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Bridge or Barrier: The Intersection of Wealth, Housing, and the Disparate Impact Standard

Bridge or Barrier: The Intersection of Wealth, Housing, and the Disparate Impact Standard

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Table of Contents

Introduction

For some, zoning is a measure taken for the retention of property value and to keep unideal activities out of residential areas. Still, for others, it is a tool that excludes them from mobility.[2] Zoning laws regulate land use.[3] This is a balancing act between the interest of the landowner and the interest of the community at large.[4] Exclusionary zoning is a form of land restriction that has an adverse effect based on

1. Khadijah M. Wright, J.D. Candidate, Florida A&M University College of Law, 2023; B.S., Physics, University of Central Florida, 2020. The author would like to thank Professor Areto Imoukhuede for his insight and guidance on this project.

2. Christopher Serkin, *A Case for Zoning*, 96 Notre Dame L. Rev. 749, 749-50 (2020); John Infranca, Differentiating Exclusionary Tendencies, 72 Fla. L. Rev. 1271, 1271 (2020).

3. 16 Am. Jur. Trials 99 Relief from Zoning Ordinance § 1 (2022).

4. *Id.*

income and level of wealth.[5] It entails a suburb adopting large-lot zoning, which reduces the supply of developable land, increases the prices of land, and hikes the market value of homes in these areas.[6] On its face, this may appear only positive; however, exclusionary zoning results in less affordable housing.[7]

Housing affordability plays a vital role in society; it is an asset-building and wealth-accumulation mechanism.[8] For example, the COVID-19 pandemic increased housing prices but reduced income.[9] This wealth association with housing has been used to exclude land use and, by extension, people that would disrupt or lower property value.[10] Wealth is not removed from the issue of race.[11] Previous historical and legislative factors affect the wealth of Black Americans today. Policies that aim to exclude on the basis of wealth should rouse suspicion about the racial element sometimes reframed in the language of wealth.

This note asserts that exclusionary zoning and housing based on income or economic standing can have a disparate impact on race. The disparate impact standard of the Fair Housing Act of 1968, 42, U.S.C.S § 3601 et seq., used in the Texas Department of Housing and Community Affairs v. Inclusive Communities, does not do enough to aid plaintiffs in bringing claims where there is a racial disparity in housing.

Part One of this paper will discuss the Federal policies that historically contributed to the wealth gap that exists on the basis of race, the legacy of these policies, and how they affect wealth in modern-day.

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5. Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1667 (2013).

6. *Id.*

7. *Id.*

8. THOMAS P. BOEHM & ALAN SCHLOTTMANN, WEALTH ACCUMULATION AND HOMEOWNERSHIP: EVIDENCE FOR LOW-INCOME HOUSEHOLDS, 1-2 (2004); Jenny Schuetz, *Rethinking homeownership incentives to improve household financial security and shrink the racial wealth gap*, BROOKINGS (Dec. 9, 2020), https://www.brookings.edu/research/rethinking-homeownership-incentives-to-improve-household-financial-security-and-shrink-the-racial-wealth-gap/.

9. Jessica Dickler, *Home prices are not rising much faster than incomes, studies show*, CNBC (Nov. 10, 2021), https://www.cnbc.com/2021/11/10/home-prices-are-now-rising-much-faster-than-incomes-studies-show.html.

10. See Cecilia Rouse, et. al., *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, WHITE HOUSE (June 17 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/#:~:text=Exclusionary%20zoning%20laws%20place%20restrictions,on%20the%20height%20of%20buildings.

11. Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1220 (2007).

Part Two will discuss the intent of the Fair Housing Act and argue that economic standing touches and affects race: a class intended to be protected by the act. Lastly, Part Three will examine the standard set by the United States Supreme Court in the Texas Department of Housing and Community Affairs v. Inclusive Communities case and argue that this disparate impact acts as both a bridge and a barrier for bringing claims under the Fair Housing Act.

I. Wealth and Race are Significantly Intertwined Historically

Wealth can be defined as the total of an individual's owned assets minus what an individual owes; however, wealth represents an accumulation of assets that provides a level of security to families.[12] Wealth provides a cushion that allows for stability in income fluctuations, selling assets for cash, or using those assets as collateral.[13] Wealth is one allowance of familial investment in the form of education and homeownership.[14] This cushion of security has been denied to Black Americans for generations.[15]

A. Historical Barriers to Wealth Used Race as A Basis for Exclusion

A wealth gap and wealth inequality divide those possessing this cushion from those without.[16] In the United States, there exists not only a wealth gap separating the classes but a wealth gap distinguishing wealth by race.[17] This racial wealth gap transcends the demographics of age, marital status, education, and income.[18] For comparison, in 2016, White families, on average, had seven times the wealth of Black American families and five times the wealth of Latino families.[19] A significant contributor to this wealth gap is history.[20] The

12. Shapiro Thomas, et. al., *The Racial Wealth Gap Increases Fourfold*, Inst. on Assets & Soc. Pol'y (May 2010); Palma Joy Strand, Inheriting Inequality: Wealth, Race, and the Laws of Succession, 89 Or. L. Rev 453, 458 (2010).

13. Strand, *supra* note 12, at 458.

14. *Id.*

15. *Id.* at 456.

16. *Id.*

17. Lynnise E. Phillips, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 St. Louis L.J. 419, 421 (2018).

18. *Id.*

19. *Id.*

20. Alice M. Thomas, *The Racial Wealth Divide Through the Eyes of the Younger Family: Undoing America's Legacy of Wealth Inequality in Search of the Elusive American Dream Utilizing A Sankofa Model of Transitional Justice*, 5 Fla. A&M U. L. Rev. 1, 1 (2009).

historical separation of wealth stems from disparity—in public policy, social norms, and the loss that lies latent and unrealized between generations.[21]

Slavery is an amalgamation of loss for Black Americans.[22] The compound impact of slavery is not solely the loss of freedom, the loss of being free from pain and suffering, or a loss of income.[23] Economically, it is also a loss of opportunity, a loss to accumulate capital and pass on an inheritance, and a loss of mobility.[24] This loss, while attributed to the inception of slavery, did not end with its cessation.[25]

In designing and implementing the G.I. Bill, the World War II Servicemen's Readjustment Act of 1944, the federal government encouraged residential segregation and discrimination against Black Americans.[26] The G.I. Bill deliberately left the distribution of federal housing and educational benefits to universities, private banks, and white homeowner associations—that openly discriminated against Black people.[27] The G.I. Bill was a preservation of White wealth that was double-pronged.[28] The race-neutral language of the G.I. Bill avoided the overt appearance of alienation of Black voters. By design, the G.I. Bill administered the federal benefits by state and local government, which deferred to the social norms surrounding race—racism.[29] The G.I. Bill is typically attributed to and celebrated for creating the middle class. However, this was only true for White veterans, their families, and their heirs.[30] Black veterans were denied the opportunity and access to purchase real estate, while White veterans could purchase homes.[31]

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21. EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA, 49 (ROWMAN AND LITTLEFIELD, 5TH ED. 2018); Mehrsa Baradaran, *Closing the Racial Wealth Gap*, N.Y.U. L. REV. (2020), https://www.nyulawreview.org/online-features/closing-the-racial-wealth-gap/.

22. Thomas Craemer, et. al., *Wealth Implications of Slavery and Racial Discrimination for African American Descendants of the Enslaved*, 3 REV. BLACK POL. ECON. 218, 220 (2020).

23. *Id.*

24. *Id.*

25. Nathalie Martin, *Bad Apples or a Rotten Tree: Ameliorating the Double Pandemic of COVID-19 and Racial Economic Inequality*, 82 MONT. L. REV. 105, 124 (2021).

26. Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 585 (2014).

27. *Id.*

28. *Id.* at 590.

29. *Id.*

30. *Id.* at 585.

31. *Id.*

"The housing benefit provided the federal government guarantees of up to 50% of loans made by private banks and lending institutions to veterans for the purchase or construction of homes, farms, and business properties."[32] A vast majority of lending institutions refused loans to Black Americans.[33] The Federal Housing Act (FHA) promoted neighborhood segregation to go along with their property grading scale.[34] The presence of Black people in a neighborhood would significantly reduce the rating of the neighborhood.[35] The G.I. bill was intended to ease veterans' transition back to civilian life.[36] The bill enabled millions of working-class Americans to buy their first homes, get an education, and, in reality, be the American middle class. Still, this perspective is focused primarily on the White American experience.[37]

The G.I. Bill's tactic of using race-neutral terms while having legislation singularly benefit the White majority. Is one that can be deemed borrowed from the New Deal.[38] The New Deal tied to race and wealth together.[39] The New Deal had race-neutral rules which shifted wealth away from Black Americans.[40] The New Deal excluded agricultural and domestic workers from its economic cushion; these occupations served as a "neutral proxy for race."[41] Most Southern Black Americans and approximately two-thirds of all Black employees were employed as agricultural and domestic workers.[42] The effect excluded Black workers from the financial benefit that the legislation intended to provide.[43] This meant pensions, unemployment compensation, and the right to bargain collectively were denied to most Black workers.[44]

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32. Perea, *supra* note 26, at 596.
33. *Id.*
34. *Id.* at 597.
35. *Id.*
36. *Id.* at 590.
37. *Id.*
38. Erin Blackmore, *How the GI Bill's Promise Was Denied to a Million Black WWII Veterans*, HISTORY (Apr. 20, 2021), https://www.history.com/news/gi-bill-black-wwii-veterans-benefits.
39. Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1223 (2007).
40. *Id.*
41. *Id.*
42. Perea, *supra* note 26, at 589.
43. *Id.*
44. *Id.*

The latent costs of these wealth inhibitors should not be ignored when they affected Black Americans for generations.[45] One reason for the racial disparity in wealth is inheritance.[46] Intergenerational gifts have implications for wealth building.[47] A study by Gittleman and Wolff examined factors affecting wealth accumulation from 1984 to 1994. It concluded that it would be tough for Black Americans to make up significant ground relative to White Americans regarding wealth because of Black Americans' lower rate of inheritance, lower income, and holding most of their economic assets in home equity.[48] When controlled for income, Black Americans are five times less likely to receive large gifts and inheritances than White families.[49]

To make an intergenerational gift, a person must first have the asset to transfer.[50] One form of this asset is income.[51] Occupational race-typing impacts income, and occupational race-typing influences Black economic standing.[52] Black Americans may have succeeded in nontraditional occupations. However, Jim Crow type discrimination has been replaced with a new web of racial practice that limits Black mobility and affects Black people's everyday life.[53] This is commonly done by pigeonholing Black people to certain roles.[54] Even when income differences are controlled, a racial wealth gap still exists in every income group except the bottom quintile, where median net worth is zero for everyone.[55]

The combined impact of legislative bills such as the G.I. Bill and the New Deal has, over time, impacted Black Americans' ability to accumulate assets. While these legislative wrongdoings may seem like past actions and not relevant to Black American wealth today, they remain relevant. The latent costs of these legislative and societal wrongdoings are one of opportunity. The G.I. Bill was impactful enough to fuel the creation of the white middle class. However, such

45. Strand, *supra* note 12, at 458.

46. Bonilla-Silva, *supra* note 21.

47. Signe-Mary McKernan, et. al., *Private Transfers, Race, and Wealth*, URBAN INST. (Apr. 11, 2011), https://www.urban.org/research/publication/private-transfers-race-and-wealth.

48. *Id.*

49. *Id.*

50. Strand, *supra* note 44, at 456.

51. *Id.* at 458.

52. *See* Bonilla-Silva, *supra* note 21, at 46.

53. *Id.*

54. *Id.*

55. Kriston McIntosh, *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap.

discriminatory practices robbed most Black Americans of the opportunity to be part of that rising class. What lies latent is what Black Americans could have done with this legislation's financial benefits because they were never given the opportunity. The impact of this is compound. For instance, the loss of Black American veterans being able to use the G.I. Bill to fund their housing is one less asset those veterans possess. It is also one less possession to have the opportunity to pass down in the form of an intergenerational gift. The absence of this intergenerational gift is the loss of opportunity for the next generation to use this property, leverage it by inheriting a home, or among other things to use it as a source of income. These small unrealized individual gains can impact those Black American lives by offering them that financial cushion in situations of changed income or emergencies. Over many generations, these non-acquired gains become more apparent in the impact that they could have had. Unfortunately, because what lies hidden is intergenerational financial choice and opportunity, for many, this loss is unaccounted for and unrealized though its effect is compound.

B. Wealth Exclusion Affects Both Race and Housing

Homeownership is one component of what was typically considered the American dream.[56] Black Americans store most of their economic assets through home equity.[57] Generally, homeowners have 48% of their net worth represented by their homes.[58] low-income homeowners have 80% of their net worth represented by their homes compared to upper-income homeowners whose homes represent 26% of their net worth.[59] Home equity is a significant part of low-income homeowners' net worth.[60]

The issue of housing in America has long varied based on race.[61] Home equity is affected by the history of segregation and redlining that ensured that Black housing was concentrated in "less desirable" locations to market interest and was coupled with the slow rate of housing stock appreciation in Black neighborhoods.[62] The Fed-

56. Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 332 (2009).

57. Bonilla-Silva, *supra* note 21.

58. Brown, *supra* note 56, at 341.

59. *Id.*

60. *Id.*

61. Nathalie Martin, *Bad Apples or a Rotten Tree: Ameliorating the Double Pandemic of COVID-19 and Racial Economic Inequality*, 82 MONT. L. REV. 105, 130 (2021).

62. Bonilla-Silva, *supra* note 45.

eral government, through the FHA and the Home Owners Loan Corporation (HOLC), supported housing discrimination and redlining.[63] The HOLC established the grading system for neighborhoods—distinguishing the desirables from the undesirables.[64] The purpose of these classifications was to grade property for bank lending.[65] In-demand homogenous locations were rated A, a rating of B was for completely developed areas, and C ratings were reserved for areas that exhibited "infiltration of a lower grade population" or locations lacking homogeneity.[66] A rating of D was for areas characterized by detrimental influences, such as an undesirable population or infiltration of people from these undesirable populations.[67] The presence of Black people in a housing community would usually render the community a D grade.[68] This kept Black families out of White and middle-class neighborhoods.[69]

Even after the Fair Housing Act of 1968, which prohibits discrimination based on race, color, gender, religion, or national origin, private investors continue to use wealth through race to discriminate against Black lenders in the housing industry by applying different lending standards to Black neighborhoods.[70] This reverse redlining practice was predatory and destructive because the people who borrowed were likely ineligible for conventional loans.[71] Many private banks continued to either refuse to loan or continue to engage in predatory lending in predominantly Black and Hispanic neighborhoods.[72] This suppressed minority homeownership.[73] For example, loan delinquency resulting from exploitative credit offerings of reverse redlining confirms the stereotype of poor creditworthiness that underwrote the practice of redlining.[74]

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63. Perea, *supra* note 26, at 583.

64. *Id.* at 597.

65. *Id.* at 598.

66. *Id.*

67. *Id.*

68. *Id.*

69. Perea, *supra* note 26.

70. John E. Theuman, Annotation, *Evidence of Discriminatory Effect Alone as Sufficient to Prove, or to Establish Prima Facie Case of Violation of Fair Housing Act* (42 U.S.C.A. §§ 3601 et seq.), 100 A.L.R. FED. 97, § 2(A) (1990); Rachel D. Godsil & Sarah E. Waldeck, *Home Equity: Rethinking Race and Federal Housing Policy*, 98 DENV. L. REV 523, 549 (2021).

71. Theuman, *supra* note 69; Rachel D. Godsil & Sarah E. Waldeck, *Home Equity: Rethinking Race and Federal Housing Policy*, 98 DENV. L. REV 523, 549 (2021).

72. *Id.*

73. Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV 869, 874 (2020).

74. *Id.*

All of these issues pour into the problem of exclusionary housing. Exclusionary zoning describes the occurrence of suburbs adopting large-lot zoning or other density control that reduces the supply of developed land.[75] The effect of this is that it makes housing unaffordable for low-income or without sources of wealth to depend on.[76] Zoning can racially impact communities at large, even in their architectural designs.[77] Instances in residential areas where certain in-home activities are prohibited, for example, "low-income" home businesses such as barbershops or child care facilities are restricted. Still, home businesses such as running an in-home insurance practice are allowed one demonstration of the covert racialized nature that exclusionary zoning can take.[78] Though the disguise of exclusionary zoning may purport itself as a concern of property value retention or not wanting crime introduced in the community, sometimes its effects are equivalent to supporting racial zoning.[79] The legality of these policies can slip through the cracks because housing is not a fundamental right, nor is wealth a suspect classification.[80]

The trick of exclusionary zoning, unlike racial zoning and racially restrictive covenants, which facially exclude based on race, is that it is a less obvious type of discrimination.[81] Though exclusionary zoning facilitates discrimination through wealth, it is cyclical.[82] It preserves some homeowners' gains through restrictive zoning because these policies reduce the supply of land and lock out those who are least able to pay.[83] The historic economic disadvantage of Black Americans put them in a vulnerable position, both in not being able to pay and being the group that suffers based on the racial aspect of exclusionary zoning.[84]

75. Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1667 (2013).

76. *Id.*

77. Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J 1934, 1980 (2015).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* 1 Regul. Takings § 4-2 (2021).

83. *Id.*

84. *Id.*

II. The Fair Housing Act of 1968 intended to Prevent Discrimination Based on Group Characteristics

The Fair Housing Act of 1968 was one of the last barriers to housing segregation that had been ongoing in the United States.[85] It came after the Civil Rights Act of 1964 and 1965 with a warning that housing segregation would result in two separate and unequal American societies.[86] The Fair Housing Act made it illegal to refuse to sell or rent or negotiate for sale or rental of, or otherwise make unavailable or deny because of race, color, religion, sex, or national origin.[87] As of 2014, and permeating today, the United States is still characterized by high levels of segregation.[88] The census data from 1970 to 2010 showed that residential segregation between Black Americans and White Americans only declined modestly during that period.[89]

A. Tropes: A Substitute for Not Saying Race

Where a person lives depends a great deal on race and income.[90] Fair Housing and community development movement have their most significant challenges where race and poverty intersect.[91] Fair Housing and community development are two sides of the same coin; they both grew out of the need to address the wrongs of Jim Crow.[92]

The Fair Housing Act, where race was concerned, was intended not only to prevent racial discrimination in real estate renting or selling but also bared discrimination in advertising.[93] It banned real estate agents from making an untrue statement about a dwelling's availability to deny access to Black Americans.[94] Also, it blocked real estate agents from making comments about the race of neighbors or in-movers to promote panic selling or influence buyers.[95] In theory, the

85. Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court's Recent Interest in the Fair Housing Act*, 79 Mo. L. Rev. 539, 552 (2014).

86. *Id.*

87. *Id.* at 553.

88. *Id.* at 554.

89. *Id.*

90. Elizabeth K. Julian, *The Fair Housing Act After 40 Years: Continuing The Mission to Eliminate Housing Discrimination And Segregation: Fair Housing and Community Development: Time to Come Together*, 41 Ind. L. Rev. 555, 556 (2008).

91. *Id.* at 557.

92. *Id.* at 558.

93. Douglas S. Massey, The Legacy of the 1968 Fair Housing Act, 30 Socio. Forum 571 (2015).

94. *Id.*

95. *Id.*

Fair Housing Act was the Federal government's commitment to integrated housing and fair practices; however, this was compromised by stripping it of its enforcement mechanism.[96]

The United States Department of Housing and Urban Development (HUD) could neither bring legal action against discriminators nor resolve disputes through an internal administrative process.[97] HUD could only engage in conference, conciliation, and persuasion.[98] If a HUD investigation revealed blatant discrimination, there was no means for the agency to force compliance, grant a remedy, assess damages, or prohibit discriminatory practices from continuing.[99] The Department of Justice (DOJ) could only act if there was evidence of a "pattern or practice" of discrimination or raised an issue of "general public importance."[100] The Act placed the burden on aggrieved persons who were granted the right to file a civil suit to recover damages in federal court.[101]

Though it is debatable whether the promise of the Fair Housing Act of balancing living patterns has been realized, the intent of the Fair Housing Act to cease racial discrimination in housing has been ongoing.[102] In *United States v. Birmingham*, a Michigan federal district court ruled that the city had violated the Fair Housing Act when it prevented a corporation from constructing low-income family housing because residents of the community were fearful that low-income housing would lead to the influx of black people into the city, which would result in a reduction in property value.[103] The court stated that while wealth may not have been a suspect classification triggering any heightened scrutiny, the private fears and the motivating factor of the residents were associated with low income—as a correlation for race—and a lowering property value that this classified discriminatory in-

96. *Id.*

97. Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247, 250 (2016).

98. *Id.*

99. *Id.* at 251.

100. *Id.*

101. *Id.*

102. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (referencing the FHA co-sponsor Senator Walter F. Mondale, who stated the FHA "was to replace the ghetto 'by truly integrated and balanced living patters.'"); Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court's Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 552 (2014);, History of Fair Housing, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history (last visited Apr. 23, 2022).

103. United States v. Birmingham, 538 F. Supp. 819, 830 (E.D. Mich. 1982).

tent.[104] Similarly, in Alexander v. Riga, the third circuit determined that the Fair Housing Act was violated when the defendant denied the plaintiff housing by falsely telling the plaintiff that the apartment rental was unavailable while truthfully informing white testers that the apartment was available.[105]

Additionally, the Ninth Circuit Court in *Keith v. Volpe* determined it was a violation of the Fair Housing Act when plaintiffs within the path of a freeway construction would be displaced and denied housing because the current residents of the intended relocation community were concerned about increased traffic, crime, overcrowded schools, and a loss of city taxes.[106] The *Keith v. Volpe* case demonstrated a violation of the Fair Housing Act because of the disproportionate impact of the freeway development on Black residents.[107]

These cases show the judicial system's dedication to carrying out one prong of the legislative intent of the Fair Housing Act—to prevent racial discrimination in housing. However, these cases also represent that discrimination based on race does not solely take one form, and racial terms do not explicitly need to be used to exclude or disproportionately affect Black people.

In *Keith v. Volpe*, the refusing resident's justifications were increased traffic, a loss of tax money to the city, and increased crime.[108] Likewise, in *Alexander v. Riga* availability was the excuse to exclude the Black plaintiffs from a housing community.[109] Finally, United States v. Birmingham showed that the notion of being "low-income" was a trope and reasoning the residents associated with Black Americans.[110] The residents correlated this trope with a reduction in property value.[111] It was because these private concerns had been expressed that they could be classified as a determining factor the city used to decide why racial discrimination became a factor in the case's outcome.[112]

The policy concerns these cases reflect are not a new societal issue; rather it is dishonest about the nature of racial discrimina-

104. *Id.*
105. Alexander v. Riga, 208 F.3d 419, 424 (3d Cir. 2000).
106. Keith v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988).
107. *Id.*
108. *Id.*
109. Riga, 208 F.3d at 424.
110. United States v. Birmingham, 538 F. Supp. 819, 830 (E.D. Mich. 1982).
111. *Id.*
112. *Id.* at 828.

tion.[113] If specific societal issues disproportionately touch certain racial groups, it follows that exclusion or inclusion based on those societal issues can be used as a means to include or exclude that racial group without explicitly "saying race."

B. Wealth and Income: Dog Whistles for Race

If historically, Black Americans have been disempowered financially, wealth and income barriers that exist today that disparately affect Black Americans can be used as a means of excluding them. Zoning takes this form.[114]

When economic discrimination occurs in the form of zoning, it signals that unless a family or a person can afford a single-family home they are not welcome in the neighborhood.[115] These zoning policies keep more affordable housing out of those communities.[116] This touches on race because there have been many historic barriers that keep Black Americans excluded from wealth, and these barriers continue to persist today.[117] The justification of exclusion from communities such as being low-income or insinuating that low-income persons will be a blight to the community ignores the disparate impact these seemingly race-neutral statements can have on race—without explicitly mentioning race.[118]

For example, the Mount Holly Township in New Jersey proposed a plan to eliminate existing homes in the Gardens neighborhood that housed predominantly low-income members of the community.[119] This 30-acre plot of land was to be replaced with more expensive housing units.[120] Additionally, the 30-acre of land was also the only

113. *See* McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting) ("A generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past.").

114. Richard Kahlenberg, *The 'New Redlining' Is Deciding Who Lives in Your Neighborhood*, N.Y. TIMES Apr. 19, 2021, https://www.nytimes.com/2021/04/19/opinion/biden-zoning-social-justice.html.

115. *Id.*

116. *Id.*

117. Lynnise E. Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS L.J. 419, 421 (2018); Perea, *supra* note 26, at 585.

118. Swati Prakash, *Racial Dimension of Property Value Protection Under the Fair Housing Act*, 101 CAL. L. REV 1437, 1444 (2013).

119. Mount Holly Garden Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 377 (3d Cir. 2011).

120. *Id.*

neighborhood in the Township that was comprised of predominantly Black and Hispanic residents.[121] When the census of the apartment complex was taken, the community was divided equally between rental properties and homeownership.[122] Because of various issues that persisted in the community, such as overcrowding, absentee landlords, and drainage problems, the community was considered a blight.[123]

When there was an issue with an individual home, the connected nature of the housing community caused a chain reaction of property value reduction.[124] Despite private attempts to revitalize the community, the Township commissioner conducted a study to determine whether the Gardens' neighborhood was eligible for development under New Jersey law, and it was.[125] As a result of this, the Township began to acquire properties in the Garden community.[126] The redevelopment plans that followed required the demolition of all the homes in the neighborhood and the permanent or temporary relocation of all of the community residents.[127] Ultimately, the plan that was adopted for the community after the destruction of the homes, was to construct 520 new homes with only 56 being deed-restricted.[128] Only eleven of these would be offered on a priority basis to the former residents of the garden community, and the plan did not include any rehabilitation of existing units.[129]

In bringing this case, the residents argued that this redevelopment plan was a violation of the Fair Housing Act due to the disparate impact it had on the Hispanic and Black community; they also highlighted that race is a class that the Fair Housing Act was intended to prevent discrimination against.[130] The court agreed with the residents on this issue because they were able to show that 32.32% of Hispanic residents and 22.54% of Black residents would be affected by the demolition of the houses compared to 2.7% of White residents.[131] This made the Hispanic and Black residents of the neighborhood respectively,

121. *Id.* at 378.
122. *Id.*
123. *Id.*
124. *Id.*
125. Mount Holly Garden Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 379 (3d Cir. 2011).
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 380-81.
131. Mount Holly Garden Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 382 (3d Cir. 2011).

eleven (11) and eight (8) times more likely to be affected by the demolition of the houses.[132]

The intricacies that exist between the demolition of the homes and the case that came before the court are noteworthy.[133] The conflict between the Township and the Gardens community persisted for six years.[134] A part of the Township's targeting of the Gardens community for redevelopment was approaching the residents to purchase their homes while demolition was ongoing—lowering the property value of the minority neighborhood.[135] This was in an effort to preserve the property values of the surrounding predominantly white neighborhoods by leveraging the redevelopment policy to force out the Gardens residents.[136] Before making it to the Supreme Court, this case was settled between the Township and the residents when the Township agreed to build more homes and set some aside for the then-current residents of the Gardens community.[137] Other members of the Gardens community were able to receive relocation allowances for their move out of the community for the redevelopment plan to proceed.[138]

Moreover, in Greater New Orleans there was a housing proposal for Provident development that consisted of implementing four mixed-rental complexes with 72-units each.[139] The development was specifically geared towards being an option for affordable housing.[140] To accomplish this, there was an income restriction on the units and a 70% lowering of rent.[141] A moratorium was placed on developing housing structures with more than five units.[142] Another moratorium was placed on multi-family housing for 12 months or until the parish zoning policies could be updated.[143]

The court ruled that housing discrimination violated the Fair Housing Act because the moratorium had a disparate impact on Black Americans by reducing the number of available housing structures

132. *Id.*

133. Prakash, *supra* note 118, at 1440.

134. *Id.* at 1441.

135. *Id.* at 1440.

136. *Id.* at 1443-44.

137. Adam Liptak, *Fair-Housing Case Is Settled Before it Reaches the Supreme Court*, N.Y. TIMES (Nov. 13, 2013), https://www.nytimes.com/2013/11/14/us/fair-housing-case-is-settled-before-it-reaches-supreme-court.html.

138. *Id.*

139. Greater New Orleans Fair House Act Ctr. v. ST. Bernard Par., 641 F. Supp. 2d 563, 566 (E.D. La. 2009).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

containing five or more units.[144] This was because 17.31% of Black households in the New Orleans metropolitan area lived in housing structures with five or more units compared to only 9.54% of White households.[145] This made Black residents 85% more likely to live in housing structures containing five or more units than the White households in the metropolitan area.[146] The moratorium impacted the black residents by limiting the number of units and affected rental properties.[147]

Black residents were disproportionately affected by the moratorium because it reduced the supply of available rental property.[148] Over 90% of structures with more than five units were rental.[149] 51.7% of Black residents lived in rental units compared to approximately 25% of White residents.[150] It is significant that the type of housing impacted by the moratorium was affordable housing.[151] Black households were far more likely to have incomes within the income range proposed for the development and implementation of the affordable housing plan.[152] Just over 17% of Black households have payments in the lowest income ranges served by the affordable housing—being 87% times more likely to be in the income range to qualify.[153]

Here, again it is not merely the facts of the case that bear significance but also the background events that lead to the case.[154] Before the case was filed, Provident posted a notice to the public about the development identifying it as mixed-income housing.[155] Not long after the notice, an editorial piece was written in the local newspaper on the development that insinuated that the new development would bring crime and turn their community into a ghetto with drugs, crime, and

144. Greater New Orleans Fair House Act Ctr. v. ST. Bernard Par., 641 F. Supp. 2d 563, 566 (E.D. La. 2009).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Greater New Orleans Fair House Act Ctr. v. ST. Bernard Par., 641 F. Supp. 2d 563, 566 (E.D. La. 2009).

150. *Id.*

151. *Id.* at 568.

152. *Id.*

153. *Id.*

154. Greater New Orleans Fair House Act Ctr. v. ST. Bernard Par., 641 F. Supp. 2d 563, 566 (E.D. La. 2009).

155. *Id.* at 571.

violence.[156] It suggested that taxpayer money should be spent on something other than the creation of a blight.[157]

These cases do not exist in a vacuum. They show that while the Fair Housing standard seeks to prevent discrimination against housing based on race, race-based discrimination can be affected without any explicit racial component. It is not simply that housing and income are related, but also that language such as blight, crime, affordable housing, or lowering of property value are charged words that can be used as a form of racial exclusion.[158] Racial tropes can be camouflaged. Where issues disproportionately impact a racial group, a policy that impacts those issues can also affect that racial group disproportionately.[159]

In the Mount Holly Garden Citizens in Action, Inc. case, blight and being low-income were attempted justifications for removing Black and Hispanic residents from their community. In Greater New Orleans Fair House Act Center, affordable housing that targeted lower-income residents were found to have a substantial impact on race. Suppose economic exclusion or notions, such as blight, crime, or low-income persons, can lower property value and are capable of keeping Black Americans out of a community. In that case, the racial exclusion is free to hide behind racial neutrality while the impact of these justifications is experienced disproportionately on a racial basis.[160]

III. HE DISPARATE IMPACT STANDARD IS IMPLEMENTED BUT LEAVES A LOOPHOLE

The ability to disproportionately affect one race while using race-neutral terms is one reason why the disparate impact standard for assessing the effect of policies on housing is essential. It makes uniform the varying court standards for proving discrimination and partially leaves behind the notion of "intentional racism."[161]

156. *Id.*

157. *Id.*

158. *See* Smith v. Clarkton, 82 F.2d 1055, 1066 (4th Cir. 1982).

159. Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563, 563 (E.D. La. 2009).

160. Prakash, *supra* note 118, at 1487.

161. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 524 (2015).

A. The Disparate Impact Standard Is Both a Step Forward and a Barrier

The United States Supreme Court case, *Texas Department of Housing* and *Community Affairs v. Inclusive Communities*, set the standard for Fair Housing by stating that disparate impact was enough, in some cases, to show a discriminatory practice.[162] This replaced disputes between the lower courts regarding the standard a plaintiff must meet to have a cognizable claim under the Fair Housing Act.[163] Lower courts varied on whether Fair Housing claims that were not discriminatory on their face had to show both a disparate impact and a discriminatory intent similar to constitutional claims.[164]

The shifting to this disparate impact is essential because the Fair Housing Act has committed to prohibiting discrimination in housing.[165] It is important to note that not all things intended to have a racial effect are espoused or worded in a racial form.[166] Similarly, in minimizing discriminatory practices, a closer focus should be placed not just on the intent of the doer, but the impact received as a result of the doer's actions. It has been upheld and demonstrated by the Court that the purpose of the discriminator should outweigh the effects obtained on those discriminated against.[167] This has allowed the judicial system to turn away its eyes in the face of racial injustice by failing to identify how racism can hide behind other justifications for discriminatory action.[168]

The standard set in the Texas Department of Housing case, while it found that some disparate impact claims were cognizable under the Fair Housing Act, the Court narrowed its opinion on disparate impact liability to prevent a constitutional question from

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162. *Id.* at 525.

163. *Id.*

164. Wash. v. Davis, 426 U.S. 229, 241 (1976); Atkins v. Robinson, 545 F. Supp. 852, 867 (E.D. Va. 1982); Griggs v. Duke Power Co., 401 U.S. 424, 431-33 (1971); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 142 (3d. Cir. 1977).

165. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 531 (2015).

166. *Id.*

167. Wash. v. Davis, 426 U.S. 229, 239 (1976) ("It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.").

168. *See, e.g.*, McCleskey v. Kempt, 481 U.S. 279, 282 (1987) (holding that racial disparities in the death penalty was not a violation of the Equal protection Clause).

arising.[169] The Court iterated that the disparate impact liability was primarily focused on the removal of artificial, arbitrary, and unnecessary barriers that upheld discrimination rather than removing "valid governmental policies."[170] The Court expressed that this standard allowed plaintiffs to uncover discriminatory intent by counteracting unconscious prejudices and disguised animus that escape easy classification as disparate treatment.[171]

However, the Supreme Court paints this standard as being analogous to the business necessity standard under Title VII to provide a defense against disparate-impact liability.[172] This is to stress that if a requirement is a "reasonable measure" for housing authorities and private developers to carry out their valid interests, these organizations should be able to continue their practices.[173]

Moreover, the Court expressed the standard for a disparate impact claim that relies on statistical evidence—statistical disparity "must fail if the plaintiff cannot point to a defendant's policy that causes that disparity.[174] This causality relationship between the disparate effect and the policy is purported to indicate that racial imbalance alone, without more, does not establish a prima facie case under the disparate impact standard.[175] This requirement is meant as an insulation for defendants to ensure they are not held liable for racial imbalances they did not create.[176]

The Court states that this standard will be difficult to overcome for a plaintiff seeking to challenge a developer's decision to construct a new building in one location rather than another.[177] The court fears that without this causal relationship, defendants may employ the need for quotas in their development, which the Court expresses is a more significant constitutional concern.[178] The Court was not blind to the fact that this causal requirement would be hard to prove because of the "multiple factors that go into investment decision about where to con-

169. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 540 (2015).

170. *Id.*

171. *Id.*

172. *Id.* at 541.

173. *Id.*

174. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 542 (2015).

175. *Id.*

176. *Id.* at 542-43.

177. *Id.* at 543.

178. *Id.*

struct or renovate housing."[179] In implementing this standard, the court paved a definite way for plaintiffs to challenge housing policies that have a disparate impact based on race while simultaneously creating a hurdle.

In the concurring opinion, Justice Kennedy rightfully identifies that much progress remains to be made in the struggle against racial isolation.[180] The Justice determines that society must remain wary of policies that reduce homeowners to nothing more than their race in hopes of preventing the American society from becoming two societies, "one black, one white—separate and unequal."[181]

Since the ruling, HUD has published its implementation of the Fair Housing Act's disparate impact standard to serve as a guideline for implementing the legislation.[182] The focus behind the publishing was to clarify the plaintiff's burden-shifting task for establishing a prima facie case, where the Supreme Court warned that, without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be considered in a pervasive manner.[183]

The guideline was a rule proposed to include available defenses and rebuttals to an allegation of discrimination based on race.[184] The significance of that rule was to warn against racial quotas.[185] Also, a new burden-shifting framework was included; it gave plaintiffs the responsibility to ensure their claims identified a specific policy or practice that had a discriminatory effect and pleads with facts supporting a five-element test.[186] The main takeaway from this change for plaintiffs was that it would only be sufficient to identify a program as a whole if explaining how it causes disparate impact as opposed to a particular policy.[187]

In the guidelines, HUD itself also acknowledges that most plaintiffs would likely be unable to meet this standard.[188] A single act, such as a zoning decision or a developer's choice of where to construct new housing, would only be sufficient under this standard if the plain-

179. *Id.*

180. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 546 (2015).

181. *Id.*

182. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42854 (proposed Aug. 19, 2019).

183. *Id.* at 42855.

184. *Id.* at 42857.

185. *Id.*

186. *Id.* at 42858.

187. *Id.*

188. HUD's Implementation, *supra* note 182, at 42858.

tiff could show that this single act was a policy or practice.[189] Additionally, the five elements that the plaintiff would need to show are (1) the policy is arbitrary, artificial, and unnecessary; (2) a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class; (3) that the challenged policy or practice has an adverse effect on members of a protected class; (4) the disparity caused by the policy is significant, and (5) the complaining party's injury is directly caused by the policy.[190]

These five principles present an uphill climb for plaintiffs. The difficulties in proving these five principles are that the plaintiffs will not always know what legitimate objective the defendant will assert in response to their claim.[191] Furthermore, a plaintiff may not know how a policy advances an interest of a private developer.[192] Claims that rely on statistical analysis to show the disparity is only enough to give an inference about the relationship between the statistical data and the causation of the practice or policy.[193]

B. The Disparate Standard Creates a Loophole

The disparate impact standard is a step in the right direction by allowing it to be easier for plaintiffs to plead a plausible case under the Fair Housing Act. However, it creates a barrier to bringing their claims. By setting a disparate impact standard, the Supreme Court simultaneously set up a barrier by essentially stating that disparate impact is insufficient. In doing so, the Court and HUD purport to recognize the covert nature that racism can take on while simultaneously raising the bar and dismissing the fundamental nature of discriminatory practices—their disparate impact.

The burden-shifting nature of the standard serves to prop up the defendants accused of having discriminatory practices.[194] In setting the standard, the Court lets it be known that even showing that the nature of the policy or practice as artificial, arbitrary, or unnecessary is not enough if this can be shown to be for a legitimate purpose.[195] Actually, the Court has disregarded the harm to plaintiffs

189. *Id.*
190. *Id.* at 42858-59.
191. *Id.* at 42858.
192. *Id.*
193. HUD's Implementation, *supra* note 182, at 42858.
194. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 540 (2015).
195. *Id.*

that discrimination itself causes. Instead, the Court has demonstrated that its interest lies not in asserting that—discrimination is intolerable—but rather in unreasonable discrimination for no other purpose aside from discriminating is unacceptable. This distinction is essential, particularly to those plaintiffs that this standard disregards. These are the plaintiffs for whom the discriminatory effect is felt but is not actionable.[196]

This standard is issued while the court maintains its fear of superfluous claims or acts of people being unnecessarily litigious in circumstances where disparate impact exists but is unrelated to a defendant's actions.[197] There is no need to ignore the need for a causal link between the results and the defendant's actions; however, where single events, policies, or practices that cause these discriminatory impacts are ruled as not enough—even when it causes a disparate racial impact—it undermines the experiences of the plaintiffs.[198]

In conjunction with undermining the experiences of the plaintiff and the impact of the racial effect of these policies, implementing this standard is contrary to the intent of the Fair Housing Act: to prohibit racial discrimination in housing.[199] Instead, the Supreme Court and HUD have placed a barrier to racial discrimination in housing only when it appears invidiously unreasonable, exemplifying that some racism and racial disparities are acceptable.

Justice Kennedy is correct when he states that more progress is yet to be made in housing.[200] This is because America is not far removed from its legacy of racism.[201] If America is not removed from its legacy, showings of racial disparities should not be ignored as simply coincidental but rather should arouse stringent concerns about racial inequity. It is akin to the idea expressed by author Ibram X. Kendi that the effect of racist policies is seen when there are racial discrepan-

196. *See* TBS Grp., LLC v. City of Zion, 2017 U.S. Dist. LEXIS 183060 (N.D. Ill. Nov. 6, 2017); Mass. Fair Hous. Ctr. v. United States HUD, 496 F. Supp. 3d 600 (D. Mass. 2020).

197. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 543 (2015).

198. HUD's Implementation, *supra* note 182, at 42,858.

199. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (referencing the FHA co-sponsor Senator Walter F. Mondale, who stated the FHA "was to replace the ghetto 'by truly integrated and balanced living patters.'"); Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court's Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 552 (2014); *History of Fair Housing*, U.S. DEP'T OF HOUS. AND URBAN DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history (last visited Apr. 29, 2022).

200. *See* William M. Wiecek, *Structural Racism and the Law in America Today: An introduction*, 100 KY. L.J. 1, 5-8 (2012).

201. *Id.*

cies.[202] These racial discrepancies, whether justified in existing to exclude low-income persons, blight, or crime, should be scrutinized to permit the race adversely affected to bring their claims. Allowing plaintiffs to freely bring claims because there is a policy that causes a disparate racial link is the only reasoning that follows from a genuine commitment to ending racial segregation in housing. Rulings otherwise create a social policy that some forms of racism are acceptable. This notion is against the intent of the Fair Housing Act.

CONCLUSION

The Supreme Court has paved a way and simultaneously placed a barrier on the road it has paved. The Court qualified and made it cognizable for plaintiffs to bring a cause of action based on policies and practices with disparate racial impact.[203] The manner in which HUD has implemented the standard the Court has stated sets back some claims of racial discrimination by making it more difficult for the plaintiff to plead a plausible claim under the Fair Housing Act.[204]

The hopes of this standard were and continue to be essential as it is one avenue for plaintiffs to argue and show the intersectional nature of racial discrimination. Race discrimination does not solely occur when racial terms are explicitly used. Instead, the nature in which other issues disproportionately affect a racial group can rear its head when those disproportionate issues are used to exclude a race—without an explicit statement.

Wealth intersects with race, especially since wealth has systematically and legislatively excluded Black Americans in the past.[205] Wealth has long played a role in housing based on the policies and practices used to keep Black Americans from wealth and property ownership. Where language that seeks to exclude based on wealth, whether by interchanging the words with crime, property value, or blight, should arouse suspicion as to whom these policies are intended to exclude. The disparate racial impact these policies may have should be seen as instances of racial discrimination and not excused as stand-

202. *See* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 9 (BOLD TYPE BOOKS 1ST ED., 2016).

203. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 540 (2015).

204. HUD's Implementation, *supra* note 182, at 42854.

205. Alice M. Thomas, *The Racial Wealth Divide Through the Eyes of the Younger Family: Undoing America's Legacy of Wealth Inequality In Search of the Elusive American Dream Utilizing A Sankofa Model of Transitional Justice*, 5 FLA. A&M U. L. REV. 1, 1 (2009).

alone acts that have no merit.[206] Race nor wealth stand alone, and there are numerous ways to attempt to exclude Black people from the full benefits of American society. It is then pertinent to be critical of the racism that presents in the form of a disparate racial impact.

206. Prakash, *supra* note 118, at 1437.