

1-1-2008

## Katrina's Window: Localism, Resegregation, and Equitable Regionalism

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### Recommended Citation

David D. Troutt, *Katrina's Window: Localism, Resegregation, and Equitable Regionalism*, 55 Buff. L. Rev. 1109 (2008).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol55/iss4/4>

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## ARTICLES

### **Katrina's Window: Localism, Resegregation, and Equitable Regionalism**

DAVID D. TROUTT†

The promise of [New Orleans] is the lesson that can be learned from that city. At its best, when the people are doing what they do naturally—blending a seamless culture—it has a oneness about it that very few places in the rest of this country has [sic]. New Orleans' promise is [it] can teach America how to be America. If anybody's listening.<sup>1</sup>

The Negro has indicated tremendous concern about his suspected confinement to the first ward. At almost every one of the Planning Board meetings, collectively they have stated they do not feel that any residential use should be allowed to remain in the first ward. In piercing through what they say, what they really mean is don't keep us in the first ward, let us live where our income or our desires allow us. You have a tremendous pressure building up in your community on the part of the non-whites to go across the

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† Professor of Law and Justice John J. Francis Scholar, Rutgers Law School-Newark. I wish to thank Derrick Bell and John Payne for their thoughtful comments on early drafts of this Article. I am also grateful for the feedback I received from participants after presenting many of these ideas at the First Annual Critical Race Theory Seminar at UCLA Law School as well as before policymakers at the Institute for Regional and Community Transformation. I am deeply indebted to Maritza Braswell for her thoroughness and ingenuity in providing outstanding research assistance for this Article, as well as to Dennis Kim-Prieto in the library. I learned a lot from the many gracious people I interviewed in New Orleans. All mistakes are mine.

1. Interview by PBS with John Scott, Artist, in New Orleans, La. (Feb. 12, 2007).

bridge.<sup>2</sup>

## INTRODUCTION

Like so many images and incidents from the aftermath of Hurricane Katrina in New Orleans, the decision by the Jefferson Parish police to close the Gretna Bridge to evacuees fleeing the flooded city three days after the storm has become a metaphor for a damaged social contract. Witnesses, mostly black, reported police, mostly white, firing warning shots over their heads and angrily denying them passage through the West Bank suburb.<sup>3</sup> Police spokesmen asserted that mayhem had begun to ensue, that the parish's resources were taxed after busing evacuees, and that New Orleans was a better rescue point.<sup>4</sup> But the public reactions were telling: Jefferson Parish residents praised their police for keeping outsiders out, outsiders filed civil rights lawsuits,<sup>5</sup> and the national public took umbrage at another apparent instance of callous official indifference.

Yet the Gretna Bridge incident reflects something more complicated and less often acknowledged about New Orleans-as-metaphor for America's social contract after the August 2005 storm. It demonstrates the importance of city-suburb boundaries—jurisdictional borders, specifically—in

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2. *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108, 110 (2d Cir. 1970) (quoting the city's planning consultant's advice to the Planning and Development Board in February 1968).

3. See Bruce Hamilton, *Evacuees Recount Gunfire at Bridge Blockade; Gretna, Jeff Officials Defend Katrina Action*, NEW ORLEANS TIMES-PICAYUNE, Feb. 26, 2006, at A1.

4. See *id.* The official characterizations of mayhem, looting, and crime in and outside of New Orleans during the immediate aftermath of the storm, were often wrong and sometimes fatal. Perpetuated by black local officials (e.g., New Orleans Mayor Ray C. Nagin and Police Chief Eddie Compass) as well as national news media correspondents, the reports of widespread lawlessness fit a set of preconceived beliefs about the largely black poor devastated by the flooding, justified a slower, militarized response from rescuers and may have delayed critical rescues for sickly and dehydrated survivors. For a full discussion of the implications of racial framing that occurred in the storm coverage, see Cheryl Harris & Devon Carbado, *Loot or Find?*, in *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* 86 (David Dante Troutt ed., 2006).

5. See Paul Purpura, *Court Explores Evacuees' Right to Cross Bridge; Gretna, Police Chief Face Katrina Lawsuit*, NEW ORLEANS TIMES-PICAYUNE, Jan. 25, 2007, at B1.

the social identification of space and safety, and how under what I call legal localism, a suburban locality's police powers are routinely used to affirm expectations segregated by both race and class. In fact, there have been several defensive exercises of local authority in the post-Katrina environment, including St. Bernard Parish's enactment of an ordinance preventing homeowners from renting out their homes to anyone other than a blood relative without a permit,<sup>6</sup> a Jefferson Parish resolution barring construction of any multi-family housing with the use of state-issued tax credits,<sup>7</sup> and statements by the St. Tammany Parish sheriff warning people with dreadlocks or "chee wee hairstyles" that they could "expect to be getting a visit from a sheriff's deputy."<sup>8</sup>

By *legal* localism, I am referring to both the ideology of local governance that is central to most scholarship on local government law as well as its legal sense, codified in decades of state law decisions that combined with private industry actors and federal policies to build a fortified suburbia around the nation's great cities, and whose rules of exclusion were ultimately upheld against constitutional attack by a series of Supreme Court decisions in the 1970s. Legal localism, I argue here, is the legal form of the American Dream and the template for our social contract. For the mostly white suburban parishes that comprise the New Orleans metropolitan area, legal localism is the formal triumph of a long historical process of what Arnold Hirsch called "Americanization."<sup>9</sup> In this analysis, New Orleans is not just any American city. It is perhaps *the* American city, reflecting the struggle between urban potential and racial identity. Its history of racial and caste complexity before Reconstruction, the geographic barriers to its expansion, the sometimes violent ebb and flow of its race relations, the ideological battles over equality and Jim Crow segregation, and its ultimate white flight to sprawling suburbs which

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6. See Bill Quigley, Editorial, *Eighteen Months After Katrina*, TRUTHOUT, Feb. 27, 2007, [http://www.truthout.org/docs\\_2006/022707N.shtml](http://www.truthout.org/docs_2006/022707N.shtml).

7. See *id.*

8. *Id.* (quoting Sheriff Jack Strain).

9. Arnold R. Hirsch, *Simply a Matter of Black and White: The Transformation of Race and Politics in Twentieth-Century New Orleans*, in CREOLE NEW ORLEANS: RACE AND AMERICANIZATION 262 (Arnold R. Hirsch & Joseph Logsdon eds., 1992); see discussion *infra* p. 1118.

left behind national extremes of concentrated black poverty and urban decline represented—before Katrina—a mirror to the country's failures of residential organization. However, *after* Katrina, when even the President's omission of the city's recovery in his January 2007 State of the Union address suggested the depth of political fatigue around the meaning of disaster, New Orleans is a window to the scope and content of metropolitan law and policy reform in the United States.

In most law and policy analyses concerned with poverty and even structural inequality, there is a tendency to focus narrowly within the hardship, at the intersection of marginality, or at least to stay on the city side of the bridge. The flaw in that focus yielded the sort of national confusion around promised post-Katrina discussions of race and class. Without a comparative perspective on poverty and the middle-class—or what I have earlier described as an interdependence between “antimarkets” and “metamarkets”<sup>10</sup>—people lack meaningful context. So, the conversation rarely occurred or lasted for long and, at this writing, the story of New Orleans' displaced poor will likely become one of accidental migrations to an uneven diaspora.<sup>11</sup>

Yet Hurricane Katrina nevertheless revealed many randomly related “truths” about the kinds of lives Americans live and where they live them. First, “white flight” is not a historical concept, but remains an accurate descriptor for the residential settlement patterns of most white Americans—outside of large cities.<sup>12</sup> Second, cities

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10. David Dante Troutt, *Ghettos Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427 (2000) (representing the foundation article to the theory of antimarkets, the potential role of consumer principles and an introduction to a legal paradigm for economic development in ghetto areas of American cities).

11. See Shaila Dewan, *Road to New Life After Katrina Is Closed to Many*, N.Y. TIMES, July 12, 2007, at A1 (describing the continuing struggles to find work, housing and stability among Katrina survivors unable to return to New Orleans).

12. However, some important recent scholarship on Southern suburbanization does not fully agree with the way this term is used. For instance, as Matthew D. Lassiter writes, “[t]he interrelationship between suburban expansion and urban retrenchment represents the most important framework for investigating political realignment in postwar America, but the overemphasis on the metaphor of ‘white flight’ reduces suburbanization to an appendage of urban

are still the repositories of political disfavor, even contempt, "raced" by suburban development patterns as a synonym for costly black failure and legitimate white fear.<sup>13</sup> Third, racial and economic segregation are as much the norm today in America as they were, on average, over the civil rights era.<sup>14</sup> Fourth, whatever one may think of integration or the personal factors contributing to persistent poverty, segregation works on particular groups as an instrument of social and economic marginalization; the chronic absence of resources that results for the undesirable objects of segregation—largely poor and working-class blacks—contributes to cumulative disadvantages which are even harder to overcome.<sup>15</sup> Fifth, segregation accompanies suburban sprawl and enclavism, which creates economic and environmental waste, a succession of declining communities and disparities between middle-class and more affluent localities within a metropolitan area.<sup>16</sup> The New Orleans

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history and provides an incomplete account of the development of metropolitan space." MATHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* 9 (2006). Undoubtedly, whites fled cities for suburbs after World War II for many more reasons than fear or contempt of racial integration. In many cases, including that of New Orleans, lending rules and real estate industry offerings made the suburbs more attractive and less expensive than continuing to rent in cities. See generally Dolores Hayden, *Building the American Way: Public Subsidy, Private Space*, in *THE SUBURB READER* 273 (Becky M. Nicolaidis & Andrew Wiese eds., 2006) (describing cost structures and public subsidies to homeowners and developers during the pre- and post-war suburban housing booms).

13. See JASON SOKOL, *THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945-1975*, at 6-8 (2006) (summarizing the range of reactions, including shock and fear, among ordinary white Southerners as learned through personal narratives).

14. See LEWIS MUMFORD CTR. FOR COMPARATIVE URBAN AND REG'L RESEARCH, *ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND* 1 (2001), available at <http://mumford.albany.edu/census/WholePop/WPreport/MumfordReport.pdf> (providing an analysis of trends in residential segregation between 1980 and 2000, and concluding that "[r]esidential segregation among blacks and whites remains high in cities and in suburbs around the country. There were some signs of progress in the 1980s, with a five-point drop in the segregation index (from 73.8 to 68.8). The change continued at a slower rate in the 1990s (a decline of just under 4 points). . . . [A]t this pace it may take forty more years for black-white segregation to come down even to the current level of Hispanic-white segregation").

15. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993). See also the discussion *infra* pp. 1128-33.

16. See, e.g., Robert D. Bullard, *Anatomy of Sprawl*, in *SPRAWL CITY: RACE,*

region illustrated all of these phenomena before Katrina, which, despite its rich history, resembled most of metropolitan America.

This Article seeks to provide analytic connective tissue between the tragedy of cities like New Orleans and the underlying doctrines of marginalization embodied in our most favored local government laws. I do so by telling a historical narrative of residential organization, critiquing localism, and ultimately arguing for principles of metropolitan governance and land use regulation which I call equitable regionalism. Many more capable scholars have done the same before me.<sup>17</sup> However, I hope this Article offers the continuing discourse three distinct threads of analysis. First, it provides a history of race, space, and class in New Orleans that demonstrates how tenuous the process of Americanization was over its embattled development, and how the resulting mythologies eclipsed a vision of urbanization that seems all but lost now. My aim is to demonstrate that New Orleans' urban exceptionalism was lost long before Katrina, but in the aftermath its liberal precepts appear worthy of revival. Second, the Article critiques legal localism as more than a good doctrine with

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POLITICS, AND PLANNING IN ATLANTA 1, 2-7 (Robert D. Bullard et al. eds., 2000) (describing many of the negative effects of sprawl on cities and older suburbs).

17. See, e.g., Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) [hereinafter Briffault, *Our Localism I*]; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) [hereinafter Briffault, *Our Localism II*]; Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552 (1999); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000) [hereinafter Cashin, *Localism, Self-Interest*]; Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131 (2004); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1064-68 (1996); Georgette C. Poindexter, *Towards a Legal Framework for Regional Distribution of Poverty-Related Problems*, 47 WASH. U. J. URB. & CONTEMP. L. 3 (1995); John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655 (2001); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83; cf. David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261 (2005).

inequity-producing flaws. Legal localism, I argue, is the modern successor to racial segregation, an instrument effectively shielded from constitutional attack by the proxy of economic discrimination.<sup>18</sup> In particular, the Supreme Court rulings of the 1970s, which insulated localism from attack also contributed to the cultural assertions of color-blind innocence that characterize contemporary discussions of racial difference. Finally, I argue that the twin goals of saving cities and investing in the social capital of the concentrated urban poor can only come about through dedicated reform of our legal rules along the principle of equitable regionalism. Political and empirical realities now show that this principle is capable of a workable, though anti-localist, premise: What is good for the poor is also good for the middle-class.

Part I examines the history of race relations across spatial relationships in New Orleans, with particular emphasis on how American thinking produced a binary capitulation—two races, one white, one black—despite the resistance of radical Creoles of color and substantial barriers to spatial distance imposed by the climate and the landscape. That history is directly complicit in the vulnerabilities that produced the continuing disasters for so many after Katrina. This Part concludes with an analysis of how the late-breaking development of suburbia around New Orleans followed the same segregated patterns seen elsewhere during the post-war period. Part II asserts that what segregation started, localism codified and has proved a more formidable guarantor of middle-class wealth and privilege on the one hand, and concentrated black poverty on the other. Specifically, this Part examines the jurisprudential edifice fortifying segregation in the more durable form of race-neutral rules of local autonomy developed by state legislatures and courts, but ultimately, as I argue, given the Supreme Court's imprimatur in a series of illustrative cases

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18. I use the term "legal localism" to distinguish the legal constellation of rules, court decisions, and rationales supporting local autonomy from the cultural imagination from which it comes. Localism as an idea is much larger than legal localism as a set of doctrines, though the idea could not have nearly the organizational influence in American life without the complicity of the latter. Legal localism, for example, could have focused primarily on large cities as its prototype, rather than smaller suburban municipalities, favoring and empowering the former over the latter. Yet that would have contradicted the exclusionary impulses animating localism.



decided in the critical decade of the 1970s. These rules reproduce racial and economic segregation through their interaction with economic rationalism, decentralization, consumption, and political fragmentation as well as black middle-class antipathy toward integration. The analysis modifies previous analyses of the creation of American ghettos during the middle decades of the twentieth century<sup>19</sup> by attributing more responsibility for the emergence of a so-called "urban underclass" in the 1980s and 1990s to the consolidation of legal localism in the 1970s. Part III argues that cities cannot expect to command the resources to provide adequately for the excluded poor or to sustain economic growth without regional alliances for, among other things, distributing fair housing obligations and sharing tax revenues. These reforms flow from a principle called equitable regionalism. Like some other regionalist proposals, it is grounded in planning principles. These, I propose, should follow a neighborhood, rather than municipality, model, as demonstrated by some of the experiments currently underway in New Orleans' rebuilding efforts.

### I. THE HISTORY AND REALITY OF NEW ORLEANS' AMERICANIZATION

New Orleans' steep social and economic decline before Hurricane Katrina is well known. Its wrenching poverty, murder rates, failing public schools, political corruption, and hypersegregation<sup>20</sup> belied the positive gloss of its "Big Easy" notoriety. Less remembered, however, is its heritage as one of America's first great urban centers, which necessarily includes its formative struggles over racial integration, interethnic cooperation, and the politics of land settlement. This Part examines New Orleans' eventual "Americanization"—as the historian Arnold Hirsch and others use the term<sup>21</sup>—in order to illustrate how a failing

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19. See, e.g., ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960, at 40-67 (1983).

20. The term "hypersegregation" describes an area in which at least four of five possible measures of segregation—unevenness, isolation, clustering, centralization, and concentration—occur over a particular threshold. See MASSEY & DENTON, *supra* note 15, at 74-77.

21. Hirsch, *supra* note 9.

city in contemporary terms, failed long ago (in fits and starts) to be an urban model for the nation. Americanization, as I intend to use it, refers to two critical phenomena. First, it is the process of binary capitulation by which a polyglot city of French- and Spanish-identified Creoles, Irish and German immigrant laborers (and later Italians), and "Yankee" American protestants became "white," while free and enslaved black people from Africa, various parts of the South as well as Haiti, became identified as "black"—with a significant portion identifying themselves as "Creole" in the last but continuing memory of original differences. Second, Americanization is the exploitation of this binary capitulation to institutionalize typical American residential patterns, especially racial segregation, upon a physical landscape that now represents, literally, the fatal implications of marginalized spaces.

New Orleans' reputation for racial integration is sometimes exaggerated relative to its rapid segregation over the last fifty years. As the following discussion shows, "blacks" and "whites" lived in much greater proximity to each other in the city for a longer period of time than in most American cities. In this sense, the struggle to Americanize into segregated living patterns was completed later than it was for most hypersegregated cities. What is most instructive here, however, is that the process was a historical struggle, with multiple forces as engaged in a conflict over the meaning of racial identity as they were over segregation. Further, New Orleans' struggles over racial identification of both its people and its spaces would not likely have been so pronounced had the unique physical characteristics of its location not demanded density. "America's Western Capital" was as much a critical port city as an island, surrounded by the Mississippi, Lake Ponchartrain, vast swamplands, and impassable marshes until late in the nineteenth century. Its harsh topography necessarily invited density, if not verticality, so that, as the city grew in population, both classes and races lived closer to each other in or near the high ground grid of the Vieux Carre.<sup>22</sup> According to some geologists, the area was "a land between earth and sea—belonging to neither and

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22. See PEIRCE F. LEWIS, *NEW ORLEANS: THE MAKING OF AN URBAN LANDSCAPE* 20 (2003).

alternately claimed by both.”<sup>23</sup> Americanization as a spatial reality, therefore, would not take its full shape until the possibility of suburban sprawl transformed the region in the late 1950s, 1960s, and 1970s.

A. “Americanization” I: *The White Supremacist Roots of New Orleans’ Geography*

Antebellum New Orleans was complex and defiant of generalizations because so many fixed categories in American racial experience were routinely subverted by its customs. Despite laws designed to maintain the supremacy of whiteness in the racial order, even slaves’ acceptance of a subordinated status was superficial.<sup>24</sup> Social, sexual, political, and economic connections among whites and blacks were too varied and frequent.<sup>25</sup> Ownership of black slaves by free Negroes is illustrative. In 1830, 735 Negroes owned 2,351 Negro slaves.<sup>26</sup> While the phenomenon of New Orleans blacks owning slaves is sometimes characterized as part of a Franco-French (and lighter-skinned) elite of free Creole hegemony over darker-skinned blacks, many “slaves” were family members who were subsequently manumitted.<sup>27</sup> Nor could the categories of white and black enjoy universal references in a tightly configured city developed in an efficient grid on the high ground along the Mississippi River. In 1810, the city’s population was 36.7% white, 28.7% free people of color, and 34.6% slaves.<sup>28</sup> By 1850, it was 76.9% white, 8.5% free people of color, and 14.6% slaves.<sup>29</sup> But during that span, the “white” population had changed many times over as German, Irish, then Italian laborers entered the port city alongside existing whites of “American,” Spanish, and French

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23. *Id.* at 34 (quoting CHARLES R. KOLB & J.R. VAN LOPIK, U.S. ARMY ENGINEER WATERWAYS EXPERIMENT STATION TECHNICAL REPORT 3-483, GEOLOGY OF THE MISSISSIPPI RIVER DELTAIC PLAIN, SOUTHEASTERN LOUISIANA (1958)).

24. JOHN W. BLASSINGAME, *BLACK NEW ORLEANS: 1860-1880*, at 9 (1973).

25. *See id.*

26. *Id.* at 11.

27. *Id.* (“[S]uch masters entered 501 of the 1,353 manumission petitions in the emancipation court between 1827 and 1851.”).

28. Joseph Logsdon & Caryn Cosse Bell, *The Americanization of Black New Orleans, 1850-1900*, in *CREOLE NEW ORLEANS*, *supra* note 9, at 206.

29. *Id.*

origin.<sup>30</sup> Serious social antagonisms between the latter two—the old guard who had given the city its distinctive flavor and the Eastern elites of the country's westward expansion—fueled the divided shape of the city's geography as well as its ultimate identity.<sup>31</sup> Yet despite expressions of white supremacy and fear of blacks typical of many parts of America,<sup>32</sup> social admixture prevented racial identity in New Orleans from adhering to binary categories and instead, for both blacks and whites, remained multitudinous.

“Americanization” refers first to the process by which a polyglot city struggling to incorporate multiple cultural influences discovers and institutionalizes racial segregation. Segregation—the *de jure* and *de facto* forced identification of racialized space—is rooted in the meanings associated with land and place. “[T]he city's social history was both paralleled and influenced by its physical development. If the city's geography had once forced New Orleanians into intimate association, physical changes in modern New Orleans facilitated the drive of white supremacists toward racial segregation and polarization.”<sup>33</sup>

This first aspect of Americanization did not occur swiftly or linearly, but by pendular accretions. During the 1850s, the pendulum swung away from the city's integrated traditions and economic opportunities which had attracted ambitious free “American” blacks, and blacks saw a vanishing of freedoms. In 1852, for example, three municipalities merged and racial oppression increased.<sup>34</sup> It was a period in which many more “American” whites came to the city.<sup>35</sup> The city's population grew along with the sources of cultural influence. By 1860, free people of color were only 6.4% of the population, but their absolute numbers—

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30. See LEWIS, *supra* note 22, at 63.

31. See *id.* at 44-47. There was deep animosity for the Americans among the Franco-Spanish residents of New Orleans, and the distrust and contempt for ways and beliefs was mutual. See *id.* Canal Street came to divide the American sector from the city, and in 1836 New Orleans was divided into three separate municipalities which reflected the political extent of the conflicts. See *id.*

32. See BLASSINGAME, *supra* note 24, at 16.

33. Logsdon & Bell, *supra* note 28, at 197.

34. *Id.* at 208.

35. See *id.* at 206.

10,939—were significant.<sup>36</sup>

Blacks with Franco-Caribbean origins—mostly from Haiti and roughly identifiable as Creole<sup>37</sup>—often embraced the principles of social equality, full political rights, and liberty reflected in the French and Haitian revolutions.<sup>38</sup> Like the founders a generation before them, Creole “radicals” succeeded in passing a state constitution in 1868 that “mandated the integration of all government facilities, including public schools, and also all private businesses licensed by the state to serve the public.”<sup>39</sup> But there was tremendous and violent backlash by whites and disagreement among blacks about how far to push against the segregationist tide. By 1866, a year of race riots between whites and blacks, New Orleans blacks experienced a growing divide.<sup>40</sup> This intraracial divide would remain a critical fulcrum in the contested meanings given to race and space.

Before the civil war, the racial geography of the city—the early foundation for what would become the second phase of Americanization—showed a patchwork of blacks throughout. Many blacks lived in the French Quarter. Others lived among the white households for whom they often worked as domestics, in “small, nuclear clusters” behind “superblocks” fronted by wealthy boulevard homes.<sup>41</sup> The poorest blacks, however, lived in *battures* or backswamps, poorly drained, unkempt, mosquito-infested

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36. *Id.*

37. *See infra* note 54.

38. *See* Logsdon & Bell, *supra* note 28, at 209.

39. *Id.* at 241.

40. *See id.* at 240-41. Disagreements over whether to seek universal suffrage were a harbinger of the differences between DuBois and Washington decades later—or Malcolm and Martin many years later—with some demanding full equality and others urging caution and self-help. The militants won, however briefly, when blacks in Louisiana gained suffrage as well as integrated government facilities and public schools. The violence reported by the creole-led *Tribune* may have helped passage of the Fourteenth Amendment and the Reconstruction Acts. “It was, ultimately, a white-black ‘American’ alliance that eclipsed creole eminence and weakened resistance to a policy of racial separation.” *Id.* at 195.

41. LEWIS, *supra* note 22, at 50-51 (“If America had to have racial segregation, the New Orleans pattern was less malevolent than that of most northern cities.”).

areas near the river.<sup>42</sup> Over time, the latter would come to symbolize the more familiar pattern of residential organization we see today.

### B. *The Civil War, Reconstruction, and Radical Creolism*

With the Civil War came an intensification of racialized emotion. Fear has always been a key ingredient of racial animus, but after the war humiliation also affected Southern whites' views of themselves generally and the configuration of a city like New Orleans in particular. "Humiliated by their defeat in a war in which blacks had marched in the legions of the victors, southern white men returned from the field of battle to find the Negro in places which they felt were their own."<sup>43</sup> Calls for violence against blacks grew more frequent, clashing with the growing desire of blacks across the South to see their new freedoms expressed in respect for black "manhood"—equal justice, political participation, suffrage, integrated schools and public facilities, and control of their own institutions.<sup>44</sup> In New Orleans, Reconstruction brought many of these things, as well as the makings of a white segregationist backlash designed to humiliate black citizens in turn.<sup>45</sup>

"Nowhere did Reconstruction begin so early or advance so far in its legal challenges as in New Orleans."<sup>46</sup> Radical black Creole reformers who had lost their dominance by 1870 were briefly re-ascendant during the period as the racial pendulum swung again. However, despite the political gains the reformers had helped secure for blacks in the 1870s, there were discernible tensions among blacks in the city over how far to push for full citizenship rights. While the backlash against Reconstruction was powerful throughout the South, these tensions ironically may have

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42. *See id.* at 51-52.

43. BLASSINGAME, *supra* note 24, at 174.

44. *See id.* at 176-77 (quoting the black New Orleans *Tribune*, which reportedly wrote: "We wish to be respected and treated as men—not as Africans, or negroes, or colored people, but as Americans and American citizens.").

45. Interestingly, Blassingame notes that "[t]he word humiliation appeared more frequently than any other in Negro catalogues of the impact of segregation on them." *Id.* at 179.

46. Logsdon & Bell, *supra* note 28, at 216.

produced a strength in Louisiana sufficient to hold back the retrenchment longer than elsewhere.<sup>47</sup> But it came. Resegregation occurred in 1877 and again in the 1879 "Redeemer" constitution.<sup>48</sup> Radical Creoles of color such as Aristide Mary, Louis A. Martinet, and Rodolphe Desdunes, philosophical forebears of the modern civil rights movement, sought recourse in the federal courts.<sup>49</sup> In 1890, they formed the American Citizens Equal Rights Association and brought two lawsuits; the most famous was named for the Creole activist who challenged segregated train cars, Homer Plessy, biologically just one-eighth black.<sup>50</sup> That legal defeat was devastating, leading New Orleans to become, "in its race relations, very similar to other American cities in the South."<sup>51</sup>

Following Reconstruction, legal segregation would take many forms, particularly with the late nineteenth century rise of Jim Crow, which had profound effects on the social construction of a racial calculus and its physical manifestations in urban land. Cheryl Harris has argued that this process significantly contributed to the identification of property in whiteness.<sup>52</sup> This, too, is a feature of what Hirsch called Americanization. The emerging racial calculus that, by law, devalued even a little black heredity, submerged ethnicity and, for those who were privileged to have one, demanded a choice. White Creoles, for instance, became white. "In an age of racial totalitarianism, the rapid assimilation of white immigrants and the fierce determination of white creoles to link their identity to a biological rather than a cultural heritage sharply demonstrated how Americanized white New Orleans had become."<sup>53</sup>

As segregation systematized the conditioning of social and economic benefits in New Orleans, it not surprisingly revealed the trade in skin color. That is, a system that creates both property and social relations in biological

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47. *See id.* at 249-51.

48. *See id.* at 253.

49. *Id.*

50. *See id.* at 257. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896).

51. Logsdon & Bell, *supra* note 28, at 259.

52. Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

53. Logsdon & Bell, *supra* note 28, at 190.

identity implies markets of trade in those “values.” The color line in New Orleans had—and has—always reflected a certain caste system of racial lineage among blacks; the very term “Creole” remains charged today because of its association with lighter-skinned elites.<sup>54</sup> Whites and white institutions encouraged the divisions among blacks. During the antebellum period, most free Negroes were mulatto, while most slaves were black—77% and 74%, respectively, in 1860.<sup>55</sup> The former were legally barred from interacting with the latter.<sup>56</sup> After Reconstruction, and notwithstanding the fierce advocacy of equal rights by radical Creoles of color, black Creoles often sought to gain the status benefits of assimilation that white Creoles chose.<sup>57</sup> In the 1875 census, hundreds of Louisiana mulattoes reported themselves as “white.”<sup>58</sup> “In all probability, from 100 to 500 Negroes became ‘white’ every year from 1875 to the 1890s.”<sup>59</sup>

## II. AMERICANIZATION II: TECHNOLOGY AND CHANGES TO THE LAND UNDER JIM CROW AND FORMAL LAND USE LAWS

### A. Technology

Jim Crow and the separate-but-equal doctrine, upheld by the Supreme Court in *Plessy v. Ferguson*, demonstrated

54. Definitions abound, including those limited to time periods. In the eighteenth and early nineteenth centuries, many simply defined Creole as indigenous to Louisiana or New Orleans, as opposed to born elsewhere, particularly slaves. See CREOLE NEW ORLEANS, *supra* note 9, at xi n.4. There is evidence that for a while after that, the term was used to describe people of European descent born in the Americas. See Gwendolyn Midlo Hall, *The Formation of Afro-Creole Culture*, in CREOLE NEW ORLEANS, *supra* note 9, at 58, 60-61. This all-white usage of the term was especially prevalent during Reconstruction. See CREOLE NEW ORLEANS, *supra* note 9, at 98; see also ALINE ST. JULIEN, COLORED CREOLE: COLOR CONFLICT AND CONFUSION IN NEW ORLEANS (1987); Joseph G. Tregle, Jr., *Creoles and Americans*, in CREOLE NEW ORLEANS, *supra* note 9, at 131, 134, 138-41. However, it is far from clear how the term came to hold its contemporary connotation of a black person with longstanding roots in New Orleans and French, Spanish, or Haitian lineage.

55. BLASSINGAME, *supra* note 24, at 21.

56. *Id.*

57. See Hirsch, *supra* note 9, at 262, 265.

58. BLASSINGAME, *supra* note 24, at 201.

59. *Id.*



the role of law in facilitating the creation of a post-Civil War racial marketplace. Law codified the hegemony of American race perceptions—white supremacy—and institutionalized the racial choices available to whites or to those blacks who could stake some property-like claim in their origins. For the latter, this was increasingly difficult to do. The American racial calculus was deliberately narrow and simple—the white-black binary. Even after *Plessy*, the legal status of partial black identity was nebulous, though its social significance was clear.<sup>60</sup> To be white under segregation meant, of course, to have at least some choices about the exercise of one's trade value; to be black meant to have few to none.<sup>61</sup> Because of technological changes, those choices greatly expanded for New Orleans' whites by the turn of the century.

Pumps allowed the landscape to expand beyond the edges

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60. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) ("It is true that the question of the proportion of colored blood necessary to constitute a colored person . . . is one upon which there is a difference of opinion in the different states . . . . But these are questions to be determined under the laws of each state, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race."); *Lee v. New Orleans Great N. R.R. Co.*, 51 So. 182 (1910) (suggesting that "persons of color" included persons with as little as one-sixteenth African ancestry); see also TED GIOIA, *THE HISTORY OF JAZZ* 34 (1997) ("[T]he most decisive turning point was the passage of the Louisiana Legislative Code of 1894 that designated that anyone of African ancestry was a Negro."); CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 153-54 (1987) ("Determination of race was wholly impossible to be made . . . by any tribunal, much less by the conductor of a train . . . . In addition, neither federal nor Louisiana law had defined the limits of race [and] . . . under the Louisiana separate car law the determination depended on the conductor's arbitrary judgment."); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1178 n.72 (1997) ("Louisiana did not statutorily define Blackness [but] did adopt via its Supreme Court an 'appreciable mixture of negro blood' standard."); Orville Lee, *Legal Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society*, 26 L. & SOC. INQUIRY 847, 868 (2001) (citing VIRGINIA R. DOMINGUEZ, *WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA* 2 (1986)) (referring to "a 1970 Louisiana statute that made 1/32 'Negro blood' the dividing line between white and black"); Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473, 1507 (2003) ("After the Louisiana Supreme Court ruled that anyone of traceable African origin was 'colored,' that state's Bureau of Vital Statistics assumed an equally powerful role in maintaining the racial order.").

61. This remains the case, as the discussion of Hurricane Katrina, *infra*, demonstrates.

of the Mississippi. First legislated in 1899, the city installed pumps which within a decade radically transformed the livable environment by draining large sections of swampland near Lake Ponchartrain.<sup>62</sup> New canals soon followed along with progressive expansion of sewerage systems to more of the city.<sup>63</sup> The geographer Craig Colten has argued that Progressive Era principles mostly informed the distribution of new engineering technology around the city, but its inequitable consequences were determined by Jim Crow land laws and policies:

Despite the influence of racism, the public works programme followed Progressive Era engineering principles and Jim Crow emerged through overt real estate policies. A process-oriented analysis clearly shows that drainage opened new areas to Black residences. In this respect, drainage contributed to segregation. Allowing African-Americans to occupy these low areas reflected established patterns of turning low-value land associated with environmental problems over to minority populations. The development of lakefront property required drainage, but limiting sales to whites was a function of real estate practices.<sup>64</sup>

In the 1920s, the Orleans Levee District helped stimulate a building boom and a northern population shift by securing two thousand acres of waterfront real estate.<sup>65</sup> The combination of high costs and *de jure* discrimination ensured that these newly developed areas were occupied by whites. Black population expansion occurred in the floodplain.<sup>66</sup> These events in the physical and racial configuration of the city reflected law. Louisiana passed a statute in 1924 empowering cities of 25,000 people or more to impose residential segregation; it took the New Orleans city council a full week to comply.<sup>67</sup> Equally important at

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62. See CREOLE NEW ORLEANS, *supra* note 9, at 198.

63. See Craig E. Colten, *Basin Street Blues: Drainage and Environmental Equity in New Orleans, 1890–1930*, 28 J. HIST. GEOGRAPHY 237, 247–48 (2002).

64. *Id.* at 253.

65. See CREOLE NEW ORLEANS, *supra* note 9, at 198.

66. See *id.* at 199.

67. See Hirsch, *supra* note 9, at 268. According to Colten's research, Louisiana Act No. 117 in 1912 authorized cities to enact segregation ordinances and Act No. 118 in 1924 outlawed integrated neighborhoods, while New Orleans Ordinance 8037 in 1924 authorized the state acts in the city. Colten, *supra* note 63, at 256 n.66.

the time was white Democrats' successful efforts to disenfranchise all black voters through the use of white primaries, poll taxes, literacy tests, and the "understanding clause."<sup>68</sup>

B. *The Intersection of Jim Crow, Rational Planning, and Localism*

Throughout metropolitan America, the 1920s was also a critical decade in the advent of formal urban planning tools, especially after exercise of the police power was upheld by the Supreme Court in *Euclid v. Ambler Realty*.<sup>69</sup> In 1918, the state of Louisiana passed Act 27, which roughly inaugurated land use planning—the segregation of certain kinds of business buildings from residential buildings—for municipalities of more than 50,000.<sup>70</sup> Like many cities, New Orleans Parish followed the lead of the State Zoning Enabling Act (SZEa), which was drafted by the federal Department of Commerce, and adopted the first comprehensive zoning ordinance in 1929.<sup>71</sup> The state enabling act, which allowed municipalities to create land use plans at their option, was not passed until 1946.<sup>72</sup>

There is nothing particularly novel about the land use regulation adopted by either the State of Louisiana or the City of New Orleans. Louisiana's enabling act does not mandate that a municipality adopt a master plan. Instead it gives each municipality the authority to create a planning commission, and such commission can adopt its own comprehensive plan.<sup>73</sup> Furthermore, even where a plan is adopted, "developers need only the blessing from the City

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68. Hirsch, *supra* note 9, at 268.

69. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 396-97 (1926).

70. Stephen D. Villavaso, *Planning Enabling Legislation in Louisiana: A Retrospective Analysis*, 45 LOY. L. REV. 655, 657 (1999).

71. See City Archives New Orleans Public Library, Historical Note, <http://nutrias.org/inv/zone1929.htm> (last visited Sept. 21, 2007). An attempt to revise the Comprehensive Zoning Ordinance in 2001 was never adopted. See New Orleans Land Use Plan, Apr. 1999, [http://secure.cityofno.com/Portals/cpc/Land%20Use%20Plan/Land%20Use%20Plan%20\(text%20only\).pdf](http://secure.cityofno.com/Portals/cpc/Land%20Use%20Plan/Land%20Use%20Plan%20(text%20only).pdf).

72. See LA. REV. STAT. ANN. §§ 33:101 to :106 (West 2002).

73. See *id.* § 33:101.

Council to override the guidelines.”<sup>74</sup> None of it is mandatory. Interjurisdictional cooperation is not required in any meaningful way. It provides generally for the orderly exclusion of incompatible uses within municipalities. Most importantly, it expresses the regulatory architecture of localism, which has remained normative ever since.<sup>75</sup>

What is interesting, as we have seen in the case of drainage and sewage, is that formal rational planning devices—which would remain good law today—would operate alongside and correspond to Jim Crow segregation laws—which would not. New Orleans was among many cities that engaged in a variety of racial zoning attempts before most were struck down by the Supreme Court in *Buchanan v. Warley*.<sup>76</sup> For instance, as C. Vann Woodward

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74. Brett Clanton, *New Orleans City Council Moves Forward with Zoning Ordinance Revision*, NEW ORLEANS CITY BUSINESS, May 27, 2002, available at [http://www.findarticles.com/p/articles/mi\\_qn4200/is\\_20020527/ai\\_n10172437](http://www.findarticles.com/p/articles/mi_qn4200/is_20020527/ai_n10172437).

75. The planning process in New Orleans, even before Katrina, has received substantial criticism, primarily due to the lack of force behind zoning guidelines. *See id.* In 2002 critics argued over what should come first: a new city master plan or new comprehensive zoning ordinances. *See id.* Many questioned “the value of revising zoning laws when developers need only the blessing from the City Council to override the guidelines.” *Id.*

Right after Katrina, various groups, including the Urban Planning Committee of the Bring New Orleans Back Commission, suggested New Orleans adopt a new Master Plan and “give it the force of law through a charter change.” BRING NEW ORLEANS BACK COMMISSION URBAN PLANNING COMMITTEE, ACTION PLAN FOR NEW ORLEANS: THE NEW AMERICAN CITY (2006). Similarly, other groups, like the Bureau of Governmental Research, suggested that an effective approach would be to “limit the City Council’s role in land-use decisions,” and give “the City Planning Commission and the Board of Zoning Adjustments . . . greater authority.” Bruce Egger, *N.O. Urged to Revamp Land-Use Policies; Council has too Much Power, Nonprofit Says*, NEW ORLEANS TIMES-PICAYUNE, Aug. 4, 2006, available at [http://bgr.org/BGR%20in%20the%20News/N.O.\\_urged\\_to\\_revamp\\_land-use\\_policies\\_TP080406.pdf](http://bgr.org/BGR%20in%20the%20News/N.O._urged_to_revamp_land-use_policies_TP080406.pdf). This, coupled with a change in “how members of the two bodies are appointed to try to make them more professional and nonpolitical,” would give neighborhoods a greater voice in the post-Katrina rebuilding process. *Id.* “Many of [these] changes . . . [were] designed to give legal force to the master plan for the city’s physical development.” *Id.*; *see also* Seymour D. Fair, Planning For a New Era: Proposed Changes for Land Use Decision Making in New Orleans (Aug. 4, 2006), <http://thethirdbattleofneworleans.blogspot.com/2006/08/bureau-of-governmental-research.html>; Stephen D. Villavaso, Growth Management: How Communities Grow/Change/Redevelop in a Post-Katrina and Post-Kelo World (Sept. 25, 2006), [http://www.lorman.com/seminars/teleconference.php?product\\_id=165217&topic=DEV&pod\\_only=1](http://www.lorman.com/seminars/teleconference.php?product_id=165217&topic=DEV&pod_only=1).

76. 245 U.S. 60 (1917).

wrote in *The Strange Career of Jim Crow*, the city "developed a law requiring a person of either race to secure consent of the majority of persons living in an area before establishing a residence therein."<sup>77</sup> Frustration with the Court's ruling would embolden other devices that advanced segregation such as racial covenants in leases restricting sales to white persons.<sup>78</sup>

### III. "DESEGREGATION" AND THE POST-WAR INSTITUTIONALIZATION OF MARGINAL SPACES

Segregation intensified after *Brown*,<sup>79</sup> as white Louisianans manufactured ways to resist the ruling. In particular, the 1950s saw the rise of the White Citizen's Council. In 1956, the state passed thirteen pieces of "hate" legislation; in 1961, it passed ninety-two such acts in further resistance to school desegregation.<sup>80</sup> New Orleans continued to pass segregation ordinances such as Code of the City of New Orleans section 50-6, which required prisoner work squads to be "made up wholly of white males or wholly of colored males,"<sup>81</sup> and Ordinance No. 828, which required the segregated operation of local taverns.<sup>82</sup> Politically, the mayoral election in 1961 of a candidate openly antagonistic to blacks, Vic Schiro, led to conflict and more political isolation for blacks.<sup>83</sup> Economically, the federal government's active collusion with, if not encouragement of, private discrimination against blacks in

77. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 100-01 (1974).

78. *See id.* at 101; *see also* Tyler v. Harmon, 104 So. 200, 201 (La. 1925) (upholding New Orleans Ordinance 8037, which was enacted under the authority of Louisiana Act 117 of 1912, and gave municipalities the power to enact segregation ordinances, and under Louisiana Act 118 of 1924, which prohibited racial mixing by neighborhood). The case was subsequently overturned. Tyler v. Harmon, 107 So. 704 (La. 1926), *rev'd sub nom.* Harmon v. Tyler, 273 U.S. 668 (1927).

79. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

80. Hirsch, *supra* note 9, at 281.

81. *Pounds v. Theard*, 230 So. 2d 861, 862 (La. Ct. App. 1970) (holding the ordinance unconstitutional).

82. *See Pania v. City of New Orleans*, 262 F.Supp. 651, 652 (E.D. La. 1967) (holding that Ordinance No. 828 was unconstitutional).

83. *See* Hirsch, *supra* note 9, at 283-84. For instance, when faced with the threat of integrating swimming pools, Schiro closed them. *Id.* at 288.

housing and mortgage lending criteria after World War II contributed as much as any factor to the foundations of inequality in New Orleans—and across the country—that took their tangible form in residential relationships.<sup>84</sup>

### A. *White Flight and Sprawl*

The second phase of Americanization—the racial identification of segregated suburban space—occurred later in the New Orleans metropolitan area than in many cities,<sup>85</sup> mainly because the unforgiving landscape defeated the economic underpinnings of whiteness-as-valuable-property until highway and drainage technologies caught up. The city was rapidly abandoned by whites, losing two-thirds of the white population between 1950 and 2000.<sup>86</sup> The exodus would change the population dynamics of the region, transforming New Orleans from a city that was 45% black in 1970 into one that was 67% black in 2000,<sup>87</sup> with an overall population loss during the same period of 18% or 109,000 people.<sup>88</sup> New Orleans' loss was initially neighboring Jefferson Parish's gain. Jefferson became the focal point of middle-class white flight, even after completion of the causeway that linked New Orleans and St. Tammany Parish.<sup>89</sup> Residents made known their hostility to blacks—and the poor generally—as much of the early exodus coincided with resistance to school

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84. For a much fuller discussion of the various modes of economic discrimination in lending, highway, and urban renewal funding, the promotion of redlining and other means of discrimination against black, Latino, and immigrant groups by both governmental and private actors, see Troutt, *supra* note 10, at 437-58 (describing, *inter alia*, an assortment of public subsidies offered on a discriminatory basis to white borrowers over the first two-thirds of the twentieth century).

85. Matthew Lassiter describes the process this way: "As in the nation at large, which operated under its own progressive mythology of racial harmony, the politics of moderation in the Sunbelt South attempted to move beyond the Jim Crow system of legal segregation through the spatial policies of suburban sprawl and urban containment." LASSITER, *supra* note 12, at 11.

86. LEWIS, *supra* note 22, at 125.

87. BROOKINGS INSTITUTION, NEW ORLEANS AFTER THE STORM: LESSONS FROM THE PAST, A PLAN FOR THE FUTURE 9 (2005).

88. *Id.* at 4.

89. See LEWIS, *supra* note 22, at 78-80.

desegregation orders following *Brown*.<sup>90</sup> The middle-class migration to Jefferson Parish “goes a long way toward explaining the near absence of a white middle-class in New Orleans City.”<sup>91</sup>

But Jefferson Parish would not be enough to fulfill typical patterns of Americanization, and its decline would follow the city's.<sup>92</sup> By the late 1960s and 1970s, parts of New Orleans clearly resembled “antimarkets”—sites of racial and economic negation from white middle-class norms—and fear of crime and school integration fueled white desires for even greater geographic distance from blacks.<sup>93</sup> Sprawl represented geographic, demographic, and economic trends. The causeways and bridges over Lake Ponchartrain and the addition of the completed Interstate 10—following Huey Long's “Airline Highway”—had by now shortened commutes to more distant parishes in the seven-parish New Orleans metropolitan area.<sup>94</sup> By 2000, a majority of the metropolitan population lived outside New Orleans; Jefferson Parish's population was nearly equal to the city, and the population of St. Tammany doubled.<sup>95</sup> Sprawl accompanied economic growth at the expense of the city as well. Between 1970 and 2000, New Orleans had only 42% of the area's jobs, while employment growth ballooned in the suburbs, especially St. Tammany.<sup>96</sup> Nevertheless, the region “de-densified”—i.e., its population per acre actually decreased by 21%.<sup>97</sup> For most of the region's whites, therefore,

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90. See *id.* at 99, 125. According to Lewis, the prevailing attitudes among whites was that they viewed themselves as a “superior race, and the idea of living next to blacks as equals was unthinkable.” *Id.* at 125.

91. *Id.* at 138.

92. Jefferson Parish now has ghettos. See *id.*

93. See *id.* at 127-28. See *infra* p. 1134-36, for a more detailed discussion of the term “antimarkets.”

94. See LEWIS, *supra* note 22, at 139. In addition to Orleans (the city), Jefferson, and St. Tammany, there are St. Bernard, Plaquemines, St. Charles, and St. John the Baptist.

95. BROOKINGS INSTITUTION, *supra* note 87.

96. *Id.* For instance, St. Tammany's gain in its employment base was 431% over the period, Jefferson's was 157%, and St. Charles' was 148%. *Id.*

97. *Id.* at 11. In fact, densities remained constant in the city for over thirty years as the consumption of metro area land continued to defy natural barriers. “Between 1982 and 1997, the metropolitan area lost 1.4 percent of its population. But during the same period of time, the number of new square

sprawl offered newer homes<sup>98</sup> and shorter commutes<sup>99</sup> on (usually) higher ground.

Black suburbanization took on a very different cast despite the growth in the late 1970s and 1980s of a significant black middle-class. Its suburbanization increased only in the older suburb of Jefferson Parish—to 23% of the population in 2000—yet remained low in the other suburban parishes of the region, and significantly declined in the parish of greatest economic opportunity, St. Tammany—from 18% to 10%.<sup>100</sup> Middle-class blacks benefited from an irony of sprawl when a huge subdivision planned for within the city's borders called "New Orleans East" went bankrupt in the 1980s following the oil bust.<sup>101</sup> The former swampland along Interstate 10 was sold to many families eager to flee urban chaos for suburban order at affordable prices and became "the *only* major middle-class black suburb in the whole metropolitan area."<sup>102</sup> The tragedy of that irony today is that Katrina's storm surges over Lake Ponchartrain inundated nearly all of New Orleans East.

### B. *Public Housing*

Just as the dual processes of Americanization overcame New Orleanians' unique defiance of binary racial identities and fully segregated spaces, the city's experience with public housing eventually defied the best early expectations of the federal program and degenerated into ghettoization. New Orleans, after all, was one of the first cities to build public housing after the 1937 Act.<sup>103</sup> Though segregated by

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miles of urbanized land grew 25 percent . . ." *Id.* at 10.

98. According to the 2000 Census, the median age of homes in the six suburban parishes is fairly recent: Jefferson, 1971; St. Bernard, 1972; Plaquemines, 1975; St. Charles, 1978; St. John the Baptist, 1979; and St. Tammany, 1983. U.S. CENSUS BUREAU, CENSUS SUMMARY FILE: SF3 CENSUS DATA, at H035001 (2000).

99. Over half of all workers over the age of sixteen who did not work at home in the six suburban parishes traveled less than thirty minutes to work in 2000. *Id.* at P032001.

100. BROOKINGS INSTITUTION, *supra* note 87, at 10.

101. LEWIS, *supra* note 22, at 80-81.

102. *Id.* at 81.

103. See 42 U.S.C. § 1437 (2000). The first was Iberville, which supplanted



race, the first projects would reflect for whites the reformers' wishes for upward mobility through transitional, but dignified spaces.<sup>104</sup> Indeed, the failure of public housing for blacks in New Orleans is a microcosm of the failure of the social contract in the United States. As Martha Mahoney points out in her case study of the projects created by the Housing Authority of New Orleans (HANO), what worked for most white residents of public housing immediately after World War II—affordable housing without social stigma, total geographical isolation or class over-concentration, and the establishment of a way station to economic opportunities in a promising private housing market—was deliberately withheld from black residents of the city.<sup>105</sup> Thus, the subversion of housing goals by HANO's segregated policies interacted with widespread private economic discrimination to deprive blacks of the privileges of a generous citizenship enjoyed by whites.

At least two key factors characterize the dual trajectories of whites and blacks in public housing. First, while black turnover rates were low in the projects, high white turnover rates generally reflected the greater array of private housing opportunities and jobs available in the post-war local economy.<sup>106</sup> In many instances, whites who expressed satisfaction with their HANO apartments simply could not pass up the offer of affordable mortgages for housing in segregated and increasingly suburban neighborhoods.<sup>107</sup> Such loans were not offered to blacks, who increasingly doubled up in public housing as private markets in the city became less affordable.<sup>108</sup>

Second, while blacks in public housing got poorer and whites moved out, HANO built new housing projects closer

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the notorious "Storyville" red-light district beside the French Quarter. See LEWIS, *supra* note 22, at 132.

104. See Martha Mahoney, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251, 1283 (1990) ("Whites seem to have treated the segregated projects as a step en route to the private market, or as a cushion to financial setbacks.").

105. *Id.* at 1253.

106. See *id.* at 1282.

107. See *id.* at 1275.

108. See *id.* at 1276.

to each other or expanded existing ones.<sup>109</sup> As neighborhoods declined, discriminatory lending policies that trapped blacks—specifically, redlining and other forms of disinvestment—prevented them from markedly improving their communities. In this way, HANO's siting practices must be viewed as another dimension of the city's Americanization, since it departs radically from the history of more heterogeneous neighborhood organization. HANO, together with the relocation of white, middle-class households and jobs to the suburbs, was deliberately segregating interests and making ghettos. New Orleans had no majority-black neighborhoods until 1976,<sup>110</sup> yet by that time public housing was almost entirely black.<sup>111</sup>

Public housing, as we will see in the next section, is now "raced." That is, it is identified less with the failure of governmental policies or democratically enforced prejudices and more with the poor black residents concentrated within the projects. The character aspects of these identifications necessarily combine an abstract individual's race *and* her class because, from the distance of segregated perception, they cannot be told apart. Beyond racism, the associations between persistently poor black populations and drugs, crime, gangs, and antisocial conduct run so deep as to render "projects" the prototypical undesirable land use for middle-class Americans—of any race. The project becomes much like the person to be avoided, as antithetical to the self. This may explain some of the public's "Katrina fatigue" despite popular exhortations in the storm's aftermath to engage difficult subjects of race and class.<sup>112</sup> Yet it is the institutional origins of these identifications in places like New Orleans which should concern us here. Because they represent a fundamental flaw in our social contract which increasingly reveals the mythology of middle-class stability.

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109. *See id.* at 1284.

110. *See* BROOKINGS INSTITUTION, *supra* note 87, at 6 (quoting the planning historian Daphne Spain).

111. *See* LEWIS, *supra* note 22, at 133.

112. There is perhaps no better example of at least official disinterest in continuing discussions of race, class, and Katrina than President Bush's omission of any mention of the disaster in his State of the Union address seventeen months after the storm.

### C. Ghettoization and Antimarkets

Meanwhile, New Orleans became a case study in inner-city American poverty. Scholars of poverty in the United States recognize a distinction between poverty generally and ghetto poverty. Poverty generally affects millions of Americans for a variety of reasons and for different periods of time. It may or may not be directly traceable to structural factors in the economy or institutional practices, such as racism. There are two important facts about poverty generally in the United States: Most poor people are white, and most of the white poor cannot be defined by spatial characteristics.<sup>113</sup> Most white poor people live among moderate-income and middle-income people rather than in isolation and they typically share the local resources and amenities of non-poor communities. In the New Orleans metro area, only 11% of poor whites lived in areas of concentrated poverty in 2000.<sup>114</sup> Forty-three percent of the black poor lived in such areas.<sup>115</sup>

Ghetto poverty, on the other hand, is defined in racial, economic, and spatial terms. Overwhelmingly, it describes black and, to a lesser extent, Latino poverty. Ghetto poverty is more clearly reflective of structural factors, such as race discrimination in employment, segregation in housing,<sup>116</sup> and structural changes in employment and wages.<sup>117</sup> It is geographically concentrated, increasingly isolated from the

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113. See PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 66 (1997). In his exhaustive study, Jargowsky notes an increase in concentrated white poverty between 1970 and 1990, but still representing relatively small percentages of poor white people—from 2.9% to 6.3% (the same figures for blacks were 26.1% and 33.5%). *Id.* at 40-43. Spatialization of poverty is also reflected in the racial concentration of high poverty neighborhoods. Putting aside regional differences, whites comprised just 22.5% of high poverty neighborhood residents in 1990 compared to 49.7% for blacks and 24.3% for Latinos. *Id.* at 61-63. Whites in high poverty neighborhoods tended to live in much smaller cities than blacks (though not necessarily Latino groups). See *id.* at 65. White poverty is simply not spatially comparable to black poverty in its character and concentrations. See *id.* at 66-68. See further discussion *infra* at Part IV.

114. BROOKINGS INSTITUTION, *supra* note 87, at 7.

115. *Id.*

116. See, e.g., MASSEY & DENTON, *supra* note 15, at 18-19.

117. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 3-50 (1987).

non-poor, and can be measured in census tracts. Its socioeconomic dynamics are traceable in institutional patterns, such as educational performance, serious crime, and involvement with the criminal justice system and public welfare institutions. Invariably, ghetto poverty is a phenomenon rooted in cities and is therefore the focus of the poverty discussed here.

These definitions require one further step. I refer to persistently poor, ghetto neighborhoods as "antimarkets."<sup>118</sup> Antimarkets is a term of relation and posits that ghettos must be viewed in geographic as well as socioeconomic and historical comparison to the middle-income areas around them. Antimarkets are measurable sites of economic and political negation over time, where consumer infrastructures fail to provide basic public and private goods and services to community members, citizens are disproportionately governed by public law systems that often regulate their privacy, public health is secondary, educational systems are reflective of scarce resources and chronically underperform, and severe economic instability is common among households. Moreover, antimarkets must always be viewed relative to middle-income areas nearby, like a racial counterfactual, since one is typically the anti-norm of the other. For example, antimarkets enjoy few of localism's protective zoning devices that support the needs of families with school-age children.<sup>119</sup> Transiency is common, homeownership is tenuous, and participatory democracy is rare. Everything costs more.<sup>120</sup> Drugs and joblessness are the antecedents to a great many bad outcomes.<sup>121</sup> Antimarkets are frequently despised by the residents of middle-class communities who, ironically, often depend on them to shoulder the burden of environmental uses most would not tolerate in their backyards.<sup>122</sup>

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118. Troutt, *supra* note 10, at 429.

119. See Dubin, *supra* note 17, at 740-41 (arguing that low-income black communities have been historically denied the "protective zoning" devices that supported economically stable neighborhoods).

120. See DAVID D. TROUTT, *THE THIN RED LINE: HOW THE POOR STILL PAY MORE* (1993) (containing a study of consumer disparities between low- and middle-income neighborhoods in Oakland and Los Angeles).

121. See WILSON, *supra* note 117, at 93-108.

122. New Orleans is a prime example of this. In general, the environmental issues that affect the Gulf Coast region are very different from those affecting

This contempt for the “Other” in antimarkets is both reflexive and reflective, and comes about in part because of the little acknowledged interdependency between antimarkets and middle-class areas (called “metamarkets,” in my earlier work). It is reflexive in its automatism—even the sympathetic middle-class are quick to deny a connection between the plight of the ghetto poor and our own status, let alone responsibility. It is reflexive in the sense of the

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the rest of the country. Cities like New Orleans are located near companies that “manufacture a range of products including fertilizers, gasoline, paints, and plastics . . . .” Manuel Pastor et al., *In the Wake of the Storm: Environment, Disaster, and Race After Katrina*, 2006 RUSSELL SAGE FOUND. 1, 3. The proximity to such pollution-generating factories, and the fact that much of Louisiana’s drinking water comes from underground aquifers susceptible to contamination from polluting industries, creates a general vulnerability to environmental threats. However, much of New Orleans’ vulnerability can also be attributed to the “history of . . . white resistance [that] has affected both race relations and the region’s ecology.” *Id.* Because the South has often been a “sort of dump for the rest of the nation’s toxic waste,” states like Louisiana have become a breeding ground for environmental hazards and such hazards tend to disproportionately affect communities of color. *Id.*

For years, the government has encouraged the growth of the petrochemical industry through “wartime federal investment . . . . [and] [t]ax exemptions for plant construction and expansion . . . .” Craig E. Colten, *The Rusting of the Chemical Corridor*, 47 J. SOC’Y HIST. OF TECH. 95, 96 (2005), available at <http://www.historyoftechnology.org/eTC/v47no1/colten.html>. Additionally, “[t]he Louisiana Stream Control Commission issued waste-discharge permits with few questions asked during the 1950s and 1960s, particularly along the Mississippi, where the commission turned down only one application between 1958 and 1966.” *Id.* This encouragement resulted in continued expansions “which included massive buyouts by large corporations . . . to build large petrochemical complexes,” and eventually, the environmental effects could no longer go unnoticed. Pastor et al., *supra*, at 29.

New Orleans was generally susceptible to environmental health hazards, but certain groups were particularly vulnerable to the severe effects of the storm. For example, “[n]inety-eight percent of the residents of the Lower Ninth Ward, the lowest-lying area of New Orleans that was most vulnerable to flooding, were African Americans.” *Id.* at 19. Not only were residents in this area severely impacted by flooding, but they were likely exposed for longer periods of time, as this is the same population that was less likely to have access to private transportation. *See id.* Such long periods of exposure to debris, oil spills, mold, E. coli in the floodwaters, contaminated soil and sediments, contaminated drinking water, and high concentrations of lead, arsenic, and various carcinogens are likely to have devastating effects. *See id.* at 30. What Katrina did was to reveal some of that environmental racism, as well as that topographical inequity. Yet going forward, the revelation of such dangerous conditions will put greater pressure on housing markets, allow for fewer safe areas for development, present serious challenges to local density preferences, and, therefore, may yield little patience for affordable housing.

zero-sum interdependency localism has promoted. Middle-class resistance to the siting of affordable housing in its neighborhoods, meaningful racial integration, the sharing of environmental burdens necessary to the region's businesses and residents, desegregated classrooms, common employment centers, mass transit—all represent perfectly rational, yet self-maximizing instincts, as we will see. However, the interdependency should be clear: Where middle-class or metamarket communities reject wealth and resource-sharing with less privileged people in order to maintain “good ratables,” the neighborhoods where less desirable people can live—antimarkets—are concentrated with unwanted uses, economically unstable households, and a lack of legal controls protective of individual welfare; in current parlance, “bad ratables” necessarily accumulate in areas that are the negation of “good ratables.” The one cannot exist without the other.<sup>123</sup>

By the time Hurricane Katrina struck, New Orleans had created multiple antimarket neighborhoods. In 2000, the city's overall poverty rate was 28%, only a couple of percentage points higher than in 1970, but among the highest in the nation.<sup>124</sup> Its homicide rate—along with high levels of police corruption and brutality that coincided with high rates of witness harassment to produce alarmingly low rates of both felony conviction and incarceration—frequently made it the murder capital of the country.<sup>125</sup> However, three brief examples demonstrate the entrenchment of antimarket characteristics before the storm: poverty concentration, educational dysfunction, and the repudiation of public housing on behalf of low-income households.

First, black poverty in the city concentrated over time

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123. A similar kind of interdependency has come to characterize different types of suburbs within a state, as well as more affluent suburbs and central cities. See discussion *infra* Part IV.

124. See BROOKINGS INSTITUTION, *supra* note 87, at 6.

125. See, e.g., Adam Nossiter & Christopher Drew, *Dysfunction Fuels Cycle of Killing in New Orleans*, N.Y. TIMES, Feb. 5, 2007, at A1 (reporting on the record murders since Katrina that once again make New Orleans the most violent city in the country). Most of the crime is black-on-black, drug-related killing in which suspects are rarely apprehended or charged. *Id.* Low arrest and conviction rates are variously blamed on anti-snitching fears induced by frequent retribution on witnesses who cooperate, lax judges, low-paid prosecutors, and a long history of corrupt, abusive police practices in poor neighborhoods. *Id.*

into “extreme poverty tracts”—e.g., census tracts in which at least 40% of the households had incomes below the poverty line—mainly in parts of the city that were most at risk in the event of a hurricane or flood. In 2000, 50,000 poor residents lived in forty-seven extreme poverty tracts.<sup>126</sup> All of these were predominantly black.<sup>127</sup> By contrast and extremes of inequality, wealthy neighborhoods like the Garden District were 85% white.<sup>128</sup> Unemployment rates were also telling. The Lower Ninth Ward for example, where 85% of the population was black, had a 14% unemployment rate.<sup>129</sup> Overall, in neighborhoods where 90% of residents were black, the unemployment rate was 20%.<sup>130</sup> In sharp contrast, predominantly white neighborhoods like Gentilly, the Read Boulevard East, and the French Quarter had unemployment rates below 5%.<sup>131</sup> Furthermore, approximately 9% of white children under the age of eighteen were living in poverty in the New Orleans metro area, compared to over 44% of black children under eighteen living in poverty.<sup>132</sup>

Second, the New Orleans public schools were so abysmal that they went into state receivership in 2000, and FBI offices were established on school grounds to root out corruption.<sup>133</sup> Public education suffered in southern Louisiana, according to Peirce Lewis, partially as a result of the variety of private schools developed first by Catholics seeking parochial education and followed by wealthy Protestants.<sup>134</sup> Like much of the South, New Orleans had never seriously provided educational resources for blacks,

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126. BROOKINGS INSTITUTION, *supra* note 87, at 6.

127. *See id.*

128. *Id.* at 7-8.

129. JOHN R. LOGAN, *THE IMPACT OF KATRINA: RACE AND CLASS IN STORM-DAMAGED NEIGHBORHOODS 1* (2006), <http://www.s4.brown.edu/Katrina/report.pdf>.

130. *Id.*

131. *Id.*

132. Diversitydata.org, Metropolitan Quality of Life Data: Economic Opportunities: Child Poverty Rate by Race/Ethnicity, <http://diversitydata.sph.harvard.edu/profiles.jsp?ma=5560> (compiling data from the 2000 U.S. census).

133. *See* Adam Nossiter, *Plan Shifts Power to New Orleans Schools*, N.Y. TIMES, Jan. 18, 2006, at A12; *see also* LEWIS, *supra* note 22, at 131.

134. LEWIS, *supra* note 22, at 99.

which re-organized in the white flight after *Brown* and contributed to high rates of illiteracy among black parents and a general lack of experience with formal learning among older generations.<sup>135</sup> The city's poor public educational system is frequently mentioned as a factor in its competitiveness relative to rival cities in the region and throughout the South.<sup>136</sup>

Finally, the failures of public housing in New Orleans have been the target of reform efforts which respond in theory to agency mismanagement issues and necessary mixed-income development, but in practice risk eliminating affordable housing options for the city's poor. In the face of widespread evidence of corruption and ineffectiveness, the federal Department of Housing and Urban Development (HUD) assumed supervision over HANO in 2001.<sup>137</sup> HUD has tried to advance poverty de-concentration policies through HOPE IV mixed-use developments. The problem is that, like many such initiatives across the country, demolition has far outpaced the construction of affordable new housing, and former public housing tenants are displaced to an inadequate market of housing vouchers.

Demolition of the St. Thomas housing project in 2000 is a fitting example. Built in 1941, St. Thomas contained 1,500 units on 64 acres of prime land in the uptown neighborhood.<sup>138</sup> HUD and HANO permitted a

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135. See *id.* at 130.

136. See *id.* at 131. Lewis further notes that the growing presence of black school children in Jefferson Parish has triggered white flight from the public schools. *Id.* at 131 n.14. Black children outnumbered white in 1999-2000. *Id.* As Jefferson becomes more like older suburbs nationally, some believe that St. Tammany Parish is at risk of a similar decline. *Id.*

137. See Gwen Filosa, *Ejected Public Housing Residents Return to C.J. Peete; Homecoming Lacks Utilities, Permission*, NEW ORLEANS TIMES-PICAYUNE, Feb. 11, 2007, at B1.

138. See LEWIS, *supra* note 22, at 134-36; see also *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 215 (5th Cir. 2006) (describing a brief history of the St. Thomas project). The court in *Coliseum Square Ass'n* described the project as such:

By 1994, St. Thomas had become excessively run-down and crime-ridden. The Housing Authority of New Orleans initiated renewal efforts, which resulted in a plan to renovate the area covered by St. Thomas. In 1996, HUD granted the Housing Authority of New Orleans \$25 million through the HOPE IV program for revitalizing St. Thomas . . . . Because of its grant of federal funds, HUD became responsible for



redevelopment project on the site that would consist of a total of 1,142 units, most of them luxury condos and market-rate apartments, with only 337 low-income units.<sup>139</sup> Further, the applicable zoning ordinance was amended to allow for the addition of a “big box” retailer—Wal-Mart.<sup>140</sup> The proposed project galvanized opposition from local community groups representing tenants as well as smart growth advocates and preservationists critical of the land use decisionmaking process. Litigation ensued, but the project was built.<sup>141</sup> The fears of gentrification and displacement among former public housing tenants were

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ensuring that its financing of the revitalization project complies with the requirements of NEPA and NHPA. In 1998, HANO enlisted a private developer . . . to assist in improving the plan . . . . By September 2000, HUD completed the initial Section 106 review required by the National Historic Preservation Act (“NHPA”) . . . . Subsequently, the Housing Authority of New Orleans, the State Historical Preservation Officer, and the Advisory Council on Historic Preservation (a federal agency) signed a Memorandum of Agreement (“MOA”) for the project. Demolition began in October 2000. . . . On September 4, 2001, after HRI publicly announced that Wal-Mart would be filling the retail space, the State Historical Preservation Officer asked to reopen the NHPA review. . . . [I]nvestigation included consultation with . . . the City of New Orleans and its planning commission, the State of Louisiana, the general public (including St. Thomas residents), and the project’s opponents (including neighborhood groups and preservation agencies).

*Id.* at 226. In July of 2002 the plaintiffs, on behalf of the citizens of New Orleans, seeking to compel HUD to withhold funding for the project and arguing HUD did not comply with the National project, did not comply with National Environmental Policy Act (NEPA), and the NHPA. *Id.* at 227. Plaintiffs also argued that certain zoning changes negatively impacted the environment, and that the project was only in compliance with the local zoning ordinance *after* the change in the local zoning laws. *Id.* But the court held that proving there was a change in the zoning laws was insufficient proof of the project’s alleged significant impact on the human environment. *Id.* at 233. The court also struck down plaintiffs’ argument that the project imposed an unfair and highly controversial tax increase on the residents. *Id.* at 233-34.

139. See LEWIS, *supra* note 22, at 135.

140. See Interview with William Borah, New Orleans land use lawyer, in New Orleans, La. (Dec. 12, 2006).

141. See *Coliseum Square Ass’n*, 465 F.3d at 250 (adhering to the strict standard that required plaintiffs, which in this case were community organizations representing the citizens of New Orleans, to show HUD acted “arbitrarily” or “capriciously” and showing that the court was very deferential to HUD’s determinations and in reviewing HUD’s consideration of environmental justice issues, finding there was “no administrative insensitivity to racial or economic inequality”).

confirmed, and the experience fomented deep distrust for HUD and future HOPE IV projects in New Orleans.

Since the storm, a number of factors, including the slow pace of recovery, have converged to prevent large numbers of the city's poorest residents from returning, HUD has sought a wholesale elimination of many New Orleans housing projects in favor of mixed-income development,<sup>142</sup> and a wave of decentralization is affecting public education and there is a movement toward charter schools.<sup>143</sup>

#### D. *Cumulative Fault Lines Revealed: Hurricane Katrina*

As the preceding analysis demonstrates, *de jure* segregation—the system of racially identified space—coalesced with formal land use planning to institutionalize *de facto* segregation in the city and suburbs of New Orleans, notwithstanding some of the most considerable early anti-segregation forces in the nation's history. Although the actual geographic fault lines changed over time, the basic color scheme did not. Race-neutral land use regulation reproduced the patterns of racial inequality that slavery, Jim Crow, and segregation inscribed. To the present, whites in the New Orleans metropolitan area have enjoyed unrestricted access to, and economic opportunities arising from, appreciating markets of higher, less polluted lands. For poor blacks in public housing or increasingly concentrated low-ground antimarket neighborhoods, life became routinely more isolated from the political mainstream, viable neighborhood institutions, economic opportunity, and stability. It also became significantly more dangerous.<sup>144</sup>

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142. See Deborah Cotton, *From the Ground Up: Housing Residents Take Their Protest to the French Quarter*, KATRINA HELP CENTER, July 6, 2006, <http://www.thebeehive.org/Templates/HurricaneKatrina/Level3NoFrills.aspx?PageId=1.5369.6532.8587>; see also *Anderson v. Jackson*, No. 06-3298, 2007 WL 458232 at \*1 (E.D. La. 2007); Richard Wolf, *Some New Orleans Housing May Reopen*, USA TODAY, Jan. 15, 2007, [http://www.usatoday.com/news/nation/2006-12-19-katrina-housing\\_x.htm](http://www.usatoday.com/news/nation/2006-12-19-katrina-housing_x.htm).

143. See, e.g., Michael Tisserand, *Education Politics Flood New Orleans: As the City Struggles to Rebuild, the Debate over Charter Schools Heats Up*, UTNE READER, Mar.-Apr. 2007, at 10.

144. See BRIAN L. LEVY, *BAYOU BLUES: THE SOCIAL STRUCTURE OF A DISASTER—A CASE STUDY OF HURRICANE KATRINA 1 (2006)*, <http://www.uga.edu/juro/2006/levy.pdf>. This Hurricane Katrina case study examines how environmental racism-classism and residential segregation

All of this became fatally apparent on August 29, 2005, when Katrina, a category four hurricane, devastated the city and its compromised system of levees and canals, producing flooding that killed over 1,800 people, destroyed 200,000 homes, and inundated almost 80% of Orleans Parish.<sup>145</sup> Despite the wide swath of destruction and the inevitability that a great many, moderate- and middle-income Orleanians would be affected, Hurricane Katrina's force fell disproportionately on the city's huge population of very poor people.<sup>146</sup> Their lack of resources—as well as their overwhelmingly dark skins—was on international display for several excruciating days of the aftermath, as they waited in and outside the city's convention center and Superdome for rescue by armed national guard. In most cases, one single aspect of their vulnerability made them visible: They lacked access to a car. Beyond that, many lacked the capacity to stay in hotels or to travel by public transportation to friends or families elsewhere. In their race, class status, and addresses, they represented for a city and a nation the unimagined devastation to which people with limited social capital<sup>147</sup> are routinely vulnerable.

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produce a greater disaster risk for poor, black Americans. . . . Disasters offer a unique realm of analysis for environmental racism-classism because . . . [they] enable analysis of how individuals are housed in areas with a pre-existing risk. Race is found to be a strong predictor of flood damage, while class is found to be unrelated. . . . These results, if accurate, undermine the notion of a race-class nexus for production of harms.

*Id.*

145. BROOKINGS INSTITUTION, *supra* note 87, at 12.

146. *See id.* at 17.

147. By a lack of social capital, I refer to the condition of being undereducated, physically and socially separated from valuable land and from vital economic and information relationships, lacking the leverage of political organization, poor, connected to the state mostly through compelled relationships with public institutions, and often at chronic risk of poor health. “[S]ocial capital’ refers to features of social organization, such as networks, norms, and trust, that facilitate coordination and cooperation for mutual benefit. Social capital enhances the benefits of investment in physical and human capital.” Robert D. Putnam, *The Prosperous Community: Social Capital and Public Life*, AM. PROSPECT, Mar. 21, 1993, available at <http://xroads.virginia.edu/~hyper/DETOC/assoc/13putn.html>; see also Leonardo Vazquez, *A Plan For Democratic and Equitable Planning In New Orleans*, PLANETIZEN, Nov. 7, 2005, <http://www.planetizen.com/node/17769> (“Social capital is the network of ties that people have with one another. It is what makes it possible for people to

The relationship between race and poverty associated with the worst of Katrina's damage brought rare visibility to the country's social landscape. Eighty percent of the households living in flooded areas of the parish were black;<sup>148</sup> the average annual income of those households was \$38,000, compared to \$55,000 in non-flooded areas.<sup>149</sup> The rate of homeownership in the flooded areas was 53%—though some affected areas, such as the Lower Ninth Ward, had even higher rates—compared to 69% in non-flooded areas.<sup>150</sup> However, renters, whose losses and voices were hardly discussed in most public conversations about rebuilding or participation in planning, accounted for more than 50% of those who were displaced.<sup>151</sup> The gaping proportion of renters is not merely a constant among persistently poor populations—they tend to have low rates of homeownership. It is also a reflection of the large numbers of public housing residents who were displaced by the storm, every one of which was black.<sup>152</sup> Those projects, we have seen, were primarily located in extreme poverty neighborhoods—i.e., census tracts in which at least 40% of the households have below-poverty incomes. In 2000, New Orleans had forty-seven extreme poverty census tracts, and Hurricane Katrina inundated thirty-eight of them.<sup>153</sup>

These statistics depict structurally engrained economic marginalization, which follows from the legal, historical, and economic antecedents described in the context of slavery, Reconstruction, Jim Crow, and legal segregation. However, the sedimentation of inequality could not have occurred without physical, racial, and economic distance, as well as the legal support to sustain it. Localism, as I argue

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work together to achieve social change. The social capital effort would focus on neighborhood quality of life. As residents engage in planning for their own neighborhoods, they will be better prepared to think about the future growth of their city. Also, by phasing in growth, the city can better provide services to residents and businesses. This will help attract more people to the city.”)

148. BROOKINGS INSTITUTION, *supra* note 87, at 15.

149. *Id.*

150. *Id.*

151. *Id.* at 16; *see also* Dewan, *supra* note 11.

152. *See* The Brookings Institution, *Key Indicators of Entrenched Poverty*, in BROOKINGS METROPOLITAN POLICY PROGRAM 2005 (compiling U.S. Census Bureau and U.S. Department of Housing and Urban Development data).

153. BROOKINGS INSTITUTION, *supra* note 87, at 5, 17.

in the next Part, provided the jurisprudential edifice that succeeded formal segregation. Together with the ghettoizing array of discriminatory policies promulgated by the federal government, innumerable private actors, and transformations in the labor economy, the obvious problems presented by Hurricane Katrina—the problems of persistent, concentrated urban poverty—have grown much bigger than most cities can overcome on their own.<sup>154</sup> Nothing can effectively overcome the marginalizing effects of segregation and suburban sprawl without the participation of those same predominantly white middle-class communities in the metropolitan area. Like a great many parts of the country, middle-class households in New Orleans' surrounding parishes have benefited economically from their distance from the poor, particularly blacks. However, there is mounting evidence that those benefits are ephemeral and—because of the environmental and quality-of-life costs they entail—limited, especially for those in older suburbs.

This Article will conclude with some specific ideas about local government reform under a principle of what I call equitable regionalism. However, the description of the process of Americanization and segregation in Parts I and II is now followed in Part IV by an analysis of how segregation gave rise to legal localism, a set of facially neutral doctrines grounded in city police powers but suited to suburban localities. It is the resonance of localism with courts and increasingly important suburban political constituencies that supplants *de jure* racial segregation.

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154. Though it is a discussion worthy of a companion article, there is a great deal more that the city and parish of New Orleans *could* do on behalf of its poorest citizens, and it should. Beyond the many social capital and in-place community building strategies that have shown promise in other places, this analysis argues that a more equitable use of regional planning tools is a condition of sustained social and economic development outcomes. However, as I argue in Part IV, *infra*, a precondition of effective equitable regionalism is public participation in comprehensive planning among city residents.

#### IV. RESEGREGATION, THE SUPREME COURT, LEGAL LOCALISM, AND RESISTANCE AGAINST INTEREST

##### A. *Resegregation and the Creation of Legal Localism*

If the begrudging rejection of racial segregation represented an affirmation of the principles of equality and pluralist democracy articulated by the founders in the late eighteenth century and argued by radical Creoles of color in the late nineteenth century, how could racial segregation persist in a different guise through the twentieth century? Why would the development of suburbia have to necessitate such a destructive shift in the ability of cities like New Orleans to sustain middle-class norms and outcomes for so many of their residents? To be sure, the answers to these questions span several disciplines and social and economic phenomena. However, I argue in this Part that local government law has played a key structural role in fashioning a more durable system of racial and economic inequality than *de jure* racial discrimination could. Beginning with the power to zone—and, in many regions of the country, to prevent annexation—local governments—creatures of state power—were given the autonomy necessary to an exclusive existence outside of the large cities from which most of their more residents originally came. Emanating from race-neutral principles of rational planning and home rule, the network of rules governing the powers of suburban municipalities were developed and reinforced by the courts in ways that defined a lenient role for the state in interlocal conflicts and asserted state power over localities only occasionally and within narrow notions of shared regional responsibilities. The result is legal localism, the norm of local governmental rules today, which closely corresponds to the more general cultural idea of localism, which characterizes a spectrum of impulses and attitudes about territorial control of community in the United States. Much of this formation has been covered by other scholars, particularly Richard Briffault and Sheryll Cashin.<sup>155</sup> Some of it bears review here in the service of a different analytical emphasis: the connection to preserving racial segregation and perpetuating its corresponding

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155. *See supra* note 17.

economic advantages and disadvantages that fall mainly, but not exclusively, along racial lines. With respect to racial segregation and concentrated poverty, localism has been characterized in a facilitative, rather than a causal, light. It is time localism—legal and cultural—be recognized as the primary agency behind resegregation, without which it would neither have been accommodated nor sustained.

Legal localism defines the relevant localities it governs in a subtle hierarchy, with suburbs first and cities—especially larger, urban centers—second.<sup>156</sup> This structural tilt represents two foundational aspects of suburban development. First, they were made in opposition to certain aspects of city life as a refuge for the wealthy away from the indignities of the largely immigrant poor and the uncouth.<sup>157</sup> Suburbs were originally designed to *sustain* an exclusive quality of life. As they opened up after World War II, they were further designed to *create* an exclusive quality of life for the emergent middle-class. Second, they must be conservative legally and socially in order to preserve status quo stability against the invasion of destabilizing forces.<sup>158</sup> Suburban legal power is sometimes a tool, but more often a shield used to defend against outsiders.<sup>159</sup> Local control must mean the power to exclude even more than the power to include; indeed, the attractiveness to employers and residents with high incomes and few public needs—i.e., its capacity to include—has always been premised on the success of a locality's efforts to exclude.<sup>160</sup>

### B. *The Burger Court and Localism's Jurisprudential Edifice*

The character and function of localism took lasting shape under the sanction of courts precisely during the

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156. See Briffault, *Our Localism II*, *supra* note 17, at 373-74; Williams, *supra* note 17, at 119 n.190 ("Note that the Supreme Court, like Jefferson himself, has not used the Jeffersonian rhetoric of local control to argue for local control of cities.").

157. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 150-51 (1985).

158. See Briffault, *Our Localism I*, *supra* note 17, at 70-71.

159. See, e.g., Briffault, *Our Localism II*, *supra* note 17, at 355 ("The core of local legal autonomy is defensive and preservative . . .").

160. See Cashin, *Localism, Self-Interest*, *supra* note 17, at 1993.

peak period of white flight from cities, the federal passage of civil rights laws aimed at frustrating formal segregation, and intense battles over school busing. Although most legal localism had been developed by state courts, several important Supreme Court decisions demonstrate the way local autonomy would be balanced against the constitutional arguments advanced by both nineteenth and twentieth century civil rights advocates. More importantly, the five cases discussed here—*Village of Belle Terre v. Boraas*,<sup>161</sup> *Warth v. Seldin*,<sup>162</sup> *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>163</sup> *San Antonio Independent School District v. Rodriguez*,<sup>164</sup> and *Milliken v. Bradley*<sup>165</sup>—put the Court's invaluable imprimatur on the critical aspects of local autonomy.<sup>166</sup> Specifically, they solidified the power to exclude outsiders through zoning ordinances and other land use devices even where such localized decisions clearly and negatively affected regional housing markets, affirmed the sanctity of jurisdictional borders within which local powers are exercised, and defended localities' presumptive power not only to retain local control of education but of school finances, even if doing so produced gross fiscal disparities among municipalities. Surprisingly, legal scholars have paid too little attention to the significance of these cases decided in the 1970s, the decade that saw not only the suburban resettlement of white middle-class urban dwellers but also the beginnings of significant economic decline in the nation's largest cities.<sup>167</sup> Without them, the twin pillars of local autonomy—land use and school finance—would not

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161. 416 U.S. 1 (1974).

162. 422 U.S. 490 (1975).

163. 429 U.S. 252 (1977).

164. 411 U.S. 1 (1973).

165. 418 U.S. 717 (1974).

166. Arbitrarily limiting consideration to the 1970s, there were others from the Burger Court. See *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). *But see* *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Hills v. Gautreaux*, 425 U.S. 284 (1976).

167. *But see* Williams, *supra* note 17, at 111-13. Williams looked at many of the same Burger Court cases analyzed here and found a strong Jeffersonian notion underlying the decisions' sometimes contradictory support for local sovereignty, especially in upholding exclusionary zoning and local control over schools. *Id.*



have been secure in the jurisprudential edifice succeeding racial segregation.<sup>168</sup>

In *Belle Terre*, the Court resolved a dispute brought by college students in favor of the town and its right under the police power to zone areas exclusively for families of related persons. Race was not directly at issue in the case and, had it been, the Court indicated the ordinance could not survive constitutional scrutiny.<sup>169</sup> Instead, the homeowner and renters believed the village's ordinance infringed on their constitutional rights to travel and privacy.<sup>170</sup> In affirming the broad police powers of the suburban locality in the case, the Court referred to precedent from large cities.<sup>171</sup> However, in its assumptions about the need for such expansive power and the ends to which it would likely be put, *Belle Terre* is clearly a suburban case. Despite the ostensibly locality-neutral language of Douglas's opinion, the city of New York—the closest large city to the Long Island suburb of Belle Terre—could not have exercised

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168. This analysis differs from an earlier one in which I explore the specific reproduction of middle-class ideals in Supreme Court opinions of that era. Troutt, *supra* note 10. The analyses are complementary since both go to the formation of an armored suburbia and the Courts' methods of sanction. However, the analysis here demonstrates how these opinions form a bulwark of legal localism, which could supplant formal segregation.

169. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6 (1974) ("If the ordinance segregated one area only for one race, it would immediately be suspect under the reasoning of *Buchanan v. Warley*, 245 U.S. 60, where the Court invalidated a city ordinance barring a black from acquiring real property in a white residential area by reason of an 1866 Act of Congress, 14 Stat. 27, now 42 U.S.C. § 1982, and an 1870 Act, § 17, 16 Stat. 144, now 42 U.S.C. § 1981, both enforcing the Fourteenth Amendment. 245 U.S., at 78-82."). The issue had begun to receive some attention from legal commentators, too. See generally Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Wiley E. Mayne, Jr., Note, *The Responsibility of Local Zoning Authorities to Nonresident Indigents*, 23 STAN. L. REV. 774 (1971).

170. *Village of Belle Terre*, 416 U.S. at 7.

171. For such a situation, see *Berman v. Parker*, 348 U.S. 26 (1954), an urban slum removal case from Washington, D.C., in which the Court stated:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

*Id.* at 33.

power in that way. Like most major cities, it was, and is, too large, too heterogeneous in people and types of neighborhoods, and has too many kinds of already permissible uses and lifestyles to impose such restrictions.<sup>172</sup> Further, the Court's language locates the (idealized) environment the Village was trying to maintain well outside the "city":

The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.<sup>173</sup>

By pitting the Village's regulation against "urban problems," the Court situated the localist power to exclude certain types of residents within the suburbs. The decision, therefore, belongs among those that establish legal localism on behalf of suburbs in direct reference to the excluded uses and users common to larger cities. But a racial subtext is also clear. The power to exclude categories of uses associated with urban problems unfortunately remains code for black people to this day. It is an enormous power, made greater by its capacity to preclude strict scrutiny, and allows the proliferation of racial proxies under the guise of rational planning and community self-determination.<sup>174</sup>

172. Briffault points out that timing also prevents cities from engaging in such regulation in that their spatial and demographic diversity developed well before the rise of localist legal principles in defining a municipality's police powers. Briffault, *Our Localism II*, *supra* note 17, at 373-74. Zoning protects parochial interests against *future* incursions. *Id.*

173. *Village of Belle Terre*, 416 U.S. at 9.

174. Justice Douglas's rather famous quote could be modified with the benefit of hindsight to read, "a sanctuary for [white] people." *Id.* at 9. Interestingly, this outcome was explicitly rejected by the Court's greatest champion of civil rights, Justice Thurgood Marshall, and utterly ignored by Justice Brennan, both of whom dissented in *Belle Terre*.

This is not a case where the Court is being asked to nullify a township's sincere efforts to maintain its residential character by preventing the operation of rooming houses, fraternity houses, or other

In another zoning case, *Warth v. Seldin*, plaintiffs were fair housing advocates—individuals and organizations representing the affordable housing interests of Rochester, New York's low- and moderate-income tenants—challenging neighboring Penfield's zoning ordinance for excluding people from living in the town on the basis of class status.<sup>175</sup> Again, race was not directly in dispute. Plaintiffs' constitutional claims were dismissed by the district court and the Second Circuit on standing grounds, and the Supreme Court affirmed.<sup>176</sup> The result demonstrates a less obvious dimension of localism's conservative power. Not only were the claims based on economic discrimination rejected, but the dismissal on standing grounds worked the legal procedural equivalent of the zoning ordinance's purpose: It defined and excluded outsiders and denied any regional responsibility a suburb might have for their housing needs. Specifically, the Court found that nonresidents were entitled to no say in the regional effects, or negative externalities, associated with one town's efforts to bar the entry of others. Plaintiffs had argued, for instance, that Penfield's exclusions necessarily affected the distribution of affordable housing opportunities across the relevant metropolitan area, devaluing the city of Rochester's housing market and burdening its tax base.<sup>177</sup> The majority found these arguments wholly speculative as to causation, and, in sharply dismissive language, considered any economic impact on neighboring localities merely "incidental adverse effects" of the regulation.<sup>178</sup>

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commercial or high-density residential [sic] uses. Unquestionably, a town is free to restrict such uses. Moreover, as a general proposition, I see no constitutional infirmity in a town's limiting the density of use in residential areas by zoning regulations which do not discriminate on the basis of constitutionally suspect criteria.

*Id.* at 17 (Marshall, J., dissenting).

175. The ordinance maintained 98% of the town for single-family detached residences only. *Warth v. Seldin*, 422 U.S. 490, 495 (1975).

176. *See id.* at 493.

177. *See id.* at 493, 496.

178. *Id.* at 509. Quoting precedent, the majority began by saying:

'Of course, pleadings must be something more than an ingenious academic exercise in the conceivable.' We think the complaint of the taxpayer-petitioners is little more than such an exercise. Apart from the conjectural nature of the asserted injury, the line of causation between Penfield's actions and such injury is not apparent from the

In contrast, *Arlington Heights* actually *was* a land use case in which race was directly an issue in dispute. There, a low-income housing development corporation was denied a variance which would have allowed it to build a complex of affordable apartments in a suburb outside of Chicago. Hearings were held in which opponents of the rezoning made mixed objections, some based on the “social issue,” most based on an expected drop in property values.<sup>179</sup> The Village rested its denial on grounds of zoning integrity, given the single-family character of the area, and the expectations of resident homeowners.<sup>180</sup> Plaintiffs sued under the then-existing discriminatory effects standard of the Fair Housing Act,<sup>181</sup> but lost before the Court. Using the intent standard it had just announced in *Washington v. Davis*,<sup>182</sup> the Court acknowledged that minorities might be disproportionately affected by the lack of affordable housing in Arlington Heights, but that the decision to deny the rezoning request was based on racially neutral land use principles.<sup>183</sup>

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complaint. Whatever may occur in Penfield, the injury complained of—increases in taxation—results only from decisions made by the appropriate Rochester authorities, who are not parties to this case.

*Id.* at 509 (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973)). *But see, e.g.*, *NAACP v. City of Kyle*, No. A-05-CA-979, 2006 WL 1751767, at \*1, 5 (W.D. Tex. June 16, 2006) (explaining that the NAACP, the Home Builders Association of Greater Austin, Inc. (HBA), and National Association of Home Builders, Inc. (NAHB), brought a claim after the City of Kyle adopted changes to its zoning ordinances). In *NAACP*, the plaintiffs argued that the changes, which required a minimum garage size, an increase in the minimum home size, and an increase in the minimum lot size, would cause the average price of a single family residence to increase by about \$38,000. *Id.* at \*1. This increase would thus have a disparate impact on African Americans and Hispanics and would “have a segregative effect on the community.” *Id.* The Court held the disparate impact on minority communities was a viable injury. *Id.* at \*5. The Court also held that such injury could be traced to the zoning ordinances because generally, “more stringent zoning and subdivision ordinances . . . cause[ ] the price of entry level homes to increase and that . . . price increase has . . . a disproportionate negative effect on the ability of minorities to purchase starter homes in the City’s jurisdiction.” *Id.*

179. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 257 (1977).

180. *See id.* at 258.

181. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended in scattered sections of 42 U.S.C.).

182. 426 U.S. 229 (1976).

183. *Village of Arlington Heights*, 429 U.S. at 270-71.

*Arlington Heights* is important to localism in demonstrating (1) its interaction with contemporary race discrimination standards, namely specific intent; and (2) the relative immunity enjoyed by land use decisions with segregative effects so long as a rational planning rationale is also apparent. The decision was a test case for both sides of the suburban housing integration conflict. Plaintiffs discovered the tremendous difficulty in mounting a frontal assault on policies with clear racially—and economically—segregative effects. Defendant-suburban municipalities learned how insulated their land use decisionmaking could be from constitutional attack so long as a paradigm of categorical land uses—first articulated in *Village of Euclid v. Ambler Realty*<sup>184</sup>—was scrupulously followed. These three land use cases provided a localist manual for excluding lower-income residents and black people generally. Joan Williams has argued that, as a jurisprudential matter, the Burger Court's political values followed a Jeffersonian model of local sovereignty and a hostility toward cities that fit within the demographic conflicts of the era:

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184. 272 U.S. 365 (1926). For instance, *Euclid's* language with respect to the "parasitic" effect of apartment houses resonates today.

With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

*Id.* at 394-95.

By 1970, the intertwined issues of racial and economic discrimination had become closely linked with the fight between city and suburb. As cities became poorer and blacker, and suburbs became richer and whiter, housing and school discrimination issues took on a city/suburb dynamic in many metropolitan areas. The Court has used the principle of local autonomy to refuse relief for discrimination in housing or schools whenever such relief requires changes in a city's basic metropolitan structure. The Court's local sovereignty principle enabled it to eviscerate fourteenth amendment equal protection requirements in the large number of cases in which discrimination in housing or schools cannot be remedied without alteration of local boundaries or local duties.<sup>185</sup>

Two school cases affirmed localism as the nearly exclusive locus of control over educating children within sacrosanct municipal boundaries.

In *Rodriguez*, the Court confronted a direct federal equal protection challenge to the way the majority of states allowed local control of school funding. Plaintiffs were a class of Mexican-American parents from tax-poor, urban school districts in Texas, challenging the state's method of school finance on the ground that its reliance on locally collected property taxes beyond a baseline of uniform state funding worked substantial disparities between property-rich and property-poor districts.<sup>186</sup> The wide differences in per-pupil expenditures helped to support smaller class sizes, higher teacher pay, and more experienced teaching.<sup>187</sup> The district court had ruled in plaintiffs' favor, finding that education was a fundamental right under the Constitution, wealth was a suspect classification, and any governmental scheme which discriminated in public education on economic grounds was therefore subject to strict scrutiny.<sup>188</sup> The Court reversed on each holding, finding no fundamental right to education, denying that wealth was suspect, and upholding the importance of local autonomy over school finance on rational basis grounds.<sup>189</sup> Mindful of

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185. Williams, *supra* note 17, at 118 (footnotes omitted); see also Briffault, *Our Localism I*, *supra* note 17, at 30-31, 37-38.

186. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4-6 (1973).

187. See *id.* at 14 n.35.

188. See *id.* at 17-18.

189. See *id.* at 18.

the federalism concerns implicated in the plaintiffs' challenge,<sup>190</sup> the majority characterized the trial evidence as involving murky issues of social and economic policy outside the Court's expertise and producing only an allowable and expected amount of fiscal inequality.<sup>191</sup>

Despite the necessary emphasis on state power relative to federally guaranteed rights, *Rodriguez* is squarely a localism decision in its substance and its narrative of local power. The majority dismissed the fiscal inequality between rich and poor districts as a hybrid or compromise between local fiscal control and irreproachable state-wide minimum standards. Instead, the disparities reflected differences in ingenuity and democratic priorities between localities, primarily matters of choice yielding competitive diversity. As Justice Powell stated:

[L]ocal control means . . . the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs.<sup>192</sup>

The argument fully ignored the relative incapacity of tax-poor districts to exercise such fiscal choices on behalf of their school children, and that, as Justice Marshall pointed out in a stinging sixty-seven-page dissent, the inequality of fiscal resources resulted in denial of an equal opportunity to learn.<sup>193</sup> These concerns, according to the majority's

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190. *See id.* at 44 ("[I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.").

191. *See id.* at 50-51.

192. *Id.* at 49-50.

193. *Id.* at 84 (Marshall, J., dissenting). The Court, he argued, ignored its own education precedent when, in the desegregation context, it had ruled that unequal resources for black law students amounted to a denial of equal protection notwithstanding a baseline of law school curricula. *See id.* (citing *Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950)). Justice Marshall's voluminous dissent suggests disagreement among the justices so bitter as to imply genuine animus as to the meaning of the case. For example, Marshall asserts that the majority violated basic rules of appellate procedure by allowing the appellants to argue against facts that had gone unchallenged at trial for the first time at oral argument before the Court. *See id.* at 95 n.56. Further, he argued that the majority's indifference to fiscal disparities was blind to the line-up of wealthy

narrative were irrelevant to both local control and equal protection in the school finance context. The Court even foreshadowed the competition for “good ratables” that dictate so many local governmental decisions to this day:

Nor is local wealth a static quantity. Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions—public and private.<sup>194</sup>

If the blueprint for sprawl and fiscal zoning was not already known to suburban communities across the United States by then, it now bore the Supreme Court’s seal.

Finally, *Milliken v. Bradley* affirmed the primacy of local control over education policy in rejecting an interdistrict remedy for Detroit’s clear record of racial segregation in its schools. Like *Warth*, *Milliken* is one of the few to directly comprehend the regional scope of institutional racism. The district court found that, given residential patterns at the time, no intradistrict remedy could achieve desegregated schools within the city and, because any attempt would probably further identify particular schools—i.e., code them—as majority black, it would hasten more white flight to the suburban periphery.<sup>195</sup> As a practical matter, only a regional or metropolitan remedy would work.

The majority, per Chief Justice Burger, disagreed, concerned less about the probability that serious constitutional violations would go without a meaningful remedy than with the administrative uncertainty caused by crossing admittedly arbitrary boundaries.<sup>196</sup> Yet the narrative of *Milliken* is not as emphatic about local control

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school districts who filed amicus curiae briefs on behalf of Texas. *See id.* at 85 & n.42.

194. *Id.* at 54.

195. *Milliken v. Bradley*, 418 U.S. 717, 738-39 (1974). Specifically, the trial judge wrote that “while [they] would provide a racial mix more in keeping with the Black-White proportions of the student population [they] would accentuate the racial identifiability of the [Detroit] district as a Black school system and would not accomplish desegregation.” *Id.* (quoting Brief for Petitioner, *Milliken v. Bradley*, 418 U.S. 717 (No. 73-434)).

196. *See id.* at 741-42.



as its legacy suggests.<sup>197</sup> Instead, it is more meaningful as a pronouncement about community and responsibility, which resonates to this day. After all, Detroit was not always so black; its white population had been streaming out of the city for years up to and beyond 1970, when *Milliken* was first brought.<sup>198</sup> Local control of predominantly white school districts in the suburbs outside of Detroit defined and defended a sense of community for its residents. Many of them had fled Detroit and, therefore, rejected membership in that community. In doing so, those communities and their school districts could not be asked to assume any of the responsibility for the segregative policies leading up to that point in the Detroit schools nor for the effects of such demographic shifts.<sup>199</sup> What mattered from a somewhat formalist constitutional perspective was that those demographic shifts ended up in nearly all-white districts which did not and could not have engaged in segregation. An interdistrict remedy would force them to accept blame for Detroit's past practices, casting serious doubt on the sanctity of jurisdictional borders.<sup>200</sup> In this sense, the

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197. The oft-quoted language is the following: "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 quality of the educational process." *Id.*

198. See generally THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 209-29 (1996). Detroit, like New Orleans, has a history as one of the most segregated cities in the United States. See *id.* app. A, at 273.

199. Joan Williams makes a related point about community in the context of the Burger Court land use decisions such as *Belle Terre*.

The Court's use of Jeffersonian rhetoric serves to blur the underlying issue of how to define the "community" entitled to self-determination. Of the myriad possible "communities" available—from the neighborhood to the nation—the Court chose to focus its solicitude upon predominantly white, relatively affluent suburbs that were opposing the introduction of low- and moderate-income housing or other "undesirable" uses.

Williams, *supra* note 17, at 112.

200. The use of economic proxies for racial struggles is relevant in another important respect here: it obscured the extent to which affluent whites benefited from localist rules far more than middle- and lower middle-class whites. The latter could be vociferous antibusing segregationists in part because they were the whites whose lives were altered by desegregation orders. However, in Charlotte, North Carolina, where "busing equalization" took hold across the metropolitan area, a coalition of whites and blacks worked

majority's arguments are familiar to many discussions of legal remedies for past racial discrimination—colorblindness. The Court's willingness to use colorblindness to trump even local control continues in its most recent school desegregation decisions.<sup>201</sup> Regionalism, especially equitable regionalism, as I later discuss, often risks provoking defensive reactions about blame for discriminatory conditions.

The doctrines of legal localism illustrated by the previous sample of cases were of critical utility in institutionalizing a variety of transitions occurring around the middle of the past century. On the one hand, the fatal contradictions of *de jure* segregation and the separate-but-equal doctrine had been exposed to the world after World War II and was jurisprudentially untenable. Here, *Brown* must be seen against the larger context of federal legislative changes, a burgeoning civil rights movement, and, for many whites, unwelcome cultural confrontations.<sup>202</sup> Cities embodied much of the impetus for flight. On the other hand, the suburbs and a strong economy were expanding along with the role of the federal government in providing the financial and infrastructural means to a middle-class ideal for returning veterans. That the benefits of national policy would accrue on a racially discriminatory basis did not, for residents of recipient communities, pose a challenge to their validity. Instead, the changing landscape

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successfully to spread the effects of school desegregation across classes. According to Matthew Lassiter: "The Charlotte case reveals that the long-term viability of urban school systems undergoing court-ordered desegregation depended upon spatial and socioeconomic remedies that encompassed the entire metropolitan region and pursued racial stability through policies sensitive to the demands of class fairness." Matthew Lassiter, "Socioeconomic Integration" in *the Suburbs: From Reactionary Populism to Class Fairness in Metropolitan Charlotte*, in *THE NEW SUBURBAN HISTORY* 120, 140 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006).

201. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908 slip op. at 1-2, 11-17 (U.S. June 28, 2007). In *Parents Involved*, the Court struck down two voluntary school assignment plans in Seattle, Washington and Jefferson County, Kentucky on the grounds that their binary classification schemes sought racial balance in violation of the Equal Protection Clause and the non-racial desegregation dictates of the *Brown* case. *Id.* at 11-17. Although the school districts' explicit use of race in making assignment decisions compelled heightened scrutiny, the plurality gave little deference suggested by earlier cases to the educational policy decisions made by elected local school officials acting on behalf of the affected local communities. *Id.*

202. This was especially true for Southern whites. See SOKOL, *supra* note 13, at 6-8.

promoted a twentieth century notion of rugged individualism and the welcome political moderation of colorblindness.<sup>203</sup> Yet the powers of local autonomy that made suburbs safe havens from the city, the poor, and blacks were always characterized by defensiveness. They were in many ways untried powers, not on behalf of the very affluent, but for the middle-class, blue-collar ascendants to suburbia who were somewhat unaccustomed to wielding exclusionary controls. By the 1970s, as we have seen, the controls were tested by myriad legal attacks. They held. From these decisions, a jurisprudential edifice was erected that would define insiders from outsiders, draw economic meaning from jurisdictional lines, empower suburbs against the cities from which they came, and limit their responsibilities even to their regional neighbors. For the first time, none of this occurred on the basis of race. Neutral rules then interacted with markets and quickly increased the value of exclusions. Suburbia's footing has not been questioned since.

Most importantly, the creation of legal localism effectuated a paradigmatic alteration of race relationships by substituting economic proxies for race which could withstand constitutional challenge. Localism is, therefore, a post-war instrument of economic segregation, and economic segregation is nearly always a post-civil rights proxy for racial segregation. Today, the doctrines that give mechanical support to these proxies are settled law. Very little in more contemporary jurisprudence refutes these principles despite evidence that a great many communities that may have exercised local autonomy for the paramount purpose of maintaining segregation indeed—three decades later—succeeded. The same appears to be true of attitudes. Expectations have settled. As the analysis in the next section shows, the conjoining of legal localism and localist attitudes around the economic right to exclude reflects the

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203. Matthew Lassiter describes these sentiments within the terms Richard M. Nixon used to great effect with voters he called the "Silent Majority":

The ascendance of color-blind ideology in the metropolitan South, as in the rest of the nation, depended upon the establishment of structural mechanisms of exclusion that did not require individual racism by suburban beneficiaries in order to sustain white class privilege and maintain barriers of disadvantage facing urban minority communities.

LASSITER, *supra* note 12, at 4.

mindset of privatization. Like private clubs with unfettered rights to make their own rules and determine their own membership, the sovereignty of local governments to ignore nonresidents—at least where economic membership is concerned—goes mostly unquestioned.<sup>204</sup> Unfortunately, this idea of sovereignty, without more, facilitates continued segregation. Thus, having explored the creation of legal localism, the analysis turns next to localism as the successor instrument to the philosophy of segregation in its current residential forms.

### C. *Legal Localism as the Instrumental Successor to Segregation Today*

It is important to acknowledge two corresponding trends since localism was institutionalized. First, segregation—by race and class—is arguably as pronounced today as it was when whites began fleeing post-*Brown* desegregation orders, though some areas have seen some decrease. For example, the New Orleans metropolitan area ranked as the fourteenth most segregated region in 2000, with a dissimilarity index of sixty-nine (over sixty is considered high); that was the same rate in 1990, and only three points below the index for the New Orleans metro area in 1980.<sup>205</sup> Relatedly, the isolation index for New Orleans metro area blacks, which measures the extent to which blacks live in census tracts with only other blacks, ranks seventh highest in the nation and has gone roughly unchanged between 1980 and 2000 at about 70%.<sup>206</sup> In general, segregation remains highest where black populations are greatest<sup>207</sup>—

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204. Briffault makes a similar observation in Briffault, *Our Localism II*, *supra* note 17, at 373 n.122.

205. LEWIS MUMFORD CTR. FOR COMPARATIVE URBAN AND REG'L RESEARCH, *supra* note 14, at 7.

206. *Id.* at 9.

207. The report from the Lewis Mumford Center explains:

Black-white segregation remains very high except in the metropolitan areas with the smallest black populations. Over twenty years, segregation declined by more than 12 points in metro areas with less than 5% black population, and by nearly 10 points in areas that are 10-20% black. But in those areas with 20% or more blacks, the decline was only half that (about 6 points). The total black population of this latter set of metro areas (20% or more black) is nearly 15 million, about half the national total. This means that the African American population in

among the larger central cities in the country<sup>208</sup>—which also means that the nation's black population is disproportionately concentrated in areas with high indices of racial segregation and isolation.<sup>209</sup>

Second, the growth of suburban municipalities under localism is tangible evidence of an "American Dream" for what is now a majority of Americans deemed middle-class. The overall economic success of a municipal form based on increasingly valuable homeownership and environmental support for family stability cannot be taken lightly. Not all disdain for large city life or attraction to suburban living reflects structural racism.<sup>210</sup> Interwoven markets responding to common consumer preferences produced a model of sustainable household wealth that is largely efficient, consistent with democratic beliefs, and economically durable.<sup>211</sup> Locally responsive land use regulation and education policies have tangible empowerment effects while also protecting residential communities from dangerous uses and adverse public health risks.<sup>212</sup> It is also a rational system, based largely on equality of opportunity rather than overt prejudice, which has produced substantial social

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the United States is about equally divided between regions where there has been moderate progress since 1980 and regions where progress is very slender.

*Id.* at 4.

208. The dissimilarity index for Detroit (eighty-five), New York (eighty-two), Chicago (eighty-one), Newark (eighty), Miami (seventy-four), Philadelphia (seventy-two), and Los Angeles (sixty-eight) shows how large population centers are ranked among the twenty most segregated in 2000. *Id.* at 7.

209. *Id.* at 11. Blacks are not significantly moving away from segregated areas either. "In 1980 a majority (53.9%) lived in metro areas where segregation was 75 or above. Those same metro areas still held 51.9% of African Americans in 1990, and 50.6% in 2000. Thus there was very little net shift away from these highly segregated areas." *Id.*; see also MASSEY & DENTON, *supra* note 15, at 81-82.

210. See generally JACKSON, *supra* note 157, at 73-86 (discussing the cultural attraction to suburbs historically).

211. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 2 (1995).

212. Indeed, it is this function of "protective zoning" that some have argued is missing in low-income urban neighborhoods, also disproportionately populated by families with school-age children, yet subject to incompatible uses that undermine consumer infrastructures of basic goods and services, discourage economic investment, and increase poor health outcomes. See Dubin, *supra* note 17, at 757-73; Troutt, *supra* note 10 at 496-504.

and economic benefits for people of myriad racial and ethnic backgrounds.<sup>213</sup> That the legal edifice on which it stands, localism, systematically justified a constitutive economic segregation of the black poor, and whose dynamics are complicit in the steady decline of most major American cities, has not damned it to its beneficiaries. As the titles of Richard Briffault's exhaustive analyses suggest, *Our Localism*,<sup>214</sup> it is us. It reflects us, consumes us, and, reflexively, we consume it in a self-sustaining cycle.

Nevertheless, these findings beg two normative questions: Why should specific commitments to segregation—as only one possible model of exclusion—continue to run so deep in legal localism? And why should a system capable of producing so many wealth-enhancing opportunities remain committed to reproducing the kind of staggering inequality witnessed in New Orleans? Several reasons reveal themselves: economic rationalism, decentralization, consumption, political fragmentation, and black middle-class preferences against racial integration.

First, economic segregation *appears* rational under a system that discriminates on the objective basis of land use categories, wealth maximization considerations, and parental preferences about child welfare rather than immutable characteristics like race. As the history of land use and occupancy within the city of New Orleans shows, racial segregation had always commodified land occupancy according to status categories, for instance, making poorly drained, hazardous areas less valuable to whites and home to blacks. Over time, patterns developed there and in cities across the country where racially and economically disfavored areas became one and the same. The template for a proxy was well established by the time whites left the city—increasingly a racially identified space—for the suburbs where the capital structure of development—i.e.,

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213. See, e.g., OLIVER & SHAPIRO, *supra* note 211, at 136-47 (discussing specific housing factors in wealth acquisition by race as well factors contributing to racial disparities in home ownership rates, such as interest rate differentials by race); NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA 2006* 16-17 (2006) (chronicling home ownership rates). However, racial disparities will only increase as a result of the current crisis in subprime loans which disproportionately affect black homeowners.

214. Briffault, *Our Localism I*, *supra* note 15; Briffault, *Our Localism II*, *supra* note 15.

the system of government-financed private mortgage lending, insurance, infrastructure development, highways, etc.—could ultimately reduce preferences into something as quantifiable and efficient as a test score: property values. By most measures, economic segregation is theoretically good for property values. Thus, patterns originating clearly along racial rules eventually developed into markets after those rules were rejected, a transition the Supreme Court, and many state courts, sanctioned under legal localism.

Today, this conclusion is intrinsic to an economic analysis of localism. For instance, in a recent book William Fischel propounds a political thesis around the centrality of property values:

The homevoter hypothesis holds that homeowners, who are the most numerous and politically influential group within most localities, are guided by their concern for the value of their homes to make political decisions that are more efficient than those that would be made at a higher level of government. Homeowners . . . balance the benefits of local policies against the costs when the policies affect the value of their home . . .<sup>215</sup>

Furthermore, the history of sprawl tells us that most middle-class homeowners—and their real estate brokers, lenders, and insurers—have traditionally devalued blackness on sight. And it may never be true that accepting low-income people into a community is “efficient,” given the near unanimous association between them and declining property values, higher taxes for public services, crime, and underperforming schools. The point is that economic rationalism supplanted racism as a critical first step in sustaining segregation under law.

If spatial separations between people, however unequal, are rationally and legally justified, the resource imbalance created by those relationships will fulfill certain instrumental cultural prophecies. The first is that, in the absence of overt racial discrimination in housing, education, and employment, something must be inherently wrong with the segregated poor. Their alarming statistical demise in educational performance, incarceration rates, unemployment, out-of-

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215. WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 4 (2001).

wedlock births, welfare reciprocity, etc., was confirmation of inadequacies. On the other hand, in the absence of overt racism or privilege taking, something must be inherently right about the separated middle-class.<sup>216</sup> Its prosperity became emblematic of unequaled American power in the world, especially after the Cold War ended. This is, of course, a crude contemporary version of the binary capitulation described earlier as the first step toward New Orleans' Americanization. Yet it is a necessary sociological complement to the political and legal developments that created and sustained economic segregation as a fit successor to segregation. When the resource disparities on either side of the binary are compared, it is the basis for self-fulfilling prophecies about the dangerous nature of an undeserving black poor and the pluck and justifiable well-being of a largely white middle-class.

A second reason for localism's succession is decentralization, another train that could not be stopped. As more localities developed further beyond urban boundary lines and, resisting annexation,<sup>217</sup> began consolidating their legally protected identities, decentralized government meant localist government. This political fragmentation is in part a measure of sprawl, but it demonstrates the appeal of local autonomy to define who belongs and what goes inside its borders. With population declining in central cities, local governments proliferated.<sup>218</sup> Rusk uses the example of the nation's original 168 metropolitan areas: In 1950, 60% of the residents of these areas were governed by

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216. As some commentators have recently described post-civil rights attitudes about race:

The persistence of racial disparities . . . had nothing to do with racism and everything to do with the failure of the racial other to take full advantage of the unlimited opportunities that were available to all. Whites who benefited from these structures were not privileged, but innocent people who had earned what they had acquired and, unlike racial minorities, were deserving of national respect.

John A. Powell et al., *Towards a Transformative View of Race: The Crisis and Opportunity of Hurricane Katrina*, in *THERE IS NO SUCH THING AS A NATIONAL DISASTER: RACE, CLASS, AND HURRICANE KATRINA* 59, 66 (Chester Hartman & Gregory D. Squires eds., 2006).

217. This development was crucial to local government power. See DAVID RUSK, *INSIDE GAME OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA* 9 (1999); Briffault, *Our Localism I*, *supra* note 17, at 77.

218. RUSK, *supra* note 217, at 66-67.



just 193 city councils, commissions, and mayors or city managers.<sup>219</sup> Forty years later, the proportion shifted dramatically: 70% of the metro area residents were under the governance of 9,600 suburban municipalities, towns, villages, townships, and counties.<sup>220</sup> No doubt some of this sprawl represents people moving from one suburb to another—usually from older to newer—in a pattern of leapfrogging mobility that has long characterized patterns of suburbanization.<sup>221</sup> Indeed, that pattern illustrates the emerging truth about suburbs: they are far from monolithic or equal. Increasingly, as discussed in the next Part, the inner-ring or older suburbs, like Jefferson Parish adjacent to Orleans Parish, have been penetrated by black and other residents of color. Many of these suburban cities are in economic decline and have become disfavored by many middle-class homeowners. When those who can move to newer localities do so, racial segregation tends to increase. In this manner, decentralization both reflects and facilitates segregation by encouraging flight. That is, localism makes it rational, while decentralization makes it possible.<sup>222</sup>

This leads to a third reason for localism's succession: consumption. The emphasis on property values showed the extent to which housing choices are commodified. Decentralization revealed the popular proliferation of those choices in further patterns of segregation. Consumption embodies the idea that the package of a locality's goods and services—e.g., the quality of its schools, the value of its homes, the amount of its taxes, the appeal of its amenities—has become the primary means by which middle-class people choose where to live. Like Tiebout's consumer-voter,<sup>223</sup> they shop. Stark racial animus may not play a conscious role in their thinking, although there is

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219. *Id.*

220. *Id.* at 67.

221. See MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 2 (1997); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 115, 1135-36 (1996); Cashin, *Localism, Self-Interest*, *supra* note 17, at 2003 n.99.

222. Cashin, *Localism, Self-Interest*, *supra* note 17, at 1993.

223. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417-24 (1956) (theorizing the compulsion dynamic of preferences among middle-class "consumer-voters").

strong evidence that it still might.<sup>224</sup> Instead, the objective economic categories contained within land use schemes and reflected in real estate marketing *subsume* segregation. Segregation is simply one of the characteristics of housing commodities in middle-class housing markets. Concealed as an aspect of the market, it becomes the norm and often goes unchallenged.<sup>225</sup> As modes of consumption increasingly condition participation in society, segregation risks becoming, like square footage, an unremarkable aspect of residential value—or worse, it is *presumed*.

A fourth reason for localism's succession is the role of politics in promoting racial and economic distance—fragmentation—between communities of voters whose interests might otherwise be shared. Decentralization creates a political framework for parochialism. Political interests are easily narrowed.<sup>226</sup> From an interlocal perspective, the demands of localism require that municipalities act defensively against incursions as well as against each other. Interlocal cooperation is often difficult under this arrangement unless dividing lines are clear. Economic segregation, especially as a proxy for race, is just such a line. Thus, Republicans successfully exploited class and race antagonisms following the legislative achievements of the civil rights movement and pitted the political interests of working- and lower middle-class whites against poor black recipients of welfare.<sup>227</sup> Affirmative action has also served as such a bright-line political wedge issue, encompassing racial and economic fears among white voters. In any event, decentralized governance may

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224. See, e.g., RUSK, *supra* note 217, at 318-24 (discussing evidence of white racist attitudes on housing choice).

225. See David Dante Troutt, *Ghettos Revisited: Antimarkets, Consumption, and Empowerment*, 66 BROOK. L. REV. 1, 19-24 (2000). For many people in the U.S. housing market, finding economically and/or racially integrated communities is increasingly difficult. See generally NAT'L FAIR HOUS. ALLIANCE, UNEQUAL OPPORTUNITY—PERPETUATING HOUSING SEGREGATION IN AMERICA: 2006 FAIR HOUSING TRENDS REPORT (2006), [http://www.nationalfairhousing.org/resources/newsArchive/resource\\_24256802754560627686.pdf](http://www.nationalfairhousing.org/resources/newsArchive/resource_24256802754560627686.pdf).

226. See Cashin, *Localism, Self-Interest*, *supra* note 17, at 2027-33.

227. See, e.g., LASSITER, *supra* note 12, at 17 (arguing that historical misconceptions about Richard Nixon's "Southern Strategy" ignore the persuasiveness of appeals to a "silent majority" of suburban whites whose themes would appeal to suburban voters for decades); ORFIELD, *supra* note 221, at 35-36 (describing political alignments in the Minneapolis-St. Paul area)..

preclude opportunities for local coalition-building among groups who are routinely separated from each other and are accustomed to viewing their interests as at odds. According to Cashin's analysis, these are the isolation effects of a segregated political culture fueled by localism, which breeds its own cohesive strength.<sup>228</sup>

Finally, the analysis so far has implicitly assumed the opposition of white middle-class suburbanites, the primary consumers of segregation, to living in racially integrated communities. However, the degree of resegregation today would almost certainly require the cooperation of middle-class black people, at least so far as suburban racial integration is concerned. Conventionally, we assume the interplay of two factors in residential segregation: zoning exclusions and lack of economic means among blacks. But zoning is not always a factor in racial segregation, especially in many southern areas where urban planning regulations are less entrenched. Economic disparities are not uniformly overwhelming. Something else is happening. The unscientific answer lies in some form of pervasive discomfort, if not hostility, among black middle-class people toward integration. That is, without the same formal barriers to black middle-class mobility as in decades past, *preferences* for segregation may be cooperating forces. The New Orleans scenario suggests a reason: Middle-class blacks are less willing to sacrifice—exactly what is not clear—for racial integration.<sup>229</sup>

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228. Sheryll Cashin analyzes these tendencies in the context of parochialism and institutionalization. Cashin, *Localism, Self-Interest*, *supra* note 17, at 2015-23. Parochialism results from homogenous political identities based narrowly on boundary lines, which blind voters from natural allies beyond them. *See id.* at 2015. The more identity is connected to boundaries, the easier it is for voters to choose their allies. *See id.* The more homogeneity is chosen, the stronger and more cohesive those communities' exercise of local power. *See id.* at 2018-19. Localism, therefore, breeds its own strength, in part because it fosters homogeneity as a uniting political interest against outsiders. *See id.* This dynamic contributes to regular "mobilizations of bias," *id.* at 2022, a feature of what I call localism generally. Institutionalization, in Cashin's terms, describes the normalization of those parochial attitudes into the political status quo. *Id.*

229. These middle-class blacks have enclaves in older suburbs, such as Jefferson Parish or the subdivisions of New Orleans East, instead. Unfortunately, these areas were devastated by Hurricane Katrina. *See* discussion *supra*, at 1130-31. For a stimulating discussion of the dimensions of black middle-class suburbanization and the various costs associated with living in or outside predominantly white areas, see generally Sheryll D. Cashin,

*D. What is Lost: Resistance Against Middle-Class Interest*

As the durable successor to segregation, localism has produced unprecedented wealth and community stability for millions of affluent and middle-income American households. Yet the racial proxy on which it stands—economic segregation—necessarily produces stunning inequalities. Persistent ghetto poverty among blacks concentrated in resource-abandoned hulks of once-great cities has preconditioned incalculable social instability and diminished economic opportunities for generations of households. In the disastrous aftermath of Hurricane Katrina, New Orleans' historical march toward this feature of Americanization proved fatal, ruinous, and shameful. The tragedy of New Orleans demonstrates the urgent need for equitable reform of legal localism on behalf of the persistently poor and the cities in which they struggle. Localism's exclusions have obvious spillover effects, but none greater than the costs to cities and their residents.

However, those costs do not remain entirely within the city and its residents, particularly when federal assistance to states for programs like affordable housing development, health care, and income assistance decrease and state taxpayers must make up the difference. A growing body of research is showing that the costs of localism—especially on the middle-class—are even more direct than that. Specifically, the land-grab of suburban sprawl represents a costly waste of natural resources and environmental damage.<sup>230</sup> Cross-border effects may represent a combination

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*Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729 (2001).

230. As one scholar explained:

Suburban sprawl is fueled by the "iron triangle" of finance, land use planning, and transportation service delivery. Sprawl-fueled growth is widening the gap between the "haves" and "have-nots." Suburban sprawl has clear social and environmental effects. The social effects of suburban sprawl include concentration of urban core poverty, closed opportunity, limited mobility, economic disinvestment, social isolation, and urban/suburban disparities that closely mirror racial inequities. The environmental effects of suburban sprawl include urban infrastructure decline, increased energy consumption, automobile dependency, threats to public health and the environment, including air pollution, flooding, and climate change, and threats to farm land and wildlife habitat. Many jobs have shifted to the suburbs and communities where public transportation is inadequate or nonexistent.

of neighbor-to-neighbor externalities or the aggregation of localist policies pursued by municipalities engaged in necessary competition.<sup>231</sup> The leapfrogging of consumer investment into “favored quarters”<sup>232</sup> leaves behind more and more moderate- and middle-income suburban dwellers with increased taxes for fewer services.<sup>233</sup> In many metropolitan areas around the country, cities as well as older suburbs represent the “have-nots” of state finance, which subsidize the lower taxes and infrastructural improvements of the “haves.” The structural inequality inherent in localism has reached past the urban periphery. As Myron Orfield explains:

An area with high social needs and low resources is generally not a nice place to live, with poor services and high taxes. Conversely, an area with high resources and low social needs is a nice place to live, with good services and low taxes. This process of polarization fuels itself as high-income individuals with broad residential choices and businesses seek out pleasant places, good services, and low taxes and avoid unpleasant places, poor services and high taxes. As the favored quarter captures more and more high-income

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The exodus of low-skilled jobs to the suburbs disproportionately affects central-city residents, particularly people of color, who often face more limited choice of housing location and transportation in growing areas.

Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 *FORDHAM URB. L.J.* 1183, 1201 (2004). The biggest problem is that “the decision of who lives where, particularly given entrenched housing segregation, is not simply driven by choice.” Pastor et. al., *supra* note 122, at 8. In his case study of Hurricane Katrina, Brian L. Levy discusses the concept of “environmental racism,” and suggests residential segregation is responsible for it. LEVY, *supra* note 144. He outlines “place stratification,” the concept that certain places are more desirable to live in than others, as “[a]n important factor of residential inequality.” *Id.* He also highlights the significant role certain “institutional mechanisms” play in allowing the dominant group to retain control over the more desirable areas. *Id.* Some of these mechanisms include: redlining, exclusionary zoning, and the strategic placement of affordable housing units. *See id.* Thus, the only way to ensure equitable development is to recognize the harm caused by these exclusionary mechanisms and plan preventatively. *See id.*

231. *See* Briffault, *supra* note 221, at 1133.

232. *See supra* note 221 and accompanying text; *see also* ORFIELD, *supra* note 221, at 5-7 (discussing Robert Charles Lessor and Company’s real estate consultant Christopher Leinberger’s use of the term to describe exclusive areas of high services, low taxes, and multiple barriers to housing affordable enough to support the many low-wage workers needed for their job base).

233. *See, e.g.*, Ken Belson, *In Success of “Smart Growth,” New Jersey Town Feels Strain*, *N.Y. TIMES*, Apr. 5, 2007, at B1.

residents, its base increases, taxes go down, and/or services improve. It becomes an even more attractive area. But as individuals and businesses leave areas with high social need and high taxes, the base shrinks and tax rates go up. The incentive to get out grows.<sup>234</sup>

Perhaps the greatest detriment of all is economic: Metropolitan areas that continue to embrace localism at the expense of shared regional responsibilities tend to be less competitive in attracting economic development, keeping businesses and jobs, and maintaining a deep and talented labor pool.<sup>235</sup> At a certain point, of course, constant flight and leapfrogging may reflect market preferences, but this feature of localism—and the legal and political deference to it—permits self-interested, irrational, and inefficient preferences to flourish at the expense of regions, cities, and impoverished minority communities within them.<sup>236</sup>

Meanwhile, we increasingly live our lives in non-local terms, since most of what we do by necessity crosses jurisdictional lines. We often work in different towns or cities than we live, shop in regional malls and store locations, eat and attend cultural events throughout the metropolitan area, and seek friendships and recreation across the region. As a nation, we now tend to sleep locally but live and work regionally. The anomaly is that the myriad regional relationships that make up our actual lives are governed by a contradicting web of local jurisdictional powers.<sup>237</sup> Our tools of democratic decisionmaking, like our laws, take little account of regional realities.

The foregoing suggests that some form of regional

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234. ORFIELD, *supra* note 221, at 9. The most unstable suburbs are older, working-class localities without a dynamic tax base, even more less stable than central cities. *See id.* at 31. They are more easily overwhelmed by economic decline than central cities, because the latter are better equipped institutionally and have more diverse resources. *See id.*

235. *See generally* MANUEL PASTOR JR. ET AL., *REGIONS THAT WORK* (2000). *See also* Briffault, *supra* note 221, at 1139-41. “[I]nterlocal competition, interlocal wealth disparities, and the resulting inferior services and infrastructure in central cities can bring down the economic base of the region as a whole, making affluent areas as well as poorer ones less well-off than they might have been had the region as a whole invested more in poorer localities.” *Id.* at 1140.

236. *See* Cashin, *Localism, Self-Interest*, *supra* note 17, at 2012-13.

237. *See* Briffault, *supra* note 221, at 1142-43.

governance may be closer to what we want than localism. In theory, regional governance of planning issues critical to the maintenance of middle-class concerns should not be politically hard to sell. Pervasive frustration with the daily effects of sprawl link with traditional middle-class voter concerns about the environment, traffic, and preservation of natural resources.<sup>238</sup> As a result, urban growth boundaries should be more prevalent than they are.<sup>239</sup> Where issues clearly transcend local control and create waste, solutions are expensive and require the fair allocation of tax burdens. Hence tax base sharing should be more prevalent than it is.<sup>240</sup> Notwithstanding the incomplete state of the evidence, arguments in favor of some form of regional governance appear to support the best interests of a middle-class public.

Of course, if this were true, we would have much more of it. Instead, we have, in places like New Orleans and surrounding other major U.S. cities, an often inefficient, selectively democratic, inequality-producing legal norm of localism. Briffault argues that a major reason localism remains entrenched in places where it is counterproductive is the political power and discretion it provides local elites:

[T]he resistance to regionalism in the political process is largely a matter of the self-interest of those who benefit from the status quo, such as local elected officials, land developers, corporations that are the subjects of interlocal bidding, and the businesses and residents located in the high-tax base localities of the metropolitan area.<sup>241</sup>

This is undoubtedly true of many older cities—including New Orleans—but the criticism, I argue, illustrates a problem with even the best legal commentary on localism: It fails to emphasize sufficiently legal localism's succession as the instrument of post-war *de facto*

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238. See RUSK, *supra* note 217, at 331-32; Cashin, *Localism, Self-Interest*, *supra* note 17, at 2013.

239. See, e.g., RUSK, *supra* note 214, at 159-61 (discussing the process by which Portland, Oregon's growth boundaries were established). *But see* Briffault, *Our Localism I*, *supra* note 17, at 46 (arguing against urban growth boundaries as having exclusionary effects in tightening housing markets).

240. See RUSK, *supra* note 217, at 329; *see also* discussion *infra* Part V.A.

241. Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 27 (2000) (footnotes omitted).

segregation. The demographic and economic events before, during, and after Hurricane Katrina in the New Orleans metro region help reveal localism's irrational side. The resistance to regionalism inherently reflects structural racism and anti-urbanism at a time when such a political commitment militates against the economic interests of many of its proponents. I agree with Briffault, Cashin, and others about the principal remedy: regional governance. The version I espouse can be called equitable regionalism, with emphasis on local comprehensive planning with the force of law as a necessary precondition. A discussion of the principle follows in Part V.

## V. A GENERAL BLUEPRINT FOR EQUITABLE REGIONALISM

### A. *Equitable Regionalism*

In the foregoing analyses, I have attempted to demonstrate from an urbanist perspective how the re-entrenchment of racial and economic segregation was facilitated by this country's legal and ideological commitment to localism. I have done so primarily through the example of metropolitan New Orleans—before and after Hurricane Katrina—an area whose original exceptionalism might have been a model for a racially divided nation but whose capitulation to racially and politically distinct geography produced a horrendous spectacle of dislocation, economic ruin, psychological devastation, and death. Given the scope of the underlying pattern in cities and the specific harms to New Orleans, it is difficult to propose a workable remedy in this same analysis. What I hope to add, however, is further support for regionalism as both an idea and a set of law reform-oriented commitments.

Antisegregation efforts have not typically focused on regionalism with the same intensity that, for example, smart growth scholarship has. Nor has planning been a central focus of urban legal scholars. I suggest that the preceding analysis compels a focus on both regionalism and planning as a means to dismantling the structure of residential segregation. Mindful that any state-level prescriptions are subject to vast differences in state political organization, I propose a remedial principle called equitable regionalism, which can be applied differently in different



states. As the definition which follows indicates, equitable regionalism is aimed at reducing structural inequities that are routinely the product of localism. Therefore, this Part illustrates the principle in the context of two important areas affecting community composition and fiscal imbalances: sharing the distribution of affordable housing and sharing tax revenues fairly across relevant regions. These examples are also consistent with an emphasis on a planning approach, which, I have argued, offers a way out of localism's segregative effects without rejecting its core tenets. The Article concludes with some observations about how best to integrate equitable regionalism with neighborhood planning, particularly in inner cities where it has been lacking.

1. *Definition and Components.* Most forms of regionalism recognize that many issues affecting localities within a state are not susceptible to remedies by individual municipalities, but must require interlocal cooperation at the behest, usually, of the state. Sprawl, water and sewer access, transportation, environmental regulation, and even economic development are examples of issues for regional governance in one form or another. *Equitable* regionalism recognizes that issues with distinct equity implications should be susceptible to regional cooperation *because* they are typically the subject of localist opposition. Affordable and public housing, revenue sharing, and density controls are examples of issues for equitable regionalism. Yet equitable regionalism also responds to the condition of large cities in metropolitan areas as well as to older suburbs where poverty has concentrated among blacks and other minorities and which have lost a significant tax base to more affluent suburbs. Those cities, like New Orleans, are often in a fiscal free fall, particularly with respect to schools, social services, and housing assistance for their persistently poor residents, and their internal efforts to improve the health, housing, education, income, and safety concerns residents are rarely adequate. Given the ideological resistance to racial and economic integration that inheres in localism's rules, equitable regionalism probably has to be imposed by the state legislatively, in ways that explicitly benefit middle-income residents, too, but through significant reallocation of the costs and burdens associated with poverty. However, this type of regionalism should produce more than efficiency gains from

cost-spreading. Among the myriad benefits associated with greater equity across regions are the increased “life chances” or social capital—economic productivity and lower public services costs—of all state residents. Poverty, we have seen, is expensive. Its costs, duration, and prevalence can be greatly reduced by a commitment to regional equity.

Therefore, equitable regionalism is a principle of local government law reform by which states enact legislation to compel interlocal cooperation where equity, and often efficiency, demand it. Its goal is a more even distribution of state resources across municipal populations, the transformation of marginal areas into more integrated communities and the reduction of significant disparities in the provision of public and private services among localities. It is constructive of efficient regional growth, and destructive of localism’s tendencies toward racial segregation and poverty concentration. Although I discuss only two issues here—affordable housing and tax revenue sharing—equitable regionalism is also concerned with school finance, efficient public infrastructure, improving the reach of public transportation, environmental preservation and the just allocation of environmental burdens and hazards, creating optimal residential densities, and reducing sprawl. Some of these issue areas have been the province of local planning authority with wasteful and inequitable results. Equitable regionalism, therefore, would diminish local control of matters with clear regional implications and manifest externalities. The principle may take many forms, from top-down to bottom-up, voluntary and compulsory, population cut-offs—or locality size—for participation requirements, commission-driven, and/or legislative. A region like the New Orleans metropolitan area is better served by a top-down, compulsory state legislation requiring parishes within the region to provide for some portion of these components, through their planning regulation with elected regional commission authority over compliance.

However, because the principle of equitable regionalism originates with the need to share the burdens of major cities and poorer suburbs with their better-off regional neighbors, it must realistically account for some of the missing advantages of suburban localism. One of those is higher levels of political participation. Low-income urban neighborhoods are generally places of low voter turn-out, weak organizational structures, and limited opportunities

for resident democratic participation. Many commentators recognize the critical role of participation in building stable communities; Rodolphe Desdunes and the radical Creoles of color had long ago argued for the preservation of those rights as a condition of equal citizenship.<sup>242</sup> Planning, I argue in the next section, is the appropriate vehicle for greater democratic stakeholdership from the standpoint of equitable regionalism. But planning and local sovereignty are not the same thing. The latter is a feature of localism that is dependent on jurisdictional boundaries. For that reason, the planning precondition I propose within the principle of equitable regionalism is based on neighborhood units, not municipalities.

2. *Rationales.* The principle of equitable regionalism is premised on several rationales, two of them equitable, two economic, and the last ones on political pragmatism. First, both racial and economic justice are seminal concerns in the political fabric of the nation. The struggle for civil rights never fully progressed to a movement for economic equity, in part because of the legal impediments denying fundamental economic rights. However, the country's shame, embarrassment, and individual generosity after Hurricane Katrina suggests that, while this interest has never been strong, it is not negligible. Coupled with the empirically obvious overlap between class and race in New Orleans, the twin rationales urge recognition of equitable regionalism.

Another equity rationale is remedying the fiscal disparities associated with so-called "favored quarters." Where unequal state bargaining power creates fiscal imbalances by which major cities and less-favored, but older, suburbs wind up subsidizing expensive infrastructural extensions to newer, wealthier, and exclusive suburbs, regional revenue balance mechanisms should be triggered.<sup>243</sup> Equitable regionalism would encourage the kind of fiscal transparency that would limit inequitable interlocal subsidization by subjecting to more public scrutiny the formulas for allocation of state infrastructure expenditures.

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242. See *supra* notes 48-50 and accompanying text.

243. See Cashin, *Localism, Self-Interest*, *supra* note 17, at 1988 (displaying that Cashin's empirical support for these assertions is unparalleled); see also Briffault, *Our Localism II*, *supra* note 17, at 380-81.

In this way, the principle may help erode antimajoritarian tendencies in state fiscal policy.

Economically, equitable regionalism is necessary to diminish the negative externalities arising from increased interlocal interdependency, and to acknowledge that interdependency in formal and mutually beneficial ways.<sup>244</sup> The leapfrogging phenomenon by which residents either leave older suburbs or enter an area's newer suburbs encourages the wasteful passing on of burdens, as do school closures and wasteful duplication of public services in new population centers after old ones decline.<sup>245</sup> Moreover, many public goods transcend local boundaries, putting certain localities in a better position than others to provide them. Efficiency, therefore, demands regional cooperation. A related economic rationale is the greater regional competitiveness that often comes with cooperative planning.<sup>246</sup> As tax and poverty rates decline, the area becomes more attractive to businesses and other institutions.

This diversity of economic rationales, provided they are supported by particular regional facts on the ground, should allow for more frequent political alliances across municipal boundaries. As Orfield counsels, the political challenge of regionalism in any form is to show middle- and lower middle-class voters in suburbs with low and declining property tax values that their interests converge with central cities, that tax base sharing will improve their services while lowering their taxes, that it will restrict their fair housing commitments to regional standards, and that it will stabilize their communities against further decline.<sup>247</sup>

### B. *Legislative Priorities*

The country's largest cities have been sapped of their fiscal capacity to grow and provide the social capital inputs needed by concentrated, low-income households deliberately

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244. For more on interdependency among regional actors, see Briffault, *supra* note 221, at 1137-39.

245. See Cashin, *Localism, Self-Interest*, *supra* note 17, at 2003 n.99.

246. See generally PASTOR ET AL., *supra* note 235.

247. ORFIELD, *supra* note 221, at 37. "On the merits, these middle-income, blue collar suburbs are the largest prospective winners in regional reform." *Id.* at 13.

left behind by generations of suburban localism's legally protected policies of segregation. The continuing crisis in New Orleans is tragic evidence of a resource imbalance that can produce fatal effects. That illustrative metropolitan failure argues for regionalist reform—specifically, equitable regionalism—by which state power is engaged to mandate inter-local cooperation around, at a minimum, the issues that localism consistently rejects at the expense of a widening array of a state's working- and middle-class communities. Next, I examine two such issues at the core of the equitable regionalism principle—fair sharing of affordable housing and greater proportionality in the allocation of increased tax revenues—to show how these priorities may work in practice.

1. *Sharing Affordable Housing*. Nothing is more expensive to cities, or more corrosive of social capital development, than racially concentrated poverty, a socioeconomic condition produced by massive suburban resistance to housing designated for even moderate-income households. Given the history of local resistance, municipalities must be compelled to provide real opportunities for affordable housing development which explicitly seek racial as well as economic balance across metropolitan areas.<sup>248</sup> There are a number of compulsory means, including inclusionary zoning<sup>249</sup>—with or without strong market mechanisms—state legislative regional housing formulas—sometimes within planning requirements—and housing

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248. A great many experiments in regional fair share housing fail because of municipalities' efforts to fill affordable units with the elderly, recently divorced white women, and college students. While these demographic groups have real needs for affordable housing opportunities in stable communities, favoring them over harder-to-house low-income black and Latino families systematically compounds the problem fair share planning is meant to alleviate.

249. See Angela Glover Blackwell, *Equitable Gulf Coast Renewal: Creating Housing Opportunity Through Inclusionary Zoning*, POLICY LINK, at 2-4. (providing a brief discussion on inclusionary zoning, and arguing that "inclusionary zoning is an essential policy strategy to avoid the re-concentration of poverty in New Orleans and ensure the fair distribution of affordable housing across the city and surrounding region"). Blackwell points to existing patterns of income and racial segregation, provides statistics about New Orleans prior to Katrina, and concludes inclusionary zoning is "an important tool to guide more balanced and equitable housing development patterns in New Orleans." *Id.* at 4. See generally JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 6.7, at 244-47 (2003).

incentive programs—carrot or stick approaches. The key, however, is to fashion mandatory rules that preclude competitive rule breaking at the local level or steady evisceration through loop holes or non-enforcement. This may entail the creation of regional oversight bodies, whose members are both elected and appointed, and charged with ensuring fair compliance with state-mandated housing goals.

Regional inclusionary housing schemes usually require a percentage of housing units affordable to an established median income guideline as a condition of residential development permitting in a given area.<sup>250</sup> For instance, Montgomery County, Maryland, passed a Moderately Priced Dwelling Unit (MPDU) ordinance which mandates that 15% of all new development over fifty units must go to moderate-income buyers or renters.<sup>251</sup> Additional affordable housing comes through a provision allowing the county's Housing Opportunities Commission—the public housing authority—to purchase up to a third of the units.<sup>252</sup>

A second approach maintains regional fair share housing allocations by imposing obligations through comprehensive plan elements, which must be periodically submitted by municipalities to regional authorities created by state legislation and meet established regional housing needs at different income levels.<sup>253</sup> This planning regulation

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250. See NICK BRUNICK ET AL., *LARGE CITIES AND INCLUSIONARY ZONING* 5 (2003), [http://www.bpichicago.org/rah/pubs/keeping\\_for\\_sale.pdf](http://www.bpichicago.org/rah/pubs/keeping_for_sale.pdf); KAREN DESTOREL BROWN, *EXPANDING AFFORDABLE HOUSING THROUGH INCLUSIONARY ZONING: LESSONS FROM THE WASHINGTON METROPOLITAN AREA* 18-19 (2001), <http://www.brookings.edu/dybdocroot/es/urban/publications/inclusionary.pdf> (explaining that inclusionary schemes can be required at either the local or regional level).

251. MONTGOMERY COUNTY, MD., CODE § 25A-1 (2006); see also RUSK, *supra* note 217, at 186-90.

252. MONTGOMERY COUNTY, MD., CODE § 25A-1 (2006). Builders can negotiate density bonuses in exchange. RUSK, *supra* note 217, at 188. Low- to moderate-income buyers may sell their subsidized units after ten years, but a portion of the proceeds must go to the county's revolving Housing Initiative Fund. See *id.* at 189-90.

253. Cf. Daniel R. Mandelker, *Twists In The Path From Mount Laurel: The Affordable Housing Element in Comprehensive Plans*, 30 B.C. ENVTL. AFF. L. REV. 555, 565 (2003) (arguing that the practice may overstate the availability of land in older suburbs and concerned that imposing affordable housing may contribute to sprawl).

combines consistency requirements with regional equity. For instance, California requires municipalities to submit a housing element—as well as others—which includes an extensive housing needs inventory and goals statement for the locality relative to the surrounding region.<sup>254</sup> The housing element is then part of a city's regional fair share allocation.<sup>255</sup> In New Jersey, the famed *Mt. Laurel* fair share housing litigation<sup>256</sup> was ultimately reduced to a legislative scheme for regional affordability allocations with many of the same features.<sup>257</sup> Unfortunately, the state legislature's inclusion of a localist provision and regional

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254. CAL. GOV'T CODE § 65583 (West 2006), which states:

The housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing. The housing element shall identify adequate sites for housing, including rental housing, factory-built housing, and mobilehomes, and shall make adequate provision for the existing and projected needs of all economic segments of the community.

Massachusetts makes similar requirements, including an extensive array of required elements. See MASS. GEN. LAWS ANN. ch. 41, § 81D (West 2007). Elements include, among others, land use, housing, economic development, natural and cultural resources, open space and recreation, and circulation. *Id.*

255. CAL. GOV'T. CODE § 65584 (West 2007) provides in part:

(d) The regional housing needs allocation plan shall be consistent with all of the following objectives:

(1) Increasing the housing supply and the mix of housing types, tenure, and affordability in all cities and counties within the region in an equitable manner, which shall result in each jurisdiction receiving an allocation of units for low and very low income households.

(2) Promoting infill development and socioeconomic equity, the protection of environmental and agricultural resources, and the encouragement of efficient development patterns.

(3) Promoting an improved intraregional relationship between jobs and housing.

(4) Allocating a lower proportion of housing need to an income category when a jurisdiction already has a disproportionately high share of households in that income category, as compared to the countywide distribution of households in that category from the most recent decennial United States census.

256. *S. Burlington County NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975) (*Mt. Laurel I*); *S. Burlington County NAACP v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (*Mt. Laurel II*).

257. See N.J. STAT. ANN. §§ 52:27D-301 to 329 (West 2007).

contribution agreements largely undermined the fair share scheme by permitting municipalities to buy out up to half their designated housing obligations and reconcentrating those affordable units—at a discount—in the state's already overburdened cities.<sup>258</sup> The *Mt. Laurel* experience remains a cautionary reminder about the level of political resistance localities will mount in order to avoid affordable housing obligations under regional governance.<sup>259</sup> In recognition of these political realities, at least one commentator has argued in favor of a system of housing incentives under which resistant localities paid the equivalent of a tax for avoiding their desegregation obligations;<sup>260</sup> New Jersey may already demonstrate that many suburban municipalities are willing to pay such costs as the price of continued local control.

The benefits of economic and racial desegregation through either of the means discussed above are reflected by a single empirical fact about concentrated urban poverty: It is virtually unknown to the white poor. In fact, in New Orleans, while 43% of blacks lived in concentrated poverty,

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258. *Id.* § 52:27D-312; see Joel Norwood, *Trading Affordable Housing Obligations: Selling a Civic Duty or Buying Efficient Development?*, 39 CONN. L. REV. 347, 372-73 (2006); Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1228-29 (2006); Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 313-14 (2002); John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685, 1688-90 (1998).

259. See, e.g., Nicole Garnett, *Trouble Preserving Paradise*, 87 CORNELL L. REV. 158, 166 (2001); David D. Troutt, *Mount Laurel and Urban Possibility*, 27 SETON HALL L. REV. 1471, 1475-77 (1997).

260. See John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1574 (1993). Under his proposed National Fair Share Act, Professor Boger would include the following provision:

As an incentive, the Act would promise to disperse new federal housing funds through state governments to all municipalities that choose to shoulder their "fair share" housing obligations. As a disincentive, this legislation would modify the federal tax code so that property holders in municipalities that choose to ignore their prescribed housing goals would progressively lose their mortgage interest and property tax deductions. These tax code modifications would have a dual purpose: First, to prompt citizens to encourage municipalities to comply with federal law, thereby hastening metropolitan integration; second, to reverse the economic advantages that currently flow toward property holders in segregated communities.

*Id.* at 1574.



only 11% of whites did.<sup>261</sup> Instead, poor whites are economically integrated in more moderate- and middle-income neighborhoods and localities. This means they share in many of the same social capital inputs—schools, recreation, economic investment, role models, employment opportunities, etc.—enjoyed by more affluent neighbors. The white poor cannot be ignored politically and their political interests are nevertheless shared by others in the locality. Although the causal link is not exact, poor whites do not stay persistently poor—they acquire more wealth than the minority poor and enjoy greater better economic mobility over their lives.<sup>262</sup> Hence, from the experience of the white poor, economic integration—or social and political resource sharing—alone seems to be a significant factor in improving life chances and mobility. Further, the spatial coexistence between poor whites and middle-class whites demonstrates that poverty alone does not doom property values, destroy a tax base, or ruin schools.

2. *Revenue Balance/Tax Base Sharing.* Tax base sharing is almost the conceptual antidote to the concentration effects of wealth and poverty exacerbated by the localist compulsion toward fiscal zoning. Where localities find it prudent to attract “good ratables” such as easily taxed commercial and industrial properties and to repel “bad ratables” such as low- and moderate-income housing for families in need of costly public services,<sup>263</sup> regional tax base sharing changes the logic by de-emphasizing the primacy of jurisdictional borders. Rather than measuring one municipality’s ability to successfully compete against its neighbors for good ratables and, in the process, create costly region-wide externalities in infrastructure, traffic, pollution, and sprawl, the regional interest is made paramount and the norm of intergovernmental competition is replaced with a more equitable and efficient norm of intergovernmental cooperation. There are two essential methods that are applied statutorily to defined regions within a state. One is to

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261. BROOKINGS INSTITUTION, *supra* note 87, at 7.

262. See MASSEY & DENTON, *supra* note 15, at 123-42; see also *supra* note 108 and accompanying text.

263. For more on municipalities’ ratables compulsion, see Briffault, *supra* note 221, at 1136.

create a baseline tax valuation for commercial and industrial development, and every increase in value over time as well as new developments are subject to an assessment for a regional fund.<sup>264</sup> Distributions from the fund are made according to a formula that allows municipalities with high services costs but limited tax base to participate in a nearby community's gains.<sup>265</sup> The second approach is similar, but uses appreciating residential values as the property taxes subject to the regional distribution formula.<sup>266</sup> In addition to providing a balancing source of revenues for tax poor municipalities, tax base sharing may rein in the forces of decline even among municipalities who win short-term fiscal zoning contests but lose in the long term through low-density sprawl.<sup>267</sup>

The premier example of property tax base sharing as a feature of equitable regionalism is the fiscal disparities legislation enacted by the Minnesota legislature in 1971.<sup>268</sup> The Minnesota Fiscal Disparities Act requires

each taxing jurisdiction in a seven-county area to contribute to a regional pool forty percent of the growth in the value of its commercial-industrial tax capacity. Municipalities are assigned a portion of that pool, based on population and the ratio of the total market value of property per capita in the jurisdiction to the

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264. American Planning Association, *Tax Equity Devices and Tax Relief Programs*, in GROWING SMART LEGISLATIVE GUIDEBOOK 14-1, 14-6 (Stuart Meck ed. 2003) available at [http://www.planning.org/guidebookhtml/chapter\\_fourteen\\_1.htm](http://www.planning.org/guidebookhtml/chapter_fourteen_1.htm) [hereinafter APA GROWING SMART GUIDEBOOK].

265. *Id.* Chapter 14 also contains useful illustrative formulas, calculations, and model legislation. *Id.* at 14-1 to -7.

266. *Id.*; see also ORFIELD, *supra* note 221, at 85.

267. ORFIELD, *supra* note 221.. According to Orfield:

In itself, intrametropolitan competition for tax base harms the entire region, not just the city that loses. When cities engage in bidding wars for businesses that have already chosen to locate in a region, public monies are used to improve one community's fiscal position and services at the expense of another's well being. Businesses can take advantage of this competition to shed social responsibilities. By threatening to leave, they can force troubled communities to pay them to stay.

*Id.* at 86-87.

268. The Charles R. Weaver Metropolitan Revenue Distribution Act, MINN. STAT. ANN. § 473F.01-.08 (West 2001 & Supp. 2007).

average market value of property per capita in the region.<sup>269</sup>

In 2000, Orfield reported that sharing under the Act had reduced interlocal tax base disparities by about twenty percent; in cities of more than 9,000 people, the ratio of disparity had declined from sixteen-to-one to four-to-one.<sup>270</sup> Orfield notes that the program would be even stronger if a greater percentage of commercial tax base valuation were included in the collection formula and if it could also draw from rising home values.<sup>271</sup> Further, it is not clear to what extent the Minnesota program would work to alter racial segregation—or if it would be politically viable at all—in a metropolitan area with a more substantial black population.<sup>272</sup> In 2000, the proportion of blacks in the Minneapolis metropolitan area was only 6.1%.<sup>273</sup> By contrast, blacks made up 37.7% of the New Orleans metropolitan area during the same period.

### C. *Comprehensive Planning and Neighborhood Participation*

Equitable regionalism is not a workable principle for cities and their poor unless certain localist structures are in place to ensure that cities plan comprehensively and with

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269. Myron Orfield & Nicholas Wallace, *The Minnesota Fiscal Disparities Act of 1971: The Twin Cities' Struggle and Blueprint for Regional Cooperation*, 33 WM. MITCHELL L. REV. 591, 592 (2007).

270. *Id.* at 603.

271. ORFIELD, *supra* note 221, at 87. Minnesota is not the only state to experiment with tax revenue sharing legislation. In 1968, for example, the New Jersey legislature passed a tax base sharing law for the creation of a Hackensack Meadowlands District, which covered fourteen municipalities around the marshlands supporting the Meadowlands sports complex. Hackensack Meadowlands Reclamation and Development Act, N.J. STAT. ANN. §§ 13:14-60 to -76 (West 2003); APA GROWING SMART GUIDEBOOK, *supra* note 264. "The plan's intent was to compensate those municipalities for the fiscal impact of land-use decisions made by the commission. Each municipality contributes to an 'intermunicipal account' in an amount equal to a percentage of increases in assessed valuation of property within the district, starting from the base year of 1970." *Id.*

272. Cashin offers a similar, though broader, caveat about regionalist experiments in Cashin, *Localism, Self-Interest*, *supra* note 17, at 2037.

273. LOIS M. QUINN & JOHN PAWASARAT, RACIAL INTEGRATION IN URBAN AMERICA: A BLOCK LEVEL ANALYSIS OF AFRICAN AMERICAN AND WHITE HOUSING PATTERNS 8 (2003), <http://www.uwm.edu/Dept/ETI/integration/integration.htm>.

the maximum participation of all their residents. In the abstract, participatory planning is localism's greatest strength, because the community's will about health, safety, and welfare is transformed into rational processes that tend to protect the broadest range of stakeholder interests. In theory, the danger of a professionalized planning elite running away with delegated powers is offset by an informed, often vigilant electorate as well as by the legal strictures associated with comprehensive planning—specifically, the requirement that zoning decisions, for instance, be consistent with a master plan—the consistency or “force of law” requirement. Not all localities follow these rules; not all states impose them. Many, like Louisiana, do not mandate that local land use regulation conform to comprehensive planning goals, or even that the latter be adopted. In sufficiently small, especially suburban, municipalities, where interest in land use decision making is fairly uniform among residents, such localist “planning” schemes, focused largely on zoning and exercised through local zoning ordinances, are adequate to protect homeowner stakeholders.

Yet in larger cities whose residents would most benefit from the protections of rational planning processes and the formal participation of the public in determining community character, comprehensive planning is rare, often an afterthought. This is a problem for democracy as well as for cities. Localism need not be viewed merely as a means by which homogeneous communities sustain parochial interests against change from outsiders. Localism can and should tap the energy and resources of residents, particularly at the neighborhood level where differences may be most dynamic, access to information is more equal, and where a true fabric of community may be most effectively sewn through the exchange of experiences.<sup>274</sup> The formal participation process may take many forms, but an established model is comprehensive planning. The primary benefit of promoting comprehensive planning at neighborhood levels is goal-setting, which is itself impossible without an exchange of information about what currently exists in an area, an assessment of needs and a

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274. See Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 273-79 (1993) (arguing that citizens feel the strongest pull toward participation in their immediate neighborhoods).

frank, professional disclosure of constraints. Comprehensive planning in this manner can develop even a low-income area's sense of collective voice, political empowerment and a future orientation necessary to any notion of stakeholdership. With the aid of professional planners, as discussed below in the New Orleans rebuilding context, and a regulatory scheme demanding legal compliance with the resulting master plan, communities may strengthen themselves against the vagaries of unforgiving political and economic markets, rather than appear defensively at the crisis point of an unwanted environmental threat or a mysterious wave of displacing gentrification. Of greatest importance here, cities whose communities regularly engage in comprehensive planning with the force of law are better situated to see themselves in a regional context and to contribute to and gain from processes of equitable regionalism.<sup>275</sup> Larger cities that do not structure planning rules to have the force of law risk alienating residents as a result of vesting ultimate decisionmaking power within the discretion of local elected officials where accountability is hampered by a lack of transparency.<sup>276</sup>

New Orleans had no such tradition of local comprehensive planning and citizen participation until Katrina destroyed the city. After several fits and starts, a process—still underway—entitled the Unified New Orleans Plan was undertaken. Although efforts to give this model of public participation the force of law sufficient to overcome a studied tradition of council-manic zoning discretion and weak neighborhood inputs are incomplete at this writing, the broad ideas bear brief mention here.

The Unified New Orleans Plan<sup>277</sup> (UNOP) appears to be the latest, and final effort to create a comprehensive rebuilding plan, and was officially endorsed on July 5,

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275. See generally Peter Marcuse, *Rebuilding a Tortured Past or Creating a Model Future: The Limits and Potentials of Planning*, in *THERE IS NO SUCH THING AS A NATIONAL DISASTER*, *supra* note 216, at 271 (discussing the variety of productive roles planners can assume and the socioeconomic effects of more equity-minded strategies).

276. See *infra* note 283.

277. See UNIFIED NEW ORLEANS PLAN, FINAL DRAFT OF THE CITYWIDE STRATEGIC RECOVERY AND REBUILDING PLAN (2007), <http://www.unifiedneworleansplan.com/home2/> (providing a link to each section of the report).

2006.<sup>278</sup> The plan's Community Support Organization was to coordinate a plan for each of the city's thirteen districts.<sup>279</sup> Because a major focus of UNOP was to incorporate community feedback and ensure the planning process was "resident-driven,"<sup>280</sup> this planning process involved various city-wide meetings. In addition to the various planners assigned to each individual district, a city-wide planning team was also created<sup>281</sup> in order "to both issue criteria for drafting the district plans and to produce the single, unified document at the end of the process."<sup>282</sup> After collecting public response and gathering information through the planning teams, the findings and recommendations were collected in a five-section report now known as UNOP.<sup>283</sup>

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278. Press Release, City of New Orleans Mayor's Office, City Council and Civic Leaders Reach Accord; "Unified New Orleans Neighborhood Plan" To Guide Rebuilding Process For City (July 5, 2006), *available at* [http://www.rockfound.org/about\\_us/press\\_releases/2006/no\\_pr070506.pdf](http://www.rockfound.org/about_us/press_releases/2006/no_pr070506.pdf). The responsibility of oversight for this plan belongs to the New Orleans Community Support Foundation (NOCSF), a six member board, and subsidiary of the Greater New Orleans Foundation (GNOF). The NOCSF was responsible for staffing the process. They began by hiring the architecture firm, Concordia, which put an advisory board in place called the Community Support Organization (CSO). The CSO consists of nine members. *See* UNOP, What is the Unified New Orleans Plan, <http://unifiedneworleansplan.com/home2/section/22/> (last visited Mar. 3, 2007). The composition of the board includes "one appointee each from the Mayor's office, the New Orleans City Council, the City Planning Commission, the Greater New Orleans Foundation, and five members representing the community from each of the five City Council districts." Press Release, UNOP, Community Support Organization Members Announced; Assignments for District and Neighborhood Planning (Aug. 28, 2006), *available at* [http://thinknola.com/w/images/1/1e/Members\\_announced-08-28-06-19600.pdf](http://thinknola.com/w/images/1/1e/Members_announced-08-28-06-19600.pdf). The CSO "was organized as a new governance model bringing the community directly into the decision making process of the city's planning initiative." *Id.* The CSO was in place to "oversee all major steps within the planning process," and would be in charge of selecting and overseeing the work of planning teams. *Id.*

279. Press Release, UNOP, *supra* note 278.

280. Coleman Warner, *Major Grants for N.O. Depend on Consensus*, NOLA.COM, Aug. 7, 2006, [http://www.nola.com/newslogs/topnews/index.ssf?/mtlogs/nola\\_topnews/archives/2006\\_08\\_07.html](http://www.nola.com/newslogs/topnews/index.ssf?/mtlogs/nola_topnews/archives/2006_08_07.html).

281. UNOP, Meet the Citywide Team, <http://unifiedneworleansplan.com/home2/section/23-108/> (last visited Mar. 3, 2007).

282. NOLAplans, Detailed Description of UNOP, [http://www.nolaplans.com/unop\\_detail/](http://www.nolaplans.com/unop_detail/) (last visited Sept. 22, 2007).

283. The first section, entitled "Recovery Assessment" discusses New Orleans' outlay prior to the storm, as well as the division of the thirteen

While many praise UNOP for involving New Orleanians and sharing the process with the community,<sup>284</sup> many more remain skeptical and some communities angry about the planning process.<sup>285</sup> The skepticism surrounds

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planning districts. UNOP, [http://www.willdoo-storage.com/Plans/CityWide/UNOPFINAL\\_1.pdf](http://www.willdoo-storage.com/Plans/CityWide/UNOPFINAL_1.pdf) (last visited Oct. 1, 2007). It provides maps of the districts and neighborhoods and a brief overview of Katrina's physical impact with maps depicting the flooded areas. The second section, called "Citywide Recovery Framework" provides various plans and predictions involved in the UNOP process. UNOP, [http://www.willdoo-storage.com/plans/CityWide/UNOPFINAL\\_2.pdf](http://www.willdoo-storage.com/plans/CityWide/UNOPFINAL_2.pdf) (last visited Oct. 1, 2007). It estimates population growth over the next ten years and assesses what the planning implications may be given such estimates. *Id.* It divides the assessments based on five drainage basins, each of which encompass anywhere from one to seven districts. *Id.* This section outlines seven recovery goals and provides three recovery scenarios: (1) "Re-pair"; (2) "Re-habilitate"; and (3) "Re-vision." *Id.* The section incorporates community feedback on the various scenarios gathered from the community meetings. *Id.* The third section, "Summary of Recovery Projects," provides an overview of the "recovery policies, programs, and projects." UNOP, [http://www.willdoo-storage.com/plans/CityWide/UNOPFINAL\\_3.pdf](http://www.willdoo-storage.com/plans/CityWide/UNOPFINAL_3.pdf) (last visited Oct. 1, 2007). It divides the projects by sectors and provides charts for each sector that compares citywide plans for each sector, to the individual district plans that are necessary for, and correspond to, the citywide project. *Id.* It also includes a timeline for implementation and UNOP's prioritization criteria for each project. *Id.* Section four begins with an implementation timeline across three phases of the project: (1) short-term, which shows the required investment between 2007 and 2009; (2) mid-term, which shows the required investment between 2009 and 2011; and (3) long-term, which shows the required investment between 2012 and 2016. UNOP, [http://www.willdoo-storage.com/Plans/CityWide/UNOPFINAL\\_4.pdf](http://www.willdoo-storage.com/Plans/CityWide/UNOPFINAL_4.pdf) (last visited Oct. 1, 2007). It outlines the necessary oversight for the rebuilding process, and calls for collaboration between various local authorities. *Id.* More importantly, however, this section encourages new zoning and regulatory approaches. *Id.* It suggests updates to the existing Master Plan and the Comprehensive Zoning Ordinance. *Id.* The final section of the plan is the financial section. It breaks down the total \$4.1 billion of estimated costs based on the various sectors and shows the approximate costs for the next two years, the next five years, and the costs that stretch beyond five years. UNOP, [http://www.willdoo-storage.com/Plans/CityWide/UNOPFINAL\\_5.pdf](http://www.willdoo-storage.com/Plans/CityWide/UNOPFINAL_5.pdf) (last visited Oct. 1, 2007). This section also discusses the general strategies in place to secure funding, listing the various governmental—state and federal—agencies that are potential funding sources, as well as the various private entities that have or may contribute to UNOP. *Id.*

284. See James S. Russell, *\$14 Billion New Orleans Plan May Strand Neighborhoods*, BLOOMBERG.COM, Feb. 14, 2007, [http://www.bloomberg.com/apps/news?pid=email\\_en&refer=muse&sid=awsIN03BZSDs](http://www.bloomberg.com/apps/news?pid=email_en&refer=muse&sid=awsIN03BZSDs).

285. See, e.g., Manuel Roig-Franzia, *Hostility Greets Katrina Recovery Plan*, WASHINGTON POST, Jan. 12, 2006, available at, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011102146.html> (describing the community's outrage to UNOP's proposed moratorium on the city's most damaged neighborhoods).

the plan's feasibility, and the anger relates to the impact this plan will have on lower income families.<sup>286</sup> Their criticisms have merit insofar as they critique processes which fail to restructure a local planning and political structure that is both outdated and parochial in its priorities. Its chief problem is the lack of a consistency requirement between planning initiatives and a comprehensive plan—a product of a weak planning commission and a strong city council.<sup>287</sup> However, the process of planning, review, and critique by experts around the country has revealed a great deal about the fault lines in city planning and participatory democracy in New Orleans, which may not be unique to the city.<sup>288</sup> Despite the criticism, the

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286. For example, one organization focused on New Orleans' poor, Association of Community Organizations for Reform Now (ACORN), released its own plan. ACORN HOUSING/UNIVERSITY PARTNERSHIP, A PEOPLES' PLAN FOR OVERCOMING THE HURRICANE KATRINA BLUES: A COMPREHENSIVE STRATEGY FOR BUILDING A MORE VIBRANT, SUSTAINABLE, AND EQUITABLE 9TH WARD (2007), [http://aap.cornell.edu/aap/crp/outreach/nopi/upload/Peoples\\_Plan\\_for\\_9th\\_Ward.pdf](http://aap.cornell.edu/aap/crp/outreach/nopi/upload/Peoples_Plan_for_9th_Ward.pdf). According to ACORN, the district planning teams were not required to address issues such as health care, public safety, building codes, transportation, economic development, land use, and institutional development—i.e., the infrastructure of community development. *Id.* at 7.

287. As has been stated:

Unlike its counterparts in most other American cities, the [City Planning] Commission does not have the force of law behind its decisions, meaning that all development and infrastructure proposals are vetted by the notoriously political City Council that has already demonstrated hostility to the UNOP process. [However] [e]ven if its decisions did have legal standing, the City Planning Commission is currently operating with less than half of its pre-storm staff, and is unlikely to serve as an effective advocate for city rebuilding without a major overhaul and infusion of resources.

JEDIDIAH HORNE & BRENDAN NEE, AN OVERVIEW OF POST-KATRINA PLANNING IN NEW ORLEANS 12 (2006), [http://www.bnee.com/wp-content/uploads/2006/10/An\\_Overview\\_of\\_the\\_Unified\\_New\\_Orleans\\_Planning\\_Process.pdf](http://www.bnee.com/wp-content/uploads/2006/10/An_Overview_of_the_Unified_New_Orleans_Planning_Process.pdf).

288. As ACORN further observed:

The City's current zoning ordinance was prepared at a time when local planners expected the city's extractive, manufacturing, transportation, retail, financial, and tourism industries to continue to grow, albeit at a modest pace, and the residential neighborhoods to remain stable.

The 9th Ward is zoned to accommodate: moderate density residential development; neighborhood-oriented retail; three east-west commercial corridors; major industrial areas; significant rail, barge, and ship-related transportation functions; and a small number of public open spaces. Recent declines in the region's oil and gas, shipping, and assembly industries have left the 9th Ward with large swaths of



UNOP process and the others undertaken in the alternative illustrate the beginnings of a potentially formidable urban planning infrastructure capable of providing the democratic foundation at the neighborhood level that is a practical precondition to effective equitable regionalism.

#### D. *Barriers to Reform*

The foregoing proposals' normative appeal is certain to suffer prudential constraints, given the analysis of resistance, rationality, and cultural distance that preceded it. To the extent that my analysis in this difficult context proposes a fruitful coalition of state-wide interests to dismantle structures of racial and economic disadvantage based on facts, I acknowledge the persuasive impotence of providing more information.<sup>289</sup> I am also aware that the inherently political nature of these proposed reforms may lead to death by popular referenda, if not by state legislatures.<sup>290</sup>

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underutilized and, in some cases, heavily-polluted industrial areas. . . .

Economic declines in the above-mentioned industries in recent years have undermined the economic opportunities for workers in these industrial sectors, causing many to seek employment elsewhere. This factor, along with the development of newer suburban developments offering larger homes, better infrastructure, and improved schools and municipal services, has resulted in a slow but steady decline in the 9th Ward's residential population. . . .

The post-disaster planning recovery efforts required by Hurricanes Katrina and Rita provide residents, business owners, and elected officials from the 9th Ward with the opportunity to work with city planners to revise the area's zoning ordinance in response to long-term economic and demographic trends, Katrina and Rita impacts, and contemporary and future building trends and land use patterns.

ACORN HOUSING/UNIVERSITY PARTNERSHIP, *supra* note 286, at 18-19.

289. Cheryl I. Harris and Devon W. Carbado make a similar argument in their brilliant analysis of the way the national news media characterized white Katrina survivors during the New Orleans floods—"finding"—and black ones—"looting"—asserting instead that something other than facts are necessary to alter cognitive frames. Harris & Carbado, *supra* note 4, at 88.

290. For two analyses of the various local and state political constraints influencing workforce housing development and housing desegregation, see John J. Delaney, *Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation: Do Land Use Regulations That Preclude Reasonable Housing Opportunity Based Upon Income Violate the Individual Liberties Protected by State Constitutions*, 33 U. BALT. L. REV. 153, 187-190 (2004) and Philip D. Tegeler, *Housing Segregation and Local Discretion*, 3 J.L. & POL'Y

Hopefully, three more facts make the present situation different than failed efforts of the past. First, we may be approaching the end-game in terms of the ability to simply develop more state lands while abandoning others. Beyond the sheer waste and environmental degradation that occurs through leapfrogging sprawl, there is finitude for every flight strategy. Second, as Cashin, Orfield, and others make clear, the fiscal problems occurring in many suburbs compared to a state's favored quarters may fuel demands for greater transparency about the distribution of state revenues and resources. Illuminating systemic cross-subsidization, therefore, promises the possibility of class-based coalitions seeking regional fairness—along with significant opposition—which has worked before.<sup>291</sup> Third, with a clearer mutuality of interests, regional equity coalitions should attract many more politically powerful interests, including smart-growth, transportation alternatives, and environmental advocates. If so, out of decades of structural inequity may come the transformative realization that often what is good for the state's poor also benefits its middle-class.

### CONCLUSION

The worst national disaster in United States history also showcased the dire consequences of localism as the cultural and legal successor to segregation. Long before Hurricanes Katrina and Rita devastated the Gulf Coast, New Orleans' status as an exceptional city had been lost to Americanizing trends. Its resistance to the conventional racial binary was overcome after Reconstruction; its unique densities and accommodation of the physical landscape were transformed into sprawling divisions by technology and suburbanization. From the *Brown* decision forward, I have argued in this Article, New Orleans and the metropolitan area around it developed much like the rest of the nation. Localist tendencies combined with legal

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209, 212-27 (1994).

291. See, e.g., Lassiter, *supra* note 200, at 120-43 (describing Charlotte, North Carolina's successful busing equalization coalitions of whites and blacks in the early 1970s). For an analysis of when affordable housing strategies find a favorable reception in suburban communities, see GEORGE C. GALSTER ET AL., WHY NOT IN MY BACKYARD?: NEIGHBORHOOD IMPACTS OF DECONCENTRATING ASSISTED HOUSING (2003).

protections for local autonomy—as exemplified and supported by several key decisions of the Burger Court—to resegment the region. A decade before Katrina, New Orleans, like most central cities, was financially incapable of deconcentrating neighborhoods of persistent poverty and politically powerless to wrest a more equitable sharing of state fiscal resources and burdens from its neighboring parishes.

This analytic focus on the role of legal localism in resegmenting America's metropolitan regions suggests its own remedial principle: equitable regionalism. Under this principle of state legislative reform, political coalitions may be possible in joining the interests of antipoverty, fair housing, and community development advocates with their counterparts in smart-growth, environmental preservation, and antisprawl organizations. Urban neighborhoods chronically destabilized by poverty need localism's emphasis on participation through planning devices; similar devices may help to effectuate equitable regional goals. The current anti-majoritarian rules have weakened both cities and a great many suburbs, suggesting ultimately that what benefits the isolated urban poor may also improve the welfare of the suburban middle-class.