceptions of American national identity that ultimately both reflect a single strand of collectively valuing unrestricted access.⁴⁵ While early American ideology located democracy in unrestricted common resources, subsequent ideologies of both frontierism and homesteading reflected two additional versions of this commitment to open opportunity. Each distinct model of property access administered fence laws in ways that supported prevailing national priorities. When early Americans prioritized the right to engage in the kind of public land use that had been prohibited in England, the national collective applied boundary rules so as to allow for customary land uses and permissible limitations to access. As American conceptions of open opportunity moved away from the unfettered right to prosper through land use, and towards unrestricted access to economic prosperity,⁴⁶ administration of enclosure laws shifted to reflect collectively held conceptions of appropriate freedom of entry. As the cowboy was free to pursue individual prosperity across fence lines when manifest destiny was palatable to the national ethos, the fence-making “rail splitter”⁴⁷ gained legal superiority in fence law as the national priority shifted towards settlement and creation of a unified market.

⁴⁴ Gouge, *supra* note 40.

⁴⁵ Freyfogle discusses the ideal of property-as-access as consistent with the American desire for a basic “competency,” or access to resources sufficient to ensure against external domination. Freyfogle, *supra* note 13, at 30.

⁴⁶ *Id.* at 37.

⁴⁷ “The “rail-splitter” image signified one who toiled on the frontier, cleared the land, and built a homestead. *See e.g.*, Norman Rockwell, *Lincoln The Rail Splitter* (1965) (depicting Lincoln as the axe-swinging rail splitter after which he stylized himself during his Presidential campaign).

What is a “good fence?”

The *Mending Wall* narrator does not condemn fences entirely, but limits his question to the fence within the poem, the wall that nature and human instinct react against. Frost’s own position vacillated between the narrator’s skepticism and the neighbor’s confidence in his father’s precept, suggesting that Frost was also unable to come to clear terms about how to distinguish good fences from bad. The narrator seems content to concede that some fences do make good neighbors, for example “where there are cows.” The *Mending Wall* narrator, however, doubts that the wall in the poem is one of those good fences, noting that this fence is neither required to keep cows enclosed nor to protect crops, and worries that it may only result in exclusion and offence.

Frost had a good relationship with his neighbor in New Hampshire, with a fence marking property lines, and was quoted as saying “good fences *do* make good neighbors, you know.”⁴⁸ On the other hand, Frost also questioned the imposition of divisive boundaries and rejected “rigid separation” in general.⁴⁹ The author claimed to be both the narrator and the neighbor, meaning that common interpretations of *Mending Wall* as advocating for or against fences are likely overly simplistic. A closer reading of the poem reveals that certain fences, “good ones,” do in fact facilitate neighborly relations. It follows then, that ascertaining the qualities and context of “good fences” would shed light on fences’ relationships to neighborly relations and why we continue to wall ourselves off from our neighbors.

The long-standing tension between custom and documentary evidence in determining legitimate division lines is well documented in court cases involving domestic boundary disputes. *Evidence in Boundary Cases*, a treatise on evidentiary practices used in nineteenth

⁴⁸ Anne M. Lange, *Fencing with Meaning: Robert Frost’s “Mending Wall,”* in BETWEEN FENCES 59 (Gregory K. Dreicer ed. 1996).

⁴⁹ *Id.* at 59.

century fence adjudication, states that the long-standing principle of establishing boundaries in “cases of doubtful construction” requires that “the claim of the party in actual possession ought to be maintained.”⁵⁰ Courts, however, have tended to resolve disputes of land borders by looking to parole evidence, which may be admitted to resolve an ambiguity or rectify an error in the written document.⁵¹ The general presumption has been that “the dotted line upon a map is not per se, conclusive evidence that the line was run,” and, unless there is also conclusive evidence that both neighbors knew and assented to the boundary lines described in the written document, courts will consider contextual evidence in their adjudication of actual boundary lines.⁵² Contextual evidence, then, carries significant evidentiary weight and is largely assessed through use, fencing, or a combination of the two.

Principles underlying fence practice and administration remain relatively constant even as fencing functions and materials evolve. Fences communities impose within internal boundaries illustrate how fence-makers self-consciously employ modes of construction to delineate boundaries between good neighbors and how they wield those same principles to exclude bad neighbors. Contemporary fence customs are largely based on early English and American conceptions of fences and law; modern fence experience “repeat[s] the modes of the first settlers in this country.”⁵³ Since the earliest legislation on the “legal fence” in America, the way a certain boundary line was used in practice could be considered equally as dispositive of boundary location as evidence offered in the form of written land grants, meaning that the visible boundary of possession was often determinative of property ownership. Crediting two potentially conflicting kinds of evidence may have exacerbated boundary disputes between adjoining

⁵⁰ RANSOM H. TYLER, A TREATISE ON LAW OF BOUNDARIES AND FENCES 282 (Albany, NY, William Gould & Sons 1876) [hereinafter A TREATISE ON LAW OF BOUNDARIES AND FENCES].

⁵¹ *Id.* at 285.

⁵² *Id.* at 286.

⁵³ THE LEGAL FENCE, *supra* note 9, at preface.

landowners, but the law attempted to resolve this by holding that sufficient markers of land boundary were to be adjudged by the ‘bystander,’ legislatively conferring substantial authority to community members to adjudicate boundaries as appropriate.⁵⁴

How does the bystander read a fence?

Given the historical and enduring rule that “[i]n all cases, sufficiency of fence to be adjudged by fence viewers,”⁵⁵ material characteristics of a fence are then essential to, and perhaps constitutive of, the divisions the fence-maker wishes to establish. Retaining practices from English common law, American law has adjudicated boundaries based on “the evidence of a bystander [] competent to prove where lines were run in a certain private survey, [whether or not] the surveyor be living.”⁵⁶ In placing authority in the common viewer, the “any man,” foundations of fence law reveal a democratic tendency underlying decisions of boundary adjudication that may help reconcile American land claims with the notion of limitless opportunity. Basing this form of decision-making on the layman’s perspective is not unlike reliance on the ‘Ordinary Observer’ in takings adjudication⁵⁷ or the ‘reasonable man’ standard in tort law. The bystander requirement, however, connotes special emphasis on the context, as a ‘bystander’ is implicitly more steeped in culturally specific understanding of boundary

⁵⁴ A TREATISE ON LAW OF BOUNDARIES AND FENCES, *supra* note 50, at 281-94.

⁵⁵ THE LEGAL FENCE, *supra* note 9, at 508.

⁵⁶ A TREATISE ON LAW OF BOUNDARIES, *supra* note 50, at 281 (quoting *Richardson v. Milburn*, 17 Md. R., 67 (1829)).

⁵⁷ In discussing “takings” determinations in property rights, Bruce Ackerman describes a similar trend of courts deferring to the discretionary judgment of the “Ordinary Observer” over more static decision-making methods of the “Scientific Policymaker.” The Ordinary Observer judges based on common, non-legal understandings of language and meaning and they tend to rule, in large part, based on visceral perception. Indeed, one criticism of deferring to Ordinary Observer judgment is the tendency toward personal biases of activism or deference when faced with a “hard case.” Kris Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1224 nn.77 (discussing BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977)). The practice of bystander-adjudicators of fence law is not as susceptible to this criticism, as the layperson-judge is resolving a dispute in which both parties and the judge are all community members influencing the kinds of divisions that will be erected within the community prospectively.

requirements and standards of the disputing parties than would be the general ‘ordinary’ or ‘reasonable’ man.

Historically, disputes involving fences have been resolved by fence-viewers from the community, and these local adjudicators made decisions based on plain view assessments of the fence, the adjoining lands, and the allegations of each party.⁵⁸ Fence adjudicators were instructed to determinate accurate boundaries; “[i]n accordance with the principle of construction that what is *most material* and *most certain* in a description shall prevail over that which is *less material* and *less certain*, it is a general rule that course and distance must yield to natural and ascertained objects.”⁵⁹ The bystander’s assessment was then recorded into deed,⁶⁰ demonstrating that material characteristics of the boundary structure influenced the way that affected communities understood the fence, and also affected such apparently objective evidence as the written deed. Early courts afforded much deference to the common-law system and upheld fence viewer-based judgments even despite the fact that the judgment was unappealable in federal court.⁶¹ The tradition of community members serving as adjudications and basing judgments on subjective impressions of boundary explains, in part, the contemporary anxiety that fences evince the proper purpose and make the appropriate statement. Though private property protections and the right to exclude have gained legal strength since colonial times, determinations of fence-sufficiency within the context of community understandings are still generally made by community members and not by an “outside” judge, a practice that recalls the democratic and common law influences of agrarian cultures that once predominated.

⁵⁸ A TREATISE ON LAW OF BOUNDARIES AND FENCES, *supra* note 50, at 365.

⁵⁹ *Id.* at 30.

⁶⁰ *Id.* at 365.

⁶¹ “The decision of the fence viewer is conclusive and the fact that it may not be appealed in federal court does not render it unconstitutional.” EMLIN MCCLAIN, 1 DIGEST OF DECISIONS OF THE SUPREME COURT OF IOWA: INSOFAR AS THEY RELATE TO IOWA LAW 784 (Callaghan & Co. 1887)) (reporting court holding in *McKeever v. Jenks*, 59-350.

How does the bystander read construction material?

Throughout history, choice of construction material for fences was often governed by the availability of financial and material resources; these factors are somewhat less constraining today. Contrary to expectation, even when fences were judged by contemporaries who were familiar with the particular conditions of hardship or material constraint, the viewer's knowledge of contextual constraints is frequently overcome by a visceral reaction to physical material of the fence and surroundings. The 1874 public outcry against "vicious wire" offers one instance of a particularly vehement public reaction based on subjective impressions of the physical characteristics that overshadowed the utility-value of the fencing. This example is especially noteworthy considering that barbed wire was invented in response to the dire lack of adequate, affordable fencing material in the West, a deficit that had reached the point of crisis.⁶² Cognizant that barbed wire was a long-awaited remedy to a national emergency, viewers nonetheless reacted to barbed wire as a "vicious,.. alien element," that affronted existing customary ways of life in the West. Because barbed wire bore none of the traditional physical characteristics of hard work in ranch culture (as did the revered split-rail fence, for instance), cutting and destroying this new form of fencing was psychologically permissible, an act that had been previously considered taboo. The rash of fence cutting in the 1880s was marked by a deliberately aggressive destruction of barbed wire, in which fence-crossers twisted and tangled the wire to protest the introduction of such a foreign element as a means to exclude the public.⁶³ Ranchers were vilified for using barbed wire and some states even passed laws against its use,⁶⁴ revealing a judgment by

⁶² John B. Jackson, *Barbed Wire Fences and the American West*, in *BETWEEN FENCES*, *supra* note 48, at 66.

⁶³ *Id.*

⁶⁴ Gregory K. Dreicer *Wired! The Fence Industry and the Invention of Chain Link*, in *BETWEEN FENCES*, *supra* note 48, at 72.

settler communities that prioritized emotional reaction over efficiency and even necessity. In the case of barbed wire, the violence associated with the material superceded even the need to retain livestock, a fundamental requirement of ranch life.

The overwhelming weight accorded the physical nature of barbed wire when balanced against the presumably compelling counterweight of a national crisis illustrates the way material characteristics may affect the viewer. Even less controversial fencing materials, however, are likewise influential in conveying a message to the viewer about the nature of the fence.

Assumptions based on fence material abound in our cultural norms. Consider, for example, the idyll associated with the wooden picket fence in contrast to traditionalist distaste displayed for the cheaper, plastic version of the new-moneyed homeowners, or the cultural association of stone with legitimacy, longevity, and pedigree, which perhaps explains architectural choices within the American educational establishment seeking to legitimate higher education institutions in America by appealing to European traditions.

In modern neighborhoods, conventions of acceptable fence construction tend to be based both on existing meaning attached certain materials and on the narrative the community has chosen for itself. In Queen Creek, Arizona, for example, natural materials are encouraged for internal fences so that they remain unobtrusive in the desert landscape.⁶⁵ Chain link fencing, on the other hand, must convey unneighborly connotations, as this type of fence is generally prohibited within communities of good neighbors and permissible only for barrier walls at the outer limits of the community.⁶⁶ As modern day industry and wealth increasingly afford the fence-maker a wide range of construction material, careful attention to selection of materials is increasingly relevant. The special weight to be afforded the way communities self-regulate

⁶⁵ Queen Creek, Ariz., Fencing Requirements for the Town of Queen Creek (2005).

⁶⁶ See, e.g., PLANNING DIV., CITY OF LAKE OSWEGO, OR., STAFF REPORT: AMENDMENTS TO COMMUNITY DEVELOPMENT CODE 2-3 (2005).

residence land is justified by the unique way in which people perceive this particular type of property. Indeed “stronger claims attach” to this type of property, because it is a tangible and long-standing kind of property right.⁶⁷ Residential property claims, in particular, “are closely bound up with personhood because [the home is central to] the way we constitute ourselves as continuing personal entities in the world.”⁶⁸ Given that residence land invokes such strong notions of personal attachment, individual choices evinced by the exterior of the property may then reflect back and present a public face for the owner as well.

How does the bystander read height?

“...Spills the upper boulders in the sun;
And makes gaps even two can pass abreast. “

Characterization of a fence as such imposes no requirement that it meet a certain standard of height. Definitions of “fence” encompass a wide range of heights; choices in this matter are governed by and indicative of the fence-maker’s purpose. Early New England colonists created cognizable fences by simply piling brush around the edges of their fields when other materials were scarce, creating mounds of bramble that served as an effective fence by visibly marking their property lines.⁶⁹ The Norman Rockwell-era front yard fence is another variety of delineatory fence. Most often, these fences are low, see-through white picket or wrought iron and are designed so as not to interfere with the visual dominance of the house. They do not so much enclose space as demarcate it, creating neat edges for gardens.⁷⁰ In this situation, the viewer may infer that this kind of fence is adequate in a relatively encroachment-free, intrusion-free

⁶⁷ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1003 (1982) (paraphrasing BRUCE ACKERMAN in PRIVATE PROPERTY AND THE CONSTITUTION.)

⁶⁸ *Id.* at 959.

⁶⁹ Anne Stillman, *Fences and the Settlement of New England*, in BETWEEN FENCES, *supra* note 48, at 17.

⁷⁰ Erin Hanafin Berg, Memphis Landmarks Commission, *Looking Back Over Fences*, THE KEYSTONE NEWSPAPER (Memphis, Tenn.), available at <http://www.memphisheritage.org/mhihost/Keystone-Fences.html> (quoting LARRY FORD in THE SPACES BETWEEN BUILDINGS).

environment in which community conflict does not necessitate stronger exclusionary mechanisms. In view of the surrounding context, the fence, though structurally insubstantial, may nonetheless be considered sufficient as a ‘legal fence.’

High fences are often intended to be privacy fences, which are specifically designed to keep prying eyes out of back yards. Within communities, these fences are granted special allowances to breach community norms for neighborly fences. Privacy fences are recognizable for unusual height, full closure (as opposed to open-railed front yard fences), and lack of ornamentation. In fact, even open-lot advocating neighborhood associations routinely approve “the typical six-foot-high, dog-eared board fence,” provided that it is limited to the backyard.⁷¹ San Antonio fencing regulations set out height requirements that otherwise strictly limit interior front yard fences to three or, if an “open fence,” four feet, yet allow for six to eight foot privacy fences, screening fences, and buffer walls at the perimeter of external divisions.⁷² These high fences express a need for protection, and, built to be taller than the full body of a standing adult, provide a shield against intrusive eyes, encroachments, or trespass.

Where these fences exist, the viewer assumes that the fence-maker felt the additional fortification was needed and tends to assume it is warranted. In one Venice Beach community, local homeowners have challenged restrictions on fence height primarily based on security concerns, maintaining that high fences are needed to ensure their family’s safety and indicating perceptions of lurking danger by saying “my fence and hedge is the only thing that makes me feel safe on my property.”⁷³ The author of a nineteenth century *Atlantic Monthly* article on rural

⁷¹ A possible predecessor to these modern privacy fences may be the Native American fortification fences which were built with similarly shaped stakes “some thirty or forty feet long,” set close together and doubly-fortified at the joints. Anne Stillman, *The Fences of New England*, in BETWEEN FENCES, *supra* note 48, at 12.

⁷² SAN ANTONIO, TEX, SAN ANTONIO MUNICIPAL CODE (UDC), ch. 35-514 (d) (2007) (as amended).

⁷³ Vince Echevaria, *Residents Raise Fence Dispute to Venice Neighborhood Council*, ARGONAUT NEWSPAPER, Marina del Rey, Ca., Feb 7, 2008, available at http://www.argonautnewspaper.com/articles/2008/02/07/news_-_features/top_stories/2v.txt.

affairs in England noted this tendency to increase fence height in response to perceived threat after observing that additional height had been added to the original structures around English residences.

In most cases I saw that the walls in such places had been raised by an addition of some three feet. The upper courses of bricks were plainly discernable to be of a make different from that of the original wall, and the joint and newest mortar could easily be detected. This seemed to show, unmistakably, an increase in the feeling of reserve, and perhaps in the necessity for it. The walls that would sufficiently exclude the public a hundred years and more ago, were found insufficient, and some fifty years ago... the barriers were made higher....⁷⁴

This bystander's conclusion about the fence-maker's state of mind is supported by fence-maker assertions in contemporary disputes, which often express desire for higher fences as a response to increases in crime. Higher fences are frequently built in response to security concerns, though arguments in these disputes give rise to questions as to efficacy of additional height and the legitimacy of the perceived need for protection. Ultimately, however, whether the outsider threat is greater in reality or the mind of the fence-maker is immaterial to the image of distrust and suspicion that a high fence conveys.

How does the bystander read opacity?

“Something...makes gaps even two can pass abreast.”

“The gaps I mean,

No one has seen them made or heard them made.”

Regulations as to the amounts of open space and solidity within the fence attest to the atmosphere the fence regulator seeks to effect. Internal fence codes of planned communities strictly regulate these construction choices, providing minimum openness standards for interior

⁷⁴ THE LEGAL FENCE, *supra* note 9, at app. 4 (Notes on English Fencing and Fence Law).

fencing of fifty to seventy percent.⁷⁵ Queen Creek, which “prides itself on maintaining its rural character and open space,” mandates that intra-community fences be constructed of natural materials and maintain at least fifty percent of the surface area as open-rail, “view fencing.” In contrast to the open-fence policy that applies to any fences in public view, walls designated as barriers are permitted to be almost twice as high, must be solid, and may not bear any opening or slot large enough for use as a foothold. Inside the Queen Creek borders, the open-community message is evident in low “view fencing” that blends in with the natural landscape. The limits of this community are marked by solid barrier walls that create a stark and insurmountable division, and clearly announce the communal desire to exclude the unknown outsiders from the neighboring city.⁷⁶

In each set of self-determined internal rules, communities chose openness within their borders and preferred that solid walls be kept out of public view. In describing the Queen Creek community, planners tout their ability to maintain a small town atmosphere and shield residents from crime, instability, and low air quality- all potential intrusions that threaten urban dwellers of nearby Phoenix. Exterior security walls offer assurance that the name-knowing counterperson is a trusted “in-member” and not contemplating identity theft, fraud, stalking, and other such “outsider” crimes. In the observers’ eyes, it matters not whether the message-laden Queen Creek fences were deemed necessary to ensure security or were self-consciously enacted to evoke the image of a “first name” community, where a person behind the counter isn’t an uncaring stranger, but someone who will know you by name;⁷⁷ the pattern illustrates a widespread cultural

⁷⁵ See, e.g., COMMUNITY DEVELOPMENT CODE FOR THE CITY OF LAKE OSWEGO, OR., CMTY. DEV. CODE; FENCING REQUIREMENTS FOR THE TOWN OF QUEEN CREEK, *supra* note 65; SAN ANTONIO MUNICIPAL CODE, CH. 35-514, *supra* note 72.

⁷⁶ QUEEN CREEK, ARIZ., TOWN ORDINANCE 47-94 (2008), *available at* <http://www.queencreek.org/Index.aspx?page=401>

⁷⁷ TOWN OF QUEEN CREEK, ARIZONA, COMMUNITY PROFILE (2008), *available at* <http://www.queencreek.org/Index.aspx?page=22>.

attachment to open spaces amongst trusted groups and a collective determination that solid exterior walls are necessary to allow for trust within the internal group. In these cases, it seems, the community has made a clear decision as to “what [they were] walling in or walling out,” and, through that choice, demonstrated the instances in which they cared “to whom [they were] like to give offence.”

What does attention to aesthetics say?

“Some [boulders] are loaves and some so nearly balls....
‘Stay where you are until our backs are turned!’”

A fence-builder’s attention to visual appearances demonstrates regard for the viewer’s ability to appreciate aesthetic qualities and makes a statement as to the fence-maker’s personal priorities. Personal property, like residential land, is so closely related to an owner’s sense of identity that it is often a site of expression of the owner’s character, as it “encompass[es] future projects or plans, as well as past events and feelings.”⁷⁸ If we ascribe to Locke’s contention that mixing labor with property imbues property with a greater tie to a person’s sense of self,⁷⁹ the very act of improving property by building a fence makes reading the structure as expressive of the owner’s character all the more warranted.

Good homeowners, in keeping with social conventions, show respect to neighbors by placing the more finished side of the fence facing outward, so that structural support and raw edges are not seen by the public.⁸⁰ Where resources and circumstances permit, ornate archways, enlarged gateways, and columnar frames may offer incomers an “enhanced reception” and “provide a useful, ceremonial symbol from the moment of entering.”⁸¹ Ornamentation and decorative elements designed to appeal to the viewer imply a desire for dialogue and elicit a

⁷⁸ Radin, *supra* note 67, at 968.

⁷⁹ *Id.* at 965 (explaining Locke’s theory of labor as a basis for property claims).

⁸⁰ Phillip Dole, *The Picket Fence at Home*, in *BETWEEN FENCES*, *supra* note 48 at 31.

⁸¹ *Id.* at 30.

response that is, predictably, distinct from the unilateral message that flat exteriors send to the viewing public.

Aesthetic expression enables the fence-maker to send a message about themselves to the viewers. Arguably, all affirmative construction initiatives provide some indication of the designer's character or motive, though the adorned fence is notable as a self-conscious endeavor to convey a message that offers the fence-maker an additional opportunity to make a recursive statement on the original statement made by building the fence. Mural walls exemplify this dialogic element by specifically drawing on decorative mechanisms to engage with the viewer; "where exteriors... have been personalized by the community through art, the spaces nearby become real places for social interaction even though they are ragged and formless."⁸² Because the aesthetic character of a fence can evoke strong reactions, some communities, like San Antonio for instance, explicitly justify fence regulations as an attempt to prevent blight.⁸³ Other cities, like Oswego, minimize affirmative design requirements, but make clear the limits of acceptability by prohibiting chain-link fencing on for aesthetic reasons.

Lack of individual ornamentation is similarly illustrative of the builder's mindset, as aesthetic choices must be made during construction, which includes the decision to disregard conventions. The emotional impact of matte, windowless walls, as found in institutional settings, evidence the subjective effect of a decision to ignore fundamental aesthetic norms. To prevent this atmosphere inside community boundaries, some municipalities impose fencing codes that mandate incorporation of a design element to break up unadorned stretches of solid fencing.⁸⁴ In some cases, the absence of aesthetic individuality is attributable to the community's chosen scheme of visual uniformity, the rigor and detail of which is dependant on the dictates of

⁸² LARRY R. FORD, *THE SPACES BETWEEN BUILDINGS* 57 (2000).

⁸³ SAN ANTONIO MUNICIPAL CODE, *supra* note 72.

⁸⁴ See CITY OF LAKE OSWEGO, *supra* note 75, sy, LOC. 45.15.025 50.66.051, 50.66.030, 45.15.025.

strongly regulated neighborhood associations. Even so, an individual's willingness to give up the authority of choice in constructing their own statement, as required by many gated community fence regulations, is likewise significant as a statement of personal priorities.⁸⁵

The chances for good neighborhood

“...just another kind of outdoor game,
One on a side. It comes to little more...”

Fences as Community-Organizing

Community creation of and adherence to systems of fence-signaling effectively addresses what Carol Rose calls the “conundrum of public property” and orders what courts have ‘disapprovingly called the ‘unorganized public.’⁸⁶ Studies on land-use customs consistently show that individuals who construct fences in accord with the accepted fence language can reasonably expect their rights to be respected without having to resort to the legal system.⁸⁷ Even when the formal legal system is invoked, fence-law tends to be rooted in common practice and relies on a bystander as adjudicator, meaning that constructing fences in accord with community morays assures rights within the formal legal system as well. Even in cases at one end of the exclusionary spectrum, in which “[r]esidents of such [gated] communities are making an

⁸⁵ Cf. Echevaria, *supra* note 73 (reporting on community members challenging fence restrictions as infringement upon their freedom to decide for themselves).

⁸⁶ Rose, *supra* note 34, at 730, 744 (discussing custom as “an informal technique for managing a commons). *See also* Smith, *supra* note 15 (submitting boundary placement as a non-legal method of mitigating the destructive overuse of public resources by the community-owners of a semi-commons.) Smith’s semicommons consists of both private and community interests that impact each other, and his theoretical framework both rationalizes and justifies boundary regulations in municipalities and neighborhoods.

⁸⁷ *See, e.g.,* Ellickson, *Of Coase and Cattle*, *supra* note 4, at 677 (“To discipline deviants, the residents of rural Shasta County use the following four types of countermeasures, listed in escalating order of seriousness: (1) self-help retaliation; (2) reports to county authorities; (3) claims for compensation informally submitted without the help of attorneys; and (4) formal legal claims to recover damages. The law starts to gain bite as one moves down this list.”). If Ellickson’s findings on Shasta County social ordering hold true more broadly, then having an effective language in which to signal to potential deviants is crucial to have any power in the first step of the process. In terms of fence-law, the substantial influence of common law on formal fence law makes the need for boundary compensability crucial at every stage of social control, whether it begins at the legal system or only ends there.

unambiguous statement that they expect their right to exclusive use of community property to be enforced,”⁸⁸ the in-group agrees upon a desired result and then invokes principles of design and social psychology to elicit that outcome. This ‘mending wall’ process requires the community to convene and agree on mutually acceptable standards that function independently of the legal system. The way in which the negotiations of these norms, the act of mending wall, is carried out is crucial to the character of the neighborhood attached; this relationship is illustrated well by considering examples of two very different versions of neighborly wall-building.

Bad Fences and Bad Neighbors

Partition walls provide an example, admittedly a rather obvious one, of a boundary marker that is unlikely to produce good neighborly relations. In contrast to division fences,⁸⁹ partition walls require neither the consent nor cooperation of the adjoining landholder. Strictly contained on one of the two adjoining properties, these fences tend to increase neighborly conflict that is often irresolvable through community regulatory mechanisms and may necessitate legal resolution. Partitions may be exactly the kind of wall that *Mending Wall*’s narrator is hesitant to construct, at least not without knowing “what [he] was walling in or walling out, and to whom [he] was like to give offence.”

While the one-sided nature of partition fences may, indeed, ‘give offence’ to neighbors, it seems likely that the form is dictated by the function and the offense given is the impetus for, instead of the unwitting result of, the structure. Partition fences within the global community

⁸⁸ Georgette Chapman Phillips, *Boundaries of Exclusion*, 72 MISS. L. REV. 1287, 1302 (2007).

⁸⁹ Early English and American common law distinguishes between partition fences and division fences as conferring different duties on adjoining landholders. Division fences were often of the open rail variety, and appropriately constructed in equal parts on the land of each adjoining owner. Both neighbors shared responsibility for construction and repair, which indicates a relationship of cooperation underlying the entire enterprise and suggesting that fences, in these types of circumstances, may indeed act as unifiers. Unlike traditional inter-neighbor division fences, partition fences are a more one-sided undertaking. A TREATISE ON LAW OF BOUNDARIES AND FENCES, *supra* note 50, at 344, 362-363 (describing statutes and case law on division fences between neighbors).

illustrate the phenomenon of underlying conflict precipitating, as opposed to stemming from, these structure. These walls are rare and generally only constructed on a foundation of prior-given offence. The Berlin Wall and the Jerusalem Wall, both examples of “apartheid walls,” were erected amidst cross-border hostility so irreconcilable that one side eventually deemed physical boundary the only possible way to ensure safety. Arguably the most successful of these partition walls, the Jerusalem wall, has resulted in lower rates of delinquency and individual attacks, but has also created such animosity that Israel has become increasingly the target of international hostility. Since building the “temporary” partition that divided Jerusalem from Palestine, Israel’s relationship with nearly all of their neighbors has worsened, necessitating additions to the wall with Palestine and plans to walls themselves off from Egypt as well. In the above-mentioned example, the security wall was built following decades of war, hundreds of instances of violence each year, and as a final measure of protection when all communication failed.

Aesthetically, these apartheid walls express communicative disconnect. Read in the language of fence norms, the imposing, obscuring walls decorated only with tangles of barbed wire attest to the fence-makers’ own prejudices as well as their message. In unambiguous terms, the structure tells the fence-viewers to remain on their side of the fence, that their presence is not desired. A perhaps unintended message this wall sends, however, is the derivative statement that the builder considered communication so valueless that they deemed it a reasonable sacrifice when weighed against the benefits of a physical barrier. In Coase’s Farmer-Rancher paradigm and Ellickson’s Shasta County studies of transaction rules and incentives, although reaching distinct conclusions about motivating factors, both revealed a similar result of neighborly

cooperation resulting in “coordination to mutual advantage.”⁹⁰ The partition wall-builder’s unwillingness to attempt this coordination then, insinuates that one reason might be due to that a perceived lack of mutual advantage.

The danger in building a wall, then, is less in ‘giving’ offence or incurring bad neighborhood, but instead in foreclosing opportunities to ‘meet and walk the line,’ to negotiate norms upon which good neighborhood depends. The proposal for the border wall between the United States and Mexico, for example, has elicited widespread criticism from adjoining landowners on both sides of the fence, a group of critics that even includes parties ideologically aligned with the stated goal of the fence planners.⁹¹ That landowners on both sides of the fence, the majority of which is still in its conceptual stage, have already turned litigious exposes the divisiveness of the wall, and offers little promise for improved relations in the future. While fence norms may not inhere across distinct communities, invoking legal arbitration is universally understood to be adversarial. “To hire an attorney is to escalate a conflict. A good neighbor does not do such a thing because the ‘natural working order’ calls for two neighbors to work out their problems between themselves.”⁹² ‘Worki[ing] out their problems between themselves’ may be exactly the mending wall process so enduringly characteristic of good neighbors.

The argument that security, not friendship, is the purpose for the border fence, does not necessarily diminish the importance of attending to the message the fence conveys; a crucial element of ensuring security is a good relationship with neighbors. When building a partition, the more pressing question is not what kind of fence should be built as an alternative, but what message the action of wall-building sends and whether that message is conducive to *either* a

⁹⁰ ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 4, 138 (1991) (hereinafter ELLICKSON, ORDER WITHOUT LAW).

⁹¹ See, e.g. Suzanne Gamboa, *Texas Officials Sue U.S. Over the Border Fence*, WASH. POST, May 16, 2008.

⁹² Ellickson, *Of Coase and Cattle*, *supra* note 4, at 683.

good fence or good neighborly relations. Physical partitions are total divisions, and once physically created, perhaps more difficult to tear down because of the psychological divide the physical structure has imposed.⁹³ Partitions are not made simply by setting “one stone on a stone” but are constructed with both physical materials and psychological messages; even after the stone structure has disappeared, neither bulldozers nor treaties can remove the psychological divisions that remain lingering in the collective psyche.

Good Fences and Good Neighbors

In rural Vermont, requirements for a ‘good fence’ change with the seasons. In the summer, a good fence, in the eyes of a Vermont bystander, is sufficient if it adequately constrains livestock. From May through November, fences are “an expedient” for “growing crops and grazing cattle” and must be properly maintained for those purposes. Beginning in November, however, good neighbors practicing good fence conventions must “open their gaps” and remove the wire between fence posts.⁹⁴

This summer-winter dichotomy of land-use rights has evolved as Vermonters have struggled to establish working order amidst harsh conditions of New England weather and farm life. Indeed, this system of “unwritten law” functions primarily as “just a natural way of doing things,”⁹⁵ though may be enforced through a widely followed regulatory system that functions through social penalty and self help mechanisms instead of legal action. From November through May, fencing cutting is an appropriate self-help remedy to enforce the open gap rule. From May through November, cutting a neighbor’s fence would be unthinkable, and even entering their

⁹³ For a discussion of the effect of physical structures on individual and collective psychology, see generally CHRISTOPHER ALEXANDER, 9 *THE NATURE OF ORDER*, bk.1 372, 372 n.1 (2002) (describing different studies attempting to define and quantify the correlation of physical structure, mental state, and community well-being).

⁹⁴ A. W. Sadler, *The Seasonal Context of Hallowe’en: The Unwritten Law* in HALLOWEEN AND OTHER FESTIVALS OF DEATH AND LIFE 175 (Jack Santino ed., 1994)

⁹⁵ *Id.* at 174.

land is taboo, “during the summertime, you wouldn’t think of walkin’ through somebody’s hayfield, or cornfield, or oatfield, really, unless you had a good reason to.”⁹⁶

While traditionalist Vermont property owners view appropriate land-use rights as dependent upon season, the law makes no such temporal distinction. Local law, however, attempts to merge conflicting conceptions of property rights in much the same way that Holmes reconciled conflicting private and public property rights by privileging the owners’ exclusive property right, but requiring that the owner who wishes to exercise those rights make special efforts to do so. While fences would normally be sufficient evidence of an owner’s intent to exclude the public, Vermont customary practice is so hostile to wintertime fences that the property owner bears the burden of giving neighbors additional notice of their intent to exclude. Local code provides that, in the wintertime, exclusivity may be achieved through a costly and complicated method of posting notice, which is designed to discourage owners from exercising this property right. “Posting” requires placing “No Hunting and No Trespassing” signs and a single strand of wire around the perimeter of the property. In addition, the owner must register the property as ‘posted land’ with the town clerk and the fish and game department; if all the posting requirements are not met, “the land is not truly posted, and is therefore open to all who care to use it.”⁹⁷

The change in ‘good fence’ characteristics reveals certain fence-construction qualities as constitutive of good neighborly practice by isolating the underlying practices that make each set of characteristics appropriate in context. Good fences, in the summer, make good neighbors by confining livestock and must be properly maintained and sufficiently high and sturdy to constrain cattle, thereby preventing damage to the neighbors’ crops and grass. Fences maintained

⁹⁶ *Id.* at 176.

⁹⁷ *Id.* at 175-176.

in accord with these norms are consistent with ‘legal fence’ requirements, but need no such legal benediction to defend against property infringement claims. Liability and damage claims, where they do exist, are likewise resolved within the neighborly ordering system. In the winter, however, when cows cannot wander, neighbors join in cooperation again to remove the unnecessary fences that place bounds on the wintertime desire to roam. The fence that was good in September, if left standing in November, brands the owner as selfish, ‘plain mean,’ and a declaration of animosity towards his neighbors. The resulting Vermonter practice of ‘mending fences,’ in which neighbors twice annually ‘meet [figuratively] to walk the line’ and structure property divisions to effect the boundaries they deem necessary and appropriate. In this sense, both the neighbor and narrator’s sides are given credence, and it becomes clearer how and when good fences do make good neighbors.

Conclusion

Neither *Mending Wall* neighbor fully articulates the value in the relationship between good fences and good neighbors, but the cooperation underlying the mending ritual illustrates a mutual social benefit in mending wall that runs deeper than structural repair. In the end, Frost’s conflicting instincts about building fences, voiced through the neighbor’s faith in tradition and the narrator’s skepticism, are left unresolved. Both intuitions are warranted by conventions of fence-practice. The proposition that good fences make good neighbor is phrased backwards, and more aptly phrased ‘good neighbors make good fences.’ Conversely then, bad neighbors make bad fences and bad fences make even worse neighbors.

Boundaries that communities impose internally demonstrate that walls have uses and effects beyond mere division. Hindsight review of fences designed to enclose, exclude, protect,

or demarcate reveals that the very act of creating a physical structure necessarily invokes all of the aforementioned functions. The multiplicity of uses may explain why neighbors continue to build walls, but the often-unconsidered multiplicity of effects explains why, in many cases, unintended consequences have led to boundary disputes.

Because residence-land is so bound up with personal identity,⁹⁸ it makes sense that interactions occurring at the borders of that property would be highly sensitized; perceived infringement on or affront to that personalized property would be particularly inflammatory. However, because of the length of relations between adjoining landowners, those situations are particularly well suited for regulation by private agreement and compromise.⁹⁹ The element of personal identity at stake in these matters likely explains why fence adjudication has been largely strictly through community interpretive devices that rely on localized interpretations of meaning and propriety. Even when litigation is invoked, it is usually a last resort. In addition, legal adjudication of fence and boundary disputes tends to generally defer to community conventions of boundary resolution. The social connotations of invoking litigious relations are often more injurious to prospective community interaction than the court-ordered outcome of the judgment, as the party in breach of community norms risks being branded as poorly-socialized in community norms, “‘bad apples,’ ‘odd ducks,’ or as people not aware of the natural working order.”¹⁰⁰ In this way, negative effects of partition-building reverberate beyond the purpose or even the message to the adjoining landowner, and the message inadvertently sent to the broader public community is that the builder cannot comport with norms of cooperation, that they may be a ‘bad apple.’

⁹⁸ See Radin, *supra* note 67, at 968.

⁹⁹ “A farmer and a rancher who own adjoining lands are enduringly intertwined, and therefore readily able to employ nonlegal methods of dispute resolution.” Ellickson, *Of Coase and Cattle*, *supra* note 4, at 677.

¹⁰⁰ Ellickson, *Of Coase and Cattle* *supra* note 4, at 687.

Fence-mending may be, as Frost says, “just another kind of out-door game.” The physical structure often is, as the narrator suggests,¹⁰¹ functionally unnecessary, but playing that game is useful nonetheless.¹⁰² The fence structure may be purely symbolic, but the lack of obvious utility does not render it useless; “false folklore” may be advantageous for internal cohesion when it harms no one and is merely a useful myth.¹⁰³ By instituting visible structures around which to order a community, groups have the opportunity to reframe values and define the collective. Fences of partition, built between neighbors but without the cooperation or communication of the adjoining party, are unlikely to create a meeting of the minds where none existed before. Conversely, however, increased communication, even if only to agree upon acceptable division practices, draws in an inherently democratic undercurrent to the relationship, as “[s]ocial interactions profoundly affect the quality of civic life” and “random face-to-face interactions among people of different ethnic, socioeconomic, and generational backgrounds have a profound effect on the level of trust and, hence, social capital that individuals develop.”¹⁰⁴ While the contention that “such interactions influence individuals to be more “other-regarding,”¹⁰⁵ is more idealistic than the current social context seems to warrant, increasing dialogism inherently situates division-creating initiatives more in line with the enduring element of American identity that has entwined democratic opportunity and individual property rights.

The pretend fortifications and functionless enclosures created, the games that building fences requires provide an answer to the narrator’s plaintive question, “why do [fences] make good neighbors?” It is not, however, the physical fence that makes the good neighbor. Instead, it

¹⁰¹ “There where it is we do not need the wall...”

¹⁰² Game theorists, in fact, describe interactions as occurring within this type of continuing neighborly relationship “iterated games.” ELLICKSON, ORDER WITHOUT LAW, *supra* note 90, at 164.

¹⁰³ *Id.* at 118.

¹⁰⁴ Phillips, *supra* note 88, at 1313.

¹⁰⁵ *Id.*

is the back and forth, the way 'mending wall' brings each neighbor from 'beyond the hill,' to renegotiate the setting of the wall between them once again, and agree on the set of spells and stone structures upon which their relationship will rest.