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MAPPED OUT OF LOCAL DEMOCRACY

Michelle Wilde Anderson

ARTICLES

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Michelle Wilde Anderson*

In the novel Sula, Toni Morrison describes a neighborhood known locally as the Bottom, where the black community lived. It was “the hilly land, where planting was backbreaking, where the soil slid down and washed away the seeds, and where the wind lingered all through the winter.” We know such Bottoms. We have seen neighborhoods forsaken in the levees’ breach, public housing blocks gapped with boarded windows, and floodplain shantytowns for farmworkers. We know of homes on land scarred by contamination or dogged by natural adversity. But across the country are Bottoms of another, less familiar type. On the outskirts of small cities and incorporated suburbs across the country, hundreds of high-poverty neighborhoods of color lack rudimentary services like sewage systems, drainage, and streetlights. Integrated economically with city populations but excluded from participatory rights in city government, these unincorporated urban areas bear disproportionate numbers of landfills, municipal utility plants, and freeways that benefit urban populations but threaten local health and depress land values.

What to do with today’s lost neighborhoods? It is the late dawn of the twenty-first century, when integration is stronger and civil rights laws are weaker, when local government budgets are dwarfed by demands. Suing local governments or lobbying them, two of the most important strategies of twentieth-century advocacy for social justice, have been weakened by judicial and political hostility to redistributive claims. Yet state and local government law retains malleability and promise. Laws governing the allocation of power among local agencies exert significant influence over unincorporated urban areas in particular and spatial polarization by race and class more generally.

In part a prescription for unincorporated urban areas specifically, in part an

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exploration of solutions for any problem of metropolitan inequality, Mapped Out of Local Democracy takes stock of today's tools. It argues for a new priority in metropolitan law and policy: state legislative reforms to empower and reshape county governments to represent regional interests and regional logic in intergovernmental negotiations. Strengthening counties to bargain with other local agencies over matters with redistributive consequences, like annexation, can bring an interlocal perspective to critical local decision making and create a promising corridor for addressing contemporary issues of urban inequality. By bringing counties—our most neglected, under-theorized layer of urban government—into sharper relief, this Article offers a new direction in state and local government law in order to seek progress on economic and racial polarization in America's cities.

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INTRODUCTION

During the hardscrabble years of the late nineteenth century, racially restrictive covenants pushed low-wage African-American workers to settle in White Level, a new residential enclave outside the town of Mebane, North Carolina. Across the country several decades later, Latino labor migrants and “Okie” exiles of the Dust Bowl planted ramshackle stakes in the segregated fringe outside Fresno, a fledgling urban node in California’s heartland. And just as the industrial flurry of World War II was settling, black families working in Zanesville, Ohio built a neighborhood known as Coal Run Road on land they could afford beyond reach of the city’s Ku Klux Klan: the earth atop a

catacomb of disused mine shafts with poisoned groundwater, just beyond the city's edge.¹

Fast forward in time, and these three neighborhoods, like numerous others across the West and South, remain in place today—as poor, in relative terms at least, as they have always been. Still majority black and Latino, these communities witnessed the long march from de jure to de facto segregation. Homes lack rudimentary urban services such as clean water, adequate sewage disposal, sidewalks, and streetlights. Landfills, industrial plants, municipal utility plants, and freeways threaten residents' health and depress their land values. Yet one thing has changed: neighboring cities have swelled, expanding urban boundaries and causing an increasingly complex latticework of municipal services to surround, but not include, these communities. Stopped in time, like air pockets of history, these neighborhoods have seen city growth pass them by. Residents continue to live without the right to vote in their adjacent city, because borders have mapped them out of local democracy.

Daily life in many unincorporated urban areas, as I call these understudied communities²—household greywater pumped into overflowing backyard pits, the stench of leaking septic systems during the rain, and children tip-toeing across flooded dirt streets—would inspire distress even in Jane Addams or Jacob Rijs. How could such communities have remained static so long? The thunder of the civil rights movement's call for voting rights and fair housing should have reached them, urban expansion should have absorbed them, and the ascent of suburban land values should have enriched them. Instead, the grounds for excluding unincorporated urban areas simply evolved, traveling an axis from race to class to transform spatial exile under segregation into a rational, seemingly unavoidable economic reality. As memories of these communities' origins atrophy, and as the costs of redress rise with worsening

1. For more on the histories of these communities, see generally Plaintiffs' Combined Opposition to Defendants' Motions for Summary Judgment at 9-13, *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007) (No. 2:03-cv-1047); WALLACE SMITH, *GARDEN OF THE SUN: A HISTORY OF THE SAN JOAQUIN VALLEY, 1772-1939*, at 611-12 (2d ed. 2004); W. END REVITALIZATION ASS'N, *EPA ENVIRONMENTAL JUSTICE STUDY: FAILING SEPTIC SYSTEMS AND CONTAMINATED WELL WATERS: AFRICAN-AMERICAN COMMUNITIES IN MEBANE, NORTH CAROLINA* (2002), available at http://www.wera-nc.org/News/epa/epaej_1202.htm.

2. In a prior article, I provided a vocabulary and a conceptual baseline for understanding the problem of unincorporated urban areas, arguing that the dependence of these areas on diffuse, underfunded, and overburdened county government helps to explain the history of these communities and the particular challenges they face. I defined unincorporated urban areas to be neighborhoods that are: (1) unincorporated (lying outside the borders of any incorporated city, and thus reliant on counties as the most proximate tier of general purpose local government); (2) contiguous on one or more sides with the border of a city or lying within the area legally designated for a city's expected growth; (3) primarily residential, with densities greater than or similar to adjacent, incorporated land; and, (4) low-income, as defined by census tract data. Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 *UCLA L. REV.* 1095, 1101 (2008).

decay, what was once an expressly racial system has become a matter of plainspoken, race-neutral financing constraints.

A story like this is familiar. Unincorporated urban areas represent a paradigmatic problem of spatial inequality—pockets of concentrated poverty rooted in a racially ordered history. In the tradition of their times, residents of unincorporated urban areas and their advocates have deployed conventional tools of change: they have organized locally and they have sued. But for unincorporated urban areas, as for other segregated, high-poverty enclaves, local political economies and antidiscrimination protections have proven to be blunt instruments, filed down by twentieth century legal changes that diminished city financial reserves and weakened federal courts' remedial power to address racial segregation.

When familiar tools falter, what works as prescription? To confront that question, this Article probes for twenty-first-century means to address inherited twentieth-century problems of spatial inequality. It investigates solutions to the unincorporated urban areas problem as both an end in itself and as a model of modern redress for similar patterns. I argue that state laws governing local agencies retain flexibility and power—when successfully designed, they can incentivize desirable local government actions, facilitate negotiated bargains among local governments, and prevent harms with cross-border consequences. States allocate authority among cities, counties, special districts, and regional agencies, thus shaping the terms of regional cooperation. In the context of annexations, states have distributed authority in a way that renders counties largely passive in managing urban growth and remediating metropolitan patterns of spatial polarization by race and class. I argue that empowering counties in matters with redistributive consequences, like annexation, brings a regional perspective to critical local decisionmaking and provides the most promising corridor for addressing contemporary issues of spatial inequality.³ Long neglected by most local government academics and legal reformers, counties have languished as a problematic manager of high-poverty urban enclaves with little thought for their potential to lead in regional progress.

3. This Article thus furthers the increased attention in the legal community on the power of existing local governments to address social problems in innovative ways, when and if they are empowered and liberated by law to do so. *See, e.g.*, GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* (2008) (arguing that state law often prohibits cities from addressing problems, especially regional ones, like housing and crime); David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999) (exploring local governments' powerful ability to give shape and life to constitutional principles); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005) (arguing that local governments can, and perhaps should, hold responsibility for making marriage eligibility determinations); A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555 (1993) (examining the role of local governments, particularly through their land use authority in protecting biodiversity).

This Article, part problem-solving mission and part road map for modern legal reform, explores three approaches to problems of spatial inequality: community organizing, civil rights litigation, and local government restructuring. Part I drops an anchor in the unincorporated urban areas problem, describing these neighborhoods, the pattern of selective annexation (known as municipal underbounding) that underlies their unincorporated status, and the potential risks and rewards of pursuing annexation as a solution. Parts II and III explore traditional tools of change and their current constraints. The first of these barriers is cities' finance-driven rules for growth management and annexation, which block organizing efforts to lobby for inclusion and redistribution within existing local politics. Second is courts' reluctance to mandate the movement of a local border, a major barrier to remedying a pattern of discriminatory annexation through antidiscrimination litigation. Though restrictive in the context of unincorporated urban areas, the respect for local autonomy that underlies both of these two barriers has important virtues, including freedom for state and local experimentation over annexation and growth control.

Part IV seeks to harness this flexibility by proposing a new frontier in local government reform: the potential of county governments to alleviate problems of metropolitan polarization. Counties, our ubiquitous but under-theorized tier of existing superlocal government, can evolve to represent regional interests and regional logic in intergovernmental negotiations, including over annexation. This Part offers a portfolio of state legislative reforms that empower counties, but do so carefully. Such reforms must balance cities' legitimate need for urban growth control (and anti-sprawl objectives in general) against state and regional needs for adequate and efficient urban services in all urbanized areas. Infrastructure financing models that were common throughout the twentieth century suggest means to pay for service improvements triggered by resulting annexations.

Like fossils, unincorporated urban areas reveal a history of twentieth-century urban change in the control of local boundaries. Like laboratories, they offer a setting in which to test twenty-first-century strategies for resolving questions of social injustice. By investigating a contemporary problem of pre-civil rights vintage, we find old wounds and new possibilities, both hidden under history's crust.

I. THE PROBLEM OF MUNICIPAL EXCLUSION

In 1939, just beyond the city lines of Belle Glade, Florida, the Farmers' Home Administration built the Okeechobee Center, a public housing development for black Caribbean farmworkers employed by the regional sugar industry.⁴ The local housing authority managed the development, as well as a

4. Jacqueline Leavitt, *White Town in Town, but an Outhouse for the Blacks: Belle*

second, identical development for low-income whites, under a de jure housing segregation regime until 1977.⁵ Residents of both developments sought annexation, and in 1961, without issuing a public explanation, the city annexed only the white development.⁶ For the next forty years, the black neighborhood lobbied and petitioned for annexation—efforts that were denied repeatedly by the city.⁷ Meanwhile, acute need for capital outlays and improved municipal services, including waste disposal and city police protection, led to the deterioration of the black development.⁸

Having lost faith that annexation of the black development could occur by political means, tenants and community advocates brought suit in 1995, claiming racial discrimination and voting rights infringement in the city and housing authority's failure to permit annexation of the Okeechobee Center.⁹ Among other cases, they relied on *Gomillion v. Lightfoot*, in which the Supreme Court found that the "inevitable" and unconstitutional effect of a redefinition of a city's boundaries was to remove minority citizens from the city's jurisdiction, thereby discriminatorily depriving them of "the benefits of residence," including the right to vote in city elections.¹⁰

Yet in 1997 and 1999, the plaintiffs in *Burton v. Belle Glade* lost at the district court and at the Eleventh Circuit Court of Appeals.¹¹ In rejecting plaintiffs' voting rights claims, the circuit court reasoned that it lacked the equitable power to move a city border, and it focused on the rationality of the city's contemporary, race-neutral reasons for excluding the neighborhood, including the net cost to the city of extending services to the development.¹² By the time the civil rights movement had peaked and plateaued, local autonomy and the sanctity of local borders had become a barrier to remedying segregation and discrimination. Today, Okeechobee Center remains outside city lines. This Part introduces the pattern underlying Belle Glade's history, and

Glade, Florida, 54 U. DET. J. URB. L. 765, 766-67, 769 (1977).

5. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1183 n.1 (11th Cir. 1999) (observing that de jure segregation ended under court order in 1977), *reh'g en banc denied*, 193 F.3d 525 (11th Cir. 1999).

6. *Id.* at 1184.

7. *Id.* at 1184-85 (describing formal annexation efforts by tenants in 1961, 1973, 1980-85, and 1995).

8. *Id.* at 1185 & n.6.

9. *Burton v. City of Belle Glade*, 966 F. Supp. 1178, 1179, 1181 (S.D. Fla. 1997). Plaintiffs argued that the failure to annex amounted to vote denial for black tenants of the excluded development, vote dilution for black voters within city lines, and discriminatory expenditure of federal funds by the City of Belle Glade and its housing authority. Their claims arose under the First, Thirteenth, Fourteenth, and Fifteenth Amendments of the U.S. Constitution, § 2 of the Voting Rights Act of 1965, and Title VI of the Civil Rights Act of 1964.

10. *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

11. *Belle Glade*, 178 F.3d at 1183.

12. *Id.* at 1185-86, 1185 n.6, 1193, 1195, 1200.

it explores the risks and rewards of annexation as a solution to such neighborhoods' challenges.

A. *Unincorporated Urban Areas and the Pattern of Municipal Underbounding*

Okeechobee Center is not alone. A recent study of unincorporated urban areas in California's Central Valley identified more than 125 such communities in eight counties.¹³ In the Mississippi Delta, nearly twenty percent of the total black population and nearly forty percent of the black rural nonfarm population lived on the fringe of incorporated municipalities in 1980, and in twenty of the twenty-two municipalities with a sizable fringe population (at least one-half as large as the municipal population), more African-Americans lived in that fringe than inside the city.¹⁴ Dozens of additional unincorporated urban areas have been identified in Texas, North Carolina, Florida, Mississippi, California, and states across the Southwest.¹⁵

Research indicates that unincorporated urban areas face one or both of two main challenges: a lack of basic infrastructure and services like wastewater treatment and streetlights and/or an overconcentration of undesirable land uses like freeways and municipal utility plants.¹⁶ To date, identified neighborhoods have been predominantly Latino and African-American, often with a history of settlement under de jure and de facto segregation.¹⁷ Lying just beyond city boundaries, such neighborhoods remain unincorporated and dependent on county government.¹⁸

13. Victor Rubin et al., *Unincorporated Communities in the San Joaquin Valley: New Responses to Poverty, Inequity, and a System of Unresponsive Governance* 12 (Nov. 27, 2007) (unpublished report, on file with author).

14. Charles S. Aiken, *Race as a Factor in Municipal Underbounding*, 77 ANNALS ASS'N AM. GEOGRAPHERS 567 (1987).

15. See Anderson, *supra* note 2, at 1102-03; see also ALLAN M. PARNELL ET AL., *THE PERSISTENCE OF POLITICAL SEGREGATION: RACIAL UNDERBOUNDING IN NORTH CAROLINA* (2004), http://www.mcmoss.org/CedarGrove/Docs/regional_underbounding.pdf. Additional studies of poverty in unincorporated areas more generally (not necessarily near a city border) have identified thousands of low-income unincorporated subdivisions in the Southwest—including at least 1800 in Texas alone. See, e.g., PETER M. WARD, *COLONIAS AND PUBLIC POLICY IN TEXAS AND MEXICO: URBANIZATION BY STEALTH* (1999) (documenting colonias neighborhoods in Texas); Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995); Vinit Mukhija & Paavo Monkkonen, *What's in a Name? A Critique of 'Colonias' in the United States*, 31 INT'L J. URB. & REGIONAL RES. 475, 476 (2007) (documenting colonias communities in Southern California).

16. Anderson, *supra* note 2, at 1101-02.

17. *Id.* at 1101.

18. In a small minority of states and cities, unincorporated urban areas will not occur, by definition. These areas include consolidated city-county governments, "independent" cities not encompassed by any county's territory, areas in which a city has subsumed one or more county governments and all land is incorporated within that city, and the few New England states in which all territory lies within a municipality and there is no functioning unit of county government. Anderson, *supra* note 2, at 1103 n.17.

One cause for unincorporated urban areas may be municipal underbounding: annexation policies and practices in which cities grow around or away from low-income minority communities, thus excluding them from voting rights in city elections and, in many cases, municipal services.¹⁹ Existing empirical investigation of that explanation over time is patchy and regional, but suggestive.²⁰ The most comprehensive and specific (albeit regionally confined) evidence comes from a 2007 study of annexation patterns in the nonmetropolitan south during the 1990s.²¹ Taking into account the racial demographics of both the annexing city and its fringe areas “at risk” for annexation, the study made three key findings.²² First, it found that towns with black populations at the urban fringe that were disproportionately larger than the black population in the town were less likely to annex any fringe areas at all, whether black or white. In general, a slowdown in annexation in these areas would lend itself to two alternative explanations: discriminatory motives (a desire not to annex any new areas at all if the town will be required to annex black ones along with any white ones) or bureaucratic motives (avoidance of the federal preclearance procedures mandated by § 5 of the Voting Rights Act, as discussed in Part III). By differentiating annexation behavior based on the percent black at the fringe, the Lichter et al. study undermines the bureaucratic explanation; if it were true, there should be no difference in the annexation

19. See, e.g., CHARLES S. AIKEN, *THE COTTON PLANTATION SOUTH SINCE THE CIVIL WAR* 319-27 (1998); Aiken, *supra* note 14, at 564-65; Anderson, *supra* note 2, at 1113.

20. Clingermyer and Feiock conducted a multivariate analysis of annexation patterns in the 1980s across most metropolitan cities (as defined by populations greater than 25,000 in 1990) in the country. JAMES C. CLINGERMYER & RICHARD C. FEIOCK, *INSTITUTIONAL CONSTRAINTS AND POLICY CHOICE: AN EXPLORATION OF LOCAL GOVERNANCE* 101-05 & tbls.6.1, 6.2, 6.3 (2001). While their study offered valuable insights with respect to other variables in annexation (such as the annexing city’s form of government and expenditures on services), the study’s racial demographic variables were so imprecise as to be misleading. Their study accounted for two racial variables: the percent black of the annexing city and the percent black of the surrounding county—the latter measure thus capturing the racial demographics of all unincorporated land in the county as a whole rather than the unincorporated areas eligible for annexation. Yet the racial demographics of non-fringe unincorporated areas in the county (such as scattered rural populations, distant unincorporated subdivisions, the fringe areas surrounding other cities, etc.) are irrelevant to understanding a city’s annexation choices. Furthermore, the study failed to compare the racial demographics of the fringe land annexed with the fringe land not annexed in order to capture racial preferences in annexation, and its use of “percent black” as the sole measure of racial diversity is inappropriate for a national study in which other racial groups are overrepresented at the urban fringe. As a result, the authors’ claim that race did not significantly influence annexation, *see id.* at 105, is not substantiated. Lichter et al. offers a substantially more specific methodology by identifying (using finer census block level data), land “at risk” for annexation, and analyzing the racial demographics of both annexed and non-annexed land in that at risk area. See Daniel T. Lichter et al., *Municipal Underbounding: Annexation and Racial Exclusion in Southern Small Towns*, 72 *RURAL SOC.* 47, 52 (2007).

21. See Lichter et al., *supra* note 20, at 47.

22. *Id.* at 59, 66.

patterns of towns with or without large black fringe populations.

The study by Lichter et al. also found that predominantly white towns in counties with a higher percentage of African-Americans (defined in the study as a “black threat” to white voting majorities) were less likely to annex black populations at the fringe than white ones.²³ Using a multivariate analysis, the study similarly found that largely white towns were substantially less likely to annex black populations at their fringe than were more racially diverse towns.²⁴ Available census data enabled only limited socio-economic controls to test for class discrimination as an alternative explanation for these outcomes, but the study found “modest statistical evidence” that race was independently motivating annexation decisions.²⁵

Additional nationwide empirical evidence similarly suggests that prior to the passage of the Voting Rights Act of 1965, political and racial factors motivated urban annexation decisions in ways that imprinted the urban landscape with segregated municipal boundaries.²⁶ A comprehensive economic analysis of annexations during the 1950s, for instance, found that cities “used annexation to increase the proportion of white voters and dilute nonwhites’ voting power,” and that they did so even where city officials believed that annexations were not in their cities’ economic self-interest (as captured by contemporary cost-revenue analysis).²⁷ The study found that cities spent considerable sums funding infrastructure in suburbs following annexation and thus often “lost money on annexation,” which made their annexation decisions “irrational” from a fiscal standpoint.²⁸ These earlier studies help one understand the formation of unincorporated urban areas, while Lichter et al. help to explain their geographic stasis over time. The present Article completes the picture, showing how little that residents of unincorporated urban areas have been able to do to force annexation.

23. *Id.* at 60, 67.

24. *Id.* at 64, 67. This finding included a control variable for the black population in contiguous fringe areas, i.e., comparing annexations when the white and more diverse towns had similarly sized black populations at their fringe. *Id.* at 64-65.

25. *Id.* at 62-63.

26. See D. Andrew Austin, *Politics vs. Economics: Evidence from Municipal Annexation*, 45 J. URB. ECON. 501, 528 (1999) (testing the assumption that cities’ desire to expropriate suburban tax bases motivated annexations, and finding that economic considerations alone could not rationally justify annexations during the 1950s); Thomas R. Dye, *Urban Political Integration: Conditions Associated with Annexation in American Cities*, 8 MIDWEST J. POL. SCI. 430, 441 (1964) (investigating the effect of “social distance,” including socioeconomic differences, between cities and the neighborhoods they annexed, and finding that annexations were much more likely to come to fruition if the central city’s population was *more* “middle class” than the areas it annexed—a finding that undermines any claim that annexations were merely animated by the preference for wealthier communities).

27. Austin, *supra* note 26, at 528; see also *id.* at 504-05.

28. *Id.* at 528; see also *id.* at 520 (finding that, during the time period of study, “the ‘capture’ of existing suburban tax base [did] not motivate annexation”).

Within a broader framework of spatial inequality, municipal underbounding and the unincorporated urban areas it leaves behind are an incident of inter-jurisdictional segregation. Rather than single municipalities carved into racially and socioeconomically defined neighborhoods (intra-jurisdictional segregation), inter-jurisdictional segregation describes metropolitan areas carved into racially and socioeconomically defined local government units. In the case of unincorporated urban areas, local borders demarcate areas within a city's jurisdiction, distinguishing them from those residual areas within a county's unincorporated jurisdiction. Unincorporated urban areas are thus an important kindred of a better-understood variation of inter-jurisdictional segregation: the splintering of metropolitan populations into myriad independent municipalities with distinct economic conditions and racial demographics.²⁹ As compared to discrimination by and within single cities or districts, a landscape of inter-jurisdictional segregation demands the pursuit of access or inclusion rather than equity. This is because many of the local officials with the greatest authority and resources to shape neighborhood conditions—whether through the siting of land uses or the provision of services—no longer have racially and economically diverse constituents to whom they owe a duty of nondiscriminatory voting rights, services, or land-use policy. As a result, advocates have little recourse to demand equal treatment by local decisionmakers. Instead, they have to seek the access that entitles them to a fair share of local governments' resources, political attentions, and political power.

Heretofore, civil rights attorneys, social scientists, and academics have focused their attention on intra-jurisdictional segregation (the heart of the early civil rights movement's struggle against racially restrictive covenants, racial steering, and other tools of segregation) and inter-jurisdictional segregation in the form of city-suburban polarization among incorporated municipalities within metropolitan areas. Yet a wave of advocacy to address municipal underbounding is currently emerging. Recent lawsuits in Stanislaus County, California and Muskingum County, Ohio, alleged that the borders of municipalities and water districts were shaped and moved to exclude minority neighborhoods,³⁰ while the University of North Carolina Center for Civil

29. See, e.g., Sheryll D. Cashin, *Drifting Apart: How Wealth and Race Segregation Are Reshaping the American Dream*, 47 VILL. L. REV. 595 (2002) [hereinafter Cashin, *Drifting*]; 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); 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). Cashin, for instance, has warned of a mutually reinforcing dynamic in which spatial segregation expands racial and socioeconomic inequality by privileging a suburban professional class and engendering political indifference to low-income neighborhoods in social distress. See Cashin, *Drifting*, *supra*, at 596.

30. See Third Amended Complaint para. 3, Comm. Concerning Cmty. Improvement v.

Rights, the Southern Coalition for Social Justice, California Rural Legal Assistance, and dozens of non-profit organizations dedicated to urban and rural poverty have undertaken comprehensive community advocacy, legislative efforts, and representation of unincorporated urban areas in the South and West.³¹ This Article can guide their course.

B. *The Potential Rewards and Downsides of Annexation as a Remedy*

The needs in unincorporated urban areas can be addressed in at least four ways: relocate the residents, change county government, form an independent city, and seek annexation to an existing city. This Article focuses only on annexation, but the present Subpart surveys of each of these alternatives. To focus on annexation as realistic and desirable in some (if not most) cases is not to promise a panacea, however, and this Subpart also acknowledges the risks and downsides of annexation as a solution.

The first approach to the unincorporated urban areas problem entails moving individuals out of these communities and into more desirable habitats,³² with or without the demolition and redevelopment of entire

City of Modesto, 2007 WL 4365584 (E.D. Cal. 2007) (No. CIV-F-04-6121); Class Action Complaint para. 3, *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007) (No. 2:03-cv-1047).

31. See, e.g., UNIV. OF N.C. LAW SCH., CTR. FOR CIVIL RIGHTS, 2008-09 ANNUAL REPORT, <http://www.law.unc.edu/documents/civilrights/annualreport200809.pdf>; Cal. Rural Legal Assistance, Inc., Community Equality Initiative, <http://www.crla.org/index.php?page=community-equity-initiative> (last visited Jan. 28, 2010); S. Coal. for Social Justice, Municipal Exclusion, <http://www.southerncoalition.org/node/22> (last visited Jan. 28, 2010); Tex. RioGrande Legal Aid, Economic and Social Justice: Colonias & Real Estate Law, http://www.trla.org/sections/teams/index.php?page=ess_colonias (last visited Jan. 28, 2010).

32. This was the approach taken by the fair housing movement, in which civil rights reformers (particularly in the North) reacted to the racial and economic divergence of incorporated suburbs from central cities. To overcome this newly polarized landscape of jurisdictional segregation, they advocated for the free movement of individuals across fixed municipal borders, targeting housing and land use practices that violated individual rights. The combined import of the Fair Housing Act and *Jones v. Alfred H. Mayer Co.* established the right of individuals to rent, buy, or sell housing in any jurisdiction, free from both public and private acts of discrimination. The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). A long trajectory of cases confronted the power of cities to exclude minorities by blocking affordable housing. See, e.g., *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Warth v. Seldin*, 422 U.S. 490 (1975). The progress towards free movement of individuals within a landscape of jurisdictional segregation reached its apex (however briefly) in cases that prevented cities from selectively approving municipal service extensions as a way of discouraging desegregation. See *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974) (effectively protecting minorities' rights to locate within affordable unincorporated urban areas at the city's edge by holding that although a municipality has no obligation to extend services across its borders, once it elects to do so, race cannot factor in its services decisions); *Kennedy Park Homes Ass'n v. City of*

unincorporated urban areas.³³ The present Article rejects this approach as the most problematic of the alternatives: in the past, such movement of individuals through displacement (such as urban renewal programs) has shown only sporadic success at advancing race and class integration, and it has meant land loss for minority families and the demolition of stable, historically rooted communities³⁴

More desirable—but much less viable as a short-term solution—is to leave the communities under the exclusive jurisdiction of county government, but to reform county resources, institutional structures, and regulatory regimes such that they apply more rigorous health, safety, and related land-use standards in their urbanized areas.³⁵ Such an approach would seek to improve services, infrastructure, and land-use planning for all urban areas, perhaps by establishing minimum neighborhood habitability standards at the state level or by incorporating environmental justice concerns (defined broadly to include the distribution of neighborhood amenities, disamenities, and services) in the land

Lackawanna, 436 F.2d 108 (2d Cir. 1970) (holding that a city's refusal to approve a municipal service extension to a low-income housing development for blacks, to be located in a white area, constituted racial discrimination in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

33. This approach was, of course, the heart of mid-century slum clearance programs that demolished older, mixed-use urban neighborhoods to make way for publicly-accessible or revenue-generating uses (such as transportation infrastructure, shopping malls, and parks) and provided high density replacement housing on- or off-site—housing that quickly became concentrated ghettos of joblessness, crime, despair, and dilapidation. For the history of such programs in specific cities, *see generally* ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE & HOUSING IN CHICAGO 1940-1960, at 100-34 (1998); ROBERT O. SELF, AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND 139-55 (2003); THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 48-50 (1996); Raymond A. Mohl, *Race and Space in the Modern City: Interstate-95 and the Black Community in Miami*, in URBAN POLICY IN TWENTIETH-CENTURY AMERICA 100, 100-58 (Arnold R. Hirsch & Raymond A. Mohl eds., 1993).

34. The results of efforts to relocate individual low-income families of color in white, middle-class suburbs under court-ordered programs to distribute public housing have yielded small (albeit important) gains. *See, e.g.*, LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA (2000); James Rosenbaum et al., *New Capabilities in New Places: Low-Income Black Families in Suburbia*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 150 (Xavier de Souza Briggs ed., 2005). For a discussion of the social harms and resegregationist consequences of urban renewal, *see supra* text accompanying note 33.

35. In a forthcoming work, I will explore how we might improve land use and building code regulations rooted in urgent matters of health and safety, while continuing to foster unincorporated areas as sources of affordable housing. In other words, I will explore the regulatory balance between improving conditions and keeping such areas free from many of the aesthetic and discretionary controls associated with municipal land use regimes. *See* Michelle Wilde Anderson, *Habitat Adequacy: Minimum Standards for American Neighborhoods* (work in progress).

use planning process.³⁶ This might address habitability but not political voice, given that unincorporated urban areas would remain without a city government and without direct influence over an adjacent city that may have regulatory or land use power over that unincorporated fringe.

A third alternative is for unincorporated urban areas to form their own cities, though as a practical matter, some neighborhoods are too small or too poor for independence. Even for larger cities, incorporation may raise its own viability challenges over the long run.³⁷ East Los Angeles, an unincorporated urban area with a strong history, cultural identity, and local geography as a distinct “place” within Los Angeles County, illustrates both the barriers and the important potential in this strategy. Despite decades of yearning (and several failed attempts) to incorporate, the area remains unincorporated. At least in part, this is due to state and interlocal decisions to route freeways and other major streets through the community, which has left East L.A. with significantly less taxable land than adjacent neighborhoods and thus with riskier prospects for municipal fiscal independence.³⁸ A new cityhood drive is well underway, however, and whether or not it ultimately prevails, it illustrates the potential viability of an incorporation option for some larger unincorporated urban areas.

A final approach, and the focus of this Article, is to move a city border to encompass such neighborhoods through annexation. Annexation leads to service improvements and extensions in the following way: It brings unincorporated urban areas into a city that already provides urban services and triggers legal requirements that cities must bring underserved areas up to

36. Thinking more aggressively about counties as stewards of urban life, we can reconceptualize the state delegation of authority to local government and establish a theory of adequacy in municipal services. *See id.* A precursor to this theory was offered by Charles Haar and Daniel Fessler, who argued that local governments might be liable to provide equal services under common law liability for common carriers. *See* CHARLES M. HAAR & DANIEL WM. FESSLER, *FAIRNESS AND JUSTICE: LAW IN THE SERVICE OF EQUALITY* (1987). In the years since their book, education reform has pursued adequacy rather than equality under state constitutional law, providing a model of reform in housing and services.

37. *See generally* CEDAR GROVE INST. FOR SUSTAINABLE CMTYS., *INCORPORATION, ANNEXATION AND EXTRA-TERRITORIAL JURISDICTION: A DOUBLE STANDARD? PREDOMINANTLY-MINORITY TOWNS STRUGGLE* (2004), <http://home.mindspring.com/~mcmoos/cedargrove/id19.html> (analyzing the challenges faced by incorporated, predominantly minority towns in North Carolina); Anderson, *supra* note 2, at 1122-23 & nn.100-01, 1133 (describing viability challenges faced by some low-income minority towns that did incorporate in the deep South); Ankur J. Goel et al., *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker than Brown*, 23 HARV. C.R.-C.L. L. REV. 415 (1988) (profiling several neighborhoods that sought independent political control through incorporation and assessing the practical and philosophical implications of this approach as a civil rights strategy).

38. *See* Anderson, *supra* note 2, at 1128 n.129, 1151-52; Sarah Ihn, *The Long Road to Self-Determination: A Critique Of Municipal Incorporation Through the East Los Angeles Cityhood Movement*, 13 HARV. LATINO L. REV. (forthcoming 2010) (manuscript at 6-7, on file with author).

municipal health and safety standards.³⁹ By providing city voting rights (giving residents of unincorporated urban areas the same two levels of local government that city dwellers usually enjoy), annexation also increases the proximity and, potentially, the responsiveness of political representation.⁴⁰ Making city governments accountable to unincorporated urban areas can support habitability improvements in a number of ways, including by empowering these neighborhoods to protest the over-concentration of undesirable land uses in their communities.⁴¹ In addition to these advantages, this strategy leaves historically rooted communities intact and permits the rural or regional specialization of county government. Conceived of as a method for overcoming inter-jurisdictional segregation, annexation moves borders—not homes or people—in order to “relocate” a neighborhood from one jurisdiction to another.

Yet annexation will not be desirable for every unincorporated urban area. Before turning to strategies for achieving annexation, this Part will explore its potential risks and downsides. The first of these is that for low-income households with a tenuous foothold in homeowner status, if not a tenuous foothold in their regional housing market more generally, change brings risk. Would the material improvements required by annexation lead to displacement of existing residents? If we reasonably assume that basic infrastructure leads to an increase in property values,⁴² then the answer to this question depends in part on the tenure status of the residents.⁴³ In neighborhoods occupied

39. See *infra* text accompanying note 80.

40. These benefits are captured on the website of the Fresno County Local Agency Formation Commission:

It has been the experience of cities and counties throughout California that annexation of County islands have [sic] resulted in a more efficient urban service delivery system comprised of sewer; water; trash collection; police protection; fire protection; groundwater recharge; code enforcement; etc. Allowing islands to become part of a city has allowed residents to participate in the decisions that impact not only their immediate neighborhoods, but their communities.

Fresno County Local Agency Formation Comm'n, Island Annexations, <http://www.fresnolafco.org/Island%20Annex.asp> (last visited Nov. 23, 2009).

41. As discussed in *Cities Inside Out*, such over-concentration results in part from city governments' interest in siting urban infrastructure in accessible locations without causing displacements that harm constituents—an objective that cities can meet by using the power of extraterritorial eminent domain to locate such infrastructure just outside city boundaries. See Anderson, *supra* note 2, at 1152-53.

42. To the extent that this assumption is incorrect (i.e., that home values are in fact static or minimally increase following annexation), the risks discussed in this Part (including displacement, loss of affordable housing, windfalls, and moral hazards) would be alleviated. Infrastructure improvements in that case would simply increase habitability at the bottom of the homeowner housing market.

43. Comprehensive data on tenure status in unincorporated urban areas has not yet been collected. Research on unincorporated colonias neighborhoods (an academic category that partially overlaps with that of unincorporated urban areas, see Anderson, *supra* note 2, at 1115-20), however, indicates the dominance of owner-occupied dwellings. See Larson,

predominantly by homeowners, involuntary displacement through service improvements could only result from two potential cost increases: property taxes and fees for municipal services. The first of these is substantially mitigated in a majority of western and southern states by state constitutional and statutory rules that (whatever their adverse impacts on service quality and tax parity) freeze the property value assessed for taxation or otherwise stabilize property tax rates.⁴⁴ The second, fees for new services, is likely to be less than or equal to the price that residents pay to provide private market substitutes for public services (such as replacing and maintaining septic systems, hauling and storing water, running streetlights off of home generators, cleaning and rebuilding homes after a flood event, and other such costs), and certainly less than the housing appreciation triggered by improved basic services.⁴⁵ To the extent that some unincorporated urban areas are renter-occupied, however, vulnerability to displacement is arguably higher, as rents might increase to reflect the neighborhood's heightened desirability. This may present an important downside of an annexation solution in some communities.

The potential for increased costs or rents requires each community to investigate local fees and tax changes which would follow an annexation.⁴⁶ Pro

supra note 15, at 205.

44. Such laws include California's Proposition 13, Missouri's Hancock Amendment, and Michigan's Headlee Amendment (and similar constitutional amendments in Colorado, Louisiana, and Washington), which mandated voter approval of any tax increase; in addition to laws in Alaska, Florida, South Carolina, Arizona, Connecticut, Delaware, Hawaii, and other states that limited government taxes to a specified per capita level or mill rate. See Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 930-32 (2003); Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 392 & n.80 (2004); Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. 191 (2001); see also ARIZ. CONST. art. IX, § 17; CAL. CONST. art. XIII A, § 4; COLO. CONST. art. X, § 20; CONN. CONST. art. III, § 18; DEL. CONST. art. VIII, § 6; FLA. CONST. art. VII, § 9(b); HAW. CONST. art. VII, § 9; LA. CONST. art. VII, § 2; MICH. CONST. art. IX, § 6; MO. CONST. art. X, § 22(a); S.C. CONST. art. X, § 7; WASH. CONST. art. VII, § 2; ALASKA STAT. § 29.45.080(b) (2009).

45. Indeed, a study of the cost impacts of annexation on several unincorporated urban areas in North Carolina found that the cost of such private substitutes amounted to significantly more than any tax or fee changes triggered by annexation. See UNIV. OF N.C., CTR. FOR CIVIL RIGHTS, INVISIBLE FENCES: MUNICIPAL UNDERBOUNDING IN SOUTHERN MOORE COUNTY app. I (2006), <http://www.law.unc.edu/documents/civilrights/briefs/invisiblefencesreport.pdf>. Similarly, a calculation of the costs borne by residents denied city water outside of Zanesville, Ohio found that each household paid up to, and sometimes more than, ten times the cost of public water service for the costs of purchasing bottled drinking water and purchasing, hauling, and storing household water. See Class Action Complaint paras. 3, 34, *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007) (No. 2:03-cv-1047) (describing costs such as: installation and maintenance of a cistern and pump, purchase of chemicals for treating water, and repair and replacement of hot water tanks and appliances damaged by running contaminated water).

46. Building on the annexation study discussed *supra* note 45, research and advocacy in this field would benefit from case studies that assess the costs and benefits of annexation for specific communities. Such studies would provide models for how to assess the impacts

bono attorneys are needed to support community groups by providing legal and financial analysis of the effects of annexation and service improvements. Such analysis can use and modify existing tools like “economic impact reports,” which have been pioneered by community economic development advocates. Residents considering annexation need information about the costs of changing the status quo: how much do they currently pay for county taxes combined with private substitutes for municipal services? How much would it cost to remain under county jurisdiction, but to purchase municipal service extensions? How would tax rates and service costs change upon annexation? How much does a petition for annexation and any attendant environmental review cost in that city and state? Concrete impact analysis combats the rumor-driven speculation and misinformation that can chill efforts for change, particularly in low-income communities.

Improved services and annexation may create an additional risk of displacement by making unincorporated urban areas more attractive for public or private redevelopment. Sub-local governance, currently a subject of promising experimentation,⁴⁷ is an important bulwark against such risks. For instance, the Land Assembly District structure proposed by Michael Heller and Rick Hills could be applied to provide unincorporated urban area residents with a defense against speculators seeking to buy out community members, one by one, for the purpose of eventually aggregating and redeveloping the separate parcels in a single, high-value use.⁴⁸ The Land Assembly District mechanism would place adjacent landowners in a special district that can approve or disapprove (by a majority vote) the sale of their properties to a developer or municipality seeking to assemble the land as a single parcel.⁴⁹ It would offer community members a say in their neighbors’ decisions regarding property

of annexation along financial, regulatory (i.e., local laws concerning the use of one’s property), and political dimensions. Objective measures (like tax and fee levels) and residents’ subjective views (such as their perception of the responsiveness or accessibility of local government officials) are both relevant to such impact analysis.

47. See, e.g., MARY PATTILLO, *BLACK ON THE BLOCK: THE POLITICS OF RACE AND CLASS IN THE CITY* 121-47 (2007) (identifying the increasing prominence of black middlemen and middlewomen in serving as intermediaries between Chicago’s white government officials and private investors on the one hand, and community organizations and residents on the other); Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 504-05 (1997) (discussing sublocal institutions like enterprise zones, tax increment finance districts, special zoning districts, and business improvement districts that decentralize and vary certain matters of taxation, services, and regulation within individual cities); Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2018-23 (2007) (discussing the decentralization of power in urban redevelopment, with city governments becoming weaker players in comparison to community groups and other dispersed seats of influence).

48. See Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1469, 1488-96 (2008).

49. *Id.* at 1469.

sales, but more importantly, it would enable such residents effectively to “unionize” to capture the increased value of their parcel if aggregated with those of their neighbors.

In addition to displacement, improvements in unincorporated urban areas may mean the loss of affordable housing within the overall metropolitan housing market. Rather than focusing on existing residents, as does the risk of displacement, this issue concerns prospective residents who need to rent or to purchase homes priced below the prevailing housing market. The loss of affordable housing puts a strain on low-income households that must be accounted for in community-specific analysis of the impact of annexation. Yet the needs of future affordable housing seekers should not invariably trump the needs of present affordable housing occupants and owners. The responsibility to provide affordable housing for the greater community should not fall on individual homeowners. Playing that role is not asked of middle- or upper-class American suburbs, where appreciation of real property is an unquestioned social good. During the historical periods in which blue-collar American suburbs have been required to play that role (such as under court orders mandating placement of public housing in areas like Yonkers, New York⁵⁰), there have been foreseeable objections to asking low-income neighborhoods to bear the brunt of social goals held but not lived by wealthier communities. Such objections only intensify in the face of the additional moral concern that depressing habitability levels in low-income areas is an unacceptable way to maintain an affordable housing stock—the principle that animated, among other changes, the establishment of building codes to improve conditions in slum tenements.

A third criticism of annexation in this context is that persons living in unincorporated urban areas obtained a cheaper price for housing based on inferior material conditions and exclusion from city boundaries. Would annexation represent a windfall for them? No more so than other land use decisions that positively impact area property values. Furthermore, the concept of windfalls carries negative connotations, but it need not be negative. Our public policy has long taken for granted that housing appreciation is a desirable social and economic outcome that increases community and individual wealth and serves as an engine of buying power in the American economy. Indeed, as discussed in Part II, the government has historically subsidized infrastructure in blue-collar, middle-, and upper-class suburbs in the name of upward mobility and wealth creation through housing appreciation. Furthermore, the social goods that stem from habitability improvements cast positive spillover effects—improvements in one neighborhood may improve the quality of life

50. See LISA BELKIN, *SHOW ME A HERO: A TALE OF MURDER, SUICIDE, RACE, AND REDEMPTION* (1999) (a journalistic narrative of the social and political perception of the Yonkers desegregation litigation).

and home values in adjacent areas as well.⁵¹ And, because the reforms proposed here do not enable land assembly by the government, service upgrades would not attract the kind of attention from speculators or developers that would make savvy real estate interests the predominant beneficiaries of increased housing values in these neighborhoods.

Concerns regarding moral hazards are short to follow the concern about windfalls. This critique would argue that annexing unincorporated urban areas and/or otherwise improving conditions there will encourage uninhabitable settlement at the urban fringe as a stepping stone to annexation. Such a view suggests that growth at the urban fringe is necessarily undesirable, where in fact, it may be the only means to build affordable housing over the objections of more affluent residents, unions, or others with an interest in controlling growth within city lines or increasing its costs. Moreover, even if we assume (a proposition that I would dispute) that housing choices depend on ex ante reasoning of that degree of information and sophistication, we can readily prevent undesirable development. The proposals in Part IV thus account for any development incentives they might create. Furthermore, some degree of prevention has already been secured by the nationwide increase in county land use planning and subdivision requirements (i.e., which mandate the installation of basic municipal services prior to issuance of development approvals). In addition, many states currently grant extraterritorial regulatory powers (including the power to zone and impose municipal service and land use requirements) to cities, which give cities the right to require new development to conform to city standards for infrastructure.⁵² Such policies amplify the risk of losing affordable rental and homeownership opportunities, but they permit states and local governments to establish habitability minimums that apply equally across housing markets, inside or outside of city lines.

A final concern of annexation is that as a territorial enlargement, annexation increases the constituency of a city government and thereby dilutes the participatory influence of its existing residents.⁵³ Yet due to the small size

51. The classic example of a housing windfall illustrates the point: If households near an airport complain about noise pollution and successfully achieve noise abatement, their property values might go up despite the fact that they moved to the nuisance. But that noise reduction may still be desirable in social or economic terms for a broad range of parties affected by the sound.

52. See Richard Briffault, *Town of Telluride v. San Miguel Valley Corp.: Extraterritoriality and Local Autonomy*, 86 DENV. U. L. REV. 1311, 1313-17 (2009) (exploring the origins of municipalities' "surprisingly widespread" extraterritorial police powers, including zoning and condemnation authority).

53. Richard Briffault, for instance, has considered the annexation option in the context of neighborhoods seeking remediation for extraterritorial regulation, but expressed concern that expansion of local government populations through annexation comes into tension with participatory values favoring the smallest possible municipal scale. Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1133 (1996).

of most unincorporated areas, annexation is feasible without meaningfully increasing the territorial scale of the local government. And more importantly, we must look beyond our first observations of vote dilution and ask: whose participatory values are favored and whose are put at risk?⁵⁴ In addition to thinking of the constituency of existing residents, we should also account for the participatory rights of voting minorities within existing city lines (its own vote dilution problem) as well as the participatory rights of persons outside of city lines (a vote denial problem).⁵⁵

One way or another, the costs and benefits of annexation deserve careful, community-specific analysis, and a one-size-fits-all cure of annexation would be a patently undesirable remedy for municipal underbounding. But for those communities that do decide that annexation is in their best interests, this Article considers their options. Among the several doors available to advocates representing such communities, which will open?

II. COMMUNITY MOBILIZATION: SEEKING MUNICIPAL INCLUSION THROUGH LOCAL POLITICS

Activism in (and patience with) the local political and market economy is a commonly recommended antidote to problems of spatial inequality in a post-civil rights era.⁵⁶ This is the community organizing solution—the strategy of lobbying local government on behalf of neighborhoods to seek resources and policy changes. Applied to the problem of municipal underbounding, this hypothesis predicts that residents can pressure city and county governments to promote annexations and service improvements. Yet the problems of unincorporated urban areas, including municipal underbounding, are ill-suited to this approach if one adheres to the premise, as this Article does, that avoiding the involuntary displacement of existing residents is a central priority.⁵⁷ Under the current system of local finance, cities enjoy the legal

54. Richard Schragger put it well: “The creation of a place for meaningful self-government (in space and in politics) for those inside the (metaphorical and sometimes literal) gates always affects (and often injures) those who are outside those gates.” Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 374 (2001).

55. See, e.g., Anderson, *supra* note 2, at 1158 (describing voting demographics in the city of Modesto, California, where a Latino population of twenty-five percent within city lines was able to elect only one city councilmember under the formerly at-large voting district in one hundred years, but the population in unincorporated urban areas just outside city lines would more than double the Latino vote within Modesto).

56. Antidiscrimination law, as discussed in the next Part, is now a relatively weak opponent for social conditions historically rooted in racial discrimination and segregation.

57. As previously noted, urban renewal and redevelopment programs have a dark and extensive history of displacing low-income minority communities in order to make way for land uses that benefit political majorities. See *supra* text accompanying note 33. Indeed, some unincorporated urban areas in the South were themselves the offspring of such efforts; they were created after white political elites used urban renewal funding to demolish stands of black housing within municipalities and rebuild housing outside city boundaries where

right, if not the fiduciary duty, to engage in class discrimination when making annexation choices. State laws widely mandate fiscal impact assessments of boundary changes, and they currently provide few incentives or benefits to offset fiscal losses from the annexation of a poor neighborhood. As a practical matter then, capital investment and increased tax revenue in unincorporated urban areas are currently prerequisites to annexation within local political economies. Part II discusses the available levers of local advocacy and the barriers to their efficacy as a response to municipal underbounding.

A. Levers of Local Reform

Residents of qualified unincorporated areas have three means to press for annexation by an adjacent city: they can petition the city directly for annexation, lobby the city to initiate and approve an annexation, and/or lobby the county to pressure the city to undertake annexation. This Part introduces the basic legal structure underlying each of these approaches.⁵⁸ This structure applies whether or not a jurisdiction lies in a home rule state, as annexation is a matter of statewide concern.⁵⁹

In the main, annexations are initiated either by a city or by landowners in an unincorporated area.⁶⁰ Resident or landowner petitions for annexation typically require the signatures of a majority, supermajority, or consensus of landowners and/or electors in the area to be annexed, in addition to other procedural submissions.⁶¹ Once initiated, decisional power shifts to the city or

black voters could be excluded from town elections. *See, e.g.,* AIKEN, *supra* note 19, at 319-27; Anderson, *supra* note 2, at 127 n.127, 1137.

58. For a general presentation of the main features of annexation law, particularly the range of state laws governing landowner consent to annexation, *see generally* RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 211-35 (7th ed. 2009); Clayton Gillette, *Voting with Your Hands: Direct Democracy in Annexation*, 78 S. CAL. L. REV. 835, 838-39 (2005); Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247, 260 (1992).

59. Daren Waite, *Annexation and the Voting Rights Act*, 28 HOW. L.J. 565, 569 (1985).

60. Six states also permit annexation via petition to the state legislature, though this method has been uncommon since the late nineteenth century. *See* PAULA E. STEINBAUER ET AL., UNIV. OF GA., CARL VINSON INST. OF GOV'T, *AN ASSESSMENT OF MUNICIPAL ANNEXATION IN GEORGIA AND THE UNITED STATES: A SEARCH FOR POLICY GUIDANCE* 68-69 app. b (2002), available at <http://www.cviog.uga.edu/publications/pprs/53.pdf>; David G. Bromley & Joel Smith, *The Historical Significance of Annexation as a Social Process*, 49 LAND ECON. 294, 294-95 (1973).

61. *See, e.g.,* ALA. CODE § 11-42-21 (2009) (requiring landowner consensus); COLO. REV. STAT. § 31-12-107 (2009) (requiring landowner majority); 65 ILL. COMP. STAT. 5/7-1-4 (2009) (requiring landowner and elector majority); IND. CODE §§ 36-4-3-5, 36-4-3-5.1 (2009) (requiring a majority of landowners or owners of supermajority of assessed land value; approving different annexation methods depending on whether a petition represents the consent of a consensus or a majority of landowners and residents); NEB. REV. STAT. § 17-405 (2009) (requiring landowner and inhabitant majority); NEV. REV. STAT. § 268.636(1) (2009)

other institutional arbiter of annexation proposals; no jurisdictions give contiguous residents a right, at common law or by statute, to compel approval of the annexation.⁶² Prior to approval in many states, landowners seeking annexation may be obliged to fund an environmental review of the annexation,⁶³ a process that, in California for example, imposes a median cost of more than \$68,000.⁶⁴

City initiation of an annexation typically begins by passing a resolution of the governing body, and in some states, calling a special election in the area to be annexed and/or the city. In order to initiate proceedings, a city's governing body must deem such an annexation fiscally and/or politically desirable, and it must follow basic notice, hearing, and filing requirements established by each state.⁶⁵

Regardless of the mode of initiation, ultimate annexation approval authority rests outside of residents' and landowners' hands. States vary in approval procedures for annexations, but a resident-initiated annexation petition must be followed by positive legislative action by the city,⁶⁶ approval by a court or regional or state boundary commission, and/or electoral consent of voters in the city. For city-initiated annexations, all states allocate approval authority to one or more of the following entities or groups: majority approval by the city governing body, majority approval by city voters, majority approval

(requiring landowner majority); N.C. GEN. STAT. § 160A-31 (2009) (requiring consensus); OHIO REV. CODE ANN. § 709.02(C)(1) (West 2009) (requiring landowner majority); OKLA. STAT. tit 11, § 21-105 (2009) (requiring landowner and elector supermajority); WIS. STAT. § 66.0217 (2009) (approving different annexation methods depending on whether a petition represents the consent of a consensus or a majority of landowners and residents).

62. Indeed, state law clearly holds that the power of annexation lies in the hands of states and municipalities, not petitioners for annexation. *See, e.g.,* Roberts v. City of Mesa, 760 P.2d 1091, 1093 (Ariz. Ct. App. 1988) (stating that municipalities have “complete discretion” in deciding whether to undertake an annexation, and that “petitioners [for annexations] are mere applicants and have no power or right to require annexation” (internal quotation marks omitted)); *see also* People *ex rel.* Lake Bluff v. City of N. Chicago, 586 N.E.2d 802, 806-07 (Ill. App. Ct. 1992); Scheuer v. Johns-Manville Prod. Corp., 70 N.E.2d 876, 880 (Ill. App. Ct. 1947); Mayor and Council of Rockville v. Brookeville Tpk. Const. Co., 228 A.2d 263, 270 (Md. 1967).

63. *See, e.g.,* Bozung v. Local Agency Formation Comm'n, 529 P.2d 1017, 1027 (Cal. 1975) (holding that annexations are subject to the requirements of the state environmental review statute); City Council of Watervliet v. Town Bd. of Colonie, 822 N.E.2d 339, 342 (N.Y. 2004) (holding that the state environmental quality review law requires environmental review prior to an annexation); King County v. Wash. State Boundary Review Bd., 860 P.2d 1024, 1033-34 (Wash. 1993) (same).

64. *See* ELISA BARBOUR & MICHAEL TEITZ, PUB. POLICY INST. OF CAL., CEQA REFORM: ISSUES AND OPTIONS 12 (2005), available at www.ppic.org/content/pubs/op/OP_405EBOP.pdf (estimating average costs based on 2004 dollars).

65. *See* I ANTIEAU ON LOCAL GOVERNMENT LAW § 3.04 (2d ed. 2009); STEINBAUER ET AL., *supra* note 60, at 68-69 app. b (classifying states' annexation laws according to, inter alia, procedural requirements).

66. *See, e.g.,* ALA. CODE § 11-42-21 (2009); MO. REV. STAT. § 71.012 (2009); N.C. GEN. STAT. § 160A-31 (2009); City of Leeds v. Town of Moody, 319 So.2d 242 (Ala. 1975).

by voters and/or landowners in the area to be annexed, a municipal court, or a boundary commission.⁶⁷ Nothing in federal law prohibits cities from disapproving an annexation based on the wealth of the area's inhabitants,⁶⁸ and, as discussed *infra*, state law encourages or mandates cities to consider a neighborhood's taxable property wealth before annexation.

Nor can constituent pressure on counties lead directly to the initiation or outcome of annexation proceedings, even if unincorporated urban areas are able to attract their government's attention to their needs.⁶⁹ Counties cannot initiate annexations formally.⁷⁰ Relatively few states entitle counties to notice of a proposed annexation,⁷¹ and even fewer require the county to consent to an annexation under any circumstances.⁷² The most formal role for counties in any state consists of holding a minority of seats on a regional boundary commission charged with reviewing and authorizing annexations or performing a quasi-judicial role in reviewing an annexation according to statutory criteria.⁷³ As discussed further in Part IV, counties have a vested interest in the

67. Clayton Gillette has argued that this later option of concurrent majorities (direct democratic majority in area to be annexed plus majority of representative body or electorate of municipality) is preferable to alternative systems, because it does the best job of encouraging both parties to negotiate to reach the optimal extent and terms of annexation. *See* Gillette, *supra* note 58, at 859-60.

68. *See* *Wilkerson v. City of Coralville*, 478 F.2d 709, 711 (8th Cir. 1973) (considering a low-income neighborhood's allegation of wealth discrimination in an annexation and holding "[w]e find no right of annexation available to anyone, owners or residents, regardless of economic status. Whether [the city], in the exercise of its powers relating to the annexation of territory, should be permitted to encircle and exclude an impoverished area is a matter of legislative policy for the State of Iowa.").

69. *See* Anderson, *supra* note 2, at 1155-59.

70. The only exception to this characterization, as found by this author, is in Arizona, where counties may initiate an annexation of very small parcels (less than ten acres) that are completely surrounded by a municipality. *See* ARIZ. REV. STAT. § 11-269.07 (LexisNexis 2009).

71. *See* GA. CODE ANN. § 36-36-6 (2009) (requiring written notice to the county); MD. CODE ANN. art. 23A, § 19(o)(3) (LexisNexis 2009) (requiring that a city submit a copy of its annexation plan to the county).

72. Only Delaware gives counties approval authority over all annexations. *See* DEL. CODE ANN. tit. 22, § 101A(2)(c)-(d) (2009). In Ohio, counties must approve an initial resident petition for annexation, but once thus approved, the annexing municipality may reject the annexation. *See* OHIO REV. CODE ANN. §§ 709.02 (A)-(B), 709.04 (LexisNexis 2009). Other states, including Indiana, Kansas, and West Virginia, grant approval authority to counties in narrow circumstances. *See* IND. CODE ANN. §§ 36-4-3-9(a), 36-4-3-9.1(2) (LexisNexis 2009) (requiring county approval of annexations only in consolidated city-county governments and where the municipality was not included in that county as of 1982); KANS. STAT. ANN. § 12-521 (2009) (requiring county approval of annexations not otherwise permitted under state annexation rules); W. VA. CODE § 8-6-5 (2009) (giving counties approval authority over "minor boundary adjustments" only); *see also* FLA. STAT. § 171.046(2)(a) (2009) (permitting annexation of territorial islands after a city and county reach an interlocal agreement for the annexation).

73. *See, e.g.*, CAL. GOVT. CODE § 56325 (2009) (creating a boundary commission in

outcome of annexations, because annexation removes tax-paying and service-consuming households from the county's unincorporated constituency. Such transfer to a city of primary authority for a neighborhood can be from the county's point of view desirable (as with a high poverty urbanized area in need of services the county does not or cannot afford to provide) or undesirable (if the area to be annexed provides important property tax revenues for the county).

Whatever political pressure they might apply, residents are thus ultimately beholden to city and regional decisionmakers to assess the desirability of an annexation.

B. *The Barrier: Borders for Sale in a Market for Entry and Residence*

Whether an annexation proceeds turns on one question: does the city, in its discretion, believe that an annexation would be advantageous for the city? The assessment of the desirability of an annexation turns on the perceived fiscal consequences to the city of providing services to, and drawing revenues from, a new neighborhood. Borders themselves are now part of the new market economy of city government, such that low-income unincorporated urban areas today face major barriers to annexation.⁷⁴ Local governments are no longer in the business of financing the physical infrastructure improvements necessary to bring unincorporated areas up to municipal standards in preparation for annexation.⁷⁵ Budget shortfalls are now a fact of life for most American cities,

each county that includes two members of the county board of supervisors, as well as five other members) and § 56375 (granting that commission the authority to review, approve, or disapprove annexations); NEV. REV. STAT. § 268.626 (2009) (for each mid-size county, designating a city annexation commission that includes two representatives from the county and one from each city in the county) and § 268.630 (granting that commission the authority to review, approve, or disapprove annexations).

74. The "price" of moving borders, as described here, is distinct from the costs to individuals of crossing borders. The costs facing individuals who wish to move their households across jurisdictional lines, which lay at the heart of the fair housing movement, are much better understood. Most prominent among them is exclusionary zoning, in which local governments use their land-use authority to define who may live in a community through the facially race- and class- neutral regulation of residential densities, dwelling types (such as prohibitions against mobile homes), minimum lot or building sizes, bedroom and bath minimums, or amenity requirements that establish de facto property value requirements within a certain jurisdiction. *See, e.g.*, JONATHAN LEVINE, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE 67-85 (2006); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1083-89 (1996); Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 405-15 (2001); Troutt, *supra* note 29, at 434-54; *see also* Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006) (describing the installation of high cost amenities like golf courses to deter entry by racial or socioeconomic groups not attracted to those amenities).

75. Property in an annexed area immediately becomes subject to taxation by its new local government, and as a result, most states give local governments a corresponding obligation to extend standard municipal services to the new territory prior to or soon after

as their governments struggle to meet obligations to provide state-mandated locally desirable programs and services with shrinking revenue.⁷⁶ Cities have thus sought new sources of funding to reduce their dependence on property taxes and intergovernmental aid.⁷⁷ Local government financing of physical infrastructure and housing-related services (a category that excludes education⁷⁸) has evolved toward a privatized, consumer marketplace in which agencies increasingly “price” and “sell” governmental services and planning approvals and require developers and landowners to help provide or pay for the shared services required by their properties.⁷⁹ Local governments now effectively set a price for (1) entry (a landowner or group of landowners seeking to relocate a local border to encompass their parcels through annexation), and (2) residence (services provided within a jurisdiction).

The first price includes the costs of outfitting an unincorporated area with infrastructure and services. Municipal code standards and state annexation laws provide that annexed areas are entitled to municipal services at or shortly following annexation.⁸⁰ In response to these rules and the increased constraints on their finances, local governments evolved over the twentieth century to apply their land-use authority to require that infrastructure for new homes—everything from sewer connections, sidewalks, street lights, to water mains—be paid for or constructed by developers as a condition of planning permission. Taking this principle that “growth should pay its own way” even further, local governments have established complex systems requiring developers to pay for

annexation. *See infra* note 80.

76. *See, e.g.,* Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 B.U. L. REV. 633, 633-47 (2008).

77. *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 S.M.U. L. REV. 177, 189 (2006).

78. Our commitment to free public education means that children in unincorporated urban areas are included within a school district (usually the adjacent city’s district), regardless of their exclusion from municipal boundaries. In addition, redistributive efforts in the financing of education distinguish schools from the “pay for what you get” model described here.

79. *See id.* at 190; *see generally* Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 23-24, 28-31 (1998); Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41 (1995).

80. *See, e.g.,* GA. CODE ANN. §§ 36-36-51 (4), 36-36-92 (e) (2009); MICH. COMP. LAWS §§ 82.2, 123.1 (2009); OHIO REV. CODE ANN. § 709.12 (West 2009); OKL. STAT., tit. 11, § 21-103(D) (2009); *see also* ARK. CODE ANN. § 14-40-303 (2009) (requiring municipalities to commit to providing municipal services to annexed area within three years of annexation); IND. CODE § 36-4-3-13(d) (2009) (requiring municipalities to commit to the provision of non-capital municipal services within one year of annexation and capital municipal services within three years); MO. REV. STAT. § 71.015 (4)(b) (2009) (same); N.C. GEN. STAT. § 160A-35(3)(b) (2009) (requiring municipalities to commit to commencing construction of any necessary water and sewer lines within one year of annexation). State law implicitly or explicitly provides that the municipal code of the annexing city applies to the newly annexed area upon annexation. *See, e.g.,* NEB. REV. STAT. § 14-118 (2009); N.J. REV. STAT. § 40A:7-14 (2009).

the impacts that new households will have on the existing services provided in the jurisdiction or to otherwise contribute to the fiscal health or livability of the jurisdiction. Exactions, the general pattern by which local governments condition planning approval of building projects on developers' satisfaction of negotiated requirements and payments, now come in a wide array of shapes and sizes.⁸¹ Subdivision developers must routinely dedicate land to the public for uses in such form as streets, parks, schools, and transit facilities, or pay fees in lieu of dedication.⁸² And local governments commonly require construction of facilities (like streets and lighting, drainage, and sewage tie-ins) for use by subdivision residents and the public.⁸³ Many municipalities now also employ development impact fees, one-time charges on landowners, which offset the large-scale capital expenditures (such as funds to increase the capacity of a municipal treatment facility or water district) necessary to serve a new building.⁸⁴ Local governments increasingly rely on a variation of development impact fees known as linkage fees, which fund off-site public facilities such as schools, low-income housing, emergency services, open space, and public transit; however, these and other development impact fees have been subject to extensive constitutional scrutiny and limited by strict rules.⁸⁵

An additional principle underlying annexations is that, unlike past eras in which city boosterism or the preservation of racial group majorities facilitated annexations,⁸⁶ any local government considering an annexation today takes into account an estimate (which is often flawed and unscientific⁸⁷) of the financial bottom line of the land acquisition—whether the area will generate enough in local taxes, as compared to its service costs, to make the boundary

81. See WILLIAM W. ABBOTT ET AL., EXACTIONS AND IMPACT FEES IN CALIFORNIA: A COMPREHENSIVE GUIDE TO POLICY, PRACTICE, AND THE LAW 15 (2001); Rosenberg, *supra* note 77, at 189, 202.

82. Rosenberg, *supra* note 77, at 190, 199-203.

83. See *id.* at 198, 200.

84. Development impact fees, in contrast to user fees or taxes, are solely for funding capital investment in new infrastructure or expanded capacity in existing infrastructure. Rosenberg, *supra* note 77, at 206. A General Accounting Office survey of local governments in 2000 found that 59.4 percent of cities with populations greater than 25,000 employ development impact fees, as do 39 percent of metropolitan area counties. *Id.* at 207 (citing U.S. GEN. ACCOUNTING OFFICE, LOCAL GROWTH ISSUES: FEDERAL OPPORTUNITIES AND CHALLENGES 43, 62 (2000)). Though such charges have steadily expanded in scope, the practice of development exactions reaches back into the early twentieth century, with roots in the early regulations of residential subdivisions, including official map acts and benefit assessment districts. See *id.* at 192-96.

85. For a comprehensive discussion of the constitutionality of different types of exaction fees, see EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA, at xxxiii (Robert H. Freilich & David W. Bushek eds., 1995) [hereinafter EXACTIONS, IMPACT FEES AND DEDICATIONS].

86. See *supra* note 26; *infra* note 123.

87. See Reynolds, *supra* note 44, at 435; Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J. L. & POL. 451, 457 (2005).

change a long-term fiscal gain for municipal coffers. At least eighteen states require a city to evaluate and disclose costs and financing plans for extending public services to the annexed territory before approval of annexation is granted, and most others enable their local governments to undertake such fiscal analysis.⁸⁸ Pursuant to this mandate, cost-revenue analysis (commonly referred to as fiscal impact analysis) is now a stock tool for urban planners across the country. It assesses public costs associated with development, rezonings, annexations, or alternative land use plans by projecting “the direct, current, public costs and revenues associated with residential or nonresidential growth to the local jurisdiction(s) in which this growth is taking place.”⁸⁹

The shift towards fiscal impact analysis represents a philosophical as well as methodological change, because the approach, in its own terms, “ignores all other nonfiscal costs or benefits and costs or benefits which may be conferred differentially, i.e., on one group in a community at the expense of another.”⁹⁰ Poor communities generally offer less in property taxes than they will need in service upgrades (even if they exert a higher tax effort), and thus a fiscal impact calculus cautions strongly against absorbing communities like unincorporated urban areas into city lines. Perhaps for this reason, even the original authors of the fiscal impact methodology caution that in the annexation context, there is a “potential for misuse” because “every land use does not benefit the community” and not all such less fiscally-desirable land uses should be excluded from city lines.⁹¹

The Supreme Court has recognized local governments’ incentives to hinge

88. ROBERT W. BURCHELL & DAVID LISTOKIN, *THE FISCAL IMPACT HANDBOOK: ESTIMATING LOCAL COSTS AND REVENUES OF LAND DEVELOPMENT* 246 (1978).

89. *Id.* at 1. “Direct” impact refers to primary costs and revenues (e.g., new teachers needed, new property taxes) and “current” means as if the growth were undertaken today. *Id.* at 2. The fiscal impact approach is thus distinct from a cost-benefit analysis approach, which considers a land use proposal’s projected negative and positive impacts on a neighborhood, thus incorporating a mechanism by which a community can place value on attributes such as having a heterogeneous community, and weigh those values against negative effects like increased congestion. Nor does fiscal impact analysis capture cost effectiveness, which compares the relative expenditure and effects of annexation or development and sets a maximum level of acceptable costs to the community based on those land-use or annexation decisions requiring the least local government expenditure and generating the greatest return. *See id.* at 3.

90. *Id.* at 3. For this reason, cost-revenue should not be singularly determinant in urban planning decisions. Yet it does have two key advantages: first, promoting local governments’ financial planning and stability, and, second, improving governmental transparency and objectivity in decisionmaking (which, when used properly, can prevent land-use decisions founded on racially discriminatory assumptions about a neighborhood’s land values rather than empirical data). Multi-factorial analysis of annexation decisions can preserve these upsides while mitigating the downsides of fiscal impact methodology by accounting for cost-revenue calculations as well as the need for urban services, health and safety considerations, intergovernmental efficiency, political responsiveness, and other non-quantitative factors.

91. BURCHELL & LISTOKIN, *supra* note 88, at 8.

local decisions on their revenue-generating potential, but it has embraced these incentives as features of local control. Indeed, it has reasoned that the fact that local agencies (and their residents) have the ability to improve their municipal revenues, and thus their services, by courting and competing for high value properties capable of generating higher levels of tax revenues undermines any need to redistribute revenues for municipal services.⁹² The Court failed, however, to acknowledge the corollaries of this revenue incentive: districts and their residents can (and presumably, under the Court's view of local government competition, should) work to keep out low-value properties, and low-income cities must accept land uses that are dangerous in terms of public health or damaging in terms of constituent land values. This type of effort is so prevalent as to have earned an acronym now part of common parlance: NIMBY-ism.⁹³

To be desirable for annexation under our current system, a neighborhood must thus be able to afford start-up infrastructure and provide enough property taxes over time that the annexation will serve the jurisdiction's fiscal interests. Taken together, these two principles of annexation decisionmaking mean that residential land absorbed through annexation will tend to fall into one of two categories: (1) naked land that the city has or will zone and permit for subdivision development or other revenue-generating use, which will pay for its own infrastructure,⁹⁴ or (2) developed land that is already equipped with necessary services and infrastructure and whose properties will net an increase in the city's tax base. Unincorporated urban areas fall in neither of these categories. Many such areas lack rudimentary infrastructure, while others have been saddled with undesirable public land-uses (especially freeways and infrastructure like sewage treatment plants) that offer no revenue-generating potential. While such areas will generate some residential property tax revenue for the city, their revenue-generating capacity is unlikely to survive cost-revenue calculations.

It is not simply the entry to a new jurisdiction that imposes a price for crossing or moving borders. Even after a neighborhood is chosen for annexation, a second category of costs arises.⁹⁵ Local government market

92. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54 (1973).

93. NIMBY stands for "Not In My Backyard."

94. Many cities require a subdivision's acquiescence to annexation as a prerequisite to the right to purchase city services and obtain tie-ins to city infrastructure.

95. These costs of residence, along with the exclusionary land-use practices noted *supra*, act as a reinforcing cause of the unincorporated urban areas phenomenon, as such laws push low-income residents just beyond municipal borders in search of affordable housing. See Anderson, *supra* note 2, at 1129-33. For example, demand for housing in certain colonias has been traced to this expulsive force, as municipalities zone out local farm and industrial workers through prohibition of trailers and other prefabricated or low-cost housing. See Elizabeth M. Provencio, Note, *Moving from Colonias to Comunidades: A Proposal for New Mexico to Revisit the Installment Land Contract Debate*, 3 MICH. J. RACE & L. 283, 284 n.4 (1997) (discussing a 1995 discrimination challenge to a village's

economies now also commodify the use and allocation of public services through various fees and charges by which tenants and landowners pay for such necessities as waste collection, water, and fire protection. For existing developments, cities routinely fund capital improvements such as streetlights, road repair, sewers, sidewalks, utilities, and, in some cases, parks through assessment districts that impose periodic charges to which residents must consent.⁹⁶ In addition, cities increasingly rely on mechanisms to charge service users on an ongoing basis, such as user fees for government-owned facilities or consumption of a government-provided service such as garbage collection.⁹⁷

The current city financing system of pricing borders—both in terms of entry and ongoing residence—has come to supplant general taxation as a lifeblood of local government financing.⁹⁸ Municipal revenues generated by the “charges and miscellaneous” sources in this system now outpace municipal revenues attributable to traditional sources of tax revenue.⁹⁹ This type of service pricing has the important advantages of keeping uniform taxes low and tailoring government and its costs to consumer preferences, with the result that poor families need not finance amenity services of greater interest to affluent areas. Yet service pricing creates a regressive substitute for taxation by failing to reflect the economic capacity of consumers.¹⁰⁰ Taxes are assessed against everyone subject to the municipality’s taxation authority, without consideration of any given taxpayer’s ability to pay or his likelihood of benefiting from

ordinances restricting mobile home construction).

96. Also known as direct benefit assessments, these charges are imposed on landowners (often at their specific request) within a defined area to finance public improvements. *See Reynolds, supra* note 44, at 397-402; *Rosenberg, supra* note 77, at 195 n.58; *see also, e.g., CAL. GOVT. CODE* §§ 50078-50078.20, 54710.5 (2009) (authorizing local governments to impose assessments for police and fire, flood control, and drainage and water management services); *CAL. STRS. & HIGH. CODE* § 18165 (2009) (authorizing cities to impose assessments for street lighting).

97. *Rosenberg, supra* note 77, at 189, 202.

98. Local governments also rely on a range of bond mechanisms, most of which require high levels of voter approval, to finance public works. These may include general obligation bonds, revenue bonds, assessment bonds, redevelopment tax allocation bonds, and a range of other state-specific financing tools. *See, e.g., ABBOTT ET AL., supra* note 81, at 8-12 (2001).

99. Of California cities’ current sources of restricted funds, for instance, the largest single source (thirty-nine percent) is charges for water, sewer, refuse, and other services. Remaining shares of restricted funds come from: state and federal funding (ten percent); fees (eight percent); special taxes (three percent); licenses and permits (two percent); debt service (one percent); and assessments (one percent). Of cities’ non-restricted general funds, eleven percent come from property taxes, ten percent come from sales taxes, four percent comes from utility users taxes, seven percent comes from other taxes, and four percent comes from other sources. MICHAEL COLEMAN, LEAGUE OF CAL. CITIES, A PRIMER ON CALIFORNIA CITY FINANCE 3 (2005), available at <http://www.californiacityfinance.com/FinancePrimer05.pdf>.

100. *See Reynolds, supra* note 44, at 380; *Rosenberg, supra* note 77, at 189.

expenditures funded by the tax.¹⁰¹ Municipal services distributed pursuant to general city taxes allow political processes to draw local government resources to areas of need or political advocacy; whereas a price-driven system rewards neighborhood purchasing power, a formally equal but functionally exclusionary barrier for low-income communities. A service pricing scheme means that some households cannot afford vital services necessary for habitability, like ties for water and sewage lines.

The systems of service pricing mean that for an unincorporated urban area, the “price” of crossing into a municipality by moving the border to encompass the excluded community also includes the menu of user charges and fees that residents will be required to pay upon entry. The compound effect of low wages, depressed home values, and the high price of purchasing services thus traps unincorporated urban area residents in a vicious cycle: they cannot afford the price of crossing the border to obtain services and voting rights to affect service levels precisely because they have so long lacked urban services that their property values are weak and slower to appreciate. Indeed, the fees for services under a pay-for-what-you-get system mean that annexation may not even be desirable and affordable for unincorporated urban areas unless the initial investment in infrastructure is funded by outside sources.

Petitions for annexation and other levers of local mobilization can do little to address the structural economic reality that cities are unlikely to approve fiscally unattractive annexations without inducement. The local political economy currently vests most annexation power in cities and leaves unincorporated urban areas with weak political leverage. As discussed in Part IV, states, unincorporated area residents, and counties, who each have their own vested interests in annexation, must be invited to the annexation table to foster negotiated political compromise.

III. SUING FOR CHANGE: ANTIDISCRIMINATION LAW IN AN ERA OF LOCAL AUTONOMY

When politics fail, municipal underbounding seems ripe for a litigation solution that reflects the problem’s history of racial segregation and racially ordered provision of municipal services and voting rights. Residents of many unincorporated urban areas see their status as the result of past and present racial discrimination in annexation, and their stark demographics (suburban neighborhood of color outside city lines, suburban white neighborhoods inside) give commonsense credence to their perspective. Yet addressing any problem of spatial inequality—be it racial segregation, disparities in neighborhood

101. This is known as the uniformity principle, which, in the words of the Florida Supreme Court, instructs that “there is no requirement that taxes provide any specific benefit to the property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property.” *Collier County v. State*, 733 So. 2d 1012, 1017 (Fla. 1999). See generally Reynolds, *supra* note 44, at 379, 381.

services, or discriminatory annexation, to name a few—through a civil rights lawsuit faces formidable, well-known doctrinal barriers. Such cases must surmount, among other obstacles, the constitutional requirement of proving racially discriminatory intent and the increasingly extensive statistical proof required to establish a disparate impact claim under statutory protections like the Fair Housing Act.¹⁰²

In the context of municipal underbounding, those familiar challenges of proof are followed by an additional barrier: federal courts are reluctant, or perhaps even unwilling, to move a local border. Only a narrow band of factual scenarios can be redressed with existing antidiscrimination protections, and even in those cases, local autonomy to establish and move local borders has come to serve not only as a license to behave in any way consistent with state law, but also as a quasi-affirmative defense to claims that racial discrimination was a motivating force behind service or annexation decisions. This Part discusses this particular barrier to using civil rights laws as a strategy to address municipal underbounding.

A. Federal Protection Against the Discriminatory Movement of Borders

Theoretically, statutory and constitutional civil rights protections guard against municipal underbounding. Local governments have been found liable for the discriminatory movement of borders—whether through municipal annexation or the creation or alteration of special district lines.¹⁰³ Pursuant to the Equal Protection Clause of the Fourteenth Amendment, courts have enjoined changes to local borders that are overtly motivated by race, including

102. These challenges have been explored extensively in the academic literature and will not be reviewed here. *See, e.g.*, Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 22-53 (1976); Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1069-73 (1998); L. Camille Hébert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive Wards Cove and the Civil Rights Act of 1990?*, 32 B.C. L. REV. 1, 88-90 (1990); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321-24 (1987); John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 648 & n.125 (2008); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 287, 294 (1997).

103. Though school desegregation litigation is conceptually and doctrinally distinct in some important ways from litigation over discriminatory annexation by a general purpose local government, the contexts are governed by the same rules concerning federal courts' equitable power to move a local border. *See Hills v. Gautreaux*, 425 U.S. 284, 293 (1976) (expressly articulating the applicability of a school district desegregation case to any case that tests "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state government entities"); *see also id.* at 294 (observing that the same school district desegregation opinion "was based on basic limitations on the exercise of the equity power of the federal courts and not on a balancing of particular considerations presented by school desegregation cases").

a city's decision to de-annex black neighborhoods,¹⁰⁴ a white city's secession from a county school district to avoid a desegregation order,¹⁰⁵ and gerrymandered school district lines and intradistrict attendance zones that tracked residential racial demographics.¹⁰⁶ As a remedy for such violations, courts have ordered the reorganization, consolidation, and fragmentation of school districts and voting districts.¹⁰⁷ Pursuant to equal protection's one-person-one-vote guarantee, courts have ordered states to reapportion their political subdivisions.¹⁰⁸

104. *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960) (striking down an Alabama state legislative enactment that redefined the boundaries of the City of Tuskegee from a square to a twenty-eight-sided figure—a change that excluded nearly every black voter from the town without removing a single white voter); *see also* *Franklin v. City of Marks*, 439 F.2d 665, 670 (5th Cir. 1971) (finding that it would state a constitutional claim under the Fourteenth Amendment if plaintiffs demonstrated that a deannexation order was an attempt to escape the obligation to provide equal municipal services to a minority neighborhood).

105. *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 489 (1972) (upholding an injunction barring a state from creating a new school district to serve a city seeking to avoid inclusion in a desegregation order affecting county schools); *Wright v. City of Emporia*, 407 U.S. 451, 451, 470 (1972) (reaching a similar holding on similar facts).

106. *See, e.g., Newburg Area Council, Inc. v. Bd. of Educ.*, 510 F.2d 1358, 1359 (6th Cir. 1974) (holding that the city and county school districts failed to eliminate state-imposed segregation, and the district court therefore had the power to ignore state-created school district lines); *Haney v. Bd. of Educ.*, 410 F.2d 920, 924-25 (8th Cir. 1969) (striking down school district boundaries that created a gerrymandered all-black district, because “[i]f segregation in public schools could be justified simply because of pre-*Brown* geographic structuring of school districts, the equal protection clause would have little meaning”); *United States v. Texas*, 321 F. Supp. 1043, 1056, 1059 (E.D. Tex. 1970), *aff’d*, 447 F.2d 441 (5th Cir. 1971) (holding that the state education agency had deployed consolidations, detachments, and transfers to segregate black students into nine school districts and ordering the state to devise a reorganization plan for desegregating the districts).

107. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993) (finding a claim under the Equal Protection Clause based on a congressional district whose shape can be understood only as an effort to segregate voters into separate districts on the basis of race); *Hoots v. Pennsylvania*, 672 F.2d 1107, 1110, 1120 (3d Cir. 1982) (affirming the consolidation of five of the school districts surrounding Pittsburgh into a single district based on a finding that the state and county board of education had drawn the five school districts to effectuate segregation); *United States v. Bd. of Sch. Comm’rs*, 637 F.2d 1101, 1116 (7th Cir. 1980) (affirming an interdistrict desegregation remedy to bus children across district lines where the state had purposefully discriminated); *Evans v. Buchanan*, 555 F.2d 373, 381 (3d Cir. 1977) (en banc) (ordering that the school districts of Wilmington and its Northern suburbs “shall be reorganized into a new or such other new districts” as would be prescribed by the state following the lower court finding of interdistrict violations); *Haney*, 410 F.2d at 925-26 (holding that a district court had the remedial authority to order district consolidation in spite of a state law requiring electoral approval of such actions); *United States v. Missouri*, 388 F. Supp. 1058, 1060-62 (E.D. Mo. 1975), *aff’d as modified*, 515 F.2d 1365 (8th Cir. 1975) (ordering the annexation of two districts into a third district); *Texas*, 321 F. Supp. at 1050 (finding that districts drawn to maintain a dual school system “require consolidation with nearby units so as to assure their students equal educational opportunities”).

108. The reapportionment earthquake of *Reynolds v. Sims* echoed *Gomillion* for the proposition that a State is “‘insulated from federal judicial review’” when it exercises authority “‘within the domain of state interest,’” but it loses that insulation when state power

Federal statutory protection also applies. Since 1971, the Voting Rights Act of 1965 has recognized the potential for boundary lines to fence out minority voters (vote denial) and disempower minority voters within a jurisdiction (vote dilution).¹⁰⁹ To this day, all annexations in jurisdictions covered by § 5 of the Act (including most of the South and additional scattered counties) must be reviewed and precleared by the Department of Justice.¹¹⁰ Courts interpreting § 5 have found violations where a city uses double standards in selecting which areas should be annexed, either overlooking black areas in favor of white ones¹¹¹ or overlooking black areas in favor of vacant areas that will likely be inhabited by white voters.¹¹² Standards under § 2 of the Act, which applies nationwide,¹¹³ are much less clear. Neither the Supreme Court nor the circuits

is deployed to infringe on a federally protected right. 377 U.S. 533, 566 (1964) (quoting *Gomillion*, 364 U.S. at 347) (ordering state reapportionment after holding that existing and proposed plans for apportionment of seats in the two houses of the Alabama Legislature violated the Equal Protection Clause by failing to reflect the distribution of the state's population). See also *Avery v. Midland County*, 390 U.S. 474 (1968) (ordering the reorganization of voting districts within a county to reflect the constitutional principle of one person, one vote enunciated in *Reynolds*).

109. *Perkins v. Matthews*, 400 U.S. 379, 388 (1971). In reaching its holding, the Court described a national study finding that gerrymandering and district boundary changes had become common methods of subverting the newly realized franchise among black voters. *Id.* at 389.

110. See *id.* at 381. Section 5 of the Voting Rights Act requires preclearance approval by a court or by the Attorney General “[w]henever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that [previously] in force or effect” so as to ensure that it “does not has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” *id.* (citing 42 U.S.C. § 1973(c) (2006)). Section 5 was recently upheld by the Supreme Court, though it was interpreted to permit any covered jurisdictions to “bail out” of preclearance requirements. *See* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

111. See *Perkins*, 400 U.S. at 388-94 (upholding an Attorney General's finding that the annexation of a majority white neighborhood amounted to a retrogression); see also *Dotson v. City of Indianola*, 739 F.2d 1022, 1024 (5th Cir. 1984) (reviewing a denial of preclearance by the Department of Justice based on a municipality's failure to annex black subdivisions). Failures to annex black areas also became an element of proof in other civil rights litigation unrelated to voting rights. See, e.g., *Buchanan v. City of Jackson*, 708 F.2d 1066, 1069 n.5 (6th Cir. 1983); *Lopez v. Merced County*, 473 F. Supp. 2d 1072 (E.D. Cal. 2007).

112. See *City of Rome v. United States*, 446 U.S. 156, 161-62 (1980) (affirming the Attorney General's decision to deny preclearance to thirteen annexations, nine of which were of vacant tracts of land that “were near predominantly white areas and were zoned for residential subdivisions”); see also *Pleasant Grove v. United States*, 479 U.S. 462, 466, 472 (1987) (affirming the Attorney General's refusal to preclear the annexation of a vacant tract and a white but minimally populated tract in light of the city's past refusal to annex adjacent black communities).

113. 42 U.S.C. § 1973(a)-(b) (prohibiting any voting practice or procedure that results in a denial or abridgement of the right to vote, with a violation to be determined based on the “totality of the circumstances”); *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986) (citing S. REP. NO. 97-417, at 30 (1982), reprinted in 1982 U.S.C.C.A.N. 177, at 207-08) (holding that

have definitively answered whether a vote denial or dilution claim under § 2 might encompass a claim of discriminatory annexation.¹¹⁴ Both a Supreme Court opinion citing the provision's legislative history and a circuit opinion expressed doubt that a vote dilution claim could reach an annexation,¹¹⁵ but a recent opening may have appeared in a partisan redistricting opinion from the Court.¹¹⁶

Given the extension of civil rights constitutional and statutory protections into annexation, one might assume that such cases face hindrances no greater than (and no less than) those associated with any civil rights action. In fact, however, plaintiffs in a municipal underbounding action face an additional barrier—indeed, one that is merely a different incarnation of the local autonomy barrier to local political mobilization.

§ 2 “prohibits all forms of voting discrimination” and reaches both vote denial and vote dilution claims).

114. It is not entirely clear why challenges to discriminatory annexations have rarely arisen outside of the states and counties covered by § 5 of the Voting Rights Act. In part, the absence of such cases reflects the fact that annexations are far less common in northeastern cities (which tend to be “landlocked” by other incorporated municipalities) than in southern or western municipalities bordered by unincorporated land. In addition, the pattern of low-income unincorporated urban areas across the west has been widely overlooked by academics and civil rights advocates, and annexations have thus not been scrutinized for their implications on minority voting rights and municipal services. *See* Anderson, *supra* note 2, at 1098, 1120-24 (arguing that the focus on metropolitan white flight has consumed our attention at the expense of several important patterns of low-income suburbanization).

115. Justice Kennedy, in a portion of an opinion announcing the judgment of the Court joined only by Chief Justice Rehnquist, conveyed in dicta that “we think it quite improbable to suggest that a § 2 dilution challenge could be brought to a town’s existing political boundaries (in an attempt to force it to annex surrounding land) by arguing that the current boundaries dilute a racial group’s voting strength in comparison to the proposed new boundaries.” *Holder v. Hall*, 512 U.S. 874, 884 (1994) (opinion of Kennedy, J., joined by Rehnquist, C.J. & O’Connor, J.). *See also id.* (“Plaintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group.” (quoting S. REP. No. 97-417, at 68 n.224 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, at 246)). Justice Kennedy reasoned that a voting change subject to preclearance under § 5 may not necessarily be subject to a dilution challenge under § 2, because, unlike § 5 retrogression analysis, § 2 lacks a reliable benchmark for measuring dilution. *See id.* Noting that language, but declining to weigh in on the applicability of § 2 to annexations, the Eleventh Circuit rejected a plaintiff’s § 2 claims in a discriminatory annexation case. *See* *Burton v. City of Belle Glade*, 178 F.3d 1175, 1197 n.22 (11th Cir. 1999). The court found that it lacked the remedial power to order an annexation, which foreclosed satisfaction of one prong of § 2 analysis—the availability of a meaningful remedy. *Id.* at 1199-1200.

116. *In League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), Justice Kennedy found a cause of action under § 2 for an electoral boundary change that appeared discriminatory, even though the district court found no racially motivated discrimination. Similar logic might apply to an annexation that appeared discriminatory, even if it was fiscally motivated. I am grateful to Chris Elmendorf for drawing my attention to this argument.

B. *The Barrier: The Ascent of Local Control*

While liability has remained real as a theoretical matter, its practical import requires that federal courts can and will act to remedy any violation through a structural injunction. In the annexation context, such a remedy would logically, if not necessarily, include court-ordered boundary changes. Yet to order such a measure, federal courts must view local government borders as susceptible to federal equitable jurisdiction. In early civil rights challenges in this area, courts found such jurisdiction. They viewed local governments as subdivisions or delegates of state power, and thus found jurisdiction over local governments in the cases holding states accountable for federal civil rights violations. Over the course of the civil rights movement, however, courts increasingly came to view local governments as possessing a democratically rooted right to autonomy that situated them as a separate tier of American federalism—like mini-polities with independent legitimacy rooted in their election by local constituencies.¹¹⁷ To these newly empowered local governments, greater federal deference was due. With a source of power drawn up from the people, rather than down from the states, local governments became increasingly insulated from the exercise of federal equitable jurisdiction. We can most clearly understand the nature and significance of these changes in a genealogy across three phases—before, during, and after the civil rights movement.

Prior to 1964 (the year of the first successful challenge to local borders at the U.S. Supreme Court), states enjoyed absolute discretion to create or alter the configuration of their subdivisions directly, or to empower their local governments to grow, shrink, create, or consolidate. Federal courts exercised neutrality with respect to these decisions to shape or move local boundaries, finding that such matters did not affect federal individual rights.¹¹⁸ In instances

117. See Richard Briffault, *Who Rules at Home? One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 339, 346-48 (1993) (theorizing two competing conceptions of local governments as “locally representative bodies” or as “arms of the states,” both of which have been prominent in Supreme Court cases on local government). The present Article builds on Briffault’s framework by looking at a topical cross section of local government cases across a historical continuum, observing how, in the context of civil rights challenges to local borders, Briffault’s competing conceptions arose not as coincident views but as distinct doctrinal phases.

118. *Hunter v. Pittsburgh*, 207 U.S. 161, 175, 179 (1907) (upholding a state law permitting consolidation of two cities if the majority of the votes cast in the combined territories favored the consolidation, despite the fact that on the facts before the court, a majority of the votes cast in one of the cities opposed consolidation). The Court wrote:

Although the inhabitants and property owners may, by [changes such as expanding or contracting the municipal territorial area] suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences.

Id. at 179.

of “any unjust or oppressive exercise of [state power],” whether economic or political, those aggrieved had only one remedy: take their complaints to the state legislature.¹¹⁹ Local governments warranted no particular federal deference, and during this period courts expressed no respect for the democratic legitimacy of local governments or their borders. On the contrary, cases during this time viewed municipalities as administrative subdivisions and instrumentalities of the states, not as independent democracies. In the words of the Supreme Court in 1923: “In the absence of state constitutional provisions safeguarding it to them, municipalities have *no inherent right of self government* which is beyond the legislative control of the State.”¹²⁰ Instead, local powers were defined by a state’s “sovereign will,”¹²¹ and it was the “absolute discretion” of the states,¹²² not local democracy, that authorized municipal boundary changes. Whether states delegated this authority to their subdivisions—as they increasingly did in the early 1900s—or reserved it for themselves, federal courts took no role in overseeing or reviewing annexations and other local boundary changes. This was, in short, an era in which state autonomy granted a local license to chart municipal lines, and neither state nor local governments faced legal consequences for the racial implications of their growth.¹²³

With a series of decisions in the 1960s and 70s,¹²⁴ the Court recognized

119. *Id.* at 179.

120. *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (emphasis added).

121. *Id.* Other cases falling within this line of precedent, broadly defined, include: *Williams v. Mayor & City Council of Balt.*, 289 U.S. 36 (1933); *R.R. Comm’n of Cal. v. L.A. Ry. Corp.*, 280 U.S. 145 (1929); *City of Newark v. New Jersey*, 262 U.S. 192 (1923); *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919); *Williams v. Eggleston*, 170 U.S. 304 (1898); *City of New Orleans v. New Orleans Water-Works Co.*, 142 U.S. 79 (1891); *Mount Pleasant v. Beckwith*, 100 U.S. 514 (1879); *Comm’rs of Laramie County v. Comm’rs of Albany County*, 92 U.S. 307 (1875); *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

122. *Hunter*, 207 U.S. at 178.

123. Notably, federal neutrality during the early phase of this period was not due to stasis in local boundaries—the late nineteenth and early twentieth centuries saw tremendous movement of local borders through annexations, with widespread patterns of “forcible annexation” in which older central cities engulfed underserved, unincorporated suburbs of various economic stripes to boost the cities’ regional economic power and population. Growth for growth’s sake—fueled by the spirit of civic boosterism and prestige, the promise of urban economies of scale, and intercity competition—propelled this aggressive annexation of the urban fringe. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 140-47 (1985); JON TEAFORD, *CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA, 1850-1970*, at 77 (1979); see also JON TEAFORD, *THE AMERICAN SUBURB: THE BASICS* 15-16 (2008) [hereinafter TEAFORD, *THE AMERICAN SUBURB*] (quoting an 1885 CHICAGO TRIBUNE article that proclaimed: “It is the history of all American municipalities that they absorb their populous suburbs. The gravitation is resistless”).

124. Such cases arose in the South, where advocates reacted to local politicians’ attempts to relocate municipal boundaries in order to remove newly enfranchised African-American voters and to avoid school desegregation orders. See BERNARD TAPER, *GOMILLION*

that local government decisions to move their borders could violate federally protected individual rights, both constitutional and statutory, by causing minority disenfranchisement or segregation.¹²⁵ In *Gomillion v. Lightfoot*, the beachhead case on this score, the Court enjoined the alteration of municipal borders to exclude newly enfranchised black voters, holding that states' "unrestricted power" under the Constitution to define and organize their political subdivisions was not an adequate defense to "circumventing" constitutional voting rights.¹²⁶ In the school desegregation context, the Court held that the "broad remedial powers of the court" could include, as "an interim corrective measure," the "frank-and sometimes drastic-gerrymandering of school districts and attendance zones."¹²⁷ Soon thereafter, the Court recognized a violation of the Fourteenth Amendment in the creation of a new school district for a city avoiding a desegregation order affecting county schools.¹²⁸ Boundaries, in that case a detachment to form a new school district, could impede the process of school desegregation and effectively "creat[e] a refuge for white students."¹²⁹

V. LIGHTFOOT: THE TUSKEGEE GERRYMANDER CASE (1962); Aiken, *supra* note 14, at 569-74; Gayle Binion, *Racial Discrimination by Alteration or Refusal to Alter School District Boundaries*, 54 U. DET. J. URB. L. 811, 812-24 (1977); Peter H. Weiner, *Boundary Changes and the Power of the Vote*, 54 U. DET. J. URB. L. 959, 964-90 (1977). Using the Fifteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Voting Rights Act of 1965, civil rights proponents sought to bar Southern local governments from preserving segregation with the manipulation of local borders.

125. *See* *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 489 (1972); *Wright v. City of Emporia*, 407 U.S. 451, 451, 470 (1972); *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

126. *Gomillion*, 364 U.S. at 347.

127. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 27 (1971) (affirming a lower court's remedial authority to aggregate noncontiguous school zones to redress the constitutional violation of maintaining a dual school system).

128. *Scotland Neck*, 407 U.S. at 489; *see also Wright*, 407 U.S. at 451, 470 (enjoining a city's secession from a county school system two weeks after the entry of a county desegregation order, because the detachment would undermine the effectiveness of the desegregation remedy). The Court noted that such a tactic had "confronted other federal courts . . . on numerous occasions in recent years." *Wright*, 407 U.S. at 453. *See also Aytch v. Mitchell*, 320 F. Supp. 1372 (E.D. Ark. 1971) (striking down a school district detachment, based in part on the financial impact to the residual district, which would become ninety-six percent black); *Burleson v. County Bd. of Election Comm'rs*, 308 F. Supp. 352 (E.D. Ark. 1970) (striking down a detachment in a case, interestingly, brought by white residents who would be left behind in a resulting, majority black district); Binion, *supra* note 124, at 812-24 (discussing the so-called "splinter district" or detachment cases).

129. *Scotland Neck*, 407 U.S. at 489. The Court reached a similar holding the same day in *Wright v. City of Emporia*, finding that a city's detachment from a county school system two weeks after the entry of a county desegregation order would undermine the effectiveness of the desegregation remedy. *Wright*, 407 U.S. at 451, 470. *Wright*, however, unlike *Scotland Neck*, was written by a divided Court, as Justices Burger, Blackmun, Rehnquist, and Powell began nudging the constitutional guarantee of equal protection towards an intent-based framework satisfied by facially colorblind state action. *See id.* at 482-83 (Burger, J.,

Such decisions seemingly constituted a new era in federal constitutional liability and remedial power in the context of the organization of state subdivisions. Yet in terms of their conception of local agencies, these decisions marked the continuation of a doctrinal phase, not the beginning of a new one. They preserved a conceptualization of local governments as instrumentalities of the state, and thus, inheritors of constitutional constraints on state action.¹³⁰ The decisions expressed no concern for the democratic processes or local will that had led to unconstitutional actions, nor did they balance these apparent goods against the unconstitutional harms they sometimes produce. Instead, the newfound federal constitutional limits on acts of racial discrimination by states were merely applied to such acts by localities, making local governments liable for racial discrimination because of, not in spite of, the imprimatur of state authority and discretion.¹³¹

Despite these important cases in the tumultuous decade spanning 1964-1974, no federal court went so far as to order a municipality to annex a minority area as a remedy for the application of racial double standards in municipal annexation. And shortly following these cases, even as sources of federal liability for racial discrimination remained in place, the expansion of federal checks on municipal power ceased abruptly. Though the rhetoric of states' rights had developed only recently as a basis for resisting racial integration, widespread Southern resistance to school busing fueled a series of

dissenting) (acknowledging effectiveness to be the measure of a desegregation plan but resting the dissent on the absence of "discriminatory purpose" or "objectionable" considerations of race).

130. See *Gomillion*, 364 U.S. at 342-43 (distinguishing *Hunter*); *id.* at 347 (describing local governments as expressions of states' power to organize their political subdivisions); see also *Haney v. County Bd. of Educ.*, 410 F.2d 920, 925 (8th Cir. 1969) (holding that "[p]olitical subdivisions of the state are mere lines of convenience for exercising divided governmental responsibilities" in a case reorganizing school district boundaries to dismantle a segregated dual system).

131. Rejecting the City's claim of municipal autonomy rooted in *Hunter* and other cases, a unanimous Supreme Court held that "the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." *Gomillion*, 364 U.S. at 344-45. The Court thus effectively found that local officials stood in the shoes of state officials, equally accountable to individuals' constitutional rights. See also *Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958) ("[F]rom the point of view of the Fourteenth Amendment, [local officials] stand in this litigation as the agents of the State."); *Ex parte Virginia*, 100 U.S. 339, 347 (1879) ("A State acts by its legislative, its executive, or its judicial authorities. . . . Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."); see generally Kathryn Abrams, *No "There" There: State Autonomy and Voting Rights Regulation*, 65 U. COLO. L. REV. 835, 839 (1994) (arguing that federal voting rights jurisprudence, including *Gomillion*, fundamentally altered the domain of state autonomy over internal political processes by making state autonomy "a sort of residual category—to be respected if no civil rights-based problems arose").

dissents, and ultimately majority decisions, that valued local control of municipal and school district affairs even where it undermined redress of civil rights violations.¹³² One dissent framed the need for federal court restraint as more than a matter of “polite deference to the role of local governments”; rather, a city’s request to secede from a desegregating school district fell within a protected realm of “local prerogatives” and had to be permitted due to the “*overriding* importance” of local control of education.¹³³ “[L]ocal control,” in the words of a Court majority, represented “freedom,” “participation,” adaptation to “local needs,” “experimentation,” “competition,” “a multiplicity of viewpoints,” and “a diversity of approaches.”¹³⁴

The setting to celebrate local control in these cases was education, and indeed, one might wonder whether education elicited special deference from the Court that would not be afforded to other local agencies. Yet no such distinction is evident in the cases themselves, where local democracy appeared, for the first time, as an explicit value of constitutional proportions that functioned like a defense capable of “overriding” claims of racially discriminatory districting.¹³⁵ These principles of local control were later

132. Resistance to federal court intrusion into local affairs first gained voice in federal case law in a series of dissents in voting rights and desegregation cases. In *Perkins v. Matthews*, for instance, Justice Black bemoaned federal oversight of local boundary changes under the Voting Rights Act, finding such interference to be an “utter degradation of the power of the States to govern their own affairs” analogous to British repression of the American colonies. *Perkins v. Matthews*, 400 U.S. 379, 403, 407 n.7 (1971) (Black, J., dissenting); see also *City of Rome v. United States*, 446 U.S. 156, 201 (1979) (Powell, J., dissenting) (describing “local control of the means of self-government [as] one of the central values of our polity” (footnote omitted)); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 253 (1973) (Powell, J., concurring in part, dissenting in part) (“Communities deserve the freedom and the incentive to turn their attention and energies to this goal of quality education, free from protracted and debilitating battles over court-ordered student transportation.”); Goodwin Liu, Brown, Bollinger, and *Beyond*, 47 *How. L.J.* 705, 718-27 (2004) (tracing the origins and longevity of the value of local control in the education context).

133. *Wright*, 407 U.S. at 477-79 (Burger, C.J., dissenting) (emphasis added).

134. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973). Joan Williams has argued that in *Rodriguez* and *Milliken v. Bradley* (discussed *infra*), the Burger Court’s celebration of local autonomy reflected Thomas Jefferson’s exaltation of local self-governance and distrust of centralized government power, as well as nineteenth-century local government theorist John Dillon’s concern about protecting private property from redistribution by municipalities. See Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 *Wis. L. Rev.* 83, 102-03, 106-07.

135. In 1974, a circuit court opinion noted that “[a]t least until *Milliken v. Bradley*, the law was clear that political subdivisions of the States may be readily bridged when necessary to vindicate federal constitutional rights.” *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930, 934 (7th Cir. 1974) (collecting cases) (internal citation omitted). By the 1990s, local control had further strengthened to narrow constitutional liability. See David S. Tatel, *Judicial Methodology, Southern School Segregation, and the Rule of Law*, 79 *N.Y.U. L. Rev.* 1071, 1126 (2004) (remarking upon the “virtual absence in [*Board of Education v. Dowell*, 498 U.S. 237 (1991) and *Missouri v. Jenkins*, 515 U.S. 70 (1995)] of any concern about the

exported to the housing context, confirming that it was local government, not education in particular, that warranted restraint by federal courts.¹³⁶

The insulation from remedies under federal law that appeared in the education cases was reminiscent of earlier federal neutrality with respect to local borders, but it rested on a new view of local governments. Local agencies enjoyed the status of “bona fide political entit[ies],”¹³⁷ rather than “department[s] of the State,”¹³⁸ and their borders could not be “casually ignored or treated as a mere administrative convenience”¹³⁹ Through this lens, local governments enjoyed rights to self-determination derived from their role as small-scale democracies elected by a horizontal base of constituents, rather than, as in the pre-civil rights phase, from a vertical delegation by their states. Their claims to autonomy were rooted not in an entitlement to participation and control at a certain small scale of democracy, but rather in the democratic autonomy of the polis as defined by existing borders.

In *Milliken v. Bradley*, most notably, the Court struck down a district court’s remedial reorganization of multiple school districts into clusters within a metropolitan desegregation area.¹⁴⁰ Parents retained local control under the lower court remedy (albeit over new geographic territories)—a remedy that preserved proximate democratic access and local accountability but shifted local borders. This did not, however, satisfy the Court’s vision of protected local autonomy.¹⁴¹ In his *Milliken* dissent, Justice White expressed his frustration with this hardening of local boundaries: “[P]resently constituted

seriousness of the Fourteenth Amendment violations or the educational harms of segregation, particularly when compared to the majority’s emphasis on the virtues of local control”); see also *id.* at 1131; Williams, *supra* note 134, at 110-11 (observing that *Milliken* and *Rodriguez* and other Burger Court opinions elevated local sovereignty to a “quasi-constitutional principle” and “extol[led] local autonomy to constrict the scope of the fourteenth amendment”).

136. See *supra* note 103.

137. *Wright*, 407 U.S. at 479 (Burger, C.J., dissenting).

138. *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923).

139. See *Milliken v. Bradley*, 418 U.S. 717, 741 (1974). Notably, however, the school district borders at issue in *Milliken* had been drawn not by the local districts themselves but by the state. *Id.* at 727, 790-91.

140. *Id.* at 733-34; *Bradley v. Milliken*, 345 F. Supp. 914, 918, 928 (E.D. Mich. 1972). The district court decision on appeal had found that actions by state and local educational authorities had intentionally segregated Detroit’s schools from its surrounding areas and that a meaningful remedy could not be achieved within the largely black school district’s existing boundaries. See *Milliken*, 418 U.S. at 724-29. Consequently it consolidated fifty-three suburban school districts plus the City of Detroit into a single desegregation area to be redivided into racially integrated, spatially contiguous clusters. See *id.* at 732-34. The desegregation plan imposed a busing scheme comparable to existing patterns in terms of time and distance, and better than an intradistrict remedy in terms of remedial costs. *Id.* at 813-14 (Marshall, J., dissenting).

141. Thus it was that Judge Edwards, one of the authors of the Sixth Circuit decision on appeal, later reflected that *Milliken* “imbued school district boundaries . . . with a constitutional significance which neither federal nor state law had ever accorded them.” See ALEXANDER POLIKOFF, *WAITING FOR GAUTREAUX* 125 (2006).

school district lines do not delimit fixed and unchangeable areas of a local educational community.” Rather, “local authority may simply be redefined in terms of whatever configuration is adopted” through restructuring, with parents within a restructured school system “continuing their participation in the policy management of the schools” that concern them.¹⁴² After *Milliken*,¹⁴³ however, it seemed that remedies affecting one local government to redress unconstitutional harms proven against another constituted an excessive exercise of federal power—akin to punishing one state for liability proven against another rather than remedying harms committed by departments of the state by restructuring state administration.¹⁴⁴

A case soon after *Milliken* confirmed that the borders of local governments enjoyed a special status when it came to federal equitable control. In *Hills v. Gautreaux*, a unanimous Court affirmed a remedial integration plan to locate new public housing units across an entire metropolitan area, even though the plan subjected nondefendant local governments to court authority.¹⁴⁵ The order thus moved people across local borders and into “innocent” jurisdictions,¹⁴⁶ but by its terms “would not consolidate or in any way restructure” the affected cities, and the decision emphasized that it would not “displace” local governments’ “rights and powers”—a strong mark of federalist deference.¹⁴⁷

This third era also rejected the view of local governments animating

142. See *Milliken*, 418 U.S. at 778 (White, J., dissenting).

143. *Milliken*, of course, did not occur in a vacuum. The 1974 decision’s view of local governments as independent democracies aligned with two voting rights cases (*Avery v. Midland County*, 390 U.S. 474 (1968), and *Kramer v. Union School District*, 395 U.S. 621 (1969)) that afforded citizens equal representation before local governments. It thus turned away from *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719 (1973), a case in tension with *Avery* and *Kramer*, which granted some types of special districts more flexibility to design participatory governance schemes outside of one person one vote constraints.

144. In this way, *Milliken* implicitly rejected any analogy between local agency borders and state apportionment lines, even where both were established by the state. It parted ways with precedent such as *Reynolds v. Sims*, which had looked at the state as a map whose subdivision lines could be moved, rather than as a landscape of autonomous jurisdictions with inherent rights to their borders as presently defined. See *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).

145. *Hills v. Gautreaux*, 425 U.S. 284, 305-06 (1976); see POLIKOFF, *supra* note 141 (providing an engaging history of the development of the case and its relationship to contemporaneous precedent).

146. Indeed, the order did not permit the Chicago Housing Authority to build public housing units outside of Chicago—an aspect of the relief sought by the petitioners. Rather, it permitted metropolitan relief only with respect to the Section 8 program, in which HUD contracted directly with willing developers and landlords without exercising “a coercive effect on suburban municipalities.” *Hills*, 425 U.S. at 305. The availability of metropolitan area relief was justified narrowly based on HUD’s operating definition of the Chicago housing market (which included incorporated suburbs surrounding the City of Chicago) and the authority of HUD and the Chicago Housing Authority to operate beyond Chicago city lines in the private housing market. *Id.* at 298-99.

147. *Id.* at 305-06.

Hunter, and preserved in *Gomillion* and *Reynolds*, that local agencies derive both their authority and, subsequently, their constitutional liability from their status as subdivisions of the state. The Court had only recently articulated that it constituted “state-imposed segregation” when a local school board operated under de jure segregation (a theory reminiscent of the *respondeat superior* liability presented in *Hunter v. Pittsburgh*),¹⁴⁸ but it diverged sharply from this position in *Milliken*. In the latter case, the Court rejected a lower court finding that a defendant school district was an instrumentality of the State of Michigan and its statewide school board, making the city school board’s actions those of a state agency.¹⁴⁹ By severing state accountability in this way, the Court required plaintiffs to establish liability against each local government subjected to federal equitable power.

Federal review thus transformed across the twentieth century from a posture of neutrality to scrutiny to active deference. The resulting view of local autonomy embraced more than a respect for a particular scale of accessible democracy; it represented a justification for actual borders, whatever their configuration or history. Where state autonomy had long issued a license to shape local borders, local autonomy now constituted a defense of existing local borders, even those drawn using segregation’s pen.

For this reason, antidiscrimination law in the annexation context developed a few major substantive limitations. First, with the limited exception of actions to consolidate racially gerrymandered dual school districts,¹⁵⁰ constitutional

148. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 200 (1973); see also *id.* at 216 (Douglas, J., concurring) (“When a State forces, aids, or abets, or helps create a racial ‘neighborhood,’ it is a travesty of justice to treat that neighborhood as sacrosanct in the sense that its creation is free from the taint of state action.”); cf. *Hunter v. Pittsburgh*, 207 U.S. 161, 179 (1907) (holding that harms caused by local government action should be pled to the state legislature as the responsible body).

149. See *Milliken*, 418 U.S. at 734-35 n.16. By this holding, the Supreme Court minimized the role of the State of Michigan—the entity that granted, defined, and controlled the powers of its subdivisions, both city and suburb. Yet the boundaries between Detroit and its suburbs “were themselves state action that predictably entrenched segregation.” Richard Thompson Ford, *Brown’s Ghost*, 117 HARV. L. REV. 1305, 1314 (2004). One further degree removed, these boundaries were also the indirect effect of state actions—such as municipal incorporation laws, the delegation of certain types of land-use authority to local governments, transportation funding—that had enabled the white citizens of Detroit to leave the city found liable of unconstitutional segregation and move into an “innocent” suburban jurisdiction. See *id.*

150. These cases were limited to those in which the school district lines were drawn to track racial demographics and maintain segregation, see *supra* notes 106-107 (citing cases in which courts struck down racially gerrymandered school district boundaries that predated the Court’s decision in *Brown*), as opposed to those in which courts found that school districts tracked city boundaries that had come to reflect residential racial segregation. See, e.g., *Bradley v. Sch. Bd.*, 462 F.2d 1058, 1064 (4th Cir. 1972) (reversing a lower court consolidation order by reasoning, in part, that the district lines at issue reflected city borders, had existed for more than 100 years, and were not alleged to be motivated by discrimination when established). Such a distinction foreshadowed the intent versus impact standard of Fourteenth Amendment liability later adopted by the Court. See *Washington v. Davis*, 426

and statutory accountability for discriminatory boundaries has only attached to discrete state actions—i.e., any legal consequences have hinged on the racially regressive *movement*, not the historically rooted shape, of local borders. At issue was what the Court in *Gomillion* described as “affirmative legislative action,” rather than decisions made in the past and preserved through inaction over time.¹⁵¹ As a result of this doctrinal characteristic, advocates cannot bring a claim on behalf of a minority community that they have an affirmative right to annexation (a restorative justice approach). Instead, they can claim only a negative right to freedom from discriminatory annexations (such as by establishing that a city approved an annexation of a white area after a long period of disapproving black ones).

This rule permits liability in a limited array of fact patterns, including local agency attempts to deannex black neighborhoods, to detach a white school district in the face of a desegregation order, or to redraw school lines to preserve segregation within unitary school systems.¹⁵² As such, the law can protect the status quo for minority neighborhoods already found within local agency lines, just as the black residents of the City of Tuskegee, Alabama could successfully block their town’s attempt to deannex their neighborhoods. By contrast, minority neighborhoods that are excluded from city lines or school districts cannot bring a claim of discriminatory annexation policy in the absence of a precipitating event demonstrating a racial double standard, such as a proposal to annex white neighborhoods after long refusing to annex black ones. Nor can the law reach a town not seeking to move its borders, but using federal urban renewal funding to “move” minority neighborhoods from inside city boundaries to outside (i.e., by demolishing black homes within boundary lines and replacing that housing with subsidized housing units outside city lines), as was common throughout the small-town South in the late 1960s and

U.S. 229, 242 (1976).

151. *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (distinguishing the deannexation act before the Court in *Gomillion* from the failure to reapportion congressional districts at issue in a prior case); see *Wright v. City of Emporia*, 407 U.S. 451, 465-66 (1972) (reasoning that the timing of a city’s vote to detach to form its own school district—just two weeks following entry of the court’s desegregation order against the county—amplified the stigmatizing effect on the county district’s black children); see also Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 303 (1997) (observing “how important Tuskegee’s pre-existing boundaries were to the Court’s willingness to review” the act altering those boundaries in *Gomillion*).

152. Yet even here, the precedent of the school district detachment cases proves of weakened utility in light of *Milliken*’s restraints on federal equitable power. The detachment cases arose after the remedial authority of the court was already established by the constitutional violation of operating a dual school system—detachment was merely a form of unconstitutional resistance to the court’s desegregation remedy, rather than a freestanding constitutional violation predicating its own invocation of federal equitable power. See, e.g., *Wright*, 407 U.S. at 459 (finding that the operation of the dual school system was the “predicate for the District Court’s action” to stop the formation of the new district).

1970s.¹⁵³ Such a loophole has preserved the status quo with respect to older patterns of segregation within and across town lines.

The absence of any affirmative rights of outsiders to alter local government borders applies even where those outsiders are subject to a city's extended sphere of regulatory authority, which is often the case for unincorporated urban areas. In *Holt Civic Club v. Tuscaloosa*, the Court rejected the due process and equal protection claims of residents of an unincorporated zone outside of city borders but within a city's "police jurisdiction" to enforce city police and sanitary regulations, criminal court jurisdiction, and business-licensing rules.¹⁵⁴ Under Court precedent, Justice Rehnquist reasoned, "the geographical boundary of the governmental unit at issue" had always drawn the spatial contours of voting qualifications.¹⁵⁵ Any other standard would be unworkable for the very reason that local borders "cannot corral the influence of municipal actions," and the cross-border effects of municipal actions would entitle too diffuse an array of extraterritorial actors to the franchise.¹⁵⁶ Where earlier decisions had acquiesced to inadvertent ("arbitrary"¹⁵⁷) spillover effects caused by local agency borders, *Holt* permitted agencies to exert intentional and legally established overflow effects. For unincorporated urban areas like the neighborhood of Holt,¹⁵⁸ borders could be used to confine a city's voting population without confining the city's regulatory domain.¹⁵⁹ The Court's opinion in *Holt* thus further hardened local borders, even as its reasoning deviated from the strong view of local government autonomy articulated by *Milliken*.¹⁶⁰

153. See AIKEN, *supra* note 19, at 322-27; see also *id.* at 326 (identifying the "major factor" animating the choice to locate federally subsidized housing in the Yazoo Delta of Mississippi as "fear by white-controlled municipal governments that increases in housing for blacks within corporate limits will dilute white voting strength," and describing how advocates for improved housing standards were forced to accept relocation outside town lines in exchange for local authorization to seek federal funding and local land use approvals); see also *id.* (describing African-American pockets of Tunica, Mississippi and other southern towns that were pushed outside of city lines).

154. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 61-63 (1978).

155. *Id.* at 69-70.

156. *Id.*

157. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54 (1973).

158. The current plan to route a freeway bypass through the unincorporated Holt community in spite of opposition manifests the effects of this extraterritorial influence and zoning authority.

159. I do not mean to convey unqualified opposition to the outcome in *Holt*, but merely to identify its consequence in the context of the unincorporated urban areas problem. As a policy matter, the decision faced adverse implications on either side. Had the dissenting view prevailed, thus prohibiting overflow regulatory power without voting rights, the decision would likely have encouraged development of middle-class subdivisions approved on county land just outside municipal lines. In those jurisdictions that retained their extraterritorial regulatory power but compensated for it with cross-border voting privileges, such communities would enjoy representation without taxation.

160. The decision celebrated states' "extraordinarily wide latitude" in delegating

This legal structure also means that under the maximum exertion of federal power, jurisdictions can pay a penalty for failure to annex black areas—namely the loss of their power to annex white areas or vacant areas expected for white occupancy without their decision. The underlying concept is thus not to make the victim of double standards in annexation policy whole (i.e., by mandating annexation of black areas), but to build in penalties for discriminatory annexation decisions, or, seen another way, to create incentives to annex minority areas along with white ones. Even these penalties are limited, however, because local governments may offset retrogressive effects from an annexation by making additional changes that strengthen the impact of the minority vote, even if the balance sheet does not completely neutralize the negative impact of the annexation on minority voting strength.¹⁶¹

A deeper look at one of the signature success stories in combating discriminatory annexation illustrates these limitations. Embracing, but not expressly relying upon, the larger context of the city's annexation decision—including the history of black neighborhoods' failed annexation attempts and the town's history of rank racial discrimination using other types of state action—the Court in *Pleasant Grove* affirmed a finding that the city had intended to annex only white areas and had applied a double standard to annexation efforts by black areas.¹⁶² The case, however, represented a hollow victory for the black communities that had unsuccessfully petitioned for annexation. The black neighborhood of Dolomite, for instance, had petitioned Pleasant Grove for annexation after the city withdrew fire and paramedic services to the area, resulting in the death of five community members. Meanwhile, the city revoked free public education for Dolomite children after

authority to political subdivisions, including the freedom to define cities' extraterritorial power, thus reverting to the view of local power before *Milliken*. *Holt*, 439 U.S. at 71; *see also id.* (noting that the "absolute discretion" standard announced in *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) had been qualified, but not by much).

161. *See City of Petersburg v. United States*, 354 F. Supp. 1021, 1024, 1031 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973) (summarily affirming a district court finding that a city's creation of single-member districts could cure a retrogressive annexation that effectuated a nearly ten percent drop in the black proportion of the city population, a change that transformed the black community from a voting majority to a voting minority); *City of Richmond v. United States*, 422 U.S. 358, 371 (1975) (considering a "neutralization" scenario similar to that in *City of Petersburg*, and holding that the standard of "retrogressive effect" under the Voting Rights Act should be the net effect of an annexation change offset by other changes [i.e. the net increase or decrease in minority voting strength] rather than the achievement or failure to achieve maximization of minority voting strength); *see also City of Port Arthur v. United States*, 459 U.S. 159, 167-68 (1982).

162. *City of Pleasant Grove v. United States*, 479 U.S. 462, 465-67 (1987); *see also City of Pleasant Grove v. United States*, 623 F. Supp. 782, 787-88 (D.D.C. 1985) (describing the city's history of discrimination in numerous contexts). Families were thus faced with the choice of paying tuition at the Pleasant Grove schools or enrolling in the Birmingham school district (with schools that were eighty-four percent black). *See Stout v. Jefferson County Bd. of Educ.*, 845 F.2d 1559 (11th Cir. 1988).

desegregation orders placed the black children of Dolomite in Pleasant Grove's school district (whose schools were ninety-four to ninety-seven percent white). Desperately lacking emergency services and access to free public education, Dolomite sought annexation to all its surrounding municipalities and was annexed to the racially integrated city of Birmingham. Dolomite families brought a lawsuit seeking injunctive relief to prevent the Pleasant Grove school district from excluding the children until they had achieved unitary status in compliance with desegregation orders, arguing that "but for the racially motivated refusal of Pleasant Grove to annex Dolomite, the Dolomite students would remain in the Pleasant Grove schools today, as the annexation to Birmingham would never have occurred."¹⁶³ The district court denied their claims, and the Eleventh Circuit affirmed.¹⁶⁴ Thus the city of Pleasant Grove successfully used annexation policy to prevent educational and political integration, in spite of prevailing civil rights actions along both education and voting rights fronts.

In the Fourteenth Amendment liability context, a contemporary claim of racial discrimination in boundary changes is further limited by the required showing of racially discriminatory purpose.¹⁶⁵ If a racially disparate impact showing is insufficient, the Constitution cannot reach instances in which a boundary change (such as the formation of a new city or school district) creates a local government that is highly racially segregated, but otherwise lacks overt indicia of discriminatory purpose.¹⁶⁶ The school district detachment cases failed to overcome this limitation—while this precedent blocked the formation of new districts where such actions were expressly motivated by race and a resistance to desegregation, no case has enjoined the formation of new incorporated cities that are predominantly white.¹⁶⁷

163. *Stout*, 845 F.2d at 1562.

164. *Id.* at 1563-64.

165. See *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Milliken*, 418 U.S. at 745 (finding that a metropolitan area remedy might be appropriate "where district lines have been deliberately drawn on the basis of race"); *Bradley v. School Bd.*, 462 F.2d 1058, 1064 (4th Cir. 1972) (refusing to move local borders because they were not alleged to be motivated by discrimination when established); see also *supra* note 102 (citing academic literature analyzing the intent versus impact standard).

166. See NANCY BURNS, *THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS* (1994) (exploring the role of racial self-segregation by whites in the widespread incorporation of new municipalities during the post-World War II period); Williams, *supra* note 134, at 118 (arguing that *Milliken* and other Burger Court cases emphasizing local autonomy had the effect of insulating metropolitan segregation between cities and suburbs from Fourteenth Amendment protections).

167. See, e.g., *Caserta v. Vill. of Dickinson*, 672 F.2d 431, 432 (5th Cir. 1982) (rejecting constitutional challenges to a municipal incorporation for lack of evidence of discriminatory purpose); *Taylor v. Twp. of Dearborn*, 120 N.W.2d 737, 743 (Mich. 1963) (rejecting a Fourteenth Amendment challenge to the incorporation of a new, predominantly white community); *Marshall v. Mayor of McComb City*, 171 So. 2d 347, 350 (Miss. 1965) (rejecting a challenge to the deannexation of a predominantly black neighborhood from an otherwise predominantly white town because plaintiffs "failed to offer any tangible evidence

Lastly, the status of local borders has simply hardened in the face of antidiscrimination law. This is the legacy of *Milliken*'s interdistrict violation rule, that a federal court lacks the equitable power to move the local borders of multiple districts to remedy liability established against a single district.¹⁶⁸ The plaintiffs, the Court held, had the constitutional right "to attend a unitary school system in [their existing school] district," not the constitutional right to demand that nondefendant suburbs facilitate their integration.¹⁶⁹ Courts thus cannot take a metropolitan-wide, problem-solving approach to remedying a problem of spatial inequality; instead, any remedial court action to move local borders among jurisdictions—i.e., to take action that would affect more than one local government—requires that each of the affected governments actively promoted racial discrimination in their own or an adjacent district. This deference to local autonomy confines both the constitutional rights of minority plaintiffs and the remedial flexibility of the district court. While this limitation did not preclude successful constitutional actions against all segregated borders, it did require proof that any affected jurisdictions actively and purposefully contributed to metropolitan residential segregation.¹⁷⁰

that the city was either motivated by racial considerations or that it in fact acted for reasons of race").

168. See *Milliken*, 418 U.S. at 745 ("[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.").

169. See *id.* at 746-47 ("The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit district to attend schools in [the suburban districts], they were under no constitutional duty to make provisions for Negro students to do so.").

170. Justice Stewart, who provided the majority's fifth vote, wrote a concurrence identifying a window for interdistrict liability, and therefore interdistrict relief, reserved by *Milliken*. He described three scenarios in which an interdistrict violation could be shown that would warrant an interdistrict remedy: officials drew or changed school district boundaries to effectuate segregation (the *Scotland Neck* scenario discussed *supra*), officials transferred schools and school territories between districts, or housing or zoning laws purposefully furthered residential segregation underlying school district segregation. 418 U.S. at 755 (Stewart, J., concurring). Several lower courts determined that state and local authorities in some cities—including Pittsburgh, Indianapolis, Wilmington, and Louisville—had perpetuated the interdistrict harms remediable under *Milliken*, and the courts ordered remedial interdistrict busing or district consolidation as the cure. See, e.g., *Hoots v. Pennsylvania*, 672 F.2d 1107, 1110, 1120 (3d Cir. 1982) (affirming the consolidation of five of the school districts surrounding Pittsburgh into a single district based on a finding that the state and county board of education had drawn the five school districts to effectuate segregation); *United States v. Bd. of Sch. Comm'rs*, 637 F.2d 1101, 1116 (7th Cir. 1980) (affirming an interdistrict desegregation remedy to bus children across district lines where the state had purposefully discriminated when (1) the legislature made a deliberate decision to maintain school segregation by failing to extend the boundaries of the Indianapolis public schools in concert with an expansion of the city limits of Indianapolis, and (2) the city housing authority had located all public housing within the old city limits of Indianapolis in order to keep black families out of suburban schools and neighborhoods); *Evans v. Buchanan*, 555 F.2d 373, 381 (3d Cir. 1977) (en banc) (ordering that the school districts of

In the context of municipal underbounding, this quiet fortification of local borders meant that by the time the Eleventh Circuit heard *Burton v. Belle Glade*, the case discussed *supra* in Part I, the court reached the conclusion that:

Court-ordered *annexation* is a remedy of unprecedented scope and magnitude. Indeed, we are not surprised that Appellants cannot point to a single case, nor have we been able to find one, that has ordered so unusual a remedy. For it is one thing for a court sitting in equity to proscribe policymakers from employing unambiguously racial bases for decision-making and to order government entities to make annexation decisions on race-neutral grounds, but it is quite another to force a municipality to expand its physical boundaries by annexation.¹⁷¹

Belle Glade thus adopted the view that annexation was firmly located in the domain of local government autonomy, and that this domain lay outside the reach of constitutional and statutory civil rights liability for discriminatory state action.¹⁷²

Local borders thus gained legitimacy, rationality, and power in the years shortly after the peak of civil rights reform. Local autonomy, the guardian of these borders, demonstrated a peculiar ability to turn a source of historic liability into a defense against a contemporary remedy. A pillar of local autonomy had become its historic authenticity, its roots in the organic decisionmaking of the people over time—in contrast to an artificial, one time intervention by a court's blunt judgment. Yet for unincorporated urban areas, it is in this very history of local growth that one finds borders drawn to effectuate segregation and discrimination. Seen through the lens of local autonomy, the longevity and history of a local border make it draconian for a federal court to exercise its power to intervene. Seen through the lens of antidiscrimination, the historic roots of a local border can trace a city's racial narrative, documenting the "root and branch" of segregation. The final decades of the twentieth century

Wilmington and its Northern suburbs "shall be reorganized into a new or such other new districts as shall be prescribed by the state legislature or the State Board of Education" following the lower court finding of interdistrict violations); *Newburg Area Council, Inc. v. Louisville Bd. of Educ.*, 510 F.2d 1358, 1359 (6th Cir. 1974) (holding that all affected school districts had been found guilty of de jure segregation and had themselves ignored boundary lines in order to perpetuate segregation, thus giving the district court the power to consolidate the districts); *Evans v. Buchanan*, 393 F. Supp. 428, 433-36 (D. Del. 1975) (three-judge court), *summarily aff'd by Buchanan v. Evans*, 423 U.S. 963, 963 (1975) (three Justices dissenting) (finding interdistrict violations including state transportation funding and policies, optional attendance zones, racial discrimination in public housing and lending, and other acts of state law); *see also* DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 46-47 (1995).

171. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1200 (11th Cir. 1999).

172. Consistent with this view that annexation is special, Jerry Frug has argued that the Court has invoked a conception of "community" in the context of annexation that "relies on the romantic, touchy-feely image commonly associated with the term" and "evokes the idealized feeling of belongingness, oneness, solidarity, and affective connection imagined to have existed in a traditional, face-to-face village" Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 267 (1993).

chose the former view, making history a shelter from, not an impetus for, liability.

Nonetheless, civil rights attorneys can address municipal underbounding through the courts, and indeed they continue to do so. Some plaintiffs are able to produce bodies of proof capable of satisfying heavy liability burdens, and other areas of law have seen the muscular exercise of federal equitable power that could fortify municipal underbounding claims.¹⁷³ Federal or state statutory reform could support these outcomes.¹⁷⁴ However, local autonomy has come to represent a particular barrier to spatial inequality in the movement of local borders. In civil rights litigation, unincorporated urban areas must come up against local autonomy as an opponent, rather than marshalling it as an asset, as the next strategy seeks to achieve.

173. See, e.g., *Missouri v. Jenkins*, 495 U.S. 33, 52-58 (1990) (holding that a federal court had the remedial authority to order a local government with taxing authority to levy taxes in excess of a state limit if necessary to remedy a Constitutional violation); *Final Judgment, Kennedy v. City of Zanesville*, (OS)H1071702 (29617) 080502 (S.D. Ohio July 10, 2009) (awarding plaintiffs nearly \$10.9 million in damages after finding that water district boundaries were drawn to deny plaintiffs access to public water based on their race); *Plata v. Schwarzenegger*, No. C01-1351 THE, 2005 WL 2932243 (N.D. Cal. May 10, 2005) (unpublished opinion) (finding the federal equitable jurisdiction to appoint a receiver to take over the State of California's prison health care system); cf. Doug Rendleman, *Brown II's "All Deliberate Speed" at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?* 41 SAN DIEGO L. REV. 1575 (2004) (reflecting on federal courts' role in defining constitutional rights to desegregated education, implementing that right through injunctions, and withdrawing from injunctive relief in the era after *Milliken*, but arguing that nonetheless, courts would continue to play an important role in school desegregation lawsuits). On the other hand, a 2009 Supreme Court opinion pointedly criticized institutional reform injunctions for raising "sensitive federalism concerns," particularly where decrees affected state or local budget priorities. See *Horne v. Flores*, 129 S.Ct. 2579, 2593-94 (2009); see also *id.* at 2631 (Breyer, J., dissenting) (noting that "the Court may mean its opinion to express an attitude, cautioning judges to take care when the enforcement of federal statutes will impose significant financial burdens upon States").

174. One model for such reform dates to 1977, when Professor Donald Hagman proposed a civil rights statute to prohibit the use of boundary lines as a means of separating minorities from housing, services, or voting rights. His "White Curtain Act" made it unlawful for any local government to move or fail to move a local border (a definition that reached decisions on annexation, consolidation, detachment, and incorporations) with a discriminatory motive or with a discriminatory impact not shown to be necessary to achieve a constitutionally valid purpose. See Donald G. Hagman, *Recommended Statute to Preclude Racially Disadvantaging Local Government Boundary Change*, 54 U. DET. J. URB. LAW. 1063, 1063-68 (1976-1977). As a freestanding federal civil rights bill, such a proposal is at least as unlikely today as its author deemed it to be in 1977. Yet discrete amendments to the Fair Housing Act and the Voting Rights Act could achieve similar goals through a more modest legislative process.

IV. EMPOWERING COUNTIES TO REFORM THE REGIONAL POLITICAL ECONOMY

Unincorporated urban areas thus represent a living archive of two of the twentieth century's most dramatic transitions in local government: the increasing privatization of municipal services described in Part II, and the development of local autonomy as a defense to the movement of borders described in Part III. These two patterns moved in a synchronous relationship, such that by the time local governments were subject to liability for racial discrimination in the allocation of services and the drawing of their borders, the era of subsidizing suburbanization had all but closed. In its place stands a complex edifice of pricing mechanisms for local government attention—a system in which citizens look more like consumers served according to their purchasing power rather than producers who receive services in exchange for participation in the municipal economy. City borders have become an important way to sort desirable and undesirable residents, with annexations dependent on the perception, if not the reality, of positive fiscal impacts for the city budget. Even in communities that can show a compelling history of racialized annexation patterns, little can be done as a matter of civil rights law.

This new landscape of hardened American municipal borders—subject to a marketplace for entry and residence and insulated from federal antidiscrimination law—impedes solutions to the unincorporated urban areas issue that rely on the tools of local activism or civil rights litigation. Yet the very local autonomy fostered over the twentieth century suggests an alternative strategy: to preserve local control as against state or federal power, but to reshuffle the metropolitan agenda by giving county governments a stronger and more regional role to play. In response to municipal underbounding, such an approach would mean altering local agencies' authority over annexation by giving counties and their residents a stronger role in negotiating and influencing the terms of annexations. Such a platform of reforms, discussed below in Part IV.A, could position counties to serve as regional coordinators of growth while keeping their power balanced with continued city influence over matters of annexation and urban development. A county reform remedy has several potential downsides and uncertainties, as discussed here, but it holds greater promise of evolving progressively toward redistributive goals on annexation. Even if counties take the lead, however, the question remains who will pay for the capital infrastructure necessary to bring unincorporated urban areas up to city code standards. No easy answers are available (with matters of infrastructure financing, they never are), but, as explored in Part IV.B, promising suggestions can be found in our very own urban history and current policy trends.

A. *Overcoming County Powerlessness*¹⁷⁵ in *Annexation Law*

To some people on the urban fringe, “terms like ‘metro government’ and ‘annexation’ are calls to a holy war of resistance.”¹⁷⁶ Indeed, residents of some unincorporated suburbs have fought venomous battles against central city annexation attempts. Academic and public debates about American annexation law have pivoted around this story, focusing on the tensions between revenue-hungry cities and property-rich suburban residents opposed to annexation, while largely overlooking annexation processes for unincorporated residents seeking inclusion.¹⁷⁷ As a result, annexation law and the academic and policy debates about it have focused on allocating power between two groups: city governments and the residents of territory proposed for annexation. On one side, that dichotomy emphasizes cities’ need to capture growth at their fringe in order to grow their population and revenue base. On the other side, the debate emphasizes self-determination and the consent of the governed, the idea that residents should not be coerced into municipal citizenship. Annexation laws are commonly sorted and critiqued for how they distribute power between these two groups—in other words, for their position on the spectrum between enabling city expansions against suburban economic interests and prohibiting such action without suburban consent.

The unincorporated urban areas issue demands that we complicate the constituencies of annexation decisions and discard some of our current assumptions. As a first change to this end, annexation law must anticipate that the interests of “annexees” (the residents of an unincorporated area proposed for annexation), are not monolithic—they include outsiders seeking inclusion against city interests. While annexation policy has always accounted for annexees in general, it has largely assumed that in cases of conflict, it is annexees who oppose annexation and the city that stands to gain from an expansion.¹⁷⁸ Through the unincorporated urban areas lens, we notice that

175. This nomenclature extends and refers back to the concept of “city powerlessness,” which was first developed by Gerald Frug in a pathbreaking article arguing that our conception of cities as subdivisions of state power has constrained their ability to address current problems or control their development. See Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1083-90 (1980).

176. See *Moorman v. Wood*, 504 F. Supp. 467, 469 (E.D. Ky. 1980); BRIFFAULT & REYNOLDS, *supra* note 58 (excerpting same).

177. See, e.g., Gillette, *supra* note 58; Reynolds, *supra* note 58. *Cities Inside Out* sought to complicate this narrative of higher income suburbs that resist annexation to adjacent municipalities. The article identified the unincorporated urban areas problem and situated it within what I called an economic gravity pattern of urban development, which recognized the interaction of “employment magnetism, housing necessity, and suburban aspiration” to draw low-income households to the relatively unregulated urban periphery. See Anderson, *supra* note 2, at 1129-30. I argued, as I further develop here, that this phenomenon disrupts our typical understanding of annexation law. *Id.* at 1133.

178. State annexation laws vary in the power they afford to annexees (whether

residents with a stake in annexation policy may be neither rich nor opposed to city inclusion. They may actively want, and need, out from under sole dependence on county government, where their political voice, their housing choices, and the habitability of their homes and communities may be compromised.¹⁷⁹

In addition to illuminating these outsiders as a constituency of annexation policy, the unincorporated urban areas issue suggests two other interests that must be substantively accounted for: county governments and residual county residents left in unincorporated jurisdiction following an annexation. Both are largely left out of the annexation equation, both academically and legislatively.¹⁸⁰

Yet counties are not, as current law would suggest, disinterested observers. They serve as the residual, single, general-purpose local government for any area that lies outside of city lines.¹⁸¹ The revenues (both taxes and fees) generated by unincorporated areas determine the scope and extent of basic services in these areas, and unincorporated land defines the territory served by county providers of law enforcement and other services. These two interests mean that unincorporated area resident taxpayers and service recipients, as well as county employees and their unions, have a stake in annexation decisions. In some counties, some or all unincorporated areas are wealthy holdouts that have resisted annexation to adjacent cities. In such cases, counties may have an interest in keeping these areas unincorporated to retain a higher share of the area's property tax revenue.¹⁸² In municipal underbounding scenarios, unincorporated areas are likely to represent a net fiscal loss for counties, because they include the urbanized land left over after cities have cherry picked (through annexations as well as municipal incorporations) most or all

exceedingly strict annexee approval requirements that favor opponents to annexation or no political power for annexees at all), but they pivot on the empowerment or disempowerment of *opposition* to annexation rather than the seeking of annexation against city interests.

179. See Anderson, *supra* note 2, at 1140-59.

180. For a legislative picture of counties' current role in annexations, see *supra* notes 69-73 and accompanying text. Two other scholars of annexation policy have identified counties and their residual residents as important constituents affected by annexations, though neither has been focused on the interests or influence of these groups. See Gillette, *supra* note 58, at 840 (noting "the interests that residual residents from the source jurisdiction have in the outcome of an annexation," though focusing on the interests of the annexing municipality and the residents of the area to be annexed); Reynolds, *supra* note 58, at 255-56 (identifying counties among those units of local government affected by annexations, and advising that states should account for the financial impact on counties and other governments whose territory is reduced through annexations).

181. And, as I have explored extensively, many counties struggle in the provision of urban government to unincorporated urban areas. See generally Anderson, *supra* note 2.

182. In addition, these areas may purchase higher levels of a la carte services from the county (using assessment districts and other financing techniques described in Part II), which gives county employees and their unions a particularly high stake in retaining these areas as unincorporated service territories.

commercial, industrial, or high-end residential parcels with high tax capacity.

One might presume that counties can improve the revenue generative capacity of unincorporated urban areas in ways other than annexation, such as the exercise of county land use powers to select for projects that will improve county revenues. In many states, however, the property tax revenue generated by unincorporated urban areas is not soundly within counties' control for two reasons. In most states that have unincorporated urban areas, unincorporated residents at the municipal fringe are also subject to extraterritorial municipal regulatory authority.¹⁸³ This means that for a certain radius outside city lines (e.g., five miles from all city borders) cities in those states have the power to zone, regulate, and even condemn land without according voting rights or annexation to that area's residents.¹⁸⁴ This policy makes good sense from the point of view of anti-sprawl growth management (because it discourages counties from permitting sprawling land uses at the city periphery in order to generate county revenue), but it leaves counties without regulatory authority to improve their tax base in these areas, further hindering counties' control over their own fiscal condition. In addition to counties' compromised land use powers at the urban fringe, county government is practically weak on land use as well. Counties tend to have thinner staffs and fewer laws governing land use—features that have the desirable effects of keeping governance costs lower for rural landowners and providing more libertarian land use regimes that allow construction of necessary but unpopular uses (like public waste management facilities, major roadways, and affordable housing).

County service impacts due to annexation relate not simply to revenues but to efficiencies. Annexations that form "islands" or "peninsulas" of county land surrounded by property within city lines create noncompact and noncontiguous service areas for counties—a situation that runs against the most basic principles of efficiency in urban planning and service provision. (Imagine here, county deputy sheriffs driving twenty minutes from their rural stationhouse to respond to a 911 call regarding gang violence in an unincorporated urban area, when city police trained in urban crime are available just blocks away.)¹⁸⁵ Many counties thus govern scattered urban pockets along with large swathes of rural land.

Counties' interests in annexations are not monolithic, and there is surprisingly scarce research about their political economies or decisionmaking patterns.¹⁸⁶ Yet one fact is apparent: counties have a fiscal interest in supporting and promoting the annexation of high-poverty unincorporated urban

183. See Anderson, *supra* note 2, at 1152-54; Briffault, *supra* note 52.

184. See *supra* notes 154-160 and accompanying text.

185. See Anderson, *supra* note 2, 1106-12 (describing this type of illogical service provision in unincorporated urban areas across the country).

186. See *id.*, which began the process of correcting this deficit. This author is currently at work on a comprehensive analysis of the political economy of county government.

areas whether or not they particularly care about the well-being of the residents there. While politics may not always follow fiscal rationality, particularly given the influence of municipalities over county government (as discussed below), this fiscal interest means that in the usual case, particularly in counties without ample tax bases (where unincorporated area service needs will be greatest), we can expect counties to seek withdrawal from the problematic management of urban land if we get them to the table in annexation decisions. If we think of annexation in terms of assigning an entitlement that will foster the most efficient negotiated outcome, states' current systems give it only to some combination of city governments and residents of the area to be annexed.¹⁸⁷ Counties also need a voice, even as they should not hold an entitlement to approve or disapprove annexations alone.

The other major constituency of an annexation decision is unincorporated residents who are not in the area proposed for annexation. This may be a large group: for instance, all residual county unincorporated residents affected by the county's loss of property tax revenue following an annexation. Or, it may be a small one: the residents of an area about to become an island or isolated peninsula of unincorporated land. For example, if a boundary commission is considering an annexation proposal from a greenfield site or middle class subdivision, should an adjacent neighborhood that is excluded from the territory proposed for annexation have participation or protest rights in the decision over that annexation? The excluded neighborhood is neither the annexee nor the annexor. Yet it may have interests at stake. It may expect that the diminution in its local unincorporated population will reduce the attention paid by county officials or county services like law enforcement. Or it may simply see the proposed annexation as the most cost-effective way to promote its own annexation. For reasons of bureaucratic efficiency if not fairness, the law should give these residents some place in the negotiations over annexations.

While this Article advocates empowering counties and their residents over matters of annexation, such changes must be balanced against and limited by the positive attributes of city control and veto power over some annexations. City power and discretion over matters of annexation enables cities to capture population growth and new revenues at their fringes, which is a critical element of the "elasticity" widely believed essential for urban fiscal health.¹⁸⁸ Sound urban growth management requires that cities can limit counties' ability to permit new land uses outside city lines that will facilitate uncoordinated and inadequately served urban sprawl that can later be handed over to a city's

187. Clayton Gillette usefully conceptualized annexation in this way and concluded that concurrent majorities (direct democratic majority in area to be annexed plus majority of representative body or electorate of municipality) optimize interlocal negotiations. *See* Gillette, *supra* note 58.

188. *See generally* DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993); Reynolds, *supra* note 58.

balance sheet. For these reasons, advocates for giving cities stronger annexation powers—including the “involuntary annexation” power to annex areas against residents’ will—ground their views in the sensible and worthwhile goal that city boundaries encompass city growth.¹⁸⁹ They argue that annexation law should prevent wealthy unincorporated suburbs from freeriding on city taxpayers by enjoying the advantages of adjacency to city life without paying city taxes for city services.

City boundaries should indeed encompass urban land, but that principle should apply across the board, whether the urban land at issue is rich or poor.¹⁹⁰ To find that consistency, balancing free rider effects against inclusionary goals, cities cannot be the sole governmental negotiating interest in annexations. Thus, rather than substituting strong counties for strong cities (which would simply empower a new self-interested local government in place of the old one) the proposals here seek to balance city and county interests. Indeed, certain existing features of county government make it an attractive negotiating partner over annexation, even from the perspective of city interests. Residents of incorporated areas enjoy the same voting rights in county government as those held by unincorporated area residents. Political accountability to city interests is thus built in to county governance. When it comes to interlocal negotiations and regional decisionmaking of the kind described here, stronger counties do not necessarily mean weaker cities.

1. *Specific reforms*

State laws can bring counties into annexation decisions in two ways: (1) by empowering counties and their residents to initiate, facilitate, and consent to annexations; and (2) by protecting counties, where appropriate, from annexations that will cherry-pick unincorporated land to leave behind residual territory that is underserved, inefficient to govern, or too costly to serve at habitable standards.

In the category of empowerment, state laws should give counties review authority of any annexation proposal by creating county input and comment mechanisms before annexation courts or agencies, and by giving counties (both elected representatives and unincorporated area residents) a stronger presence equal to that of municipal interests on interlocal annexation decisionmaking boards. In addition, county residents outside the territory proposed for an annexation should have formal protest rights to trigger a public hearing or give input regarding annexation impacts if they can meet statutory petition

189. See Reynolds, *supra* note 58.

190. Indeed, Reynolds recognized the need for consistent application of an urban land inclusion principle when she argued that cities’ involuntary annexation powers should be matched by a corresponding duty to annex unincorporated areas that satisfy statutory annexation criteria and petition for inclusion. See Reynolds, *supra* note 58, at 271.

requirements.¹⁹¹ States vary in their methods of annexation decisionmaking, and thus the mechanisms for county input and representation would take varied shapes across the country.

A range of three approaches is possible. Direct and coequal representation with cities is the strongest option. The minority of states with boundary commissions provide a model of literal power sharing by seating county representatives alongside city representatives and a local citizen (who may be an unincorporated area resident). In the second approach, applicable to states with third-party annexation decisionmakers like a municipal court, the statutory annexation review criteria should include fiscal and service impacts on counties in a manner analogous to the use of fiscal impact analysis for city land use decisions, including annexation.¹⁹² Annexation criteria should also tightly constrain municipal underbounding (further detailed below) and promote the annexation of any urbanized land at the municipal fringe. The weakest model for county input, but nevertheless an improvement on most states' status quo, is to give counties a formal review and comment process before city legislatures.

Equally importantly, empowerment must include initiation rights. State law should permit counties to petition for annexation on behalf of their unincorporated neighborhoods, a procedure not currently available in any state.¹⁹³ Such a reform would provide the additional benefit of alleviating the costs and administrative burdens on landowners amenable to annexation—no small feat when it comes to low-income neighborhoods without the means to pay for legal counsel, filing fees, and the mobilization of local consent for a petition.

Serious inclusion of county interests in annexations must also give counties or eligible unincorporated residents the ability to compel annexation to an adjacent municipality in certain narrow circumstances.¹⁹⁴ In particular, there are two circumstances where giving counties the entitlement to compel annexation is both sensible and fair. First, where state law grants the power of involuntary annexation to municipalities (i.e., the right to annex territory without that area's consent), it should provide a corresponding right to enforce annexation of low-income areas against a city.¹⁹⁵ While few states currently grant involuntary annexation powers in any case, many of them give cities such powers with respect to county islands. Such a policy promotes the elimination of higher income islands, but it retains city discretion to exclude low-income

191. For instance, protest rights might be limited to a certain percentage of the landowners within a defined distance from the area proposed for annexation.

192. See *supra* notes 88-91 and accompanying text.

193. See *supra* note 70 and accompanying text.

194. See *supra* note 69-73.

195. See Reynolds, *supra* note 58, at 247 n.1 (identifying laws in Idaho, Indiana, Kansas, Louisiana, North Carolina, Oregon, Tennessee, Oklahoma, Illinois, and Texas that, subject to certain prerequisites, permit municipalities to annex land irrespective of residents' wishes).

pockets. Awarding asymmetrical power to cities at the expense of unincorporated area residents has been justified in terms of urban growth management and the distribution of urban public services, and those same rationales apply with equal force to the reverse case of unincorporated urban areas seeking inclusion.¹⁹⁶ Second, mandatory annexation is appropriate in cases of public health, safety, or environmental risk that inclusion in a city will resolve (including the need for drainage, flood control, pollution caused by inadequate sewage, and wastewater disposal).¹⁹⁷ Oregon provides an example of an appropriate reform of this type by mandating annexations where a public health hazard exists that city services will alleviate.¹⁹⁸ Shy of mandatory annexations, a softer version of pressuring cities to approve petitions for voluntary annexation is to entitle landowners whose annexation petition is refused to purchase extraterritorial services (those not provided by the county) from any city that provides them.

Under current law, no states except Oregon and Utah identify, either at common law or by statute, situations in which annexation is mandatory.¹⁹⁹ Instead, annexation petitions must be followed by positive legislative action,²⁰⁰ and/or majority electoral consent of the area to be annexed, the annexing local government, or, most commonly, the unincorporated area and the annexing city.²⁰¹ Such limitations have some important arguments in their favor, as mandatory annexations carry heightened risks of unintended consequences. For instance, annexations without municipal consent could constitute an unfunded mandate on cash-strapped local governments, and mandatory annexation

196. Indeed, in this vein, the most prominent academic advocate for involuntary annexation powers has acknowledged that where states grant municipalities the power to impose an annexation without the consent of the area to be annexed, state law should equally grant the power to compel an annexation to unincorporated area residents that qualify under the state's contiguity requirements. *See Reynolds, supra* note 58, at 284-86.

197. State law should nevertheless limit such compulsory annexations to circumstances where a need for a particular public service exists and the city can provide that service. An example of this statutory language is provided in Indiana, where annexation of an unincorporated area can be mandatory if "essential municipal services and facilities are not available to the residents of the territory sought to be annexed [and] the municipality is physically and financially able to provide municipal services to the territory sought to be annexed . . ." IND. CODE § 36-4-3-5(d) (2009) (authorizing court-ordered annexation even without the consent of a municipality if certain conditions, including those above, are met).

198. *See* OR. REV. STAT. § 222.850-915 (West 2009); *see also* OR. REV. STAT. § 222.855 (2009) (providing for compulsory annexation if "a danger to public health exists because of conditions within the territory" and "such conditions can be removed or alleviated by sanitary, water or other facilities ordinarily provided by incorporated cities"); *W. Side Sanitary Dist. v. Health Div. of the Dep't of Human Res.*, 614 P.2d 1151 (Or. 1980); *Kelly v. Silver*, 549 P.2d 1134 (Or. 1976).

199. OR. REV. STAT. § 222.855 (2009); UTAH CODE ANN. § 10-2-407(3)(a)(iii) (West 2009). The Utah statute is discussed *infra* note 222 and accompanying text.

200. *See supra* note 66.

201. *See supra* notes 58-73 and accompanying text.

without improvements in county regulatory capacity could encourage the platting and sale of substandard subdivisions near city borders. These potential downsides, however, could be offset by combining mandatory annexation requirements with other reforms, such as by requiring annexation of unincorporated urban areas as a prerequisite for infrastructure financing of improvements that benefit both incorporated and unincorporated land.

In addition to empowering counties directly, reforms should go farther to protect counties from decisions made by city governments, courts, and boundary commissions. As the law currently stands, the composition of or fiscal effect on post-annexation, unincorporated county populations is simply not a determinative factor in any state's annexation law. To prevent racially or economically selective cherry-picking of land just outside municipal lines, annexation law should require cities to take account of a proposed annexation's effect on the county and its revenue base. As a first reform to this end, state annexation laws should make exclusion of low-income neighborhoods a substantive factor weighing against annexation approval by an annexation court or boundary agency. In other words, where state law is currently structured to define statutory factors that guide a third-party decisionmaker on an annexation proposal, that list of relevant factors should include: (1) the financial effects of the annexation on the residual population, and (2) the service needs and conditions of the area proposed for annexation.

Indirectly accounting for county interests in the annexation game must also include state laws that prevent and constrain municipal underbounding. A few states, such as Arizona and Georgia, have made inroads in this direction by prohibiting or at least discouraging "gerrymandered annexation[s]"²⁰² that create unincorporated islands within a city's fabric.²⁰³ Such laws represent a

202. *Roberts v. City of Mesa*, 760 P.2d 1091, 1095 (Ariz. Ct. App. 1988).

203. Approximately twenty-three states currently have some form of law preventing the creation of islands or facilitating their annexation. *See* STEINBAUER ET AL., *supra* note 60, at 68-69 app. B; *see also* ARIZ. REV. STAT. ANN. § 9-471(I) (2009) ("A city or town shall not annex territory if as a result of such annexation unincorporated territory is completely surrounded by the annexing city or town."); GA. CODE ANN. § 36-36-4 (West 2009) (prohibiting annexations that will create unincorporated islands); UTAH CODE ANN. §§10-2-402(1)(b)(iii), 10-2-418(1)(b) (West 2009) (prohibiting annexations that will leave behind an unincorporated island unless the annexation satisfies more strict substantive criteria); *Charter Twp. of Pittsfield v. City of Ann Arbor*, 274 N.W.2d 466, 468 (Mich. Ct. App. 1978) (holding that the creation of islands is prohibited by judicial interpretation of state contiguity requirements). Under current state law, additional measures to discourage island creation merely impose additional procedural requirements on selective annexations without penalizing or otherwise prohibiting the annexation. *See, e.g.*, TEX. LOC. GOV'T CODE ANN. § 43.057 (Vernon 2009) (requiring additional findings by a municipality prior to an annexation that will create an unincorporated island); *City of Wood Vill. v. Portland Metro. Area Local Gov't Boundary Comm'n*, 616 P.2d 528 (Or. Ct. App. 1980) (requiring the Portland Metropolitan Area Local Government Boundary Commission to consider the effect of an annexation to Portland on any island created by the boundary change). By contrast, in Florida, a state with strict contiguity and compactness requirements, annexation ordinances have been upheld even where they create islands of unincorporated territory within the local

logical extension of annexation laws across the country that favor compactness and mandate contiguity. Existing codes that do address the problem rely on exceedingly strict definitions of the problem they seek to cure, and thus they lack the breadth of application necessary to completely prevent the formation of islands.²⁰⁴ Yet model elements from several codes, the product of legal innovation across the country, can be combined for more complete coverage. For instance, California law makes the creation of an island merely an adverse factor in agency approval of proposed annexations (a weak form of island prevention law), but the code uses a broad and inclusive definition of the term “islands” (a stronger model than alternatives across the country).²⁰⁵ A model island prevention law would include, first of all, an expansive definition of the term “island” that includes any unincorporated area surrounded on at least seventy-five percent of its borders by a municipal boundary (either the annexing city or its neighbor), a state or county boundary, an undevelopable topographic boundary (such as an ocean, river, steep canyon, or hollow), a major industrial land use (like a resource extraction site, public works installation, oil refinery, or landfill),²⁰⁶ a major parcel of state or federal land (such as an interstate highway, prison, park, or wilderness area), and/or a parcel to which a county does not have reasonable access for the provision of governmental services.²⁰⁷ Relying on this inclusive definition, a model state

government. *See* MacKinlay v. City of Stuart, 321 So.2d 620 (Fla. Dist. Ct. App. 1975). *But see* FLA. STAT. § 171.204 (2009) (requiring that, prior to the approval of any annexation that will leave behind unincorporated islands, the municipality undertake additional long-range planning measures for the territory proposed for annexation).

204. For instance, nearly all states with legislation designed to prevent the formation of islands define such territories as completely surrounded by one or more municipalities. *See, e.g.,* ARK. CODE ANN. § 14-40-501(a)(1)(A)(i) (West 2009); COLO. REV. STAT. § 31-12-106(1) (West 2009); IDAHO CODE ANN. § 50-222(3)(a)(ii) (West 2009); MONT. CODE ANN. § 7-2-4501 (2007). *But see* CAL. GOV'T CODE § 56375(a)(4)(A) (West 2009).

205. *See* CAL. GOV'T CODE § 56375(a)(4)(A) (Deering 2009) (defining an island as any territory “[s]urrounded or substantially surrounded by the city to which the annexation is proposed or by that city and a county boundary or the Pacific Ocean if the territory to be annexed is substantially developed or developing”).

206. Such a provision is designed to reflect the reality that a neighborhood may be the final area of land realistically eligible for annexation before county land uses on large parcels representing no or low tax revenue begin. *See* Anderson, *supra* note 2, at 1109-10 (describing the UUA of North Richmond, which is not considered an island under California law, but is trapped between a city boundary, the Pacific Ocean, a Superfund site, an active oil refinery, and a county landfill and recycling center).

207. Components of each of these terms can be found scattered in codes across the country. *See, e.g.,* ARK. CODE ANN. § 14-40-501(a)(1)(A)(ii) (2009) (recognizing state borders); CAL. GOV'T CODE § 56375(a)(4)(A) (Deering 2009) (recognizing oceans and county boundaries); GA. CODE ANN. § 36-36-4(a)(3) (2009) (recognizing “unincorporated area[s] to which the county would have no reasonable means of physical access for the provision of services otherwise provided by the county”); ILL. MUN. CODE § 7-1-13 (2009) (recognizing state-owned property, forest preserve districts, and park districts); OR. REV. STAT. § 222.750(2) (2009) (recognizing creeks, rivers, bays, lakes, or interstate highways).

law should prohibit those annexations which result in such islands.²⁰⁸ A state's existing annexation consent rules (such as a referendum election of residents or landowners in the area to be annexed) would apply, but they would apply to the entire area to be annexed.²⁰⁹

In addition to preventing selective annexation (i.e., preventing municipal annexations that bypass poor communities and/or create unincorporated islands), state law should proactively facilitate the annexation of existing unincorporated urban areas, be they island pockets or urban fringe. In some cases, such facilitation can be as simple as alleviating procedural requirements for annexations of islands of unincorporated land (using the broadened definition of islands described above), which is currently the practice in California, Colorado, and Montana.²¹⁰ Alternatively, states can remove the discretion of the boundary agency or city to refuse an island annexation once it has been initiated,²¹¹ or require that any annexation that will create an unincorporated island give the residents of that island the opportunity for voluntary annexation.²¹² Where state law requires consent of the area to be annexed (such as through a referendum election), state legislatures should consider waiving or reducing that requirement in cases where a proposed annexation will eliminate an unincorporated island or alleviate an urgent need for public services, and the county has initiated or supported the annexation.²¹³

208. See *supra* note 203 (citing ARIZ. REV. STAT. ANN. § 9-471(I) (2009); GA. CODE ANN. § 36-36-4 (2009); UTAH CODE ANN. §§10-2-402(1)(b)(iii), 10-2-418(1)(b) (2009); *Charter Twp. of Pittsfield*, 274 N.W.2d at 468).

209. As with any single annexation containing multiple neighborhoods or constituent groups, any given subset of an area proposed for annexation might oppose absorption. Under existing law, such subsets may be outnumbered by consenting areas within the area proposed for annexation, or the opposing neighborhoods are excluded from the annexation to become an unincorporated island. To the extent that my proposal forecloses the second option, it results in annexation of would-be islands against residents' wishes in the same way that any voting minority can lose an election. The justification for this compromise lies in the larger growth management, efficiency, and environmental concerns enumerated throughout this Part.

210. See CAL. GOV'T CODE § 56668 (West 2009) (making the creation of islands and narrow corridors of unincorporated territory one of the statutory factors to be considered in state agency review of an annexation proposal); *Bd. of County Comm'rs v. City & County of Denver*, 548 P.2d 922, 927 (Colo. App. 1976) (interpreting a Colorado state law to provide a conclusive presumption that an area with a two-thirds contiguous boundary with a local government for more than three years satisfies at least one element of the test for annexation); *Brodie v. City of Missoula*, 468 P.2d 778, 782 (Mont. 1970). Notably, however, such measures have no power to overcome a city's lack of interest in annexing a particular area.

211. See CAL. GOV'T CODE § 56375(a)(4) (West 2009) (requiring the governing boundary commission to approve the annexation of an unincorporated island, once proposed by a city); MICH. COMP. LAWS § 42.34(2) (2009) (permitting state boundary commissions to order the annexation of an island).

212. See MO. REV. STAT. §71.012(1) (2009).

213. In California, for instance, when a city passes a resolution to annex islands meeting certain requirements, that annexation proposal is not subject to protest proceedings.

In a variant of procedural relaxation, states could empower their boundary agencies or counties to establish annexation programs analogous to inclusionary zoning ordinances, in which development entitlements depend on setting aside a certain quotient of units for affordable housing. Similar laws in the annexation context would require annexation of county islands or low-income fringe areas in exchange for approval or positive review of a city's proposed annexation of a higher-income area.²¹⁴

Such reforms need not simply coerce annexations by cities. Instead, they can offer incentives to augment cities' self-interest in undertaking certain annexations, and thus facilitate interlocal bargaining between cities and counties over those annexations.²¹⁵ In Florida, for instance, state law has encouraged the annexation or independent incorporation of all land within highly urbanized counties. In order to facilitate or incentivize the annexation of final residual pockets of low-income unincorporated land, the state has channeled state infrastructure investment into unincorporated urban areas in order to lift them to municipal code standards and reduce the costs of annexation.²¹⁶ States can also enable cities to benefit from such annexations, or make annexations a basis for regulatory or financing concessions from counties or the state. For instance, in those states with mandatory affordable housing allocations (also known as "fair share" allocations), states should permit cities to satisfy a certain portion of their affordable housing obligations by "regularizing" an unincorporated urban area with municipal services and approving an annexation petition from the community.²¹⁷ While such measures will not add new affordable housing stock to the regional base, they ensure minimum service (and thus habitability) standards in existing housing, an

See CAL. GOV'T CODE § 56375(a)(1) (West 2009). Several states similarly waive resident consent requirements. *See* IDAHO CODE ANN. §50-222(3)(a), (5)(a) (2009); MONT. CODE ANN. §§ 7-2-4501, 7-2-4502 (2009); NEB. REV. STAT. § 16-122 (2007); NEV. REV. STAT. § 268.660(2) (2008). Another category of states currently waives resident consent requirements, but permits residents to seek relief through judicial review, *see* COLO. CONST. art. II, § 30; ARK. CODE ANN. § 14-40-503(b) (2009); COLO. REV. STAT § 31-12-106 (2009), or a referendum election, *see* OR. REV. STAT. § 222.750 (2009). However, voluntary consent to any annexation, including that of an island, is still required in most states.

214. I am grateful to Evelyn Lewis, a participant at a UC Davis Faculty Workshop of the present Article, for a helpful suggestion to this effect.

215. *See generally* Clayton P. Gillette, *The Conditions of Interlocal Cooperation*, 21 J.L. & POL. 365 (2005) (assessing the incentives, barriers, and costs to interlocal bargaining as a means of achieving regional cooperation and efficiency).

216. For instance, Broward County attempted to eliminate all unincorporated areas within the county by bringing them into municipal lines. *See* TEAFORD, *THE AMERICAN SUBURB*, *supra* note 123, at 135-36; Anderson, *supra* note 2, at 1111-12 & nn.59-61. King County, Washington undertook similar efforts to bring all county land within the borders of Seattle and other municipalities. *See* TEAFORD, *THE AMERICAN SUBURB*, *supra* note 123, at 136.

217. Admittedly, such an incentive is available only in the minority of states with a fair share system of affordable housing.

independently desirable goal, and help cities to meet affordable housing quotas that they routinely fail to satisfy at the risk of enforcement litigation. State law should also balance existing requirements regarding revenue-sharing agreements between cities and counties following annexation with long-term service and infrastructure plans for newly annexed unincorporated urban areas in which capital infrastructure will be funded by both the city and county.

A stronger voice in annexations for counties should enable participation by county residents as much as by county government. This involves easing procedures by which residents and/or landowners in unincorporated urban areas can petition for so-called voluntary annexation. While nearly every state currently permits such petitions,²¹⁸ the costs of preparing such petitions can be prohibitively high for low-income communities, and the territory to be annexed must often satisfy onerous prerequisites. States can easily alleviate these requirements by requiring fewer residents or landowners to sign a petition commencing annexation proceedings,²¹⁹ by waiving procedural requirements like notice and a hearing where all landowners in the area to be annexed have consented to the annexation via petition,²²⁰ by eliminating the environmental review requirement (as described further below), or by taking into account economic, social, or service needs in the area to be annexed.²²¹ Utah has adopted an even more dramatic approach by mandating annexation where owners of a majority of the land in the area (by acreage as well as by value) have petitioned and certain other simple requirements are met.²²² State law can further encourage petitions for voluntary annexation by requiring cities and/or counties to provide residents with a cost impact assessment of annexation. Such an assessment would estimate changes in property or parcel tax rates and service fees following annexation, both of which are critical pieces of data for

218. See, e.g., N.C. GEN. STAT. § 160A-31 (2009); OHIO REV. CODE ANN. § 709.02 (West 2009); *In re* Annexation of 118.7 Acres in Miami Twp. to Moraine, 556 N.E.2d 1140, 1144 (Ohio 1990); *County of Chesterfield v. Berberich*, 100 S.E.2d 781 (Va. 1957).

219. South Carolina, Minnesota, Delaware, and Maryland, for instance, require only twenty or twenty-five percent of a territory's qualified electors to initiate an annexation proceeding (as well as, in Maryland's case, owners of at least twenty-five percent of the assessed land valuation in the area). See DEL. CODE ANN. tit. 22, § 101A(a)(1) (2009); MD. CODE OF 1957 ANN. art. 23A., § 19(b)(1) (2009); MINN. STAT. § 414.031(1) (2009); S.C. CODE ANN. § 5-3-300 (2009).

220. California currently has such a provision permitting its boundary commissions to approve or disapprove of an annexation (if they so choose) without notice, a hearing, or an election. See CAL. GOV'T CODE § 56663 (West 2009).

221. In New Jersey, for instance, state law permits annexation petitioners to appeal a city's refusal to annex on the basis that, inter alia, "refusal to consent to the annexation is detrimental to the economic and social well-being of a majority of the residents of the affected land . . ." N.J. STAT. ANN. § 40A:7-12.1 (West 2009).

222. The other requirements pertain to the size of the county, the relative populations of the area to be annexed and the city, recent population growth in the city, and the property tax rate for municipal services in the area to be annexed. See UTAH CODE ANN. § 10-2-407(3)(a)(iii) (West 2009).

any community seeking annexation. Without municipal tax counsel, a neighborhood is hard-pressed to reach such estimates on its own.

A final measure to support county residents' interests is to alleviate the costs of annexing unincorporated urban areas by exempting land already developed in urban use from the requirement that municipalities conduct environmental review of any annexation.²²³ This requirement imposes substantial costs on cities or on neighborhoods petitioning for annexation. It is designed to address the long-term environmental consequences of annexing (and thus developing in urban use) undeveloped land, and is thus irrelevant, even counterproductive, where a proposed annexation seeks to absorb land already developed for urban use. Such an exemption would be justifiable on environmental grounds (e.g., to limit the environmental externalities caused by deficient municipal infrastructure), as well as in terms of other state policy goals such as public health and services efficiency. An exemption to the current rule would be similar to those already in place in many states for the development of affordable housing and other actions encouraged by the state.

2. *Political interests and alignment*

A reform platform thus situated, changes to state annexation laws would require a diverse political coalition at the state level. For any problem of spatial inequality, which almost by definition has commanded the attention of only a minority of state legislators in the past, lobbying to change state rules requires a coalition of diverse interests. Yet creative coalitions can be formed among groups targeting health, public services efficiency, environmental mitigation, and social justice.²²⁴ Each of these groups has vested interests in the unincorporated urban areas issue in particular and county power in general.

Environmental groups, for instance, should mobilize around the pollution and public health issues caused by septic and cesspool leakage, tainted water, and the juxtaposition of residential and noxious land uses in unincorporated urban areas.²²⁵ Additional environmental harms include burning or burying

223. See, e.g., *Bozung v. Local Agency Formation Comm'n*, 529 P.2d 1017 (Cal. 1975) (holding that annexations are subject to the environmental analysis requirements of the California Environmental Quality Act). In California, for instance, the state legislature could readily alleviate the costs for low-income areas seeking annexation by passing an exemption under the California Environmental Quality Act (CEQA) for annexations of low-income areas already in developed use.

224. An example of cross-sectoral coalition-building recently emerged in California, where business interests, real estate developers, environmental groups, and (after much tortured negotiation) city governments joined forces to pass a major piece of anti-sprawl legislation. See CAL GOV'T CODE § 14522.1 (West 2009); George Skelton, *Legislators Show They Do Some Things Right*, L.A. TIMES, Oct. 6, 2008 (describing "the coalition of the impossible" behind the passage of SB 375).

225. See Anderson, *supra* note 2, at 1097-98, 1101.

trash in the absence of solid waste disposal, vehicle miles traveled in the private hauling of water or solid waste, and improvised greywater disposal. In addressing such harms, annexations of unincorporated urban areas also serve the goals of minority political empowerment, and more broadly, social and environmental justice. Annexation can enable the creation of political coalitions between those inside territorial lines and those excluded from them, including racial minority “insiders” whose votes are presently diluted by the exclusion of racial minority “outsiders.” It also redresses the historical harms of racial segregation and its attendant inequalities in public investment, and it takes a step towards minimum habitability standards for regional low-wage workers.

By definition, cities have declined annexation of any unincorporated urban areas that desires it. Yet annexation of low-income islands and fringes presents some advantages (or at the very least, silver linings) for cities that are not captured by cost-revenue calculations: guarding the health, safety, and welfare of neighborhoods already within municipal lines and removing irregular jurisdictional gaps in city territory. Cities stand to improve conditions and property values in incorporated neighborhoods that border unincorporated urban areas by creating uninterrupted city policing territories, improving the conditions of shared roads, providing sidewalks to protect area children, and improving safety around schools located in unincorporated urban areas.²²⁶ By alleviating inadequate law enforcement, street lighting, and waste disposal conditions, cities can impede the use of unincorporated urban areas as a harbor for criminal activity and illegal dumping within the larger metropolitan fabric. While such benefits on their own have proven an insufficient inducement to annex low-income areas, they should be identified and, where possible, quantified in order to marshal city tolerance of reforms.

Finally, state efficiency, regulatory compliance, and public cost-saving goals are also served through improvements in unincorporated urban areas. As discussed above, efficiency in urban services delivery (including law enforcement, fire protection, and sanitary services) can be improved by bringing unincorporated urban areas into municipal service lines, thereby enabling comprehensive service planning for a city’s complete urbanized area. Such changes permit county services to specialize in serving rural and lower-density settings, while city governments specialize in serving urban areas.

226. Standing alone, it might not seem compelling, but the efficiency, geographic logic, and political reach of cities without islands of county territory is attractive to some city officials. See, e.g., Tony Barboza, *Tiny Latino Neighborhood Has Resisted Joining Anaheim*, L.A.TIMES, Mar. 6, 2009 (quoting the city of Anaheim’s mayor that annexation of a low-income county island was “inevitable,” because “[i]t’s not going to be some island forever”); see also SANTA CLARA COUNTY LOCAL AGENCY FORMATION COMM’N, MAKING YOUR CITY WHOLE: TAKING ADVANTAGE OF THE CURRENT OPPORTUNITY TO ANNEX URBAN UNINCORPORATED POCKETS (2005), available at http://www.santaclara.lafco.ca.gov/pdf-files/Final_Vers_City_Whole.pdf (encouraging cities in the county to annex their remaining islands for reasons ranging from “it’s the right thing to do,” to service inefficiencies, to planning consistency goals).

Improvements to unincorporated urban areas also build a habitable base of affordable housing at lower cost to the public than constructing such housing from scratch, because public investment in service upgrades and brownfield abatement need only augment residents' past investment of labor and capital. Such public support of "self-help" housing efforts works to support regional economies reliant on the availability of low-wage labor.

3. *Problems, limitations, and questions with county annexation power*

Policy design in specific states will vary, and county empowerment raises several uncertainties and potential weaknesses. In particular, we know very little about the political economy of county government. This is no obvious issue, because, as I have argued previously, county governments wear several distinct hats. They serve as the only general purpose local government for unincorporated areas, the second level of general purpose local government for incorporated areas, administrative subdivisions of state government, and bureaucratic units for the delivery of federal services.²²⁷ For the purposes of the annexation debate, we can expect the first two roles to come into play—county governments represent the interests of the unincorporated areas as well as those of their constituent cities. Yet these roles may collide, and my previous research indicates that unincorporated areas often lose when they do.²²⁸ For instance, counties often approve the siting of locally undesirable land uses in unincorporated urban areas because those land uses are important to municipal constituencies.

Whether as an empirical or theoretical matter, academic research casts little light on the risk of regulatory capture of county governments by specific interests, particularly constituent municipalities and county employee unions,²²⁹ and even less on the influence of those interests as compared with counties' own fiscal interests. This author's current work on county government explores these open issues. For now, we must assume fiscal rationality and self interest by county governments, an expectation made plausible by the immense financial strain on these entities and the systematic efforts by some counties and interlocal boundary agencies to eliminate county islands.²³⁰ As an added safeguard, the reforms described here seek to empower

227. See Anderson, *supra* note 2, at 1140-42.

228. See *id.* at 1142, 1145-48 (describing the various hats that counties wear and articulating several dimensions along which counties' competing mandates create and perpetuate conditions in unincorporated urban areas).

229. A recent annexation debate over a low-income unincorporated island outside of Anaheim, California demonstrated this latter dynamic. Despite views in the community that annexation and inclusion in Anaheim police jurisdiction would reduce gang violence in the neighborhood, a county sheriff's union worked to defeat the island's annexation because it would reduce county patrol territory. See Barboza, *supra* note 226.

230. Santa Clara County, California and Broward County, Florida are illustrative.

county unincorporated residents distinctly by alleviating costs and procedural hurdles for landowner annexation petitions and identifying circumstances triggering compulsory annexation by statute. Over the longer term, any reform agenda should look to shape county administrations into governments that promote rational land use policy for their unincorporated areas, including the incorporation of urbanized land, across the county's region.

Any empowerment of county government also raises questions concerning centralization. One might ask, for instance, whether county authority inherently represents centralization (as against city power) or decentralization (as against state authority). In one sense, that is an important question, and for the reasons discussed throughout this Part, this Article has embraced a version of county power that admittedly pulls a modicum of authority away from city governments. Yet it would be wrong to see city-county relations merely in terms of centralization or hierarchy. When it comes to unincorporated areas, county governments are more like city governments than regional ones. Where a local border separates an incorporated population from an unincorporated one, the city-county relationship is analogous to the relationship between two adjacent cities. Conceived in this way, we notice that legally empowering county governments means political empowerment for a body of residents. This, in turn, achieves two of the most important functions of decentralization: individual participation and local control.

Through that lens, the problem with annexation has been county powerlessness, not decentralization. Weak, if not torpid counties have enabled the unincorporated urban areas pattern to emerge and locked such neighborhoods under the jurisdiction of overburdened, diffuse, and under-resourced local governments. Whether a broader claim to coercive regional governance is an appropriate agenda for county government is a question for future development, but suffice it for now to observe that simple reforms to empower counties with authority in annexations, as outlined above, will help to rationalize urban growth, prevent future incidents of municipal underbounding, and relocate urban boundaries rooted in twentieth century patterns of racial segregation and exclusion.

These counties have systematically promoted elimination of county islands through voluntary service improvements of unincorporated urban areas as an inducement to annexation. See SANTA CLARA COUNTY LOCAL AGENCY FORMATION COMM'N, *supra* note 226 (a report promoting island annexation); Anderson, *supra* note 2, at 1111 n.59 (describing Broward County's board of supervisors' recommendation to the state legislature that all remaining unincorporated land in the county come within city lines through annexation or incorporation); see also Fresno County Local Agency Formation Comm'n, Island Annexations, <http://www.fresnolafco.org/Island%20Annex.asp> (last visited Nov. 30, 2009) (explaining Fresno County, California's interlocal boundary commission's comprehensive policy to promote the annexation of all remaining county islands in terms of service inefficiencies, service inadequacies, and the county's increasing difficulty at "maintain[ing] an acceptable level of services in view of the fiscal constraints that it continues to face").

B. *Allocating the Costs of the Redistribution: Models from History*

If state law facilitates annexations to improve both services and political representation in unincorporated urban areas, the question remains: Who will pay for the necessary infrastructure upgrades to bring unincorporated urban areas within city service networks and up to city code standards?²³¹ Infrastructure financing is messy and scarce. Yet glimmers of possibility twinkle in our very own urban history—two waves of public largess that funded America’s suburban development—as well as our current policy environment. Our history here is both cause and cure—cause, because unincorporated urban areas were, by definition, passed by in both earlier waves of financing, and cure, because these prior visions suggest a valuable policy model on the cusp of what appears to be a new period of centralized infrastructure investment.²³² We are currently making choices about how to rebuild our ailing infrastructure, and that conversation should include the needs at the urbanized municipal fringe.

History provides two models. First, is the municipal funding of suburban services (using local general tax revenues) as a precursor to annexation in the late nineteenth and early twentieth century—arguably America’s apex of urban collectivization.²³³ City politics determined what to spend and where to spend it, decisions that were shaped by democracy, interdependence, sanitation, and the drive for urban betterment, but also by racial discrimination, economic influence, corruption, and land speculation.²³⁴ The demand for better city sanitation caused by disease epidemics, progressive elites’ work to improve the living conditions of the urban poor, and technological developments in sewage systems fueled a rapid expansion in road, sewer, and water infrastructure within major American cities.²³⁵ Private individuals who stood to benefit from water

231. See *supra* note 80 and accompanying text.

232. Here, of course, I mean the Obama Administration’s commitment to financing public infrastructure with economic stimulus dollars. See, e.g., Monica Davey, *States and Cities Angle for Stimulus Cash*, N.Y. TIMES, Feb. 15, 2009, at A1; Bruce Lambert, *Dreaming of Infrastructure as Federal Aid Beckons*, N.Y. TIMES, Dec. 7, 2008, at L11.

233. See RICHARDSON DILWORTH, *THE URBAN ORIGINS OF SUBURBAN AUTONOMY* (2005); TEAFORD, *THE AMERICAN SUBURB*, *supra* note 123, at 13-15 (describing that the desire for better urban services, including sewage lines, clean water, and good schools motivated early unincorporated American suburbs to submit to annexations); Rosenberg, *supra* note 77, at 181; see also David G. Bromley & Joel Smith, *The Historical Significance of Annexation as a Social Process*, 49 LAND ECON. 294, 294-95 (1973) (analyzing the number and size of annexations from 1800-1960, and noting that the demand for urban services accounted in part for unusually high rates of annexation in the late nineteenth century). Before the Civil War, street improvements and other services were typically financed by special assessments of affected property-owners. JACKSON, *supra* note 123, at 131.

234. See generally JACKSON, *supra* note 123, at 130-37.

235. See Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 MINN. L. REV. 459, 477-78 (2005) (reviewing DILWORTH, *supra* note 233); see also JACKSON, *supra* note 123, at 131

and sewage improvements—for instance, professional engineers seeking new contracts, fire insurance entities interested in urban fire safety, and city officials taking kickbacks for infrastructure contracts—added further momentum to this transformation of municipal services.²³⁶ Progressive efforts to assuage the congested poverty of urban tenements by opening an affordable, airy suburban frontier supported annexation and service extensions to suburbs of varied economic fortunes.²³⁷

On both developed and undeveloped land at their fringes, cities subsidized much of the early growth of low-density residential suburbs through infrastructure funding, supported by local officials' political interests in delivering development successes and securing the loyalty of suburban economic interests.²³⁸ As early as 1928, local governments began requiring new subdivisions to provide public facilities within developments, but such programs represented a small fraction of the city financing and public services strategy.²³⁹ Existing residential suburbs unable to afford both autonomy and urban infrastructure acquiesced in a number of notable annexations during this period, trading their political independence for sewage and water lines.²⁴⁰ During the New Deal, the Public Works Administration and Works Progress Administration subsidized these efforts with federal dollars by financing construction of thousands of water and sewage treatment works across the country.²⁴¹

Despite the absence of controls on racial discrimination in this era, some

(describing reformers' drive to alleviate the choked poverty of urban slums by facilitating development in the breezy suburbs); WERNER TROESKEN, *WATER, RACE, AND DISEASE* (2004). This early wave of sewer infrastructure installations, which was completed in all major American cities by 1911, involved the untreated discharge of municipal waste into nearby watercourses. See William L. Andreen, *The Evolution of Water Pollution Control in the United States: State, Local, and Federal Efforts, 1789-1972: Part I*, 22 *STAN. ENVTL. L.J.* 145, 166 (2003).

236. See DILWORTH, *supra* note 233, at 23-24.

237. See JACKSON, *supra* note 123, at 131; Gerald E. Frug, *Beyond Regional Government*, 115 *HARV. L. REV.* 1763, 1772 (2002) ("In the nineteenth century, central cities supported the annexation of neighboring territory despite the fact—sometimes because of the fact—that social conditions and services were worse than those in the central city.").

238. See DILWORTH, *supra* note 233.

239. EXACTIONS, IMPACT FEES AND DEDICATIONS, *supra* note 85, at xxxiii. Freilich and Bushek divide the history of subdivision regulation and development processes into five phases: a pre-1928 era focused primarily on improving the accuracy and efficiency of land recording; a 1928 to World War II period seeing an increase in the mandatory dedication of public facilities within subdivisions; a World War II to 1970s period of requiring exactions and money in lieu of land to cover the increased burdens on off-site public facilities; a 1970s phase of growth management; and the modern era of public/private partnerships, impact fees, and linkage fees. *Id.* at xxxiii-xxxiv.

240. JACKSON, *supra* note 123, at 146-47.

241. See MARTIN V. MELOSI, *THE SANITARY CITY: URBAN INFRASTRUCTURE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 205-12 (2000); William L. Andreen, *The Evolution of Water Pollution Control in the United States: State, Local, and Federal Efforts, 1789-1972: Part II*, 22 *STAN. ENVTL. L.J.* 215, 226, 290 (2003).

urban racial minorities benefited from the collectivization of tax revenue and expansionist city growth regimes. Finer scale segregation (i.e., segregation by block rather than by neighborhood or municipality) placed most urban African-Americans in the same jurisdictions as whites.²⁴² These conditions meant that even under Jim Crow laws in the South, spatial interdependence constrained discrimination in sanitation-related municipal services. While education and law enforcement spending varied widely based on race, a recent study of the development of American physical infrastructure indicates that by 1915, sewage and water access served most city neighborhoods in most cities regardless of race.²⁴³ Although services were delivered to majority black communities a few years behind delivery to majority white areas, public investment in such services crossed racial lines in spite of racism and segregation, due to the risk of disease caused by substandard sanitation (a risk revealed by epidemics that had decimated several urban populations at the turn of the twentieth century).²⁴⁴

America's suburban revolution and the draining of the American middle class out of central cities launched a federalization of infrastructure financing at the city fringe that represents a second model of financing. Over the next decades, federal policy subsidized suburbanization through the financing of homeowner loans, roadbuilding and other transportation infrastructure, and water and sewage treatment infrastructure. In the late 1960s and early 1970s, national consciousness about the consequences of water pollution led to a dramatic spike in construction grants for municipal wastewater utilities through the Clean Water Restoration Act of 1966 and the Clean Water Act of 1972.²⁴⁵ Thousands of subdivisions built with septic systems were eventually annexed or incorporated into municipalities, after federal grants, local special assessments, and general municipal revenues funded the replacement of their systems with city or special district sewer lines.²⁴⁶ Enabled by these funds, as well as the mass ownership of automobiles and the ease of independent incorporation, cities became metropolitan regions, growing into sprawling

242. During the nineteenth century, cities were segregated at finer levels—street by street or block by block, for instance—such that in 1890, the average African-American lived in a city ward that was twenty percent black. By 1970, this same statistic had increased to seventy percent, as racial segregation reached the higher levels of geographic aggregation—with racially homogeneous census blocks, city wards, or incorporated municipalities—familiar today. See TROESKEN, *supra* note 235, at 36-37; see also DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (documenting a similar pattern).

243. TROESKEN, *supra* note 235, at 39-40.

244. *Id.* at 13, 62-63, 65-67.

245. See Andreen, *supra* note 241, at 252. More minor, but nonetheless important waves of post-war construction grants funding came through the Federal Water Pollution Control Act of 1948 and its 1956 and 1961 Amendments. See *id.* at 237-38, 241-42.

246. See ADAM ROME, *THE BULLDOZER IN THE COUNTRYSIDE: SUBURBAN SPRAWL AND THE RISE OF AMERICAN ENVIRONMENTALISM* (2001).

empires of low-density housing within independently incorporated municipalities.²⁴⁷

Whatever attractions these models hold, it would be whimsical to expect their direct replication today. Cities can ill afford to resume their role of funding consolidation at the urban fringe from their general tax revenues alone, nor can cash-strapped counties assume the role of sole subsidization of infrastructure as a prerequisite to annexation.²⁴⁸ The public-private partnerships that are now a cornerstone of neoliberal urban financing are similarly problematic, in that they would require redevelopment of unincorporated urban areas in the interests of deeper pockets, an invitation for displacement and minority land loss.

Until quite recently, the prospects for intergovernmental beneficence were similarly dim. Both stoking and reflecting public intolerance of tax redistribution, state and federal governments reduced intergovernmental grants to local agencies in the 1980s, particularly for infrastructure unrelated to transportation.²⁴⁹ Federal grants to local governments, which constituted more than eight percent of the latter's revenues in 1976, had fallen to less than four percent by 1997.²⁵⁰ In 2001, federal assistance programs that formerly provided majority funding for metropolitan-area wastewater-treatment projects provided only fifteen percent of the funding needed for such projects, leaving local communities to cover the rest.²⁵¹ Yet the needs in this area continue to

247. Discrimination against incoming black migrants reinforced entrepreneurial and developer incentives to form new cities with lower tax rates and lower service burdens. The result was the establishment of new suburbs as independent municipalities rather than center city extensions through annexation. See BURNS, *supra* note 166. The dramatic fragmentation of American metropolitan areas into independent municipalities evidences the demise of central cities' expansionist ambitions. See Frug, *supra* note 237, at 1769-70.

248. See generally Kenneth J. Drexler, *The Four Causes of the State and Local Budget Crisis and Proposed Solutions*, 26 URB. L. 563 (1994); Kimhi, *supra* note 76.

249. See ABBOTT ET AL., *supra* note 81, at 3; Rosenberg, *supra* note 77, at 180. Federal aid to cities in the 1990s amounted to only one third of the 1970 federal aid level, a drop that coincided with increasing levels of poverty in many municipalities. Georgette C. Poindexter, LizabethAnn Rogovoy, & Susan Wachter, *Selling Municipal Property Tax Receivables: Economics, Privatization, and Public Policy in an Era of Urban Distress*, 30 CONN. L. REV. 157, 165-66 (1997). For California cities, for instance, state and federal aid has fallen from an average twenty-one percent of a city's budget in 1974-75 to an average of ten percent today. COLEMAN, *supra* note 99, at 7. For additional exploration of the causes of local government fiscal crisis, see EXACTIONS, IMPACT FEES AND DEDICATIONS, *supra* note 85, at xxxiii; Drexler, *supra* note 248, at 563.

250. Reynolds, *supra* note 44, at 393. Such a change no doubt related to the fact that, prior to the heightening economic downturn in 2008-2009, federal financing for infrastructure in low-income areas was classified as a subsidy for the poor, if not a windfall. And today, even amidst the current focus on infrastructure subsidization as an economic stimulus, transportation and energy infrastructure, rather than capital investment to benefit neighborhoods, sit at the heart of federal spending plans.

251. ERAN BEN-JOSEPH, *THE CODE OF THE CITY: STANDARDS AND THE HIDDEN LANGUAGE OF PLACE MAKING* 78 (2005) (citing U.S. GEN. ACCOUNTING OFFICE, U.S. INFRASTRUCTURE FUNDING TRENDS AND FEDERAL AGENCIES' INVESTMENT ESTIMATES

grow, and analysts consider America's aging sewage treatment, water supply, roadwork, and other physical community improvements to be in a state of crisis.²⁵² The EPA estimates a \$388 billion price tag for the country's water infrastructure improvement needs through 2019—current funding allocations would leave forty-five percent of the water pipes in the U.S. in poor, very poor, or “life elapsed” status by 2020.²⁵³

Trends in the federal financing of infrastructure seem to have shifted course, however. The federal government under the administration of President Obama has made infrastructure financing a major tenet of its 2009 economic stimulus package, positioning such projects as more than simply a response to the nation's neglected infrastructure. As in earlier eras of neighborhood-based infrastructure funding, community capital investment under this program is conceived of as an economic stimulus (primarily, job creation). A lobby seeking to draw such resources toward unincorporated urban areas might target state congressional delegations to emphasize many of the same environmental, anti-poverty, and public health goals discussed in Subpart A.2 above, including the prevention of water pollution, habitable housing, disease control, crime control, and traffic management. With the United States Department of Housing and Urban Development, which currently channels some existing lines of infrastructure funding for unincorporated urban areas near the U.S.-Mexico border (called *colonias* under federal law), advocates would do well to summon turn-of-the-twentieth-century narratives emphasizing the provision of favorable environments for child rearing and upward class mobility through homeownership. Habitability concerns regarding rural and exurban areas appeal to the core mission and past work of the United States Department of Agriculture, which similarly directs current funding toward *colonias*. In Hurricane Katrina's wake, advocates for communities of color have become more active in calls for equality in infrastructure access and modernization. Their campaigns should stress that infrastructure investment in poor areas is not an asymmetrical commitment to neighborhood-based capital investment and a

(2001)); *see also* ELLEN HANAK, PUB. POLICY INST. OF CAL., *PAYING FOR INFRASTRUCTURE: CALIFORNIA'S CHOICES* 5 (2009), *available at* <http://www.ppic.org/main/publication.asp?i=863> (finding that local and regional governments finance eighty percent of capital spending for infrastructure in California).

252. *See, e.g.*, Nicolai Ouroussoff, *How the City Sank*, N.Y. TIMES, Oct. 9, 2005, at A1 (discussing how “New Orleans was a warning” of the fact that “[f]or decades now, we have been witnessing the slow, ruthless dismantling of the nation's urban infrastructure”).

253. U.S. ENVTL. PROT. AGENCY, *THE CLEAN WATER AND DRINKING WATER INFRASTRUCTURE GAP ANALYSIS* 5, 15 (2002), *available at* <http://www.epa.gov/owm/gapreport.pdf>; *see also* HANAK, *supra* note 251, at 1 (estimating that \$500 billion is needed to rebuild California's transportation, water, school, and other systems over the next twenty years); William Yardley, *Gaping Reminders of Aging and Crumbling Pipes*, N.Y. TIMES, Feb. 8, 2007, at A19 (discussing the American Society of Civil Engineers's “Report Card for America's Infrastructure,” which gave the country's wastewater infrastructure a D-minus).

means to finish a job started during earlier eras. It is justifiable in the name of equitable, not redistributive, access to investment and property appreciation.

Should intergovernmental funding continue to grow (or at least stabilize), our nineteenth century model of extraterritorial service provision suggests an intriguing modern hybrid that is peculiarly well suited to recessionary times: conscript cities to compete for federal stimulus funds to consolidate affordable housing (i.e., retrofit that housing with infrastructure) at the urban fringe. Just as turn of the twentieth century cities in the United States served as brokers and leaders of fringe infrastructure, cities will be in the best position to plan and compete for, not to mention spend, federal dollars on urban infrastructure. Intergovernmental funding for infrastructure is a competitive enterprise that requires local governments to prepare costly, highly engineered proposals. In the usual case, cities are better situated to compete for funding than counties due to higher levels of professional staffing, greater experience with application processes, smaller-scale constituencies, and control of the infrastructure lines into which unincorporated urban areas would tie. In states with extraterritorial zoning jurisdictions or spheres of influence, cities' extraterritorial land use powers should come with corresponding obligations for extraterritorial service provision, including competitive bidding for supplemental infrastructure funds. Annexation laws that nudge or, in some narrow cases, compel cities to absorb the low-income areas at their fringe (as described in Part IV) appropriately shift a land use planning opportunity to cities to aggressively pursue habitability improvements in their fringe areas.

While counties tend to be weaker partners in terms of proactive competition for intergovernmental dollars, they should not be allowed to freeride on city efforts. Counties can and should be required to invest in these areas prior to annexations through matching funds and transitional tax-sharing agreements.²⁵⁴ Such an approach has been adopted in Florida, where one county seeking to eliminate its unincorporated islands has funded infrastructure to improve the attractiveness of its pockets for voluntary annexations.²⁵⁵ Alone, these improvements have failed to promote the annexation of the least well-off and most racially segregated communities, thus indicating the importance of a certain degree of city coercion as a companion policy.

For skeptics who doubt the longevity of our expanded landscape of infrastructure funding, city and county partnerships will offer a better current default than counties alone when it comes to the urban infrastructure burden at the fringe—whatever the state of intergovernmental generosity. Planning staffing levels, existing service networks, and bureaucratic economies of scale

254. In other words, where reforms to state law would grant a corresponding right to counties to initiate and approve mandatory annexations of residual unincorporated islands and fringe areas with an urgent need for municipal services, such laws would also include a mandatory tax sharing agreement to place some of the burden of initial capital investments on the county.

255. See Anderson, *supra* note 2, at 1111-12 & nn.59-61.

make them an essential participant in soliciting and administering infrastructure funds. But the bottom line, as a practical matter, is that some degree of intergovernmental funding will be necessary to improve services at the lost, high-poverty urban edge.

CONCLUSION

Disadvantage and dilapidation are woven through the American urban fabric, across both time and geography. Today, some of our most severe poverty hides at the fringes of our towns and cities, where rural conditions maintain their misshapen hold on urban life. To address the needs in these unincorporated urban areas, occupants and advocates have summoned two traditional tools of redress—the lobby and the lawsuit. But for this problem, as for other incidents of spatial inequality, two legal developments over the course of the twentieth century have stunted these efforts.

First, local governments moved away from the collectivization of municipal taxes and the public subsidization of municipal services and infrastructure. Waves of public subsidization of suburban infrastructure—and thus subsidization of land values for residents there—withered as municipalities, under the pressure of restricted budgets, increasingly priced entry and residence within their jurisdictions. Early failures to support minority unincorporated urban areas through public infrastructure financing depressed land values and household liquidity. These changes provided a legitimate non-discriminatory basis (economic discrimination) for later decisions not to annex such communities. In tandem with this first change, courts transformed the nature of local autonomy granted to municipalities in setting their borders, increasingly treating municipal defendants in desegregation actions as small democracies rather than as state subdivisions. Under the legitimacy cast by this reconception, courts lost, or perhaps never found, the equitable power to order a municipality affirmatively to perform an annexation as a penalty for racially discriminatory boundary determinations. Juxtapose these two trajectories and it comes as no surprise, when, in the name of local autonomy and economic rationality, courts rejected civil rights claims brought by unincorporated urban areas.

The twentieth-century tools of community organizing and civil rights litigation are thus winded. Yet state and local government law continue to offer flexibility and potential. This article considers counties, a missing link in our discussions of federalism, regionalism, and local government power. It inquires whether, and how, giving counties a greater role in annexations could help to rationalize planning and improve conditions at the urban edge.

Counties' potential in this regard is less a commendation of their current competence and leadership than an adaptation to their weaknesses. Many are poor and neglectful managers of urban life. They are underresourced and

overburdened. Their governance under the one person, one vote principle gives their unincorporated residents no greater power than incorporated ones, despite unincorporated residents' lack of an alternative tier of general purpose local government. As a result of structural pressures and financial strains, and whatever their level of interest or disinterest in serving low-income unincorporated communities, counties have a strong interest in the annexation of their high poverty areas. In this role, they can provide a healthy counterbalance to—though not a replacement for—city discretion in mapping local borders.

Reshuffling the metropolitan balance of powers sets aside the question of whether cities' creation of unincorporated urban areas was driven by racial or economic discrimination. That matter is left to historians and higher authorities. By focusing instead on the background rules organizing institutional power, city discretion is restrained for its effects rather than its cause, and residents need not rely on motive to make their case. And rather than fighting the strong view of local autonomy that emerged in the twentieth century, the reforms discussed in the present Article simply apply that autonomy and power to counties as an additional tier of American local government, thereby counterbalancing harmful uses of that power by cities.

In this re-conception of county power over annexations lies the seed of future potential, and indeed this author's own future research: Might counties offer untapped potential over other matters of interjurisdictional segregation and spatial inequality? In particular, can we adjust county power (through a process of both adding and subtracting authority) to alleviate economic and racial polarization among their constituent cities? The characteristic that makes counties poor substitutes for a first-tier city government—their equal obligations to the residents of all cities and unincorporated places in their territory—suggests an untapped potential to coordinate and rationalize metropolitan regions. Many questions remain for another day, not the least of which is counties' potential for capture by their largest cities, their absent record on redistributive justice, and their poor land use planning. For now, suffice it to observe that over matters of annexation, counties' weak hand has enabled the unchecked practice of municipal underbounding and stranded unincorporated islands and fringes in material stasis and decay. On this issue at least, reform of county power provides a footpath.

