

OPERATIVELY WHITE?: EXPLORING THE SIGNIFICANCE OF RACE AND CLASS THROUGH THE PARADOX OF BLACK MIDDLE-CLASSNESS

AUDREY G. MCFARLANE*

“Analytically race and class are theoretically distinct. Realistically in the US they are indistinguishable.”¹

“[R]ace is . . . the modality in which class is lived”²

I

INTRODUCTION

No current discussion of race in the United States is complete without acknowledging the interaction of race and class. Both are overlapping categories of identity that lead to significant, yet often unacknowledged, differences in material conditions and life opportunities. But neither category, standing on its own, adequately reflects or explains reality.³ Examining these categories in tandem reveals that race and class represent interconnected yet competing constructs with consequences for the prospects of addressing racial segregation and subordination. In particular, society’s unexamined embrace of class discrimination reflects the irony that class is both the preferred method for and the hidden obstacle to racial justice.

Copyright © 2009 by Audrey G. McFarlane.

This article is also available at <http://www.law.duke.edu/journals/lcp>.

* Professor of Law, University of Baltimore School of Law. Thanks to Michele Alexandre, Janai Nelson, Gilda Daniels, Odeana Neal, Cassandra Havard, Terry Smith, Patience Crowder, and last but certainly not least, Paulette Caldwell, for comments on earlier drafts of this article and conversations about the ideas it presented. The University of Baltimore Summer Research Grant provided helpful support in developing this article.

1. Howard Winant, Remarks at the University of California Irvine Race and Law Workshop (May 2, 2008).

2. Stuart Hall, *Race, Articulation, and Societies Structured in Dominance*, in *BLACK BRITISH CULTURAL STUDIES: A READER* 16, 55 (Houston A. Baker, Manthia Diawara & Ruth H. Lindeborg eds., 1996).

3. See Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1, 27 (1994) (“[T]here is no natural congruence between class and racial interests. At different times, class allegiances may follow or cut across race lines, and vice versa.”); John A. Powell, *The Race And Class Nexus: An Intersectional Perspective*, 25 *LAW & INEQ.* 355, 358 (2007) (“[R]acial practices in the United States help define the meaning and development of our understanding, and the practices of class.”); see also DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 79–80, 182 (2004) (discussing the “property” right of Whiteness, which benefits even poor Whites, compared with the persistent racial disadvantage for even highly educated Blacks).

Taking race and class into account often means acknowledging that Black racial identity combined with poverty leads to enhanced, sometimes nearly totalizing, disadvantages. The combination leads to limited life options, a degraded or shortened life expectancy, and limits on agency: the ability to make choices in one's own life. Because the black identity is equated with poverty, little attention has been paid to the significance for racial-subordination analysis of the increasing numbers of Blacks stepping into middle-class roles formerly held almost exclusively by Whites. In land use and development, the racialized landscape has been created by racism and deliberate segregation of Blacks in black communities and Whites in white communities. As affluent Blacks become suburbanites and inner-city gentrifiers, they move into positions, privileges, and opportunities shaped by this racialized landscape. Ironically, their presence may play an inadvertent role in furthering economic discrimination that disproportionately disadvantages poor Blacks. The movement of affluent Blacks through the racialized landscape raises questions for anti-subordination analysis: what happens to subordination when the Black identity is combined with comparative affluence and educational attainment? What effect does class have on race in this circumstance? If we treat the question literally and think of race as a phenotypical matter of heritage and color, the answer is obvious; class does not change phenotype.⁴ Conversely, if race is thought of as a context-specific set of structural advantages and disadvantages and the extent to which race and class performance is part of "doing race and class," the answer is more complex. It is worth ruminating about that this more complex view of race and class comprehends racial stigma as well as class advantage and disadvantage.

Consider the example of gentrification and the concern about its exclusion of the poor through displacement. When Whites are gentrifiers, for example, the disproportionate racial impact imposed by gentrification on lower-income Blacks is visually apparent and suggests that something involving racial subordination is taking place. But because of the role of market forces in creating hot real estate markets, gentrification is viewed as being about class, not about race. The racial lens on gentrification is weakened further by the presence of affluent Blacks in the influx of gentrifiers. Their presence suggests that Blacks are welcome if they have the money, thus indicating that gentrification sounds in class, not race. But changing the race of the gentrifier does not necessarily change the racial nature of the problem. The complexity

4. For a discussion of the different advantages and disadvantages conferred by color, see Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000); Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131 (1997); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000); see also Arthur H. Goldsmith, Darrick Hamilton, & William Darity, Jr., *From Dark to Light: Skin Color and Wages Among African-Americans*, 12 J. HUMAN RESOURCES 701 (2007) (demonstrating through empirical study that light-skinned blacks who are educated and affluent have income and educational attainment measures indistinguishable from Whites).

for understanding racial subordination lies in the reality of the mechanics of displacement and exclusion: at different decisionmaking junctures, affluent Blacks sometimes demonstrate that they have similar incentives to Whites—to avoid, run away from, or oppose projects or endeavors that would benefit lower-income Blacks.

Taking race and class into account seems to demand exploration of the significance of Blackness and affluence within an existing societal structure that has evolved from white supremacy to a seemingly less-virulent, or more-benign, white norm—one in which normalcy, wealth, advantage, and presumptions of innocence are still implicitly predicated on Whiteness and in which an economic structure of white privilege and advantage is inscribed into the geography of the physical landscape. Similarly, the vestigial oppression of slavery has evolved to a norm of presuming black deviance, lack of wealth, disadvantage, and presumptions of guilt; and an economic structure whenever Blackness is inscribed on the physical landscape to mean places that are less desirable and to be avoided. Using the example of the black middle class, it is possible to see that the vestigial oppression of slavery and the domination of white supremacy have morphed but have not been eliminated.⁵ Instead, those institutions have been disaggregated into discrete, wealth-based components of Blackness and Whiteness. Thus, Blacks with money are privileged in certain limited circumstances to be operatively white. Through their wallets and educational or professional attainments they gain access to some of the privileges, goods, and services formerly reserved exclusively for Whites.

This access is contingent and sometimes unpredictable. For example, consider the experience of Blacks in a place as ubiquitous as the shopping mall. Upscale shopping and entertainment has been a central means of local economic development. Race and class exclusion is deliberately embedded into luxury retail concepts replicated throughout these developments. The welcome to Blacks as mall patrons is contingent and easily dissipated.⁶ Blacks are welcome to the extent they can show they are Blacks with class; that is, that they have the money and know how to follow middle-class norms and culture. They are also subject to greater surveillance, more onerous credit evaluation for

5. Consider the campaign and election of Barack Obama. There is no other way to characterize his election than as an incredible advancement in the crippling disadvantages of Blackness in the United States. On the other hand, it is quite obvious from the racial contortions he executed during the campaign, in order not to violate the privilege he had been granted, that he would be considered an exception to how Blacks are ordinarily regarded. See John O. Calmore, *Whiteness as Audition and Blackness as Performance: Status Protest from the Margin*, 18 WASH. U. J.L. & POL'Y 99, 115 (2005) (noting wryly that all black professionals are the *exception that proves the rule*: “We, the new people, do not so much represent blacks as we personify the exceptions that prove the rule.”).

6. See Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275, 276–78 (2001) (detailing consumer racism in retail environments including excessive policing of and disparate security measures towards blacks); see, e.g., Lewis v. J.C. Penney Co., 948 F. Supp. 367, 368–69 (D. Del. 1996). See generally JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE CLASS EXPERIENCE (1994); Joe Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101, 102 (1991).

financing or payment and dismissive treatment from store clerks regardless of whether they are or appear to be affluent.⁷

Rather than simply consider the challenges of being black and middle class, this article considers challenges and opportunities of Blackness and middle-classness in its twenty-first century context of being “operatively white.” Specifically, how should neighborhood land use conflicts be regarded if poor Blacks are disproportionately, negatively affected in relation to affluent Blacks? That racialized impact should not be dismissed as being purely about class just because the affluent are also black. Problems of class in the United States are racialized; they are never separate from the racial structures of subordination that still operate here.⁸ Accordingly, problems currently cognizable as being merely about class are necessarily still cognizable as problems of race.

This article’s goal is to generate discussion about ways to begin to frankly approach how we see race vis-à-vis class. The conversation has been diverted by attempts in the courts and the media to substitute class for race in affirmative action. To stave off those efforts, counter-arguments focus on establishing why race and class are distinct yet overlapping categories of identity.⁹ This article focuses on a different aspect of the conversation in order to ensure that both race and class are taken into account. Instead of focusing on the disadvantages of poverty, this article interrogates the notion of class as the preferred vehicle of change and confronts how racial experience is altered or alterable by class because of the privileges that class brings? Of course, this is a complex question, particularly because the black middle class does not escape the entire burden of race. Also, how do we begin to take class into account in a world that is increasingly unwilling to even account for race discrimination? If the path to racial justice is through the expansion of the black middle class, what are the obligations placed upon members of that class within the black–white racial discrimination paradigm? Ultimately, taking class into account is part of a more sophisticated understanding of how race discrimination is structurally embedded in societal and institutional structures and the inadvertent complicity of members of the black middle-class participating unquestioningly in those structures.

In order to enrich our ability to give race and class the sophisticated and probing account that their complex interaction calls for, this paper takes the concept of racialized class to its logical end and explores the ways in which racial identity and racial social position are affected by class. Part II recounts the specific example of post-Katrina New Orleans and the black-on-black conflict in the city–suburban context. Part III looks at how race and class have historically been etched into the landscape through explicit support of economic segregation in land use and real estate development. Subsequent sections

7. Kennedy, *supra* note 6, at 298, 329, 283.

8. powell, *supra* note 3, at 3.

9. See, e.g., powell, *supra* note 3, at 358 (“[R]ace and class are distinct and at the same time mutually constitutive, recursive processes in the United States . . .”).

discuss the place and parameters of the black middle class and its ability to use material means as a racial and class survival strategy within a white norm of “middle classness.” Finally, I discuss ways in which this operative Whiteness has significance for racial justice.

Because race and class are structurally inscribed into the landscape, racial justice requires economic liberation in order to advance. Economic liberation comes at the expense of the black poor. There cannot be racial justice without economic justice.

II

INTRARACIAL DISHARMONY: NEW ORLEANS, LOUISIANA

In Hurricane Katrina and its aftermath, thousands of people perished; thousands more were stranded; and hundreds of thousands more were displaced from the city and region. The devastation of Hurricane Katrina did not just reveal the level of black poverty in New Orleans, but it peeled back the veneer obscuring both racial and intraracial divergences.¹⁰ The need for habitable housing post-Katrina, let alone decent and affordable housing, was dire. Yet the struggles of race and class were evident in a number of conflicts over land use and development relating to who got to rebuild what, where.

For example, immediately after the disaster, national news stories reported the city’s efforts to tear down solidly constructed, 1930s public-housing structures in order to redevelop them as mixed-income projects with far fewer units.¹¹ A less-noticed, yet striking, news item reported an existing low-income housing development that had been destroyed when the levees were breached.¹² The project owner obtained funds relatively quickly at the time to reconstruct the housing right away on the same site.¹³ The housing development happened to be located next to another neighborhood, New Orleans East, which is a middle- to upper-middle-class black neighborhood comprised primarily of professionals.¹⁴

During the land-use-approval process, residents of this black middle-class neighborhood strongly opposed rebuilding the project on the original site.¹⁵ The neighbors’ objections were that the project should not be rebuilt next to their

10. The traditional racial cleavages were omnipresent. For example, after Katrina, white communities surrounding New Orleans passed ordinances limiting rentals to relatives only and barred storm victims from crossing a bridge to safety. See David D. Troutt, *Katrina’s Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1110–11 (2008) (discussing the Gretna Bridge incident and the Jefferson Parish ordinance).

11. Leslie Eaton, *In New Orleans, Plan to Raze Low-Income Housing Draws Protest*, N.Y. TIMES, Dec. 14, 2007, at 28; Adam Nossiter, *A Class Struggle over Housing in New Orleans: Poor Tenants Oppose Post-Katrina Plans*, INT’L. HERALD TRIB., Dec. 27, 2006, at 2.

12. Coleman Warner & Leslie Williams, *N.O. May Idle Housing in East; Multifamily Sites Worry Neighbors*, TIMES-PICAYUNE, March 8, 2007, at 1.

13. *Id.*

14. *Id.*

15. *Id.*

neighborhood because low-income housing projects had been disproportionately sited near their community.¹⁶ Implicit in their objections was the expectation that such projects should be distributed to other areas around the city, nearer other, white middle-class neighborhoods. The neighborhood's representatives on the city council introduced and obtained a moratorium on the construction of any multifamily housing for a year.¹⁷

Because the need for housing and shelter seemed a real and unavoidable emergency, this opposition to the rebuilding was shocking and disheartening. Even under ordinary circumstances, the ongoing shortage of affordable housing is commonplace and ignored. But in times of stark, sudden disaster, it is less easy to ignore the immediacy of acute, human need. Yet the neighborhood's city-council (who led the efforts to adopt the moratorium) viewed the situation as involving not only disaster relief, but also civil and property rights.¹⁸ It involved property-rights issues because as homeowners, the neighborhood residents had the right to protect their property from *incompatible* land uses like low-income, multifamily housing. As for civil rights, public and other low-income housing projects had long been relegated to border black middle-class neighborhoods, while distant white neighborhoods were protected from such encroachments.¹⁹ White neighborhoods were, for the same reason, protected from group homes, homeless shelters, toxic dumps, and other land uses seemingly inimical to the health and desirability of middle-class neighborhoods. These had instead been disproportionately located near black neighborhoods.²⁰

How should the New Orleans East neighborhood's moratorium be interpreted? How did the apartment dwellers' being poor and black play into the neighborhood opposition?²¹ Can the homeowners' motivation be seen as qualitatively different than that of a similarly situated white community that might oppose a similar project using zoning rules? What of the fact that the neighborhood and the other members of the black middle class have been disproportionately subject to close placements of public housing and other low-income housing—that zoning has racialized and classed multifamily housing as

16. *Id.* For a description of a similar conflict, see also Leonard Moore, *Class Conflict over Residential Space in an African American Community: Cleveland's Lee-Seville Public Housing Controversy*, 111 OH. HIST. 25 (2002).

17. Bruce Egler, *East N.O. Apartment Dispute Rages on; New Limits May Pass Legal Test, Council Told*, TIMES-PICAYUNE, Aug. 25, 2007, at 1.

18. Brian Thevenot, *Displaced Voices: Two Cynthias—Willard-Lewis and Hedge-Morrell—Find Themselves as City Council Members Representing Virtual Ghost Towns*, TIMES-PICAYUNE, Jan. 29, 2006, at 1.

19. MARY PATILLO-MCCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* 6 (1999) (noting that racial segregation places black, middle-class neighborhoods near or next to black, poor neighborhoods).

20. See Troutt, *supra* note 10, at 1129–31.

21. Other examples are disproportionate siting of group homes in black neighborhoods. See, e.g., *Gladden v. D.C. Bd. of Zoning Adjustment*, 659 A.2d 249, 255 (D.C. Cir. 1995).

black and poor?²² Can this issue be seen simply as homeowners' asserting their claim to the full panoply of suburban property rights that white suburban property owners take for granted? If so, the argument is that it should be their right to escape from disadvantage²³— that they are only trying to protect their property and way of life from low-income land uses that happen to be for the benefit of Blacks. It is not because of race; it is because of class.

The increased presence of Blacks in the suburbs illustrates not merely an intraracial class disjuncture, but also the disjuncture between our understanding of race and our apparent unawareness of the invidiousness of class. Black suburban homeowners are now turf defenders. They are merely doing what white middle-class homeowners do—pressure local land-use powers to keep out undesirables. Thus when Blacks attain racial equality, does it mean they attain the right to exercise unfettered class privilege?

III

THE ROLE OF CLASS IN THE RACIALIZED STRUCTURE OF LAND USE²⁴

“More than any other issue facing our nation, housing will be the concern that will force citizens to face the reality of class.”²⁵

One of the more-intractable aspects of racism today is the spatial inscription of race and class on the landscape. The disadvantages of class structures are embedded in land-use practices and law. These patterns of land use created through zoning and local government boundaries provide the opportunity to examine racial consequences of economic discrimination via segregation and homogeneity. The geography of race and class shapes our lives—where we live, our life opportunities, and our daily interactions. This geography is visible, yet we are so used to seeing it that we accept it as normal. It has thick boundaries, with thin and flexible, yet exceedingly effective, mechanisms of enforcement.²⁶

22. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 258 (1977); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 929 (2d Cir. 1988), *aff'd per curiam*, 488 U.S. 15 (1988). For the history of racial discrimination and public housing, see Michelle Adams, *Separate and Unequal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 447 (1996).

23. See STEVE MACEK, *URBAN NIGHTMARES: THE MEDIA, THE RIGHT, AND THE MORAL PANIC OVER THE CITY* 37, 199–200, 257–62 (2006) (discussing how filmmakers, advertisers, and journalists contributed to the morally decayed, violent image of the inner city—the invention of the “savage urban Other”—in the popular imagination).

24. Under current laws, these conflicts are race problems, not problems of class. It is now acknowledged that a big gap in the Fair Housing Act's protections was its emphasis on race, when, in fact, a theme of class discrimination can be viewed as effectively protecting racial discrimination. See Wendell E. Pritchett, *Where Shall We Live— Class and the Limitations of Fair Housing Law*, 35 URB. LAW. 399 (2003).

25. BELL HOOKS, *CLASS MATTERS* 140 (2001).

26. GUY STUART, *DISCRIMINATING RISK: THE U.S. MORTGAGE LENDING INDUSTRY IN THE TWENTIETH CENTURY* 148 (2003) (“[N]eighborhoods have established borders that serve to constrain the gentrifying housing market and thus constrain the supply of houses and allow gentrifiers to capture the externality effects of each other's actions for themselves.”); see also HOOKS, *supra* note 25, at 132–35 (discussing the sensitivity to color in neighborhoods and real estate).

The class aspect of the race–class matrix in land use is an inadequately told story; class subordination in land use is powerful and complicated. The class story in the United States is distinct from yet intertwined with race. The two cannot be separated because conceptions and definitions of class have been, and continue to be, deeply racialized in the United States, both as a matter of social structure and as a matter of identity.²⁷

The problematic class structure of land use involves as well an idealized vision of family life through the single-family home. Because the norm of the single-family home has been so successfully protected, resulting economic segregation has been normalized to the point that few question it. The consequences of the rules and policies allowing the pursuit of single-family-home districts are evident in the landscape in the form of urban sprawl, traffic, and environmental degradation. The social effects are mostly invisible because the social understanding is that money is the means to one's piece of the single-family pie. The customs and practices of economic segregation are considered normal and natural. Even though such customs and practices give rise to urban sprawl and disconnected landscapes, require driving everywhere, and do not necessarily serve daily human needs very well, we accept them as the norm.

The primary legal tool of land-use control—zoning—ratifies separating uses based on economic homogeneity. One of the most salient, common, and recurring cases of discrimination in land use has been zoning discrimination against multifamily housing. The United States Supreme Court's decision in *Euclid v. Ambler Realty Co.*²⁸ in 1926 enshrined such economic segregation as a legitimate use of the police power with great implications for perpetuating racial segregation. The Court upheld the right of localities to zone for certain purposes, with the understanding that, in creating a hierarchy of favored and disfavored land uses, the single-family residential home would be at the apex in the pyramid of residential protection.²⁹ By contrast, multifamily housing, apartment houses, low-cost housing, or any other kind of multiple dwelling would be inferior to, and considered incompatible with, single-family residential housing.³⁰ The apartments of the day were usually overcrowded, poorly built tenement housing, which the Court considered repugnant and hazardous to health. The social context of the *Euclid* era is also one in which zoning was viewed as a way to protect the upper middle class homeowner from the encroachments of urban life including congestion, noise and undesirable people:

27. See Martha R. Mahoney, *Class and Status In American Law: Race, Interest, and The Anti-Transformation Cases*, 76 S. CAL. L. REV. 799 (2003) (arguing that class is misconstrued as identity when it really is a reflection of social status and power relations).

28. 272 U.S. 365 (1926).

29. See Rachel D. Godsil, *Viewing The Cathedral From Behind The Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1862–63 (2004) (discussing the zoning pyramid that created a hierarchy that was the most protective of residential districts and least protective of industrial districts. Existing black residential areas were classified as industrial districts with the least protection from uses incompatible with residential use.).

30. *Euclid*, 272 U.S. at 394–95.

the poor, immigrants and blacks.³¹ The Court characterized apartments as nuisance-like land uses and held they were thus properly regulated through exclusion if the municipality deemed it proper.³²

After *Euclid*, “segregation of multiple-family dwellings became an accepted fact.”³³ *Euclid*, in effect, enshrined economic discrimination and economic privilege within localities’ legal zoning power, and that legacy is now unquestioned as desirable, normal, and unproblematic. *Euclid* continues to be the basis upon which local governments can, by facially neutral rules, make zoning decisions that have a discriminatory effect. *Euclid* dilutes any racial-discrimination claim, particularly one based on impact, because it would be negated by the rational alternative explanation of class discrimination. In other words, racial-discrimination claims in this arena are eclipsed by the rationality of cities’ choices to exclude housing that might conflict with existing residents’ preferences.

The lower-court opinion, overruled by *Euclid*, explicitly acknowledged the race and class implications presented by zoning. It expressed concern that the effect of zoning would be to ratify class discrimination by allowing arbitrary discrimination against types of land use favored, out of necessity, by the non-affluent:³⁴

The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a straight-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.³⁵

The Supreme Court was aware that zoning was economically discriminatory, yet it ultimately chose to privilege and normalize such class-based exclusion. By upholding the ability of municipalities to distinguish and separate types of residential uses based on building type, *Euclid* can be thought of as the *Plessy v.*

31. See Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 604 (2001) (“[I]mages about race, immigration and poverty were central parts of the *Euclid* litigation itself.”).

32. *Euclid*, 272 U.S. at 395 (“[In single-family residential areas,] apartment houses . . . come very near to being nuisances.”).

33. Richard F. Babcock & Fred P. Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1048 (1963); see also EDWARD C. BANFIELD & MORTON GRODZINS, *GOVERNMENT AND HOUSING IN METROPOLITAN AREAS* 71–92 (1958) (discussing the wisdom of economic segregation); Norman Williams, Jr., *Land Planning in a Democracy: Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317, 343–48 (1955) (discussing the constitutionality of economic segregation).

34. *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 312 (N.D. Ohio 1924) (invalidating zoning ordinance as taking without due process of law); see Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916–1926*, 56 U. PITT. L. REV. 367 (1994); see also David D. Troutt, *Katrina's Window: Localism, Resegregation and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1147–66 (2008) (arguing that Supreme Court doctrine has enabled localism to become “the Instrumental Successor to Segregation”).

35. *Euclid*, 297 F. at 316; see *Corrigan v. Buckley*, 271 U.S. 323 (1926) (rejecting a constitutional challenge to the enforcement of a racially restrictive covenant against a black homebuyer in a Washington, D.C. neighborhood).

*Ferguson*³⁶ of land-use law: multifamily housing affordable to lower- and moderate-income people was kept separate and unequal. This separation, benefitting the idealized middle- and upper-income people, contributed to the racialized regime of class discrimination that exists to this day.

Other Supreme Court cases reaffirmed protection for middle-class property rights. *Village of Belle Terre v. Boraas*³⁷ explicitly used idealized imagery of the suburban community of single-family homes to affirm a town's right to use blood relationships to define who may live in a town.³⁸ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.* ("*Arlington Heights I*"),³⁹ a town with a 99.9 percent white population, rejected a nonprofit housing-development group's application to rezone a parcel of land to build a townhouse development that would have been affordable and racially integrated.⁴⁰ Though the "social" issue played a factor at public hearings considering the application, these vague expressions of possible racial prejudice failed to meet the Court's strict standard of proof in intentional racial-discrimination cases.⁴¹ Under a Fourteenth Amendment equal-protection claim, disparate racial impact can help establish intentional racial discrimination, but it is, and in *Arlington Heights I* was, insufficient standing on its own. The strict standard meant that unless a zoning board or town council explicitly stated that the purpose of the adverse zoning decision was due to the race of the applicant or to the racial identity of the potential residents, any zoning denial would withstand Equal Protection challenge. In the ordinary case, a town seeking to keep a zoning district or the entire town zoned only for single-family housing would be protected if the existing zoning scheme and policy were consistent.⁴² The respondent's appellate brief submitted to the Court reveals, however, that the "social" issue discussed at the town's public hearings was race and that some council members felt duty-bound to follow the will of the citizens.⁴³ Thus, *Arlington Heights I* affirmed the legal entitlement of towns and cities to practice exclusionary zoning, regardless of its discriminatory effects on Blacks, so long as intent could not be proven.⁴⁴ Most significantly, the decision reaffirmed the right

36. 163 U.S. 537 (1896).

37. 416 U.S. 1 (1974).

38. *Id.* at 9 ("A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.").

39. 429 U.S. 252 (1977).

40. *Id.* at 255, 257.

41. *Id.* at 257, 269.

42. Similar examples are towns that have required popular referendums to allow multifamily housing in a jurisdiction. *See, e.g., City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) (affirming the use of the referendum).

43. Brief for Respondent at 16–17, *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 292 (1977) (No. 75-616).

44. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights* ("*Arlington Heights II*"), 558 F. 2d 1283 (7th Cir. 1977), on remand for review under the Fair Housing Act (FHA), the result was different. Under the FHA, an independent disparate-impact or discriminatory-effects argument was available to establish a violation of the Fair Housing Act. *Id.* at 1290. The town was found to be in violation of the FHA although the court observed that it considered the matter to have

for suburban residents to establish a system of zoning that would prevent the poor from ever taking up residence within the suburbanites' town. Even though it was clear that the class discrimination was motivated by race, class effectively obscured—and ratified—the racial injustice.

The logic of the U.S. class structure is full of racial meaning.⁴⁵ Because the class structure is raced, the racial implications of zoning are clear. Cases that overtly recognized and effectively locked in class discrimination were undoubtedly influenced by the racialized social context. Even when the Court intervened to prevent more-flagrant attempts to legalize segregation via land-use regulation, the Court's logic reflected the justices' views of the racial order—that white was supreme. For example, at the turn of the twentieth century, many municipalities, starting with Baltimore and moving south, adopted racial zoning ordinances that dictated which zoning districts were to be white and which districts were to be black.⁴⁶ A white purchaser could not purchase in a black district and a black purchaser could not purchase in a white district. In *Buchanan v. Warley*,⁴⁷ the Supreme Court invalidated Louisville, Kentucky's racial zoning ordinance that designated residential zoning districts based on the race of a majority of residents.⁴⁸ Decided during the *Plessy* era, *Buchanan* result was groundbreaking but its reasoning was troubling. In invalidating racial zoning, the Court focused mainly on the ordinance's impairment of *white* citizens' freedom to contract and ability to buy and sell property in any district:

[C]an a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?⁴⁹

The Court seemed to decide that such a racial restriction on the ability to buy and sell property exceeded any legitimate interest on behalf of the city in

been a close case. *Id.* at 1293–94. The standard under *Arlington Heights II* continues to this day to be one of two competing analytical standards for FHA disparate-impact claims. The other is found in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curiam), in which a less-stringent disparate-impact standard is applied. Nevertheless, very few other successful exclusionary zoning cases have been brought under the FHA.

45. See powell, *supra* note 3, at 358 (“Racial meaning, identity, and practices have helped shape class identity and inhibit class consciousness.”).

46. Christopher Silver, *The Racial Origins of Zoning*, in *URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS* 23–42 (June Manning Thomas & Marsha Ritzdorf eds., 1997).

47. 245 U.S. 60 (1917).

48. *Id.*

49. *Id.* at 78. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 80–81 (2004) (noting that concerns of racial equality played no role in cases like *Buchanan v. Warley*, 245 U.S. 60 (1917), which was instead concerned about property rights); Warren B. Hunting, *Constitutionality of Race Distinctions and the Baltimore Negro Segregation Ordinance*, 11 COLUM. L. REV. 24, 34 (1911) (arguing that the Baltimore racial zoning ordinance was equally fair to Blacks and Whites).

general or on behalf of any white residents individually.⁵⁰ The constitutional impact of the case was therefore relatively limited by its focus on direct, explicit, intentional racial exclusion—it was this narrow category of extreme restriction that was, and is, absolutely prohibited. *Buchanan* was effective in banning only that narrow type of racial zoning that arose briefly in cities like Louisville, Atlanta, and Baltimore, with increased Black migration and Eastern and Southern European immigration. But *Buchanan* did nothing to discourage or prohibit other, less explicit, exclusions such as zoning and racially-restrictive covenants or even outright racial discrimination in the refusal to sell to Blacks.⁵¹

The racial context at the time is apparent in other cases that identified how Blacks were regarded and how the migration of Blacks led to litigation over attempts to exclude them from certain neighborhoods. For example, the district court in *Euclid* thought that *Buchanan* proved that zoning in general should be invalidated.⁵¹ The court reasoned that the practice of municipal zoning could not possibly be upheld when racial zoning had been invalidated in *Buchanan*. To the *Euclid* district court, racial zoning had far greater factual justifications:

[N]o gift of second sight is required to foresee that if th[e] statute had been sustained [in *Buchanan*], its provisions would have spread from city to city throughout the length and breadth of the land. And it is equally apparent that the next step in the exercise of this police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants. The blighting of property values and the congesting of population, whenever the colored races or certain foreign races invade a residential section, are so well known as to be within judicial cognizance.⁵²

Other land-use decisions include statements made, almost in passing, that indicate how much of the racial order was based on white supremacy and black undesirability and inferiority.⁵³ Similarly, a number of private land-use techniques were also utilized in order to perpetuate the racial order. Racially restrictive covenants were a popular and accepted practice following the invalidation of explicitly racial zoning.⁵⁴ *Shelley v. Kraemer*⁵⁵ used the state-

50. For a discussion of a similar refusal to extend legally sanctioned racial discrimination into otherwise racially neutral common-law doctrine, see generally Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505 (2006).

51. See Richard Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 604 (2001) (“[I]mages about race, immigration and poverty were central parts of the *Euclid* litigation itself,” Chused argues that *Euclid* used code words to get the otherwise conservative Supreme Court to uphold zoning by appealing to upper middle-class sensibilities about protecting house and home by excluding nuisances in the form of apartment housing used by poor immigrants and people of color from single family enclaves.). *Id.*

52. *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307 (N.D. Ohio 1924), *rev'd on other grounds*, 272 U.S. 365 (1926).

53. For an example of racially disparaging statements intended to be affirmative made in cases, see *Falloon v. Schilling*, 29 Kan. 292 (1883) (rejecting a cause of action for nuisance against a house occupied by Blacks because they were not “worthless negroes”).

54. See *Corrigan v. Buckley*, 217 U.S. 323, 330 (1926) (holding that the Fifth and Thirteenth Amendments do not prohibit “private individuals from entering into contracts respecting the control and disposition of their own property”); see also Leland B. Ware, *Invisible Walls: An Examination of*

action doctrine to invalidate enforcement of such private covenants, but in doing so, the Court inadvertently continued to privilege white racism. By resting the decision on the public–private distinction and merely prohibiting state enforcement, the Court failed to stop the private racial discrimination perpetrated by tacit homeowner compliance with racially restrictive covenants.

The land-use cases have to be understood in a context of local practices and assumptions around class, racial homogeneity, and property values—all of which are embedded in our system of property valuation. What is often missing from the discussion of this context is a focus on how race- and class discrimination is structured into processes that support property markets, ownership, and financing.⁵⁶ Class discrimination, embedded in the basic logic of zoning, legally perpetuates a system of segregation and inequity in which black neighborhoods and white neighborhoods constitute separate property markets. One current assumption is that economic segregation happens naturally because land values are higher in wealthier neighborhoods, so economically appropriate uses are sorted by purchasers' willingness and ability to pay. That reasoning is fallacious. The real class-discrimination issue behind zoning is that without it

wealthy residents of a neighborhood could not exclude poorer residents through the simple mechanism of high land values, because the latter could always afford to move into such districts by renting apartments built there. So long as those apartments generated sufficient rent, high land values did not act as a barrier. Wealthy residents sought protection in zoning ordinances creating areas in which only single-family homes could be built.⁵⁷

The logic of *Euclid* is naked protection against the inability to exclude “undesirables” from neighborhoods with high land values. *But for* zoning, high land values do not *naturally* exclude affordable housing. Economic segregation would not occur nearly to the level it does today absent intervention by the law of zoning.

Of course, the class structure reflected in zoning cannot really be separated from the racial structure of land use and a history of intentional racial segregation, for these overlay and intermingle with class concerns. Efforts in support of racial segregation worked in tandem with *Euclid's* ratification of class discrimination. Consistent with this history, the Federal Housing Administration encouraged the use of racially restrictive covenants to promote

the Legal Strategy of the Restrictive Covenant Cases, 67 WASH. U. L.Q. 737, 739 (1989) (arguing that the great migration of southern rural Blacks to northern cities prompted the popularity of racially restrictive covenants).

55. 334 U.S. 1 (1948).

56. See Kenneth Fox, *The Suspectness of Wealth: Another Look At State Constitutional Adjudication of School Finance Inequalities*, 26 CONN. L. REV. 1139, 1155–56 (1994) (arguing that commentators have mistakenly downplayed the fact that state courts in California, New Jersey, and eight additional states—Connecticut, Wyoming, West Virginia, Arkansas, Washington, Kentucky, Montana, and Texas—have actually invalidated school finance systems for wealth discrimination, grounding these holdings under either equal-protection or state educational provisions).

57. STUART, *supra* note 26, at 37.

a discriminatory vision of what was considered necessary to promote stable, desirable, white middle-class neighborhoods.⁵⁸ When *Shelley v. Kraemer* merely invalidated these covenants under the state-action doctrine, it treated racial discrimination in decisions about where to live, and whom to buy from and sell to as private matters; it left racial discrimination in individual transactions to continue legally unaddressed for another twenty years until the Fair Housing Act was passed.⁵⁹ The discriminatory combination of government policy and individual actions by white homeowners, realtors, and appraisers was aided and reinforced by the protections of economically segregative zoning rules.⁶⁰ The resulting rate of racial segregation in the United States has been quite high; racially integrated neighborhoods continue to be an anomaly. Racial segregation indices have improved, but only slightly, and primarily in areas with military installations, which tend to be more integrated.⁶¹

Racial geography shapes lives and life's opportunities: we rely on the resulting segregated racial geography to make our decisions about where to live. Racially identified places lead to distinctly different economic conditions in terms of prices, quality of schools, shopping, and other services.⁶² These differences also play a role in wealth allocations—markets for real estate are racialized and discounted or overvalued accordingly. Middle-class neighborhoods will receive a racial premium or discount based on race.⁶³ Schools and services will be better in and near white neighborhoods and worse in and near black neighborhoods.⁶⁴

The most palpable evidence of the racially segregative effect of class discrimination has traditionally been the city–suburb divide: the mid-twentieth century's visible, racialized boundary in the geography of desired places and places of last resort.⁶⁵ The fifty-year trend of suburbanization has been countered recently with a trend toward moving back to the cities. The new

58. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 208 (1985).

59. Civil Rights Act of 1968, tit. VIII, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended as 42 U.S.C. §§ 3601-3631).

60. See Martha R. Mahoney, *Shaping American Communities: Segregation, Housing and the Urban Poor*, 143 U. PA. L. REV. 1659, 1670–75 (1995).

61. See POLLY J. SMITH, *THE IMPACT OF MILITARY DESEGREGATION ON SEGREGATION PATTERNS IN AMERICAN CITIES: A CASE STUDY OF COLORADO SPRINGS, NEW LONDON AND FAYETTEVILLE* (2007).

62. See SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 174–75 (2004).

63. See Margalynn Armstrong, *Protecting Privilege: Race, Residence And Rodney King*, 12 LAW & INEQ. 351 (1993); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

64. See CASHIN, *supra* note 62, at 132–36. A similar black-on-black class conflict example could also be made with schools. Conflicts between the Blacks divided by class have also centered around public schools. In Prince George's County, middle-class Blacks have fought to have poor Blacks not attend schools near their homes. *Id.* at 136.

65. DAVID RUSK, *CITIES WITHOUT SUBURBS* (1995) (discussing racial segregation and poverty indices in metropolitan areas with inelastic central cities).

housing and commercial developments built to accommodate both trends tend to be projects that are economically exclusive.⁶⁶ Any resulting racial segregation or exclusion of Blacks is normalized on the rationale that it is acceptably unavoidable: those with the money are welcome for the most part to partake in the “new inner city.” Today’s city–suburb divide has shifted from declining inner-ring suburbs’ to “exurbs,” and to glittering shopping and entertainment centers—racial segregation continues altered but unabated. New techniques of racialized exclusion have been added. For example, credit-scoring practices, today’s objective technique for measuring an individual’s credit, perpetuate race- and class discrimination because racial and economic segregation are embedded in our system of credit-worthiness measures.⁶⁷ Credit is used to maintain a racial order. For example, Blacks are more likely to suffer discrimination if they apply for a large loan to purchase property in a white neighborhood.⁶⁸

The result is that the race and class structure of cities and suburbs has largely set up the suburbs as the place to escape from disadvantage. Local governments respond by offering a variety of services and amenities to appeal to different constituencies who vote with their feet to select those environments that best meet their needs.⁶⁹ Some argue that homeowners are rationally invested in their neighborhoods.⁷⁰ In response to the acknowledged success that suburban (white) neighborhoods have had in keeping out the poor (and often black), some have suggested that mandatory, inclusionary zoning be paired with equity-compensation funds that would reimburse property owners for any financial loss in property values attributable to such economically integrative schemes.⁷¹ Ironically, a strong contrast between city and suburb helps enhance the value of the suburbs. Because the blight of the inner city is a part of measuring the contrast between city and suburb,⁷² the depression in the city contributes to the value in the suburbs.

Another example of the impact of class and race on the urban–suburban geography is illustrated by gentrification. Through resurgent demand for city

66. See generally Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006) (arguing that developers perpetuate segregation and avoid antidiscrimination laws by offering amenities that exclude by price and by signal the development’s demographic makeup).

67. STUART, *supra* note 26, at 205.

68. See Stephen R. Holloway, *Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio*, 88 ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS 252 (1998). See generally MORTGAGE LENDING, RACIAL DISCRIMINATION, AND FEDERAL POLICY (John Goering & Ron Wienk eds., 1996) (illustrating substantial racial disparities in ability to obtain mortgages and home insurance).

69. See generally Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

70. See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 5 (2001) (“[C]oncern for home values is the central motivator of local government behavior.”).

71. *Id.* at 270.

72. See Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1276–77 (2006).

living, gentrification was a comparatively smaller, but significant, counter-trend to the classic meaning of the city–suburb divide. Although the racial impact of displacement was disproportionate, the trend’s stark dynamic of exclusion was perceived to be about class and not about race. The debate over gentrification has been largely subdued, largely ineffectual. The demographics of the influx are most simply referred to as “the return of the creative class” (a contested term and concept nonetheless descriptive and thus useful) who had purchasing power. The sense of market dominance, runaway property values, and racial change were seen as desirable and as the inevitable result of organic market conditions.

Behind the scenes, however, techniques for commercial real-estate development and financing rely on scientific techniques of geodemography that classify neighborhoods based on race, income, housing type, and educational attainment to decide where to develop and what types of shopping structures to place in a neighborhood.⁷³ The system of real-estate appraisals, which uses the racial identity of a neighborhood to come up with property valuations, also contributes to maintaining a race and class order. Real-estate appraisers are key players in making gentrification possible. Although explicit racial criteria are no longer officially part of the profession, one appraiser confessed, “We’re not supposed to consider race at all. But it’s something you just know as a fact, you just can’t include it in the [written appraisal].”⁷⁴ Real-estate appraisers’ definitions, methods, and practices also further racialized urban development through promoting uniform building types (and uniform building values within districts). Fundamentally, the logic of such uniformity embodies an assumption about homogeneity: property is appraised according to the value of similar properties; the fewer comparables there are, the harder it is to define the market. But appraisers conspire to make such a market using racial identity.

In gentrifying city neighborhoods, the process typically starts with one (typically white) gentrifier, a “pioneer” who fixes up a house in a black neighborhood. From the racialized perspective of the appraiser, there are no real comparables against which to measure (and elevate) the value of the house. The appraiser will look to another area nearby to find another white gentrifier who has fixed up a house and use that house as the basis to measure and elevate the property value. Thus, once Whites venture into a neighborhood to gentrify, racial geography is gerrymandered to support rising property values.⁷⁵

A little-acknowledged complication of race and class arises in places like Harlem and Fort Greene, New York; Kenwood-Oakland and Bronzeville in Chicago; Oakland, California; and East Atlanta, Georgia. There, members of

73. Simon Parker, Emma Uprichard, & Roger Burrows, *Class Places and Place Classes: Geodemographics and the Spatialization of Class*, 10 INFO., COMM. & SOC’Y 902 (2007).

74. Stuart, *supra* note 26, at 142.

75. See STUART, *supra* note 26, at 148–49 (2004) (describing the process by which appraisers and real-estate brokers engage in boundary-setting between newly desirable and undesirable neighborhoods to create hot markets and rising property values).

the black middle class have a substantial presence among the white gentrifiers. In each case, there was a large black community prior to the wave of gentrification; after gentrification, the community is more racially and economically mixed, with many more white, affluent people seeking residence.⁷⁶ Though fewer neighborhood residents are lower-income Blacks, there is still a racial mix; any racial displacement will have been offset, in part, by the influx of affluent Blacks. Currently, this is not viewed as a racial problem, but purely a class problem. Why? The answer is that no racial discrimination is intended, so any racially discriminatory impact⁷⁷ is perceived to be “by accident.” Who are the black middle-class gentrifiers?⁷⁸ They are invaders whose affluence and consumption preferences contribute to rising rents and potential displacement for existing residents who live in non-rent-controlled or non-rent-stabilized apartments.⁷⁹ The effects of property markets make this so, regardless of good intentions. Thus, the shop owners with small businesses have no protection at all from displacement due to rising rents or exercises of eminent domain. Or are the new residents simply long-lost members of the black community returning home, lending their presence, expertise, and material resources to the benefit of the community? They have simply exercised a preference to spatially join a black community that was black before their arrival and is still black afterward. Their acts of reclaiming the black neighborhood represents the ideal of everything Blacks have aspired to by increasing educational attainment and access to well-paid occupations. The black American dream has always mirrored the American dream: property ownership and a comfortable place and community to call one’s own.

76. john a. powell & Marguerite L. Spencer, *Giving Them The Old “One-Two”*: Gentrification and The K.O. of Impoverished Urban Dwellers Of Color, 46 HOW. L.J. 433, 436–39 (2003).

77. See *Huntington Branch NAACP v. Huntington*, 844 F.2d 926, 933–35 (2d Cir. 1988) (adopting and explaining the disparate impact standard for proof of racial discrimination in violation of the Fair Housing Act).

78. See generally LANCE FREEMAN, *THERE GOES THE HOOD: VIEWS OF GENTRIFICATION FROM THE GROUND UP* (2006) (highlighting the different perspectives on gentrification held by Harlem residents); Jacqueline Olvera, Book Review, 30 J. URB. AFF. 106 (2008) (reviewing DAVID MAURRASSE, *LISTENING TO HARLEM: GENTRIFICATION, COMMUNITY, AND BUSINESS* (2006)) (“[N]eighborhood revitalization often occurs with little effort made to ‘economically empower’ local residents . . . especially those who have lived faithfully through the highs and lows of neighborhood change. Focusing on development policies in Harlem, Murrasse argues that even though the Upper Manhattan Empowerment Zone (UMEZ) program was intended to reinvigorate commercial activity it failed to help the long-standing African-American community. According to Murrasse, the UMEZ’s principal flaw is the lack of balance in its execution. Specifically, development choices made for Harlem seem to favor corporate retailers over small businesses that continue to lack adequate access to financial resources.”).

79. See generally Kathie Newman & Elvin K. Wyly, *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City*, 43 URB. STUD. 23 (2006) (responding to empirical studies suggesting the poor are not displaced by gentrification).

IV

INTRARACIAL DISHARMONY: HARLEM, NEW YORK

At a community meeting to discuss gentrification and the impact on cultural institutions in Harlem, the predominant tone is not critical and complaining, as one might have expected, but excited and celebratory. There is a new Harlem—safer, more prosperous, more desirable; more integrated, with Whites and black professionals joining the black and Latino residents. Something has changed. The number of white residents is higher. The affluent profile is enhanced. Is it simply class change?

Despite residents' enthusiasm, the upscale revival of Harlem revealed a newly visible disjuncture within the black community respecting neighborhoods and schools. But this disjuncture of the disparate benefits and harms of development has long been a theme in popular and sociological literature. Playwright August Wilson's last work in his chronicle of the black American twentieth-century experience, *Radio Golf*,⁸⁰ revolves around an economic-development scheme in a historically black community in Pittsburgh.⁸¹ Wilson uses the proposed scheme and an old dilapidated house as vehicles to explore the class-based cleavages within the black community.⁸² On the one side is a neighborhood maven's great-grandnephew, a wealthy professional and mayoral candidate who wants to bring development to the neglected black neighborhood.⁸³ On the other side are existing residents without much money, education, or status, but with much life experience, who would like to remain in their homes and community.⁸⁴ It becomes clear that progress means leaving them out and behind.⁸⁵ Blacks are disproportionately affected, but because there is no discriminatory intent, society accepts the change as natural. Blacks with cash are welcome.

A racial analysis is highly relevant to displacement through gentrification because poor people of color are always more likely to be victims of displacement.⁸⁶ Yet a racial critique of gentrification is inadequate so long as we view Blacks as monolithic and fail to consider what to do about class privilege within a context of racial subordination.⁸⁷ The unacknowledged reality is that

80. August Wilson, *Radio Golf*, New York: Theatre Communications Group, Inc., 2007.

81. *Id.* at 6.

82. *See, e.g., id.* at 76 (detailing an argument between wealthy black developer and working-class resident over impact of class on racial identity and behavior).

83. *Id.* at 6, 65–66.

84. *Id.* at 68 (Redevelopment requires tearing down all existing buildings or as one character observes, “We might as well turn them apartment houses over to the projects.”).

85. *See, e.g., id.* at 63 (discussing redevelopment plan centered around luxury apartments and upscale neighborhood retail: Whole Foods, Starbucks and Barnes & Noble).

86. *See generally* FREEMAN, *supra* note 78.

87. *See generally* Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 257 (2002) (discussing “hybrid intersectionality”: the dilemma of individuals who are both burdened by a subordinating characteristic and personally advantaged by other aspects of their identity). Ehrenreich argues that “on the one hand,

gentrification capitalizes on racial segregation's being embedded in the real-estate market: in development, property valuation and finance. Racially subordinating property decisions seem to coincide with valuing property higher where blacks are not located and usually result in displacing the poor people of color who reside in the segregated neighborhood. This result cannot be seen purely as a market phenomenon.⁸⁸ The racial change that typifies gentrification brings the invisible, behind-the-scenes processes to the fore. Black being replaced by white is the classic paradigm for racial subordination. But the increasing economic heterogeneity of Blacks allows the discriminatory-impact argument to be negated. When Blacks are present in the displacing group, any racial change is considered purely incidental. In either case, however, Blacks of moderate income are disparately affected; only, now, class is used not only to do the work that race used to do, but to excuse it.

Thus, just as geography is racialized, racial differences also measure expectations for economic and social status and their attendant advantages and disadvantages: who gets to seize advantage and escape disadvantage is raced. Escape requires strategic tools to navigate the boundaries (both legal, such as zoning, and financial, as from property costs) of the racially stratified landscape. When those with the tools are black and when the tools are instrumental in displacing and excluding other Blacks, paradoxically, these affluent Blacks are not solving the racial problem; they may be perpetuating it.

V

EXPLORING THE DISTINCTIVENESS OF BEING AND DOING BLACK MIDDLE CLASS

We, the new people, [black professionals] do not so much represent blacks as we personify the exceptions that prove the rule.⁸⁹

The significance of a black middle class, and the nature and quality of their class advantages and disadvantages, is complex. Blacks have advanced significantly in terms of education, employment, and income.⁹⁰ Home-ownership rates have increased as well.⁹¹ Nevertheless, the black middle class lags behind its white counterpart along a number of measures. For example, though the

hybrid intersectionality sometimes enables singly burdened individuals or groups to dilute the effect of their low status by engaging in compensatory acts of subordination against others. But, on the other hand, such acts, might also, paradoxically, increase the vulnerability of those engaging in them, making it more difficult for them to resist their own oppression." *Id.* at 291.

88. See generally Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1 (2006).

89. John Calmore, *Whiteness as Audition and Blackness as Performance: Status Protest from the Margin*, 18 WASH. U. J.L. & POL'Y 99, 115 (2005).

90. Camille Zubrinsky Charles, *Can We Live Together? Racial Preferences and Neighborhood Outcomes*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 45, 48 (Xavier De Souza Briggs ed., 2005).

91. John a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act At 40*, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 145, 147-48 (2009) (noting that as of 2000, black homeownership rates have increased from approximately thirty percent to nearly fifty percent).

overall U.S. home-ownership rate is 68%, Blacks' and Hispanics' rate is only 48%, while Whites have a rate of 74%.⁹² And white homeowners are significantly more geographically dispersed than are minorities.⁹³

[E]ven when there are substantial improvements to the economic status of minorities, their urban settlement patterns remain more concentrated than those of whites. While black households in each of the sampled metropolitan areas record significant homeownership gains in the wake of marked improvements to their economic status, those gains are less evidenced in outlying suburban areas.⁹⁴

This segregation leads to lower land values, less money for public education, reductions in school quality, and fewer commercial amenities located in and around black segregated neighborhoods. Thus, middle class black persons are still suffering from highly-disadvantageous segregation. Black versus white rates of homeownership and settlement patterns aside, the odd interaction of race and class in antidiscrimination analysis is also significant in the context of the hidden geographical relationship between the black poor and the black middle class. That relationship is complicated by these factors: First, black "middle class-ness" is a significantly less-wealthy and less-privileged status than that of middle-class Whites. Second, many members of the black middle class often live very close to the black poor.⁹⁵ Third, middle-class Blacks are often class pioneers: they were not born and raised in the middle class. Pioneers have to learn or seek to learn new class practices. The black middle class does not equal the white middle class in terms of assets. Nevertheless, many Blacks have always had middle-class values, even when poor. But it is the middle-class consciousness, coupled with purchasing power, that counts.

Another difficulty with exploring class is that we all "do" class. In so many ways, we live and benefit by economic discrimination or economic segregation. The ability to identify and categorize oneself based on class is an integral part of

92. Stuart Gabriel & Gary Painter, *Mobility, Residential Location, and the American Dream: The Intra-Metropolitan Geography of Minority Homeownership: Los Angeles, Chicago, and Washington D.C.*, Report to the National Association of Realtors 1 (Mar. 2004), available at http://www.novoco.com/homeownership/resource_files/reports/LUSK_043004.pdf (analyzing the geography of household mobility by race and showing that notwithstanding "substantial upward gains in economic status and homeownership for blacks, their urban settlement patterns remain substantially more concentrated than those of whites or Latinos").

93. *Id.* at 4 n.7.

94. *Id.* at 22.

[D]ata . . . show relatively high levels of population racial segregation. Whereas black households comprised a full 64 percent of Washington, D.C. households in 1990, that same group accounted for only about 6 percent of the households in suburban Fairfax County, Virginia. The Chicago area evidenced similarly high levels of racial segregation; there black households comprised 33 percent of the 1990 population of the City of Chicago, but only 1–3 percent of households in DuPage County and the North Suburbs. In Los Angeles, black households accounted for 15 percent of the population of the City of L.A., but only a marginal 2 percent of the households of suburban Orange and Ventura Counties. By contrast, Latino households were more uniformly represented among the geographic subdivisions of our sampled metropolitan areas.

Id. at 4.

95. See PATILLO-MCCOY, *supra* note 19, at 216.

this country's meritocratic myth: some have more wealth and privilege because they earned it. Moreover, class is not only something we are, it's also something we do daily. This is because the middle class consciousness shapes so many things that we do daily in order to fit in to society.

As an example, I was once pulled over for coasting my bike through a stop sign. The officer brusquely demanded to see my license. I handed her my Harvard ID, instead. Instantly, the police officer's attitude changed. She became very polite and pleasant, explained the law I had broken, and gave me a ticket. What was I doing when I pulled out my Harvard identification? I was signaling to her that I was a different sort of black person, who need not be regarded as a threatening law breaker but who was entitled to more respectful treatment. Because I could clearly identify myself as a member of a certain "class," I was entitled to a presumption that my mistake was an exception, not typical criminal behavior. What I did exemplifies how black people construct public identities in order to offset racial stigma and discriminatory treatment from white strangers.⁹⁶ Yet later I wondered, what did other people do in such situations without such a powerful credential to temporarily deflect racial stigma and negative presumptions?⁹⁷

It is a fact of life for middle-class Blacks that they must "do" class. They must embrace a delicate paradox in order to protect what they have accumulated to defend against perceived and actual threats from strangers. Blacks navigate the complicated race and class world with the goal of avoiding racial hostility from Whites and opting out of black racial disadvantage whenever possible.⁹⁸ Blacks who occupy the top ten percent of income earners live lives that are, according to standard economic indicators, indistinguishable from those of the white middle class.⁹⁹ The key difference is that while Whites take their middle-class identity for granted, Blacks have to actively work to promote and establish their middle-class identity: "blacks who have 'made it' must work harder, more deliberately, and more consistently to make their

96. See Robin R. Means Coleman, *The Gentrification of "Black" in Black Popular Communication in the New Millennium*, 4 POPULAR COMM. 79, 91 (2006) (arguing that black popular culture is mistakenly belittled and devalued unless it is gentrified).

97. See Roland G. Fryer, Jr. & Paul Torelli, *An Empirical Analysis of "Acting White"* 5 (Nat'l Bureau of Econ. Research, Working Paper No. W11334, 2006) ("[E]mpirical patterns are most consistent with a simple model of peer pressure. The principal idea is that individuals face a two-audience signaling quandary: signals that beget labor market success are signals that induce peer rejection. . . . 'Acting white' is more salient in public schools and schools in which the percentage of black students is less than twenty, but non-existent among blacks in predominantly black schools or those who attend private schools."); *id.* at 36-37 ("[H]igh achieving students and students in environments with more interracial contact are most burdened by 'acting white.'").

98. See KARYN R. LACY, BLUE CHIP BLACK: RACE, CLASS AND STATUS IN THE NEW BLACK MIDDLE CLASS 73 (2007). Another scholar refers to this racial performance as "covering" and observes that "the work of covering, unlike the work of conversion or passing, is imposed on all groups outside the mainstream." Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 885 (2002). He demonstrates that, in particular, "racial minorities find themselves largely unprotected from demands to cover [in the areas of grooming and language]." *Id.* at 879.

99. See LACY, *supra* note 98, at 2, 73.

middle-class status known to others.”¹⁰⁰ Class performance is an underappreciated way that Blacks alter some portion of the way their “Blackness” is perceived.¹⁰¹ The black middle-class identity is multi-dimensional: “The black middle-class identity is composed of public identities, status-based identities, racial and class-based identities, and suburban identities. Middle-class blacks employ these identities instrumentally to establish their position in American society relative to white strangers, their white middle-class neighbors, lower-class blacks and one another.”¹⁰²

Status-based identities are how one justifies one’s attitudes toward other groups.¹⁰³ Public identities are how minority individuals protect against racism from Whites. Blacks use class-related strategies to protect themselves from racial discrimination.¹⁰⁴ Class-related strategies require careful performance, largely by using material goods and by outward manifestations of mastery of white norms of speech and conducting oneself with high confidence that evidence high expectation for cordial treatment by others.¹⁰⁵ Thus, one purchases goods, services, and clothing to project an appearance of affluence and to remove the stigma of poverty. Other class-based strategies include driving an appropriately upper-middle-class status automobile, displaying a university ID,¹⁰⁶ or deploying other “cultural capital” such as manner of speech, diction, and self-presentation. Class performance includes adopting white (as opposed to black) cultural styles.¹⁰⁷ Strategic assimilation involves a race- and class-based strategy to protect and preserve one’s middle-class identity by limiting one’s personal association with poor blacks. It includes “boundaries middle-class blacks erect against the white world (race-based identities), and the boundaries middle-class blacks draw against lower classes in the black world (class-based identities).”¹⁰⁸ There is a class cleavage in the black community, but it is inadequate to view it purely as class. Because class is raced in the United States, and because class is legally invisible, each must instead be taken into account when discussing the other.

The literature has long acknowledged an intersection between race and class,¹⁰⁹ but there has been little actual exploration of the meaning of this interaction and its significance for antidiscrimination theory.¹¹⁰ Specifically, what

100. LACY, *supra* note 98, at 3.

101. *Id.* at 2–3.

102. *Id.* at 14 (elaborating on why public identities are necessary in a racialized society).

103. *Id.* at 73.

104. *Id.* at 113.

105. *See, e.g., id.* at 129, 166.

106. Lacy, *supra* note 98, at 244 n.3.

107. *Id.* at 92.

108. *Id.* at 152.

109. *See, e.g.,* Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 *DENV. U. L. REV.* 329, 377–92 (2006) (calling for critical race theory to more meaningfully embrace class as an axis of analysis of material subordination).

110. One notable exception is powell’s recent tour de force description of how race and class are not mutually exclusive. *See* powell, *supra* note 3.

is race and how does class morph or elide racial identity? Race, as a human-body distinction and category of disadvantaged or advantaged identity, has been extensively analyzed. Class, as a socioeconomic distinction and equally salient category of identity, has been less-thoroughly analyzed. One scholar, in particular, has forcefully rebutted the argument that class explains racial disadvantage and that developing a socially inclusive agenda requires taking class, instead of race, into account.

Perhaps the most glaring flaw in our popular formulations of race and class is that they are assumed to be phenotypical markers on one hand, or economic locations a-historically derived and a-contextually applied on the other. But class is more than annual income, just as race is more than skin color.¹¹¹

Nevertheless, though class is socially apparent, it is legally invisible.¹¹² Class discrimination is widely accepted. Race and class are overlapping categories, primarily because class is racialized. The appearance of one's body is often taken as an indication of one's class. This is similar to an old concept of "whitening" or "honorary whiteness."¹¹³

Accordingly, race, as the central barrier to a black person's opportunities, may change as class changes. Class is something that can be deployed in certain circumstances to deflect racial stigma and disadvantage suggests that race is inaccurately conceptualized as fixed or absolute. It might instead be only *nearly* fixed and *nearly* absolute, a slight albeit noteworthy shift signaling issues that might have to be faced fully if and when improvement in economic conditions for Blacks continues.¹¹⁴ Class is conceptualized or mythologized as fluid because it can be manipulated by acquisition of material things. But there might likewise be changes in the perception of one's race as one travels through different strata of class.

A deeper understanding of race teaches not that it has declined in significance, but that it has shifted in significance. "Blackness" has been disaggregated into acceptable and unacceptable components: some aspects associated with Blackness are reviled and celebrated, others fetishized and

111. powell, *supra* note 3, at 361.

112. Arguably there are legal disadvantages and advantages of class. See, e.g., *Euclid v. Ambler Realty's* protections for the single-family residential zone against the multifamily house protect financial security, social status and image, *Buckley v. Valeo*, 424 U.S. 1 (1976) (money is equated with free speech); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (declaring right to counsel in criminal cases); *San Antonio v. Rodriguez*, 411 U.S. 1 (1973) (ratifying wealth discrimination in education).

113. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 152–53, 155–56 (2006) (explaining the phenomenon of honorary Whiteness as a current reality for nonwhite minorities in the United States. Lopez explains that this status is most accessible to those who are phenotypically similar to Whites).

114. The current financial crisis sadly suggests that this reality may yet be a dream deferred. The foreclosure crisis has disproportionately hit black and Latino communities. See Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and The Ethic of Homeownership*, 77 *FORDHAM L. REV.* 949, 959–64 (2008) (detailing the severe negative impact of the mortgage crisis on minority homeowners); see also Mary M. Chapman, *Black Workers Hurt by Detroit's Ills*, *N.Y. TIMES*, Dec. 29, 2008, at A1 (reporting that autoworker layoffs are hitting black Americans the hardest).

denigrated, and still others co-opted and rejected. Similarly, Whiteness, as the category of people in the United States entitled to privilege, presumptions of intelligence, legitimacy, and innocence, has shifted as well. The experience of the black middle class suggests that Blacks can now adopt or manifest some components of the privileges formerly reserved to Whiteness. It used to be that, no matter what, Blacks could not find acceptance in white mainstream culture. Today, that is not the case. Education, accent, diction, material wealth, and material possessions are all proxies entitling one to some of the privileges and deference formerly reserved exclusively for Whites. Critical race theory argues that the structures of white supremacy are ever present. As a result of the disaggregation of some of the components of Whiteness, however, there has been a shift. This does not make members of the black middle class white. Nor does it make them think they are white. But to the extent a black individual can manifest certain signifiers, she steps into some of the privileges of Whiteness *sometimes, in some places*. She can be operatively white.

VI

THE BLACK-BLACK DIVERGENCE

The civil rights movement was the worst thing that ever happened to us. That's right—the worst thing. Sure we got some rights, but it split our community apart."¹¹⁵

The black-white paradigm has been the crucial paradigm in the story of geographical patterns of housing and commerce. The concentrations of black minorities within distinct communities continue to this day, which necessarily means that the property demand in those neighborhoods is decreased. Because the real estate market in those neighborhoods doesn't include Whites, the market demand is significantly reduced. Discussions of race are somewhat inadequate, though, because they follow particular, familiar patterns, focusing purely on a specific conception of the black-white paradigm. Yet it is worthwhile to consider that the distinctions based on race are accompanied by a powerful, racialized discourse of middle class versus poor in the land-use and development context. The black-white paradigm in exclusionary zoning, for example, involves the wealthy or middle-class white person (we need not even use the term white) protesting against or displacing the poor black person. (we also need not even use the term black). Another example of the racialized discourse of middle class versus poor is in the urban-gentrification context. The term "gentrification" suggests wealthier Whites displacing poor Blacks.¹¹⁶ Little attention has been paid to the significance of the increasing numbers of Blacks stepping into middle-class roles formerly held almost exclusively by Whites.

115. Steven Gregory, *The Changing Significance of Race and Class in an African-American Community*, 19 AM. ETHNOLOGIST 255, 272 n.8 (1992) (quoting a neighborhood activist and veteran of the civil-rights movement, after an NAACP meeting in East Elmhurst-Corona, Queens, New York).

116. See Freeman, *supra* note 78, at 122–23, 162–63 (discussing the perceptions and attitudes of black residents of historically black neighborhoods towards gentrification based on the growing presence of Whites in the community).

Because the problem has been oversimplified as involving affluent Whites displacing or excluding poor Blacks, the interaction of race with class has the inadvertent effect of normalizing economic discrimination and segregation.

Understanding the role of “doing” class is important because it suggests exercising agency or control over shifting racial perceptions that should be accounted for. Following a detailed ethnographic study of a Queens, New York, neighborhood that experienced racial and class change, an anthropologist offered the provocative argument that state-sponsored reforms associated with civil-rights-era activism restructured political power in the black community: the focus of neighborhood activism shifted “from institutions and strategies that emphasized a race-based definition of political interests and identity toward those privileging the discourse and claims of the black middle class.”¹¹⁷ “[C]ivil rights era reforms,” he argued, “disproportionately empowered middle-class homeowners, enabling them to translate economic gains into political power and, in the process, to rearticulate the significance of race and class in community politics.”¹¹⁸

One unavoidable fact is that middle class Blacks seek to avoid the disadvantages of poverty just as Whites do. Many Blacks who move to the suburbs do not want poor black kids in their children’s schools,¹¹⁹ revealing a divide in racial identity based on class. But middle class Blacks are less successful at getting away.¹²⁰ This is because of structural racial disadvantage in geographically concentrated black ownership. The domino effects are communities with less retail, inferior services, less commercial services. Thus the black middle class are not as successful at protecting their turf as white middle class are. So in effect this is a racial disadvantage but certainly a paradoxical one. It involves a disadvantage in escaping the poor and disadvantage in exercising privilege at the expense of the poor. As long as our society says it is OK to have “have nots,” the society will be structured to allow people the illusion of escape. One scholar noted the racialized paradox of class illusion for blacks and observed, in 1957,

[T]he black middle class embodies a love for the cultural values of white society, a rejection of the culture of the black masses and a keen awareness that they are themselves black and therefore, outside of the boundaries of the white community they strive to emulate. This paradoxical position leads the black middle class to a “deep-seated inferiority complex” and self-hatred which they attempt to resolve by constructing a “world of make-believe” to escape the disdain of whites and achieve[] their desired elite status.¹²¹

117. Gregory, *supra* note 115, at 256.

118. *Id.* at 255.

119. See Lacy, *supra* note 98, at 152 (discussing black middle-class protection of class-based identities).

120. See CASHIN, *supra* note 62, at 140 (describing the structural defects of geographically concentrated, black-owned neighborhoods).

121. E. FRANKLIN FRAIZER, BLACK BOURGEOIS 126 (1957) (quoted in Keshia Moore, *What’s Class Got to Do With It? Community Development and Racial Identity*, 27 J. URB. AFF. 437, 439 (2005)); see

Another scholar argues that this strongly negative view no longer applies, noting that the confusion over racial and class meaning is that being middle class is “raced” as white and poverty is raced as black. The black middle class is often accused of “acting white.”¹²² But this accusation is too simplistic, and it too easily dismisses what might be an undervalued, cogent explanation: conflicts between non-Whites over land use are also problems of racial discrimination. To disregard this explanation is to allow the racialized concept of class to be a way around the prohibition on racial discrimination. The legal standards of racial discrimination, both the “intentional racial discrimination” standard and the “disparate impact” standard, will fail to protect poor Blacks if class can be used as a legitimate nondiscriminatory reason, because in reality, it is every bit as racially invidious. This means that class distinctions are used to perpetuate racial disadvantage to do the work that racial classifications used to do.

Why is the possibility of black-on-black racial discrimination worth considering? In the context of affordable housing, when Whites claim that they are not engaging in racial discrimination, but simply class discrimination, many Blacks are often skeptical,¹²³ for the story and pervasiveness of racial discrimination are so sweeping and consistent.¹²⁴ Yet, the reality of opposition to affordable housing, often involves a number of “complexities, nuances and ambiguities of community decisions about local land use changes . . .”¹²⁵ The development of affordable housing is often a contest between conflicting assumptions, interests, and fears. Primarily, the contest is rooted in several interrelated factors that contribute to the NIMBY (Not In My Back Yard) reaction: fear of adverse impacts on property values, antigovernment sentiment, anti-poor sentiment, and racial prejudice and segregation.¹²⁶

But the history and present reality of racial segregation make it difficult, and likely naïve, to accept this kind of explanation. One of the disappointments of Supreme Court jurisprudence has been that the objections of white homeowners are largely legally protected, even though these types of objections

also WILLIAM JULIUS WILSON, *DECLINING SIGNIFICANCE OF RACE* 129 (1978) (noting improvements in black occupations since 1940).

122. Moore, *supra* note 121, at 439.

123. See Rolf Pendall, *Opposition to Housing: NIMBY and Beyond*, 35 *URB. AFF. REV.* 112, 115 (1999) (“Many white non-Hispanic Americans are prejudiced against minorities and can be expected to fight high-density and assisted housing for that reason. Such racist and classist anti-housing action—still a common occurrence—must be distinguished from other opposition to housing, if only because policy responses to prejudice-based opposition will differ markedly from those based on the real impacts of new housing on neighborhood quality.”).

124. See, e.g., Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3639 (2008).

125. C. Theodore Koebel, Robert E. Lang, & Karen A. Danielsen, *Community Acceptance Of Affordable Housing*, Report to the National Association of Realtors 11 (June 2004), available at <http://www.realtor.org/wps/wcm/connect/53c08d0048be37cab4a1fe0c8bc1f2ed/koebellangfr.pdf?MOD=AJPERES&CACHEID=53c08d0048be37cab4a1fe0c8bc1f2ed>.

126. *Id.* at 3 (“In some cases concern over adverse impacts may be a smokescreen for deeper conflicts over a just society and the role of government. But smokescreen or real, the fear of adverse impacts and questions about the benefits of affordable housing have to be addressed before increased levels of production can be achieved.”).

have long been strongly criticized for contributing to the racial segregation in metropolitan areas. Intentional racial discrimination is the legal standard; real-world experience reveals, though, that the motivations, mechanisms for implementation, and methods of maintenance involve a complex intertwining of race- and class discrimination. Examining this issue through a purely racial lens misses a certain level of subordination that takes place based on class and financial circumstances. On the other hand, it might nevertheless be more consistent with existing subordination theory (and strategically advantageous) to consider a racially informed paradigm to address class issues. In other words, if we attempt to unwind the knot of complexity, we would still find race at its center.

Few try to detangle the race and class issues in the current paradigm because intentional racial discrimination or disparate impact on race is usually present— and thus provides a clear-cut way to view and solve the problem. The reality is, though, that opposition to low-income people and housing happens within a structure of racial segregation and stigma such that a black poor person is never discriminated against solely on the basis of her class. Her black race is a physical signal of a stigmatized difference *worsened* by her class. While middle-class Blacks are far from immune from racial stigma, class can have an opposite *enhancing* effect on their racial disadvantage, different from the experience of poor Blacks.

VII

THE DISAGGREGATION OF THE OPPRESSION OF SLAVERY AND PRIVILEGES RESERVED TO WHITES

“Race and class acquired their meaning over time and are not comprehensible outside their historical social context.”¹²⁷

While this nation was founded upon ideal principles of liberty, freedom and equality, contradicted by an embrace of slavery and racial discrimination, there has been noteworthy progress in dismantling some unjust practices and techniques of oppression. Since the end of slavery and the Jim Crow era, Blacks and impoverishment have been synonymous. The success of antidiscrimination law has been, in part, to allow Blacks to throw off the fetters of aspects of overt discrimination and become self-sufficient, if not prosperous. For example, while a small black elite already existed at the turn of the century in the United States, its wealth and professions were severely limited: its members were relegated to service or working-class occupations.¹²⁸ “[T]he second half of the twentieth century was a period of ‘steady and sweeping movement toward

127. powell, *supra* note 4, at 361.

128. Lacy, *supra* note 98, at 24–25 (citing BART LANDRY, *THE NEW BLACK MIDDLE CLASS* (1987)).

general endorsement of the principles of racial equality and integration.”¹²⁹ With the advent of the Civil Rights Acts in the 1960s, more and more Blacks have become relatively prosperous. College graduation, professional attainment, and social mobility have improved dramatically.¹³⁰

The significance of these class changes for the meaning of race have long been the subject of debate. For example, the famous debate between William Julius Wilson and traditional-civil-rights and critical-race-theory advocates has been about whether the significance of race has declined. This has led to current debates about race-based affirmative action, and whether race should be replaced by class as a criterion for school admissions. Those who refute calls for class-based remedies argue persuasively that class has been, and continues to be, a racialized concept in the United States. Racial meaning, identity, and practices have helped shape class identity and inhibit class consciousness.¹³¹ Others argue that racial advantage and disadvantage, Blackness and Whiteness, continue to be a normal and ingrained feature of our landscape.¹³² Another scholar sees such concepts as artificial but purposeful constructs. “[W]hiteness as a theoretical construct evolved for the very purpose of racial exclusion . . . and racial subjugation. This fact was particularly evident during the period of the most rigid racial exclusion, as whiteness signified racial privilege and took the form of status property.”¹³³ These explanations are helpful to understand racial disadvantage and advantage. Yet another theory is required in order to account for the significance and meaning of continued black educational and professional attainment and improved access to material wealth and to reconcile these with continuing disadvantage for so many other black people. Intra-class land-use conflicts make the divergence in interest uncomfortably apparent and beg for an explanation of how to understand and address the disjuncture.

A significant aspect of the change in the allocation of social and economic oppression and privilege in the United States is that, historically, race was a primary (but not the only) method used to allocate citizenship, rights, and resources.¹³⁴ This overt, explicit system has been converted by civil-rights laws providing a variety of contextual laws prohibiting racial discrimination. Non-Whites (principally Blacks) received formal guarantees of nondiscrimination and “equal opportunity” in public accommodations, housing, education, and

129. Charles, *supra* note 90, at 48 (quoting Lawrence Bobo, *Racial Attitudes and Relations at the Close of the Twentieth Century*, in *AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES* 263, 269, 294 (Neil J. Smelser, William Julius Wilson, & Faith Mitchell eds., 2001)).

130. *See id.* at 48.

131. Powell, *supra* note 3, at 358–59; *see also* STEVE MARTINOT, *THE RULE OF RACIALIZATION: CLASS, IDENTITY, GOVERNANCE*, 33–36, (2003) (undertaking a historical analysis of how Whiteness was invented and class was formed in the United States).

132. *See* CRITICAL RACE THEORY: THE CUTTING EDGE xvii (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (“[R]acism is normal, not aberrant, in American society” and is “an ingrained feature of our landscape.”).

133. Cheryl Harris, *Whiteness as Property*, in *BLACK ON WHITE* 103, 116 (D. R. Roediger ed., 1993).

134. *See* Martinot, *supra* note 131, at 192–94.

employment. These laws have, over time, led to significant changes in the system of allocation of privilege and disadvantage in the U.S. opportunity structure. Rights and privileges formerly reserved by law exclusively to Whites have been made available, first on paper and increasingly more in reality, to non-Whites.

In the twenty-first century, the privileges of Whiteness and the oppression of slavery have been broken up and disaggregated into discrete, exchangeable components. For example, slavery, the most complete form of oppression, entailed ownership of the black person's entire body. Race was a key concept used to support slavery. But with the end of slavery and its absolute oppression based on race and the end of Jim Crow, improvements in conditions for Blacks have taken place alongside some very sobering negative developments. The oppression of slavery and Jim Crow is not gone; instead, it has been disaggregated and reassembled into more efficient components of oppression.

First, the dramatic rise in black incarceration, fueled mainly by incarceration of drug addicts, has had disastrous effects on the families and neighborhoods of this dramatically expanded prisoner class.¹³⁵ By virtue of their criminal records, and the resulting unemployability, members of this prisoner class are permanently relegated to economic poverty and marginalization. An under-considered legacy of this expanded prisoner class is that most black men are presumed to be members. One researcher found that a black former prisoner had no chance of employment, while a white former prisoner had an impaired, but not foreclosed ability to get a job. A black man with a clean criminal record had an equivalent ability as the white former prisoner to get employment. In the researcher's words, "being a black man was like having a felony conviction."¹³⁶

Today, ownership and control of the body is premised on criminality, with such ownership and control managed by for-profit prison industries that market prison services and sell prisoner labor, reminiscent of the Jim Crow chain-gang era in the early twentieth century.¹³⁷ Ownership and control of the body was an inefficient system of acquiring labor. It required some minimal care, housing, and upkeep of the enslaved person's body in order to preserve its commodity value. Today, however, "independent contractor" theories allow employers to maintain exploitative labor relationships with low-wage workers such as those in food processing, migrant workers, and others without the obligation to care for the worker. Low wages are the extent of the employer's obligation. The end

135. Rose M. Brewer & Nancy A. Heitzeg, *The Racialization of Crime and Punishment: Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex*, 51 AM. BEHAV. SCIENTIST 625, 633 (2008) (detailing the size and cost of the prison system); see also ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 29 (2003) (tracing the initial rise of the penitentiary system to the abolition of slavery).

136. *Black in America Part II: Black Men* (NBC television broadcast July 24, 2008).

137. Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the 'Race Question' in the US*, 13 NEW LEFT REV. 41, 53-55 (2002).

of slavery did not end exploitative work relationships, nor did it end racially discriminatory injustice and subordination.

Another example of the disaggregation of the oppression of slavery into a more-flexible and efficient form of subordinating oppression is the poor's utter indebtedness and vulnerability to predatory lending, and the curtailment of bankruptcy laws to prevent escape from this debt, creating a new, permanent form of debtor's prison. Race has been, and continues to be, a reality, but it has shifted such that Whiteness and Blackness are as much a matter of identity as functional components of privileges and oppression.

VIII

THE DISAGGREGATION OF PRIVILEGE FORMERLY RESERVED TO WHITES

Helped by prohibitions on employment discrimination, a notable black middle class has emerged. Though there is yet room for much improvement, it is undeniable that, with improved access to education and a growing norm of diversity, access to public and private employment has improved. How does the black middle class fit into a discourse about race and class? The struggles of the black middle class are unique, and it is worthwhile to consider the context within which they have "succeeded." The legacy of Whiteness was supported by an explicit, absolute ideology of white supremacy, but has become a more invisible and flexible white norm. The legacy of Whiteness led to a structural white supremacy in the form of wealth,¹³⁸ racially-identified space and network effects,¹³⁹ and normalcy and innocence.¹⁴⁰ For example, white is the norm for "middle classness," desirability as a retail shopper, homebuyer, and employee. Another aspect of the white norm is the cloak of invisibility it provides for structural white privilege and structural black disadvantage. The arguments against affirmative action can be seen as white privilege denial, Whites' fierce attachment to the meritocracy myth in defense of a standard that advantages them.

Racialized concepts of Blackness and Whiteness led to a rhetorical legacy of an individualist ideology and neoliberal approach to the economy and government. Societal institutions that were conceived within a racial context¹⁴¹ now operate in a context of ostensible racial blindness or invisibility, when in

138. See generally DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH AND SOCIAL POLICY IN AMERICA* (1999) (discussing the black-white wealth gap and structural obstacles to Black's accumulating wealth).

139. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1849-57 (1994); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 732-33 (2000).

140. See Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 496 (examining Whiteness and innocence); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1663-65 (1995) (discussing the construction of Whiteness as neutral and normal).

141. See, e.g., Civil Rights Act of 1866, 42 U.S.C. § 1981 (declaring that all citizens shall have the same rights to contract as white people).

fact race is quite perceptible and is used to form everyday meanings of inclusion, acceptability, and desirability. This has led to current debates about race-based affirmative action and whether race should be replaced by class as a criterion for school admissions.¹⁴²

For many people and places, the old racial order continues to exist. Massive structural unemployment of millions of black people, continued racial segregation in neighborhoods, and incarceration driven by the drug trade and violent crime still plague the black population. Infant mortality and life-expectancy rates are dismal indicators of marginalization and structural disadvantage. Though the practices have changed, the structures of oppression and injustice continue, reshaped into more sophisticated, invisible, and normalized forms of injustice.

How do we as a society make sense of these incredibly wide divergences in conditions in the United States? How do they exist simultaneously? The examples suggest that the oppression once known as slavery has been disaggregated and reconstituted into individualized and flexible components of oppression. Similarly, the privileges formerly reserved to Whites have been disaggregated and reconstituted into individualized and exchangeable components of privilege. It is impossible to precisely identify how many components each American citizen gets, but many get more privilege than others while some certainly get more components of oppression than would be considered fair in any rational assessment.

Regarding the reality of the disaggregation of oppression and privilege in the context of the examples of what the black middle class does to avoid or deflect racial hostility, the New Orleans example illustrates that the right to exclude and class homogeneity is what one is supposed to get from suburban membership. Yet black homeowners, as a whole, get neither the ability to exclude nor the benefits of economic homogeneity. Thus, the fundamental issue raised by the black middle-class paradox is whether the black middle class can participate in the structures that disadvantage and discriminate against poor Blacks without participating in white supremacy. Because the racialized geography of exclusion is based on economically subordinating landscapes, it seems the black middle class may gain from the privileges of middle-class homeownership, but at the expense of less affluent blacks.

Thus within the U.S. legacy of the continued white norm, Black suburbanites and gentrifiers can be, under certain circumstances, “operatively white.” The civil-rights era ended *de jure* discrimination, but still left us with race consciousness and race discrimination in fact. Slavery and racial meaning themselves have been disaggregated into discrete components of privilege and oppression.¹⁴³ The black middle class accedes to some of the privileges formerly

142. See Powell, *supra* note 3 (refuting calls for class-based remedies and arguing persuasively that class has been and continues to be an actively racialized concept in the United States).

143. See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008) (chronicling

reserved to Whiteness. White norms are often the means of external (and sometimes internal) measures of success, trustworthiness, accomplishment, intelligence, employability, and legitimacy. Blacks who model “upscale” behaviors lead a different existence than the black poor. Blacks with class step into an individualistic, merit-based system, conceived upon race and the absence of Blackness. Being operatively white does not make one white. But if the components of Whiteness are disaggregated and available for acquisition at certain times and in certain contexts, Blacks can step into some of the privileges formerly reserved for Whiteness in certain contexts, if only for a period of time.

IX

THE PROBLEM OF RACIAL EQUALITY WITHIN A STRUCTURE OF RACE AND CLASS EXCLUSION

What is the significance of being operatively white? The answer is not clear, but a few preliminary observations can be made. Most compelling is that the presence of the black middle class is used to excuse the disadvantage or displacement of the black poor. The black middle class steps into an individualistic, racialized structure, one premised and conceived upon race. The presence of Black gentrifiers is used to avoid the fact that transformation is race-based or that the structural problems exist at all. For class purposes, Black gentrifiers are tokens whose presence has the unfortunate result of obscuring the racial dimension of gentrification.

Since racial identity and subordination are part of conceptions and realities of class in the United States, the reality is that Blacks suffer in the aggregate under a solely class-based criterion. A race-based criterion is similarly inadequate, although it is likely to benefit members of racial minorities who are the most comparatively advantaged. Race and class, taken together, are meant to prioritize the interests of the least economically advantaged: the black poor. Thus, race and class, taken together, begin to acknowledge that there is a disjuncture within the black community, that some Blacks are more disadvantaged than others.

Mary Patillo’s multi-year ethnographic study of a gentrifying neighborhood in Chicago illustrates that the interests of the black middle class and the black poor are in tension, but black professionals often play an important middle-man role. They bridge the divide between downtown and the neighborhood by deploying their ability to communicate in ways that power elites will respond to, and they are instrumental in securing increased resources for the black community. Patillo notes, however, that the decisions and interests of black professionals will often be at odds with the interests of lower-income neighbors. For example, Patillo supported a redevelopment proposal that would reduce the number of affordable housing units within a proposed development. She

the unappreciated history of how the oppression of slavery was reimposed in thinly veiled forms following Emancipation).

argued that, in order for there to be a meaningful and beneficial connection between the black professional newcomers and the lower-income existing black residents, there must first be a heightened consciousness of the divergence in interests. This consciousness at least requires understanding, on the part of middle-class Blacks, that what may be in their interests will come at the expense of the interests of the poor.¹⁴⁴ Patillo observes that “as a result of moving into schools, institutions, and occupations from which they were once barred, blacks have forged legitimate alliances with powerful white elites.”¹⁴⁵

“One consequence of this success is that black professionals have the capacity either to marginalize or to broker.” The tendency to do the former is tempered by the fact that blacks of all classes share worldviews that are shaped by their common historical experience. The overall lesson is that, in defining the black community and its interests, “the middle is the place where the actual face-to-face work of inequality transpires.”¹⁴⁶

Though Patillo concludes that there is harmony within seeming intraracial conflicts, the reality is that there will be stark disputes that will have to be resolved, whether by treating intraracial class conflicts as invisible, and merely cognizable as class, or by recognizing them as racial, in the legal language for unacceptable discrimination.

The sobering problem in the quest for racial equality is that the black middle class cannot “overcome” so long as racialized class discrimination is embedded in the social and geographic landscape. Otherwise, the black middle class is put in the position of reinforcing a structure of race and class exclusion. Race discrimination is the moral claim of our time, and the structurally embedded nature of race should not be ignored simply because Blacks may be on both sides of the conflict.

X

CONCLUSION

This article has explored the significance of class within a societal structure of the white norm, where normalcy, wealth, advantage, and presumptions of innocence are all predicated on Whiteness.

Behind the mask of a class-based logic, the current system of land use actually values Whiteness. Even more problematic is that Whiteness, as a standard, embeds concepts of privilege in the law that come at the expense of others. Whiteness and class discrimination skew public policies, resulting in extreme poverty, suffering, and negative effects based on neoliberal, individualistic ideology. So long as things are so skewed, we will all be running

144. *But see* Lacy, *supra* note 98, at 31. Lacy’s work, which focuses on suburban Blacks, also discusses key insight that Blacks living together in a gentrifying community create a black unity, in the sense that middle-class Blacks see their identity and interests as tied to poor Blacks. That does not exist, she implies, in the upper-middle-class black enclave.

145. MARY PATILLO, *BLACK ON THE BLOCK* 300 (2007).

146. *Id.* at 307.

away from those *afflicted* by the disadvantages and struggle of poverty, and, due to the logic of race, Blacks will be running from themselves.¹⁴⁷

The concept of “operatively white” allows scholars to more precisely identify the divergence of interests in certain contexts based on class, to highlight the need to update antidiscrimination law, to protect against subordinating the disadvantaged regardless of skin color, and to force the black middle class to confront the paradox of privilege in a racialized world. This privilege can come at the expense of those many purport to care about. Though the black middle class may have broken down barriers to get where it is, the racialized nature of those barriers means that the only way ahead—the only way to achieve the American dream—will be at the expense of others. In light of the unique position of the black middle class, we can begin to question the unquestioned and unchallenged privileges of class so that class cannot be used to excuse or obscure new forms of racial discrimination and subordination.

In particular, we must begin to confront the obstacles that embedded class discrimination presents. These obstacles are key to the next stage of the racial-justice project. By allowing ourselves to consider intraracial conflict (or, let us say, divergences), we begin to explore what it means to take class into account in our racial discussion. It must be noted, however, that one great difficulty of focusing on the black middle class is that the claim of many to that socioeconomic status is tenuous, for the current economy is less than stable. We are now on the brink of allowing race to collapse back into class again. During the recent time of prosperity through debt, we witnessed a more widespread separation of race from class—but that was largely illusory. As the moment of prosperity ends, we must examine the economic gains enjoyed by many Blacks and learn what they have to teach us about the strange relationship between race and class in the United States—that race and class are separate axes of status, power relations, and identity. Though race is not synonymous with class, class is a significant aspect of the advantages or disadvantages of race.

The admitted limit of this theory is that the economic position of the black middle class is tenuous, not just because of a fragile economy. Its members are overly concentrated in public-sector employment, often live in neighborhoods that border black-ghetto neighborhoods, and they are often connected by family and daily living to the plight of poorer Blacks. Nevertheless, to the extent we hope that a stable middle class will continue to improve, and to the extent this group continues to diverge from a significant portion of other black people, we need to come up with a paradigm to handle disadvantageous actions taken by the more-powerful group. Until class becomes an independent, prohibited criterion for discrimination, the concept of operative Whiteness will increasingly become an imperfect but necessary substitute.

147. *But see Optimism about Black Progress Declines: Blacks See Growing Values Gap Between Poor and Middle Class—A Social and Demographic Trends Report*, PEW RESEARCH CENTER 1–4 (2007) (reporting that a significant number of Blacks identified the black poor as being a different race than themselves).