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# Regionalism, the Supreme Court, and Effective Governance: Healing Problems that Know No Bounds

Nick J Sciallo

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I can change the world  
With my own two hands  
Make a better place  
With my own two hands  
Make a kinder place  
Oh- with my  
Oh- with my own two hands<sup>2</sup>

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<sup>1</sup> (B.A., University of Richmond; J.D. candidate, West Virginia University College of Law, Class of 2006). I would like to give special thanks to Caprice L. Roberts (Associate Professor of Law, West Virginia University) for her continued editorial support from which I have benefited greatly. andrè douglas pond cummings (Associate Professor of Law, West Virginia University) has also provided rich creative support. Andrew M. Wright, Esq. (Associate, Jackson Kelly) provided insightful comments about his understanding of development and new urbanism that helped the final piece come to fruition. The Howard Scroll Editorial Staff has done excellent work in helping this article come to print. Thanks to Kevin D. Kuswa (Associate Professor of Rhetoric and Communication Studies/Director of Debate, University of Richmond) for instilling in me a strong background in critical whiteness and social theory. Lastly, thanks to my father, Richard A. Sciuлло, for his steadfast support, kindness, and intellectual enrichment.

<sup>2</sup> Ben Harper, *With My Own Two Hands*, on *DIAMONDS ON THE INSIDE* (Virgin Records 2003). Ben Harper's lyrics are appropriate here for a discussion of home, community, and humynity, because his music delves into the reasons people identify with each other. Harper's attempt to build discursive communities through music (music that ranges from folk to gospel, rhythm and blues to rock) exemplifies the type of new thinking, the type of boundary breaking, needed by decision makers when conceptualizing effective forms of governance. Christopher John Farley noted in *Time* perhaps the most succinct description of Ben Harper:

Ben Harper's kinda like that cool documentary that's playing on one screen downtown that you've been meaning to catch for weeks now but somehow haven't been able to squeeze into your schedule although you've seen *Romeo Must Die* three times already. Harper has the right look and sound to be a subterranean music hero (his sound mixes protest folk and feedback rock, and his hairdo is a cross between Bob Dylan's and Jimi Hendrix's).

## I. INTRODUCTION

By actively endorsing remedies that favor a city-suburb divide, the Supreme Court has failed to allow regional development. The Supreme Court's federalism jurisprudence is unresponsive to the myriad issues pervading society. Ultimately, individuals must take action, through a process formulated in this article, to change the way in which governments and the courts respond to the needs of populations.

Regionalism is as much an idea as it is a way to structure government.<sup>3</sup> It involves the cooperation of cities, suburbs, and other outlying areas to develop responsive solutions contoured to the needs of each specific region.<sup>4</sup> Regionalism is developed by the common bonds that hold people together (shared history, employment, environmental barriers, and transportation systems).<sup>5</sup> Further, regionalism is subnational and can spread across current city, county, and state boundaries.<sup>6</sup>

Regionalism has a long history in the United States, and an analysis of this history and where it fits into a larger discussion of federalism will illuminate new directions for the law. The decision to move in new directions is ultimately personal, however, and people must engage in a transgressive meta practice, a process discussed later that intellectually enables individuals to take action, to effectuate change in government and bring about a sense of regional cooperation.

As the United States developed, rural areas became less populated while cities grew in population and geographic size. Cities began to spill out of their established boundaries and a suburban fringe began to rise in population and size.<sup>7</sup> Soon cities spilled into

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But his songcraft--which is sometimes more about edginess than hooks--has always looked better on paper than it sounds on CD.

Christopher John Farley, *Finding His Voice- If you want to hear folk-rocker Ben Harper at his best, start downloading*, TIME, Apr. 24, 2000, at 78.

<sup>3</sup> See *infra* notes 44-51

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Peter Dreier, *Poverty in the Suburbs*, THE NATION, Sept. 2, 2004, at 7 (citing to the development of the suburbs at the expense of the city).

the surrounding area, making suburbs a fast growing rival, not an accomplice, to the development of the “center city.”<sup>8</sup>

The explosion of suburbia<sup>9</sup> was intimately tied to “White Flight”<sup>10</sup> from increasingly minority-filled center cities. So, it comes

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<sup>8</sup> I use the term “center city” for several reasons. First, it appears often in urban studies literature and for that reason, it seems appropriate to use terms that are familiar to the general field. *See, e.g.*, William H. Whyte, *CITY: REDISCOVERING THE CENTER* (1990); Cyril B. Paumier, *CREATING A VIBRANT CITY CENTER* (2004); Randy White, *JOURNEY TO THE CENTER OF THE CITY: MAKING A DIFFERENCE IN AN URBAN NEIGHBORHOOD* (1996). Second, the term denotes cities around which suburbs have blossomed. So, it is actually a term of some geographical significance because I wish to describe the cities at the center of metropolitan areas. I do not mean or intend to communicate what might be termed “inner city.” That term describes an inner segment of a center city and I do not intend that. “Inner city” also carries with it a negative connotation, which is not helpful or appropriate for this discussion. *See also* Georgette C. Poindexter, *Symposium on Regionalism: Beyond the Urban-Suburban Dichotomy: A Discussion of Sub-Regional Poverty Concentration*, 48 *BUFFALO L. REV.* 67, 67-74 (2000) (describing the competition and disparate growth of urban areas and their suburbs).

<sup>9</sup> Suburbia is the vast expanse of suburbs across the country. It does not refer to one suburb and can be used to describe a group of suburbs. Here it signifies all suburbs and not a specific metropolitan area’s suburbs. *See* SUBURBIA (New Horizons 1983); Kenneth T. Jackson, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (2005); Geoff Schumacher, *SUN, SIN, SUBURBIA: AN ESSENTIAL HISTORY OF MODERN LAS VEGAS* (2004); Andres Duany, Elizabeth Plater-Zyberk, and Jeff Speck, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2001); Alex Marshall, *HOW CITIES WORK: SUBURBS, SPRAWL, AND THE ROADS NOT TAKEN* (2001).

<sup>10</sup> “White Flight” is the movement of White populations out of the city to the suburbs. It was a phenomena that occurred in the 1940s, 1950s, and 1960s as a response to increasing minority populations in the center city. *See* Reginald Oh, *Critical Race Theory: History, Evolution, and New Frontiers: Re-Mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 *AM. U.L. REV.* 1305, 1342-45 (2004) (discussing White flight from Richmond, Virginia); Maurice E. R. Munroe, *Perspective: UnAmerican Tail: Of Segregation and Multicultural Education*, 64 *ALB. L. REV.* 241, 253 (2000) (discussing how White flight might actually move Whites away from suburbs which see a rise of Blacks, making the suburbs occupied by middle class Blacks an extension of inner city blight); Erwin Chemerinsky, *Essay: Separate and Unequal: American Public Education Today*, 52 *AM. U.L. REV.* 1461, 1468 (2003) (discussing White flight’s impact on education); Georgia A Persons, *Race, politics, and Community Development in U.S. Cities: National Politics and Charitable Choice as Urban Policy for Community Development*, 594 *ANNALS* 65, 66 (2004) (discussing how White flight has redistributed Whites to the suburbs). *But see* Luther Keith, ‘White Flight’ label misleading, *THE DETROIT NEWS*, April 11, 2001, available at <http://www.detnews.com/2001/editorial/0104/13/a02-210355.htm> (suggesting that the label of White flight might be too casually applied).

as little surprise that the dialogue of regionalism<sup>11</sup> must contain a discussion of racial tensions and racial discrimination. “The borders within the city and its surroundings have historically involved boundaries based on race, class, and status. . . . It is important to pose a viewpoint in opposition to the story of the suburb as a liberated land of plenty teeming with inter-cultural experience.”<sup>12</sup> As cities spread beyond their boundaries, giving rise to numerous surrounding suburbs (sometimes subsuming whole counties as well as smaller neighboring cities), the problems of the city<sup>13</sup> (pollution, high population density, poor education, decimated infrastructure, and more) became the problems of the region as a whole.<sup>14</sup> Those persons flocking to the suburbs likely thought they could leave the city and its problems behind. The suburb was a metaphorical island. When people realized this metaphor to be fallacious, suburban

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<sup>11</sup> The Oxford English Dictionary defines “regionalism” as the “[t]endency to, or practice of, regional systems or methods; localism on a regional basis. Also, on a national or international scale: the theory or practice of regional rather than central systems of administration, or of economic, cultural, or political affiliation; the study of such phenomena as they relate to geographic factors.” *Regionalism*, (1989), available at Oxford English Dictionary (2<sup>nd</sup> ed.), <http://80-dictionary.oed.com.www.libproxy.wvu.edu/entrance.dtl> (on file with author). This definition includes a focus on geography and decentralized decision-making, both major tenants of regionalism. See *infra* notes 63-70.

<sup>12</sup> Kevin D. Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J. L. SOCIETY 31, 34 (2002). See also Keith Aoki, *Cities in (White) Flight: Space, Difference and Complexity in LatCrit Theory*, 52 CLEV. ST. L. REV. 211 (2005).

<sup>13</sup> Janet Rothenberg Pack, *Metropolitan areas: regional difference*, BROOKINGS REVIEW, Sept. 22, 1998, at 26. Pack concludes:

Generally speaking, the gains of the policies now seen as biased in favor of suburban locations--mortgage interest deductions, property tax deductions, road construction in contrast to the development of mass transit systems, local control of land use regulations--may have been in overall quality of life and industrial efficiency. The costs have been primarily distributional--ultimately, the concentration of poverty and other social ills in the central cities. The policies that helped to spur the movement of businesses and wealthier families from city to suburbs and to restrict that same movement by the poor may have gone too far and may require cutbacks or reversals to change the direction of the incentives.

*Id.*

<sup>14</sup> Jay Walljasper, *From the 'Burbs to the 'Hood: ACTIVISTS ARE FINDING SUCCESS SOLVING SOCIAL PROBLEMS ON A REGIONAL BASIS; social problems in Minneapolis suburbs*, THE NATION, Nov. 20, 2000, at 27 (citing to the plethora of problems presented to both the center city and the suburbs).

communities began surrounding themselves with gates,<sup>15</sup> forming neighborhood associations to enforce strict rules,<sup>16</sup> and imposing large fees on residents,<sup>17</sup> all in an attempt to keep people out. Most of these issues reached the Supreme Court between the 1950s and the mid-1970s.

A battery of cases including *Brown v. Board of Education*<sup>18</sup> and its progeny, *Missouri v. Jenkins*<sup>19</sup> and *Milliken v. Bradley*,<sup>20</sup> reached the Supreme Court during the tumultuous 1950s, 1960s, and 1970s. A vast array of environmental laws<sup>21</sup> and housing

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<sup>15</sup> See Edward G. Blakely and Mary Gail Snyder, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* (1997) (discussing the history and current developments of gated communities); Josh Mulligan, *Note: Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J. L. & PUB. POL'Y 533 (2003) (discussing the development of gated communities and the desire of some gated communities to create an idealize community); Sheryll D. Cashin, *Essay: Privatized Communities and the "Secession of the Successful": Democracy and the Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675 (2001) (discussing the discriminatory practices of some gated communities). *But see* Haya El Nasser, *Gated communities are not just for the wealthy*, USA TODAY, December 16, 2002, at 1A.

<sup>16</sup> Robert H. Nelson, *The Rise of Private Neighborhood Associations: A Constitutional Revolution in Local Government*, Paper prepared for the Lincoln Institute of Land Policy Conference on "The Property Tax, Land Use and Land-Use Regulation" (January 13-15, 2002) (on file with author) (discussing the development of neighborhood associations in the United States with specific reference to their discriminatory conduct).

<sup>17</sup> While fees may seem paltry, they are significant enough to cause residents trouble. The Abingdon Village Homeowners Association in Virginia Beach, Virginia (the author's home neighborhood) charges residents \$240 per year. *Abingdon Village Homeowners Association*, available at <http://www.angelfire.com/home/AbingdonVillage/> (accessed Mar. 1, 2005). This is just one example.

<sup>18</sup> 347 U.S. 483 (1954) (overturning *Plessy v. Ferguson* and the "separate but equal" principal and ushering in the beginning of the antidiscrimination battles in the Supreme Court).

<sup>19</sup> 495 U.S. 33 (1990) (holding that judicially order tax increases were unconstitutional as a violation of federal/state comity and that there was a local interest inherent in finding a remedy for discriminatory conduct). In *Missouri v. Jenkins*, 515 U.S. 70 (1995), the Court held that a federal court could not order salary increases of remedial programs because student achievement was still too far below national standards. The Court erred here because it missed the opportunity to endorse continued judicial assistance to remedy discrimination. While this error is much more complex than this footnote would suggest, this error is too far a field from a regionalism discussion.

<sup>20</sup> See *infra* notes 86-96.

<sup>21</sup> See The National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-4347; The Clean Air Act of 1970, 42 U.S.C.A. 7401 et seq.; The Endangered Species Act

regulations<sup>22</sup> also emerged onto the national legal stage. The Supreme Court embodied a strong sense of judicial activism<sup>23</sup> and concern for national remedies to address national issues.<sup>24</sup> The result was a plethora of legislation on discriminatory conduct, environmental regulations, and living standards. While this time period saw much in the way of progressive answers to current metropolitan problems, the Court substantially erred when it held in *Milliken* that interdistrict remedies for school desegregation were

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of 1973, 7 U.S.C.A. 136, 16 U.S.C.A. 460 et seq.; The Clean Water Act of 1977, 33 U.S.C.A. 1251 et seq. These are but a few of the many laws passed during this time. See generally, Nancy Perkins Spyke, *Making Sense Out of Secondary Sources in Environmental law: A Research Primer*, 25 ENVTL. L. 93 (1995) (discussing methods to research environmental law as well as evaluating secondary sources); Jeffery G. Miller, *Summary A Generational History of Environmental Law and Its Grand Themes: A Near Decade of Garrison Lectures*, 19 PACE ENVTL. L. REV. 501 (2002) (using broad strokes to discussing the direction of environmental law and policy).

<sup>22</sup> See The Fair Housing Act of 1968, 42 U.S.C.A. §§ 3601 et. seq. and The Community Reinvestment Act of 1977, 12 U.S.C.A. 2901-2907.

<sup>23</sup> The Warren Court has long been associated with liberal judicial activism. Karen Swenson, *School Finance Reform Litigation: Why are some state supreme courts activist and others restrained?*, 63 ALB. L. REV. 1147 (2000) (referencing the Warren Court as activist); Daniel R. Cahoy, *Changing the Rules in the Middle of the Game: How the Prospective Application of Judicial Decisions Related to Intellectual Property Can Promote Economic Efficiency*, 41 AM. BUS. L.J. 1, 29 (2003) (citing to the judicial activism in the 1950s and 1960s); Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998) (recognizing the Warren Court's role in many important racial discrimination cases, but utilizing a Whiteness critique to respond to some of the praise leveled at Warren). For examples of a Whiteness critique, refer to Kuswa, *supra* note 7. See also Noel Ignatiev, *HOW THE IRISH BECAME WHITE* (1996); Richard Delgado & Jean Stefancic (eds.) *CRITICAL WHITE STUDIES* (1997); George Lipsitz, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (1998); Matthew Frye Jacobson, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1999).

<sup>24</sup> It is not necessary to make a definitive statement about the value of regionalism, because an in-depth analysis of the character of decision-makers is beyond the scope of this article. While definitely tangentially related, a subject that broad could result in several articles. It would seem that judicial activism is necessary to see change effectuated. The necessity of activism does not make it good or bad, but, on the other hand, inevitable. As it is necessary to change and to help the law and social preferences follow a somewhat similar trajectory, judges are called upon to synthesize the law and social custom to assure a beneficial interaction between the two. Justice Scalia and Justice Thomas would, of course, disagree with this assessment, but such is the nature of the constitutional interpretation divide. See *infra* note 46.

unconstitutional.<sup>25</sup> The current Supreme Court can mediate the competing desires of judicial restraint and local control with the realities of problems which exist on a much larger scale, requiring more than a solution built on precedent and intolerance, by carefully rethinking and reevaluating ideas about effective governance.

## II. FEDERALISM: POWER, PEOPLE, AND THE SUPREME COURTS POLITICAL PHILOSOPHY

Federalism is a deep and storied idea that was of preeminent concern to the Founders.<sup>26</sup> Any discussion of regionalism must first involve a discussion of federalism<sup>27</sup> because regionalism, like

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<sup>25</sup> There is much room to discuss the *Jenkins* series, *supra* note 19, but that discussion would fall far outside the regionalism debate and would be, primarily, a discussion of the role federal courts have in crafting remedies for seemingly local discriminatory action. See Carter M. Stewart & S. Felicita Torres, *Recent Developments: Limiting Federal Court Power to Impose School Desegregation Remedies – Missouri v. Jenkins*, 115 S. Ct. 2038 (1995), 31 HARV. C.R.-C.L. L. REV. 241 (1996). However, recent scholarship has cast a weary eye at remedying large societal problems. See also Tracy Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFFALO L. REV. 302, 334 (2004) (discussing *Missouri v. Jenkins* and the use of structural injunctions). Professor Thomas concludes that prophylactic orders which are aimed at societal wrongs are beyond the scope of judicial power and ought to be struck down. *Id.* at 335. While there is surely a danger of judicial power becoming so great that it extends into every conceivable aspect of the humyn condition, it seems that legal wrongs and societal harms are so closely intertwined that the focus on the latter ought not bar the righting of the former. Legal wrongs are perpetrated in a cloud of unjustness that emanates from the storm of societal harms. The potential overreaching of judicial action is not more harmful than allowing a societal wrong to continue. This begs the question: Is it such an evil to have many folks help right a wrong or to have many folks wronged? Identifying harms is difficult business. Dollar values may have come into use in tort law, but they are not readily accessible as remedies for constitutional violations. How do we identify harms? While legal wrongs are often defined by the laws which label them (a logical tail-chasing), societal harms are difficult to pin down, look up, and commodify. Societal harms are not less wrong or less deserving of a remedy because they are harder to understand. The scale of societal harms necessitates a response, even at the risk of the judiciary traveling off the *stare decisis* trail.

<sup>26</sup> See *infra* notes 31-37.

<sup>27</sup> The Oxford English Dictionary defines “federalism” as the “[t]he federal principle or system of political organization (see FEDERAL *a.* 2a); advocacy of this principle. In U.S. *Hist.* the principles of the Federal party: see FEDERAL 3a.” *Federalism*, (1989), available at Oxford English Dictionary (2<sup>nd</sup> ed.), <http://80-dictionary.oed.com.www.libproxy.wvu.edu/entrance.dtl> (on file with author). This definition includes a focus on geography and decentralized decision-making, both

federalism, is an outgrowth of the need for more responsive solutions<sup>28</sup> to today's problems. Regionalism involves moving power away from the federal government and toward potentially more responsible actors.<sup>29</sup> Federalism was what some might call the greatest debate of this country's first century.<sup>30</sup> The Federalists and Anti-Federalists exchanged words, letters, and in a few cases, bullets.<sup>31</sup> Although the federalism debate has become largely partisan, federalism was originally a discussion about preserving the independence of the states and the people from a large centralized government.<sup>32</sup> The Founders feared an oppressive national government which they knew all too well from their experience with English rule.<sup>33</sup> *The Federalist Papers*<sup>34</sup> discussed federalism among

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major tenants of regionalism. The OED defines "federal" as "[o]f or pertaining to, or of the nature of, that form of government in which two or more states constitute a political unity while remaining more or less independent with regard to their internal affairs." *Federal*, (1989), available at *Id.*

<sup>28</sup> Responsive solutions are those that have a local flair. They are contoured to the needs of particular people and communities. They are also flexible to the contours of an ever-changing regional dynamic.

<sup>29</sup> Defining regionalism is like defining justice or liberty in that it is difficult to capture exactly what one means or what one is trying to accomplish by labeling something as "regional" or "regionalism." See *supra* notes 3-9.

<sup>30</sup> See *supra* note 26; *infra* notes 31-35.

<sup>31</sup> Aaron Burr and Alexander Hamilton famously dueled over federalism ultimately resulting in Alexander Hamilton's Death. See generally Thomas Fleming, DUEL: ALEXANDER HAMILTON, AARON BURR, AND THE FUTURE OF AMERICA (2000) (discussing the duel and the other actors in the ongoing federalism debate); Roger G. Kennedy, BURR, HAMILTON, AND JEFFERSON: A STUDY IN CHARACTER (2000) (conducting a more personal inquiry into the motivations and beliefs of some Founders).

<sup>32</sup> See Gerald Leonard, THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS (2002) (discussing the federalism debate as a catalyst for partisan politics).

<sup>33</sup> See generally Jack P. Greene (Ed.), COLONIES TO NATION, 1763-1789: A DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION (1975) (discussing the fear of oppressive rule).

<sup>34</sup> Alexander Hamilton, et al., THE FEDERALIST PAPERS (1982). The Federalist Papers were written to persuade United States citizens to approve the Supreme Court and to promote the virtue of a strong federal government. But see Ralph Ketcham (ed.), THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (2003) (discussing the other side of the debate, including states rights and decentralized power). See Joseph J. Ellis, THE FOUNDING BROTHERS (2000) (discussing the connection between George Washington, John Adams, Thomas Jefferson, Alexander Hamilton, Aaron Burr, and other Founders as they argued over ideas of the new government's structure); Bruce E. Johansen, FORGOTTEN FOUNDERS (1982) (describing the formation of government by

many other issues relating to the governmental structure and are still the focus of scholars today.<sup>35</sup> These documents provide us with an understanding of the early desire to keep power dispersed through the layers of government. James Madison stated:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.<sup>36</sup>

Madison's federalist sentiments express an idea central to the debates which helped to form this country. The Founders would likely not have endorsed regionalism, as they sought to divest a large polity of its authority as a reaction to autocratic rule in Britain.<sup>37</sup> Sentiments likely ran toward more states rather than fewer states, at least among those founders in favor of a weak federal government. While the Founders would likely have opposed regionalism for fear of creating a powerful monarchal or feudal system like the one they fled, they may have endorsed a plan that assured federalist principles while grouping communities with like interests and needs.

The structure of government and the necessary vertical divide has always seemed important. Lawrence Friedman noted in his monumental work, *A History of American Law*, that "[t]he trend was already marked in the 19<sup>th</sup> century, and it continued; the population grew; big business got bigger... More and more, people were interdependent."<sup>38</sup> As the nation grew, people became inextricably

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analyzing the impact of the Iroquois Nation and to a lesser extent Benjamin Franklin's contact with indigenous peoples).

<sup>35</sup> See *infra* note 43.

<sup>36</sup> James Madison, THE FEDERALIST PAPERS, No. 45.

<sup>37</sup> See *supra* note 33.

<sup>38</sup> Lawrence M. Friedman, A HISTORY OF AMERICAN LAW (2<sup>nd</sup> ed.) 657 (1985).

intertwined. This interconnectedness can be substantially linked to the growth of the country as a whole.<sup>39</sup> Regionalism began almost 100 years ago when the five boroughs (Manhattan, Queens, Brooklyn, Staten Island, and the Bronx) merged to become New York City<sup>40</sup> and has blossomed<sup>41</sup> in several areas, including Indianapolis, Indiana, Portland, Oregon, and the Hampton Roads, Virginia metropolitan area.<sup>42</sup> Federalism has come a long way, and as federalism has grown, so has the idea of regionalism – a natural outgrowth of the movement. While the federalism debate was prominent more than 200 years ago, it remains an important issue today as the various levels of government seek to balance their interests given the new demands of the Twenty-first Century.<sup>43</sup>

As early as 1935, one writer developed a fairly lengthy proposal for dividing the country into regional units. Delbert Clark suggested doing away with the states and forming nine departments (regions).<sup>44</sup> Clark states that “[t]here is no purpose to abolish the Constitution or deprive the Supreme Court of its self-assumed power to pass on legislation. There would still be that system of checks – the whole Federal process remaining the same, except that State

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<sup>39</sup> This is likely true on the surface, but a deeper analysis of technology’s impacts shows that we are in fact becoming disconnected from each other and ourselves. See Nick J. Scullo, *Seductive Suicide: Instant Messaging and the Death of the Individual* (unpublished manuscript on file with author).

<sup>40</sup> *Brooking’s Institute’s Reflections on Regionalism*, THE PLANNING REPORT (Mar. 2000), available at [http://www.planningreport.com/tpr/?module=displaystory&story\\_id=904&edition\\_id=39&format=html](http://www.planningreport.com/tpr/?module=displaystory&story_id=904&edition_id=39&format=html). See Bruce Katz (ed.), REFLECTIONS ON REGIONALISM (2000).

<sup>41</sup> Indianapolis formed the Regional Economic Development Coalition, recently recast as the Indiana Regional Economic Development partnership, in 1993. The Greater Indianapolis Chamber of Commerce website provides a wealth of information on the success of regionalism in Indianapolis, available at <http://www.indychamber.com/redec.asp>. The Greater Portland Council of Governments was formed in 1969 and its website, available at <http://www.gpcog.org/>, is also helpful in tracking the many activities of this regional cooperative.

<sup>42</sup> This area includes the seven cities of Virginia Beach, Chesapeake, Norfolk, Portsmouth, Hampton, Suffolk, and Newport News. Refer to the Hampton Roads Planning District Commission’s website available at <http://www.hrpdc.org/>, last accessed Feb. 17, 2006.

<sup>43</sup> A LexisNexis search of United States law reviews, limited to the last two years and to articles containing “federalism” in the title, reveals 178 law review articles (as of April 25, 2005).

<sup>44</sup> Delbert Clark, *Nine Groups Instead of the 48 States*, THE NEW YORK TIMES MAGAZINE, April 21, 1935.

governments as such would cease to exist.”<sup>45</sup> While difficult to conceptualize, these departments would simply comprise larger groups of people than the current state arrangement allows. The difference with Clark’s departments is that borders are drawn in order to maximize cooperation and facilitate more effective governance. Cooperation would be maximized because people who feel akin to each other because of similar histories, similar occupations, similar resource allocation, etc. would be grouped together (i.e., Southerners, Midwesterners, etc.). More effective governance is likely to arise because governments could respond to a citizenry generally affected similarly by a similar set of challenges.

Senator Robert F. Wagner of New York, a lawyer and former state judge, regarded the Constitution as a living document and felt that viewing the Constitution as such was the key to successful social advancement.<sup>46</sup> He also concluded that state borders could not stand as barriers to advancement because viewing states and the Constitution as static entities ran counter to legal thought and world

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* There are two common ways to perceive the Constitution: as a living document and as a strictly construed document. As a living document, the Constitution changes with the times. Rules and ideas can be read into the document and the actual written document can have meaning beyond the “plain meaning” of the actual printed words. As a strictly construed document, the Constitution says what it says. The actual words of the document contain all the rules and rights that were intended to be included. The strict constructionists are most notably represented by Justice Clarence Thomas and Justice Antonin Scalia. See andrè douglas pond cummings, *Grutter v. Bollinger, Clarence Thomas, Affirmative Action and the Treachery of Originalism: "The Sun Don't Shine Here in this Part of Town,"* 21 HARV. BLACKLETTER J. 1, 56-63 (discussing the treachery and selectivity of Justice Clarence Thomas and the selective application of originalism); Roger J. Minor, *Remark: Advice and Consent in Theory and Practice*, 41 AM. U.L. REV. 1075, 1081 (1992) (discussing Justice Scalia and Justice Thomas as a rallying point for strict constructionists); Carlo A. Pedrioli, *A Key Influence on the Doctrine of Actual Malice: Justice William Brennan's Judicial Philosophy at Work in Changing the Law of Seditious Libel*, 9 COMM. L. & POL'Y 567, 583-84 (2004) (discussing the formalism of Justice Scalia and Justice Thomas); Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U.L. REV. 25 (1994) (generally discussing Justice Scalia's textualism). See also Jeffery Rosen, *Can Bush Deliver a Conservative Supreme Court?*, THE NEW YORK TIMES, November 14, 2004, at 1 (discussing, broadly, strict constructionists, and the probability of strict constructionists being appointed to the Court); Jon Sawyer, *Politics' role has become impossible to ignore*, ST. LOUIS POST-DISPATCH, March 20, 2005, at B1 (discussing Scalia's insistence that he is not a strict “constructionist,” but an “originalist,” whatever the difference might be).

history.<sup>47</sup> Senator Wagner's observations that conceptualizing states as rigid constructions served as a barrier to societal advancement were true in 1935 and remain true today. But even a court's strict adherence to the letter of law ought not bar the presentation of innovative solutions to evolving societal problems.

In 1981, Joel Garreau further advanced the idea that state borders are barriers to responsive solutions focused on the people affected, although he based his regional solution largely on environmental and geographical boundaries.<sup>48</sup> Garreau's regions, for purposes of illustration, include "The Foundry," which includes the manufacturing belt of both Canada and the United States with their struggling cities and high population densities, as well as numerous canals, rivers, and highway systems. This region extends roughly from Michigan to New York City, including Toronto and much of southern Ontario, to Philadelphia, Baltimore, Pittsburgh and Chicago, toward the South. Another of Garreau's regions is "Ecotopia," which extends past Oakland, California through Seattle, Washington and Vancouver, British Columbia, into southern Alaska. This region is tied together by the birth of new industry, including computer sciences and technology firms and the ecological orientation of many of the West Coast's residents. Garreau's option, basing regions along socio-ecological patterns, seems to be the most logical because it takes into account the natural topography of the country and the

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<sup>47</sup> World history teaches that boundaries move back and forth quite often and that people often identify with other people across geopolitical boundaries (i.e., the Kurds in Turkey and Iraq or Southerners in the United States). Legal thought has also changed from the humble origins of natural law to a multitude of alternate approaches to legal understanding including critical legal studies (CLS), feminist legal thought, and critical race theory (CRT). Much of the boundaries and critical geopolitics literature has an international focus, but the arguments are generally applicable to boundary, space, and place, criticisms at any level. To assume that critical international geopolitical literature cannot be applied to regions in the United States would be to accept the arguments that critical geopolitics scholars seek to debunk, namely that borders are so static that boundary discussions are only applicable to a certain set of constructed geopolitical boundaries. *See* Gearóid Ó Tuathail, *CRITICAL GEOPOLITICS* (1996) (critiquing current geopolitical understanding through a poststructuralist view and concluding that understands of geopolitics are fluid and change with the times); Ghassan Hage, *AGAINST PARANOID NATIONALISM: SEARCHING FOR HOPE IN A SHRINKING SOCIETY* (2003) (critiquing a reliance on borders to constitute identities because such a reliance often leads to a lack of hope which ultimately impairs the individual's appreciation of the self).

<sup>48</sup> Joel Garreau, *THE NINE NATIONS OF NORTH AMERICA* (1981).

interconnectedness and shared histories of people along these environmental lines<sup>49</sup>

G. Etzel Percy promoted a less radical alternative in 1975.<sup>50</sup> He suggested dividing the United States based upon population density, transportation, and commercial markets. This approach seems to be a middle ground between the current arrangement and the establishment of a nine to ten region structure. Were probability of success to be measured, it is more likely that more regions would be accepted as opposed to fewer regions, simply because incremental change is generally more readily accepted.<sup>51</sup>

With the Supreme Court's states' rights majority firmly intact, there is little doubt that devolution<sup>52</sup> will continue to be the order of the day.<sup>53</sup> "Federalism is thus in many ways alive and well; state law also still controls most of the law of torts, contracts and commercial law, domestic relations, and criminal law."<sup>54</sup> States are still major players in many realms of law and it is likely that the Court will continue to uphold this basic level of federalism. It appears that if one of the five justices who comprise the "states' rights" majority

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<sup>49</sup> The ecological roots of regionalism have sprouted into the ecosystem management utilized by the current ecological protection regime (*e.g.*, the Chesapeake Bay Watershed).

<sup>50</sup> G. Etzel Percy, *A THIRTY-EIGHT STATE U.S.A.* (1975).

<sup>51</sup> Incremental change is better than large changes because it is easier to adapt to a series of small changes than to one large change. A series of small changes allows each tiny change to be tested and evaluated before the next change is put in motion. For this reason, incremental change is better because it allows reflection on each change's successes and failures before more change is begun.

<sup>52</sup> Devolution is the process of moving power away from the federal government and toward the states and municipalities. This process tends to get a boost from Republicans and conservatives in the executive, legislative, and judicial branches. Courts are not the only place devolution arises, and it is usually many different branches, groups, or agencies that work together to see devolution occur.

<sup>53</sup> Erwin Chemerinsky, *Conservative and Progressive Legal Orders: Progressive and Conservative Constitutionalism as the United States Enters the 21<sup>st</sup> Century*, 67 *LAW & CONTEMP. PROB.* 53, 53-56 (2004) (concluding that the Court is perhaps more conservative than it has ever been and that the liberals on the Court are not liberal in the tradition of Marshall and Brennan and also citing to the Court's ideological divide); CNN, *Bush dismisses court speculation* (Nov. 6, 2004), available at <http://www.cnn.com/2004/ALLPOLITICS/11/05/bush.court/> (discussing Bush's goal of appointing strict constructionists); Michael C. Dorf, *The likely impact of the presidential election on the Supreme Court* (July 7, 2004), available at <http://www.cnn.com/2004/LAW/07/07/dorf.scotus.elections/> (discussing the likelihood of the Current justices leaving the bench soon and the likelihood that whoever is in power will appoint justices who are of the same ideology).

<sup>54</sup> Lawrence M. Friedman, *AMERICAN LAW OF THE 20<sup>TH</sup> CENTURY* 597 (2002).

leaves, their replacement will likely be just as concerned with states' rights.<sup>55</sup> The consequences of the Court's states rights' orientation are staggering because, "[d]evolution in governance is changing how we organize public investments in transportation, work force, and housing and how we respond to challenges from environmental pollution to concentrated poverty to continued economic competitiveness."<sup>56</sup> Today, the Court remains concerned with federalism, as nearly every issue presented potentially implicates federalism questions.<sup>57</sup>

One commentator has regarded the five-justice states' rights majority as "a band of radical judicial activists determined to impose on the Constitution their notion of a proper system of government."<sup>58</sup> This observation, while vitriolic, is accurate. The Warren Court saw a tremendous rise in judicial activism<sup>59</sup> and the Rehnquist Court is viewed by many as more activist.<sup>60</sup> Usually, the activism/restraint debate is closely associated with political parties or political philosophy. The logic goes that conservatives and/or Republicans tend to be less activist than their liberal and/or Democratic counterparts. That dichotomy is not useful here as activism is not necessarily an indication or an outgrowth of political philosophy, but

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<sup>55</sup> See Rosen, *Can Bush Deliver*, *supra* note 46.

<sup>56</sup> *Brooking's Institute's Reflections On Regionalism*, The Planning Report (Mar. 2000), available at [http://www.planningreport.com/tpr/?module=displaystory&story\\_id=904&edition\\_id=39&format=html](http://www.planningreport.com/tpr/?module=displaystory&story_id=904&edition_id=39&format=html) (accessed April 1, 2005). See Bruce Katz (ed.), *REFLECTIONS ON REGIONALISM* (2000); see also Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131 (2004) (discussing the intersections of community economic development and regionalism).

<sup>57</sup> See *infra* note 61 (emphasizing the war on terror's impact on federalism); see also Erwin Chemerinsky, *New Federalism: Real Discrimination?*, 16 WASH. U. J.L. & POL'Y 97, 100-27 (2004) (discussing the role of federalism in the decision of recent discrimination cases).

<sup>58</sup> Anthony Lewis, *The Supreme Power*, THE NEW YORK TIMES, June 29, 1999, at 19 (generally discussing the Court's role in the federalism debate). See generally Jeffrey Rosen, *Rehnquist the great? Even liberals may come to regard William Rehnquist as one of the most successful chief justices of the century; Biography*, THE ATLANTIC MONTHLY, April 1, 2005, at 79 (discussing the entirety of the Rehnquist Court with emphasis paid on Justice Thomas and Justice Scalia's jurisprudence).

<sup>59</sup> See *supra* note 23; Swenson, *School Finance Reform Litigation*; Cahoy, *Changing the Rules in the Middle of the Game*; Sumi Cho, *Redeeming Whiteness in the Shadow of Internment*.

<sup>60</sup> Stephen B. Presser, *Scalia's Court*, LEGAL AFFAIRS, September/October 2004. See Rosen *supra* note 46.

a term that derives meaning solely from a Supreme Court's deviation from prior Supreme Courts.<sup>61</sup> When thinking about regionalism, there should be no political screens to cloud policy-makers' decisions.

### III. PLACE, SPACE, AND THE PEOPLE IN BETWEEN

Exactly how much will have to burn  
 Before we will look to the past to learn  
 We walk along this endless path  
 Which has led us in a circle  
 So here we are right back  
 We can't let the future become our past  
 If we are to change the world  
 Won't you tell me  
 Tell me please  
 How many miles must we march  
 How many miles must we march<sup>62</sup>

Place matters. People interact by traveling from city to suburb, rural area to city, and back again. Modern transportation and communication have closed gaps and blurred boundaries. Environmental and economic concerns, as well as education and equality issues, cross state, county, and city bounds. Regionalism developed from the realization that problems and concerns confronted more than one municipality and that while the national government possessed money and the municipalities possessed expertise, there was still something missing. Regionalism describes a system by which cities and towns, as well as counties, boroughs, villages, and hamlets can work together to solve common problems. Neal Pierce describes regions as citistates: "A region consisting of one or more historic central cities surround[ed] by cities and towns which have a shared identification, function as a single zone for trade, commerce and communication, and are characterized by social,

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<sup>61</sup> Erwin Chemerinsky, *David G. Targer Public Policy Symposium: Our New Federalism? National Authority and Local Autonomy in the War on Terror: Empowering States When It Matters A Different Approach to Preemption*, 69 BROOKLYN L. REV. 1313, 1313-34 (2004) (focusing on preemption and federalism, but describing the contours of federalism, states rights, and adherence to *stare decisis*).

<sup>62</sup> Ben Harper, *How Many Miles Must We March*, on WELCOME TO THE CRUEL WORLD (Virgin Records 1994).

economic and environmental interdependence.”<sup>63</sup> However, this conception of cities and outlying areas working together may not be reality.

The alienation of suburbanites from the city and, although discussed less in this article, the alienation from rural areas, is part of the problematic relationship between the suburb and city populations. The alienation of the geopolitical space, which contains economic resources, from adjacent geopolitical space is the second part of the problematic relationship. To fully realize success for all future legal, social, cultural, and political endeavors, people and resources must be brought together. Pierce’s description of regionalism is problematic because it fails to view the suburbs and the city as codependent parties in forming new regions. There must be a permutation in which the city and the suburbs are regarded as a single unit in pursuit of a common future. Such a permutation would combine the strengths of the city and the suburbs to remedy the problems which permeate both environments.

There are several reasons why regionalism provides an important conceptual framework for discussions of law and politics: (1) “regions are not static entities; rather, they exist in space and time, changing over the course of decades or centuries,” and (2) “regionalism in American history is part of a continuum of social organization that stretches from localism to nationalism.”<sup>64</sup> These two concepts provide several insights into the significance of regionalism as an interpretive force. Regionalism is more than an academic concept or a system of governance; it is a way of thinking and a way of understanding the world around us. Regions do not have fixed boundaries and can grow and change as various neighborhoods and municipalities develop and communicate. It is important to understand how regionalism is the whole gray area between the poles of localism and nationalism. It involves government and governance, cooperation and competition. Consequently, regionalism provides an important way to think about the legal and political problems of the present and the future.

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<sup>63</sup> Neal Pierce, *Citistates: Cities and Suburbs in the New World Economy*, Address at the National Building Museum as part of the Smart Growth Speaker Series, (Nov. 5, 1996); see also Orlyn O. Lockard, III, *Note: Solving the “Tragedy”: Transportation, Pollution and Regionalism in Atlanta*, 19 VA. ENVTL. L.J. 161 (2000) (discussing transportation and environmental concerns in metropolitan Atlanta).

<sup>64</sup> James W. Ely, Jr. and David J. Bodenhamer, *Regionalism and American Legal History: The Southern Experience*, 39 VAND. L. REV. 539, 542-44 (1986).

States are not the answer. “The states suffer from weak executives, fragmented and obsolete fiscal procedures, badly staffed and malapportioned legislatures, poorly administered and politically selected judiciaries, and constitutions which severely restrict their ability to meet or respond to the demands made on modern government.”<sup>65</sup> Cities are being drained of their resources by flight to the suburbs. With an ever decreasing tax base, cities need suburbs as much as suburbs once needed cities. Regionalism matters because municipalities (cities and suburbs) and states are facing the same problems and need assistance from each other. This involves suburbs donating time and money to impoverished center cities and cities giving the suburbs a needed infusion of diversity. Cities and suburbs must work together to link transportation systems.

Regions are not necessarily the states of tomorrow because there is a fundamental difference between the structures of regions and states. Cultural, social, and ecological boundaries form regions.<sup>66</sup> States, however, exhibit none of these characteristics.<sup>67</sup> Comparing regions and states is like comparing apples and oranges. Like states, regions are subnational, but that is where the similarities end. Attempts to argue that regions are super-sized states ignore the construction, maintenance, and perception of regions, which dramatically differs from that of states.<sup>68</sup>

Commentators will likely implicate a federalism question although one is not necessary for a discussion of regionalism. In short, regionalism is about governance. Governance<sup>69</sup> involves having clear visions and strong ideas about cooperation and communication in order to address a broad array of concerns related

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<sup>65</sup> Piers von Simson, *Do We Need the States?*, NEW YORK TIMES, June 2, 1971, available at <http://www.sweetliberty.org/issues/regionalism/needstates.htm>. While the previous website actually runs contrary to the arguments made in this article and in von Simson’s piece, it is nonetheless a depository for information regarding federalism and regionalism, ideology aside. Von Simson’s claims about demands on government are even more true today. Technology has linked people in new and interesting ways. Transportation systems make it easier for large numbers of people to move back and forth across areas. Governments are called upon to make decisions about civil rights, biotechnology, and domestic security.

<sup>66</sup> See *supra* notes 44-5, 47-50.

<sup>67</sup> North Carolina and South Carolina have little difference between each other. The same is true of North and South Dakota. Is there really anything natural about box-shaped Wyoming?

<sup>68</sup> See *supra* notes 49-51, 64-65.

<sup>69</sup> The OED defines “governance” as “[t]he action or manner of governing.” *Governance*, (1989), available at Oxford English Dictionary (2<sup>nd</sup> ed.), <http://80-dictionary.oed.com.www.libproxy.wvu.edu/entrance.dtl> (on file with author).

to government. The difference is not a formality. “Emphasis on governance recognizes that ensuring the future quality of life and competitiveness of a region is a shared responsibility of all sectors. Moreover, it requires the shared powers and talents of these sectors working strategically to affect change.”<sup>70</sup>

#### IV. REGIONALISM’S CONSTITUTIONALITY

The Constitution seems to suggest that regionalism may be unconstitutional. “New States may be admitted by the Congress into the Union; but no new State shall be formed or erected within the jurisdiction of two or more States; or parts of States without the consent of the Legislatures of the States concerned as well as the Congress.”<sup>71</sup> The Founders had a desire to prevent the authoritative rule from which the first settlers of this country fled, but there is no evidence suggesting that they specifically disagreed with regionalism. The Founders did not anticipate the development of a nation where three-fourths of the citizens live in metropolitan areas.<sup>72</sup> Regionalism flourished in the 1900s, finding favor in the executive and legislative branches of government.<sup>73</sup>

Before engaging in a discussion about the common law and regionalism, it is important to note that regionalism is not incompatible with the directives of the Executive and Legislative branches of government. The Buck Act<sup>74</sup> established “Federal Areas” for the purpose of the Public Salary Tax Act of 1939.<sup>75</sup> This

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<sup>70</sup> Allan Wallis, *The New Regionalism*, available at [http://www.munimall.net/eos/2002/wallis\\_regionalism.ncll](http://www.munimall.net/eos/2002/wallis_regionalism.ncll) (accessed Feb. 22, 2005). Dr. Wallis has written on many issues including regionalism, government, and urban planning. He has written a book—WHEEL ESTATE: THE RISE AND DECLINE OF MOBILE HOMES. He is currently working on regional governance projects in Florida and Illinois. See also No Author Given, *Note: Old Regionalism, New Regionalism, and Envision Utah: Making regionalism Work*, 118 HARV. L. REV. 2291 (2005) (describing the need for coalitions in regional development with a focus on Utah).

<sup>71</sup> U.S. CONST. art. IV, § 3, para. 1.

<sup>72</sup> Commission on Behavioral and Social Sciences and Education, GOVERNANCE AND METROPOLITAN AMERICA (1999) (discussing the majority of the population which lives in metropolitan areas and the effects of that population distribution); David A. McGranahan and Calvin L. Beale, *Understanding Rural Population Loss*, 2 RURAL AMERICA 2-11 (2002) (describing nonmetro county population loss and settlement in frontier counties, terms explored in the article).

<sup>73</sup> See *infra* notes 74-81.

<sup>74</sup> 4 U.S.C.A. §§ 104-113 (1940).

<sup>75</sup> 4 U.S.C.A § 111 (1939).

act was the only move toward regionalism for the next twenty years. President Eisenhower created the Advisory Council on Intergovernmental Relations.<sup>76</sup> The Public Works and Economic Development Act of 1965 established a Multi-State Regional Commission.<sup>77</sup> This act recognized the myth of state boundaries and sought to bind similar states together.<sup>78</sup> Shortly thereafter, the Model Cities Act of 1966 bolstered the use of regional planning authorities.<sup>79</sup> This was an attempt to develop cities and suburbs as an economically interconnected unit. The 1960s were an important time in the development of a regional consciousness.

The Intergovernmental Cooperation Act of 1968 was established “[to] achieve the fullest cooperation and coordination of activities among the levels of government in order to improve the operation of our Federal system in an increasingly complex society.”<sup>80</sup> The Government Reorganization Act of 1969 divided the country into ten regions to facilitate the administration of federal agencies. President Nixon created a Federal Regional Council through Executive Order 11647 to streamline the administration of various federal programs and create more responsive solutions away from the central government in Washington.<sup>81</sup> The statutory basis for regionalism is much broader than one might expect, as most of the legislative history is buried in the dark recesses of the United States Code and related materials.<sup>82</sup> Thus, regionalism is neither a creation of activist judges, nor is it inconsistent with the principles upon which the country was founded.<sup>83</sup> The seeds are in the Code. Who will water the seeds, and how? These are the questions that remain for decision-makers.

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<sup>76</sup> 86 P. L. 380, 73 Stat. 703 (1959), amended at 89 P. L. 733, 80 Stat. 1162 (1966).

<sup>77</sup> 89 P. L. 136, 79 Stat. 552 (1965).

<sup>78</sup> See *supra* note 47.

<sup>79</sup> 89 P. L. 754, 80 Stat. 1255 (1966).

<sup>80</sup> 90 P. L. 577, 82 Stat. 1098 (1968).

<sup>81</sup> 37 Fed. Reg. 3167 (February 12, 1972). Executive Order 11647 was signed by President Nixon on 10 February 1972. This Executive Order was further amended by Executive Order 11731 (July 23, 1973), which was codified as 38 Fed. Reg. 19903 (July 25, 1973), Executive Order 11892 (December 31, 1975), which was codified as 41 Fed. Reg. 751 (January 5, 1976), and Executive Order 12038 (February 3, 1978), which was codified as 43 Fed. Reg. 4957 (February 7, 1978). The Order was revoked on July 20, 1979 by Executive Order 12149, codified as 44 Fed. Reg. 43247 (July 26, 1979).

<sup>82</sup> See *supra* notes 74-81.

<sup>83</sup> See *generally supra* notes 26-37.

## V. REGIONALISM: THE GOOD, THE BETTER, AND THE BEST; OR, THE (IN)JUSTICE OF THE SUPREME COURT

Don't know how  
We've lasted here so long  
There must be more good than bad  
Or we'd already be gone  
And if you get up to heaven  
Before I do  
I'm gonna tell ya  
It's gonna be cruel there too<sup>84</sup>

Regionalism has much to offer toward a solution to the racial problems plaguing the country. Professor John Powell states: "I think that bringing issues of race into regionalism is crucial to a progressive agenda that can cut away at racialized concentrated poverty and inequities in education. In fact, I believe bringing racial justice awareness to regionalism is the single most important civil rights task facing us today."<sup>85</sup> Powell illuminates a two-way street, suggesting that regionalism has something to offer racial awareness and vice-versa. This parallels the two-way street of regionalism: cities helping outlying areas and outlying areas helping cities.

In *Milliken v. Bradley* (*Milliken I*), the Supreme Court held that efforts to remedy discrimination must stop at a school district's boundaries, assuring a disjuncture in equal protection law.<sup>86</sup> This reinforced a pattern that placed a large number of minorities in center cities as they moved away from rural areas and assumed the position of a large number of White citizens leaving the cities for suburban

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<sup>84</sup> Ben Harper, *Welcome to the Cruel World*, on WELCOME TO THE CRUEL WORLD (Virgin Record 1993).

<sup>85</sup> John Powell, *What We Need To Do About the Burbs*, COLORLINES (1999), available at [http://www.arc.org/C\\_Lines/CLArchive/CL2\\_3.html](http://www.arc.org/C_Lines/CLArchive/CL2_3.html). Powell emphasizes this important point because he recognizes that racism and classism flows across borders. Criticism of suburbia stretch across a wide variety of disciplines with numerous authors weighing in on the various problems and solutions. See generally Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J. L. SOCIETY 31, 34 (2002); Aoki, *Cities in (White) Flight: Space, Difference and Complexity in LatCrit Theory*, 52 CLEV. ST. L. REV. 211 (2005); William Upsi Wimsitt, *BOMB THE SUBURBS* (3<sup>rd</sup> ed.), 2001.

<sup>86</sup> *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717 (1974).

life.<sup>87</sup> While the District Court approved school busing despite such busing being out of favor with the local population,<sup>88</sup> this approval was ultimately overruled in the Supreme Court.<sup>89</sup> The Supreme Court viewed the administrative difficulties of a metropolitan school zone as sufficient to warrant reversal.<sup>90</sup> Accordingly, the Supreme Court decided to uphold artificial boundaries at the risk of furthering discrimination.<sup>91</sup>

In *Milliken*, the Supreme Court frustrated antidiscrimination efforts across school district and city lines.<sup>92</sup> The Court erred in concluding that interdistrict measures to curb segregation were unconstitutional.<sup>93</sup> The Supreme Court disagreed with the District Court and Court of Appeals' finding that, "the Detroit schools could not be truly desegregated ... unless the racial composition of the student body of each school substantially reflected the racial composition of the metropolitan area as a whole. The metropolitan area was then defined as Detroit plus 53 of the outlying school districts."<sup>94</sup> As with many urban areas, Detroit is a city populated densely by minorities and surrounded by suburbs with predominately White populations. The Supreme Court concluded "that the relief ordered by the District Court and affirmed by the Court of Appeals was ... unsupported by record evidence that acts of the outlying districts effected the discrimination found to exist in the schools of Detroit."<sup>95</sup> Most puzzling is the Supreme Court ruling the local decision unconstitutional despite acknowledging local decisions about education as national tradition.<sup>96</sup> If it is true that local decision-making is a national tradition, which it almost certainly is, then local decision-making ought to be applied with genuine force.

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<sup>87</sup> Mark C. Rahdert, *Symposium: Vision and Revision: Exploring the History, Evolution, and Future of the Fourteenth Amendment: Obstacles and Wrong Turns on the Road from Brown: Milliken v. Bradley and the Quest for Racial Diversity in Education*, 13 TEMP. POL. & CIV. RTS. L. REV. 785, 787 (2004); Gary Orfield, *Federal Policy, Local Power and Metropolitan Segregation*, 89 POL. SCI. Q. 777, 781-83 (1975) (focusing on urban poverty resulting from the movement of Black and White populations); Munroe, *supra* note 10.

<sup>88</sup> *Bradley v. Milliken*, 345 F. Supp. 914, 932 (E.D. Mich. 1972).

<sup>89</sup> 418 U.S. 717, 744-45.

<sup>90</sup> *Id.* at 743.

<sup>91</sup> *Id.* at 762, n. 13 (Douglas, J., dissenting).

<sup>92</sup> *Id.* at 744-45.

<sup>93</sup> *Id.* at 745.

<sup>94</sup> *Id.* at 739-40.

<sup>95</sup> 418 U.S. 717, 752.

<sup>96</sup> 418 U.S. 717, 741-42. *See also* *San Antonio School District v. Rodriguez*, 411 U.S. 1, 50 (1973).

The majority likely came to its conclusion over much debate and to say that the decision was an emphatic pronouncement of a likeminded Court would be an exaggeration. The Court likely did not want to shock the constitutional law foundations of this country, which it would have done if it had decided that interdistrict relief was permissible.<sup>97</sup> However, a radical change is sometimes needed to spur new thought and action.<sup>98</sup> Such change is not always viewed favorably, but should not be viewed as something to fear; instead, change should be viewed as an important step toward correcting flaws in society.

In a somewhat cryptic concurring opinion, Justice Stewart found that the interdistrict solution was incorrect “for the simple reason that the remedy [the courts] thought necessary was not commensurate with the constitutional violation found.”<sup>99</sup> The measuring of a remedy by some mechanistic formula, which seems to be what Justice Stewart uses, reduces the discrimination debate to a formalistic procedure instead of a compassionate inquiry into the means and ends of policies to promote general conceptions and practices of fairness and equality. Justice Stewart makes another argumentative error when he concludes that “[t]he formulation of an interdistrict remedy was thus simply not responsive to the factual record before the District Court and was an abuse of that court’s equitable powers.”<sup>100</sup> The Supreme Court missed an opportunity to

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<sup>97</sup> Interdistrict relief would have been and probably still is unsettling to many, simply because most people are accustomed to areas dealing with their own immediate problems, with little attention paid to how surrounding areas influenced or affected the problem-stricken area. It is not that regionalism is unconstitutional, *supra* note 72-83, but that regionalism will provide people with something new to consider and experience.

<sup>98</sup> The Civil Rights Movement is one example of a major change, which needed major events like Martin Luther King, Jr.’s march on Washington, Rosa Parks’s refusal to move from her seat in the White section of a bus, and the fiery rhetoric of Malcolm X. This sort of resistance is not itself an action of violence, discrimination or dehumanization. Paulo Freire writes: “Consciously or unconsciously, the act or rebellion by the oppressed (an act which is always, or nearly always, as violent as the initial violence of the oppressors) can initiate love.” Paulo Freire, *PEDAGOGY OF THE OPPRESSED* (30<sup>th</sup> Anniversary Ed.) 56 (2000). In order to break the controlling structure’s hold on power and knowledge, a strong action is needed. The radical change needed may be violent, unsettling, or previously unthinkable, but it is this spark that lights the revolutionary fire.

<sup>99</sup> 418 U.S. at 754 (Stewart, J., concurring).

<sup>100</sup> *Id.* at 756 (Stewart, J., concurring). Traditionally, the trial court has been held to have broad equitable powers. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) (discussing the broad equitable powers of lower courts to remedy discrimination); *Hutto v. Finney*, 437 U.S. 678, 687, and n.9 (1978). Accordingly,

sanction a fundamental tenant of regionalism in the *Milliken I* decision—cooperation.

The *Milliken* saga unfolded in a second case in 1977.<sup>101</sup> The *Milliken II* decision has made it virtually impossible for wrongs to be righted in a cooperative fashion. The Court in *Milliken II* approved remedial education measures in Detroit, but not interdistrict relief.<sup>102</sup> The problem with *Milliken II* is that for all the dialogue on the equitable powers of the courts, the Court ultimately missed the most equitable solution—a solution that would place the resolution to the discrimination problem on the shoulders of all parties involved. There were broader geopolitical concerns at play in the *Milliken* series than the Court recognized or with which it wanted to deal. Oddly, it may be that *Milliken II* has actually caused “White Flight” by guaranteeing the suburbs a safe haven from the ills of center city educational infrastructure. If anything, the Court announced that suburbs need not worry about their city cohorts because the city’s problems were contained within a judicially sealed geopolitical box.

Nathaniel R. Jones has posed an interesting critique of *Milliken*.<sup>103</sup> This critique poses an important hypothetical question: Assume the *Milliken I* Court said:

There is a violation, and it is this violation of an expanding core of Black schools and neighborhoods always encircled by a receding ring of White schools. We do not know the extent of it, we do not know what the remedy is, but there is no question that that is a violation of the principles established in *Brown*.<sup>104</sup>

If the Court posed this question, it would likely have understood the involvement of the White suburban ring in the discrimination of the center city.<sup>105</sup> Furthermore, the Supreme Court

the appellate standard of review is abuse of discretion. *Walters v. National Assn. of Radiation Supervisors*, 473 U.S. 305, 336 (1985).

<sup>101</sup> *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977).

<sup>102</sup> *Id.* at 286-88.

<sup>103</sup> Nathaniel R. Jones, *Symposium: Brown v. Board of Education and its Legacy: A Tribute to Justice Thurgood Marshall: Panel II: Civil Rights and Education After Brown: Milliken v. Bradley: Brown’s Troubled Journey North*, 61 *FORDHAM L. REV.* 49 (1992).

<sup>104</sup> *Id.* at 54.

<sup>105</sup> The resolution of legal issues often flows directly from the way in which one structures questions of law. Just as one person’s terrorist is another’s freedom fighter, one person’s discriminatory conduct is another’s justifiable conduct. Legal issues are carefully articulated by bar and bench for a purpose—to convey a desired

could have presented this question to the district courts to craft responses with a local flare. It seems that the only possible outcome, once the involvement of the White suburbs is recognized, is to include those White suburbs in the solution. It is as if the *Milliken* Court said:

We see that there is a problem. This problem violates *Brown* in some or many ways. But, we find that such a violation is only a result of those persons in the immediate school district. Those outside the school district have no contact or effect on the district and we should not assume they do or suggest that they assist the center city in its answer to the pressing societal problems.

Post-*Milliken I*, however, the district courts are unable to seek some of the inter-district relief they may deem appropriate, which is unfortunate because it is at the district court level where judges are most likely to understand the involvement of the actors in the surrounding metropolitan area.<sup>106</sup>

In *Dayton Board of Education v. Brinkman (Dayton I)*, the Court overturned a district court's district-wide school desegregation ruling. This decision hinged on a mechanical analysis of the segregation's effects.<sup>107</sup> Mechanical analysis almost always results in non-district wide remedies because proving district-wide effects is next to impossible under a rigid quantitative analysis. Furthermore, the Court places more emphasis on the procedures by which an actor finds a violation and less on the culpability of parties to a violation and the ways in which remedies may cure a violation.<sup>108</sup> The Court should have decided in favor of a community approach involving the

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meaning. Using the language suggested by Justice Jones places an emphasis on the complex relationship between cities and suburbs and all races. There is no way to avoid a discussion of the suburbs or of White involvement in discrimination. *See supra* notes 10, 13-14.

<sup>106</sup> District courts are likely to better understand how the issues before them impact and relate to the people in the area. Those courts have their ear to the ground. While it may not be desirable to have courts crafting decisions based on local preference and not established law, it seems just as undesirable to have courts deciding cases without thought on the persons being affected.

<sup>107</sup> 433 U.S. 406, 420 (1977).

<sup>108</sup> *Id.* at 418-420.

whole Dayton, Ohio community. The Supreme Court, however, nodded to the value of metropolitan area relief in a later case.<sup>109</sup>

Some hope for regionalism was seen when the Supreme Court concluded in *Hills v. Gautreaux* that “[n]othing in the *Milliken* decision suggests a *per se* rule that federal courts lack the authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred.”<sup>110</sup> The difference between the *Milliken* case and *Hills* is that *Milliken* involved the constitutionality of directing a municipal actor that did not have jurisdiction outside of the corresponding municipality where *Hills* involved the Department of Housing and Urban Development (HUD), which has jurisdiction to act beyond the boundaries of any municipality.<sup>111</sup> In the *Hills* case, the municipality discussed was Chicago. The Court concluded that the housing market extended beyond the city limits and included the surrounding counties, legitimating inter-municipal relief.<sup>112</sup> The Court came to this conclusion by recognizing that a housing market has no boundaries and implicates no powers prescribed to any local actors.<sup>113</sup> That is to say HUD’s actions do not tread upon the powers of local government.

Justice Clarence Thomas, concurring in *Missouri v. Jenkins* (*Jenkins II*), wrote that “a deserving end does not justify all possible means.”<sup>114</sup> Justice Thomas concurs because he agrees with the remedial measures taken by the court, but he wishes to add a few remarks regarding the “course of this litigation.”<sup>115</sup> Justice Thomas specifically objects to the broad remedial powers of the federal courts and how they have been used to trample federalism.<sup>116</sup> This language is more hyperbole than reality, but Justice Thomas, as is typical, goes through a lengthy discussion of federalism’s history.<sup>117</sup> Ultimately his historical interpretation sounds unpersuasive and canned.

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<sup>109</sup> *Hills v. Gautreaux*, 425 U.S. 284 (1976) (distinguishing a housing market from an educational market because housing markets included cities and the surrounding suburbs).

<sup>110</sup> *Id.* at 298.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 299-300.

<sup>113</sup> *Id.* at n. 13 –n. 14.

<sup>114</sup> *Missouri v. Jenkins* (*Jenkins II*), 515 U.S. 70, 138 (1995) (Thomas, J., concurring) (referring to school desegregation orders).

<sup>115</sup> *Id.* at 96-97.

<sup>116</sup> *Id.* at 97.

<sup>117</sup> *Id.* at 126-33.

His concurring opinion disregards the interconnectedness and complicity of neighboring areas in racial discrimination. Far beyond education desegregation, surrounding communities are tied together in all discriminatory actions by government units. The primary problem with Justice Thomas's concurrence is that it unfairly characterizes interdistrict relief as one of the absolute most unseemly means. If interdistrict remedies are the worst, it seems that the Court has either a myopic focus on regionalism, or has simply neglected to consider the many unjust exercises of power by power-wielding entities. Justice Thomas's characterization is rhetorically dishonest, as there are many unconstitutional methods to correct discrimination, many of which are more unseemly, as the Court has enumerated in the litany of discrimination opinions through the 1970s, 1980s, and 1990s. Justice Thomas has done an injustice to *Brown*,<sup>118</sup> by characterizing the imposition of interdistrict relief on non-violating suburbs as more unconstitutional than the unconstitutionality in racist city centers.

The Supreme Court must promote regionalism because it offers many benefits for the problems that plague society.

Regionalism has much to offer the economy:

In a seeming paradox, place has become even more important in the New Economy. Although we have become a global economy, and the Internet has collapsed space and time, we have discovered that most innovation still happens face-to-face in real place. Place matters because people matter in the New Economy.<sup>119</sup>

The local economy, that is to say the microeconomic condition of citizens, is in particular need of regionalism. "Because the greatest problem now facing America's poor is their isolation, addressing the problems of concentrated poverty requires breaking the connection between the concept of decentralized power and the separation and division of the metropolitan population."<sup>120</sup> Poverty

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<sup>118</sup> See *supra* note 18.

<sup>119</sup> *Alliance for Regional Stewardship Monograph: What Makes Regions Work Today?*, The Planning Report (Dec. 2000), available at [http://www.planningreport.com/tpr/?module=displaystory&story\\_id=970&edition\\_id=48&format=html](http://www.planningreport.com/tpr/?module=displaystory&story_id=970&edition_id=48&format=html) (accessed Apr. 1, 2004).

<sup>120</sup> Gerald E. Frug, *Symposium on Regionalism: Against Centralization*, 48 *BUFFALO L. REV.* 31, 38 (2000).

occurs when business leaves areas and wealth moves away.<sup>121</sup> The flight of business from cities explains how central cities lost jobs and tax revenue while surrounding suburbs flourish with the influx of business and taxable parties. While federalism is important and power generally ought to be moved away from a powerful central government, there is a happy middle ground that embraces regionalism.

It is perhaps easier for the critic to view the suburbs as a favored group. This favored group possesses most of the income, most of the real estate, works in most of the jobs, and dictates most of the societal trends (fashion, cuisine, automobile type, etc.). Cities become forgotten as new high-rent suburbs receive highway spurs and other important infrastructure funds. The result is a relatively minor faction of the population being placed in position to receive the majority of the economic benefits. “Marginalized populations, particularly the minority poor who are relegated to poverty-ridden, central city neighborhoods, are largely excluded from participating in the favored quarter’s economic prosperity.”<sup>122</sup> The economic injustice of the city-suburban split is tantamount to economic apartheid which is destined to further entrench itself in the regional landscape as long as the region is absent from people’s mindsets.<sup>123</sup> Without a look across (from the suburb to the city and from the city to the suburb), there is no hope that the suburbs will realize the oppressive condition. Both the city and the suburbs need a cooperative perspective to understand and change the condition.

One area that lends itself to a regionalism approach is the environmental arena. Perhaps it is the nature of environmental concerns; it is difficult to contain water and air pollution within a

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<sup>121</sup> Arthur Johnson, *A new, great city rises in the West*, *The Canadian Business Daily*, May, 1996, at 9 (noting business flight from U.S. cities and an increase in poverty).

<sup>122</sup> Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing Barriers to the New Regionalism*, 88 *GEO. L.J.* 1985, 1987 (2000).

<sup>123</sup> By extension, the rural poor are likely to be helped by the growth of regional awareness as well. While this piece focuses on cities and suburbs, the outlying rural areas are also in need of help from the economically advantaged suburbs. Rural areas also need the diversity of the center city and the history upon which center cities are often built. Rural areas are just as in need of regionalism as are cities and suburbs and in a more complete project, a thorough analysis of the center city-suburb divide’s effect on rural areas is a necessity. Rural areas make up a large amount of this country’s landscape and this country was in fact founded upon this agrarian tradition.

city's boundaries. Nature does not confine forests, lakes, or mountain ranges to state or local boundaries. Environmental concerns<sup>124</sup> are of preeminent concern to the regionalist because the environment is best understood through ecosystems, an idea based upon an environmental region. "Nature was the original regionalist, of course, and both federal and state natural resource agencies have adopted the watershed and the ecosystem as jurisdictional models for programs in species loss and pollution prevention."<sup>125</sup> Ecosystems know no boundaries, insomuch as a political map will never define where the desert begins and ends or where the tundra turns to taiga. From an ecological mindset, the law could be developed into something more organic—something that is fluid, adjusting to the latitudes and longitudes of the environment. Ecosystem management is one way to think about regions and the environment. A policy for the prairie should not be the same as a policy for the evergreen forest. The Chesapeake Bay provides different challenges than the Great Lakes.

Ecosystems are not only flora and fauna, but are composed of the people living in these systems as well. The environment is composed of people and their creations (cities, roads, parks, etc.) as well as the "natural environment." What works for natural resource management, endangered species protection, and pollution prevention should also work for the problems presented to the large number of residents in these ecosystems because all residents (humyn and non-humyn) are integrally important to an improving environmental understanding. Taking a more place-centered approach provides clarity often lost in the myopic view of the Supreme Court.

## VI. INTELLECTUALLY ACCESSING REGIONALISM: A PHILOSOPHICAL TOOL KIT FOR BUILDING THE FUTURE

Regionalism will not come easily. In order for regionalism to be realized, there must be a progressive rethinking<sup>126</sup> of current political arrangements. The best way to achieve the benefits of

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<sup>124</sup> Peter Dreier, *Sprawl's Invisible Hand*, THE NATION, Feb. 21, 2000, at 6 (noting the connectedness of the city and surrounding suburbs and the need for both to work together on environmental issues in the context of smart growth).

<sup>125</sup> James Kroehe Jr., *All For One*, ILLINOIS ISSUES 11, 13 (1998).

<sup>126</sup> Progressive not necessarily as the word is often used in association with leftist political thought. I simply use this word to indicate a forward-looking approach.

governance style changes is to create a transgressive<sup>127</sup> meta<sup>128</sup> practice<sup>129</sup> (TMP). The TMP allows individuals to enable themselves to act for some sort of change. The thought process may vary greatly from individual to individual. The TMP is not a rigid formula, but instead a helpful algorithm to produce a desired result. Thus, the thought process may vary greatly from individual to individual, and the action taken by one person may be very different from the action taken by the next person. However, it is through TMP that individuals will begin to think about how and why to act.

The TMP is “transgressive” because it crosses the boundaries of dichotomous relationships: federal-state, left-right, Republican-Democrat, etc. It is also “transgressive” because it breaks and shatters the norms by which life is organized. It is a reconfiguration of belief—definitely something “outside of the box.” It may also be considered “ahead of the curve,” but more likely it is a bisecting of the curve. The TMP is new and different, so placing it along some pre-designed notion of thought is disingenuous to the TMP’s nature. Additionally, the TMP is transgressive in style because it is jumbled; there is no need for rigidity. This jumbled pile of mahjong-like thought tiles can be recast into a beautifully artistic mosaic—eventually becoming a descriptive mosaic of epic proportions. The previous pieces cannot be removed because the whole has subsumed the parts creating a new entity—a new thought.

The TMP is “meta” because this method must permeate all levels of legal and social thought. It is bigger than a single approach or methodology and owes no allegiance to any disciplines. The TMP has no master, no owner, and no ties to tradition. It is organic, growing and changing with time. It is however full of identifiable content, rich with development of intellectual activity.

The law is not enough.<sup>130</sup> There must be a current of cooperation flowing through daily lives so that we may be able to support the geopolitical arrangements of regionalism. Regionalism cannot succeed without cooperation.<sup>131</sup> The TMP is “practice”

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<sup>127</sup> “Transgression” is the exceeding of bounds, the violation of rules and regulations. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4<sup>th</sup> Ed.) (2004).

<sup>128</sup> “Meta” is used to denote a higher state of being or a transcendence of being. *Id.*

<sup>129</sup> “Practice” is used to denote a repeated custom or habit done repeatedly. *Id.*

<sup>130</sup> There must be a reliance on individual thought and action and not a reliance on what the law purports to do. Depending on others to do what must be done will assure that nothing is ever done.

<sup>131</sup> See *supra* notes 3-6.

because there must be an application on a day to day level. Practice connects theory and result. It is not enough to be guided by theory; one must actually act upon theory to realize result. We must do regionalism and be regional.

Nomenclature aside, there are steps by which a successful TMP ought to be engaged. The first step involves rethinking. This rethinking is different than thinking again; it is not a recapitulation of previous thought, but a new thought. The process is that of newthink—developing a new thought process with the purpose of bringing new ideas and new action to the table. This new thought is completely different (although perhaps containing constituent parts of previous thoughts) from what was previously thought.

After rethinking, a dwelling period is necessary. In the dwelling period, the rethought ideas are considered critically through constant application of numerous critical methodologies. The dwelling is like lowering a culinary creation to a simmer, allowing all of the seasonings to slowly permeate the main dish—marinating the “newthoughts.” Critical inquiry is made into the nature of the ideas rethought and the reconfiguration done. Options are weighed and the reconfiguration is refined.

Finally, a micro-political move is made. Micro-political practice is somewhat of a misnomer because the practice is decisively apolitical.<sup>132</sup> It is subversive, yet not unconscionable. It is not motivated by accepted standards of law or conceptions of rights. It is local, individual, and personal because this process does not cater to the macro-political machine which is in many respects not attuned to the individual. The micro-political action is, however, smaller than the macro-political structure, so it does fulfill that connotative flavor. The impact is by no means small however. Probably given the ease of understanding such an intimate action, the micro-political action is prone to modeling and easily accessible by the general populous. This is exactly what is needed—something achievable: something with potential and promise.

This micro-political move is a move made on the personal level where individuals engage in actions consistent with the results of their rethinking and dwelling. Actual action is taken (cases filed,

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<sup>132</sup> If “micropolitical” connotes small then it should. The actions are small and individual. These actions are apolitical in the sense that they do not adhere to a political ideology and should not be structured along party platforms. They are not necessarily anti-political because working within the political system may be the only way that people feel comfortable acting and any sort of action to effectuate the change desired is better than inaction.

decisions made, protests started)—this is not a solely cognitive process.<sup>133</sup> Disagreement, speaking out, and developing a consistent questioning is important at the very beginning. People need to speak up and speak out as early as possible. Thinking, destroying, and investigating is not enough.<sup>134</sup> The micro-political action that is necessary for change is personal in nature. It is an individual manifestation of the critical process begun in the early stages of the TMP and continued through the micro-political action that motivates the individual to engage in meaningful, purposeful action.

Questions that might be asked in order to spur a micro-political move include:

- (1) Who do I know and who do I not know? How can these people help me and guide me in better understanding my community and in effectuating the changes I want to see in my community or region?
- (2) In what kind of community do I wish to live?
- (3) What does my region offer and how can my region's resources be utilized?
- (4) What do I feel comfortable doing in order to change my surroundings?
- (5) Where do I want to see myself in several years, surrounded by what types of people, and engaged in what types of activities?
- (6) Where do I start? What can I do and how can I influence others? What ideas do I have and what actions can I take to better my position and the position of those around me?
- (7) How do I relate to other people? How do my actions affect others? Where do I go and who do I see when I go there?

Regionalism is best intellectually accessed through TMP because TMP provides the rethinking, critical engagement, and sincere action necessary to effectuate even the smallest transgressive

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<sup>133</sup> I am hesitant to name any specific actions that should be taken because the TMP is an organic process that each and every person must mold to their personal abilities, interests, and vision. There is no better or worse action to take. The point is simply to take an action.

<sup>134</sup> Nihilism is not the answer. Everything cannot be destroyed and there must be positive attempts to create something new. Whether or not any specific idea or philosophical paradigm is nihilist is up for debate and not the focus here. When investigating or tearing down assemblages, the critically conscious individual must build on the dialogue of what was just torn down.

movements. Every judge, lawyer, defendant, plaintiff, and person must engage in this practice. In short, to effectuate change, there must be a TMP across all strata of society. A top-down approach is usually counterproductive because it prescribes the action needed and is conducted through an entity not responsive to the individual conditions of people. On the other hand, a bottom-up approach is likely to be thwarted by the larger controlling superstructure. Consequently, it is necessary that all people simply act, irrespective of their positions in society. It must be immediate, swift, and sincere.

TMP is practicable for lawyers, professors, and judges. It may require a break from precedent, an unconventional brief or decision, or a law review article not on the beaten path. But it can and must be done to assure the paradigmatic shift necessary to open discursive terrain on which the seeds of regional communication and cooperation may grow.

## VII. WHAT'S NEXT FOR THE COURT?

The Supreme Court could rule that gated communities with high community membership fees are unconstitutional because they are designed to segregate communities. It is likely that as gated communities grow,<sup>135</sup> the Court will be confronted with a huge amount of restrictive covenant and compensated takings cases. It is likely that *Grutter v. Bollinger*<sup>136</sup> is not the last affirmative action case. Thus, it seems that as long as the Court continues to affirm the value of diversity, regionalism might have a helping hand. If a more conservative court is appointed in the coming years,<sup>137</sup> decisions will likely move away from valuing diversity,<sup>138</sup> and the outgrowth of that type of ruling is likely to place regional relief by the courts in jeopardy.

The Court could also find that state-compensated takings for economic revitalization are consistent with the principles of federalism, and that state judiciaries are the appropriate forum for

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<sup>135</sup> See *supra* note 15.

<sup>136</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) (agreeing with earlier Supreme Court decisions that diversity can be a compelling state interest).

<sup>137</sup> See *supra* note 43.

<sup>138</sup> The *Grutter* decision was a close vote and if the Court's more liberal members are replaced, even if only Justice Stevens, affirmative action may be in trouble. Scholarship arguing against affirmative action is becoming more prevalent. See, e.g., Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

challenges to compensated physical takings. This type of decision would 1) assure that areas could engage in activities designed to build communities even though they might place some businesses at a disadvantage<sup>139</sup> and 2) assure that states develop their land in accordance with their own prerogatives. This is of pivotal importance because it allows governments to help build communities and help impoverished areas. Regionalism needs a strong city center to assure success, because a strong city center will increase the likelihood of connectedness between the city and suburbs. Courts could recognize, perhaps in an affirmative action decision, that discrimination affects more than those immediately concerned with the case and controversy at hand.<sup>140</sup> These are unique and important opportunities to, at least preserve the delicate federal-state balance and, at best, present a new way to conceptualize comprehensive cooperative solutions to pressing regional problems.

It is also likely that the Court may confront a land zoning question where the development of a new suburban community is zoned to prevent low-income housing or to prevent lots smaller than two acres from being developed. With the growth of suburbs across the United States, land zoning issues could be increasingly present in the Court's docket, if they are not already present. A possible interdistrict or cross-border solution could involve neighboring communities allowing lower-income housing to develop. The Court could find that all surrounding suburbs have engaged in a plan to zone out minorities and order them to work together, allowing more equitable development.

## VIII. CONCLUSION: ARGUING FOR COOPERATIVE SOLUTIONS

A story:

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<sup>139</sup> It is also possible that urban revitalization could hurt poorer populations in cities, but it is this author's hope that urban revitalization would include affordable housing to assure potentially displaced residents of a place to stay. Inexpensive housing is not only a center city problem. Jay Walljasper, *A Fair Share in Suburbia; housing policy of Montgomery County, Maryland*, THE NATION, Jan. 25, 1999, at 15 (citing to Montgomery County's success in developing low cost housing). To be sure, gentrification is a major problem in the United States. See Neil Smith, THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY (1996); Rebecca Solnit, HOLLOW CITY: GENTRIFICATION AND THE EVICTION OF URBAN CULTURE (2001); Elijah Anderson, STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY (1992).

<sup>140</sup> See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The drive out toward the rolling hills was peaceful. I heard other autos zooming along. I looked left then right and saw families with Fords filled high with belongings—suitcases strapped to the roofs and some with trailers in tow. Highways flowed away from the struggling cityscape toward a utopia of suburban splendor. The trees in rows and houses more plentiful than ever before gave my eyes a welcome rest from the tedious smog haze of the center city. It was a utopia, an island in a sea of instability, struggle, and despair...

The construction of the suburb as a utopia<sup>141</sup> has resulted in a default conclusion that the city is a dis-topia. The association has left a lasting stigma on the center city as the suburbs have grown and flourished, forcing resources away from the cities which spawned their creation.<sup>142</sup> Suburbs have become privatopias where gated communities, land zoning, and transportation patterns have succeeded in taking the public nature of utopia and transforming it into a private condition attainable only by those with the means and mobility to achieve it. The privatopia of the suburbs has resulted in a public-private split placing the resources on the private side and relegating the public, flowing center city to a state of apnea.

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<sup>141</sup> This is no where better demonstrated then in Tracy Chapman's *Fast Car*:

You got a fast car  
And we go cruising to entertain ourselves  
You still ain't got a job  
And I work in a market as a checkout girl  
I know things will get better  
You'll find work and I'll get promoted  
We'll move out of the shelter  
Buy a big house and live in the suburbs

Tracy Chapman, *Fast Car*, on TRACY CHAPMAN (Elektra 1988).

<sup>142</sup> Some center cities have flourished, but those examples are few and far between. While there is no doubt that cities can benefit from increased investment, the tearing down of abandoned buildings, and remade sidewalks and streets, these cities ultimately lose some of their character. As skateboarding, rollerblading, athletic jerseys, and baggy jeans get banned from revitalized urban areas, the character of a city often changes. One cannot help but wonder if the city's residents are slowly and subtly pushed away from the revitalized areas by the skyrocketing parking costs, restrictive rules, and rising property values. Revitalized Memphis, Tennessee or Portsmouth, Virginia may be beautiful and quickly improving value, but ultimately who sees the benefits of these revitalized cities?

The solution is not simple, but absolutely necessary. *Milliken II* must be overturned by the next case presenting the possibility for interdistrict relief designed to include non-offending areas. While the argument will be made that such a measure would force a burden upon constitutionally compliant areas, the nature of discrimination renders solutions tied to artificial boundaries useless at best and counterproductive at worst. The Court must recognize that the burden of healing discriminatory wounds is minimal compared to the pain of the festering wound itself. Finally, the Court must recognize the need to look beyond historically dichotomous understandings of federalism and begin to adjudicate cases to allow for involvement of multiple areas in problems which ultimately know no bounds.