

1993

# From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color

Jon C. Dubin

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Dubin, Jon C., "From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color" (1993). *Minnesota Law Review*. 1683.  
<https://scholarship.law.umn.edu/mlr/1683>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

# From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color

Jon C. Dubin\*

## TABLE OF CONTENTS

Introduction .....	740
I. Historical and Legal Background .....	744
A. Racial Zoning.....	744
B. The <i>Euclid</i> Case and the Concept of Protective Zoning .....	746
C. Racial Zoning and Planning Post- <i>Euclid</i> .....	749
D. Separate Communities: Unequal Zoning Protection .....	757
E. Zoning and Environmental Racism .....	764
F. Zoning and Gentrification .....	768
G. Zoning and Hispanic Communities.....	773
II. The Right to Protective Zoning .....	779
A. The Premature Demise of Municipal Services Equalization Litigation .....	779
B. The Fair Housing Act .....	782
C. The Equal Protection Clause.....	791
D. The Thirteenth Amendment.....	796
E. The Police Power—Substantive Due Process .....	798
Conclusion .....	801

---

\* Associate Professor of Law and Director, Poverty Law & Civil Rights Clinic, St. Mary's University School of Law. The author is most grateful for the comments of Norman Dorsen, Florence Wagmen Roisman, Jose Roberto ("Beto") Juarez, Jr., John W. Teeter, Jr., Barbara Bader Aldave, and David A. Dittfurth on earlier drafts of this Article and for the thoughtful feedback received during a presentation of this paper at a Faculty Colloquium attended by members of the St. Mary's University Law faculty. The author is also indebted to research assistants Terrie McVea, Clinton R. Wilcoxson, and Martin Cirkiel, and administrative assistant, Patricia M. Reyna, for their help in preparing the Article for publication. This Article was supported by a faculty research grant from the St. Mary's University School of Law.

## INTRODUCTION

Last year marked the seventy-fifth anniversary of comprehensive zoning<sup>1</sup> in the United States and the sixty-fifth anniversary of the United States Supreme Court's approval of zoning as a valid exercise of the police power in *Village of Euclid v. Ambler Realty Co.*<sup>2</sup> More specifically, *Euclid* upheld the general principle of using the police power<sup>3</sup> to separate incompatible uses and to protect residential uses and residential environments from the pressures of growth and industrialization. Relying on analogies to nuisance doctrine, Justice Sutherland declared that "[a] nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."<sup>4</sup> Thus, the concerns over health, safety, and the general welfare that are embodied in the police power were properly extended through the device of zoning to protect single-family residences from the encroachment of commerce and industry.<sup>5</sup>

Prior to *Euclid*, municipalities had not only used zoning and residential district laws to segregate uses deemed undesirable but also to mandate racially segregated residential patterns.<sup>6</sup> Notwithstanding judicial invalidation of many of these

1. The New York City Board of Estimate and Apportionment passed what is generally agreed to be the first comprehensive or well-rounded zoning ordinance on July 25, 1916. 3 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 1.02-2, at 1-8 & n.8 (1992); ROBERT R. WRIGHT & MORTON GITELMAN, CASES AND MATERIALS ON LAND USE 754 (4th ed. 1982).

2. 272 U.S. 365 (1926). Scholars consider *Euclid* to be the "leading case" in the history of the law of zoning. See, e.g., 4 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 83.01, at 7 (perm. ed. rev. vol. 1986); Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1733 (1982) (referring to *Euclid* as "the fons et origo of modern zoning law").

3. *Euclid*, 272 U.S. at 387. The Tenth Amendment's reservation of powers to the states acknowledges local governments' police power. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 9.2, at 516 (student ed. 1984). It is the power "to promote and protect the public health, safety, morals, comfort and general welfare of the people." *Sinclair Ref. Co. v. City of Chicago*, 178 F.2d 214, 216 (7th Cir. 1949).

4. *Euclid*, 272 U.S. at 388.

5. *Id.* at 394-95. This form of protective "use" zoning is viewed as the most common type of zoning. See DONALD G. HAGMAN & JULIAN C. JUERGENMEYER, URBAN PLANNING & LAND DEVELOPMENT CONTROL LAW § 4.2, at 74 (2d ed. 1986). This perception is based on the wave of protective use zoning that swept the nation between 1916 and 1930. *Id.* *Euclid* is the most famous zoning case because it provided judicial validation of this practice. *Id.* The term "Euclidean zoning" refers to this basic form of zoning. See CHARLES M. HAAR & MICHAEL A. WOLF, LAND USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND REUSE OF URBAN LAND 372 (4th ed. 1989).

6. See A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in*

practices, significant segregated residential patterns remain as a legacy of discriminatory zoning and land use planning.<sup>7</sup>

Although much litigation and scholarship has focused on the myriad exclusionary zoning and land use planning devices that are responsible for creating and perpetuating residential segregation,<sup>8</sup> another invidious legacy of *Euclid* has gone largely unnoticed. Minority communities, which were often established as separate communities as the result of discriminatory zoning and planning devices, are then frequently deprived of the land use protection basic to Euclidean zoning principles.<sup>9</sup>

---

*the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763, 807-62 (examining state court precedents involving municipal ordinances mandating segregated residential patterns in Virginia, Maryland, Georgia, and North Carolina prior to *Buchanan v. Warley*, 245 U.S. 60 (1917)); James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547, 561, 562 & n.34 (1979) (discussing the rise and fall of racial zoning movement, and the emergence of restrictive covenants); see also 2 WILLIAMS & TAYLOR, *supra* note 2, § 59 (discussing racial zoning before and after *Buchanan*).

7. Prior to the institution of racial zoning and other land use controls in the early 1900s, residential patterns were relatively integrated. Kushner, *supra* note 6, at 552 & n.10. The trend toward racial separation accelerated after World War II. See *id.* at 561. By 1968, the Kerner Commission issued its famous report finding that our nation was "moving toward two societies, one black, one white—separate and unequal." KERNER COMM'N, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968). The partially reconstituted Kerner Commission found little change 20 years later. See Report of the 1988 Commission on the Cities, *The Kerner Report Updated, Race and Poverty in the United States Today* (1988) [hereinafter *The Kerner Report Updated*] (on file with the *Minnesota Law Review*); see also John O. Calmore, *To Make Wrong Right: The Necessary and Proper Aspirations of Fair Housing, in THE STATE OF BLACK AMERICA 1989* 77, 90-91 (1989) (noting that rate and extent of change in residential segregation in the 1970s was "unremarkable"); Douglas B. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373, 388 (1989) (showing that statistical data reveal persistence and prevalence of residential segregation in America); Gary Orfield, *Separate Societies: Have the Kerner Commission Warnings Come True?* (Feb. 29 1988) (unpublished paper prepared for the Wingspread Conference, on file with the *Minnesota Law Review*) (answering the question asked in title affirmatively). An early analysis of the 1990 census data reveals that black residential segregation is as great now as it was in the 1960s. Margaret L. Udansky, *USA at Home: Streets Still Isolate Races*, USA TODAY, Nov. 11, 1991, at 1A.

8. See, e.g., JAMES A. KUSHNER, *FAIR HOUSING* § 7.08 (1983 & Supp. 1991) (collecting cases and observing "the extraordinary attention of scholars to the problems of exclusionary zoning"); Kushner, *supra* note 6, at 590-98; see also 2 WILLIAMS & TAYLOR, *supra* note 2, §§ 38.01-.22 (analyzing exclusionary zoning cases).

9. See *supra* note 5 (defining "Euclidean zoning").

Urban planner and professor Yale Rabin asks rhetorically:

Why is it that older black neighborhoods in many American cities are frequently interspersed with land-uses . . . which are intrusive, disruptive, even hazardous, and which degrade the residential environment? Is it because blacks were forced into these already hostile surroundings by the pressures of segregation? Or have these incompatible activities somehow intruded into established black residential neighborhoods isolated by segregation? There may well be some examples of blacks moving next to junkyards; but my own experience suggests that the junkyard moving into black neighborhoods is the more common pattern, and that zoning has played a prominent role in the process.<sup>10</sup>

Professor Rabin labeled the practice of superimposing incompatible zoning on communities of color "expulsive zoning," observing that the net effect of the practice is a piecemeal replacement of residents with the superimposed uses and their owners.<sup>11</sup> The imposition of incompatible zoning occurs through lower-grade zoning or zoning authorizing noxious commercial or industrial uses which undermine the quality of the residential environment and discourage continued residencies. Residents deprived of zoning protection are vulnerable to assaults on the safety, quality, and integrity of their communities ranging from dangerous and environmentally toxic hazards to more commonplace hazards, such as vile odors, loud noises, blighting appearances, and traffic congestion.<sup>12</sup>

Higher-grade zoning, zoning or planning measures that induce certain higher-quality residential or other uses can produce similar incompatible and disruptive results. These higher-

10. Yale Rabin, *The Junkyard Nextdoor: Expulsive Zoning in Black Neighborhoods 2* (Sept. 1, 1988) (unpublished manuscript, on file with author).

11. See Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in *ZONING AND THE AMERICAN DREAM* 101, 101 (Charles M. Haar & Jerold S. Kayden eds., 1989).

12. Even these commonplace incompatible and blighting uses can cause significant damage to the integrity of residential communities. As Justice Douglas observed:

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. . . . They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

Berman v. Parker, 348 U.S. 26, 32-33 (1954); cf. KENNETH CLARK, *DARK GHETTO* 32-33 (1965) (noting that "[h]ousing is no abstract social and political problem, but an extension of man's personality. If the Negro has to identify with a rat infested tenement, his sense of personal inadequacy and inferiority, already aggravated by job discrimination and other forms of humiliation, is reinforced by the physical reality around him.").

cost uses create market pressures that effectively price out existing low-income residents through the process of gentrification.<sup>13</sup> Residents subjected to incompatible upzoning face the prospect of involuntary displacement and the functional and psychological trauma of dislocation and perhaps homelessness.<sup>14</sup>

This Article explores the history, development, and legal ramifications of government's failure to provide protective zoning to low-income communities of color.<sup>15</sup> Part I provides an

13. As Judge A. Leon Higginbotham explains:

Gentrification is a term used in land development to describe a trend whereby previously "underdeveloped" areas become "revitalized" as persons of relative affluence invest in homes and begin to "upgrade" the neighborhood economically. This process often causes the eviction of the less affluent residents who can no longer afford the increasingly expensive housing in their neighborhood. Gentrification is a deceptive term which masks the dire consequences that "upgrading" of neighborhoods causes when the neighborhood becomes too expensive for either rental or purchase by the less affluent residents who bear the brunt of the change.

*Business Ass'n of Univ. City v. Landrieu*, 660 F.2d 867, 874 n.8 (3d Cir. 1981); see also *Alschuler v. United States Dep't of Hous. & Urban Dev.*, 515 F. Supp. 1212, 1223-24 (N.D. Ill. 1981) (discussing how gentrification increases housing costs), *aff'd*, 686 F.2d 472 (7th Cir. 1982). For alternative definitions of this phenomenon focusing on the often race-based implications of gentrification, see Henry W. McGee, Jr., *Afro-American Resistance to Gentrification and the Demise of Integrationist Ideology in the United States*, 23 URB. LAW. 25, 29-30 (1991); Peter Marcuse, *Gentrification, Abandonment and Displacement: Connections, Causes, and Policy Responses in New York City*, 28 J. URB. & CONTEMP. L. 195, 198-99 (1985); and Alan M. White, Note, *Gentrification, Tipping and the National Housing Policy*, 11 N.Y.U. REV. L. & SOC. CHANGE 255, 260 (1982-83).

14. Peter Marcuse, *To Control Gentrification: Anti-displacement Zoning and Planning for Stable Residential Districts*, 13 N.Y.U. REV. L. & SOC. CHANGE 931 (1984-85). See generally Marc Fried, *Grieving For a Lost Home*, in *THE URBAN CONDITION* 151, 151-71 (Leonard J. Duhl ed., 1963) (describing effects of forced dislocation resulting from urban renewal projects); Dennis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of Community*, 25 IND. L. REV. 685 (1992) (same); Richard Lewis, Note, *Destruction of Community*, 35 BUFF. L. REV. 365 (1986) (describing effects of urban renewal on communities).

15. The primary focus of this Article is the African-American or black community due to the well-documented history of land use discrimination against African-Americans sanctioned both by law and by custom. Because of parallels between the treatment of blacks and hispanic or latino communities, the effects of zoning on these other communities will be discussed where appropriate. See *infra* notes 158-74 and accompanying text. Thus, the terms "community of color" or "minority community" are used—for want of more precise or illuminating terms to denote the impoverished, underserved communities of low-income persons of color—to refer to African-American and certain Hispanic-American communities. Cf. John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV.

historical overview of this failure by examining the intertwined judicial treatment of racial zoning and protective zoning, and the major court decisions that influenced the proliferation of segregative land use controls that have promoted and perpetuated separate minority communities. The failure to respect and protect the quality of the residential environment of these communities is a by-product of separate land use policies, resulting in the absence of zoning protection from diverse modern-day land use threats ranging from the siting of environmental hazards to the foreseeable development-induced displacement of low-income residents. Part II evaluates the various constitutional and statutory sources that support a right to protective zoning to preserve the residential integrity of low-income communities of color and to remedy the present day consequences of past inequitable zoning.

## I. HISTORICAL AND LEGAL BACKGROUND

### A. RACIAL ZONING

Although the earliest reported case of explicit racial zoning involved San Francisco's expulsive anti-Chinese ordinance in 1890,<sup>16</sup> the primary focus of early racial zoning provisions was not expulsion but exclusion and the separation of the black and white races. Shortly after the turn of the century, when legally enforced segregation approached its zenith,<sup>17</sup> several southern and border cities enacted strict racial zoning ordinances designating separate residential districts for whites and blacks. Such ordinances were a response to the mass migration of

---

201, 217 (1982) ("The reference 'minority' has become ambiguously overinclusive, now applicable to virtually all except the nonelderly, nonhandicapped, nonalien, heterosexual, white male.").

16. See *In re Lee Sing*, 43 F. 359 (N.D. Cal. 1890) (holding that ordinance requiring all persons of Chinese descent to move out of a San Francisco neighborhood within 60 days violated both the due process and equal protection clauses, and treaties with China).

17. See generally JOHN H. FRANKLIN, *FROM SLAVERY TO FREEDOM* 317-27 (4th ed. 1974) (noting that political abandonment, decreased employment, and increased racial violence frustrated signs of change for blacks at the turn of the century); RICHARD KLUGER, *SIMPLE JUSTICE* 84-110 (1976) (documenting struggles of black civil rights leaders and intellectuals when "toxins of racism flourished as never before."); HENRY L. MOON, *THE EMERGING THOUGHT OF W.E.B. DUBOIS* 183-214 (1972); GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944) (examining causes of racial distrust from 1900-1950s); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 97-118 (3d ed. 1974) (discussing expansion of Jim Crow laws in the early 1900s).

southern rural blacks to the cities<sup>18</sup> and to white residents' fears of racial amalgamation.<sup>19</sup> Baltimore passed the first such ordinance in 1910 and within six years more than a dozen cities followed suit.<sup>20</sup>

In 1917, the Supreme Court addressed the constitutionality of racial zoning in *Buchanan v. Warley* in a challenge to a Louisville, Kentucky ordinance.<sup>21</sup> Although the Court invalidated the Louisville ordinance, the peculiar facts of the case and the limited holding rendered the decision more a pronouncement on the primacy of property rights than a rejection of the premises underlying the enforced separation of the races.

In *Buchanan*, a white seller residing in a racially zoned white district entered into a contract to sell his home to Warley, a black buyer.<sup>22</sup> The contract provided that Warley would not have to purchase the property unless he had a right, under law, to occupy the property as a residence.<sup>23</sup> Buchanan sued Warley for specific performance and Warley raised the Louisville racial zoning ordinance as a defense.<sup>24</sup> Buchanan, in turn, asserted that the ordinance violated the Fourteenth Amendment of the United States Constitution and therefore could not vitiate his otherwise valid contract.<sup>25</sup>

The Supreme Court specifically declined to invalidate racial zoning on equal protection grounds. Recognizing that the express rationale for the ordinance was the preservation of racial purity, the court found that the case did not address rights

---

18. 2 WILLIAMS & TAYLOR, *supra* note 2, § 59.03, at 735-36.

19. See Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 657. The same social science data on the superiority of the white race purporting to justify early anti-miscegenation laws, provided the justification for racial zoning. *Id.* at 651-64.

In the first two decades of the twentieth century the popular horror of racial amalgamation reached its apogee. Progressive Era politicians supported a wider role for government in social planning than did their Gilded Age predecessors, and they looked for broader methods of social control than mere antimiscegenation statutes. The most obvious way to ensure separation was to force blacks and whites to live in different places.

*Id.* at 657.

20. *Id.* at 657; see also Higginbotham et al., *supra* note 6, at 810-11; Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. SOC. HIST. 179, 180-82 (1968).

21. 245 U.S. 60 (1917).

22. *Id.* at 69-70. For a discussion of the collusive nature of this lawsuit, see Higginbotham et al., *supra* note 6, at 851-52.

23. *Buchanan*, 245 U.S. at 69-70.

24. *Id.*

25. *Id.* at 70.



concerning the "amalgamation of the races."<sup>26</sup> Rather, "[t]he right which the ordinance annulled was the civil right of a white man to dispose of his property . . . to a person of color and of a colored person to make such disposition to a white person."<sup>27</sup> As such, the ordinance was neither a valid exercise of the police power nor an enactment consistent with the Fourteenth Amendment's prohibition against "state interference with property rights except by due process of law."<sup>28</sup>

## B. THE *EUCLID* CASE AND THE CONCEPT OF PROTECTIVE ZONING

Ironically, laws embodying benign, progressive applications of zoning concepts were not enacted on a wide scale until after the proliferation of racial zoning controls.<sup>29</sup> In 1916, New York enacted the first comprehensive zoning ordinance, separating and protecting residential uses from incompatible commercial and industrial uses.<sup>30</sup> Prior to the adoption of zoning, the common law tort of nuisance served as the primary device for protecting residents from the hazards of noise, odors, traffic, and a plethora of other interferences with the comfort, health, safety, and convenience of the community.<sup>31</sup> Zoning offered the promise of institutionalizing the common law theory of nuisance and providing comprehensive protection against threats to the residential environment in advance of their occurrence.<sup>32</sup>

The ordinance at issue in *Euclid* reflected these protectionist concerns. It established six classes of use districts, separating residential, commercial, and industrial uses as well as certain uses within each category.<sup>33</sup> The ordinance also regulated building height and the land area required for each use.<sup>34</sup> The land at issue was vacant and held by the Ambler Realty

---

26. *Id.* at 81.

27. *Id.*

28. *Id.* at 82.

29. See 2 WILLIAMS & TAYLOR, *supra* note 2, § 59.03, at 736 n.9.

30. 3 ROHAN, *supra* note 1, at 1-8 & n.8. The New York Court of Appeals upheld the validity of this ordinance four years later. *Lincoln Trust Co. v. The Williams Bldg. Corp.*, 128 N.E. 209 (N.Y. 1920).

31. WRIGHT & GITELMAN, *supra* note 1, § 2.

32. See John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 32. Zoning offers many advantages over the common law of nuisance, including the significant ability to avoid case-by-case protracted litigation over each offending land use. See *id.*

33. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 380-81 (1926).

34. *Id.*

Company for industrial development.<sup>35</sup> Because the ordinance prohibited industrial use on most of this vacant land, the land lost seventy-five percent of its value. Ambler Realty challenged the ordinance as a deprivation of property without due process of law under the Fourteenth Amendment.<sup>36</sup>

At least initially the Court's reasoning in *Buchanan*—expressing solicitude for the inviolability of private property rights<sup>37</sup> without questioning the white supremacist underpinnings of racial zoning<sup>38</sup>—provided an impediment to the approval of protective zoning in *Euclid*. Indeed, because the lower court judge in *Euclid* believed that the justifications for the restraints on private property established through racial zoning outweighed those for protective zoning, he invalidated *Euclid's* zoning ordinance.<sup>39</sup> He stated:

It seems to me that no candid mind can deny that more and stronger reasons exist, having a real and substantial relation to the public peace, supporting [the Louisville racial zoning ordinance in *Buchanan*] than can be urged under any aspect of the police power to support the present ordinance as applied to plaintiff's property . . . . The blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential sec-

35. *Id.* at 384.

36. *Id.*

37. The conflict over zoning arose in an era when the Court's expansive notions of substantive due process served to insulate private property owners from the consequences of several forms of social welfare legislation enacted under the states' police power. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating New York maximum hours labor law for bakery employees); *see also* GERALD GUNTHER, *CONSTITUTIONAL LAW* 444-45 (12th ed. 1991) (from the *Lochner* decision in 1905 to the mid-1930s (the "*Lochner* era") the Court invalidated nearly 200 laws on substantive due process grounds). For a general overview of this period, *see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 657-78 (2d ed. 1988). A Texas Supreme Court decision invalidating protective zoning, prior to *Euclid*, exemplifies the effect of the *Lochner* legacy on zoning.

The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. . . . It is a part of the citizen's natural liberty—an expression of his freedom, guaranteed as inviolate by every American Bill of Rights.

It is not a right, therefore, over which the police power is paramount.

*Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921); *see also* SEYMOUR I. TOLL, *ZONED AMERICAN* 17 (1969) ("This question of [the limits of the police] power was to be as decisive for the constitutional fate of zoning as it was for the New York bakery legislation."); Robert A. Williams, Jr., *Euclid's Lochnerian Legacy*, in *ZONING AND THE AMERICAN DREAM*, *supra* note 11, at 278, 278-85 (discussing the origins and development of zoning in *Lochner* Era).

38. *See* Hovenkamp, *supra* note 19, at 657.

39. *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 312-13 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

tion, are so well known as to be within the judicial cognizance.<sup>40</sup>

The Supreme Court reversed the lower court without mentioning *Buchanan*. In his opinion for the Court, Justice Sutherland first observed that if zoning ordinances were to be sustained, they would have to be justified by "some aspect of the police power asserted for the public welfare."<sup>41</sup> He then enunciated the standard by which the proper exercise of that power would be determined: for a zoning ordinance to be declared unconstitutional, it must be shown to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."<sup>42</sup>

Applying that standard to the ordinance at issue, Justice Sutherland found the city's justifications "sufficiently cogent" to survive constitutional scrutiny.<sup>43</sup> In so doing he referred to "comprehensive reports" that set out the empirical justification for protective "use" zoning:

These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous

---

40. *Id.* New Jersey courts relied on similar reasoning during this period to invalidate protective zoning. See *Ignaciunas v. Risley*, 121 A. 783, 786 (N.J. Sup. Ct. 1923), *aff'd*, 125 A. 121 (N.J. 1924). The New Jersey Supreme Court stated:

The final argument advanced in favor of the ordinance is that misplaced stores in the heart of a residential section often start a blighted area. . . . It is true that in growing cities there are often created what is termed "blighted areas." They may, in some instances, have come from the placing of stores in residential sections. Blighted areas, however, more frequently arise by the purchase in some residential section of a city of properties by members of a race different in color or nationality from those who have been living in that section which prompts the other residents in that section to move to other sections of the city more congenial. An ordinance which would obligate persons of different nationalities or religion or color to live in different and specified sections of a city would, we think, be held unreasonable and discriminatory.

*Id.*

41. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

42. *Id.* at 395. This formulation reflected the Court's merger of "the two express constitutional restrictions on any state interference with private property—that property shall not be taken without due process nor for a public purpose without just compensation—into [this] single standard." *Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1976) (Stevens, J., concurring).

43. *Euclid*, 272 U.S. at 395.

disorders; preserve a more favorable environment in which to rear children, etc.<sup>44</sup>

The Euclidean conception of protective use zoning—creating balkanized districts and categories of uses—has been widely criticized over the years as rigid, overinclusive, unsophisticated, and ill-suited to the realities of present-day urban development.<sup>45</sup> Nevertheless, the Euclidean concept of using the police power to protect the quality of the residential environment from the negative by-products of incompatible uses has persevered both through zoning and through alternative, more sophisticated, land-use controls.<sup>46</sup>

### C. RACIAL ZONING AND PLANNING POST-*EUCLID*

By extending the police power to protective “use” zoning, the Supreme Court weakened the doctrinal underpinnings of *Buchanan*. Several localities, emboldened by *Euclid*’s liberation of the police power and responding to the continuing fear of racial amalgamation, embarked on a new round of racial zon-

---

44. *Id.* at 394. The Court also relied on the growing body of cases in the lower courts upholding protective zoning as within the police power either to protect residences from the presumptive nuisance of business and industry, or merely to promote orderly municipal development. See *id.* at 390-93 (citing cases). Compare *State v. City of New Orleans*, 97 So. 440, 444 (La. 1923) (“[A]ny business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc.”) with *City of Aurora v. Burns*, 149 N.E. 784, 788 (Ill. 1924) (“The exclusion of places of business from residential districts is not a declaration that such places are nuisances, or that they are to be suppressed as such, but it is part of a general plan [to reduce the disorder and dangers inherent in unregulated municipal development.]”).

45. See, e.g., Charles M. Haar, *Reflections on Euclid: Social Contract and Private Purpose*, in ZONING AND THE AMERICAN DREAM, *supra* note 11, at 347-53; Luther L. McDougall, *Performance Standards: A Viable Alternative to Euclidean Zoning?*, 47 TUL. L. REV. 255, 255-57 nn.3-6 (1973); Mark S. Pulliam, *Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform*, 13 SW. L. REV. 435 (1983); see also *infra* note 74 (discussing impediments to multi-family and subsidized housing).

46. ROBERT BABCOCK, *THE ZONING GAME REVISITED* 263-64 (1985). Some of the Supreme Court’s modern day pronouncements on zoning include references to the continued desirability and importance of protective zoning. See, e.g., *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 433 (1988) (Stevens, J., and O’Conner, J.) (“Zoning is the process whereby a community defines its essential character” and “ensures that neighboring uses of land are not mutually—or more often unilaterally—destructive.”); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) (“[Zoning] may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.”).

ing in open defiance of *Buchanan*.<sup>47</sup> Although the Supreme Court reaffirmed *Buchanan* twice shortly after *Euclid*, it did so in unusually short *per curiam* opinions that failed to supply reasoning or moral suasion to the principled distinction between protective "use" zoning and apartheid.<sup>48</sup> Thus, several localities continued to enforce racial zoning ordinances for many years thereafter.<sup>49</sup>

With the eventual decline of racial zoning, numerous alter-

---

47. Texas enacted a law authorizing all its municipalities to provide separate residential districts based on race in March, 1927. See TEX. REV. CIV. STAT. ANN. art. 1015-b (repealed 1969). The City of Dallas adopted a racial zoning ordinance nine months later. See *City of Dallas v. Liberty Annex Corp.*, 19 S.W.2d 845, 846 (Tex. Civ. App. 1929); see also *Dowdell v. City of Apopka*, 511 F. Supp. 1375, 1378 (M.D. Fla. 1981) (discussing *City of Apopka*, Florida racial zoning ordinance enacted in 1937 and repealed in 1968), *aff'd*, 698 F.2d 1181 (11th Cir. 1983); *Clinard v. City of Winston-Salem*, 6 S.E.2d 867, 868 (N.C. 1940) (invalidating *Winston-Salem* racial zoning ordinance enacted in 1930); *Allen v. Oklahoma City*, 52 P.2d 1054, 1058 (Okla. 1935) (invalidating *Oklahoma City* racial zoning ordinance enacted in 1933).

48. See *Harmon v. Tyler*, 273 U.S. 668 (1927) (*per curiam*) (reversing Louisiana Supreme Court decision "on the authority of *Buchanan*"); *City of Richmond v. Deans*, 281 U.S. 704 (1930) (*per curiam*) (affirming decree that was based on *Buchanan* and *Harmon*). The courts in *Harmon* and *Deans* noticed the juxtaposition of potentially dissonant rationales in the *Euclid* and *Buchanan* decisions. In *Deans*, the Fourth Circuit interpreted the six-word opinion in *Harmon* as an indication that the Court's decision in *Euclid* did not overrule *Buchanan sub silentio*. 37 F.2d 712, 713 (4th Cir. 1930). In *Harmon*, the Louisiana Supreme Court relied in part on pre-*Euclid* decisions upholding the extension of the police power to protective zoning to justify the validity of racial zoning and *Buchanan*. See *Tyler v. Harmon*, 104 So. 200, 206-07 (La. 1925), *rev'd per curiam*, 273 U.S. 668 (1927).

49. The city of Miami enacted a racial zoning ordinance in 1945. See *State v. Wilson*, 25 So. 2d 860 (Fla. 1946). The city of Birmingham attempted to defend its racial ordinance all the way to the Supreme Court in 1951. See *Monk v. City of Birmingham*, 87 F. Supp. 538 (N.D. Ala. 1949), *aff'd*, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. 940 (1951). The city of Kissimmee, Florida effectively enforced its racial zoning ordinance at least as late as 1947. See *Baker v. City of Kissimmee*, 645 F. Supp. 571, 579 (M.D. Fla. 1986). The State of Texas's racial district law remained on the books until 1969. See *Walker v. United States Dep't of Hous. & Urban Dev.*, 734 F. Supp. 1289, 1293 n.18 (E.D. Tex. 1989). In *Walker*, the court observed that the city of Dallas admitted in 1988 that the racial zoning laws "established 'racially segregated housing patterns [that] have not yet been fully eradicated' . . ." *Id.* at 1294 n.18.; see also *Ammons v. Dade City*, 594 F. Supp. 1274, 1280-88 (M.D. Fla. 1984) (noting that 1914 city ordinance prohibiting racial "intermingling" remained on the books until 1975 and contributed to pattern of black residences on "the other side of the tracks" still present in 1984), *aff'd per curiam*, 783 F.2d 982 (11th Cir. 1986); cf. *Dowdell*, 511 F. Supp. at 1378 ("Although there is little evidence that the [1937 racial zoning] ordinance [repealed in 1968] was enforced by the City, there is some evidence that its existence persuaded blacks to dispose of real property owned by them on the northern side of the railroad tracks.").

native segregative land use controls flourished. The use of racially restrictive covenants mushroomed during the 1930s and 1940s, particularly in the northern, western, and mid-western regions of the country.<sup>50</sup> This practice was consistent with *Buchanan's* limited freedom of contract rationale and initially enjoyed at least tacit Supreme Court approval.<sup>51</sup> Notwithstanding the Supreme Court's later extension of the state action concept to judicial enforcement of these covenants and its concomitant invalidation of the practice on equal protection grounds in 1948,<sup>52</sup> white property owners continued to attempt to enforce these covenants up to the early 1960s.<sup>53</sup> The present day segregative consequences of this practice are manifest.<sup>54</sup>

The federal government was also deeply involved in the development of discriminatory land use policies. The Federal Housing Administration (FHA) and the Veterans Administration (VA), which provided mortgage insurance to enable low, moderate, and middle-income families to obtain low- or no-down-payment mortgages, adopted policies promoting segregation in insured housing.<sup>55</sup> The FHA Underwriting Manual in

---

50. See 2 WILLIAMS & TAYLOR, *supra* note 2, § 60.01; Kushner, *supra* note 6, at 563 & nn.37-39.

51. See *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926) (dismissing challenge of racial covenants for want of jurisdiction).

52. See *Shelley v. Kramer*, 334 U.S. 1 (1948). The fact that three sitting Supreme Court Justices in *Shelley* were required to recuse themselves due to their ownership of homes covered under covenants underscores the widespread approval of racial covenants. See 2 WILLIAMS & TAYLOR, *supra* note 2, at 754. Indeed, nearly 40 years later, the sitting Chief Justice of the Supreme Court, William Rehnquist, still owned a home with racially restrictive covenants. See Grover Hankins, *Causes of Residential Segregation, Other Views, in THE FAIR HOUSING ACT AFTER TWENTY YEARS: A CONFERENCE AT YALE LAW SCHOOL* 55, 56 (Robert G. Schwemm ed., 1988).

53. See, e.g., *Harrison v. Tucker*, 342 S.W.2d 383 (Tex. Civ. App. 1961) (reversing lower court injunction against showing or selling home to black family based on racial covenant); *Gast v. Gorek*, 211 N.Y.S.2d 112 (N.Y. Sup. Ct. 1961) (suggesting the availability of damage action for violation of racial covenant notwithstanding the rejection of damage actions for violations of such covenants eight years earlier in *Barrows v. Jackson*, 346 U.S. 249 (1953)). See generally 2 WILLIAMS & TAYLOR, *supra* note 2, § 60.05 (describing "subterfuges" used to circumvent problems encountered in enforcing racial covenants).

54. For example, racial covenants were employed extensively or with strategic location in Detroit, Chicago, St. Louis and Philadelphia, among other cities. See ROBERT C. WEAVER, *THE NEGRO GHETTO* 246-47 (1948). In 1990, these cities ranked first, eighth, tenth, and twelfth respectively in African-American residential segregation. *By the Numbers, Tracking Segregation in 219 Cities, USA TODAY*, Nov. 11, 1991, at 3A.

55. See Robert W. Collin & Robin A. Morris, *Racial Inequality In American Cities: An Interdisciplinary Critique*, 11 NAT'L BLACK L.J. 177, 182-83 (1989); Kushner, *supra* note 6, at 567-69 & nn.48-51; Leonard S. Rubinowitz &

use from 1934 to 1947 counselled against "the infiltration of in-harmonious racial and national groups," "a lower class of inhabitants," and "the presence of incompatible racial elements" in new housing.<sup>56</sup> The FHA also encouraged the use of racial covenants and denied mortgage insurance to entire "redlined"<sup>57</sup> black and integrated neighborhoods based on the belief that black residents caused a devaluation of property.<sup>58</sup>

Although the FHA adopted a policy of equal opportunity by the early 1950s, it did not even begin to address its acquiescence in the discriminatory practices of participating private lenders until 1968.<sup>59</sup> Because the FHA and VA programs subsidize nearly one-half of all mortgaged homes, the consequences of their long-term practices are widespread.<sup>60</sup>

While the federal homeownership assistance programs promoted the creation of homogeneous white suburbs, the federal public housing program for low-income families with children facilitated the development of segregated and locationally deficient black inner city neighborhoods. From the public housing program's inception in 1937,<sup>61</sup> tenants were assigned to projects

---

Elizabeth Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies In Federal Homeownership Programs*, 74 NW. U. L. REV. 491, 510-21 (1979). Congress enacted the FHA program in 1934 in the National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (codified as amended in scattered sections of 42 U.S.C.), "to rescue the failing home finance industry from the depths of the Depression by assuming the risk of loss for mortgage lending institutions." Rubinowitz & Trosman, *supra*, at 494. Congress created the VA program in the Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (codified as amended in scattered sections of 38 U.S.C.), to help war veterans own their own homes through mortgage insurance provisions similar to the FHA program and through direct loans to veterans. Rubinowitz & Trosman, *supra*, at 498 n.28.

56. Collin & Morris, *supra* note 55, at 182.

57. Redlining "denotes the practice of denying mortgage financing on property located within certain geographic areas of a city." Marcia Duncan et al., *Redlining Practices, Racial Resegregation, and Urban Decay: Neighborhood Housing Services as a Viable Alternative*, 7 URB. L. 510, 513 (1975). A lender would literally draw a red line on a city map around the community or area declared off-limits for mortgage investment. See Citizen's Commission on Civil Rights, in CRITICAL PERSPECTIVES ON HOUSING 297 (Rachel G. Bratt et al. eds., 1986).

58. Rubinowitz & Trosman, *supra* note 55, at 512-13.

59. *Id.* at 521. Similarly, while the post-war VA program had adopted a policy of racial neutrality, the agency did not attempt to stop lenders whose loans it guaranteed from discriminating on the basis of race. *Id.* at 514 n.88.

60. See Kushner, *supra* note 6, at 568 (asserting that "[t]hese policies, . . . guaranteed that Blacks would remain in the central cities.").

61. The United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (current version at 42 U.S.C. §§ 1437-1437s (1988)).

on a segregated basis, with many black projects located in slums.<sup>62</sup> When the program's production goals were greatly expanded in the United States Housing Act of 1949,<sup>63</sup> Congress virtually guaranteed that all new housing would continue to be constructed on a discriminatory basis when it rejected anti-discrimination amendments to the Act.<sup>64</sup>

Although Title VI of the 1964 Civil Rights Act outlawed discrimination in publicly funded programs,<sup>65</sup> the Department of Housing and Urban Development (HUD) did not promulgate regulations requiring the siting of new housing in viable neighborhoods and on a non-segregated basis until 1972.<sup>66</sup> This leg-

---

62. Kushner, *supra* note 6, at 577 n.65 (citing WEAVER, *supra* note 54, at 73-74, 143-44); Comment, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief*, 122 U. PA. L. REV. 1330, 1331 (1974); see *Favors v. Randall*, 40 F. Supp. 743, 747-48 (E.D. Pa. 1941) (upholding public housing segregation as an extension of the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

63. Pub. L. No. 81-171, 63 Stat. 413 (codified as amended at 42 U.S.C. §§ 1441-1490o (1988)). The Act defined "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family" as a national policy priority. 42 U.S.C. § 1441 (1988).

64. Elizabeth K. Julian & Michael M. Daniel, *Separate and Unequal—The Root and Branch of Public Housing Segregation*, 23 CLEARINGHOUSE REV. 666, 668-69 (1989) (citing 95 CONG. REC. 4791-98, 4849-61 (1949)). In their successful advocacy against the amendments, congressional liberals argued that challenging racial segregation in public housing would instigate rejection of the public housing provisions of the 1949 Act and thereby deny black families much needed housing—even though that housing would be provided on a racially segregated basis. *Id.*

65. Pub. L. No. 88-352, 78 Stat. 252 (1964) (codified as amended at 42 U.S.C. § 2000d (1988)). Notwithstanding the Supreme Court's invalidation of the "separate but equal" doctrine in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the federal government continued a formal policy of segregation in public housing tenant selection and assignments until President Kennedy's Executive Order 11,063 in 1962. See 3 C.F.R. § 652 (1962). In interpreting and applying this Executive Order, the government exempted existing projects, eschewed litigation as a means to enforce the Order, ignored local housing authorities' "widespread policy of siting new housing projects in racially identifiable neighborhoods," and then assigned tenants to correspond with the neighborhoods' demographics. "[T]here is no evidence of any public housing desegregation before 1964." David W. Price, Note, *Causation of Public Housing Segregation: HUD Authorization of Applicant Choice in Tenant Selection and Assignment Plans*, 10 B.C. THIRD WORLD L.J. 121, 130 (1990).

66. The Third Circuit's decision in *Shannon v. United States Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 821-22 (3d Cir. 1970), mandated that HUD develop an institutionalized method of site selection to assure compliance with the civil rights laws. HUD promulgated site selection regulations. 24 C.F.R. § 941.202 (1992) (public housing); 24 C.F.R. § 880.206 (1992) (subsidized housing). See generally Steven Lev, *HUD Site and Neighborhood Selection Standards: An Easing of Placement Restrictions*, 22 URB. L. ANN. 199 (1981) (examining the development of HUD's current standards for site selection);



acy of discrimination resulted in the current prevalence of separate and inferior public housing for low-income African-American families.<sup>67</sup>

Another initiative of the 1949 United States Housing Act, the Federal Slum Clearance and Urban Renewal Program,<sup>68</sup> further exacerbated black land use inequality. Designed for the ostensibly benign purpose of eliminating urban blight, federal slum clearance uprooted and dislocated thousands of black households and then confined the displacees to segregated and inferior relocation housing.<sup>69</sup> Federal highway projects pro-

---

Michael J. Veranelli, *Where Should HUD Locate Assisted Housing?*, in HOUSING DESEGREGATION AND FEDERAL POLICY 214, 214-34 (John Goering ed., 1986) (tracking HUD's attempts at promoting fair housing through site selection).

67. Julian & Daniel, *supra* note 64, at 669. Just one year after HUD promulgated site selection regulations, the HUD secretary announced a moratorium on construction of many HUD subsidized housing programs, even though Congress had appropriated funds for those programs. See *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974) (upholding the moratorium). While the moratorium did not, by its terms, include public housing, it signalled a federal retreat from the broad goals of the 1949 Housing Act which extended to all HUD housing programs for low and moderate income families. In the mid-1970s public housing production was at its lowest levels since the 1949 Act, and it came to a virtual halt in the mid to late 1980s. See Rachel G. Bratt, *Public Housing: The Controversy and Contribution*, in CRITICAL PERSPECTIVES ON HOUSING, *supra* note 57, at 335, 338-41; see also CENTER FOR COMMUNITY CHANGE, PUBLIC HOUSING UNDER SIEGE: A SPECIAL ISSUE 3-5 (1989) (detailing failure of government to modernize, repair, and build public housing in cities); NATIONAL HOUSING LAW PROJECT, PUBLIC HOUSING IN PERIL 9 (1990) (describing loss of public housing units). A significant portion of public housing units standing today were planned and constructed with the federal government's full knowledge that these units would provide separate and inferior housing for low-income black families. See *Discrimination in Federally Assisted Housing Programs: Hearings Before the House Subcomm. on Housing and Community Development*, 99th Cong., 1st & 2d Sess. 80-98 (Nov. 21, 1985) [hereinafter *Hearings*] (statement of John J. Knapp, Gen. Counsel, United States Dep't of Hous. & Urban Dev.); Craig Flourney & George Rodrigue, *Separate and Unequal: Illegal Segregation Pervades Nation's Subsidized Housing*, DALLAS MORNING NEWS, Feb. 10-18, 1985.

An increasing body of case law underscores the government's complicity in the provision of inferior housing for blacks. See, e.g., *Hills v. Gautreaux*, 425 U.S. 284 (1976); see also *infra* note 248 (discussing relevant cases).

68. United States Housing Act of 1949, Pub. L. No. 81-171, §§ 101-110, 63 Stat. 413, 414-21. This program was replaced by Title I of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, §§ 101-118, 88 Stat. 633, 633-653 (codified as amended at 42 U.S.C. §§ 5301-5320 (1988)). The 1974 Act consolidated several grant programs into the Community Development Block Grant program. 42 U.S.C. §§ 5301-5320 (1988).

69. See DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW § 8.12 (3d ed. 1992); Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745 (1971); Kushner, *supra* note 6, at 583-86; Henry W. McGee, *Urban Renewal in the Crucible of Judicial Review*, 56 VA. L. REV. 826 (1970);

duced similar results.<sup>70</sup>

Local governments' exclusionary zoning laws remain a significant ongoing land use planning impediment to African-American residential mobility.<sup>71</sup> These zoning enactments create financial barriers to residential access virtually as effective in operation as the explicitly racial laws invalidated in *Buchanan*. Exclusionary zoning and planning techniques have been described as both "innumerable and interchangeable"<sup>72</sup> and include a plethora of devices that increase the cost of housing,<sup>73</sup> impede the development of low-cost or subsidized hous-

---

see also MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL 1949-1962* (1964) (examining and critiquing the effect of federal slum clearance projects); Peter Marris, *A Report on Urban Renewal in the United States*, in *THE URBAN CONDITION* 113, 119 (Leonard J. Duhl ed., 1963) ("80 per cent of the families relocated are non-white . . . Few, if any, of the families relocated could afford the private housing planned to replace their old homes.").

Courts have also recognized the disparate consequences of federal urban renewal on black communities. See, e.g., *Garrett v. Hamtramck*, 335 F. Supp. 16, 25-27 (E.D. Mich. 1971) (urban renewal labelled "negro removal"), *rev'd in part*, 503 F.2d 1236 (6th Cir. 1974); cf. *Arrington v. City of Fairfield*, 414 F.2d 687 (5th Cir. 1969) (holding that plaintiffs had standing to challenge displacement of minority communities by urban redevelopment); *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920 (2d Cir. 1968) (holding that plaintiff may raise equal protection challenge to urban renewal program which allegedly displaced minorities in disproportionate numbers).

70. BELL, *supra* note 69, § 8.12; Kushner, *supra* note 6, at 583-86; Neal A. Roberts, *Homes, Roadbuilders, and the Courts: Highway Relocation and Judicial Review of Administrative Action*, 46 S. CAL. L. REV. 51, 55 (1972); see also Alice A. Ratliff & Michael D. Calhoun, *Use of Last Resort Housing Benefits and Redevelopment Powers to Preserve a Low-Income Community Threatened with Displacement*, 22 CLEARINGHOUSE REV. 442, 443 (1988) (describing successful fight of low-income black community to prevent complete displacement).

For judicial recognition of the racial impacts of highway projects compare *Keith v. Volpe*, 858 F.2d 467, 484-85 (9th Cir. 1988) (removing rezoning impediments to the construction of relocation housing for minority displacees), *cert. denied sub nom.* *City of Hawthorne v. Wright*, 493 U.S. 813 (1989) with *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179, 185 (6th Cir. 1967) (denying injunction against highway project despite showing of "heavy damage" to the black community), *cert. denied*, 390 U.S. 921 (1968).

71. Exclusionary zoning has been defined as "zoning that raises the price of residential access to a particular area, and thereby denies that access to members of low-income groups." Lawrence G. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767, 767 (1969).

72. RICHARD F. BABCOCK & FRED P. BOSSELMAN, *EXCLUSIONARY ZONING, LAND USE REGULATION AND HOUSING IN THE 1970S* 7 (1973).

73. These devices include the imposition of minimum lot sizes, minimum building sizes, luxury amenity requirements, and even minimum dwelling cost. See 2 WILLIAMS & TAYLOR, *supra* note 2, §§ 62-66; BABCOCK & BOSSELMAN,

ing,<sup>74</sup> or preclude or discourage residential housing altogether.<sup>75</sup>

Because of the historic and continuing disproportionately low income and wealth levels of African-American households,<sup>76</sup> these zoning devices present seemingly insurmountable obstacles to residential access to all but a handful. Indeed, courts have recognized the racially disparate consequences of these practices.<sup>77</sup>

---

*supra* note 72, at 3-17; KUSHNER, *supra* note 8, § 7.08. As late as 1972, the FHA encouraged the use of "protective covenant[s] establishing a minimum dwelling cost of quality and size [to maintain property values and ensure that] protection is afforded to desirable dwellings from the encroachment of buildings below the standards of residential character originally established." 2 WILLIAMS & TAYLOR, *supra* note 2, § 62.02, at 781 (quoting Data Sheet 40, Rev.4/59, p.3., which contained FHA's recommendation for "protective covenants").

74. Examples of such devices include direct restrictions against or referenda prerequisites to the development of multi-family or subsidized housing, limits on the number of bedrooms or bathrooms in permissible multi-family units, and provisions mandating developments for senior citizens. See generally 2 WILLIAMS & TAYLOR, *supra* note 2, § 64.01; BABCOCK & BOSSELMAN, *supra* note 72, at 7; KUSHNER, *supra* note 8, § 7.08. The exclusion of multi-family units from neighborhoods of detached, single-family homes through zoning measures is long-standing and has its genesis in *Euclid*. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) (upholding the exclusion of apartment houses from the single family district). Recognition of the value of the concept of protective Euclidean zoning persists. See BABCOCK, *supra* note 46, at 263-64. Scholars and jurists, however, increasingly have repudiated the portion of Euclidean protective zoning which authorized the blanket exclusion of apartments from neighborhoods of single-family homes as inconsistent with the general welfare. See 3 WILLIAMS & TAYLOR, *supra* note 2, § 66.14 & n.54; *infra* note 293 and accompanying text.

75. See BABCOCK & BOSSELMAN, *supra* note 72, at 9-10. These practices include overzoning for industrial, commercial, or agricultural use. *Id.*

76. According to 1990 Census Bureau figures, African-American families are approximately three times as likely to have incomes below the poverty line as white families. See BUREAU OF THE CENSUS, POVERTY IN THE U.S. (Table 2) (1990); see also CENTER ON BUDGET AND POLICY PRIORITIES, STILL FAR FROM THE DREAM: RECENT DEVELOPMENTS IN BLACK INCOME, EMPLOYMENT AND POVERTY 17 (1988) ("By 1987, the typical black family's income equalled just 56.1 percent of the typical white family's income."). In addition,

Blacks are still very unequally represented among homeowners, even after controlling for differences in income. Since equity in a home is the only substantial wealth of most families this helps account for the fact that the typical white family had eleven times more wealth than the typical black family in the mid-1980s, a gap radically larger than the black-white income and employment gaps.

ORFIELD, *supra* note 7, at 15-16. Without the equity trade-in value of an existing home, black families' abilities to purchase a new home are greatly diminished. Karl Taeber, *The Contemporary Context of Housing Discrimination*, 6 YALE L. & POL'Y REV. 339, 344-45 (1988).

77. See *infra* note 217 and cases cited therein.

## D. SEPARATE COMMUNITIES: UNEQUAL ZONING PROTECTION

Discriminatory zoning practices have created and perpetuated separate residential communities for African-Americans.<sup>78</sup> Although segregation in employment, public accommodations,

---

78. The persistence of discrimination by private realtors, brokers, landlords, and other private parties also contributes to the perpetuation of segregated residential patterns. See John Yinger, *The Racial Dimension of Urban Housing Markets in the 1980s*, in *DIVIDED NEIGHBORHOODS* 43, 43-47 (Gary A. Tobin ed., 1987). Both HUD and private audit studies employing "testers" or auditors of different races and ethnic backgrounds to seek housing in various markets demonstrate this pattern of discrimination. See *id.* at 50-60; *The Costs of Housing Discrimination and Segregation: An Interdisciplinary Social Science Statement*, in *DIVIDED NEIGHBORHOODS*, *supra*, at 268, 271 (discussing 1979 HUD study sampling market behavior in 40 cities which "found a high probability that a black family would encounter at least one case of readily measurable discrimination in the course of a typical housing search."); see also MARGARET A. TURNER ET AL., *HOUSING DISCRIMINATION STUDY* iii-vi (1991) (25-city study conducted for HUD in 1989 found an approximate 60 percent probability of discrimination against black homebuyers).

The prospect of social isolation, harassment, or violence in white neighborhoods is another impediment to African-American residential mobility. See Wilhelmina A. Leigh & James P. McGee, *A Minority Perspective on Residential Racial Integration*, in *HOUSING DESEGREGATION AND FEDERAL POLICY* 31, 37 (John Goering ed., 1986); Taeuber, *supra* note 76, at 345. See generally ROBERT F. FORMAN, *BLACK GHETTOS, WHITE GHETTOS, AND SLUMS* 96-100 (1971) (discussing informal means by which neighborhoods remain segregated); CHARLES ABRAMS, *FORBIDDEN NEIGHBORS* 81-90 (1955) (documenting violence blacks encountered when moving into white cities). Acts of intimidation and harassment against in-coming African-American families persist into the 1990s, and have sparked a debate about the ability of government to provide enhanced punishment against such racially-motivated conduct. See, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (invalidating state cross-burning prosecution on First Amendment grounds); *United States v. Lee*, 935 F.2d 952 (8th Cir. 1991) (upholding federal civil rights cross-burning conviction); *United States v. Hayward*, 767 F. Supp. 928 (N.D. Ill. 1991) (same). See generally SOUTHERN POVERTY LAW CENTER, *HATE VIOLENCE AND WHITE SUPREMACY: A DECADE REVIEW 1980-1990* (1989) (documenting over 50 cross-burnings directed at African-American households in 1988-1989).

These practices may explain the similar segregation between middle-income and lower-income African-American families. See Calmore, *supra* note 7, at 94-95. While there has been significant migration of African-American middle-class families from lower-income central city areas, these families often resettle in "spillover" African-American suburbs. See *id.* at 92; Gary Orfield, *Minorities and Suburbanization*, in *CRITICAL PERSPECTIVES ON HOUSING*, *supra* note 57, at 221, 221-25. Compare WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* 56-62 (1987) (discussing the "exodus" of middle- and working-class black families from the central city "ghettos" and the isolation of the "underclass" left behind) with Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. SOC. 329, 330-31 (1990) (suggesting that the degree of black middle-class migration from central city areas is overstated and that persistent discrimination and residential segregation are far more critical in the emergence of a black "underclass").

education,<sup>79</sup> and other aspects of American life have lessened somewhat, residential separation in 1990 has remained at essentially the same levels as in the 1960s.<sup>80</sup>

Because government-approved, or *de jure*, segregation had its genesis in theories of white supremacy, it is not surprising that *de facto* inequality often followed separateness. Put another way, if "Jim Crow" placed a badge of inferiority on the black race,<sup>81</sup> it provided license to devalue black interests as

---

79. The persistence of residential segregation has contributed to the resegregation of schools which have gone from court-supervised desegregation plans to neighborhood school systems. See, e.g., Board of Educ. of Okla. City Pub. Schs. v. Dowell, 111 S. Ct. 630, 645 (1991) (Marshall, J., dissenting) ("It is undisputed that replacing the Finger Plan with a system of neighborhood school assignments . . . resulted in a system of racially identifiable schools."); Riddick by Riddick v. School Bd. of City of Norfolk, 784 F.2d 521 (4th Cir. 1986), cert. denied, 497 U.S. 938 (1987); see also The Kerner Report Updated, *supra* note 7, at 9 ("After declining from 1968 to 1976, the number of black students enrolled in predominantly minority schools increased from 62.9 percent in 1980 to 63.5 percent in 1984").

80. See Drew S. Days, III, *Introductory Remarks, in The Fair Housing Act After Twenty Years*, 6 YALE L. & POL'Y REV. 332, 332-33 (1988) (contrasting the improvement in employment opportunities through Title VII of the Civil Rights Act of 1964, the virtual elimination of segregation in public accommodations through Title II of the Act, and the increase in black political participation attributable to the Voting Rights Act 1965, with the failure of Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act) to improve significantly the housing opportunities of African-Americans). The federal government's Fair Housing Act enforcement effort has been described as an "oxymoron." See James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348, 348 (1988) (criticizing the federal government's efforts to enforce the FHA in light of its historic role in "segregating the nation, resisting the dismantlement of apartheid, and ignoring pervasive patterns of housing discrimination"). Moreover, because of the significant federal role in creating and perpetuating residential segregation and land use inequality, a federal enforcement effort designed to remedy many of these conditions could be precluded by conflict of interest. Cf. United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1289 (S.D.N.Y. 1985) (black intervenors joined HUD as defendant in action initiated by the Department of Justice against City of Yonkers challenging segregation of public housing and public schools), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988).

In addition, civil rights organizations like the NAACP Legal Defense & Educational Fund, Inc. (LDF), perhaps drained by litigation battles, did not initiate a nationwide litigation campaign to enforce the Fair Housing Act as they had done with other new civil rights enactments. See Memorandum from Lowell Johnston, First Associate Counsel, LDF to Julius Chambers, Director-Counsel, LDF (Sept. 10, 1984) (on file with author); see also DAVID H. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION 1, 1 (1977) ("[T]here has not been a key organization such as the NAACP planning, financing and supervising [exclusionary zoning] litigation.").

81. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

well. Thus, while the Court's decision in *Plessy v. Ferguson*<sup>82</sup> inaugurated the "separate but equal" doctrine, the Court failed to define the equality component of separate facilities. Just three years after *Plessy*, as Professor Derrick Bell observed, "the Court dashed expectations that it would seriously enforce the 'equal' part of its 'separate but equal' standard" when it upheld the closure of a school board's only black high school as a budgetary measure while the board continued to operate a white high school.<sup>83</sup>

"Separate" has also meant "unequal" in the land use area. Indeed, the Kentucky Supreme Court, in upholding the racial zoning ordinance at issue in *Buchanan*, specifically acknowledged that the ordinance might confine blacks to less desirable parts of the city.<sup>84</sup> Nevertheless, it casually dismissed the claim of residential inequality, reasoning simply that "if such separation should result in the members of the colored race being restricted to residence in the less desirable portions of the city, they may render those portions more desirable through their own efforts, as the white race has done."<sup>85</sup>

In his dissent in the Court of Appeals for the District of Columbia's decision upholding the validity of racial covenants, Judge Edgerton observed that the effect of these purportedly neutral covenants was to restrict blacks to inferior housing.<sup>86</sup> He stated:

It has been contended that enforcement of covenants which exclude a race from a neighborhood does not involve discrimination because it permits reciprocity. This amounts to saying that if Negroes are excluded from decent housing they may retaliate by excluding whites from slums. Such reciprocity is not only imaginary and unequal but irrelevant.<sup>87</sup>

Inequality also followed separateness in the public housing program. A Pulitzer Prize winning investigative report in *The*

---

82. 163 U.S. 537 (1896).

83. BELL, *supra* note 69, at 537 (citing *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899)); see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 454-56 (1986) (describing the Supreme Court's uneven and detrimental treatment of "equal"); LOUIS HARLAN, SEPARATE AND UNEQUAL (1968); Annotation, *Equivalence of Educational Facilities Extended by Public School Systems to Members of White and Members of Colored Race*, 103 A.L.R. 713 (1936) (explaining how courts apply the "separate but equal" standard).

84. *Harris v. City of Louisville*, 177 S.W. 472, 476 (Ky. 1915), *rev'd sub nom. Buchanan v. Warley*, 245 U.S. 60 (1917).

85. *Id.*

86. *Hurd v. Hodge*, 162 F.2d 233, 239 (D.C. Cir. 1947) (Edgerton, J., dissenting), *rev'd*, 334 U.S. 24 (1948).

87. *Id.*

*Dallas Morning News* spurred extensive congressional hearings.<sup>88</sup> The hearings, held in November, 1985 and January, 1986, concluded:

In a 14-month investigation of the country's 60,7 federally subsidized rental developments, *The Dallas Morning News* visited 47 cities across the nation and found that virtually every predominantly white-occupied housing project was significantly superior in condition, location, services and amenities to developments that house mostly blacks and hispanics.

The news did not find a single locality in which federal rent-subsidy housing was fully integrated or in which services and amenities were equal for whites and minority tenants living in separate projects.<sup>89</sup>

Apart from land use controls that placed blacks in residentially inferior environments, governments have also engaged in practices that diminish the quality of life for the residents within African-American communities.<sup>90</sup> These practices include the provision of inferior municipal services,<sup>91</sup> selective use of annexation and boundary line changes to disenfranchise and deny services to black residents,<sup>92</sup> inequitable relocation or

---

88. *Hearings, supra* note 67.

89. Craig Flournoy & George Rodrigue, *Separate and Unequal: Illegal Segregation Pervades Nation's Subsidized Housing*, DALLAS MORNING NEWS, Feb. 10, 1985, reprinted in *Hearings, supra* note 67, at 22; see also *Hearings, supra* note 67, at 20 (letter of Rep. Henry B. Gonzalez to HUD Secretary Samuel Pierce, Feb. 26, 1985, indicating intention of subcommittee to hold hearings on the "serious charges" made by the *Dallas Morning News*).

90. In public housing, these practices involve both site selection in residentially inferior locations and inequitable provision of services and maintenance. See, e.g., *Walker v. United States Dep't of Hous. & Urban Dev.*, 734 F. Supp. 1289 (N.D. Tex. 1989) (finding that housing authority deliberately located public housing in "Negro slum areas"); *Concerned Tenants Ass'n of Indian Trails Apts. v. Indian Trails Apts.*, 496 F. Supp. 522 (N.D. Ill. 1980). See generally *Hearings, supra* note 67, at 24 (detailing the superior services and amenities provided to whites in public housing); *Julian & Daniel, supra* note 64, at 667 (describing inequities that black families face in public housing).

91. Service deficiencies typically involve street paving and lighting, surface water drainage, sewers, water mains and fire hydrants, parks and recreational facilities, and police, fire, sanitation and public utility services. See, e.g., *Ammons v. Dade City*, 783 F.2d 982, 983-84 (11th Cir. 1986) (per curiam); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff'd on reh'g per curiam*, 461 F.2d 1171 (5th Cir. 1972) (en banc). See generally PAUL R. DIMOND, A DILEMMA OF LOCAL GOVERNMENT: DISCRIMINATION IN THE PROVISION OF PUBLIC SERVICES (1978) (examining causes of and remedies for the discriminatory provision of public services).

92. See, e.g., *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987); *Ammons*, 783 F.2d at 985; *Dowdell*, 698 F.2d at 1184-85. See generally Donald G. Hagman, *The Use of Boundary Lines to Discriminate in the Provision of Services by Race*, 54 U. DET. J. URB. L. 849 (1977) (analyzing cases of boundary line discrimination in the provision of services); Ilene Dubrow, *Municipal An-*

non-location of important public institutions,<sup>93</sup> regressive and disparate property tax assessments,<sup>94</sup> encouragement of mortgage and insurance redlining,<sup>95</sup> and the disproportionate displacement of African-American families through urban renewal, highway, and local redevelopment projects.<sup>96</sup>

The disparate denial of protective zoning to African-American communities is another unequal vestige of segregative land use controls. While few cases have directly challenged the lack of protective zoning, numerous cases refer to the prevalence of incompatible uses and zoning in African-American residential areas. In a 1937 case in Alexandria, Virginia, a brickmaker seeking industrial zoning of an eighteen-acre lot for a clay pit argued that such zoning would be consistent with the non-residential character of the area as evidenced, in part, by the presence directly to the south of a warehouse, some small industries, and a "colored settlement."<sup>97</sup>

A few years later, a California appellate court in *O'Rourke v. Teeters*<sup>98</sup> offered further insight into the practice of incompatible uses and zoning. In this case, a black business owner challenged the enforcement of a protective zoning ordinance in his Los Angeles neighborhood. The city ordinance had zoned his neighborhood residential, thereby preventing him from operating an electric shop business from his home.<sup>99</sup> Ironically,

---

*tagonism or Benign Neglect: Racial Motivations in Municipal Annexations in St. Louis County, Missouri*, 53 U. DET. J. URB. L. 245 (1975).

93. See, e.g., *NAACP v. Medical Ctr., Inc.*, 657 F.2d 1322 (3d Cir. 1981); see also Cassandra Q. Butts, *The Color of Money: Barriers to Access to Private Health Care Facilities for African-Americans*, 26 CLEARINGHOUSE REV. 159, 161-62 (1992) (discussing relocation of hospitals away from black communities); cf. Alfred W. Blumrosen, *The Duty to Plan for Fair Employment: Plant Location in White Suburbia*, 25 RUTGERS L. REV. 383 (1971) (discussing location of public and private employment facilities away from black communities).

94. See, e.g., *Williams v. City of Dothan*, 745 F.2d 1406, 1408-09 (11th Cir. 1984); *Garrett v. Bamford*, 538 F.2d 63, 65 (3d Cir.), cert. denied, 429 U.S. 977 (1976). See generally Kenneth A. Baar, *Property Tax Assessment Discrimination Against Low Income Neighborhoods*, 13 URB. LAW. 333 (1981) (discussing the historical and political origins of discriminatory assessment, relevant case law, and strategies to combat the problem).

95. See Rubinstein & Trosman, *supra* note 55, at 512-13.

96. See *supra* notes 69-70 and accompanying text; see also *Larramore v. Illinois Sports Facilities Auth.*, 722 F. Supp. 443, 449-51 (N.D. Ill. 1989). See generally Nat'l Econ. Dev. & Law Ctr., *Facing the Local Redevelopment Agency*, 24 CLEARINGHOUSE REV. 1051 (1991) (analyzing the potentially disruptive consequences of local redevelopment agencies' activities on communities of color).

97. *West Bros. Brick Co. v. City of Alexandria*, 193 S.E. 881, 883-84 (1937).

98. 146 P.2d 983 (Cal. Ct. App. 1944).

99. *Id.* at 984 & n.1.



the plaintiff argued, and the court found, that he could not obtain a suitable alternative location for his business due to "race restrictions" in private covenants.<sup>100</sup> The plaintiff also argued that the presence of two pre-existing commercial establishments on his block, a planing mill within five hundred feet, unzoned areas nearby, and heavy traffic in front of the home rendered the area non-residential in character, thereby undermining the residential designation.<sup>101</sup>

In rejecting the plaintiff's claim, the court provided what is possibly the only judicial statement recognizing the importance of zoning equity within low-income minority communities. After holding that the mere existence of some commercial uses, unzoned areas, or heavy traffic do not *per se* abrogate the residential character of a neighborhood—and implicitly suggesting that these elements were characteristic of black and low-income neighborhoods—the court stated:

Any other conclusion would result in a situation where only those who have been so fortunate as to obtain enough worldly goods to enable them to erect their homes in districts beyond the possible approach of commercial enterprises could be protected in their residences from the encroachment of business, commercial, and manufacturing enterprises. It needs no argument to support the thesis that all classes of our citizens, rich and poor, of whatever race or creed, are entitled to the equal protection of our laws and the privilege of living in areas which have been properly zoned for residential purposes pursuant to the recommendation of a duly created planning commission.<sup>102</sup>

Later cases suggest that the *O'Rourke* court's "thesis" on equality of protective zoning was not as assiduously followed by city planners when its application conflicted with majoritarian interests. Incompatible zoning was employed as a "subtler" device in pursuit of segregation as compared to the invalidated devices of racial zoning and restrictive covenants.<sup>103</sup> City planners deliberately displaced black residences with industrial and commercial zoning<sup>104</sup> or used incompatible zoning to confine black

---

100. *Id.* at 984.

101. *Id.* at 984-85.

102. *Id.* at 985. The court noted that "[i]f the present judgment were to be sustained, such protection, instead of being extended to the Caucasian and Negro population, rich and poor alike, would be confined and reserved to the few wealthy residents of Los Angeles." *Id.*

103. See Charles Abrams, *The Housing Problem and the Negro*, in *THE NEGRO AMERICAN* 512, 516 (Tom Parsons & Kenneth Clark eds., 1965).

104. See *Garrett v. City of Hamtramck*, 335 F. Supp. 16, 21-22 (E.D. Mich. 1971) (finding "that governmental activities . . . during the 1960s, including industrial expansion into residential areas, . . . have resulted in removal of sub-

residents to particular portions of a city.<sup>105</sup>

In other cases the relatively common practice of overzoning for industrial use due to the income-generating potential of industrial development (and the wishful thinking of city planners)<sup>106</sup> may have formed the impetus behind the disparate denial of protective zoning. As Professor Rabin observed in his twelve-city study of expulsive zoning, "where those grandiose [industrial development] expectations exceeded the capacity of existing vacant land, they were often superimposed on developed black residential areas."<sup>107</sup> In Charlotte, North Carolina, for example, Judge McMillan in the course of the *Swann* school desegregation litigation found that "nearly all industrial land in the City" is in the black community and "[m]any black citizens live in areas zoned industrial which means that the zoning law places no restriction on the use of the land."<sup>108</sup>

Similarly, in Mt. Laurel, New Jersey, in the course of

---

stantial numbers of black persons from the defendant City"); Rabin, *supra* note 11, at 108 (referencing accounts of intentional displacement of black residences in Baltimore and St. Louis through industrial and commercial zoning).

105. For example, Charles Abrams recounts that when the Ford Motor Company moved its plant from Richmond, California to Milpitas and the union attempted to build housing for its black workers, the area selected was promptly rezoned industrially to deter black residency. See Abrams, *supra* note 103, at 516. Similarly, in 1948 former HUD Secretary Robert Weaver observed that in St. Louis, black residential areas were "hemmed in" both by restrictive covenants and by industry and commerce. WEAVER, *supra* note 54, at 246-47; see also *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390, 462 (N.J. 1983) (*Mt. Laurel II*) (describing the zoning of land for low income housing in inaccessible and industrial zone); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713, 730 (N.J.) (*Mt. Laurel I*) (documenting the overzoning of land for industrial use), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

106. See AMERICAN SOC'Y OF PLANNING OFFICIALS, *THE TEXT OF A MODEL ZONING ORDINANCE* 3 (3d ed. 1966).

[I]t is a rare ordinance indeed that does not commit greatly excessive land areas to commercial or industrial use, thereby ensuring that the land so classified will not be used for much of anything or that in the spotty development that does result large sections of the community will be permanently blighted.

*Id.*

107. Rabin, *supra* note 11, at 107. It matters little whether the primary objective served through the incompatible zoning of African-American residential communities was economic development or race-based displacement. Professor Rabin observes that "[i]n either case, the pursuit of profit or the expression of prejudice, the interests and welfare of blacks have been equally expendable." *Id.*

108. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F. Supp. 1358, 1365 (W.D.N.C. 1969); see also James McMillan, *Social Science and the District Court: The Observations of a Journeyman Trial Judge*, 39 L. & CONTEMP. PROBS. 157, 161 & n.17 (1975).

landmark exclusionary zoning litigation which the NAACP initiated, the township attempted to satisfy its court-imposed affirmative "fair share" low-income housing obligations, in part, by designating thirteen acres for such housing in the midst of an industrial zone. In the first *Mt. Laurel* decision, the New Jersey Supreme Court found that the township significantly overzoned for industrial use; while it had zoned nearly thirty percent of its land industrially, amounting to over 4,100 acres, only 100 acres were actually developed industrially in the decade.<sup>109</sup> When examining the propriety of the township's effort at compliance with the *Mt. Laurel I* mandate through the designation of the thirteen-acre tract, the court stated:

It is owned by an industrial developer, is totally surrounded by industrially zoned land, virtually isolated from residential uses, has no present access to other parts of the community, no water or sewer connections nearby, is in the path of a high speed railroad line and is subject to possible flooding. It would be hard to find . . . a less suitable parcel for lower income or indeed any kind of housing.<sup>110</sup>

#### E. ZONING AND ENVIRONMENTAL RACISM

With the emerging recognition of the problem of "environmental racism,"<sup>111</sup> the relative powerlessness of African-Ameri-

---

109. *Mt. Laurel I*, 336 A.2d at 730.

110. *Mt. Laurel II*, 456 A.2d at 462.

111. The origin of the phrase "environmental racism" has been attributed to a 1987 Report of the United Church of Christ's Commission on Racial Justice. See COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) [hereinafter TOXIC WASTES AND RACE]. This report, self-styled as "the first national report to comprehensively document the presence of hazardous wastes in racial and ethnic communities," implored its readers "committed to racial and environmental justice to challenge [this] insidious form of racism." *Id.* at ix-x. For a discussion of the United Church of Christ's 1987 Report, see Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCUSSION 163, 164 (Bunyan Bryant & Paul Mohai eds., 1992); Rachel D. Godsil, Note, *Remediating Environmental Racism*, 90 MICH. L. REV. 394, 395 (1991). See generally STEPHANIE POLLACK & JOANN GROZUCZAK, REAGAN, TOXICS AND MINORITIES: A POLICY REPORT BY THE URBAN ENVIRONMENT CONFERENCE, INC. (1984) (attacking the Reagan administration's health and environmental policies for their disproportionate impact on minorities and low income Americans); ALTERNATIVE POLICY INST. OF THE CTR. FOR THIRD WORLD ORG., TOXICS AND MINORITY COMMUNITIES (1986) (examining the extent of toxic problems in minority communities); Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69 (1991) (discussing emergence of minority grassroots groups to combat environmental racism); Kelly M. Colquette & Elizabeth A.H. Robertson, *Environmen-*

can communities is often a prominent factor in zoning and siting decisions. As environmental sociologist Robert Bullard observed, "toxic dumping and the siting of locally unwanted land uses (LULUs) have followed the 'path of least resistance.'"<sup>112</sup> Because residents of white neighborhoods marshal substantial resources to divert LULUs somewhere else, "these LULUs usually end up in poor, powerless black communities rather than in affluent suburbs."<sup>113</sup> This pattern persists "even though the benefits attributable to industrial waste production are directly related to affluence."<sup>114</sup> Professor Bullard suggests that "public officials and private industry have in many cases responded to the NIMBY [not-in my backyard] phenomenon, using the place-in-blacks'-backyard (PIBBY) principle."<sup>115</sup> Zoning and other "protectionist" land use devices fail to protect low-income communities of color from this pattern.<sup>116</sup>

The recent report of the Environmental Protection Agency's (EPA) Environmental Equity workgroup confirmed many of Professor Bullard's observations. The EPA workgroup found evidence that "minorities are more likely to live near a commercial waste treatment facility or an uncontrolled hazard-

*tal Racism: The Causes, Consequences, and Commendations*, 5 TUL. ENVTL. L.J. 153 (1991) (discussing environmental racism, specifically referring to siting of hazardous waste facilities).

112. ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY* 4 (1990).

113. *Id.* at 5, 85-86. Mohai & Bryant note:

These communities tend to be where residents are unaware of the policy decisions affecting them and are unorganized and lack resources for taking political action . . . . Minority communities are at a disadvantage not only in terms of availability of resources but also because of underrepresentation on governing bodies when location decisions are made.

Mohai & Bryant, *supra* note 111, at 164; *see also* Godsil, *supra* note 111, at 402-03 (attributing disproportionate burden of hazardous waste facilities on minority communities to relative lack of public opposition).

114. BULLARD, *supra* note 112, at 5.

115. *Id.*

116. *Id.* at 9-10, 85-86. A recent special investigation by the *National Law Journal* suggests that communities of color have received less environmental protection from the federal government as well. *See Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1-12. The *National Law Journal* investigation, which included analysis of every toxic waste site in the 12-year history of the Superfund program and every environmental lawsuit initiated by the federal government in the last seven years, concluded that "[w]hite communities see faster action, better results and stiffer penalties than communities where blacks, Hispanics and other minorities live." *Id.* at S1.

ous waste site than the general population."<sup>117</sup> The workgroup's report referred to the United Church of Christ's 1987 study<sup>118</sup> which found that the proportion of minorities residing in communities with either the largest commercial landfills or the most commercial waste facilities was triple that of other communities.<sup>119</sup> While suggesting that there are exceptions where poor communities seek a waste site or industrial facility to create jobs or increase the tax base,<sup>120</sup> the workgroup recognized that "a result of the 'not in my backyard (NIMBY)' syndrome is that such facilities will tend to be located in

---

117. 1 ENVIRONMENTAL EQUITY WORKGROUP, ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 15 (1992) [hereinafter ENVIRONMENTAL EQUITY]; see also 2 *id.* at 7-9, 18 (supporting document).

118. See *supra* note 111 (introducing and citing to the United Church of Christ Report).

119. ENVIRONMENTAL EQUITY, *supra* note 117, at 15. The workgroup also noted the General Accounting Office's 1983 study that found that blacks comprised the majority in three of the four communities where offsite hazardous waste landfills were located in eight southeastern states surveyed. *Id.* at 14; see U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983).

120. The assertion that communities of color generally either seek or approve of the economic trade-offs purportedly associated with environmentally undesirable uses is questionable. In a rare empirical study of the preferences and attitudes of African-American residents of communities containing industrial waste facilities, an "overwhelming majority (70 percent) of the residents [of the five communities surveyed] saw the industrial facilities as more of a 'burden' than a 'benefit' to their communities." BULLARD, *supra* note 112, at 79-81, 95. Some of the residents surveyed also challenged the underlying assumptions of economic benefit to the community. One resident suggested that the tax base would not be markedly enhanced through the taxes generated from an industrial facility since the facility would lower neighboring property values and the corresponding taxes from those properties. *Id.* at 94. Others indicated that the industrial facilities often failed to deliver on their promise of jobs. Whether this was due to the non-labor intensive nature of the facility in question or a failure to hire local residents, this fact undermines the purported employment trade-off. See *id.* at 93.

Professor Bullard suggests, in any event, that the jobs versus environment dilemma and the issue of monetary compensation for ongoing environmental hazards are tantamount to "environmental blackmail," and raise moral questions about the propriety of paying the poor to assume risks deemed unacceptable to the privileged. *Id.* at 91. Federal policy on the siting of low-income housing has been expressly designed to avert such a Hobson's choice for low-income housing residents. The HUD site selection regulations require that new public or assisted housing be sited in neighborhoods which are both "free from adverse environmental conditions" and within a reasonable travel time and cost from "places of employment providing a range of jobs for lower-income workers." See 24 C.F.R. §§ 941.202(e), (h), 880.206(e), (h) (1992).

communities with the least ability to mount a protest."<sup>121</sup>

An example of this pattern is found in *R.I.S.E., Inc. v. Kay*,<sup>122</sup> where a bi-racial environmental community organization in King and Queen County, Virginia challenged the siting of a regional solid waste landfill in a predominantly African-American community as part of a "pattern and practice of racial discrimination in landfill location and zoning."<sup>123</sup> Pursuant to its plan for siting the contested landfill, the county planned to rezone the proposed site from an agricultural and low-density rural designation to industrial use.<sup>124</sup>

In denying defendant's summary judgment motion on the plaintiff's equal protection claims, the court found that "[t]he proposed landfill will be located in a predominantly black area" and that "[a]ll three of the already operating county-run landfills are similarly located in predominantly black areas."<sup>125</sup> The court also noted the comparative inability of the black community to secure zoning protection.<sup>126</sup> It stated:

[T]he plaintiffs provide evidence that white resistance to the operation of a private landfill in a predominantly white residential neighborhood resulted in official denial of a proposed zoning variance necessary for the industrial use of a site zoned for agricultural use only. In contrast, the concerns of black residents about the effects of the proposed landfill on property values in the adjacent neighborhoods did not result in similar treatment. Rather, county officials approved a sudden change in zoning that transformed the site from one appropriate for agricultural use only to one appropriate for industrial use to accommodate the proposed landfill.

. . . The evidence provided by the plaintiffs of the disparate impact of county landfill placement on black residents, the contrast between official responsiveness to white resistance to landfill development and apparent nonresponsiveness to the concerns of black residents, and departures from normal procedures in gaining approval for the landfill suggests the decision to locate the landfill in a predominantly black community may have been motivated by discriminatory intent.<sup>127</sup>

---

121. ENVIRONMENTAL EQUITY, *supra* note 117, at 20-21.

122. 768 F. Supp. 1141 (E.D. Va. 1991).

123. *Id.* at 1142.

124. *Id.* at 1142-43.

125. *Id.* at 1143.

126. *Id.* at 1143-44.

127. *Id.* In a separate opinion on the merits of the case, the court reaffirmed its finding on the racially disparate impact of the county's landfill siting practices but ruled, nonetheless, that the plaintiff presented insufficient evidence of discriminatory intent to support a finding of a violation of the Equal Protection Clause. See *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1149-50 (E.D. Va. 1991). Central to the court's holding was its finding that the latest site in the black community was environmentally more suitable for a landfill

Similarly, in *Larramore v. Illinois Sports Facilities Authority*,<sup>128</sup> African-American community residents challenged the City of Chicago's selection of their neighborhood to bear the brunt of the displacement and ongoing environmental intrusions stemming from the siting of a new baseball stadium for the Chicago White Sox.<sup>129</sup> In connection with its plan, the Illinois Sports Facilities Authority displaced 425 African-American households. Additionally, the Authority received an amendment to the city's zoning ordinance for the neighborhood, which waived "'virtually every limitation which applied to every other development in the City', including limitations concerning light, heat, noise, smoke, toxic discharge, noxious odors, fire, and explosive materials."<sup>130</sup> The district court denied a motion to dismiss the area residents' challenge, finding that the plaintiffs properly had alleged a violation of the Equal Protection Clause, by having asserted that the sports authority and the city could have sited the stadium in an adjacent white community with less disruption to that community.<sup>131</sup>

#### F. ZONING AND GENTRIFICATION

Zoning that significantly increases the cost of retaining housing can be as disruptive to the residents of low-income communities of color as zoning that degrades their environment. The eventual consequence of such zoning and planning measures is the displacement of low-income residents through the process of gentrification,<sup>132</sup> a process that has been labeled

---

than the previously proposed site in the white community. See *id.* at 1150. Thus, the county's decision could be justified based on the "relative environmental suitability of the sites" rather than on racial animus. *Id.*; accord *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n*, 706 F. Supp. 880, 884-87 (M.D. Ga. 1989) (finding no intentional discrimination in selection of "adequate" landfill site despite discriminatory impact from siting decision), *aff'd*, 896 F.2d 1264 (11th Cir. 1990).

For a discussion of alternative legal theories for addressing this problem, see *infra* at Part II.B-D. Among other approaches, the finding of disparate impact alone could be sufficient to establish a *prima facie* violation of the Fair Housing Act. See *infra* Part II.B. In addition, an approach focusing on a broader pattern of historic zoning and planning discrimination—which might explain how the African-American community became more vulnerable to or "environmentally suitable" for landfills and other "LULUs" in the first place—might yield greater evidence of intentional discrimination. See *infra* Part II.B-D.

128. 722 F. Supp. 443 (N.D. Ill. 1989).

129. *Id.* at 445.

130. *Id.* at 445-46.

131. *Id.* at 450.

132. For definitions of the term "gentrification," see *supra* note 13.

"suburbanization in reverse" or "reverse exclusionary zoning."<sup>133</sup> Gentrification has affected a significant and increasing number of African-American families.<sup>134</sup> Although gentrification-induced displacement usually exacts a heavy toll on all displaced families, African-American families priced out of their own housing must confront the additional obstacles involved in seeking affordable relocation housing in a scarce and discriminatory private housing market.<sup>135</sup> These obstacles are sometimes compounded by the efforts of the new residents or "gentry" who, in the name of integration, obstruct the development of new subsidized housing which could permit displaced residents to resettle in their old neighborhoods.<sup>136</sup>

---

133. See Harold A. McDougall, *Gentrification: The Class Conflict over Urban Space Moves into the Courts*, 10 FORDHAM URB. L.J. 177, 180 (1982); cf. *supra* notes 71-77 and accompanying text (discussing exclusionary zoning).

134. See Richard T. LeGates & Chester Hartman, *Displacement*, 15 CLEARINGHOUSE REV. 207, 234-35 (1981) [hereinafter LeGates & Hartman, *Displacement*]; Richard T. LeGates & Chester Hartman, *Gentrification-Caused Displacement*, 14 URB. LAW. 31, 40-42 (1982); Marcuse, *supra* note 13, at 195, 225-27. See generally McGee, *supra* note 13 (describing gentrification and response of effected African-Americans); Peter W. Salsich, Jr., *Displacement and Urban Reinvestment: A Mount Laurel Perspective*, 53 U. CIN. L. REV. 333, 335 nn.8-9 (1984) (discussing government studies on reinvestment displacement and its effects on "socially vulnerable populations"); James D. Besser, 'Gentrifying' the Ghetto, THE PROGRESSIVE, Jan. 1979, at 30 (analyzing gentrification and its impact on minorities); Travis J. Dempsey, *How Whites are Taking Back Black Neighborhoods*, EBONY, Sept. 1978, at 72 (same).

135. McGee, *supra* note 13, at 39; Peter Marcuse et al., *Off-Site Displacement: How the Changing Economic Tide of a Neighborhood Can Drown Out the Poor*, 22 CLEARINGHOUSE REV. 1353, 1368 (1989); see *Garrett v. City of Hamtramck*, 335 F. Supp. 16, 21 (E.D. Mich. 1971), *rev'd*, 503 F.2d 1236 (6th Cir. 1974); cf. *Arrington v. City of Fairfield*, 414 F.2d 687, 691 (5th Cir. 1969) (recognizing the greater relocation burden on minority displacees); *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 931 & n.18 (2d Cir. 1968) (same). For discussion of the persistence of pervasive discrimination against African-Americans in the private housing market, see *supra* note 78 and authorities cited therein. For discussion of the overrepresentation of African-Americans among the homeless and among those living in substandard, overcrowded or unaffordable housing, see EDWARD B. LAZERE & PAUL A. LEONARD, CENTER ON BUDGET AND POLICY PRIORITIES, THE CRISIS IN HOUSING FOR THE POOR: A SPECIAL REPORT ON HISPANICS AND BLACKS (1989); Peter H. Rossi, *Minorities and Homelessness, in DIVIDED OPPORTUNITIES: MINORITIES, POVERTY, AND SOCIAL POLICY* 87, 93-95 (Gary D. Sandefur & Marta Tienda eds., 1988); see also *NAACP v. Harris*, 567 F. Supp. 637 (D. Mass. 1989) (finding "housing emergency" for low-income black families in Boston).

136. McDougall, *supra* note 133, at 178-80; Alan M. White, Note, *Gentrification, Tipping and the National Housing Policy*, 11 N.Y.U. REV. L. & SOC. CHANGE 255, 262 & n.52 (1982-83); see, e.g., *Alschuler v. United States Dep't of Hous. & Urban Dev.*, 686 F.2d 472 (7th Cir. 1982); *Business Ass'n of University City v. Landrieu*, 660 F.2d 867 (3d Cir. 1981); *Aertsen v. Landrieu*, 637 F.2d 12 (1st Cir. 1980); cf. *Tinsley v. Kemp*, 750 F. Supp. 1001, 1010-11 (W.D. Mo. 1990)



Zoning and planning measures that stimulate gentrification also have been rationalized in the name of community development.<sup>137</sup> Frequently the affected communities, having been redlined for years, possess a dire need for an increased tax base, improved services, and jobs.<sup>138</sup> The benefits of these government-induced private revitalization and economic development efforts often have not accrued to the original residents of the affected communities.<sup>139</sup> As a result, an increasing number of low-income communities of color have challenged these measures, arguing that government has a duty to improve the neighborhoods without removing their residents.<sup>140</sup>

---

(challenging demolition of vacant federal public housing units on Fair Housing Act grounds due to adverse impact on minorities on the housing waiting list who were disproportionately homeless and "inadequately housed"); *Settlement in Newark Public Housing Demolition Case*, 1 Fair Housing-Fair Lending [Bulletin], Dec. 1, 1989, ¶ 6.14 (reporting settlement reached in challenge to planned destruction of public housing units without replacements and without "intention or strategy to provide the same number of low income public housing units"). In reality, gentrifying neighborhoods rarely experience anything more than a momentary increase in residential integration since black neighborhood residents are disproportionately priced out over time. See LeGates & Hartman, *Displacement*, *supra* note 134, at 232-34; James G. Durham & Dean E. Sheldon, III, *Mitigating the Effects of Private Revitalization On Housing For the Poor*, 70 MARQ. L. REV. 1, 17 (1986); White, *supra*, at 262. The irony of the newcomers' efforts to preclude new low-income housing, in the name of integration, is that, if successful, these efforts are more likely to prevent the reintegration of neighborhoods and result in white upper middle-class homogeneity. McDougall, *supra* note 133, at 180. In recognition of the consequences of gentrification, HUD has authorized the placement of new low-income housing in "revitalizing" neighborhoods notwithstanding the regulatory mandate to site assisted housing outside of areas of minority concentration. See, e.g., *Gautreaux v. Pierce*, 690 F.2d 616, 636 (7th Cir. 1982) (noting that "the creation of the Revitalizing Area promotes integration by encouraging the development of assisted housing before land values and rents become prohibitively expensive and before low-income individuals are displaced by physical redevelopment.").

137. See Marcuse, *supra* note 14, at 196.

138. See *supra* note 57 (describing redlining); Donald C. Bryant, Jr. & Henry W. McGee, *Gentrification and the Law: Combatting Urban Displacement*, 25 WASH. U. J. URB. & CONTEMP. L. 43, 66-68 (1983).

139. Bryant & McGee, *supra* note 138, at 68; see McGee, *supra* note 13, at 44 (quoting a description of the effects of gentrification on the original residents of affected communities from R. Sully, *Gentrification* 6 (1987) (unpublished manuscript)).

140. See, e.g., *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 430 (1st Cir. 1983); *Pleune v. Pierce*, 697 F. Supp. 113 (E.D.N.Y. 1988). An organizer of one such challenge to a gentrification-inducing zoning and planning measure stated: "It is with peaceful, but powerful hearts that we move into the next phase of seeking to preserve our Black heritage land in the City of Cocoa. . . . Our request to the City has been clear and consistent: Improve, not remove; rebuild, not destroy." John A. Nagy, *Cocoa Neighbors File Suit over City's Plan to*

In *Houston v. City of Cocoa*,<sup>141</sup> low-income residents of an African-American community in Cocoa, Florida challenged a rezoning ordinance that created market incentives for the development of luxury condominiums and commercial complexes in their neighborhood.<sup>142</sup> The rezoning ordinance was the latest measure in a fifty-year pattern of discriminatory zoning and land use decisions that plaintiffs alleged had the "purpose and effect of undermining the Neighborhood residents' quality of life, encouraging the deterioration of their homes and tenancies and causing their displacement."<sup>143</sup> This pattern of discriminatory zoning included nearly fifty years of incompatible low-grade commercial zoning that introduced auto body shops, junk yards, and other noxious and blighting uses into the area.<sup>144</sup>

---

*Convert Area*, FLA. TODAY, Feb. 2, 1989, at 1B (statement of Roni Houston McNeil at press conference announcing the filing of *Houston v. City of Cocoa*). For discussion of the ways in which revitalization can be accomplished without producing significant displacement, see Joseph Giovanini, *A Neighborhood Is Renewed While Its Residents Stay Put*, N.Y. TIMES, July 21, 1988, at C5. See generally Durham & Sheldon, *supra* note 136; Marcuse, *supra* note 14; Peter J. MacDonald, Note, *Displacement in Gentrifying Neighborhoods: Regulating Condominium Conversion Through Municipal Land Use Controls*, 63 B.U. L. REV. 955 (1983).

141. 2 Fair Housing-Fair Lending (P-H) ¶ 15,625 (M.D. Fla. Dec. 22, 1989) (order denying defendant's motion to dismiss).

142. The plaintiffs' class action complaint alleged that the rezoning ordinance created a new high density residential and core commercial district within the community. Complaint ¶¶ 57, 59, *City of Cocoa* (No. 89-82-CIV-ORL-19). The new zoning rewarded developers who built in these districts through "performance standard bonuses" (PSBs) and "transferable development rights" ("TDRs"). *Id.* ¶ 57. Plaintiffs specifically alleged that:

The PSBs reward developers for building larger units, building on larger lots or building with exceptional urban design features. The PSBs authorize such developers to build with greater density than is otherwise permitted. The TDRs further reward such developers by permitting them to transfer their development rights acquired in the Neighborhood to the Central Business District ("CBD") and build with greater square footage there than is otherwise permitted. The CBD is located in a particularly valuable area of town and is also the area in which costly riverfront development has occurred and is proposed in the Redevelopment Plan.

58. The intended and foreseeable effect of the PSBs and TDRs is to displace the Plaintiffs by promoting the aggregation of separate parcels and the construction of larger and costlier units in the Neighborhood.

*Id.* ¶¶ 57-58.

143. *Id.* ¶ 2. Originally the virtually all-black community had been maintained as a separate community through the use of an explicit racial zoning ordinance enacted in 1938. See *Cocoa, Fla.*, Ordinance 1210 (Dec. 13, 1938) ("An Ordinance Dividing the City of Cocoa into Two Zones to be Called the White Zone and Colored Zone . . .").

144. Complaint ¶ 3, *City of Cocoa* (No. 89-82-CIV-ORL-19).

The pattern also included eight years of redlining from government home improvement funds, and a plan to acquire and clear the neighborhood through the city's powers of redevelopment and eminent domain.<sup>145</sup> Ironically, the city's clearance plan was designed to eliminate blight in the area, and it specifically had cited the incompatible zoning as "one cause in adding to the blighting influence of the neighborhood."<sup>146</sup>

Plaintiffs asserted that the city, after having blighted the neighborhood, sought to redevelop it "not for the benefit of its traditional black residents, but for the benefit of new, higher income and foreseeably white residents and business owners."<sup>147</sup> The rezoning incentives and related redevelopment activities were designed to induce private developers to accomplish indirectly what the city had attempted to do directly through acquisition and clearance.<sup>148</sup>

The district court denied the defendants' motion to dismiss, upholding the plaintiffs' standing to challenge the city's conduct.<sup>149</sup> The court recognized that the challenged conduct was part of a long-term, ongoing pattern of discriminatory zoning and land use planning, and that the latest measures presented a "real and immediate" threat of injury to the plaintiffs by subtle displacement.<sup>150</sup>

In a similar challenge, *16th Census Tract Crisis Committee v. City of Alexandria*,<sup>151</sup> residents of a low-income African-American community in Alexandria, Virginia filed an administrative complaint with HUD contesting an ordinance that designated their community a historic district. The residents feared that designation would cause their eventual displacement by gentrification due to the costs of repair and improvements the

145. *Id.* ¶ 3.

146. COCOA REDEVELOPMENT AGENCY, COCOA REDEVELOPMENT PLAN SUPPLEMENT 19 (1981).

147. Complaint ¶ 4, *City of Cocoa* (No. 89-82-CIV-ORL-19).

148. Displacement by private development would relieve the city not only of the costs associated with acquisition and clearance but also those associated with relocation obligations. See, e.g., *Durham & Sheldon*, *supra* note 136, at 2; *MacDonald*, *supra* note 140, at 956.

149. *Houston v. City of Cocoa*, 2 Fair-Housing-Fair Lending (P-H) ¶ 15,625, at 16,208-09 (M.D. Fla. Dec. 22, 1989).

150. *Id.* at 16,208. For further discussion of the bases of plaintiffs' substantive claims and the holding of the district court, see *infra* notes 236-40 and accompanying text.

151. For a description of the challenge, see Office of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev., Final Investigative Report in *16th Census Tract Crisis Committee v. City of Alexandria* 2-3 (Sept. 19, 1986) [hereinafter *Crisis Committee*] (on file with author).

ordinance required and increased tax assessments resulting from the anticipated rise in property values.<sup>152</sup>

HUD's Office of Fair Housing & Equal Opportunity determined in its final investigative report that the historic designation was "specifically intended to displace low and moderate income Blacks, along with others from the . . . [neighborhood], in order to upgrade properties there, to preserve a period quality of some architecture there, and to promote the rise of property values and attraction of new residents."<sup>153</sup> The report noted that the residents of this new, historic district "necessarily must include a smaller proportion of minorities because of the increased financial outlay necessary . . . and [because] Blacks have by far a lower average income in Alexandria than the white population."<sup>154</sup>

The HUD report also found that the city had knowledge of the anticipated adverse impact of its ordinance on the ability of low-income African-American families to retain housing in the community, and that it had failed to adequately mitigate that impact.<sup>155</sup> HUD concluded that the city's conduct discriminated against African-American community residents in violation of the Fair Housing Act and the Fourteenth Amendment.<sup>156</sup>

#### G. ZONING AND HISPANIC COMMUNITIES

The historic and continuing practices of officially sanc-

152. *Id.*

153. *Id.* at 85.

154. *Id.* (citations to documents omitted).

155. *Id.* at 89. The city's goals of "increasing property values and protecting a few buildings" through the new district were determined "insufficient in themselves (and capable in large part of being accomplished by less drastic means) to outweigh the negative impact on the protected class." *Id.* at 88-89.

156. *Id.* at 90. In language which, under a Reagan administration committed to relatively unrestrained entrepreneurialism, revealed uncharacteristic sensitivity to the potentially negative impacts on low-income African-American communities from encroaching private market development, the report cautioned that "[w]e must never lose sight of this fact . . . that the . . . ordinance, by definition, is intended to apply to a community which is 90% Black and to a very great degree composed of low and moderate income families with children." *Id.* at 4. It continued:

In short, the complainant class is a struggling group of low- or moderate-income minority persons, surrounded by affluence, endeavoring to maintain their traditional neighborhoods and many owner-occupied homes . . . . They . . . give every appearance of representing a distinctive minority culture and tradition in Alexandria, situated in a developmentally desirable section of the City, which is highly vulnerable to the deprivations of an encroaching affluent society.

*Id.* at 16.

tioned zoning and land use discrimination are perhaps most pervasive and well-documented as they pertain to African-American communities.<sup>157</sup> African-Americans have been subjected to the widest variety of *de jure* discriminatory practices,<sup>158</sup> and currently experience the greatest degree of residential segregation.<sup>159</sup> Because physical separation from the dominant majority group enhances the potential for une-

---

157. Other minority groups such as Native-Americans have been subjected to similar discrimination. Although this country's ignominious history of land appropriation and land use discrimination against Native-Americans is beyond the scope of this Article, for references to this history, see generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (examining the role of legal thought in the conquest of the American Indians), and Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713 (1986) (looking at historical and contemporary experience of Native-Americans). For discussion of current issues involving the nature and quality of the residential environment for Native-Americans, see Rossi, *supra* note 135, at 93-95 (discussing the overrepresentation of Native-Americans among the homeless); Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation and the Limits of State Intrusion*, 64 WASH. L. REV. 581 (1989); C. Matthew Snipp & Alan L. Sorkin, *American Indian Housing: An Overview of Conditions and Public Policy*, in RACE, ETHNICITY AND MINORITY HOUSING IN THE UNITED STATES 147 (Jamshid A. Momeni ed., 1986).

158. See also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 390-95 (1978) (Marshall, J., concurring in part and dissenting in part) (describing the "legacy of discrimination" against African-Americans). The Supreme Court has also recognized *de jure* discrimination against Mexican-Americans in the Southwest. See *Hernandez v. Texas*, 347 U.S. 475, 479-80 (1954) (noting that children of Mexican descent had been "required to attend a segregated school . . . . At least one restaurant in town prominently displayed a sign announcing 'No Mexicans Served.' On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked 'Colored Men' and 'Hombres Aqui ('Men Here')."); see also *White v. Register*, 412 U.S. 766, 768 (1973) (upholding lower court finding that "Mexican-Americans in Texas, had long suffered from, and continuè[] to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others."), *vacated as moot*, 422 U.S. 935 (1975); *Jefferson v. Hackney*, 406 U.S. 547, 551-52 (1972) (Douglas, J., dissenting) (noting that 87% of AFDC recipients are blacks or Chicanos and that "Chicanos in Texas fare even more poorly than the blacks.").

159. See Joe T. Darden, *Accessibility to Housing: Differential Residential Segregation For Blacks, Hispanics, American Indians, and Asians*, in RACE, ETHNICITY AND MINORITY HOUSING IN THE UNITED STATES, *supra* note 157, at 107, 124 (finding that blacks are more segregated and less suburban than hispanics, Asians, or Native-Americans); Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373 (1989) (examining segregation levels of blacks and hispanics and concluding that "blacks occupy a unique and distinctly disadvantaged position in the U.S. urban environment."); Margaret L. Udansky, *USA at Home: Streets Still Isolate Races*, USA TODAY, Nov.

qual treatment, inequitable zoning and land use practices have the greatest impact on African-Americans.<sup>160</sup>

Nevertheless, other communities of color—in particular, Puerto Rican and Mexican-American communities [hereinafter hispanics<sup>161</sup>—have similarly experienced substantial govern-

---

11, 1991, at 1A (analyzing 1990 census data revealing blacks to be more segregated than either hispanics or Asians).

160. Cf. Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 776 (1986) (indicating that in practice “‘green follows white’ (that is, in a society where whites remain the majority, the presence of whites in an institution protects that institution against racially unequal distribution of resources”)); James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 362 (1990) (arguing that “desegregation situates formerly discriminating citizens so that they cannot harm their previous victims without harming themselves . . .”).

161. For a discussion of the ambiguity and deficiency of the term “hispanic,” see Alex M. Saragoza et al., *History and Public Policy: Title VII and the Use of the Hispanic Classification*, 5 LA RAZA L.J. (1992); David Gonzalez, *What's the Problem with Hispanic? Just Ask a Latino*, N.Y. TIMES, Nov. 15, 1992, at E6. The other large Hispanic-American ethnic group, Cuban-Americans, is comprised of relatively recent immigrants; most were uprooted by the Cuban revolution and arrived in the United States in the 1960s. Louie A. Woolbright & David J. Hartman, *The New Segregation: Asians and Hispanics, in DIVIDED NEIGHBORHOODS*, *supra* note 78, at 138, 151-53. Because these refugees were primarily middle class and white and received the benefits of government programs designed to aid in their assimilation, they have experienced less residential segregation and are more suburban than either Puerto Ricans or Mexican-Americans. *Id.* at 143-44, 151-52; see also CENTER ON BUDGET AND POLICY PRIORITIES, *SHORTCHANGED: RECENT DEVELOPMENTS IN HISPANIC POVERTY, INCOME AND EMPLOYMENT* 21 (1988) (finding that the typical Cuban family had an income over twice as high as the typical Puerto Rican family and nearly a third higher than the typical Mexican-American family). This situation may change since more recent Cuban immigrants, including many who arrived from the Mariel boat lift of the late 1970s, tend to come from lower-income backgrounds and have African ancestry. Woolbright & Hartman, *supra*, at 152. For a discussion of the relationship of income to residential mobility see *supra* notes 71-77 and accompanying text, and also see *infra* notes 166-67 and accompanying text. For a discussion of the role of race or skin color see *infra* note 165.

Asian-Americans also experience comparatively little residential segregation relative to other racial minority groups. Woolbright & Hartman, *supra*, at 143; Darden, *supra* note 159, at 122-23; Maria Goodavage, *Asians: Not All Fit Successful Stereotype*, USA TODAY, Nov. 12, 1991, at 6A. Asian residential assimilation has occurred notwithstanding a discriminatory land use history which has included explicit racial zoning laws directed against Chinese-Americans and the internment of Japanese-Americans. See, e.g., note 16 and accompanying text (discussing San Francisco's 1890 anti-Chinese ordinance); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of Japanese-Americans). Asian-Americans' success in achieving a wider and superior range of housing opportunities has been attributed to their greater income, wealth, and educational levels than all other racial minority groups.

mental discrimination. Although there are no accounts of explicit racial zoning ordinances directed against these groups, racial covenants were employed extensively against hispanics in the West and Southwest.<sup>162</sup> Public housing site and tenant selection<sup>163</sup> and urban renewal policy have also served to confine hispanics to segregated and inferior housing.<sup>164</sup>

Residential opportunities for hispanics have also been constricted by racial discrimination in the private housing market. Private market studies reveal that hispanics, particularly those who are dark-skinned, suffer substantial private housing discrimination.<sup>165</sup> Because of their extreme poverty,<sup>166</sup> hispanics,

---

Darden, *supra* note 159, at 122-23; see also Julia L. Hansen, *Housing Problems of Asian Americans, in RACE, ETHNICITY AND MINORITY HOUSING IN THE UNITED STATES*, *supra* note 157, at 177, 186 (revealing that U.S. census data shows all Asian ethnic groups except the Vietnamese have median incomes, education levels, and employment in managerial or professional occupations in excess of whites). Nevertheless, some Asian-American communities, which have remained low-income in character, have confronted some of the incompatible zoning and planning practices discussed herein. See, e.g., *Asian-Americans For Equality v. Koch*, 527 N.E.2d 265 (N.Y. 1988) (challenge to government-assisted gentrification in New York's Chinatown); *Chinese Staff & Worker's Ass'n v. City of New York*, 502 N.E.2d 176 (N.Y. 1986) (same).

162. See ABRAMS, *supra* note 78, at 52; see also *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App. 1948) (challenging restrictive covenant prohibiting ownership or usage of property by persons of Mexican descent); *Mathews v. Andrade*, 198 P.2d 66 (Cal. Ct. App. 1948) (same).

163. See *Flournoy & Rodrigue*, *supra* note 89 (finding that both blacks and hispanics in 47 cities live in public housing projects separate from and inferior in services, location, condition and amenities to white-occupied projects); *Blackshear Residents Org. v. Housing Auth. of Austin*, 347 F. Supp. 1138, 1140-42 (W.D. Tex. 1971) ("[F]rom 1938 to 1967, it was the official policy . . . to segregate Anglos, Negroes and Mexican-Americans into different public housing projects.").

164. See, e.g., *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 925 (2d Cir. 1968) (finding that "[s]ome of the displaced . . . Puerto Rican families have been compelled to move into overcrowded housing, some into housing in excess of their financial means, and some into housing outside of the City"); *La Raza Unida v. Volpe*, 337 F. Supp. 221, 233 (N.D. Cal. 1971) (several groups, including a Mexican-American citizens group, challenged a federal-aid highway project because of displacement and inadequate relocation), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

165. See JON HAKKEN, *DISCRIMINATION AGAINST CHICANOS IN THE DALLAS RENTAL HOUSING MARKET: AN EXPERIMENTAL EXTENSION OF THE HOUSING MARKET PRACTICES SURVEY* (1979) (finding that dark-skinned Mexican-Americans faced a far higher probability of experiencing at least one incident of discrimination in a typical housing search than light-skinned Mexican-Americans); *Woolbright & Hartman*, *supra* note 161, at 150-51 (noting that Puerto Ricans' African ancestry explains in part their greater degree of residential segregation than all other hispanic groups); Margaret L. Udansky, *Hispanics: Caught in the Middle, Puerto Ricans are Facing the Most Isolation*, USA TODAY, Nov. 12, 1991, at 6A; cf. *Ranjel v. City of Lansing*, 293 F. Supp.

like African-Americans, are particularly vulnerable to exclusionary zoning and similar measures that limit residential opportunities by increasing the cost of housing.<sup>167</sup>

Governments have also engaged in conduct that has diminished the quality of the residential environment within hispanic communities. This conduct includes the failure to provide adequate basic municipal services,<sup>168</sup> the relocation or non-location

301, 308 (W.D. Mich.) (“[B]ecause of economic, social and cultural disadvantages of Mexican-Americans in the Lansing area, as well as their darker complexion, they also are victims of racial discrimination within the meaning of the thirteenth amendment.”), *rev'd*, 417 F.2d 321 (6th Cir.), *cert. denied*, 397 U.S. 980 (1969); ABRAMS, *supra* note 78, at 73 (1955) (finding that dark skinned Mexicans face similar “exclusions and discriminations” as blacks, and that Puerto Ricans “rated black by mainland standards” face housing discrimination).

166. 1990 U.S. census data reveals that 40.6% of Puerto Ricans and 28.1% of Mexican-Americans live below the poverty level, as compared with 31.9% of African-Americans and only 10.7% of whites. CENTER ON BUDGET AND POLICY PRIORITIES, 1990 POVERTY TABLES 3, 25 (1992). For an analysis of the declining economic status of Puerto Ricans relative to other hispanics, see Marta Tienda, *Puerto Ricans and the Underclass Debate*, 501 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 105, 105-19 (1989).

167. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975) (challenging zoning ordinance because of their exclusionary impact on low-income African-Americans and Puerto Ricans); Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (challenging zoning ordinance which increased the cost of housing and precluded residency by low-income Mexican-Americans); Southern Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291 (9th Cir. 1970) (challenging city council's failure to rezone tract to permit development of housing affordable to Mexican-Americans); *see also* CHARLES L. COTRELL, MUNICIPAL SERVICES EQUALIZATION IN SAN ANTONIO, TEXAS: EXPLORATIONS IN 'CHINATOWN' 7-9 (The Southwest Urban Studies Series Vol. 2, George A. Benz ed., 1976) (suggesting that after the invalidation of racial covenants, the residential containment of Mexican-Americans in San Antonio was accomplished, in part, through minimum cost requirements in deeds).

168. *See* Katzenbach v. Morgan, 384 U.S. 641, 643, 652-53 (1966) (suggesting that ban on English literacy voting requirements for persons educated in Puerto Rico in the Voting Rights Act of 1965 “may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment . . . in . . . the provision or administration of governmental services, such as public schools, public housing and law enforcement”); Peter A. Lupsha & William J. Siembieda, *The Poverty of Public Services in the Land of Plenty*, in THE RISE OF THE SUNBELT CITIES 169, 183 (David C. Perry & Alfred J. Watkins eds., 1977) (discussing fact that railroad tracks or “Las Trackas,” as South Texas Chicanos refer to them, created “color, class, and ethnic separation” as well as “the line for the disparate provision of public services”); *see also* Jimenez v. Hidalgo County Water Dist. No. 2, 68 F.R.D. 668 (S.D. Tex. 1975) (challenging the exclusion of Mexican-American owned land from a Texas water district and resulting denial of water, sewage, and drainage services), *aff'd mem.*, 424 U.S. 950 (1976). For an analysis of the litigation in *Jimenez*, *see* Peter H. Weiner, *Water, Water Everywhere: Power Flows in the Lower Rio Grande Valley*, 54 U. DET. J. URB. L. 743 (1977).



of important public institutions,<sup>169</sup> and incompatible zoning. For example, in his study of municipal services in San Antonio, Texas, political scientist Charles L. Cotrell documented the disparate provision of protective zoning to San Antonio's Mexican-American neighborhoods. After identifying zoning policy as "those almost invisible decisions which determine so much of the residential quality of life in the city,"<sup>170</sup> Professor Cotrell explained his findings:

For purposes of this study, it is assumed that residential integrity—residential areas which are basically intact and free from various categories of commercial zoning—are basically desirable environments. Further, on requests for changes from residential to commercial zoning, it is assumed that the Zoning Commission would adopt a decision-making pattern which either affirmed (protected) neighborhood integrity (by denying requests for changes from residential to commercial categories) or did not protect neighborhood integrity (by affirming high percentages of requests from residential to commercial categories). . . . The measured effect of these decisions seems to be clear: the decisions of the Anglo-dominated Zoning Commission protect neighborhood integrity by denying commercial encroachment on the Northside at a consistently higher rate than in the barrios. Administrative domination thus has the effect of reinforcing through zoning decisions the physical environment of the barrio.<sup>171</sup>

Finally, hispanic communities have also been subjected to the two modern-day land use threats discussed herein: the disparate siting of environmentally degrading uses<sup>172</sup> and govern-

169. See, e.g., *United States v. Bexar County*, 484 F. Supp. 855 (W.D. Tex. 1980) (challenging the relocation of a public hospital's maternity and newborn nursery units from Mexican-American inner-city neighborhood to predominantly "anglo" suburban community in San Antonio); *St. Luke's Community Coalition v. St. Luke's Roosevelt Medical Ctr.*, Administrative Complaint Filed with United States Dep't of Health & Human Servs. (Apr. 3, 1991) (challenging the relocation of government subsidized obstetric, neonatal, and pediatric ward from mostly Puerto Rican section of southwest Harlem to midtown Manhattan).

170. COTRELL, note 167, at 22.

171. *Id.* at 23-24; see also Rabin, *supra* note 11, at 118 (observing incompatible zoning and commercial encroachment in El Paso's Mexican-American community); *Ranjel v. City of Lansing*, 293 F. Supp. 301, 304 (W.D. Mich.) (finding that both blacks and Mexican-Americans have been displaced by industrial expansion in Lansing), *rev'd*, 417 F.2d 321 (6th Cir.), *cert. denied*, 397 U.S. 980 (1969).

172. See TOXIC WASTES AND RACE, *supra* note 111, at 20-21 (finding a comparable pattern of disproportionate siting of uncontrolled toxic waste facilities in hispanic and black communities); see, e.g., *El Pueblo Para El Aire Y Agua Limpio v. County of Kings*, No. 366045 (Cal. App. Dep't Super. Ct. Dec. 30, 1991) (writ of mandate granted on state environmental grounds, setting aside conditional use permit to operate a toxic waste facility in an hispanic community), *further proceedings*, (Cal. App. Dep't Super. Ct. June 22, 1992) (denying motion for new trial). For a discussion of the litigation in *El Pueblo*, see Susan

ment-induced gentrification.<sup>173</sup>

## II. THE RIGHT TO PROTECTIVE ZONING

### A. THE PREMATURE DEMISE OF MUNICIPAL SERVICES EQUALIZATION LITIGATION

As discussed in Part I, appropriate zoning protection is a critically important government service in determining the quality of a community's residential environment. The disparate denial of zoning protection, as with the denial of other important government services and benefits, implicates the protections of anti-discrimination and due process law.

The Fifth Circuit's decisions in *Hawkins v. Town of Shaw*<sup>174</sup> represent the high-water mark in judicial efforts to secure equality in the provision of municipal services for communities of color. In *Hawkins*, black residents of a Mississippi Delta town characterized by virtual one hundred percent residential segregation<sup>175</sup> challenged extreme disparities in the provision of basic municipal services. Blacks occupied nearly ninety-eight percent of the homes that fronted on unpaved streets and ninety-seven percent of the homes lacking sanitary sewers.<sup>176</sup> The black community was similarly deprived of surface water drainage, street lighting, water mains, and fire hydrants.<sup>177</sup>

Accepting the undisputed statistical evidence of disparities in services, the district court nonetheless ruled against the plaintiffs.<sup>178</sup> The court did not view these dramatic disparities

Dianne Rice, *Waste Incinerator's Location Amounts to 'Environmental Racism'*, *Suit Says*, SAN FRAN. DAILY J., Feb. 7, 1991, at 1.

173. See, e.g., *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 430 (1st Cir. 1983) (upholding standing of low-income blacks and hispanics to challenge government-induced gentrification); *Pleune v. Pierce*, 697 F. Supp. 113 (E.D.N.Y. 1988), *further proceedings*, 765 F. Supp. 43 (E.D.N.Y. 1991) (granting summary judgment to plaintiffs on their Title VII claim and nullifying HUD approval of a development project); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106, 1119 (D.D.C. 1987) (granting preliminary injunction against eviction of low-income hispanic and black tenants who were unable to pay increased rents caused by government-subsidized apartment renovations), *stay granted in part*, 691 F. Supp. 1459 (D.D.C. 1987).

174. 437 F.2d 1286 (5th Cir. 1971), *aff'd on reh'g per curiam*, 461 F.2d 1171 (5th Cir. 1972) (en banc).

175. The town of Shaw consisted of 2500 people of whom 1500 were black; 97% of the black residents lived in neighborhoods in which no whites resided. *Id.* at 1288.

176. *Id.*

177. *Id.* at 1289-91.

178. *Hawkins v. Town of Shaw*, 303 F. Supp. 1162 (N.D. Miss. 1969), *rev'd*,

as the result of intentional discrimination based on race or poverty,<sup>179</sup> but rather as the product of a "policy of slowly providing basic municipal services to the town's inhabitants," based on "general usage, traffic needs, adequate rights of way and other objective criteria," or physical impediments to the provision of equal services.<sup>180</sup> Accordingly, the district court concluded that the city's service delivery practices satisfied the rational basis standard of equal protection scrutiny.<sup>181</sup>

On appeal, Judge Tuttle's opinion for the panel's majority evinced immediate recognition of the nature and character of underserved communities such as plaintiffs' neighborhood. In his opening paragraph, Judge Tuttle referred to the phrase "on the other side of the tracks," noting that it "conjures up an area characterized by poor housing, overcrowded conditions and, in short, overall deterioration."<sup>182</sup> He concluded that "[w]hile there may be many reasons why such areas exist in nearly all of our cities, one reason that cannot be accepted is the discriminatory provision of municipal services based on race."<sup>183</sup>

Although he accepted the lower court's factual finding that the gross disparities in services did not result from purposeful discrimination, Judge Tuttle provided a sweeping rejection of the district court's standard for evaluating those disparities. He reasoned that discriminatory intent or motive did not have to be directly proven, concluding that "we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."<sup>184</sup> The plaintiffs' demonstra-

---

437 F.2d 1286 (5th Cir. 1971), *aff'd on reh'g per curiam*, 461 F.2d 1171 (5th Cir. 1972) (en banc). While not a part of the plaintiffs' allegations, the district court observed that the absence of zoning protection exacerbated the neighborhoods' squalid housing conditions. *Id.* at 1169.

179. The plaintiffs abandoned their claim of poverty or wealth discrimination on appeal. See *Hawkins*, 437 F.2d at 1287 n.1. For a discussion of approaches addressing service disparities predicated on wealth discrimination and notions of "minimal adequacy" as opposed to equality, see DIMOND, *supra* note 91, at 147-82; Martin A. Schwartz, Comment, *Municipal Services Litigation After Rodriguez*, 40 BROOK. L. REV. 93, 97-100 (1973); cf. *Kadmas v. Dickinson Public Schs.*, 487 U.S. 450, 461 n.1 (1988) (Marshall J., dissenting) (observing that the question of whether denial of a "minimally adequate education . . . would violate fundamental constitutional right" remains open).

180. *Hawkins*, 303 F. Supp. at 1168-69.

181. *Id.* at 1169.

182. *Hawkins*, 437 F.2d at 1287.

183. *Id.*

184. *Id.* at 1292 (quoting *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 931 (2d Cir. 1968)).

tion of the discriminatory effects of the town's municipal services practices thus established a *prima facie* violation of the Equal Protection Clause.<sup>185</sup> After determining that "no compelling state interests [could] possibly justify the discriminatory results of Shaw's administration of municipal services,"<sup>186</sup> Judge Tuttle concluded that the town violated the Equal Protection Clause.<sup>187</sup>

On *en banc* rehearing, the full court reaffirmed the panel's decision.<sup>188</sup> In its *per curiam* opinion, the majority reemphasized that it is not necessary to prove intentional discrimination under the Equal Protection Clause.<sup>189</sup> Judge Wisdom specially concurred, hailing the *en banc* court's decision as recognition of "the right of every citizen regardless of race to equal municipal services."<sup>190</sup>

Judge Wisdom's sweeping proclamation created a new, but short-lived, right. Four years after *Hawkins*, in *Washington v. Davis*,<sup>191</sup> the Supreme Court definitively and unambiguously established a discriminatory intent requirement under the Equal Protection Clause. Referring to the courts of appeals that had found "substantially disproportionate racial impact" sufficient to establish an equal protection violation, the majority stated that "with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement."<sup>192</sup> *Hawkins* was among the decisions the Court expressly disapproved.<sup>193</sup>

Since *Washington v. Davis*, race-based equalization litigation has been declared dead, or at least gravely wounded, with

---

185. *Id.* at 1288.

186. *Id.* at 1292.

187. *Id.* In his concurring opinion, Judge Bell found the town's non-racial explanations for the service disparities inadequate; he would have reversed the lower court on the narrower ground that the finding of non-purposeful discrimination was "clearly erroneous." *Id.* at 1293-94 (Bell, J., concurring).

188. *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972) (*per curiam*) (*en banc*).

189. *Id.* at 1172-73.

190. *Id.* at 1175 (Wisdom, J., concurring). Judges Roney and Clark authored dissenting opinions excoriating the *en banc* majority for enunciating a constitutional standard which authorized the usurpation of local city planning decisions by substituting "one non-compelling list of priorities for another." *Id.* at 1180 (Roney, J., dissenting); see also *id.* at 1185-86 (Clark, J., dissenting) (hypothesizing instance of "priority substitution").

191. 426 U.S. 229 (1976).

192. *Id.* at 244-45.

193. *Id.* at 244 n.12.

the suggestion that affected communities seek redress in the political arena<sup>194</sup> or through resort to the common law.<sup>195</sup> Indeed, even prior to *Davis*, at least one commentator opined that the *Hawkins* decision had provided a greater service to the community of academics than to communities of color.<sup>196</sup> While the difficulties inherent in systemic race discrimination litigation of any form in the 1990s cannot be overstated,<sup>197</sup> there is reason to believe that the reported death of equalization litigation has been somewhat exaggerated.<sup>198</sup>

## B. THE FAIR HOUSING ACT

Recent amendments and judicial interpretations of Title VIII of the Civil Rights Act of 1968, commonly referred to as

---

194. See Ralph A. Rossum, *The Rise and Fall of Equalization Litigation*, 7 CURRENT MUN. PROB. 58, 72 (1980) (arguing that the "demise of equalization litigation" places responsibility for redress of service inequities with elected officials and government agencies); cf. Godsil, *supra* note 111, at 420-25 (analyzing environmental racism as a municipal services disparity issue and suggesting that judicial remedies will continue to be insufficient unless Congress enacts a law containing a "disparate impact" standard).

195. See CHARLES M. HAAR & DANIEL W. FESSLER, *THE WRONG SIDE OF THE TRACKS: A REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION IN THE STRUGGLE AGAINST INEQUALITY* 15-20 (1986).

196. Clark Waddoups, Comment, *Hawkins v. Town of Shaw-Equal Protection and Municipal Services: A Small Leap For Minorities But A Giant Leap For The Commentators*, 1971 UTAH L. REV. 397. For validation of the first part of this proposition, see Martin A. Schwartz, Comment, *Municipal Services Litigation After Rodriguez*, 40 BROOK. L. REV. 93, 94 & n.6 (1973) (collecting articles and observing that there are many on the subject).

197. See generally Derrick A. Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (discussing why legal formalism has provided barriers to racial justice litigation and challenging the principle of racial equality); Calmore, *supra* note 15, at 225-35 (examining the link between racism and classism, and how traditional legal approaches fail to address the needs of the black poor).

198. The emerging recognition of the need to develop approaches for securing locational justice for persons of color not predicated solely on facilitating access to white communities may revitalize interest in community improvement advocacy. See, e.g., BELL, *supra* note 69, §§ 8.10, 8.13; Calmore, *supra* note 7, at 104-09; Calmore, *supra* note 15, at 237-244; John O. Calmore, *Fair Housing vs. Fair Housing: The Problem with Providing Increased Housing Opportunities Through Spatial Deconcentration*, 14 CLEARINGHOUSE REV. 7 (1980); Ankur J. Goel, *Maintaining Integration Against Minority Interests: An Anti-Subjugation Theory for Equality in Housing*, 22 URB. L. 369 (1990); McGee, *supra* note 13, at 39-44; Ankur J. Goel et al., Comment, *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker than Brown*, 23 HARV. C.R.-C.L. L. REV. 415 (1988); Michael R. Tein, Comment, *The Devaluation of Nonwhite Community in Remedies For Subsidized Housing Discrimination*, 140 U. PA. L. REV. 1463 (1992).

the Fair Housing Act,<sup>199</sup> provide a standard of liability for addressing municipal services disparities comparable to that enunciated in *Hawkins*. Enacted within a month after the release of the *Kerner Commission Report*<sup>200</sup> and the murder of Dr. Martin Luther King, the Fair Housing Act declared that the United States must "provide within constitutional limitations for Fair Housing throughout the United States."<sup>201</sup>

While saying little about the Act's substantive contours, the Supreme Court did mandate that the courts use "a generous construction"<sup>202</sup> of the Act to achieve a policy Congress considered to be of the highest priority. The primary provisions of the law prohibit discrimination in the sale or rental of housing or through conduct that otherwise makes housing unavailable,<sup>203</sup> and proscribe discrimination in the terms, conditions, or privileges of the sale or rental of housing or in the services or facilities connected therewith.<sup>204</sup> Lower courts applying the Supreme Court's "generous construction" mandate have extended these provisions to a range of discriminatory practices beyond the mere sale or rental of housing, including racial steering,<sup>205</sup> race-based appraisal practices,<sup>206</sup> redlining,<sup>207</sup> exclusionary zoning and planning,<sup>208</sup> public housing site selec-

---

199. The current version of the Fair Housing Act is the product of two enactments: The Civil Rights Act of 1968, The Fair Housing Act, Title VIII, Pub. L. No. 90-284, 82 Stat. 73; and the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 5.1 (1990). The Act is codified as amended at 42 U.S.C. §§ 3601-3631 (1988 & Supp. I 1989, Supp. II 1990).

200. See KERNER COMM'N, *supra* note 7.

201. 42 U.S.C. § 3601 (1988). For a discussion of the significance of the Kerner report and the King assassination in averting a filibuster and securing the Act's passage, see SCHWEMM, *supra* note 199, § 5.2.

202. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-10 (1972); see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 93 (1978).

203. 42 U.S.C. § 3604(a) (1988) (prohibiting discrimination on the basis of race, color, religion, sex, familial status, or national origin).

204. § 3604(b) (1988).

205. See, e.g., *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990); *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978).

206. See, e.g., *Hanson v. Veterans Admin.*, 800 F.2d 1381 (5th Cir. 1986); *United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978).

207. See, e.g., *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976).

208. See, e.g., *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 929-30 (2d Cir. 1988), *review declined in part and judgment aff'd*, 488 U.S. 15 (1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. de-*

tion and demolition,<sup>209</sup> and discriminatory community development activities.<sup>210</sup>

HUD regulations implementing the 1988 amendments to the Act now clarify that discrimination in the provision of services falls within the coverage of section 3604(b).<sup>211</sup> In addition, the regulations also extend coverage of section 3604(a) to the disparate provision of municipal services that renders housing unavailable or less available.<sup>212</sup>

Significantly, the Fair Housing Act does not require a finding of intentional discrimination to establish a violation.<sup>213</sup> The Supreme Court has not directly addressed the issue, but it recently affirmed a decision of the Second Circuit applying a discriminatory impact or effects standard in *Huntington Branch NAACP v. Town of Huntington*.<sup>214</sup> In its *per curiam* affirmation of *Huntington*, the Supreme Court at least tacitly approved an effects standard, stating: "Without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the *prima facie* case was inadequate."<sup>215</sup> In addition, there is no circuit conflict on this point,

nied, 435 U.S. 908 (1978); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

209. See, e.g., *Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637, 641-42 (D.R.I. 1991); *Tinsley v. Kemp*, 750 F. Supp. 1001 (W.D. Mo. 1990).

210. *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *aff'd as modified*, 661 F.2d 562 (6th Cir. 1981).

211. See 24 C.F.R. § 100.70(d)(4) (1992); see also *Concerned Tenants Ass'n of the Indian Trails Apts. v. Indian Trails Apts.*, 496 F. Supp. 522, 525-26 (N.D. Ill. 1980) (finding that disparities in apartment maintenance provided to black-occupied housing complex constitutes a claim under § 3604(b)). Compare *Laramore v. Illinois Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989) ("[S]ervices or facilities' [in the F.H.A.] refers to 'services generally provided by governmental units such as police and fire protection or garbage collection.'") with *Vercher v. Harrisburg Hous. Auth.*, 454 F. Supp. 423, 424-25 (M.D. Pa. 1978) (finding police protection too attenuated from housing to permit coverage under the Fair Housing Act).

212. See 24 C.F.R. § 100.65(b)(4) (1992); see also *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1291 n.9 (S.D.N.Y. 1985) ("[Section 3604(a)] has been construed to reach 'every practice which has the effect of making housing more difficult to obtain on prohibited grounds.'" (citation omitted), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

213. For discussion of the legislative history of the 1968 and 1988 Acts supporting the application of a discriminatory effects standard, see SCHWEMM, *supra* note 199, § 10.4(1); Florence W. Roisman & Philip Tegeler, *Improving and Expanding Housing Opportunities for Poor People of Color*, 24 CLEARING-HOUSE REV. 312, 315 n.16 (1990).

214. 488 U.S. 15 (*per curiam*), *aff'g* 844 F.2d. 926 (2d Cir. 1988).

215. *Id.* at 18; see SCHWEMM, *supra* note 199, § 13.4(3)(c) (Supreme Court

with courts in virtually every circuit having approved some version of a discriminatory effects standard under the Fair Housing Act.<sup>216</sup>

Under the leading formulation of the discriminatory effects standard,<sup>217</sup> the plaintiff has the burden of proving the discriminatory impact or effects from the defendant's conduct. The

---

affirmance in *Huntington* "produced a powerful endorsement of the discriminatory effect theory"); James A. Kushner, *The Fair Housing Act Amendments of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1075 (1989) (stating that "*Huntington* presents the Court's most significant tacit endorsement of the Fair Housing Act's *prima facie* effects test").

216. See, e.g., *Keith v. Volpe*, 858 F.2d 467, 482 (9th Cir. 1988), *cert. denied sub nom. City of Hawthorne v. Wright*, 493 U.S. 813 (1989); *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir.), *review declined in part and judgment aff'd.*, 488 U.S. 15 (1988); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir. 1984); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); *United States v. City of Parma*, 661 F.2d 562, 576 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *McGrath v. United States Hous. & Urban Dev.*, 722 F. Supp. 902, 907 (D. Mass. 1989); *Brown v. Artery Org. Inc.*, 654 F. Supp. 1106, 1115-16 (D.D.C. 1987) (effects standard only applies to government defendants).

217. Courts of appeals utilize three formulations of the discriminatory effects standard. The Eighth Circuit, borrowing equal protection concepts, requires defendants, upon a showing of discriminatory effects, to demonstrate that the challenged conduct serves a compelling interest. See *United States v. City of Black Jack*, 508 F.2d at 1185. The Seventh Circuit applies a four-factor calculus for evaluating whether a defendant's conduct produces impermissible discriminatory effects. See *Arlington Heights*, 558 F.2d at 1290. Those factors are: first, the strength of the showing of discriminatory effect; second, whether there is some evidence of discriminatory intent though not enough to satisfy the constitutional standard of *Washington v. Davis*; third, the strength of defendant's interest in taking the action complained of; and fourth, whether plaintiff is seeking to compel defendant affirmatively to provide housing to members of minority groups or merely to restrain defendant from interfering with the development of such housing. *Id.* at 1290. The standard utilized by the Second and Third Circuits and discussed *infra* is based on the disparate impact test developed in Title VII cases. See *Huntington*, 844 F.2d at 935 (relying on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)); *Rizzo*, 564 F.2d at 126, 147-48 (same). While the Supreme Court's evisceration of the *Griggs* standard in *Ward's Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) probably did not have a similar effect on the Title VIII burden of proof, the recent restoration of *Griggs* through the passage of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 193 Stat. 1071, 1074 (1991) renders that issue all but moot. See John M. Payne, *Fair Housing for the 1990s: The Fair Housing Amendments Act and the Ward's Cove Case*, 18 REAL EST. L.J. 307, 338-41 (1990) (asserting that *Ward's Cove's* modifications to the *Griggs* standard are employment-specific and not applicable to the *Huntington* approach to Title VIII land use mat-



plaintiff may make a *prima facie* showing of discriminatory effects through proof that either the defendant's conduct has a disparate adverse impact on a protected class,<sup>218</sup> or the defendant's conduct will have the ultimate effect of perpetuating segregation in the community.<sup>219</sup> Once the plaintiff has demonstrated discriminatory effects, the burden of proof shifts to the defendant to establish both a legitimate and *bona fide* justification or purpose the challenged conduct serves and the absence of less discriminatory alternatives to further that purpose.<sup>220</sup>

The less discriminatory alternatives component of this standard provides a powerful tool for addressing land use discrimination and inequality. Virtually any land use regulation can be justified by an arguably neutral and legitimate government objective.<sup>221</sup> Yet many alternative approaches may accomplish those governmental objectives with less residential disruption or degradation in communities of color.<sup>222</sup>

---

ters); Roisman & Tegeler, *supra* note 213, at 322-24; see also 42 U.S.C.A. § 2000e-2(k) (West Supp. 1992) (restoring the *Griggs* standard to Title VII).

Because the Supreme Court evaluated and did not disapprove the *Huntington* standard and because the Second Circuit is apparently the only court of appeals to consider the propriety of all three standards before selecting the Third Circuit's test, the *Huntington* standard probably enjoys the greatest chance of longevity. See *Huntington*, 844 F.2d at 936-39 (analyzing the various effects standards). For a discussion of the superiority of the Third Circuit's standard eventually adopted in *Huntington*, see Robert G. Schwemm, *Discriminatory Effects and the Fair Housing Act*, 54 NOTRE DAME L. REV. 199, 257-58 (1978). Professor Schwemm has also suggested that there may be little appreciable difference in these standards in application. See SCHWEMM, *supra* note 199, § 10.4 (2)(b); cf. *Elliot v. City of Athens*, 960 F.2d 975, 983-84 & n.13 (11th Cir. 1992) (citing *Arlington Heights*, *Black Jack*, and *Huntington* with approval).

218. Disparate impact may be proven by showing that a greater number of the protected class are aggrieved by the challenged conduct, that they are disproportionately affected, or that they have experienced qualitatively greater harm. See Roisman & Tegeler, *supra* note 213, at 317-18 (citing cases).

219. *Huntington*, 844 F.2d at 937.

220. *Id.* at 936.

221. See, e.g., *James v. Valtierra*, 402 U.S. 137 (1971) (holding that a mandatory referendum requirement for the construction of public housing for low-income families was justified as a procedure for democratic decision making). See generally Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1 (1988) (discussing the unpredictable nature of inquiry into legislative motive and proposing criteria and guidelines for deciding when courts should evaluate it in municipal land use regulation).

222. See Crisis Committee, *supra* note 151, at 89 (finding that the City's goals of increasing property values and protecting buildings through designation of gentrification-inducing historic district were "capable in large part of

In addition, applying analogous precedents under Title VII of the Civil Rights Act of 1964,<sup>223</sup> discriminatory conduct that commenced prior to the Act's passage should have become actionable on the Act's effective date.<sup>224</sup> In *Bazemore v. Friday*,<sup>225</sup> the Court specifically held that

[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute.<sup>226</sup>

As Justice Brennan explained, in reasoning equally applicable to Title VIII and land use discrimination, "to hold otherwise would have the effect of exempting from liability those . . . who were historically the greatest offenders of the rights of blacks."<sup>227</sup> It would also perpetuate indefinitely the continuing destructive consequences of historic discrimination. Applying this reasoning, service disparities that commenced decades earlier, which were never fully eradicated, and which continue to diminish the residential well-being of communities of color in the 1990s should be actionable under the Fair Housing Act. Those disparities became actionable on the Act's effective date, and local government's ongoing failure to rectify them constitutes a continuing violation of the Act.<sup>228</sup>

The *Bazemore* approach provides a framework for addressing another significant obstacle in municipal services equalization litigation that the Second Circuit identified in *Beal v.*

---

being accomplished by less drastic means. . . ."); *supra* notes 151-56 and accompanying text.

223. 42 U.S.C. § 2000e to § 2000e-17 (1988 & Supp. II 1990).

224. See Roisman & Tegeler, *supra* note 213, at 327-28 (explaining the relevance of *Bazemore v. Friday*, 478 U.S. 385 (1986) (per curiam), to a Fair Housing Act pattern and practice claim).

225. 478 U.S. 385 (1986) (per curiam).

226. *Id.* at 395 (Brennan, J., concurring in part).

227. *Id.*

228. While the Fair Housing Act only has a two-year statute of limitations, conduct that continues into the limitation period is actionable. See *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1374 n.72 (S.D.N.Y. 1985) (finding that a challenge to the continuing failure to remedy 30-year pattern of discriminatory site selection of public housing was not time-barred), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *United States v. City of Parma*, 661 F.2d 562, 573 (6th Cir. 1981) (holding that a challenge to 6-year pattern of exclusionary zoning and planning was not time-barred), *cert. denied*, 456 U.S. 926 (1982); *Concerned Tenants Ass'n of Indian Trails Apts. v. Indian Trails Apts.*, 496 F. Supp. 522, 526 (N.D. Ill. 1980) (holding that challenge to 4-year pattern of providing disparate services and facilities to residents of black-occupied apartment complex was not time-barred).

*Lindsey*.<sup>229</sup> In *Beal*, the court held that equality of service inputs, as opposed to outputs or results, satisfied a city's responsibility to provide equality of municipal services.<sup>230</sup> Hence, the substandard or poor physical condition of a park in a Puerto Rican and African-American community was not actionable because the city provided park maintenance inputs at a level equivalent to that provided for park maintenance in the white communities.<sup>231</sup> The court concluded that the greater prevalence of vandalism, not the city's service allocation, accounted for the disparities in the relative condition of the parks.<sup>232</sup>

In situations where the lingering effects of historical discrimination preclude equality of services, notwithstanding equal or even greater service inputs in communities of color, *Bazemore* provides an approach for securing equal services outputs by addressing the historical inequalities.<sup>233</sup> For example, if a city installed inferior water mains in a minority community fifty years ago and that community presently receives a disparate level of water services outputs as a result, the city could be required to equalize the water mains, or otherwise provide equivalent water outputs, notwithstanding equal or even greater water services inputs to the minority community. Similarly, if a city selected a minority community to shoulder a disparate burden of environmentally undesirable uses and attempted to justify its sitings based on the greater relative "suitability" of the community for such uses, plaintiffs could compel the city to remedy the lingering effects of the historic discriminatory zoning and planning practices that rendered the community less residentially suitable in the first instance.<sup>234</sup>

---

229. 468 F.2d 287 (2d Cir. 1972); see HAAR & WOLF, *supra* note 5, at 660 (suggesting the equality of input defense from *Beal* is a significant obstacle to federal relief in equalization cases); Rossum, *supra* note 194, at 68-69 (same).

230. *Beal*, 468 F.2d at 290-91.

231. *Id.* at 291-92.

232. *Id.*

233. This approach derives at least implicit support from the Second Circuit's decision in *Beal*. See *id.* at 290 (finding no duty to attain equal results from services when equal input of services is provided where "the factor requiring added effort is not the result of past illegal action").

234. Under the *Huntington* standard, the city would also have to prove that its purportedly neutral justification—the siting of LULUs in environmentally suitable locations—could not be accomplished through less discriminatory alternatives. See *supra* note 127 (suggesting approaches for averting the "environmental suitability" defense asserted in *R.I.S.E., Inc. v. Kay* and *East Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*). Other obstacles to land use and services equalization litigation remain. Where there are "invincible physical impediments" and, thus, no less discriminatory

*Houston v. City of Cocoa* illustrates the potential value of the Fair Housing Act in addressing long term historic and present day land use inequality.<sup>235</sup> In highlighting the ongoing environmental intrusions stemming from the defendants' historic discriminatory incompatible zoning, the plaintiffs alleged that "heavy commercial zoning has caused: first, the intrusion of garages, auto body shops, machine shops and other uses incompatible with the homes and apartments in the neighborhood; second, the replacement of many homes by those business uses; and third, the displacement of black residents from their homes."<sup>236</sup> The plaintiffs claimed that the "City's long-term heavy commercial zoning of the Neighborhood has diminished the quality and safety of the area and has injured Plaintiffs by bringing loud noises, noxious odors, ugly and blighted appearances and increased traffic to a formerly peaceful and residential community."<sup>237</sup> In seeking a remedy for the entirety of the city's practices under the Fair Housing Act, plaintiffs alleged that the city's conduct "serve[d] to perpetuate the results of a long history of racial discrimination by the City against black residents of the neighborhood."<sup>238</sup>

The virtually all-black community suffered obvious adverse impacts from the city's destructive zoning and planning practices. In addition, both the incompatible commercial zoning and the gentrification-inducing rezoning resulted in increasing segregation by displacing plaintiffs from the only section of black-occupied housing on the white side of the railroad tracks,

---

alternatives to a contested allocation of services, a challenge would fail. See HAAR & FESSLER, *supra* note 195, at 260-61 n.20. A suit would also be precluded where the disparities or disruptions in the residential environment are entirely attributable to the acts of non-governmental third parties. Cf. *Beal*, 468 F.2d at 289-91; Marcuse, *supra* note 135, at 1358 ("displacement by tornado" does not ordinarily create a right of action against government). Finally, the absence of sufficient statistical evidence of service disparities would preclude the demonstration of a *prima facie* violation of the Act. Cf. *Bean v. Southwestern Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979) (no disparities in the siting of solid waste facilities); *Burner v. Washington*, 399 F. Supp. 44, 52 (D.D.C. 1975) (no "significant difference" in the levels of various municipal services provided to black and white communities). These types of obstacles are present in virtually all categories of pattern and practice civil rights litigation.

235. *Houston v. City of Cocoa*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,625 (M.D. Fla. Dec. 22, 1989) (order denying defendant's motion to dismiss); see *supra* notes 141-150 and accompanying text (discussing *City of Cocoa*).

236. Complaint ¶ 80, *City of Cocoa* (No. 89-82-CIV-ORL-19).

237. *Id.* ¶ 82.

238. *Id.* ¶ 95. Plaintiffs also challenged both the adverse impact and segregative ultimate effects of the city's conduct. *Id.* ¶¶ 82-96.

resulting potentially in the loss of one-sixth of the city's black population.<sup>239</sup> In denying defendants' motion to dismiss, the district court found the contested long-term denial of protective zoning actionable under both sections 3604(a) and (b) of the Fair Housing Act.<sup>240</sup>

Ultimately, the suit settled and the community obtained relief designed to remedy most of the challenged conduct and to secure a right to protective zoning for the indefinite future.<sup>241</sup> This relief included a protective rezoning to reflect the low-density residential character of the neighborhood, to phase out existing incompatible uses over time,<sup>242</sup> and to provide inclusionary incentives for the development of affordable new housing in the neighborhood.<sup>243</sup> The settlement also permanently enjoined any future zoning or planning action that has either the

239. *Id.* ¶ 92; see also *Id.* ¶¶ 31-33, 91.

240. See *City of Cocoa*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,625, at 16,206-10; see also *supra* notes 203-204 and accompanying text (describing § 3604(a)-(b)). Because the city's redevelopment plans utilized federal Community Development Block Grant (CDBG) funds, the Court also found that the plaintiffs stated claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1988) (prohibiting discrimination in federally funded programs) and under the Housing and Community Development Act (HCDA) of 1974, 42 U.S.C. § 5309 (1988 & Supp. II 1990) (prohibiting discrimination in the CDBG program). *City of Cocoa*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,625, at 16,210-12. Regulations implementing these laws prohibit conduct which has either the purpose or the effect of discriminating on the basis of race. See 24 C.F.R. §§ 1.4(b)(2)(i), 570.602(b)(2) (1992); see also *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 591-93 (1983) (recognizing applicability of discriminatory effects standard under Title VI's implementing regulations but not under Title VI alone). The regulations also impose affirmative obligations on recipients of funds to take reasonable action to overcome the consequences of past discrimination and in the CDBG program, to promote fair housing. See 24 C.F.R. §§ 1.4(b)(6), 570.602(b)(4), 601(b).

241. See *Settlement of Florida Zoning Case Includes Housing Rehabilitation*, 1 Fair Housing-Fair Lending (P-H) [Bulletin], May 1, 1991, ¶ 11.3 (reporting final judgment in *City of Cocoa*).

242. Prior to approving the final settlement, the court dismissed a complaint in intervention by white business owners which had challenged the residential rezoning provisions. *Id.* Observing that the settlement grandfathered existing uses and terminated the right to commercial use only upon abandonment or conversion to other use, the Court held that the rezoning was not "confiscatory." See *City of Cocoa*, No. 89-82-CIV-ORL-19 (M.D. Fla. Oct 16, 1980) (order denying motion to intervene and to stay issuance of final judgment).

243. Consent Decree, *City of Cocoa*, No. 89-82-CIV-ORL-19 (M.D. Fla. July 25, 1990). The new zoning borrowed the concepts from the gentrification-inducing prior zoning—density bonuses and transferable development rights—to provide market incentives for the development of new affordable housing. Developers who constructed or rehabilitated an affordable housing unit in the neighborhood would be rewarded with the authorization to build additional

purpose or effect of involuntarily displacing the plaintiffs from the neighborhood or of "substantially undermining the quality of the residential environment."<sup>244</sup>

### C. THE EQUAL PROTECTION CLAUSE

Under *Washington v. Davis* the complaining party's burden of proof was elevated to require a showing of intentional discrimination in cases under the Fourteenth Amendment's Equal Protection Clause,<sup>245</sup> but that burden has not proven insurmountable in cases relating to municipal services,<sup>246</sup> exclusionary zoning,<sup>247</sup> or public housing discrimination.<sup>248</sup> A year after *Washington v. Davis*, the Court addressed the application of its "new" intent standard to municipal land use issues in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>249</sup> *Arlington Heights* demonstrated the Court's resolve to extend this more stringent standard beyond the employment discrimination context of *Washington v. Davis*. In applying this standard to land use issues, however, the Court also clarified that explicit racial classifications or "smoking gun" evidence would not be required to support a finding of in-

---

square footage in the valuable central business district. *Id.*; *cf. supra* note 137 and accompanying text (discussing gentrification).

244. Consent Decree, Parts II, V & VI, *City of Cocoa*, No. 89-82-CIV-ORL-19. Additionally, the settlement provided a \$675,000 housing rehabilitation fund for low-income homeowners and an award of \$20,000 in damages for the named plaintiffs. *Settlement of Florida Zoning Case Includes Housing Rehabilitation, supra* note 241.

245. U.S. CONST. amend. XIV, § 1.

246. *See, e.g., Ammons v. Dade City*, 783 F.2d 982 (11th Cir. 1986) (per curiam) (en banc); *Dowdell v. City of Apopka*, 698 F.2d 1181 (11th Cir. 1983); *Baker v. City of Kissimmee*, 645 F. Supp. 571 (M.D. Fla. 1986); *Johnson v. City of Arcadia*, 450 F. Supp. 1363 (M.D. Fla. 1978).

247. *See, e.g., Atkins v. Robinson*, 733 F.2d 318 (4th Cir. 1984); *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982); *cf. United States v. City of Birmingham*, 727 F.2d 560 (6th Cir.) (finding intentional discrimination under the FHA while applying equal protection precedents), *cert. denied*, 469 U.S. 821 (1984).

248. *See, e.g., United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *Walker v. United States Dep't of Hous. & Urban Dev.*, 734 F. Supp. 1289 (N.D. Tex. 1989); *Young v. Pierce*, 628 F. Supp. 1037 (E.D. Tex. 1985). In both *Walker* and *Young*, plaintiffs proved intentional discrimination on motions for summary judgment. In both cases, plaintiffs' counsel have remarked that in the context of public housing policy, "evidence of past and present purposeful racial discrimination is painful to look at, but it is not hard to find." *Julian & Daniel, supra* note 64, at 670.

249. 429 U.S. 252 (1977). For reference to the Seventh Circuit's decision applying the Fair Housing Act on remand, see *supra* note 217.

tentional discrimination (at least in future cases).<sup>250</sup>

As a preliminary matter, the Court held that intentional discrimination can be established even where race is only one of several factors motivating a defendant's conduct. Recognizing that governmental entities rarely render decisions motivated by a single concern, or even a dominant or primary one, the Court found that "racial discrimination is not just another competing consideration."<sup>251</sup> Evidence that race played any part in motivating the defendant's conduct shifts the burden of proof to the defendant to establish that "the same decision would have resulted even had the impermissible purpose not been considered."<sup>252</sup>

Lower courts applying this standard in land use cases have also agreed that proof of racial animosity, ill will, or evil motive on behalf of public officials is not necessary to support a finding of discriminatory intent.<sup>253</sup> Even conduct motivated by seemingly neutral financial goals such as preserving property values,<sup>254</sup> enhancing the municipal tax base,<sup>255</sup> or maximizing profit<sup>256</sup> can include elements of invidious intent. Additionally,

250. *Arlington Heights*, 429 U.S. at 264-68; see *Lodge v. Buxton*, 639 F.2d 1358, 1363 n.8 (5th Cir. 1981) (observing that one cannot expect to find a "smoking gun" in discrimination cases), *aff'd*, 458 U.S. 613 (1982). On the merits of the *Arlington Heights* case, the Supreme Court determined that plaintiffs failed to prove intentional discrimination, even though the record contained at least two types of circumstantial evidence identified by the Court as probative of discriminatory intent. *Arlington Heights*, 429 U.S. at 269-71.

251. *Arlington Heights*, 429 U.S. at 265.

252. *Id.* at 271 n.21.

253. *E.g.*, *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1185 (11th Cir. 1983); *Baker v. City of Kissimmee*, 645 F. Supp. 571, 586 (M.D. Fla. 1986); *Ammons v. Dade City*, 594 F. Supp. 1274, 1300 (M.D. Fla. 1984), *aff'd per curiam*, 783 F.2d 982 (11th Cir. 1986) (en banc).

254. In *United States v. City of Birmingham*, 538 F. Supp. 819, (E.D. Mich. 1982), the court stated:

A person who attempts to prevent a black family from buying the house next door because the presence of a black family on the block will decrease property values violates the Fair Housing Act just as assuredly as a person who attempts to prevent a black family from buying the house next door because that person dislikes all black people.

*Id.* at 830.

255. See, *e.g.*, *Crisis Committee*, *supra* note 151, at 84-90 (finding that historic district designation which will increase property values, raise tax assessments, and promote the displacement of low- and moderate-income African-American families violates the Equal Protection Clause).

256. *Cf.* *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 330 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974) (holding that intentional exploitation of discriminatory housing market for financial gain amounts to illegal discrimination); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106, 1117-18 (D.D.C. 1987) (conclud-

evidence showing that governmental planning practices were designed to create the image that persons of color are unwelcome supports a finding of discriminatory intent.<sup>257</sup>

The Court in *Arlington Heights* also held that a finding of discriminatory intent may be predicated on circumstantial evidence.<sup>258</sup> It articulated six categories of evidence probative of discriminatory intent: first, the discriminatory impact of the defendant's decision; second, the historical background of the decision;<sup>259</sup> third, the sequence of events leading up to the deci-

---

ing that low-income black and hispanic tenants' allegations of intentional discrimination supported preliminary injunction against evictions despite asserted economic objectives for renovating apartment complex).

257. See *United States v. City of Parma*, 494 F. Supp. 1049, 1097 (N.D. Ohio 1980) ("The City of Parma has consistently made decisions which have perpetuated and reinforced its image as a city where blacks are not welcome. This is the very essence of a pattern and practice of racial discrimination."), *aff'd in relevant part*, 661 F.2d 567 (6th Cir. 1981), *cert. denied*, 434 U.S. 1025 (1982); *cf.* *City of Pleasant Grove v. United States*, 623 F. Supp. 782, 787-88 (D.D.C. 1985) (finding that maintenance of all-white residential community through devices such as "advertising and marketing directed exclusively to white buyers, and racial steering," are "valid evidence of discriminatory purpose in voting rights action"), *aff'd*, 479 U.S. 462 (1987). Thus, selective marketing of a community undergoing substantial gentrification could support a finding of discriminatory intent.

258. *Village of Arlington Heights v. Metropolitan Hous. Dev.*, 429 U.S. 252, 266 (1977). In *Brown*, Judge Harold Greene explained:

In this day and age, when racial discrimination is no longer as fashionable as it was a generation or two ago, racists are more cautious than they used to be, and for that reason it is now more difficult to provide direct or conclusive proof of discriminatory intent. The law would be as blind as the mythical figure of justice if it did not take account of that reality, rejecting the use of circumstantial evidence of intent.

*Brown*, 654 F. Supp. at 1117 n.26. In *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982), the court stated:

Municipal officials . . . seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. . . . It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for the purposes of proving racial discrimination. . . .

259. Among the reasons intentional discrimination in landfill siting could not be proven in one recent case was the district court's conclusion that historical evidence of discrimination by city agencies other than the planning and zoning commission—the agency responsible for landfill siting—was irrelevant to the issue of intent. See *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880, 885 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989). This conclusion is contrary to decisions of the Supreme Court, the Eleventh Circuit, and numerous other courts, that have found evidence of discrimination in a governmental defendant's other agencies or extending to other distinct practices is relevant and probative evidence of discriminatory intent. See, e.g., *Rogers v. Lodge*, 458 U.S. 613,



sion; fourth, departures from the normal procedural processes; fifth, departures from normal substantive criteria; and sixth, the legislative and administrative history of discrimination.<sup>260</sup>

The Court's analysis underscored the importance of proof of discriminatory impact to a finding of intent. Although the Court reaffirmed the holding of *Washington v. Davis* that impact alone does not establish discriminatory intent, it recognized that under certain circumstances little else would be required. Demonstration of a particularly "stark" or extreme showing of disparate impact, coupled with the absence of a credible non-discriminatory explanation for the disparity, would, without more, justify finding intentional discrimination.<sup>261</sup>

Later in the same term, the Court supplied additional reasoning and support for this limited discriminatory effects standard, stating: "If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary one must conclude that racial or other class-related factors entered into the selection process."<sup>262</sup> This approach has been adopted in municipal services cases.<sup>263</sup>

In addition, lower courts applying *Arlington Heights* have provided an analogous twist on this standard, holding that the quantum of other evidence required to demonstrate discriminatory intent relates inversely to the magnitude of the discriminatory impact proven.<sup>264</sup> This quantum of other evidence also

---

624-26 (1982) (holding that history of discrimination in education, employment, and grand jury selection is probative of intentional voting discrimination); *Ammons v. Dade City*, 783 F.2d 982, 988 (11th Cir. 1984) (per curiam) (affirming trial court's reliance on historical evidence of discrimination "covering practically every aspect of municipal conduct in Dade City throughout its history" to support a finding of intentional discrimination in municipal services); *Whitfield v. Oliver*, 399 F. Supp. 348, 355-57 (M.D. Ala. 1975) (finding historical discrimination in public employment, voting, jury selection, and education relevant to proving intentional discrimination in the provision of welfare benefits), *aff'd*, 431 U.S. 910 (1977).

260. *Arlington Heights*, 429 U.S. at 266-68.

261. *Id.* at 266.

262. *Castaneda v. Partida*, 430 U.S. 482, 495 n.13 (1977).

263. *See, e.g., Ammons v. Dade City*, 594 F. Supp. 1274, 1301 (M.D. Fla. 1984) (holding that substantial municipal services disparities raise inference of discriminatory intent under *Castaneda*), *aff'd per curiam*, 783 F.2d 982 (11th Cir. 1986) (en banc); *Dowdell v. City of Apopka*, 511 F. Supp. 1375, 1383 (M.D. Fla. 1981), *aff'd*, 698 F.2d 1181 (11th Cir. 1983).

264. *See, e.g., Brown v. Artery Org., Inc.*, 654 F. Supp. 1106, 1117 (D.D.C. 1987); *Johnson v. City of Arcadia*, 450 F. Supp. 1363, 1378 (M.D. Fla. 1978).

diminishes where the discriminatory effect is foreseen or foreseeable.<sup>265</sup>

*16th Census Tract Crisis Committee v. City of Alexandria*<sup>266</sup> cogently illustrates the application of the foregoing equal protection principles to the problem of disparate zoning protection. In *Crisis Committee*, HUD's Office of Fair Housing and Equal Opportunity found that the city's gentrification-inducing ordinance, which designated a historic district in a low-income African-American community, violated the Equal Protection Clause.<sup>267</sup> The Agency first determined that the magnitude of the impact would be substantial: the analysis of relevant data revealed substantial African-American residential displacement had occurred and that the displacees were "nearly totally" replaced by white residents.<sup>268</sup>

The Committee also observed that while the city's "sole, or even paramount" motivation was not racial discrimination, the development plans were specifically intended to "displace low and moderate income blacks" from the Census tract.<sup>269</sup> The disparate expulsive consequences of the city's conduct were both foreseeable and foreseen by the city, which had earlier considered and rejected an approach for mitigating the displacement from the increased repair costs.<sup>270</sup> City officials also knew of the racial composition of the potential displacees because the affected African-American community vigorously opposed the ordinance on the ground that it would likely produce race-based dislocation.<sup>271</sup> Lastly, the Agency determined that the weakness of the purposes that the city asserted for the ordinance—the preservation of property values and protection of a few buildings—coupled with the availability of less discriminatory alternatives to accomplish those purposes, provided further circumstantial evidence of intentional discrimination.<sup>272</sup>

The federal courts' broad remedial power to redress constitutional violations also provides an approach for remedying the continuing effects of historic land use discrimination.<sup>273</sup> In lan-

---

265. *Dowdell*, 698 F.2d at 1186; *Baker v. City of Kissimmee*, 645 F. Supp. 571, 587-88 (M.D. Fla. 1981), *aff'd*, 698 F.2d 1181 (11th Cir. 1983); *Columbus Bd. of Educ. v. Pennick*, 443 U.S. 449, 464 (1979); *Ammons*, 783 F.2d at 982.

266. *Crisis Committee*, *supra* note 151.

267. *Id.* at 90.

268. *Id.* at 85.

269. *Id.*

270. *Id.* at 86.

271. *Id.*

272. *Id.* at 86-88.

273. *See, e.g., Hills v. Gautreaux*, 425 U.S. 284, 306 (1976); *United States v.*

guage that is now commonplace in remedial decrees, the Supreme Court has charged the lower courts with "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."<sup>274</sup> The sweeping language of several decrees equalizing municipal services which apply the Court's remedial mandate furnish a firm basis for securing a right to equality of zoning protection.<sup>275</sup>

#### D. THE THIRTEENTH AMENDMENT

The Thirteenth Amendment<sup>276</sup> arguably provides an alternative constitutional basis for addressing land use discrimination. In *City of Memphis v. Greene*,<sup>277</sup> the Supreme Court left open the question of whether section 1 of the Thirteenth

---

Yonkers Bd. of Educ., 837 F.2d 1181, 1184 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *Walker v. United States Dep't of Health & Human Servs.*, 734 F. Supp. 1231, 1238 (N.D. Tex. 1989); *cf. Ayers v. Fordice*, 112 S. Ct. 2727 (1992) (reaffirming the duty to disestablish the lingering effects of historic discrimination in higher education); *Missouri v. Jenkins*, 495 U.S. 33 (1990) (upholding order requiring government authorities to raise \$100 million dollars to fund compensatory enrichment programs in public schools to remedy historic school segregation). See generally Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983) (targeting remedial efforts at acts that perpetuate past racial discrimination). A recently filed "environmental racism" suit has applied these principles to challenge and seek a remedy for a pattern of releases of hazardous substances in Dallas's communities of color originating in 1930. See Plaintiff's Second Amended Complaint, ¶¶ 62-70, West Dallas Coalition for Envtl. Justice v. United States, No. CA-3-91-2615-R (N.D. Tex. filed May 28, 1992).

274. *Louisiana v. United States*, 380 U.S. 145, 154 (1965); see, e.g., *United States v. Paradise*, 480 U.S. 149, 183 (1987) (employing cited language in employment discrimination remedy); see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971) (relying on power of the courts to fashion remedial decrees in a school desegregation case).

275. See *Ammons v. Dade City*, 594 F. Supp. 1274, 1305 (M.D. Fla. 1984), *aff'd per curiam*, 783 F.2d 982 (11th Cir. 1986), in which the court stated:

The ultimate relief to which plaintiffs are entitled is, of course, actual and complete equality in the receipt of municipal services from the City. . . . The municipal services available to the residents of the black community should be on par with, and entirely equal to, the municipal services and facilities available to residents of the white sections of town. The first step in reaching this goal is the elimination of the effects of past discrimination in the provision of municipal services.

See also *Dowdell v. City of Apopka*, 511 F. Supp. 1375, 1384 (M.D. Fla. 1981) (using identical language), *aff'd*, 698 F.2d 1181 (11th Cir. 1983); *Baker v. City of Kissimmee*, 645 F. Supp. 571, 589-90 (M.D. Fla. 1986) (using similar language).

276. U.S. CONST. amend. XIII.

277. 451 U.S. 100 (1981).

Amendment applies to "badges and incidents of slavery" or merely to the institution of slavery and involuntary servitude.<sup>278</sup> The lower courts have provided some support for the broader proposition.<sup>279</sup> Whether or not section 1 reaches "badges and incidents," legislation enacted pursuant to section 2 of the Thirteenth Amendment, such as 42 U.S.C. § 1982,<sup>280</sup> does.<sup>281</sup>

Under a "badges and incidents" approach, a long-term, pervasive, or significantly disruptive practice of land use discrimination should be actionable.<sup>282</sup> For example, in *Houston v. City of Cocoa*,<sup>283</sup> the plaintiffs alleged that the city's long-term pattern of destructive land use in the African-American community dated back as far as the 1920s.<sup>284</sup> Plaintiffs argued that this conduct reflected the post-reconstruction subjugation of black property rights and derived its genesis from slave code prohibitions on the ownership of land or personal property.<sup>285</sup> The district court held that these allegations stated a claim under section 1 of the Thirteenth Amendment based on a "badges and incidents" analysis and under 42 U.S.C. § 1982 as a discriminatory restriction on black property rights.<sup>286</sup>

278. *Id.* at 125-26.

279. *See, e.g.,* *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1160 (9th Cir. 1979) (stating that the Thirteenth Amendment is an "affirmative declaration that all vestiges of slavery would be illegal"); *Pennsylvania v. Local Union No. 542*, Int'l of Operating Eng'r, 347 F. Supp. 268, 301 (E.D. Pa. 1972) (stating that purpose of Thirteenth Amendment extends to eradicating "badges and incidents of slavery"), *aff'd*, 478 F.2d 1398 (3d Cir. 1973).

280. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1982 (1988)). In *Greene*, the Supreme Court also left open the question whether § 1982 requires proof of intentional discrimination. *See Greene*, 451 U.S. at 120.

281. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.").

282. *Cf. Greene*, 451 U.S. at 128-29 (deciding that the closing of one street in a black neighborhood presented a mere "inconvenience" to the community which did not rise to the level of a badge or incident of slavery).

283. *Houston v. City of Cocoa*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,625 (M.D. Fla. Dec. 2, 1989) (order denying defendant's motion to dismiss).

284. Complaint ¶ 31, *City of Cocoa* (No. 89-82-CIV-ORL-19).

285. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 17, *City of Cocoa* (No. 89-82-CIV-ORL-19) (stating "slaves have no legal rights of property in things, real or personal") (citing GEORGE M. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY 12 (1968)).

286. *See City of Cocoa*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,625; *see also* Calmore, *supra* note 15, at 242 (suggesting that the badge of slavery analysis be extended to discriminatory practices which perpetuate blacks' poverty status). *But cf.* Geri J. Yonover, Comment, *Dead End Street: Discrimination, The Thirteenth Amendment, and Section 1982*, 58 CHI-KENT L. REV. 873, 904

## E. THE POLICE POWER—SUBSTANTIVE DUE PROCESS

Low-income communities of color that are unable to secure land use equity through anti-discrimination law might find limited solace in the substantive due process limits on the police power. As a general matter, the judicial standards governing the substantive review of police power enactments mandate extreme deference to municipal objectives.<sup>287</sup> There are, however, circumstances under which a city's damaging zoning or planning conduct justifies greater skepticism.<sup>288</sup> For example, the use of incompatible zoning to depress land values and decrease the cost of government acquisition warrants no similar deference to the asserted municipal objectives.<sup>289</sup>

Furthermore, *Euclid* demonstrates that the Court recognizes the importance of protecting residential communities and the residential environment from the negative by-products of industrialization and commercial development. Thus, the

---

(1982) (commenting on the effect of *Greene* that "[t]he dead end street in Memphis will have a deadening effect on judicial resolution of racial discrimination"). See generally G. Sidney Buchanan et al., *The Quest For Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1, 331, 357, 593, 610, 844, 871, 1070 (1975) (outlining development and enforcement of Thirteenth Amendment).

287. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning ordinances are constitutional unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare"). See generally Daniel J. Mandelker, *Revising the Presumption of Constitutionality in Land Use Litigation: Is Legislative Action Necessary?*, 30 WASH. U. J. URB. & CONTEMP. L. 5 (1986) (asserting that the presumption of constitutionality for land use regulations may require reversal in cases affecting fundamental rights and insular minorities, but not in cases involving developers); Keith R. Denny, Note, *That Old Due Process Magic: Growth Control and the Federal Constitution*, 88 MICH. L. REV. 1245, 1249-58 (1990) (arguing that due process analysis is wrongheaded for growth control ordinances).

288. The Court's recent reinvigoration of the Fifth Amendment's Taking Clause portends less deference to local land use regulation in the future. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987) (holding that land use regulation must substantially advance legitimate state interests). See generally Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427, 429-33 (1988) (discussing heightened judicial scrutiny of land use regulations in recent takings cases); Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627 (1988) (advocating strong judicial review of land use regulations).

289. See Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 67-74 (1988); Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the Takings Trilogy*, 44 ARK. L. REV. 65, 119-20 (1991).

Court in *Euclid* found that it is manifestly within the general welfare to protect residential communities from the dangers and degradations of blighting or disruptive uses.<sup>290</sup> Conversely, police power enactments that substantially undermine these basic Euclidean principles by authorizing the intrusion of such uses should, at a minimum, be subject to a diminished presumption of validity.<sup>291</sup>

Additionally, the state courts'<sup>292</sup> emerging heightened recognition of governments' police power responsibilities to plan for the housing needs of low- and moderate-income families<sup>293</sup> provides further support for a right to protective zoning in low-income communities. The leading manifestations of this trend at the state level are the New Jersey Supreme Court's decisions in *Mt. Laurel I*<sup>294</sup> and *Mt. Laurel II*.<sup>295</sup> In *Mt. Laurel I*, the

290. For discussion of the modern-day Supreme Court's recognition of the importance of protective zoning, *see supra* note 46.

291. *Cf. Harris v. Skirving*, 248 P.2d 408, 411 (Wash. 1952) (granting an injunction against a garbage dump that is a nuisance and is "inherently obnoxious in a residential area" notwithstanding its consistency with the City's zoning ordinance). *See generally Builders Serv. Corp. v. Planning & Zoning Comm'n of East Hampton*, 545 A.2d 530, 539 (Conn. 1988) (zoning that promotes legitimate zoning goals but also has effects contrary to the public welfare should be subjected to closer judicial scrutiny); *Mt. Laurel I*, 336 A.2d 713, 731-32 (N.J.) ("municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate"), *cert. denied*, 423 U.S. 808 (1975).

292. Exclusionary zoning is one of the areas in which state courts, applying state police power and substantive due process provisions, have exceeded the federal minima in protecting individual rights. *See, e.g., Mt. Laurel I*, 336 A.2d at 725. *See generally* William J. Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1977) (imploping state courts seeking broad construction of constitutional principles to avert United States Supreme Court reversal by predicating decisions on parallel state constitutional provisions); Stanley Mosk, *The Law of the Next Century: The State Courts, in AMERICAN LAW: THE THIRD CENTURY* 213 (Bernard Schwartz ed., 1976) (describing with approval the trend of state courts to rely on their respective constitutions).

293. *See, e.g., Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473, 487-90 (Cal. 1976); *Builders Serv. Corp.*, 545 A.2d at 546-47; *Britton v. Town of Chester*, 595 A.2d 492, 495-96 (N.H. 1991); *Mt. Laurel II*, 456 A.2d 390, 462 (N.J. 1983); *Mt. Laurel I*, 336 A.2d at 730. *Compare Berenson v. Town of New Castle*, 341 N.E.2d 236, 241-42 (N.Y. 1975) (holding that zoning must be consistent with a well-ordered plan to meet the community's present and future housing needs) *with Asian Ams. for Equality v. Koch*, 527 N.E.2d 265, 272-73 (N.Y. 1988) (finding that city's substantial overall planning for low-income housing needs preclude challenge to failure to mitigate displacement in fourteen-block area). *See generally Roisman & Tegeler, supra* note 213, at 343-51.

294. 336 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 808 (1975).

295. 456 A.2d 390 (N.J. 1987).

New Jersey Supreme Court invalidated a township's zoning provisions that had erected virtually insurmountable barriers to residential access for low- and moderate-income families.<sup>296</sup> Finding these "parochial" devices violative of the general welfare, the court imposed affirmative responsibilities on the township and other developing municipalities to employ land use regulations that provide a realistic opportunity for meeting a "fair share" of the region's present and prospective low- and moderate-income housing needs.<sup>297</sup>

Frustrated with the slow pace of compliance with this mandate, the court in *Mt. Laurel II* broadened municipalities' obligations by requiring their performance of affirmative inclusionary measures to ensure the provision of low- and moderate-income housing.<sup>298</sup> Significantly, the court also extended these affirmative obligations to developed municipalities and, in so doing, provided a principle for addressing land use inequality in low-income communities through the substantive review of land use controls. It noted that "the State controls the use of land, all of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else."<sup>299</sup> The court recognized that a municipality's "zoning power is no more abused by keeping out the region's poor than by forcing out the resident poor."<sup>300</sup>

It remains to be seen whether the New Jersey Supreme Court's expansive interpretation of the substantive limits on the police power will be widely followed in other states. Nevertheless, the *Mt. Laurel II* approach provides further support for a right to land use regulation designed to improve the quality of the residential environment and avert involuntary displacement in low-income communities of color.<sup>301</sup>

---

296. *Mt. Laurel I*, 336 A.2d at 729-34. The township's practices included substantial overzoning for industrial uses, costly minimum lot size and house size requirements, and the exclusion of multi-family housing. *Id.* at 718-24.

297. *Id.* at 732-33.

298. *Mt. Laurel II*, 456 A.2d at 442-52.

299. *Id.* at 415.

300. *Id.* at 418. The court also stated that "[e]very municipality's land use regulations should provide a realistic opportunity for decent housing for at least some part of its resident poor who now occupy dilapidated housing." *Id.*

301. For discussion of the potential applications of *Mt. Laurel II* to zoning and land use issues within developed municipalities' low-income communities see Steve Dobkin et al., *Zoning for the General Welfare: A Constitutional Weapon for Lower-Income Tenants*, 13 N.Y.U. REV. OF L. & SOC. CHANGE 911, 917-24 (1984-85); Harold McDougall, *Mount Laurel II and the Revitalizing City*, 15 RUTGERS L.J. 667 (1984); Peter W. Salsich, Jr., *Displacement and Ur-*

## CONCLUSION

The persistence of stark patterns of residential segregation in the 1990s serves as a reminder of this country's legacy of systematic discrimination in land use policy. At the same time, new and insidious forms of land use assaults—ranging from the disparate siting of toxic waste facilities to the stimulation of foreseeable race-based gentrification—pose unprecedented risks to the survival and integrity of low-income communities of color. Both new and recycled legal approaches offer the potential for reinvigorating community improvement and equalization litigation efforts to remedy historic and modern-day land use inequalities. These and other nonlitigation efforts are necessary to provide long overdue fulfillment of the congressional promise of a suitable living environment for all American families<sup>302</sup> and to return Justice Sutherland's proverbial pig from the "hood" to the barnyard once and for all.

---

*ban Reinvestment: A Mount Laurel Perspective*, 53 U. CIN. L. REV. 333, 361-79 (1984).

302. See 42 U.S.C. § 1441 (1988).



