

## Incorporated Separatism: Legitimate social mechanism or disguised discrimination

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*The Supreme Court decision in Brown v. Board of Education, and the enactment of the Civil Rights laws, establish a presumption that separation between social groups is discriminatory. This presumption prevents segregation within a community but does not prevent social groups from achieving separation by exiting community boundaries, through municipal incorporation. While municipal incorporation may serve essential economic and social needs, it may therefore also become a device for spatial discrimination. Spatial segregation through municipal incorporation, therefore, poses a significant challenge to American society's ongoing quest to achieve spatial justice.*

*This article argues that the potential discriminatory use of municipal incorporation requires the assimilation of a mandatory examination of its racial and socioeconomic implications within the incorporation approval processes. Such an examination should consider the justifications and objections for spatial separation, as well as on the incorporation's effects on the communities involved, the autonomy of the communities' members and society as a whole. The article provides a nuanced roadmap that should guide the political or judicial entities responsible for approving the incorporation in their approval process. It also provides an implementation of the proposed roadmap on two recent municipal incorporation cases: the case of St. George, Louisiana and the case of Kiryas Joel, New York. The analysis of these cases will illustrate how the proposed roadmap makes it possible to distinguish between cases where separation is merely a device for spatial discrimination and cases where separation may contribute to spatial equality.*

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## INTRODUCTION

In October 2019, the residents of St. George, Louisiana, voted to incorporate as a city and to separate from the East Baton Rouge Parish.<sup>1</sup> The vote ended a decade long efforts on behalf of the upper-middle-class

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<sup>1</sup> Rick Rojas, *Voters Near Baton Rouge Want Better Schools. First, They Need a New City*, N.Y. TIMES (Oct. 10, 2019), <https://www.nytimes.com/2019/10/10/us/baton-rouge-st-george.html>; Jess Clark, *In Diverse East Baton Rouge, An Affluent White Area Seeks Its Own City, School District*, NEW ORLEANS PUBLIC RADIO (Oct.11, 2019), <https://www.wno.org/post/diverse-east-baton-rouge-affluent-white-area-seeks-its-own-city-school-district>.

suburb of the Louisiana capital to form their own school district.<sup>2</sup> Because Louisiana does not outline a path in law for school district secession, the path of the mostly white suburb residents to achieving their goal involved political and legal challenges.<sup>3</sup> To secede from a school district, they needed to promote special legislative action as well as garner special constitutional exception.<sup>4</sup> After years of delays and failures, suburban residents have found an easier way to take control of their children's schools: they have decided to part with the East Baton Rouge Parish and start an independent city.<sup>5</sup>

Two years before the vote on St. George's incorporation as a new city, a similar vote was taken place in the state of New York. In November 2017, the residents of the town of Monroe, Orange County, went to the ballots to decide whether or not to allow the separation of the Jewish ultraorthodox village of Kiryas Joel from the town of Monroe and its incorporation as an independent new town.<sup>6</sup> Both the Kiryas Joel residents and the Monroe residents voted, and the decision, which confirms the separation, was primarily adopted by both groups of residents.<sup>7</sup> At the heart of the Kiryas Joel separation process, there were tensions between the communities regarding the lifestyle and conflicts surrounding land control and the education system.<sup>8</sup> Once again, as in the case of St. George, the political and legal challenges have led to the ultra-Orthodox residents of the village of Kiryas Joel to decide on separation through municipal incorporation.

Despite the differences between the cases, both are part of an accelerating spatial phenomenon: spatial separation through municipal incorporation. The data shows that between 1950 and 2010, the United States has witnessed the establishment of more than 3,310 new

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<sup>2</sup> See Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139 (2016); see also Margaret Newkirk, *Parents in Baton Rouge Try to Drop Out of School*, BLOOMBERG BUSINESSWEEK (Feb. 20, 2014), <http://www.bloomberg.com/bw/articles/2014-02-20/baton-rouge-parents-in-public-school-revolt-want-their-own-city> [<http://perma.cc/3UP3-KPY9>].

<sup>3</sup> For a comprehensive review of the history of school district secession in Louisiana, as well as the required legal proceedings, see Wilson, *supra* note 2.

<sup>4</sup> *Id.*; see also Gabriella Runnels, *Breaking Apart: Confronting Race in East Baton Rouge Parish*, 1 WOMEN LEADING CHANGE: CASE STUDIES ON WOMEN, GENDER, AND FEMINISM 59 (2016).

<sup>5</sup> Rojas, *supra* note 1.

<sup>6</sup> Lisa W. Foderaro, *Call It Splitsville, N.Y.: Hasidic Enclave to Get Its Own Town*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/nyregion/hasidic-kiryas-joel-upstate.html>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; see also Elizabeth Kolbert, *Village Wants Hasidic Public School District*, N.Y. TIMES (July 21, 1989), <https://www.nytimes.com/1989/07/21/nyregion/village-wants-hasidic-public-school-district.html>.

municipalities.<sup>9</sup> Municipal incorporation may occur for various reasons, such as fear of annexation, economic difficulties, clashes between different social groups, and frustration due to lack of political representation.<sup>10</sup> These reasons may be valuable and sometimes even democratically, economically, and socially justified.<sup>11</sup> However, municipal incorporation may also serve purposes that are more controversial, the prominent among them being discrimination through separation.

The article seeks to examine the phenomenon of spatial separation through municipal incorporation, and whether it can be reconciled with the prevailing legal presumption, set by the *Brown v. Board of Education*<sup>12</sup> Court and the Civil Rights laws, that separation is discrimination. By providing a socio-legal examination of the different generations of American spatial segregation, the article concludes that separation through municipal incorporation somewhat escaped the widespread realization that, at least in the public and constitutional levels, segregation is seen as discriminatory. Therefore, despite the political barriers and legal cables laid down by both federal and state law to ban segregation between social groups within the communities, the route for separation through municipal incorporation seems to be cables-free and easier to implement. Moreover, an examination of the municipal incorporation approval procedures reveal that none of the fifty states attempt to estimate the possible discriminatory consequences of the incorporation or condition the approval with proof that the separation will not lead to discrimination against and harm disadvantaged groups.<sup>13</sup> This state of affairs, despite that municipal incorporation may serve important social, economic, and even democratic purposes, renders this procedure

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<sup>9</sup> Kathryn T. Rice, Leora S. Waldner, & Russell M. Smith, *Why New Cities Form: An Examination into Municipal Incorporation in the United States 1950–2010*, 29(2) J. OF PLAN. LITERATURE 140 (2013).

<sup>10</sup> See *id.* (identifying twenty-two reasons for municipal incorporation); see also Richard Briffault, *Our Localism: Part I--The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 76–77 (1990); Russell M. Smith & Leora Waldner, *Why majority-minority cities form: non-White municipal incorporation in the United States, 1990–2010*, 39 URB. GEOGRAPHY 149 (2018).

<sup>11</sup> Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 823 (1992); Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT'L L.J. 263, 269–73 (2006).

<sup>12</sup> See *Brown*, 347 U.S. 483.

<sup>13</sup> For a comprehensive review of municipal incorporation procedures in all states, see *A Brief Summary of Municipal Incorporation Procedures by State*, CARL VINSON INST. OF GOV'T, THE U. OF GEORGIA, <http://www.senate.ga.gov/committees/Documents/CarlVinsonSummaryMunicipalIncorporationProceduresbyState.pdf> (last visited Jan. 19, 2020). See also Briffault, *supra* note 10, at 74–76 (concluding that the current requirement for municipal incorporation “do not address the effect of the formation of a new government on the surrounding area, the region or the state.”). *Id.* at 75.

exposed to exploitation by parties seeking to reapply the "separate but equal" doctrine in space.

This understanding requires a more in-depth examination of the justifications, as well as the objections to spatial separation. The article offers three justifications for spatial separation: the empowerment justification, the pluralistic justification, and the utilitarian one. Each of these justifications recognizes the importance of spatial separation between social groups, but each warrants separation of different scope and scale. On the other hand, the article offers three main objections to spatial separation: the one that stems out of the separation's social externalities, the one that focuses on the potential harm to individual autonomy and a utilitarian objection. These justifications and objections serve as the platform for a roadmap designed to provide political and legal decision-makers with instruments for determining when municipal incorporation should be approved as it is done for worthy reasons, and when it should be rejected because of its discriminatory character. The article then goes on to implement the proposed roadmap on the two recent municipal incorporation cases discussed at the beginning of the article: the St. George separation from the East Baton Rouge Parish and the separation of the ultraorthodox village of Kiryas Joel from the town of Monroe. As the article demonstrates, while these two cases seem alike, they nevertheless maintain significant differences that should affect decision-makers in their determination to approve the incorporation. While the former case expresses an attempt to reapply the "separate but equal" doctrine in the American space, the latter case challenges the irrefutable presumption that separation is always discriminatory. However, the article does not settle for this. It offers to see the case of Kiryas Joel as a call for a different understanding of the opportunities embedded in separation through municipal incorporation for achieving spatial equality. This understanding implies that separation is sometimes part of the quest for spatial equality. For some social groups, therefore, the familiar legal and social equation about separation and equality should take another expression, whereby "separate, therefore equal".

This article proceeds in six parts. Part I provides a socio-legal review of three generations of American spatial segregation. This part addresses characteristics of spatial segregation in each of the three generations and investigates the causes and procedures that led to the formation of the irrefutable legal presumption whereby "separate" is necessarily discriminatory. Part II discusses municipal incorporation and the reasons why no fewer than 3,000 communities in America have chosen to incorporate as municipalities over the last few decades. This part reveals that despite the potential for such a mechanism to be used to segregate social groups, the approval procedures of municipal incorporation do not include any reference, not least the conditioning, to the prevention of spatial discrimination. Recognizing the possibility that municipal incorporation may serve proper social, economic, and

democratic purposes, Part III of the article seeks to examine whether the refutation of the presumption that separation is discrimination can be justified. This part argues that the irrefutability of the separation is discrimination presumption has both positive and normative costs. On a positive level, the irrefutability of the presumption may prevent the identification and treatment of other discrimination mechanisms. On the normative level, such irrefutability prevents the possibility of differentiating between different cases, circumstances, and contexts in which the separation is made. Part IV extends the normative examination of justifications and objections to spatial separation. This part suggests that the spatial separation between social groups can be justified in three. The three justification include the empowerment of previously discriminated against minority communities, a pluralistic defense of communities' ability to realize their worldview, and the practical justification where separation can serve as an engine for competition and economic growth. On the other hand, it offers three objections to the application of spatial separation. The objections include the concern of social externalities, extended violation of individual autonomy, and utilitarian objection, whereby the costs involved in implementing the separation, as well as because of it, could impose a heavy financial burden on all parties involved. In light of these justifications and objections for spatial separation, Part V places a roadmap for determining the legitimacy of spatial separation through municipal incorporation. According to the proposed roadmap, the starting point for approving municipal incorporation should be under the legal presumption that segregation is discrimination. However, the existence of one of the justifications for spatial separation requires decision-makers to have a more in-depth investigation of the consequences of the separation, following all of the objections presented above. The article, therefore, calls for the implementation of a procedure that will balance the justification for separation and its implications as an inherent part of the municipal incorporation approval process. Finally, Part VI aims to take the theory and apply it in practice, considering two recent cases of municipal incorporation: the case of St. George, Louisiana and the case of Kiryas Joel, New York. The application of the theory proposed in the article on both cases reveals that in some cases the approach allows for the identification of municipality incorporation which aims to reapply the invalid and discriminatory doctrine of "separate but equal;" however, in other cases, the separation constitutes a striving for spatial equality. In these cases, the equation should be read as "separate, therefore equal."

#### I. THREE GENERATIONS OF AMERICAN SPATIAL SEGREGATION: A SOCIO-LEGAL ANALYSIS

Spatial segregation involves the "separation of socially defined groups in space, such that members of one group are disproportionately

concentrated in a particular set of geographic units compared with other groups in the population".<sup>14</sup> While the segregation of social groups is present and expressed in a wide range of fields and spheres, spatial separation carries with it the unique characteristic that every person needs a living space in the first instance. Unlike other spheres, such as education or public accommodations, there is not a single person who does not take up space. Thus, while segregation in some areas may affect sections of the population, spatial separation affects the entire community. Second, due to the physical characteristics of space, spatial segregation can be more clearly identified, diagnosed, and measured than in other spheres.<sup>15</sup> Third, control of space and its distribution is a prime source for the development of segregation and discrimination on other levels.<sup>16</sup> Finally, spatial separation presents unique difficulties with regard to the possible reparation of historical distortions.<sup>17</sup> Therefore, although spatial segregation is both influenced by and affects the separation of social groups in other spheres, its unique characteristics enable a distinct socio-legal investigation into the role of the law in establishing and maintaining spatial separation. This analysis enables the identification of three generations of American spatial segregation; in each, the law plays a different role in the construction of space. The different roles played by the law in these three generations enable the operation of different mechanisms and form a different perception of spatial justice.<sup>18</sup> It is important to recognize several caveats from the outset, which are relevant to the analysis presented in this article. First, it is socio-legal and does not

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<sup>14</sup> Douglas S. Massey, Jonathan Rothwell, & Thurston Domina, *The Changing Bases of Segregation in the United States*, 626(1) THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 74 (2009).

<sup>15</sup> See Douglas S. Massey & Nancy A. Denton, *The Dimensions of Residential Segregation*, 67 SOC. FORCES 281 (1988).

<sup>16</sup> See Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. OF SOC. 329 (1990); see also John A. Powell, *Opportunity-Based Housing*, 12 J. OF AFFORDABLE HOUSING & COMMUNITY DEV. L. 188 (2003); see also Dolores Acevedo-Garcia & Kimberly A. Lochner, *Residential Segregation and Health*, in NEIGHBORHOODS AND HEALTH 265 (Ichiro Kawachi & Lisa F. Berkman eds., 2003); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 193, 264 (Oxford U. Press, 2004); see also Samuel L. Myers, William A. Darity, & Kris Marsh, *The effects of housing market discrimination on earnings inequality*, in THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICAN CITIES 119 (Chester Hartman & Gregory Squires eds., Routledge, 2009); see also Kendra Bischoff & Sean F. Reardon, *Residential Segregation by Income, 1970–2009*, in DIVERSITY AND DISPARITIES: AMERICA ENTERS A NEW CENTURY 43 (John Logan ed., 2014), <https://s4.ad.brown.edu/Projects/Diversity/data/report/report10162013.pdf>; see also David R. Williams & Chiquita Collins, *Racial residential segregation: A fundamental cause of racial disparities in health*, 116 PUBLIC HEALTH REPORTS 404 (2016).

<sup>17</sup> RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 179-80 (Liveright Pub., 2017).

<sup>18</sup> EDWARD W. SOJA, SEEKING SPATIAL JUSTICE 67-110 (U. of Minnesota Press, 2010).

pretend to be absolute or ultimate. Therefore, it recognizes other possible classifications and categorizations of space construction and separation in American space. Furthermore, the analysis proposed in this article aims to provide a socio-legal angle to contribute to the understanding of separation in American society in general and separation in space in particular. This perspective enables the opening of a discussion on various functions of law and its impact on society and space. Second, although the analysis of the American space cannot ignore the powerful, governmental, and private economic mechanisms used to preserve space separation,<sup>19</sup> the primary purpose of this article is to provide a socio-legal examination of spatial processes. Therefore, it recognizes the significant contribution of the market and the economy to the separation of space; the paper does not include an in-depth analysis of the mechanisms and economic measurements that have affected it. Finally, the analysis proposed in this article aims to provide a broad-brush characterization of the role of law in each generation. In this sense, it is crucial to recognize that there were instances in each period, which sometimes contradict the main characteristics of this generation. These instances will not be ignored and will be discussed as part of the full picture that characterizes each of the generations for spatial separation.

The first generation of American spatial segregation began with the establishment of the United States and lasted until the court's decision in *Plessy v. Ferguson*.<sup>20</sup> This generation extended over a long period, during which American society underwent significant changes and transformations, both politically and economically. The decision to include this transformative period within one generation stems from the similarity that characterizes this period both with regards to the social groups involved and to the characteristics of spatial separation. Throughout the period of the first generation of American spatial segregation, racial subordination was practiced in most spheres of American life.<sup>21</sup> During this period, the relationships between social

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<sup>19</sup> For a discussion about the role of government and the economic processes that generated segregation, see generally Kevin Fox Gotham, *Urban space, restrictive covenants and the origins of racial residential segregation in a US city, 1900–50*, 24 INT'L J. OF URB. AND REGIONAL RES. 616 (2000); KLARMAN, *supra* note 16; CHARLES M. LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS (Cambridge U. Press, 2005); Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, in SEGREGATION: THE RISING COSTS FOR AMERICA 39-79 (James H. Carr & Nandinee K. Kutty eds., 2008); RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS: LAW, AND SOCIAL NORMS 20-46 (Harv. U. Press, 2013); ROTHSTEIN, *supra* note 17, at 17-76.

<sup>20</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>21</sup> For a detailed account on the construction of racial subordination see generally MARK M. SMITH, HOW RACE IS MADE: SLAVERY, SEGREGATION, AND THE SENSES (U. of North Carolina Press, 2006); see also MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (Routledge, 2014).



groups in United States were examined in a prism of slavery and abolition, together with social and economic processes that followed the abolition of slavery.<sup>22</sup> The abolition of slavery did not end the racial subordination that existed in American society. In fact, in some areas, the subordination of African Americans remained and even intensified.<sup>23</sup> It is, therefore, surprising to find that, in terms of space, the separation was relatively marginal.<sup>24</sup> The data shows that until the end of the 19th century, separation in the American space was relatively low so that the existence of separate neighborhoods in urban or rural environments only existed to a small extent.<sup>25</sup> Several explanations are suggested in the literature, but the most prominent among them is that spatial segregation would have been an inconvenience and an obstruction to the functioning of the subordinating system of slavery.<sup>26</sup> The recognition that space was integrated does not contradict the systematic race-based discrimination and subordination practiced throughout the first generation. On the contrary, integration was one of the constitutive components of the racial subordination system.<sup>27</sup> Therefore, the rule of law during the first generation was less concerned with racial segregation. It was more concerned with the preservation and legitimization of racial inequality and subordination. The abolition of slavery, alongside the ratification of the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> amendments to the U. S. Constitution, between 1865 and 1870, not only changed the formal legal status of African

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<sup>22</sup> COMER VANN WOODWARD & WILLIAM S. MCFEELY, *THE STRANGE CAREER OF JIM CROW* 12 (Oxford U. Press, 2002); see GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* (U. of Chicago Press, 2010); see also ALLEN C. GUELZO, *FATEFUL LIGHTNING: A NEW HISTORY OF THE CIVIL WAR AND RECONSTRUCTION* (Oxford U. Press, 2012); see also PATRICK RAE, *EIGHTY-EIGHT YEARS: THE LONG DEATH OF SLAVERY IN THE UNITED STATES, 1777-1865* (U. of Georgia Press, 2015).

<sup>23</sup> See KLARMAN, *supra* note 16, at 3.

<sup>24</sup> See generally W. E. B. DU BOIS, ELIJAH ANDERSON, & ISABEL EATON, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* (U. of Pennsylvania Press, 1996); ROBERT CLIFTON WEAVER, *THE NEGRO GHETTO* 6-26, 169 (Russell & Russell, 1948); John F. Bauman, *Black Slums/Black Projects: The New deal and Negro Housing in Philadelphia*, 41 PENNSYLVANIA HIST. 311, 314 (1974); Woodward & McFeely, *supra* note 22, at 14; Michael O. Emerson, *Is It Different in Dixie? Percent Black and Residential Segregation in the South and Non-South*, 35 THE SOC. Q. 571, 572 (1994).

<sup>25</sup> James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOWARD L.J. 547, 552 (1979); WEAVER, *supra* note 24, at 6-26, 169; David M. Cutler, Edward L. Glaeser & Jacob L. Vigdor, *The Rise and Decline of the American Ghetto*, 107 J. OF POL. ECON. 455, 456 (1999).

<sup>26</sup> KARL E. TAEUBER & ALMA F. TAEUBER, *RESIDENTIAL SEGREGATION AND NEIGHBORHOOD CHANGE* 48 (Transaction Publishers, 2008); Woodward & McFeely, *supra* note 22, at 13 ("In so far as the Negro's status was fixed by enslavement there was little occasion or need for segregation."); Emerson, *supra* note 24, at 572.

<sup>27</sup> Woodward & McFeely, *supra* note 22, at 12; Emerson, *supra* note 25, at 572.

Americans throughout the United States but also marked a substantive change in the role that the law played in the construction of space.

The undermining of the racial subordination system in the United States through the abolition of slavery and the rise of the Civil Rights Movement led southern states and local governments to create legislation that enforced racial segregation.<sup>28</sup> Racial segregation, therefore, served as a means by which white supremacists sought to preserve the discriminatory and subordinate racial system that had been lost with the abolition of slavery and the enactment of constitutional amendments.<sup>29</sup> The Jim Crow laws mandated racial segregation in all public facilities in southern states, starting in the 1870s and 1880s.<sup>30</sup> In 1896, the Supreme Court approved the discriminative concept underlying the Jim Crow laws, rejecting constitutional challenges against the discrimination they would generate. In *Plessy vs. Ferguson*, the U.S. Supreme Court established the “Separate but equal” doctrine, which suggested that as long as the facilities provided to each race were equal, state and local governments could apply policies that separated different races.<sup>31</sup> In this case, *Plessy vs. Ferguson* represents the mirror image of the law’s role while in the first generation, the aim was to legitimize racial inequality rather than being concerned with spatial segregation, in the second generation, the law, which was bound to constitutional equality duties, not only approved but also facilitated racial segregation. Therefore, *Plessy vs. Ferguson* represents the beginning of the second generation in American spatial separation, in which alleged equally funded discrimination had become legitimate, if not worthy.<sup>32</sup> Data shows that in 1890, American cities were not exceptionally segregated.<sup>33</sup> However, the rapid spread of the Jim Crow laws, now constitutionally backed by the Supreme Court, changed the American space, making it more segregated than ever before.<sup>34</sup> In the south, the abolition of slavery, as well as the expansion of white supremacy sentiments, increased spatial separation in the main cities.<sup>35</sup> In the north, where there was a massive demand for labor in industrial cities, an influx of southern African Americans escaping the Jim Crow laws

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<sup>28</sup> WOODWARD & McFEELY, *supra* note 22, at 13. *See also* STETSON KENNEDY, JIM CROW GUIDE TO THE U.S.A.: THE LAWS, CUSTOMS AND ETIQUETTE GOVERNING THE CONDUCT OF NONWHITES AND OTHER MINORITIES AS SECOND-CLASS CITIZENS (U. of Alabama Press, 2011).

<sup>29</sup> Emerson, *supra* note 24, at 572; DAVID BROWN & CLIVE WEBB, RACE IN THE AMERICAN SOUTH: FROM SLAVERY TO CIVIL RIGHTS (Edinburgh U. Press, 2007).

<sup>30</sup> BROWN & WEBB, *supra* note 29, at 192-194; WOODWARD & McFEELY, *supra* note 22, at 12.

<sup>31</sup> KLARMAN, *supra* note 16, at 8-27.

<sup>32</sup> *Id.* at 16-17.

<sup>33</sup> WEAVER, *supra* note 24, at 6-26, 169; Cutler, Glaeser & Vigdor, *supra* note 25, at 456.

<sup>34</sup> Cutler, Glaeser & Vigdor, *supra* note 25, at 469; ; Massey, Rothwell & Domina, *supra* note 14, at 78; KLARMAN, *supra* note 16, at 48.

<sup>35</sup> Emerson, *supra* note 24, at 572-73; TAEUBER & TAEUBER, *supra* note 26, at 14-15.

settled in separate areas within the cities.<sup>36</sup> The spatial separation in the north was as a result of prejudices part of veteran residents, but also economic and social considerations on the part of the migrants.<sup>37</sup> The legal backing for spatial segregation granted by the Supreme Court in the *Plessy vs. Ferguson* found expression in a variety of legal practices, which were designed to establish and maintain this separation. To prevent racial spatial integration, local governments made use of racial zoning ordinance<sup>38</sup> as well as enforcing racially restrictive covenants.<sup>39</sup> While the use of racial zoning ordinances was declared as unconstitutional by the Supreme Court in *Buchanan v. Warley* as early as 1916,<sup>40</sup> courts consistently rejected challenges to the enforcement of racially restrictive covenants.<sup>41</sup> These practices were so widely spread that by 1940, all the major industrial centers in the north had ghettos, which kept African Americans segregated spatially.<sup>42</sup> The Supreme Court's support for segregation, even if it was purportedly only with equal funding, as well as its legitimization of discriminatory and spatially segregating practices, made the law an active agent in the implementation of spatial segregation. In the second generation, therefore, the law served as a *facilitator* for the creation and maintenance of racial-based spatial separation.<sup>43</sup>

The third generation of spatial segregation began with the Supreme Court's rejection of the "Separate but equal" doctrine in *Brown v. Board of Education*.<sup>44</sup> After more than half a century of a steady rise in the rate of spatial separation, the Supreme Court in *Brown* ruled that racially-based separation should be considered categorically as

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<sup>36</sup> Allen J. Scott, *Industrialization and Urbanization: A Geographical Agenda*, 76 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 25, 43 (1986); Cutler, Glaeser & Vigdor, *supra* note 25, at 460.

<sup>37</sup> STANLEY LIEBERSON, A PIECE OF THE PIE: BLACKS AND WHITE IMMIGRANTS SINCE 1880 374-81 (U. of California Press, 1981); KLARMAN, *supra* note 16, at 25.

<sup>38</sup> Frank A. Aloï, Arthur Abba Goldberg & James M. White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule*, 1 U. Tol. L. Rev. 65 (1969); Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 101 (Charles Monroe Haar & Jerold S. Kayden eds., 1989); Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 23 (June Manning Thomas, Marsha Ritzdorf eds., Sage Publications, 1996).

<sup>39</sup> John P. Dean, *Only Caucasian: A Study of Race Covenants*, 23 THE J. OF LAND & PUB. UTIL. ECON. 428, 431 (1947); Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 544 (2000); Gotham, *supra* note 19, at 623-25.

<sup>40</sup> *Buchanan v. Warley*, 245 U.S. 60 (1917).

<sup>41</sup> BROOKS & ROSE, *supra* note 19, at 45.

<sup>42</sup> DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 41-46 (Harv. U. Press, 1993); Cutler, Glaeser & Vigdor, *supra* note 24, at 456.

<sup>43</sup> KLARMAN, *supra* note 16, at 48.

<sup>44</sup> *See Brown*, 347 U.S. 483.

discrimination, and therefore unconstitutional.<sup>45</sup> However, it can be argued that this was only the *symbolic* beginning of the third generation for two reasons. First, although the "separate but equal" doctrine was officially rejected in *Brown*, from a spatial perspective, this ruling was preceded by another ruling of the Supreme Court in *Shelley v. Kraemer*.<sup>46</sup> Here, the Supreme Court forbade racially restrictive housing covenants, denying the ability of state authorities and courts to enforce racial segregation, although it was privately initiated.<sup>47</sup> As Richard Rothstein argues, *Shelley v. Kraemer* was to spatial separation what *Brown* was to education.<sup>48</sup> Second, the first practical expression of the principled determination given in *Brown* came only after more than a decade, in the enactment of civil rights laws that outlawed housing discrimination based on race, color, religion, sex, or national origin.<sup>49</sup> But *Brown's* symbolism is essential not only in the question of the starting point of the third generation but also in the role of the law in perpetuating spatial separation in this generation. The third generation of American spatial segregation is distinct from the previous two generations, both concerning the social groups involved and in the role that the law played in perpetuating separation in space. Unlike the previous generations, the third generation of American spatial separation made the issue of separation more extensive in all aspects related to the social groups involved. Thus, while the first two generations focused on race and ethnic-based segregation, the third generation expanded the potential for spatial separation along economic lines.<sup>50</sup> Shifting the basis for spatial separation from race and ethnicity to income widens the circle of those involved in the spatial separation. However, differences in income level are often proxies for racial and ethnic affiliation.<sup>51</sup> This ongoing change in the basis for segregation, however, was a direct result of the role played by the law in the third generation.

The beginning of the third generation was encouraging regarding the role of law in the construction of space. On a declarative,

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<sup>45</sup> *See id.*

<sup>46</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>47</sup> *Id.*; *see also* BROOKS & ROSE, *supra* note 19, at 140-67.

<sup>48</sup> ROTHSTEIN, *supra* note 17, at 85.

<sup>49</sup> Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19.

<sup>50</sup> Alan J. Abramson, Mitchell S. Tobin & Matthew R. VanderGoot, *The changing geography of metropolitan opportunity: The segregation of the poor in U.S. metropolitan areas, 1970 to 1990*, 6 HOUSING POL'Y DEBATE 45 (1995); Paul A. Jargowsky, *Take the Money and Run: Economic Segregation in U.S. Metropolitan Areas*, 61 AM. SOC. REV. 984 (1996); Douglas S. Massey, Mary J. Fischer, William T. Dickens, & Frank Levy, *The Geography of Inequality in the United States, 1950-2000*, in BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 1 (William G. Gale & Janet Rothenberg Pack eds., 2003).

<sup>51</sup> Richard Reeves, Edward Rodrigue, & Elizabeth Kneebone, *Five evils: Multidimensional poverty and race in America*, BROOKINGS, Apr. 14, 2016, at 4-5.

constitutional level, the law denied the legitimacy of segregation and established the legal presumption that separation was categorically unequal. *Brown* was followed by several important civil rights laws, which had a significant impact on American society. These laws, especially the Civil Rights Act of 1964,<sup>52</sup> and the Fair Housing Act of 1968 (FHA),<sup>53</sup> changed basic principles in American law and outlawed discrimination with regards to residence or employment on the grounds of race, color, religion, gender, and national origin.<sup>54</sup> However, while in its constitutional capacity, the law rejected separation and advocated equality, in its private capacity, it legitimized separation. It arguably turned it into a constitutive feature of the American space. In this sense, the law created a gap between the declarative dimension and the practical one. The prohibitions on discrimination and segregation, which the legislation established on a public-constitutional level, disappeared when they were implemented in private law. The public-private distinction was introduced for the first time at *Shelley v. Kraemer*, which allowed restrictive racial covenants but forbade their state enforcement.<sup>55</sup> However, even after the enactment of the FHA, which prohibited discrimination on an individual level,<sup>56</sup> various exemptions were prescribed in the act itself that allowed the preservation and perpetuation of spatial separation.<sup>57</sup> The public-private distinction led to a number of significant spatial processes, the effects of which are still evident in the American space. One of these processes is known as the "White flight," which represents the large-scale migration of white populations from racially mixed urban areas to more racially homogeneous suburban regions.<sup>58</sup> While the reasons for the white escape are varied,<sup>59</sup> the legal possibility to limit the entry of others into residential projects by creating private proprietary mechanisms has enabled the preservation of separation between the suburbs and the urban space.<sup>60</sup> Another interrelated spatial process was the flourishing of homeowner's

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<sup>52</sup> Civil Rights Act, 42 U.S.C. § 2000e (1964).

<sup>53</sup> 42 U.S.C. §§ 3600 et seq.

<sup>54</sup> 42 U.S.C. §§ 3604-3606.

<sup>55</sup> See *Shelley*, 334 U.S. 1.

<sup>56</sup> 42 U.S.C. §§ 3604-3606

<sup>57</sup> See, e.g., Robert G. Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME L. REV. 199 (1978); James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605 (1999); John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 18 J. AFFORDABLE HOUSING & COMMUN. DEV. L. 145 (2008).

<sup>58</sup> William H. Frey, *Central City White Flight: Racial and Nonracial Causes*, 44 AM. SOC. REV. 425, 425-28 (1979); DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA* 39-40 (U. of California Press, 2009); RACHAEL A. WOLDOFF, *WHITE FLIGHT/BLACK FIGHT: THE DYNAMICS OF RACIAL CHANGE IN AN AMERICAN NEIGHBORHOOD* 2-36 (Cornell U. Press, 2011).

<sup>59</sup> Frey, *supra* note 57, at 425-28.

<sup>60</sup> ROTHSTEIN, *supra* note 17, at 93-109.

associations (HOAs); private associations which were formed for managing residential subdivision. While HOAs were first established in the United States in the mid-19th century, they nevertheless flourished in the third generation of American spatial segregation.<sup>61</sup> Along with the development of infrastructure and transportation, the main reason for using HOAs since the 1960s was due to their identification as frameworks for exclusion and spatial separation, which were protected by private law.<sup>62</sup> Finally, another process that has gained momentum since the 1970s is gentrification, the spatial process of changing the character of neighborhoods through the influx of more affluent residents and businesses.<sup>63</sup> Gentrification often increases the economic value of a neighborhood but forces low-income residents out due to the increased cost of rent and goods.<sup>64</sup> This involuntary residential displacement of economically weak population groups is a prominent expression of the third generation of American spatial segregation.<sup>65</sup> It is the result of the abandonment of space for private law and the market forces, which despite the declarations of integration and equality, establish and perpetuate spatial segregation on the ground. This article, however, will focus on another spatial mechanism, whose contribution to spatial segregation has received little legal attention. This process—spatial separation through municipal incorporation—which thrived throughout the third generation for spatial separation, has broad political, social, economic, and spatial implications that, along with its many benefits, may serve as a device for expanding discrimination in space. In the next part of the article, I will discuss the characteristics of separation through municipal incorporation, as well as the implications that it has for both space and society.

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<sup>61</sup> Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982); BROOKS & ROSE, *supra* note 19, at 102.

<sup>62</sup> Ellickson, *supra* note 61, at 1528; MASSEY & DENTON, *supra* note 42, at 36; Richard Thompson Ford, *Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1883-86 (1994); Daria Roithmayr, RACIAL CARTELS, 16 MICH. J. RACE & L. 45 (2010).

<sup>63</sup> NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY* (Routledge, 2005); LORETTA LEES, TOM SLATER, & ELVIN WYLY, *GENTRIFICATION* (Routledge, 2013).

<sup>64</sup> SMITH, *supra* note 63, at 25-28; Michelle Boyd, *Defensive Development: The Role of Racial Conflict in Gentrification*, 43 Urb. Aff. Rev. 751, 752-56 (2008); Edward Goetz, *Gentrification in Black and White: The Racial Impact of Public Housing Demolition in American Cities*, 48 Urb. Stud. 1581, 1582-83 (2011); LEES, SLATER, & WYLY, *supra* note 63, at 2-38.

<sup>65</sup> John A. Powell & Marguerite L. Spencer, Giving Them the Old “One-Two”: Gentrification and the K.O. of Impoverished Urban Dwellers of Color, 46 HOWARD L.J. 433 (2003).

## II. MUNICIPAL INCORPORATION: JUSTIFIED SOCIAL NEED OR DEVICE FOR SPATIAL SEPARATION?

Municipal incorporation is the process in which a community that is part of a county, unincorporated parish, or a town claims independence through incorporation as a separate city.<sup>66</sup> Such municipal independence has far-reaching effects on the space in which these new cities incorporate. Municipalities may affect taxes, school districts, elected representation, and public utility services.<sup>67</sup> They also affect the surrounding areas and communities, as they may lead to social fragmentation and competition over resources.<sup>68</sup> Data suggests that municipal incorporation was peaked in the 1950s and declined during the following decades.<sup>69</sup> However, even today, communities across the United States strive to incorporate as municipalities for various reasons.

Both new governance and global governance advocates celebrate municipal incorporation as an expression of decentralization of government powers; for various reasons, prominent among them are efficiency, democracy, and pluralism.<sup>70</sup> Rice, Waldner, and Smith suggest that communities strive to incorporate as municipalities for different, sometimes conflicting, reasons. According to their research, some communities struggle to incorporate as municipalities and defend their communities against annexation threats. Others do so to fight undesirable growth and to gain zoning control,<sup>71</sup> while others aim to incorporate to enhance public services and allow the community to control local revenue.<sup>72</sup> The research also found that less than 10 percent of the communities incorporate for exclusion purposes that are to exclude others on either a racial or economic basis.<sup>73</sup> The rate of exclusion as a basis for incorporation as a municipality, however, is particularly low, and as the researchers admit, does not appear to reflect the real rate of discrimination that characterizes these spatial moves.<sup>74</sup> Powell and Graham suggest that discrimination and the quest for exclusion based on

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<sup>66</sup> Briffault, *supra* note 10, at 73-74.

<sup>67</sup> For a state by state comprehensive review of the functions of local government and the fiscal autonomy of incorporated cities see DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL JR., *HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK* (2001).

<sup>68</sup> Rice et al., *supra* note 9, at 140; Briffault, *supra* note 10, at 75-77; Christopher J. Tyson, *Municipal Identity as Property*, 118 PENN ST. L. REV. 647 (2013).

<sup>69</sup> Rice et al., *supra* note 9, at 141.

<sup>70</sup> See Yishai Blank, *Localism in the new global legal order*, 47 HARV. INT'L L.J. 263, 269-73 (2006) [hereinafter Blank: Localism]; Yishai Blank, *Federalism, subsidiarity, and the role of local governments in an age of global multilevel governance*, 37 FORDHAM URB. L.J. 509, 546-47 (2010) [hereinafter Blank: Federalism]; Briffault, *supra* note 11.

<sup>71</sup> See Nadav Shoked, *Quasi-Cities*, 93 B.U. L. REV. 1971, 2001 (2013).

<sup>72</sup> Rice et al., *supra* note 9, at 142-47.

<sup>73</sup> *Id.* at 148.

<sup>74</sup> *Id.* at 149.

racial and economic grounds was a more significant motive in the construction of the space, and in the desire of communities to incorporate as municipalities.<sup>75</sup> Powell and Graham demonstrate that this spatial process as a result of intentional historic governmental policies: the "federally subsidized movement of the largely white middle class from city to suburb and the state-authorized establishment of thousands of individual autonomous governments in those suburbs."<sup>76</sup> Separation through municipal incorporation entailed various advantages for politically and economically strong, mostly white social groups. An independent municipality often gained autonomy in establishing boundaries, determining land-use policies, taxation, education, and the provision of other services.<sup>77</sup> Powell and Graham suggest that the result of this intentional governmental policy led to "the proliferation of thousands of suburban municipal jurisdictions, each seeking to create and attract a valuable tax base while simultaneously externalizing expensive social costs and excluding people of color."<sup>78</sup>

Incorporation as a municipality is not an imposed or mandatory spatial process. This spatial process requires the consent of intentional action by the community. An absolute majority of states have set requirements for the establishment of a new city.<sup>79</sup> Some states set density within the area or minimum distance from closest city requirements while others focused on minimum population requirements.<sup>80</sup> These requirements were sometimes set to make it difficult for communities to incorporate as new cities.<sup>81</sup> Others were set to ensure the efficiency and applicability of the process. In addition, all the states set methods for municipal incorporation—methods that are especially important for understanding the use of municipal incorporation as a device for spatial segregation.<sup>82</sup>

The methods that states set to approve municipal incorporation are varied. They range from relatively minor requirements (such as residents' petition to the state authorities) to particularly stringent conditions (such as the need for constitutionally mandated commission's approval). Most of the states, however, set approval procedures that range in between. For example, in Florida, Georgia, Nevada, New York, North Carolina, and

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<sup>75</sup> John A. Powell & Kathleen Graham, *Urban fragmentation as a barrier to equal opportunity*, in *RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM* 79 (Dianne M. Piche, William L. Taylor, Robin A. Reed eds., 2002).

<sup>76</sup> *Id.* at 85.

<sup>77</sup> *Id.* at 85-86.

<sup>78</sup> *Id.* at 86.

<sup>79</sup> See KRANE ET AL., *supra* note 67, at 472, 480 (Table A5).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 472.

<sup>82</sup> *Id.*



Washington, the state legislators must vote to approve incorporation.<sup>83</sup> In Arkansas, Kentucky, Louisiana, and Wisconsin, the approval authority is vested in an administrative judge.<sup>84</sup> And in Indiana, Montana, Nebraska, Virginia, West Virginia, and Wyoming, the county must agree to have the disputed area turned into a city.<sup>85</sup> While the methods for approving municipal incorporation differ from one state to another - especially when it comes to the governing or legal entities responsible for approving the separation - an absolute majority of states require that incorporation as a municipality be approved by a political or legal entity.

The methods set by the states for approving communities' incorporation as municipalities have an essential role in understanding the use of municipal incorporation as a spatial segregation device. Two reasons sharpen the importance of the methods used for separation through municipal incorporation: First, the methods of municipal incorporation may be easier to implement than those involving segregation on a racial or economic basis within a given municipality. Second, the criteria for deciding on municipal incorporation approval do not include the reference to the discriminatory consequences of this process. To illustrate these claims, consider a socially powerful community that seeks - whether for racial or economic reasons - to establish a separate school district for community children. In the legal situation after *Brown*, and the enactment of the civil rights laws, an attempt to segregate education within a given community is expected to be banned by either the legislators or the courts for being discriminatory.<sup>86</sup> This determination consists of the legal presumption, which has taken root in the American jurisprudence after *Brown* and the rejection of the "separate but equal" doctrine - whereby segregation is discrimination. This legal presumption, however, became an irrefutable presumption, according to which separation qua separation is conceived as discriminatory. This presumption has led the states to fight segregation, which turned it difficult to implement separation within a given

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<sup>83</sup> See *id.* at 480 (Table A6). FLA. STAT. §§ 165.01 et seq (Florida); GA. CODE ANN. § 36-31 (2018) (Georgia); NEV. REV. STAT. §§ 266.005 et seq (Nevada); N.Y. GEN. MUN. LAW §§ 119-M - 119-OOO (New York); N.C. GEN. STAT. § 120-163 (North Carolina); WASH. REV. CODE § 35.02 (Washington).

<sup>84</sup> ARK. CODE § 14-38-101- 117 (Arkansas); KY. REV. STAT. 81.060 (Kentucky); LA. REV. STAT. § 33:4 (2017) (Louisiana); WIS. STAT. § 66.0203 (Wisconsin).

<sup>85</sup> IND. CODE § 36-5-1-2 (Indiana); MONT. CODE ANN. §§ 7-2-4101-4111 (Montana); NEB. REV. STAT. § 17-101 (Nebraska); VA. CODE ANN. § 1-224 (Virginia); W. VA. CODE §§ 8-2-1 (West Virginia); WYO. STAT. ANN. §§ 15-1-201-15-1-207 (Wyoming)

<sup>86</sup> According to a recent study, states tightening the procedures for school district secession due to the economic and discriminatory consequences of these measures. See FRACTURED: THE ACCELERATING BREAKDOWN OF AMERICA'S SCHOOL DISTRICTS (Edbuild, 2019), <https://edbuild.org/content/fractured/fractured-full-report.pdf> [hereinafter Edbuild].

community.<sup>87</sup> Part of the measures taken by the states in their fight against social discrimination was to toughen the conditions for school district secessions.<sup>88</sup> As recent research found, the processes for school district secessions in most states are often lengthy, require the consent of the seceding and the remaining communities, and require the approval of different government agencies.<sup>89</sup> These conditions have been set to make it more difficult to create social segregation in schools, wherein some states the approval procedures deliberately require the approving agencies to consider racial or socioeconomic factors.<sup>90</sup>

The legal presumption that segregation is discrimination puts cables on the hands of social groups who are seeking to separate themselves from other social groups. Social groups' desire for separation, then, leads them to try and find other ways to achieve their goal. The relative ease of approval procedures turns separation through municipal incorporation into a means for circumventing the legal prohibition of social segregation between social groups in the same community. It allows social groups who want to separate from other groups to avoid the legal presumption of segregation being discriminatory. As mentioned, in some cases, the procedures involved in obtaining approval for municipal incorporation are shorter and less complex than the processes involved in school district secessions.<sup>91</sup> Therefore, strong social groups that seek to separate from disadvantaged social groups would prefer to invest efforts in establishing a new city rather than to create separation within the community. However, the duration of the proceedings and the requirements involved in fulfilling them are not the only reason for this preference. Investigation of the criteria that the political or legal approving authorities are required to consider before approving municipal incorporation reveals that these do not include any reference to the motives for incorporation and, in particular, to the racial and economic consequences it may produce.<sup>92</sup> The exclusion of mandatory examination

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<sup>87</sup> *Milliken v. Bradley*, 418 U.S. 717 (1974). *Milliken* significantly weakened the power of the lower courts to maintain desegregation efforts, it should be noticed that at the declarative level, segregation is still conceived as discriminatory. *See id.*

<sup>88</sup> *See* Edbuild, *supra* note 86.

<sup>89</sup> *Id.*

<sup>90</sup> For example, in Wisconsin the law requires the approval for school secession examination of “[t]he socioeconomic level and racial composition of the pupils who reside or will reside in territory proposed to be detached from one school district and attached to an adjoining school district.” *See* WIS. STAT. ANN. § 117.15. Similar requirements were set by Arkansas (ARK. CODE § 6-13-1504); Nebraska (NEB. REV. STAT. ANN. § 79-441); Wyoming (WYO. STAT. ANN. §§ 21-6-201, 21-6-207); Colorado (COLO. REV. STAT. § 22-30-114) and California (CAL. EDUC. CODE § 35753).

<sup>91</sup> *See* Edbuild, *supra* note 86. *See infra* Part VI.A (discussing St. George, Louisiana incorporation).

<sup>92</sup> Briffault, *supra* note 11, at 74-76 (concluding that the current requirement for municipal incorporation “do not address the effect of the formation of a new government on the surrounding area, the region or the state.”). ...

of the racial, social, and economic implications of the municipal incorporation makes it an escape route for strong communities that seek to differentiate spatially.

However, the fact that municipal incorporation *may* serve as a means for social segregation and discrimination should not turn it into an invalid and illegitimate spatial process. As most scholars suggest, municipal incorporation may be socially desirable for a number of distinct reasons.<sup>93</sup> Understanding that municipal incorporation may serve essential social needs on the one hand, but as a device for spatial discrimination, on the other, requires a rethinking of the approval procedures for these applications. Examination of the approval procedures in the various states reveals that the central node where institutional change can be implemented to determine the purpose and implications of specific municipal incorporation is the approval requirement by a political or judicial entity. Therefore, before approving the incorporation, the approval authority should consider the social, spatial, and economic implications of the incorporation. An obligation to consider these considerations during the incorporation procedures will allow the approving authority to be exposed to the justifications for the requested separation and the considerations against its implementation.

Due to the devastating social implications of spatial discrimination, the premise of this examination should be the legal presumption that segregation - even through municipal incorporation - is discriminatory. However, due to the essential social needs that municipal incorporation may serve, it would be wrong to regard this presumption as irrefutable, only because the two social groups involved have different social characteristics. In the next part of the article, I will discuss the need to recognize that the legal presumption that segregation is discrimination is a starting point for any determination process regarding municipal incorporation, but is not necessarily the result of it.

### III. THE SOCIAL COSTS OF TURNING SEPARATION AS DISCRIMINATION INTO AN IRREFUTABLE PRESUMPTION

Almost 125 years have passed since the Supreme Court ruled that Homer Plessy deliberately violated Louisiana's Separate Car Act of 1890, which required "equal, but separate" train car accommodations for white and non-white passengers.<sup>94</sup> The *Plessy* Court endorsed the "separate but equal" doctrine, which became the cloud pillar of legislation and rulings in the second generation of spatial segregation in the United States.<sup>95</sup>

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<sup>93</sup> Rice et al., *supra* note 9, at 140; Briffault, *supra* note 10, at 76-77 (1990); Smith & Waldner, *supra* note 10, at 150-1; Blank: Localism, *supra* note 70, at 269-73; Shoked, *supra* note 71, at 2001.

<sup>94</sup> See *Plessy*, 163 U.S. 537.

<sup>95</sup> See KLARMAN, *supra* note 16, at 48-49.

While the doctrine has encountered several challenges over the years, it is common to consider the ruling in *Brown* as the one in which the court rejected the "separate but equal" doctrine, holding that its implementation in the education field was discriminatory.<sup>96</sup> Nearly 65 years have passed since *Brown*, and it is now clear that the ruling did not achieve the results that separation opponents were hoping.<sup>97</sup> The spatial separation between social groups in America is not only not diminished, but there is data to indicate its expansion.<sup>98</sup> Separation motives have also not changed significantly over the last century. Racial and economic motives drive most of the segregation of social groups in America.<sup>99</sup> As mentioned, spatial segregation in the third generation is carried out mainly by the use of market forces as well as private law tools.<sup>100</sup> On the public and constitutional level, however, the Court's determination in *Brown* - that "separate but equal" is discriminatory - has become an irrefutable presumption about the discriminatory nature of separation. The irrefutability of this presumption intensified with the enactment of civil rights laws in the 1960s. This was the background for the opposition for separation demands such as those of the black separatist movement of the 1960s - demands that were opposed to the pretext that separation qua separation is morally wrong and discriminatory.<sup>101</sup> The link created by the *Brown* court, then, between separation and discrimination had turned into a complicated one. Alongside the fact that it was not certain that this was the intention of the *Brown* court,<sup>102</sup> it seems that establishing such an irrefutable presumption has both a normative and positive cost.

At the outset, it is important to make clear that the question at the heart of this part is not whether it is right to set a presumption according to which segregation between social groups is a discriminatory practice.

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<sup>96</sup> See *Brown*, 347 U.S. 483.

<sup>97</sup> Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1334 (2004) ("As an articulation of principle, *Brown* has succeeded. As a tool of integration, it has failed. American children today attend increasingly segregated schools."). See also Gary Orfield, Erica Frankenberg, Jongyeon Ee, Jennifer B. Ayscue, *Harming Our Common Future: America's Segregated Schools 65 Years after Brown*, THE CIV. RTS. PROJECT (May 10, 2019) <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf>; Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157 (2000).

<sup>98</sup> Douglas S. Massey, Jonathan Rothwell, & Thurston Domina, *The changing bases of segregation in the United States*, 626 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 74 (2009).

<sup>99</sup> *Id.*

<sup>100</sup> See *supra* notes 55-63 and accompanying text.

<sup>101</sup> Ankur J. Goel, Willie J. Jr. Lovett, Robert Patten & Robert L. Wilkins, *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker than Brown*, 23 HARV. C.R.-C.L. L. REV. 415 (1988).

<sup>102</sup> See, e.g., John A. Powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 U.S.F. L. REV. 419, 459 (2000).

History had answered this question on the affirmative. The widespread use of spatial separation to discriminate on racial or socio-economic grounds in the second and third generations of American spatial segregation requires recognition of the ability of segregation to serve as a mechanism for discrimination. In a sense, the widespread use of separation for discriminatory purposes justifies conceiving separation as the usual suspect for discrimination. The question, then, is whether it is right to make this presumption *irrefutable* - or, in other words, whether *any* separation between social groups should be considered discriminatory. In this part, I argue that turning the presumption about the discriminatory character of separation between social groups into an irrefutable one may cause both normative and positive distortions in the quest for equality.

Setting an inextricable link between separation and inequality may harm the positive quest for equality as it masks other, in times more acute, causes for inequality in society. According to this argument, separation is only one means out of many that powerful social groups may use in order to maintain their superiority. The most significant support for this argument was given in the first generation of spatial separation in America. In this generation, even before the enactment of the Jim Crow Laws and the application of the "separate but equal" doctrine, the spatial reality was relatively integrative.<sup>103</sup> And yet, the intensity of discrimination and racial subordination that prevailed during the period of slavery was significant and devastating.<sup>104</sup> Racial discrimination and subordination were carried out in the first generation without using the mechanism of separation. Separation mechanisms were introduced in the American space only *after* the law had banned other subordinate mechanisms. This understanding reveals that while separation may indeed serve as a mechanism for discrimination, it is not the only mechanism and is doubtful that it is the most offensive. While this understanding should not legitimize separation, it should nevertheless avoid making it the only culprit in the discrimination of disadvantaged social groups - a reality that disguises various discrimination mechanisms that operate regularly.

Second, the irrefutable presumption that separation between social groups is discriminatory is also questioned normatively. Consider, for example, a case in which a disadvantaged group in the population demands spatial separation because it believes such separation will strengthen its economic status or will empower its communal identity. Is such a case similar in character to the case where the segregation is demanded by a strong social group, seeking to separate from weaker social groups? Intuitively, the answer should be no! While the less affluent claim for segregation is intended to achieve social equality, the more affluent claim for discrimination is intended to preserve society's

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<sup>103</sup> See sources cited *supra* note 24.

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

inequality. And yet, legally, these two claims for separation are expected to receive similar treatment. The presumption that separation is discriminatory prevents creating a distinction between different claims for separation, although they may carry different circumstances and implications on social equality. Consider, for example, the Black Separation Movement in the 1960s. The movement claimed that African Americans should preserve spatial separation from whites to protect their identity and culture.<sup>105</sup> Integration, argued the movement supporters, will not strengthen the personal and group identity of African Americans but would force them to assimilate in the white culture.<sup>106</sup> These empowerment-based arguments still find expression in the recent flourishing of Afrocentric schools in Brooklyn, NY. These schools aim to empower African American children by providing an educational framework that would celebrate black culture and history.<sup>107</sup> The law, however, showed little tolerance for these claims.<sup>108</sup>

Establishing an irrefutable presumption that separation qua separation is discriminatory, therefore, prevents the ability to differentiate between different cases, circumstances, and contexts. It fails to capture the different roles that separation between social groups may play, as well as the various implications of such spatial separation. The next part of the article seeks to examine in depth the range of normative considerations that justify the separation between different social groups, on the one hand, and denying it on the other. This investigation would provide a comprehensive platform for considering the normative scope of the segregation as discrimination presumption.

#### IV. THE DIFFERENT FACES OF SEPARATION: NORMATIVE JUSTIFICATIONS AND OBJECTIONS

Can spatial separation between social groups with different characteristics, worldview or lifestyle be justified? While the legal presumption is that separation is discriminatory, there are other reasons why separation might not be desirable. For example, if we allow each social group to separate spatially, we will soon find ourselves with a

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<sup>105</sup> KWAME TURE & CHARLES V. HAMILTON, *BLACK POWER: POLITICS OF LIBERATION IN AMERICA* 164-177 (1992) (calling for the African American communities to take control over their community institutions as a step toward self-determination).

<sup>106</sup> *Id.*

<sup>107</sup> Eliza Shapiro, *'I Love My Skin!' Why Black Parents Are Turning to Afrocentric Schools*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/nyregion/afrocentric-schools-segregation-brooklyn.html>.

<sup>108</sup> *United States v. Fordice* 505 U.S. 717 (1992). Interestingly, Justice Thomas's concurring opinion expresses a concern that the strict review of policies that divided students by race should not be used against historically black universities in the state. *Id.* at 745-749.

divided and fragmented society – one that lacks any sense of a shared community. To further investigate this question, this part will discuss three prominent justifications for spatial separation between social groups with different characteristics, as well as three objections. These considerations should be at the center of any examination designed to confirm spatial separation.

#### A. Justifications for Spatial Separation of Social Groups

##### 1. *Stronger Alone: The Empowerment Justification*

Minorities have often been victims of spatial and residential segregation.<sup>109</sup> As Massey, Rothwell, and Domina demonstrate, minorities such as African Americans, Latinos, and Asians were the most prominent victims of spatial separation, which consisted, at least until the 1970s, on race and ethnicity.<sup>110</sup> The change in the characteristics of American spatial segregation, from racial and ethnically based segregation to income-based segregation, did not significantly change the location of minorities in this equation. Then, as today, minorities in American society suffered from spatial exclusion,<sup>111</sup> as well as repeated attempts by government and private parties to establish and maintain spatial separation.<sup>112</sup> The social and legal battle to diminish racial and ethnic-based spatial segregation in the United States was primarily the battle of minorities seeking to be considered as equals in society.<sup>113</sup> The rejection of the “separate but equal” doctrine has been a significant yet symbolic milestone in the struggle for equality for minorities in the United

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<sup>109</sup> See, e.g., Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVTL. L. 89, 97 (1998) (“Racially segregated housing patterns in the United States exist to a large degree as a result of intentional discrimination against minorities.”); Jania S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 UCLA L. REV. 1689, 1695 (1996).

<sup>110</sup> Massey, Rothwell & Domina, *supra* note 14, at 75.

<sup>111</sup> See Seitles, *supra* note 109, at 97-102; See JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 89-103 (1995); Natasha M. Trifun, *Residential Segregation after the Fair Housing Act*, 36 HUM. RTS. 14 (2009).

<sup>112</sup> See Trifun, *supra* note 111, at 14 (“Discriminatory behavior makes the housing search process more expensive for African Americans and other minority groups, and limits these groups’ choices to poorer neighborhoods with inferior housing.”).

<sup>113</sup> This understanding of the direct connection between separation and inequality was at the heart of the civil rights movement a struggle to end segregation. See, e.g., Steve Valocchi, *The Emergence of the Integrationist Ideology in the Civil Rights Movement*, 43 SOC. PROBS. 116, 126 (1996) (“At a time when a debate raged within the black community about the meaning of racial equality in the United States, this relationship between the NAACP and the Roosevelt Administration served to narrow the agenda toward a specific definition of rights that focused on integration and the elimination of segregation at all costs.”).

States,<sup>114</sup> by declaring that a worthy society cannot legitimize separation between people because of their racial, ethnic, or religious difference. The Court's legal declaration in *Brown* celebrates equality and inclusiveness.<sup>115</sup> However, it failed to recognize that sometimes, spatial separation empowers minorities instead of marginalizing them.

Attempts to prevent racial and ethnic-based spatial segregation over the years led both state and local governments to adopt inclusive spatial policies, such as subsidized housing, inclusionary zoning, and restrictions on discrimination.<sup>116</sup> However, in response to these integration efforts, some scholars argue that the quest for equality was being obscured.<sup>117</sup> The law, as expressed in the Supreme Court ruling in *United States v. Fordice* showed little tolerance for these claims.<sup>118</sup> However, scholars, as well as social activists, suggest that there are cases in which separation may be desirable.<sup>119</sup> This would be the case, for example, in a situation where integration strips the minority community of essential characteristics, history, and values.<sup>120</sup> Another argument not entirely detached from the former is that separation may in times empower minorities, whether because they can preserve their history and values, or because they may develop a sense of belonging and social affiliation.<sup>121</sup> The empowerment justification stood at the core of both the black separatist movement of the 1960s and the incorporation attempts of black communities in the 1980s.<sup>122</sup> It also found to be the prominent influencing factor for the municipal incorporation of no less than 44 newly incorporated

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<sup>114</sup> McUsic, *supra* note 97, at 1334.

<sup>115</sup> *Brown*, 347 U.S. 483. *See also* McUsic, *supra* note 97.

<sup>116</sup> For a comprehensive review of the policies embraced to fight with both racial and income-based segregation *see* Florence W. Roisman, *Opening The Suburbs To Racial Integration: Lessons For The 21st Century*, 23 W. NEW ENG. L. REV. 65, 67-72 (2001); Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971 (2002); Jennifer M. Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 369-384 (1995).

<sup>117</sup> *See, e.g.*, Michael R. Tein, *The Devaluation of Nonwhite Community in Remedies for Subsidized Housing Discrimination*, 140 U. PA. L. REV. 1463, 1470 (1992); Henry W. Jr. McGee, *Afro-American Resistance to Gentrification and the Demise of Integrationist Ideology in the United States*, 23 URB. LAW. 25, 40 (1991) ("Despairing of meaningful racial integration of white areas, Afro-Americans may come to demand more dominion of their own neighborhoods. In the gentrification context, blacks may resist efforts to integrate their neighborhoods.").

<sup>118</sup> *See Fordice*, 505 U.S. 717.

<sup>119</sup> *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990); Goel et al., *supra* note 102, at 417-18.

<sup>120</sup> Goel et al., *supra* note 101, at 417-418; Peller, *supra* note 119, at 796.

<sup>121</sup> Goel et al., *supra* note 101, at 475 ("Integration fails to realize that 'cultural identity' can be a starting point from which blacks may begin, as a group, to become economically and politically empowered."); ROY L. BROOKS, *INTEGRATION OR SEPARATION?* 194, 246 (Harv. U. Press, 1996).

<sup>122</sup> Goel et al., *supra* note 101, at 419-25.



municipalities (e.g., city, town or village) between 1990 and 2010, according to recent research conducted by Smith and Waldner.<sup>123</sup> These empowerment-based arguments still find expression in the recent flourishing of Afrocentric schools in Brooklyn, NY. Approximately six Afrocentric schools in Brooklyn, in which about 2,300 children are enrolled, decided to provide African American children with an educational framework that would celebrate black culture and history.<sup>124</sup> As Rafiq Kalam Id-Din II, the founder of the Ember Charter School, described as its mission: "Everything you do needs to be focused on agency and empowerment."<sup>125</sup>

Segregation as empowerment justifies spatial segregation, where it contributes to the minority's ability to flourish. This understanding echoes some of the arguments on behalf of multiculturalism, which supports limited segregation of minorities from general society.<sup>126</sup> However, it should be recognized that the empowerment justification depends upon the characteristics of the community and the need, insofar as it exists, for spatial separation to recover past injustices, and to empower the community. It is also important to note that such a demand for spatial separation must come from the minority community itself and cannot be imposed by an external party.<sup>127</sup> The significance of these qualifications is that the empowerment justification for spatial separation cannot, and should not, be broadly exercised. It requires a careful examination of the circumstances of each case and the characteristics of each community.

## 2. *Live and Let Live: The Pluralistic Justification*

Another justification for the spatial separation of communities is rooted in a fundamental pluralistic approach, which imposes a duty on liberal states to allow all citizens to live under whatever conception of the

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<sup>123</sup> Smith & Waldner, *supra* note 10, at 150-51

<sup>124</sup> Shapiro, *supra* note 107.

<sup>125</sup> *Id.*

<sup>126</sup> See, e.g., WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 141-142, 258 (1989) ("It would not have taken much investigation for Marshall or glazer to discover that Indians suffer the same harms and feel the same humiliation when they are denied the freedom to live fully in their own community, as a result of forced integration, that blacks felt when they were denied the freedom to live fully in their community, as a result of forced segregation."); Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture* 61 SOC. RES. 491 (1994) ("A liberal state may not be neutral with respect to the cultures of minorities, especially those in danger of dwindling or even disappearing. The state is obligated to abjure its neutrality, in our view, not for the sake of the good of the majority, but in order to make it possible for members of minority groups to retain their identity.").

<sup>127</sup> Goel et al., *supra* note 101, at 417 ("The advocates of incorporation argue that a separateness which is voluntary not imposed by the dominant power, but recognizing the racial divisions within society-can promote local control and responsiveness to the needs of the black community.").

good they deem appropriate.<sup>128</sup> At the core of the foundational pluralistic approach lies the understanding that every person may hold different beliefs and values. Elizabeth Anderson identifies this principle, saying that “[p]eople experience the world as infused with many different values,”<sup>129</sup> and the state should, therefore, be obligated to allow all people to live by their values through the establishment of diverse social institutions, which people can use to promote these values.<sup>130</sup> Anderson, therefore, argues that the state has an obligation “to expand the range of significant opportunities open to its citizens by supporting institutions that enable them to govern themselves by the norms internal to the modes of valuation appropriate to different kinds of goods.”<sup>131</sup> Applying Anderson’s pluralistic approach to the spatial discourse means that the liberal state must be prepared to allow spatial segregation if it contributes to individuals’ actualization of their values and norms.<sup>132</sup> It would legitimize separation among social groups whenever their integration leads one of the parties, or both, to lose their ability to realize their conception of the good.

The pluralistic justification for spatial segregation bears similarities to the empowerment justification. Like the empowerment justification, the pluralistic justification seeks to enable communities to preserve their characteristics, values, and norms according to which they operate. As with the empowerment justification, the pluralistic justification does not apply to the forced application of spatial segregation but instead conditions separation on the community’s free will or demand. However, there are also differences between these two justifications. The prominent among them relate to the characteristics of communities that may require spatial separation. According to the empowerment justification, only minority communities that historically suffered oppression, discrimination, and exclusion by the majority should be permitted to separate spatially. The legitimization of spatial separation, a policy perceived as discriminatory and socially harmful, stems from a long history of discrimination and exclusion. According to this justification, minority communities can correct past injustices by using the tools with which they are already accustomed. It is different, however, if the pluralistic justification is examined. According to the pluralistic justification, spatial segregation is not unique to minority communities. Any community whose unique characteristics and ability to realize its

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<sup>128</sup>For a foundational pluralistic approach *see generally* ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (Harv. U. Press, 1995). *See also* Shai Stern, *When One’s Right to Marry Makes Others “Unmerry”*, 79 ALB. L. REV. 627 (2015).

<sup>129</sup> ANDERSON, *supra* note 128, at 1.

<sup>130</sup> *Id.* at 149; Stern, *supra* note 128 at 642.

<sup>131</sup> ANDERSON, *supra* note 128, at 149.

<sup>132</sup> Nomi Maya Stolzenberg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J. CONTEMP. LEGAL ISSUES 897, 934 (2002); Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L.J. 1 (1995).

members' worldview requires spatial separation, should be permitted to do so. While the empowerment justification is based primarily on using the past to construct the future, the pluralistic justification aims mainly to foster the ability of communities to function correctly in the present.

### 3. *Good Fences Make Good Neighbors: The Utilitarian Justification*

The most common justification used to legitimize spatial separation between social groups is based on utilitarian principles. Studies that tried to trace the reasons for separation through municipal incorporation in the United States found that an overwhelming majority of the reasons that underpinned the petitions for incorporation were due to economic considerations.<sup>133</sup> Conflicts between communities on resources (with an emphasis on land), as well as on control local revenue, are the main factors in igniting incorporation processes.<sup>134</sup> These conflicts trigger the utilitarian justification for spatial separation in two manners: first, separation through municipal incorporation may improve economic efficiency through competition by driving down service costs.<sup>135</sup> Second, separation through municipal incorporation may prevent communities from experiencing what Hardin termed as the “Tragedy of the commons”.<sup>136</sup> Co-ownership in a resource may become a tragedy if two or more co-owners cannot reach an agreement about the proper use or management of their shared resources. In such a case, so argue Hardin, division and separation would be more efficient than the continuation of co-ownership.<sup>137</sup> This rationale, which calls for division and separation to ensure efficiency, may also justify the spatial separation between different communities. When communities holding a completely different set of values and norms are required to share resources, such as educational institutions, they may face ongoing conflicts that will prevent any of them from deriving the proper and desired benefit of those institutions .

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<sup>133</sup> Rice et al., *supra* note 9, at 142-47; Smith & Waldner, *supra* note 10, at 150-51. For a broader debate over the economic effects of spatial consolidation and fragmentation see Richard Briffault, *Our Localism: Part II--Localism and Legal Theory*, 90 COLUM. L. REV. 346, 401-02 (1990); Kenneth V. Greene & Thomas J. Parliament, *Political Externalities, Efficiency, and The Welfare Losses from Consolidation*, 33 NAT'L TAX J. 209 (1980); Robert Warren, *A Municipal Services Market Model of Metropolitan Organization*, 30 J. OF THE AM. INST. OF PLANNERS 193, 197-98 (1964).

<sup>134</sup> *Id.*

<sup>135</sup> Vincent Ostrom, Charles M. Tiebout, & Robert Warren, *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 THE AM. POL. SCI. REV. 831 (1961). See also NANCY BURNS, *THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS* (Oxford U. Press, 1994); Briffault, *supra* note 133, at 401-02; Rice et al., *supra* note 9, at 142-47.

<sup>136</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (Dec. 13, 1968).

<sup>137</sup> See discussion in ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 12-13 (1990).

While the empowerment and pluralistic justifications share multiple similarities, among which the voluntary demand of a community to differentiate spatially based on its characteristics is prominent, the utilitarian justification involves an entirely different view. According to the utilitarian justification, separation between social groups should also be implemented if one of the groups sharing a common space does not wish to implement it. The reason for this lies in the perspective that characterizes utilitarian perceptions, which is the consideration of aggregate welfare, regardless of the will of those who make up the equation. This aspect of the utilitarian justification has the potential to facilitate the imposition of spatial segregation on various communities, ignoring their characteristics and the implications of that separation on the conduct of the community. In a sense, the utilitarian justification's disregard for the voluntary choice of spatial segregation is reminiscent of the dark ages, when racial discrimination was justified for utilitarian reasons, in service of perceived aggregate welfare.<sup>138</sup> These and other objections will be the focus of the next part, which will explain the reasons for opposing spatial separation between different social groups.

## B. Objections to Spatial Segregation

### 1. *It's not you, it's me: Influences on General Society*

Each of the three justifications for spatial segregation, while differing in the scope and scale of their application, holds that social groups should be allowed to segregate spatially in some instances. Whether segregation is required to empower long-oppressed communities because of its essential role in preserving a community's norms and values or because it contributes to the aggregate welfare, spatial segregation can be legitimized despite its moral flaws and historic role in fostering discrimination. One objection to legitimizing spatial segregation, despite its potential contribution to minority communities or to society as a whole, is that it imposes costs and improper norms on society as a whole. This objection has multiple layers. The first often called the "slippery slope" argument, suggests that legitimizing spatial separation will not successfully be restricted within defined boundaries, as in the case of a voluntary demand of a minority community. Instead, it will cross borders and expanses, eventually spreading to the entire American space.<sup>139</sup>

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<sup>138</sup> For a comprehensive discussion on arguments that support segregation because of its economic benefits, see Robert L. Jr. Hayman, *Neutral Principles and the Resegregation Decisions*, 9 Widener L. Symp. J. 129, 142-149 (2002). See also KLARMAN, *supra* note 16.

<sup>139</sup> Will Kymlicka, *Do we need a liberal theory of minority rights? Reply to Carens, Young, Parekh and Forst*, 4 CONSTELLATIONS 72, 80 (1997) ("One of the most common and influential objections to minority rights for any group is that it would lead

According to this view, even under the allegedly egalitarian spatial policies of the third generation of American spatial segregation, racist and discriminatory attitudes remain dormant beneath the surface.<sup>140</sup> Widening the prohibitions on segregation in public law has led to discriminatory and racist views being expressed mainly through market forces and private law. Therefore, reinstating the possibility of spatial separation could, on a public level, be liable to incite racist and discriminatory behaviors, and drive spatial segregation even in situations where there is no justification. In a sense, the slippery slope argument seeks to prevent the return of America to the second generation of spatial segregation, in which spatial separation was legitimate and justified for various reasons by a large portion of the population. Banning separation, even when is voluntary, therefore, has both expressive and preventive role.

A second aspect of legitimizing separation between social groups is that it may lead to over fragmentation of society, resulting in a decline in social cohesion and an increase in social exclusion.<sup>141</sup> Expanding communities' ability to separate may lead to social over-fragmentation, which will undermine the entire society's ability to function correctly, prevent proper treatment of cross-community crises, and deny proper services in the state and county levels.<sup>142</sup>

Finally, the objections for separation might also concern the possibility that community norms, for the sake of which the community has separated from society, will bleed into the common space outside the community. This is a counter-intuitive argument that is based on the notion that spatial separation allows illiberal communities to exacerbate the application of non-liberal norms in community space, thereby deepening the impact they have on society as a whole.<sup>143</sup> The core of this argument is that when illiberal communities integrate with society, they reduce the scope and scale of the application of their illiberal norms, while, when given spatial autonomy, they are expected to implement these norms more forcefully. The fact that the state legitimizes such conduct

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us down a 'slippery slope' in which more and more groups would demand more and more rights, leading to the eventual disintegration of society.”).

<sup>140</sup> MOON-KIE JUNG, *BENEATH THE SURFACE OF WHITE SUPREMACY: DENATURALIZING U.S. RACISMS PAST AND PRESENT* 21-54 (2015) (investigating past and present racist trends in American space).

<sup>141</sup> See, e.g., David Lowert, Ruth Hoogland DeHoog, & William E. Lyons, *Citizenship in the Empowered Locality: An Elaboration, a Critique, and a Partial Test*, 28 URB. AFF. Q. 69 (1992); John Powell, *Sprawl, Fragmentation, and the Persistence of Racial Inequality: Limiting Civil Rights by Fragmenting Space*, in URBAN SPRAWL: CAUSES, CONSEQUENCES & POLICY RESPONSES 73 (The Urb. Inst. Press, 2002). Cf. Richard C. Feiock, Jill Tao, & Linda Johnson, *Institutional Collective Action: Social Capital and the Formation of Regional Partnerships*, in METROPOLITAN GOVERNANCE: CONFLICT, COMPETITION, AND COOPERATION 147-158. (Richard C. Feiock ed., Georgetown U. Press, 2004).

<sup>142</sup> See Briffault, *supra* note 133, at 433-34.

<sup>143</sup> Stolzenberg, *supra* note 132.

may affect the norms in society. To conclude, the influence objection calls for the prohibition of spatial separation between social groups, out of concern that such separation would impose improper costs and norms in the space around the community.

## 2. *One for all?: Harm to Community Members' Autonomy*

A different objection to legitimizing spatial segregation stems from a concern for the individual autonomy of members of the segregated community.<sup>144</sup> According to this argument, the three justifications for spatial separation between social groups ignore the interests of individual members of the community and, no less importantly, their autonomy. The autonomy objection recognizes that communities, although important to their members, may violate their independence to the point of claiming that they will sacrifice themselves for the sake of the community.<sup>145</sup> In such cases, communities, however important they may be, can become prisons for individuals.<sup>146</sup>

Spatial separation does not create communities or shape their characteristics. The various justifications for spatial segregation refer to existing communities that seek to differentiate themselves spatially. However, spatial separation of the community from other communities intensifies or is likely to intensify violation of the autonomy of individual members of the community.<sup>147</sup> In cases of minority, and especially illiberal communities, we might suggest two explanations. First, spatial segregation empowers the community as a whole and its leaders in particular.<sup>148</sup> Empowering community leaders creates the potential for further reduction of individual autonomy, further subordinating the individual's discretion to the directives of leadership. Second, and equally important, spatial segregation creates a barrier between those who belong to the community and those who do not. This barrier, although it may have existed socially or covertly when the communities intertwined, prevents individual members of the community from being exposed to

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<sup>144</sup> See, e.g., Jeff Spinner-Halev, *Autonomy, association and pluralism*, in MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY 157 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005); Allen E. Buchanan, *Assessing the Communitarian Critique of Liberalism*, 99 ETHICS 852, 861 (July 1989); Hanoch Dagan & Michael H. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 552 (2001); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 729 (1998).

<sup>145</sup> See, e.g., Dagan & Heller, *supra* note 144, at 552; Gregory S. Alexander & Eduardo M. Penalver, *Properties of Community*, 10 THEORETICAL INQ. L. 127, 144-45 (2009); Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 3, 42 (1989).

<sup>146</sup> Dagan & Heller, *supra* note 144, at 567-69 (discussing the importance of the right to exit a community); Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165 (1998).

<sup>147</sup> See Stern, *supra* note 128, at 635.

<sup>148</sup> Stolzenberg, *supra* note 132, at 932-33.

other norms, and to those who believe in them.<sup>149</sup> Exposure to alternatives generally develops the ability to think autonomously. As noted, this barrier also reduces the ability of individual members of the community to create social, economic, and cultural affiliations with those who do not belong to the community and thus has a chilling effect on their ability to exit the community as they choose.<sup>150</sup>

### 3. *(Economically) stronger together: The Utilitarian Objection*

The utilitarian objection to spatial segregation of minority communities has many aspects, the common denominator of which is the conclusion that granting legitimacy for spatial segregation may harm aggregate welfare.<sup>151</sup> In this part, two such utilitarian objections to the legitimization of spatial separation of social groups will be presented. The first suggests that segregation involves inherent costs imposed on both communities: the one that separates and the one that remains. If both communities are in the same economic situation, there is likely to be no separation. The reason for this lies in the fact that separation is usually demanded either by strong communities that seek to differentiate spatially from disadvantaged communities or by underprivileged communities - that is, minority communities - who seek to differentiate spatially for reasons of empowerment or preservation of their worldview. Thus, in a separation scenario, one community is likely to be stronger financially than the other. Therefore, although - as evidenced by the utilitarian justification I mentioned above - one of the communities may improve its economic situation following the separation, the disadvantaged community is likely to be economically affected. When considering aggregate welfare, the post-separation situation seems unlikely to change and may even worsen. Disadvantaged communities that aim to spatially separate may not be able to bear the costs of municipal mechanisms and institutions, as well as the provision of services to the residents of the new city. As the socially strong community is the one demanding separation - then transferring tax money to the new city may impair the ability of the remaining (disadvantaged) community to function economically.

The second aspect of the utilitarian objection involves the social cost of the separation, emphasizing the over-fragmentation it can lead to in

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<sup>149</sup> Shai Stern, *Takings, Community, and Value: Reforming Takings Law to Fairly Compensate Common Interest Communities*, 23 J. L. & POL'Y 141 (2014).

<sup>150</sup> GEORG SIMMEL, *CONFLICT & THE WEB OF GROUP AFFILIATIONS* 95-125 (1955); Gideon Bolt, Jack Burgers, & Ronald van Kempen, *On the social significance of spatial location; spatial segregation and social inclusion*, 13 NETHERLANDS J. OF HOUSING AND THE BUILT ENV'T 83 (1998).

<sup>151</sup> See generally *PAYING FOR INEQUALITY: THE ECONOMIC COST OF SOCIAL INJUSTICE* (Andrew Glyn & David Miliband eds., 1994). See also James H. Carr & Nandinee K. Kutty, *The New Imperative for Equality, in Segregation* 17-54 (James H. Carr & Nandinee K. Kutty, eds., Routledge, 2008).

society.<sup>152</sup> This argument, while recognizing the Tieboutian assertion that competition across local jurisdictions may provide the optimal level of local governments' ability to provide public goods,<sup>153</sup> still concerns about the costs of decentralization and over-fragmentation.<sup>154</sup> These over fragmentation costs include the frustration of efficient coordination and allocation of resources, thwarting the possibility of local solutions to a diverse range of externality problems, and preventing the existence of a political arena for resolving disputes.<sup>155</sup> Over-fragmentation, therefore, imposes a substantial economic burden on society.

The objections to the spatial separation between social groups with different characteristics, therefore, justify a presumption that segregation is discriminatory. At the same time, the justifications mentioned above readily acknowledge that it is a rebuttable presumption, which in some circumstances can and should be trumped by other considerations. In the next part, I take these insights and suggest a roadmap for the political or judicial authorities to assist the determination process regarding municipal incorporation approval.

#### V. RETHINKING SEPARATION AND EQUALITY: A ROADMAP FOR DETERMINING MUNICIPAL INCORPORATION

A rebuttable presumption that spatial separation is discrimination requires rethinking the relationship between separation and equality. As some of the justifications mentioned above for spatial separation imply, in some instances, spatial separation may not only fail to compromise equality but vice versa, it may be a stage on the path to achieving it.<sup>156</sup> In this part, I suggest a roadmap to address the approval of petitions for municipal incorporation. The premise of the proposed roadmap is that the law must identify and acknowledge the instances in which separation contributes to equality, which means that the law should recognize those instances where it is no longer "separate *but* equal" but "separate *therefore* equal."

When can spatial separation contribute to social equality? According to the justifications mentioned above, spatial separation can contribute to equality when it is required to correct past wrongs in cases of minority communities,<sup>157</sup> to preserve the ability of social groups to realize their conception of the good,<sup>158</sup> or when it contributes to the

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<sup>152</sup> See sources cited *supra* note 133. See also Blank: Federalism, *supra* note 70, at 536; Briffault, *supra* note 133, at 433-34.

<sup>153</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POL. ECON. 416 (1956).

<sup>154</sup> Max Neiman et al., *Communications*, 70 THE AM. POL. SCI. REV. 149, 158 (1976).

<sup>155</sup> *Id.*

<sup>156</sup> See Smith & Waldner, *supra* note 10, at 161-62.

<sup>157</sup> See *supra* Part IV.A.1.

<sup>158</sup> See *supra* Part IV.A.2.



aggregated welfare.<sup>159</sup> However, these arguments may contradict each other. For example, spatial separation may be necessary to empower a minority community or to preserve the community's ability to realize its members' conception of the good, but the social costs involved in such separation are high and place too heavy a burden on society as a whole. On the other hand, it is possible that spatial separation will not entail significant social costs, but will not be justified by the characteristics of the social group demanding the separation. How can policymakers and judges cope with petitions for municipal incorporation that include contradictory justifications? Moreover, alongside the justifications mentioned above, there are several objections to spatial separation. Should these objections be taken into account when considering the approval of the municipal incorporation petition? And if so, how can the justifications and objections to spatial separation be balanced for policy purposes?

In this part, I propose a roadmap to decide on municipal incorporation petitions, which may carry racially, socially, or economically harmful consequences. The proposed roadmap is based on both justifications for spatial separation and the objections against it, and it intends to provide policy tools for the authorities approving the incorporation. The underlying assumption of this roadmap is that not all municipal incorporation petitions are the same in their characteristics, motives, and implications. Therefore, any municipal incorporation petition should be examined per its characteristics, motives, and consequences - and only after such examination can it be determined whether the circumstances of the case justify refuting the presumption that segregation is discrimination.

The starting point of the proposed roadmap is the rebuttable presumption that spatial separation is discriminatory. As mentioned above, both the past and the present of American space reveal that separation is still a device for discriminating against disadvantaged social groups.<sup>160</sup> However, the perception that separation between social groups is a device for discrimination - and not discriminatory in itself - is essential, as it underlies the possibility of refuting this presumption in the appropriate circumstances. What should be recognized as circumstances that justify the rebuttal of the presumption? I argue that each of the justifications mentioned above for spatial separation may trigger such an examination.

The three justifications for spatial separation between social groups are not identical. The foundational differences between the three justifications for spatial separation reveal that the legitimacy of the municipal incorporation petition cannot be conditioned on the existence of all three justifications. Instead, every justification should be regarded

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<sup>159</sup> See *supra* Part IV.A.3.

<sup>160</sup> See *supra* Part I. See also Powell, *supra* note 140.

as a trigger for opening an examination of the unique circumstances of the case. The practical implication of this determination is that the fulfillment of one of the justifications is a prerequisite for considering a municipal incorporation petition. The starting point in any approval determination process of a community seeking spatial separation should be either (A) a minority community; (B) a community with a unique lifestyle that requires spatial segregation; or (C) the separation will maximize aggregated welfare. However, a willingness to consider a municipal incorporation petition is not a decision in a petition on its merits. The fulfillment of one of the justifications, then, opens the door to rebut the presumption of separation as discrimination.

Once the possibility to rebut the presumption has been recognized, an examination of the implications of spatial separation should begin. As mentioned, there are also significant objections to spatial separation, some, if not all, cast a heavy shadow on the legitimization of spatial separation. To approve a municipal incorporation petition, policymakers and judges should conclude that the unique circumstances of the separation considerably dismiss the objections. Due to the characteristics of these objections, they likely will not be overwhelmingly rejected. For example, the objection for spatial separation that concerns the impact of separation on society as a whole has a wide range of potential both present and future effects; not all can be predicted when the petition is filed. Therefore, the politicians and judges responsible for approving municipal incorporation petitions must carefully examine the likely realization of the objections, as of the time of the filing, and in particular, the consequences that they will have for three factors: the community, the individual members of the community, and society as a whole. Such an examination would ensure that the requested separation not only does not compromise equality, but would be a step towards achieving it.

The three objections for spatial separation involve the potential externalities of such separation on society, the possible harm to the autonomy of individual members of segregated communities, and the economic implications of such separation. These objections focus on the effect of spatial separation on three main factors: the community, the individual members of the community, and society. Communities may be affected by municipal incorporation because such segregation entails significant costs, some of which the community is unable to fund.<sup>161</sup> For example, incorporation as a new city requires the community to form a municipality, to set institutions, and to provide services to the city

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<sup>161</sup> See Charles R. Adrian & Charles Press, *GOVERNING URBAN AMERICA* 46 (4th ed. 1972); RONALD VOGEL & JOHN HARRIGAN, *POLITICAL CHANGE IN THE METROPOLIS* 260 (Routledge, 2015); Briffault, *supra* note 133, at 374-80.

residents.<sup>162</sup> These institutions and services carry economic costs, which impose on the new city and threaten its functioning.<sup>163</sup> The utilitarian objection aims to prevent separation processes that threaten the community's ability to thrive due to the costs involved in the separation. Decision-makers and judges that are required to approve an incorporation petition should consider, therefore, the ability of the community to fund this separation, with all that it entails.

Separation through municipal incorporation also threatens the autonomy of the individual members of the new city. As the autonomy objection suggests, individual members' independence is threatened by spatial segregation through municipal incorporation in two different manners: first, separation strengthens the community hierarchy and gives additional power to community leadership, and secondly, spatial separation creates new barriers between community members and those who are not community members. The ability of individual members of the community to exercise their autonomy decreases after the new city is incorporated. Decision-makers and judges that are required to approve an incorporation petition should consider, therefore, the implications of separation through municipal incorporation on individual members' autonomy.

The concern that separation through incorporation would infringe on the autonomy of the individual members of the community intensifies when the community seeking to separate spatially is illiberal.<sup>164</sup> The strengthening of the leadership, and the imposition of barriers on the part of community members, may reduce the autonomy that community members have gained in a situation that precedes separation. In this sense, empowering an illiberal minority community to be incorporated as a municipality connects community authority and governing authority, a connection which raises concern about the preservation of the autonomy and constitutional rights of the community members. Another challenge concerns the enforcement of community norms through governing powers. In this sense, the concern is establishing the connection between community authority and government authority, which will extend the harm to individual community independence when it comes to their right to oppose the leadership, to protest against it, and to suggest alternatives to a path chosen by the community leadership. These concerns become more acute as the sanctions held by the municipal government are no longer informal, social sanctions, but governmental and legal ones.

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<sup>162</sup> VOGEL & HARRIGAN, *supra* note 161, at 260 (arguing that the need to supply the required infrastructure for growth and basic municipal services may be "too expensive for small-town governments to do on.").

<sup>163</sup> *Id.*; see also Briffault, *supra* note 133, at 374-80. (discussing potential solutions to overcome these inherent disincentives to suburban independence).

<sup>164</sup> Stern, *supra* note 149, at 639. See also Stephen Deets & Sherrill Stroschein, *Dilemmas of autonomy and liberal pluralism: examples involving Hungarians in Central Europe*, 11 Nations & Nationalism 285, 286 (2005).

These concerns reinforce the understanding of the legitimacy of municipal separation incorporation. The law - mainly through the incorporation approval mechanisms - should play a protective role that would protect individual members of the community from extending the infringement to their autonomy, as well as the loss of their constitutional rights. To fulfill its protective role, the law should address these concerns primarily through strict adherence to the constitutional rights of the community members, with emphasis on the rights enumerated in the First Amendment to the Constitution: freedom of expression, the right to criticize the government, and freedom of association.<sup>165</sup> Therefore, any attempt by the municipal government to restrict or limit the exercise of individual members' constitutional rights should be under strict scrutiny and under the assumption that the restrictions on these rights should be reduced as far as possible. When the community demanding the separation holds illiberal norms, decision-makers and judges responsible for approving the separation should operate under the presumption whereby the separation will impair the autonomy of the individuals – an assumption that the community must rebut before the approval of its incorporation petition.

Finally, the objections mentioned above raise concerns about the potential implications of spatial separation through municipal incorporation on society as a whole. There are several facets to this objection. First, legitimizing spatial segregation through municipal incorporation may enhance the impression that segregation is legitimate and thus expand the segregation between different social groups already prevalent in society. Second, spatial segregation through municipal incorporation may incur social and economic costs in what remains of the parishes from which the segregated communities separated.<sup>166</sup> For example, economically powerful communities that seek to incorporate as a new city leave behind their parishes, which usually include disadvantaged social groups. These left-behind parishes may struggle with financial problems due to the departure of the strong community, both because of the loss of the tax money of the strong community and the fact that the new city may compete for limited financial resources.<sup>167</sup> Third, and just as necessary, separation through municipal incorporation can impose significant financial costs on society, at both local and state level, mainly due to the concern that society will be forced to fund the segregated community.<sup>168</sup> This challenge sharpens when the community that seeks to segregate spatially is a religious community; a reality that evokes the Establishment Clause of the First Amendment and concerns

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<sup>165</sup> U.S. CONST. amend. I.

<sup>166</sup> See Briffault, *supra* note 10, at 75.

<sup>167</sup> Rice et al., *supra* note 9, at 140.

<sup>168</sup> See VOGEL & HARRIGAN, *supra* note 161, at 260.

state contribution to the establishment of religion.<sup>169</sup> Finally, separation through municipal incorporation – especially when the separated community is one that embraces illiberal norms – threatens the normative set of values of the liberal society.<sup>170</sup> The reason for this lie, within the legitimacy separation through municipal incorporation, is to create and apply the illiberal community set of values and norms.

To conclude, the proposed roadmap urges policymakers and judges that are responsible for approving municipal incorporation petitions to consider both justifications and objections for spatial separation as a part of the incorporation approval procedures. Such examination should begin with the presumption that separation qua separation is discriminatory. To rebut this presumption, the community that aspires to separate spatially through municipal incorporation is required to prove that one of the justifications for spatial separation exists in the circumstances of the case. If one of the justifications is proven, the various objections to spatial segregation should be examined, with emphasis on the impact of these objections on the community, the individual members of the community, and society. In a case where the community that seeks to separate spatially is illiberal, the burden placed on the decision-makers and judges responsible for approving municipal incorporation is more significant. In such a case, examination before approval must ensure that the incorporation approval does not result in a further restriction on the autonomy of community members as well as additional externalities on the society. In the next part, I will examine the applicability of the proposed roadmap on two recent municipal incorporation cases. The analysis of these cases will illustrate how the proposed roadmap makes it possible to distinguish between cases where separation is merely a device for spatial discrimination and cases where separation may contribute to spatial equality.

#### VI. A TALE OF TWO NEWLY SEGREGATED CITIES: FROM ST. GEORGE LOUISIANA TO KIRYAS JOEL, NEW YORK

To provide a concrete example of the complexity of the considerations for and against spatial separation through municipal incorporation, I would like to examine two cases where spatial separation took place recently. The first case deals with the separation of residents of an upper-middle-class suburb of the Louisiana capital from the East Baton Rouge Parish, and the second one deals with the separation of the Jewish ultraorthodox village of Kiryas Joel from the town of Monroe, New York. The different characteristics of these two cases allow the examination of both justifications and objections for spatial separation through municipal incorporation, and equally important provide a

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<sup>169</sup> U.S. CONST. amend. I. *See also* discussion in Minow, *supra* note 132, at 22.

<sup>170</sup> *See* Spinner-Halev, *supra* note 144.

platform for examining the circumstances that may justify the rebuttal of the presumption that separation is discriminatory.

A. *St. George, Louisiana: New city, old features of separation*

The residents of a mostly white suburb of Baton Rouge voted in October 2019 to incorporate a new city of their own — to be called St. George — and take away control of the community taxes, schools, and other services from the less affluent.<sup>171</sup> The quest of the upper-middle-class suburb of the Louisiana capital residents for separation begun in 2010 with a focus on creating a separate school district for the southeast corner of the parish.<sup>172</sup> However, creating an independent board of education under the Louisiana Constitution requires a long and complex process.<sup>173</sup> Such a move requires constitutional amendment as well as voting for all the population groups that may be affected by the decision.<sup>174</sup> When the residents of the new city of St. George realized the obstacles involved in establishing an independent board of education, they turned to the surprisingly easier alternative. Instead of creating an independent board of education, they decided to separate from the East Baton Rouge parish fully and to incorporate it as a new city.<sup>175</sup> By incorporating as a new, independent city — a decision that only requires the support of most suburb residents — they hope that their initial goal will become achievable.<sup>176</sup>

The separation of St. George from the East Baton Rouge parish raised public criticism.<sup>177</sup> The ambition of the mostly white, upper-middle-class suburb to separate from the more diverse parish was criticized as a “white flight” move, by which the white population of St. George aims to segregate itself from the African American and Hispanic

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<sup>171</sup> See sources *supra* note 1.

<sup>172</sup> For a description of the initial goal of the suburb’s struggle for separation see the official website of the City of St. George, Louisiana at THE CITY OF ST. GEORGE, LOUISIANA, <http://www.stgeorgelouisiana.com/Why-How> (last visited Jan. 20, 2020) (“Incorporating the city of St. George was not the original intention of our grassroots group. Originally, we were attempting to provide local schools for local children through the creation of an independent school district in the southern part of the parish. Opposition to our efforts at improving local education from a faction of the Louisiana House of Representatives forced us to think differently. We found that incorporated cities like Baker, Zachary and Central have much better opportunities to create their own school districts. As we began debating whether to expand the fight into incorporating a city, we recognized what a wonderful opportunity we have to create Louisiana’s next great municipality right here in St. George.”).

<sup>173</sup> See Wilson, *supra* note 1.

<sup>174</sup> *Id.*; see also Runnels, *supra* note 4.

<sup>175</sup> See LA. REV. STAT. § 33:1

<sup>176</sup> See THE CITY OF ST. GEORGE, LOUISIANA, *supra* note 172.

<sup>177</sup> *Id.* For the efforts of a group of East Baton Rouge residents who have organized to fight incorporation, see No St. George, <http://nocityofstgeorge.com/> (last visited, Jan. 1, 2020). See also Rojas, *supra* note 1; Runnels, *supra* note 4; Clark, *supra* note 1.



majority of the parish.<sup>178</sup> Opponents of the decision described it as the renewed application of the "separate but equal" doctrine, one that seeks to restore the discriminatory reality that prevailed before *Brown v. Board of Education*.<sup>179</sup> Mary Olive Pierson, who previously represented the city-parish in her legal fight against St. George, argues that the struggle is focused on removing St. George's children from schools. The school has a predominantly African American and Hispanic student population indicates that the St. Georgians "don't want African Americans in this city."<sup>180</sup> The separation opponents deny that the decision was driven out of racial motivation.<sup>181</sup> Instead, they argue that the decision was a result of their tiredness of the parish political indifference, of not being taken seriously by decision-makers and of Baton Rouge's "ailing school system."<sup>182</sup>

The denials of racial and discriminatory motives at the basis of separation decision, however, met with difficulties when the characteristics of the separation examined. The population of the new city of St. George is seventy percent white,<sup>183</sup> while data from 2017 reveal that eighty-nine percent of the students in the East Baton Rouge schools are nonwhite.<sup>184</sup> The household income rate and property value data also reveal the differences between the population of the new city and the rest of the parish.<sup>185</sup> While the median property values in the East Baton Rouge parish is approximately \$176,000, single-family homes in the

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<sup>178</sup> Clark, *supra* note 1. See also Jack Barlow, *The St George movement in Baton Rouge: an education revolution, or white flight?*, THE GUARDIAN (Apr. 8 2015), <https://www.theguardian.com/us-news/2015/apr/08/st-george-movement-baton-rouge-louisiana-schools>; Adam Harris, *The New Secession*, THE ATLANTIC (May 20, 2019), <https://www.theatlantic.com/education/archive/2019/05/resegregation-baton-rouge-public-schools/589381/>; Margaret Newkirk, *Parents in Baton Rouge Try to Drop Out of School*, BLOOMBERG BUSINESSWEEK (Feb. 20, 2014), <https://www.bloomberg.com/news/articles/2014-02-20/baton-rouge-parents-in-public-school-revolt-want-their-own-city>.

<sup>179</sup> Runnels, *supra* note 4; Harris, *supra* note 178. See also JAMES A. RICHARDSON & ROY L. HEIDELBERG, SCHOOL DISTRICT RESTRUCTURING & REFORM: EAST BATON ROUGE PARISH 5-6 (2012).

<sup>180</sup> Andrea Gallo & Charles Lussier, *Unifying or dividing? St. George city movement draws mixed reviews from residents, Mayor Broome*, THE ADVOCATE (Mar. 2, 2018), [https://www.theadvocate.com/baton\\_rouge/news/article\\_0962de76-1e37-11e8-ac50-f7fe0687c3ec.html](https://www.theadvocate.com/baton_rouge/news/article_0962de76-1e37-11e8-ac50-f7fe0687c3ec.html)

<sup>181</sup> See *supra* note 172. See also Barlow, *supra* note 178 (quoting St George spokesperson Lionel Rainey III that says: "Playing the race card, it's an intellectually dishonest point of view . . . Race has unequivocally nothing to do with what we're looking at.").

<sup>182</sup> See Barlow, *supra* note 178; Diana Samuels, *St. George Report Lays Out 'Potentially Harmful' Impacts of Proposed New City in East Baton Rouge Parish*, THE TIMES-PICAYUNE (Dec. 2, 2013), <http://www.nola.com/news/baton-rouge/index.ssf/2013/12/st-george-report-lays-out-pote-1.html>.

<sup>183</sup> Runnels, *supra* note 4, at 68; Harris, *supra* note 179.

<sup>184</sup> See Edbuild, *supra* note 86, at 14.

<sup>185</sup> *Id.*

southeast corner of the parish, where St. George is located, sell for over \$1 million.<sup>186</sup> These differences may well tell the story: a politically and economically strong community, a community belonging to the majority group in the population, seeks to separate itself from weaker populations. In this regard, the separation of St. George from the East Baton Rouge parish are reminiscent of spatial segregation characteristics that have been practiced in the United States for centuries: Strong communities seek to differentiate spatially from disadvantaged populations. However, spatial separation between social groups may take different shapes. The story of the ultraorthodox village of Kiryas Joel, New York, may illustrate just how much.

*B. Kiryas Joel, New York: the Jewish shtetl that wants to become a town*

In a referendum held in November 2017 in the upstate New York town of Monroe, the majority of residents voted to separate from the village of Kiryas Joel. This decision ended a long period of clashes between the residents of Kiryas Joel and those of Monroe, which had mainly stemmed from cultural differences between the two populations. To understand the depth of the differences between two social groups, it is necessary to describe the Kiryas Joel community and its defining characteristics. Kiryas Joel was founded in the early 1970s as a semi-rural outpost of the Satmar Hasidic sect based in Brooklyn, and grew rapidly, creating the need for multi-family housing and additional land for it.<sup>187</sup> The Satmar are the largest, most devoted Hasidic community in America.<sup>188</sup> Even among other ultra-Orthodox Jewish sects, it is considered one of the most zealous in its implementation of Jewish law and opposition to reforms or innovation.<sup>189</sup> The Satmar sect initially moved with their way of life from Hungary to Brooklyn after World War

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<sup>186</sup> *Id.*

<sup>187</sup> See Nomi Maya Stolzenberg, *Board of Education of Kiryas Joel Village School District v. Grumet: A Religious Group's Quest For Its Own Public School*, 203 (USC Legal Studies Research Paper No. 09-30 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1441413](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1441413); LOUIS GRUMET, JOHN CAHER, & JUDITH KAYE, *THE CURIOUS CASE OF KIRYAS JOEL: THE RISE OF A VILLAGE THEOCRACY AND THE BATTLE TO DEFEND THE SEPARATION OF CHURCH AND STATE* (Chicago Rev. Press, 2016).

<sup>188</sup> See generally ISRAEL RUBIN, *SATMAR: TWO GENERATIONS OF AN URBAN ISLAND* (Peter Lang, 2d ed. 1997); JEROME MINTZ, *HASIDIC PEOPLE: A PLACE IN THE NEW WORLD* 27-42 (1992. )

<sup>189</sup> See Shaul Magid, “*America is No Different*”, “*America is Different*”—*Is There an American Jewish Fundamentalism?*, ACADEMIA, [https://www.academia.edu/41218393/Shaul\\_Magid\\_America\\_Is\\_No\\_Different\\_America\\_Is\\_Different\\_Is\\_There\\_an\\_American\\_Jewish\\_Fundamentalism\\_Part\\_II\\_American\\_Satmar\\_in\\_Fundamentalism\\_Perspectives\\_on\\_a\\_Contested\\_History\\_Charleston\\_University\\_of\\_South\\_Carolina\\_Press\\_2014\\_92-107](https://www.academia.edu/41218393/Shaul_Magid_America_Is_No_Different_America_Is_Different_Is_There_an_American_Jewish_Fundamentalism_Part_II_American_Satmar_in_Fundamentalism_Perspectives_on_a_Contested_History_Charleston_University_of_South_Carolina_Press_2014_92-107) (last accessed Jan. 31, 2019); SIMON A. WOOD & DAVID HARRINGTON WATT, *FUNDAMENTALISM: PERSPECTIVES ON A CONTESTED HISTORY* 70 (2014).



II, where the separation of religion and state combined with Brooklyn's housing opportunities. These enabled the expanding Satmar community and other Central European Jewish immigrants to establish isolated, illiberal communities that functioned independently of many state-regulated structures.<sup>190</sup> Satmar families, eschewing birth control, typically have eight to ten children.<sup>191</sup> They speak Yiddish, dress in long clothes to avoid revealing body parts in public, engage in full gender separation outside the home, and generally refrain from consuming American media or publications that do not come from within the community.<sup>192</sup>

The Satmar community proliferated so rapidly that lack of housing acted as a catalyst for the 1974 establishment of the second location of the Satmar sect in the town of Monroe, New York. This community was named Kiryas Joel.<sup>193</sup> The establishment of the village of Kiryas Joel symbolized not only a split in the American Satmar community but also a turning point in the community's struggle for spatial separation.<sup>194</sup> The village of Kiryas Joel saw value in convergence within itself, providing for its needs autonomously, and maintaining spatial and social separation from external populations. These characteristics naturally led to a distance between residents of the village of Kiryas Joel and residents of the town of Monroe, so that even before the referendum on municipal separation, the residents of Kiryas Joel were spatially and culturally separated. At the same time, attempts to obtain legal approval for this separation were repeatedly rejected. The most striking legal confrontation concerned the Kiryas Joel residents' aspirations to establish a separate and independent board of education. While most of the village's children attended private schools that were gender-segregated according to the religious norms of the community, the disabled children were sent to a Monroe Public School. Because of Monroe's refusal to gender-segregate its public school, the New York legislature authorized Kiryas Joel to establish a public school that would serve the village's disabled children. Citizen taxpayers and the New York School Board Association sued, claiming that the statute creating this special school district was not neutral and violated the requirement to separate church and state as mandated by the First Amendment. The case went to the Supreme Court, which in *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*<sup>195</sup> ruled that the special school district gave too much authority over a secular function of

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<sup>190</sup> Rubin, *supra* note 187, at 32-35.

<sup>191</sup> WOOD & HARRINGTON WATT, *supra* note 189, at 70-75; MINTZ, *supra* note 188, at 1-9; Minow, *supra* note 132, at 9-10; NOMI MAYA STOLZENBERG, NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM 275-281 (Michael Helfand ed., 2015).

<sup>192</sup> Minow, *supra* note 132, at 9-10.

<sup>193</sup> See GRUMET ET AL., *supra* note 187, at 11-28; Stolzenberg, *supra* note 187.

<sup>194</sup> GRUMET ET AL., *supra* note 187, at 11-28.

<sup>195</sup> Bd. of Educ. v. Grumet, 512 U.S. 687 (1994).

society to a religious group and unconstitutionally delegated a secular function to a religious body.<sup>196</sup> While the New York legislature responded by adopting new legislation that appeared to be more general and more neutral, it was also taken to the Supreme Court. The *Grumet* case is one prominent example among many, of the tension between the two social groups, resulting from fundamental differences between their worldviews and ways of life. It also attests to the fact that spatial and cultural separation existed between the village of Kiryas Joel and the town of Monroe even before the 2017 referendum. This separation was officially approved, however, in a vote made by the two social groups involved. This vote was the cornerstone of the first exclusive ultra-orthodox town in the United States: the town of Palm Tree.

*C. Between New York and Louisiana: Should we compare apples to oranges?*

The cases of St. George and Kiryas Joel reveals that separation claims may be entirely different. While the struggles for spatial separation of both residents of the white Baton Rouge suburb and those of ultra-orthodox Satmar community have ended with the same result, there are significant differences between them regarding the motivations of the struggle, the status of the parties and the consequences that this separation may have. While in St. George, the separation was claimed by the economically and politically strong party in Kiryas Joel separation was claimed by an economically and politically disadvantaged minority group. While segregation in St. George is required to improve the education services provided to upper-middle-class students through the exclusion of students from less affluent, non-white populations, Kiryas Joel's struggle for separation from Monroe intended to preserve the ability of Satmar's Hasidim to live their lives per their religious norms. While the separation process in St. George was initiated and decided by one of the parties, the method in Kiryas Joel was jointly initiated and decided by the villagers and the residents of Monroe. These differences, I argue, go to the root of the normative argument for holding that spatial separation should be conceived as discrimination. At the same time, the objections mentioned above to legitimizing spatial segregation between social groups require discussion on the merits of a case, and the implications of separation on all parties involved, and on society as a whole. In this part, I would like to examine how each case - the separation of St. George from the East Baton Rouge parish and the separation of Kiryas Joel from the town of Monroe - addresses the justifications and objections to spatial separation. As I argue, the variance between the two cases requires a more nuanced and sensitive reference to social group separation claims.

In St. George, the separation process initiated to allow the mostly white suburb to gain control over resources and educational institutions. Separation supporters have argued that suburban residents do not enjoy

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<sup>196</sup> *Id.*

their tax money properly and that the quality of their children's education is compromised due to their integration into the parish's education system.<sup>197</sup> Does the claim of segregation on the part of the residents of St. George answer any of the justifications for spatial separation between social groups? The answer to this question should be negative. St. George's residents cannot be perceived as belonging to any American minority community. The suburb is made up of a predominantly white population that enjoys a relatively high socio-economic status.<sup>198</sup> In this state of affairs, the empowerment justification cannot be used as a basis for the separation claim. The pluralistic justification is also irrelevant in the circumstances of St. George. The suburban residents do not hold a shared conception of the good, and the attempt to preserve such a shared understanding of the good does not underlie their claim for separation. As mentioned above, the claim for separation from the East Baton Rouge parish is intended to improve the education services provided to suburban children while excluding the children of less affluent populations of the entire parish.<sup>199</sup> Separation, in this case, therefore, cannot be justified on pluralistic grounds. However, can St. George's separation from the East Baton Rouge parish be justified for efficiency? Although the answer to this question is not as definitive as with the two previous justifications, it seems that this justification also cannot be used to justify separation in the present case.

The utilitarian justification for spatial separation through municipal incorporation is intended for cases where integration between social groups impairs the ability of the various groups to function, which leads to ongoing conflicts that carry high costs. In this state of affairs, according to the utilitarian justification, it would be justified to separate the parties to avoid these costs. However, there are significant costs to the separation. From the utilitarian point of view, it is appropriate to examine the costs involved in separation, both concerning the need to maintain two separate municipal systems and the implications for the activities of each social group. The utilitarian justification, therefore, should be reserved, but in cases where the gaps between the groups are significant, they impair the ability of each of the groups to function. The utilitarian justification, then, should be reserved but in cases where the gaps between the groups are so significant that they create paralysis and impairment of each group's ability to manage appropriately. In other cases - where both social groups can function properly (even if either wants to improve its status or quality of life) - the costs associated with separation should prevent its implementation. In the case of St. George, the residents' motivation to separate spatially from the East Baton Rouge parish was due to their desire to record the value of their tax money and to maintain

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<sup>197</sup> See *supra* note 172. See also Wilson, *supra* note 2; Runnels, *supra* note 4; Samuels, *supra* note 182.

<sup>198</sup> RICHARDSON & HEIDELBERG, *supra* note 17, at 5-7.

<sup>199</sup> See *supra* note 172. See also sources cited *supra* note 182.

a higher quality education system. Although improving the quality of education provided to your children, this does not justify the spatial separation - certainly as this separation will seriously harm the current parish's educational frameworks, and therefore negatively affect the quality of education of the parish children.

A conclusion that none of the justifications for spatial separation are valid in the case of St. George ends the examination for legitimizing separation in this case even before it began. According to the roadmap proposed in this article, none of the justifications apply in a particular case, the presumption that separation is discrimination is not undermined. In such a case, there is no need to examine the consequences of separation, as the circumstances of the case do not cross the first stage of examination. The separation of St. George from the East Baton Rouge parish is just another link in the discrimination chain in the American space, designed to separate social groups on a racial and economic basis. As such, it has no justification.

Is the case of Kiryas Joel different? Are the circumstances of the case, in which the Satmar Ultraorthodox community incorporated as a town, justify seeing the separation in this case as non-discriminatory? To answer these questions, we must examine whether any of the justifications for spatial separation apply in the Kiryas Joel case, and if so, what are the implications of legitimizing separation. Examination of the justifications for spatial separation reveals that at least two of them apply in the case of Kiryas Joel. The empowerment justifications should apply as the ultra-orthodox community of Kiryas Joel is a minority community that can argue that spatial separation is required for it to be empowered. Among other things, such a claim can arise from the growing clashes between ultra-Orthodox populations in upstate New York and New Jersey and the parishes in which they reside.<sup>200</sup> These clashes - through which non-ultra-

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<sup>200</sup> For the ongoing resistance exists among New York and New Jersey city residents to the expanded presence of ultra-Orthodox communities, *see, e.g., Ben Sales, New York's Orthodox Jews are expanding into these towns, and some residents aren't happy*, JEWISH TELEGRAPHIC AGENCY (Aug. 18, 2017), <https://www.jta.org/2017/08/18/united-states/new-yorks-orthodox-jews-are-expanding-into-these-towns-and-some-residents-arent-happy>; Ben Sales, *Insisting it's not anti-Semitic, NJ group launches anti-ultra-Orthodox campaign*, THE TIMES OF ISRAEL (Jan. 24, 2019), <https://www.timesofisrael.com/insisting-its-not-anti-semitic-nj-group-launches-anti-ultra-orthodox-campaign/>; Bethany Mandel, *Is It Wrong To Want Ultra-Orthodox Jews To Stay Out Of Your Town?*, FORWARD (Aug. 21, 2017), <https://forward.com/opinion/380571/is-it-wrong-to-want-ultra-orthodox-jews-to-stay-out-of-your-town/>. For the growing threat to ultra-Orthodox communities throughout New York and the expansion of violence against those communities, *see* Mary Esch & Ryan Tarinelli, *As Jewish enclaves spring up around NYC, so does intolerance*, ABC NEWS (Jan. 2, 2020), <https://abcnews.go.com/US/wireStory/anti-semitism-grows-jewish-communities-nyc-suburbs-68027499>; Jessica Le Masurier, *With anti-semitism on the rise in New York, Orthodox Jews in Brooklyn are on the defensive*, FRANCE24 (Jan. 5, 2020), <https://www.france24.com/en/20200105-with-anti-semitism-on-the-rise-in>

Orthodox members of the parish seek to limit the expansion of ultra-Orthodox communities – can serve as a basis for empowerment claims on behalf of the ultra-orthodox communities.<sup>201</sup> They may also serve as the basis for the pluralistic justifications. Recall that the pluralistic justification legitimizes spatial separation as long as the separation is required to allow either of the social groups involved to realize its shared conception of the good. In the case of Kiryas Joel, the illiberal, strictly religious norms held by the Satmar community were the source of tension that developed between the social groups in the town of Monroe. Monroe residents' attempts to prevent the expansion of the ultra-Orthodox community - including through zoning that does not conform to ultra-Orthodox lifestyles<sup>202</sup> and a refusal to allow gender segregation in schools<sup>203</sup> - prompted the ultra-Orthodox community to seek separation.<sup>204</sup> The assumption of the ultra-Orthodox community was that separation through municipal incorporation would enable the community to live its life under the norms of the ultra-Orthodox Jewish conception of good.<sup>205</sup> This assumption corresponds to the pluralistic justification for spatial separation.<sup>206</sup> Does the separation claim by the Satmar community of Kiryas Joel justified by the utilitarian view? As previously explained, the utilitarian justification holds that spatial separation may only be justified in cases where integration impairs the ability of the social groups involved to function properly. Although the situation developed in Monroe before the separation indicates the inability of the ultra-Orthodox community to function properly - in part due to a significant lack of lands for the community growing housing needs and the acute normative differences arising from the community religious perception - this

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new-york-orthodox-jews-in-brooklyn-are-on-the-defensive; Adeel Hassan, 'A Different Era': Anti-Semitic Crimes, and Efforts to Track Them, *Climb*, N.Y. TIMES (Jan. 3, 2020), <https://www.nytimes.com/2020/01/03/us/anti-semitism-hate-crimes.html>.

<sup>201</sup> See *supra* Part IV.A.1.

<sup>202</sup> Zoning issues and the adaptation of zoning laws to the Satmar community needs stood at the core of continuous legal clashes between the Satmar community and the surrounding communities. For example in 2011 Kiryas Joel had sued to void neighboring Woodbury's zoning laws, arguing in court papers that zoning for single-family houses on large lots prevented Hasidic Jews from "living and freely practicing their religion in Woodbury" and placed an "unreasonable burden" on Kiryas Joel. See Chris McKenna, *Kiryas Joel drops zoning court fight against Woodbury*, TIMES HERALD-RECORD (Dec. 1, 2017), <https://www.recordonline.com/news/20171201/kiryas-joel-drops-zoning-court-fight-against-woodbury>. See also Nomi Maya Stolzenberg, *A Tale of Two Villages (or, Legal Realism Comes to Town)*, in NOMOS XXXIV 290, 296-98 (Ian Shapiro & Will Kymlicka eds., 1997).

<sup>203</sup> See *Grumet*, 512 U.S. 687. See also Jane Gayduk, *No More Play Dates? Sex-Segregated Park Opens in New York*, THE OBSERVER (Apr. 12, 2013), <https://observer.com/2013/04/kiryas-joel-sex-segregated-park-opens-in-new-york/>.

<sup>204</sup> See, Stolzenberg, *supra* note 202.

<sup>205</sup> Foderaro, *supra* note 6.

<sup>206</sup> See *supra* Part IV.A.2.



question cannot be given an unequivocal answer. From a utilitarian point of view, it is unclear whether the costs involved in separation are lower than those involved in maintaining integration between groups. This conclusion, however, is not required for further examination of the separation results in the case of Kiryas Joel. As the roadmap proposed in this article suggests, one justification for spatial separation is sufficient to undermine the non-refutability of the separation as discrimination presumption. To determine whether it is right to refute the presumption in the Kiryas Joel case, then we should examine the implications that this separation may have on the community, the individual members of the community, and society.

How is the separation of Kiryas Joel from Monroe expected to affect the Satmar community? The new town of Palm Tree is expected to be used as a platform to strengthen the community's ability to realize its religious conception of good. In this way, municipal services and institutions, with an emphasis on the education system, are expected to follow community norms and adapt to the worldview of town residents.<sup>207</sup> In addition, the new city's zoning rules are expected to be in line with the needs of its residents.<sup>208</sup> For example, zoning laws are expected to authorize large apartments suitable for families with many children and to allow the establishment of religious and worship institutions.<sup>209</sup> This result accords with the goals of the empowerment and pluralist justifications for spatial separation. However, municipal incorporation carries with it significant costs, which entail the burden on the independent town to bear all the costs of the municipal mechanisms. Things get sharper when it comes to Kiryas Joel, which was defined by the Census Bureau as the poorest village among the nation's 3,700 villages, towns, or cities with more than 10,000 people.<sup>210</sup> This data also requires an examination of the consequences of the separation society as a whole. The poor socio-economic condition of Kiryas Joel places a burden on the state to financially support the separation and the provision

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<sup>207</sup> For the constitutional challenges that the new town of Palm Tree (previously, Kiryas Joel) would face when trying to implement religious norms as municipal norms, see Debra Nussbaum Cohen, *New York Hasidim Challenge Constitution in Bid to Forge the First ultra-Orthodox Town in America*, HAARETZ (Nov 23, 2017), <https://www.haaretz.com/us-news/.premium-ny-hasidim-challenge-constitution-in-bid-to-get-own-town-1.5626673>.

<sup>208</sup> See, e.g., Chris McKenna, *Palm Tree could add 4,400 housing units*, TIMES HERALD-REC. (July 19, 2018), <https://www.recordonline.com/news/20180719/palm-tree-could-add-4400-housing-units>; Chris McKenna, *More housing proposed in Kiryas Joel*, TIMES HERALD-RECORD (Aug. 26, 2019), <https://www.recordonline.com/news/20190826/more-housing-proposed-in-kiryas-joel>.

<sup>209</sup> *Id.*

<sup>210</sup> See Sam Roberts, *A Village With the Numbers, Not the Image, of the Poorest Place*, N.Y. TIMES (Apr. 20, 2011), <https://www.nytimes.com/2011/04/21/nyregion/kiryas-joel-a-village-with-the-numbers-not-the-image-of-the-poorest-place.html> (discussing 2016 Census data).

of municipal services. Alongside the economic burden on society, financial support on behalf of the state also raise a constitutional question arising from the establishment clause of the First Amendment. Since the Satmar community in Kiryas Joel is a community defined by its religious character, state financial support for may trigger establishment clause concerns, as it can be seen as a means of realizing religious community norms. This question was at the core of the *Grumet* case,<sup>211</sup> in which the New York legislature's special state statute established a separate board of education along the village boundaries of Kiryas Joel to serve this distinctive religious population. Justice Souter concluded that the legislators' decision to create a new separate district for the Kiryas Joel community, a decision counter to regular state practice, was undermining the state's constitutional obligation to act in neutrality, therefore violating the Establishment Clause.<sup>212</sup> Should the *Grumet* court's approach – viewing the state support for the Kiryas Joel community as a violation of the Establishment Clause – apply to the village's separation claim? Moreover, if the answer is on the affirmative, does that mean that any claim for spatial separation by religious communities should be rejected? I believe that we should seek the answer in the justifications for spatial separation through municipal incorporation.

Separation through municipal incorporation does not necessarily concern religious communities, although it is reasonable to assume – an assumption that is strengthen with the wide flow of ultra-orthodox communities in New York and New Jersey<sup>213</sup> – that the will of religious communities to preserve their lifestyle may play a major role in communities' quests for separation. Nevertheless, the justifications for spatial separation does not concern religion as such. While religious communities may be minority communities that may enjoy the empowerment justification, or alternatively, their religious conception of the good may trigger the pluralistic justification, these justifications do not depend on religious affiliation but rather justify separation for non-religious grounds. A decision on whether the state should permit, support, or regulate self-segregated communities should thus be based on non-religious justifications as specified above. In the context of spatial separation, the state should accommodate religion as long as segregation is justified according to secular (social) justifications. The verification

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<sup>211</sup> See *Grumet*, 512 U.S. 687.

<sup>212</sup> *Id.* at 702 (“Because the district's creation ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result, we have good reasons to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority.”).

<sup>213</sup> See, e.g., Joseph Berger, *Uneasy Welcome as Ultra-Orthodox Jews Extend Beyond New York*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/nyregion/ultra-orthodox-jews-hasidim-new-jersey.html?searchResultPosition=1>.

should also accompany such recognition that the social costs highlighted in the objections specified above do not impose too heavy a burden on society. When the state acts according to this principle, it does out of secular respect for the needs of religious communities or any other community. Therefore, the state does not violate the Establishment Clause, as it is motivated by secular and social concerns rather than religious ones.<sup>214</sup>

Another social implication of separation through municipal incorporation of religious or other illiberal communities relates to these communities' lack of commitment to liberal norms. This concern stems out of the understanding that when spatially separated, illiberal religious communities would perceive themselves as exempt from anti-discrimination laws, therefore, may discriminate against those who are not members of the community and exclude them from housing, education, employment, and other municipal services. American law established anti-discrimination duties through several anti-discrimination laws, such as the Civil Rights Act of 1964,<sup>215</sup> the Fair Housing Act of 1968,<sup>216</sup> and the Americans with Disabilities Act of 1990.<sup>217</sup> These laws protect race, color, religion, sex, and national origin in the areas of voting, education, employment, public accommodation, and housing. In addition to federal legislation, numerous state and local laws address discrimination that is not covered by these laws.<sup>218</sup> This set of rules challenges an illiberal religious community such as Kiryas Joel that seeks to segregate spatially, as it reinforces its commitment to equality, even to those who are not members of the community or who do not share its religious conception of the good.<sup>219</sup> Anti-discrimination laws require the community to refrain from discriminating against those who are not

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<sup>214</sup> For a similar suggestion, see Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127-46 (1990).

<sup>215</sup> Civil Rights Act, 42 U.S.C. § 2000e (1964).

<sup>216</sup> 42 U.S.C. § § 3600 et seq.

<sup>217</sup> 42 U.S.C. § 12101.

<sup>218</sup> Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies: State Nondiscrimination Policies Fill the Void but Federal Protections Are Still Needed*, CTR. FOR AM. PROGRESS ACTION FUND (June 2012), [https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state\\_nondiscrimination.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf).

<sup>219</sup> In the case of Kiryas Joel, the distinction is not only between Jews and non-Jews nor a distinction between Jewish people and non-religious Jewish people. In the case of the Satmar community, the new town is expected to exclude those belonging to other ultra-Orthodox communities. Moreover, due to the split that exists in the community involving inheritance struggles between the two former Rebbe's sons, supporters of Rabbi Zalman, the Rabbi's younger son (termed "Zaloinim") are also expected to be excluded from the new town. For a comprehensive review of the Satmar community inheritance struggles, see SAMUEL C. HEILMAN WHO WILL LEAD US?: THE STORY OF FIVE HASIDIC DYNASTIES IN AMERICA 152-208 (U. of California Press, 2017).



members of the community concerning housing, employment, and education. Yet, requiring the community not to differentiate between those who belongs to the community and those who do not could thwart the justifications for separation. In the case of Kiryas Joel, the primary motive for separation was the reluctance of members of the community to compromise their religious lifestyle concerning gender segregation in schools and public spaces. Applying anti-discrimination laws in the new town of Palm Tree, therefore, will frustrate the entire purpose of separation. This tension sharpens since an attempt to compel religious communities such as Kiryas Joel to comply with anti-discrimination laws provokes an additional constitutional challenge; the Free Exercise Clause,<sup>220</sup> which aims to limit the state's actions to restrict religion-related activities. Over the last few years, the extent of exemption from anti-discrimination laws granted for religious reasons has expanded.<sup>221</sup> However, as in the case of the Establishment Clause, the treatment toward segregated religious communities when it comes to their exemption from anti-discrimination law should be done under the non-religious justifications for spatial separation. Accordingly, segregated religious communities cannot use the Free Exercise Clause to exempt themselves from anti-discrimination laws but because of their religious character. Such an exemption, however, should be considered where subordination to the anti-discrimination laws would thwart the justification for spatial separation. Exempting Kiryas Joel from anti-discrimination laws should not be considered because of its religious character.<sup>222</sup> The justifications for separation, however, may require such exemption in some cases.<sup>223</sup> Such justifications-based exemptions from anti-discrimination laws cannot be sweeping, and must be examined in accordance with the threat posed by the specific case on the realization of separation justifications.

Finally, the Kiryas Joel case also requires examination regarding the threat that the separation from Monroe imposes on the autonomy of the individual community members. As previously mentioned, the separation of Kiryas Joel from Monroe was due to the significant normative differences that exist between the two social groups. The people of Kiryas Joel have advocated separation to preserve their extreme ultra-Orthodox lifestyle. A lifestyle that involves the application of illiberal values and norms, for example, gender segregation in both private and public spheres and the rejection of secular curriculum in the education system. However, empowering an illiberal community to be incorporated

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<sup>220</sup> U.S. CONST. amend. I.

<sup>221</sup> See, e.g., Alex J. Luchenister, *A New Era of Inequality: Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63 (2015); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015).

<sup>222</sup> See Stolzenberg, *supra* note 144, at 934 ("The incorporation of a 'Hasidic' town does not serve to create a Hasidic community, so much as to defend the community and its constitutive practices and institutions from attack.").

<sup>223</sup> *Id.* at 933-35.

as a municipality connects community authority and governing authority, a connection that raises concern about the preservation of the autonomy and constitutional rights of the community members. Kiryas Joel was at the center of such a legal challenge in 2013, even before deciding on separation. In 2013, The New York Civil Liberties Union and the American Civil Liberties Union sued the village of Kiryas Joel after press reports documented a public park in which women and girls were confined to an area with red benches and playground equipment, with boys and men confined to a blue area.<sup>224</sup> The lawsuit was settled after the town of Monroe government agreed not to endorse the segregation of the sexes in the public sphere.<sup>225</sup> However, the separation of Kiryas Joel from Monroe raised concerns that providing governing powers to the Satmar community would reawaken its leaders' desire to shape the public sphere to align with community norms. Another challenge concerns the enforcement of community norms through governing powers. In this sense, the concern is that establishing the connection between community authority and government authority will extend the violation of the autonomy of individual community members, especially when it comes to their right to oppose the leadership, to protest against it, and to suggest alternatives to a path chosen by the community leadership.<sup>226</sup> These concerns become more acute as the sanctions held by the municipal government are no longer informal, social sanctions, but governmental and legal ones.

However, although the importance of protecting the autonomy of individual members of the community cannot be underestimated, it

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<sup>224</sup> See The New York Civil Liberties Union Statement from December 11, 2013, regarding the lawsuit jointly filed by the Union and the American Civil Liberties Union because of Kiryas Joel refusal to disclose public records about a sex-segregated park. *NYCLU, ACLU Sue Hasidic Enclave Kiryas Joel for Information on Sex-Segregated Park*, N.Y. C.L. UNION (Dec. 11, 2013), <https://www.nyclu.org/en/press-releases/nyclu-aclu-sue-hasidic-enclave-kiryas-joel-information-sex-segregated-park>. See also Debra Nussbaum Cohen, *New York Hasidic Sect Sued Over Gender-segregated Park*, HAARETZ (Dec. 17, 2013), <https://www.haaretz.com/jewish/premium-hasidim-sued-over-sex-segregated-park-1.5301009>.

<sup>225</sup> See Chris McKenna, *Lawsuit settled over KJ gender separation in park*, TIMES HERALD-REC. (Apr. 1, 2014), <https://www.recordonline.com/article/20140401/NEWS/404010313>.

<sup>226</sup> The inner conflicts of the Satmar community are rarely expressed beyond the community institutions. However, due to the inheritance struggle that still go on in the community, some conflicts arrive to the court. While most cases seem to revolve around property rights and financial responsibilities, most of them reflect challenges to the full control of community leadership in institutions, and as a result, the way the community is managed. See, e.g., *Matter of Congregation Yetev Lev D'Satmar Inc. v Congregation Machneh Rav Tov*, 33 Misc. 3d 1206(A) [Sup. Ct., Ulster County 2011] (a challenge to the leadership control over the most important financial corporation of the community – the Yetev Lev D'Satmar Inc.); *Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc. v. Congregation Yetev Lev D'Satmar, Inc.*, 31 A.D.3d 480 (2d Dep't 2006) (a lawsuit for quiet title by opposition to the leadership).

should be addressed, and not prevent communities from incorporating as municipalities when justified. As argued above, the key to protecting the autonomy of individuals in illiberal communities who have been incorporated as cities is to monitor closely for the implementation of individuals' rights, with emphasis on the rights enumerated in the First Amendment to the Constitution: freedom of expression, the right to criticize the government, and freedom of association.<sup>227</sup> Ensuring these rights and ongoing monitoring of their implementation will reduce the fear of infringing on the autonomy of individuals in the community.

In conclusion, trying to compare the case of St. George and the case of Kiryas Joel is like comparing apples and oranges. While in the former, no justification for separating St. George's residents from East Baton Rouge's parish can be identified, numerous justifications apply for separating Monroe and Kiryas Joel residents. The differences between the cases concern both the identity and the status of the party that demands the separation, with regard to the motives for the separation and with regard to the consequences it may have on each of the parties. While the case of St. George is just another expression of segregation as discrimination, the case of Kiryas Joel is more complex. The Kiryas Joel's circumstances suggest another view of the spatial separation Cathedral: separation may sometimes not be discriminatory but rather equal. Despite the many concerns that accompany the establishment of the first ultra-Orthodox town in the United States – concerns that cannot be underestimated and need to be addressed – Kiryas Joel or the new Town of Palm Tree might be regarded as the implementation of a new equation in the American space: separate, therefore equal.

## CONCLUSION

Municipal incorporation serves essential social, economic, and spatial needs. The decentralization of local government is justified for democratic, utilitarian, and pluralistic reasons. However, it may also serve as a route designed to circumvent the legal prohibition of spatial discrimination. In some cases, social groups wishing to separate from other, usually less affluent social groups, may bypass the separation bans that have been practiced since *Brown v. Board of Education* and the Civil Rights laws through incorporation as a separate city. The potential discriminatory use of municipal incorporation requires the assimilation of a mandatory examination of its racial and socioeconomic implications within the incorporation approval processes. Such an examination should consider the justifications and objections for spatial separation, as well as on the incorporation's effects on the communities involved, the autonomy of the communities' members and society as a whole .

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<sup>227</sup> U.S. CONST. amend. I.

The article provides a nuanced roadmap that should guide the political or judicial entities responsible for approving the incorporation in their approval process. It also provides an implementation of the proposed roadmap on two recent municipal incorporation cases: the case of St. George, Louisiana, and the case of Kiryas Joel, New York. The analysis of these cases will illustrate how the proposed roadmap makes it possible to distinguish between cases where separation is merely a device for spatial discrimination and cases where separation may contribute to spatial equality. As the examination of the two cases demonstrates, the former case expresses an attempt to reapply the "separate but equal" doctrine in the American space, while the latter case challenges the irrefutable presumption that separation is always discriminatory. This understanding implies that separation is sometimes part of the quest for spatial equality. For some social groups, therefore, the familiar legal and social equation about separation and equality should take another expression, whereby "separate, therefore equal."