

**“MIRROR, MIRROR, ON THE WALL . . .”:<sup>1</sup>  
REFLECTIONS ON FAIRNESS AND  
HOUSING IN THE OMAHA-  
COUNCIL BLUFFS REGION**

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*“It wasn’t African Americans moving in that  
caused housing values to go down in . . . neighborhoods,  
it was whites leaving.”*

—Race: The Power of an Illusion<sup>2</sup>

*“In some cities, kids living just blocks apart lead incredibly  
different lives. They go to different schools, play in different  
parks, shop in different stores, and walk down different  
streets. And often, the quality of those schools and the safety  
of those parks and streets are far from equal – which means  
those kids aren’t getting an equal shot in life.*

*That runs against the values we hold dear as Americans.  
In this country, of all countries, a person’s zip code  
shouldn’t decide their destiny. We don’t guarantee equal  
outcomes, but we do strive to guarantee an equal shot at op-  
portunity – in every neighborhood, for every American.”*

—Barack Obama<sup>3</sup>

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1. JACOB GRIMM & WILHELM GRIMM, *Snow White*, in GRIMM’S FAIRY TALES (Stephanie Hedlund & Rochelle Baltzer eds., Magic Wagon 2011) (1812).

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2. *Race-The Power of an Illusion, The House We Live In* (California Newsreel transcript April 29, 2003). Transcript of episode available on the California Newsreel website: <http://newsreel.org/transcripts/race3.htm>.

3. Press Release, Barack Obama, The White House Office of the Press Secretary, Making Our Communities Stronger through Fair Housing (July 11, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/11/weekly-address-making-our-communities-stronger-through-fair-housing>.

*“When things aren’t working the way they should be . . .  
you have the makings of a great design project.”*

—Bruce Mau<sup>4</sup>

## I. INTRODUCTION

This article is about fair housing in the Omaha, Nebraska-Council Bluffs, Iowa metropolitan region. I focus on this region because I teach at the Creighton University School of Law and have lived in Omaha for almost ten years. I am enough of an insider to have heard a lot of stories about how things work here; I am enough of an outsider that I hear those stories with a sense of how things are done elsewhere.

In 2015, the United States Department of Housing and Urban Development (“HUD”) promulgated a regulatory requirement that cities receiving HUD funds ratchet up efforts to Affirmatively Further Fair Housing (“AFFH”) as required by the Fair Housing Act of 1968.<sup>5</sup> Inspired by that mandate, I began to look past current inequities in housing to the institutional structures that facilitated White<sup>6</sup> suburban growth after World War II, a time during which federal law and local practice together prevented Black citizens from purchasing homes outside of limited geographical areas.

Discrimination in housing has been against the law since 1968, yet the institutions of development that created neighborhoods of unequal opportunity and channeled people into those neighborhoods remain largely in place today. The effects of those institutions today are more indirect than direct, but they continue to do their work—work that is more structural than individual.

The particular institutional arrangements that I describe in this article, arrangements that constitute what I have termed the “SID+annexation development regime,” are specific to this region. In fact, they are limited to the Nebraska side of the region, and this article’s examination of them is thus specific to this part of this region. My approach here, however, is relevant beyond Omaha. Other cities and metro areas have their own variations on the theme of structural racism in housing and development. Understanding how those structures are constructed is an important step toward dismantling them.

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4. WARREN BERGER, GLIMMER: HOW DESIGN CAN TRANSFORM YOUR LIFE, AND MAYBE EVEN THE WORLD 185 (2009).

5. 42 U.S.C. §§ 3601-3619, 3631 (2012).

6. In this article, except when quoting others, the racial and ethnic descriptors I use are Black, White, and Hispanic. See Palma Joy Strand, *Is Brown Holding Us Back? Moving Forward, Six Decades Later: Visionary States, Civic Locals, and Trusted Schools and Teachers*, 23 KAN. J.L. & PUB. POL’Y 283, 285 n.15 (2014).

This practice recognizes the path dependence of the status quo—we are where we are because of where we have been.<sup>7</sup> History provides important context for understanding the institutional arrangements of today. Institutional forensics—using history, sociology, and law to dissect current structures of inequity—allows us to understand how structural racism works.

#### A. LOOKING BACK – “THE MAP”

I am sitting at a desk in the reading room at the National Archives in College Park, Maryland. It is a hot July day outside; inside, it is cool but also bright and sunny. Around me, researchers peruse genealogical and military records and other historical documents. I have in front of me the Home Owners’ Loan Corporation (“HOLC”) file for Omaha. I turn to the envelope attached to the back of the file, remove the Security Map that the HOLC drew in late 1935/early 1936, and unfold it.<sup>8</sup>

I know about redlining, of course. The lines drawn by the federal government in maps during the New Deal resulted in the denial of loans for mortgages on homes in Black and integrated neighborhoods for decades.<sup>9</sup> But when I unfold the map, I am not prepared. The map looks amateurish. It has handwritten numbers and shading that is textured like the crayon coloring of a child, and when I touch the blue lightly with my finger, a little color rubs off.

Yet this map has power—I can feel it. This “Security Map” transcribed the residential patterns of the Omaha of the Great Migration, the Omaha of the Great Depression, into policy, into action, into law. This map put the federal imprimatur on locally created patterns of racial segregation in housing. This map—this very map that I am holding—discerned, coalesced, and then perpetuated the predominantly Black neighborhoods north of Cuming Street and south of Binney Street and (mostly) between 20th and 30th Streets, neighborhoods that are still predominantly Black today. And, just as surely as it solidified Black neighborhoods, this map revealed and then grounded burgeoning White neighborhoods, especially White development spreading to the west. This westward development remains predominantly White today.

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7. See *id.* at 293 & *infra* note 74 and accompanying text.

8. See *infra* Appendix B.

9. SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 111-12 (2004). For a more detailed description of redlining, see Alexis Madrigal, *The Racist Housing Policy That Made Your Neighborhood*, *THE ATLANTIC* (May 22, 2014), <http://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/>.

On this map, green does not touch red. Looking at the entire city, which extends west only as far as 72nd Street, I can see clearly how the green all-White neighborhoods labeled “Best” in the map’s legend are separated from the red (actually pinkish) mostly-Black neighborhoods labeled “Hazardous” by the map’s legend. Cautious, protective swathes of blue (“Still Desirable”) and yellow (“Definitely Declining”) neighborhoods insulate and *quarantine* the green from the red. This map, created in consultation with mortgage lenders and bankers from the Omaha community, reflected the 1935 status quo of where people lived. This map also reflects the 2016 status quo of where people live: On the Racial Dot Map for Omaha, Black residents are concentrated north of the city center and Hispanics to the south; White residents spread to the west.<sup>10</sup>

#### B. TAKING STOCK

Race and housing, housing and race. These two strands of the social double helix recombined in the twentieth-century United States to create a new form of inequality—housing segregation by race. The Security Map drawn by the federal HOLC during the New Deal distributed private funds and guarantees along racial lines. Though the Fair Housing Act of 1968<sup>11</sup> outlawed this type of racial discrimination in 1968, the results of decades of discriminatory policies and practices are not easily undone. A racialized status quo perpetuates itself even without additional discrimination.<sup>12</sup> Throughout the nation, almost fifty years later, housing segregation is prevalent,<sup>13</sup> as are racial wealth disparities<sup>14</sup> and differential access to opportunity based on geography of residence.<sup>15</sup>

Housing is fundamental, foundational, and financial. Housing is fundamental because having a place to live is, as the head of Omaha’s

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10. See Dustin Cable, *The Racial Dot Map*, WELDON COOPER CENTER FOR PUBLIC SERVICE (July 2013), <http://www.coopercenter.org/demographics/Racial-Dot-Map>. Across the Missouri River to the east, Council Bluffs, Iowa, is also predominantly White. *Id.* See also CENTER FOR PUBLIC AFFAIRS RESEARCH, UNIVERSITY OF NEBRASKA AT OMAHA, SELECTED CHARACTERISTICS FOR CENSUS TRACTS IN DOUGLAS, SARPY, LANCASTER AND HALL COUNTIES, NEBRASKA, FROM THE 2009-2013 AMERICAN COMMUNITY SURVEY 13 (March 2015), [http://nebraskalegislature.gov/pdf/reports/committee/select\\_special/lpc/lpc2015selcharco.pdf](http://nebraskalegislature.gov/pdf/reports/committee/select_special/lpc/lpc2015selcharco.pdf).

11. 42 U.S.C. §§ 3601-3619 (2012).

12. See, e.g., Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Law of Succession*, 89 OR. L. REV. 453, 464-68 (2010) (discussing how facially race-neutral law governing succession reproduces existing racial advantage and disadvantage).

13. CASHIN, *supra* note 9, at 83-124; Kyle Crowder et al., *Neighborhood Diversity, Metropolitan Constraints, and Household Migration*, 77 AM. SOC. REV. 325, 325 (2012).

14. Strand, *supra* note 12, at 461-63.

15. See Gregor Aisch et al., *The Best and Worst Places to Grow Up: How Your Area Compares*, NY TIMES (May 4, 2015), <http://www.nytimes.com/interactive/2015/05/03/upshot/the-best-and-worst-places-to-grow-up-how-your-area-compares.html>.

U.S. HUD office, Earl Redrick, observes, the basis for everything else: If you do not have a safe and reliable place to live, the rest of life becomes precarious. Housing is foundational because so much of our lives is centered on and profoundly affected by where we live: the safety of our streets, the schools we attend, our neighborhood connections, even our access to grocery stores. Housing is also financial because most families in the U.S., especially middle class families, hold most of their wealth in the form of home equity.<sup>16</sup>

President Barack Obama’s conviction that “a person’s zip code shouldn’t decide their destiny”<sup>17</sup> responds to recent research documenting that where children grow up within the U.S. in fact does matter. A team of economists led by Raj Chetty, working with income statistics from millions of individuals in the cohort of children born between 1980 and 1982, concluded “there is substantial variation in intergenerational mobility across areas within the U.S.”<sup>18</sup> Compared to the national average, for example, poor children growing up in some counties had a much better chance of upward mobility, while poor children growing up in other counties had significantly poorer prospects.<sup>19</sup> The Chetty team identified five factors correlated with social mobility: segregation and inequality (negative correlations with upward mobility) as well as K-12 school quality, social capital, and fewer single-parent families (positive correlations).<sup>20</sup>

In July 2015, HUD issued final regulations containing a revised and reinvigorated interpretation of its obligations under the provision of the 1968 Fair Housing Act that requires HUD to Affirmatively Further Fair Housing.<sup>21</sup> The Fair Housing Act, acknowledging the historical role of the federal government in promoting discrimination in housing, placed on HUD the responsibility for not simply enforcing a cessation of discrimination, but also overcoming the effects of past discrimination—the AFFH duty.<sup>22</sup> The charge in the original 1968 Fair

16. Strand, *supra* note 12, at 460 (“[F]or the three middle quintiles of Americans . . . the principal residence is between one-half and two-thirds of total net worth.”).

17. See *supra* note 3 and accompanying text.

18. Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the U.S.*, 129 Q.J. OF ECON., 1553, 1554 (Nov. 2014).

19. *The Causal Effects on Household Income in Adulthood by County*, THE EQUALITY OF OPPORTUNITY PROJECT, <http://www.equality-of-opportunity.org/> (last visited Oct. 26, 2016).

20. Chetty et al., *supra* note 18, at 1557-58.

21. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903) [hereinafter *AFFH I*].

22. With this requirement, the Fair Housing Act went beyond the approach of the Civil Rights Act of 1964, which simply prohibited discrimination on the basis of race and other prohibited characteristics. The AFFH duty puts an affirmative duty on HUD, again going beyond the review function of the federal government provided by Voting Rights Act of 1965, which both prohibited discrimination in voting and gave additional protection in the form of a requirement that forbade local jurisdictions from changing

Housing Act to “all executive branch departments and agencies administering housing and urban development programs and activities to administer these programs in a manner that affirmatively furthers fair housing[ ]” had languished.<sup>23</sup> As HUD itself acknowledged regarding pre-2015 enforcement efforts, “the . . . approach was not as effective as originally envisioned.”<sup>24</sup> The 2015 regulations signaled a new approach and a new level of commitment.

The 2015 AFFH regulations move beyond current acts of discrimination in housing by identifiable actors to the group-based disparities that characterize the race-housing nexus today.<sup>25</sup> In line with this focus, the 2015 AFFH regulations specify the use of “big data” generated by HUD from census information. With these data, the regulations provide context for localities, which are the primary decision-makers in land use and housing decisions, to engage in an informed and serious assessment of housing and race as well as other group indicia that are of concern in providing or accessing housing.

HUD General Counsel Helen Kanovsky, speaking to my Emerging Perspectives on Governance class in Washington, D.C. in the fall of 2015, characterized the AFFH regulations as inviting local communities to look at themselves in a mirror. This “Mirror, Mirror, on the Wall” exercise calls for localities, and the people and organizations within those localities, to look honestly at themselves, their neighborhoods, and their historical and current patterns of development. For all of us in our own localities, when we look at our reflection in the AFFH Mirror, what do we see?

This article responds to that question for one mid-sized metropolitan area, the Omaha-Council Bluffs region (metro area population 915,312 in 2010) that straddles the Missouri River across the Nebraska-Iowa state line. Evident to even the casual observer, the Omaha-Council Bluffs region exhibits strong patterns of racial/ethnic and socioeconomic segregation. Though the region has its own unique history and characteristics, residential segregation in Omaha-Council Bluffs echoes residential segregation in most other metro areas in the United States. In terms of opportunity, Douglas County is “pretty bad for income mobility for children in poor families. It is better than

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their voting structures without preclearance from the U.S. Department of Justice. *But see* *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (invalidating preclearance provisions of Voting Rights Act).

23. *AFFH I*, 80 Fed. Reg. at 42272.

24. *Id.* See also Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.

25. Joe Feagin, *Excluding Blacks and Others From Housing: The Foundation of White Racism*, 4 CITYSCAPE: J. POL'Y DEV. & RES. 79 (1999).

about 36 percent of counties.”<sup>26</sup> Pottawattamie County, on the other hand, is “pretty good . . . better than about 73 percent of counties.”<sup>27</sup> And Sarpy County is “very good . . . better than about 84 percent of counties.”<sup>28</sup>

Part II of this article provides an overview of the AFFH regulations,<sup>29</sup> followed by a metro-wide, birds-eye survey of housing patterns and related characteristics in Part III.<sup>30</sup> Part IV presents the dominant story of the region’s development—the steady westward march of the Omaha city limits through annexation.<sup>31</sup> Part V identifies the predominant legal vehicle for that growth, Sanitary and Improvement Districts (“SIDs”), and a set of interlocking legal structures that has served as the engine for post-WWII westerly suburbanization in the region, what I refer to in the article as the SID+annexation development regime.<sup>32</sup> Part VI describes how the SID+annexation development regime has contributed, and continues to contribute, to the concentrations of racial and ethnic poverty in the region.<sup>33</sup> Finally, Part VII offers questions and proposed actions for neutralizing the current development regime and for initiating new development strategies to Affirmatively Further Fair Housing.<sup>34</sup>

## II. THE MIRROR: THE DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING

The Fair Housing Act of 1968 enacted two distinct strategies to combat discrimination in housing. Similar to the Civil Rights Act of 1964<sup>35</sup> and the Voting Rights Act of 1965,<sup>36</sup> the Fair Housing Act prohibits discrimination in the provision of housing on the basis of race, national origin, and other protected characteristics.<sup>37</sup> This prohibition is enforceable by direct legal action, and it encompasses acts that

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26. See Aisch et al., *supra* note 15.

27. *Id.* (Select “Pottawattamie”).

28. *Id.* (Select “Sarpy”). The outlying counties in the Heartland region, except for Cass to the south of Sarpy (better than 83% of counties), are overall better still. *Id.* (Select “Cass”). Harrison: better than 94% of counties. *Id.* (Select “Harrison”). Mills: better than 89% of counties. *Id.* (Select “Mills”). Washington: better than 91% of counties. *Id.* (Select “Washington”). Saunders: “among the best counties in the U.S.” *Id.* (Select “Saunders”).

29. See *infra* notes 41-82 and accompanying text.

30. See *infra* notes 83-143 and accompanying text.

31. See *infra* notes 144-200 and accompanying text.

32. See *infra* notes 201-248 and accompanying text.

33. See *infra* notes 249-278 and accompanying text.

34. See *infra* notes 279-293 and accompanying text.

35. 42 U.S.C. §§ 2000e-2000e-17 (2012).

36. 42 U.S.C. §§ 1973-1973aa-6 (2012).

37. *Programs Administered by Fair Housing an Equal Opportunity (“FHEO”)*, UNITED STATES DEP’T OF HOUSING AND URBAN DEV. (Sept. 25, 2007), [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/progdsc/title8](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdsc/title8).

have “disparate impact” as well as those with direct effect and invidious intent.<sup>38</sup> The Fair Housing Act also directed the United States Department of Housing and Urban Development (“HUD”) to administer its programs in a manner that affirmatively furthers fair housing.<sup>39</sup> According to HUD itself, “This is not only a mandate to refrain from discrimination but a mandate to take the type of actions that undo historic patterns of segregation and other types of discrimination and afford access to opportunity that has long been denied.”<sup>40</sup>

#### A. RACIAL DISCRIMINATION IN U.S. HOUSING – A BRIEF SUMMARY

The history of housing discrimination impeding access to opportunity is both a national and a local history. As a result of the Great Migration of Black citizens out of the South to the north and west in the early decades of the twentieth century, cities that did not previously have significant numbers of Black residents saw their Black populations rise. This population influx, labor competition, racial tensions, and racial violence led to White animosity and the rise of racially restrictive covenants in housing, which limited the ability of Black citizens to live and purchase homes in many areas. In 1948, the United States Supreme Court declared these covenants unconstitutional in *Shelley v. Kraemer*,<sup>41</sup> but federal redlining policy, which arose with the New Deal, continued in effect. Redlining, taking its name from the red- or pink-colored areas on Home Ownership Loan Corporation (“HOLC”) maps prepared for cities throughout the nation in the 1930’s, channeled federal and private mortgage subsidies and funds to all-White neighborhoods and to the White citizens who were able to purchase homes in those neighborhoods. Though the Fair Housing Act made redlining illegal in 1968,<sup>42</sup> redlining practices continued.<sup>43</sup> Moreover, decades of legalized housing segregation based on

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Title VIII of the Civil Rights Act of 1968 (Fair Housing Act) prohibits discrimination in the sale, rental and financing of dwellings based on race, color, religion, sex or national origin. Title VIII was amended in 1988 . . . by the Fair Housing Amendments Act, which . . . expanded coverage . . . to prohibit discrimination based on disability or on familial status (presence of child under age of 18, and pregnant women)[.]

*Id.* (citing 42 U.S.C. §§ 3601-3619 (2012); 24 CFR Parts 100, 103 (2016)).

38. Texas Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015).

39. 42 U.S.C. § 3608.

40. *AFFH I*, 80 Fed. Reg. at 42274.

41. 334 U.S. 1 (1948).

42. FEDERAL RESERVE, FEDERAL FAIR LENDING REGULATIONS AND STATUTES: FAIR HOUSING ACT, CONSUMER COMPLIANCE HANDBOOK (2006), [https://www.federalreserve.gov/boarddocs/supmanual/cch/fair\\_lend\\_fhact.pdf](https://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_fhact.pdf).

43. See, e.g., JONATHAN BROWN & CHARLES BENNINGTON, RACIAL REDLINING: A STUDY OF RACIAL DISCRIMINATION BY BANKS AND MORTGAGE COMPANIES IN THE UNITED STATES 4 (1993) (“Focussing [*sic*] on 16 large metropolitan areas, this study identified 49



race created racially separate neighborhoods that became part of the geographical fabric of the majority of cities around the nation, baked into the nation’s housing DNA through racialized patterns of post-WWII suburbanization.

Redlining led directly to housing segregation and indirectly to racialized wealth. White households, with access to federally insured and standardized credit, bought into suburban neighborhoods that saw rising demand, increasing property values, tax-supported schools, and wealth in the form of home equity. Black households, without access to credit and without the ability to buy into non-redlined neighborhoods, were relegated to areas within central cities that saw falling property values, underfunded schools, and little home equity wealth.<sup>44</sup>

The contemporary fallout of twentieth-century housing segregation thus goes beyond continuing patterns of racially segregated housing to disparities between White and Black wealth on the order of twenty to one.<sup>45</sup> Fallout today also includes predatory lending to would-be minority home buyers, which has been documented as an important contributing cause of the housing crisis in the late 2000s.<sup>46</sup> Overall, the centuries-old historical link between race and economics<sup>47</sup> has been re-enacted from the mid-twentieth century to the pre-

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major mortgage lenders whose geographic lending patterns in 62 separate instances substantially excluded or underserved minority neighborhoods . . . . This study also found that even though racial redlining has been prohibited by federal civil rights laws for many years, federal authorities have failed to adopt effective regulations and enforcement procedures thereby condoning both the serious and subtle injuries to minority neighborhoods. This is a systemic failure, not a matter of occasional lapses.”)

44. In fact, Black citizens who sought to participate in the wealth-building home-ownership market were prime targets for predatory schemes, which further enriched those (usually Whites) in a position to exploit them. In *Family Properties: How the Struggle Over Race and Real Estate Transformed Chicago and Urban America*, for example, historian Beryl Satter details the use of the contract for deed as a vehicle for White landlords in the Chicago region to make money off of would-be Black home buyers. Black citizens lost out by virtue of being excluded from federal home-buying loan assistance programs; they lost out again to unscrupulous profiteers. BERYL SATTER, *FAMILY PROPERTIES: HOW THE STRUGGLE OVER RACE AND REAL ESTATE TRANSFORMED CHICAGO AND URBAN AMERICA* (2009).

45. Palma Joy Strand, *Education-as-Inheritance Crowds Out Education-as-Opportunity*, 59 ST. LOUIS L.J. 283, 290 n.45 (2015).

46. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629 (2010). See also *City of Miami v. Citigroup*, 801 F.3d 1268, 1276 (11th Cir. 2015) (reasoning that City of Miami was an “aggrieved person” under the Fair Housing Act and consequently able to state a claim that banks’ decades-long practice of discriminatory predatory lending practices—“redlining”—constituted a violation of the Act’s anti-discrimination provisions), *cert. granted sub nom. Wells Fargo & Co. v. City of Miami*, 136 S. Ct. 2545 (2016), *argued*, Nov. 8, 2016.

47. See Strand, *supra* note 12, at 473-77.

sent through housing discrimination and unequal access to housing wealth.<sup>48</sup>

Federally supported White suburbanization and the redlining of minority and mixed neighborhoods provided the social and political context for the Fair Housing Act's passage in 1968. Unlike Jim Crow segregation and unlike widespread voter suppression, which were centered in the South and implemented by states, racial discrimination in housing was a national phenomenon that the federal government spearheaded and that enjoyed broad political support.<sup>49</sup> This context explains the Fair Housing Act's charge to HUD to go beyond ending housing discrimination and to take positive action to undo the effects of past discrimination through "affirmatively furthering fair housing" ("AFFH"). This context also explains the substantial political controversy that accompanied the passage of the Fair Housing Act.<sup>50</sup>

Despite containing anti-discrimination provisions underscored by the AFFH imperative, the Fair Housing Act did not turn housing policy and practice on a dime. Though a few states and localities moved toward greater inclusivity in housing,<sup>51</sup> they were the exception. More typical was the laissez-faire constitutional approach that the United States Supreme Court adopted in response to thinly disguised local housing decisions that had patently racial effects. In 1977, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>52</sup> the Court upheld a city's zoning decision disallowing the construction of multi-family low- and moderate-income housing against an Equal Protection challenge. Although the "impact of the Village's decision [did] arguably bear more heavily on racial minorities," "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."<sup>53</sup> On this legal terrain, even a generous "disparate impact" interpretation of the statute's anti-discrimination provisions would be insufficient to undo the status quo.<sup>54</sup>

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48. *Id.* at 462.

49. KENNETH JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 203-18 (1985).

50. See Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247, 254-55 (2016).

51. See, e.g., *S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp.*, 336 A.2d 713 (N.J. 1975); MICHAEL FADEN ET AL., STRENGTHENING THE MODERATELY PRICED DWELLING UNIT PROGRAM: A 30 YEAR REVIEW: A REP. TO MONTGOMERY CTY. COUNCIL ON FUTURE PROGRAM AND POL'Y OPTIONS (2004).

52. 429 U.S. 252 (1977).

53. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269, 265 (1977) (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

54. For example, the United States Supreme Court held in *Inclusive Communities* that an anti-discrimination claim can be brought under the Fair Housing Act based on disparate impact. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*,

These political realities also hobbled early AFFH efforts.<sup>55</sup> Moreover, HUD’s AFFH initiatives are indirect and incentive-based rather than command-and-control regulations. To date, the primary strategy through which HUD meets its AFFH duty is disbursing grant funds to local entities only when “program participants certify, as a condition of receiving Federal funds, that they will affirmatively further fair housing.”<sup>56</sup> Private enforcement of this mandate exists only in the form of legal action against HUD to perform its statutory duty or for sanctions for its failure to do so.<sup>57</sup>

For decades, HUD implemented its AFFH duty through a process in which grantees or their consultants prepared an Analysis of Impediments (“AI”) to fair housing and committed to designated steps to affirmatively further fair housing as a condition for receiving HUD grants. This process applied to all HUD grantees throughout the nation including states, local governments, and public housing authorities. When HUD certified these commitments, its AFFH duty was deemed fulfilled and grant funds were released.<sup>58</sup>

In the mid-2000s, a lawsuit ruptured this status quo. The Anti-Discrimination Center of Metropolitan New York successfully asserted a *qui tam* action against Westchester County, New York.<sup>59</sup> A *qui tam* action enables a private party to bring an enforcement action claiming fraud against the government; the private party sues on the government’s behalf.<sup>60</sup> In this case, the Anti-Discrimination Center alleged that the County was perpetrating a fraud against HUD by misrepresenting its AFFH actions in its Analysis of Impediments.<sup>61</sup> Essentially, the charge was that the County had obtained federal grant funds under false pretenses. A 2009 settlement between the County, the Anti-Discrimination Center, and the United States Department of Justice “obligated [Westchester] County to pay \$30 million to the United States . . . and pay \$2.5 million to the [Center.] . . . [Westchester] County also made various commitments to affirma-

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135 S. Ct. 2507 (2015). On remand the United States District Court for the Northern District of Texas held that Inclusive Communities did not prove a prima facie case and dismissed its disparate impact claim challenging the allocation of Low Income Housing Tax Credits to further concentrate affordable housing with prejudice. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016).

55. Hannah-Jones, *supra* note 24.

56. *AFFH I*, 80 Fed. Reg. at 42274.

57. Matthew J. Termine, Note, *Promoting Residential Integration Through the Fair Housing Act: Are Qui Tam Actions a Viable Method of Enforcing “Affirmatively Furthering Fair Housing” Violations?* 79 *FORDHAM L. REV.* 1367, 1384-87 (2010).

58. *Id.* at 1391.

59. *Id.* at 1369-71.

60. *Id.* at 1393.

61. *Id.* at 1396.

tively further fair housing and to eliminate discrimination in housing opportunities.”<sup>62</sup>

Following the Westchester County settlement, the United States Government Accountability Office issued a report entitled “HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans.”<sup>63</sup> New proposed AFFH regulations in 2013 described a revised process.<sup>64</sup> Final AFFH regulations appeared in July 2015, accompanied by the understated observation from HUD that “the [Analysis of Impediments] approach was not as effective as originally envisioned.”<sup>65</sup>

#### B. THE 2015 AFFIRMATIVELY FURTHERING FAIR HOUSING REGULATIONS

In the 2015 AFFH regulations, the general parameters of HUD’s AFFH mandate went unchanged. The primary mode of implementation still requires grantees to meet conditions attached to HUD funds. Enforcement by third parties remains tenuous.

The specifics, however, have changed substantially. The 2015 AFFH regulations replace the Analysis of Impediments with a more rigorous Assessment of Fair Housing based on HUD-provided

local and regional data on integrated and segregated living patterns, racially concentrated areas of poverty [(“RCAP”)] or ethnically concentrated areas of poverty [(“ECAP”)], the location of certain publicly supported housing, access to opportunity afforded by key community assets, and disproportionate housing needs based on classes protected by the Fair Housing Act.<sup>66</sup>

Based on these standardized data, HUD grantees are required to “identify the contributing factors for segregation, racially or ethnically concentrated areas of poverty [and] disparities in access to opportunity,” establish goals for overcoming these factors, and “identify the metrics and milestones for determining what fair housing results will

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62. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., N.Y., 712 F.3d 761, 765 (2d Cir. 2013) (involving County non-compliance with consent decree). Absent the consent decree, “[t]he County’s exposure under the False Claims Act would have been \$156 million—treble damages based on \$52 million in false claims.” *U.S. ex rel. Anti-Discrimination Ctr.*, 712 F.3d at 765. Westchester County put HUD in an awkward position: Had HUD actually been defrauded, or had it been at least partially complicit in, or aware of, the languid AFFH efforts of Westchester County—and perhaps other grantees?

63. *AFFH I*, 80 Fed. Reg. at 42275.

64. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710 (proposed July 19, 2013) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903) [hereinafter *AFFH II*].

65. *AFFH I*, 80 Fed. Reg. at 42272.

66. *Id.* at 42272.

be achieved.”<sup>67</sup> HUD, in turn, commits to a new, more robust review process of local commitments.<sup>68</sup>

The 2015 rules make clear that access to fair housing goes beyond ensuring an affordable place to live and removing impediments to that goal:

Because housing units are part of a community and do not exist in a vacuum, an important component of fair housing planning is to assess why families and individuals favor specific neighborhoods in which to reside and whether there is a lack of opportunity to live in such neighborhoods for groups of persons based on race, color, national origin, disability, and other characteristics protected by the Fair Housing Act.<sup>69</sup>

The new Assessment of Fair Housing thus calls for consideration of “access to public transportation, quality schools and jobs, exposure to poverty, environmental health hazards, and the location of deteriorated or abandoned properties when identifying where fair housing issues may exist.”<sup>70</sup>

As reflected in the statement by President Obama at the beginning of this article, the new AFFH regulations manifest a conviction that fair housing is about access to opportunity. Moreover, the mandate for access to opportunity reflects a textured understanding of the nature of choice. In response to a comment about some housing segregation being self-imposed, for example, HUD articulates the goal of ensuring a “full range of housing options and choices” to all individuals and groups.<sup>71</sup> Full choice is not to be presumed from a status quo in which some housing options come with less access to opportunity than others. For example, if people choose housing in areas with lesser opportunity because that housing is affordable, the presumption does not arise that they are freely choosing less opportunity.

In this view, fair housing options and choices mean that “access to high-performing schools is a critical neighborhood component that should be considered in efforts to affirmatively further fair housing.”<sup>72</sup> Further, “A [RCAP/ECAP] is not an area of opportunity simply because it is served by a public transportation system or any single indicator of opportunity.”<sup>73</sup> With this nuanced view of choice and clear understanding of the link between housing and opportunity, the 2015 rules recognize the foundational nature of housing. Fair housing pro-

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67. *Id.* at 42355 § 5.154.

68. *Id.* at 42358 § 5.162.

69. *Id.* at 42282.

70. *Id.*

71. *Id.* at 42280.

72. *Id.* at 42337.

73. *Id.* (noting the acronym stands for Racially Concentrated Area of Poverty/Ethnically Concentrated Area of Poverty).

vides access to opportunity for everyone, because everyone is a member of the community.

### C. THREE KEY ASPECTS OF THE 2015 AFFH RULES

Three aspects of the 2015 AFFH rules are noteworthy from a structural point of view. First, the rules call for localities to expand the scale of their consideration of fair housing—looking at groups rather than individuals and looking at regions rather than specific localities. The rules respond to a “legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing.”<sup>74</sup> The harm is institutional and structural, evidenced in statistical disparities<sup>75</sup> in housing patterns based on race, ethnicity, and socioeconomic status. The rules’ reliance on “big data” affirms the group-based scope of both past injury and present effect.

At the same time, the rule gently yet unmistakably pushes legally distinct local entities toward regional collaboration. In addition to HUD providing regional as well as local data, the rule explicitly encourages regional consultation in the course of the Assessment of Fair Housing.<sup>76</sup> Further, regions that have prepared Fair Housing Equity Assessments (“FHEAs”) under the recent Sustainable Communities grant program jointly administered by HUD, the Environmental Protection Agency, and the Department of Transportation<sup>77</sup> are allowed a “bye” in meeting the first deadline for submitting the new Assessment of Fair Housing.<sup>78</sup> This reward for past regional collaboration postpones additional effort to meet new AFFH requirements by virtue of prior regional cooperation, and it may nudge cooperating local entities further in the direction of regional collaboration.

Second, notwithstanding the pull toward a regionalist perspective, the 2015 rules are grounded in a recognition of local variation in both obstacles to fair housing and strategies for overcoming those ob-

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74. *Id.* at 42272.

75. See Palma Joy Strand, *Racism 4.0, Civity, and Re-Constitution*, 42 HASTINGS CONST. L.Q. 763, 765-71 (2015).

76. *AFFH I*, 80 Fed. Reg. at 42360 § 91.100.

77. See *The Fair Housing and Equity Assessment (FHEA)*, UNITED STATES DEP’T OF HOUSING AND URBAN DEV., [https://portal.hud.gov/hudportal/HUD?src=/program\\_offices/economic\\_development/regional\\_fairhsg\\_equityassesmt](https://portal.hud.gov/hudportal/HUD?src=/program_offices/economic_development/regional_fairhsg_equityassesmt) (last visited Nov. 6, 2016) (describing FHEA as essentially a regional Analysis of Impediments); see also *Sustainable Communities Regional Planning Grants*, UNITED STATES DEP’T OF HOUSING AND URBAN DEV., [https://portal.hud.gov/hudportal/HUD?src=/program\\_offices/economic\\_development/sustainable\\_communities\\_regional\\_planning\\_grants](https://portal.hud.gov/hudportal/HUD?src=/program_offices/economic_development/sustainable_communities_regional_planning_grants) (last visited Nov. 6, 2016) (supporting “locally-led collaborative efforts that bring together diverse interests from the many municipalities in a region to determine how best to target housing, economic and workforce development, and infrastructure investments to create more jobs and regional economic activity.”).

78. *AFFH I*, 80 Fed. Reg. at 42357 § 5.160(a)(2); see also *id.* at 42324.

stacles.<sup>79</sup> Local variation stems in part from local entities holding primary responsibility for land use decisions, from legal landscapes that vary by state and locality, and from varying local histories, demographics, and cultures. The new AFFH rules seek to influence, channel, and affect the direction of local decisions; they do not make specific findings, set definitive standards, or direct particular strategies. “The duty to affirmatively further fair housing does not dictate or preclude particular investments or strategies as a matter of law.”<sup>80</sup> This approach provides space for local variation, local creativity, and local adaptations of the fair housing wheel to best meet local needs, thrive in local conditions, and enjoy local buy-in.<sup>81</sup>

The 2015 rules are thus quite circumspect from a federalism point of view. HUD specifies a policy direction and relevant parameters while assigning to local entities the responsibility to craft specific tailored goals and actions within those parameters to move in that direction. To some degree, this federal modesty may reflect the fact that the rule’s posture is attaching conditions to HUD disbursements rather than outright regulation, reflecting the fact that the AFFH language directs itself to HUD rather than to states and localities. Yet the rules read also as federal articulation of a necessary partnership between a central government with its broad-based, long-term vision and decentralized entities with local knowledge and the capacity to innovate. Such a partnership makes sense from a practical as well as legal point of view.

Third, and most fundamental, going beyond even the expansive “disparate impact” anti-discrimination mandate, the AFFH rules play offense rather than defense. “HUD has the statutory authority to ensure that participants in HUD-funded programs not only refrain from discrimination, but also take meaningful actions to increase fair housing choice and access to opportunity and combat discrimination.”<sup>82</sup>

The rules explicitly decline to designate what those meaningful actions should be. Instead, the regulatory posture is creative and divergent. The rules seek to elicit from local entities entrepreneurship rather than compliance. There are indeed specifics to the AFFH rules. Program participants must prepare an Assessment of Fair Housing

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79. *Id.* at 42288-89. “Overcome” is the word used in the regulations, substituted for “mitigate and address” in the proposed regulations. *Id.*

80. *Id.* at 42279.

81. *Cf.* Strand, *supra* note 6, at 334 (“For educational initiatives to truly ‘take,’ they must be homegrown. Districts can certainly learn from one another, but buy-in ultimately takes root through the process of identifying issues and opportunities and developing responses internally.”).

82. *AFFH I*, 80 Fed. Reg. at 42282; *see also id.* at 42279 § 5.152 (defining the term meaningful action to include acts “reasonably expected to achieve a material positive change”).

using the data provided by HUD on patterns of segregation, concentrated areas of poverty, and differential access to opportunity. The Assessment of Fair Housing must include specified meaningful actions—goals with benchmarks and timelines.

Within these parameters, local entities have discretion to generate and design their own AFFH meaningful actions. With additional discretion and freedom to maneuver, however, comes responsibility for initiative and innovation. Playing offense requires marshaling resources, developing strategies, and adopting a can-do (rather than a have-to-do) mindset.

The aptness of the Mirror analogy for the 2015 AFFH regulations is apparent. HUD generates data on housing and related characteristics of a local grantee. These data provide a comprehensive portrait of housing, not only of the locality but also of its region. HUD essentially holds up this AFFH Mirror and requires localities to look at their fair housing reflection, to describe what they see, and to take ameliorative actions if the reflection reveals unfairness in the form of lack of widespread access to neighborhoods of opportunity.

### III. WHY WE NEED A MIRROR: SEGREGATION IN THE CITY

When localities look into the Affirmatively Further Fair Housing (“AFFH”) Mirror, the reflection they see is of overall patterns of housing and opportunity. Familiar statutory prohibitions against discrimination operate against specific acts with identifiable effects, even when those effects ripple out to groups. The statutory mandate to AFFH, in contrast, operates to reverse the effects of decades of interlocking institutional and structural policies that led to actions throughout financial, real estate, political, and legal systems that advantaged an entire group of citizens while disadvantaging another. The line between advantage and disadvantage was race, and that line directed more Whites to affluence and more Blacks to a lack of wealth and opportunity.

The reflection of systemic racism and disadvantage appears in disparate statistics, in regional maps that show trends, in indicia and indices that capture what the statistics and maps show us. This Part of the article summarizes the reflection of the Omaha-Council Bluffs region in the AFFH Mirror. Dismantling systemic differential access to housing and opportunity requires first understanding the results of the existing systems.

#### A. STATISTICS AND MAPS

Whites, Blacks, and Hispanics in Omaha-Council Bluffs live in racial and ethnic clusters, and the region falls toward the “more segre-



gated” end of the national spectrum as compared to other metropolitan areas in the United States. Using 2010 United States Census data, the Institute for Child, Youth, and Family Policy of the Heller School at Brandeis University ranks the largest 100 metropolitan regions in the United States on the basis of segregation of Blacks, Hispanics, and non-Hispanic Whites. The Institute measures segregation using a dissimilarity index with a value of 0% denoting total integration and 100% total segregation.<sup>83</sup> Omaha, with a Black-White dissimilarity index of 61.3%, is the 38th most segregated metropolitan area in the United States.<sup>84</sup> In terms of Hispanic/non-Hispanic White segregation, Omaha is the 30th most segregated area nationally, with a dissimilarity index of 48.8%.<sup>85</sup>

These racial and ethnic clusters correspond to socioeconomic separation. According to 2000 United States Census data, approximately 6.9% of Omaha non-Hispanic Whites, 14.3% of Omaha Hispanics, and 21.4% of Omaha Blacks live in high-poverty neighborhoods.<sup>86</sup> In terms of exposure to neighborhood poverty, Omaha ranks 81st out of the top 100 metro areas for Whites,<sup>87</sup> 58th for Hispanics,<sup>88</sup> and 34th for Blacks.<sup>89</sup> Whites in Omaha are less exposed to poverty in their neighborhoods than Hispanics, who are in turn less exposed to poverty in their neighborhoods than Blacks. Relative to the 100 largest metropolitan areas nationally, Omaha is doing well in terms of Whites not experiencing neighborhood poverty, a little better than average in terms of Hispanics, and below average for Blacks.

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83. *Segregation of the Population: Dissimilarity with Non-Hispanic Whites by Race/Ethnicity*, HELLER SCHOOL FOR SOCIAL POLICY AND MANAGEMENT, <http://www.diversitydata.org/Data/Rankings/Show.aspx?ind=163&ch=6&tf=38&sortby=Value&sortChs=6&sort=HighToLow&notes=True&rt=MetroArea&rgn=ShowLargest100> (last visited Jan. 13, 2017). The dissimilarity index is defined as representing “the proportion of one racial group that would need to relocate to another neighborhood (census tract) for that racial group to be distributed across the metro area like a second (reference) racial group.” *Id.*

84. *Id.* The range is significant: the most integrated Black-White city is Provo-Orem, UT, at 21.9% (Provo-Orem, UT); the most segregated is Milwaukee-Waukesha-West Allis, WI, at 81.5%. *Id.* Almost two-thirds (62) of all 100 metro areas fall in the 50-60% range. *Id.*

85. *Id.* (select “Hispanic,” followed by “UPDATE THIS REPORT”). The most integrated city is Palm Bay-Melbourne-Titusville, FL at 25.0%; the most segregated is Springfield, MA, at 63.4%. Two-fifths (40) of all 100 metro areas fall in the 40-50% range.

86. *Exposure to Neighborhood Poverty by Race/Ethnicity*, HELLER SCHOOL FOR SOCIAL POLICY AND MANAGEMENT, <http://www.diversitydata.org/Data/Rankings/Show.aspx?ind=59&tf=7&sortby=Name&sort=HighToLow&notes=True&rt=MetroArea&rgn=ShowLargest100> (last visited Jan. 13, 2017).

87. *Id.* (Select “All,” followed by “UPDATE THIS REPORT”).

88. *Id.* (Select “Hispanic,” followed by “UPDATE THIS REPORT”).

89. *Id.* (Select “Non-Hispanic Black” followed by “UPDATE THIS REPORT”).

The effects of residential segregation—people living in separate racial or ethnic and socioeconomic clusters—extend far beyond housing. Where you live affects your physical and mental well-being: housing is connected to health. Where you go to school depends on where you live: education is connected to housing. Your health also contributes to success in school: education is connected to health. Your academic preparation affects work qualifications: employment, as well as wealth and income, are connected to education. Where you live also affects who you know: housing affects your social networks. Who you know affects whether you can find a job: social networks affect employment and income. The old jingle that starts with the hipbone being connected to the thighbone captures the reality of links between different parts of a system, whether it is the health of a human body or the well-being of a social community. The jingle, in fact, oversimplifies reality. More or less directly, all bones and all social indicators are connected to all others: advantage and disadvantage, the effects of residential segregation, are systemic.

These interconnections are starkly visible in maps of the Omaha-Council Bluffs region that show well-being according to a wide range of measurable attributes. Educational levels measured by high school graduation or General Educational Development (“GED”) equivalent and having a bachelor’s degree are higher to the west (predominantly White), lower in eastern Omaha to the immediate north (predominantly Black) and south (predominantly Hispanic) of the city center.<sup>90</sup> More people live in poverty in eastern Omaha; fewer to the west.<sup>91</sup> Household incomes are higher to the west and lower to the east.<sup>92</sup> Homeownership is higher to the west, lower in the east,<sup>93</sup> and homes are more valuable to the west, less valuable to the east.<sup>94</sup> Unemployment is lowest to the west, higher elsewhere.<sup>95</sup> In east Omaha, many residents lack health insurance; in west Omaha, most residents are insured.<sup>96</sup> Areas of high well-being according to various measures align, as do areas of relatively less well-being. In Omaha, west is better off than east, especially those areas in the east that abut the city center to the north and south.

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90. CENTER FOR PUBLIC AFFAIRS RESEARCH UNIVERSITY OF NEBRASKA OMAHA, *supra* note 10, at 19 (examining a high school graduation/GED). *Id.* at 22 (examining a bachelor’s degree).

91. *See id.* at 25.

92. *See id.* at 31.

93. *See id.* at 43.

94. *See id.* at 46.

95. *See id.* at 37.

96. *See id.* at 52.

## B. THE (RACIALIZED) HISTORY OF SUBURBIA

These patterns did not just happen. Before World War II, Omaha extended west only as far as about 72nd Street.<sup>97</sup> Pre-war housing was relatively modest, on small lots, and accessible to central industrial and downtown areas by streetcar. Following the war, suburbanization came to the region.

Nationally, four factors fueled the explosion in suburban development.<sup>98</sup> First, federal subsidies for roads shifted the primary transportation mode to the automobile and opened up areas farther from traditional city cores for development.<sup>99</sup> Second, federally backed mortgages brought home-buying within the reach of many. Third, local policies and practices provided tracts of land capable of being subdivided for low-density residential development. Fourth and finally, the post-war baby boom led to a surge in demand for homes to accommodate families with children. All but the last of these factors were the direct products of government policy and action. These four factors explain the suburban growth of the Omaha-Council Bluffs region, and they explain why housing built farther from the city center is larger, less dense, and less accessible. They do not explain why this development proceeded predominantly westward. Nor do they explain the racialized character of suburban development.

As to the "why west?" question, former Omaha City Planner Steve Jensen suggests that part of the reason was the historical westward focus of the city. The city, as the eastern terminus of Union Pacific, was from the beginning oriented in the direction of the construction of the Transcontinental Railroad. This orientation contributed to close ties between city founders and the State of Nebraska, closer than their ties with the City of Council Bluffs or the State of Iowa. Another part of the reason, according to Jensen, is the large Papio River watershed that extends west from the Missouri River and encompasses most of Douglas County, which facilitates connecting development into a single sewer network.

As to the racialized pattern of suburban development, the Federal Housing Administration, the agency responsible for determining the parameters for underwriting home-buying mortgages, explicitly disfa-

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97. Numbered streets on the Nebraska side run north-south, start at the Missouri River in the east, and march westward. To the west, the Omaha city limits currently reach well past 200th Street.

98. PETER HALL, *CITIES OF TOMORROW* 291-94 (4th ed. 2014).

99. Interstate 80, which links New York City and San Francisco east-west, comes into Council Bluffs from the northeast, passes south of the Omaha city center, and heads west and south toward Lincoln. Interstate 29, running north-south between North Dakota and Kansas City, passes through Council Bluffs on the Iowa side of the river.

vored neighborhoods with Black residents.<sup>100</sup> The Home Ownership Loan Corporation (“HOLC”) prepared Security Maps for all 259 cities in the United States with more than 40,000 residents as of 1930.<sup>101</sup> In all of those cities, maps with green (“best”), blue (“still desirable”), yellow (“definitely declining”), and red (“hazardous”) zones both affirmed residential segregation by race and made race the primary determinant of where and for whom federal funds would subsidize home-buying and wealth creation—and where and for whom they would not.<sup>102</sup> The federal maps, originally informed by local practices and judgment, in turn affirmed and channeled the actions of those same local officials and local lending institutions in allocating financial support for development and home-buying going forward.<sup>103</sup> Whites enjoyed broad suburban horizons and access to federally backed mortgages; Blacks did not.

In Omaha, three areas were redlined on the 1936 HOLC map—an area north of the central city that was predominantly Black, a large area south of the stockyards to the south of the central city where workers from the stockyards lived, and a small area to the north of the stockyards that was occupied by a brewery. A single large area, hermetically sealed off and protected by the blue and yellow from the red, was given the green light. This green area begins with a small rectangle in the east at 36th Street between Cuming and Leavenworth Streets and widens out around 42nd Street to a large block between Center and Blondo Streets that extends all the way to 72nd Street.<sup>104</sup> When one looks at the map, the momentum of this green block toward the west and away from the neighborhoods to the east is palpable.

Geography and founding history may have set the stage for Omaha’s westward orientation, and local practices of racial discrimination in housing may have provided the scenery and the props. It was the federal government acting through the HOLC, however, that wrote the script and produced the play. The green light for federally subsidized mortgages beckoned White residents west, and they responded.

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100. JACKSON, *supra* note 49, at 203-18.

101. Charles M. Torrance & Flora B. Hudson, *HOLC City Survey Program* (Dec. 31 1957), National Archives Building, Washington, DC (certified copy on file with author).

102. JACKSON, *supra* note 49, at 203-04 (describing HOLC defining process and criteria); *see also* MAPPING INEQUALITY: REDLINING IN NEW DEAL AMERICA, <http://dsl.richmond.edu/panorama/redlining/#opacity=0.8&loc=10/42.7258/-87.8089&city=176> (last visited Nov. 11, 2016).

103. JACKSON, *supra* note 49, at 214. “[A]s urban analyst Jane Jacobs has said, ‘Credit blacklisting maps are accurate prophecies because they are self-fulfilling prophecies.’” *Id.*

104. And a skinny green pipestem north along Fontenelle Boulevard (46th Street) reaching up to the golf course bounded by Ames Avenue on the north.

## C. THE HEARTLAND 2050 FAIR HOUSING EQUITY ASSESSMENT

A Fair Housing Equity Assessment ("FHEA") prepared in Spring 2015 as part of the Heartland 2050 Sustainable Communities grant administered by Omaha's Metropolitan Area Planning Authority ("MAPA") previews what we might see in the Omaha-Council Bluffs AFFH Mirror.<sup>105</sup> The FHEA covers five counties in eastern Nebraska and three counties in western Iowa. This eight-county area, the "Heartland Region," is centered on the Omaha-Council Bluffs metro area, which consists of Douglas and Sarpy Counties in Nebraska and the City of Council Bluffs and an area around its perimeter in Pottawattamie County in Iowa.

The cities of Omaha in Douglas County (2010 city population of 408,958) and Council Bluffs in Pottawattamie County (2010 city population of 62,230) form the urban core of the region. Sarpy County, to the immediate south of Douglas County in Nebraska, is the fastest-growing county in the Heartland region with 30% population growth between 2000 and 2010, though Douglas County gained more residents in that period.<sup>106</sup> Of the population growth in Douglas County, only about a third was inside the Omaha city limits.<sup>107</sup> Overall, the FHEA concluded, "the majority of population growth is in suburban and exurban areas."<sup>108</sup>

Demographically, the Heartland Region is aging.<sup>109</sup> It is also becoming less White, racially and ethnically, though even Douglas County, which is home to 90% of the region's Black population and 75% of its Hispanic population, remained 72% non-Hispanic White in 2010.<sup>110</sup> Hispanics are the fastest-growing group.<sup>111</sup> By 2040, the year around which the United States Census Bureau projects that the United States will become minority non-Hispanic White, Douglas County is projected to be over 50% people of color, while Sarpy and Pottawattamie Counties are projected to be in the 30-49% range.<sup>112</sup>

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105. See *About Us*, PARTNERSHIP FOR SUSTAINABLE COMMUNITIES, [www.sustainablecommunities.gov/mission/about-us](http://www.sustainablecommunities.gov/mission/about-us) (March 2, 2015) (providing description of Sustainable Communities, an interagency HUD-DOT-EPA partnership).

106. Beth Goodman & Bob Parker, *Fair Housing and Equity Assessment: Heartland 2050*, Spring 2015, at 16. [hereinafter *FHEA*]. Douglas County added 53,525 additional residents compared to 36,245 for Sarpy County. *Id.*

107. *Id.* at 16 (highlighting the population growth of 18,951 inside Omaha and population growth of 53,525 outside of Omaha for Douglas County).

108. *Id.*

109. *Id.* at 17 (explaining much of this shift is due to the aging of the baby boomer generation, which started turning 65 in 2011).

110. *Id.* at 18.

111. *Id.*

112. POLICYLINK & PROGRAM FOR ENVIRONMENTAL AND REGIONAL EQUITY, *EQUITABLE GROWTH PROFILE OF THE OMAHA-COUNCIL BLUFFS REGION*, 12 (2014), [http://national.equityatlas.org/sites/default/files/Omaha\\_Council\\_Bluffs\\_Profile\\_Final.pdf](http://national.equityatlas.org/sites/default/files/Omaha_Council_Bluffs_Profile_Final.pdf).

Minority populations in the region are concentrated in Douglas County, and they are further “concentrated in Omaha, with the highest concentrations on the east side of Omaha.”<sup>113</sup> The FHEA describes how the region’s Black population is concentrated in one small area in northeast Omaha: “In 2010, 68% of people who lived in the North Omaha cluster were Black. One-quarter of the region’s Black population lived in these [eleven] census tracts in 2010.”<sup>114</sup> In contrast, the five rural counties in the Heartland Region are all at least 95% non-Hispanic White; Pottawattamie County is 90% non-Hispanic White (Council Bluffs is 87%), and Sarpy County is 84% non-Hispanic White.<sup>115</sup>

Further, all counties in the Heartland Region except Douglas County are more White than income alone would predict. The FHEA’s Race and Income Index, which gauges “non-economic drivers of segregation . . . indicates that non-economic factors play a stronger role in the housing choices of Black households than for other minority groups.”<sup>116</sup> The history of residential segregation by race and redlining in Omaha affirms the presence of these “non-economic factors.” In short, housing segregation in the region is not just about economics—it is about race.

The FHEA assesses not only concentrations of minority populations generally, but also concentrations of minority residents who are poor. The FHEA thus identifies Racially Concentrated Areas of Poverty (“RCAP”) and Ethnically Concentrated Areas of Poverty (“ECAP”) in the region.<sup>117</sup> Reflecting historical Black-White housing segregation and differential access to housing wealth, the largest RCAP in the region is the predominantly Black “North Omaha RCAP Cluster,” centered in the area formerly known as the “Near North Side.” The nucleus of this RCAP is the northernmost redlined area on the 1936 HOLC Security Map. A smaller RCAP/ECAP cluster in east central Omaha is racially mixed, and another even smaller ECAP in east southern Omaha is majority Hispanic and lies within the southernmost redlined area on the 1936 HOLC Security Map. The FHEA observes that recent demographic shifts in these two tracts “suggest

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113. *FHEA*, *supra* note 106, at 19.

114. *Id.* at 78. The North Omaha cluster is the largest of the region’s Racially Concentrated Areas of Poverty (“RCAP”). *Id.*

115. *Id.* at 18. The five rural counties in the Heartland Region are: Harrison, Mills, Cass, Saunders, and Washington. *Id.*

116. *Id.* at 61, 63.

117. *Id.* at 72. Defined as more than 50% minority and more than three times the average family poverty rate for the metro area (3 times 9.1% = 27.3% in 2010).

White flight."<sup>118</sup> Whites are moving out, which increases minority concentrations.

The FHEA connects housing patterns with access to opportunity by analyzing the areas of concentrated poverty in terms of the stressors of poverty and environmental health hazard exposure and the assets of labor market engagement, job access, neighborhood school proficiency, and transit.<sup>119</sup> Overall, "[p]oor White people live in neighborhoods of higher opportunity than poor Black or Hispanic or Latino residents of the Heartland Region."<sup>120</sup> Focusing on children, the FHEA concludes that "for all major racial/ethnic groups, children in poverty live in neighborhoods of lower opportunity than the average Heartland resident."<sup>121</sup> Comparing the situations of poor children in the region on the basis of race and ethnicity, "White children are more likely to live in neighborhoods of similar opportunity access as the average for all Heartland residents."<sup>122</sup>

The FHEA also highlights concentrations of affordable and HUD-supported housing in Omaha, located primarily in eastern Omaha;<sup>123</sup> the lack of multi-family housing outside of Omaha and Council Bluffs;<sup>124</sup> and the overall scarcity of affordable housing: "[f]or every 100 residents that qualify for housing assistance, only [twenty-three] units are available."<sup>125</sup> Impediments<sup>126</sup> to "deconcentrating poverty and segregation" include barriers to lending: "Blacks and Hispanics are denied loans about twice as often as non-Hispanic White loan applicants."<sup>127</sup> In addition, the FHEA observes that "[s]ome people living in eastern Omaha may prefer to continue living in their existing neighborhood, where they are close to family and friends."<sup>128</sup> Interviews and surveys with Omaha Housing Authority residents, however, suggest that this comment may overstate the preference: 40.96% and 34.94% responded "Somewhat Agree" or "Neither Agree or Disa-

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118. *Id.* at 82, 85 (explaining these areas include Park East and Southside Highland).

119. *Id.* at 91.

120. *Id.* at 116.

121. *Id.* at 117.

122. *Id.* at 116.

123. *Id.* at 37, 40, 130-31.

124. *Id.* at 27.

125. *Id.* at 128. Data from 2011-2013 actually indicate that there are only 19 units available for every 100 qualified residents—4,205 adequate, affordable, and available units for 21,902 extremely low income ("ELI") renter households (down from 37 per 100 in 2005-2007). *Mapping America's Rental Housing Crisis*, THE URBAN INSTITUTE, <http://apps.urban.org/features/rental-housing-crisis-map/> (last visited Jan. 13, 2017) (suggesting to enlarge the map to the state of Nebraska and select Douglas County).

126. The FHEA was prepared under the AFFH Analysis of Impediments framework, prior to promulgation of the 2015 AFFH regulations.

127. *FHEA*, *supra* note 106 at 132.

128. *Id.*

gree” that it was their choice to live near a family or support system as opposed to seeking a desirable neighborhood; only 7.23% responded “Strongly Agree.”<sup>129</sup>

Overall, the current picture painted by the FHEA accords with a history of institutional and social discrimination in housing. That discrimination literally confined Omaha’s Black population to neighborhoods defined by underinvestment and a lack of wealth-building opportunities. More recently, Hispanic newcomers to the metro area have clustered in older, previously White ethnic neighborhoods in eastern Omaha, to the south of the city center.

#### D. WHITE INSULATION

Rubin’s vase is a well-known visual in black and white: Depending on the color the observer focuses on, he or she discerns either a vase in the middle or two faces in profile oriented toward each other. Racially segregated housing offers a similar duality. One perspective, the more familiar focus adopted by the FHEA, highlights Black concentration and disadvantage. Another perspective, however, focuses on White insulation and advantage.

Over the same decades that Black residents of Omaha were shut out of the suburban housing market spreading to the west, White residents of Omaha moved to suburbia, bought houses, and built wealth in the form of home equity. White citizens of Omaha, like White citizens nationally, have accumulated advantage, while Black citizens of Omaha, like Black citizens nationally, have accumulated disadvantage. The flip side of the RCAP and ECAP identified in the FHEA is wealthy, predominantly White suburbs in western Omaha.

Accompanying the tangible relative racial and ethnic advantage and disadvantage of housing discrimination historically is physical, social separation: Racially segregated housing has isolated people of different races and ethnicities from one another.<sup>130</sup> The predominance of Whites in the Omaha-Council Bluffs region has led to Whites in particular being racially insulated. An Index of Exposure, not contained in the FHEA,<sup>131</sup> measures the percentage of people of various racial and ethnic groups that an average person of any racial or ethnic group is likely to encounter as neighbors.<sup>132</sup> The Index of Exposure at the census tract level for Whites in Omaha-Council Bluffs in 2000 was

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129. *Id.* at 127.

130. *Id.* at 60-61.

131. *See id.* (explaining the isolation index, calculated only for non-White racial/ethnic groups).

132. *Racial Residential Segregation Measurement Project*, POPULATION STUDIES CENTER, <http://enceladus.isr.umich.edu/race/seg.html> (last visited Jan. 13, 2017).



87.8, meaning that the average White person in the metro area was living in a census tract that was 87.8% White, 4.8% Black, and 4.6% Hispanic.<sup>133</sup> The average Black person in Omaha-Council Bluffs in 2000, in contrast, lived in a census tract that was 42.5% Black, 48.5% White, and 5.8% Hispanic.<sup>134</sup> The average Hispanic's census tract in 2000 was 19% Hispanic, 69% White, and 8.6% Black.<sup>135</sup> *Even though the Black and Hispanic populations are concentrated, Black and Hispanic metropolitan area residents are significantly more likely to encounter people of different races as neighbors than are White residents.*

The racial insulation of Whites in Omaha that resulted from racial segregation and housing discrimination was not imposed by outside institutions on unwilling White residents. The area in North Omaha that was redlined on the 1936 HOLC Security Map had been created as a concentration of Black citizens by local actions before the HOLC map-drawer came to town. The map "was compiled with the advice of the best real estate men in the city and [was] their composite opinion of security gradings."<sup>136</sup> An Appendix to the HOLC Omaha report lists the bankers and realtors interviewed.<sup>137</sup> The federal government transmuted pre-existing local practice into binding national policy.

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133. *Id.* (suggesting to select "Get Segregation Indexes," followed by "U.S. Metropolitan Areas," then "Proceed with query," then "Midwest," and "Proceed with query." Lastly, select "Omaha, NE-IA MSA" and "Proceed with query."). Other metro areas in the middle of the country considered as comparators in the FHEA had generally comparable or lower Index of Exposure values for White/White insulation, with only Des Moines having a higher value: Des Moines: 90.7%; Grand Rapids: 86.4%; Salt Lake City: 86.2%; Wichita: 84.6%; Little Rock: 83.1%; Tulsa: 78.5%; and Oklahoma City: 78.1%. *See id.* (suggesting to follow the same directions, replacing only city names). *See also, Omaha-Council Bluffs, NE-IA Metropolitan Statistical Area, DIVERSITY AND DISPARITY*, <http://www.s4.brown.edu/us2010/segregation2010/msa.aspx?metroid=36540> (last visited Nov. 11, 2016). According to this more recent source, White exposure to Blacks and Hispanics rose between 2000 and 2010, from 4.8% to 5.8% and from 4.3% to 6.9% respectively. *Id.* For even smaller neighborhood areas, block groups and blocks, the isolation is higher for all races. For example, the average Omaha-Council Bluffs Black resident in 2000 lived in a census tract that was 42.5% Black, in a block group that was 45.4% Black, and on a block that was 51.2% Black. Similarly, the average Hispanic resident in the metro area lived in a census tract that was 19% Hispanic, in a block group that was 21% Hispanic, and on a block that was 28.5% Hispanic. *Id.*

134. *Id.* According to a more recent source, Black exposure to Whites and Black exposure to Hispanics rose between 2000 and 2010, from 49.2% to 51.7% and from 5.8% to 9.7%, respectively. *Id.*

135. *Id.* According to a more recent source, Hispanic exposure to Whites fell between 2000 and 2010, from 69% to 60.4%, while Hispanic exposure to Blacks rose slightly in the same period, from 9.2% to 9.5%. *Id.*

136. Summary: Survey of Omaha, Nebraska, Mortgage Rehabilitation Division 7, Mar. 25, 1936, National Archives Building, Washington, DC. (certified copy on file with author).

137. Appendix: Survey of Omaha, Nebraska, Mortgage Rehabilitation Division 7, Mar. 25, 1936, National Archives Building, Washington, DC. (certified copy on file with author).

Forty years later, in *United States v. School District of Omaha*,<sup>138</sup> the 1975 decision ordering the desegregation of the Omaha Public Schools despite the absence of *de jure* school segregation, the United States Court of Appeals for the Eighth Circuit explicitly found that “the segregated housing patterns in the city . . . were the result of discriminatory state *and private* actions.”<sup>139</sup> The brief history of housing discrimination in Omaha sketched by the Eighth Circuit extended from before World War II to “at least from 1965 through 1968.”<sup>140</sup> In the latter period, “[a]pproximately one-third to one-half of multiple listing cards”<sup>141</sup> indicated that sellers did not want to sell homes to minorities, and “[i]n the late 1960’s sellers were given an option by the realtors to cross out a sentence banning discrimination in listing agreements.”<sup>142</sup>

Further, the Eighth Circuit’s 1975 description of an increase in Black residents in neighborhoods surrounding the historically Black neighborhoods in northeast Omaha as an “encroachment pattern”<sup>143</sup>—in quotation marks in the court’s opinion with no source cited—highlights the aversion of Omaha Whites to integrated neighborhoods historically. The implication by the Eighth Circuit accords with the nonverbal message of voluntary separation of Whites contained in the 1936 HOLC Security Map. Decades of actions taken by many White citizens of Omaha to avoid living near Black citizens created the foundation for racial and ethnic residential insulation of White citizens today.

#### IV. THE FULL-LENGTH OMAHA REFLECTION: ANNEXATION – WESTWARD HO!

A former colleague here at Creighton University School of Law who lives in an upscale yet close-in area of Omaha,<sup>144</sup> used to jokingly refer to visiting friends in western Omaha as “going to Wyoming.” Though there is a difference of a few hundred miles between going to “West O” and traveling to Wyoming, both entail getting on Interstate-

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138. 521 F.2d 530 (8th Cir. 1975).

139. *United States v. Sch. Dist. of Omaha*, 521 F.2d 530, 534 (8th Cir. 1975) (emphasis added).

140. *Sch. Dist. of Omaha*, 521 F.2d at 534.

141. *Id.* at 534-35.

142. *Id.* at 534.

143. *Id.*

144. This area, the Dundee area, is shaded green on the 1936 HOLC Security Map. Today, Warren Buffett’s Omaha home is in this part of the City.

80 and driving west. Both journeys also land you in a place that is whiter than where you started.<sup>145</sup>

This section explores how the legal structure of annexation has both propelled and contained the centrifugal and centripetal forces of Omaha’s westward suburbanization. After a brief survey of the broader debate between localist and regionalist perspectives on central cities and their regions, the section examines the specific history and practice of annexation in Omaha. This background sets the stage for the discussion of the fair housing implications of specific development arrangements that follows.

#### A. LOCALISM VERSUS REGIONALISM

Two conflicting perspectives exist in the legal, public policy world as to the desirability of metropolitan regions being divided into separate local jurisdictions. Each perspective highlights certain aspects of the political and fiscal dynamics that occur among jurisdictions within metropolitan areas. Each perspective is grounded in the laws of various states that provide for municipal incorporation of new cities on the one hand and annexation of land by existing cities on the other.

A localist perspective emphasizes the self-determination, citizen participation, and community-building function of local political life. In this view, local jurisdictions are the valuable cornerstone of democracy because they provide a range of opportunities for citizens to develop and practice participatory skills and to deepen civic commitment through action. At the local level, residents are drawn into active citizenship by engaging with their local governing bodies.<sup>146</sup>

In addition to these political benefits, the localist view asserts that numerous jurisdictions promote efficiency by enabling a broad range of packages of goods and services among which consumer-residents can choose by moving to one or another local jurisdiction. Some prospective residents may choose good schools and higher tax rates while others will opt for few services and a low financial commitment. This economic view, first articulated by Charles Tiebout in 1956, assumes full information about the local entity “products” as well as full information and mobility on the part of residents.<sup>147</sup> Sher-

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145. *QuickFacts: Wyoming*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/56> (last visited Nov. 11, 2016). Wyoming’s Non-Hispanic White population was 84% in 2015. *Id.*

146. *See, e.g.*, Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 273-79 (1993). *See also, e.g.*, Sheryll Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing Barriers to the New Regionalism*, 88 GEO. L.J. 1985, 1996 n.44 (2000).

147. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-20 (1956).

yll Cashin summarizes Tiebout's idea: "In other words, local autonomy increases the likelihood that public goods are tailored to local tastes and demands."<sup>148</sup> Though Tiebout's assumptions do not match real life—he assumes, for example, that all consumers live on dividend income and thus have no need of employment—his work does capture the competition and variation that exist between neighboring jurisdictions within a region.

The regionalist perspective, in contrast, highlights the harms that unfettered localism inflict on a region as a whole.<sup>149</sup> At the regional scale, jurisdictional fragmentation encourages local governments to engage in self-interested actions that have negative externalities. This is one effect of interlocal competition, another unfortunate reality that Tiebout's thesis assumes away. Exclusionary zoning by one locality, for example, may leave few options for citizens deemed less desirable or more costly. These excluded citizens may end up able to access only a few of the region's localities, which both restricts their choice and results in uneven distribution of needs and resources within the region. Moreover, community building at a very localized level may occur at the expense of community building at a metropolitan level—localism can thus interfere with collective action to address regional challenges.<sup>150</sup> In the regionalist's view, though there may be benefits to localism, they are outweighed by its distributive fallout and negative consequences at the regional level.

Generous municipal incorporation provisions in state law embody the localist perspective. Such provisions facilitate creation of a multiplicity of cities in a region, including suburbs that can surround and landlock a central city. Wielding their municipal taxing and land use authority, suburban cities can attract relatively wealthy and mobile residents needing relatively few services and make themselves unavailable to other residents.

Unchecked localism can result in concentrations of wealth and poverty in disparate jurisdictions within a metropolitan area. Cashin concludes that "localism benefits only the relatively affluent suburbs that are not constrained by service burden and declining tax bases."<sup>151</sup> As a result of unequal and inequitable development in metropolitan areas, so-called "favored quarters" emerge, and these areas,

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148. Cashin, *supra* note 146, at 1996 n.45.

149. See, e.g., Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 451 (1990). See also, e.g., Cashin, *supra* note 146, at 1996, 2002-07.

150. See Richard Briffault, *Local Government Boundary Problems in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1156 (1996).

151. Cashin, *supra* note 146, at 2003.

“through disproportionate political influence, receive massive, disproportionate infrastructure investments that fuel their growth . . . .”<sup>152</sup>

Alternatively, expansive annexation powers grant central cities the quality of elasticity.<sup>153</sup> Central cities that have the ability to expand their reach by annexing unincorporated land in the path of development and even previously incorporated but smaller cities benefit both economically and politically.<sup>154</sup> Economically, annexation allows central cities to capture the tax base associated with upscale suburban growth. The suburbs of elastic central cities lie within city limits and contribute to city coffers rather than existing as separate incorporated municipalities with discrete budgets. Politically, a central city’s ability to expand keeps different socioeconomic and racial or ethnic groups in one local polity. Though wealthier residents in newer outlying parts of the city and poorer residents in older inner-city neighborhoods may manifest different interests, they remain in political relationship and conversation in determining city policies and action.

David Rusk summarizes the cons of localism and the pros of elasticity:

In general, the more highly fragmented a metro area is, the more segregated it is racially and economically. Smaller jurisdictions are typically organized to promote and protect uniformity rather than diversity. Conversely, areas characterized by geographically large, multi-powered governments and more unified school systems tend to promote more racial and economic integration and achieve greater social mobility.<sup>155</sup>

Elastic central cities, according to Rusk, are more likely to remain on an even economic keel and to be integrated and equitable along racial and socioeconomic lines.<sup>156</sup> Further, the fates of central cities and their suburbs are linked, with wealth disparities impeding progress for the region overall.<sup>157</sup>

Building on an understanding that “[i]ntra-regional fragmentation both originates from and exacerbates existing social stratification and weak economic growth profiles[,]”<sup>158</sup> Christopher Tyson empha-

152. *Id.*

153. DAVID RUSK, *CITIES WITHOUT SUBURBS* 20-22 (1993).

154. *Id.* at 5-49 (enumerating ways in which elasticity benefits cities and metropolitan regions).

155. *Id.* at 34.

156. *Id.* at 29-38, 41-43.

157. *Id.* at 31-33, 40-41. See also CHRIS BENNER & MANUEL PASTOR, *EQUITY, GROWTH, AND COMMUNITY: WHAT THE NATION CAN LEARN FROM AMERICA’S METRO AREAS* 30-31 (2015); MANUEL PASTOR ET AL., *REGIONS THAT WORK: HOW CITIES AND SUBURBS CAN GROW TOGETHER* 2-4 (2000).

158. Christopher Tyson, *Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital*, 73 U. PITT. L. REV. 505, 518 (2012).

sizes the importance of annexation to mid-size metropolitan areas with regional populations between one-half and two million.<sup>159</sup> For these metropolitan areas in particular, annexation has the “potential to both strengthen regional economic development efforts and curb the continued growth in race and class stratification.”<sup>160</sup>

According to Tyson, mid-size metropolitan areas face the challenges associated with global economic competition without some of the assets of larger regions, assets such as international visibility and “symbolic scale—the scale of history and cultural narrative.”<sup>161</sup> Development patterns also differ: mid-size regions, which mostly developed in the twentieth century,<sup>162</sup> “generally follow low-density, decentralized, automobile-oriented land use patterns.”<sup>163</sup> Consistent with this overall low density, mid-size regions exhibit a “relative lack of activity in the central city core.”<sup>164</sup>

Yet mid-size cities are similar to larger cities in being metropolitanized. “Metropolitanization is the process by which a central city evolves to become a component of a larger regional entity that includes outside environs—suburbs, exurbs, and surrounding rural areas—that are tied to the central city by employment, commerce, mass communications, economic interdependence, and cultural and identity ties.”<sup>165</sup> In a global world, metropolitanization means that economic development occurs at the regional level rather than at the level of individual localities. Mid-size regions are also like large metropolitan areas in that the central city “must be healthy, vibrant, and ripe for economic possibility if the region is to prosper.”<sup>166</sup> Without the advantages enjoyed by large central cities, Tyson concludes, mid-size metropolitan regions especially benefit from the intra-regional economic cooperation that is facilitated by an elastic central city fueled by annexation.<sup>167</sup>

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159. *Id.* at 523. Tyson’s conclusions are based on case studies in three states, which correlate better central-city annexation prospects with more thriving mid-size metro areas: Mississippi (poor annexation prospects); Tennessee (judicially supported annexation recognizing the importance of annexation to urban well-being); and North Carolina (statute giving strong annexation prerogatives to central cities). *Id.* at 541-60.

160. *Id.* at 520.

161. *Id.* at 522.

162. *Id.* at 525.

163. *Id.* at 524.

164. *Id.* at 525.

165. *Id.* at 527.

166. *Id.* at 529.

167. *Id.* at 560.

With a population between 900,000 and one million,<sup>168</sup> the Omaha-Council Bluffs region fits squarely within Tyson’s mid-size metropolitan region range. The region developed in the second half of the twentieth century and reflects “low-density, decentralized, automobile-oriented land use.”<sup>169</sup> The City of Omaha is part of a larger metropolitan region, and Omaha’s health affects regional health. In this view, annexation is highly important to the well-being and resilience of both the City of Omaha and the region overall.

## B. BRINGING OMAHA INTO FOCUS

For almost a century, the City of Omaha has been an elastic central city by virtue of its extensive annexation authority. In 1985, the Omaha Planning Department reported that

[s]ince 1854 [when it was founded], the City has grown from a town of [twenty] homes to a city of over 100 square miles with [an extra-territorial] jurisdictional area of an additional 100 square miles.<sup>170</sup> Much of this expansion occurred since World War II, as the city more than doubled in size after 1950.<sup>171</sup>

In the three decades since 1985, the City has continued to annex at a robust rate: through five annexations since 2010 alone, for example, Omaha gained over 40,000 residents.<sup>172</sup>

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168. *Omaha-Council Bluffs-Fremont, NE-IA CSA*, CENSUS REPORTER, <https://censusreporter.org/profiles/33000US420-omahacouncil-bluffsfremont-neia-csa/> (last visited Nov. 12, 2016). The 2015 population of the region was 952,263. *Id.*

169. Tyson, *supra* note 158, at 524.

170. Bruce McKendry, *The Evolution and Interpretation of the Annexation Authority of the City of Omaha—A Statutory Search for Legislative Intent*, 19 CREIGHTON L. REV. 311, 313 n.11 (1986) (citing Omaha City Planning document). The City of Omaha’s extraterritorial jurisdiction (“ETJ”) extends out to “three miles of the corporate limits of any city of the metropolitan class.” NEB. REV. STAT. § 14-116 (2012). Within this extraterritorial jurisdiction, Omaha has the power to regulate development by setting infrastructure requirements and to “prescribe standards for laying out subdivisions in harmony with a comprehensive plan.” *Id.*

171. McKendry, *supra* note 170, at 313 n.11.

172. In 2011 and 2012, Omaha annexations brought in about 7,000 and 6,500 people respectively. Christopher Burbach, *Omaha Mayor Stothert proposes largest annexation since 2007, when city took over Elkhorn*, OMAHA WORLD-HERALD (July 10, 2014), [http://www.omaha.com/news/metro/omaha-mayor-stothert-proposes-largest-annexation-since-when-city-took/article\\_4af052c2-840f-5a70-979d-7a85de785214.html](http://www.omaha.com/news/metro/omaha-mayor-stothert-proposes-largest-annexation-since-when-city-took/article_4af052c2-840f-5a70-979d-7a85de785214.html). In 2014, Omaha annexed 18 areas containing 8,700 residents. Christopher Burbach, *Omaha City Council OKs 18 of Stothert’s 19 proposed annexations, continuing growth west and south*, OMAHA WORLD-HERALD (Aug. 20, 2014), [http://www.omaha.com/news/metro/omaha-city-council-oks-of-stothert-s-proposed-annexations-continuing/article\\_eed56b62-27c9-11e4-a000-0017a43b2370.html](http://www.omaha.com/news/metro/omaha-city-council-oks-of-stothert-s-proposed-annexations-continuing/article_eed56b62-27c9-11e4-a000-0017a43b2370.html). In 2015, Omaha annexed 16 areas with almost 12,000 residents. Christopher Burbach, *Omaha growing: Council OKs plan to add 16 areas, nearly 12,000 people*, OMAHA WORLD-HERALD (Aug. 12, 2015), [http://www.omaha.com/news/metro/omaha-growing-council-oks-plan-to-add-areas-nearly-people/article\\_441d7122-bb55-5a36-828a-d539026c4eff.html](http://www.omaha.com/news/metro/omaha-growing-council-oks-plan-to-add-areas-nearly-people/article_441d7122-bb55-5a36-828a-d539026c4eff.html). In 2016, Omaha annexed seven areas containing about 6,000 residents. Roseann Moring, *Council OKs Stothert’s annexation plan; 6,000 people will become Omaha residents*, OMAHA WORLD-HERALD (Aug. 10,

Omaha's remarkable and continuing elasticity results directly from the unusually generous annexation powers granted to the city under Nebraska law. Several aspects of these powers contribute to their expansive nature. The first sentence of the applicable state annexation statute, Nebraska Code Section 14-117, declares: "The corporate limits of any city of the metropolitan class shall be fixed and determined by ordinance by the council of such city."<sup>173</sup> Omaha is a "city of the metropolitan class,"<sup>174</sup> and this procedural provision of the annexation statute thus authorizes the Omaha City Council to unilaterally annex qualifying areas. The statutory process makes no mention of a procedural requirement, common to annexation statutes, for approval by voter referendum.<sup>175</sup>

The provision takes at its word the 1907 seminal United States Supreme Court opinion in *Hunter v. Pittsburgh*,<sup>176</sup> in which the Court upheld the City of Pittsburgh's annexation of the City of Allegheny against a Due Process challenge.<sup>177</sup> The *Hunter* Court described the state's power to adjust municipal boundaries in absolute terms:

The number, nature, and duration of the powers conferred upon [municipal corporations] and the territory over which they shall be exercised rests in the absolute discretion of the state . . . . The state, therefore, at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.<sup>178</sup>

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2016), [http://www.omaha.com/news/metro/council-oks-stoherent-s-annexation-plan-people-will-become-omaha/article\\_0b835061-9cc7-5f46-810e-6a0e7bc3479c.html](http://www.omaha.com/news/metro/council-oks-stoherent-s-annexation-plan-people-will-become-omaha/article_0b835061-9cc7-5f46-810e-6a0e7bc3479c.html).

173. NEB. REV. STAT. § 14-117 (2012).

174. See NEB. REV. STAT. § 14-101 (2012) (defining cities of the metropolitan class as "cities in this state which have attained a population of three hundred thousand inhabitants or more"). Omaha has over 400,000 residents. *FHEA*, *supra* note 106, at 16 (using 2010 census data). Though Omaha is the only "city of the metropolitan class" in the state, the general language of the statute avoids legal prohibitions against special legislation, laws passed by a state legislature that apply to only one locality. Article III, Section 18 of the Nebraska State Constitution prohibits "local or special laws," including laws "Incorporating Cities, Towns and Villages, or changing or amending the charter of any Town, City, or Village." NEB. CONST. art. III, § 18. The special legislation prohibition, under Nebraska law, "aims to prevent legislation that arbitrarily benefits a special class." *J.M. v. Hobbs*, 849 N.W.2d 480, 489 (Neb. 2014). See also *City of Millard v. City of Omaha*, 177 N.W.2d 576, 580 (Neb. 1970) (applying special legislation prohibition to annexation of city regardless of whether it had home rule charter).

175. Referendum requirements themselves, however, can be weighted in favor of either the annexor or the potential annexee. See GERALD FRUG, RICHARD FORD & DAVID BARRON, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 410-11 (6th ed. 2015) (describing voting variations for annexation).

176. 207 U.S. 161 (1907).

177. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 180 (1907).

178. *Hunter*, 207 U.S. at 178-79. The full passage reads as follows:



The Nebraska State Legislature has delegated that power for the City of Omaha entirely to the City itself<sup>179</sup> and, more specifically, to the City Council alone.<sup>180</sup> The City Council votes, and annexation is a *fait accompli*.

Having described the annexation process by the City of Omaha, section 14-117 turns to the substantive contours of the power:

The city council of any city of the metropolitan class may at any time extend the corporate limits of such city over any contiguous or adjacent lands, lots, tracts, streets, or highways, such distance as may be deemed proper in any direction, and may include, annex, merge, or consolidate with such city of the metropolitan class, by such extension of its limits, any adjoining city of the first class having less than ten thousand population or any adjoining city of the second class or village.<sup>181</sup>

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Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

*Id.* The Supreme Court has not overruled *Hunter*, though subsequent decisions are less extreme in their language. *See, e.g., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (“While the broad statements as to state control over municipal corporations contained in *Hunter* have undoubtedly been qualified by the holdings of later cases . . . we think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that states have in creating various types of political subdivisions and conferring authority upon them.”).

179. By delegating decision-making authority over annexations to the Omaha City Council, the state legislature avoids potential special legislation prohibitions that might arise were it to itself determine city boundaries and decide annexation matters. The state may have absolute control as a matter of federal law under *Hunter* over the configuration of local jurisdictions and at the same time be constrained under state special legislation law in terms of the legislature adjusting boundaries in specific situations. Creating processes involving local referenda or delegating power to local bodies that are largely immune from legal challenge by affected residents emerge from the interaction of these two legal imperatives.

180. NEB. REV. STAT. § 14-117.

181. *Id.*

The language is sweeping: “at any time,” “such distance as may be deemed proper,” and “in any direction” describe plenary power as well as multiple and unlimited horizons. In keeping with this expansiveness, Omaha as a “city of the metropolitan class” may annex adjoining cities or villages that are already distinct incorporated entities. Neither a referendum nor vote is required. Any city with a population of less than ten thousand is fair game.<sup>182</sup>

One limitation to Omaha’s expansive annexation power is its inability to annex across county lines. The Nebraska Supreme Court imposed this boundary judicially in the 1966 decision *Barton v. City of Omaha*,<sup>183</sup> though the precise statutory basis for the Court’s ruling is unclear.<sup>184</sup> In fact, when the state legislature adopted the “in any direction” language in 1917, the Omaha city limits already reached to the Sarpy County line to the south by virtue of the City’s muscular and high-profile annexation of the City of South Omaha two years before.<sup>185</sup> And the concluding sentence of section 14-117, then and now, asserts: “Any other laws and limitations defining the boundaries of cities or villages or the increase of area or extension of limits thereof shall not apply to lots, lands, cities, or villages annexed, consolidated, or merged under this section.”<sup>186</sup> By its plain language, section 14-117 takes precedence over all other boundary provisions, including the drawing of county lines.<sup>187</sup> The Nebraska Supreme Court, however, determined otherwise.<sup>188</sup>

Under the authority of section 14-117, the City of Omaha has annexed a series of former towns and incorporated cities: Beechwood, South Omaha, Dundee, Benson, Florence, Hayes, Millard, and Saratoga. Most recently, in 2005, Omaha annexed the City of Elkhorn on

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182. NEB. REV. STAT. § 17-101 (2012) identifies cities of the second class as cities with populations over eight hundred and less than five thousand. NEB. REV. STAT. § 16-101 (2012) identifies cities of the first class as cities with populations between five and one hundred thousand. Between cities of the first class and cities of the metropolitan class are cities of the primary class (e.g. Lincoln) with populations between one and three hundred thousand. NEB. REV. STAT. § 15-101. Omaha’s annexation power extends to all cities of the second class and those cities of the first class with populations less than ten thousand.

183. 145 N.W.2d 444 (Neb. 1966).

184. *Barton v. City of Omaha*, 145 N.W.2d 444, 446-47 (Neb. 1966) (denying the City of Omaha power to annex territory outside of Douglas County). See also McKendry, *supra* note 170, at 340-41.

185. McKendry, *supra* note 170, at 356 (detailing the map of annexations by City of Omaha); Emmett Hoctor, *Tom Hoctor and the Magic City: The South Omaha Annexation Fight: 1890-1915*, 64 NEBRASKA HISTORY 256 (1983) (describing quarter-century attempts by Omaha to annex and efforts by the then-separate city of South Omaha to resist annexation, which ended in annexation in 1915).

186. NEB. REV. STAT. § 14-117.

187. See McKendry, *supra* note 170, at 348.

188. *Barton*, 145 N.W.2d at 447.

its western frontier by annexing unincorporated area between the two cities and then capturing Elkhorn itself.<sup>189</sup> The account of the events surrounding that annexation given by the Nebraska Supreme Court in its opinion dismissing Elkhorn’s legal objections reads like a cross between a melodrama and a horse race: The City of Omaha had its annexor eye on the City of Elkhorn, a city of the first class with a population of 7,623. Elkhorn secretly set in motion a process to itself annex land to grow over the magic, unannexable ten thousand population threshold. Omaha found out about the Elkhorn plan, and the Omaha mayor called a special annexation meeting of the City Council. Though neck in neck, Omaha managed to pass its annexation ordinance first, nosing out Elkhorn at the finish line!

How did Omaha achieve this annexation victory? The Nebraska Supreme Court summarized the trial court’s findings as follows: “[T]he Legislature [gave] Omaha statutory priority over Elkhorn by requiring first class cities to fulfill more statutory requirements than metropolitan class cities and limiting first class cities’ annexing authority to only urban and suburban land.”<sup>190</sup> Therefore, according to the court, “Elkhorn ceased to exist as a separate municipality on March 24, 2005, the date that Omaha’s annexation ordinance became effective.”<sup>191</sup> The horse with the head start and smoother course wins the race.

More frequently than incorporated cities or villages, Omaha annexes unincorporated areas already developed and primed to be folded into the city. In 2014, for example, Omaha Mayor Jean Stothert proposed eighteen unincorporated areas for annexation, of which the City Council approved seventeen: “[thirteen] residential neighborhoods, four business parks, and a piece of farm ground.”<sup>192</sup> In 2015, the mayor proposed seventeen unincorporated areas for annexation, of

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189. *City of Elkhorn v. City of Omaha*, 725 N.W.2d 792, 798 (Neb. 2007).

190. *City of Elkhorn*, 725 N.W.2d at 801.

191. *Id.* at 811.

192. The Miracle Hill golf course was proposed but not approved. Burbach, *supra* note 172 (Aug. 20, 2014). There is a discrepancy between the headline of the Omaha World-Herald article announcing that the City Council had OK’d eighteen of nineteen proposed annexations and the text of the article, which indicates that 17 of 18 proposed were annexed. *See also* Burbach, *supra* note 172 (July 10, 2014) (listing 18 areas proposed for annexation).

which the City Council approved sixteen.<sup>193</sup> The 2016 annexation included seven unincorporated areas.<sup>194</sup>

Most of these unincorporated areas were residential neighborhoods developed through Sanitary and Improvement Districts (“SIDs”), a form of special district that has predominated in the westward expansion of Omaha suburban development.<sup>195</sup> Described in greater detail in the next Part, SIDs are public entities that give private developers access to municipal bond financing to subsidize infrastructure for developing areas outside the city limits.<sup>196</sup> Operating to a significant degree as privatized governments, SIDs are governed by boards of directors that over time can transition from members chosen by the SID developer to residents of the neighborhood. Purchasing a home in an SID entails paying fees and property taxes to the SID to cover payments on the debt incurred for development. Upon annexation, property taxes may well decrease as the city assumes the SID’s debt,<sup>197</sup> which contributes to widespread acquiescence to annexation on the part of SID residents.<sup>198</sup>

In recent annexations, service provision issues have been the primary focus of opposition. Residents of the areas to be annexed may object on the grounds that their existing privatized services are superior to those to be provided by the City of Omaha.<sup>199</sup> At the same time, City Council members representing older and less prosperous parts of Omaha have been concerned that the City is stretching services too thin and that their constituents will suffer.<sup>200</sup>

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193. See Roseann Moring, *Proposal targeting 17 areas for annexation is a money-maker for Omaha, Mayor Stothert says*, OMAHA WORLD-HERALD (June 22, 2015), [http://www.omaha.com/news/metro/proposal-targeting-areas-for-annexation-is-a-money-maker-for/article\\_1cf305aa-168e-11e5-b3d9-dffc46d82c2c.html](http://www.omaha.com/news/metro/proposal-targeting-areas-for-annexation-is-a-money-maker-for/article_1cf305aa-168e-11e5-b3d9-dffc46d82c2c.html) (listing seventeen proposed areas); Roseann Moring & Emily Nohr, *Some think Omaha’s annexation would be a drain on city services*, OMAHA WORLD-HERALD (July 20, 2015), [http://www.omaha.com/news/metro/some-think-omaha-s-annexation-would-be-a-drain-on/article\\_b8fc31d8-8013-5668-be59-c97f3c8e5c09.html](http://www.omaha.com/news/metro/some-think-omaha-s-annexation-would-be-a-drain-on/article_b8fc31d8-8013-5668-be59-c97f3c8e5c09.html) (reporting that Mayor Stothert has “removed one area, Cinnamon Creek, saying that area would cost too much”); Burbach, *supra* note 172 (Aug. 12, 2015).

194. Moring, *supra* note 172.

195. See, e.g., Burbach, *supra* note 172 (July 10, 2014) (referring to SIDs in areas to be annexed); Burbach, *supra* note 172 (Aug. 12, 2015) (stating that fifteen of sixteen annexed areas in 2015 were SIDs).

196. See *infra* notes 201-226 and accompanying text.

197. See Burbach, *supra* note 172 (July 10, 2014) (explaining that Omaha would take on remaining debt and “[p]roperty taxes would go down in most of the annexed areas . . . because the City of Omaha tax levy is lower than the levy for most of the affected SIDs”). See also Moring & Nohr, *supra* note 193. “Almost all the areas would see a property tax decrease . . .” *Id.*

198. There may also be an expectation on the part of SID residents outside the city limits that “SIDs are intended to become part of the city eventually, and that it’s just a matter of when.” Moring & Nohr, *supra* note 193.

199. *Id.*

200. *Id.*

Notwithstanding these concerns, Omaha has benefited and continues to benefit from annexation. Unlike central cities that are trapped by incorporated suburbs, which can lead to wealthy enclaves that avoid fair-share economic contribution to regional well-being, Omaha has been able to capture revenues associated with the sprawling suburban areas within Douglas County to the west of the city center. With these fiscal benefits comes the political advantage of substantial parts of the region being connected in a single local government entity. Passed in 1917, the Omaha annexation statute has enabled the central city to protect its keystone role in the region for over a century.

#### V. A CLOSER LOOK—THE CURIOUS ROLE OF THE SID

Omaha’s extensive annexation powers have enabled the City to capture much of the tax base associated with suburban development to the west. At the same time, public and affordable housing as well as poor and non-White residents remain clustered in eastern Omaha. At a macro scale, the City is similar to an “integrated” school in which poor and minority students are tracked into classes with less experienced teachers and less challenging curricula.<sup>201</sup>

As discussed above in Part III, concentrations of racial and ethnic minorities in low-income housing are a principal focus of the Fair Housing Equity Assessment (“FHEA”).<sup>202</sup> The Affirmatively Furthering Fair Housing (“AFFH”) mandate, however, goes beyond eradicating discrimination—beyond potentially invalidating increased concentrations of low-income and affordable housing. AFFH review considers also whether all people have the opportunity to live in all neighborhoods, including those favored with quality amenities such as good schools and jobs. AFFH thus looks also to measures not taken, to the creation of preserves of neighborhoods of opportunity in which affordable housing is the rare exception. The AFFH posture is to ask why, in such areas of opportunity, there exists insignificant stock of low-income housing, which renders these neighborhoods inaccessible to low- and moderate-income residents.

The concentration of more affordable housing in eastern Omaha results partly from more modest housing stock in older parts of the city. This concentration has been intensified by the more recent placement of low- and moderate-income housing in these same older parts of the city. This concentration also results, however, from a *lack* of

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201. See, e.g., JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY (2d. ed. 1985) (documenting how tracking within racially desegregated schools channels lower-income and minority students to less challenging academic classes).

202. See *supra* notes 105-129 and accompanying text.

such housing being built in the newer, more westerly parts of the city. Actions that suppress affordable housing in one part of the city increase the housing differential just as effectively as actions that concentrate affordable housing in another part of the same city. Advantage and disadvantage are inseparable.<sup>203</sup>

The FHEA ascribes some of Omaha's concentration of affordable housing in the east to the resistance of existing residents in the west to the placement in their midst of low- and moderate-income housing and the people who would live in that housing—the Not In My Back Yard (“NIMBY”) phenomenon.<sup>204</sup> Yet the status quo of little affordable housing in western Omaha did not come into existence by virtue of hostile neighbors. Current suburban developments in the western part of the metropolitan area were built without affordable housing when there were no existing neighbors: The cornfields that existed when these neighborhoods were originally built did not object to any housing, affordable or otherwise.

Rather than being a response to NIMBY opposition, the prevailing status quo of little affordable housing in western Omaha emerged out of the operation of the institutional structures of development. Predominant among these structures is the SID, which is the primary legal vehicle for suburban development and eventual annexation in Douglas and Sarpy Counties.<sup>205</sup> The lack of affordable housing that exists in western Omaha is a direct result of an SID+annexation development regime that remains largely in place today. Part of Omaha's reflection in the AFFH Mirror, in fact, reveals that legal structures that appear to be neutral actually have played a key role in creating the housing disparities that exist. This Part of the article describes the SID+annexation development regime in greater detail and examines its negative effects on fair housing.

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203. See Strand, *supra* note 12, at 485-502 (describing both White advantage and Black disadvantage aspects of racial wealth disparities); Strand, *supra* note 75, at 771-79 (identifying implicit bias and structural racism as Black disadvantage and White Privilege and government wealth-building programs that benefitted predominantly Whites as White advantage).

204. See FHEA, *supra* note 106, at 133.

205. The SID legal structure is not available in Iowa, so development in Council Bluffs proceeds via other institutional arrangements. RALPH TODD ET AL., THE SANITARY IMPROVEMENT DISTRICT AS A MECHANISM FOR URBAN DEVELOPMENT 49 (1975), <http://digitalcommons.unomaha.edu/cgi/viewcontent.cgi?article=1005&context=cparpubarchives> [hereinafter *UNO Report*]. See also Deena Winter, *Nebraska is King of Chapter 9 bankruptcies – how'd that happen?*, NEBRASKA WATCHDOG.ORG (July 26, 2013), <http://watchdog.org/97793/nebraska-king-of-chapter-9-bankruptcies-howd-that-happen/> (noting that the City of Lincoln does not use SIDs as a vehicle for development). Winter quoted Melvin Krout, Lincoln's planning director, referring to SIDs as a “Ponzi scheme”: “While SIDs may be ‘terrific’ for developers, attorneys, engineers and bonds people, Krout said, he doesn’t think they’re a good deal for homeowners. ‘The homeowners get stuck with a pretty high bill, comparatively, for infrastructure,’ he said.” *Id.*

## A. SIDs

Though Omaha’s annexation of other, smaller cities such as Elkhorn makes the headlines, the fine print reads differently. As with the 2014, 2015, and 2016 annexations, most of the land that Omaha has annexed has been unincorporated.<sup>206</sup> Sort of.

In fact, most developed areas annexed by Omaha have lain within special districts known as SIDs. A 1975 report prepared by the Center for Applied Urban Research of the University of Nebraska at Omaha (“UNO”) for the Nebraska State Legislature offers a concise summary of the origins of Omaha’s SIDs:

The history of the Sanitary Improvement District (SID) in Nebraska is closely tied to the history of urban development in the Omaha Metropolitan Area. The end of World War II freed the pent-up demand for new dwelling units in Nebraska as well as in the rest of the nation. Omaha’s stock of platted lots was rapidly used up in the late 40’s and pressures were great for opening up new areas. To meet the demand, new dwellings began to spring up on the fringes of the City, but altogether too many of these were served only by wells and septic tanks. As the housing boom developed it became clear that such utilities could not satisfactorily accommodate large concentrations of suburban populations. Yet the City found it difficult to extend water, sewer and other utilities to the new areas, partly because many existing areas of the City were not provided with such services and political necessity demanded that these needs be met first. Consequently, neither the developers nor the City had the organizational capacities or the financial resources to urbanize these fringe areas properly.<sup>207</sup>

State legislation passed in 1949<sup>208</sup> laid the legal foundation for the suburban SID-based expansion of Omaha and the extensive post-World War II annexation described in Part IV. The crux of the SID approach was the provision of “capital to developers through tax-exempt government financing devices (warrants and bonds) so develop-

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206. See John Minahan, Comment, *Nebraska Sanitary and Improvement Legislation*, 5 CREIGHTON L. REV. 269, 289 (1972) (“it is estimated that some 90% of new residential development outside the city limits are through [the SID] vehicle.”). To the present, since the Elkhorn annexation in the mid-2000s, all Omaha annexations have been of unincorporated areas, though many of them are SIDs. See *supra* notes 171-173 and accompanying text.

207. UNO Report, *supra* note 205, at vii.

208. Minahan, *supra* note 206, at 269, 271-74. Enabling legislation for Sanitary and Improvement Districts was passed in 1947, and began to gain widespread acceptance after a second SID Act was passed in 1949. Amendments were made in the 1960s. *Id.*; UNO Report, *supra* note 205, at vii.

ers could install standard-quality improvements in their developments.”<sup>209</sup>

Though the SID private control/public financing approach to development has been modified to allow for greater oversight by the City since the 1950s and 1960s, private initiative in development through SIDs remains the norm in Omaha today.<sup>210</sup> Approximately 158 unannexed SIDs exist currently in Douglas County alone.<sup>211</sup> Further, SIDs perform the same development function in Sarpy County.<sup>212</sup>

Public financing of improvements through SIDs occurs in two stages.<sup>213</sup> SIDs issue warrants in the initial stages of development to cover costs as they are incurred.<sup>214</sup> Then, once improvements are completed, SIDs levy both general taxes and special assessments on the parcels within district boundaries that benefit from improvements.<sup>215</sup>

In practice, providing developers with public financing “did not automatically lead to the installation of standard-quality improvements in new developments.”<sup>216</sup> It took the exercise of the City of Omaha’s regulatory authority within its extraterritorial (three-mile)

209. *UNO Report*, *supra* note 205, at vii.

210. *See, e.g., Sanitary and Improvement District (SIDs)*, NEBRASKA DOUGLAS COUNTY CLERK/COMPTROLLER, <http://www.douglascountyclerk.org/sidinfo> (last visited Nov. 14, 2016).

211. Telephone Interview with Cassie Paben, Deputy Chief of Staff – Economic Development, City of Omaha (July 13, 2016); *see also Sanitary and Improvement District (SIDs)*, *supra* note 210.

212. *UNO Report*, *supra* note 205, at viii (beginning in 1960s); *Sanitary and Improvement Districts (SIDs)*, SARPY COUNTY NEBRASKA, <http://www.sarpy.com/clerk/sids.html> (last visited Nov. 14, 2016). In contrast, SIDs have not been the preferred mode of development in Lincoln, the second-largest metropolitan area in the state. *See UNO Report*, *supra* note 205, at 15-16. Lincoln historically has guided development by annexing land and taking the lead in financing infrastructure improvements. *Id.* at 19 (“the City of Lincoln . . . is a prime example of the . . . development approach [of] public decisions on improvements and public financing . . .”). At the time of the 1975 UNO Report, public control of infrastructure with private financing was “the prevailing mode of development throughout the rest of the nation.” *Id.* at 16. The UNO Report noted, “Although the SID is credited with spurring the development of urban areas in Nebraska (particularly Omaha), urban development has taken place both in Nebraska and nationally without the SID mechanism.” *Id.* at 19. The report concluded that robust growth in cities not using the SID approach “questions the purported superiority of the SID to other . . . development concepts.” *Id.*

213. For more complete descriptions of SID formation and operation, *see UNO Report*, *supra* note 205, at 1-48; Minahan, *supra* note 206, at 274-89.

214. *See* Minahan, *supra* note 206, at 279-80; *UNO Report*, *supra* note 205, at 5 n.2; *Explanation of a SID – Sanitary and Improvement District*, CBS HOME BLOG, (Aug. 24, 2010), [http://blog.cbshome.com/explanation-of-a-sid-sanitary-and-improvement-district.htm#\\_z4cBYIOUo](http://blog.cbshome.com/explanation-of-a-sid-sanitary-and-improvement-district.htm#_z4cBYIOUo).

215. *See UNO Report*, *supra* note 205, at 37-48 (discussing SID financing, including apportionment of debt repayment to special assessments and general obligation financing).

216. *Id.* at 15.



zoning jurisdiction to accomplish that shift.<sup>217</sup> And, in addition to standard improvements such as roads, sewers, and other essential infrastructure, “[d]evelopers soon learned . . . that the SID mechanism permitted them to transfer much of the cost of sometimes very plush improvements such as private clubs to the public financing mechanism provided by the SID.”<sup>218</sup>

Though SIDs are vehicles for development of land by private entities,<sup>219</sup> they are public districts authorized by state statute.<sup>220</sup> SIDs have the power of eminent domain.<sup>221</sup> SIDs have the fiscal authority to impose special assessments and to issue general obligation bonds that enjoy the tax-exempt status of municipal bonds.<sup>222</sup> When SIDs go bankrupt, as they do during downturns in the housing market, they reorganize as municipalities under Chapter 9 of the United States Bankruptcy Code.<sup>223</sup>

The SID governance structure provides for a board of trustees comprised of owners of property within the SID geographical limits or the designees of those owners.<sup>224</sup> These provisions historically led to concentration of control by principal developers on SID boards.<sup>225</sup>

The consequence of this situation is that the SID becomes simply an extension of the developer and, in effect, invests him with certain governmental powers. Specifically, he is able to make public expenditures and, more important, to incur public debts for which others eventually have to assume responsibility: home buyers in the SID or city taxpayers, if the SID is annexed.<sup>226</sup>

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217. *Id.* at 15, 21.

218. *Id.* at 15.

219. *Id.* at 4-5 (highlighting the private developer role).

220. NEB. REV. STAT. § 31-727 (2008). *See also* Rexroad, Inc. v. Sanitary Improvement Dist. No. 66, 386 N.W.2d 433, 435 (Neb. 1986) (stating SID is a political subdivision of the State of Nebraska); Neb. Att’y Gen., Opinion Letter on Application of the Preliminary Property Tax Rate Provisions of Section of LB 1085 for Political Subdivisions (Aug. 28, 1996). In addition to development, SIDs are granted certain regulatory powers, such as the regulation of dogs and other animals, regulation and provision for streets and sidewalks, regulation of parking, and provision of snow removal. NEB. REV. STAT. § 31-727(6)(b).

221. NEB. REV. STAT. §§ 31-736, 31-737, 31-738 (2008).

222. NEB. REV. STAT. § 31-739 (2008) (highlighting general obligation bonds); NEB. REV. STAT. § 31-751 (2012) (explaining special assessments).

223. *See Thanks to SIDs, Nebraska has the most Chapter 9 bankruptcies*, LINCOLN JOURNAL STAR (July 16, 2012), [http://journalstar.com/ap/business/thanks-to-sids-nebraska-has-the-most-chapter-bankruptcies/article\\_523813c8-c544-5982-8833-cb5f0bf2671d.html](http://journalstar.com/ap/business/thanks-to-sids-nebraska-has-the-most-chapter-bankruptcies/article_523813c8-c544-5982-8833-cb5f0bf2671d.html); 11 U.S.C. §§ 901-904, 921-930, 941-946 (2012).

224. NEB. REV. STAT. § 31-727(3).

225. *UNO Report*, *supra* note 205, at 11-12.

226. *Id.* at 17-18.

## B. SID+ANNEXATION

The denouement of the SID process in Douglas County is annexation by the City of Omaha. Upon annexation, special assessments continue in effect. The general obligation bond debt, however, is assumed by the City of Omaha. This eventual transfer of debt obligations to the City creates incentives for developers to minimize special assessments, paid first by the developer and then by those who purchase SID properties, and to maximize general obligation bond debt, serviced by the SID until annexation and then transferred to all city residents.<sup>227</sup>

Between 1960 and 1975, SID debt accounted for the majority of general obligation debt of the City of Omaha: “Over this period, Omaha’s assessed value increased by 115 percent . . . while the bonded debt increased by 533 percent . . . .”<sup>228</sup> Moreover, “[o]f even greater significance is the fact that nearly all of the increase in Omaha’s debt ratio (debt as a percent of assessed value) can be attributed to debt assumed by the annexation of SID’s.”<sup>229</sup> The City’s debt ratio rose from 2.3 in 1960 to 6.8 in 1975.<sup>230</sup> Between 1968 and 1973, Omaha’s debt increased by 141 percent compared to “an average debt growth of 33.1 percent for the 42 largest cities in the United States.”<sup>231</sup> This debt could have been lowered by higher pre-annexation mill levies on SIDs,<sup>232</sup> and in fact oversight of both improvements and financing has increased in the past four decades.<sup>233</sup>

This debt “impose[d] a major burden on residents of the City.”<sup>234</sup> The UNO Report concluded that the historical debt data “calls into question the wisdom of past annexation decisions.”<sup>235</sup> In the mid-1970s, in fact, Omaha Mayor Edward Zorinsky shifted away from aggressive annexation.

The key reason for this change was the increase in the city’s bonded indebtedness as a result of assuming the debts of annexed areas. Between 1969 and 1971 annexations added \$34.7 million to the city’s debt, necessitating an increase in

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227. *Id.* at 18-19.

228. *Id.* at 25.

229. *Id.* (emphasis removed).

230. *Id.*

231. *Id.* at 28.

232. *See id.* at 79 (noting that “there is a tendency for SID Board of Trustees . . . to keep mill levies unrealistically low in the early stages of the SID’s development.”).

233. *See, e.g.*, City of Omaha Planning Department, Application Subdivision Plat and Guidelines on the Source and Use of Funds (Reviewed in July 2014) (delineating permissible sources—general obligation, special, and private—for specified expenditures) (on file with author).

234. *UNO Report*, *supra* note 205, at 28.

235. *Id.* at 46-47.

the debt levy in 1973. Zorinsky believed that annexing sanitary improvement districts discriminated against Omaha taxpayers and led to unsavory relations between realtors and politicians.<sup>236</sup>

Approximately 278 SIDs had been created in Douglas County up to the time of the UNO Report in 1975.<sup>237</sup> By 2011, of 843 SIDs created overall, 550 had been annexed “by Omaha or a surrounding city.”<sup>238</sup> At that time, about 300 unannexed SIDs existed in Douglas and Sarpy Counties.<sup>239</sup> The City of Omaha annexed some three dozen SIDs in 2014, 2015, and 2016.<sup>240</sup>

Between 1975 and today, two housing downturns—the first in the 1980s and the second in the late 2000s—led to a spate of SID bankruptcies. By 2012, SIDs in Nebraska, concentrated in the Omaha-Council Bluffs region, accounted for “almost one-fifth of the more than 220 [municipal] bankruptcies filed in the U.S. since 1981.”<sup>241</sup> The legal power to file a Chapter 9 municipal rather than Chapter 11 corporate bankruptcy comes from the state, and it gives municipalities—and SIDs—“an advantage over companies . . . . Unlike a company, municipalities don’t need to ask the bankruptcy court for permission to pay any bills they ran up before filing for court protection . . . . That means creditors can’t put as much pressure on . . . .”<sup>242</sup>

Jean Stothert, Omaha’s current mayor, has pursued an aggressive annexation policy vis-à-vis SIDs. Criteria for assessing SIDs and other unincorporated areas for annexation include the city’s ability to provide police and fire protection, a focus on eliminating islands of

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236. LAWRENCE H. LARSEN ET AL., *UPSTREAM METROPOLIS: AN URBAN BIOGRAPHY OF OMAHA & COUNCIL BLUFFS* 327 (2007). A series of articles published in the *Omaha World-Herald* in 1970 “pointed to abuses under the law. There [were] allegations of irregularities in financing, excessive interest rates, and irregularities in connection with the issuance of bonds. Criticism has also focused upon the nature of improvements made in the districts . . . as well as excessive assumption of SID debts upon annexation.” Minahan, *supra* note 206, at 270-71. The preparation of the UNO Report in 1975 appears in line with the shift at that time toward a more critical assessment of the role of SIDs.

237. See *UNO Report*, *supra* note 205, at vii-viii.

238. Caitlin Devitt, *Some Omaha-Area Improvement Districts Don’t Recoil from Chap. 9*, *THE BOND BUYER* (Sept. 6, 2011), [http://www.bondbuyer.com/issues/120\\_172/omaha-chapter-9-bankruptcy-1030784-1.html](http://www.bondbuyer.com/issues/120_172/omaha-chapter-9-bankruptcy-1030784-1.html).

239. *Id.*

240. See *supra* note 172 and accompanying text.

241. Steven Church, *Nebraska, Not California, is King of Municipal Collapse*, *BLOOMBERG NEWS* (July 15, 2012), <http://www.bloomberg.com/news/articles/2012-07-16/nebraska-not-california-is-king-of-municipal-collapse>.

242. *Id.* “In Nebraska, Chapter 9 [SID] bankruptcies are more like prepackaged Chapter 11 cases because the district owners and creditors most often work out an agreement beforehand . . . . Those deals almost always guarantee full repayment of bondholders’ principal, stretched over a longer period of time and at a lower interest rate.” *Id.*

land that are already surrounded by the city, and a revenue-positive effect for the city.<sup>243</sup> Concurrent with these annexations, the Nebraska State Legislature continues to tinker with the provisions governing SIDs. In 2015, for example, Senator Sue Crawford from Bellevue in Sarpy County introduced a successful bill that required disclosure of SID status to homebuyers: not all purchasers of homes in SIDs were aware that their properties lay within SIDs and not within city limits.<sup>244</sup> In 2016, Omaha Senator Joni Craighead's bill to "[restrict] asset expenditures by sanitary and improvement districts (SIDs) that have received notice of annexation" became law by a unanimous vote.<sup>245</sup> Some SIDs with cash on hand had been responding to annexation notification by spending down their accounts.<sup>246</sup>

As infrastructure requirements have risen and the financial resources of local governments have fallen in recent decades, the use of special tax districts similar to SIDs to fund infrastructure in private developments at municipal-bond interest rates has increased across the nation. In these districts,

[l]and-secured bonds generally are not rated by the rating agencies because they are considered riskier than other municipal bonds and are unlikely to receive investment-grade ratings . . . . As home builders have come to understand, however, as long as all goes according to plan, the risks lessen over time.<sup>247</sup>

In a standard scenario, homeowners in the development over time assume the cost of repaying the funds borrowed for infrastructure devel-

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243. *Property Taxes Will Decline in SIDs to be Annexed*, MAYOR JEAN STOTHERT CITY OF OMAHA (June 20, 2016), <http://mayors-office.cityofomaha.org/city-news/245-property-taxes-will-decline-in-sids-to-be-annexed>; Telephone Interview with Cassie Paben, *supra* note 211. Though the author submitted several requests, she was unable to obtain a written policy from the City of Omaha containing the official criteria or internal process it follows in making annexation decisions.

244. See L.B. 420, 104th Legislature, 1st Sess. (Neb. 2015). The League of Nebraska Municipalities supported legislation to require acknowledgements from purchasers of real estate in SIDs. *Legislative Bulletin*, LEAGUE OF NEBRASKA MUNICIPALITIES, at 6 (Feb. 13, 2015) [http://www.lonm.org/attachments/Bulletins/2015/2015\\_Bulletin\\_6.pdf](http://www.lonm.org/attachments/Bulletins/2015/2015_Bulletin_6.pdf). Legislative Bill ("L.B.") 420 was passed into law on a vote of 44-3 as part of L.B. 324 in April 2015. *Urban Affairs Committee*, NEBRASKA LEGISLATURE (Apr. 24, 2015), <http://news.legislature.ne.gov/urb/page/3/>.

245. *Annexation restrictions approved*, UNICAMERAL UPDATE (Feb. 18, 2016), <http://update.legislature.ne.gov/?p=18541> (stating L.B. 131 passed on a vote of 46-0).

246. Telephone Interview with Cassie Paben, *supra* note 211.

247. Steve Heaney & Ken Powell, *Tax District Financing: A Guide to Funding Infrastructure through Land-Secured Bonds*, NATIONAL ASSOCIATION OF HOMEBUILDERS: LAND DEVELOPMENT, Spring 2007, at 38, <https://www.awcnet.org/portals/0/documents/legislative/InfraNAHBFundInfraLandSecuredBonds.pdf>. "Risks are highest as development begins and the project is still 'dirt'; risk then declines as the project reaches its full potential, builds out, and establishes a diversified tax base with a record of special tax or assessment payments." *Id.*

opment: “The annual tax or assessment levy is generally part of the owner’s property tax bill . . . .”<sup>248</sup> The primary public subsidy is the lower interest rates on money borrowed that results from tax-exempt status. In the historical development pattern in Omaha, however, the public has also subsidized SIDs by assuming SID debt upon annexation.

There was, further, a racial skew to these subsidies. In the 1950s and 1960s, the period during which Omaha’s SID+annexation development regime took root, racial discrimination in housing was the norm in the city. While Black residents were channeled to the “Near North Side,” White residents who could afford larger, newer, more expensive homes and the expense of maintaining a private automobile availed themselves of new suburban homes in SIDs west of the Omaha city limits that eventually, through annexation, became western Omaha. When SID debt was assumed by City of Omaha taxpayers at large, Black taxpayers contributed to paying off that debt. Black taxpayers in Omaha thus helped to subsidize western SID development from which they were excluded.

## VI. FAIR HOUSING EFFECTS OF THE SID+ANNEXATION DEVELOPMENT REGIME

The SID+annexation development regime captured for the City of Omaha the valuable tax base associated with suburban development. The regime also kept within Omaha’s governmental structure a broad geographical range of political interests and voices. Yet, beneath the surface neutrality of Omaha’s SID+annexation development system lie deep structural biases that tilt suburban development in the region away from Affirmatively Furthering Fair Housing (“AFFH”). Because these biases lie in the intrinsic definition and operation of the Sanitary Improvement Districts (“SIDs”) as institutions and their interaction with potentially annexing cities, these biases manifest themselves even in the absence of discriminatory intent or an awareness of race or other protected classes.

### A. DEVELOPMENT RISKS AND COSTS

The first set of biases relates to the risks and costs of the development of housing. A primary rationale given for SIDs is that they take the risks associated with development away from the City.<sup>249</sup> The

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248. *Id.*

249. *See, e.g., UNO Report, supra* note 205, at 54 (stating bond house representatives cited advantage of SIDs as “allow[ing] the City to see beforehand what it would be annexing and, thus, be better able to decide whether or not it want[s] to annex specific developments”); *Id.* at 65 (explaining Omaha city officials described SIDs as “a painless

SIDs bear the risk associated with development; the City assumes financial exposure only later, upon annexation when the success of any given SID development is more readily discerned. Yet the financial incentives of these developers are private rather than public: Developers are called to profit by maximizing net revenues. Eventually, the City pays for the privilege of avoiding development risk.

Part of maximizing profit is offering a product that is likely to sell and that will sell for as high a price as possible. SID developers minimize their risk of unsold inventory by providing non-innovative housing likely to be broadly acceptable to suburban home buyers of means. Detached single-family homes near predictable commercial centers are the result. Mixed-income and multi-family developments that would provide housing affordable by households of more modest means, as well as mixed-use developments, are perceived as riskier investments; therefore, they are not constructed.

Concurrently, SID imperatives push developers to provide homes that are as upscale as the real estate market will allow. In fact, in the early decades of the SIDs, developers sometimes used the public funding to which they had access to provide “plush improvements such as private clubs . . . .”<sup>250</sup> The argument arose that “since upon annexation the cost thereof would burden the entire city, it was unfair to those taxpayers of the annexing city who did not have access to similar facilities in their part of town.”<sup>251</sup> A countervailing view held that “to advocate that a new development should be curtailed to anything less than optimal because of deficiencies in the developments of older parts of the city is to argue for the compounding of deficiency.”<sup>252</sup>

SID developers also minimize risk by passing expenses through to eventual buyers of the homes developed. The homes built by SIDs tend to be more expensive than older and closer-in homes because they are new, large, and detached. SID homes are also more expensive because purchasers are on the hook for repayment of the SID warrants and bonds—at least until annexation—as well as for special assessments, which are unchanged by annexation. Property taxes on SID homes consequently tend to be higher than property taxes on non-

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way of getting adequate public improvements in new developments without having to go through City Council every time. Under the SID procedure, by the time these capital expenditure matters get to the City Council they have been transformed into an annexation question and have lost their identity as capital expenditures for areas outside the City.”).

250. *Id.* at 15.

251. Minahan, *supra* note 206, at 278.

252. *Id.* at 279.

SID homes.<sup>253</sup> This tax differential may result in a perception of high property taxes generally, in particular by those who have the means to purchase an SID home. It also has the effect of softening resistance by SID residents to annexation if taxes actually decrease when SIDs are annexed.<sup>254</sup>

SID property taxes are high in part because the cost of the development is initially borne only by the SID’s residents. In part, however, SID property taxes are high because the SID process entails administrative costs via the involvement of bond houses and bond counsel above and beyond the standard fees associated with municipal bonds issued by cities, which have ratings set by non-specialized bond houses.<sup>255</sup> The SID property taxes also include developer profit: When a private developer assumes a risk that the city has chosen to avoid, the developer charges for doing so<sup>256</sup>—and that cost is eventually passed on to SID homeowners and, ultimately, city taxpayers.

The reassurance that SIDs lessen the risk of development for the annexing city loses its luster when examined closely. The SID approach relieves the city of the immediate financial, and, thus, political, risk associated with suburban development. Just as with purchasing

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253. Deena Winter, *Special districts – with power to tax – grow like corn in Nebraska*, NEBRASKA WATCHDOG.ORG (Sept. 13, 2013), <http://watchdog.org/105554/special-districts-with-power-to-tax-grow-like-corn-in-nebraska/>.

[T]he property tax rates in . . . SIDs are much higher than in most cities – about 25 percent to 35 percent higher, according to [Bill Lock, research analyst for the Legislature’s Revenue Committee]. Property taxes are higher in SIDs because the cost of infrastructure is borne by such a small tax base, rather than spreading it out to a large tax base, like Omaha’s. Cities assume the debt of an SID upon annexation, so Omaha doesn’t usually annex SIDs until their debt is low or paid off.

*Id.*

254. See, e.g., Burbach, *supra* note 172 (July 10, 2014); Moring, *supra* note 193. Compare Christopher Curry, *City’s annexation effort meets organized opposition*, THE GAINESVILLE SUN (Oct. 3, 2012), <http://www.gainesville.com/news/20121003/citys-annexation-effort-meets-organized-opposition> (noting “annexation . . . would increase property tax rates – with the current difference being 1.07 mills – or an additional \$1.07 in taxes for every \$1,000 of taxable property value.”), with Jimmy Nesbitt, *Deputies, residents rise to challenge West Side annexation*, EVANSVILLE COURIER & PRESS (Mar. 14, 2009), <http://archive.courierpress.com/news/local/deputies-residents-rise-to-challenge-west-side-annexation-ep-447661406-326965701.html> (stating annexation opponents estimate “property taxes will increase 30 to 50 percent if the area is annexed into the city.”).

255. See *UNO Report*, *supra* note 205, at 47.

256. See MURRAY FROST, A FRAMEWORK FOR DISCUSSING SID-RELATED PROBLEMS 3 (1985), <http://digitalcommons.unomaha.edu/cgi/viewcontent.cgi?article=1247&context=cparpubarchives>. (identifying, explicitly, the interest of “profits to developers and others in the SID industry.”). *Cf.* *Mun. Bldg. Auth. of Iron Cty. v. Lowder*, 711 P.2d 273, 280 (Utah 1985) (noting special district was created to finance a new jail to avoid limits on general obligation debt of county and “[the county] almost certainly will pay more, since general obligation bonds probably would have carried a lower interest rate than the somewhat riskier bonds being issued by the Authority.”).

insurance, however, avoiding risk does not come for free. Up front, SID home-buyers pay more for homes in the form of special assessments and higher property taxes because they pay the profit and increased costs incurred when the developer takes the risk off the city's hands. In the long run, upon annexation, the city—and all of its taxpayers, including those who benefit only very indirectly from the city's expanded tax base—assumes the debt incurred by the developer, long since passed along to the SID property-owners.

#### B. EXCLUSIONARY DEVELOPMENT

The second set of biases in the SID+annexation regime relates to the city's ceding control and influence over development to developers operating as SIDs. Throughout much of the period that SIDs have been building market-rate and upscale housing to the west of Omaha, the City of Omaha has been working to respond to an unmet need for public housing and for low-income housing in general. Though the 2015 AFFH regulations are new, the City has for years been filing Analysis of Impediments reports in conjunction with receiving grants from the United States Department of Housing and Urban Development ("HUD"). Low-income housing tax credits have been deployed. The result, as the Fair Housing Equity Assessments ("FHEA") documents, is a concentration of low- and moderate-income housing in eastern Omaha with very little such housing west of 72nd Street—the very areas of Omaha developed through the SID+annexation regime.

Nowhere in this regime has there been consideration of the public priority of providing housing for all members of the Omaha region. Increased oversight of SIDs by city planning departments beginning several decades ago has changed neither the essential structure nor the underlying incentives of the regime. City review focuses on SID compliance with design and engineering requirements and provision of the public amenities designated by the SID authorizing statute, but the SID statute does not even mention affordable housing. The SID+annexation development regime, a regime that is operated through public districts with public financing controlled by private for-profit entities, is silent on the provision of housing for community members with low or moderate incomes and results in the lack of inclusion—effectively the exclusion—of affordable housing in SID developments.

Incentives for affordable housing make a cameo appearance in the City's Master Plan, prepared under Mayor Mike Fahey, who held office between 2001 and 2009. The Housing Element asserts: "To reduce the cost of construction and provide incentives for the development of affordable housing, the City should reduce develop-



ment fees for construction of new affordable single-family and multi-family housing.”<sup>257</sup> Similarly, the Urban Development Element includes, among program objectives for suburban development, to “[c]reate healthy and diverse neighborhoods throughout the city by . . . promoting the development of affordable housing through the use of incentives in the form of reduced development fees for such housing.”<sup>258</sup>

Throughout the nation, cities have undertaken a wide variety of approaches to creating incentives, both carrots and sticks, for market-rate developers to incorporate affordable housing into their projects. Hundreds of cities have passed inclusionary zoning ordinances.<sup>259</sup> Other jurisdictions have supported affordable housing by assessing impact or linkage fees on new development, with some programs offering actual construction of affordable housing in mixed-use developments as an alternative.<sup>260</sup> Still others have negotiated site plan packages for developments that include affordable housing units.<sup>261</sup>

The Nebraska SID authorizing statute, in contrast, does not require that SID developments include housing for a range of residents, including those with low and moderate incomes. Nor does the City mandate low- and moderate-income or affordable housing in these developments. Without public requirements, SIDs are free to maximize profit and minimize risk by building as homogeneously and as upscale as the market will allow. Compared to the robust approaches to providing affordable housing in new developments in other localities, the reduced application fees mentioned in the Master Plan are timid indeed.

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257. MIKE FAHEY, OMAHA MASTER PLAN: HOUSING ELEMENT 29 (n.d.), <http://urbanplanning.cityofomaha.org/images/stories/Master%20Plan%20Elements/Housing%20Element.pdf>.

258. MIKE FAHEY, OMAHA MASTER PLAN: URBAN DEVELOPMENT ELEMENT 11 (n.d.), <http://urbanplanning.cityofomaha.org/images/stories/Master%20Plan%20Elements/UrbanDevelopment02-16.pdf>.

259. “More than 400 cities, towns, and counties now implement inclusionary zoning programs.” The Urban Institute, *Expanding Housing Opportunities Through Inclusionary Zoning: Lessons from Two Counties*, THE OFFICE OF POLICY DEVELOPMENT AND RESEARCH (Dec. 2012), [https://www.huduser.gov/portal/publications/affhsg/HUD\\_496.html](https://www.huduser.gov/portal/publications/affhsg/HUD_496.html) (explaining the case study of effects of inclusionary zoning policies in place in two counties, Montgomery County, Maryland, and Fairfax County, Virginia for more than 30 years each).

260. Cornerstone Partnership & The National Municipal Policy Network, *Affordable Housing Impact Fee Programs*, POLICY BRIEF, Sept. 2013, at 28-29, <http://localprogress.org/wp-content/uploads/2013/09/Affordable-Housing-Impact-Fee-Programs.pdf>.

261. See, e.g., Fatimah Waseem, *Howard planning board tackles Downtown Columbia affordable housing plan*, THE BALTIMORE SUN (April 15, 2016), <http://www.baltimoresun.com/news/maryland/howard/columbia/ph-ho-cf-planning-board-downtown-housing-0421-20160415-story.html>.

C. LACK OF ACCOUNTABILITY FOR ENSURING DEVELOPMENT OF AFFORDABLE HOUSING

The third set of biases inherent in the SID+annexation development regime arise from the ways in which the regime operates to blur causation and diffuse accountability. The reflection in the AFFH Mirror is obscured by smoke. In most local jurisdictions, development projects are reviewed by and subject to the up-or-down approval of local public bodies responsible for zoning and land use. Affordable housing advocates find voice when inadequate housing exists. Developers seeking to build market-rate housing subdivisions and mixed-use projects may find approval conditioned on providing affordable housing—an important public good.

In contrast, it is not clear where in the SID+annexation process such an issue might be raised. Can the issue of affordable housing be raised when an SID is formed? Is there a process to ensure that the question is addressed when SID plans are reviewed by city planning staff? When land subdivision is complete, is there a process for approving actual design of housing that folds in affordable housing considerations? Once buildings are built, is it too late to ensure affordable housing in any SID development? Does an annexing city factor AFFH imperatives into its decision-making?

The response to all of these questions is that at *none* of these points is there a clear opening or process space provided for considering fair and affordable housing concerns.<sup>262</sup> Though every SID is legally a public district, governance is well insulated from public oversight and influence in the early days when fundamental decisions are being made and the interest of the developers at the helm is primarily to make a profit rather than to promote overall community well-being.<sup>263</sup> The interests of residents enter into decision-making only insofar as they affect a developer's bottom line.

With respect to SID governance, in fact, the 1975 UNO Report flagged a potential constitutional defect. The United States Supreme Court has held that the Equal Protection Clause mandates inclusion of all eligible voters in elections within not only general-purpose mu-

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262. Cf. Alan Gless & Peter Longo, *An Overview of Nebraska Water Law*, in THE HISTORY OF NEBRASKA LAW 105 (Alan G. Gless ed. 2008) (“[The] duties and powers [of Nebraska’s multiplicity of resource-related special-purpose districts are] spread across an organizational grid so complex that points of accountability [are] hard to find.”)

263. NEB. REV. STAT. § 31-727(3) provides that the governing board of the SID be comprised of owners of land within the district or their designees. In the early days of the SID, a developer and the developer’s designees will constitute the entirety of the SID’s board of trustees. NEB. REV. STAT. § 31-727(3). See *UNO Report*, *supra* note 205, at 10-12 (stating the predominance of developers on SID boards of trustees). Only as SID properties are purchased by other persons will membership on the board open up.

nicipalities<sup>264</sup> but also within special districts.<sup>265</sup> Where a special district, such as an SID, has significant governmental powers, the statutory restriction of voting to property-owners rather than residents overall has been held unconstitutional.<sup>266</sup> In the early stages of an SID, where there are only property-owners and no residents, the current arrangement may pass constitutional muster. A legal challenge by a non-property-owning resident once an SID is developed and populated, however, would pose a serious constitutional issue.

The governance of the City of Omaha, conversely, *does* meet constitutional requirements and *does* represent the interests of all its residents. All eligible residents may vote for city council and mayor; districts are of approximately equal population. And the City of Omaha has important public interests at stake—witness the three-mile extraterritorial jurisdiction provision that allows the City to regulate areas of future annexation. Yet the City’s involvement and power to influence not simply physical infrastructure but SIDs’ effects on the social infrastructure are minimal. Omaha is peripheral to SID decisions until after the fact. Avoiding risk, it turns out, entails relinquishing control as well as paying a cost premium.

Overall, the structure and dynamics of the SID+annexation development regime are the vehicle for Omaha’s growth to the west. They explain how western Omaha became the favored quarter of the region. They explain the dearth of affordable housing in SID-developed western Omaha that, along with the placement of low- and moderate-income housing in east and central Omaha, has resulted in a

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264. *Avery v. Midland Cty.*, 390 U.S. 474, 478-79 (1968) (extending the Fourteenth Amendment’s one-person, one-vote requirement to general purpose local government elected body).

265. *See, e.g., Hadley v. Junior College Dist.*, 397 U.S. 50, 58 (1970) (stating all citizens residing in the community college district must be able to vote equally for trustees of district). *But see, e.g., Ball v. James*, 451 U.S. 355, 371 (1981) (explaining that allocation to landowners for directors of water reclamation district and exclusion of other residents is allowable under Equal Protection Clause).

266. *See City of Phoenix v. Kolodziejski*, 399 U.S. 204, 213 (1970) (opining that exclusion of those not owning real property from ability to vote in bond election is a violation of Equal Protection Clause); *Cipriano v. City of Houma*, 395 U.S. 701, 702 (1969) (determining restriction to “property taxpayers” of right to vote in elections on issuance of revenue bonds by municipal utility was successfully challenged as violation of Equal Protection by “nonproperty taxpayers”); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 622 (1969) (stating that restriction in school districts of franchise to parents or guardians of children in public schools and owners or lessees of taxable realty was unconstitutional). *See also UNO Report, supra* note 205, at 21-22 (“The laws concerning voting for SID boards of trustees may conflict with the constitutional principle of one-person one-vote . . . . It should be noted that the rarely used 1947 SID Act extended the right to vote in SID elections to *legal voter residents* whether or not they were property owners in the SID, and did not count votes on the basis of the amount of property owned.” (emphasis in original) (citing *Avery*, 390 U.S. at 478-79; *Hadley*, 397 U.S. at 58; *Kramer*, 395 U.S. at 622; *Kolodziejski*, 399 U.S. at 213).

concentration of such housing in the eastern and central parts of the City.

Perhaps most importantly, the structure and dynamics of the SID+annexation development regime explain why robust community discussions of inclusionary zoning and affordable housing do not inform the development process. As I interviewed housing advocates and interested parties in the region for this article, I asked over and over why there is no movement for inclusionary zoning in Omaha. Many people I asked seemed puzzled by the question. No one had a response that made sense. The privatization of decisions regarding the pattern of development provides an answer: Exclusionary decisions are made by SIDs that are not accountable to the public. The city, which is accountable to the public, has ceded authority and avoids responsibility.

#### D. THE ROLE OF SCHOOL DISTRICTS

A significant indicator of a neighborhood of opportunity is good public schools. In fact, school ratings may have become the current form of redlining, with high test scores signifying areas that are more affluent and White and lower test scores signifying poorer areas with larger minority populations.<sup>267</sup> As Omaha has expanded its city boundaries through the SID+annexation development regime, formerly separate rural school districts such as Millard and more recently Elkhorn have remained separate. Even earlier, Westside District 66 was created defensively in 1947 just outside the Omaha city limits at that time. The student populations of the various districts reflect the concentrations of poorer and minority members of the community in eastern Omaha described in the FHEA. The Omaha Public Schools (“OPS”) are 29% White, and 74.24% of its students receive free or reduced lunch. In contrast, the Westside Schools are 74% White with 30.9% free-and-reduced-lunch students; the Millard Schools are 80% White with 18.11% free-and-reduced-lunch students; and the Elkhorn Schools are 88% White with 6.33% free-and-reduced-lunch students.<sup>268</sup> Westside, Millard, and Elkhorn, moreover, were

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267. Kendra Yoshinaga & Anya Kamenetz, *Race, School Ratings and Real Estate: A 'Legal Gray Area,'* NATIONAL PUBLIC RADIO (Oct. 10, 2016), <http://www.npr.org/sections/ed/2016/10/10/495944682/race-school-ratings-and-real-estate-a-legal-gray-area> (“[S]chools have become a proxy for the racial or ethnic composition of neighborhoods.”).

268. Nebraska Department of Education, *2015-2016 Membership by Grade, Race, and Gender* (Nov. 24, 2015), <http://drs.education.ne.gov/quickfacts/Student%20Characteristics/Membership/Membership%20by%20Grade%20Race%20and%20Gender%20Reports/PDF%20Documents/2015-16%20Membership%20by%20Grade,%20Race%20and%20Gender.pdf>.

not involved in the court-ordered desegregation of OPS in the 1970s and 1980s.<sup>269</sup>

Until the mid-2000s, there was an 1891 state statute on the books requiring “that each incorporated metropolitan city in the state of Nebraska . . . shall constitute one school district.”<sup>270</sup> In 2005, OPS announced a plan to take over several schools in suburban school districts lying within city boundaries as expanded through annexation over the years.<sup>271</sup> Strong political reaction against the OPS “One City, One School District” Plan<sup>272</sup> resulted in the amendment of the statute<sup>273</sup> and the creation by the Nebraska State Legislature of the Learning Community of Douglas and Sarpy Counties in 2007.<sup>274</sup> Leaving all school districts intact, an authorized common levy gestured toward a sharing of regional educational resources to meet regional educational needs. The Nebraska legislature’s deauthorization of the common levy in 2016,<sup>275</sup> the result of its deep unpopularity with some of the more suburban/exurban parts of the counties, leaves the school status quo undisturbed.

While the City of Omaha has achieved elasticity through annexation, the SID+annexation development regime has concentrated affluent White citizens to the west and less-well-off and minority residents in the eastern part of the city. School district boundaries have facilitated separation of the areas internal to the City of Omaha in terms of provision of the essential public social service of education. The com-

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269. Margaret Reist, *OPS’ vision: One city, one school*, LINCOLN JOURNAL STAR (Sept. 23, 2007), [http://journalstar.com/special-section/news/ops-vision-one-city-one-school/article\\_fabab7bb-23e5-5911-8e1a-21f5065a997a.html](http://journalstar.com/special-section/news/ops-vision-one-city-one-school/article_fabab7bb-23e5-5911-8e1a-21f5065a997a.html). (“During [the 1970s], OPS was being forced to integrate through busing but the suburban school districts were not.”).

270. NEB. REV. STAT. § 79-409 (2013).

271. *Critics Blast OPS Plan*, WOWT NEWS (June 7, 2005), <http://www.wowt.com/news/headlines/1608961.html>; *“One District” Fight*, WOWT NEWS (July 28, 2005), <http://www.wowt.com/news/headlines/1746637.html>; Meredith Grunke, *Citizens testify on OPS “One City, One School District” debate*, THE DAILY NEBRASKAN (Jan. 31, 2006), [http://www.dailynbraskan.com/citizens-testify-on-ops-one-city-one-school-district-debate/article\\_7a3201b2-2dc2-5a98-ba90-5bc8996ec69a.html](http://www.dailynbraskan.com/citizens-testify-on-ops-one-city-one-school-district-debate/article_7a3201b2-2dc2-5a98-ba90-5bc8996ec69a.html); Reist, *supra* note 269. The Westside schools were not involved in the controversy because of a separate state statute from 1947, which exempted that district from the 1891 statutory provision. *Id.*

272. Rhea Borja, *Neb. Governor, Districts Oppose Omaha School Annexation Plan*, EDUCATION WEEK (Aug. 30, 2005).

273. NEB. REV. STAT. § 79-409 (“Each incorporated city of the metropolitan class in the State of Nebraska shall contain at least one . . . school district.”) (emphasis on new language added).

274. *Learning Community timeline: Twists and turns since 2005*, OMAHA WORLD-HERALD (Apr. 19, 2016), [http://www.omaha.com/news/legislature/learning-community-timeline-twists-and-turns-since/article\\_2d4a9614-c750-583d-bae6-edfe2e10d348.html](http://www.omaha.com/news/legislature/learning-community-timeline-twists-and-turns-since/article_2d4a9614-c750-583d-bae6-edfe2e10d348.html).

275. *Id.* See also Martha Stoddard et al., *Lawmakers approve bill to revamp Learning Community, end controversial common levy*, OMAHA WORLD-HERALD (Apr. 15, 2016), [http://www.omaha.com/news/legislature/lawmakers-approve-bill-to-revamp-learning-community-end-controversial-common/article\\_8acfdc6a-0189-11e6-870c-0344a1c1556d.html](http://www.omaha.com/news/legislature/lawmakers-approve-bill-to-revamp-learning-community-end-controversial-common/article_8acfdc6a-0189-11e6-870c-0344a1c1556d.html).

bination of SIDs and school district boundaries within Omaha's city limits has led to an elastic city with highly effective internal segregation of minorities and those who are less affluent—and a regional geography with differentials in the level of opportunity.

The essential impermeability of the boundaries of suburban school districts is not peculiar to Omaha. Forty years ago in *Milliken v. Bradley*,<sup>276</sup> the United States Supreme Court confined urban school desegregation to central city school districts: “[T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country.”<sup>277</sup> Preventing desegregation of the almost entirely Black Detroit public schools across district boundaries with the surrounding predominantly White suburban schools, the Court heralded the value of localism: “No single tradition in public education is more deeply rooted than local control over the operation of schools . . . .”<sup>278</sup> Given the legal sanctity of school district boundaries—in Omaha and nationally—fair housing and residential access to various neighborhoods is all the more essential in ensuring fairness of opportunity for all.

The reflection in the Omaha-Council Bluffs AFFH Mirror is, it turns out, not fair at all. The facially neutral provisions of the SID and annexation statutes cloak decisions that concentrate low- and moderate-income housing in eastern Omaha in significant part by funneling that housing away from new developments in the western part of the region. School district boundaries protect predominantly White suburban areas within the city limits from racial and ethnic mixing in public schools with students currently attending predominantly minority OPS schools. And lack of accountability for exclusionary development clouds the entire scene.

## VII. AFFIRMATIVELY FURTHERING FAIR HOUSING IN THE OMAHA-COUNCIL BLUFFS REGION

The reflection in the Omaha-Council Bluffs Affirmatively Furthering Fair Housing (“AFFH”) Mirror reveals public and low-income housing as well as racial and ethnic minorities clustered in eastern Omaha. Suburban development stretches to the west. Most of the region's western suburbia was originally built outside of city limits in

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276. 418 U.S. 717 (1974).

277. *Milliken v. Bradley*, 418 U.S. 717, 741 (1974).

278. *Milliken*, 418 U.S. at 741. *See also* *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (“The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters.”); Strand, *supra* note 6, at 294-96 (noting celebration of local control over public education in *Milliken* and *Rodriguez*, supported by hesitancy on part of federal courts to interfere with state-local relationship).

Sanitary and Improvement Districts (“SIDs”); much has now been annexed by the City of Omaha. Most of this development has been single-family housing affordable primarily by more affluent households with access to reliable private transportation. And, though racial discrimination in housing was outlawed almost five decades ago, most of the residents of this part of the region are White and have very limited exposure to Blacks and Hispanics as neighbors.

A similar, though smaller-scale and somewhat diluted, pattern of development toward the south and west is currently underway in Sarpy County, the county immediately to the south of Omaha and Douglas County;<sup>279</sup> Sarpy County currently houses 133 SIDs.<sup>280</sup> Meanwhile, the City of Bellevue in the eastern part of Sarpy County is home to a higher proportion of the county’s racial minorities.<sup>281</sup>

Overall, the SID+annexation development regime has been the primary institutional engine for a pattern of bifurcated housing on the Nebraska side of the Omaha-Council Bluffs region. Affirmatively, the regime has provided market-rate single-family suburban homes to the west. Negatively, the regime has operated to exclude low- and moderate-income multi-family housing from new development, contributing substantially to the concentration of affordable housing in the eastern part of the City of Omaha.

This development regime has, in the decades since World War II, created opportunity for some and not for others. Exclusionary development—economically and racially exclusionary development—has been the norm. The SID+annexation development regime has, moreover, enriched SID developers and the professionals who support their work, with lower-opportunity taxpayers of the City of Omaha historically helping to foot the bill. The regime has been institutionally structured to defuse criticism of exclusionary development and to diffuse initiatives for inclusionary and equitable development.

The AFFH mandate calls localities to reflect on the degree to which all households in their region—whether those households are low-, moderate-, or high-income; Black, Latino, or White—have access to neighborhoods of opportunity. The AFFH goal is thus an Omaha-Council Bluffs metro area that is more integrated and more equitable,

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279. Emily Nohr, *What should Sarpy County look like in the future? Officials meeting to map it out*, OMAHA WORLD-HERALD (Jan. 10, 2014), [http://www.omaha.com/money/what-should-sarpy-county-look-like-in-the-future-officials/article\\_8e954692-0901-5b9a-b3ec-2ce0f3f76d3d.html](http://www.omaha.com/money/what-should-sarpy-county-look-like-in-the-future-officials/article_8e954692-0901-5b9a-b3ec-2ce0f3f76d3d.html).

280. SID REPORT, SARPY COUNTY (Nov. 1, 2016), <http://www.sarpy.com/clerk/documents/ALLSIDSReport.pdf>.

281. *QuickFacts Sarpy County, Nebraska*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/31153,3103950,31> (last visited Nov. 11, 2016). In 2015, non-Hispanic Whites were 76.3% of the population in Bellevue and 83.8% in Sarpy County. *Id.*

with access to neighborhoods of opportunity for all. In terms of AFFH, unchanged continuation of the SID+annexation development regime perpetuates and extends the status quo. This status quo does not Affirmatively Further Fair Housing. In this Part, I consider how—given the regional reflection in the AFFH Mirror—to stop the anti-AFFH momentum of the existing development regime and to infuse new pro-AFFH energy in development in the region.

#### A. OVERHAUL THE SID+ANNEXATION DEVELOPMENT REGIME

The AFFH project is an undertaking of no small magnitude. The SID+annexation development regime has been the preeminent mode of metropolitan growth in the Omaha-Council Bluffs region for over half a century. It has become “the way things are done here.” Just as the system was created and implemented, however, it can be dismantled and replaced. This will not be quick, and it will not be easy. But if we truly seek different and more equitable patterns of residential demography, if we truly seek to Affirmatively Further Fair Housing for all, then a fundamental shift of direction is imperative. This section includes four concrete actions to challenge the region’s development status quo.

##### 1. *Amend the Nebraska SID Authorizing Statute to Include the Provision of Affordable Housing as a Public Priority and to Increase Cities’ Role in Planning Development*

The Nebraska State Legislature should amend the state statute authorizing SIDs to state explicitly that one of the standard-quality improvements associated with any residential subdivision development is the provision of affordable housing and to shift initiative and responsibility from private developers to nearby cities exercising extraterritorial jurisdiction and poised to annex at a later date. In 1987, the State of Texas passed legislation authorizing municipalities to create Public Improvement Districts (“PIDs”) within city limits or their extraterritorial jurisdiction.<sup>282</sup> These PIDs, similar to SIDs in a number of ways, differ from SIDs in that public improvements include “the development, rehabilitation, or expansion of affordable housing” along with other infrastructure investments.<sup>283</sup> PIDs are also created by the governing body of the municipality or county, though private entities may initiate the process through petition.<sup>284</sup>

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282. TEX. LOC. GOV’T CODE ANN. § 372 (West 2016) (The Public Improvement District Assessment Act).

283. TEX. LOC. GOV’T CODE ANN. § 372.003(b)(15) (West 2016).

284. TEX. LOC. GOV’T CODE ANN. §§ 372.002, 372.005 (West 2016).



Though the special district may be a useful approach to development,<sup>285</sup> the SID structure reflects the public concerns that prevailed in past decades, public reticence about asserting important community values, and undue deference to and faith in private developers’ capacity and motivation to promote regional well-being. At present, the strongest requirement that new development address regional needs such as affordable housing is a mild and indirect provision in the extraterritorial jurisdiction statute: “[A] city shall have authority within [its three-mile extraterritorial jurisdictional area] . . . to prescribe standards for laying out subdivisions in harmony with a comprehensive plan . . . .”<sup>286</sup> More specificity and more muscle are imperative. A major overhaul of the statute is long past due.

### 2. *Undertake an SID Accounting*

The benefits of elasticity that the SID+annexation development system has provided to the City of Omaha and, thus, to the region may well have been and continue to be substantial. The costs associated with attaining that elasticity may also be substantial. The 1975 UNO Report detailed some of the financial costs associated with the operation of the system in its earlier decades, such as debt for the annexing city and high administrative costs for SID development. Costs also include the profit realized by developers.

More deeply, an analysis of the distributive financial effects of the system would reveal not just overall benefits and costs, but also who has gained and who has not. For the second half of the twentieth century, housing has not been just housing; housing has been wealth. On the one hand, redlining and other modes of housing discrimination erected a documented barrier between Black citizens and opportunities to create housing wealth. On the other hand, did the SID+annexation development regime support White citizens in creating such wealth? And, of the utmost importance, what does this balance sheet look like today?

### 3. *Clarify the Legal Status of SIDs as Public Special Districts*

SID governance must meet applicable constitutional standards. Undertaken by public special districts, SID decisions and actions are “state action.” SIDs must comply with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in their voting and governance structures. Equal Protection jurisprudence suggests that governance bodies for which non-landowning residents

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285. Carter T. Froelich & Lucy Gallo, *An Overview of Special Purpose Taxing Districts*, NAT’L ASSOC. HOME BUILDERS (Sept. 2014).

286. NEB. REV. STAT. § 14-116.

cannot vote are unconstitutional. As public bodies, SIDs are also subject to Due Process and other requirements of the Bill of Rights incorporated to the States via the Fourteenth Amendment.

Further, SIDs have legal responsibility for actions they take that have a disparate impact on the availability and distribution of housing. Does provision of new development that contributes to disparate concentrations of upscale and affordable housing violate the anti-discrimination provisions of the Fair Housing Act? Are cities that participate in SID development complicit? Alternatively, may cities hold SIDs responsible for violating the Fair Housing Act?<sup>287</sup>

#### 4. *Demand Transparency and Accountability in Development Decisions*

A major aspect of the SID+annexation development regime is lack of transparency and accountability for development decisions. In an odd way, the regime's success is also its weakness. In other metropolitan regions, incorporated suburban cities landlock inelastic central cities. Many of these suburbs have historically sought to limit multiple-family dwellings (and those who would live in them) through exclusionary zoning. Their success results in affluent White jurisdictions capturing attractive suburban tax bases, leaving concentrations of poverty and minorities in central cities with impoverished tax bases. This success, however, also draws legal and political challenges and awareness of the dynamic leading to unequal outcomes. Though the United States Supreme Court declined to hold exclusionary zoning an Equal Protection violation in the landmark case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>288</sup> in 1977, the issue was at least named and joined.

Just like an inelastic central city, Omaha's concentrations of poverty and minorities lie in the pre-1950 central city. White affluent suburban development lies elsewhere. Elasticity has not enabled the region to address this issue; it may even have hidden it and therefore contributed to its continuation. No separate cities in the western part of the metropolitan area can be identified as exclusionary, and Omaha's tax base remains robust. What is lost is a way to identify who precisely is responsible for the specific decisions that underlie the segregation that exists and how to hold the people and entities making those decisions accountable. Omaha has succeeded perhaps in part because of the "smoke," which has obscured policies that are unfair and predatory in outcome, if not in intent.

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287. See *supra* note 46 (City of Miami).

288. 429 U.S. 252 (1977).

B. DESIGN A DEVELOPMENT SYSTEM THAT AFFIRMATIVELY FURTHERS FAIR HOUSING

It is daunting to even contemplate uprooting a financial-legal-political system comprised of interlocking institutions and practices such as the SID+annexation development regime. Shifting regional gears on development and the way Omaha—or any city—provides housing calls for the creativity that results when everyone involved agrees that the way things are is not the way we want them to be. This creativity may be tapped by viewing the AFFH imperative as a design challenge. As the quote at the beginning of this article observes:

“When things aren’t working the way they should be . . . you have the makings of a great design project.” And the bigger the problem, the more it challenges designers to question and rethink, to go deep in the investigation of the problem, to come up with original ideas and smart recombinations, to draw and build those ideas in order to make new possibilities visible and tangible.<sup>289</sup>

In a design innovation mode, what steps can the Omaha-Council Bluffs metropolitan area take to change directions and start moving along a different path? A design approach challenges us to be open, imaginative, and hopeful.

1. *“Why does it have to be that way?”*

The starting point for design is to ask what may seem, especially to people steeped in a status quo, a stupid question: “Why does it have to be that way?”<sup>290</sup> Asking this question about development practices and patterns gets immediately at the underlying values of whether we are all in this region together—our collective well-being as well as our physical residence. Asking this question surfaces fears about poor and non-White neighbors, property values, and effects on essential public services, such as schools. Asking this question also exposes those who have other agendas. Not asking this question signals acceptance of a region that is divided internally, weakening the whole. Not asking this question does not Affirmatively Further Fair Housing.

2. *The Importance of Difficult Conversations*

In asking this “stupid question,” the Omaha-Council Bluffs metro area will be called to put on the table issues of race, ethnicity, and economic equity that people often find difficult to talk about, issues that many people—especially affluent White people—are unpracticed

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289. BERGER, *supra* note 4, at 185.

290. *Id.* at 27.

in discussing. The “Midwestern nice” culture of the region contributes to this difficulty. So, too, does the very system that needs to change: When issues are deflected rather than joined, they go underground. Not discussing them does not resolve them; it just makes future discussion even more difficult. Race. Ethnicity. Poverty. Inequality. Lack of exposure and practice compounds both the difficulty of confronting these issues and the need to confront them.

### 3. *Make Unexpected Connections*

If development and housing patterns do not need to be the way they are, then how should they be? How *can* they be? Design advice is to “jump fences”—to go sideways and connect with insights from other fields. Are there other regions that are taking exciting leaps in addressing this challenge? Should Omaha-Council Bluffs think big—looking beyond Texas’s PIDs to Montgomery County, Maryland’s Moderately Priced Dwelling Unit (“MPDU”) policy? For decades, Montgomery County has dispersed moderate-income housing throughout the county with an overarching mandate: “Between 12.5 and 15 percent of the total number of units in every subdivision . . . be moderately priced.”<sup>291</sup> Montgomery County’s MPDU program has resulted in an estimated more than 12,000 moderately priced homes in thirty years.<sup>292</sup> What can Omaha-Council Bluffs learn from Montgomery County? Exciting things can happen when government brings private developers and public priorities together in non-zero-sum interactions.

### 4. *Face the Way Things Are and Imagine the Way They Could Be*

The FHEA for the Omaha-Council Bluffs metropolitan area was prepared in the context of the Heartland 2050 Sustainable Communities work led by the Metropolitan Area Planning Authority (“MAPA”). I spoke to Beth Goodman, the project manager with ECONorthwest, the consultant that prepared the FHEA. She recounted how she, a White woman from out-of-state Oregon coming to a local group with substantial minority representation, had some apprehension when presenting the draft report. What struck her during her presentation, however, was how powerful the maps contained in the FHEA were at reflecting back to the group what they already knew: where the areas of concentrated racial and ethnic poverty are, where the jobs in the

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291. *Moderately Priced Dwelling Unit Program (MPDU) Overview*, MONTGOMERY CTY., MD MONTGOMERY PLANNING, <http://www.montgomeryplanning.org/research/analysis/housing/affordable/mpdu.shtm> (last visited Nov. 16, 2016).

292. MONTGOMERY PLANNING (Dec. 2004), <http://www.montgomeryplanning.org/community/housing/documents/MPDUProductionthrough202004.pdf>.

region are, where the housing is affordable, and where it is not.<sup>293</sup> Seeing the visual representation of what community members already knew brought it home, telling the story in a way that was concrete, meaningful, and irrefutable. The FHEA maps confirmed and named their lived experience of their own community.

Just as the FHEA makes division, inequity, and lack of access to neighborhoods of opportunity visible—we can draw new maps. These maps need to go deeper than transporting people from where they currently live. These maps need to envision pathways that lead to people living where they choose—without constraints of income or other barriers to accessibility. Creating these pathways is what the AFFH Mirror exercise is all about.

### VIII. LOOKING FORWARD

One of my favorite places in Omaha is the Bob Kerrey Pedestrian Bridge over the Missouri River, which links Omaha on the west/Nebraska side with Council Bluffs on the east/Iowa side. The state line is embedded in metal in the concrete walkway, and people often pose for photos with one foot in each state. The bridge has a graceful, sinuous curve to it, and the “linking two states” conceit is both fun and a reminder of the often-arbitrary nature of jurisdictional lines.

Almost always on the bridge I see a happy mixture of people from different racial and ethnic groups—all enjoying the bridge with friends and family. Since its completion in 2008, the bridge has become a public space for all. It invites a kind of mingling that is not all that frequent in the Omaha-Council Bluffs region.

This mingling is a sign of fairness of access and of a sense of belonging by many different types of residents. The easy flow of different people also lets us see that those “other” folks are also out to have a good time and enjoy the nice weather—just like us. Increasingly, businesses and schools are mindful and explicit about diversity and inclusion of people from different backgrounds—not only because it is the right thing to do, but also because it is the smart thing to do. Likewise, difference is valuable for creativity and resilience in cities and communities.

Revisiting my trip to the National Archives with which I began this article, what strikes me about the Security Map of Omaha was the power of the federal government. This power was not the power to impose racial segregation through redlining on a resistant Omaha.

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293. Telephone Interview with Beth Goodman, Project Manager, ECONorthwest (July 2016).

This power, rather, was to affirm and entrench the racial segregation that Omaha—like other cities across the nation—had already created.

Decades after the federal government declared a reversal of direction, repudiating racial segregation in housing, Omaha-Council Bluffs has not revisited a development regime that took root during the era of redlining. The message of the Affirmatively Furthering Fair Housing (“AFFH”) regulations is that it is time.

The AFFH Mirror invites Omaha-Council Bluffs, and other regions, to look deep. If the reflection is not fair, just as Omaha took the local initiative to segregate housing by race almost a century ago, the regulations invite the region to take the local initiative to expand access to housing in neighborhoods of opportunity. We are all part of the solution, and the local level is where it starts.<sup>294</sup>

*Author’s Note:* I wrote this article in the summer and early fall of 2016, during the final year of the administration of President Obama. The election in November calls into question the long-term status of the 2015 regulations promulgated by that administration to implement the Affirmatively Furthering Fair Housing mandate of the Fair Housing Act.<sup>295</sup> Yet the history of local and federal action that created the racially segregated neighborhoods of the 1930’s and of today reveals that the federal government’s role was to “second,” to endorse and solidify discriminatory decisions and policies that were already underway at the local level. Whatever happens to the 2015 regulations, localities that have looked in the AFFH Mirror have seen what they have seen; they know what they know. Localities have the responsibility to protect the interests and further the well-being of all of their residents. Localities can, almost a century later, again lead the way in housing policy and practice—this time toward equity and justice.

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294. Lisa Alexander, Address at Creighton University School of Law: Bringing Home the Right to Housing (March 2016). Cf. David Brooks, *Are We on the Path to National Ruin?* NY TIMES (July 12, 2016), <https://www.nytimes.com/2016/07/12/opinion/are-we-on-the-path-to-national-ruin.html> (“America still has great resources at the local and social level.”).

295. Emily Badger, *How Ben Carson at Housing Could Undo A Desegregation Effort*, NY TIMES (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/upshot/how-ben-carson-at-housing-could-undo-a-desegregation-effort.html>.

## APPENDIX A: OMAHA HOUSING – CONVERSATIONS IN THE OMAHA-COUNCIL BLUFFS REGION

Kitty Amaya – Fair Housing and Equal Opportunity, Omaha Field Office, U.S. Department of HUD

Jamie Berglund – Senior Director, Community Initiatives, Greater Omaha Chamber of Commerce

Amanda Brewer – Executive Director/President, Habitat for Humanity of Omaha

Charles Coley – Executive Director, Metro Area Continuum of Care for the Homeless

Bob Dean – President, Seldin Company

Oscar Duran – Program Director, Habitat for Humanity of Omaha

Patricia Evans – Planning Department, City of Omaha, NE

Gary Fischer – General Counsel, Family Housing Advisory Services, Inc.

Joe Garcia – Fair Housing Center Director, Family Housing Advisory Services, Inc.

Beth Goodman – Project Manager, ECONorthwest

Alec Gorynski – Senior Director, Community Development and Corporate Social Responsibility, First National Bank of Omaha

Christian Gray – Director, inCOMMON Community Development

Don Gross – Directory of Community Development, City of Council Bluffs, IA

Tim Hemsath – Associate Professor, College of Architecture, University of Nebraska – Lincoln

Matthew Henke – Director of Grants Programs, Iowa West Foundation

Teresa Hunter – Executive Director, Family Housing Advisory Services, Inc.

Shaun Ilahi – General Counsel, Habitat for Humanity of Omaha

Steven Jensen – Principal, Steven Jensen Consulting and Former Planning Director, City of Omaha, NE

Michael Maroney – President, Omaha Economic Development Corp.

Othello Meadows – Executive Director, Seventy-Five North Revitalization Corp.

Scott Moore – Partner, Baird Holm LLP

Emily Nguyen – Director of Research and Evaluation, Omaha Community Foundation

Cassie Paben – Deputy Chief of Staff – Economic Development, City of Omaha, NE

Earl Redrick – Director, Omaha Field Office, U.S. Department of HUD

Ken Reed-Bouley – Director, Schlegel Center for Service and Justice, Creighton University

Sister Marilyn Ross – Former Executive Director, Holy Names Housing

Jeff Spiehs – Community Engagement Coordinator, Metropolitan Area Planning Agency

Mark Stursma – Planning Director, City of Papillion, NE

James Thele – Planning Director, City of Omaha, NE

Franchell Watson-Abdalla – Former Grants and Programs Coordinator, Homeownership Program Manager, Omaha Housing Authority

Chad Weaver – Planning Department, City of Omaha, NE

John Wiechmann – President & CEO, Midwest Housing Equity Group

Greg Youell – Executive Director, Metropolitan Area Planning Agency



## APPENDIX B: MAP OF OMAHA AND VICINITY

The U.S. government Home Owners' Loan Corporation ("HOLC") prepared this "Security Map" for Omaha in 1935/1936. The Map's Legend designates the following meaning for the four colors:

- Green = Best
- Blue = Still Desirable
- Yellow = Definitely Declining
- Red = Hazardous

A jpg of the original map, which is located at the National Archives in College Park, MD, is available at <http://hdl.handle.net/10504/109008>.

