

3-2017

## Reconstructing Local Government

Daniel Farbman

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### Recommended Citation

Daniel Farbman, *Reconstructing Local Government*, 70 *Vanderbilt Law Review* 413 (2019)

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# VANDERBILT LAW REVIEW

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VOLUME 70

MARCH 2017

NUMBER 2

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## ARTICLES

### Reconstructing Local Government

*Daniel Farbman\**

*After the Civil War, the South faced a problem that was almost entirely new in the United States: a racially diverse and geographically integrated citizenry. In one fell swoop with emancipation, millions of former slaves were now citizens. The old system of plantation localism, built largely on the feudal control of the black population by wealthy white planters, was no longer viable. The urgent question facing both those who sought to reform and those who sought to preserve the "Old South" was: What should local government look like after emancipation? This Article tells the story of the struggle over the answer to that question. At the center of that struggle is an untold legal history of local government reform during Reconstruction. In the years immediately after the Civil War, idealistic Yankee reformers went south with the explicit aim of remaking the "fabric of southern culture" by rebuilding the South in the image of their northern homes. Specifically, in North Carolina, Virginia, and South Carolina, these reformers rewrote state constitutions to replace the plantation and county court with townships modeled on the New England town. Southern conservatives resisted the new townships, understanding them as foreign impositions targeted to destroy*

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*their old way of life. Within a decade they had dismantled the new townships and built the foundations of a new Jim Crow local order rooted in the county and approximating a return to the plantation. By telling this new history, this Article contributes to present scholarship in at least two ways. First, the story highlights a binary struggle between “communitarian” localism embodied in the civic participation of the New England town and “proprietary” localism embodied in the private power of the plantation owner. This struggle was framed with crystal clarity during Reconstruction, but it remains a powerful analytic tool for understanding today’s debates and struggles over local government. Second and relatedly, this history reveals the extent to which racial anxiety shaped and continues to shape local institutions. The communitarian township experiment was fueled by a vision of racial equality—and the white supremacist response to it was fueled by resentment and resistance to that vision. When we think about localism and racial inequality, we tend to think about the responses to school desegregation in the mid-twentieth century when racial resentment and fear during the “Second Reconstruction” drove white flight and contributed to resegregation through suburbanization. This Article shows that we may be looking at the wrong Reconstruction. In fact, the pathologies of local government, racial segregation, democracy, and protection of property were framed after the Civil War, in the crucible of a direct conflict between utopian racial egalitarianism and white supremacy.*

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## INTRODUCTION

The township system is an [e]ducator [i]n Self-Government, and has been commended, at all times, by political thinkers, who have at heart the good of the people. It is one of the grandest of political principles, leaving absolutely to neighborhoods the right to govern themselves in local matters . . . .<sup>1</sup>

Slavery is an indispensable police institution . . . .<sup>2</sup>

In 1860, the population of Granville County, North Carolina, was evenly split: half of the residents were free and half were slaves.<sup>3</sup>

1. *Address to the Voters of North Carolina*, DAILY CONSTITUTION (Raleigh, N.C.), July 5, 1875, at 3.

2. GEORGE FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS 98 (Richmond, A. Morris 1857).

3. See Rosser Howard Taylor, *Slaveholding in North Carolina: An Economic View*, in 18 THE JAMES SPRUNT HISTORICAL PUBLICATIONS 64 (R. D. W. Connor et al. eds., 1926). While the vast majority of the black population was enslaved, there were more than nine hundred free blacks living in Granville County in 1860. See JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA 17 (1943). Granville County, because of its even racial split and fortuitously thorough

Local government for the free white citizens took the form of the old county court system—appointed county justices of the peace (generally drawn from the social and economic elite) ran the business of local government.<sup>4</sup> Where slavery was strong (as it was in Granville County), the counties were largely controlled by planter elites.<sup>5</sup> In every instance county governments were primarily dedicated to protecting the property rights of residents. Counties provided courts and minimal law enforcement, but few other services (schools, aid to the poor, etc.).

One reason that the counties were weak was because another, much stronger system of local government existed alongside and within them. The slaves of Granville County were subject to the despotic feudal control of slaveholders on their home plantations.<sup>6</sup> With a few minor limitations, slaveholders had wide jurisdiction over slaves' bodies and social lives.<sup>7</sup> Although there were certainly circumstances when slaves came into contact with the county court system,<sup>8</sup> plantations were the primary unit of local government for the vast majority of the black population.

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recordkeeping, has been the focus of a number of studies of North Carolina in the nineteenth century. Granville County was the main site of study for Laura Edwards's *Gendered Strife and Confusion: The Political Culture of Reconstruction* and Sharon Ann Holt's *Making Freedom Pay: North Carolina Freedpeople Working for Themselves, 1865–1900*.

4. Elites controlled local government as well. Except for sheriffs and county court clerks, all county officials were appointed. Nominated by state legislators and confirmed by the governor, the powerful justices of the peace held life tenures. Virtually omnipotent in local affairs, they selected most other county officials, set tax rates, determined road-building policies, established schools, and provided for aid to the poor. In their judicial capacity they issued all writs necessary for legal activities. Selected from the "best families" of each county and secure in the values of their social class, the justices of the peace benefited their own kind in the conduct of local affairs.

FRED ARTHUR BAILEY, WILLIAM EDWARD DODD: *THE SOUTH'S YEOMAN SCHOLAR* 4 (1997).

5. Isabel Ferguson's description for Virginia applies well to eastern North Carolina: "The county government, as adopted in Virginia, was a well established organization of great influence when it was taken over by the planter to further his ends." Isabel Ferguson, *County Court in Virginia, 1700–1830*, 8 N.C. HIST. REV. 14, 14 (1931).

6. PHILIP D. CURTIN, *THE RISE AND FALL OF THE PLANTATION COMPLEX: ESSAYS IN ATLANTIC HISTORY* 12 (1998) ("[T]he owner not only controlled his work force during their working hours, he also had, at least de facto, some form of legal jurisdiction. His agents acted informally as policemen. They punished most minor criminals and settled most disputes without reference to higher authority.").

7. While there was law on the books that allowed a master to be prosecuted for killing one of his own slaves, any violence short of killing was rendered explicitly permitted by Justice Ruffin's famous ruling in *State v. Mann* that "the power of the master must be absolute, to render the submission of the slave perfect." *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829).

8. Ariela Gross has documented the important (if largely offstage) role that slaves played in the daily business before the antebellum southern courts. See generally ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* (paperback ed. 2006). More recently, Laura Edwards added to this research documenting the

In 1865 at the end of the Civil War, the once stable systems of local government in Granville County (and across the South) were broken. The feudal control of the planters on their plantations was eradicated with emancipation. With the stroke of a pen at Appomattox, the county's citizenry had doubled. More importantly, that citizenry was, for the first time in American history, evenly split between white and black voters. The weak county government that had been run by the planters to protect their property was now tasked with representing and governing a newly integrated population which presented problems of local governance that had never been faced. All of the thorny difficulties of Reconstruction were present: How should freed slaves be integrated into the political community? How should they live as neighbors with their former masters? How should property, power, wealth, and influence be redistributed? How should the South be modernized, reborn, protected? In the face of all this, unable to return to the old system under slavery or chart a path forward, local government floundered and failed.<sup>9</sup> What remained was a question: What would local government look like in the post-bellum South?

This Article tells the story of the struggle over the answer to that question. At the center of that struggle is an untold legal history of local government reform during Reconstruction. In the years immediately after the Civil War, idealistic Yankee<sup>10</sup> reformers went south to help renovate the conquered Confederate states. These men and women were not shy about their desire to remake the South in the image of their northern homes. Specifically, in North Carolina, Virginia, and South Carolina, these reformers saw the need for functional local government and embarked on a reform experiment that sought to remake the very fabric of southern local government by imposing the model of the New England town through the new state constitutions.

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ways in which slaves, as part of the antebellum southern local milieu, exerted influence on the lived experience of local law. *See generally* LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009).

9. Laura Edwards describes "the inability of Granville County's conservative elites to control public space" in 1867 when, struggling to enforce the law and keep the peace, the white elites of the county sought the aid of the hated Freedmen's Bureau. LAURA F. EDWARDS, *GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* 14 (1997).

10. Throughout this Article I will use the term "Yankee" not in the denigrating sense as southerners at the time understood it, but rather to name a particular strain of self-identified proud northerner. To be a Yankee was to believe that the North and northern politics and culture were beacons of progress, prosperity, and republican virtue.

Seeing Reconstruction through the history of what I will call the “township experiment” changes the focus from state and national institutions to the local, where the lived difficulties of the post-slavery, post-war South were at play.<sup>11</sup> The problem of local government in Granville County was typical of the problem across the region. Emancipation and integration were overlaid onto well-worn social, political, and class structures, which combined to create a strong sense of a southern “way of life” independent of government institutions. Even where the township experiment was not proposed as a solution, the struggle between radicals supporting Reconstruction and conservatives pushing for southern Redemption was a local one.<sup>12</sup> Although the township experiment was only tried in three states, it was less an outlier than a window into the complex local politics of Reconstruction. The resistance to (and defense of) the townships where they were imposed would have been much the same had it been imposed elsewhere. All across the South, conservatives were struggling to transition from plantation localism to what would become Jim Crow localism. The otherwise subtle dynamics of this transition are shown in stark relief by the fight over the townships. Understanding Reconstruction as a local struggle—and struggle over control and design of local government—traces new lessons out of Reconstruction and into the present. Among the many that are latent in the history, I present three that are essential to the argument of the Article.

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11. Mine is hardly the first legal history of Reconstruction to focus on local experience. Laura Edwards’s study of Granville County in *Gendered Strife and Confusion* and her more recent *Legal History of the Civil War and Reconstruction* both observe the legal imprint of Reconstruction on the daily, local lives of southerners. Still, the vast majority of legal history focused on Reconstruction has understood Reconstruction in terms of federal law: the primary contributions of Reconstruction to American law were the “second founding” embodied in the Reconstruction Amendments. Originalists have delved into the history of the amendments to justify *Brown*. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). Historicists of other bents have been drawn like moths to a flame to the tantalizing possibilities of the amendments, choked off by the courts. See, e.g., Jack Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010) (“Modern doctrine has not been faithful to the text, history, and structure of the Thirteenth, Fourteenth, and Fifteenth Amendments. These amendments were designed to give Congress broad powers to protect civil rights and civil liberties; together they form Congress’s Reconstruction Power.”). A full catalogue of the articles claiming new understandings of federal law drawn from historical accounts of federal Reconstruction would take up far too much space. Suffice it to say that much less work has been done on the way that the local legal changes during Reconstruction have shaped today’s local government law.

12. While Reconstruction needs no definition, Redemption may. I use Redemption here consistently with the historical scholarship to refer to the movement of southern conservatives and white supremacists to end Reconstruction and “redeem” the South by returning its government to the hands of the white ruling class that had held power before the war. See generally NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR (2007).

First, close attention to the fight over the township experiment reveals a fundamental disagreement between radicals and conservatives over what local government was and should be. Radicals were communitarian localists.<sup>13</sup> They believed that local government was a vehicle of civic education, democratic engagement with one's fellow citizens, and prosperity. Their view echoed John Adams's definition of the pillars of the New England town as communal gatherings and collective effort: town meetings, town militia, town schools, and town church.<sup>14</sup> Conservatives, by contrast, were proprietary localists. Local government should not be a forum for bringing people together, but rather a tool for protecting private property. Their model was plantation localism, where the feudal plantation was protected by the county court. Under plantation localism, local government's role was not to build community, but to protect the right to exclude others from one's property, family, or society.

This struggle was not new. The history of American local government law is, I propose, a history of the struggle between these opposing views of what local government should be.<sup>15</sup> Communitarian

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13. I am using "localism" in a specific sense throughout the Article. In his famous two-part description of "Our Localism," Richard Briffault defined localism as a position in a debate: localists are "proponents of greater local power." See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990). I am using it differently. For me, localism refers to a theory of how local governance ought to work—what is local government good for. It is possible, given this definition, to imagine a localism that believed that local government was good for nothing and should be abolished. Importantly, localism is different from local government in the same way that theory is always different from practice. The structures of local government law are animated by localism, but not coextensive with it.

14. John Adams, Diary Entry (July 21, 1786), in 3 THE WORKS OF JOHN ADAMS 400, 400–01 (Charles F. Adams ed., Boston, Charles C. Little & James Brown 1851).

15. Like any binary structure, communitarian localism versus proprietary localism erases layers of nuance. On the one hand, one could easily subdivide each position into a number of other more finely drawn descriptions. Jefferson, for instance, while a communitarian in the southern context (see *infra* Part I), was far more interested than Adams in the individual civic experience in a well-functioning local government. He emphasized that "by making every citizen an acting member of the government . . . [the ward system] will attach him by his strongest feelings to the independence of his country, and its republican constitution." Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 7 THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE 9, 13 (Henry Augustine Washington ed., Phila., J.B. Lippincott & Co. 1871). On the other hand, as I will discuss further in Part III and in future work, the fact that the two positions are largely rhetorical leaves open room for opportunistic shifting back and forth. This is most likely when one can construct an argument that it is the true will of the community that local government protect private property. Despite all this, I will persist in using the binary because it reveals more than it obscures across the broad sweep of the story. The fundamental differences between communitarian and proprietary localisms are greater than the smaller internal differences within those camps, and while the rhetorical shiftiness undermines



localism and proprietary localism clashed and mixed in the Early Republic, with northerners generally embracing the more communitarian model of town localism, while southerners embraced the proprietary plantation ensconced within the county. These competing conceptions of localism not only shaped the legal landscape of the westward-expanding empire, they also fueled the sectional conflict that would boil over in the Civil War.

Fast-forwarding past Reconstruction and Redemption, the same tension between communitarian and proprietary localism still structures the way we think about local government law.<sup>16</sup> Look at nearly any contemporary local government problem and you will find echoes of these two views of localism. Present-day communitarian localists argue that authentically participatory local democracies can govern well, instruct citizens in civic virtue, and heal racial, economic, and class divisions within a community. Present-day proprietary localists continue to respond that local control means the right to exclude, the power to protect property (including from taxation), and is a tool for protecting and rationalizing racial, economic, and class segregation. The result is often a confusing mixture of the two with the virtues of local democratic control being invoked to justify proprietary ends.<sup>17</sup> As I argue in Part III, the history of the township experiment helps alleviate that confusion by showing that there can be multiple rationales for local control. Sometimes advocates make communitarian arguments to justify local control, and sometimes they

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claims of intellectual purity, it also reinforces the fact that the two accounts of localism are, indeed, distinct.

16. Indeed, versions of this binary are all too familiar in contemporary debates within the local government law scholarship. In 1990 Richard Briffault drew a distinction between Gerald Frug's "participatory" localism and Charles Tiebout's "economic" localism. Participatory localism advanced the utopian hope that cities could be sites of participatory democracy and thus social justice. By contrast, economic localism justified the city (but primarily the suburb) as the most economically efficient way of organizing government. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 393–403 (1990). This split between participation and efficiency maps onto a larger descriptive account which frames suburbs as exclusionary, insular, and protective while cities are inclusive, immersive, and explosive. See Richard Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1178–80 (1996). Participation and efficiency, like inclusion and exclusion, are binaries that map onto the present state of local government. I propose that they are reflections of the communitarian/proprietary binary that I am identifying and tracing here. As such, I am adding a historical gloss to familiar terms of debate.

17. See *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974):

No single tradition in public education is more deeply rooted than local control over the operation of the schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process. . . . [L]ocal control over the educational process affords citizens an opportunity to participate in decisionmaking [and] permits the structuring of school programs to fit local needs . . . .

use the same core idea of what local government is for in order to argue against local control when it serves proprietary ends. The structures are more complex, but the essential debate is familiar between the history and the present.

A second lesson emerges from the rhetoric of resentment that Redeemers used to combat the township experiment and support their arguments for a return to proprietary localism. Opponents of the township appealed to resentment politics in two intertwined ways. First, they painted the townships as oppressive outside impositions: Yankeeizing.<sup>18</sup> Second, they described the townships as vehicles of "negro domination," allowing black voters to elect black local officials and wrest control away from white southerners. Together outsider resentment and racial resentment combined into a powerful conservative resentment militating against progress, change, and redistribution.

This cocktail of resentment politics is familiar from the twentieth century civil rights story and from our own present moment of racial tension. What the story of the township experiment contributes is the extent to which this resentment is a product of local disputes. Just as the racial resentment of a white southerner in 1870 was fueled by the prospect of being arrested by a black sheriff and tried by a black magistrate, so too might we understand present resentment politics as reflecting concrete local anxieties as much as, if not more than, abstract national politics.

This leads to the third lesson. Southern conservatives motivated by resentment during Reconstruction found themselves with no government to turn to for retreat. The federal government was more than a political opponent; it was perceived as a hostile conquering power. State governments were dominated by the hated Republican coalition of carpetbaggers, scalawags, and blacks. Now, under the township experiment, local government was similarly alien. In short, conservatives and white supremacists during Reconstruction saw every layer of government as oppressive and illegitimate. Oppressive because they were in the hands of their political opponents; illegitimate because those hands were black. As a result, conservative rhetoric opposing the townships went beyond resentment of those in power and turned toward attacks on government itself—in all its forms.

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18. This term was used both by disparaging southerners and northern reformers. See Charles D. Cashdollar, *The Pittsburgh Soldiers' and Sailors' Convention, September 25-26, 1866*, 48 W. PA. HIST. MAG. 331, 338 (1965) (quoting a general from New York, saying "there can be no lasting peace until the South is chained down, revolutionized, Yankeeized").

This turn away from government characterized Redemption politics more broadly. When conservatives regained control over government, they took out their hostility by crippling the power of government at the state and local levels. State governments adopted blanket policies of retrenchment, radically cutting back on government spending and services, leaving behind only a shell of Jim Crow regulations and protections for landowners. To protect against too much local democracy, local governments were put under the control of the state and served as bulwarks for white property owners against integration, redistribution, and communitarian political progress. Proprietary local government spent next to nothing on services while it protected white elite power against the promise/threat of communitarian political resistance.

The links between proprietary localism and anti-government rhetoric during the 1870s point us toward similar connections today. Although we tend to identify the Tea Party and other government skeptics with opposition to the federal government, if we look from the local level, it becomes clear that they do not have a great deal of trust in local or state government either. The same local resentments are at play, and, where they have control over all branches of government, the same kind of minimal proprietary localism characterizes local government. As I articulate in Part III, many of our present local government structures, from suburbs to dissolving cities, can be understood as proprietary localism fueled by intertwined racial and outsider resentment.

A broader historiographical and methodological point frames these three lessons. In the context of local government law scholarship, this Article (and my work more broadly) offers a heretofore unexplored historical perspective. The local history of Reconstruction has not been told—but the same can be said of many otherwise well-examined periods of American history. Although local government law scholarship frequently considers history, we do not have anything more than an episodic set of historical accounts of localism as it was intertwined in national legal development. Related to this, outside of cities (which have been well addressed) there has been far too little work done on the formation of the non-city local governments that blanket the country, determine its cartography, and structure the lives of so many.

This Article proceeds in four parts. Part I describes local government in the South before the Civil War. Construing enslaved black residents as part of the political community, I describe plantation slavery as a form of proprietary feudal local government. This model did not go unchallenged, however. Jefferson and his

political allies leveled a persistent (and persistently failing) challenge to it on communitarian grounds. This Part demonstrates how proprietary localism came to be bundled with the southern “way of life.” Part II is a history of the township experiment, focusing primarily on North Carolina, with brief summaries of the experiments in South Carolina and Virginia.<sup>19</sup> Here, under the new stresses of emancipation and Reconstruction, the battle lines between competing visions of local government law were starkly drawn. To defeat the township experiment, opponents proposed the most minimal form of local government as the best hope of protecting the old proprietary order. Part III offers present implications from this history by way of three examples. Here I argue that the fundamental disagreement between communitarian and proprietary localists manifests itself in present-day local government disputes. Not only does the history give us new tools to understand those disputes, but it suggests that what has seemed like a battle over whether localism is a good thing might actually be a battle over what version of localism we prefer. Finally, in Part IV, I conclude with three provocations suggesting ways that the history of the township experiment might change the way we think about the role of local government and localism in the law more broadly.

### I. LOCALISM IN THE ANTEBELLUM SOUTH

We are pious toward our history in order to be cynical toward our government. We keep summoning the founders to testify against what they founded. Our very liberty depends so heavily on distrust of government that the government itself, we are constantly told, was constructed to instill that distrust.<sup>20</sup>

Anti-government voices in the present usually seek support from history. Reference to the heroic founding moment is embedded in the very name of the “Tea Party” movement.<sup>21</sup> The present-day opponents of government suggest a return to a simpler time: a “nineteenth-century Jeffersonian world of minimal government, low taxes, absolute private property, individual rights, self-interested

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19. I should note here, as I do in Part II, that a version of the township experiment was also carried out in West Virginia in 1861 when the state split off from Virginia in order to stay in the union. While that story shares much with the stories told in this paper, it is critically distinct because without emancipation, conquest, and thus forced integration, the key ingredients of advocacy and resistance were different.

20. GARRY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* 16 (1999).

21. For an exposition of the (mis)reading at the heart of this historical reference, see JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY 1–19* (2010).

entrepreneurship, and laissez-faire economics.”<sup>22</sup> In this imagined simpler time, self-governance was about individual freedom from government oppression. Federal and state governments were weak and local government was nonexistent.<sup>23</sup>

One need hardly be a legal realist<sup>24</sup> to recognize that this account of “limited” government could also be described as a set of government priorities: to protect private property (including money), to protect individual rights, to encourage self-interested entrepreneurship, and to facilitate laissez-faire economics. Seen this way, even the most romanticized version of antebellum “freedom” was characterized by government—and most of it was local government.<sup>25</sup> In fact, what present day government skeptics seem to be describing is an outline of proprietary localism. In reality, for much of the country, this description did not fit the circumstances. Across most of the North, strong norms of communitarian localism supported a widely regulated and often prescriptive suite of local regulations.<sup>26</sup> In some areas of the South, similar, if less formalized, webs of local regulation and obligation dominated.<sup>27</sup> There was one particular instance, however, where the romantic proprietary description fit the picture: in states and counties where plantation slavery predominated. Here,

22. WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* ix (1996).

23. In the words of Citizens for Self-Governance, an organization founded by one of the leaders of the Tea Party movement: “America was designed to be a self-governing society, where decisions are made as close to home as possible.” *Who Decides?*, CITIZENS FOR SELF-GOVERNANCE (2016), <https://selfgovern.com/who-decides/> [https://perma.cc/4H4X-YV2Y]. What does “close to home” mean? Not quite state or local government, rather it means that “decisions are best made by the individual, family, or community.” *Mission and Four Pillars of Self-Governance*, CITIZENS FOR SELF-GOVERNANCE (2016), <https://selfgovern.com/four-pillars-self-governance/> [https://perma.cc/V7B6-FYLK].

24. Although, I should admit here that I am on record as being a sympathizer. See Daniel Farbman, *The Scalpel and the Salve: Rekindling Romantic Realism*, 1 *CRITICAL ANALYSIS* L. 212 (2014).

25. William Novak’s *The People’s Welfare* argues in the very first sentence that “[a] distinctive and powerful governmental tradition devoted in theory and practice to the vision of a well-regulated society dominated United States social and economic policymaking from 1787 to 1877.” NOVAK, *supra* note 22, at 1. More recently, Laura Edwards built upon this foundation showing the way that “localized law”—grounded in governmental forms—structured life in the antebellum South. See *generally* EDWARDS, *supra* note 8.

26. Novak’s study focuses primarily (though not entirely) on northern regulations, and what he describes is a pervasive set of moral and economic interventions. See NOVAK, *supra* note 22, at 1 (“At the heart of the well-regulated society was a plethora of bylaws, ordinances, statutes, and common law restrictions regulating nearly every aspect of early American economy and society, from Sunday observance to the carting of offal.”).

27. See EDWARDS, *supra* note 8, at 3–16 (examining the Carolinas in explaining the South’s use of localized rather than state law to “keep the peace” by adjudicating criminal matters and personal disputes).

state and especially local governments were controlled by planter elites who were eager protectors of their own autonomy on their plantations. Here is where the logic of individual freedom (for slave owners) and protection of property (land and slaves) was the highest calling of government.

Understanding the plantation as the ideal of proprietary localism is critical to understanding both the history of the township experiment and the present implications of that history. On the plantation, the owner's mastery over land and property was protected by state and county to its maximum extent,<sup>28</sup> while the power of local or state government to intervene was extremely circumscribed. As a quasi-feudal system, a planter's home and lands were very much like his "castle." In that sense, the plantation and the local governance structure that supported it were a libertarian's dream. But, critically, the plantation served other governance purposes as well. Planters were entrusted with the power (essential to southern governments) of policing and controlling much of the enslaved population in the South.<sup>29</sup> In practice, then, plantations were local governments below the county level where black residents were governed despotically. Moreover, while the planters were rulers individually on their plantations, they were also rulers collectively as a "regional ruling class," controlling law and policy at the local and state level for much of the Early Republic.<sup>30</sup> Thus, while planters themselves may have been able to enjoy the benefits of proprietary local governments, those subject to their direct control (slaves) or indirect control (poor whites) were not.

This distributional dissonance highlights the extent to which proprietary localism as practiced by southern planters was a means of protecting the established racial and economic order. Although it was successful, and plantation localism predominated across the South, it was not unchallenged. A consistent, strong minority of southerners sought to supplant the county and plantation with something more

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28. Like all property rights, of course, the rights of planters on their plantation could only be protected by creating constraints on the rights of others. This meant that there was actually fairly frequent litigation amongst slave owners to resolve disputes about the use and misuse of their most valuable property—their slaves. See GROSS, *supra* note 8, at 23 ("Civil trials involving slaves were the routine events bringing townfolk and planters together to fight over their human property . . .").

29. WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 24–25 (3d ed. 2012) ("[A]lthough the great majority of slaveholders owned small farms where a few slaves labored beside their masters, most slaves lived and worked on plantations where cotton, tobacco, sugar cane, or rice were cultivated on a large, commercial scale.").

30. *Id.* at 25.

communitarian. Beginning with Thomas Jefferson, these voices argued that plantation localism upheld aristocracy and that it should be replaced with a “ward system” modeled on the New England town.

Local government in the antebellum South was thus a subject of dispute. In what follows, I outline the two competing models: proprietary plantation localism and the communitarian ward system. Understanding the terms of this dispute before the Civil War paints the backdrop for the disputes that would emerge after emancipation and during Reconstruction.

### *A. Proprietary Plantation Localism*

We have tended to look at antebellum governance through the eyes of white citizens. The debate between Jeffersonians and planters was a debate over how free white landowners should organize local government. The question of how black residents fit in has never been raised. Most whites agreed that this was the easy question: black residents of the South were governed by their masters (or, in the case of free blacks, were increasingly pressured to either return to slavery or move north).<sup>31</sup> Controversial or not, it was clear that plantations were governed by planters. And seen through the eyes of the slave, there can be no doubt that planters had the powers of government. I propose that construing slaves as part of the population is a starting point for understanding the outlines of local government in the antebellum South. Proprietary localism depended upon excluding black residents from the political community and creating an alternative method of governance to control them. The paternalistic control that planters exerted on their plantations bled over into the county court system as well. The counties were protectionist, not participatory. They maintained the status quo; they were not a forum for changing it.

#### 1. The Manorial Plantation

Defined by the rules of private property and outside the jurisdiction of any town or city, on first blush the plantation might seem to represent the ideal of retreat from government. This nostalgic

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31. In Virginia, as part of a campaign to eliminate free blacks from the state, “whites encouraged free blacks to return to slavery,” arguing that the “slaves’ lot was superior to that of freed people.” WILLIAM A. LINK, *ROOTS OF SECESSION: SLAVERY AND POLITICS IN ANTEBELLUM VIRGINIA* 157 (2003). In Georgia, on the eve of the Civil War, the House of Representatives passed a bill that would “allow free persons of color to go into voluntary slavery, or to compel them to move from the state.” CLARENCE L. MOHR, *ON THE THRESHOLD OF FREEDOM: MASTERS AND SLAVES IN CIVIL WAR GEORGIA* 48 (2001).

ideal continues to do cultural work,<sup>32</sup> but it does not describe the actual operation of plantation localism in the antebellum South. Just as the New England town structured the daily social and political lives of residents, so too did the plantation structure the daily social and political lives of both black and white southerners within its orbit.<sup>33</sup>

Plantations were forms of despotic local government, and a large number of southerners were under their jurisdiction.<sup>34</sup> Most obviously, on plantations and smaller farms, enslaved people were subject to the (almost) absolute authority of the slave owner.<sup>35</sup> More broadly, plantation owners extended their governing influence over poor whites in the immediate neighborhood either by hiring them to work on the plantation as overseers or craftsmen, entering into tenancy contracts with them, or exerting other forms of control over their economic and social lives.<sup>36</sup>

The private and public lives of those who lived on and around plantations were governed through formal or informal institutional

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32. A version of this is evident in the famous collection of southern nostalgic manifestoes, *I'll Take My Stand: The South and the Agrarian Tradition*. Donald Davidson meditated on what he took to be the universal southern (male) desire to "retire to the farm and live like gentlemen." Donald Davidson, *A Mirror for Artists*, in *I'LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION* 28, 54 (1977). Though pitched against urban industrialization, the agrarian romantic view took the old plantation as a model of escape and remove. Where the West and the "state of nature" represented by Indian tribes symbolized escape in the Early Republic, the plantation and the "simple" agrarian life of the past emerged as a model of escape in the hurly-burly of the turn of the twentieth century.

33. This is so obvious a claim that it is actually hard to cite directly. Nearly every historian of North American slavery has understood not only that planters exercised despotic control over their property, but that, when aggregated, that despotic control created something universal—a southern slave society. Eugene Genovese wrote that slave society was "determined by particular relationships of class power in racial form." EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 4 (1972).

34. Edgar Thompson, a mid-century historian of the "Old South," noted, "There are, or have been, plantations with constitutions, laws, courts, jails, policemen, and even monetary systems of their own. At one time in the history of the South the planter possessed the power of life or death over the members of his plantation." Edgar T. Thompson, *Purpose and Tradition in Southern Rural Society: A Point of View for Research*, 25 *SOC. FORCES* 270, 271 (1946).

35. In the words of Phillip Curtin, "[T]he owner not only controlled his work force during their working hours, he also had, at least de facto, some form of legal jurisdiction. His agents acted informally as policemen. They punished most minor criminals and settled most disputes without reference to higher authority." CURTIN, *supra* note 6.

36. Planters not only represented the most readily accessible market for neighboring farmers, but they controlled the local infrastructure either indirectly (through county government) or directly. Roads and canals were increasingly privately held, meaning that non-elite free farmers were entirely dependent on the patronage of planters to conduct their business. See Samuel C. Hyde, Jr., *Mechanisms of Planter Power in Eastern Louisiana's Piney Woods, 1810-1860*, 39 *LA. HIST.* 19, 31 (1998).



arrangements under the control of the planter.<sup>37</sup> Crimes were punished, benefits were allocated, labor was taxed, infrastructure was built. Plantations walked and talked like local government.

Moreover, the planter elite happily accepted that the plantations were the base unit of government. George Fitzhugh, the famous pro-slavery firebrand, identified slavery as the essential police power in the South.<sup>38</sup> Fitzhugh and his allies understood the plantation system of slavery as an institutionalized patriarchy that established a rational and sustainable system of government founded on the Aristotelian model of the family.<sup>39</sup>

This description helps to clarify the fact that the antebellum plantation system in the South was a quasi-feudal system of government. The plantation, like the manor, straddled the line between public and private. The owner, like the lord, sometimes resembled a family patriarch and sometimes resembled a head of state.<sup>40</sup> In a feudal system, the manor was the most “local” site of government, establishing the web of duties and prohibitions that structured people’s lives.<sup>41</sup> In the antebellum South, the pattern was much the same.

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37. On large plantations, the despotic power of the planter was often delegated in a formal structure of governance with hierarchies established both among hired white employees and the slaves themselves. Not only was governance organized hierarchically, it was frequently reduced to a set of governing rules. Reducing plantation rules to a written code not only formalized governance, but it also approximated a humanist commitment to “rule of law” as a constraint on the owner’s absolute power. “By creating rules for plantation governance—regardless of how the rules were followed—slaveholders assured themselves that their plantations were established on principles of humanity.” MARGARET ABRUZZO, *POLEMICAL PAIN: SLAVERY, CRUELTY, AND THE RISE OF HUMANITARIANISM* 143 (2011).

38. Fitzhugh, writing in a chapter with the title “The World is *Too Little Governed*,” proclaimed that “[s]lavery is an indispensable police institution” that effectively regulates the lives of Southerners slave and free. FITZHUGH, *supra* note 2, at 97–98.

39. “There cannot be enough [government to support religion or morality] without domestic slavery, because, in its absence, men are placed in competitive and antagonistic positions toward each other.” GEORGE FITZHUGH, *SOCIOLOGY FOR THE SOUTH, OR THE FAILURE OF FREE SOCIETY* 200 (Richmond, A. Morris 1854). In other words, free labor leads to self-interest, which erodes the bonds of communal government. *Id.* Laura Edwards helps to make sense of how the family model operated as a part of and a link to government. “In law, slavery fit within a system of governance that linked individuals to the state and defined their legal rights through their positions within households. Heads of household assumed moral, economic, and legal responsibility for all their domestic dependents, including African American slaves, white wives, and children.” LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION* 58 (2015).

40. Of course, in the case of the slaveholder, there were many instances where the owner was actually both father and master.

41. See Susan F. French, *Tradition and Innovation in the New Restatement of Servitudes: A Report from Midpoint*, 27 CONN. L. REV. 119, 122 (1994) (“In the feudal period, local government was organized on the manorial level, with the grant of manor lands carrying rights and obligations of governance over the inhabitants.”).

## 2. The County Oligarchy

Across most of the antebellum South, the county was the lowest level of local governance recognized by the state constitution—there were no town governments. With some variation, most county governments were modeled on the Virginia county court system. Under that system, counties were governed by justices of the peace who served on the county court. These justices were picked by the governor (or legislature) from a slate of names submitted by the sitting justices.<sup>42</sup> The effect of this was that the planter elite held a nearly dynastic control over the reins of power at the level of both the plantation and the county.<sup>43</sup>

While Jeffersonians bemoaned the control that planters exercised over county governments, the planter elite themselves celebrated it. From their perspective, the county courts protected both property rights and good government. Proprietary localism protected the status quo by ensuring that a surfeit of democracy would not lead to redistribution. The elite rejected the egalitarianism of Jacksonian democracy, instead adopting the position that in genteel democracy some men were fit to govern and others were fit to be governed.<sup>44</sup> For example, Virginia-native Chief Justice John Marshall believed that “the people, left to themselves, are not capable of self-government.”<sup>45</sup> Putting local government in the control of “only our most intelligent and respectable citizens” meant a protectionist rather than

42. See Robert Wheeler, *The County Court in Colonial Virginia*, in *TOWN AND COUNTRY: ESSAYS ON THE STRUCTURE OF LOCAL GOVERNMENT IN THE AMERICAN COLONIES* 111, 113–14 (Bruce C. Daniels ed., 1978). Wheeler describes the county government system before the revolution, but the fundamentals of the system remained in place after independence.

43. See Letter from Thomas Jefferson to Samuel Kercheval, *supra* note 15, at 10: The justices of the inferior courts are self-chosen, are for life, and perpetuate their own body in succession forever, so that a faction once possessing themselves of the bench of a county, can never be broken up, but hold their county in chains, forever indissoluble. Yet these justices are the real executive as well as judiciary, in all our minor and most ordinary concerns.

44. Fitzhugh drew a connection to classical republicanism:

The ancient republics were governed by a small class of adult male citizens, who assumed and exercised the government, without the consent of the governed. The South is governed just as those ancient republics were. In the county in which we live, there are eighteen thousand souls, and only twelve hundred voters. But we twelve hundred, the governors, never asked and never intend to ask the consent of the sixteen thousand eight hundred whom we govern.

FITZHUGH, *supra* note 2, at 354.

45. ALBERT J. BEVERIDGE, 4 *THE LIFE OF JOHN MARSHALL* 488 (1919). Marshall understood that a change from the “self-perpetuating County Court system” to one in which new justices were appointed by the Governor “without regard to recommendations of the local justices . . . would have destroyed the traditional aristocratic organization of the political, social, and to a great extent the economic, life of Virginia.” *Id.*

participatory localism.<sup>46</sup> John Randolph stated the case bluntly, speaking against proposed reforms in 1829, when he argued that if reformers should “succeed in introducing the newest, theoretical, pure, defecated Jacobinism into this Commonwealth” it would “inflict[] a deeper wound on Republican Government[] than it ever experienced before.”<sup>47</sup>

### B. Communitarian Ward Republics

Those who opposed plantation localism were no more concerned with the rights of slaves than the planters were. Instead, they were concerned with the unequal power that planters wielded over white yeomen farmers. They argued that the planters’ grip on local power left little room for small farmers who owned few or no slaves to participate in government. They wanted to redistribute that power by changing the structure of local government. Jefferson’s proposed ward system was the tool that they proposed.

#### 1. The Ward System

In Thomas Jefferson’s view, the ideal base unit of government was the “ward republic,” a small, self-governing, local entity modeled on the New England town.<sup>48</sup> Although he first proposed a version of the ward system in 1779,<sup>49</sup> Jefferson did not elaborate it until 1815, when a movement was afoot to rewrite the Virginia Constitution. In 1813, he wrote to John Adams saying that his wards were modeled on the New England town and that they represented “those portions of self-government for which [the people] are best qualified.”<sup>50</sup> They would be “the most fundamental measure for securing good

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46. Alex B. Long, *An Historical Perspective on Judicial Selection Methods in Virginia and West Virginia*, 18 J.L. & POL. 691, 736 (2002) (quoting Philip P. Barbour speaking at the Virginia Constitutional Convention of 1829–1830).

47. *Id.* at 737 (second alteration in original).

48. Jefferson famously wrote that New England towns “have proved themselves the wisest invention ever devised by the wit of man for the perfect exercise of self-government, and for its preservation.” Letter from Thomas Jefferson to Samuel Kercheval, *supra* note 15, at 13.

49. Committee of Revisors, *A Bill for the More General Diffusion of Knowledge*, in 2 THE PAPERS OF THOMAS JEFFERSON 526, 526–35 (Julian P. Boyd ed., 1950).

50. Letter from Thomas Jefferson to John Adams (Oct., 28, 1813), in 6 THE WRITINGS OF THOMAS JEFFERSON 221, 225 (Henry Augustine Washington ed., Washington, D.C., Taylor & Maury 1854). Jefferson hoped that self-governance would lead to political solidarity, remembering the opposition that he had faced during his presidency from town meetings. He hoped that in their wards, southerners would “act in mass, as your people have so often done, and with so much effect by their town meetings.” *Id.* at 226.

government, and for instilling the principles and exercise of self-government into every fibre of every member of our commonwealth."<sup>51</sup>

Jefferson was not the communitarian that John Adams was, but he believed deeply in participation. In outlining his plan in advance of the 1820 Virginia constitutional convention, he argued that "by making every citizen an acting member of the government . . . [the ward system] will attach him by his strongest feelings to the independence of his country, and its republican constitution."<sup>52</sup> For Jefferson, participation was about legitimacy. The problem with plantation localism was not simply that it was protectionist, but that it was undemocratic and thus risked resistance. The wards, by contrast would "be pure & elementary republics . . . . In this way we shall be as republican as a large society can be; and secure in the continuance of purity in our government, by the salutary, peaceable and regular control of the people."<sup>53</sup>

## 2. Wards and Plantations

While Jefferson and his allies never proposed that a more communitarian local government would upset slavery, their opponents saw the way that the argument tended. If plantation localism was illegitimate because it excluded some white citizens, what about the millions of slaves who were governed despotically by their owners?<sup>54</sup>

51. Letter from Thomas Jefferson to Joseph C. Cabell (Jan. 17, 1814), in 6 THE WRITINGS OF THOMAS JEFFERSON 299, 301 (Henry Augustine Washington ed., Washington, D.C., Taylor & Maury 1854).

52. Letter from Thomas Jefferson to Samuel Kercheval, *supra* note 15, at 12–13. The mechanics of Jefferson's plan were relatively simple: (1) "Divide the counties into wards" that were small enough that every citizen could attend a meeting in person if called upon. (2) Give those wards control over "all things relating to themselves exclusively." These functions included a justice, a constable, a militia, a school, roads, care for the poor, etc. (3) Relatedly, give each ward control over how to cast votes for congress and president. (4) Build the county government from this foundation by assembling the justices chosen by each ward into a "county court" that would serve as a legislature on matters of common county concern. This newly subdivided ward fit neatly into Jefferson's proposed hierarchy of divided government power. He believed that government should be broken into four layers of authority: national, with responsibility over "all concerns foreign and federal"; state; county republics, "for the duties and concerns of the county"; and ward republics, "for the small, and yet numerous and interesting concerns of the neighborhood." *Id.*

53. Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), in 4 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 302, 302 (Thomas Jefferson Randolph ed., London, Henry Colburn & Richard Bentley 1829).

54. John Randolph said as much during the debates over the new Virginia constitution in 1830. He threatened that giving more power to poor (i.e., non-slaveholding) whites would mean that "in less than twenty years you would have a Bill brought into the House of Burgesses for the emancipation of every slave in Virginia." WILLIAM G. SHADE, DEMOCRATIZING THE OLD DOMINION: VIRGINIA AND THE SECOND PARTY SYSTEM 1824–1861, at 69 (1996).

The protection of slavery trumped any grievances that yeomen farmers might have. And so in 1830, when Virginia did finally call a constitutional convention, Jefferson's ward system was never even given serious consideration.<sup>55</sup> By 1837, when George Tucker wrote the first biography of Jefferson, he described the ward system proposal as a romantic scheme of the great man's late life unsuited to the real world of politics.<sup>56</sup>

Although the ward system was relegated to an idealistic impossibility, it remained a reference point for those who opposed proprietary plantation localism. In 1827, a Jacksonian newspaper in Kentucky critical of elite control of local government published a set of excerpts from Jefferson's letters urging the state to consider a version of the ward system.<sup>57</sup> In 1848, the governors of North Carolina and Virginia each proposed a version of Jefferson's ward system to replace the county courts.<sup>58</sup>

55. *Id.* at 70. Lewis Summers, a westerner, proposed that the reform be considered, but the committee "dismissed the motion without serious discussion." Even though the plan was a non-starter at the convention, that did not mean that it had no political support. The Kercheval letters were first made public in 1826, after Jefferson's death, when Kercheval himself sent them out around the state for publication. As the 1829–1830 Virginia convention was being contemplated and gathering, the letters were republished by papers around the state expressing implicit (and sometimes more explicit) support for the reforms he put forward there. *See Mr. Jefferson*, U.S. TELEGRAPH (Washington, D.C.), Apr. 28, 1829, at 5 (noting somewhat cryptically that "republication at this time, we consider very opportune . . ."); *Mr. Jefferson and the Convention*, VIRGINIA ADVOCATE (Charlottesville, Va.), May 16, 1829, at 2 (publishing the letters without comment); *Mr. Jefferson and the Convention*, RICHMOND ENQUIRER, July 7, 1829, at 2 (suggesting a line of opposition to reforms and exhorting the delegates at the convention to "read these letters with some attention, and see how far Mr. Jefferson's views are 'in sentiment' with theirs, on what should be the fundamental laws of Virginia").

56. *See* GEORGE TUCKER, 2 THE LIFE OF THOMAS JEFFERSON, THIRD PRESIDENT OF THE UNITED STATES 390–93 (London, Charles Knight & Co. 1837). Tucker was a member of one of Virginia's first families, and though he was a westerner of a sort (he lived in the Shenandoah Valley), he was also a main-line moderate elite. He had become famous in 1824 when he published a novel, *The Valley of Shenandoah*, which was the first novelistic account of life in Virginia (and one of the first examples of the genre of the "Plantation Novel"). Although he was not an aggressive defender of slavery, he was a chronicler and defender of the status quo. It is thus unsurprising that his critique of Jefferson's plan was that it threatened to make politics too reactive and volatile. He argued that

[h]ad this ward system prevailed throughout the Union a year or two since, Georgia would have expelled the Cherokees from their natal soil by force, and provoked a civil war with the general government. . . . [A]nd what may not Virginia have done after the Southampton massacre [Nat Turner's rebellion in 1831], or any other southern State, since the incendiary proceedings of northern fanatics towards their slaves?

*Id.* at 393. In other words, Tucker saw the ward system as a kind of license for mob rule and the old county system as a tool for maintaining a moderate peace in the face of political furor.

57. *Right of Suffrage*, COMMENTATOR (Frankfort, Ky.), Sept. 29, 1827, at 3.

58. *See Convention Bill up in Orange*, RALEIGH DAILY TELEGRAM, July 29, 1871, at 2 (presenting the governor of North Carolina's recommendation to adopt the ward system);

None of these ideas took root, and plantation localism not only persisted, but as the sectional conflict heated up it became enshrined as an integral part of the “southern way of life.” A faux-communitarian and quasi-democratic rhetoric developed defending plantation localism as a defining element of southern identity. As the South became increasingly anxious about northern encroachment and the existential threat to slavery posed by abolitionists, southerners defended their protectionist system of local government. Plantation localism represented them *not* because it was democratic (the elites explicitly disavowed this) but rather because it responded to a crescendo of racial and outsider resentment. The North was coming to free the slaves and impose racial equality. Under threat, the “southern way of life” came to overlap with the idea of southern “self-government.” South Carolina’s declaration of secession made the link explicit: Lincoln’s election and Republican control of the federal government meant that “[t]he slaveholding States will no longer have the power of self-government, or self protection, and the Federal Government will have become their enemy.”<sup>59</sup> Proprietary localism—in the form of plantation localism—channeled that resentment and made the protection of the status quo a higher virtue than political participation.

### C. Localism at War

Secession and the Civil War both consolidated and generalized attitudes about localism.<sup>60</sup> In the North, leading up to the war and for the duration, the communitarian localism of the town was fired with martial energy. Towns gathered in meetings to denounce the Fugitive

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William Smith, *Governor’s Message*, ALEXANDRIA GAZETTE, Dec. 8, 1848, at 3. Smith proposed to break the counties into smaller districts and noted that

    this scheme of districts is, in principle, nothing but the township system of many of our sister States; nothing but the ward system of the illustrious Jefferson; but the hundred system of the great Alfred. It is a system sanctioned and approved by ancient and modern experience; which I can with great confidence recommend to your favorable consideration.

JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA 19 (Richmond, Samuel Shepherd Public Printer 1848).

59. DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION ¶ 25 (1860).

60. The relationship between antebellum localism, the sectional crisis, and the outbreak of the Civil War will be the subject of future work. My intention here is merely to trace the rough outlines as they relate to the story during Reconstruction.

Slave Law of 1850,<sup>61</sup> and towns became the primary centers for military recruitment, with companies within regiments often being filled out entirely by residents of a single town.<sup>62</sup> As anyone who has visited a town green in New England can attest, that sense of local endeavor was expressed after the war in the form of monuments to the towns' slain.

The war also increased southerners' commitment to localism. "[T]he rhetoric of secession and its affirmation of decentralized authority in law and government gave new meaning to existing expectations of local control."<sup>63</sup> Indeed, because plantation localism had protected the power of the planters and fostered a sense of freedom from the demands of external government, it was not uncommon for local communities to reject the commands of the Confederate state and federal governments and act on their own as they saw fit.<sup>64</sup>

The conventional story is that the Civil War defeated a robust conception of states' rights and thereby increased the power and scope of the federal government. This story has structured our understanding of Reconstruction and Redemption by focusing attention on the battles between the states and the federal government. But even as the sectional conflict did ratchet up state loyalties, it ratcheted up local loyalties even further. Rather than decrease the importance of localism, the sectional strife during the war further entrenched ideas about northern and southern "ways of life," which were rooted in localism. These strongly held cultural commitments to communitarianism (the New England town) or proprietary localism (plantation localism) drew clear distinctions between the sections and increasingly attributed the ills and depredations of the other section to those fundamental local distinctions. As the next Part shows, northerners attributed the economic troubles of the South to their backward planter aristocracy. In turn, southerners saw northerners as grasping capitalists whose

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61. See, e.g., GILBERT NASH, HISTORICAL SKETCH OF THE TOWN OF WEYMOUTH, MASSACHUSETTS, FROM 1622 TO 1884, at 82 (Weymouth, Weymouth Historical Soc'y 1885) (noting resolutions passed in 1850 and again in 1854 opposing the Fugitive Slave Law).

62. Individuals had an incentive to recruit new soldiers for new companies so that they could become officers. This meant that men with local influence often sought to raise companies within a given town. The result was that towns went to war together, often under local command. See, e.g., NED SMITH, THE 22ND MAINE VOLUNTEER INFANTRY IN THE CIVIL WAR: A HISTORY AND ROSTER 34 (2010).

63. EDWARDS, *supra* note 39, at 49.

64. See *id.* at 59–62 ("White Confederates thought that legal authority rested—at least in part—with them. That presumption was derived from a tradition of local governance, which accommodated the customs of particular communities.").

towns were little better than factories to be run efficiently with no regard to the good life.

With localism so closely identified with a collective sectional way of life, it was no surprise when northern reformers targeted local government as a fulcrum for a wider project remaking the South. Thinking that plantation localism was defunct and that a new localism could and must be built for the South, a few idealistic Yankees in North Carolina, Virginia, and South Carolina proposed to replace the old poisonous plantation with “the wisest invention ever devised by the wit of man for the perfect exercise of self-government, and for its preservation.”<sup>65</sup> Nor was it a surprise when, in response, southerners resisted that threat and fought to preserve the localism that they knew and identified with.

## II. TO REMAKE THE SOUTH

I don't care a rag for “the Union as it was.” I want to fight for the Union “better than it was.” Before this is accomplished we must have . . . a thorough and complete revolution and renovation. This I expect and hope. For this I am willing to die—for this I expect to die.<sup>66</sup>

### A. *The Fabric of Southern Culture and Yankee Local Government*

When the Civil War ended in 1865, it left behind a set of institutional design questions on a scale as large, if not larger, than those that faced the newly freed colonies after independence. Through a brutal exercise of military force, the Civil War had forced the emancipation of millions of slaves and thrown the entire social fabric of the South into disarray. Plantations had been seized, the most valuable assets of the rich had turned from property into citizens, and the foundations of the old political order were crumbling. The sheer carnage of the war led many to see it as a millennial moment of transformation. Not only had the southern “way of life” been shattered, so too had the northern attitude of appeasement and compromise. In this conquered chaos, it was not so unreasonable to imagine that a whole new southern “way of life” could be established.

The seceding states of the Confederacy were in a state of existential limbo. They had retained their cartographical borders (mostly<sup>67</sup>), but their status as part of the union was uncertain. It is

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65. Letter from Thomas Jefferson to Samuel Kercheval, *supra* note 15, at 13.

66. Letter from Albion W. Tourgée to Brothers of the Union (Jan. 1863) (on file with the Chautauqua County Historical Society & McClurg Museum, Albion Winegar Tourgée Papers #454).

67. See, e.g., West Virginia.



easy to forget in hindsight just how open the question of what to do with the conquered territory was. The dominant view, represented by President Johnson and held in common by many conservative southerners, was that the war had vindicated Lincoln's original position that the states could not secede, meaning that they should return to the union on much the same terms as they had left it.<sup>68</sup> The leading radical politicians in Washington disagreed. Massachusetts Senator Charles Sumner and Pennsylvania Congressman Thaddeus Stevens were the leading radical voices in their respective chambers. Both argued that, although the states had no right to secede, the result of secession and northern victory was that the states no longer existed as they had before the war.<sup>69</sup> As a result, they argued Congress had sweeping authority to remake the Confederacy on whatever plan it saw fit.

Behind these theories of congressional power was the radicals' utopian vision that the end of the war presented a "golden moment" of opportunity to perfect the government of the United States.<sup>70</sup> Thaddeus Stevens was among the most strident advocates of this *carpe diem* approach. His argument rested on the principle that the states were no longer entitled to recognition as they had been before secession and were instead "an alien enemy to be dealt with according to the laws of war."<sup>71</sup> From this foundation, he urged that Reconstruction seek to do more than mend the torn fabric of the union. He argued for a total reform of southern society: "The whole fabric of Southern society must be changed, and never can it be done if this opportunity is lost . . . Heretofore, it had more the features of aristocracy than democracy. The Southern States have been despotisms, not governments of the people."<sup>72</sup>

Naming the South an aristocracy was not radical in itself, but his proposal for reforming southern government was. Stevens

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68. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 179 (Henry Steele Commager & Richard B. Morris eds., 1988) (describing President Johnson's position that "secession had been null and void, the states remained intact, and Reconstruction meant enabling them to resume their full constitutional rights as quickly as possible").

69. Stevens saw the seceding states as "conquered provinces," subject to wide federal control through military victory. Sumner agreed on the extent of control, but argued that the states had committed "suicide" when they seceded, forfeiting their former sovereign status. See *id.* at 232.

70. *Id.* at 230 ("[T]he driving force of Radical ideology was the utopian vision of a nation whose citizens enjoyed equality of civil and political rights, secured by a powerful and beneficent national state.").

71. Thaddeus Stevens, *Reconstruction; Hon. Thaddeus Stevens on the Great Topic of the Hour. An Address Delivered to the Citizens of Lancaster, Sept. 6, 1865*, N.Y. TIMES, Sept. 10, 1865, ¶ 7.

72. *Id.* ¶ 44.

proposed that plantations should be broken up and that wealth and land should be redistributed to freed slaves and veterans.<sup>73</sup> Stevens's intentions were explicitly framed in terms of creating the conditions for democratic self-governance in southern government. "How can republican institutions, free schools, free churches, free social intercourse, exist in a mingled community of nabobs and serfs: of the owners of twenty thousand acre manors with lordly palaces, and the occupants of narrow huts inhabited by 'low white trash'?"<sup>74</sup>

Stevens's catalog of "republican institutions" was instructive. Free schools, free churches, and free social intercourse all point to his Yankee view of politics and society founded on the bedrock of town government. Moreover, these all emphasize the communitarian virtues of the town by making gathering in school, in church, and in town meeting, essential to Republican virtue. In fact, Stevens could have been paraphrasing John Adams's four pillars of New England society: "[T]own meetings, training days, town schools, and ministers."<sup>75</sup> Stevens's goal was virtuous northern Republicanism, and his blueprint, implicitly, was the New England town.

From long before the beginning of the war, northern radicals had contemplated reforming the South by transforming it to emulate New England. In 1841, William Lloyd Garrison (the famous and acerbic abolitionist editor of *The Liberator* and sometimes advocate of northern secession) argued that the sectional conflict would only end when "the genuine principles of New-England industry and enterprise are permitted to take root in the soil [of the South.]"<sup>76</sup> This note was picked up by William Seward in his famous "Irrepressible Conflict" speech in 1858. Seward argued that there were two systems—northern free labor and southern slavery—and that they were antagonistic. The logic of the claim that "the United States must and will, sooner or later, become either entirely a slave-holding nation, or entirely a free-labor nation," suggested that the answer to the conflict

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73. Stevens estimated that by confiscating the land of the largest landowners, the federal government would have 394,000,000 acres of land at its disposal. After giving each freedman forty acres, the remaining 354,000,000 acres would be divided up into farms to be sold (veterans would be ideal purchasers), and the proceeds would go to veterans' benefits. *Id.* ¶¶ 19–20. ("But we propose to confiscate all the estate of every rebel belligerent whose estate was worth \$10,000, or whose land exceeded two hundred acres in quantity. Policy if not justice would require that the poor, the ignorant, and the coerced should be forgiven.")

74. *Id.* ¶ 44.

75. *Id.* Training days and town meetings suggest a version of "free social intercourse" both in the militia and in political conversation.

76. William Lloyd Garrison, *Executive Session*, *LIBERATOR* (Bos., Mass.), Sept. 10, 1841, at 2.

was imposing Yankee virtue on the South.<sup>77</sup> Once the war broke out, the chorus of sectional chauvinism intensified, and the calls transplanting Yankee institutions in the South became more strident. Capitalists imagined that Yankee free labor ideology would revolutionize southern agriculture: “[T]he whole cotton country must be permeated and regenerated by New England men and by New England ideas.”<sup>78</sup> Mainstream political reformers imagined a new, healthy, free-labor Republicanism founded on Yankee principles: “The blighting influences of slavery in the South will be supplanted by the thrift, the enterprise, and the free institutions of the North.”<sup>79</sup>

Talk of northernizing the South generally proceeded at a high level of generality, but the New England town was always lurking below the surface as an ideal. Because the town was the building block of Yankee virtue, remaking New England in the South could not happen without the town. Henry Ward Beecher drew this connection as early as 1863. “The frame work of New England society is the most intensely moral of any on the earth. . . . There is a true democracy in New England. A New England township, I think, is the only literal political democracy on the globe.”<sup>80</sup> Joel Parker, a conservative professor at Harvard Law School agreed in 1866, arguing that the towns “have been the arterial system of New England, through which has circulated the life-blood which has invigorated, sustained, and strengthened her . . . .”<sup>81</sup>

77. William H. Seward, Sec’y of State, *The Irrepressible Conflict* ¶ 10 (Oct. 25, 1858).

78. Edward Atkinson, *The Future Supply of Cotton*, 98 N. AM. REV. 477, 485 (1985). Atkinson goes on to imagine the picture more fully. *Id.* at 495–96:

Then picture this land as it shall surely be a few years hence,—the land divided, if not by confiscation, then by the operation of the ordinary working of our system of land tenure . . . the freedmen developing, as at Port Royal, the desire to become land-owners, and enabled to become so by the large profits which the next few years must yield to all cultivators of cotton,—villages established,—the Yankee school-teacher everywhere at work,—the men in the fields,—the women in their own homes,—the children at school,—none clad now in coarse hand-made fabrics, but in New England manufactures purchased and paid for with their own money . . . and everywhere the church spire pointing its finger toward heaven, leading up to the one Infinite Power which is now guiding this nation through sorrow and tribulation . . . .

79. *Article VI. The Re-election of Mr. Lincoln*, 22 UNIVERSALIST Q. & GEN. REV., Jan. 1865, at 90–91.

80. *On Wednesday Evening, February 4th, the Rev. Henry Ward Beecher Delivered a Lecture on “New England”: Before the Boston Merchantile Library Association, of Which the Boston Journal Furnishes the Following Report*, DAILY EVENING BULL. (S.F., Cal.), Mar. 5, 1863.

81. Joel Parker, *The Origin, Organization, and Influence of the Towns of New England*, 9 PROCEEDINGS MASS. HIST. SOC’Y 14, 16–17 (Jan. 1, 1866). A year later, Massachusetts’s Governor Bullock echoed this sentiment when he argued that New England “owes too much of its happiness and renown” to the towns “that have trained the people in democratic habits and principles.” *The Importance of Independent Municipalities*, EVENING POST (N.Y.), June 5, 1867, at 3.

The problem with southern politics and culture was that it was aristocratic and thus proprietary and protectionist. The solution was local democratic participation geared toward gathering the community together to make progress together. In 1865, Orestes Brownson argued that the lack of towns in the South contributed to the fact that “the rights and interests of the poorer classes of persons have been less well protected.”<sup>82</sup> But Brownson was an optimist writing at the end of the war, and he predicted that as peace established itself, slavery melted away, and as the southern aristocracy broke up, “the New England system, in its main features, is pretty sure to be gradually introduced, or developed . . . .”<sup>83</sup>

During the war and at its close, a militant vindictiveness began to appear in the calls for bringing Yankee values south. As President Johnson’s Presidential Reconstruction threatened to allow southern states and Confederate leaders back into the union,<sup>84</sup> and as reports reached the North about the oppression of freed blacks under the new Black Codes,<sup>85</sup> radicals began to demand the fruits of conquest. Wendell Phillips argued that northern victory meant the “North making over the South in its likeness, till South Carolina gravitates by natural tendency to New England.”<sup>86</sup> Veterans were even more strident and blunt. In 1866, in Pittsburgh, radical Union veterans gathered in a convention to insist that the conquest that came from Union victory not be squandered. General James Cochrane made the rough terms clear: “[T]here can be no lasting peace until the South is chained down, revolutionized, Yankeeized.”<sup>87</sup>

At the nexus between idealism and militancy, northern missionaries in the South during and after the war took up the work of Yankeeizing their new homes with vigor. One of the first comprehensive experiments with reconstructing and northernizing the South took place on the Sea Islands of South Carolina, which had been

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82. O. A. BROWNSON, LL. D., *THE AMERICAN REPUBLIC* 274–75 (N.Y., P. O’Shea 1865).

83. *Id.* at 275.

84. *See generally* FONER, *supra* note 68, at 177–227 (discussing the failure of presidential reconstruction).

85. The Black Codes were a set of state laws passed in the former Confederacy to define the extent of the freed men and women’s new freedom. *Id.* at 199–202. They were, in essence, an effort to create a new set of regulations, which would limit the freedoms of the black workforce and preserve the plantation system to the maximum extent possible. *Id.* Freed slaves might be nominally free, but they would be economically constrained and tied to their plantations under penalty of criminal sanctions. *See id.* (discussing the enactment of and reaction to Black Codes).

86. MARK WAHLGREN SUMMERS, *THE ORDEAL OF THE REUNION: A NEW HISTORY OF RECONSTRUCTION* 58 (2014).

87. Cashdollar, *supra* note 18, at 338.

liberated by Union troops at the beginning of the war in 1861.<sup>88</sup> The Sea Islands and their large rice plantations had been abandoned by planters, leaving thousands of former slaves suddenly free. Idealistic northerners, adopting the name “Gideonites,” came south to conduct the “Port Royal Experiment.” Their northernizing agenda was clear: they came armed with “John Adams’ maxim[:] that civil society must be built up on the four corner-stones of the church, the school-house, the militia, and the town-meeting.” Using these cornerstones, the plan was to “build there a new New England, replete with Yankee institutions.”<sup>89</sup>

After the Civil War ended in 1865, a new wave of northerners came south with much the same ideology as the Gideonites. The Yankee soldiers had conquered, and they were followed by Yankee teachers: “Wherever the Yankee soldier has tramped the Yankee schoolmarm will teach. . . . [A]nd the work of Yankeeification proceeds.”<sup>90</sup> And then the Yankee soldiers returned to seek their fortunes and remake the South.<sup>91</sup> These idealistic, militaristic, and occasionally opportunistic northerners would become critically important framers of the new constitutional orders of their adopted states. By 1868, the hopes for a national program of land and wealth redistribution to northernize the South by force had faded. The compromise of Congressional Reconstruction put everything aside apart from suffrage and basic civil rights as recognized by the Thirteenth and Fourteenth Amendments to the Constitution.<sup>92</sup> The

88. For a full and rich account of this experiment, see WILLIE LEE ROSE, *REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT* (1964).

89. *Id.* at 229.

90. A Summer Visitor, *The Mean Yankees at Home*, 23 *ATLANTIC MONTHLY* 61, 62 (1869).

91. These were the maligned “carpetbaggers” who were cast by southerners and the early historians of Reconstruction as “jackals” who “went south after the Civil War to take advantage of the Negro vote, gain election to office, and get rich by plundering the Southern people.” RICHARD NELSON CURRENT, *Foreword* to *THOSE TERRIBLE CARPETBAGGERS*, at xi (1988). Beginning at the turn of Reconstruction historiography in the middle of the twentieth century, the old negative image of the carpetbagger has been largely resuscitated, but it still carries baggage. See K. Stephen Prince, *Legitimacy and Interventionism: Northern Republicans, the “Terrible Carpetbagger,” and the Retreat from Reconstruction*, 2 *J. CIVIL WAR ERA* 538, 539 (2012) (“If we accept, with Current and Tunnell, that the carpetbaggers were not actually that terrible, we are still left to account for the phenomenon that Tourgée described—the widespread, nearly universal, northern acceptance of the “terrible carpetbagger” stereotype during the latter years of Reconstruction.”).

92. The details of the process to reach this compromise would require far more space than I can devote here. In short, Democrats and moderate Republicans were initially opposed to suffrage (especially as applied to northern states). Radicals were forced to give ground in a number of areas. Charles Sumner had wanted to mandate public education as a condition for readmission, Wendell Phillips and Thaddeus Stevens wanted to mandate land redistribution. In the end, Congress readmitted southern states with ratification of the Fourteenth Amendment

stage was set for former Confederate states to reenter the union if they met the conditions laid out in the Reconstruction Acts. Those were, primarily: to ratify the Fourteenth Amendment and draft a new constitution allowing for equal suffrage<sup>93</sup>

But if the hope of a national program to remake the South died in 1867, it lived on in the states that had been instructed to draft new constitutions. Although the delegates who gathered in the constitutional conventions of 1868 across the South were not bound to act beyond the requirements of the Reconstruction Acts, many were eager to. These delegates were a mixture of northern radicals, southern unionists, and freed blacks—many of whom remained committed to the radical project of remaking the fabric of southern culture. The terms of this remaking were clear: reform governance and overturn the aristocracy. Campaigning for his seat as a delegate at the North Carolina convention, Albion Tourgée wrote: “Shall the new State have an Oligarchy or a Republic? An Aristocracy or a Democracy? . . . Do you choose to govern yourselves or be ruled by those who still crave the name of ‘master’? Will you be free men or [S]erfs?”<sup>94</sup>

The new constitutions went well beyond the minimal requirements of Congress. They mandated public education, judicial and penal reform, electoral reform, and many more “northernizing” innovations.<sup>95</sup> The Yankee influence was clear in state after state. Given this influence, it is not at all surprising that the township experiment was part of the project in North Carolina, South Carolina, and Virginia. It was precisely the kind of structural reform that states across the South were turning to.

### *B. The Township Experiments*

The Yankee idealists who wrote the New England town into the constitutions of North Carolina, South Carolina, and Virginia shared a common belief: “[T]he township system . . . secures powers in

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and a promise (before the Fifteenth Amendment was passed) that their constitutional provisions guaranteeing equal suffrage would never be repealed. See JAMES M. MCPHERSON, *THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION* 407–22 (1964).

93. See Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429 (laying out framework for equal suffrage and the Fourteenth Amendment).

94. ALBION W. TOURGÉE, *To the Voters of Guilford (1867)*, in *UNDAUNTED RADICAL: THE SELECTED WRITINGS AND SPEECHES OF ALBION W. TOURGÉE* 26–27 (Mark Elliot & John David Smith eds., 2010).

95. See FONER, *supra* note 68, at 320 (“[M]any articles [were] copied directly from the North.”).

the hands of the public to regulate their own concerns. The local management of the township dethrones the old aristocratic order, and educates the people to self-government.”<sup>96</sup> The theory was simple: townships create political engagement, which forms new political communities, which, in turn, train citizens in the arts of self-government and create the circumstances for economic and cultural progress.<sup>97</sup> If the project of remaking the South was to remake the southern “way of life” from the ground up, the township experiment was a linchpin.

Although the vision was largely the same in each of the three states, the legal histories were quite different for structural, political, and contingent reasons. In Virginia, the township experiment was written into the constitution in 1869 but required legislative action before the reforms were set in motion. By 1870, the political winds had shifted enough that the proposed reforms never really took hold. In 1874, the experiment was ended by constitutional amendment. In South Carolina, the experiment had an even shorter life. Townships were required by statute in a special legislative session in 1868, giving content to a constitutional amendment that had been adopted to enable the reform. Nearly as soon as the borders were drawn and elections begun, opposition to the reforms emerged from across the political spectrum. By 1870, the township statute had been repealed and the experiment ended.<sup>98</sup>

It was in North Carolina where the experiment was most fully implemented, and where, as a consequence, the opposition to it was most robust and illustrative. In North Carolina, the township experiment was written into the constitution in 1868.

It was a principal bone of contention in the battles between the radicals and conservatives for the next seven years. The communitarian idealism of the reformers met increasingly stiff resistance from conservatives fueled by both outsider and racial resentment. This resistance slowly coalesced around a new proposal: eliminate the danger of the townships by giving the state government control over local government. Over the angry protest of Republicans

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96. Edward Daniels, *The Township System*, DAILY STATE J. (Alexandria, Va.), Oct. 29, 1872, at 2. There is no indication that there was any coordination between the framers of the constitutions in these three states.

97. In the words of Daniel Corbin, the architect of the township experiment in South Carolina, when responsibility for governance is “in the hands of the people . . . the public interest are excited, the people educated, and the country developed and improved.” *The Last Sensation: Metropolitan Police Tyranny. A Protest Against Repealing the Township Law*, CHARLESTON DAILY NEWS, Jan. 15, 1870, at 1.

98. I will summarize the history of the experiment in these two states in more detail below.

and reformers, this was how the township was finally written out of the state constitution in 1875. Within two years, the state had used its new power to erase the townships from the map.

### 1. The Township Experiment in North Carolina

#### *a. Albion Tourgée*

The story of the township reform in North Carolina begins (and, to some extent, ends) with Albion Tourgée. It was Tourgée who wrote and advocated for the constitutional language that created townships in North Carolina. It was Tourgée who fought to preserve the townships for nearly a decade. And it was Tourgée who blamed the failure of the entire project of Reconstruction on the failure of the township experiment there.<sup>99</sup>

Tourgée was a self-labeled carpetbagger who perfectly embodied the complex idealism and opportunism of the Yankee reformer: part missionary, part capitalist, and part militant. Born in the Western Reserve of Ohio (a bastion of New England culture in the West)<sup>100</sup> in 1838, Tourgée split his childhood between Ashtabula County and his aunt's house in western Massachusetts.<sup>101</sup> In both of these places, local government meant the model of the New England town.<sup>102</sup>

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99. In his 1880 novel, *Bricks Without Straw*, Tourgée wrote bitterly that “the township system, with its free discussion of all matters, even of the most trivial interest to the inhabitants; that nursery of political virtue and individual independence of character, comporting, as it did, very badly with the social and political ideas of the South—this system was swept away . . .” ALBION W. TOURGÉE, LL.D., *BRICKS WITHOUT STRAW* 461 (N.Y., Fords, Howard & Hulbert 1880). And with it, so too was self-governance, democracy, and the promise of a new political order in the South. *Id.* at 461–63.

100. The Western Reserve acquired its name because it was originally granted to Connecticut under the Northwest Ordinance of 1787. Until 1800 it was known as “Connecticut’s Western Reserve.” MARK ELLIOT, *COLOR-BLIND JUSTICE: ALBION TOURGÉE AND THE QUEST FOR RACIAL EQUALITY FROM THE CIVIL WAR TO PLESSY V. FERGUSON* 47 (2006). Unlike southern Ohio, much of which had been granted to Virginia and settled by southerners, the Western Reserve was mostly settled by New Englanders who established towns and town meetings modeled on their home states. Untethered to the conservative “Brahmin” aristocracy of New England, the Western Reserve evolved into a hotbed of radical egalitarian thought by the mid-nineteenth century. A combination of religious revivalism, abolitionism, and mediated Jacksonian populism meant that the Western Reserve was one of the most radical and far left regions in the North. *See id.* at 49 (“Both western New York and Ohio’s Western Reserve developed a distinct egalitarian culture that was fiercely committed to the self-improvement of the individual. . . . [T]hese regions would become Radical Republican strongholds providing the strongest support for the most radical legislation of the Reconstruction era.”).

101. *Id.* at 50–53.

102. In fact, the settlers in the Western Reserve were reviving an old model of the New England town that no longer existed (or perhaps never had existed). They were utopians and



Unlike many of the Yankee voices of Reconstruction, Tourgée was neither a veteran of the abolition movement nor a member of the northern elite. Before the war, he shared the baseline radical politics of his neighbors, but, at least by his own account, he was a man of letters only obliquely interested in politics—he was not yet a radical.<sup>103</sup> It was his experience in the Civil War that transformed him into a crusading radical and idealist.<sup>104</sup> When he witnessed slavery in practice for the first time while convalescing from an injury on a Unionist plantation in Kentucky, Tourgée came away appalled: “My brain throbs—my blood boils! . . . I cannot forget what has occurred.”<sup>105</sup> This experience, in concert with Lincoln’s Emancipation Proclamation (issued that same fall), seems to have marked a turning point for Tourgée. He had entered the war a unionist, but he had become a radical advocate not only for ending slavery, but for ending the entire political culture which harbored it. In a letter to his old fraternity brothers written in early 1863, Tourgée wrote: “I dont [sic] care a rag for the ‘*the Union as it was.*’ I want and fight for the *Union ‘better than it was.’* Before this is accomplished we must have . . . a thorough and complete revolution and renovation.”<sup>106</sup>

With these words, Tourgée staked an early claim to the vision that Stevens would lay out two years later. He was a remarkably

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communitarians following Adams’s idealized model. They “constructed villages formed after the English model with a defined town center, a church and a school . . . This ideal depended on shared values and communal networks to bind them together in a single purpose where Protestant ethics and principles of enlightenment sustained one another.” MAE PELSTER, *ABOLITIONISTS, COPPERHEADS AND COLONIZERS IN HUDSON & THE WESTERN RESERVE* 20 (2011).

103. In the midst of his political emergence in 1868, Tourgée reported that while he was “an ardent disciple of [abolitionist] Josh Giddings and others of that ilk. I . . . was still such an egregious ass, as to waste my youthful breath hurraing for that cowardly and weak-kneed concern known as the old Whig party.” ELLIOT, *supra* note 100, at 55. Tourgée’s most recent biographer, Mark Elliot calls this characterization into question, noting that Giddings was one of the leaders of the Republican Party that essentially destroyed the Whig Party and speculating that Tourgée’s politics were really more radical before the war than he let on. *Id.* at 55–56.

104. Although initially reluctant to enlist during the frenzy after Fort Sumter, Tourgée did join the army in the spring of 1861. *Id.* at 76–77. Just months later, in the disastrous first Battle of Bull Run, Tourgée was nearly paralyzed, injuring his spine in a way that would trouble him for the rest of his life. *Id.* at 78–81. For months, Tourgée thought that he would never be able to walk again, and he despondently gave up the hope of participating in the war effort and began to study law. *Id.* at 81–84. But by the summer of 1862, he had recovered enough to return to action as a lieutenant in a newly formed regiment from Ashtabula County in the Western Reserve that he had helped organize. *Id.* at 84. Drawn from the most radical part of the North, Tourgée’s new regiment was filled with abolitionists, and as they went south, they repeatedly found themselves in the situation of resisting army orders to return the “contraband” slaves who flocked to the army lines seeking freedom. *Id.* at 84–88.

105. *Id.* at 88.

106. *Id.* at 89.

consistent advocate for revolution and renovation for the rest of his life and his zeal was evident in the course he took after the war.

In October of 1865, Tourgée moved to North Carolina with his new wife Emma and two of his old college classmates to recover from his war injuries, seek his fortune, and help rebuild the South.<sup>107</sup> Tourgée settled in Guilford County, near Greensboro, where he leased a fruit tree nursery and began to practice law.<sup>108</sup> Almost as soon as he arrived, Tourgée identified himself as a friend of the freed blacks and white unionists.<sup>109</sup> He quickly fell in with the interracial radical community that was busily establishing an infrastructure of Union League chapters across the county and the state.<sup>110</sup> By 1866, Tourgée had been chosen as one of North Carolina's delegates to a convention of "southern loyalists" in Philadelphia. When he returned home in 1867, he was an emerging Republican hero and an instant villain to conservatives.<sup>111</sup>

I tell Tourgée's story in this much detail because it is in many ways the archetypal carpetbagger tale. The township experiment, in all of its manifestations, was the product of a specific kind of Yankee idealism that Tourgée embodied. Radicals like Tourgée found themselves in a unique position during the early years of Reconstruction in the South. Just two years removed from the mundane life of an Ohio lawyer, Tourgée and his compatriots were protagonists in the project of framing new constitutions for their adopted states. That old goal of "revolutionizing" the South was no longer speculative. It seemed immediately possible.

107. Tourgée's lingering back injury ultimately forced him to resign from his regiment in December of 1863 and return home to Ohio and his fiancée Emma. *Id.* at 98. A reluctant civilian, Tourgée returned to his legal study, passed the bar, and began to practice law. *Id.* at 103–04.

108. *Id.* at 105.

109. *See id.* at 106–07 (describing Tourgée's relations with both southern unionists and freedpeople upon his arrival in Greensboro). The first clients that Tourgée took upon arriving in North Carolina were native unionists, many of whom had claims against the federal government for confiscation and destruction of property during the war. He also not only took black clients, but also took an active interest in the freedpeople's struggles. He hired many freedpeople to work in the nursery and started up a school for freedpeople in Greensboro.

110. *Id.*

111. The Democratic paper in Tourgée's adopted hometown modified an old epithet to attack him for his speech in Philadelphia: "While Mr. Tourgee may resemble 'rotten mackerel by moonlight[—he stinks and he shines],' we would respectfully suggest that he only stinks—certainly he does not shine." *An Important Question Settled*, GREENSBORO PATRIOT, Sept. 14, 1866, at 1. The *Patriot* attributes the saying to John Randolph—the same Randolph who called Jefferson's wards "defecated Jacobinism." PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, at 532–33 (Richmond, Samuel Shepard & Co. 1830).

*b. North Carolina's Convention*

In the fall of 1867, North Carolina was preparing for a convention to draft a new constitution to meet the requirements set out by the Reconstruction Acts. The convention was a radical project, and the old governing elite disparaged and ignored it. The conservative paper in Wilmington voiced a common view when it called the gathering the “Gorilla Convention” and proclaimed it illegitimate.<sup>112</sup> In part because conservatives largely declined to participate (or were barred from the ballot by their Confederate military service), the cohort of delegates who were chosen to gather in Raleigh the winter of 1867 was dominated by radicals.<sup>113</sup> The convention itself was dominated by Tourgée.

At twenty-nine, Tourgée was the youngest delegate to the convention, but he proved to be an energetic and ubiquitous advocate for his ideas and, by sheer will and activity, managed to have a hand in nearly all of the lasting reforms written into the new constitution. Tourgée brought to his work his vision of a renovated and revolutionized South, and the resulting constitution showed it. His influence on the proceedings was so pervasive that for many years in retrospect some referred to the 1868 convention as the “Tourgée Convention.”<sup>114</sup> He was instrumental in framing new language requiring universal manhood suffrage, judiciary reform, penitentiary reform, legal code reform, and the establishment of universal education.<sup>115</sup> Taken together, these provisions both set out a new suite of positive rights for *all* North Carolinians and sought to create an empowered electorate to protect them.<sup>116</sup> The key engine of creating that electorate was a new system of local government conducive to an inclusive communitarian vision for the state—Tourgée was there too

112. *Tourgee*, WILMINGTON MORNING STAR, Jan. 11, 1868, at 2.

113. The ambivalence of conservatives is evident in an article from the *Greensboro Patriot* advancing the candidacy of a few conservatives as alternatives to Tourgée, but at the same time urging that the convention itself was something to be resisted. See *Candidates for the Convention*, GREENSBORO PATRIOT, Nov. 8, 1867, at 2 (“Let no man stay at home and thereby fail to vote for H[arris] and M[endenhall], and if possible, thereby defeat A.W. Tourgee & Co. Those who have resolved to vote against the calling of a convention should not hesitate to vote for the Conservative ticket . . .”).

114. ELLIOT, *supra* note 100, at 128.

115. Judge Robert N. Hunter, Jr., *The Past as Prologue: Albion Tourgée and the North Carolina Constitution*, 5 ELON L. REV. 89, 102–03 (2013).

116. *Id.* at 98 (“The political linchpins of these guarantees depended upon an electorate who would support these rights and support the election of officials who believed in these guarantees, and would act to implement and enforce them.”).

as the chairman of the committee responsible for the township experiment.<sup>117</sup>

Although the experiment was central to the overall reform project, it was not the most prominent or controversial topic at the convention. The sheer number of reforms that the convention considered over a three-month span diluted specific opposition to particular policies.<sup>118</sup> Conservative opposition was fueled by outsider resentment (“northern oppression”) and racial resentment (the “Gorilla Convention”), but the complaints tended to be more generalized than specific. Tourgée’s committee did not present its report and recommendation on the townships until the third month of the convention.<sup>119</sup> The discussion of the committee’s report took less than one day. Just two days after the report was presented and discussed, it passed the convention and became part of the draft constitution.<sup>120</sup> All indications suggest that, although there was opposition to the plan in the form of nay votes (fourteen out of 101), there was very little vocal opposition on the convention floor.<sup>121</sup>

The plan that Tourgée’s committee proposed had thirteen sections and, with minimal alteration, subtraction, and addition, was the plan that was written into the final document as Article VII: “Municipal Corporations.” The first two sections began with the existing structure, defining the governance structure for counties going forward.<sup>122</sup> Sections 3 and 4 laid out the process by which the county officers would supervise the surveying, creation, and naming of the “convenient districts” that the county would be divided into. These new districts, upon approval of the General Assembly, would “have

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117. See *Special Order*, DAILY N. CAROLINIAN (Raleigh, N.C.), Mar. 6, 1868, at 2 (“Tourgée, chairman of the committee, said since the old county court system had been abolished, the committee had reported a plan proposing a Board of Commissioners to attend to county taxation and other public matters.”).

118. This new constitution was a “break as sharp, if not more so, than that marked by the Independence Constitution itself.” JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 13 (G. Alan Tarr ed., 1993).

119. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA AT ITS SESSION 1868, at 314 (Raleigh, Joseph W. Holden 1868) [hereinafter “JOURNAL”] (beginning discussion of the report starting on March 5, 1868).

120. *Id.* at 352–53 (passing the “third and final reading” on March 7, 1868).

121. Those nay votes included twelve of the thirteen conservatives at the convention. Not a single conservative voted for the township plan, and only two Republicans voted against it. *Id.*

122. N.C. CONST. of 1868, art. VII, §§ 1–2. There were to be biennial county elections to choose county officers: a Treasurer, Register of Deeds, and five commissioners. Those officers would exercise “general supervision and control of the penal and charitable institutions, schools, roads, bridges” etc. of the county. The original proposal at the convention included the officer of Sheriff and “one or more Coroners” in the list of county officers. These offices were eliminated during the debate over the bill. See JOURNAL, *supra* note 119, at 315.

corporate powers for the necessary purposes of local government and shall be known as townships.”<sup>123</sup>

Tourgée’s plan sailed through the convention with almost no opposition.<sup>124</sup> With little attention and almost no direct opposition, North Carolina had replaced its old plantation localism with a new communitarian model uncompromisingly drawn from the mind of a Yankee idealist.

*c. Outsider Resentment: The Conqueror’s Localism*

Although the township experiment passed through the convention with little resistance, it almost immediately became a target for conservative opposition to ratification. In the weeks after the convention, the townships became a focal point for conservatives’

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123. N.C. CONST. of 1868, art. VII, §§ 2–4. Having created these townships, Section 5 outlined the three officers that would make up the “Board of Trustees” of each township: a Clerk and two Justices of the Peace. *Id.* § 5. Elected biennially, the Trustees would have control over municipal matters, including taxes, finances, roads, and bridges. In addition to the Board of Trustees, there would also be biennial elections for a separate School Committee, which would have control over township schools. This provision was among the most altered from the original committee report. Tourgée’s original proposal had called for annual elections (on the Jeffersonian and New England models), but the convention settled on biennial elections. Additionally, Tourgée’s initial proposal had been to give the Board of Trustees authority over the schools, but as the education provisions of the constitution evolved, he and the convention settled on creating a separate School Committee. *See JOURNAL, supra* note 119, at 315–17. There is some ambiguity in the constitution respecting whether the new school districts would be coextensive with the new townships. Article IX called for dividing counties up into school districts but did not specify that those districts need be coextensive with the new townships. N.C. CONST. of 1868, art. IX, § 3. But Section 5 of Article VII clearly states that the School Committee will be elected by the township. *Id.* art. VII, § 5. Sections 6 through 9 laid out the powers and limitations of the new municipal governments. *Id.* §§ 6–9. Section 6 required the trustees to assess taxable property in the township, Section 7 prohibited *all* municipal corporations (towns, cities, and counties) from incurring debt or collecting taxes for purposes beyond necessary expenses without a majority vote of the residents. *Id.* §§ 6–7. Section 8 prohibited drawing any money from a county or township treasury except “by authority of law.” *Id.* § 8. Section 9 required that all municipal taxes be uniform and *ad valorem*. *Id.* § 9. Sections 10 through 12 outlined the process by which local governance would proceed during the process of defining the new townships and holding elections. *Id.* §§ 10–12. First, the county officers would be elected and begin their work ten days after the new constitution was ratified. *Id.* § 10. While the new townships were being defined, and before elections could be held, the Governor was instructed to appoint justices of the peace in each county to keep the machinery of government working. *Id.* § 11.

124. It was the last provision, which, despite the fact that it had little bearing on the structure of the new system, drew the most attention. Section 13 prohibited municipalities (including townships) from collecting taxes or otherwise using funds in order to pay any debt “contracted, directly or indirectly, in aid or support of the rebellion.” N.C. CONST. of 1868, art. VII, § 13. Although the conservatives at the convention did not go so far as to openly oppose this last provision, four committee members declined to endorse it and when it came before the convention as a whole, the conservatives moved to amend it to allow towns to repay debt that “indirectly” supported the rebellion. This motion failed on a near party-line vote. *See JOURNAL, supra* note 119, at 318–19.

deeply felt resentment of northern oppression: "The general characteristics of our old customs are to be changed[ ]" and replaced with "Yankee customs."<sup>125</sup> Outsider resentment came hand in hand with a turn toward a more proprietary local government that provided fewer services and assessed fewer taxes. Townships "require[d] a complexity of machinery and officers, and an amount of expense, wholly unadapted to the wants, tastes and education of our people."<sup>126</sup> Between the claim that the townships were not "adapted" to the South and the argument that southerners wanted less local government, conservatives began to construct a story about what a native local government system would look like. The intricacies of the Yankee town were all tied up in its communitarian soul. Northerners wanted their towns to employ people and provide services. Perhaps more importantly, they wanted townships to be training grounds for democratic participation. Townships would be "schools where the lessons of statesmanship will be learned [and] which may be afterwards displayed in the government of the State."<sup>127</sup> Southerners, by contrast, wanted their towns to employ few people and do little apart from protect the freedom of property owners to do what they wanted. Democracy was neither a primary nor a secondary value. Instead, conservatives argued for a localism that was native and suited to the South, which left the political and social order intact.

In the back and forth about the township plan, a fundamental struggle that would define Reconstruction politics emerged. Radicals and Republicans saw the defeated South as a land without functioning institutions of government. Those who had been excluded from political power (freedmen, poor whites, yeomen) would be trained to rebuild their governments by participating in their new local government. This process would forge a new electorate and citizenry that would move beyond the elite plantation politics that defined slavery. Southerners, and especially conservative southerners who had an affinity for the old plantation system, agreed that they did not have functioning institutions of government, but blamed that on being conquered and colonized. They were not interested in forming a new electorate with former slaves and "the mob." They were not interested

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125. *The New Constitution*, WILMINGTON J., Mar. 13, 1868, at 2. The proof of this was in the language: "New offices and new names are to be introduced, in accordance with the customs of the Northern States." *Id.*

126. *Thoughts for the People. No. 7. Fifteen Solid Objections to the Proposed Constitution!*, SEMI-WKLY. SENTINEL (Raleigh, N.C.), Mar. 28, 1868, at 1.

127. JOURNAL, *supra* note 119, at 486. This defense of the constitution was distributed and printed widely across the state. See, e.g., *Address of Messrs. Rodman and Gahagan*, WKLY. N.C. STANDARD (Raleigh, N.C.), Apr. 8, 1868, at 1.

in having a local government “machinery” that would train a new polity. Rather, they wanted a local government that would protect the old political order to the maximum extent possible.

*d. Racial Resentment: The New Integrated Townships*

Despite opposition, the new constitution was ratified in a special election in April of 1868.<sup>128</sup> Almost immediately, county officers began the sometimes painstaking work of laying out the new townships.<sup>129</sup> The first township elections were set for the fall of 1869. As the townships transitioned from theory to practice, the shape of the arguments over the township system began to evolve. Seemingly for the first time, conservatives observed that the townships gave new political power to black citizens, sometimes resulting in the election of black officials. This triggered the first wave of racial resentment leveled against the townships. At the same time, perhaps because of the threat to white supremacy, conservatives began to advocate more active participation in local politics than they had previously done. They argued, on the one hand, that the new local governments were illegitimate both as engines of racial egalitarianism and outsider domination, but on the other hand, that as a matter of political expedience, they should be captured to keep power out of the hands of those who would undo the southern way of life.

The fear of “negro domination” through the town began to emerge before the elections. In a letter addressed to the (predominantly Republican) “White Men of Western North Carolina,” an anonymous “Springfield” noted that by helping ratify the constitution, western white men have “let your white brethren be . . . enslaved” at the hands of the coming crop of “negro township judges,” trained in the diabolical ideologies of the “league,” who will appropriate white property without cause.<sup>130</sup> In this way, conservatives used racial resentment to undermine the legitimacy of the new townships. Not only would black elected officials be unqualified, but their very presence would strip away local identity

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128. See ORTH, *supra* note 118, at 13.

129. The process of laying out the new township borders took a long time. Tourgée’s own Guilford County did not designate new townships until October—and there the borders were coextensive with previously existing tax districts. See *Townships in Guilford*, PATRIOT & TIMES (Greensboro, N.C.), Oct. 15, 1868, at 3. Meanwhile, in Wake County (where the state capital Raleigh is), the townships had still not been adequately laid out in time to hold township elections in 1869—a year later. See *Township Elections—Wake County*, DAILY SENTINEL (Raleigh, N.C.), July 17, 1869, at 2.

130. Springfield, *To the White Men of Western North Carolina*, SEMI-WKLY. SENTINEL (Raleigh, N.C.), Sept. 23, 1868, at 3.

and local control.<sup>131</sup> The alarm became both a critique of the township and a call for electoral participation as conservative papers threatened that if conservatives do not turn up to vote, “the control of affairs must be reposed in ignorant negroes. . . .”<sup>132</sup>

As would be true for much of the process of Redemption, racial resentment was both a rallying cry for electoral participation and a call to limit government once control was regained. Pragmatic conservatives partially abandoned their disdain for the new system in the effort to win local elections and use the new form as a tool of wresting power away from the “radical” governing party. As conservatives sought public office, an undertone of validation for the system crept into their rhetoric. The *Raleigh Sentinel* proclaimed, “[M]uch depends for the security and peace of society upon the intelligence, the virtue and promptness of the magistracy. If the Justices of the Peace are wise and good men, much irritation, litigation and lawlessness will be avoided.”<sup>133</sup> Holding his nose, John Gatling exhorted voters to “accept a situation which he finds to be inevitable,” and turn out to vote. Subtly acknowledging that the ultimate goal remained to do away with the new system, Gatling emphasized that “it is not wise, because an office happens to be of low degree, to regard it as unimportant. It is in the ‘small affairs’ of life we make our greatest mistakes.” Interestingly, Gatling defended his electioneering by recognizing the virtues of local control:

The lowest officers are brought in most immediate contact with the people, they are the company officers of the political army, upon whose humble shoulders rest our strongest hopes for success, at whose hands the greatest good *may be* accomplished, or whose corruption, villainy and petty tyranny *may* drive our people mad . . . .<sup>134</sup>

Importantly, Gatling’s view of local control was not communitarian. His local officials were representatives of the interests of the people, not the people themselves.<sup>135</sup> They were

131. The *Wilmington Journal* suggested that

every “Township” in the State, in which there may be a large negro majority, be called “Holden” [after the hated Republican governor]. . . . So that the name shall be beslavered with the negro, now and forever, and the one shall not be mentioned without suggesting, by the most natural and intimate association, the other.

*Our Raleigh Correspondence*, WILMINGTON J., Feb. 19, 1869, at 4.

132. The paper went on: “[O]r worse, a few malignant and carpet bag whites in every respect more depraved and worthless than their black brethren.” *The August Election*, TARBORO’ SOUTHERNER, Jul. 22, 1869, at 2.

133. *Elections in August*, WKLY. SENTINEL (Raleigh, N.C.), July 29, 1869, at 2.

134. John Gatling, *To the Voters of Gates County, Without Respect to Party or Color*, DAILY SENTINEL (Raleigh, N.C.), July 8, 1869, at 2.

135. Gatling’s rhetoric was consistent with the rhetoric of the Democratic Party which, after the war, had become increasingly supportive of decentralization. In 1867, decrying Republican centralized government, Horatio Seymour railed against putting the South under the “almost



protectors, not democrats. In the context of the politics of racial and outsider resentment, the terms of that protection were clear. The goal was not to participate in politics to build civic engagement; it was to participate in order to protect against the civic engagement of blacks, carpetbaggers, and scalawags.

When the township elections came, the results were somewhat inconclusive. Some conservative papers put a positive spin on the election, noting that many of the towns across the state elected Democrats.<sup>136</sup> But most conservatives perceived the elections to be a Republican victory and either bemoaned conservative apathy<sup>137</sup> or returned to the *ex ante* position that townships were either an oppressive outrage or an annoying triviality.<sup>138</sup> Despite the generally positive outcome for Republicans, the staunchest proponents of the experiment saw danger in the elections. In elections across the state, they observed that conservatives had managed to co-opt the process

savage" "black rule." But in the same speech, he praised the "township system of government" as the core of a well-run political system. Praising the power of local control to protect communities, Seymour emphasized that the townships "allow the people of the localities to take care of those things which most concern them, and concerning which they have the most intelligence." *The Masses Moving. Great Meeting in Brooklyn. Eloquent Speeches by Hon. Henry C. Murphy and Gov. Seymour*, ARGUS (Albany, N.Y.), Oct. 26, 1867, at 2. Democrats would continue to praise the township throughout the 1870s, despite the pitched partisan battles in the South. Townships in the North were constructed as the bedrock of a decentralized government and a bulwark against perceived Republican nationalization and consolidation. In 1870, a Democratic senator in Ohio called the township system "the brightest example of democratic government" and credited New England with setting it. *The Campaign. Mass Meeting in Brainard's Hall—Able Speech of Senator A.G. Thurman*, CLEVELAND DAILY PLAIN DEALER, Sept. 28, 1870, at 4. Elsewhere in Ohio, Democrats picked up the call in even more strident terms. In 1873, the Democratic *Cincinnati Enquirer* called the New England town meeting "the germ of the Republic, the purest democracy born on earth." *The New England Town-Meeting*, CINCINNATI ENQUIRER, May 8, 1873, at 4. Months later, campaigning for Governor of Ohio, Democrat (and old copperhead) William Allen proclaimed that "[t]here is only one perfect democracy, the New England town meeting. The people in that little democracy make and execute the laws so far and fully as it is possible for them to do so." *The Danger and the Hope of the Hour*, CINCINNATI ENQUIRER, Sept. 1, 1873, at 4. In 1875, the *Enquirer* reiterated that the system is "the germ of our system of Government . . . It is democracy perfected." *The New England Town Meeting*, CINCINNATI ENQUIRER, Apr. 16, 1875, at 4. In 1878, the *Enquirer* expanded the argument to suggest that the National Democratic Party was "born in the New England town-meeting, which knew no monopoly, which tolerated nothing but perfect equality." *The Ohio Democracy National—The Eastern Democracy Sectional*, CINCINNATI ENQUIRER, Jan. 28, 1878, at 4. Later that year, the claim became even more grand—entwining the town meeting with the "great reform movements in this country" including, surprisingly, abolition. *That "Rag Baby,"* CINCINNATI ENQUIRER, June 29, 1878, at 4.

136. See *The Township Elections*, NEWBERN J. COM., Aug. 12, 1869, at 2.

137. See *Our Township Election*, ASHEVILLE NEWS & MOUNTAIN FARMER, Aug. 13, 1869, at 2.

138. The virulently conservative *Henderson Index* proclaimed that it was "not accustomed to despair for as small cause as a township election going against us." *We Fear the Township Election . . .*, HENDERSON INDEX, Aug. 20, 1869, at 2.

either through putting forward candidates who should have been disqualified by their Confederate service or by suppressing black and poor white voters. Thus, despite what seemed like a promising beginning to the experiment in operation, men like Tourgée warned that the elections revealed the seeds of the demise of the township if white supremacy was allowed to operate freely in the political process.<sup>139</sup>

*e. Conservative Resentment v. Democracy:  
The Fight to End the Townships*

The 1869 local elections did not resolve the existing conflicts over the township experiment, but they did increase the urgency of conservative opposition. Almost as soon as the election was over, leading conservative voices began to call for a new constitutional convention to “fix” the abuses of the 1868 constitution. Abolishing the township was one of their core objectives.<sup>140</sup>

For the first time, conservatives brought outsider resentment and racial resentment to bear as part of a single argument. Taken together they combined to form a more generalized conservative resentment against Reconstruction government. This resentment bolstered the argument that the townships were wasteful, oppressive, and illegitimate. The *Sentinel* called the system a “yankeeism” and an excuse to “provide offices and place for carpet-baggers, dishonest scalawags and lazy negroes.”<sup>141</sup> The solution to all of these problems was to dismantle the communitarian experiment and replace it with antebellum proprietary localism. “Let this ignoble and oppressive system be blotted out also, and the good old system of our fathers restored.”<sup>142</sup>

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139. Tourgée was an opponent of the township elections themselves, claiming that they were invalid because many conservatives who were disqualified from holding office under the new constitution were running and being elected (and in some cases being certified as elected). Leading up to the election, Tourgée had warned that they were going to be a “farce” and he staunchly opposed allowing disqualified candidates to serve. *Who Appoints Justices of the Peace*, GREENSBORO PATRIOT, Aug. 26 1869, at 2. In his new role as circuit judge, he argued that the governor’s interim appointees should hold onto their offices “until there shall have been a loyal election held in the township.” *Who Appoints Justices of the Peace*, GREENSBORO UNION REG., Aug. 25, 1869, at 2.

140. See *The Present Constitution*, DAILY SENTINEL (Raleigh, N.C.), Sept. 22, 1870, at 2.

141. *The Standard and the Commissioners*, SEMI-WKLY. SENTINEL (Raleigh, N.C.), Sept. 15, 1869, at 2.

142. *Repudiation*, TRI-WKLY. EXAMINER (Salisbury, N.C.), Oct. 6, 1869, at 2.

During the elections of 1870, the townships remained a pivotal issue.<sup>143</sup> Conservatives attacked Republican candidates on the grounds that if elected they would defend the townships.<sup>144</sup> This tactic was part of a conservative electoral surge that allowed them to take control of the state legislature in 1870. One of the legislature's first acts was to call for a new convention.<sup>145</sup> In the official conservative statement in defense of the call for a convention, townships had prominent billing, buoyed by strong conservative resentment.

The present county and township governments are intolerable evils. Their cumbrances and inefficiency, their expensiveness, and the numerous avenues to peculation and extortion which they open up, are grievances which have brought complaints and remonstrances from all sections of the State. We believe there is an almost universal desire for the restoration of the old County Courts, as the simplest, cheapest, and most honest system of county government ever devised, and for the abolishment of the existing system, with its wheels in wheels, crushing the people with burdens.<sup>146</sup>

This official position went hand in hand with the overt racial resentment that had emerged during the township elections. Conservatives observed that there were white men "under negro rule and domination" to convince other whites in the Piedmont and the mountains (predominantly Republican regions where there were white majorities) that they needed to vote to eliminate the township system out of racial solidarity.<sup>147</sup> In all of their arguments, conservatives steered carefully clear of arguments based in democracy. The county courts were the most honest and native system, not the most democratic.

In the face of these headwinds, Republicans in North Carolina launched a vigorous defense of the township system. They began from the position that the old county courts were not a viable option. They were widely reviled, and those proposing them in place of the townships offered no alternative but a return to a broken system.<sup>148</sup>

143. Even those conservatives who were opposed to calling a general convention (both because it was futile in the face of Republican opposition and because it might give radicals a chance to do more mischief) remained committed to finding a way to undo the township system. See Rowan, *The Convention Question*, OLD N. STATE (Salisbury, N.C.), Nov. 4, 1870, at 2.

144. *The County Candidat[es]*, SEMI-WKLY. SENTINEL (Raleigh, N.C.), Nov. 5, 1870, at 1.

145. See ORTH, *supra* note 118, at 15.

146. *Legislative Address on the Convention*, TARBORO' SOUTHERNER, Feb. 16, 1871, at 2.

147. *Coming Campaign*, WKLY. SENTINEL (Raleigh, N.C.), Feb. 21, 1871, at 4. The full quote is pretty inflammatory:

Will the white men of Wilkes and the mountains continue to vote the Republican ticket with 80,000 ignorant negroes, to the ruin and oppression of their brethren in the East? If they will, let them vote against Convention and move down to Halifax or Granville, where they can enjoy negro rule to their hearts' content.

*Id.*

148. An anonymous writer to *The Carolina Era* made this point clearly, noting that the opponents "object to the Township system, but propose no substitute. Are we to go back to the old

The most forceful and widely distributed defense of the experiment took the conflict between the old plantation localism and the new townships head on.<sup>149</sup>

The official Republican response to the call for a convention posed a sharp challenge to those who were nostalgic for the “old system.” In short, it argued that the old system that conservatives sought to return to was plantation localism—a system that was no longer possible to achieve. The argument was that because there was no way to go back, the only way was forward into the new political reality—and that the township experiment was the best path forward.

The Republicans’ first move was to rebut the framework of outsider resentment. Conservatives may have argued that “townships are a [Y]anke invention, imported into North Carolina as a badge of subjugation, and machinery of oppression,” but in it was the township that was the original model for Republican self-rule in North Carolina.<sup>150</sup> On this account, the township was the original blueprint for local government, one that “the growing influence of our slave interest” had overturned in favor of the plantation. The argument was direct: the planter elite “substitute[d] the *slave plantation* in place of

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County Court system, with Justices appointed by the Legislature . . . and an accumulation of costs . . . ? They make no comparison of the costs of the two systems.” Conservative, Letter to the Editor, CAROLINA ERA (Raleigh, N.C.), June 8, 1871, at 3. Others used a version of the same point to note the county court system was not some perfect nostalgic relic, and indeed that some of the very same people who oppose the township system had tried to reform the county system before the war. See, e.g., *Convention Bill up in Orange*, RALEIGH DAILY TELEGRAM, July 29, 1871, at 2.

149. Some moderate voices sounded conciliatory notes, accepting the assertion that the township system was flawed, but arguing that it should be fixed through legislative tinkering rather than a full on convention. A moderate named Marcus Erwin was quoted by the *Raleigh Daily Telegram* as arguing that the system was flawed but that “the Legislature had the power, as it is the duty of that body, to correct every evil and abuse growing out of the system, except the destruction of the system itself.” *The State Constitution*, DAILY TELEGRAM (Raleigh, N.C.), Feb. 23, 1871, at 2. In the same vein is a letter to the *Telegram* offering a tepid defense of the system noting, on the one hand, that Jefferson advocated the system and that it works well in the North and West, but on the other hand that “the upper classes here seem greatly averse to this system, and it may be best not to force it upon them, if after a fair trial, they do not become reconciled to it.” Enquirer, *The Convention*, RALEIGH DAILY TELEGRAM, May 12, 1871, at 1. The same Erwin also argued that the township system was nothing more than the realization (at long last) of Jefferson’s dream of Ward Republics. Marcus Erwin, *The Constitution*, CAROLINA ERA (Raleigh, N.C.), June 27, 1871, at 1.

150. *To the People of North Carolina*, CAROLINA ERA (Raleigh, N.C.), June 20, 1871, at 3. The township system was rooted in “twelve centuries [of English law that] have marked that free society from which we have borrowed the substantial parts of our own.” Not only did Tocqueville and Jefferson regard “the *township* as a very corner stone of social liberty in this country,” *id.*, but so did the original founders of North Carolina, as evidenced by the fact that the township was the original form of government in the colony.

*the township.*"<sup>151</sup> In short, the township was native; it was the plantation that was invasive and foreign.

The next move was to link outsider resentment to racial resentment. White supremacy was linked to nostalgia for the old ways through the remembered fantasy of racial domination. It was through the desire for racial domination that plantation localism had become normalized, creating "some yearning after *the plantation*, throughout North Carolina. Many virtuous people no doubt struggle with the forbidden appetite."<sup>152</sup> While the plantation was forbidden and foreclosed by emancipation, white political and economic supremacy was not. And so, the Republicans revealed, the real motivation behind the attack on the townships was to reinstate the white supremacist proprietary localism of the plantation by removing the new obstacle of destabilizing communitarian townships.

The Republicans argued that this was precisely why the townships were so important. They were the only hope for moving the South beyond its defeat and the white supremacist ideology of slavery. The township represented dynamic egalitarian community; it was a "natural republic made up of *neighbors* . . . who ought to be, and generally are, friends."<sup>153</sup> Implicit was the idea that the township would promote racial cooperation and cultivate common interest. Among neighbors, the Republicans argued, civic virtue and merit would erase racial animus.<sup>154</sup> This cooperative meritocracy contrasted sharply with old county court system that "depend[ed] upon the reluctant favor of court house cliques."<sup>155</sup> The township thus replaced a feudal patronage system dedicated to maintaining the status quo with a form of participatory democracy designed to create social mobility for white and black citizens.<sup>156</sup>

The Republican response made the contrast between communitarian and proprietary localism the center of the political debate. Conservatives had focused on protecting a tradition rooted in

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151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* They argued that the townships "promote[d] public spirit [and] . . . afford[ed], in the organized circle of its neighbors, that *machinery* for forcing forward and upward local merit." *Id.*

155. *Id.*

156. This advancement argument had another valence too. Responding to conservatives' arguments that townships worked well in the North where the population was denser and more wealthy, the committee argued that it was the township system itself which allowed the poor and sparsely populated North to grow in size and wealth: "[T]hey have grown to their present prosperity under the influence of this institution." *Id.* This argument, incidentally, bears a striking resemblance to Orestes Brownson's suggestion in 1865 that the township system is a natural incident of a progressing society. See BROWNSON, *supra* note 82, at 274-75.

white supremacy by retreating to the county courts. The Republicans responded that retreat was both impossible and undesirable. Local government should not preserve the broken past, but rather should be the foundation of a functional future. The Republicans called conservatives on their racial and outsider resentment and called on the voters of North Carolina to seize the opportunity of a new, egalitarian, and prosperous future.

Even if the Republicans had been somewhat circumspect in their racial justice rhetoric, their opponents understood the argument as an attack on white supremacy. Conservatives portrayed the authors as race traitors. Their betrayal came in charging “late slaveholders” with the “yearn[ing] to re-enslave the negro.”<sup>157</sup> Without actually repudiating this charge, the *Sentinel* asserted that it was proof that the Republican leaders had betrayed all of their old white political allies by spreading “calumny and falsehood” against them.<sup>158</sup> In what has become a familiar move in the century since, racial resentment politics was used to fight off any charge of racism.

The Republicans won this round. In the first week of August, election day came and the public voted against holding a new convention.<sup>159</sup> Although the conservatives were gaining political power, there was still a strong enough Republican political base in the state to preserve the 1868 constitution for the moment. The township had been central to the campaign, and the defeat of the convention was, at least in some degree, an indication that North Carolinians liked what they saw from the townships in their first years.

Even so, in the aftermath of the convention defeat, the township experiment remained in the crosshairs, even as conservatives focused their attention on amending the constitution rather than calling a new convention.<sup>160</sup> Recognizing that the strategy of straight repeal had met resistance, a few voices began to formulate a more nuanced plan that would leave the townships intact, but give the conservative legislature the power to override local elections if they did not like the results. This idea was floated in an explicitly white supremacist letter from Caswell County in the fall of 1871:

We who live in negro counties, must appeal to the white men of the west to save us, so far as they can, by electing judges and magistrates by the legislature. To have a

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157. *Phillips and Holden*, RALEIGH SENTINEL, June 22, 1871, at 2.

158. *Id.*

159. ORTH, *supra* note 118, at 23.

160. Licking its wounds, the *Sentinel* took solace in the fact that “[t]he legislature will no doubt propose to relieve the people of townships.” *What Next?*, DAILY SENTINEL (Raleigh, N.C.), Aug. 20, 1871, at 2.

township system, and the county and townships governed by negroes, is more than a people should be required to bear.<sup>161</sup>

Nothing came of this idea in 1871, but it would not be forgotten.

Instead, conservatives proposed an amendment that would abolish Article VII of the new constitution nearly entirely and thereby put matters of local government squarely in the hands of the legislature.<sup>162</sup> Over the winter of 1871–1872, the legislature hashed out the language of this proposed amendment. As promised, the final wording proposed to essentially eviscerate the township system. Township governments would be abolished, every mention of “townships” in Article VII would be removed, and the state legislature would be given power to design and control county governments.<sup>163</sup> The amendment was passed by the legislature in the spring of 1872 and stood ready to be presented to the voters.

The dynamics of this proposed amendment revealed the degree to which appeals to plantation localism were rooted in protecting against redistribution of power and property through the townships. Conservatives had consistently called for a return to the county court system, but rather than write that into the amendment, they instead transferred the power over local government design to the state legislature. There, elite conservative power seemed to be in relatively stable control and thus insulated from the storms of local democratic chaos. By making the legislature the guardians of local power, conservatives entrusted the elites with the management local governments for the protection of their interests—in precisely the same way that they had before the war.

But the conservatives’ hold on power at the state level was more tenuous than they believed. In 1872, Republicans regained a measure of power in the state elections, in no small part due a federal crackdown on the Ku Klux Klan in the state and the attendant diminishment of the Klan’s influence over the electoral process.<sup>164</sup> The Klan and other white supremacist vigilante groups had been instrumental in conservative electoral gains through voter

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161. Caswell, Letter to the Editor, SEMI-WKLY. SENTINEL (Raleigh, N.C.), Sept. 30, 1871, at 2.

162. The Democratic Party of North Carolina, *Address of the Central Executive Committee*, CAROLINA ERA (Raleigh, N.C.), Oct. 31, 1871, at 1. Ironically, only Section 13, the section forbidding repayment of confederate debts, would remain.

163. *Amendments to the Constitution*, N. CAROLINIAN (Raleigh, N.C.), Dec. 28, 1871, at 2.

164. OTTO H. OLSEN, *CARPETBAGGER’S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE 190–91* (1965). Republicans actually won a majority of the popular vote, but gerrymandering meant that they remained in the minority in the General Assembly.

intimidation and violence.<sup>165</sup> More fundamentally, the Klan represented a direct localized expression of the racial and outsider resentments that fueled much of the opposition to the townships.<sup>166</sup> Linked as the Klan was to the movement to restore plantation localism, it was not surprising that the Klan's decline helped to save the township experiment, if only temporarily.<sup>167</sup>

The resurgent Republicans had wrapped themselves in the township experiment as the "essential principle[] of the existing constitution."<sup>168</sup> Against the rising tide of Redemption, Republicans were increasingly adamant that they were fighting a holy war to preserve democracy against a return to aristocracy and despotism. This made communal and participatory localism more and more central—doing away with the townships would be "essentially un-Republican."<sup>169</sup>

### *f. Demise*

The reprieve was, indeed, brief. In 1874, opponents of Reconstruction harnessed racial and outsider resentments and rode them to a big electoral victory; conservatives retook command of the legislature that they would not relinquish until the 1890s.<sup>170</sup> The result was that the long-sought convention was finally successfully called and set to convene in September of 1875. Unsurprisingly, the townships were still a primary target. Conservatives pulled together all of the strands of resentment in this final push. Townships were a Yankee imposition "not in any way suited to the wants or desires of

165. See RICHARD BAILEY, *NEITHER CARPETBAGGERS NOR SCALAWAGS: BLACK OFFICEHOLDERS DURING THE RECONSTRUCTION OF ALABAMA, 1867–1878*, at 204 (2010).

166. What we refer to collectively as "the Klan" was actually a collection of local groups operating county to county with little centralized control. During the first years of Reconstruction, the Klan operated much more like a patchwork of local white supremacist governments in exile than a cohesive regional or national movement. See DAVID CUNNINGHAM, *KLANSVILLE, U.S.A.: THE RISE AND FALL OF THE CIVIL RIGHTS-ERA KU KLUX KLAN 19–20* (2013).

167. Some constitutional amendments were proposed in 1873, but for once, the townships were not in the crosshairs. "Every proposition looking to any change, interference or alteration, whatever, in the Judicial, County or Township systems failed on a second reading." *Constitutional Amendments*, *DAILY ERA* (Raleigh, N.C.), Feb. 12, 1873, at 1.

168. *The Amendments*, *NEW N. STATE* (Greensboro, N.C.), Feb. 12, 1873, at 2.

169. *Id.*

170. 1874 was a disastrous year for Republicans across the South. Conservatives and Democrats used the Civil Rights Act, pending in Washington, to play up racial resentment. This, coupled with increasingly open intimidation and violence deterring black voters from the polls, led to a region-wide shift away from Republicans and toward Redemption. See FONER, *supra* note 68, at 549–50.



the people."<sup>171</sup> They were "not suited to our sparsely settled communities."<sup>172</sup> They were too expensive.<sup>173</sup> They threatened white supremacy: "[O]ur people must submit to ignorant negro Magistrates, who cannot write a warrant, negro school Committee men who can neither read nor write, negro Constables and Clerks."<sup>174</sup> These arguments had a new tone of confidence. Conservatives were explaining what they were about to do, not trying to convince anyone to support them.

In contrast, Republican responses took up the defense of townships in a much more urgent tone. Democracy and self-rule were under immediate attack. Townships "might be, if properly carried out, the true government of the people," and the conservatives were going to destroy it just as "the people are beginning to get used to [it] and like [it]."<sup>175</sup> Other voices reminded voters of the "tyranny" of the old county system that the Democrats proposed to reinstate.<sup>176</sup>

The vehemence of the Republican rear-guard action bore some fruit. When the election for delegates to the new convention was held, Republicans shockingly achieved a near even split with the conservatives.<sup>177</sup> Republicans saw their comparative victory as a cause for hope that the township system and the innovations of the 1868 constitution might be saved again.<sup>178</sup> There was some substance to this hope. Many of the more sweeping changes that conservative hard-liners had dreamed of were made impossible by the heterogeneous group of delegates.<sup>179</sup> Nevertheless, the convention would ratify thirty-six amendments to the 1868 constitution, including one that gutted the township experiment and left it for dead.<sup>180</sup>

171. *The North Carolina Convention Question Abroad*, DAILY CHARLOTTE OBSERVER, Mar. 31, 1875, at 2.

172. *Courts*, MORNING STAR (Wilmington, N.C.), June 12, 1875, at 2.

173. See *The Countersign—Pass it Along the Line*, GREENSBORO PATRIOT, June 30, 1875, at 2 (listing Democratic talking points and emphasizing the expense and waste of the township system).

174. *Why We Need a Convention*, CAROLINA MESSENGER (Goldsboro, N.C.), July 8, 1875, at 2.

175. *The Township System . . .*, N. CAROLINIAN (Elizabeth City, N.C.), June 2, 1875, at 2 (reprinting from the *Greensboro North State*).

176. *Does Any Man . . .*, DAILY CONST. (Raleigh, N.C.), July 13, 1875, at 2.

177. Albion Tourgée was elected (in a very tight race) and so he was sent to frame a constitution for his adopted state for the second time in seven years.

178. The Republican *Era* gloated that the elections represented a final chastisement of the presumption of "Southern Democracy" and celebrated the dismay of the Democrats at the election results. *The Lesson of the North Carolina Campaign*, ERA (Raleigh, N.C.), Aug. 19, 1875, at 1.

179. See OLSEN, *supra* note 164, at 205.

180. See ORTH, *supra* note 118, at 16.

Throughout the convention, conservative delegates offered a host of amendments to Article VII. Plato Durham, one of the few conservative veterans from the 1868 convention, proposed the most straightforward attack: "Resolution declaring that article 7 of the Constitution ought to be abrogated."<sup>181</sup> Republican papers scoffed at the "some half dozen propositions" saying "[d]own with the township system."<sup>182</sup> Conservatives, they argued, seized on "[w]hatever tends to limit and restrain the privileges of the people—to keep power from their hands and make them the helpless victims of a corrupt and ruthless aristocracy."<sup>183</sup> They hated the township system because it was "the nursery of freedom, the training school of independent voters and the bulwark of general education."<sup>184</sup> Conservatives, Republicans argued, only wanted to "steal power from the people."<sup>185</sup>

Although the Republican defense did not save the townships entirely, it did force the conservatives to take a more covert approach toward repeal. Instead of eliminating any part of the existing Article VII, the convention settled on proposed amendments that would leave the township system standing, subject to one additional section. This section gave the legislature plenary power to "modify, change, or abrogate" the local government system of the state at will.<sup>186</sup> In practice, this provision meant that the conservative legislature had flexible power over local government. Conservatives painted it as a compromise. In counties where townships were safely controlled by white conservatives, the township system (and direct election) could be preserved. But in counties and townships under radical or black control, the legislature could appoint township and county officials itself.<sup>187</sup>

The conservative "compromise" made the backdrop of racial and outsider resentment all the more clear. Communitarian localism

181. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA HELD IN 1875, at 59 (Raleigh, J. Turner 1875) (hereinafter "J. OF N.C. CONST. CONVENTION").

182. *Save the People's Constitution!*, DAILY CONST. (Raleigh, N.C.), Sept. 13, 1875, at 2.

183. *Id.*

184. *Id.*

185. *Political Integrity*, ERA (Raleigh, N.C.), Sept. 30, 1875, at 2.

186. The draft language is intentionally oblique: "The General Assembly shall have full power by statute to modify, change or abrogate any and all of the provisions of this article and substitute others in their place, except sections seven, nine and thirteen." J. OF N.C. CONST. CONVENTION, *supra* note 181, at 252. Left immune to meddling were the requirements that no municipality contract any debt unless necessary for its expenses, that all taxes should be *ad valorem*, and that municipalities not be allowed to pay confederate war debts.

187. Townships were perhaps "burdens, even in the West, where intelligent white men are in power," but "in the East, where ignorant negroes rule, they are a crying evil, a travesty upon government, a stench in the nostrils of honest men." *The Voice of the East*, NEWBERN J. COM., Sept. 18, 1875, at 2.

might be palatable where the community was dominated by white elites committed to protecting the "old ways." But where democratic participation meant electing blacks and outsiders, it must be quashed. Republicans protested, calling the proposed change "inconsistent with a democratic or republican form of government."<sup>188</sup> But by 1875, even the most radical Republican could see that resentment was a more powerful force in southern politics than democratic egalitarianism. The racialized appeal of "relief to the East"<sup>189</sup> cut across party lines, and appeals to black empowerment were not only losers, but potentially career ending. Against this backdrop, Republican paeans to the virtues of Republican self-governance were not enough to move the political needle.<sup>190</sup>

The constitutional amendments proposed by the 1875 convention were ratified by the voters of North Carolina in 1876.<sup>191</sup> Conservatives celebrated the suite of amendments as a return to self-government in North Carolina and an end to Reconstruction.<sup>192</sup> The fact that the townships had been partially spared at the convention briefly promised that perhaps in the West (in the mountain country where Jeffersonians had always been strongest) the township might survive in pockets. It was a short lived hope. In 1877, the legislature acted on their new powers over the townships and stripped *all* townships of their "very existence as corporate bodies."<sup>193</sup> All that remained of the townships of 1868 were their borders, which outlined little more than administrative memories.<sup>194</sup> Although the Republicans had battled the bill in the House and forced a few amendments, their consolations were quite minor: they forced the bill

188. J. OF N.C. CONST. CONVENTION, *supra* note 181, at 162.

189. *The Work Before Us—The Constitutional Amendments*, CAROLINA MESSENGER (Goldsboro, N.C.), Dec. 2, 1875, at 2.

190. O. H. Dockery argued (from Jefferson) for the benefits of people having direct electoral control over those who determine their taxes. *Remarks of Hon. O.H. Dockery, of Richmond, on the Ordinance to Amend Article VII of the Constitution (Municipal Corporation), in the Constitutional Convention, Oct. 8, 1875*, ERA (Raleigh, N.C.), Nov. 4, 1875, at 2. Tourgée took the more idealistic Tocquevillian tack arguing that townships are the schools of democracy and the engines of economic progress. *Judge Tourgée's Speech*, UNION REPUBLICAN (Winston-Salem, N.C.), Oct. 12, 1876, at 2.

191. ORTH, *supra* note 118, at 16.

192. The other amendments largely limited the power of the statewide electorate. In addition to retaking control over local government, the legislature also was given more control over the judiciary while the number of executive offices was reduced. *See id.*

193. *Wallace v. Bd. of Trs. of Sharon Twp.*, 84 N.C. 164, 167 (1881).

194. In *Wallace*, The North Carolina Supreme Court held that the towns retained their borders for the purposes of defining electoral districts, but that they were no longer corporations and that they retained no powers. *Id.* ("If corporations still, whence do they derive their existence, now that every clause in the Constitution which gave them being has been abrogated, and every section of every act which could possibly be so construed has been repealed?").

to make explicit that it could be repealed.<sup>195</sup> In other words, they made sure that the epitaph for the township system promised that it could rise again.

The new regime not only did away with local control by erasing the township, it also significantly curtailed participatory democracy at the county level. Elections for county offices were all but abolished, and the powers of the county commissioners were made subject to the direct approval of the state-appointed justices of the peace.<sup>196</sup> The result was that the state government had complete control over local affairs and that the old elite political class reclaimed authority.

Putting localism in the hands of the state to protect the old way of life was a new strategy aimed at a familiar goal.<sup>197</sup> Before the Civil War, planter elites had controlled government at the plantation level, the county level, and the state level. After the war, plantations no longer existed in the same way, and the new electorate posed a fundamental threat to local control. It made sense, then, that the only way to reestablish something like plantation localism was to put local government in the hands of the one branch safely controlled by the elite and then use that control to keep the state out of the way of private owners' business. This approach to localism was essential to the dominant political program of the post-Reconstruction government in North Carolina (and indeed across the South). "Retrenchment" meant government should "spend nothing unless absolutely necessary."<sup>198</sup> Under this regime, returning counties to state control made local governments protectors of an untaxed zone of freedom for

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195. The Senate version of the bill made no such reference to its own ephemerality. See *The New County Government System*, CHARLOTTE DEMOCRAT, Feb. 9, 1877, at 2.

196. HELEN G. EDMONDS, *THE NEGRO AND FUSION POLITICS IN NORTH CAROLINA 1894–1901*, at 118 (1951). Section 3 of the act left townships intact but made it clear that they "shall have or exercise [no] corporate powers whatever." Section 4 made the Justices elected by the General Assembly (and laid out the complex system of starting up the new regime), and Section 5 gave those new Justices the power to elect (from among themselves presumably) a county Board of Commissioners that would have control over both county and township affairs. *An Act to Establish County Governments*, CHARLOTTE DEMOCRAT, Mar. 2, 1877, at 2.

197. Here this history intersects with a broader national movement toward increased state power over local governments. John Dillon wrote in his 1873 treatise that local governments were creatures of state governments and that all of their powers were derived from and subject to repeal by those states. As David Barron and others have noted, Dillon's rule was underpinned by a deep commitment to a laissez-faire view of government: "Under the new approach, the public's sole constitutional obligation was to avoid interfering with private market orderings." David Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 508 (1999). I leave a full accounting of the ways in which the retreat to state control in North Carolina mirrored/heralded a retreat to state control in the North to future work.

198. C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877–1913*, at 58 (1971) (quoting Governor Drew of Florida).

property owners to operate in.<sup>199</sup> A new form of proprietary localism was born in the image of plantation localism—but with a sharper edge of anti-government rhetoric.

*g. Aftermath*

After the demise of the township experiments, Republicans were a minority, but the Republican coalition did not cease to exist. A strong minority of voters in North Carolina remained committed to the township as their best hope for political and social change. In 1880, Rufus Barringer, Republican candidate for lieutenant governor, addressed townships on the campaign trail. He hit all the old notes, calling the system “the crystallized idea of all local self-government. . . . It trains all classes in the great duties of reflection, debate, and submission to defeat.” By stripping this system away, the Democrats had “robbed . . . [the people] . . . of their right to county government” and suppressed “the voice of the people.”<sup>200</sup> Barringer predictably lost his election, but he was not the only public voice in the 1880s to keep the argument alive.<sup>201</sup>

It matters that the flame of the township system was kept lit because in the 1890s, Republicans had a brief political resurgence in the moment of Fusion politics where populist opponents to the essentially aristocratic Democratic establishment joined with the remnants of the Republican party to take back the North Carolina legislature in 1894.<sup>202</sup> When the Fusion tickets took back the legislature, democracy, self-rule, and dismantling the rule of the elites took center stage. With that, Republicans returned to the county government reform of 1875–1877 as one of their primary leverage points. Along with the repeal of the (racist) election laws, the main issue for Republicans was “the repeal of the present county

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199. See *id.* at 58–59. Eric Foner roughly agrees in one of his few mentions of the township experiment. By taking power from local majorities, North Carolina “effect[ively] restor[ed] the oligarchic antebellum system of local government.” FONER, *supra* note 68, at 591. What Foner critically elides, however, is the fact that the old oligarchic structure was rooted in the plantation, while the “return” required some escape from government altogether in the absence of the plantation. See *id.*

200. *The Republicans at Yadkinville*, UNION REPUBLICAN (Winston-Salem, N.C.), Aug. 12, 1880, at 2.

201. The occasional letter, speech, or op-ed would remind Republicans of the travesty on democracy that the Democrats had committed in 1875. See, e.g., *The County System and the Election Laws*, UNION REPUBLICAN (Winston-Salem, N.C.), Feb. 14, 1884, at 2.

202. See generally EDMONDS, *supra* note 196.

government laws, placing the affairs of the people back in their own hands, where they should be."<sup>203</sup>

In 1895, the fusion legislature passed a new county government bill that ousted the current county officials and magistrates and reestablished popular election for all of the offices.<sup>204</sup> The township system itself was not reinstated, but popular control was restored. For a moment, communitarian localism in the form of participatory democracy held sway again. Blacks and poor whites united to challenge proprietary elite control. As it had in 1868, a shift in local power promised to unsettle the status quo—and resentment politics quickly took shape. As soon as the new system was in place, calls for “relief for the East” from the specter of black political power immediately rang out.<sup>205</sup> The new county system and the modest black electoral success under it became a rallying point for an explicit “white supremacy” campaign,<sup>206</sup> which helped sweep Democrats back into power in 1898.<sup>207</sup> Back in power, the Democrats rewrote the county government law again, this time making the white supremacist compromise explicit. Rather than making all county and town officials chosen by the legislature, the new law singled out the counties most at risk of “negro rule” and gave the legislature power to choose officers in those counties, while leaving the majority white counties with majority elections.<sup>208</sup>

While Republicans failed to reestablish the townships and failed to achieve racially egalitarian local government, the new compromise was a shift away from elite proprietary localism. As poor and rich whites agreed on the terms of Jim Crow segregation, the prospect of a more participatory localism seemed less alarming. Racial

203. *Lincoln County Letter*, UNION REPUBLICAN (Winston-Salem, N.C.), July 26, 1894, at 1.

204. EDMONDS, *supra* note 196, at 118–19.

205. *Relief for the East and the West*, CHARLOTTE OBSERVER, Aug. 30, 1898, at 7.

206. *Id.* at 121. This campaign was not only political—the white supremacist rhetoric was responsible for violence across the state, most notably in Wilmington, where it fueled the infamous and deadly race riots of 1898.

207. A set of talking points issued by the State Democratic Committee in response to the populist campaign handbook makes the texture of the rhetoric clear. Over and over again, the Committee argues that Republicans explicitly favor “Negro Rule” and that the populists have been complicit partners in bringing this about. The Committee retells the history of the township reforms of 1868 and the “heroic” fight against it culminating in the 1875 amendments. Against this backdrop the core point is clear:

In the short time since the Republicans again came into power, wonderful progress has been made in fixing the well known Republican policy of giving the local offices to the negroes in the counties and towns of the east. . . . And again as in the days prior to '76 [sic] the eastern people are appealing to their brethren of other sections for relief.

*Populist Hand Book Answered*, FAYETTEVILLE OBSERVER, Oct. 13, 1898, at 1.

208. *True to Their Promises . . .*, CHATHAM REC. (Pittsboro, N.C.), Apr. 20, 1899, at 2.

resentment eased where there was no risk of integration, and outsider resentment eased where the local governments looked and felt “home grown.” Over the next century, the idea that county officials would be elected became normalized, and the restrictions on the targeted counties were relaxed. Townships have disappeared into the background of North Carolina local government law.<sup>209</sup> What remain are counties, modified with elements of communitarian localism, but still anchored to a proprietary past.

## 2. The Township Experiments in Virginia and South Carolina

North Carolina’s township experiment was the most complex and long-lasting in the post-bellum South. It was not, however, the only one of its kind. In the two other states where the experiment was tried, familiar battles between communitarian and proprietary localism were staged.<sup>210</sup>

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209. Under current law, townships may be created, destroyed, or altered by authority of the county government. See N.C. GEN. STAT. ANN. § 153A-19 (West 2016). North Carolina courts have consistently held that townships do not have any constitutional standing as local governments: “[T]hey are but territorial sections of counties upon which, for appropriate purposes, power is conferred to perform functions of government of local application and interest.” *Wittkowsky v. Bd. of Comm’rs of Jackson Cty.*, 63 S.E. 275, 277 (N.C. 1908). That does not mean that they are meaningless, as counties have on occasion vested townships with limited grants of power. See *Arnold v. Varnum*, 237 S.E.2d 272, 279 (N.C. Ct. App. 1977) (holding that counties may grant townships the authority to operate public hospitals and levy taxes for that purpose).

210. There was one other nearly contemporaneous township experiment that I am only noting in passing here. In 1861, West Virginia broke away from Virginia and chose to remain in the union. OTIS RICE, *WEST VIRGINIA: A HISTORY* 140–41 (1985). At the new state’s constitutional convention in the fall of 1861, the delegates voted to enact Jefferson’s long desired ward system under a different name: the township system. See W. VA. CONST. of 1863 art. VII. The township experiment lasted for a decade in West Virginia before it succumbed to the same forces at work across the rest of the South. Although West Virginia was never conquered or subject to Reconstruction government, it was among the first states to vote the Republicans out of office in the first years of Redemption. See JOSEPH RANNEY, *IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW* 8 (2006). The conservative agenda was consistent with the agenda in other southern states: remove the yoke of Yankee rule and return power to the native white elites. In this vein the townships were framed as an alien imposition. At the same time, the old county court system, which had been demonized for a century by West Virginians, emerged as a symbol of self-determination. See Samuel Woods, *The New Constitution Reviewed*, SPIRIT JEFFERSON (Charlestown, W. Va.), Jul. 16, 1872, at 1. In 1872, the conservative narrative triumphed, and the Democrats pushed through a new constitution that abandoned the township experiment. In the words of dismayed Republicans observing from out of state, West Virginia had given up “the most vital democratic feature than can be engrafted into any state constitution” in favor of a system “under which the popular voice is relieved from nearly all the duties of self-government.” *“The people of West Virginia propose to . . .”* DAILY STATE J. (Alexandria, Va.), Dec. 9, 1872, at 2.

In many ways, the story of the township experiment in West Virginia was a prequel to the stories in North Carolina, Virginia, and South Carolina. A strong skepticism toward New

*a. Virginia*

While racial resentment did not emerge until later in the process in North Carolina, it was front and center from the beginning in Virginia. There, the township experiment was met with immediate white supremacist backlash when it was adopted in 1868, and it was undermined before it could even take root when conservatives regained control of the state in 1870.

Virginia's Reconstruction constitution (not ratified until 1870) outlined the township experiment in Section 2 of Article VII—laying out the new plan in a single paragraph. The key elements of the plan were: (1) each county would be divided into not fewer than three townships; (2) the officers would be elected annually, and they would include: a supervisor, a clerk, an assessor, a collector, a commissioner of roads, an overseer of the poor, three justices of the peace, and three constables; (3) the supervisors of each township would comprise a “board of supervisors” for the county as a whole, resolving issues of county governance and disputes between townships.<sup>211</sup> This plan looked quite different from the North Carolina plan on a number of levels.<sup>212</sup> The most significant difference, it would turn out, was that Virginia's plan was not self-executing—the legislature had to take positive action to implement the townships.

As soon as the township experiment was proposed, conservative papers noted with horror the prospect of some townships where whites would be under the control of “[a] negro sheriff, a negro attorney for the commonwealth, a negro county treasurer, a negro superintendent of the poor, negro supervisors, negro assessors, negro collectors, negro school trustees, negro constables, negro township clerks, negro overseers of the roads, negro magistrates.”<sup>213</sup> To bring the point home, one paper went on to list the proportional white and black population of a number of the state's counties to show just how

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England imports and an “Old South” political establishment dedicated to returning to and protecting the “old ways” won out in the mid-70s. The story was different, however, in that neither race nor conquest were directly part of the story. Familiar though the rhetoric was, the internal politics of West Virginia made the township experiment there seem more like a continuation of the long fight over Jefferson's wards than a new form of local government for a new South.

211. VA. CONST. of 1870, art. VII, § 2.

212. In the first place, the North Carolina plan took up thirteen sections of the new Article VII, while this plan was just a single paragraph. More substantively, however, the Virginia plan provided for *many* more township officers while also making the county's leading officers (the Board of Supervisors) composed of the supervisors of the townships. This meant more officers elected at the township level with more control over county government.

213. *Address of the Conservative Members of the Late State Convention to the People of Virginia*, PETERSBURG INDEX, Apr. 21, 1868, at 1.



great the risk of black domination was in a given county.<sup>214</sup> Another commenter observed with disgust that under the new system, “[t]he negroes would have about *two thirds* of these [township] officers.”<sup>215</sup>

This appeal to racial anxiety was coupled with the fact that Virginia did not have as robust a Republican majority as either of the Carolinas. This was partly true because the most reliably Republican western regions of the state had already departed to form West Virginia. The relatively moderate group of Republicans that remained fractured in 1870, leaving radicals on the outside of the governing coalition.<sup>216</sup> Because the township system required legislative enactment to take effect, the loss of the legislature was a crippling blow.

By 1872, it was clear that it was only a matter of time before the township provision was written out of the constitution altogether. For a brief moment (and for the first time) in the face of this fatalistic realization, the Republican establishment put up a defense. Edward Daniels, a carpetbagger and Union veteran, was the editor of the *State Journal* in Alexandria, one of the main organs of the Republican party in the state. Between 1872 and 1874, he embarked on a spirited defense of the township, framing it as the best hope for participatory self-governance and the only engine of southern progress.<sup>217</sup> Daniels was influential enough to get the party to write a township plank into its 1873 platform calling for: “The perfection and enlargement of the Township System so as to encourage emigration and co-operative

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214. *Id.*

215. “*You Mean Hound*,” *NATIVE VIRGINIAN* (Orange, Va.), May 29, 1868, at 2.

216. Precipitated by a fight over the disfranchisement of former Confederate officers, the state Republican Party split between radicals and a more moderate allegiance between conservative Republicans and Democrats which called itself the “True Republicans.” See JANE ELIZABETH DAILEY, *BEFORE JIM CROW: THE POLITICS OF RACE IN POSTEMANCIPATION VIRGINIA* 27 (2000).

217. Take two articles, for example. In the first, Daniels muses on the best way to achieve lasting political reform and takes Jefferson as a teacher. He attributes the quote “True political reform must begin in the township” to Jefferson and goes on to argue that Jefferson was concerned with Virginia’s centralized political structure and that, despite the township system existing in name, centralization still prevails. See *Political Reform—Where to Begin It*, *DAILY STATE J.* (Alexandria, Va.), July 9, 1873, at 2. A week later Daniels returns to the theme, with a more utopian rhetoric. The township is the “measure of true civilization.” It is a school for practical government and a school for living together: “Without the township there is no healthful source for the political life of the *nation*. The *state* is a political cripple that has not its strongest vitality in its townships.” The problem is that the people have not committed themselves to the project of learning at this school. The system must be more than a managerial division, it must live in the “hearts of the people.” They must “guard it as the very Ark of the Covenant of Liberty.” Only by establishing a committed and functioning township system can the “great work of reconstruction” be done. *The Township*, *DAILY STATE J.* (Alexandria, Va.), July 22, 1873, at 2.

colonies, thus increasing the power of local self-government against state centralization."<sup>218</sup>

As had happened in North Carolina, Republican commitment to the township experiment solidified under attack, but there was simply not enough support to save it. Conservative papers barely bothered to defend the movement to abolish the system, and in 1874, amendments to erase townships altogether were approved handily.<sup>219</sup> The amendments struck out the first two sections of Article VII, thereby excising townships and all vestiges thereof from the constitution as if they had never existed.<sup>220</sup>

Virginia's return to the county court system was much more thorough than North Carolina's. The townships were gone altogether, and the old planter elites were free to reestablish control over local government. Where appeals to participatory democracy and communitarian localism had swayed some North Carolina voters, Virginia (without West Virginia) was a tougher audience. The politics of racial resentment were closer to the surface, and the old commitment to elite planter control was deeply ingrained. In this sense, Virginia's brief township experiment helps to explain the absence of any township experiment at all in other southern states. The same problem of local governance pertained across the South after emancipation, but by and large, the answer was a return to proprietary localism in the form of county government rather than communitarian reform.

#### *b. South Carolina*

If racial resentment was front and center in Virginia, it was nearly nonexistent in South Carolina. There (unlike Virginia and North Carolina), the post-war electorate was majority-black. Just as it did in the other states, the township experiment threatened to redistribute power from those who held it to those without. But in South Carolina, that meant that it threatened to give conservatives more power than they would have otherwise had at the local level. Before it was even a year old, it was killed by *black* elite politicians in an effort to preserve their fragile control over state politics.

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218. *Proposed Platform*, DAILY STATE J. (Alexandria, Va.), July 30, 1873, at 2.

219. The official tally of votes was 88,596 votes for the amendments to 60,066 votes against them. *By the Governor. A Proclamation*, ALEXANDRIA GAZETTE, Dec. 3, 1874, at 2. Thus, the amendments were approved by a roughly sixty percent majority. Despite the margin, the fact that forty percent of the electorate voted to retain the townships is a helpful reminder that post-Reconstruction southern politics were not as monolithic as they seem.

220. *Id.*

South Carolina's township experiment was the brainchild of a single Yankee radical. David Corbin was a native Vermonter who was raised in a small town on Lake Champlain.<sup>221</sup> After serving in the Union army, in 1865 Corbin was ordered south to Charleston, South Carolina, to work for the Freedmen's Bureau there.<sup>222</sup> In 1867, on the eve of the new state constitutional convention, Corbin was appointed U.S. Attorney for South Carolina (a position he would hold for the next ten years, simultaneously with many others).<sup>223</sup> Corbin was not an active member of the constitutional convention of 1868, but he had been elected to serve in the state senate during the special legislative session held with the express purpose of drafting legislation to flesh out the new legal regime.<sup>224</sup> It was there that he made his mark on the post-war legal structure of his adopted state.<sup>225</sup>

In 1868, Corbin drafted and defended an elaborate bill to divide South Carolina's counties into townships.<sup>226</sup> Corbin's law read as if he had simply transplanted the Vermont model he was familiar with in all of its intricate procedural detail into South Carolina.<sup>227</sup> Perhaps

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221. Linda M. Welch, *David T. Corbin*, VT. CIVIL WAR, <http://vermontcivilwar.org/get.php?input=1430> (last visited Oct. 10, 2016) [<https://perma.cc/P656-2VPJ>].

222. *Id.*

223. *Id.*

224. Although the laws enacted at this special session were not part of the constitution, they were quasi-constitutional in the sense that they were explicitly intended to elaborate on the new constitution and lay out the legal framework for the new state. In fact, these laws were printed for publication alongside the constitution itself. See THE CONSTITUTION OF SOUTH CAROLINA, ADOPTED APRIL 16, 1868, AND THE ACTS AND JOINT RESOLUTIONS OF THE GENERAL ASSEMBLY PASSED AT THE SPECIAL SESSION OF 1868, TOGETHER WITH THE MILITARY ORDERS THEREIN RE-ENACTED (Columbia, S.C., John W. Denny 1868).

225. Corbin and Tourgée were parallel figures in many ways. Like Tourgée, Corbin introduced bills to reform all parts of South Carolina's legal system, from the courts to the legal code to the prisons. See *Columbia, July 8*, ORANGEBURG NEWS, July 11, 1868, at 2 (introducing a judicial elections bill); *Special Telegraph to the Daily News*, CHARLESTON DAILY NEWS, Sept. 12, 1868, at 1 (introducing a penitentiary reform bill).

226. Prior to 1868, South Carolina had no counties. Instead, the state was divided up into "districts." The new constitution transformed those districts into counties and made county offices elected rather than appointed. See *Gaud v. Walker*, 53 S.E.2d 316, 321 (S.C. 1962).

227. The system was actually embedded in a pair of statutes. The first law defined the "Jurisdiction and Duties of County Commissioners." An Act to Define the Jurisdiction and Duties of County Commissioners, Pub. L. No. 66, 1868 S.C. Acts 128. Those commissioners' first responsibility, upon passage of the act was to "divide their respective Counties into townships." *Id.* § 11, 1868 S.C. Acts at 130. The extent of these townships was outlined with painstaking specificity. They could be anywhere between thirty-six and one hundred square miles (depending on population, infrastructure, and convenience). When surveyors laid out the borders, they were required to

erect permanent monuments to designate the respective boundary lines at every angle thereof. . . . The monuments shall be of stone, brick or iron, and be at least four feet high from the surface of the ground, and the initial letter of the respective names of contiguous townships shall be plainly and legibly cut or marked thereon.

because of its bewildering complexity and specificity, at first almost nothing was done by anyone at the state or county level to implement Corbin's plan.<sup>228</sup> In the first half of 1869, some momentum picked up. A few townships were laid out and named, and some elections were held. These few elections revealed a troubling trend for the governing Republicans: across the state reports began to come in that black voters, even in majority-black townships, were rejecting party-line politics and electing mixed tickets of white and black township officers.<sup>229</sup> Before the township elections, counties had been firmly under the control of Republican officers, many of them black. Now conservatives and white supremacists were using local government as a tool to begin to break up black political power in the state.<sup>230</sup>

To make matters worse, the township statutes were so complex that officers across racial and political lines were having a hard time figuring out how to make it work: it was "a sore puzzle to many."<sup>231</sup> At the confluence of these problems, a movement began in the summer of 1869 to abolish the township system. Mutterings started to come from across the state. Grand juries recommended repeal in their old capacity as assessors of the public welfare.<sup>232</sup> Newspapers began to

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*Id.* The second statute (Pub. L. No. 71, §§ 6–65) laid out the township procedures in agonizing detail. An Act to Organize Townships, and to Define Their Powers and Privileges, Pub. L. No. 71 §§ 6–65, 1868 S.C. Acts 146, 146–53. There were to be annual meetings (set for the "second Tuesday of April") where the town residents would meet to choose a Town Clerk, three town selectmen, at least one surveyor of the highways, and one constable. *Id.* The procedures for these meetings were laid out in a detail that seemed to be drawn from extensive practical experience. The most prominent import from Vermont was the office of "moderator." Moderators were (and remain) the people who preside over the meeting. They are the parliamentarians, chairpeople, and facilitators. Corbin's plan followed the old New England model whereby a different moderator would be chosen at each meeting. *See id.*

228. Corbin was outraged, arguing that the township system was the linchpin of local governance for the whole state. He managed to push some counties to act, but it was slow going. *See Affairs in Columbia*, CHARLESTON DAILY NEWS, Dec. 4, 1868, at 1.

229. *See Affairs in Colleton. An Interesting Letter from the Country*, CHARLESTON DAILY NEWS, June 30, 1869, at 1. This concern echoed Tourgée's concerns after the first local elections in North Carolina in 1869. One of the elements of more local government meant that old dynamics of oppression, dependence, and violence could be brought to bear on the political process more directly. The result was that in places black voters were being coerced through force or persuasion to cede power to the old elites.

230. It is easy to overstate this point, and the precise level of discontent among the black political leadership is almost impossible to gauge. What is clear, however, is that conservative observers were apt to gloat about the fact that the township law was not working out to the advantage of the radicals—which explained why they turned against it. *See Things in Darlington*, CHARLESTON DAILY NEWS, Sept. 2, 1869, at 1.

231. *Meeting of Selectmen*, INTELLIGENCER (Anderson, S.C.), May 13, 1869.

232. The grand juries got more and more pointed as the prospect of repeal became more imminent. In July, a grand jury disapproved of the way that the system handled road repair and called for either reform or, if necessary, repeal. *See Presentment of the Grand Jury*, KEOWEE COURIER (Pickens, S.C.), July 23, 1869, at 2. By October, a different grand jury went further,

call for repeal.<sup>233</sup> But the most significant event was that a statewide organization of county commissioners—a largely radical (and black) body of politicians—emerged as opponents of the system. The commissioners met for the first time in July, “for the purpose of taking into consideration the present township law with its great burden.” They drafted an official memorial requesting that the law be repealed or suspended.<sup>234</sup>

The township system was left almost without support. In the last months of 1869, the Republican-dominated legislature proposed a bill to repeal the township system to almost no opposition.<sup>235</sup> Despite Corbin’s last-ditch appeal to the virtues of participatory self-government,<sup>236</sup> the coalition in opposition was just too strong. In January of 1870, the bill was repealed, and South Carolina’s townships vanished.<sup>237</sup> Only four senators voted against repeal.<sup>238</sup>

It is impossible to say how a more modest township plan on the model of either North Carolina or Virginia would have fared in South Carolina. It is certainly true that the bewildering detail of Corbin’s plan emphasized the degree to which the new system was an

arguing that while the system might work in New England, it does not work in poor, sparsely populated South Carolina. See G.W. Fox, *Presentment of the Grand Jury*, INTELLIGENCER (Anderson, S.C.), Oct. 7, 1869, at 2. A third grand jury in Lancaster County agreed in November, arguing that the system does not work here and “beg[ging] [for] a repeal of the act creating the townships, or a suspension of the same for a term of ten years.” *The Township System*, EDGEFIELD ADVERTISER, Nov. 3, 1869, at 3.

233. *The Daily Phoenix* in Columbia echoed the sentiments of the *Marion Star* that repealing the township law would be a “step in the right direction.” *Weekly Review of the State Press*, DAILY PHOENIX (Columbia, S.C.), Aug. 15, 1869, at 2.

234. *Meeting of County Commissioners*, DAILY PHOENIX (Columbia, S.C.), July 30, 1869, at 2.

235. See *From the State Capital*, CHARLESTON DAILY NEWS, Nov. 25, 1869, at 1. Conservatives were thrilled at this outcome invoking outsider resentment to crow over the demise of a plan to “turn South Carolina into a new Ireland, making every township a feof, ruled by the officers of the conquering power.” *Id.*

236. Corbin argued in his final protest that townships were the bastions of empowered local self-governance. When governance is

in the hands of the people . . . [the] public interest are excited, the people educated, and the country developed and improved. . . . [With the repeal of this act] the people are deprived, at one fell swoop, of any voice in their local affairs. . . . We protest against this enormity.

*The Last Sensation. Metropolitan Police Tyranny. A Protest Against Repealing the Township Law*, CHARLESTON DAILY NEWS, Jan. 15, 1870, at 1.

237. The repeal left one fragment of the law in place: “[T]hat portion . . . fixing the number, names and boundaries of the respective townships in the respective Counties.” *Acts and Joint Resolutions Passed by the Legislature of South Carolina. An Act to Repeal and Act Entitled “An Act to Organize Townships and to Define Their Powers and Privileges,”* DAILY PHOENIX (Columbia, S.C.), Mar. 27, 1870, at 2. Although this suggests that the shadow of the township system still remained on the maps and in the administrative structure of the state, the townships fell out of use and are no longer part of the state’s municipal scheme.

238. *Repeal of the Township Act*, ORANGEBURG NEWS, Jan. 22, 1870, at 2.

imposition rather than an organic system of self-government. The South Carolina experience reveals something critical about structural local reform. The township system, in isolation, was no protection of racial equality. Rather, by forging new polities and framing new definitions of local self-government, it promised to unsettle and redistribute political power. Where that redistribution threatened white elites and triggered racial anxiety (North Carolina and Virginia), conservatives and white supremacists opposed it. But where that redistribution threatened a nascent but strong base of black political power, black Republicans and their allies opposed it.

### 3. Elsewhere in the South

What can these four stories really tell us about the broader question of how localism and local government reform operated during Reconstruction? One might reasonably argue that North Carolina's story was an outlier—a product of some combination of coincidence, personality, and North Carolina's unique politics. To some degree, there is no doubt that this view is right. The township experiment was not programmatic. Where it was implemented, it was the product of individual Yankee idealists responding to the situation before them. But it is precisely the idiosyncrasies of the separate experiments that suggests that together they reveal something more consistent across the region.

When Tourgée et al. identified the problem of post-emancipation local government and proposed to establish a new communitarian localism in the South, they poked a hornet's nest. Simply because that nest was not poked in other states did not mean that it was not there. The racial and outsider resentments that fueled opposition to the township wherever it was implemented were common enough to support the inference that a similar dynamic would likely have played out had the experiment been tried in Georgia, Florida, Alabama, Mississippi, Texas, or elsewhere. In this sense, the story of North Carolina's township experiment is not an outlier so much as it is a window into the otherwise difficult to perceive transition between plantation localism and Jim Crow localism.

This is consistent with what we can glean from local government reforms in other southern states. In Georgia and Florida, the 1868 constitutions began the process of turning over control of the local governments to the state legislature immediately.<sup>239</sup> In Alabama,

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239. In Georgia, the 1868 constitution preserved the old county court system with the slight change that the state legislature was empowered (though not required) to establish the office of

Mississippi, and Texas, on the other hand, county governments were pushed toward a more participatory democratic model: county officers (sheriffs, magistrates, solicitors, clerks) were made subject to election, rather than appointment.<sup>240</sup> These were small steps, but they met much the same fate as the township had when Redemption came in the mid-1870s. The fear of “negro domination” led conservatives and Democrats across the South to take steps to restrict black political power at the local level. Raw violence and intimidation outside of the constitutional process were a large part of the story.<sup>241</sup> These steps were bolstered by constitutional changes as well. The Texas Constitution of 1876 did not end local elections, but it did follow North Carolina and Dillon’s Rule in asserting that local governments were “legal subdivisions of the state” and assigning many of the functions that they had previously performed to the state legislature.<sup>242</sup> In 1890, Mississippi solved the problem of local black political power through explicit provisions disenfranchising black voters.<sup>243</sup>

The most extreme example of retreating to proprietary localism from weak communitarianism (beyond the township experiment states) is Alabama. In 1875, Alabama rewrote its constitution to give state government the same kind of control over local government that North Carolina asserted. Where blacks and Republicans wielded local power, the state legislature abolished the local governments and took it upon themselves to appoint the local officials themselves.<sup>244</sup> In 1901,

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county commissioner “in such counties as may require them, and to define their duties.” GA. CONST. of 1868, art. V, § 15. In Florida, the constitutional language was stronger, and gave the legislature power to make sweeping changes to the system of local government. FL. CONST. of 1868, art. IV, § 21 (“The Legislature shall establish a uniform system of county, township, and municipal government.”).

240. See ALA. CONST. of 1868, art. V, § 21; *id.* art. VI, §§ 11, 17, 18; MISS. CONST. of 1868, art. V, § 21; TEX. CONST. of 1869, art. V, §§ 9, 18, 19.

241. See SARAH WOOLFOLK WIGGINS, *THE SCALAWAG IN ALABAMA POLITICS, 1865–1881*, at 118 (1977) (“Although the Ku Klux Klan no longer officially existed in Alabama, a reign of terror against Republicans continued, especially in west Alabama counties with a heavy black population.”). In Mississippi, the efforts to suppress black democratic participation at the local level were even more pronounced. White supremacists devised the “Mississippi Plan” to systematically intimidate and disenfranchise black voters in the 1875 elections. MICHAEL LES BENEDICT, *THE FRUITS OF VICTORY: ALTERNATIVES TO RESTORING THE UNION, 1865–1877*, at 143 (1986).

242. See TEX. CONST. of 1876, art. XI, §§ 1–2 (noting the individual legal status of counties).

243. Mississippi was the first among many southern states to adopt explicit disenfranchisement measures into its constitution. “The Mississippi Constitution of 1890 disqualified those convicted of certain crimes, and required voters to pay a poll tax, pass a literacy test and be able to read, understand and interpret the state constitution.” Gabriel J. Chin, *The “Voting Rights Act of 1867”: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1592 (2004).

244. See Will Parker, *Still Afraid of “Negro Domination?”: Why County Home Rule Limitations in the Alabama Constitution of 1901 are Unconstitutional*, 57 ALA. L. REV. 545, 557

the new constitution took matters further, cementing absolute state control over local government and hamstringing local governments from providing even the most basic services.<sup>245</sup> In Alabama, even absent the challenge of a truly communitarian localism, the resolution during the peak of Jim Crow was a retreat to strict proprietary localism that protected property and prevented local governments from threatening the status quo distribution of power.<sup>246</sup>

Although what I have provided here is little more than a sketch of broader trends in post-bellum southern localism, the sketch is clear enough to show the value that attention to the township experiments has. It is through the contrast between the communitarian localism of the township and the proprietary opposition to it that the dynamics at work across the South become clear. The Jim Crow local settlement in North Carolina was not an outlier—it was the rule.

### C. History Lessons

The demise of all three of the township experiments, seen from a distance, fits well into the standard historical narrative of Reconstruction. Historians of Reconstruction from DuBois to Dunning to Foner have all essentially agreed that southern resistance to Reconstruction was fueled by a cocktail of white supremacy, outsider resentment, and antebellum nostalgia. If this story is familiar, the failure of the township seems inevitable: the townships were defeated in North Carolina and elsewhere because they were intended to

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(2005) (“During the late 1870s, the legislature abolished at least nine courts of county commissioners or city councils in the Black Belt.”). Judge Myron Thompson described it succinctly in his opinion in a 1986 case:

Following this “redemption” by the white-supremacist Democratic party, the state legislature passed a series of local laws that eliminated elections for county commission and instead gave the governor the power to appoint the commissioners. This system of gubernatorial appointment was particularly favored in black belt counties threatened with black voting majorities. According to the plaintiffs’ historian, the gubernatorial appointment system is widely understood to have been designed to prevent the election of black county commissioners.

Dillard v. Crenshaw County, 640 F. Supp. 1347, 1358 (M.D. Ala. 1986), *order dissolved*, CIV.A.2:85CV1332-MHT, 2006 WL 3392071 (M.D. Ala. July 31, 2006), and *order dissolved*, CIV.A. 2:85CV1332MHT, 2006 WL 3923887 (M.D. Ala. Oct. 3, 2006).

245. See Parker, *supra* note 244, at 549–52 (explaining several provisions of the Alabama Constitution of 1901).

246. See Joe Summers, *Missing Local Democracy, in A CENTURY OF CONTROVERSY: CONSTITUTIONAL REFORM IN ALABAMA* 67 (Bailey Thompson ed., 2002) (“The clear intent of the framers of the 1901 Alabama Constitution was to stifle democracy in the state. These men, mainly wealthy plantation owners and Birmingham industrialists, sought to protect their property and privilege from populist demands for responsive government.”).



undermine white supremacy, Yankeeize the South, and kill the old aristocracy.

While this history certainly fits into the familiar standard narrative, it would be too easy to file the demise of the township experiment as just another inevitable failure.<sup>247</sup> My reading of the township experiments suggests that while their demise was consistent with the tide of southern politics, it was not as inevitable as it might seem today. Consider, again, the real-world local government crisis facing every southern state and county after emancipation. In a place like Granville County, plantation localism rooted in a weak county court was no longer possible or adequate. Something new was needed. Where Yankee reformers had the idea and the political support, they proposed what seemed to them to be the best and only solution to a vacuum of local government: the communitarian town. It was the best and only hope for building a new healthy government on the ashes of the conquered Confederacy.

No one disagreed that the old order was either dead or seriously wounded. Southern conservatives grudgingly acknowledged that the slaves had been freed and that black men were now legally allowed to vote (though they undermined this freedom with every stratagem at their command for more than a century—and even into the present), and they grudgingly accepted that they had lost the war. They were acutely aware that they had been conquered and were being ruled by a combination of the conquering force and their former slaves. What resulted was a struggle at all levels of government between two *new* orders. The Yankees proposed a renovation, and the township experiment was a perfect example of the sort of total change that such a renovation meant. Conservatives, on the other hand, proposed a new set of protections for elite power, which they sold as a return to the old order, but that, in fact, was a new view of government and localism. The North Carolina story reveals the extent to which two somewhat contrasting strands of arguments intersected. Local government was centralized and controlled by the only branch of government that the elites trusted. At the same time, *all* levels of government were directed away from providing services and redistributing power and wealth and were directed toward a

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247. That the failure of Reconstruction was inevitable has been one of the most consistent and difficult to shake themes in the last century of Reconstruction historiography. It is hard to argue with Jane Dailey when she says that “historians have traditionally taken the victory of Democratic race baiting for granted and have seen white racial animosity and anxiety as inevitable . . .” DAILEY, *supra* note 216, at 78. Nevertheless, there is a consistent, if consistently minor, strain of scholarship that has questioned the inevitability of the end of Reconstruction and the onset of Jim Crow. *See id.* at 6 (noting various scholarly approaches).

protectionist proprietary stance of protecting self-determination against the dangers of racial and outsider control.

We know how it turned out across the South, but there was a real struggle between these two new visions. As was most clear in North Carolina, the township really did represent a powerful tool of political change. Those who had been shut out of power before (blacks, poor whites, yeoman farmers) were suddenly voting in local elections and getting elected. The township was supposed to leverage these changes slowly by changing the terms of local politics until the new polity was self-supporting. But it was precisely these changed terms that motivated southern conservative opposition. Conservatives demanded “relief for the East” not only because of their immediate outrage at being governed by their former slaves, but because of the threat that the new polity posed to the old regime as a whole.<sup>248</sup> In short, the townships began to do the very transformative work that they had promised, and so they needed to be stopped.

Recognizing the potential of the township experiments doubles back on a common theme in Reconstruction history. Could it be true that the township experiments, for all their flaws, might have been effective policy? It has become commonplace to imagine what would have happened had the radicals actually achieved agrarian reform (forty acres and a mule) and redistributed southern land. Why not also imagine what might have happened had the township system taken hold? One could conceive of any number of ways in which a robust system of local governance might have mitigated Jim Crow, even without wholly buying into the utopian rhetoric of the system’s Yankee boosters.<sup>249</sup>

There is one final point to make within the framework of Reconstruction historiography. Looking from the local upwards suggests that there may be local roots to the region-wide ideology of Redemption and Jim Crow. The ways in which racial resentment and outsider resentment shaped the desire for proprietary localism and the rejection of communitarian localism help to explain the larger trend toward government retreat during the last decades of the nineteenth century in the South. The redemption governments adopted wide-ranging policies of “retrenchment” calling for radically shrinking government and taxation. As C. Vann Woodward observed, “Cheapness, even niggardliness, under this tutelage became widely

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248. See *Relief for the East and the West*, *supra* note 205.

249. This hypothetical has its most famous adherent in Tourgée himself, who proposed in his novel *Bricks Without Straw* that had the township system survived in North Carolina, it would have served as a bulwark against white supremacy, ignorance, and the oncoming shadow of Jim Crow.

accepted as the criterion of good government. . . . Large numbers of offices were abolished, departments were cut to skeleton staffs, and occasionally public services were simply dropped.”<sup>250</sup> The extreme austerity extended to all areas of government but especially to those identified as holdovers from Yankee rule. Public schools were a particular target, and budgets for schools across the South were slashed.<sup>251</sup> In Florida, the legislature abolished the newly established penitentiary and stopped work on the state’s first public university.<sup>252</sup> The result of retrenchment was a radically minimalist model of government that privileged the power of property holders and serviced a libertarian laissez-faire model of economics.<sup>253</sup>

The most common explanations for the redeemers’ embrace of retrenchment are economic and racial. Some historians (both sympathetic and critical) have argued that after the federal government withdrew from the South, there simply was not enough money to support all of the social services that the Republicans had erected.<sup>254</sup> Poverty was the result of conquest both because of the ravages of the war (and the end of slavery) and because of the perceived corruption of the Reconstruction governments.<sup>255</sup> If conquest explained scarcity, it also explained southern resentment. Conservatives believed that the Yankee innovations were intended to benefit the freed blacks, and thus saw taxes as mandated redistribution. The way to ensure not only that black citizens would be excluded from public office, but that they would be excluded from public services as well, was simply to abandon government as much as possible.<sup>256</sup>

These accounts of retrenchment have not always been central to the story of the birth of Jim Crow during Redemption. The story of the township experiment suggests, first, that they should be more

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250. WOODWARD, *supra* note 198, at 59.

251. *See id.* at 60–63 (“[T]hroughout the South public education suffered under the pinch of the Redeemers’ policy of retrenchment as well as under the general poverty and depression.”); *see also* FONER, *supra* note 68, at 589 (noting that Texas began charging fees for its schools, while Mississippi and Alabama placed the entire tax burden for schools on local governments).

252. *See* FONER, *supra* note 68, at 589 (noting Florida’s “retrenchment” policy).

253. J. MICHAEL MARTINEZ, *COMING FOR TO CARRY ME HOME: RACE IN AMERICA FROM ABOLITIONISM TO JIM CROW* 217 (2011).

254. *See, e.g.*, WOODWARD, *supra* note 198, at 60–61 (arguing that “the extreme poverty of the South would have made a satisfactory program of public education and services impossible under any regime”).

255. MARTINEZ, *supra* note 253, at 217.

256. FONER, *supra* note 68, at 588 (arguing that the Redeemers were unified by a desire to “dismantl[e] the Reconstruction state, reduc[e] the political power of blacks, and reshap[e] the South’s legal system in the interests of labor control and racial subordination”).

central. Understanding the way that racial and outsider resentment operated at the local level helps explain how the post-bellum South shaped its “way of life.” The retreat from services at the state and regional level was perfectly consistent with the retreat from communitarian localism and the embrace of proprietary localism. Moreover, to the extent that the government was active during Redemption and Jim Crow, it acted to preserve the social order—through laws mandating segregation and through proprietary protections of property holders in a shadow version of plantation localism.

#### *D. Coda: Jim Crow Localism*

Jim Crow localism was, to a large degree, the return to plantation localism that the opponents of the township experiments sought. As a descriptive matter, weak county governments (often democratically unaccountable) served to protect the freedom of elite property owners to assert wide-ranging control over southern political, economic, and social life. There is a puzzle in this parallel, however: the Jim Crow era is usually remembered as an era of robust government intervention in the lives of southern citizens. The figure for this intervention was “de jure” segregation where state and local government mandated and enforced a regime of racialized apartheid. It is indisputable that white supremacy was inscribed in law and enforced by government during the period between Redemption and the mid-twentieth century. So too is it indisputable that racial inequality continues to exist long after the Jim Crow legal regime was dismantled. It has been tempting, therefore, for scholars to draw a distinction between the “clear” government sponsored racism of the old days and the “covert” de facto racism that pervades our institutions today.<sup>257</sup> Leaving the complexities of this caricature to one side for the moment, this useful binary tends to suggest that Jim Crow was an era of strong state regulation.

And indeed it was, but this government-enforced white supremacy does not undermine the observation that local government

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257. The distinction between de jure and de facto racism can be found everywhere—from middle school textbooks to academic history books. One particularly influential account distinguishes Jim Crow—where racism was an “ideology . . . manifest in institutional arrangements, such as separate schools and voting restrictions”—from “laissez-faire racism”—where “modern racial inequality relies on the market and informal racial bias to re-create, and in some instances sharply worsen, structured racial inequality.” Lawrence Bobo, James R. Kluegel & Ryan A. Smith, *Laissez-Faire Racism: The Crystallization of a Kinder, Gentler, Antiblack Ideology*, in *RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE* 15, 17 (Steven A. Tuch & Jack K. Martin eds., 1997).

was weak and as proprietary as possible. That is because the regulatory regime of segregation worked hand in glove with a return to elite control over local life. The Jim Crow laws were parallel to slavery itself—a set of tools to maintain the social and racial hierarchy that private control required. The problem of Reconstruction for conservatives and white supremacists was, what should be done about emancipation and the “problem” of newly minted black citizens? In order to approximate a return to the old “southern way of life” rooted in plantation localism, the old racial hierarchy needed to be reestablished. Replacing slavery with a system of laws that reinscribed white supremacy achieved this goal, and so, just as southern states enforced slavery, they enforced the Jim Crow laws, leaving room for elite whites to reestablish control over the details of local governance.

Remember that the Jim Crow order began with retrenchment and a radical reduction of government services. As the tide of government services receded, those left behind were those who had most benefitted from those services: the freed men and women. The initial result at the end of the nineteenth century was a set of laws establishing state-sponsored segregation that facilitated a dramatic increase in the power of the money and property-rich elite to dictate the terms of daily life.<sup>258</sup>

A clear way to see this result is to observe the daily dynamics of local governance of black citizens in the Jim Crow South. Two of the most salient outrages, sharecropping and lynching, were both approximations of the plenary power held by planters under plantation localism that were insulated from interference by the Jim Crow state.

Sharecropping was the dominant agricultural arrangement in the post-Reconstruction South. Black farmers were given contracts to work small “farms” with their families. Workers subsisted on the land, trading their labor and their crops for necessities in a nearly constant state of debt.<sup>259</sup> This system was sanctioned by law, but that law was essentially an abdication of government regulation. The agricultural system was structured by lien laws that gave planters control over the

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258. Risa Goluboff has recently argued that the public and private faces of Jim Crow were intertwined and that it was as much an economic system as it was a government system. “Jim Crow existed because every day, in ways momentous and quotidian, governments, private institutions, and millions of individuals made decisions about hiring, firing, consuming, recreating, governing, educating, and serving that kept blacks out, down, and under.” RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 7 (2007).

259. See FONER, *supra* note 68, at 594 (explaining the southern property laws of the late 1800s and the concept of “sharecropping”).

crops grown on their land. Laborers were explicitly denied the protected status of landowner and were instead given limited rights to farm the land without owning the products of their work.<sup>260</sup>

The landowner's dominance of the local economic sphere was so complete that in many cases, sharecroppers were paid only in dedicated scrip that could only be redeemed at the planter-owned "company store."<sup>261</sup> In many ways, sharecropping reinscribed all of the old economic local control of the old plantation system, but outside of the boundaries of government.<sup>262</sup>

If sharecropping represented privatized economic localism, then lynching represented privatized police power. Lynch law was the opposite of governmental policing. Jim Crow lynch law was characterized by the government's agents (the police) staying out of the way of private vigilantes.<sup>263</sup> While the official corridors of governmental justice were not bastions of racial equality in the Jim Crow South,<sup>264</sup> vigilantism and lynchings were among the most important exercises of local police power.<sup>265</sup> The threat of violence, coupled with the knowledge that the government would do nothing to stop it, was functionally a form of police power. Much like the impunity of the master in his dealings with his slaves, lynch law subjected black citizens to a privatized system of local control.

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260. *See id.* (same).

261. *See* MARTINEZ, *supra* note 253, at 164 ("Sharecroppers often were forced to purchase shoddy merchandise and foodstuffs from company stores at exorbitant prices.").

262. Foner and others note that sharecropping did provide more day to day autonomy than existed in the plantation. *See* FONER, *supra* note 68, at 595 (stating that "blacks clung to whatever day-to-day autonomy they could wrest from the sharecropping system"). This is undoubtedly true on its own terms, although the fact that many sharecroppers had no currency and were contractually bound to the land limited the degree to which they could exercise any autonomy.

263. For one statement of this among many, see Louis Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1174 (1963) (stating that "[s]ince the police play no part except to stay away and let the lynchers do their work, it involves little public expense, preparation, or manpower.>").

264. Historians have reached a consensus that black citizens suffered a loss of legal rights during the Jim Crow era. *See* Melissa Milewski, *From Slave to Litigant: African Americans in Court in the Postwar South, 1865–1920*, 30 LAW & HIST. REV. 723, 725–26 (2012) (collecting sources). There is some evidence, however, that this consensus overstates the point by focusing primarily on cases involving racially charged legal questions like segregation, interracial sexual liaisons, and voting rights. *See id.* (collecting sources).

265. *See* David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth Century America*, 39 LAW & SOC'Y REV. 793, 822 (2005):

By "taking the law into their own hands," Southern lynch mobs transformed felt weakness into a show of strength, claiming the sovereign power to manage their own affairs, defeat their own enemies, and assure their own security. Lynchings asserted the continuing autonomy of local communities and marked out the practical limits of state and federal power.

These two examples, by no means the only ones, paint the picture of a Jim Crow localism where broad private power over poor black residents was protected by government. Seen from the local level, Jim Crow localism looks a great deal like plantation localism. The promise of communitarian, participatory local power for black residents was marginally brighter after Reconstruction, but the overall governmental commitment to proprietary localism and protection was much the same.

### III. IMPLICATIONS: PRESENT EXAMPLES

Extrapolating present lessons from history is a risky enterprise. Historians (legal or otherwise) are schooled to avoid the temptations of “presentism.”<sup>266</sup> It is undoubtedly true that drawing concrete and discrete contemporary prescriptions from history necessarily takes that history “out of context.” Any simplistic attempt to transpose a historical narrative from its past context into the present will both produce bad prescriptions and flatten the history itself.

Why then, one might reasonably ask, propose any present implications from the history of the township experiment? Why not quit while I am ahead? Here are three answers. First, as a theoretical matter, I am sympathetic with the cadre of new critical legal historians who argue that legal history is an essential tool for interrogating the present. Markus Dubber argues that “the point of historical analysis here is, once again, critique, and more specifically critique of present conditions.”<sup>267</sup> Christopher Tomlins and John Comaroff agree, pushing against the “caesura that amputates past from present” in history, preferring instead a critical history that “interrogates, judges, and condemns the past in order to free the present from its grasp.”<sup>268</sup> This leads me to my second point. In writing this history, I have not been able to avoid reflecting on the

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266. To simplify greatly, presentism in the practice of history refers to the disfavored tendency to read the events of the past “in terms of present concerns” rather than placing them in their rich, and highly contingent context. “Presentism, at its worst, encourages a kind of moral complacency and self-congratulation.” See Lynn Hunt, *Against Presentism*, AM. HIST. ASS’N (May 2002), <https://www.historians.org/publications-and-directories/perspectives-on-history/may-2002/against-presentism> [<https://perma.cc/MC2K-VFYL>].

267. Markus D. Dubber, *New Historical Jurisprudence: Legal History as Critical Analysis of Law*, 2 CRITICAL ANALYSIS L. 1, 8 (2015).

268. Christopher Tomlins & John Comaroff, “*Law As . . .*”: *Theory and Practice in Legal History*, 1 U.C. IRVINE L. REV. 1039, 1043 (2011). My own project is not nearly so intrepid as either Dubber or Tomlins proposes. They, along with Holmes and Nietzsche, see history as a tool for dismantling the false idols of the present. I propose, more modestly, that reflecting on history can help us understand the present.

ways in which present problems in local government law seem genealogically connected to these past problems. The fights over local government during Reconstruction are both fundamentally different from today's fights and, simultaneously, reminiscent. That reminiscence bears reflection. Thirdly, and finally, in undertaking that reflection, I am convinced that our present conversations about local government law are enriched and altered, if not revolutionized, by this history. Traces of communitarian and proprietary localism are evident in present battles over local government from zoning, to education, to municipal incorporation, to state takeovers. In the specific context of Reconstruction, communitarian localists advocated for the township and for local autonomy, while proprietary localists fought against the township and advocated for state control over local government. During Reconstruction, the theoretical arguments about what local government is for were intertwined with concrete proposals for how local government should be structured.

In present debates about local government and what it is good for, echoes of communitarian and proprietary localism persist. Some advocates still argue that local government should be a vehicle for civic participation, robust public services, and an egalitarian polity. Others argue that local government should protect private property, maintain low taxes, and protect existing distributions of wealth and power. The trouble in the present is that these arguments are not nearly so clearly linked to specific local government structures as they were during Reconstruction. Present communitarian localists sometimes favor more local autonomy and sometimes favor less. The same is true of present proprietary localists. Even messier is the fact that parts of rhetoric of communitarian localism (especially regarding self-governance) are often used to defend a vision of localism that protects private property rather than encouraging civic participation.

The messiness of applying the historical lesson to the present is a reminder of how careful we must be with the translation. These are echoes and reflections, not iron-bound causal links. And yet, the messiness should not obscure the extent to which the core terms of the debates over localism are similar. The three examples that follow reveal communitarian and proprietary localism as present positions linked to history. The echoes of the history give us new purchase and new perspective on the problems of local government law that we face today.

As a pragmatic matter, new perspective promises better debates, which, in turn, might promise better policy. Present day proprietary localists still draw energy from racial resentment, outsider resentment, and a desire to protect property from redistribution.



Likewise, present day communitarian localists still too often imagine that structural legal reforms can effect sweeping societal change. Knowing the history and seeing the connections to the present lays the groundwork for more nuanced and perhaps better thinking about what local government is good for today.

At a broader level, recognizing battles over local government as a competition between two conceptions of localism is a shift in the way that we think about local government law. More often than not, the debate amongst local government law scholars focuses on whether localism is a force for good or a force for ill. Some scholars argue that local governments can be vehicles for good and just government,<sup>269</sup> while others argue that local governments and local autonomy are vehicles of exclusion, racial inequality, and injustice.<sup>270</sup> The history here suggests new terms for this debate. The question is not whether localism is good or bad—the question is what local government is good for.<sup>271</sup> That is the question that was being asked during

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269. Local government optimists are split into two camps. Gerald Frug is usually identified with the position that local autonomy is necessary to achieve authentic civic participation and self-governance. In truth, while autonomy is the word often used to label his position, Frug is not a champion of autonomy in its familiar sense. He advocates, instead, for a “decentralized” form of local autonomy where local power exists, but in a complex overlapping set of local structures, rather than a single, unitary, sovereign municipal government. See generally Gerald E. Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993). Drawing on Tocqueville and Arendt, Frug suggests that local power enhances a citizen’s “ability to participate actively in the basic societal decisions that affect one’s life.” Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1068 (1980). While Frug and others in this camp argue that participatory governance is “good governance,” they do not argue that it is efficient. See *id.* at 1067. The argument that local autonomy provides for efficient governance is instead linked to the public choice economic analysis of Charles Tiebout, who argued that multiple empowered small municipalities would allow for mobile “consumer-voters” to choose the local community that best fit their needs for municipal services. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

270. Sheryll Cashin’s formulation is representative: “Localism, or the ideological commitment to local governance, has helped to produce fragmented metropolitan regions stratified by race and income.” Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1988 (2000).

271. This point is an admittedly abbreviated gesture at a larger intervention into the field that I intend to pursue in future work. It is my view that the fight over whether localism is a good thing has created an unnecessary stalemate in the literature. The problem begins with the definition of localism. Note Cashin’s framing in the quote in the previous note: localism is “the ideological commitment to local governance.” *Id.* Building from this definition, pessimists like Richard Briffault argue that “our localism” offers license for local governments to segregate and exacerbate inequalities. See Briffault, *supra* note 16, at 382. Briffault and Cashin see Frug’s optimistic embrace of local governance as romantic—imagining what local governments could do rather than being realistic about what they are doing. Buried by this argument is the fact that all parties actually share a common idea about what local government should be good for. All of these interlocutors agree that good local government would be inclusive and participatory. The disagreement is in outlook. Frug and the optimists think that good local government is possible

Reconstruction, and, as the three examples that follow show, that is the question that is still being asked today.

*A. Rolling Hills—The Proprietary Suburb*

Since the end of the nineteenth century, municipal incorporation has been used as a tool for groups to escape from larger governing polities (counties or cities). All too often, homeowners seeking to escape a larger, more racially and economically diverse polity managed to make use of the forms of government to facilitate that escape.<sup>272</sup> A stark example of this model of retreat from government is the “city” of Rolling Hills, on the Palos Verdes Peninsula. Rolling Hills began in 1936 as a private housing development on unincorporated land in Los Angeles County.<sup>273</sup> It was a gated community, surrounded by a wall enclosing some of the most valuable property in southern California. All of its roads were privately maintained, and the community governed itself through a community association that was essentially a private homeowners association.<sup>274</sup>

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despite its problems; Briffault and the pessimists think that those problems are proof that the optimists’ vision of local government is doomed.

Moreover, framing the dispute as one about local autonomy makes strange bedfellows unnecessarily. Thus, Frug and Tiebout are frequently paired as sharing the view that local power is good—alongside wealthy suburbanites seeking to maintain walls against their poor (and black) neighbors. But Frug, Tiebout, and the suburbanites each have radically different ideas of what local government is good for. Frug (like the supporters of the township experiment) believes that local participation can be a vehicle of reform, equality, and self-determination. For Tiebout, these values are ancillary. The purpose of local government is to provide citizens with a marketplace where they can choose the kind of services and governance that they prefer. And the suburbanites look at local government in much the same way the opponents of the township did. The purpose of local government is to protect property rights and preserve the existing distribution of wealth, power, and racial hierarchy. Reorienting the terms of the discussion away from local autonomy and toward the deeper dispute over what local government is good for puts these strange bedfellows back in the right beds and, I will propose, lays a foundation for new ways of thinking about contemporary problems in local government law.

272. Richard Briffault offers the somewhat pessimistic argument that this kind of privatized municipal organization defines “our localism.” He argues that the suburb itself has come to represent our ideal of local self-government and that through that identification, “[t]he central function of local government is to protect the home and family—enabling residents to raise their children in ‘decent’ surroundings, servicing home and family needs and insulating home and family from undesirable changes in the surrounding area.” Briffault, *supra* note 16, at 382. Although the dominant image of the suburb remains white and wealthy, the demographic reality is that American suburbs are increasingly racially and economically diverse. Alongside the rebirth of many cities has come a new movement of poor and minority residents to the suburbs. The result has been so-called “melting pot suburbs” in major metropolitan areas across the United States. See WILLIAM H. FREY, *DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA* 159 (2014). In 2014, Ferguson, Missouri, brought this fact into national prominence, showing clearly that poverty and racial injustice are suburban problems as well as

In the 1950s, the neighboring city of Torrance was threatening to annex wealthy unincorporated areas on its borders, and Rolling Hills and its neighboring communities were targeted. In response, rather than fight off the advances of Torrance to remain in unincorporated land, the residents of Rolling Hills voted to incorporate as a separate city.<sup>275</sup> By incorporating, Rolling Hills essentially protected its private character while avoiding redistributive taxes. Today, the roads and common spaces are still maintained by the private community association, the walls of the city remain up, and not only are visitors not welcome, but there is an ordinance assessing a fine on any uninvited visitor who enters.<sup>276</sup>

The story of Rolling Hills pits against each other two competing ideas of what local government is good for. On the one hand, Torrance sought to annex Rolling Hills in order to bring those residents into the city polity. This approach reflected an inclusive, integrationist, expansive, and frankly redistributive aspiration for the city—capturing new property tax revenue was a primary motivation. If the annexers were not precisely communitarian localists, they were at least in sympathy with that vision of the purpose of local government. The opponents of annexation (and proponents of incorporation) had a different view. As their subsequent actions showed, they wanted local government to protect their property values, keep their taxes low, and preserve the existing distributions of wealth, power, and racial hierarchy within their walls. Even if they were not proprietary in precisely the same sense as southern conservatives, they shared a basic vision of what local government was (and is) good for.

Rolling Hills, and the modern suburban story that it represents, is critically different from the township experiment in two ways that serve as reminders of the limits of presentism. First, Rolling Hills and other proprietary suburbs are using local autonomy to advance proprietary localist goals. During Reconstruction, it was the communitarian Yankees who championed local control and autonomy.<sup>277</sup> This difference highlights the extent to which competing ideas about what local government should do are not tethered to

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urban problems. See, e.g., Pete Saunders, *The Death of America's Suburban Dream*, GUARDIAN (Sept. 5, 2014), <https://www.theguardian.com/cities/2014/sep/05/death-america-suburban-dream-ferguson-missouri-resegregation> [<https://perma.cc/ND2W-PVN2>].

273. GARY MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* 88 (1981).

274. *Id.*

275. *Id.*

276. *Id.* at 91.

277. See *supra* Part II.

specific local government structures in the present. The point is not that local control now *always* serves proprietary ends, but rather that proprietary ends are sometimes served by local control. More precisely, the question is not whether local control should rest in the suburb, the city, or the region. The question is what those with that local control expect to do with it.

The first difference is a reminder that the ideas operate differently in different contexts. The second difference is a reminder that the ideas cannot be transplanted pure from the history. The advocates of incorporation in Rolling Hills defended local control not only as a means of protecting their property, but also in terms of protecting their democratic rights of self-government. Incorporation, on its surface, seems to serve the participatory goal at the heart of communitarian localism. If centralization threatens democratic self-determination, then incorporation defends it. Indeed, "local control" has become a watchword for suburban localism on the model of Rolling Hills all across the country.<sup>278</sup> Although this difference from Reconstruction is dramatic, it would be a mistake to accept that the two competing localisms are no longer helpful. Proprietary localist goals may be cloaked in democracy and yet remain hostile to participation and even competing ideas of democracy. By incorporating, Rolling Hills preserved its existing system of property-oriented protectionist government<sup>279</sup> against the threat of being subsumed into a more diverse and more robust urban municipal government. In some ways, joining Torrance would have made local governance in Rolling Hills *more* participatory across a broader and more diverse polity, even while it diluted the specific local power of the small group of landowners.

### *B. Memphis Schools—Segregation and Proprietary "Local Control"*

The pessimists among local government law scholars often begin their arguments from the observation that "our localism," as a descriptive matter, broadly protects existing racial and economic

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278. See Briffault, *supra* note 16, at 384–85.

279. Prior to incorporation, Rolling Hills operated as a private homeowners association ("HOAs"). HOAs often operate as mirror images of proprietary municipalities. According to Evan McKenzie, in 1992, "there were 150,000 associations privately governing an estimated 32 million Americans." EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 11 (1994). These HOAs are sometimes situated within towns and cities and are sometimes situated on unincorporated county land. They often operate as quasi-governments. See Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1520 (1982) (analyzing the legal status of homeowners associations).

inequalities.<sup>280</sup> Segregation in public education is one of the clearest examples of this problem. Since the end of de jure school segregation with *Brown v. Board of Education*, suburban school districts have retreated to the protection of “local control” to defend against the threat of integration across municipal boundaries.<sup>281</sup>

A stark recent example of this use of “local control” took place in Shelby County, Tennessee, beginning in 2010. Prior to 2010, there were two school districts in Shelby County—Memphis City Schools (“MCS”) and Shelby County Schools (“SCS”).<sup>282</sup> The student population of MCS was more than ninety percent black and Hispanic,<sup>283</sup> and an overwhelming majority of MCS students were economically disadvantaged.<sup>284</sup> By contrast, the student body of SCS was much more racially diverse and much better off economically.<sup>285</sup>

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280. Sheryll Cashin describes this as the “tyranny of the favored quarter” who wield local control as a weapon to avoid the tax burdens of life in a metropolitan region while protecting their own services and reaping the benefits of “the region’s public infrastructure investments and job growth.” Cashin, *supra* note 270, at 1987. Richard Briffault has argued that the suburban model of local government, which allows for exclusion and protection of existing distributions of wealth and power, has become the paradigm for (and dominant form of) American local government law. See Briffault, *supra* note 16, at 382.

281. *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.”). Erika Wilson has argued that the power of “local control” in arguments over public education has “elevated localism in education to a near constitutional norm.” Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 642 (2011). In contemporary usage, “local control” has become a watchword for conservative opponents of centralized control of public education. Donald Trump repeatedly advocated for “local control” over education on the campaign trail in 2016, by which he meant a decreased federal role, an end to the common core national standards, and support for school vouchers and charter schools. See Louis Freedberg, *Trump Choice for Secretary of Education Calls for ‘Local Control’ of Schools*, EDSOURCE (Dec. 12, 2016), <https://edsource.org/2016/trump-choice-for-secretary-of-education-calls-for-local-control-of-schools/574155> [https://perma.cc/TG58-DGAL].

282. See Daniel Kiel, *The Enduring Power of Milliken’s Fences*, 45 URB. LAWYER 137, 157 (2013). Kiel has documented the Memphis/Shelby County story in a series of law review articles. In a separate article, Michelle Anderson has also discussed the story reflecting on its implications for regionalism in public education. See Michelle Anderson, *Making a Regional District: Memphis City Schools Dissolves into Its Suburbs*, 112 COLUM. L. REV. SIDEBAR 47 (2012). I should note here that my own treatment of this story is a summary and thus necessarily elides many of the complications, complexities, and nuances of a rich and messy situation.

283. See Anderson, *supra* note 282, at 50.

284. Kiel, *supra* note 282, at 157.

285. See Anderson, *supra* note 282, at 50 (demonstrating that 52.3% of SCS students were white, while 42.4% were black and Hispanic). Only 37.1% of SCS students were economically disadvantaged. See *id.* at 47, note 3.

Plans to merge the two districts had been discussed (and resisted by residents of the suburbs) for years.<sup>286</sup> In December 2010, the Memphis School Board made the decision, without county input by voting, to dissolve and surrender its charter.<sup>287</sup> By disappearing, the school board was essentially voting to create a single, unified Shelby County school district. Faced with an immediate threat to the local control of SCS, suburban residents petitioned the state legislature for relief, and the legislature acted quickly. Before any district lines could be erased or any students reassigned, Tennessee passed a law that delayed the merger through a complex transition planning process and gave suburbs within Shelby County the power to incorporate as separate school districts and thus withdraw from the merged district.<sup>288</sup> By the fall of 2012, less than a year after MCS had voted to dissolve, six suburban municipalities in Shelby County had voted to create new school districts insulated from SCS and were thus immune from the merger. The result was that Memphis merged with the poorer and less organized parts of the county, while the richer suburbs maintained and strengthened their borders against racial and economic integration.<sup>289</sup> In the end, the county schools have become less racially and economically diverse, protected behind their new boundaries.<sup>290</sup>

Throughout the struggle between proponents and opponents of consolidation, localism and local control were watchwords. In Daniel Kiel's interpretation, a central lesson of the whole affair was that a desire for local control over education trumped all other considerations: "Opposition was based on the very idea of breaking

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286. Daniel Kiel, *A Memphis Dilemma: A Half-Century of Public Education Reform in Memphis and Shelby County from Desegregation to Consolidation*, 41 U. MEM. L. REV. 787, 825–26 (2011).

287. *See id.* at 833–35.

288. *See* Anderson, *supra* note 282, at 54. The state-mandated transition planning commission was stacked against Memphis, with state and county representatives having more than twice as many seats on the commission as the city school board.

289. *See* Kiel, *supra* note 282, at 164–65.

290. The new SCS look a lot like the old MCS (8% white, 90% black and Hispanic, 59% disadvantaged). Five of six new districts are significantly whiter and richer than the old SCS: Arlington is 75% white, 21% black and Hispanic, 6% disadvantaged; Bartlett is 62% white, 32% black and Hispanic, 18% disadvantaged; Collierville is 65% white, 23% black and Hispanic, 7% disadvantaged; Germantown is 74% white, 16% black and Hispanic, 2% disadvantaged; and Lakeland is 76% white, 14% black and Hispanic, 7% disadvantaged. Of the six new districts, only Millington retains something like the old demographics of the old SCS (45% white, 52% black and Hispanic, 35% disadvantaged). For all statistics, see, *State Report Cards*, TENN. DEP'T EDUC., <https://www.tn.gov/education/topic/report-card> (last visited Jan. 30, 2017) [<https://perma.cc/9A2P-S2FKJ>].

down the [district] lines, not on any particular policy . . . .”<sup>291</sup> The suburban residents who opposed consolidation framed it as a threat to local control, and they framed the promised new regional district as centralization and a dilution of local power. They framed the threatened consolidation as an intrusion.<sup>292</sup>

The Memphis suburbs advanced a set of proprietary arguments about what local government was for. As in Rolling Hills, they harnessed the language of local control to protect private property and to perpetuate existing distributional inequalities. They represented the “bad” localism that pessimists see as pervasive in our localism. But opposition to that kind of localism under the guise of regionalism or some other name is not a rejection of localism but rather a different vision of localism. If the suburbanites sought more “local control,” what was it that the Memphis-based consolidators were seeking? They were not seeking centralization at the state level—it was the state legislature that stepped in to protect the local control of the suburbanites. Nor were they seeking some sort of federal, technocratic control. Instead, their regionalism looks more like an *alternative* form of localism. The newly merged school district was appealing not because it limited local control, but rather because it enhanced their local control by erasing suburban boundary lines. The consolidators sought to match the local polity to the local problem. Memphis and Shelby County were perfect examples of the problem of the “favored quarter” that Sheryll Cashin identified.<sup>293</sup> Suburbanites benefitted from the services and infrastructure of the metropolitan area while refusing to share the regional burdens. Consolidation would have allowed Memphis (with twice the population of the suburbs) to exert more “local control” over the problem of education.

Seen this way, regionalism is as much a form of localism as suburban “local control.” This view circles back to communitarian and proprietary localism again. The real struggle in Memphis was not over whether there should be local control. It was over the purpose of local government. Suburbanites argued for more local control, defending an essentially proprietary idea of what local government should do: protect private property, keep tax revenue local, and maintain existing distributions of wealth, power, and racial hierarchy.<sup>294</sup> Consolidators argued for regionalism, defending a more communitarian vision of

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291. See Kiel, *supra* note 282, at 165–66.

292. *Id.*

293. See Cashin, *supra* note 270, at 1987.

294. See Kiel, *supra* note 282, at 165–66 (describing the tensions surrounding the Memphis merger in terms of local control).

what local government should do: create a meaningful local polity, give political stakes to the relevant stakeholders, and wield local government as a tool of progress and more equitable distribution.<sup>295</sup>

*C. State Takeovers—Communitarian “Local Control”*

Sometimes proprietary localism takes the form of new protectionist local structures. A third contemporary example is strikingly parallel to the strategy that the conservatives employed in North Carolina when they gutted the township experiment. When cities and towns face fiscal crises, it has become increasingly common for state legislatures to step in and assume the reins of local control.<sup>296</sup> In the most extreme form, a state takeover means that the state ousts local (usually elected) officials, replacing them with state-appointed officers or boards charged with righting the fiscal ship.<sup>297</sup> When this happens, attitudes about local autonomy flip. It is the descendants of the communitarian localists who argue in favor of local control and against centralization, while the decedents of proprietary localists celebrate the virtues of state control.

The dynamics of these modern state takeovers are very similar to the strategies employed across the South during Redemption to discipline local governance. Then, the paternalism and white supremacy were explicit: state control was required to protect against “negro domination” and misrule.<sup>298</sup> Today, the picture is muddier. The justification for contemporary state takeovers is also misrule, but misrule in the shape of corruption<sup>299</sup> and financial mismanagement.<sup>300</sup> Some of these claims have merit; others tread closely to a racialized and class-based indictment of post-white-flight municipal governance.

Those who defend the takeovers argue that poorly run, democratically elected local governments do not serve the interests of

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295. *Id.*

296. In a recent article, Clayton Gillette collected instances of state takeovers, creating a taxonomy of state interventions in local government from “monitoring without interference” to the “direct takeover and displacement of local officials.” Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1384–97 (2014).

297. As Gillette notes, in the most extreme instances of fiscal distress, states like Rhode Island and Michigan have “authorized takeover boards to exercise the more radical measure of fully displacing local officials.” *Id.* at 1395.

298. *See supra* Part II.B.

299. Corruption was part of the argument for state takeovers in Camden, New Jersey; Detroit, Michigan; Chelsea, Massachusetts; and Jefferson County, Alabama. Gillette, *supra* note 296, at 1408.

300. *See id.* at 1406 (casting light on the fiscal crisis New York City experienced in the 1970s).



the local citizens. Thus, the argument goes: state takeover actually serves to vindicate the “real” interests of the local community by removing the tarnish of bad government.<sup>301</sup> Critical to this argument is the idea that a system of local government that serves the “interests” of local citizens actually serves democracy in the short term (by good governance) and in the long term (by building stronger local institutions).

Substituting “interests” for democracy was central to the proprietary localism during Redemption. Conservatives argued that local government that uses taxpayers’ money more wisely and protects property rights governs better.<sup>302</sup> On this account, the lack of participatory democratic input is a feature, not a bug, of the system because it protects local governments from the messiness and misrule of local democracy. Critically, however, limiting local “democracy” does not mean abandoning localism. Supporters of takeovers believe that the role of local government is to protect the interests of local residents as measured by property values and existing distributional measures.<sup>303</sup>

It should be no surprise that modern-day communitarian localists have pushed back against state takeovers, arguing that they do not solve the problems at the root of distressed local governments (segregation, depopulation, poverty).<sup>304</sup> Instead of creating the conditions for local prosperity, state takeovers strip local power to serve the interests of the state government—often preferring the protection of property to policies that would redistribute power and

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301. Clayton Gillette is the most prominent academic voice behind this position. *See id.* at 1400–01 (examining the effects of state intervention).

302. Richard Schragger has gently pushed back against the idea that a purely market-based management of local government actually achieves better results. Responding to an earlier article by Gillette, Schragger argued that it is unclear whether direct democracy or the market-based discipline of bondholders reach measurably better “good governance” results. *See* Richard C. Schragger, *Citizens Versus Bondholders*, 39 FORDHAM URB. L.J. 787, 797 (2012) (“[B]asic checks and balances and ‘good government’ do not sufficiently explain the low rates of municipal failures.”).

303. Gillette, *supra* note 296, at 1400–01.

304. Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577, 582 (2012):

Centralization of power by the state on these terms does not ameliorate structural causes of financial distress, like concentrated poverty, the loss of middle-class jobs across a region, or local borders that fragment a single metropolitan area into socioeconomically segregated cities. Indeed, local democratic dissolution may only exacerbate fiscal malaise over the longer term by facilitating changes (like the abrupt sale of public assets) that produce quick returns at the cost of permanent sustainability.

wealth.<sup>305</sup> Thus the debate between communitarian and proprietary localism takes on much the same form that it had during Reconstruction. The question is not bad government versus good government. Rather, it is the promise of local power to upset the status quo versus the interests of those with property to maintain their control over wealth and power. As with Rolling Hills and Memphis, and as with nearly every problem in local government law, state takeovers present a conflict over what local government is good for. As context varies, so too do the specifics of the answer to the question. Sometimes those who see local government as a vehicle for participation, civic engagement, and redistribution support robust local control. Sometimes they oppose it. Sometimes those who see local government as a tool for protecting property, keeping taxes low, and maintaining the status quo distribution of wealth and power support robust local control. Sometimes they oppose it. What remains stable from past to present are the core arguments, even if the strategies and structures evolve. Even if the shapes of these arguments are impressionistic, they are recognizably associated with the differences between communitarian and proprietary localism.

#### IV. CONCLUSIONS

Local control and localism retain rhetorical power, but the meaning of local control is contested. When legal scholars and legal reformers discuss the virtues (and vices) of localism, they should be clear about which of these contested meanings they intend to invoke. The proprietary localism of the plantation was no less “local” and no further from “the people” than the communitarian localism of the New England town. As a slightly more prescriptive matter, once scholars and reformers are clear about which virtues they are embracing, they can learn from the failure of the township experiments the important lesson that even if local government is woven into the fabric of a place’s “way of life,” purely systemic reforms to local government cannot, by themselves, drive broad social, cultural, and legal reforms. Coming to terms with the fact that the very meanings and purposes of local government are contested means encountering the complexity of that contest in the messy political, social, and cultural context of *lived* localism.

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305. Schragger, *supra* note 302, at 801 (“A different (and more likely) explanation for the punitive attitude toward municipalities is hostility to public employee unions or a more general hostility to redistributive spending.” (citation omitted)).

*A. The Virtues of Localism—Federalism*

Along with the (mild) resurgence of limited government federalism in the courts has come a new interest in linking federalism with local government. The argument is that “localities represent *better* sites for pursuing federalism’s values because they are closer to the people, offer more realistic options for voting with one’s feet, and map more closely onto communities of interest.”<sup>306</sup> David Barron has argued that local governments should get the benefit of some of the deference that states receive under classic federalism.<sup>307</sup> Heather Gerken has argued that we should take the principle “all the way down” past the city to the smallest existing forms of local government: school boards, juries, water districts.<sup>308</sup>

This move implicitly accepts the first proposition of Tea Party federalists (the one that they hold in common with Jefferson): that the federal government is not the best forum for republican self-governance—at least in some areas of the law. Local government federalists argue that states, in their modern form, are not much better as fora for self-government. The appeal of the increasingly local focus is that the more local we go, the closer to “the people” we get.<sup>309</sup>

The question is: Who are “the people”? And do we really want to be close to them? Lurking behind local government federalism is, I think, a latent communitarian localism that answers that “the people” are in community with each other and are participating with each other to govern themselves. But seen through the history of the township experiment, my story suggests that we should be skeptical of attributing the virtues of communitarian localism to all local governments. Where proprietary localism holds sway, deferring to local authority might mean deferring to the forces most directly responsible for maintaining segregation and economic inequality. Just as we might be wary of deferring to the “local knowledge” of the feudal planter, so too might we be wary of seeking the voice of the people in proprietary suburbs. The meanings and purposes of local government

306. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 23 (2010).

307. See David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 490 (1999) (“[O]ur towns and cities are what we know them to be: important political institutions that are directly responsible for shaping the contours of ‘ordinary civic life in a free society.’”).

308. Gerken, *supra* note 306, at 24.

309. Taking just one example from Gerken’s search for “the people” in smaller local formations: “Juries’ decisions would give us a more fine-grained read on where the People stand. . . . [O]ne involving face-to-face interactions unmediated by political parties or electoral politics.” *Id.* at 32.

are contested. If we seek something like Jefferson's ideal fit between individual and government in the most local arrangements, we must be prepared to be disappointed. Even if communitarianism and democratic legitimacy can sometimes be found, so too can exclusionary proprietary localism. In other words, one might follow self-government "all the way down" looking for Tocqueville's town and instead find a plantation.

There are two related takeaways here. First, there is a risk in accepting the first postulate of contemporary federalism: that the federal government is a poor representative of "the people" and we should look for a better one. Where we look to find "the people" whose authority we want to advance should and must depend on what we want from them. If we seek places where participatory democracy and communal spirit are vibrant, then we should discriminate between various kinds of localism to privilege the one we want. With this in mind, we might find that larger scale governments actually look *more* communitarian because the mechanisms for participation and collective engagement are more robust than at the local level.

Relatedly, if the goal is truly to find those places where "the people" are self-governing, there are a lot of troubling questions that we must confront. In a wealthy, gated, and homogeneous suburb, "the people," narrowly defined, are in control. But they have used that control in service of exclusion and anti-government retreat.<sup>310</sup> If we seek better, more diverse, more egalitarian visions of self-governance, then we have to do more than follow the local all the way down. Instead, we have to look for what we are really looking for: traces of communitarian localism. Those traces might be evident in government institutions, or they might be evident elsewhere outside of any formalized government body.<sup>311</sup> In some instances, from some perspectives, that localism might look like giving local governments more control, and in some it might look like taking control away. But if we remember that the localisms that we like and the localisms that we don't like are *both* localism, then it must be true that advancing one vision will come at the expense of another. One person's local control is another person's tyranny

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310. As Richard Ford, among others, has argued, allowing local governments to draw boundaries and self-define the limits of their community can result in exclusion and allow local governments to operate as instruments of racial oppression. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1860–61 (1994).

311. We might find them in churches, book clubs, little leagues, summer camps, etc.

*B. Integration and Redistribution*

The problem that faced both Republican and conservative southerners in 1868 was racial inequality and integration. The problem of racial inequality, rooted in segregation, although much changed, has not gone away. In both past and present, the problems are essentially local. I am willing to admit freely that I admire the efforts of the revolutionaries, idealists, and utopians who brought the town south with them during Reconstruction. Their grand goal of fixing the South from the ground up with communitarian participatory democracy was laudable. To indulge in the counterfactual: I think that we would be better off today had they succeeded.

Instead, much of our local government law today preserves structural inequalities rather than breaking them down. Today's communitarians face the same questions that Tourgée and his fellow travelers faced in 1868: How can local government be a tool for dismantling inequality and building a better politics? The township experiments show starkly the danger of relying on structural reform alone to change deeply ingrained cultural practices. The North Carolina Republicans were too right in their diagnosis of the problem: slavery and the plantation system were embedded in the lived localism of the South. Simply erasing the positive legal structures that supported them was not enough. Plantation localism was so powerful that, when it was challenged with the township experiment, conservative southerners found a way to return to an approximation of it by other means.

One possible conclusion is that local government is simply not the right place to launch an attack on deep social problems. Even if it is true that local government reflects an ingrained "way of life," it may be that that the currents of that "way of life" run too deep to be accessed by reform. Under this account, the failure of the township experiments was inevitable because plantation localism was the fundamental structure of southern life.

The history of the township experiment shows, I think, that this is the wrong conclusion to draw. The Redeemers fought off the township experiments with effort. In pockets, communitarian localism was starting to change the political realities of North Carolina. It was precisely this demonstrated risk that made the township a primary target of Redemption. Thus, even as the township experiment shows the risk of purely structural reform, it also shows the promise that strong participatory self-governance can lead to change.

The problem is not that local reform cannot work, but rather that reformers have to be attentive to the complex dynamics at play. Where systemic reform stokes racial or outsider resentment, that resentment has fueled a turn against communitarian participation and toward proprietary protectionism. The answer is not to avoid stoking those resentments, but rather to account for them. Any communitarian localist reform should be calibrated to protect against proprietary backlash.

### *C. Plantations on the Cul de Sac*

One final takeaway is less prescriptive than provoking. The history here suggests a link (more oblique than direct) between the modern proprietary suburb and the plantation. Although we still tend to think of Tocqueville and Jefferson's ideal democracies when we think of American local government, this Article suggests that we might do better to think of Fitzhugh's plantation. Perhaps the real American ideal is not to be a civically responsible yeoman, but rather a small-scale feudal lord, master of your small domain: a planter on the cul de sac.

The strong version of this provocation does not stand up to close scrutiny. The distinctions between the planter and the homeowner are too extreme and the differences between the antebellum county courts and the modern proprietary suburb are too wide. Still, the mere suggestion might do some good. Forcing those of us who study and work on local government to grapple with the tradition of plantation localism and its past and present power might change the way we think about the value and risks of local government. If we take seriously the possibility that our localism exists to vindicate our "forbidden appetite"<sup>312</sup> for a planter's total control, then perhaps we have a more realistic picture of how race, property, and power have structured the local government that we have. That proprietary appetite operates under the veneer of communitarian rhetoric. Perhaps by naming it, by "count[ing its] teeth and claws,"<sup>313</sup> we can finally confront it and let it go.

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312. Recall that this was the charge that the Republicans leveled against the opponents of the township experiment in North Carolina. *To the People of North Carolina*, *supra* note 150.

313. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

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