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# The Law and Economics of Affirmative Action in Housing: The Diversity Impulse

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# THE LAW AND ECONOMICS OF AFFIRMATIVE ACTION IN HOUSING: THE DIVERSITY IMPULSE

GEORGE STEVEN SWAN, S.J.D.\*

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## I. INTRODUCTION

The problem of the twenty-first century is the problem of the colorline.<sup>1</sup>

The following pages share the insight of Professor Michael G. Dawson that even middle-class African-Americans deem their own personal destinies as bound to that of their race. Improving class status deepens the perception of group interest in the minds of prospering African-Americans. One might speculate that enriched educational achievement on the part of such individuals would debilitate this perceived attachment to their race. Rather, education accompanies an opposite effect. Political scientist Claudine Gay argues that the material cause of African-Americans' continuing racial identification lies in their neighborhoods' unsatisfying quality. As the residential payoffs to African-American middle-class status expand, racial sensitivity could evanesce. The prominence of race in individuals' psychologies might prove a function of neighborhood socioeconomic phenomena.

Residential choices in America are exposed to political machinations. These include real estate regulations along the lines of "open-space" laws enforced by local authorities at the behest of the local rich. African-Americans are aware of the vital role of homeownership in group advancement. Unfortunately, legal controls on real estate can exclude African-

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<sup>1</sup> "[T]he problem of the Twentieth Century is the problem of the colorline." W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* vii (1983), *quoted in* Le Von E. Wilson & George Steven Swan, *The Law and Policy of Civil Rights: A Tactical Perspective for Educators*, 14 *EXPLORATIONS ETHNIC STUDIES* 57, 57 (1991).

Americans—or even extrude resident African-American populations—from a community. The residential colorline is the central characteristic distinguishing African-Americans from every other tile in America's ethnic mosaic.

Historically, President Franklin D. Roosevelt's New Deal spawned long-lived federal housing credit programs. Practically, these programs proved venomously exclusionary of African-Americans. The federal government ratified overt racial discrimination. Comparably lethal to African-American dreams for access to homes comparable to white Americans' access was the famed G.I. Bill of Rights, itself a product of President Roosevelt's administration. Decades of political incrementalism has helped to erect an edifice of *de facto* segregated housing.

Affirmative action in housing might mark an incremental method whereby diversity among residential districts—some becoming racial checkerboards—simultaneously must mean racial diversity within at least some such precincts. Can tax policy be harnessed toward such an end? For over two decades Low Income Housing Tax Credits have encouraged the conjuring of residences allotted, long-term, to lower income households. Racial affirmative action diversity in housing would not run counter to the affirmative action paradigm familiar from employment, and from educational diversity experiments. Indeed, the call for diversity in student bodies emerged originally from an awareness of the artificial lack of suburban residential diversity. As recently as 2003, the Supreme Court sanctioned diversity as a critical variable in legitimatizing affirmative action in higher education.

But do not Supreme Court precedents obstruct a Congressional progressive reform of our tax law in 2007 to encourage affirmative action in housing? The scholarship of the renowned Professor Laurence H. Tribe suggests that they need not. In any case, the years-ago advocacy research of Chief Justice John Roberts teaches America anew the old lesson that Congress can finesse any such difficulties in advance. Congress can so move thanks to its option of implementing federal court jurisdictional reforms, in tandem with pro-diversity, housing affirmative action legislation.

## II. ENHANCED CLASS STATUS REINFORCES RACIAL AFFINITY: THE INSIGHTS OF PROFESSOR MICHAEL C. DAWSON

A deep level of attachment to an expansive federal government clearly divides African-Americans from Euro-Americans.<sup>2</sup> An historical sense of

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<sup>2</sup> STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 304 (1997).

vulnerability haunts African-American political attitudes.<sup>3</sup> In supposing that the destiny of their race hinges upon a governmental helping hand—and that only the forceful presence of that hand holds their racial foes at arm’s length—most African-American voters remain in the camp of just one of the two major political parties.<sup>4</sup> According to the savviest of analysts, African-Americans, it is said, share an appreciation for the necessity of, and efficacy of, taking the political initiative collectively.<sup>5</sup> “Even the middle class views its hard-won status as fragile, with the consequence that individual blacks see their own fate as tied to that of the race, the political scientist Michael Dawson has persuasively argued.”<sup>6</sup>

Professor Dawson, in his *Behind the Mule: Race and Class in African-American Politics*,<sup>7</sup> warns:

Consider two black lawyers. One is a recent graduate from an elite law school who is working at a major corporation or law firm. She is earning an excellent salary that is at least somewhat on par with those of her white classmates. The other is an older lawyer who was not allowed to go to an elite law school and has a practice based in the black community. This lawyer’s income hardly matches the salary of the other lawyer, but both share the same occupation. In this case, income better captures the disparities between class segments than does occupation. Income and education are the primary class measures used in this study.<sup>8</sup>

Dawson’s work drew upon the National Black Election Panel Study (NBES) of 1984-1988.<sup>9</sup> It consisted of a national telephone survey wherein 1,150 interviews were conducted with adult African-Americans.<sup>10</sup> The NBES represented one of the most extensive political surveys of the African-American populace to have been conducted.<sup>11</sup> It delivered both economic and general metrics of absolute and relative group status.<sup>12</sup> “These measures

<sup>3</sup> *Id.*

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

<sup>5</sup> See, e.g., LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002).

<sup>6</sup> THERNSTROM & THERNSTROM, *supra* note 2, at 304.

<sup>7</sup> MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* (1994).

<sup>8</sup> *Id.* at 75.

<sup>9</sup> *Id.* at 77.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

allow us to compare the different hypotheses according to which the most important determinants of political choice are based on class, individual utility, evaluations of what is good for society, or racial group utility, respectively."<sup>13</sup>

There clearly exists a relationship between socioeconomic status and the perception of economic subordination.<sup>14</sup> Preliminarily, those enjoying greater education and status are *more* likely than their less-blessed kin to believe that African-Americans (as a group) are in a poor economic state, absolutely and relatively.<sup>15</sup> Occupation, apparently, contributes slight information to that afforded from education and income.<sup>16</sup> Even as late as 2004, it seemed that employment status never yet had been utilized in models predicting black racial attitudes.<sup>17</sup>

The concept of linked fate explicitly ties perceived self-interest to perceived racial group interests.<sup>18</sup> African-American group interest has served as a proxy for self-interest.<sup>19</sup> This concept of linked fate was measured during 1984 and 1988<sup>20</sup> (along with the aforementioned perception of the economic subordination of African-Americans).<sup>21</sup> Heed the results emphasized by Dawson:

However, the *more* education one had, the more likely one was to believe that blacks were economically subordinate to whites, and consequently, the more likely one was to believe that one's fate was linked to that of the race. *Education thus had the opposite effect from the one predicted by those who believed that increased opportunities for blacks should lead to a weakening of perceived attachment to the race.*<sup>22</sup>

Perceptions of relative group influence assist in predicting someone's political orientation.<sup>23</sup> In questions about the relative influence of African-Americans, and Euro-Americans, in 1984 and 1988 there was scant

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 79.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Claudine Gay, *Putting Race in Context: Identifying the Environmental Determinants of Black Racial Attitudes*, 98 AM. POL. SCI. REV. 547, 551 n.5 (2004).

<sup>18</sup> DAWSON, *supra* note 7, at 76.

<sup>19</sup> *Id.* at 77.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 79.

<sup>22</sup> *Id.* at 81-82. (emphasis in original).

<sup>23</sup> *Id.* at 86.

disagreement among blacks over whether African-Americans had adequate influence.<sup>24</sup> Of 1984, Dawson again waxes emphatic:

In 1984, all variables except those relating to age contributed to the perception that whites have too much influence. Those who believed that blacks had too little influence, believed that their fate was linked to that of the race, were more affluent, and believed that blacks were economically worse off than whites were more likely to believe that whites had too much influence. Once again, the class variables have the opposite effects from those one would be led to expect by those who argue that higher socioeconomic class correlates with a higher degree of conservatism. *Class status and perceptions of group interests reinforce each other.*<sup>25</sup>

Somewhat divergent was the 1988 pattern, with class and perceptions of group interests boasting weaker effects.<sup>26</sup>

Why, to borrow Dawson's language, have enriched opportunities for African-Americans not led to a weaker perceived attachment to the race? Why has elevated socioeconomic class not correlated with an enhanced degree of conservatism?

### III. NEIGHBORHOOD QUALITY AS MATERIAL ROOT OF RACIAL AFFINITY: THE INSIGHTS OF PROFESSOR CLAUDINE GAY

#### A. *Gay Isolates the Symptoms*

Professor Claudine Gay, during 2004 (in her study, *Putting Race in Context: Identifying the Determinants of Black Racial Attitudes*)<sup>27</sup> cited Dawson for the proposition that individual socioeconomic status impinges upon African-Americans' racial attitudes. Thereby, higher-status blacks agree the more fervently that race endures as the definitive element in individual biographies.<sup>28</sup> The higher status African-Americans—measured (typically) by educational attainment—are more likely than are lower-status African-Americans to subscribe to ideas of shared fate, and to argue that racial

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 87 (emphasis in original).

<sup>26</sup> *Id.*

<sup>27</sup> Gay, *supra* note 17, at 547. Prof. Gay is a member of the Stanford University Political Science Department.

<sup>28</sup> *Id.* at 547 (citing, *inter alia*, DAWSON, *supra* note 7).

membership determines someone's access to economic prospects.<sup>29</sup> Well-documented is the positive association between individual socioeconomic status and African-American racial identification, although it remains poorly understood.<sup>30</sup>

Results from the 2000 Census indicate that the majority of suburban African-Americans<sup>31</sup> live in racially segregated suburbs. There the degree of residential segregation is not just heavy, but is unvaried since 1990. African-America's urban exodus less serves as a vehicle for racial change than for economic segregation.<sup>32</sup> Economists know how a house's price embeds information about the value attaching to every type of amenity: quiet, greenery, shopping, low crime, etc. (The price of identical homes situated opposite one another probably signals how much people prefer a house facing the sun).<sup>33</sup> Citing the widely-respected study<sup>34</sup> by Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass*,<sup>35</sup> Gay observes that African-Americans are able to purchase fewer neighborhood amenities with their income, dollar for dollar, than are other groups.<sup>36</sup> A 2001 Brookings Institution Center on Urban and Metropolitan Policy study ascertained that for every dollar of income, African-American homeowners owned \$2.16 worth of house; for each such dollar, white homeowners owned \$2.64 worth of house.<sup>37</sup> Residential circumstances might factor into perceptions of the persistence of race as an overriding variable in life.<sup>38</sup> For an African-American, the incapacity to secure a favorable residential environment might facilitate her belief that race still delimits her hopes for socioeconomic rewards.<sup>39</sup>

<sup>29</sup> *Id.* at 549 (citing, *inter alia*, DAWSON, *supra* note 7).

<sup>30</sup> *Id.* at 547 n.1.

<sup>31</sup> See, e.g., TOM MARTINSON, *AMERICAN DREAMSCAPE: THE PURSUIT OF HAPPINESS IN POSTWAR SUBURBIA* (2000); ANDREW WIESE, *PLACES OF THEIR OWN: AFRICAN AMERICAN SUBURBANIZATION IN THE TWENTIETH CENTURY* (2004).

<sup>32</sup> Gay, *supra* note 17, at 548.

<sup>33</sup> TIM HARFORD, *THE UNDERCOVER ECONOMIST: EXPOSING WHY THE RICH ARE RICH, THE POOR ARE POOR—AND WHY YOU CAN NEVER BUY A DECENT USED CAR!* 94 (2006).

<sup>34</sup> See, e.g., George Steven Swan, *The Political Economy of American "Apartheid": Shaw v. Reno*, 11 T. M. COOLEY L. REV. 1, 14 (1994).

<sup>35</sup> DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

<sup>36</sup> Gay, *supra* note 17, at 549.

<sup>37</sup> David Rusk, *The "Segregation Tax": The Cost of Racial Segregation on Black Homeowners*, SURVEY SERIES (The Brookings Inst., Wash., D.C.), Oct. 2001, at 1, 3, available at <http://www.brook.edu/es/urban/publications/rusk.pdf>.

<sup>38</sup> Gay, *supra* note 17, at 550.

<sup>39</sup> *Id.*



Gay utilized data from the 1992-1994 Multi-City Study of Urban Inequality (MCSUI).<sup>40</sup> The MCSUI is a linked study of households and employers in four metropolitan areas: Atlanta, Boston, Detroit, and Los Angeles County.<sup>41</sup> The analysis relied upon survey data for 3,109 respondents who self-identified as black.<sup>42</sup> The survey was supplemented with 1990 Census data on the racial and socioeconomic features of respondents' neighborhoods.<sup>43</sup> In three of the four metropolitan areas, Gay found that blacks who live in neighborhoods offering the security that draws from well-tended homes and easy access to public and private services are less likely to believe that race endures as the definitive feature of their lives. Atlanta represents the exception.<sup>44</sup> Only therein do expressions of linked fate ("Do you think that what happens to [black] people in this country will have something to do with what happens in your life? Will it affect you a lot, some, or not very much?")<sup>45</sup> prove unrelated to neighborhood quality.<sup>46</sup>

Beliefs concerning barriers to African-American socioeconomic achievement were tested with the query: "In general, how much discrimination is there that hurts the chances of [blacks] to get good-paying jobs? Do you think there is a lot, some, only a little, or none at all?"<sup>47</sup> Finds Gay:

While discrimination and linked fate attitudes are both responsive to shifts in residential circumstances, African Americans more readily discard notions of linked fate (i.e., shifting from "a lot" to "none" or "not very much") than they do their firm belief that discrimination remains a barrier to black socioeconomic attainment (i.e., shifting only from "a lot" to "some").<sup>48</sup>

Whatever the philosophical base underlying block solidarity,<sup>49</sup> what proves its material foundation? After all, African-Americans' continuing color-consciousness pushes against the (increasingly colorblind) long-term

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<sup>40</sup> *Id.* at 550.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 554.

<sup>45</sup> *Id.* at 552.

<sup>46</sup> *Id.* at 554.

<sup>47</sup> *Id.* at 552.

<sup>48</sup> *Id.* at 555.

<sup>49</sup> See, e.g., TOMMIE SHELBY, *WE WHO ARE DARK: THE PHILOSOPHICAL FOUNDATIONS OF BLACK SOLIDARITY* (2005). "Middle-class blacks, Shelby opines, are preoccupied with the 'public image' of blackness because they see racial stereotypes as impeding their social mobility (e.g., career advancement)." Hawley Fogg-Davis, Book Review, 4 *PERSPECTIVES ON POLITICS* 578, 579 (2006).

tide of American history.<sup>50</sup> Over the past lifetime, for example, the South switched from its historical partisan affiliation,<sup>51</sup> and the latest scholarship proves that this allegiance shift was not racially motivated. It was predicated upon class influences and the profound economic evolution of that region.<sup>52</sup>

### B. *Gay Diagnoses the Disease*

#### 1. THE CONTRIBUTION OF PROFESSOR THOMAS M. SHAPIRO

Gay concludes that the influence of neighborhood quality on the prominence of race evidences the material roots of African-American racial identity: "To wit, neighborhood quality affects the salience of race by providing blacks with an objective basis on which to either accept or reject the standing belief that their lives remain overly determined by their racial group membership."<sup>53</sup> The same year in which Gay wrote, Thomas M. Shapiro elucidated her thinking in different language:

A family's assets, consisting of financial resources like savings accounts, stocks, bonds, home equity, and other investments, are not merely means through which they measure success or make a life. These assets also define a family's community and class status and racial identity. Our conversations with families will illustrate how they use assets to establish class, community, and race boundaries. While it is no longer legal to deny access to housing based on race, there is no law against keeping out people who cannot afford a mortgage and thus hoarding community and educational opportunities. The home we own, how big that home is, and its location are key statements in our class identity. Immigrants, Asian Americans, Hispanics, and others form racial identities in large measure by the characteristics of the communities they live in. For example, Hispanics who live in predominantly upper-middle-class white communities and whose children attend

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<sup>50</sup> "Where minorities are joined by a sizable nonaffluent white population, the policy preferences for most whites, African Americans, and Latinos are similar—a development that stimulates leadership awareness and responsiveness on behalf of all traditionally excluded groups." Linda Faye Williams, Book Review, 4 PERSPECTIVES ON POLITICS 768, 770 (2006). *But cf.* MICHAEL K. BROWN, ET AL., WHITE WASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY (2003).

<sup>51</sup> *See, e.g.*, EARL BLACK & MERLE BLACK, THE RISE OF SOUTHERN REPUBLICANS (2002).

<sup>52</sup> *See, e.g.*, BYRON E. SHAFER & RICHARD JOHNSTON, THE END OF SOUTHERN EXCEPTIONALISM: CLASS, RACE, AND PARTISAN CHANGE IN THE POSTWAR SOUTH (2006).

<sup>53</sup> Gay, *supra* note 17, at 559.

white schools are far more likely to be treated as and identify as white than those living in poor nonwhite communities. In contrast, African Americans can use assets to achieve class status, but where they live has little consequence for their racial identities. Widespread residential segregation further restricts African American families from using assets to break out of racial boundaries.<sup>54</sup>

Gay explains that African-American beliefs regarding race are infused with a legacy of economic oppression “as opposed to being strictly an expression of cultural solidarity.”<sup>55</sup>

## 2. THE CONTRIBUTION OF PROFESSOR CASS R. SUNSTEIN

That core racial attitudes are influenced by neighborhood socioeconomic contexts casts light over the well-documented, albeit paradoxical, tendency of lower-class African-Americans to feel less racially-oriented than do middle-class African-Americans.<sup>56</sup> Residing primarily among higher-

<sup>54</sup> THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 11 (2004). Shapiro is the Pokross Professor of Law and Social Policy at Brandeis University.

<sup>55</sup> Gay, *supra* note 17, at 559. Grasping the prominence of economic variables—as distinguished from cultural variables, *see, e.g.*, WALDO E. MARTIN, JR., *NO COWARD SOLDIERS: BLACK CULTURAL POLITICS AND POSTWAR AMERICA* (2005)—does not require the denial of racial stigma as an important concept, *see, e.g.*, GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (2002), regarding America’s twenty-first century wars. *See, e.g.*, MATTHEW FRYE JACOBSON, *ROOTS TOO: WHITE ETHNIC REVIVAL IN POST-CIVIL RIGHTS AMERICA* (2006); ERIC P. KAUFMANN, *THE RISE AND FALL OF ANGLO-AMERICA* (2004). These follow the minority rights revolution of a generation past. *See, e.g.*, JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* (2002). The South was turned upside-down after World War II. *See, e.g.*, PETE DANIEL, *LOST REVOLUTIONS: THE SOUTH IN THE 1950S* (2000).

Of course, racial discrimination can endure through unconscious assumptions. *See, e.g.*, LU-IN WANG, *DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE* (2006); *cf.* DEIRDRE A. ROYSTER, *RACE AND THE INVISIBLE HAND: HOW WHITE NETWORKS EXCLUDE BLACK MEN FROM BLUE-COLLAR JOBS* (2003).

Sociologist William T. Bielby is the leading courtroom proponent of a simple but powerful theory: “unconscious bias.” He contends that white men will inevitably slight women and minorities because they just can’t help themselves. So he tries to convince judges that no evidence of overt discrimination—no smoking gun memo, for instance—is needed to prove a case. As Allen G. King, an employment defense attorney at the Dallas office of Littler Mendelson, puts it: “I just have to leave you to your own devices, and because you are a white male,” you will discriminate.

Michael Orey, *White Men Can’t Help It: Courts Have Been Buying the Idea that They Have Innate Biases*, *BUS. WK.*, May 15, 2006, at 54, 54. “Plaintiffs have used [University of Pennsylvania] Professor Bielby as an expert witness in more than fifty cases . . .” *Id.* at 57.

<sup>56</sup> Gay, *supra* note 17, at 559.

status blacks may reinforce the supposition that race remains the overriding element in someone's life.<sup>57</sup> Gay's findings call to mind Cass R. Sunstein's 1999 formulation of his Law of Group Polarization.<sup>58</sup> Sunstein's Law is pregnant with implications for legal and economic institutions, and is (partially) explanatory of extremism.<sup>59</sup> Group polarization arises when a deliberating group's membership shifts to a more extreme point, in whatever direction was indicated by that membership's pre-deliberation tendency.<sup>60</sup> "[I]t has been found to matter whether people think of themselves, antecedently or otherwise, as part of a group having a degree of solidarity. If they think of themselves in this way, group polarization is all the more likely, and it is likely too to be more extreme."<sup>61</sup>

The political polarization in America of recent decades has been accompanied closely by fundamental economic and social changes.<sup>62</sup> It is probable that polarization occurs toward heavier ethnic identification.<sup>63</sup> Intragroup discussion can ensure that when an ethnic group, and the individual members thereof, finish, they feel a far heavier ethnic identification than had the median member (pre-discussion).<sup>64</sup> Sure enough, Gay's Boston and Los Angeles survey item research teaches emphatically: "African Americans who live amongst *and* interact with highly educated blacks believe more strongly than socially engaged blacks in less-educated contexts—or their unengaged neighbors—that race will limit their opportunities for socioeconomic attainment."<sup>65</sup>

<sup>57</sup> *Id.* at 549.

<sup>58</sup> See, e.g., CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005). His most recent book is CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* (2006). Sunstein is the Karl Llewellyn Distinguished Services Professor of Jurisprudence, of the University of Chicago Law School and Political Science Department, and is an influential political and legal theorist.

<sup>59</sup> Cass R. Sunstein, *The Law of Group Polarization*, 10 J. OF POL. PHIL. 175, 175-76 (2002).

<sup>60</sup> *Id.* at 178.

<sup>61</sup> *Id.* at 181 (citing PATRICIA WALLACE, *THE PSYCHOLOGY OF THE INTERNET* 73-76 (1999); Russell Spears et al., *De-Individuation and Group Polarization in Computer-Mediated Communications*, 29 BRIT. J. SOC. PSYCHOL. 121, 121-34 (1990); Douglas Abrams et al., *Knowing What to Think by Knowing Who You Are: Self-Categorization and the Nature of Norm Formation, Conformity and Group Polarization*, 29 BRIT. J. SOC. PSYCHOL. 97, 112 (1990)).

<sup>62</sup> See, e.g., NOLAN MCCARTY, KEITH T. POOLE AND HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006).

<sup>63</sup> Cass R. Sunstein, *The Law of Group Polarization* 20 (Chicago Law Sch. John M. Olin Program in Law & Econ., Working Paper No. 91, 2d Series, 1999), available at [http://www.law.uchicago.edu/Lawecon/WkngPprs\\_76-100/91.CRS.Polarization.pdf](http://www.law.uchicago.edu/Lawecon/WkngPprs_76-100/91.CRS.Polarization.pdf).

<sup>64</sup> *Id.* at 22.

<sup>65</sup> Gay, *supra* note 17, at 557 (emphasis in original). "Unfortunately, these items were included only in the surveys fielded in Boston and Los Angeles; the ... model could be fitted only to those data." *Id.*

According to Sunstein:

Informational and reputational forces are very much at work here, producing cascade effects, and group polarization can lead members to increasingly extreme positions. It is not too much of a leap to suggest that these effects are also present within ethnic groups and even nations, notwithstanding the unusually high degree of national heterogeneity.<sup>66</sup>

Group polarization is likely, even in the face of equality, and of wholly conscientious attempts to reach both truth and understanding.<sup>67</sup> (Of course, ascribing to *others* a singular identity like race constitutes identity thinking itself negative.<sup>68</sup> That concept was bruited only last year by the Master of Trinity College, Cambridge, Amartya Sen, winner of the Nobel Prize in Economics in 1998 for his contributions to the welfare economics field). What Ellis Cose denominated as the rage of a privileged class<sup>69</sup> might emerge from the frustration middle-class African-Americans sense when struggling to translate rising incomes, expanded educational credentials, and occupational mobility, into more desirable residential conditions.

### C. *Gay Prescribes the Remedy*

The “neighborhood gap” is the difference between one’s household income and the quality of one’s neighborhood.<sup>70</sup> Results from the 2000 Census disclose that this gap is greater, and is growing with more celerity, for the most affluent African-Americans than for those near the poverty level.<sup>71</sup> Gay investigated the “neighborhood racial gap,” the absolute value of the difference between the preferred and the actual racial composition of the neighborhood. This gap proves positively associated with the view that discrimination endures as a roadblock against African-American socioeconomic

<sup>66</sup> Sunstein, *supra* note 59, at 185.

<sup>67</sup> Sunstein, *supra* note 63, at 27.

<sup>68</sup> See, e.g., AMARTYA SEN, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* (2006); Nadine Robitaille, *The Illusion of Identity: Nobel Prize-Winner Amartya Sen on Violence, Identity, and Globalization*, SPEAKER SERIES (Int’l Dev. Res. Centre, Ottawa, Ont.), Apr. 2004, [http://www.idrc.ca/en/ev-96559-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-96559-201-1-DO_TOPIC.html); Amartya Sen, Letter to the Editor, *Our Inspirations from the Past are Selective*, WALL ST. J., Apr. 18, 2006, at A19.

<sup>69</sup> ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1995).

<sup>70</sup> Gay, *supra* note 17, at 559.

<sup>71</sup> *Id.* (citing JOHN LOGAN, LEWIS MUMFORD CTR. FOR COMPARATIVE & REG’L RESEARCH, *SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS AND HISPANICS IN METROPOLITAN AMERICA* (2002)).

success. That result comports with the proposition that unmet residential preferences breed pessimism over race.<sup>72</sup>

Gay speculates optimistically of this malady: "If the residential returns to middle-class status improve—for example, with tougher enforcement of fair housing laws—the paradox of heightened race consciousness may disappear."<sup>73</sup> Gay patriotically elaborates:

Whether African Americans perceive race as the defining interest in their lives is of central political importance. A worldview in which racial group membership is thought to determine one's life chances underlies support for black political candidates, disposes African Americans to policy solutions that emphasize government intervention, and encourages collective mobilization to improve the status of blacks. Hence, if the salience of race is vulnerable to processes of neighborhood socioeconomic changes, the political cohesiveness that this salience sustains may be equally vulnerable.<sup>74</sup>

So, what is the economics of residence ("the residential returns to middle-class status")?

#### IV. THE ECONOMICS OF RESIDENCE

##### A. *The Propertied and the Unpropertied*

Real estate is a foundation of life.<sup>75</sup> In a country of burgeoning population,<sup>76</sup> the value of real estate to individuals, and to societies, grows at an

<sup>72</sup> *Id.* at 560 n.15.

<sup>73</sup> *Id.* at 560.

<sup>74</sup> *Id.* Varied are the answers to what limits housing choice (begetting a racially unequal geography of opportunity), and what are the socioeconomic consequences of this geography. *See, e.g., THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* (Xavier de Souza Briggs ed., 2005).

<sup>75</sup> PATRICK K. HETRICK & LARRY A. OUTLAW, *NORTH CAROLINA REAL ESTATE FOR BROKERS AND SALESMEN 1* (4th ed. 1994).

<sup>76</sup> Mexico is the maternity ward of the United States. Approximately one of eight adults born in Mexico now lives in the United States. ROBERTO SURO, PEW HISPANIC CTR., *ATTITUDES TOWARDS IMMIGRANTS AND IMMIGRATION POLICY: SURVEYS AMONG LATINOS IN THE U.S. AND MEXICO 14* (2005), available at <http://pewhispanic.org/files/reports/52.pdf>. In 2005, over 20 percent of nationally representative samples of Mexicans were inclined to work in the U.S. illegally. *Id.* at 13. Of course, public finance shapes American preferences regarding immigration. *See, e.g., GORDON H. HANSON, WHY DOES IMMIGRATION DIVIDE AMERICA? PUBLIC FINANCE AND POLITICAL OPPOSITION TO OPEN BORDERS* (2005).

unprecedented rate. Regulations governing real estate ownership date from the earliest times. They have evolved into a massive *corpus* of law.<sup>77</sup> Scarce land enhances in value as economic activity spurts. More important, the wealthy expend more upon better-located residences. To ration the slowly-adjusting housing supply in response to a growing demand, disproportionate increases in prices are indispensable, but planning restrictions can halt this adjustment in supply.<sup>78</sup>

Metropolitan fragmentation denotes the phenomenon whereby suburban communities can break away to found separate political entities.<sup>79</sup> Most local governments heavily rely on the property tax (primarily, a tax levied against the value of land and buildings).<sup>80</sup> The revenue yield, at a given rate of taxation, is largely decided by how land is utilized.<sup>81</sup> As suburbanization ("sprawl"<sup>82</sup>) proceeded,<sup>83</sup> local governments realized that they could wield their police powers to fatten their fisc and yet retain attractive communities, notwithstanding the impact upon neighboring jurisdictions.<sup>84</sup> The ratio of public service costs to tax revenue tends to be low in high-income

<sup>77</sup> HETRICK & OUTLAW, *supra* note 75, at 1.

<sup>78</sup> Martin Wolf, *Dangers of Great Housing Market Delusion*, FIN. TIMES, Apr. 17, 2006, at 4.

<sup>79</sup> See, e.g., RICHARDSON DILWORTH, *THE URBAN ORIGINS OF SUBURBAN AUTONOMY* (2005).

<sup>80</sup> DICK NETZER, *ECONOMICS AND URBAN PROBLEMS: DIAGNOSES AND PRESCRIPTIONS* 94 (1970).

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

<sup>82</sup> See, e.g., ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* (2005); NATURE IN FRAGMENTS: THE LEGACY OF SPRAWL (Elizabeth A. Johnson and Michael W. Klemens eds., 2005); OWEN D. GUTFREUND, *TWENTIETH-CENTURY SPRAWL: HIGHWAYS AND THE RESHAPING OF THE AMERICAN LANDSCAPE* (2004); DOLORES HAYDEN, *A FIELD GUIDE TO SPRAWL* (2004); ANDRÉS DUANY, ELIZABETH PLATER-ZYBERK, AND JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL, AND THE DECLINE OF THE AMERICAN DREAM* (2000); and Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301 (2000). The most recent book-length study of sprawl is WILLIAM T. BOGART, *DON'T CALL IT SPRAWL: METROPOLITAN STRUCTURE IN THE TWENTY-FIRST CENTURY* (2006). Of course, recent times have witnessed the emergence of edge cities. See, e.g., JON C. TEAFORD, *THE METROPOLITAN REVOLUTION: THE RISE OF POST-URBAN AMERICA* (2006).

<sup>83</sup> KEVIN M. KRUSE AND THOMAS J. SUGRUE, *THE NEW SUBURBAN HISTORY* (2006); DOLORES HAYDEN, *BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH, 1820-2000* (2003).

Despite the desires of some new urbanists and "smart growth" activists to cram people into dense cities and regions, the America of 2050—contrary to the contention of some demographers—also will likely be far more dispersed. A combination of new telecommunications technologies and rising land prices will accelerate the shift of population beyond the current suburban fringes and into the countryside. The demographer Wendell Cox calls this "sprawl beyond sprawl." It is driven by the simple fact, according to most recent surveys, that the vast majority of Americans—upward of 80%—still prefer single-family homes over apartments, while no more than 10% to 15% want to live near the central core.

Joel Kotkin, *400,000,000*, WALL ST. J., Oct. 17, 2006, at A14.

<sup>84</sup> NETZER, *supra* note 80, at 94-95.

areas of expensive homes.<sup>85</sup> On the other hand, young families with numerous children of school-age are likely to purchase moderate-value homes generating a limited tax base.<sup>86</sup> Zoning for large minimum-lot sizes becomes popular.<sup>87</sup>

The human right to property is a longtime concern of Anglo-American law,<sup>88</sup> and is expressly protected in our Constitution.<sup>89</sup> Notwithstanding the notion that the human right to property is a perquisite of the rich, such rights can prove of greater value to the non-rich.<sup>90</sup> The non-rich populace *en masse* can command far greater wealth than can the plutocracy. Hence, under *laissez faire*, numerous holdings of the wealthy would be bid away from them by the heftier purchasing power of the balance of the citizenry.<sup>91</sup> Entrepreneurs drawing upon borrowed funds can acquire châteaux, to replace them with abodes for those of modest incomes.<sup>92</sup> Developers are intermediaries whose strategies are premised upon whatever many other people are willing to pay for. The genuine competitors bidding against affluent incumbents in a given area are those would-be buyers and renters of modest homes.<sup>93</sup> Property rights enable mere renters, of moderate incomes, to throw an aggregate heavy weight in the marketplace.<sup>94</sup> This

<sup>85</sup> *Id.* at 95.

<sup>86</sup> *Id.* Familiar in the study of urban economics is the role of housing. See, e.g., BRENDHAN O'FLAHERTY, *CITY ECONOMICS* (2005).

<sup>87</sup> NETZER, *supra* note 80, at 95.

<sup>88</sup> See, e.g., BERNARD H. SIEGAN, *PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT* (2001). So salient to Anglo-American law has become the study of law and economics that Colin Mayer, the new Dean of Said Business School at Oxford University, anticipates a masters'-level program "such as joint law and economics targeted at specific consumers such as law firms and the economics departments of governments." Linda Anderson, *Oxford's Said Aims to Compete with Harvard*, FIN. TIMES, December 4, 2006, at FT Rep. 7.

<sup>89</sup> See, e.g., BERNARD H. SIEGAN, *PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION* (1997). As well it should be so shielded. "Between 1970 and 2004, the homeownership rate climbed to 69% from 63%, even as the physical size of the median new home grew by nearly 60%." Brink Lindsey, *Book view*, WALL ST. J., Sept. 21, 2006, at D6. This is the ordinary American's castle.

<sup>90</sup> THOMAS SOWELL, *BASIC ECONOMICS: A CITIZEN'S GUIDE TO THE ECONOMY* 279 (rev. and expanded ed. 2004) [hereinafter *BASIC ECONOMICS*]. Sowell's most recent book is THOMAS SOWELL, *EVER WONDER WHY?: AND OTHER CONTROVERSIAL ESSAYS* (2006). Dr. Sowell "laments the fact that more public intellectuals aren't applying economic analyses to racial policies . . ." Jason L. Riley, *The Weekend Interview with Thomas Sowell: Classy Economist*, WALL ST. J., Mar. 25, 2006, at A8.

<sup>91</sup> *BASIC ECONOMICS*, *supra* note 90, at 279.

<sup>92</sup> *Id.* at 280.

<sup>93</sup> THOMAS SOWELL, *APPLIED ECONOMICS: THINKING BEYOND STAGE ONE* 105 (2004).

<sup>94</sup> *Id.* at 104.



human right to property (of those less well-off) often has been invaded (to succor the wealthy).<sup>95</sup>

Those who are vastly propertied can impede such outcomes of liberty, via choking the human right to property, e.g., through “open space” laws.<sup>96</sup> Thereby, well-heeled property-holders can exclude would-be neighbors earning humbler incomes and yearning to buy shelter for their loved ones. (The rich simultaneously can boost the prices of their own property, thanks to its deepening scarcity in relation to an increase in local employment).<sup>97</sup> Many among those hardest-impacted cannot afford to live in the very community wherein they toil. Outsiders, once, might have moved in to potential residences now aborted by open space policies.<sup>98</sup>

These outsiders’ interests could have been championed in the marketplace by would-be sellers of local land, indulging the legally-protected right to dispose of their land as they deemed proper.<sup>99</sup> The greater profits must accrue to those existing landholders willing to deal when developers are at liberty to decide for themselves how many homes per acre are to be constructed, than when such decisions are extracted from decision-makers locked into a political straightjacket. The underlying contest erupts between the prospective purchasers of houses-and-renters of apartments, and the incumbents voting legislation costless to themselves but laying grievous burdens upon their fellows.<sup>100</sup> Many among the rich have bridled

<sup>95</sup> BASIC ECONOMICS, *supra* note 90, at 279.

<sup>96</sup> *Id.* at 280.

<sup>97</sup> *Id.* at 281. In many urban centers, large numbers of condominium units—in some instances, upwards of one-third—have been purchased by speculators, not by new urbanites. Joel Kotkin, *The Ersatz Urban Renaissance*, WALL ST. J., May 15, 2006, at A14.

Extreme urban housing prices are . . . in large part the product of political constraints. As Harvard’s Ed Glaeser has pointed out, regulatory restraints, neighborhood “nimbyism” and “smart growth” policies have played a large role in driving up housing prices by restraining supply, particularly outside favored downtown districts where, after all, there are few neighbors around to object to new construction.

*Id.* But Kotkin denies that upper-income residents are to be blamed for middle-class flight in more than a handful of cities. *Id.*

<sup>98</sup> BASIC ECONOMICS, *supra* note 90, at 102.

Executives in places like greater Boston or the San Francisco Bay area now complain they cannot staff firms locally since well-educated workers, particularly those in their 30s, can no longer afford to buy houses in these traditional tech centers. Instead, they often opt to expand further out, to areas where a middle-class lifestyle is still within reach. This also explains the movement of professional service companies, for example, from San Francisco to Las Vegas, where not just the slots are ringing. Professional business service employment in that desert city has risen by a remarkable 30% since 2002.

Kotkin, *supra* note 97.

<sup>99</sup> BASIC ECONOMICS, *supra* note 90 at 103-04.

<sup>100</sup> *Id.* at 104.

other Americans' human right to property so that the working class is held at bay (i.e., kept out of desirable locales).<sup>101</sup>

Indeed, if the unwanted plebeians once have purchased a foothold, why don't patricians just unmuzzle snarling police to expel the *hoi polloi*? The high and the mighty do. In the wake of *Kelo v. New London*,<sup>102</sup> it is but seldom that eminent domain abuse victimizes the wealthy. Instead, developers and cities, typically, work hand in hand to take the holdings of the poorer, or of the middle-income folk. Developers can be awarded modest beachfront bungalows, to erect million dollar-plus condominiums.<sup>103</sup> How have these interventions impinged upon African-Americans?

<sup>101</sup> *Id.* at 105-06. Witness the ongoing struggle over zoning in posh Collier County, Florida. Noelle Knox, *Wealth Gap Swallows Up American Dream*, USA TODAY, November 24, 2006, B1.

"When legal protections are broken, and property rights are abandoned, the poorest members of society are vulnerable to immense exploitation, and the creation of new wealth is impeded by the lack of civil stability." Glen Austin Sproviero, Book Note, *Moral Visions of the Free Market*, U. BOOKMAN, Fall 2006, at 36, 37, available at <http://www.kirkcenter.org/bookman/44-2-sproviero.html>. House prices in Manhattan, California and Hawaii have been judged to resemble those in London, Dublin and Barcelona:

Most of the price reflects the location rather than the accommodation. You cannot make more houses on East 69th Street or in Belgravia. Nor can you make more houses at the most prestigious addresses, because it is in the nature of prestigious addresses that there are not many of them.

Well located houses are what the economist Fred Hirsch called a positional good. House prices are consequently a product of sociology as well as economics. That combination explains why it is Britain, Ireland and Spain, not France, Italy and Germany, that have seen the fastest rises in European house prices and Hawaii, California and New York, not Idaho, Mississippi and Nebraska, have been the hot spots in the US.

John Kay, *Pay No Attention to Useless House Price Forecasts*, FIN. TIMES, November 7, 2006, at 15. Indeed, you cannot make more homes in the most prestigious towns if local law forbids building houses and apartments for the working class.

<sup>102</sup> 545 U.S. 469 (2005). "In the five years between 1998 and 2002, more than 10,000 properties nationwide were threatened or condemned for private development through eminent domain; in just the past year since *Kelo*, more than 5,700 properties have been similarly threatened or taken." Scott Bullock, *The Specter of Condemnation*, WALL ST. J., June 24, 2006, at A11; cf. John Fee, *Eminent Domain and the Sanctity of the Home*, 81 NOTRE DAME L. REV. 783 (2006).

<sup>103</sup> Scott Bullock, Letter to the Editor, *We Must Undo Kelo Decision's Damage*, WALL ST. J., Apr. 18, 2006, at A19. (Mr. Bullock is a senior attorney at the Institute for Justice, which represented the homeowners in *Kelo v. New London*). *Id.*

Since the dot-com boom, many big city mayors—such as Baltimore's Martin O'Malley and San Francisco's Gavin Newsome—have placed their faith on selling their cities primarily as "hip and cool" for the "creative class." By luring talented singles, gays, artists and well-heeled empty-nesters, they hoped, their cities would prosper even as *hoi polloi* exited for the bland suburbs and exurbs. This explains the widespread enthusiasm among urban boosters for the construction—often with city subsidy—of concert halls, museums, fancy restaurants and boutique hotels.

Kotkin, *supra* note 97, at A14. (emphasis added).

## B. *The White and the Black*

Residence constitutes a crucial factor in the state of African-American advancement. In *Kelo*, the National Association for the Advancement of Colored People filed an *amicus curiae* brief on behalf of the homeowners.<sup>104</sup> Only last year, *Black Enterprise* proclaimed: “[Y]ou know that our mission is to close the wealth gap between black and white households, and that increasing rates of homeownership—the primary source of wealth for most Americans—among African Americans is critical to achieving that objective.”<sup>105</sup> *Black Enterprise* has proclaimed a ten point Declaration of Financial Empowerment. In the Editors’ emphatic reminder: “We revised DOFE in January 2004 and made the No. 1 principle *to use homeownership to build wealth*.”<sup>106</sup> Why?

Property rights deliver the option to convert physical assets into financial assets.<sup>107</sup> That option, in turn, facilitates the creation of further wealth

<sup>104</sup> Douglas Schwartz, Letter to the Editor, *We Must Undo Kelo Decision's Damage*, WALL ST. J., Apr. 18, 2006, at A19.

<sup>105</sup> Earl G. Graves, Sr., *One Prize, But Hundreds of Winners*, BLACK ENTERPRISE, Mar. 2006, at 12. “In the United States the dispossessed are largely black . . .” MARILYN FRENCH, *BEYOND POWER: MEN, WOMEN, AND MORALS* 403 (1985).

Across racial lines, homeownership is the greatest contributor to generating wealth in the United States. That’s why BE launched its Own Your First Home Contest last year. It’s also why “to use homeownership to build wealth” remains the No. 1 Principle of our Declaration of Financial Empowerment, the centerpiece of the BE Black Wealth Initiative ([www.blackenterprise.com/wealth/wbk.asp](http://www.blackenterprise.com/wealth/wbk.asp)). The benefits of homeownership are many, and they extend beyond personal asset building. Homeowners tend to play more active roles in their communities, they vote at higher rates, and they contribute to neighborhood stability at higher rates than non-homeowners, according to public policy studies.

“Homeownership is transformative because people use their equity to pay for education for themselves or their children,” says Ken Wade, chief executive officer of NeighborWorks America, a Washington, D.C.-based nonprofit organization that provides financial and training assistance to improve communities. “A good number of small businessmen get their start by tapping into the equity in their homes,” he adds.

Tony Parrish, *Achieve Your Dream of Homeownership*, BLACK ENTERPRISE, Aug. 2006, at 110, 113.

<sup>106</sup> *Our Commitment to Wealth Building*, BLACK ENTERPRISE, Mar. 2006, at 14 (emphasis in original). See, e.g., Sheryl Nance Nash, *Future Plans in Real Estate: Chris Butler Is Positioning His Finances to Become a Property Owner*, BLACK ENTERPRISE, June 2006, at 88.

On the other hand, a secular rise in housing prices creates no wealth: “Unless a homeowner decided to move to Antarctica or into a smaller house, the new wealth did not increase their house buying power.” Vitaliy Katsenelson, *How Mental Accounts and Oil Prices Can Hit Spending*, FIN. TIMES, Sept. 23/24, 2006, at W5. Instead, rising housing prices increase property taxes (as a home is appraised at a greater value), and increase housing sale transaction costs (as agents collect a percentage of the price). *Id.*

<sup>107</sup> Sowell, *supra* note 93, at 200.

(whether in combination with others, or individually).<sup>108</sup> Many Americans have built their own businesses—some of which evolved into titanic corporations—by borrowing money for the launches thereof.<sup>109</sup> They obtained the requisite initial capital through borrowing, while putting up homes, farms, or other real estate as collateral.<sup>110</sup> But not everyone could.

In the post-open housing law<sup>111</sup> context of 1972, U.S. Representative Paul N. McCloskey, Jr., offered:

In housing, I can best present the problem by describing... actual situations in my own home area, the San Francisco peninsula, one of the highest-per-capita-income areas in the world, the home of Stanford University, an area of unparalleled climate and beauty, the community where some of the leading businessmen, lawyers, Nobel Prize winners and scientists of Western civilization reside—but where many people still refuse to sell or rent their homes in all-white neighborhoods to black applicants.

Several years ago, the San Mateo City School District hired, in the spring, ten black teachers to go to work the following September. None did. Why? They couldn't find housing because of the refusal of local apartment-house owners, realtors and home owners to sell or rent to black people.<sup>112</sup>

<sup>108</sup> *Id.* at 200-01. "Instead of using funds to make repairs and renovations that increase a property's value, many homeowners use the equity in their homes to expand their real estate holdings. And with interest rates still relatively low, such loans are even more appealing to investors." Carolyn M. Brown, *Real Deals: How to Use Equity to Build a Portfolio of Real Estate Assets*, BLACK ENTERPRISE, December 2006, at 43.

<sup>109</sup> Sowell, *supra* note 93, at 198-99.

<sup>110</sup> *Id.* at 199. For example, the provision to spouses of joint title for houses erected in Indian squatter communities, Namita Datta, *Joint Titling—A Win-Win Policy?: Gender and Property Rights in Urban Informal Settlements in Chandigarh, India*, 12 FEMINIST ECON. 271, 271-3 (2006), allows residents to utilize their small houses for loan collateral "to set up an income-earning enterprise." *Id.* at 277. "Homeownership, a traditional measure of economic well-being, does more than just help families build equity. The children of homeowners tend to perform better in school and have fewer behavioral problems. And home equity is a major source of collateral for people seeking bank loans to start new businesses." Editorial, *Home Economics*, WALL ST. J., May 26, 2006, at A10.

<sup>111</sup> Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §3601 et seq. (2006)).

<sup>112</sup> PAUL N. MCCLOSKEY, JR., TRUTH AND UNTRUTH: POLITICAL DECEIT IN AMERICA 147 (1972). Mr. McCloskey remains alive and kicking: "In one of the year's most improbable races, the 78-year-old former congressman has jumped back into politics in a long-shot bid to oust House Resources Committee Chairman Richard Pimbo." David Rogers, *In California, a Fight for Republican Priorities—McCloskey Seeks to Return to House and 'Give Them the Ben Franklin Treatment,'* WALL ST. J., June 1, 2006, at A4.

But twenty-first century America practices more subtle exclusionary arts.

Most of the land in San Mateo County, California, lies—as “open space”—legally off-limits to housing.<sup>113</sup> Although the total population of San Mateo County expanded by approximately 50,000 persons between the 1990 and 2000 Censuses, the African-American population therein actually shrank from over 35,000 to less than 25,000 people.<sup>114</sup> In the adjacent,<sup>115</sup> likewise affluent<sup>116</sup> San Francisco County, the African-American population withered from above 79,000 during 1990 to below 61,000 in 2000.<sup>117</sup> Meanwhile, the population overall swelled by 50,000.<sup>118</sup> *Held at bay.* Finds Dr. Thomas Sowell of the Hoover Institution at Stanford University in Palo Alto, California: “All the while, people in such places speak of a need for ‘diversity’ and ‘affordable housing’—neither of which they have or are likely to get, as their populations become whiter and older with rising housing prices.”<sup>119</sup>

Consistent with, albeit distinct from, Gay’s insight (that the impact of neighborhood quality upon the obtrusiveness of race demarcates the material kernel of black racial identity) is the finding of Shapiro: “The residential color line is the key feature distinguishing African Americans from all other groups in the United States.”<sup>120</sup> (Another sage submitted: the problem of the twenty-first century is the problem of the colorline). The decades since the passage (during the 1960s) of open housing legislation have witnessed the phenomenon of white flight from integrating communities.<sup>121</sup> A driving force behind residential segregation is a combination of attitude and actions.<sup>122</sup>

<sup>113</sup> BASIC ECONOMICS, *supra* note 90, at 280; SOWELL, *supra* note 93, at 103.

<sup>114</sup> BASIC ECONOMICS, *supra* note 90, at 280-1; SOWELL, *supra* note 93, at 108-9.

<sup>115</sup> SOWELL, *supra* note 93, at 108.

<sup>116</sup> BASIC ECONOMICS, *supra* note 90, at 281.

<sup>117</sup> SOWELL, *supra* note 93, at 108.

<sup>118</sup> *Id.* “Census officials say that domestic migration tends to be one of the finest measures of the impact of such economic factors such as . . . housing prices.” Rafael Gerena-Morales & Michael Corkery, *Bursting Tech Bubble, Higher Housing Costs Send People Packing*, WALL ST. J., Apr. 20, 2006, at B1. Census data comparing annual domestic net migration rates from the 2000-2004 span against comparable rates from the 1990s finds that the rate of domestic migration out of the San Francisco Bay area nearly trebled “to an annual net loss of 14.7 people per 1,000 population, vs. a rate of 5.5 people in the 1990s.” *Id.*

<sup>119</sup> SOWELL, *supra* note 93, at 109. Of the 200 largest American metropolitan areas, the four with the highest living costs (measuring all household expenditures) are, in this order: San Francisco, California; Santa Cruz, California; San Jose, California; and Santa Ana, California. *200 Largest Metro Areas*, FORBES, May 22, 2006, at 204. 204.

<sup>120</sup> SHAPIRO, *supra* note 37, at 141 (2004).

<sup>121</sup> *Id.* at 122.

<sup>122</sup> *Id.* at 124.

Specifically, a familiar element in the story of real estate in the United States is the dynamic of a lowering of property values when African-American families move in and white flight takes off. Homeowners demand a steep compensation to settle in a neighborhood more than 10 percent African-American.<sup>123</sup> It is only fair that families should worry over losing value in their homes. But initially assuming that African-American neighbors decrease property values, and the consequent behaving as if this assumption were correct, trigger a self-fulfilling prophecy.<sup>124</sup> The premises are: (a) the foremost sellers will collect the loftiest prices for their homes; so (b) to wait is only to warrant that property values must go south. The upshot is that moving out nourishes instability, exactly when a neighborhood needs stability. Thus, residential segregation is prolonged.<sup>125</sup> But a federal affirmative action in housing statute, providing for checkerboard neighborhoods via restrictive covenants, would perpetuate integration. The stability inhering therein would present a sound ground for the retention of homes by a white market element hitherto leery of investing in housing locales presumptively vulnerable to white flight. (In 2007, white neighborhoods in general are presumptively vulnerable to white flight).

How did Americans reach this pass?

## V. THE POLITICAL ECONOMY OF TWENTIETH-CENTURY HOMEOWNERSHIP POLICY: THE INSIGHTS OF PROFESSOR IRA KATZNELSON

### *A. President Franklin D. Roosevelt's New Deal*

Before 1880, most families in the United States owned their own homes.<sup>126</sup> It was at that juncture that public opinion began its repudiation of economic laissez faire. That repudiation was marked by passage of the Interstate Commerce Act during 1887.<sup>127</sup> A steady decline in the home

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<sup>123</sup> *Id.* at 122.

<sup>124</sup> *Id.* at 123.

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

<sup>126</sup> JOHN HOOD, *INVESTOR POLITICS: THE NEW FORCE THAT WILL TRANSFORM AMERICAN BUSINESS, GOVERNMENT, AND POLITICS IN THE TWENTY-FIRST CENTURY* 193 (2001).

<sup>127</sup> Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379 (1887). The Sherman Antitrust Act was passed three years later. Sherman Antitrust Act of 1890, Pub. L. No. 51-647, 26 Stat. 209 (1890). These measures prefigure Progressivism:

The progressives were the self-conscious social and legal reformers who occupied center stage in the period roughly from the onset of the 20th century through the election of Franklin Delano Roosevelt as president in 1932.... Progressives believed in the power of science and economics, employed by government, to lift up the economic and social position of the general population.

ownership rate moderated briefly in the 1920s.<sup>128</sup> That decade witnessed the initial (but not final) national housing bubble.<sup>129</sup> The Roaring Twenties presented an interruption in the long-term slide from economic *laissez faire*.<sup>130</sup> The homeownership rate plunged during the 1930s.<sup>131</sup>

Then, the administration of President Franklin D. Roosevelt elected to utilize federal credit to increase employment in the construction trades (which were unionized).<sup>132</sup> By far the most popular of U.S. housing strategies have been policies operating through mortgage credit terms and availability.<sup>133</sup> The Federal Home Loan Bank system inaugurated a series of

David Gordon, *Planners in Black Robes*, 12 MISES REV. 23, 24 (2006) (book review) (quoting RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* 2-3 (2006)). Was the New Deal necessary?

At the time the New Deal began, mutual assistance for insurance did not consist of a few isolated workingmen's groups. Philanthropy of the poor did not consist of a few Lady Bountifuls distributing food baskets. Broad networks, engaging people from the top to the bottom of society, spontaneously formed by ordinary citizens, provided sophisticated and effective social insurances and social services of every sort.

David Gordon, *A Man, a Plan, a Flop*, 12 MISES REV. 1, 2 (2006) (book review) (quoting CHARLES MURRAY, *IN OUR HANDS: A PLAN TO REPLACE THE WELFARE STATE* 116-17 (2006)). The Interstate Commerce Commission was abolished during 1996. See ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995). This was because its prominent functions were removed by deregulation statutes, and its remaining functions were shifted elsewhere. Joseph F. Zimmerman, *Congressional Preemption: Removal of State Regulatory Powers*, 38 PS: POL. SCI. & POL. 375, 375 (2005), available at <http://www.apsanet.org/imgtest/375-378.pdf>.

<sup>128</sup> HOOD, *supra* note 126, at 125.

<sup>129</sup> A. Gary Shilling, *Implosion*, FORBES, June 19, 2006, at 168. The savvy recognition of a bubble in housing is not as profitable to investors as one might guess. According to the Regents Professor Emeritus of Economics at the Robinson College of Business at Georgia State University: "Certainly, the housing market is hard to short." Donald Ratajczak, *Is There a Housing Bubble?*, J. OF FIN. SERVICE PROF., Jan. 2006, at 39, 42.

<sup>130</sup> Indeed, seen from a longer historical perspective, it was the Harding-Coolidge epoch that was the interruption of a long-term historical process. It had not been a universally accepted American doctrine that "the business of the United States is business." All of the early twentieth century was filled with protest and action against this view. But for a brief, ecstatic period, the American people, all criticisms stilled by the euphoria of the boom, forgot truths and passions and prejudices that, all the same, were merely sleeping.

DENIS W. BROGAN, *THE ERA OF FRANKLIN D. ROOSEVELT: A CHRONICLE OF THE NEW DEAL AND GLOBAL WAR* 359 (1950).

<sup>131</sup> HOOD, *supra* note 126, at 125.

<sup>132</sup> *Id.* at 198.

<sup>133</sup> NETZER, *supra* note 80, at 84. "African Americans are more likely to receive subprime mortgage loans than Latinos and much more likely to receive them than whites." Cliff Hocker, *Blacks Saddled with High-Interest Loans*, BLACK ENTERPRISE, June 2006, at 48. The most recent discussion of discrimination in credit and housing markets is Gary A. Dymksi, *Discrimination in the Credit and Housing Markets: Findings and Challenges*, in *HANDBOOK ON THE ECONOMICS OF DISCRIMINATION* (William M. Rodgers, III, ed., 2006).

district banks to buy loans from private lenders to encourage mortgage lending and new housing construction. The Home Owners Corporation assisted families refinancing mortgages (rather than confront foreclosure). It issued \$8 billion in loans to a million U.S. families from 1933 to 1935.

Congress, during 1934, passed a Housing Act to create federal mortgage insurance for the small home. The newborn Federal Housing Administration (FHA) was to reimburse lenders upon default.<sup>134</sup> By 1940, 40 percent of housing startups were covered by FHA mortgage insurance.<sup>135</sup> (Housing starts leaped from 332,000 in 1936 to 619,000 in 1941).<sup>136</sup> In some instances, by contrast with nowadays,<sup>137</sup> it became cheaper to purchase a home than to rent.<sup>138</sup> (Examination of the premiums charged under FHA guidelines discloses that—given those risks tied to FHA loans—the program underprices mortgage insurance).<sup>139</sup> That Act likewise produced a Federal Savings and Loan Insurance Corporation, to rescue savings and loan companies overextended in their mortgage undertakings.<sup>140</sup>

Another Housing Act, of 1937, further expanded loan guarantees. In 1938, Congress launched the Federal National Mortgage Association (“Fannie Mae”) to purchase and sell mortgage loans in the secondary market.<sup>141</sup> It is indisputable that Fannie Mae has achieved its original goal of increasing the sums of money available for mortgages. Fannie Mae today is the largest single source of funding for mortgages in America.<sup>142</sup>

<sup>134</sup> HOOD, *supra* note 126, at 198.

<sup>135</sup> *Id.* at 199.

<sup>136</sup> MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 17 (1995).

<sup>137</sup> “It is now much more expensive to pay the mortgage than to rent a comparable place, tax considerations included.” Morton B. Zuckerman, *Did Someone Say Bubble?*, U.S. NEWS & WORLD REP., May 8, 2006, at 72. “Rents have risen because more people are renting now that it’s more difficult to afford a home.” James C. Cooper, *Inflation Backs the Fed Into a Corner*, BUS. WK., July 3, 2006, at 29. “In San Francisco or Honolulu, for example, annual ownership costs are 68 and 73 percent greater than rental costs.” Alison Beard, et al., *To Buy or To Rent?*, FIN. TIMES (London), July 15, 2006, at 1.

<sup>138</sup> OLIVER & SHAPIRO, *supra* note 136, at 17.

<sup>139</sup> Donald F. Cunningham & Patric H. Hendershott, *Pricing FHA Mortgage Default Insurance*, 3 HOUSING FIN. REV. 373 (1984).

<sup>140</sup> HOOD, *supra* note 126, at 198-99.

<sup>141</sup> *Id.* at 199. “For years, high-level jobs at Fannie Mae were lucrative prizes for lawyers, bankers and political operatives waiting for their next U.S. government post. Along with generous pay came the company’s feel-good mission of helping low-income people afford homes.” James R. Hagerty, *Fannie’s Next Fight Could Be Payback Time*, WALL ST. J., June 8, 2006, at C1.

<sup>142</sup> Byron York, *Funny Business at Fannie Mae*, NAT’L REV., June 19, 2006, at 22, 22.

Wall Street banks are the new housing-finance agencies, when it comes to buying mortgage-backed securities.

Defying expectations that the flat yield curve would force them to sell their holdings this year, banks have kept buying, easily supplanting Fannie Mae and Freddie Mac as the main source of demand.



The New Deal's<sup>143</sup> alphabet soup of housing credit agencies largely survives.<sup>144</sup> The homeownership rate rocketed from its historical nadir of 44 percent in 1940, to 63 percent by 1965.<sup>145</sup> Tax breaks for homeowners increased the demand for housing. In the 1970s and 1980s, Americans accurately believed their homes to be their primary investment.<sup>146</sup> Until legislation of the late 1970s and early 1980s shielded Individual Retirement Accounts, and 401(k)s, from taxation, the mortgage interest deduction prodded many Americans to treat their homes as their sole retirement asset.<sup>147</sup>

Homeownership had attracted what has been styled a "critical mass"<sup>148</sup> by the mid-1960s. That critical mass impacted upon the American political economy.<sup>149</sup> Certainly, home values do impact local government taxation, school financing, and land use policies.<sup>150</sup> American education, at the secondary level, largely is financed through local property taxes. Therefore, wealthy suburbanites can afford plush schools. This reverses earlier times when the finest public schools were urban.<sup>151</sup>

That has left mortgage-bond investors wondering whether the banks will also take on another of Fannie and Freddie's roles: providing steady demand whenever turbulence hits the mortgage market.

Neil Shah, *Banks Scoop up Mortgage Bonds*, WALL ST. J., June 24, 2006, at B5.

<sup>143</sup> "As a result of the New Deal, state autonomy was very different in 1940 from what it had been in 1920." CASS SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 351 (1997); see, e.g., G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2002).

<sup>144</sup> HOOD, *supra* note 126, at 200.

<sup>145</sup> *Id.* at 199. By 2006, U.S. homeownership was at an all-time peak (of 69 percent). *Home Economics*, *supra* note 110. "The minority homeownership rate of 52% [was] also unprecedented." *Id.* But how can the voice of capitalism brag about even the prior datum?

Today more than three quarters of Costa Ricans own homes, and nearly every one of those homes has a refrigerator, washing machine, and color television. Even in remote villages, people have access to electricity, clean water, and public education. The literacy rate is 96 percent, and life expectancy is seventy-eight years—a year longer than in the United States.

Stephen Kinzer, *The Trouble with Costa Rica*, N.Y. REV. BOOKS, June 8, 2006, at 56 (book review).

<sup>146</sup> JOHN H. MAKIN & NORMAN J. ORNSTEIN, *DEBT AND TAXES* 299 (1994).

<sup>147</sup> HOOD, *supra* note 126, at 200.

<sup>148</sup> *Id.* at 201.

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

And housing is much more important to most Americans than the stock market is. Half of Americans own stocks or mutual funds; 69% of households own their own abodes. And homeownership is much more evenly spread. The top 10% of the income pile owns 24 times as much in stocks as the bottom 20% but only 6.4 times as much in residence value. So the average Joe is better off now, even though stocks remain below their early 2000 peak.

A. Gary Shilling, *The Cupboard Is Bare*, FORBES, Oct. 2, 2006, at 110.

<sup>150</sup> See, e.g., WILLIAM A. FISCHER, *THE HOMEOWNER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT, SCHOOL FINANCE, AND LAND-USE POLICIES* (2005).

<sup>151</sup> Mortimer B. Zuckerman, *Rich Man, Poor Man*, U.S. NEWS & WORLD REP., June 12, 2006, at 72, 71.

Upon the 1945 close of World War II, approximately 50 percent of the revenue collected by states and localities derived from taxes on property. By 1965, that share had slumped to 45 percent. Yet by 1980, it further had dropped to 30 percent. (There it remains).<sup>152</sup> As a proportion of personal income taken in property taxes, the burden grew by 29 percent from 1950 to 1956.<sup>153</sup> Between 1965 and 1980 it shriveled by nearly as much.<sup>154</sup> According to the economic theory of democracy, homeowners voted to insulate themselves from taxes: "Every economic theory of government must assume that the governors carry out their social function primarily in order to attain their private ends."<sup>155</sup> (Since 1980, the proportion of personal income taken in property taxes has risen at a modest rate).<sup>156</sup>

Bear in mind that "[t]raditionally, a considerable portion of American citizens have been renters, before the 1930s a much higher percentage than now."<sup>157</sup> Washington artificially had engineered a social evolution unlikely to have been spawned by free market forces.<sup>158</sup> But what need justifies any federal housing policy? For housing is a private asset. Its use is priced with facility.<sup>159</sup> Mortgages are bundled for sale to investors as mortgage-backed securities.<sup>160</sup> The Chicago Mercantile Exchange last year launched futures and options tied to changes in the price of residential real estate.<sup>161</sup> The

<sup>152</sup> HOOD, *supra* note 126, at 201.

<sup>153</sup> *Id.* at 201-02.

<sup>154</sup> *Id.* at 202.

<sup>155</sup> ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 291 (1957). But an exception to this axiom is claimed by Kenneth Arrow of Stanford University, winner of the Nobel Prize in Economics in 1972. Arrow was interrogated (in relevant part):

There was a study done recently by an economist at Santa Clara University, Daniel Klein, showing disproportionate numbers of registered Democrats versus registered Republicans in various departments at the University of California, Berkeley, and Stanford. [The study's findings are available at [http://www.ratio.se/pdf/wp/dk\\_aw\\_voter.pdf](http://www.ratio.se/pdf/wp/dk_aw_voter.pdf).] He has concluded that this kind of ideological imbalance has a negative impact on the education of students. He implies that there is a temptation to hire one's own.

*Nobel Prizewinner Kenneth Arrow on Economic Thought and Academic Freedom*, ACADEME, May-June 2006, at 45, 47. Arrow retorted (in relevant part), "In this case, the criticism seems to be just wrong, because I think the departments hire on the basis of merit. And I think it's nonsense to say that we're discriminating against Republicans." *Id.* "And why beholdest thou the mote that is in thy brother's eye, but . . . not the beam that is in thine own eye?" *Luke 6:41* (King James); *Matthew 7:3* (King James).

<sup>156</sup> HOOD, *supra* note 126, at 202 (citing "Computed by author using data from Moody, various tables.").

<sup>157</sup> GORDON TULLOCK, *Education and Medicine*, in *THE ECONOMICS AND POLITICS OF WEALTH REDISTRIBUTION* 294, 298 (2005).

<sup>158</sup> HOOD, *supra* note 126, at 200.

<sup>159</sup> *Id.* at 216.

<sup>160</sup> York, *supra* note 142, at 22.

<sup>161</sup> Doug Cameron & Christopher Swann, *US Housing Futures Market Launched*, FIN. TIMES (London), May 23, 2006, at 6.

construction thereof is readily financed through the private capital markets.<sup>162</sup>

The great migration of blacks to northern cities began during World War I.<sup>163</sup> Approximately 2 million blacks moved north between the two World Wars.<sup>164</sup> In the trailblazing national public opinion poll of racial attitudes, during 1939,<sup>165</sup> just 12 percent even of middle-western whites held that African-Americans "should be able to live wherever they want to live, and there should be no laws or social pressure to keep them from it."<sup>166</sup> Possibly the most potent promoter of residential segregation<sup>167</sup>—even during the era of racial violence, restrictive covenants, and blockbusting<sup>168</sup>—was federal lending policy.<sup>169</sup> (Of course, even an extremely low interest policy cannot lift persons on the very bottommost income level.<sup>170</sup> What color were they?) Entire central city areas were, typically, redlined. This signified that loans therein would not be advanced at all.<sup>171</sup> Pronounce expert analysts Susan

Economists were provided with a new tool to assess the cooling US housing market yesterday with the launch by the Chicago Mercantile Exchange of futures and options tied to changes in residential real-estate prices.

The prolonged boom in house prices, alongside the rise of more complex mortgage products, has raised concerns about the severity of an emerging slowdown and its impact on consumer spending.

*Id.*

<sup>162</sup> HOOD, *supra* note 126, at 216.

<sup>163</sup> SUSAN WELCH ET AL., RACE AND PLACE: RACE RELATIONS IN AN AMERICAN CITY 22 (2001).

<sup>164</sup> *Id.*

<sup>165</sup> THERNSTROM & THERNSTROM, *supra* note 2, at 60. This poll was reported thanks to *Fortune* magazine. *Id.*

In 1935 market research techniques were applied to politics and public issues. *Fortune* was the first to publish widely the results of such surveys (conducted under the direction of Elmo Roper and others), and then George Gallup offered his features on a regular syndicated basis to numerous newspapers. Beginning in 1936 "what the polls say" during national campaigns became one of the most interesting and widely featured pieces of news.

DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 235-36 (1962).

<sup>166</sup> THERNSTROM & THERNSTROM, *supra* note 2, at 60 (citing Eugene L. Horowitz, 'Race' Attitudes, in CHARACTERISTICS OF THE AMERICAN NEGRO 204 (Otto Klineberg ed., 1944)).

<sup>167</sup> WELCH, ET AL., *supra* note 163, at 23.

<sup>168</sup> *Id.* at 22-23.

<sup>169</sup> *Id.* at 23.

To a large extent existing residential patterns are the outcomes of millions of individual housing decisions, but free choice is not the only force operative in the housing market. The government, through its building and loan programs, has also participated in the establishment of segregated neighborhoods, and thus, must bear a significant responsibility for the *de facto* school segregation that results from neighborhoods isolated by race and class.

BRADLEY R. SCHILLER, THE ECONOMICS OF POVERTY AND DISCRIMINATION 287 (1995).

<sup>170</sup> NETZER, *supra* note 80, at 90.

<sup>171</sup> WELCH ET AL., *supra* note 163, at 23.

Welch, Lee Sigelman, Timothy Bledsoe and Michael Combs: "Thus, the federal government sanctioned overt racial discrimination."<sup>172</sup> Is it any wonder that in the presidential election of 1940, a clear majority of African-Americans nationwide might have preferred Republican candidate Wendell L. Wilkie over President Roosevelt?<sup>173</sup>

### B. *President Franklin D. Roosevelt's GI Bill of Rights*

In 2005, Ira Katznelson was the author of the well-received,<sup>174</sup> *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*.<sup>175</sup> Katznelson explained that no other New Deal initiative so profoundly changed the United States<sup>176</sup> as did the Selective Service Readjustment Act<sup>177</sup> (the "GI Bill").<sup>178</sup> Between 1944 and 1971, federal spending thereunder for former soldiers exceeded \$95 billion.<sup>179</sup> In 1948, 15 percent of the federal budget was allocated to the GI Bill; meanwhile, 17 percent of the federal workforce served with the Veterans Administration.<sup>180</sup>

<sup>172</sup> *Id.* "During the foundational period of the 1930s and 1940s, these federally backed instruments [including Fannie Mac and the FHA], especially those created by the GI Bill for veterans, used redlining, local control, and overt discrimination to make it very difficult, often impossible, for blacks to qualify for mortgages." IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD STORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 163 (2005).

<sup>173</sup> DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* 156-157 n.118 (2001) (citing James J. Kenneally, *Black Republicans During the New Deal: The Role of Joseph W. Martin, Jr.*, 55 *REV. POL. 117*, 120 (1993)).

<sup>174</sup> In the reckoning of Stanford University's Edgar G. Robinson Professor of U.S. History Emeritus George M. Fredrickson: "Ira Katznelson has made a major contribution to the affirmative action debate in his book *When Affirmative Action Was White*." George M. Fredrickson, *Still Separate and Unequal*, *N.Y. REV. BOOKS*, Nov. 17, 2005, at 32, 33 (book review). Katznelson is the Ruggles Professor of Political Science and History at Columbia University.

<sup>175</sup> KATZNELSON, *supra* note 172.

<sup>176</sup> *Id.* at 112.

It is often forgotten that military service brought huge advantages for previous generations of American soldiers; for none more than those who benefited from the Bill of Rights passed by Congress in 1944. This measure was designed to avert the threat of a return to 1930s mass unemployment by easing soldiers' re-entry into the labour market with educational grants, start-up business loans and house mortgages; but, when the post-war consumer boom enabled America largely to avoid another slump and to provide jobs for the veterans, the Bill became instead a piece of social engineering which, in effect, transformed access to higher education and created a new middle class.

Ben Shephard, *The Wrong Power*, *TIMES LITERARY SUPPLEMENT*, June 30, 2006, at 10, 10 (book review).

<sup>177</sup> Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284 (1944).

<sup>178</sup> KATZNELSON, *supra* note 172, at 112.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

Upon his execution of this bill into law, President Roosevelt assured Americans: "It makes provision for the guarantee by the federal government of not to exceed 50 percent of certain loans made to veterans for the purchase or construction of homes, farms, and business properties."<sup>181</sup> With GI Bill assistance, millions purchased homes.<sup>182</sup>

Veterans Administration mortgages funded upwards of 5 million new homes.<sup>183</sup> With GI Bill interest rates capped at modest levels, and down payments waived for loans of up to 30 years duration, the balance tilted sharply from renting to purchasing.<sup>184</sup> In 1946 and 1947, Veterans Administration mortgages accounted for over 40 percent of the total.<sup>185</sup> That proportion is striking given that youthful veterans were dramatically less likely to have accumulated the funds to buy property than were those who had sat out World War II.<sup>186</sup> Between 1945 and 1954, America added 13 million new homes to the stock of housing.<sup>187</sup> In California, the federal government in 1936 had insured just six percent of home mortgages.<sup>188</sup> By 1950, it insured half.<sup>189</sup>

Unfortunately, federally-backed instruments created for veterans by the GI Bill invoked redlining, local control, and express discrimination, to impede or to preclude African-Americans from qualifying for mortgages.<sup>190</sup> The GI Bill mainly was crafted by the U.S. House of Representatives Committee on World War Legislation.<sup>191</sup> It was chaired by John Rankin of Mississippi. U.S. Representative Rankin was openly anti-Catholic, anti-Jewish, and anti-African-American.<sup>192</sup> He quarterbacked the drafting of a statute allotting implementation, primarily, to states and localities.<sup>193</sup> The mighty American Legion countenanced racial segregation, and (to garner Southern backing in Congress) made clear its disinclination to challenge Southern mores by enforcing equal treatment for all veterans.<sup>194</sup>

<sup>181</sup> Franklin D. Roosevelt, *Statement on Signing the G.I. Bill of Rights* (June 22, 1944), in *THE ESSENTIAL FRANKLIN DELANO ROOSEVELT* 309 (John Gabriel Hunt ed. 1996).

<sup>182</sup> KATZNELSON, *supra* note 172, at 112.

<sup>183</sup> *Id.* at 115.

<sup>184</sup> *Id.* at 115-16.

<sup>185</sup> *Id.* at 116.

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

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 163.

<sup>191</sup> *Id.* at 122-23.

<sup>192</sup> *Id.* at 123.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

Discovers Katznelson: "The alliance of the Rankin-led South, the VA, and the Legion produced a bill combining generosity to veterans with provisions for the dispersion of administrative responsibilities that were designed to shield Jim Crow."<sup>195</sup> Again: "The GI Bill's remarkable bounty thus could be directed to the country's poorest region while keeping its system of racial power intact."<sup>196</sup> Once more: "[T]he approach Rankin took combined complete federal funding with state and local control over the auspices of the Veterans Administration. It also empowered private institutions, including banks and colleges, to offer services only to veterans they would choose to assist or admit."<sup>197</sup> No wonder is it that economist Sowell offers: "Historically, government itself has been a major promoter of residential segregation."<sup>198</sup>

Katznelson discerns:

[T]he results that can be traced directly to public policy here were profound and long-lasting. Missed chances at homeownership obviously compounded over time. Renters accumulate no equity, while homeowners almost always secure financial gains that exceed inflation.

The consequences proved profound. By 1984, when GI Bill mortgages had mainly matured, the median white household had a net worth of \$39,135; the comparable figure for black households was only \$3,397, or just 9 percent of white holdings. Most of this difference was accounted for by the absence of homeownership. Nearly seven in ten whites owned homes worth an average of \$52,000. By comparison, only four in ten blacks were homeowners, and their houses had an average value of less than \$30,000. African Americans who were not homeowners possessed virtually no wealth at all.

Over time, it is much harder to make up gaps in wealth than in income.<sup>199</sup>

A political economy of incrementalism had fed *de facto* housing segregation. So, what is incrementalism?

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<sup>195</sup> *Id.* at 124.

<sup>196</sup> *Id.* at 125.

<sup>197</sup> *Id.* at 126.

<sup>198</sup> THOMAS SOWELL, *MARKETS AND MINORITIES* 116 (1981).

<sup>199</sup> KATZNELSON, *supra* note 172, at 163-64 (footnote omitted).

## VI. THE POLITICAL ECONOMY OF INCREMENTALISM: CAN IT APPLY TO REMEDYING *DE FACTO* HOUSING SEGREGATION?

The incremental mode of decision-making opens by identifying the problem for resolution.<sup>200</sup> (This starting point distinguishes incrementalism from the rational-comprehensive method.<sup>201</sup> That latter rational ideal, in its pure form, opens with defining the mix of positive values to be attained: what economists style a social welfare function).<sup>202</sup> The incremental process, typically, is remedial. Witness the New Deal's alphabet soup of housing credit agencies. It aims at the alleviation of specific problems (e.g., today, *de facto* housing segregation) rather than upon the pursuit of abstract ideals (e.g., today, a colorblind citizenry).<sup>203</sup> Problems are presented to the government by affected publics (e.g., by the victims of *de facto* residential segregation). They are not elicited from abstract analysis of the social environment.<sup>204</sup> Temporal and informational constraints restrict policymakers' attention to those options most likely to be adoptable. Practically, these constraints confine policymakers' focus to incremental alternatives diverging from existing policies but marginally.<sup>205</sup>

Incrementalism can be understood as a kind of political market.<sup>206</sup> Economic markets are greatly decentralized machines, wherein innumerable bargainers strike the best deals available.<sup>207</sup> If certain underlying assumptions are met (e.g., perfect information, perfect competition, etc.) the sum of countless individual transactions means an efficient result to the public's interest, an outcome superior to central planning. Insofar as centrally-directed rationality is unattainable in the political marketplace, too, a highly decentralized political bargaining process among self-interested individuals likewise wins outcomes preferable to those consequent to comprehensive centralization.<sup>208</sup> Incrementalism marks a political analogue to the self-correcting, efficient market.<sup>209</sup>

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<sup>200</sup> MICHAEL T. HAYES, INCREMENTALISM AND PUBLIC POLICY 17 (1992).

<sup>201</sup> *See id.* at 16.

<sup>202</sup> *Id.* at 17.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 22.

<sup>207</sup> *Id.* at 23.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* (citing CHARLES E. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY (1965)). The political effect of the market was much written about by Yale's Charles E. Lindblom. ALBERT O. HIRSCHMAN, A PROPENSITY TO SELF-SUBVERSION 218 (1995). Lindblom typified the post-liberal tradition. Ian Bell, Book Review, 4 PERSPECTIVES ON POLITICS 580, 581 (2006).

The framers of the American constitutional system built-in a bias against substantial policy innovations.<sup>210</sup> For example, Congress essentially is reactive.<sup>211</sup> On the other hand, the system in place in 2007 does afford a quantity of access-points.<sup>212</sup> Reformers can start the process anywhere they please.<sup>213</sup> Research reveals the difficulty for proposals, in the American system, to win agenda status.<sup>214</sup> It is insufficient that a problem be serious as evidenced, as is *de facto* housing segregation, by a variety of statistical indicators.<sup>215</sup> Political and bureaucratic machineries are naturally most responsive to those more organized, more prestigious, and better-funded interests.<sup>216</sup>

Luckily, an aroused public opinion can catapult an issue onto many institutions' agendas.<sup>217</sup> Those special interests can be quelled by an electoral majority once it becomes clear to the electorate that injustice is being worked by such interests.<sup>218</sup> Empirical research teaches that an issue has a greatly-enhanced chance of reaching agenda-level if, when public concern attracts attention to a problem, a plainly perceived and readily grasped solution already lies at hand.<sup>219</sup> A challenge which few comprehend how to meet (e.g., global warming) probably will fade from the agenda before securing a governmental response.<sup>220</sup> Voter mobilization approaches impossibility regarding difficulties summoning professional expertise.<sup>221</sup> Contrariwise, when a problem (like *de facto* residential segregation) entails a readymade solution (like, imaginably, affirmative action in housing) amelioration is far more likely.<sup>222</sup>

But would affirmative action in housing just be social engineering along the lines of Washington's manipulation of homeownership since the New Deal? No. Comprehended accurately, social engineering is not, simply, the

<sup>210</sup> HAYES, *supra* note 200 at 31.

<sup>211</sup> In the words of the well-known constitutionalist, David Cole of Georgetown University Law Center, *see, e.g.*, George Steven Swan, *The Political Economy of Congressional Social Policymaking: United States v. Eichman and Texas v. Johnson*, 19 N.C. CENTRAL LAW J., 146, 161 (1991), there is a problem: "the reality is that nothing substantial happens in Congress unless actual events and political pressures create a need for action." David Cole, *In Case of Emergency*, N.Y. REV. BOOKS, July 13, 2006, at 40, 43.

<sup>212</sup> *See* HAYES, *supra* note 200, at 31 (citing DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* 507-08 (1951)).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 32.

<sup>215</sup> *Id.*

<sup>216</sup> THOMAS SOWELL, *RACE AND ECONOMICS* 198 (1975).

<sup>217</sup> HAYES, *supra* note 200, at 32.

<sup>218</sup> SOWELL, *supra* note 216, at 198.

<sup>219</sup> HAYES, *supra* note 200, at 32.

<sup>220</sup> *Id.* at 32-33.

<sup>221</sup> SOWELL, *supra* note 216, at 198.

<sup>222</sup> HAYES, *supra* note 200, at 33.



process of the *per se* institutionalization of radical change. What matters is the type of reform. The imposition of wage-price controls marks an example of social engineering, through its interference with the spontaneous balancing effectuated by a free play of supply and demand. It must be absurd to assert, rather, that unshackling wages and prices also constitutes social engineering (even should it engender temporary economic dislocations).<sup>223</sup>

Diversity in America is about keeping government at a safe distance.<sup>224</sup> The mixed economy is authoritarian. A step towards a freer market is libertarian. Legalizing affirmative action in housing would expand Americans' liberty. It less would mimic wage-price controls, than mimic the repeal thereof. Likewise, tax credits are libertarian: being pro-choice, they expand the zone of liberty. Legalizing affirmative action in housing (adding a tax credit incentive) would supplement the post-1968 one-size-only permission for a colorblind housing market, with the fresh option of erecting the new checkerboard neighborhood. For is not the law and economics movement fancied a type of legal behaviorism,<sup>225</sup> aiming to fine tune the free market?<sup>226</sup>

<sup>223</sup> Bret Stephens, Book Review, WALL ST. J., Mar. 11-13, 2006, at D10. "While change can certainly be destabilizing, there is a difference between changing in order to move away from tradition and changing in order to return to it." Michael P. Foley, *The Language of Prayer*, WALL ST. J., June 23, 2006, at W11.

<sup>224</sup> See, e.g., PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* (2006).

<sup>225</sup> According to George Washington U. Law School of Prof. David Fontana:

[T]he American law school, like the rest of the university, has been influenced, starting in the 1950s, by the behavioral revolution in the social sciences and the way it placed a priority on survey research, econometrics, and rational-choice theories. The work that came out of that revolution led to a variety of new scholarship that reflected more "universalist" perspectives, which were based on scientific methods that behavioralists believed applied to all questions social scientists wanted to answer.

The behavioral revolution has also changed the academic life of the law schools. Many law professors now have secondary degrees, and a large number of those secondary degrees are in fields particularly influenced by behavioral science, like economics or political economy.

David Fontana, *American Law Schools, Meet the World*, CHRON. HIGHER EDUC. (Wash., D.C.), May 26, 2006, at B10. Social policy programs are advanced as responses to market societies' problems. See, e.g., PETER G. ROSNER, *THE ECONOMICS OF SOCIAL POLICY* (2005). Affirmative action constitutes a social experiment. See, e.g., *THE ECONOMICS OF AFFIRMATIVE ACTION* (Harvey J. Holzer & David Neumark eds., 2004).

<sup>226</sup> See ELEANOR KERLOW, *POISONED IVY: HOW EGOS, IDEOLOGY, AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL* 144 (1994).

As long as one's theory is predictively useful within one's field, why inquire about the limits of this usefulness or about possibilities of research which are eclipsed or occluded by the very success of that research? Or why inquire about the theorizer? Why inquire about his or her choice of method and subject matter, and what this choice presupposes and precludes?

## VII. AFFIRMATIVE ACTION IN HOUSING

### A. *The Checkerboard Community*

Broadening the freedom of Americans by legalizing racially restrictive covenanted-affirmative action in housing must be a Congressional initiative. The Fair Housing Act, a portion of the Civil Rights Act of 1968,<sup>227</sup> bars discrimination premised upon race, color, sex, religion, or national origin in housing financing, sale, or rental.<sup>228</sup> Congress is a reactive, not proactive, creature. But is there evidence in America, quantitatively,<sup>229</sup> for any sustained appetite for a racially-stabilized residential integration?

Yes. As long-since reported in the legal literature, this taste for integrated housing was manifest in survey data of exactly (1976-1978) three decades past. Then, interracial reconciliation demonstrably was less nearly mature than it is in 2007. A December 1, 1977-January 10, 1978, Louis Harris and Associates national survey in collaboration with the U.S. Department of History and Urban Development Policy Studies Division disclosed that the "Racial Composition of Preferred Neighborhood" proved "Half White—Half Minority" in the minds of 57.2 percent of African-Americans.<sup>230</sup> The 1976 Detroit Area Survey of the University of Michigan interviewed parties from sample households in the tri-county Standard Metropolitan Statistical Area of Detroit. Twelve percent of African-Americans chose an ethnically pure African-American neighborhood as their primary preference. Sixty-three percent opted for a half- African-American half-white neighborhood as their first choice. (Another twelve percent of Detroit's African-Americans picked this as their number two choice).<sup>231</sup> Thus, 57 to 75 percent of African-Americans welcomed the prospect of a 50-50 racially integrated neighborhood. (Others desired a wholly monochrome option—an alternative realistically in the cards in 2007, as in 1976).

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BRUCE WILSHIRE, *THE MORAL COLLAPSE OF THE UNIVERSITY: PROFESSIONALISM, PURITY, AND ALIENATION* 73 (1990).

<sup>227</sup> Title VII of the Civil Rights Act of 1968 (codified as amended at 42 U.S.C. § 3601 *et seq.* (2006)).

<sup>228</sup> 42 U.S.C. § 3604 (2006).

<sup>229</sup> "When the 'exact' scientist can count or measure something, he experiences a pleasure which, to the outsider, is hard to understand." KONRAD LORENZ, *ON AGGRESSION* 16 (Marjorie Kerr Wilson trans., 1966).

<sup>230</sup> U.S. DEPT. OF HOUSING AND URBAN DEV. OFF. OF POL'Y DEV. & RES., *THE 1978 HUD SURVEY ON THE QUALITY OF COMMUNITY LIFE: A DATA BOOK 9, 298-99* (1978) *noted in* Swan, *supra* note 34 at 29 n.289.

<sup>231</sup> Reynolds Farley *et al.*, *Barriers to the Racial Integration of Neighborhoods: The Detroit Case*, 441 *ANNALS AM. ACAD. POL. & SOC. SCI.* 97, 104 (1979), *noted in* Swan, *supra* note 34, at 29 nn.288-90.

The 1977-1978 Louis Harris nationwide survey discovered that 15.5 percent of Euro-Americans styled a 50-50 racially integrated neighborhood as their ideal.<sup>232</sup> Meanwhile, in 1976 Detroit, eleven percent of whites said they would feel very comfortable, and another 15 percent said they would feel somewhat comfortable, with a neighborhood composition of four African-Americans per three (not four) whites. (Even respecting a three-quarters African-American neighborhood, just 84 percent of whites admitted themselves unwilling to move into such a locale).<sup>233</sup> Thus, 15 to 26 percent of Detroit's Euro-Americans avowedly could settle into a 50-50 racially integrated neighborhood.

There being so many more whites than blacks in the United States' Standard Metropolitan Statistical Areas as defined by the Office of Management and Budget, this smaller proportion of whites (than blacks) with a propensity to integrate sufficed numerically to match up with their black counterparts in 50-50 racially checkerboard neighborhoods.<sup>234</sup> So why don't they? Recall the imperative of white flight before integrating black newcomers. In 2007, it remains illegal for neighbors to covenant a 50-50 racially-stable, integrated neighborhood. Yet even if Congress were to legalize racially covenanting a checkerboard neighborhood, how might Congress get a wary public to start the housing affirmative action ball rolling?

## B. Section 42 Tax Credits

### 1. THE STATUTORY FRAMEWORK

Under the Fair Housing Act,<sup>235</sup> low-income housing tax credit<sup>236</sup> properties are rented out to the benefit of low-income tenants. Low Income Housing Tax Credits (LIHTC) were instituted in the Tax Reform Act of 1986.<sup>237</sup> (These credits commonly are denominated Section 42 tax credits from the applicable section of the Internal Revenue Code).<sup>238</sup> That enactment wiped away most other tax incentives to stimulate equity investment in real estate (including low-income housing).<sup>239</sup> Creative

<sup>232</sup> U.S. DEPT. OF HOUSING AND URBAN DEV. OFF. OF POL'Y DEV. & RES., *supra* note 230, at 299, *noted in* Swan, *supra* note 34, at 30 n.294.

<sup>233</sup> Farley *et al.*, *supra* note 231, at 105, 335, *noted in* Swan, *supra* note 34, at 30 nn.292-294.

<sup>234</sup> Swan, *supra* note 34, at 30-31.

<sup>235</sup> 42 U.S.C. § 3601 *et. seq.* (2006).

<sup>236</sup> 26 U.S.C. § 38 (a)(2) and (b) (5) (2006).

<sup>237</sup> 26 U.S.C. § 42 (2006).

<sup>238</sup> *Id.*

<sup>239</sup> Michael A. Stegman, *The Excessive Costs of Creative Finance: Growing Inefficiencies in the Production of Low-Income Housing*, 2 HOUSING POLICY DEBATE 357, 359 (1991).

financing already had gained notoriety during the 1970s in California.<sup>240</sup> Then, soaring housing prices had spun local markets out of control.<sup>241</sup> The demand for mortgage funding exceeded the willingness of conventional suppliers to extend adequate credit at affordable terms to satisfy demand.<sup>242</sup>

LIHTC Projects present housing developers an avenue to capital by allowing tax credits to for-profit investors committing capital to the development of affordable residential projects. The tax credit is awarded to a project not in any lump sum, but claimed by the for-profit investor/owner over a decade-long span.<sup>243</sup> In return, the project must set aside a fraction of its units to low income households,<sup>244</sup> for a 15 year minimum.<sup>245</sup> Projects for new construction (not federally subsidized) receive a maximum tax credit-allocation having a present value of 70 percent<sup>246</sup> (some 9 percent per annum)<sup>247</sup> of the project's qualified basis.<sup>248</sup> In a project with federal assistance, the top tax credit allocation has a present value of 30 percent<sup>249</sup> (some 4 percent per annum)<sup>250</sup> of the project's qualified basis. (Whether a building is federally subsidized is a matter of statutory definition).<sup>251</sup>

A qualified low-income housing project is one for residential rental property<sup>252</sup> wherein either (a) a minimum of 20 percent of the residential units must be both rent-restricted<sup>253</sup> and occupied by residents whose income is 50 percent (or less) of the area's median gross income ("20-50 Test"),<sup>254</sup> or (b) a minimum of 40 percent of the residential units must be both rent-restricted and occupied by residents whose income is 60 percent (or less) of this area's median gross income ("40-60 Test").<sup>255</sup>

The program is administered at the state level,<sup>256</sup> with each state reaping a division of credits corresponding to its population.<sup>257</sup> Section 42 tax credits

240 *Id.* at 357.

241 *Id.*

242 *Id.*

243 26 U.S.C. § 42(f)(2006).

244 § 42(g).

245 § 42(i)(1).

246 § 42(b)(2)(B)(i).

247 § 42(b)(1)(A).

248 § 42(d).

249 § 42(b)(2)(B)(ii).

250 § 42(b)(1)(B).

251 § 42(i)(2).

252 § 42(g)(1).

253 § 42(g)(2)(A).

254 § 42(g)(1)(A).

255 § 42(g)(1)(B).

256 § 42(h)(3).

257 § 42(h)(3)(C).

are allocated only if a building is subjected to an extended low-income housing commitment between the taxpayer and her housing credit agency.<sup>258</sup> It must bind all successors of the taxpayer,<sup>259</sup> and must, with respect to the property, be recorded as a restrictive covenant pursuant to state law.<sup>260</sup> The vast majority of residential subdivisions nowadays carry restrictive covenants applicable to every property within the subdivision.<sup>261</sup> If there exists an overall plan whereby restrictions are laid upon every lot in the subdivision to the mutual benefit of every parcel composing that subdivision, then each purchaser of a lot within the subdivision may enforce such restriction against any other lot owner therein.<sup>262</sup>

While the "compliance period" for any building is 15 years,<sup>263</sup> housing units supported by low-income tax credits are supposed to continue in low-income use for up to 30 years, with an "extended use period" of 15 years after the close of the compliance period.<sup>264</sup> Owners desiring to sell or to convert their tax credit project after 15 years obtain termination of their extended use period if the state credit agency cannot find a buyer to maintain the low-income housing project for the remainder of the 30 year interval.<sup>265</sup> (Termination of the extended use period also obtains upon foreclosure, unless foreclosure is a taxpayer ploy to end the extended use period).<sup>266</sup>

The sale of tax credits to an investor is styled syndication. Developers typically enter into limited partnerships, whereby the income and tax credits pass through to the partners as taxable income. The developer seeks limited investors to deliver initial capital in return for the lion's share of annual tax credits. (The developer serves as the general/managing partner).<sup>267</sup> Investor capital contributions might be rendered through construction, or over a number of years.

Ruefully, it was explained during the 1980s that the tax credit alone could elicit new, conventionally financed low-income housing at a rental of approximately \$491 monthly for a two-bedroom apartment.<sup>268</sup> Assuming a 30 percent rent-income ratio, to meet a \$491 gross rental a household would

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<sup>258</sup> § 42(h)(6)(A).

<sup>259</sup> § 42(h)(6)(B)(v).

<sup>260</sup> § 42(h)(6)(B)(vi).

<sup>261</sup> HETRICK & OUTLAW, *supra* note 75, at 219.

<sup>262</sup> *Id.* at 221.

<sup>263</sup> 26 U.S.C. § 42(i)(1) (2006).

<sup>264</sup> § 42(h)(6)(D)(ii)(II).

<sup>265</sup> § 42(h)(6)(E)(i)(II).

<sup>266</sup> § 42(h)(6)(E)(i)(I).

<sup>267</sup> Low-Income Housing Tax Credit, [http://en.wikipedia.org/wiki/Low-Income\\_Housing\\_Tax\\_Credit.html](http://en.wikipedia.org/wiki/Low-Income_Housing_Tax_Credit.html) (last visited Oct. 14, 2006).

<sup>268</sup> STEGMAN, *supra* note 239, at 360; see also JOSEPH GUGGENHEIM, TAX CREDITS FOR LOW-INCOME HOUSING 69 (1989).

need a \$19,640 income.<sup>269</sup> Such an income was 30 percent above the 1986 median income of all American renters.<sup>270</sup> When the solitary source of subsidy is the tax credit, so-called low-income housing can be constructed in suburban fringe areas where incomes are flusher and costs are less onerous—not where needs are greatest. It is the households with poverty-level incomes that suffer the much deeper housing deprivation than do those aided by otherwise unsubsidized tax credit projects. The law permitted equity investors to access tax credit breaks by developing housing for families with incomes as elevated as 60 percent of the median, when only 19 percent of all current residents of federally-assisted housing enjoyed incomes even 50 percent of the median.<sup>271</sup> Such statistics evoked the fulmination: “Surely this is not the income group that Congress intended to target.”<sup>272</sup>

## 2. THE KEEN WISDOM OF PROFESSOR GORDON TULLOCK

Why in the world not? Professor Gordon Tullock is a distinguished co-founder of the subdiscipline of law and economics.<sup>273</sup> Professor Tullock of the George Mason University School of Law<sup>274</sup> is widely supposed, in law and economics circles, to be in the running for the Nobel Prize in Economics.<sup>275</sup> Ponder, in the context of low-income housing developments, Tullock’s ripe advice:

There is a rough rule of thumb by which we can detect which projects are designed to help the poor and which are not designed to help them. This rule of thumb is that if there is a means test, i.e., if the aid is so arranged that it cuts off at a reasonably low level, then it is designed to help the poor. If there is no such test, then it is not designed to help the poor, although it may, in fact, do so to some

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<sup>269</sup> STEGMAN, *supra* note 239, at 360.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 360. See also James E. Wallace, *Who Benefits From Preservation: The People Behind the Numbers*, 2 HOUSING POLICY DEBATE 219 (1991).

<sup>272</sup> STEGMAN, *supra* note 239, at 360.

<sup>273</sup> See, e.g., GORDON TULLOCK, LAW AND ECONOMICS (Charles K. Rowley ed., 2005) (The Selected Works of Gordon Tullock, vol. 9). “Yet the main task of political economy remains to provide a better understanding of the *ongoing* interactions between politics and economics.” HIRSCHMAN, *supra* note 209, at 227 (emphasis in original).

<sup>274</sup> See John J. Miller, *A Law School With a Twist*, NAT’L REV., Mar., 13, 2006, at 31, 32. “George Mason has been hiring top professors and researchers and expanding its campus for several years.” Stefan Fatsis, *Educational Slam Dunk? --- Upstart George Mason Hopes to Turn Hoops Success Into More Students*, MONEY, WALL ST. J., Mar. 30, 2006, at B1.

<sup>275</sup> MILLER, *supra* note 274, at 32.

extent. This rule of thumb is undeniably rough, but it seems to fit the world fairly well.<sup>276</sup>

Is the LIHTC cutoff at a reasonably low level?

Virtually at all times and places where income distribution has been examined, there have been found more persons of below-average incomes than of above-average incomes. This is reflected in a skewed income distribution. A few extraordinarily rich people accompany a cluster of ordinary folk with incomes somewhat beneath the mean. Every electorate displays a majority with incomes somewhat below the mean.<sup>277</sup> But in a democracy, a general problem of the poor is that the reasons people are inept in the give-and-take of the marketplace also render them maladroit in the to-and-fro of the political forum.<sup>278</sup>

To paint with a broad brush, what the poor extract from democracy correlates not with their potential ballot-weight (which tends to be dissipated) but with the upper-income electorate's basically charitable motives:

The transfer of funds from the wealthy, even though it is not large-scale in absolute quantity, benefits mainly the middle class. When the poor are given special privileges (and they are in all societies), this reflects charity on the part of the middle class and wealthy rather than their political power. In any event, if we look at the actual history of the development of social security and other universal programs in the United States, it is fairly obvious that redistribution to the poor was not one of the major objectives.<sup>279</sup>

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<sup>276</sup> *General Welfare or Welfare for the Poor Only*, in Tullock, *supra* note 157, at 245. "New Deal social welfare legislation created two tracks of programs—needs-based programs such as Aid for Dependent Children, and 'universal' programs including Social Security." Nicholas J.G. Winter, *Beyond Welfare: Framing and the Racialization of White Opinion on Social Security*, 50 AM. J. POL. SCI. 400, 417 (2006). The contrast of Social Security to other social welfare programs was explicit from the beginning, as President Roosevelt made plain in 1935. *Id.* at 404. The upshot proves to be "that at least some of the so-called universal programs in fact have become associated with whiteness, serving, perhaps, as a psychological aspect of white privilege." *Id.* at 417.

<sup>277</sup> DAN USHER, POLITICAL ECONOMY 288 (2003).

<sup>278</sup> TULLOCK, *supra* note 157, at 254. So it is suggested that the class structure of the U.S. two-party system renders one of these two parties drawn, disproportionately, from those people the more successful among the populace. Such partisans prove to be those among the populace the more extensively skilled for economic combat. See, e.g., Thomas B. Edsall, BUILDING RED AMERICA: THE NEW CONSERVATIVE COALITION AND THE DRIVE FOR PERMANENT POWER (2006).

<sup>279</sup> *Id.* at 255. The imperative behind the welfare state's special assistance to the middle (not lower) class has been explained with arithmetical exactness. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 274-75 (1974). Political economy theorizes that the functions of universal suffrage are to

Adds Tullock relevantly to the LIHTC:

It should be noted that insofar as the middle-class voters can succeed in getting funds from the wealthy, there is no obvious reason why they should pass them on to the poor. Thus, even if we do have a scheme that raises the cost to the upper-middle groups, there is no reason to believe that the poor rather than the lower middle class will benefit.<sup>280</sup>

The LIHTC is a mechanism not for the sustenance of the poor, but of the lower middle-class.

### 3. THE CAVEAT

In all events, the lesson of Section 42 tax credits is that Congress does gesture toward *economic* integration in neighborhood development. That program creates options for renters. It does so by means of tax credits. This device is a diminution, not expansion, of political power wielded over the free market. (Section 42 tax credits conspicuously have benefited renters who are more comfortably-off than are the truly needy).

Compare the notion of tax credits paving the way to *racial* integration, likewise, within neighborhood developments. Such an evolution would, likewise, open new options for homebuyers. Being an option running to residential purchasers, it would, likewise, be fundamentally a market phenomenon. Naturally, bids and asking prices for each unit in checkerboarded condominiums, or for each checkerboard-squared residential lot, would clasp at the market-clearing level. Homebuyers, as always, would be plopping down their own money for their own homes. Black and white next-door-neighbors would be making interdependent investments. (Affirmative action in housing no more represents a welfare project than do Section 42 tax credits comfort the imperiled poor—the welfare segment of society—who need a safety net. Both are middle-class, or in any event, working-class exercises). To the extent, at least, that Section 42 tax credits have eased economic integration in housing, affirmative action in housing tax credits too might do some good. A tool for stabilizing the aimed-for integration is the restrictive covenant. Once it widely is seen that the sky does not crash upon the checkerboard neighborhood, residential racial integration in general could become spontaneous and self-perpetuating.

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delegitimize direct action, and to domesticate the proletariat. ALBERT O. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* 112-119 (2002).

<sup>280</sup> TULLOCK, *supra* note 157, at 259.



Indeed, pro-diversity affirmative action in housing can compare favorably with Section 42 tax credits. The Section 42 tax credits, in integrating a development financially, produce a locale of economically unequal neighbors. (Is this not the whole idea?) These financially heterogeneous neighbors are reminiscent of the colorful, miniature armies on a chessboard, because on a chessboard the pawns and the various pieces command unequal strengths.

Rather, affirmative action in housing would integrate condominiums or subdivisions on racial diversity grounds alone. Adjacent homeowners therein, like homeowners ordinarily, would greet one another as income near-equals. Financial homogeneity marrying with racial diversity, racial integration via affirmative action in housing might conceivably run more smoothly than does the Low Income Housing Tax Credits system. Why? Because the former creates a checkerboard in more way than one. Alternate home sites keyed to different races manifestly would correspond to alternately-colored checkerboard squares. But on each lot would reside a homeowner with pockets equally as heavy as those of her neighbors. This corresponds to the rank-equality in the realm of the checkers. (African-Americans and Euro-Americans can share core values/aspirations).<sup>281</sup> Like meets like. But the latter more resembles a chessboard. Atop the chessboard, knights overshadow pawns.

On the other hand, it might be feared that developers of condominiums and subdivisions cannot profitably entice adequate numbers of pioneer buyers even into stable, racially covenanted checkerboard neighborhoods. Developers might object that the hoped-for profits to be wooed from the purchasers (at the market rate) of the black squares on the checkerboard will not outweigh the market's dreaded discounting of prices for the white squares—even assuming the sweetener of tax credits. Ambitious developers might be horrified by the risk of writing off an integration-shy three-fourths of the potential buyers of their white squares.

As a leading theorist of the subdiscipline of law and economics, U.S. Court of Appeals for the Seventh Circuit Judge Richard A. Posner,<sup>282</sup> last year insisted bluntly:

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<sup>281</sup> See, e.g., AMITAI ETZIONI, *THE MONOCHROME SOCIETY* (2001).

<sup>282</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (6th ed. 2003); IAN SHAPIRO, *THE FLIGHT FROM REALITY IN THE HUMAN SCIENCES* (2005). Only last year Judge Posner was recognized afresh as the "foremost exponent" of the Chicago school of law and economics. NICHOLAS MERCURO AND STEPHEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POSTMODERNISM AND BEYOND* 48 (2d ed. 2006). Judge Posner's latest book is RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

This is a commercial society. Having money is the surest path to prestige in the United States, and the people who go into business accept this social standard that money is the measure of your worth. You can't expect them to be the first to sacrifice their commercial opportunities in order to make a moral gesture.<sup>283</sup>

Yet even the failure of affirmative action in housing would not theoretically be a dead loss. In a libertarian society, giving people choices is of value in itself, however seldom an option might be exercised. More mundanely, the failure of affirmative action in housing would (at least) present a sad experiment teaching Americans more clearly the social and economic pressures protracting *de facto* residential segregation. Baldly put, were affirmative action in housing to fail after 2007 to dissolve *de facto* residential segregation (even as the 1968-2007 era of an officially colorblind housing market has failed to eliminate *de facto* segregation), America would be none the worse-off. Tax credits unclaimed cost nothing, and the field would remain open for the thereby better-instructed next generation to gamble on a third legal-and-economic strategy.

### VIII. CAN NEIGHBORHOOD DIVERSIFICATION FIT THE AFFIRMATIVE ACTION PARADIGM?: THE INSIGHT OF PROFESSOR EDWARD A. WYNNE

Affirmative action generally is identified with education,<sup>284</sup> and with employment.<sup>285</sup> Must not an affirmative action push for diversity in

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<sup>283</sup> Katherine Mangan, *Agents of Fortunes*, CHRON. HIGHER EDUC. (Wash., D.C.), June 23, 2006, at A16. The context of Posner's remarks is the effectiveness of teaching ethics to business students. *Id.*

<sup>284</sup> See, e.g., DAVID O. SACKS & PETER A THIEL, *THE DIVERSITY MYTH: "MULTICULTURALISM" AND THE POLITICS OF INTOLERANCE AT STANFORD* (1998). According to Shelby Steele of the Hoover Institution (Stanford University):

Europeans are utterly confounded by the swelling Muslim populations in their midst. America has run from its own mounting immigration problem for decades, and even today, after finally taking up the issue, our government seems entirely flummoxed. White guilt is a vacuum of moral authority visited on the present by the shames of the past. In the abstract it seems a slight thing, almost irrelevant, an unconvincing proposition. Yet a society as enormously powerful as America lacks the authority to ask its most brilliant, wealthy and superbly educated minority students to compete freely for college admission with poor whites who lack all these things. Just can't do it.

Shelby Steele, *White Guilt and the Western Past*, Wall St. J., May 2, 2006, at A16. See also Shelby Steele, *White Guilt: How Blacks and Whites Together Destroyed the Promise of the Civil Rights Era* (2006).

<sup>285</sup> See, e.g., Jessica Bulman-Pozen, Grutter at Work: A Title VII Critique of Constitutional Affirmative Action, 115 YALE L.J. 1408 (2006).

residential neighborhoods be somehow at odds with these undertakings? No. In fact, before the 1978 Supreme Court decision in *Regents of University of California v. Bakke*,<sup>286</sup> when persons spoke regarding educational “diversity,” they nearly invariably referred to America’s variety of universities and colleges.<sup>287</sup> The earliest unambiguous mention in the news media of the educational merit attaching to “diversity” within the *student body* surfaced only on November 23, 1977. It was on that date that the *Washington Post* summoned attention to the thinking of Edward A. Wynne.<sup>288</sup> Sociologist Wynne in 1977 was the author of *Growing Up Suburban*.<sup>289</sup>

In a report entitled “Sociologist’s Study Says That Suburbs Isolate Children From Reality, Diversity,”<sup>290</sup> the *Post*’s Bill Peterson related Wynne’s comprehension of the stunting of suburban children’s emotional maturing.<sup>291</sup>

This leads, he says, to antisocial and self-destructive conduct, including high suicide rates, drug use, delinquency and introverted behavior. Sociologist Wynne lays the blame on many things that have made suburban living attractive to two generations of Americans: big lawns, shopping centers, safe streets and large, modern schools.<sup>292</sup>

Somewhat ominously, Peterson recorded: “Children who grow up in suburbs, he adds, ‘are uniquely isolated from diversity,’ outside stimulations and most real-life situations, making it hard for them to adjust to later life.”<sup>293</sup>

In *Growing Up Suburban*, Wynne relates that constructive affective learning is fostered by diversity.<sup>294</sup> Merely trifling learning will occur should diversity be of so low an intensity that scant emotional demands are made

<sup>286</sup> 438 U.S. 265 (1978).

<sup>287</sup> PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 108 (2003). As President of Educational Credential Evaluators, Inc., James S. Frey framed it just last year: “One of the greatest attributes of our system of higher education is its heterogeneity.” James S. Frey, Letter to the Editor, *CHRON. HIGHER EDUC.* (Wash., D.C.), May 26, 2006, at B17.

<sup>288</sup> WOOD, *supra* note 287, at 109.

<sup>289</sup> EDWARD A. WYNNE, *GROWING UP SUBURBAN* (1977).

<sup>290</sup> Bill Peterson, *Sociologist’s Study Says That Suburbs Isolate Children from Reality, Diversity*, *WASH. POST*, Nov. 23, 1977, at A2.

<sup>291</sup> WOOD, *supra* note 287, at 109.

<sup>292</sup> Peterson, *supra* note 290, at A2.

<sup>293</sup> *Id.*

<sup>294</sup> WYNNE, *supra* note 289, at 56.

of learners.<sup>295</sup> On the other hand, diversity must not menace the identity, and the self-esteem, of those learners.<sup>296</sup> Here lie: (a) the Scylla of excessive diversity so exciting participants to fear, or anger, such that they suspect or flee the intrusive parties; and (b) the Charybdis of tokenism, whereunder old ways endure, and the diversity is simply quaint.<sup>297</sup> Should diversity provoke excess stress within a powerful community, members may be drawn by their commitment bond into intense resentment of the inescapable alien.<sup>298</sup> Thus, in enriching diversity, the legitimacy element (which fosters a moderate promotion of diversity) is important.<sup>299</sup>

Since an infinite variety cannot be introduced into the learning environment, what few types of diversity are called for?<sup>300</sup> Wynne looks to the types of people with whom suburban adolescents probably will contact between the ages of leaving community college (as to a university campus), and launching of their careers (upon the completion of their post-graduate or professional school):

Perhaps a useful rule is to first consider the kinds of adults and children that contemporary suburban adolescents will probably come in touch with when they are between the ages of (let us say) 20-35. What age cohorts and socioeconomic statuses will such persons represent? They may include infants—the children of those former adolescents; elderly people—the aged parents of former adolescents; and very effective wealthy people and poor people—their bosses and varied subordinates. Unquestionably, for most adolescents in modern suburbs these persons represent a far greater diversity than they will come close to in their schools or communities.<sup>301</sup>

Conspicuous by their absence from Wynne's list are racial, ethnic, or linguistic minorities. Nonetheless, housing-affirmative action, to enhance residential diversity, is no mere educational/employment affirmative action copycat tactic. The cry for diversity among students arose from the pre-*Bakke* critique of the artificial lack of residential diversity in suburbia. So, what in 2007 is the affirmative action paradigm?

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<sup>295</sup> *Id.* at 57. The importance of the public schools in America's diverse society is a commonplace observation. See, e.g., DAVID TYACK, *SEEKING COMMON GROUND* (2004).

<sup>296</sup> WYNNE, *supra* note 289, at 56.

<sup>297</sup> *Id.* at 57.

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

<sup>299</sup> *Id.* at 57-58.

<sup>300</sup> *Id.* at 57.

<sup>301</sup> *Id.*

## IX. GRUTTER V. BOLLINGER

A. *What Is a Paradigm?: The Insights of Professor Thomas Kuhn*

As explicated by the late Professor Thomas Kuhn,<sup>302</sup> the careful investigation of any given field at a specific juncture reveals a set of recurring and quasi-standard illustrations of various theories and their applications.<sup>303</sup> These comprise that community's paradigms,<sup>304</sup> disclosed in its lectures and texts. In studying them and in practicing with them, the community members absorb their profession.<sup>305</sup> Scientists can concur that a colleague has defined a seemingly stable solution to a cluster of outstanding problems, nevertheless disagreeing (perhaps unconsciously) about what features make the solution enduring. That is, they can identify a paradigm without ever attempting to rationalize it.<sup>306</sup> In fact, a paradigm need not imply any such full rules-set exists.<sup>307</sup>

Research problems within a single scientific tradition do not share their satisfaction of some explicit set of rules.<sup>308</sup> Specialists proceed from models acquired via education and their literature, often in ignorance of what characteristics afford their models' community paradigm status.<sup>309</sup> Scientists

<sup>302</sup> See, e.g., THOMAS KUHN (Thomas Nickles ed., 2003).

<sup>303</sup> A paradigm does not impose a rigid or mechanical approach but can be taken more or less creatively and flexibly. The concept was influential in supplanting the positivist conception of science as an abstract, rationally and logically structured set of propositions. Kuhn's view emphasizes its concrete historical situation in the space of problems and approaches inherited from preceding achievements. A paradigm is only upset in periods of revolutionary science, typically arising in response to an accumulation of anomalies and stresses that cannot be resolved within its framework.

SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 276 (1996).

<sup>304</sup> THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 43 (3rd ed., 1996).

<sup>305</sup> *Id.*

<sup>306</sup> KUHN, *supra* note 304, at 44. "We tend to view shifts in scientific paradigms merely as advances in precision, which inevitably impose certain austerities on language and imagination. Newton did not necessarily desire a purely mechanical physics, but we assume he was driven towards one by the imperatives of empirical and mathematical truth." David Bentley Hart, *A Good Push*, TIMES LIT. SUPP., Mar. 24, 2006, at 31.

<sup>307</sup> KUHN, *supra* note 304, at 44. See also MICHAEL POLANYI, PERSONAL KNOWLEDGE 69-132 (1958).

<sup>308</sup> KUHN, *supra* note 304, at 45.

<sup>309</sup> When well conceived, a model leaves no doubt about its assumptions. It lists the important factors and offers educated guesses about their interaction. Within this self-imposed framework, the investigator makes predictions about the real world, and the more precise the prediction, the better. He thus puts the product of his thinking on the line by exposing it to evidential proof or disproof. There is nothing in science more provocative than a cleanly defined and surprising prediction, and nothing held in higher regard than such a

never learn laws in the abstract, but as encountered through application.<sup>310</sup> As long as a paradigm remains secure, practitioners function sans consensus over its rationalization.<sup>311</sup> The standard paradigm underlying economic model-building boasts roots reaching back to the work of Alfred Marshall.<sup>312</sup>

In short, advances in scientific knowledge result from paradigm shifts. Thereby, a prior way of looking on the world is, relatively rapidly, replaced by another. A slow process of reappraisal is not the mode of replacement.<sup>313</sup> Insofar as Kuhn's work depicts scientific development as the succession of tradition-bound intervals punctuated by non-cumulative breaches, its theses, doubtless, are of widespread applicability.<sup>314</sup> Unfortunately, the grand problem is that American constitutional law contains absolutely no means whereby to explain revolutions in constitutional interpretation. It cannot account for what judges should be doing when they introduce revolutionary changes in doctrine.<sup>315</sup> In all events, the American juridical scientist's paradigmatic method of analyzing affirmative action, today, dates from a dramatic Supreme Court opinion of 2003.

prediction confirmed in detail.

EDWARD O. WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE* 198 (1998).

<sup>310</sup> KUHN, *supra* note 304, at 46.

<sup>311</sup> *Id.* at 48-49.

<sup>312</sup> See, e.g., JOHN SUTTON, *MARSHALL'S TENDENCIES: WHAT CAN ECONOMISTS KNOW?* (2002). "Alfred Marshall (b. 1842 – d. 1924) was a great English economist." George Steven Swan, *The Political Economy of the Interstate Commerce Clause: United States v. Lopez and United States v. Robertson*, J. LEGAL STUD. BUS. 165, 176 n.84 (1997) (citing HUGH S. NORTON, *THE WORLD OF THE ECONOMIST* 12 (1973)). "Alfred Marshall, author of the first great economics text, *Principles of Economics*, published in 1890, defined his subject as the study of mankind in the ordinary business of life." John Kay, *Everyday Economics Makes for Good Fun at Parties*, FIN. TIMES, May 2, 2006, at 17. Marshall resembles no less exalted a predecessor than Adam Smith, both in the similarity of their successes, and in their positions in economic history. JOSEPH SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* 834 (1976).

<sup>313</sup> See JENNIFER BOTHAMLEY, *DICTIONARY OF THEORIES* 395 (1993) (citing GEOFFREY ROBERTS & ALISTAIR EDWARDS, *A NEW DICTIONARY OF POLITICAL ANALYSIS* (1991)).

Since the natural sciences do make demonstrable progress along certain fronts, one can expect that parochialism will be scotched in these fields at some point. But since neither the humanities nor, I think, the social sciences operate in this self-correcting and progressive context, ideologies will periodically stifle free inquiry. And we know that there are epochs, fads, and 'paradigm shifts' even in the natural sciences, which can be construed as phenomena of shifting mimetic engulfment.

WILSHIRE, *supra* note 226, at 101.

<sup>314</sup> KUHN, *supra* note 304, at 208.

<sup>315</sup> Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L. J. 1977, 1979 (2006).

### B. *The Blessings of Diversity*

In its June 23, 2003, opinion in *Grutter v. Bollinger*,<sup>316</sup> the Supreme Court had granted a writ of certiorari<sup>317</sup> to resolve the disagreement among the Courts of Appeals over this question: Is diversity a compelling interest that can justify a narrowly tailored use of race in the selection of applicants for admission to public universities?<sup>318</sup> In *Grutter*, the Court endorsed Justice Lewis F. Powell's determination in *Regents of University of California v. Bakke*<sup>319</sup> that student body diversity<sup>320</sup> is a compelling state interest justifying the consideration of race in university admissions.<sup>321</sup> (Needless to say, in *Grutter* none of the Justices sought the original understanding of the Civil War-born text in controversy).<sup>322</sup> Petitioner, and the United States, in *Grutter*

<sup>316</sup> 539 U.S. 306 (2003).

<sup>317</sup> *Grutter v. Bollinger*, 537 U.S. 1043 (2002).

<sup>318</sup> *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003).

<sup>319</sup> 438 U.S. 265 (1978) (Powell, J.).

<sup>320</sup> Diversity can be approached from, or even celebrated from, different approaches. See, e.g., KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006).

<sup>321</sup> *Grutter*, 539 U.S. at 329. On the other hand, the U.S. Court of Appeals for the Third Circuit declined to read a diversity exception (for faculty diversity) to the Title VII prohibition on employment discrimination. *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547 (3d. Cir. 1996).

<sup>322</sup> Marvin H. Lett, *A History of Avoidance*, NAT'L L. J., Mar. 6, 2006, at 23. Some argue that the original meaning of the Fourteenth Amendment would accommodate affirmative action. See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005). However, according to the dean of Reconstruction historians, Eric Foner, the Bureau of Refugees, Freedmen, and Abandoned Lands was born of a tension between interventionist and laissez faire approaches to Emancipation's aftermath. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* 68 (1988).

Not until Congress stood on the verge of adjournment in March 1865, and after many months of disagreement between House and Senate over its provisions, was the bill establishing the Freedmen's Bureau adopted. (At the same time, Congress chartered the Freedmen's Savings Bank to encourage habits of thrift among the former slaves.) The Bureau was to distribute clothing, food, and fuel to destitute freedmen and oversee 'all subjects' relating to their condition in the South. Despite its unprecedented responsibilities and powers, the Bureau was clearly envisioned as a temporary expedient, for not only was its life span limited to one year, but, incredibly, no budget was appropriated—it would have to draw funds and staff from the War Department. Charles Sumner had proposed establishing the Bureau as a permanent agency with a secretary of Cabinet rank—an institutionalization of the nation's responsibility to the freedmen—but such an idea ran counter to strong inhibitions against long-term guardianship. Indeed, at the last moment, Congress redefined the Bureau's responsibilities so as to include Southern white refugees as well as freedmen, a vast expansion of its authority that aimed to counteract the impression of preferential treatment of blacks.

*Id.* at 69. So how legitimate is affirmative action under this original understanding? Foner's tension

asserted that the affirmative action plan therein for the University of Michigan School of Law was not narrowly-tailored, since race-neutral devices existed to elicit the educational benefits of student body diversity sought therein. However, narrow tailoring need not demand exhaustion of every imaginable race-neutral alternative.<sup>323</sup> Narrow tailoring requires sober, good faith assessment of practical race-neutral options that will deliver the diversity a university deserves.<sup>324</sup>

*Grutter* observed that the Law School's compelling interest was not merely to assure some specific proportion of a particular group simply due to its ethnic origin or race.<sup>325</sup> The Law School looked instead to those consequent educational payoffs which diversity is designed to produce.<sup>326</sup> The Michigan affirmative action practice promoted cross-racial understanding, aided the breakdown of racial stereotypes, and facilitated students' better comprehension of people of a different race.<sup>327</sup> Numerous studies demonstrate that student body diversity facilitates learning outcomes. Diversity better arms graduates for a diverse society and workplace, and better prepares students professionally.<sup>328</sup>

merely marked perpetuation of the antebellum Republican attitudes:

A good number of ambiguities in Republicans' racial attitudes stemmed from the contradiction between their political outlook, which stressed civil rights and some kind of legal equality, and the free labor ideology. For even those Republicans most active in efforts to extend the legal rights of free Negroes insisted that black men must prove themselves capable of economic advancement before they could expect full recognition of their equality. [Leading editor Horace] Greeley, for example, criticized black leaders for devoting their time to the struggle for political rights. Instead, he insisted, they should concern themselves with self-improvement and character-building, by having black men withdraw from menial trades, form separate communities, and prove that they could acquire wealth and manage business.

ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 298 (1979). See also ROBERT C. WILLIAMS, *HORACE GREELEY: CHAMPION OF AMERICAN FREEDOM* (2006).

<sup>323</sup> *Grutter*, 539 U.S. at 339.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 329-30 (citing *Regents of University of California v. Bakke*, 438 U.S. 265, 307 (1978)).

<sup>326</sup> *Id.* at 330.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* (citing, *inter alia*, Brief for American Educational Research Association, et al. as *Amici Curiae* 3). The discussion in the text accepts, *arguendo*, the merits of diversity. On the other hand, a grimmer portrait of the corrosive effects of ethnic diversity is limned by one of the planet's most influential political scientists, Robert Putnam of Harvard University: "His research shows that the more diverse a community is, the less likely its inhabitants are to trust anyone from their next-door neighbour to the town mayor." John Lloyd, *Harvard Study Paints Bleak Picture of Ethnic Diversity*, FIN. TIMES, Oct. 9, 2006, at 1. "Because diversity creates conflict, any creativity gains are swamped by those associated with the conflict itself." Edward P. Lazear, *Diversity and Immigration*, in ISSUES IN THE ECONOMICS OF IMMIGRATION 117, 118 n.2 (George J. Borjas ed., 2000) (internal citations omitted).



### C. *The Critical Mass*

The University of Michigan School of Law enrolled a “critical mass”<sup>329</sup> of underrepresented minority students to ensure their capacity to render unique contributions to the School’s character.<sup>330</sup> It wanted a “critical mass” of minority students toward assembling a class both broadly diverse and exceptionally academically qualified.<sup>331</sup> Surely, “the Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.”<sup>332</sup> Michigan did not base its call for the “critical mass”<sup>333</sup> on any supposition that minority students articulate some characteristic minority outlook on any topic.<sup>334</sup> Quite the reverse: minimizing the strength of such stereotypes is a central element of the Law School mission, which cannot be satisfied with only a token total of minority students.<sup>335</sup> Again: “The Law School has determined, based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”<sup>336</sup>

### D. *The Time Limit*

To be sure, racial classifications may be employed no more broadly than a compelling interest demands. To enshrine a permanent justification for racial preferences would violate this basic principle of equal protection. Every government use of race must contain a logical termination point. So, under *Grutter* race-conscious admissions policies must be temporally restricted:<sup>337</sup> “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>338</sup>

<sup>329</sup> *Grutter*, 539 U.S. at 329.

<sup>330</sup> *Id.* at 333.

<sup>331</sup> *Id.* at 329. (citing Brief for Respondents *Bollinger et al.* 13).

<sup>332</sup> *Id.* at 330.

<sup>333</sup> *Grutter v. Bollinger*, 539 U.S. at 333.

<sup>334</sup> *Id.* (citing Brief for Respondents *Bollinger et al.* 30).

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 342.

<sup>338</sup> *Id.* at 343. Justice Harry Blackmun skeptically hoped that affirmative action would have died nineteen years ago. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 403 (1978) (Blackmun, J.). The Center for Equal Opportunity in Sterling, Virginia, examined undergraduate, law school, and medical school admissions at the University of Michigan for 1999, and 2003–2005 inclusive. These facts evidence diehard radical discrimination. The Center’s data are available at [www.ceousa.org](http://www.ceousa.org).

## X. GRUTTER INFORMS AFFIRMATIVE ACTION IN HOUSING

How does *Grutter* inform race-conscious tax incentives to implement affirmative action in housing? For federal equal protection questions must arise. First, *Grutter* recognized (on a constitutional level) the merits of tailoring race-conscious programs narrowly, and in a context of assessing such a program's practical, race-neutral alternatives. Here, the protraction beyond 2007 of the status quo left over from 1968 (*de facto* housing segregation) well might be deemed unconscionable. The bankrupt 1968-2007 policy alternative (a formally, but bootlessly, color-blind housing market) is, it might be argued, inadequate to enable Americans practically to live as they wish (in stable, racially-integrated neighborhoods).

Second, *Grutter* recognized that the University of Michigan Law School affirmative action practice, which it upheld, was not formulated simply by the numbers for numbers sake. It was not a structure constructed just to guarantee the enrollment of a specified percentage of a race or ethnic group. Michigan geared its pro-diversity affirmative action program toward educational benefits, and cross-racial understanding. A similar "non-numbers" benefit to flow from a pro-diversity affirmative action policy in housing would be the relief of Cose's rage of a privileged class. It would be the drawing of the poison from what Gay exposes as the physical source of African-American racial bitterness: "The influence of neighborhood quality on the salience of race is evidence of the material roots of black racial identity."<sup>339</sup> This is a far cry from a numerical mechanism merely to reshuffle the population's black and white cards.

Third, *Grutter* recognized that a critical mass of affirmative action students proved requisite to doing the job for which affirmative action was inaugurated. Similarly, Gay by most salubrious coincidence recounts that African-Americans reveal their preferred racial-residential environment: "The median preferred racial balance is 47% black."<sup>340</sup> This metric most agreeably is congruent with the prospect of an affirmative action-covenanted

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<sup>339</sup> Gay, *supra* note 17, at 559. Political science scholar Gay's language is reminiscent of a famous passage from history's most influential lawyer: "Just as man's knowledge reflects nature (i.e., developing matter), which exists independently of him, so man's *social knowledge* (i.e., his various views and doctrines—philosophical, religious, political and so forth) reflects the *economic system* of society. Political institutions are a superstructure on the economic foundation." V.I. LENIN, *The Three Sources and Three Component Parts of Marxism*, in 1 V.I. LENIN: SELECTED WORKS IN THREE VOLUMES 66, 67-68 (1970) (emphases in original).

<sup>340</sup> Gay, *supra* note 17, at 552.

50-50 checkerboard neighborhood. (To reaffirm: this equal split addresses relieving the rage of a privileged class, and not numbers for numbers' sake).

Fourth, *Grutter* recognized the unhealthiness of race-conscious practices, and the consequent propriety of "sunset thinking" even at their inception. It announced the Court's expectation that the University of Michigan Law School's affirmative action project could expire in 25 years, i.e., by 2028. (Concededly, even the most impassioned adherents of affirmative action in higher education<sup>341</sup> have indicated since *Grutter* that racial preferences must stretch well past 2028).<sup>342</sup> How might this relate to an affirmative action-covenanted 50-50 checkerboard neighborhood? By most salutary coincidence, modern covenants frequently build-in a several decades-later expiration.<sup>343</sup> Real property restrictive covenants have extended, ordinarily, for twenty years.<sup>344</sup>

Moreover legal options for promoting affirmative action in housing lie readily at hand (beyond reliance upon the logic of *Grutter*).<sup>345</sup> The first option is a litigant's device. Exercising the interpretive tactic, the advocate solicits the bench to hold that state courts do not violate the equal protection clause should they grant relief by injunction or damages to parties seeking vindication of privately negotiated affirmative action-restrictive covenants. Why ought state courts to hold so? Because fatal state action would not be involved.

<sup>341</sup> DEREK BOK & WILLIAM G. BOWEN, *THE SHAPE OF THE RIVER* (1998).

<sup>342</sup> See, e.g., WILLIAM G. BOWEN, MARTIN A. KURZWEIL & EUGENE M. TOBIN, *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION* (2006).

<sup>343</sup> HETRICK & OUTLAW, *supra* note 75, at 222. Strikingly common patterns to preferential policies, including the persistence thereof, are encountered all around the globe:

Preferential programs, even when explicitly and repeatedly defined as "temporary," have tended not only to persist but also to expand in scope, either embracing more groups, or both. Even preferential programs established with legally mandated cut-off dates, as in India and Pakistan, have continued far past those dates by subsequent extensions.

THOMAS SOWELL, *PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE* 15 (1990).

<sup>344</sup> MASSEY AND DENTON, *supra* note 35, at 36.

<sup>345</sup> These four points would seem prophylactic against equal protection challenges under *Bolling v. Sharpe*, 547 U.S. 497 (1954), to a Congressional enactment entailing racially-related tax credits. But *Grutter* reflected the Powell opinion in *Bakke* before it, *Regents of University of California v. Bakke*, 438 U.S. 265, 312-14 (1978), by acknowledging the longtime special concern of First Amendment analysis for a university's academic freedom. *Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003). This freedom includes the right to select students who will, by maximally contributing to the robust exchange of ideas, help achieve the university's mission of diversity. *Id.* at 329. *Grutter*, like Powell's previous opinion in *Bakke*, determined that the use of a quota in a race-conscious admission program is not narrowly tailored. *Id.* at 334. *Cf.* *Grazt v. Bollinger*, 539 U.S. 244, 270-76 (2003). And is there not absent any constitutional penumbra, *cf.* *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965), favorable to restrictive covenants (created under state law), similar to the dimension of the First Amendment favorable to the independence of university admission-decision making?

The second tool is a Congressional legislative device. By means of jurisdictional reform, Congress collegially can release the federal judiciary (including the Supreme Court) from the burden of adjudicating *Bolling*-related affirmative action in housing controversies. Associated, at least speculatively, with the exercise of this legislative option are the names of John Roberts, and Antonin Scalia.

### XI. THE INTERPRETIVE DEVICE: THE COUNSEL OF PROFESSOR LAURENCE H. TRIBE

The premier constitutional law professor,<sup>346</sup> Laurence H. Tribe of Harvard Law School, in 2000 asserted this position: The subjection to Fourteenth Amendment scrutiny of state court opinions regarding which contracts are enforceable by injunction,<sup>347</sup> e.g., *Shelley v. Kraemer*,<sup>348</sup> or by award of damages,<sup>349</sup> e.g., *Barrows v. Jackson*,<sup>350</sup> is a corollary to a post-1937 Supreme Court synthesis in Constitutional adjudication.<sup>351</sup> The insight that contracts and the law thereof are creatures of the state (notwithstanding the plain role of private parties in giving them content) smashes the misperception that when a state judge enforces a contract she simply executes the bidding of private entities:<sup>352</sup> "We all now understand that, on the contrary, that agent is following, perhaps with some leeway taking the form of permissible discretion, a state-composed script consisting of rules and principles the sum of which constitutes quintessential 'state action' in the form of state law."<sup>353</sup>

In 1988, Tribe meanwhile had acknowledged (perhaps less philosophically) that Chief Justice Vinson, writing for the Supreme Court, had failed to enunciate successfully the reasoning underlying the *Shelley*

<sup>346</sup> KERLOW, *supra* note 226, at 157. Since 1981, Tribe as a practitioner has charged clients as much as \$525 an hour. *Id.* at 240.

<sup>347</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1357 n.28, § 8-5 (3d ed. 2000).

<sup>348</sup> 334 U.S. 1 (1948).

<sup>349</sup> TRIBE, *supra* note 347, at 1357 n.28.

<sup>350</sup> 346 U.S. 249 (1953).

<sup>351</sup> See, e.g., George Steven Swan, *The Political Economy of the Burger Court: A Study in Constitutional Functionalism*, 7 ST. LOUIS U. PUB. L. REV. 359, 359-60, 397-99 (1988); George Steven Swan, *The Political Economy of Supreme Court Social Policymaking 1987*, 8 ST. LOUIS U. PUB. L. REV. 87, 87-91 (1989). The common variable to the 1937-2007 American political economy of a federal judiciary-enforced, anything-goes social policy (over, for instance, pornography, abortion, and flag burning), and a congressionally-managed, nationwide mixed-economy, is this political economy's disdain for mediating institutions. *Id.* at 91. See also George Steven Swan, *The Political Economy of American Family Policy, 1945-1985*, 12 POPULATION AND DEV. REV. 739, 752 (1986).

<sup>352</sup> TRIBE, *supra* note 347, at 1357 n.28.

<sup>353</sup> *Id.* (emphasis in original).

holding.<sup>354</sup> *Shelley* held that state courts violate the Equal Protection Clause should they grant injunctive relief to litigants seeking enforcement of (privately negotiated) racially restrictive covenants.<sup>355</sup> Commentators and jurists alike have, characteristically, evaluated *Shelley* with suspicion.<sup>356</sup> (*Shelley* endured as a more problematic state action case<sup>357</sup> than did, say, *New York Times v. Sullivan*).<sup>358</sup>

Tribe's prosaic approach to state action aimed to identify concisely the substantive constitutional issue for resolution.<sup>359</sup> As understood conventionally, the Equal Protection Clause demands state neutrality as to race. Superficially, such mandated neutrality is obtained in a blind judicial enforcement of a contract restricting the sale of land.<sup>360</sup> Were *Shelley* properly decided, the reason was either that: (a) neutrality cannot suffice in the matter of racially segregated housing; or the perhaps more libertarian reading (b) that the state's contract and property rules were, factually, not neutral in their embrace of racial restraints on alienation while rejecting numerous other restraints as non-enforceable.<sup>361</sup> The state contract and property rules encompassed elaborate doctrines geared to impede the enforcement of restrictions upon the alienation of land.<sup>362</sup> Restraints on alienability were, in general, disfavored by the state law.<sup>363</sup> But, Tribe emphasizes, "racially restrictive covenants were included within a special subclass of restraints that the state courts would *not* set aside."<sup>364</sup> The Supreme Court's opinion in *Shelley*, according to Tribe, meant that the Fourteenth Amendment requires a state "to make judicial invalidation of private agreements causing racial segregation *just as available* as judicial invalidation of other disfavored restraints on the free alienability of real property."<sup>365</sup>

Adoption by Congress of Tribe's latter proposition as explanatory of *Shelley* would finesse any equal protection challenge, premised upon *Shelley*, to a federal affirmative action in housing statute. Maybe contract law is a

<sup>354</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1711 (2d ed. 1988).

<sup>355</sup> *Id.* at 1697.

<sup>356</sup> *Id.* at 1711-12.

<sup>357</sup> *Id.* at 1714. Justices do not define the law simply through their policy preferences, nor through their precedents, but via the interaction of these two variables. THOMAS G. HANSFORD & JAMES F. SPRIGGS, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 130 (2006).

<sup>358</sup> 376 U.S. 254 (1964).

<sup>359</sup> TRIBE, *supra* note 354, at 1715.

<sup>360</sup> *Id.* at 1714.

<sup>361</sup> *Id.* at 1714-15.

<sup>362</sup> *Id.* at 1715.

<sup>363</sup> *Id.* at 1488.

<sup>364</sup> *Id.* (emphasis in original).

<sup>365</sup> *Id.* (emphasis in original).

creature of the state. Maybe a private entity entering a contract is following a script consisting of rules and principles, the sum whereof embodying quintessential state action incarnated as state law. Yet the federal enactment—while one embracing racial restraints on alienation—would *not* be woven into a fabric of state contract and property rules themselves geared to limit the enforcement of restrictions against the alienation of land. Congress, by crisp contrast, would override state law in exercising the sweeping<sup>366</sup> Congressional interstate commerce power.<sup>367</sup>

Nonetheless, what if Congress instructed by Tribe's treatise of 2000 should fear that the advocate's interpretive tactic is too daring? Then, surgically precise legislative instruments lie readily at hand.

## XII. THE JURISDICTIONAL REFORM DEVICE: THE COUNSEL OF CHIEF JUSTICE JOHN ROBERTS

In his then-capacity as Special Assistant to the Attorney General of the United States, Chief Justice John Roberts prepared a memorandum entitled, *Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments*.<sup>368</sup> Counselor to the Attorney General Kenneth W. Starr had recommended that a memorandum be assembled to marshal arguments favoring the Congressional authority to control the Supreme Court's appellate jurisdiction.<sup>369</sup> The consequent Roberts memorandum was penned for advocacy purposes. It did not purport to delineate an objective review of the issue.<sup>370</sup>

<sup>366</sup> See, e.g., George Steven Swan, *The Law and Economics of State-Sanctioned Medical Marijuana: Gonzales v. Raich*, 7 FLORIDA COASTAL L. REV. 473, 532-33 (2006); Swan, *The Political Economy of the Interstate Commerce Clause: United States v. Lopez and United States v. Robertson*, *supra* note 312, at 165; George Steven Swan, *The Political Economy of Commerce Clause-Tenth Amendment Tensions: Garcia v. San Antonio Metropolitan Transit Authority*, 6 HAMLINE J. PUBLIC L. 199 (1985).

<sup>367</sup> U.S. CONST. art. I, § 8, cl. 3. Tribe's proposition tends to refurbish *Corrigan v. Buckley*, 271 U.S. 323 (1926). The sole constitutional issue therein was whether a racially restrictive covenant was constitutionally vulnerable, *Corrigan*, 271 U.S. at 329-30 (it was not), instead of whether judicial enforcement thereof would be invalid. *Shelley v. Kraemer*, 334 U.S. 1, 8-9 (1948) (as in the context of *Shelley*).

<sup>368</sup> Memorandum from John Roberts, Special Assistant to the Attorney General of the United States, Office of the Attorney General, to Kenneth Starr, Attorney General of the United States, Office of the Attorney General (on file with author), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/014-supreme-court-jurisdiction/folder014.pdf#page=4>.

<sup>369</sup> *Id.* at 2.

<sup>370</sup> *Id.* Some posit that Congress invokes indirect methods of influencing the judiciary, rather than more direct methods such as impeachment or budget-cutting. See CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (2006).

Then-Special Assistant Roberts explained that the Article III, section 2, exceptions clause<sup>371</sup> power of Congress to declare exceptions to Supreme Court appellate jurisdiction<sup>372</sup> obtains, pursuant to the express language of that clause, over questions both of law and fact.<sup>373</sup> By its terms, the clause embraces no limit.<sup>374</sup> This plain and unequivocal wording marks, inevitably, a stumbling block for anyone construing the clause in a fashion more restrictive.<sup>375</sup> It marks the most potent argument affirming the congressional authority.<sup>376</sup>

### A. *The History*

The history of the drafting and the enactment of the exceptions clause justifies no departure from the overt message of its wording.<sup>377</sup> Artful drafters, the Framers were to have been expected to know how to frame the more constricted interpretations fancied by latter-day commentators—had such constructions really have been intended.<sup>378</sup> Recognition that the exceptions clause is not one that is essentially indeterminate and incapable of fixed or precise definition<sup>379</sup> (such as, e.g., the Due Process Clauses,<sup>380</sup> or the prohibition on unreasonable searches and seizures)<sup>381</sup> is crucial.<sup>382</sup>

Some critics ordain to contract the range of the exceptions clause by positing that its solitary purpose was to permit Congress to bar the Supreme Court from review of jury determinations of fact.<sup>383</sup> It cannot be asserted that the exceptions clause was designed to address objections born of Article III, section two's grant to the Supreme Court of appellate jurisdiction both as to law and fact, because the exceptions clause antedates that problematic

<sup>371</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>372</sup> See, e.g., Swan, *supra* note 211, at 159-60; George Steven Swan, *Article III, Section 2, Exceptions Clause Canadian Constitutional Parallels: Canada Teaches the United States an American History Lesson*, 13 CALIF. W. INT'L L. J. 37 (1983).

<sup>373</sup> Memorandum from Roberts, *supra* note 368, at 2.

<sup>374</sup> *Id.* According to DePaul University College of Law Professor Andrew S. Gold, "The Appellate Jurisdiction Clause also seemingly grants Congress unbounded authority to make 'Exceptions' to the appellate jurisdiction." Andrew S. Gold, *Appellate Jurisdiction Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 258, 259 (David F. Forte ed., 2005).

<sup>375</sup> Memorandum from Roberts, *supra* note 368, at 2.

<sup>376</sup> *Id.*

<sup>377</sup> *Id.* at 4.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

<sup>381</sup> U.S. CONST. amend. IV.

<sup>382</sup> Memorandum from Roberts, *supra* note 368, at 4.

<sup>383</sup> *Id.*

language.<sup>384</sup> True, ratification proponents did, in responding to claims the Supreme Court could violate (by appellate review of fact questions) the right to jury trial, highlight the exceptions clause.<sup>385</sup> Nevertheless, even were the Framers troubled over the vulnerability of jury determinations, the exceptions power they created extended well beyond that specific topic.<sup>386</sup> Statements regarding the exceptions clause by supporters of the Constitution did not at all hint at a limited ambit to the Congressional sway thereunder (even if, perhaps, directed to the problem of jury determinations of questions of fact).<sup>387</sup>

Besides, the Judiciary Act of 1789 reached far beyond fact questions in establishing exceptions to Supreme Court appellate jurisdiction.<sup>388</sup> It was passed in the wake of ratification<sup>389</sup> with the involvement of numerous Framers.<sup>390</sup> Anyway, the Seventh Amendment of 1791 provides, *inter alia*, that “no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.”<sup>391</sup> Had the aim of the exceptions clause been to insulate jury determinations of fact, the Framers in 1787 could have taken that direct approach of 1791.<sup>392</sup> From the outset, Congress has exercised its exceptions power in a substantive fashion, because Congress never has granted a Supreme Court appellate jurisdiction over the complete Article III judicial power.<sup>393</sup> What need, one might query in 2007, for judicial review of legislation at all?<sup>394</sup>

<sup>384</sup> *Id.* at 5.

<sup>385</sup> *Id.* at 6. “The phrase in the Appellate Jurisdiction Clause that raised the most serious concerns was the grant to the Supreme Court of appellate jurisdiction ‘both as to Law and Fact.’” GOLD, *supra* note 374, at 258.

<sup>386</sup> Memorandum from Roberts, *supra* note 368, at 6.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 7.

<sup>389</sup> Indeed, Rhode Island failed to ratify the Constitution until May 29, 1790. LIBRARY OF AMERICA, THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION PART TWO 1074 (1993).

<sup>390</sup> Memorandum from Roberts, *supra* note 368, at 7.

<sup>391</sup> U.S. CONST. amend. VII. “Ultimately, the Seventh Amendment and the Double Jeopardy Clause of the Fifth Amendment mollified the Anti-Federalists’ concerns by removing jury findings of fact from appellate review.” GOLD, *supra* note 374, at 258–59.

<sup>392</sup> Memorandum from Roberts, *supra* note 368, at 7.

<sup>393</sup> *Id.* at 12.

<sup>394</sup> See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006). U.S. Representative Paul N. McCloskey, Jr., recalled Congress’ reaction to *Marbury v. Madison*, 5 U.S. 137 (1803): “Response from Congress was immediate and forceful. As Representative Caesar Rodney of Delaware phrased it, ‘Judicial supremacy may be made to bow before the strong arm of legislative authority. We shall discover who is the master of the ship.’” MCCLOSKEY, *supra* note 112, at 178.



Also, judicial pronouncements over the exceptions clause support a Congressional authority to divest the Supreme Court of appellate jurisdiction over certain classes of cases.<sup>395</sup> In *Ex parte McCardle*,<sup>396</sup> during 1869, McCardle was being held in the custody of U.S. Marshalls. Under the Habeas Corpus Act of 1867, McCardle had applied to the federal circuit court for habeas corpus relief. As his case was pending in the Supreme Court, Congress repealed the provisions in the Act of 1867 permitting appeal to the Supreme Court.<sup>397</sup> The undoubted Congressional aim was preclusion of a Supreme Court decision in McCardle's case. The Supreme Court unanimously upheld that exercise of the Congressional power. It clearly built its opinion upon the exceptions clause.<sup>398</sup> The repeal proved effective even supposing the legislative motive to have been the preclusion of a possibly offensive Supreme Court ruling on the merits in *McCardle*.<sup>399</sup> In its *McCardle* opinion, the Supreme Court considered the exceptions clause authority plainly at issue, and admitted it a boundless scope.<sup>400</sup>

In *Ex parte Yerger*,<sup>401</sup> also during 1869, the Supreme Court adhered explicitly to the Congressional authority to deny it jurisdiction in *habeas corpus* cases arising under the Act of 1789 (as well as those arising under the Act of 1867).<sup>402</sup> The *McCardle* holding, in tandem with language in *Yerger* touching upon Congressional authority, vividly signifies that Congress can wholly divest the Supreme Court of appellate jurisdiction in *habeas corpus* cases.<sup>403</sup>

After all, removal of appellate jurisdiction from the Supreme Court cannot relieve courts from their duty to respect the supremacy of federal law.<sup>404</sup> State court judges are bound by oath under Article VI<sup>405</sup> to support

<sup>395</sup> Memorandum from Roberts, *supra* note 368, at 8.

<sup>396</sup> 71 U.S. 506 (1869). This is the seminal opinion on jurisdiction-stripping statutes under the exceptions clause. GOLD, *supra* note 374, at 259.

<sup>397</sup> Memorandum from Roberts, *supra* note 368, at 8.

In the aftermath of the war, with the country bitterly divided over Reconstruction policies, the Supreme Court found itself again at odds with the Congress. Representative Thaddeus Stevens, the radical Reconstructionist, at one time spoke of "murderers that are being turned loose" by a court decision, and Congress went so far as to enact a law depriving the Supreme Court of jurisdiction in cases under the Habeas Corpus Act of 1867.

MCCLOSKEY, *supra* note 112, at 182.

<sup>398</sup> Memorandum from Roberts, *supra* note 368, at 8.

<sup>399</sup> *Id.* at 9.

<sup>400</sup> *Id.*

<sup>401</sup> 75 U.S. 85 (1868).

<sup>402</sup> Memorandum from Roberts, *supra* note 368, at 10.

<sup>403</sup> *Id.* at 11.

<sup>404</sup> *Id.* at 16. Furthermore, appellate jurisdictional reform under the Exceptions Clause never retaliates against judges. It reassigns jurisdiction from an errant set of judges to another, in whom the

the Constitution, including its Supremacy Clause. America has surmounted instances when exceptions to Supreme Court appellate jurisdiction barred that Court from guaranteeing a uniform reading of federal law. Between 1789 and 1914, the Supreme Court enjoyed no appellate jurisdiction of any type over state court decisions striking down state enactments on the basis of the U.S. Constitution.<sup>406</sup> Such an interpretation of the U.S. Constitution by a state supreme court in direct conflict with a prior opinion from the United States Supreme Court was unreviewable.<sup>407</sup>

Sensitive to the benefits of diversity, Special Assistant Roberts cited Antonin Scalia:

...Professor Scalia pointed out that Congress could make exceptions to Supreme Court appellate review in those areas where uniformity was not necessarily desired. Non-uniformity and diversity depending on local conditions can be viewed as desirable goals, and the exceptions clause provides a possible means to that end. Scalia recognized that non-uniformity in the interpretation of federal law could be criticized as "sloppy", but asked: compared to what? Given the choice between non-uniformity and the uniform imposition of the judicial excesses embodied in *Roe v. Wade*, Scalia was prepared to choose the former alternative.<sup>408</sup>

Furthermore, in relieving the Supreme Court of appellate jurisdiction, the Congress does not dictate some particular result.<sup>409</sup> Other courts would still exercise the capacity to declare acts of Congress unconstitutional.<sup>410</sup>

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people repose more confidence. Former Supreme Court Justice Sandra Day O'Connor accurately reminds Americans:

The Framers understood quite well that without judges who could enforce the Constitutional rights and guarantees without fear of retaliation, the Constitution would be meaningless. That is why no term of office was provided for federal judges and that is why judicial salaries for federal judges may not be reduced during their service. The many calls for retaliation against judges for rulings in particular cases, run directly counter to the concept of the Framers of the Constitution.

*Justice O'Connor Speaks Out, THE THIRD BRANCH, May 2006, available at <http://www.uscourts.gov/ttb/05-06/justiceoconnor/index.html>.*

<sup>405</sup> U.S. CONST. art. VI, cl. 2.

<sup>406</sup> Memorandum from Roberts, *supra* note 368, at 16.

<sup>407</sup> *Id.* at 16-17.

<sup>408</sup> *Id.* at 19.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at 20.

Were Congress to divest the Supreme Court of appellate jurisdiction, such initiative would not undercut the whole system of judicial review.<sup>411</sup>

Too, the Congressional exercises of its Exceptions Clause muscle remains subject to the equal protection component of the Due Process Clause of the Fifth Amendment.<sup>412</sup> But the equal protection constraint of the exceptions power cannot be twisted so tightly as to vitiate the exceptions clause.<sup>413</sup> Of interest as to affirmative action is Roberts' grasp of bills pertaining to Supreme Court appellate jurisdiction and school desegregation. Appellate jurisdiction reform bills classify on the basis of the kind of case involved (e.g., school desegregation/restrictive covenant affirmative action). Although race is a suspect class, a class of cases is not.<sup>414</sup>

Argues Roberts: "The classification involved does not operate on the basis of race, and affects both black and white litigants. The point is clearest so far as exceptions to Supreme Court appellate jurisdiction are considered."<sup>415</sup> Furthermore:

It is...difficult to see why that group whose cases are excepted from Supreme Court review—a group which includes both black and white litigants, both those in favor of and opposed to any particular desegregation order—are entitled to the extraordinary protection of strict scrutiny judicial review. The same is true of that aspect of the pending bills excluding such cases from the lower federal courts as well as from Supreme Court appellate review. Both whites and blacks and both those opposing and seeking relief alleged to promote desegregation sue in the federal courts, raising claims going both ways on the merits.<sup>416</sup>

Suppose Congress in 2007 enacts an affirmative action in housing statute precluding the jurisdiction of the federal judiciary. It is hard to surmise why that group whose cases are exempted from review—a group which encompasses both African-American, and Euro-American litigants, and encompasses both those pro- and con- any specific restrictive covenant—must be entitled to the extreme protection of strict scrutiny judicial review. Why is it difficult? Because both Euro-Americans and African-Americans—and both those opposing and seeking relief alleged to promote housing

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<sup>411</sup> *Id.* at 21.

<sup>412</sup> U.S. CONST. amend. V; *see also* *Bolling v. Sharpe*, 347 U.S. 397 (1954).

<sup>413</sup> Memorandum from Roberts, *supra* note 368, at 23.

<sup>414</sup> *Id.* at 24.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

integration—would (otherwise) have been suing in the federal courts, therein raising claims on the merits cutting in both directions.

What of appellate jurisdictional reform bills alleged to impinge upon the exercise of some fundamental right?<sup>417</sup> Fundamental rights equal protection analysis, here, must be premised upon a fundamental right of access to federal court: “Access to federal court, however, has never been identified as a fundamental right. The process and that right can be satisfied by access to state courts.”<sup>418</sup>

### B. *Hamdan v. Rumsfeld*

In the decades since Roberts penned his study, the Supreme Court has stood aloof from scholarly contest over the exceptions clause. Its precedents endure. They stand for an inclusive Congressional authority to tether the Supreme Court’s appellate jurisdiction.<sup>419</sup> Witness Justice John Paul Stevens’ opinion on June 29, 2006, for the Supreme Court in *Hamdan v. Rumsfeld*.<sup>420</sup> The Court denied a governmental motion, made on the ground of §1005 (e) of the Detainee Treatment Act of 2005,<sup>421</sup> to dismiss a writ of certiorari. Simultaneously, Stevens added a conciliatory footnote: “Because we conclude that §1005 (e) (1) does not strip federal courts’ jurisdiction over cases pending on the date of the DTA’s enactment, we do not decide whether, if it were otherwise, this Court would nonetheless retain jurisdiction to hear *Hamdan*’s appeal.”<sup>422</sup> So Congress is signaled that the Supreme Court prudently prepares a retreat from its contestable jurisdiction.

<sup>417</sup> *Id.*

<sup>418</sup> Memorandum from Roberts, *supra* note 368, at 25. A congressional exemption from federal jurisdiction of a particular substantive matter (e.g., school bussing) appears more akin to refusing to fund abortions, while funding other childbirth options, than to cutting off food stamps from women obtaining abortions. See *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); see also *TRIBE*, *supra* note 347, at 274 n.28.

<sup>419</sup> *GOLD*, *supra* note 374, at 261. Fittingly, then, on July 19, 2006, the U.S. House of Representatives voted 260 to 167 in favor of the proposed Pledge Protection Act. That proposed Act would relieve the federal judiciary of jurisdiction over cases challenging the Pledge of Allegiance. 152 CONG. REC. H5432 (daily ed. July 19, 2006) (review of H.R. 2389).

<sup>420</sup> 126 S. Ct. 2749 (2006).

<sup>421</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

Telephonic interviews with 1,013 adult Americans by Opinion Research Corp. over October 20-22, 2006, asked: “Do you think elected officials should have more control over federal judges and the decisions they make in court cases, or no more control?” “No more control” was the alternative selected by 67 percent; “More control” was the alternative selected by 30 percent; and 3 percent held “No opinion”. (Sampling error was +/-3.) *Polls: What Do Americans Think of Their Courts?*, THE THIRD BRANCH, November 2006, available at <http://www.uscourts.gov/ttb/11-06/polls/index.html>.

<sup>422</sup> *Hamdan*, 126 S. Ct. at 2769 n.15.

*Hamdan* is reminiscent of *Powell v. McCormack*.<sup>423</sup> Therein, Chief Justice Earl Warren held robustly that the U.S. House of Representatives could not refuse, on grounds other than those enunciated in the Constitution, to seat a person duly elected by her constituents.<sup>424</sup> Like *Hamdan*, *Powell* reads like a bold vindication of Supreme Court prerogative. But canny Warren cautiously dropped his own footnote: "Since we conclude that Powell was excluded from the 90th Congress, we express no view on what limitations may exist on Congress' power to expel or otherwise punish a member once he has been seated."<sup>425</sup> The true lesson of *Powell* was that a timorous Supreme Court merely called for an empty distinction: Expel, do not exclude. In *Powell*, as in *Hamdan*, a trembling mountain merely brought forth a mouse.

David Cole, of Georgetown University Law Center, lost no time in hailing *Hamdan*: "It is a potent refutation of the Bush doctrine, and a much-needed resurrection of the rule of law."<sup>426</sup> "The fact that the Court decided the case at all in the face of Congress's efforts to strip the Court of jurisdiction is remarkable in itself."<sup>427</sup> Cole long has erred in seeing the rule of law in what really is a cynical minuet of Congressional-Supreme Court self-interest.<sup>428</sup> *Hamdan*, like *Powell*, merely proves a timid Supreme Court openly prepares a retreat. The Supreme Court fears Congress. Congress *spank*.

### C. *The Future*

Happily, this has squared with Justice Stephen Breyer's recent summons to Americans to exercise their ancient liberty (freedom to participate in government), with courts taking on enhanced account of Constitution's

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<sup>423</sup> 395 U.S. 486 (1969).

<sup>424</sup> *Id.* at 522.

<sup>425</sup> *Id.* at 507 n.27.

<sup>426</sup> David Cole, *Why the Court Said No*, 53 N.Y. REV. OF BOOKS 41, 43 (2006).

<sup>427</sup> *Id.* at 42.

<sup>428</sup> Swan, *supra* note 351 at 161. This Realpolitik minuet continued when Congress responded to *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), by deliberately stepping on the toes of the Supreme Court. On October 17, 2006 President George W. Bush executed into law the Military Commissions Act of 2006. See Pub. L. No. 109-366, 120 Stat. 2600 (2006). Prof. John Yoo, rejoiced over how Congress had: directly reversed *Hamdan* by making clear that the judiciary cannot take up the Geneva Conventions; barred courts from reliance upon foreign or international legal opinions, in cases involving military commissions; stripped the judiciary's habeas jurisdiction over alien enemy combatants; and marked the first time since the Civil War wherein Congress had seen fit to narrow the judiciary's habeas power during wartime (due to Congressional disagreement with judicial opinions). John Yoo, *Congress to Courts: 'Get Out of the War on Terror'*, WALL ST. J., Oct. 19, 2006, at A18.

democratic element in their interpretation of the Constitutional text.<sup>429</sup> In 2004, the respected scholar<sup>430</sup> Larry D. Kramer, Dean of the Stanford University School of Law, explained that the mere prospect of jurisdictional reforms might invigorate popular constitutionalism in the teeth of judicial review:

[A] great irony of making clear that we can and should punish an overreaching Court is that it will then almost never be necessary to do so. Rather than more or constant conflict, we will instead see a different equilibrium emerge, as a risk-averse and potentially vulnerable Court adjusts its behavior to greater sensitivity on the part of political leadership in the other branches.<sup>431</sup>

An activist, progressive Congress can arrange for affirmative action in housing, notwithstanding any backward-looking Supreme Court stand-patism. The economic analysis of law teaches that societies do not converge on one optimal set of institutions as the outcome of competition. The variance among functionally efficient institutions is inexplicable to economics.<sup>432</sup> Hence, stand-patism is a threat to the requisite creative experimentation.

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<sup>429</sup> See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

<sup>430</sup> See, e.g., Robert J. Muldoon, Jr., *The People Themselves: Popular Constitutionalism and Judicial Review*, 90 MASS. L. REV. 44, 47 (2006) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

<sup>431</sup> KRAMER, *supra* note 430, at 253.

<sup>432</sup> Capitalism itself does not fully dictate a single, optimal set of instructions on which all societies will necessarily converge as a result of ever more ruthless competition. There is a degree of variance among functionally efficient institutions, and the choice that any given society makes among them is often the result of norms or path-dependencies that economics as a science cannot explain.

Francis Fukuyama, *Still Disenchanted? The Modernity of Postindustrial Capitalism*, in *THE ECONOMIC SOCIOLOGY OF CAPITALISM* 75, 76 (Victor Nee & Richard Swedberg eds., 2005). A nation's legal tradition, according to one noted scholar of comparative law, (ALAN WATSON, *ROMAN LAW & COMPARATIVE LAW* (1991)), is a variable independent of political, social and economic circumstances. ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 186 (1981). Insofar as Western law responds to political, social and economic factors, it does so (in considerable degree) in terms dictated by the legal system. *Id.* at viii, 188.

### XIII. CONCLUSION

#### A. *The Economics*

The preceding discussion has appreciated the comprehension of Professor Michael G. Dawson that African-Americans—even of the middle class—feel their personal futures to be fused with the future of their race. A deepened sense of racial group interest (in the apprehension of prosperous African-Americans) is reinforced by their very advancement in the class system. Enhanced levels of education for African-Americans would, presumably, tend to sap the sense of intraracial connection. Still, education accompanies the evolution of identification in the opposite direction. African-Americans' dissatisfaction with their residential environment—in light of what those better-off among them suppose they should be able to afford—is the material source of African-Americans' enduring racial identification. Such is the epiphany of political scientist Claudine Gay. If race-prominence in the minds of successful African-Americans proves a function of neighborhood socioeconomic phenomena, then racial irritabilities might be relieved by way of enriched residential payoffs to successful African-Americans.

Meta questions about a discipline like law or mathematics are not ordinarily those entailed by that discipline itself.<sup>433</sup> They are not legal, nor mathematical.<sup>434</sup> These instead are philosophical queries, residing in jurisprudence, in the philosophy of science, or in the philosophy of mathematics.<sup>435</sup> The certainty and rigor of mathematics is achieved a priori, because a mathematician neither relies upon observation for her insights, nor do her insights themselves encompass observations.<sup>436</sup> Philosopher

<sup>433</sup> REBECCA GOLDSTEIN, *INCOMPLETENESS: THE PROOF AND PARADOX OF KURT GÖDEL* 27 (2005).

<sup>434</sup> *Id.* at 27-28.

<sup>435</sup> *Id.* at 28.

<sup>436</sup> *Id.* at 17.

No experience would count as grounds for revising, for example, that  $5 + 7 = 12$ . Were we to add up 5 things and 7 things, and get 13 things, we would recount. Should we still, after repeated recounting, get 13 things we would assume that one of the 12 things had split or that we were seeing double or dreaming or even going mad. The truth that  $5 + 7 = 12$  is used to evaluate counting experiences, not the other way round.

The a priori nature of mathematics is a complicated, confusing sort of a thing. It's what makes mathematics so conclusive, so incorrigible: Once proved, a theorem is immune from empirical revision. There is, in general, a sort of invulnerability that's conferred on mathematics, precisely because it's a priori.

*Id.* at 17-18.

Rebecca Goldstein recently styled mathematicians as supreme in the topmost turret of the vaulting tower<sup>437</sup> of pure reason.<sup>438</sup>

Her misconception is a common one. Economics, similarly, is *a priori*.<sup>439</sup> As the late, distinguished economist Murray N. Rothbard emphasized:

Economics is *praxeological*, i.e., its propositions are absolutely true given the existence of the axioms—the basic axiom being the existence of human action itself. Economics, therefore, is not and cannot be “empirical” in the positivist sense, i.e., it cannot establish some sort of empirical hypothesis which could or could not be true, and at best is only true approximately. Quantitative, empirico-historical “laws” are worthless in economics, since they may only be coincidences of complex facts, and not isolable, repeatable laws which will hold true in the future.<sup>440</sup>

<sup>437</sup> *Id.* at 18.

<sup>438</sup> GOLDSTEIN, *supra* note 433, at 16, 18.

<sup>439</sup> While economics might be *a priori*, a professor of philosophy at the University of Cambridge, Simon Blackburn, admits that first premises seldom command a consensus:

Kant denied any important distinction here: for him, you either appealed to universally shared, unchangeable standards of reason or you manipulated and deceived.

The trouble is that whether or not they are found in arithmetic, logic, and even science, these hoped-for universal standards are thin on the ground when we come to any interesting question of politics, religion and morals. Here, the contingent nature of the contours of our minds, and the role of culture and history in shaping them, are all too visible—politicians and lawyers must know how to work with them.

Simon Blackburn, *The Lie of the Land*, FIN. TIMES, July 28, 2006, at W6. Who proffers standards of reason? “Indeed much of the most important work in legal theory is now done not by lawyers but by political philosophers and economists working both within law schools and within their own academic departments.” RONALD DWORKIN, JUSTICE IN ROBES 34 (2006). In any event, the discipline of economics was born less an *a priori* exercise than a function of biology or physical science. See, e.g., MARGARET SCHABAS, THE NATURAL ORIGINS OF ECONOMICS 12-13 (2006).

<sup>440</sup> MURRAY N. ROTHBARD, 1 MAN, ECONOMY, AND STATE 756-57 (1970) (emphasis in original).

What the economist has in the package is not knowledge but chess. The game of chess is ruthlessly logical; it will thus be no surprise one day when computers beat the best living players. Logic, not knowledge, is the province of computers. Chess does not require knowledge, in the truest sense; it requires elaborate logic. Personnel departments are not instructed to recruit business candidates from chess clubs; if a top business executive happens to be a chess master, that is a coincidence.

WILLIAM J. HUDSON, BUSINESS WITHOUT ECONOMISTS: AN IRREVERENT GUIDE 51 (1987).



Business—applied economics<sup>441</sup>—does grapple with nitty-gritty reality. Businesspersons, inevitably, miscalculate.<sup>442</sup> But the feedback generated by the profit and loss system—unlike that feedback from alternative economic systems—timely rewards accuracy (with profit) and curbs error (with loss). This is why modern juridical science properly increases society's reliance upon the mechanisms of the market.

### B. *The Law*

This country's citizenry is prey to governmental pollution of the atmosphere wherein Americans make their housing choices.<sup>443</sup> Local "open space" laws can narrow the range of alternatives of the would-be homebuyers of modest means. This market distortion can further fatten privileged property owners. This is appropriately so, since (as one is reminded by the

<sup>441</sup> What the executive must do is to accept full and total responsibility for decisions and for the knowledge required to make them sound. What the chief researcher must do is abandon the forecasting of Truth (guruism) and adopt the role of adjutant to the executive whom he serves, closely supporting that person's pursuit of fuller knowledge.

The cornerstone of the failure of economists has been the mistaken view that knowledge does not exist in persons, but only in books, data tables, and computers. Real knowledge exists only in real people. Businesspeople succeed according to whether they have full and accurate knowledge of situations. The knowledge they possess is contained in their own minds, nowhere else. They may have been helped in the formation of that knowledge by written reports, charts, memos, and so on, but it is only what they fully incorporate in their minds that makes up their living knowledge.

HUDSON, *supra* note 440, at 50.

<sup>442</sup> Douglass C. North, who won the Nobel Prize in Economics in 1993, noted:

From 1927 on, and especially in 1929, the investors became convinced that not only was prosperity here to stay, but that profits could be quickly made by buying a stock that would be sold at a tremendous profit after it had been bid up by everyone else. It appeared that everyone entered the stock market to engage in such activities; and as they did, they continued to bid up the prices. Many speculators bought on margin, borrowing funds, so that with a very small amount of their own money they acquired large amounts of stock. This was fine as long as they stocks kept rising: they could pay off the money they owed and still have substantial profits. But if the stock fell, that was something else again. The stock market disaster in the fall of 1929 was of an explosive character. There appeared to be no bottom, and the result was that stocks fell to such depths that they wiped out a tremendous number of investors and left them heavily indebted. Between 1929 and 1933, approximately four-fifths of the total value of stock disappeared.

DOUGLASS C. NORTH, *GROWTH AND WELFARE IN THE AMERICAN PAST: A NEW ECONOMIC HISTORY* 167 (1966). When North writes explosive, he means implosive.

<sup>443</sup> Queen's University (Ontario) economist Dan Usher finds "Exploitation by language, religion, or race originates in the pathology of democratic politics rather than in the pathology of language, religion, or race." USHER, *supra* note 277, at 290.

once-controversial<sup>444</sup> legal scholar who won the Nobel Prize in Economics in 1974,<sup>445</sup> the late Dr. Friedrich A. Hayek), “privilege” derives from “private law.”<sup>446</sup> African-Americans are alert to the substantial contribution that homeownership renders to an ethnic minority’s progress. Outrageously, legal controls upon real estate—meaning, bluntly, government coercion of flesh and blood women and men—can deter African-Americans from moving into an area. It can even tend to eliminate numbers of African-Americans from a town they already call home. The residential colorline is a major feature in distinguishing African-Americans from their fellow Americans.

The New Deal of President Franklin D. Roosevelt, who was inaugurated on March 4, 1933,<sup>447</sup> spawned federal-level housing credit programs of notable longevity. In combined effect, these were callously exclusionary of African-Americans. Open racial discrimination was validated by the United States government. Also injurious to the aspirations of African-Americans (for access to homes comparable to that of Euro-Americans) was the rotten fruit of the G.I. Bill of Rights (also passed during the presidency of Franklin D. Roosevelt). Incrementally, a network of federal laws helped solidify the cold reality of *de facto* segregated housing from coast to coast.

Housing affirmative action might offer an incremental means of fostering diversity among neighborhoods. Some could transmute into racial checkerboards. These might exploit, against the white flight so disastrous to

<sup>444</sup> See generally HERMAN FINER, *ROAD TO REACTION* (Greenwood Press 1977) (1945).

<sup>445</sup> “He was a notable influence on the economic and political right wing, especially in the 1980s in Britain.” *Hayek, Friedrich*, in BLACKBURN, *supra* note 303, at 167.

<sup>446</sup> FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 154 (1972); see also WEBSTER’S COLLEGIATE DICTIONARY 789 (5th ed. 1948).

<sup>447</sup> I am prepared under my constitutional duty to recommend the measures that a stricken nation in the midst of a stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption.

But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis—broad executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.

Franklin D. Roosevelt, *First Inaugural Address*, in THE ESSENTIAL FRANKLIN DELANO ROOSEVELT, *supra* note 181, at 34. In contemplation of this latter imprecation, “In 1933, Congress granted him those extraordinary powers, and the fateful analogy between social policy and warfare had begun.” Gerald J. Russello, *Garet Garrett: Intellectual Ancestor to Postwar Conservatives*, 44 U. BOOKMAN 13, 15 (2006) (reviewing GARET GARRETT, *SALVOS AGAINST THE NEW DEAL: SELECTIONS FROM THE SATURDAY EVENING POST 1933-1940* and GARET GARRETT, *DEFEND AMERICA FIRST: THE ANTIWAR EDITORIALS OF THE SATURDAY EVENING POST 1939-1942*), available at <http://kirkcenter.org/bookman/44-2-russello.html>.

the nascent integration of neighborhoods in 2007, the weapon of the racially restrictive covenant (once brandished by segregationists). Tax policy might be channeled toward encouraging affirmative action in housing, at least insofar as racial integrationists can be heartened by the history of Low Income Housing Tax Credits facilitating economic integration in housing. Affirmative action in housing would not constitute a welfare system; nor does the Low Income Housing Tax Credit project. Affirmative action in housing, being keyed to homebuyers, necessarily would bypass the poorest Americans; likewise does the Low Income Housing Tax Credit project (for better or worse).

To date, the affirmative action paradigm is familiar from employment, and from educational diversity efforts. Affirmative action in housing would be consistent therewith. It was recognition of an artificial lack of residential diversity in suburbs that, originally, summoned diversity in student bodies. Diversity in student bodies was ratified by the Supreme Court as a licit element in the defense of higher education affirmative action plans, just four years ago.

Supreme Court precedent as to the racially restrictive covenant (when covenants were drawn as a segregationist sword) might seem poised against affirmative action in housing. Yet slaying affirmative action in housing could be counterproductive. With increasing frequency restrictive covenants are styled protective covenants. This is because their underlying goal is the defense of the landowner's property value—an undertaking plainly to be vindicated from a law and economics perspective.<sup>448</sup> When was the phrase “protective covenant” more vividly descriptive than respecting (a neighborhood-stabilizing) affirmative action in housing? If covenants are prescribed for a subdivision, then curbs equally fall upon every property therein.<sup>449</sup> Each holding is protected by, and is benefited by, the covenants.<sup>450</sup>

Happily, Professor Laurence H. Tribe's authoritative work hints at a road detouring such problematic precedents as *Shelley v. Kraemer*<sup>451</sup> and *Barrows v. Jackson*.<sup>452</sup> Besides, the decades-ago advocacy research of the Attorney General's boyish Special Assistant John Roberts trumpets the message that the democratic Congress can smother in advance any federal judicial challenges to housing affirmative action: Congress can circumvent the undemocratic federal judiciary itself. Congress is armed with the fearsome Article III, section 2, exceptions clause power. Authority for the proposition that the exercise of this power is not taboo has been offered, (so

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<sup>448</sup> HETRICK & OUTLAW, *supra* note 75, at 214.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> 334 U.S. 1 (1948).

<sup>452</sup> 346 U.S. 249 (1953).

wrote the future Chief Justice Roberts), by the future Associate Justice Antonin Scalia.<sup>453</sup>

This nation has suffered the self-inflicted wound of artificial racial division since 1619.<sup>454</sup> In 2007, let Americans proceed to liquidate politically-spawned *de facto* residential segregation. They can attempt to do so via a more libertarian, alternative legal environment. It could facilitate (yet never coerce) affirmative action in housing through restrictively covenanted checkerboard neighborhoods. By 2019, the segregation of 2007 might be melting away. With stable housing integration convincing everyone that the sky does not fall upon integrated neighborhoods, white flight could halt. Race might dramatically diminish as a residential determinant by 2019. No longer would race be so crushing a factor in partisan fealties.<sup>455</sup> Ultimately, one hopes the covenants (binding the black sheaves to the white sheaves) themselves would be discarded spontaneously, as legalistic bothers non-germane to an at last colorblind land.

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<sup>453</sup> See RALPHA. ROSSUM, *ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION* (2006); PAUL I. WEIZER, *THE OPINIONS OF JUSTICE ANTONIN SCALIA: THE CAUSTIC CONSERVATIVE* (2004); SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE (Kevin A. Ring ed., 2004).

<sup>454</sup> "At Jamestown, Virginia, in 1619, had been landed, in chains, the first slaves from Africa." MCCLOSKEY, *supra* note 112, at 139. Bitter was the fruit of this seed. See, e.g., ANTHONY S. PARENT, *FOUL MEANS: THE FORMATION OF A SLAVE SOCIETY IN VIRGINIA, 1660-1740* (2003). Some contend that the intentional suppression of the rights of African-Americans to the economic advantage of whites remains crucial. FRANCIS D. ADAMS & BARRY SANDERS, *ALIENABLE RIGHTS: THE EXCLUSION OF AFRICAN AMERICANS IN A WHITE MAN'S LAND, 1619-2000* (2003).

<sup>455</sup> "As blacks move in greater numbers to suburbs and Hispanics continue to increase their numbers, broad-based coalitions become a political necessity." David Gergen & Jeremy Licht, *Politics, Post-Civil Rights*, U.S. NEWS AND WORLD REP., Apr. 24, 2006, at 40.

