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The United States Supreme Court and Residential Segregation: "Slavery Unwilling To Die"

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Introduction: Residential Segregation, Structural Racism, and History

Racial residential segregation is the most important and most visible manifestation of structural racism in America today. Segregated housing provides the matrix for all other social ills afflicting African-Americans in the United States, and is the principal cause of racial inequality in the United States today.[1] It displays "the spectacle of slavery unwilling to die," as Justice William O. Douglas put it in a 1968 concurring opinion.[2]

Given the pervasive social impacts of residential segregation, it was inevitable that litigation resulting from it should make its way to the United States Supreme Court. This article surveys the history of that litigation throughout the twentieth century to provide an overview of the Court's encounter with the persistent reality of restrictions on African Americans' access to housing. It locates that history in the larger sweep of the quest for racial equality throughout the past century, describing gains made in the Second Reconstruction (the Civil Rights Era,1954-1971) and then observing the Court's regression during the succeeding period, which historians see as the Second Redemption.

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[1] As Douglas S. Massey and Nancy A. Denton put it in their magisterial study *American Apartheid: Segregation and the Making of the Underclass* (1993), viii, "racial residential segregation is the principal structural feature of American society responsible for the perpetuation of urban poverty and represents a primary cause of racial inequality in the United States."

[2] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 445-447 (Douglas J. concurring). See the discussion of this case, *infra* note 127 and surrounding text.

For a century now, the Court has encountered cases that have involved both deliberate and structural segregation and, unsurprisingly, has produced a mixed record in dealing with them.[3] To evaluate this record, we must recognize the differences between traditional and structural racism, two fundamentally different understandings of what racism is and how it operates in American society today. Those understandings form the thinking of the Justices when they encounter issues of residential segregation.

The older view, referred to here as traditional racism, assumes that racism is an expression of conscious and deliberate malevolence: fear, dislike, and hatred of the racially-different Other. Traditional racism manifests itself in overt acts. It was the Jim Crow segregation of "Colored Only" waiting rooms and drinking fountains. The traditional racist intends to discriminate, both to preserve white supremacy and to degrade the dignity of people of color. He does so in overt ways, whether by preventing children of other races from attending white schools or by donning a bed sheet to go out and burn a cross. So entrenched is this understanding that we have difficulty imagining "racism" to be anything but the traditional kind. In the judicial understanding of traditional racism, only the individual, not the group to which he belongs, can be wronged, and only his particular injury can be redressed. "The relevant proposition," wrote Justice Antonin Scalia in *Richmond v. Croson* (1989), "is not that it was blacks,

[3] For an overview of the impacts of residential segregation, see U. S. Housing Scholars and Research and Advocacy Organizations, *Residential Segregation and Housing Discrimination in the United States* (2008), http://www.prrac.org/pdf/FinalCERDHousingDiscriminationReport.pdf (last visited April 22, 2017).

or Jews, or Irish who were discriminated against, but that it was individual men and women, 'created equal', who were discriminated against."[4]

The more modern manifestation of racism is known as structural racism.[5] In contrast with the traditional kind, structural racism is found in social outcomes, not discriminators' intent. It is measured not by states of mind or the behavior of bad actors, but by the results of social processes that advantage whites and deny opportunity to people of color. Overt bigotry is beside the point, and in any event is often lacking today. Sociologists sometimes refer to this invisible form of racism as "institutional racism" because it is seen in the ways that social institutions like schools and employment practices diminish opportunities for blacks and preserve white privilege. Structural racism is invisible, but its consequences are manifest in all social domains: employment, education, criminal justice, and above all, housing.

The Justices of the United States Supreme Court have recognized only traditional racism as having a constitutional dimension that law can appropriately resolve. They have refused to acknowledge structural racism and, except where Congress has intervened, have rejected constitutional solutions that would remedy its effects. This is perverse: the Court is (reluctantly) willing to confront the receding manifestation of traditional racism today, as its significance wanes, but it prohibits political institutions from trying to meliorate the real and more destructive manifestation of structural racism. Why should this be so?

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[4] City of Richmond v. J. A. Croson, 488 U.S. 469, 528 (1989) (Scalia, J. concurring).
[5] For a more extensive description of structural racism in a legal context, see William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1 (2001).

Social scientists have confirmed the reality of structural racism for over forty years. This constitutes more than a scholarly consensus: its theoretical foundations and their empirical validation have been repeatedly and overwhelmingly confirmed.[6] Legal scholars have been quick to take up these findings in social science and translate them into mature legal scholarship.[7] The product is a mass of

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[6] For extensive citations to the principal secondary sources, see William M. Wiecek and Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095, 1101-03, 1113-14 (2014).

[7] To cite only the most prominent: David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99; Ian Haney-Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000); ROBERT C. POST & K. ANTHONY APPIAH, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW (2001); john a. powell, *Tearing Down Structural Racism and Rebuilding Communities*, 40 CLEARINGHOUSE REV. 68 (2006); Sylvia Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603 (1999); R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010); Neal Gotanda, *Our Constitution is Color-Blind - A Critique*, 44 STAN. L. REV. 1 (1991); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753 (2001); Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Robert L. Nelson, et al., *Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences*, 4 ANN. REV. L. & SOC. SCI. 103 (2008); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit bias: Scientific foundations*, 94 CAL. L. REV. 945 (2006); J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHIC. L. REV. 935 (1989); Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIAMI L. REV. 431 (2009); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Role of the Courts*, 81 N.C. L. REV. 1597 (2003); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Jerry Kang & Kristin Lane, *Seeing through Colorblindness: Implicit Bias and the Law*, 58 U.C.L.A. L. Rev. 465 (2010); Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Reva Siegel, *Discrimination in the Eyes of the Law: How 'Color Blindness' Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000); ANDREW KULL, THE COLOR-BLIND CONSTITUTION

scholarly investigation that exhaustively describes the problem and proposes solutions for it.

This study draws on that work to review the history of the United States Supreme Court's encounter with one social domain, housing, in the twentieth-century to demonstrate *how* the Court has failed to acknowledge structural racism. The conclusion offers several explanations for *why* it has done so. A fuller historical account must await a different occasion.[8] But a thumbnail sketch of the history of inequality in America is a necessary prelude to a review of the Court's encounters with structural racism in housing because it provides

(1992); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS (2010); Jack M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1993); Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753 (2001); Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & LAW 197 (2004); John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067 (1998); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); john a. powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791 (2007); Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Ian F. Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.–C.L. L. REV 1 (1994); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); IAN HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2006); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994); Scott Grinsell, *"The Prejudice of Caste": The Misreading of Justice Harlan and the Ascendancy of Anticlassification*, 15 MICH. J. RACE & L. 317 (2009).

[8] I have begun a long-range project tracing the encounter of the Supreme Court with constitutional issues involving African Americans from 1800 to the present. Over the course of a long scholarly career, I have presented fragments of that project (*inter al.*, Wiecek, *Slavery and Abolition before the United States Supreme Court, 1820-1860*, 65 J. AM. HIST. 34 (1978); WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941-1953 (vol. XII of the Holmes Devise HISTORY OF THE SUPREME COURT OF THE UNITED STATES) 621-706 (2006), but the comprehensive story lies in the future.

both background and context. That historical interpretive framework is followed by a review of the origins of urban residential segregation in private and local governmental policies during the first half of the twentieth century. Then in the period known popularly as Civil Rights Era, which historians refer to as the Second Reconstruction,[9] the Justices displayed an unwonted openness to attacks on elements of residential segregation. But that receptivity soon faded. After the conservative turn in American public law *circa* 1972, the Court resumed its customary indifference to equal opportunity in access to housing.

This story maps onto a larger historical narrative of racial inequality in the United States. Sketched in brief outline, that narrative goes like this: Europeans and Africans have settled the temperate regions of the North American continent for over four centuries. For the first half of that period, whites enslaved nearly all blacks in one of the harshest regimes of slavery the world has ever known. Inequality was absolute; if equality had a temperature, it would be near zero Kelvin. The cataclysm of the Civil War brought that regime to a violent, abrupt end, and Americans of both races had to work out a new civil status for the people hitherto enslaved. For the brief period known as Reconstruction (1862-1877), the United States Congress and southern state legislatures passed constitutional amendments and enacted legislation to endow African Americans with legal and civic status, empowering them to enter into legally-enforceable relationships and (for males) participate in political life through voting,

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[9] MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945–2006 (3d ed., 2007); CARL M. BRAUER, JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION (1977); George S. Burson, *The Second Reconstruction: A Historiographical Essay on Recent Works*, 59 J. Negro Hist. 322 (1974). C. Vann Woodward coined the phrase in a 1957 essay, *The Political Legacy of Reconstruction*, 26 J. Negro Educ. 231 (1957).

office-holding, and jury and militia service. Among the rights confirmed was the right to acquire, own, and dispose of real and personal property.[10]

That effort was bludgeoned in a movement that historians call Redemption, *circa* 1872-1910, which halted and then reversed postwar efforts toward equality, replacing them with a civic status for the freedpeople that imposed on them a form of servitude. The Reconstruction Amendments and supportive legislation may have provided nominal equality, but the reality on the ground for people of color was white supremacy and their degradation in all realms, social, economic, and political. Throughout Redemption, the United States Supreme Court was complicit in this reversal of their fortunes, validating and rationalizing the retrograde rejection of equality.[11]

This counterrevolution against racial justice and equality began to weaken around World War I though, as the Court sometimes rebuffed some of the more regressive policies of the southern states.[12] After another war and another resulting period of social instability, the first Redemption began to disintegrate. *Brown v. Board of Education I*[13] began a second Reconstruction in 1954, which lasted, like its predecessor, roughly fifteen years, until 1970-1972. Then in a time of retreat that we call the second Redemption, *circa* 1972 to the present,

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[10] The Civil Rights Act of 1866 (Act of April 9, 1866, ch. 31, sec. 1, 14 Stat. 27; current version at 42 U.S.C. sec. 1982) provided that all persons may "inherit, purchase, lease, sell, hold, and convey real and personal property."

[11] The most destructive instances were *United States v. Reese*, 92 U.S. 214 (1875); *United States v. Cruikshank*, 92 U.S. 542 (1875); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Williams v. Mississippi*, 170 U.S. 213 (1898); and *Giles v. Harris*, 189 U.S. 475 (1903).

[12] United States v. Reynolds, 235 U.S. 133 (1914); Guinn v. United States, 238 U.S. 309 (1915); Moore v. Dempsey, 261 U.S. 86 (1923); Powell v. Alabama, 287 U.S. 45 (1932); Norris v. Alabama, 294 U.S. 587 (1935) (this and *Powell* were the Scottsboro Boys Cases); Brown v. Mississippi, 297 U.S. 278 (1936).

[13] 347 U.S. 483 (1954).

those hostile to the egalitarian gains of both Reconstructions tried to sweep back racial progress. Once again, the Supreme Court has gone along, repudiating its earlier egalitarian impulses and protecting structural racism in most of its manifestations.

By 1970, both traditional and structural racial barriers in access to housing remained firmly entrenched.[14] Residential segregation in American cities was seemingly ineradicable and intractable. Housing discrimination, understood as racial impediments to getting quality housing for sale or rent, yielded only grudgingly to fair-housing pressures. Both problems – segregation and discrimination – achieved two related effects, like the two sides of a coin: they preserved whites' monopoly of social capital,[15] and they thereby excluded African-Americans from such group status benefits, restricting their access to networking and other essentials of social cohesion. This did not "just happen" or come about by accident; it was accomplished by coordinated collective action on the part of whites in both the public and private sectors. Governments at all levels – federal, state, and local – have imposed racial segregation on America's cities throughout the twentieth century.[16] The Supreme Court has steadfastly refused to acknowledge this sociological reality, and has colluded, perhaps inadvertently, in perpetuating it.

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[14] Deborah Kenn, *Institutionalized Legal Racism: Housing Segregation and Beyond*, 11 B. U. PUBL. INT. L.J. 35 (2001).

[15] On the significance of social capital, see James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. (SUPPLEMENT) S95-S120 (1988) and ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 19-23 (2000).

[16] RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) explores this theme in detail.

I. Background: The Rise of Residential Segregation and the Court's Early Responses to It, 1900-1950

Before the Civil Rights Era of the 1960s, the Court resolved several major constitutional problems that had arisen when white Americans sought to impose spatial bounds on their contacts with African Americans. After Emancipation, residential segregation was not the social or constitutional problem that it became in the twentieth century. In the cities of the South, blacks continued to live among whites much as they had done before the Civil War, in alleys and side streets, the black population scattered among the white.[17] Even in the black residential neighborhoods of the urban South, African-Americans were not confined, at first by law and then by institutional inertia, to segregated zones of the cities. That was to be a phenomenon of the twentieth century.[18]

Urban residential segregation, especially in the North, was a consequence of successive migrations of African Americans from the rural South, first to the cities of the Old and Border South, then to the North. A single statistic tells the story: in 1870, 80% of black Americans lived in the rural South; a century later, in 1970, that same 80% now lived in cities.[19] Concurrent with this revolution in black de-

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[17] Angelina Grigoryeva & Martin Ruef, *The Historical Demography of Racial Segregation*, 80 AM. SOC. REV. 814-42 (2015); LEEANN LANDS, THE CULTURE OF PROPERTY: RACE, CLASS, AND HOUSING LANDSCAPES IN ATLANTA, 1880-1950 32-40 (2009); N. J. Demerath & H. W. Gilmore, *The Ecology of Southern Cities*, *in* THE URBAN SOUTH 155-160 (Rupert B. Vance & N. J. Demerath, eds. 1954).

[18] Arnold R. Hirsch provides an excellent overview of this process in *With or Without Jim Crow: Black Residential Segregation in the United States*, *in* URBAN POLICY IN TWENTIETH-CENTURY AMERICA 65-99 (Hirsch & Raymond A. Mohl, eds., 1993).

[19] MASSEY & DENTON, AMERICAN APARTHEID, *supra* note 1, at 18.

mography, and to a great extent caused by it, was the rise of residential Jim Crow: the deliberate segregation of African-Americans into restricted enclaves. The "index of dissimilarity," a demographic measure of segregation, for Cleveland, Ohio provides a striking but typical example of the metastasis of residential apartheid.[20] At the time of the Civil War, the index stood at 49.0; by 1940, it had risen to 92.0.[21] (The higher the index number, the greater the segregation.)

A. Early Segregation by Local and Private Action

Whites at first sought to achieve residential apartheid by mandating it by law. Baltimore adopted a segregation ordinance in 1910, prohibiting persons of one race from occupying a house in a block where the majority of inhabitants were of the other race.[22] This quickly spread throughout the Border states and upper South, with copycat ordinances being adopted in Richmond, Louisville, St. Louis, and Oklahoma City by 1916. But the United States Supreme Court held these ordinances unconstitutional in *Buchanan v. Warley* (1917).[23] Writing for a unanimous Court, Justice William R. Day de-

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[20] The index of dissimilarity measures racial segregation by asking what percentage of the black population would have to relocate to achieve perfect integration. Thus the higher the percentage, the more intense and complete the separation of the races. See the discussion in *Racial Residential Segregation Measurement Project*, http://enceladus.isr.umich.edu/race/seg.html (last visited April 28, 2017).

[21] MASSEY & DENTON, AMERICAN APARTHEID, *supra* note 1, at 21; *see* KENNETH L. KUSMER, A GHETTO TAKES SHAPE: BLACK CLEVELAND, 1870-1930, at 161-189 (1978).

[22] Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. SOUTHERN HIST. 179 (1968); Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1982).

[23] 245 U.S. 60 (1917); *see* Patricia H. Minter, *Race, Property, and Negotiated Space in the American South: A Reconsideration of Buchanan v. Warley*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 345-68 (Sally E. Hadden and Patricia H. Minter, eds. 2013); ALEXANDER M. BICKEL & BENNO C. SCHMIDT, THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 789-812 (1984) (vol. IX of the HOLMES

livered an ambiguous opinion: was the vice of the ordinance its implicit racial discrimination (an equal protection issue), or was it the interference with freedom to acquire and dispose of property (a due process issue)?[24] Day's opinion left this tantalizing issue unresolved. *Buchanan* did not conclusively scotch efforts to create racial zoning, though. Into the 1930s, urban planners continued to devise schemes that would segregate the races through planning and zoning.[25] But eventually the vogue for segregation ordinances passed and lawyers turned to a more potent weapon, the restrictive covenant.

Racially restrictive covenants originated during the nineteenth century on the West Coast from whites' efforts to exclude Chinese and other Asians. At first they met a hostile reception in federal and state courts, either because such overt racial discrimination violated the equal protection guarantees of the Fourteenth Amendment (despite the state-action limitation of the *Civil Rights Cases* [1883][26]),[27] or on the common law Property grounds that it violated public policy or constituted an unreasonable restraint on alienation.[28] By the 1920s,

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DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES); *see also* DAVID DELANEY, RACE, PLACE, AND THE LAW, 1836-1948, at 98-147 (1998).

[24] *See also* Harmon v. Tyler, 273 U.S. 668 (1927) (overruling Louisiana Supreme Court decisions upholding a comparable New Orleans segregation ordinance); Richmond v. Deans, 281 U.S. 704 (1930) (same effect).

[25] Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 23-42 (June M. Thomas & Marsha Ritzdorf, eds.,1997).

[26] 109 U.S. 3 (1883).

[27] Gandolfo v. Hartman, 49 F. 181, 182 (C.C.S.D. Cal. 1892) ("Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other.").

[28] Title Guaranty & Trust Co. v. Garrott, 42 Cal. App. 152, 183 P. 470 (1919) (rejecting the constitutional challenge but upholding the common law one). See the summary of results in these state-court decisions compiled in Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 545-47 (2000). Carol M. Rose provides a brief overview of the history of racial covenants

though, state courts overcame such constitutional doubts and upheld the covenants.[29] In this, judges were merely conforming to trends in the larger society.

Lured by job opportunities and fleeing intensified oppression throughout the South, blacks began moving north in such large numbers during the World War I period that the resulting population shift has become known as the Great Migration.[30] Conflicts over jobs and housing ensued, and northern whites reacted with a spasm of violence directed at these newcomers unseen since the time of Reconstruction.[31] In response, the National Association of Real Estate Boards (NAREB), its local affiliates, as well as homeowners' and neighborhood improvement associations, all pressed for voluntary cooperation among whites to exclude blacks from white neighborhoods. NAREB vigorously promoted the use of racial covenants throughout the United States, policing its members to keep them in line with its segregationist program. It also infiltrated the Federal Housing Administration to promote its policies from within.

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in *Property Law and the Rise, Life, and Demise of Racially Restrictive Covenants*, in POWELL ON REAL PROPERTY, vol. 11, WFL13-1 (Michael Allan Wolf, ed., 2013).

[29] Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922); Porter v. Johnson, 232 Mo. App. 1150, 115 S.W.2d 529 (Mo. Ct. App. 1938).

[30] NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1991); ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION (2010); MILTON SERNETT, BOUND FOR THE PROMISED LAND: AFRICAN AMERICANS' RELIGION AND THE GREAT MIGRATION (1997).

[31] See the table of these race riots, beginning with the deadly East Saint Louis riot of 1917, in Jones-Correa, *Origins and Diffusion*, *supra* note 28, at 556.

Where suasion proved inadequate, violence in the form of nighttime bombings, cross-burnings, and window-smashing supplemented more polite forms of coercion.[32] Some of this violence was instigated by the recently revived Ku Klux Klan in its second avatar.[33] "Sundown towns" throughout the United States posted warnings ordering blacks to leave town before sunset or face unspecified consequences.[34] In this environment, racial covenants skyrocketed in popularity.[35] The United States Supreme Court, in harmony as it usually is with public opinion, spurned a constitutional challenge to the covenants as "entirely lacking in substance or color of merit" in *Corrigan v. Buckley* (1926).[36] The august *Restatement of Property* (1944) affirmed this position, gratuitously justifying it on the grounds of "avoidance of unpleasant racial and social relations and the stabilization of the value of the land."[37]

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[32] Leonard S. Rubinowitz & Imani Perry, *Crimes without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335 (1972); Jeanine Bell, *The Fair Housing Act and Extralegal Terror*, 41 IND. L. REV. 537, 538-541 (2008).

[33] KENNETH T. JACKSON, THE KU KLUX KLAN IN THE CITY, 1915-1930 (1966).

[34] JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2005).

[35] HELEN C. MONCHOW, THE USE OF DEED RESTRICTIONS IN SUBDIVISION DEVELOPMENT (1928) and Andrew A. Bruce, *Racial Zoning by Private Contract in the Light of the Constitutions and the Rule Against Perpetuities*, 21 ILL. L. REV. 704 (1927) are contemporary accounts of the rise of what Bruce correctly characterized as private zoning.

[36] 271 U.S. 323, 330 (1926) (relying on the state action doctrine).

[37] RESTATEMENT OF PROPERTY, § 406, cmt 1. The first RESTATEMENT was composed by the elite of American Property authorities at the time: Richard Powell (the Reporter), A. James Casner, Harry Bigelow, Lewis Simes, and William Draper Lewis, inter al., and carried with it the imprimatur of the prestigious American Law Institute.

This complacent acceptance of privately-imposed and –enforced segregation could not last.[38] NAACP activism after World War II, plus the surge in black demand for decent housing, guaranteed a legal challenge to racial covenants. In California, a bellwether of civil-rights progressivism in the post-war period, the eminent jurist Supreme Court Justice Roger Traynor condemned racial covenants as inconsistent with public policy.[39] A Boalt Hall law professor, Dudley McGovney, published an article the next year contending that state-court enforcement of racial covenants constituted state action and as such, violated the Equal Protection clause, and could be nothing more than an empty gesture.[40] The United States Supreme Court soon endorsed this insight in the companion cases of *Shelley v. Kraemer* (1948)[41] and *Hurd v. Hodge* (1948).[42]

In *Shelley*, Chief Justice Fred M. Vinson conceded that a private agreement between buyer and seller in the form of a covenant not to convey real property in the future to a member of a specified race

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[38] The most thorough history of racial covenants to date is RICHARD R. W. BROOKS & CAROL ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAWS, AND SOCIAL NORMS (2013).

[39] Fairchild v. Raines, 24 Cal. 2d 818, 834, 151 P.2d 260 (1944) ("Race restriction agreements, undertaking to do what the state cannot, must yield to the public interest in the sound development of the whole community."). Traynor was later to figure prominently in *Reitman v. Mulkey* (1967), discussed below.

[40] Dudley O. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional*, 33 CAL. L. REV. 5 (1945); *accord* Harold I. Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem*, 12 U. CHIC. L. REV. 198 (1945).

[41] 334 U.S. 1 (1948), prohibiting *state* court enforcement of racial covenants. The opinion was unanimous, but Justices Reed, Jackson, and Rutledge recused themselves, presumably on the grounds that they owned property subject to such covenants. *See generally* JEFFERY D. GONDA, UNJUST DEEDS: THE RESTRICTIVE COVENANT CASES AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT (2015). CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959) remains useful.

[42] 334 U.S. 34 (1948) (prohibiting *federal* court enforcement of racial covenants).

was not per se unconstitutional.[43] But, picking up on McGovney's suggestion, he held that state court enforcement constituted state action under the *Civil Rights Cases* (1883) and thus violated the equal protection clause. The state was implicated in two ways: first, its courts (and, if necessary, its law enforcement apparatus) provided the covenants with whatever legal and practical effect they had. Without judicial action, the covenant could not be enforced. Second, the state court was enforcing a corpus of state substantive common law that enabled things like restrictive covenants. Vinson dismissed the faux equality argument (both races were equally affected) by his most frequently-quoted epigram, "equal protection of the laws is not achieved through indiscriminate imposition of inequalities."[44] Five years later, the Court extended the *Shelley* doctrine to ban actions at law for recovery of damages for breach of a racial covenant.[45]

Vinson's insight, that the state was implicated in the existence of a background law of property that structured such things as covenants and easements, represented the triumph of the Legal Realist idea that the supposedly "private" ordering of the market, in such things as racial covenants, was in reality coercive, enabled by state substantive law and enforced by state courts and police.[46] Without substantive law and enforcement, a racial covenant would be nothing more than an unenforceable precatory gesture. The coercive power of the state lurks in the background of every private contract,

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[43] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 8, at 674-81, analyzes the Vinson opinion and defends it against its numerous critics. The following paragraphs draw on those pages.

[44] Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

[45] Barrows v. Jackson, 346 U.S. 249 (1953).

[46] Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

deed, or will. Chief Justice William H. Rehnquist later hailed the power to exclude, which is at the core of the racial covenant, as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[47] Thus to claim that an individual has a legally-recognized and enforceable "right"[48] to refuse to sell to African-Americans is functionally to legitimate state-enforced discrimination against an entire class of people.

Worse, affirming a power to discriminate sustains a white person's racist preference at the cost of denying the legally and constitutionally secured right of all people to exercise a fundamental civic capacity in society, the right to acquire, use, and occupy property, first guaranteed to African-Americans by the Civil Rights Act of 1866 and then confirmed by the Fourteenth Amendment. To defend a right to discriminate is to privilege racism over human dignity.

B. Segregation and Discrimination by Federal Mandate

Before World War II, the initiative for imposing racial segregation in cities and suburbs passed from private and local control to the federal government. From the Great Depression into the 1970s, federal policy mandated discrimination and segregation throughout the nation.

Shelley v. Kraemer had not brought an end to the use of racial covenants. Even if unenforceable, they continued to be inserted in deeds, plats, and developers' declarations.[49] In their heyday, the

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[47] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). Rehnquist was enamored of this idea; he repeated it verbatim in *Dolan v. Tigard*, 512 U.S. 374, 384 (1994).
[48] Technically, this is a privilege or a power, not a right. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).
[49] Motoko Rich, *Restrictive Covenants Stubbornly Stay on Books*, N.Y. TIMES, April 21, 2005. I recall my shock (and naiveté) when as a young attorney conducting title

1930s and 1940s, they complemented federal and private racist initiatives that created the hypersegregated ghettoes that developed in American cities by 1960.[50] The Home Owners Loan Corporation (HOLC), created in 1933, was one of the earliest New Deal agencies and the progenitor of federally-mandated racial discrimination in housing. It refinanced existing mortgages, made loans directly to owners who had lost homes to foreclosure, and was responsible for popularizing the long-term self-amortizing mortgage that has become the standard instrument of residential real-estate financing today.[51] It also created standardized appraisal methods based in large measure on what were known as "Residential Security Maps."[52] These identified and color-coded neighborhoods into four tiers, ranging from prime properties designated variously as First or A or

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searches in New Hampshire Registries of Deeds in 1962-1964, I frequently encountered racial covenants in post-1948 deeds, a mere fourteen years after *Shelley v. Kraemer*.

[50] As used in this paper, the term ghetto refers to a spatially delimited urban community inhabited by racially or ethnically homogenous people, usually characterized by relative poverty, inferior public schools, lack of economic opportunity, and high rates of violence and crime. *See generally* "Ghetto," 3 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 311–14 (2008).

[51] PRICE FISHBACK ET AL., WELL WORTH SAVING: HOW THE NEW DEAL SAFEGUARDED HOME OWNERSHIP (2013) provides a brief introduction to the HOLC's accomplishments, but it ignores racial issues entirely. Disturbing as this is, it exemplifies an approach typical and symptomatic of the general understanding of the relationship between the federal government and racial segregation in the twentieth century. Unfortunately, it is the viewpoint that continues to underlie the Supreme Court's residential segregation decisions.

[52] KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 198-218 (1985); Kenneth T. Jackson, *Race, Ethnicity, and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration*, 6 J. URBAN HIST. 6, 419 (1980); Kristen B. Crossney & David W. Bartelt, *The Legacy of the Homeowner's Loan Corporation*, 16 HOUSING POL'Y DEBATE 547 (2005.) *But cf.* Amy E. Hillier, *Redlining and the Homeowners Loan Corporation*, 29 J. URBAN HIST. 394 (2003), who contends that the HOLC maps were relatively uninfluential, and that the real villain in redlining was the FHA.

green to the least desirable (Fourth/D/red). The prime properties were "homogenous," the lesser ones "infiltrated" or "invaded" by "undesirable elements," particularly "the colored element." All African-American neighborhoods, as well as predominantly white neighborhoods with some black residents, were labeled "hazardous" and consigned to the red D class. These maps provided the basis for red-lining, whereby banks and other lenders, insurance companies, and government agencies identified districts where they would not make or insure mortgage loans, or where they would provide only costlier mortgages ("reverse-red-lining").[53]

The Federal Housing Administration (FHA), created a year later, insured long-term mortgage loans made by private lenders. Its activities were supplemented by comparable programs of the Veterans Administration (VA), created by the GI Bill (1944). The FHA adopted the HOLC's techniques, appraisal criteria, and possibly even its maps. But the FHA went further, publishing *Underwriting Manuals* in 1935, 1936, 1938, and 1947, which mandated that insured "properties shall continue to be occupied by the same social and racial classes," and shall exclude "incompatible racial element[s]."[54] The *Manuals* endorsed racial covenants and even racial zoning as effective ways to achieve this. For the first time, the urban historian Kenneth Jackson concluded, the federal government, through the FHA, actively promoted "segregation and enshrined it as public policy"

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[53] Congress finally got around to trying to inhibit redlining, though not make it per se illegal by providing criminal penalties and civil fines, in the Home Mortgage Disclosure Act of 1975, codified at 12 U.S.C. §§ 2801-2810, which attempts to make information about lending practices available to potential private attorneys-general, in the hope of smoking out discriminatory lending practices.

[54] FEDERAL HOUSING ADMINISTRATION, UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT, Nov. 1, 1936, ¶¶ 229, 233, 266, 283.

for the nation's housing market.[55] The FHA in effect forbade lending to blacks who wanted to move into white neighborhoods, and then refused to insure lending in black neighborhoods, effectively excluding African Americans from the housing credit market altogether.[56]

As a result of FHA policies, black families found it impossible to get loans for residential property in what were fast becoming America's segregated cities.[57] FHA policies enforced segregation, destroyed property values and therefore the wealth of black homeowners, and hollowed out the social infrastructure of black neighborhoods in the cities. White suburbs, closed off to blacks by private discrimination, mushroomed; racial prejudice moved from being an individual vice to becoming national public policy. The Columbia University urban planner Charles Abrams concluded that the FHA was the "vanguard of white supremacy and racial purity." It "adopted a racial policy that could well have been culled from the Nuremberg laws. From its inception FHA set itself up as the protector of the all white neighborhood."[58] In 1948, FHA Administrator Franklin Richards defiantly announced that the ruling in *Shelley* would force "no change either in our basic concepts or procedures" and "would in no way affect the programs of this agency."[59] The

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[55] JACKSON, CRABGRASS FRONTIER, *supra* note 52, at 213.

[56] Kevin F. Gotham, *Racialization and the State: The Housing Act of 1934 and the Creation of the Federal Housing Administration*, 43 SOC. PERSP. 291 (2000).

[57] John Kimble, *Insuring Inequality: The Role of the Federal Housing Authority in the Urban Ghettoization of African Americans*, 32 LAW & SOC. INQUIRY 399 (2007).

[58] CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 229-30 (1955).

[59] Quoted in Arnold R. Hirsch, *Choosing Segregation: Federal Housing Policy between Shelley and Brown*, in FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA 206, 211-12 (John F. Bauman et al.) (2000).

FHA refused to comply with President John F. Kennedy's 1962 Executive Order 11063, banning discrimination in the sale or rental of housing in federally-assisted or -owned housing.[60] Even after George Romney, the Secretary of the Department of Housing and Urban Development (the parent agency of the FHA), admitted to Congress in 1970 that the FHA deliberately and systematically denied insurance to inner city neighborhoods,[61] the FHA continued its collusion with banks and realtors in blockbusting, steering, and mortgage discrimination.[62]

In this same period, the United States Housing Authority and the Public Works Administration built three hundred public housing projects in American cites. The large majority of these were racially segregated by the agencies involved.[63] This assured that African Americans too poor to own their homes and dependent on federally-subsidized projects for housing would be herded into what soon came to be known as vertical slums, where poverty and race were fused. This segregation was in part the consequence of a public-housing program that was "an adjunct to corporate city central business district [CBD] redevelopment, serving as a receptacle for some of the residents displaced by demolition of low-income or minority neighborhoods too close to CBDs."[64]

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[60] MASSEY & DENTON, AMERICAN APARTHEID, *supra* note 1, at 190.

[61] "Statement of George Romney . . . ." in EQUAL EDUCATIONAL OPPORTUNITY: HEARINGS BEFORE THE SENATE SELECT COMMITTEE ON EQUAL EDUCATIONAL OPPORTUNITY, 91 Cong. 2d sess., 2755 (1970).

[62] Beth J. Lief & Susan Goering, *The Implementation of the Federal Mandate for Fair Housing*, *in* DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION 227-231 (Gary A. Tobin, ed.) (1987); GEORGE R. METCALF, FAIR HOUSING COMES OF AGE 86-92 (1988).

[63] MODIBO COULIBALY, RODNEY D. GREEN, & DAVID M. JAMES, SEGREGATION IN FEDERALLY SUBSIDIZED LOW-INCOME HOUSING IN THE UNITED STATES 131-33 (1998).

[64] *Id.* at 131.

The FHA's segregationist policies were reinforced by the slum clearance, urban renewal, and public housing projects that the federal government pursued after World War II under the National Housing Act of 1934 and the Housing Act of 1949.[65] The Acts provided federal subsidies for public housing, but made local participation optional. Thus municipalities like suburbs that wanted to exclude poor and minority residents could do so by the simple and passive expedients of not creating a housing agency or applying for federal funds.[66] Meanwhile, large cities did, thus assuring that all public housing projects would be located in cities and, more specifically, in black neighborhoods in those cities. Collusion by local governments, most notoriously in Chicago, assured that public housing would be built only in formerly-black neighborhoods.[67] These policies concentrated people of color and urban poverty in The Projects, often multi-story, high-density apartment buildings with few amenities like parks and only limited access to jobs and supermarkets. The relocation of persons evicted from areas designated as "slums" had the effect of destabilizing adjoining neighborhoods, further creating

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[65] Act of June 27, 1934, ch. 847, 48 Stat. 1246 and Act of July 15, 1949, ch. 338, 63 Stat. 413. On federal urban policy generally, see Raymond A. Mohl, *Shifting Patterns of American Urban Policy since 1900*, *in* URBAN POLICY IN TWENTIETH-CENTURY AMERICA 45 (Arnold R. Hirsch & Mohl, eds.) (1993).

[66] Residential racial segregation occurs in small towns and rural areas, too, but it has been little studied by demographers. Our most complete knowledge of segregative practices is focused on urban areas. Daniel T. Lichter et al., *National Estimates of Racial Segregation in Rural and Small-town America*, 44 DEMOGRAPHY 563 (2007).

[67] ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960 (1983). In *Hills v. Gautreaux*, 425 U.S. 284 (1976), the Court sustained the power of lower federal courts to fashion remedial decrees that extended beyond Chicago's municipal boundaries, to overcome the Chicago Housing Authority's practice of siting public housing only in black neighborhoods. ALEXANDER POLIKOFF, WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO (2006).

racial tensions. The underlying policy itself forced a ghettoization of people of color who received welfare assistance. By the 1970s, the image of public housing was defined by the disasters of Pruitt-Igoe in St. Louis and Cabrini-Green in Chicago.

These governmental initiatives were supplemented pervasively with private practices by banks, insurance companies, realtors, and lawyers who engaged in behaviors like steering,[68] blockbusting,[69] redlining,[70] and outright discrimination in the sale or rental of housing.[71] Throughout the 1960s, realtors continued to press for repeal of state fair housing laws, most notably in California, where newly-elected Governor Ronald Reagan urged repeal of the Rumford Fair Housing Act[72] in 1967. But by then, opposition in California to repeal of fair housing legislation had mounted sufficiently that Reagan backed off, and in the next year actually stifled a repeal measure.[73]

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[68] Showing prospective black purchases or renters property only in black neighborhoods. In *Gladstone Realtors v. Bellwood*, 441 U.S. 91 (1979), the Court sustained standing for testers who ferreted out steering practices that violated the Fair Housing Act, a significant but anomalous triumph for civil rights plaintiffs at a time when they otherwise met a frosty reception at the High Court. *See also* Havens Realty v. Coleman, 455 U.S. 363 (1982) (sustaining testers' standing in a case involving rental housing).

[69] Realtors' practice of alarming white property owners by telling them that that blacks were moving into the neighborhood, buying their property at a panic discount, and then reselling it at re-inflated prices to black purchasers. Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics, and Race-Based Real Estate Speculation*, in 67 FORDHAM L. REV. 1145-61 (1998).

[70] Drawing lines on maps to designate zones where mortgage lending or insurance would not be available. The Federal Home Loan Bank Board continued its overt redlining practices until 1970. JACKSON, CRABGRASS FRONTIER, *supra* note 52, at 203.

[71] ROSE HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS (1969) is a thorough qualitative study of contemporary (*c.* 1954-1968) realtors' practices, beliefs, attitudes, and "ideology" concerning racial discrimination in housing, demonstrating the pervasive effect of prejudice among sellers and their agents.

[72] *See infra* note 102 and surrounding text.

[73] LOU CANNON, GOVERNOR REAGAN: HIS RISE TO POWER 201-05 (2003).

Reagan was conflicted on the matter. On one hand, he defended people's "basic and cherished right to do as they please with their property. If an individual wants to discriminate against Negroes or others in selling or renting his house, he has a right to do so."[74] On the other hand, he claimed to be distressed by actual discrimination and even more so by accusations that he himself was a racist.[75]

Enactment of measures like the Rumford Act at the state level and the 1968 Fair Housing Act[76] at the federal level misled supporters into thinking that they had achieved lasting victories over housing discrimination that would soon enjoy widespread support among whites. The reality proved to be stubbornly different: whites doggedly resisted racial integration in their neighborhoods throughout the nation.[77]

FHA-induced redlining illustrates the operation of structural racism. Though overtly racist in its origins, mandated exclusion of "inharmonious racial groups" could be defended on non-racial, which is to say in lawyer-speak, facially neutral, terms. The FHA had a defensible interest in policing and sustaining the soundness of the mortgages it insured. Thanks to blockbusting and panic selling, the value of the insured properties could plummet suddenly when realtors turned a neighborhood over. This artificially-induced white

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[74] Reagan campaigning in his successful bid for the California governorship in 1966, quoted in LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT 205 (2001).

[75] See the account of an incident at the National Negro Republican Assembly in 1966 in CANNON, GOVERNOR REAGAN, *supra* note 73, at 142-143.

[76] *See infra* note 156 and surrounding text.

[77] Arnold R. Hirsch, *Massive Resistance in the Urban North: Trumbull Park, Chicago, 1953-1966*, 82 J. AM. HIST. 522 (1995). JOHN F. BAUMAN, PUBLIC HOUSING, RACE, AND RENEWAL: URBAN PLANNING IN PHILADELPHIA, 1920-1974 (1987) provides a detailed case study of how public housing in Philadelphia degenerated into a "federal slum" of despair and poverty.

flight drained social wealth out of changing neighborhoods and rendered many mortgages precarious. Thus the FHA could claim that it was simply looking after investment values, even after it was forced to abandon its facially racist policies.

Since most African-Americans could not obtain mortgages, thanks to the FHA, would be home-buyers were forced to the exploitative expedient of buying homes under installment land contracts.[78] Unscrupulous speculators would buy up run-down properties at a discount, then foist them off on desperate African-Americans seeking housing, under contracts (not deeds) that permitted immediate repossession if the borrower missed one installment payment. After repossessing, the "contract seller," as he was known, would then sell the property to the next victim, to repeat the cycle. (Sometimes the contract seller would sell the contract to investors, an early, rudimentary development of the secondary mortgage market.). The hapless victims would lose their down payment, plus all installment payments made. One estimate suggests that 85% of all black-owned Chicago residential properties were held under installment contracts.[79] The process sucked wealth out of black communities and into the hands of speculators.

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[78] In an installment land sales contract, the Buyer-Seller relationship is based solely on a contract: Seller does not convey a deed to the property until the purchase price is paid off. Buyer makes a down payment and continues to make monthly payments to Seller in specified amounts and at specified times. If Buyer defaults, Seller retains the right to immediately repossess and to retain all payments made till that time as liquidated damages. This arrangement has an enormous potential for abuse, and state courts have intervened to limit its worst abuses. See the discussion and critique of the land sales contract by Justice Cruz Reynoso and Chief Justice Rose Bird of the California Supreme Court in *Petersen v. Hartell*, 40 Cal. 3d 102, 707 P.2d 232 (1985).

[79] Beryl Satter provides a detailed look at the practice in Chicago, and the struggle against it, in FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE Exploitation OF BLACK URBAN AMERICA (2009).

The troika of slum clearance, urban renewal, and public housing policies adopted by the federal government after World War II linked private enterprise (and with it, opportunities for politically-powerful interest groups like developers) with decentralized public planning (zoning, building codes, and other land-use controls) under amorphous policy guidelines. The planning documents and discussions of the era are irradiated with implicit racism. It scarcely needs to be said that the people directly involved – mostly African-American residents of the neighborhoods to be razed by slum clearance projects – were not consulted in any of this. The consequences were disastrous for them: the destruction of functioning city neighborhoods along with slums; interstate highways cutting through the heart of cities, which simultaneously destroyed vibrant black and white neighborhoods while enabling suburban sprawl where displaced whites could flee; and the concentration of poverty and race in the Projects, often high-rise slums that created or housed the urban pathology that they were supposed to remove (drugs, crime, vandalism, despair.) The sociologist Xavier de Souza Briggs aptly refers to this policy as "containment plus sprawl."[80] "This is the sacking of cities," Jane Jacobs mourned in her classic *The Death and Life of Great American Cities*.[81] James Baldwin spoke for most in the black community when he condemned the whole cluster of urban renewal policies as "Negro removal."[82]

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[80] Xavier de Souza Briggs, *Politics and Policy: Changing the Geography of Opportunity*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 310-41 (Xavier de Souza Briggs ed., 2005).

[81] JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 4 (1961).

[82] James Baldwin Interview (1963), https://www.youtube.com/watch?v=T8Abhj17kYU (last visited April 22, 2017).

The United States Supreme Court benignly gave its blessing to the whole process in *Berman v. Parker* (1954),[83] shutting its eyes to the racial implications and, needless to say, the structural consequences of slum clearance and urban renewal. Justice William O. Douglas, for a unanimous bench, accorded abjectly low deference to all legislative judgments involving urban renewal, even though he conceded that the immediately-affected property, a functioning department store, was not a slum. "We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive." He broadened the constitutional phrase "public use"[84] to embrace any "public purpose," as determined by the legislature, an expansive reading that has had unforeseen consequences.[85] *Berman v. Parker* insulated subsequent housing-related structural racism from judicial scrutiny.

II. The Court Confronts Residential Segregation During the Second Reconstruction

By 1965, as cases involving housing questions began to make their way to the Supreme Court in the Civil Rights Era, extensive residential segregation had been established by private discriminatory actions, which were encouraged and supported by federal, state, and municipal governments. The Court's precedents provided ambivalent guidance for dealing with this pervasive discrimination. *Buchanan v. Warley* and *Shelley v. Kraemer* could have led a contemporary to expect that the Justices might be sympathetic to challenges

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[83] 348 U.S. 26, 33 (1954); *see* Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URBAN LAWYER 423 (2010).

[84] U.S. Const. amend V: "nor shall private property be taken for public use, without just compensation."

[85] Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Kelo v. New London, 545 U.S. 469 (2005).

to racist housing practices. Yet *Berman v. Parker* cautioned that they could as readily be oblivious to the consequences of public policies that constrained African-Americans' access to housing. The Court would write on an almost blank slate.

Viewed historically, the Court's residential segregation cases display a striking pattern, paralleled in other civil rights issues. After World War II, up to 1971, the Justices confronted racial issues open-mindedly, sensitive to lingering vestiges of slavery and Jim Crow era servitude. Though not activist, and restrained at all times by the prudent conservatism of jurists like the second John M. Harlan, the Court did recognize structural racial problems and did what it could to address them. Through the late 1960s, the Court thwarted state and private efforts to preserve segregation, while it expanded federal authority to overcome housing segregation's impacts. But after the Court's ideological about-face of 1970-71,[86] its housing decisions displayed a striking indifference, verging on hostility, to claims of discrimination in access to housing.

In 1948, the Vinson Court modestly extended the reach of the equal protection clause in a case involving the California Alien Land Laws of 1913 and 1920.[87] The earlier statute was aimed at Japanese farmers, whose diligence made them successful competitors in truck farming for California's urban markets. It forbade ownership of agricultural land by persons ineligible for citizenship – almost entirely Japanese Issei (persons born in Japan who emigrated to the United

[86] EARL M. MALTZ, THE COMING OF THE NIXON COURT: THE 1972 TERM AND THE TRANSFORMATION OF AMERICAN LAW (2016) surveys the Term but contends that the change was less dramatic.

[87] Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as Prelude to Internment*, 19 BOSTON COLLEGE THIRD WORLD L.J. 37 (1998).

States.) The later act was designed to prevent the Japanese from circumventing the predecessor statute by buying land in the name of their native-born children (Nisei), who by operation of the birthright citizenship clause of the Fourteenth Amendment[88] were American citizens and thus beyond the ban of the 1913 Act. Kajiro Oyama, an Issei, bought eight acres of southern California farmland in the name of his son Fred, a Nisei, in the 1930s. While they were displaced to a relocation camp during the war, the state escheated the lands on the grounds that they were acquired in violation of the 1920 Act. The Truman administration considered both statutes an international embarrassment, and Secretary of State Dean Acheson argued the case for the challengers before the Court. In a 7-2 decision, *Oyama v. California* (1948),[89] Chief Justice Fred Vinson held that the statutes in their procedural aspects denied the Oyamas equal protection in that they imposed invidiously different procedural obstacles on the parties because they were Japanese, an impediment that would not apply to Europeans or Chinese similarly situated.[90] Justices Hugo Black, William O. Douglas, and Frank Murphy, concurring,[91] would have gone further to hold the statues unconstitutional on substantive equal protection grounds. The California Supreme Court agreed, finally holding the statutes unconstitutional in *Sei Fuji v. State* (1952).[92] The *Oyama* decision suggested that the equal protection clause was stirring from its eighty-year coma, a conclusion affirmed next year

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[88] U.S. CONST, amend. XIV, § 1, first sentence: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."
[89] Oyama v. California, 332 U.S. 633 (1948).
[90] Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010).
[91] Randall Kennedy provides a brief appreciation in *Justice Murphy's Concurrence in Oyama v. California: Cussing Out Racism*, 74 TEXAS L. REV. 1245 (1996).
[92] 38 Cal. 2d 718, 242 P.2d 617 (1952).

by publication of Joseph Tussman's and Jacobus ten Broek's seminal law review article, "The Equal Protection of the Laws,"[93] which heralded the dawn of the equal protection clause in the modern era.

The Court's first housing discrimination case of the Civil Rights Era likewise came out of California. In retrospect, that is not surprising. The Golden State was the birthplace of racial covenants, going back into the nineteenth century, when they were aimed first at the Chinese, then the Japanese. The prejudice reflected by the Alien Land Laws and anti-Asian covenants lingered into mid-century. Many white Californians supported Japanese exclusion during the Second World War. Wartime internment resulted in a massive land transfer of Japanese-owned properties to white buyers. In such a climate, active state intervention was necessary to assure all people of color the opportunity to obtain decent housing.

But demographic and political trends after the war incited widespread white resistance to fair housing legislation.[94] Suburban growth, post-war prosperity, and a broad-based shift toward the politics and values of the Republican Party transformed the politics of the white middle class from Democratic to GOP leanings by 1960, more than two decades before a comparable political switch took place in the South.[95] The new conservative white suburban electorate was receptive to ideological appeals to anti-communism, states' rights, resistance to federal power, limited government, individual-

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[93] Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

[94] DANIEL M. HOSANG, *"Get Back Your Rights": Fair Housing and the Right to Discriminate, 1960-1972*, *in* RACIAL PROPOSITIONS: BALLOT INITIATIVES AND THE MAKING OF POSTWAR CALIFORNIA ch. 3 (2010).

[95] RICHARD WHITE, IT'S YOUR MISFORTUNE AND NONE OF MY OWN: A HISTORY OF THE AMERICAN WEST 574-79 (1991).

ism, and the sanctity of private property. This reorientation supported more practical goals aimed at preserving white entitlement and its implicit benefits: security, stability, a sense of shared community, and a monopoly of the benefits of Sunbelt growth. Racial integration threatened whites' material wealth (captured in the rising values of their homes), their sense of racial solidarity, and the low levels of crime and juvenile delinquency that the suburbs offered.[96] Freedom to associate with whom you pleased, and the power to control access to your property, were the values that the *Los Angeles Times* defended in 1964 when it insisted that it was an error to "correct a social evil" (racial discrimination) at the cost of "destroying . . . a basic right in a free society."[97] Ronald Reagan seconded that theme two years later: it was wrong "to give one segment of our population a right at the expense of the basic rights of all our citizens."[98] Most California whites were not explicitly racist in the traditional sense, at least as far as African-Americans were concerned, but they, more than other Americans, underwent a sudden shift in perspective in 1965 as the images on their television screens switched from Bull Connor's police dogs and fire hoses assaulting peaceful black demonstrators in the Deep South to images of looting rioters in Watts two years later.

In this inauspicious environment, California progressives attacked what contemporaries considered "the most serious domestic problem of the time,"[99] racial discrimination, in the Hawkins Act of 1959, which forbade discrimination by persons selling or renting

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[96] MCGIRR, SUBURBAN WARRIORS, *supra* note 74.
[97] L.A. TIMES, editorial Feb. 2, 1964.
[98] Quoted in MCGIRR, SUBURBAN WARRIORS, *supra* note 74, at 205.
[99] Kenneth L. Karst and Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Equal Protection*, 1967 SUP. CT. REV. 39, 40.

publicly assisted housing.[100] This was immediately followed by the Unruh Civil Rights Act of 1959, a state public-accommodations act that banned all aspects of racial discrimination "by all business establishments of every kind whatsoever."[101] Though the California Supreme Court read this to cover all aspects of the housing market, including real estate brokerage, the legislature later banned housing discrimination specifically by the Rumford Fair Housing Act of 1963.[102]

At that point, a powerful coalition of real estate owners, brokers, and landlords, the California Real Estate Association (CREA), backed by the emergent California conservative movement (which included the California Republican Assembly and the John Birch Society), denounced the Rumford Act as the "Forced Housing Act" and promoted a referendum measure known as Proposition 14. This popularly enacted amendment to the state Constitution prohibited the state and all its subdivisions (municipalities, counties) from restricting "the right of any person . . . to decline to sell, lease or rent" to anyone "as he, in his absolute discretion, chooses." In 1964, California voters approved Prop 14 by a two-million vote margin.[103] The sovereign people of the Golden State thereby declared that the power to discriminate on the basis of race was a fundamental constitutional right, equal in dignity to freedom of speech or freedom from

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[100] Ch. 1681, [1959] Cal. Stat. 4074.

[101] Currently codified, as amended, in Cal. Civil Code § 51(b): "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

[102] Cal. Health & Safety Code, secs. 35700 et seq. The statute exempted rental properties of less than four units.

[103] MATTHEW DALLEK, THE RIGHT MOMENT: RONALD REAGAN'S FIRST VICTORY AND THE DECISIVE TURNING POINT IN AMERICAN POLITICS, 42-61 (2000).

cruel punishment. This was an idea that was widely and openly popular among whites at the time. "The essence of freedom is the right to discriminate," unabashedly claimed the CREA's president. Gubernatorial candidate Ronald Reagan agreed: "if an individual wants to discriminate against Negroes or others in selling or renting his house he has a right to do so."[104] (The United States Supreme Court explicitly denounced that idea in 1973: "invidious private discrimination . . . has never been accorded affirmative constitutional protections.")[105]

The state's Supreme Court quickly declared Prop 14 unconstitutional, holding that it encouraged or authorized racial discrimination in violation of the Fourteenth Amendment's equal protection clause.[106] Such encouragement constituted state action, the court reasoned, because the state was significantly involved in private discriminatory acts. Yet just *how* the state became "involved" remained unclear and unexplained, a vagueness that provoked sharp criticism.[107]

Aggrieved landlords appealed to the United States Supreme Court, which in *Reitman v. Mulkey* (1967) affirmed the state court's decision without much further clarifying just how the state became "involved."[108] In a brief and thinly reasoned opinion, Justice Byron

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[104] Both quoted in Christopher W. Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 438 (Sally E. Hadden & Patricia Hagler Minter, eds., 2013).
[105] Norwood v. Harrison, 413 U.S. 455, 470 (1973).
[106] Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825 (1966).
[107] Inter al.: Harold W. Horowitz & Kenneth L. Karst, *The Proposition Fourteen Cases: Justice in Search of a Justification*, 14 U.C.L.A. L. REV. 37 (1966).
[108] Reitman v. Mulkey, 387 U.S. 369, 379, 381 (1967).

White for the majority invoked earlier and inapposite precedents[109] for the proposition that the state can become significantly enough involved in private discrimination to constitute state action[110] if its "permissive statute" can be construed as an "authorization" to discriminate. Otherwise, he simply held that Prop 14 "significantly encourage and involve the state" in the actions of private discriminators. This was a conclusory statement: White relied on the state court's knowledge of local circumstances, but made no independent review of the facts.

Justice William O. Douglas, concurring, offered a more persuasive argument for the presence of state action.[111] Drawing on sociological analyses done by the U.S. Civil Rights Commission, he reconstructed the chain in which real property changes hands, by sale or rental, from the individual owner, through the realtor and title companies, to the mortgage lender, to developers, in order to demonstrate that the state "harnesses" private actors to do what the state itself is forbidden to do. Then he returned to a point originally made by the first Justice Harlan in the *Civil Rights Cases* (1883):[112] state action is implicated where the state licenses the business of the discriminators, in this case, realtors. Licensing takes place "in an environment where the whole weight of the system is on the side of discrimination." Regrettably, Douglas's realistic analysis attracted the support of no other Justices.

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[109] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); McCabe v. Atchison, Topeka & Santa Fe R.R., 235 U.S. 151 (1914).

[110] So as to bring it within the Fourteenth Amendment's command that "No *State* shall . . . ." Charles L. Black remedied the deficiencies of the Court's state-action reasoning in *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

[111] 387 U.S. at 381-87.

[112] 109 U.S. 3, 41 (1883).

Justice John M. Harlan, unpersuaded by his grandfather's arguments eighty-four years earlier, wrote for the four dissenters[113] in the most tightly reasoned opinion of the lot. He pointed out that the state's involvement, such as it was, was merely passive, akin simply to doing nothing in the face of private discrimination, constituting only inaction rather than state *action*. Encouragement, he warned was a "slippery criterion" that had no apparent limits. But his finely-crafted argument was vitiated by his disingenuous claim that the state court had failed to show any invidious purpose or effect behind Prop 14.

Though White's opinion for the majority was a superficial disappointment,[114] the majority did at least intuit a result that accorded with reality. Prop 14 was a coup overriding legislative judgment successively arrived at three times.[115] The referendum was heavily financed by the California Real Estate Association, the state Chamber of Commerce, and other special interest groups (as California referenda and initiatives often are) and was explicitly premised on a racist objective: preservation of the ability to discriminate, achieved by disabling state and local legislative power.

The Court reaffirmed its *Reitman* conclusions in *Hunter v. Erickson* two years later, striking down under the equal protection clause an amendment to the Akron, Ohio city charter that required that any ordinance regulating the sale or lease of housing "on the basis of race, color, . . . or ancestry" must be approved by a majority of the city's voters at a referendum. It also suspended the existing fair

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[113] Harlan, Black, Clark, and Stewart, at 387 U.S. at 387-96.

[114] See the critique in Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Equal Protection*, *supra* note 99, at 39-48.

[115] The Hawkins Act (1959), the Unruh Civil Rights Act (1959), and the Rumford Act (1963).

housing ordinance until approved by popular referendum. Justice White in an 8-1 decision readily disposed of the amendment, condemning it as an explicitly racial classification that made it more difficult to seek the protection of law against racial discrimination. "The reality is that the law's impact falls on the minority," placing a "special burden on racial minorities," he wrote.[116] He thereby anticipated the reasoning of *Romer v. Evans*[117] twenty-seven years later. Yet his reliance on an effects test contrasts sharply with his rejection of such a test five years later in *Washington v. Davis* (1976).[118]

Like other popular-democracy measures enacted to confine legislative power for the purpose of oppressing some minority,[119] the fair housing referenda represented just the kind of majoritarian action that that *Carolene Products*' footnote 4 had directed judicial power to police: legislation based on "prejudice against discrete and insular majorities" and legislation that "restricts those political processes" that clear the channels of democracy.[120] Originally adopted in the hope of enhancing democracy, modern initiative and referendum legislation often has the opposite effect. In place of an informed, debated, fact-based discussion of issues by a legislative body, which at its best takes into account all points of view and interests, laws initiated or adopted by popular vote reduce issues to a stark binary, yes-or-no option. Making matters worse, the proposed legislation is often drafted in confusing or misleading language.

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[116] Hunter v. Erickson, 393 U.S. 385, 391 (1969).
[117] 517 U.S. 620 (1996).
[118] 426 U.S. 229 (1976); *see infra* note 246 and surrounding text.
[119] Such as Colorado Amendment 2, adopted in 1992, which would have deprived gay and lesbian persons of the protection of general laws, and which was held unconstitutional in Romer v. Evans, 517 U.S. 620 (1996).
[120] United States v. Carolene Products Co., 304 U.S. 144, 154 n.4 (1938).

The outcome in *Reitman* did not douse the ardor of fair housing's enemies. Before 1968, nine popular democracy measures (initiatives or referenda) prohibiting or repealing fair housing legislation succeeded elsewhere.[121] This development was squelched only by enactment of the 1968 federal Fair Housing Act.[122] The racial potential of these direct-democracy measures made them, in the opinion of one critic, the "most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day."[123] Though the Supreme Court is willing to permit scrutiny of legislators' motives in enacting laws that have a racially-differential impact (a topic discussed below), it has declined to look into the motives of the people when they enact legislation directly.[124] Thus, in what seems a paradox of democracy, it is easier to enact racist laws by initiative or referenda, where the sovereign people themselves are the source of the laws or the authority for their enactment, than to do so through the filter of republican legislative bodies. This result stands in remarkable contrast to direct-democracy measures that diminish the rights of gays and lesbians, where the Court has exercised an alert and stern vigilance.[125]

After the First World War, the United States Supreme Court intervened only sporadically in the problem of residential segregation, first striking down segregation ordinances in 1917 (*Buchanan v. Warley*), then withdrawing judicial authority to enforce racial covenants

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[121] Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399 (1999); Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

[122] Codified at 42 U.S.C. §§ 3601-3619.

[123] Bell, *The Referendum: Democracy's Barrier to Racial Equality*, *supra* note 121, at 15.

[124] City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003).

[125] Romer v. Evans, 517 U.S. 620 (1996).

in 1948 (*Shelley v. Kraemer*) and in the same year voiding racially-based restrictions on land ownership (*Oyama v. California*), and finally in 1967 nullifying a state constitutional amendment that would have guaranteed a right to discriminate (*Reitman v. Mulkey*).[126] This trajectory reached its apogee in *Jones v. Alfred Mayer Co.* (1968).[127] *Jones* marked the culmination of the Court's willingness to approach issues of residential segregation and housing discrimination in ways that at least implicitly took into account societal realities and to affirm doctrines that would help resolve those problems. Its realism, plus its determination to forge a solution rather than pose an obstacle to it, would all too soon become a thing of the past. The *Jones* case resuscitated both the Thirteenth Amendment and the 1866 Civil Rights Act, summoning them forth from the mausoleum in which the late nineteenth century Court had entombed them. It creatively identified a way out of the state-action cul-de-sac created by the *Civil Rights Cases* of 1883.[128] The Court reaffirmed Congress's role in both identifying rights and in fashioning remedies. A majority of the Justices, for almost the last time, enlisted in the struggle to dispel segregation's lingering miasma. After 1970, a different majority of the Justices has been content to regard segregation with torpid indifference, if not implicit approval.

Joseph and Barbara Jo Jones, an interracial couple, attempted to buy a house in a St. Louis County subdivision in 1965 and were rejected because "we aren't selling houses to Negroes until the market opens up."[129] They brought suit in a federal court. Working within

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[126] The major exceptions to this enlightened trajectory in the half-century 1917-1967 were *Corrigan v. Buckley* (1926) and *Berman v. Parker* (1954), both discussed above.
[127] 392 U.S. 409 (1968).
[128] 109 U.S. 3 (1883).
[129] Mayer salesman, quoted in Darrell A. H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co*, 77 FORDHAM L. REV. 999, 1006 n.35 (2008).

the confines of the contemporary state-action doctrine, they argued that blanket racial discrimination by a developer met the criteria for some degree of state involvement, and thus would be a violation of the Fourteenth Amendment's equal protection clause. They lost at the trial level. United States District Court Judge John K. Regan read 42 U.S.C. section 1982, the current version of the relevant provision of the 1866 Act,[130] as deriving its authority from the Fourteenth Amendment, and under applicable precedent, as not implicating state action in any way.[131] He saw the discrimination in the Jones's case as purely the action of a private racist, not a state agency.

On appeal to the Eighth Circuit, the Joneses fared better: Judge Harry Blackmun[132] affirmed, but went out of his way to suggest how the plaintiffs could succeed on a Thirteenth Amendment theory, by arguing that private racial discrimination was one of the "badges and incidents of slavery" that could be reached by federal legislation (section 1982) enacted under the authority of the *Thirteenth* Amendment. He went so far as to invite the Supreme Court to so hold, or simply to declare that state action is no longer a limit on Congress's authority, at least as far as housing discrimination is concerned.[133] He admitted that he had "serve[d] the issues up on a tray, figuratively, for the Supreme Court to take. I hope they will." To another

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[130] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." This descended directly and verbatim from the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

[131] Jones v. Alfred H. Mayer Co., 255 F. Supp. 115 (E.D. Mo. 1966).

[132] Yes, THE Harry Blackmun; he was elevated to the Supreme Court three years later.

[133] Jones v. Alfred H. Mayer Co., 379 F.2d 33 (8th Cir. 1967).

colleague, he admitted that he "spell[ed] out precisely how the opposite decision could be reached."[134]

In the United States Supreme Court, the Joneses won a stunning victory. Justice Potter Stewart took up Judge Blackmun's invitation, holding first that section 1982 banned all private discrimination and then that it was constitutional because it was enacted under the authority of the Thirteenth Amendment.[135] Stewart acknowledged the "revolutionary implications" of this opinion, but concluded that Congress had "meant exactly what it said," because it intended to strike at all private forms of racial oppression and white monopolization of power in the wake of slavery's abolition. This included power to "eliminate all racial barriers to the acquisition of real and personal property." Stewart thereby read the language of section 1982 as broadly as possible.

In upholding Congress's power under the Thirteenth Amendment, Stewart returned to an argument that had been advanced in the *Civil Rights Cases* of 1883. He read section 1 of the Amendment as an "absolute declaration that slavery shall not exist." Backed by section 2's unrestricted grant of enforcement power (the first such provision in the Constitution and its amendments), this meant that Congress could reach "all badges and incidents of slavery," including not only private discrimination, but all "burdens and disabilities

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[134] LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 30 (2005).

[135] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422, 440, 441, 443 (1968). He apparently did so at the urging of one of his then-clerks, Laurence Tribe, who was to go on to a distinguished career as an authority on the Constitution as the Loeb University Professor of Constitutional Law at the Harvard Law School. MICHAL R. BELKNAP, THE SUPREME COURT UNDER EARL WARREN, 1953-1969, at 175 (2005). BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT: A JUDICIAL BIOGRAPHY 702-03 (1983).

. . . upon those fundamental rights which are the essence of civil freedom."[136] This sweeping recognition of congressional power meant that Congress could protect all "fundamental rights," including access to property.[137] Stewart saw racial segregation as "a substitute for the Black Codes," which themselves were makeshift substitutes for slavery. This was a historically realistic view of segregation's function in modern society. "The freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to . . . live wherever a white man can live." Racial discrimination is a relic of slavery amenable to congressional power because it "herds men into ghettos and makes their ability to buy property turn on the color of their skin."

Justice William O. Douglas carried the implications further in a vigorous concurrence: all modern forms of racial discrimination were instances of the "spectacle of slavery unwilling to die," and as such all could be banned under Congress's Thirteenth Amendment section 2 power.[138] The next year, Douglas, now writing for a majority, extended the remedies available under section 1982 to include damages, significantly expanding the remedial power under the 1866 Act.[139] The expansive language chosen by the normally measured Stewart and the more unrestrained Douglas bespoke a realism about racial conditions in their time that unfortunately would soon to fade away into an arid formalism.

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[136] Civil Rights Cases, 103 U.S. at 20-21 (Bradley majority opinion).

[137] "Property rights" comprise five essential components: the ability to acquire, use, and dispose of property, to exclude others from it, and the capacity to call upon the laws to protect those four preceding rights.

[138] 392 U.S. at 445-47.

[139] Sullivan v. Little Hunting Park, 396 U.S. 229 (1969).

Jones was an extraordinary opinion, by several measures, justifying a contemporary evaluation as "the most far-reaching race relations case since the Civil War."[140] Singlehandedly, it revived the dormant (some would have thought extinct) Thirteenth Amendment, placing it center stage as a hitherto-untapped source of federal authority to act when states were indifferent to private racism or supportive of it, passively or actively. Section 1982 went well beyond the limitations of the 1968 Fair Housing Act: it applied to all housing (the 1968 Act contained the "Mrs. Murphy's boardinghouse" exemption of owner-occupied buildings of four or fewer rental units as well as single-family dwellings); the 1968 Act's original enforcement mechanisms were limited to administrative procedures; the Department of Housing and Urban Development at first had no effective enforcement authority.[141]

By recognizing both congressional and judicial power to efface the badges and incidents of slavery, the *Jones* Court opened the door to expansive federal action against the lingering effects of enslavement and the servitude that followed it in the collapse of Reconstruction.[142] Leaving aside possible applications of the Amendment that have no necessary connection to racial oppression,[143] *Jones* might be

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[140] Arthur Larson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470, 486.

[141] On the disappointments and compromises of the 1968 Act, see John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067 (1998).

[142] William M. Carter, *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U. CAL. DAVIS L. REV. 1311 (2007).

[143] Such as (1) restrictions on reproductive rights: Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401 (2000) and Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990); (2) civil liberties: Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENTARY 403 (1993) and Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992); (3) discrimination

read to suggest that the Thirteenth Amendment is relevant to modern problems including racial profiling,[144] racial disparities in delivery of health care,[145] peremptory challenges,[146] environmental racism,[147] and capital punishment.[148] And since the Amendment is not couched in racially exclusivist terms, it can serve as a basis for challenges to sweatshops, peonage, and all forms of unfree labor (including debt bondage).[149] It is similarly relevant to forms of coercion that distinctly victimize women: trafficking, coerced prostitution,

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based on sexual orientation: David P. Tedhams, *The Reincarnation of "Jim Crow": A Thirteenth Amendment Analysis of Colorado's Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133 (1994); (4) electoral mechanisms: Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 230 (1994); and (5) labor relations: Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989); Rebecca Zietlow, "The Constitutional Right to Organize," in LABOR AND VULNERABILITY (Martha Fineman and Jonathan Fineman, eds., forthcoming). I do not suggest that such applications are necessarily improper. Rather, I contend that the Thirteenth Amendment's potential is most appropriately realized when applied to issues that have two qualities, one that is explicitly identified in the text of the Amendment itself (involuntary servitude) and the other a racial component (racial subordination), which is inextricably associated with unfreedom in American experience.

[144] William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial* Profiling, 39 HARV. C.R.-C.L. L. REV. 17 (2004).

[145] Larry J. Pittman, *A Thirteenth Amendment Challenge to Both Racial Disparities in Medical Treatments and Improper Physicians' Informed Consent Disclosures*, 48 ST. LOUIS U. L.J. 131 (2003).

[146] Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990).

[147] Marco Masoni, *The Green Badge of Slavery*, 2 GEO. J. ON POVERTY L. & POL'Y 97 (1994)

[148] Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1 (1995)

[149] Samantha C. Halem, *Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry*, 36 SAN DIEGO L. REV. 397 (1999).

and possibly even mail-order brides.[150] What all these have in common (except the last) is that each has its analogue in some experience of slavery. Disparities in the delivery of health care, for example, recall deliberate medical experimentation on slaves, the notorious Tuskegee syphilis experiment conducted by the U. S. Public Health Service in the 1930s, and centuries of medical and scientific abuse of people of color.[151]

Lower federal courts have read the Thirteenth Amendment in a stinting fashion, confining its reach to actual slavery or forced labor,[152] but the Supreme Court has reversed, disapproved, distinguished, or superseded its earlier restrictive readings of the Thirteenth Amendment,[153] suggesting that it might have been open to a more expansive understanding, at least until 1970. Twice the Court dropped tantalizing hints that the Thirteenth Amendment, in contrast to the Fourteenth, might not be limited by the intent requirement of *Washington v. Davis*. In *Memphis v. Greene* (1981), a decision discussed at greater length below, the Court declined to "speculate about the sort of impact on a racial group that might be prohibited

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[150] Bahar Azmy, *Unshackling the Thirteenth: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981 (2002); Neal Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791 (1993); Vanessa B.M. Vergara, *Comment, Abusive Mail-Order Bride Marriage and the Thirteenth Amendment*, 94 NW. U. L. REV. 1547 (2000).

[151] HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT (2006).

[152] Atta v. Sun Co., 596 F. Supp. 103 (E.D. Pa. 1984); Alma Society, Inc. v. Mellon, 601 F.2d 1225, 1237 (2d Cir. 1979); Lopez v. Sears, Roebuck, & Co., 493 F. Supp. 801, 807 (D. Md. 1980).

[153] Specifically: Plessy v. Ferguson, 163 U.S. 537 (1896), implicitly overruled by Morgan v. Virginia, 328 U.S. 373 (1946) and Brown v. Board of Education, 347 U.S. 483 (1954); Hodges v. United States, 203 U.S. 1 (1906), overruled by Jones; Corrigan v. Buckley, 271 U.S. 323 (1926), distinguished by Hurd v. Hodge, 334 U.S. 24 (1948).

by [the Thirteenth Amendment] itself."[154] The next year, the Justices left open the question whether "the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by a discriminatory purpose."[155]

In 1968, Congress enacted what has come to be known as the Fair Housing Act.[156] A flawed piece of legislation, enacted in the riotous aftermath of Martin Luther King's slaying, the statute did achieve some positive goals: it applied to both sales and rentals of housing, it covered realtors and lenders, it applied to advertising, and it specifically banned blockbusting. But the statute was crippled by the compromises necessary to get it enacted, most notably the exemption of single-family homes and owner-occupied dwellings of no more than four units (the so-called "Mrs. Murphy's boarding house" exemption). As originally passed, the act provided only for administrative enforcement by the Department of Housing and Urban Development through investigation and arbitration, feeble mechanisms compared with mandated enforcement by the Justice Department or provisions for private suits (the so-called "private attorneys-general").[157] Yet taking it as it was, the statute was in its time as forceful an expression of public policy by Congress in favor of fair housing opportunities throughout the nation as was then politically feasible.

The United States Supreme Court is at its most assured in deciding cases involving major issues of public policy when the Justices know that they have the implicit concurrence of Congress, as signaled by supportive or compatible legislation. Thus 1968 might have

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[154] 451 U.S. 100, 128 (1981).
[155] General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390 n.17 (1982).
[156] 42 U.S.C. §§ 3601-3619. In its time, this measure was more commonly called the Civil Rights Act of 1968, linking it to its immediate predecessors, the Civil Rights Acts of 1957, 1960, 1964, and 1965.
[157] Congress later partly amended this oversight by the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988.

marked the beginning of a period when the Court encountered housing issues boldly and continued in the trajectory set by *Shelley*, *Reitman*, and *Jones*, knowing that it and Congress were in sync in their shared determination to root out residential segregation.

III. The Court Protects Residential Segregation in the Second Redemption, 1970-2005

The promise of the Civil Rights Era withered in the Second Redemption, which began as Justice William H. Rehnquist took his seat in 1971. The Court then reprised its earlier role in facilitating residential segregation. It rejected the possibility of finding housing to be a fundamental right, though its contemporary, the New Jersey Supreme Court, did so hold. The Justices dialed back *Shelley v. Kraemer*'s reading of state action. They endorsed local referenda that excluded low-income housing. The Justices deadlocked among themselves on the substantive issues of exclusionary zoning, but nonetheless erected almost insuperable procedural barriers to those who would challenge it. Throughout, they turned a blind eye to racist decision-making through land-use controls. Finally, they concocted a doctrine, the purpose/impact distinction of *Washington v. Davis* (1976), that constitutes an almost insuperable barrier to using law to combat structural racism.

A. Housing as a Fundamental Right?

The Supreme Court began its regressive post-1970 course reversal by quashing one of the last initiatives from the expiring era of Warren Court liberal activism, an attempt to identify the right of non-discriminatory access to housing as "fundamental" and therefore protected to some extent by the equal protection clause of the Fourteenth Amendment, at least against state infringement, perhaps

against private violation as well. This failure to protect housing as a right had the effect of reinforcing existing patterns of urban segregation.

By the late 1960s, the Court had identified two "strands" of equal-protection jurisprudence. The first and more familiar strand squinted suspiciously at "suspect classifications," of which the two most prominent were race and gender. It was under this strand of analysis that the Court issued its most resounding equal protection decisions, beginning with *Brown v. Board of Education* (1954, 1955). But there is a second strand, less well known, that relied on the equal protection clause to strike down state-created barriers to certain rights deemed "fundamental." Scholars refer to this fundamental-rights strand as substantive equal protection.[158]

The Court in *Skinner v. Oklahoma* (1942)[159] had held that marriage and procreation were a "basic liberty," "one of the basic civil rights of man," and therefore "fundamental," and as such, protected by the equal protection clause. It extended this fundamental-rights idea to strike down a poll tax in state elections in 1966,[160] because voting is a "fundamental right," and economic discrimination in access to the ballot violates the command of equal protection.[161] Justice Douglas for the majority noted suggestively that "notions of what constitutes

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[158] Wallace Mendelson, *From Warren to Burger: The Rise and Decline of Substantive Equal Protection*, 66 AM. POL. SCI. REV. 1226 (1972).

[159] 316 U.S. 535, 541 (1942) (holding that an arbitrary decision to impose sterilization on one class of repeat offenders [grand larceny] but not on a comparable group [embezzlers] violated the equal protection clause).

[160] By the Twenty-fourth Amendment, ratified in 1964, the poll tax in *federal* elections had been abolished.

[161] Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966); affirmed and extended before 1970 in Kramer v. Union Free School District, 395 U.S. 621 (1969) (restricted franchise for school district elections), Cipriano v. Houma, 395 U.S. 701 (1969) (restricted voting on municipal utility bonds), and Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (restricted voting on general obligation bonds).

equal treatment for purposes of the Equal Protection Clause do change," confirming a dynamic understanding of the equal protection clause's potential where fundamental values were involved. Could the remnant of the Warren Court's liberal bloc – Justices Black, Douglas, Brennan – have been contemplating an eleventh-hour initiative to expand that potential to include "food, shelter, and other necessities of life"?

The issue came before the Court indirectly, in a case involving durational residence requirements for welfare assistance. In 1969, just as the final curtain was falling on the Warren Court,[162] Justice William Brennan wrote for the majority in *Shapiro v. Thompson* (1969),[163] invalidating a Connecticut durational residence requirement. Connecticut and other states imposed a one-year waiting period on newly-arrived migrants into the state before they became eligible for welfare benefits. The majority held this policy unconstitutional on the grounds that it interfered with an American citizen's right to travel among the states and to be treated like other residents of the destination state. In the course of reaching this conclusion, Justice Brennan referred to "welfare aid upon which may depend the ability of the families to obtain the very means to subsist – food, shelter, and other necessities of life." Whatever he may have meant by this cryptic allusion, alarmed conservatives saw in it the camel's nose of a right to life's necessities – "food, shelter, and" . . . who knows what else? clothing? education? medical care? – poking into the capacious tent of equal protection. Justice Harlan sounded the tocsin of conservative alarm in dissent, warning against the kind of judicial overreach implied in the "notion that this Court possesses a peculiar

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[162] Chief Justice Warren retired a month after the Shapiro decision was handed down.

[163] 394 U.S. 618, 627, 677 (1969).

wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises."

For if the Court were to find a fundamental right to housing in the equal protection clause, much else might follow.[164] The Constitution itself might be the source of a right of access to housing, with no need for mediation by statute. Statutes can be repealed, modified, interpreted in ways disappointing to their sponsors, or simply ignored (as the experience of the 1866 Civil Rights Act for eighty years demonstrated). A constitutional right rests on a much more stable foundation because it is more secure from the vagaries of politics. A constitutionally based housing right might provide a broad platform for assaults on urban residential segregation patterns, possibly forestalling the emergence of the mischievous purpose-impact distinction in the next decade.[165] And if the Constitution itself secures one fundamental human necessity, housing, then why not others? Clothing, nutrition, medical care, and education could be eligible candidates. Beyond sweeping away public and perhaps even private impediments to such access, might such a right be read to include a positive mandate on the state to provide it when an individual could not do so on her own? All of this and more might grow out of the seed that Brennan might have been planting in his casual observation. After all, just a few years earlier, an obscure legal academic conjured into being a whole new dimension of entitlements by an

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[164] Academic commentators pounced on this possibility immediately: Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

[165] See the discussion of *Washington v. Davis* (1976), *infra* note 246 and surrounding text.

imaginative law review article identifying "The New Property," a panoply of procedural protections for recipients when government entitlements like welfare assistance might be withdrawn.[166] Considering what grew out of *Carolene Products'* footnote 4 after 1938, the possibilities were limited only by a liberal judge's imagination, as Harlan warned in his Shapiro dissent. Thus it may have reasonably appeared to the emergent conservative bloc on the Court in 1970 that this was indeed in the offing. Judging by the speed of their reaction, they seemed determined to abort this possibility at the outset.

Their concerns were not conjured up from groundless fantasies. In 1948, the international community affirmed housing as a fundamental human right, drawing its inspiration from FDR's "Four Freedoms" address of 1941. Article 25 of the Universal Declaration of Human Rights, adopted by the United Nations at its founding, provides that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. . ."[167] This right to housing was reaffirmed in the International Covenant on Economic, Social, and Cultural Rights, adopted by the United Nations in 1966. Its Article 11 guaranteed an adequate standard of living, including food and shelter: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate

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[166] Charles A. Reich, *The New Property*, 73 YALE L.J. 737 (1964). On the impact of this article, see STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 220-237 (2011).

[167] Universal Declaration of Human Rights, Art. 25, http://www.un.org/en/documents/udhr/index.shtml#a25 (last visited April 25, 2016.)

food, clothing and housing."[168] The International Convention on the Elimination of all Forms of Racial Discrimination,[169] extended this obligation to all forms of structural discrimination by affirming "the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of " the right to housing, and the right to own property. Whether or not this international perspective was on the minds of the Brennan group, their conservative opponents had not forgotten the anxieties aroused by the Bricker Amendment controversy in 1953, when they worried that domestic commitments like desegregation might be imposed by treaties.[170]

Harlan and other conservatives moved quickly to tamp down the unwelcome potential for activism growing out of an enlarged sense of equal protection that might extend to housing and "other necessities of life." Their opportunity soon came in a Maryland case challenging a $250 state-imposed cap on Aid to Families with Dependent Children, *Dandridge v. Williams* (1970).[171] Upholding the limit, Justice Stewart rejected an equal protection challenge to the cap, as well as its implicit potential. For the Court to assume this role would be to resume Lochnerizing, he claimed, but now under the equal protection rather than the due process clause. Two years later, the Court

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[168] International Covenant on Economic, Social, and Cultural Rights, Art. 11, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx (last visited April 25, 2017.) Though adopted in 1966, the ICESCR did not go into effect until 1976.

[169] Commonly known as CERD, adopted in 1965: 660 United Nations Treaty Series 195, art. 5, secs. (d), (e).

[170] Their fears were not fully allayed by Justice Black's plurality opinion in *Reid v. Covert*, 354 U.S. 1 (1957), disavowing any implication that treaties might override constitutional limitations.

[171] 397 U.S. 471 (1970). AFDC = Aid to Families with Dependent Children; replaced in 1996 by TANF (Temporary Assistance to Needy Families).

spurned a claim that shelter constituted a "fundamental interest" protected by the equal protection clause. There is no "constitutional guarantee of access to dwellings," Justice White insisted in *Lindsey v. Normet* (1972).[172] "The Court does not provide judicial remedies for every social and economic ill," he wrote. "The assurance of adequate housing" is a responsibility of legislatures, not courts. With that, hopes for a constitutional protection for access to housing faded, and struggles over residential segregation moved on to other fronts.

Contrast the United States Supreme Court's unyielding rejection of a constitutional basis for equal access to shelter with that of a contemporary court that was not under the sway of conservative dogma. In the 1975 Mount Laurel cases,[173] the New Jersey Supreme Court found constitutional protection for the right of access to housing in the "basic state constitutional requirements of substantive due process and equal protection of the laws."[174] "Shelter, along with food, are [sic] the most basic human needs," the New Jersey judges

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[172] 405 U.S. 56, 74 (1972) (upholding a state procedure that barred the defense of warranty of habitability in proceedings for evicting holdover tenants who are behind in rent payments).

[173] See DAVID L. KIRP, JOHN P. DWYER, AND LARRY A. ROSENTHAL, OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995).

[174] Southern Burlington County N.A.A.C.P. v. Mt. Laurel Township, 336 A.2d 713, 725 (1975) ("Mount Laurel I"). The Court located these state due process and equal protection guarantees in Art. I section 1 of the 1947 New Jersey Constitution, which provides: "1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." It did not rely on the "acquiring, possessing, and protecting property" clause itself, an inexplicable omission. The Mount Laurel cases are discussed at greater length *infra* note 221 and surrounding text.

concluded unanimously. From that, they deduced an affirmative obligation on the part of growing New Jersey municipalities[175] to provide a "reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing,"[176] as well as a negative constraint on the power of towns to engage in exclusionary zoning. (As will be noted below, exclusionary zoning is a major contributor to residential segregation.[177]) Even though all petitioners in the Mount Laurel litigation were black or Latino, the court framed the issue solely in economic terms, ingenuously conceding that the exclusionary zoning involved in this case was not adopted to exclude people "on the obviously illegal bases of race, origin or believed social incompatibility."[178] Faced with obdurate resistance by New Jersey cities to the successive and far-reaching decrees of the Court, the New Jersey legislature stepped in by enacting the state's 1985 Fair Housing Act,[179] transferring enforcement authority to an administrative agency, the Council on Affordable Housing. The Mount Laurel cases point to a road not taken by the United States Supreme Court: finding constitutional support for overcoming structural barriers to access to non-segregated housing.

B. The Law of Property

Throughout the 1970s, the Court squandered much of the egalitarian potential identified in the cases that culminated with Jones v. Alfred Mayer. It began by draining *Shelley v. Kraemer* of much of its

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[175] Extended to all municipalities in the state by a later phase of this litigation known as "Mount Laurel II": Southern Burlington County N.A.A.C.P. v. Mount Laurel Township, 456 A.2d 390 (N.J. 1983).
[176] Mount Laurel I, 336 A.2d at 728.
[177] See *infra* note 213 and surrounding text.
[178] 336 A.2d at 717.
[179] N. J. Stat. Ann. § 52:27D-301

force. This occurred in *Evans v. Abney* (1970),[180] a complicated course of litigation that carried the struggle over residential segregation into the remote reaches of trust law. The problem began in 1911 when a United States Senator and Confederate veteran from Georgia, Augustus O. Bacon, devised land in trust for use as a public park by "the white women, white girls, white boys and white children of the City of Macon."[181] He explained in his will that "while he had only the kindest feeling for the Negroes he was of the opinion that in their social relations the two races (white and negro) should be forever separate."[182] The park was managed by a Board of Managers ("all seven to be white persons" under terms of the will), with the city of Macon as trustee. When the city determined in 1963 that it could no longer maintain a segregated public park,[183] the white managers asked that the city be removed as trustee and be replaced with private trustees who would continue to operate the park on a segregated basis, a request granted by Georgia courts.[184] The United States Supreme Court struck down this move in *Evans v. Newton* (1966),[185] holding that the park was a "public institution," whatever the legal title might be under Georgia trust law.

At that point, the litigation returned to the Georgia Supreme Court as segregationists tenaciously fought the park's integration. The Georgia judges obliged, holding that the trust had failed and the

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[180] 396 U.S. 435 (1970).
[181] Quoted in Evans v. Newton, 220 Ga. 280, 281, 138 S.E.2d 573 (1964).
[182] Quoted in Evans v. Newton, 382 U.S. 296, 297 (1966).
[183] Under *Dawson v. Baltimore*, 220 F.2d 386 (4 Cir.1955), *aff'd*, 350 U.S. 877 (1955), and its progeny, particularly *New Orleans City Park Improvement Assn. v. Detiege*, 252 F.2d 122 (5th Cir. 1958), aff'd. 358 U.S. 54 (1958).
[184] Evans v. Newton, 220 Ga. 280 (1964).
[185] 382 U.S. 296 (1966)

property should therefore revert to Bacon's heirs.[186] But that result was not inevitable: the Georgia court actually had two options before it in construing the trust to effect the settlor's[187] intent. To simplify: the Georgia judges might have asked: which did Bacon want more, a park or segregation? The judges assumed that it was the latter, but they might have as easily found the former. Had they decided that Bacon was more interested in creating a park for the people of Macon, whatever the later changes in the social climate, they could have reached that result by applying the trust doctrine of cy pres.[188] The Georgia judges considered that idea, and explicitly rejected it.

The effect of that decision was thus to place the case squarely within the scope of *Shelley*, which ought to have been controlling precedent. A state court, construing state substantive law, interpreted legal instruments (the devise and trust) in such a way as to frustrate racial integration in the interests of preserving what all acknowledged to be unconstitutional racial discrimination. State action was involved because Georgia courts were enforcing a racial restriction that, as in *Shelley*, prevented willing parties from revising park policies to conform to constitutional understandings not present when Bacon wrote his will. Justice Brennan in dissent cogently pointed out that "a public park [is] being closed for a discriminatory

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[186] Evans v. Newton, 221 Ga. 870, 148 S.E.2d 329 (1966); 224 Ga. 826, 165 S.E.2d 160 (1968).

[187] I.e., Bacon. In trust law, the settlor is the person who creates the trust; the trustee is the person, body, or institution that holds legal title to the property given in trust and administers it; and the beneficiary is the person who benefits from it and holds what is called equitable title.

[188] Cy pres: an "equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor's intention as possible, so that the gift does not fail." BLACK'S LAW DICTIONARY, 10th ed.

reason . . . and it is a state court that is enforcing the racial restriction."[189] But to no avail: Macon lost a park, Bacon's remote heirs reaped a windfall, both whites and blacks suffered diminished recreational opportunities, all in the service of honoring a paternalistically racist dead hand. *Evans v. Abney* did not overrule *Shelley v. Kraemer*, but it diminished its authority and utility as a precedent for finding impermissible state action in the doings of state courts. Two decades later, Justice Antonin Scalia jeered at *Shelley*'s weakened authority: "any argument driven to reliance upon an extension of that volatile case is obviously in serious trouble."[190] In place of *Shelley*'s realism, *Evans* substituted an empty formalism and reinvigorated the state action doctrine as a looming roadblock in the way of racial justice. A significant transformation was taking place in the outlook of the Justices in 1970.

The Court, again speaking through Justice Black, upheld another segregationist-motivated closure of public facilities in *Palmer v. Thompson*, decided in 1971. Public facilities like parks and city-maintained swimming pools are residential segregation issues because they form a component of the physical space in which we live out our lives. A governmental action closing them rather than integrate reinforces other forms of spatial segregation, above all, housing. Notionally, shuttering a swimming pool or a leafy park deprived whites as well as blacks of relief from the southern summer heat. But the impact was more severe on African-Americans because it denied them one of the few available escapes from the segregated spaces in the South that confined their bodies as much as their aspirations. Some whites could find relief in private pools or other recreational sites off-limits to African-Americans, but black residents were left to

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[189] 396 U.S. 435, 454-55, 457 (1970).
[190] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 282 n.14 (1993).

swelter in housing that lacked air conditioning. Jackson, Mississippi had segregated the four pools that it maintained for whites and the one pool it provided for blacks. When a federal court ordered the pools desegregated, the city decided to close all of them, claiming that it could not safely and economically operate them as integrated facilities. The white city government refused to abandon segregation, even if it meant closing its pools.

This presented the Supreme Court with the problem of legislative motivation, always a perplexing challenge for the Justices. Some of the Court's leading precedents from John Marshall's day to Earl Warren's cautioned against any inquiry at all into the motives of legislators.[191] Yet during the Second Reconstruction, the Court jettisoned that reserve whenever racist motivation was obvious, as in *Gomillion v. Lightfoot* (1960),[192] where whites gerrymandered all but a handful of African-American residents of Tuskegee, Alabama out of the city's governance, or *Griffin v. County School Board of Prince Edward County* (1964),[193] where a Virginia county closed its public schools rather than integrate, but provided public tuition support for white children to attend segregated academies. In the *Palmer* case, Justice White in dissent provided irrefutable evidence of segregationist motivation behind the closure decision. But in *Palmer*, Black speaking for the majority blocked any inquiry into even blatant racist intent, observing that "it is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of

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[191] Fletcher v. Peck, 6 Cranch (10 U.S.) 87 (1810); United States v. O'Brien, 391 U.S. 367 (1968).

[192] 364 U.S. 339 (1960).

[193] 377 U.S. 218 (1964); *see* BOB SMITH, THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1961-1964 (1965). The *Griffin* decision brought an end to Virginia's program of Massive Resistance.

a group of legislators."[194] Thus the majority refused to question even an openly racist decision "solely because of the motivations of the men who voted for it." Read in tandem with *Washington v. Davis*, decided five years later, *Palmer* would foreclose all judicial review of state actions disadvantaging blacks: *Davis* required proof of malign legislative intent, but *Palmer* suggested that such intent standing alone was insufficient to prove a constitutional violation.[195] Together, they could potentially insulate all state-promoted housing segregation from the equal protection clause.

The Court's encounters with residential segregation were often frustratingly ambiguous, a characteristic inherent in the problem of structural racism. All problems of structure lead to a racially disparate outcome, resulting in loss of opportunity for blacks and reassertion of white privilege. But they are usually justifiable on a racially neutral rationale. The Court is thus led into the cul-de-sac of motive: what did those in control of the situation intend? Was there a discriminatory purpose? What if there were multiple motivations, some legitimate, some not? How far can a court go in inferring something as complex as motivation? How reliable can our judgments about others' motives be? These issues were posed again when the city council of Memphis, Tennessee authorized a street closing.

Hein Park is an elegant white Memphis community of upscale houses in a quadrangle formed by Rhodes College in the west; a large public space, Overton Park, to the south; a residential area buffering a commercial district to the east; and, to the north, bounded by

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[194] Palmer v. Thompson, 403 U.S. 217, 224-25 (1971). Black had been the author of the Griffin opinion, which he distinguished by claiming that that decision had actually been based on the effects of the closure, not the legislators' state of mind. White's dissent provided ample proof of segregationist intent at 249-62.

[195] Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

Jackson Avenue, the predominantly black community of Hollywood/Chelsea. Running north-south through Hein Park is West Drive. Hollywood residents used West Drive to access Overton Park and downtown Memphis.[196] Two years after Memphis was roiled by the sanitation workers' strike and the assassination of Martin Luther King, Hein Park residents asked the city council to close West Drive to "undesirable traffic" coming from the Hollywood neighborhood. But the city's traffic engineer denied that West Drive carried a heavy or dangerous flow of vehicular traffic. The police, fire, and sanitation departments opposed the closing.

What did that ambiguous phrase "undesirable traffic" signify? Could it serve equally well to convey legitimate as well as racist meanings? And if it did, could the Court unpack the ambivalent meanings and strike down the closure decision because of its racist component? The word "undesirable" served from the 1950s through the '70s as a dog-whistle code word signifying African-American.[197] In a class action suit, Hollywood residents challenged the closure decision on two grounds. First, they claimed that the city's action violated 42 U.S.C. § 1982, the section of the 1866 Civil Rights Act that guarantees the right to acquire and use property.[198] They reasoned that closure diminished the value of their property in the Hollywood section and inconvenienced them in a way that did not affect white residents. Second, they contended that their exclusion from West

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[196] David Tyler, *Traffic Regulation or Racial Segregation? The Closing of West Drive and Memphis v. Greene* (1981), 66 TENN. HIST. Q. 56 (2007).

[197] *See generally* IAN HANEY LOPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2014).

[198] 42 U.S.C. § 1982: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Drive constituted one of the badges of slavery forbidden under the Thirteenth Amendment.

Justice John Paul Stevens for the majority dismissed the section 1982 claim, holding that the "slight inconvenience to black motorists" caused by the closing did not affect the value of their properties in the Hollywood area or severely restrict access to their homes.[199] The Thirteenth Amendment badges-of-slavery argument was more formidable after *Jones v. Alfred Mayer*, but it too proved unavailing. Even assuming some "disparate impact" on black residents, he held that the inconvenience they experienced did not amount to a relic of slavery. Conceding that the traffic imposition discomfited blacks, the harm was nevertheless too slight, in Stevens' estimation, to invoke the majestic interdict of the Thirteenth Amendment's section 1.

But structural racism was operating invisibly in the background: an exclusive all-white neighborhood sought and got an amenity at the expense of its black neighbors. Had he been more sensitized to that sociological pattern, Stevens might have noted that the events leading up to the closing of West Drive met most of the criteria for finding a discriminatory purpose: impact on the petitioners, historical background of the decision, and departures from normal procedures.[200] (Until then, Memphis had never closed a road to alleviate traffic.) Stevens evaded the implications of the closure by circular reasoning: because American neighborhoods are often characterized by a "common ethnic or racial heritage," a decision that affects a neighborhood can also affect a racial group, but it is not on that account unconstitutional. He emphasized the need for courts to accord

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[199] Memphis v. Greene, 451 U.S. 100, 119 (1981).

[200] These criteria were identified in the case of *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), discussed *infra* note 247 and surrounding text.

broad discretion to land-use planning decisions made by local governments (a major theme of Justice George Sutherland's 1926 *Euclid v. Ambler Realty* opinion[201]). Given that generic principle of deference, petitioners challenging zoning decisions that were not overtly and explicitly motivated by racial considerations would thereafter face a daunting challenge.

C. *Racial Exclusion by Popular Referenda*

The problem of motivation also haunted contemporaneous cases involving referenda that banned low-income housing. *Reitman v. Mulkey* was at the time only four years old, but the Court smothered it in *James v. Valtierra* (1971)[202] so effectively that one contemporary observer suggested that it may have been implicitly overruled.[203] *Reitman* and its progeny, *Hunter v. Erickson*, had struck down racially-specific referenda. Opponents of fair housing then learned to be more discreet, and in 1970 promoted an amendment to the California Constitution, Article 34, that prohibited construction of low-income housing without approval in a local election. The provision carefully avoided mention of race or ethnicity, speaking only of a "low rent housing project." A federal District Court held the provision unconstitutional on the authority of *Hunter v. Erickson*, because it placed a special burden on both the poor and racial minorities (which the three-judge panel recognized as largely overlapping categories) in their quest for better housing.[204]

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[201] *See infra* note 215 and surrounding text.
[202] 402 U.S. 137 (1971).
[203] Donna M. Murasky, *James v. Valtierra: Housing Discrimination by Referendum?*, 39 U. CHI. L. REV. 115, 142 (1971).
[204] Valtierra v. Housing Authority, 313 F. Supp. 1 (N.D. Cal. 1970).

But a majority of the Supreme Court reversed in *James v. Valtierra* (1971). Justice Hugo Black summarily rejected the possibility that the referendum requirement might have anything at all to do with race; it was "a law seemingly neutral on its face," and he declined to go behind the record to investigate further.[205] He refused to extend *Hunter*, and dismissed any possibility of an equal-protection challenge merely because a statute "disadvantages" some group. He again extolled the supposedly democratic nature of a referendum,[206] stretching to find race-neutral bases for what was in reality another brick being mortared into the wall that created urban residential segregation by giving local communities veto power over proposed low-income housing options. Increased expenditures for public services to occupants of low-income housing, as well as declining tax revenues, were justification enough to slide by the obvious racial impacts of the referendum veto. After 1971, the Court retreated from its previously expansive recommitment to equality, and exalted facial neutrality and formalism as touchstones of the new era in equal protection analysis.

The Court reaffirmed its approval of the referendum as a popular-democracy device for forestalling construction of low-income housing in *Eastlake v. Forest City Enterprises* five years later.[207] But the full significance of *James v. Valtierra* became apparent only later, in a 2003 case that is an epitome of the way in which the modern Court

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[205] James v. Valtierra, 402 U.S. 137, 141-142 (1971). Justices Marshall, Brennan, and Blackmun dissenting treated the issue as one of poverty, not race, and attempted to have that given suspect-classification status, a doomed effort at the time.

[206] On the discriminatory use of referenda generally, see Bell, *The Referendum: Democracy's Barrier to Racial Equality*, *supra* note 121.

[207] 426 U.S. 668, 679 (1976): "As a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment when applied to a rezoning ordinance."

ignores the workings of structural racism even when the sociological reality of the process is laid out for them. In 1995, the residents of Cuyahoga Falls,[208] an exurb of Akron, Ohio some fifty miles south of Cleveland, vetoed a low-income-housing project by referendum. Judge Nathaniel R. Jones of the Sixth Circuit Court of Appeals, one of the federal courts' most distinguished African-American jurists at the time, carefully reviewed the pre-referendum debates under *Arlington Heights* criteria.[209] He found ample evidence of racial bias driving the referendum vote: white residents said "they know what kind of element is going to move in there;" "the Mayor also linked the project to the same type of 'social engineering that brought us busing,'" and so on.[210] He accordingly reversed summary judgment for the city.

But when the city appealed, the Supreme Court, speaking through Justice Sandra Day O'Connor in *Cuyahoga Falls v. Buckeye Community Hope Foundation* (2003),[211] refused to accord the thinly-veiled racist sentiments behind the referendum any dispositive weight. Instead, she insisted that the petitioners were challenging the referendum process itself, not its substantive outcome. Racist comments by private citizens and even the city's mayor did not constitute state action, the only role for them that the Court recognized.

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[208] Approximately 95% of the residents of Cuyahoga Falls were white; 25% of the residents of nearby Akron were black, while approximately 45% of Cleveland's population was black.

[209] *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266-68 (1977), one of the progeny of the intent/effects doctrine of *Washington v. Davis*, 426 U.S. 229 (1976), permitted an inference of discriminatory intent in an exclusionary zoning case by a showing of "circumstantial evidence," such as a "clear pattern," "historical background," "specific sequence of events," departures from normal substantive results or procedure, and "administrative history."

[210] Buckeye Community Hope Foundation v. Cuyahoga Falls, 262 F.3d 627, 636 (6th Cir. 2001). He also required that petitioners be given an opportunity to demonstrate a violation of the Fair Housing Act of 1968.

[211] 538 U.S. 188 (2003).

She even went out of her way to insist that such remarks enjoyed First Amendment protection. Thus, for the present, it is seemingly impossible to raise the question of whether anti-public-housing referenda are a way of preventing the development of low-income housing in lily-white cities and thereby serve as a proxy for de facto segregation.

D. Exclusionary Zoning

Twentieth-century efforts to create exclusively white residential areas in cities, and to confine blacks within a ghetto of poverty and oppression, proceeded by phases. All of them involved land use planning: either public – processes by which governmental bodies like city councils enacted ordinances to mandate segregation – or private, where private individuals and groups imposed apartheid, with the state's role being limited to providing background substantive law and courts to enforce private agreements. The first phase, public planning by segregation ordinances, dwindled after the Supreme Court declared the activity unconstitutional in *Buchanan v. Warley* (1917). Lawyers then devised the racial covenant, a form of private land-use planning, but that too began to recede after *Shelley v. Kraemer* (1948). By then, however, the federal government had mandated segregation, discrimination, and exclusion in housing practices for over a decade. Suburbs mushroomed around all American cities after World War II, and suburban population growth outpaced urban for the first time in 1970. Suburban growth was promoted by the federal discrimination directives, supplemented by federal highway policy, and was implemented through private exclusionary practices like redlining and outright discrimination.[212] The earlier

[212] JACKSON, CRABGRASS FRONTIER, *supra* note 52, passim.

segregationist techniques, segregation ordinances and racial covenants, were suited to the process of urbanization, but something different was needed to extend housing segregation into the postwar suburbs. That something was exclusionary zoning.

Exclusionary zoning is the structural racist adaptation of more traditional forms of residential segregation. If a suburban community wants to exclude newcomers who are poor and people of color, it can keep them out by the simple and seemingly colorblind, facially neutral expedient of tweaking its zoning ordinance, and perhaps its building code as well, to prohibit mobile homes and to mandate single-family housing, large or wide lot sizes, generous set-back requirements, square footage minima, and other amenities that make housing more attractive but also more expensive. Proponents of such measures defend them on the grounds that they keep up property values, sustain the tax base, and encourage occupancy by older and wealthier people, who will make fewer demands on public services (schools, police) than poorer, younger families with many children.[213] But they also fence out people of color, just not as crudely and overtly as the earlier forms of racial exclusion. Exclusionary zoning offers the advantage of not being overtly racialized, but achieving the same objective: segregation as a means of retaining white privilege and excluding African-Americans from opportunity.[214]

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[213] William Bogart, *"What Big Teeth You Have!": Identifying the Motivations for Exclusionary Zoning*," 30 URBAN STUDIES 1669–1681 (1993).

[214] See generally; DAVID M. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA (2007); Marsha Ritzdorf, *Locked Out of Paradise: Contemporary Exclusionary Zoning, the Supreme Court, and African Americans, 1970 to the Present*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY, *supra* note 25, at 43-57; Kenneth Pearlman, *The Closing Door: The Supreme Court and Residential Segregation*, 44 J. AM. INST. PLANNERS 160-69 (1978); Paul King, *Exclusionary Zoning and Open Housing: A Brief Judicial History*, 68 GEOGRAPHICAL REVIEW 460 (1978).

The United States Supreme Court had validated zoning as a technique of land-use and urban planning in *Euclid v. Ambler Realty Co.* (1926).[215] Rebuffing a substantive due process challenge, Justice George Sutherland for the Court sustained a sweeping use of the police power[216] by municipal governments to direct urban growth. Cities could restrict the uses to which privately-owned property might be put in the interests of assuring a safe and wholesome environment. In case of constitutional doubt, "the legislative judgment must be allowed to control." Thus the power to zone rests on a broad and secure foundation, difficult to challenge on any grounds.[217] From the outset, zoning contained a potential for racial exclusion and confinement.[218]

State courts at first found no basis for challenging zoning requirements that imposed lot size or square footage minima.[219] But during the Civil Rights Era, legal commentators[220] and state courts began to

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[215] 272 U.S. 365, 388 (1926). This Lochner-era opinion was remarkable for coming from one of the Court's foremost conservatives, George Sutherland. The other members of the Four Horsemen quartet, Justices Van Devanter, McReynolds, and Butler, all dissented.

[216] "Police power" is a nineteenth-century term of art that refers to the inherent and plenary power of any government to regulate to promote the health, safety, welfare, and morals of its people. *See* BLACK'S LAW DICTIONARY, 10th ed. (2014), "Police power." In the American governmental structure, the states have delegated this aspect of their sovereign power to local governments through zoning enabling acts.

[217] However, the Court later qualified the sweep of Euclid by insisting that any zoning restriction must "bear a substantial relationship" to the goals of the police power, thus reserving some judicial supervision over the planning process. Nectow v. Cambridge, 277 U.S. 183, 188 (1928).

[218] Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY 23-42 (Thomas and Ritzdorf, eds., 1997).

[219] Simon v. Needham, 311 Mass. 560, 42 N.E.2d 516 (1942); Lionshead Lake, Inc. v. Wayne Twp., 10 N.J. 509, 89 A.2d 693 (1952).

[220] Lawrence G. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

apply equal protection principles to exclusionary zoning practices. The most celebrated of these cases was the Mount Laurel litigation that roiled New Jersey politics through the 1970s and '80s.[221] In 1975, the New Jersey Supreme Court, again the vanguard of civil-rights awareness, found a constitutional right of access to housing in the "basic state constitutional requirements of substantive due process and equal protection of the laws."[222] The New Jersey judges took care to emphasize that their opinion was based on the state Constitution alone,[223] thus insulating their decision from hostile review by the United States Supreme Court, a wise precaution in view of the latter Court's emerging hostility to those who would challenge exclusionary zoning.[224] The New Jersey judges unanimously reasoned that "shelter, along with food, are [sic] the most basic human needs." From that they deduced an affirmative obligation on the part of growing New Jersey municipalities[225] to provide diverse, available housing, and a negative constraint on their ability to engage in exclusionary zoning. But the New Jersey Court sidestepped the issue of structural racism by conceding – naively, it would seem – that the zoning involved in that case was not based on a desire to exclude "on the obviously illegal bases of race, origin or believed social in-

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[221] See KIRP *et al.*, supra note 173; updated by David L. Kirp, *Here Comes the Neighborhood*, N.Y. TIMES, Oct. 19, 2013.

[222] Southern Burlington County N.A.A.C.P. v. Mt. Laurel Twp., 336 A.2d 713, 725, 717 (N.J. 1975).

[223] N.J. Const. 1947, art. I, § 1.

[224] Lawrence G. Sager compared the attitudes of state and federal supreme courts in *Questions I Wish I Had Never Asked: The Burger Court in Exclusionary Zoning*, 11 SW. U. L. REV. 509 (1979).

[225] Extended to all municipalities in the state in a later phase of this litigation: Southern Burlington County N.A.A.C.P. v. Mount Laurel Twp., 456 N.J. 390 (N.J. 1983).

compatibility." (All the Mount Laurel petitioners were black or Latino.)[226] The supreme courts of Pennsylvania and New York reached similar results at the same time.[227]

When issues of exclusionary zoning came before the United States Supreme Court, the Justices responded with murky opinions on the substantive issues presented, but clear and forceful results on procedural issues. Regrettably, the procedural cases effectively restricted judicial oversight of exclusionary zoning, leaving the practice difficult to challenge in federal courts.

The Court's two principal substantive encounters with issues of exclusionary zoning came in cases that involved issues not of physical space, but of family composition. The first, *Belle Terre v. Boraas* (1974),[228] challenged a local ordinance that restricted occupancy of single-family dwellings to a "single family," defined as "one or more persons related by blood, adoption, or marriage." The village of Belle Terre, a leafy Long Island bedroom community on the North Shore near Stony Brook University, hoped thereby to preclude student slums that grow up in or near college towns. The Court readily upheld the ordinance, giving it only deferential scrutiny as "social and economic legislation." The case did not present obvious racial implications, but its deferential posture toward local zoning decisions

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[226] On the disappointing results of the Mount Laurel decisions, see Bernard K. Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L.J. 577 (1997). For a more hopeful review, see CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996). Entrenched local resistance is also the motif of the decades-old Westchester County desegregation conflict. See Editorial, *Westchester's Desegregation Struggle*, N.Y. TIMES, DEC. 31, 2011.

[227] Williston Twp. v. Chesterdale Farms, 341 A.2d 466 (Pa. 1975); Surrick v. Zoning Hearing Board, 476 Pa. 182, 382 A.2d 105 (1977); Berenson v. New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975).

[228] 416 U.S. 1 (1974).

boded ill for cases that did. Moreover, had the Justices cared to dig more deeply, they would have found ample evidence of the discriminatory effects of seemingly facially-neutral zoning. Progressive state supreme courts like those of New Jersey and New York found in their state constitutions protections for the rights of unrelated persons to live together.[229]

While *Belle Terre* lacked racial overtones, *Moore v. East Cleveland* (1977)[230] was saturated with them. Both the background and the facts of the case were peculiar. Like Belle Terre, the suburb of East Cleveland limited occupancy to a "family," but defined that term in a complex ordinance that had both the intent and the effect of excluding extended families. Justice Stewart hinted in his dissent at the complicated racial dynamics behind the ordinance: African-Americans were migrating out of the east-side ghetto of Cleveland into its eastern suburbs in search of better schools and other amenities of suburban life long enjoyed by whites. At the time the ordinance was adopted, the mayor and a majority of the city council were African Americans, and they seem to have been determined to preserve the middle-class character of the city by excluding the extended families that were more characteristic of black than of white households, and that they feared would be infiltrating the suburbs as they escaped the inner city. Inez Moore lived in a home she owned with her son, his son, and the son of her deceased daughter. The boys were therefore cousins, not brothers, a degree of consanguinity excluded by the ordinance. The town prosecuted Mrs. Moore when she refused to evict her grandson.

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[229] State v. Baker, 81 N.J. 99, 405 A.2d 368, 371 (1979) ("A municipality may not, for example, zone so as to exclude from its borders the poor or other unwanted minorities," citing Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 [1977]); McMinn v. Town of Oyster Bay, 66 N.Y.2d 544, 488 N.E.2d 1240 (1985) (relying on due process clause of state Constitution).

[230] 431 U.S. 494 (1977).

Reflecting these complexities, the Court, in no fewer than six separate opinions, split 4-1-4 on the result, which was to hold the ordinance unconstitutional. Justice Powell for the plurality held it invalid on privacy/substantive due process grounds, apparently offended by the city's unfeeling determination to separate a grandmother from her orphaned grandson. Justices Brennan and Marshall, in a sociologically-informed concurrence, condemned the implicit racial preferences for white family patterns (even if those preferences were expressed by black political leaders). Justice Stevens concurred to make a majority for the result, but only on substantive due process property grounds, condemning the ordinance as an interference with an owner's freedom to use and occupy her property as she saw fit. Ironically, though the case was so heavily freighted with racial consequences, *Moore* provided neither precedent nor guidance for the Court in confronting other substantive issues of exclusionary zoning. But it did not need to, because the Justices instead resorted to a constitutional procedural issue, standing, that effectively shunted such cases out of the federal courts.

E. Frustrating Integration Procedurally

Just as the state courts of New Jersey, Pennsylvania, and New York were tackling exclusionary zoning, such cases began to come in to the federal courts as well.[231] To judges unsympathetic to such challenges, this was an unwelcome development to be squelched decisively. They did so deftly by raising daunting procedural barriers, particularly standing, to plaintiffs in such cases. It was not always so, though: in 1972, the Court read the Civil Rights Acts of 1964 and

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[231] *See generally* Anon., *Developments in the Law – Zoning. VIII: Exclusionary Zoning*, 91 HARV. L. REV. 1624 (1978) (overview of subject).

1968 (the Fair Housing Act) broadly to allow standing for "private attorneys general" who alleged discrimination in rental housing.[232] But three years later, the climate had chilled for those who would challenge exclusionary zoning. These procedural decisions have almost foreclosed federal courts from playing a consequential role in challenges to suburban exclusionary zoning practices.

The issue involved in these cases, standing, identified the legal status of a plaintiff or petitioner that enables him to present a claim in a court. In federal courts, through a mass of confusing, inconsistent, and incoherent cases decided over the last half-century, standing is now understood to have three constitutional components, and three sub-constitutional, "prudential" ones. To simplify by way of introduction, a plaintiff must show that he has (1) sustained an injury that is personal to him, (2) that was caused by the defendant, and that (3) a court can provide some sort of relief for that injury. Each of these is mandated by the Case or Controversy requirements of Article III, section 2 of the federal Constitution, and may not be waived by courts, Congress, or the parties.[233] The prudential requirements forbid a plaintiff (4) from proffering a claim of some third party not before the court, rather than his own; or (5) presenting a "generalized grievance" that he shares with most other people; and (6) require that his claim be within the "zone of interests" protected by the Constitution or statute under which he claims. Standing is indispensable to constitutional adjudication, but it has an opportunistic potential that sometimes enables judges to reach the merits of a case sub rosa, deciding it on the basis of their unstated preferences, under the guise of holding that a plaintiff lacks stand-

[232] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).
[233] Allen v. Wright, 468 U.S. 737 (1984).

ing. Abused in this way, it lends itself to unprincipled judging, conscious or not. This sinister quality pervaded the exclusionary zoning cases.

In *Warth v. Seldin* (1975),[234] an array of low-income housing advocates challenged the zoning ordinance and practices of Penfield, New York, a well-to-do suburb of Rochester that at the time was 98% white.[235] Petitioners included: four individuals who were poor and either black or Puerto Rican who wanted to move to Penfield but could not find housing there within their means; four other individuals who were Rochester residents and taxpayers, who alleged that their taxes were higher than they might have been if Penfield had not closed itself off to affordable housing; two activist non–profits dedicated to creating affordable housing; and two associations that wanted to build low-income housing in Penfield. They alleged that Penfield's zoning ordinance was per se exclusionary, and that Penfield officials had resisted all efforts to obtain permits and variances.

Justice Powell, writing for the conservative majority of the Burger Court,[236] systematically rejected each of the petitioners on standing grounds, relying on both constitutional and prudential grounds. He claimed that the poor/minority plaintiffs failed to satisfy all of the constitutional bases: they did not show actual injury to themselves, (based on at least a "substantial probability" that they had been frustrated in their attempts to find a place to live in Penfield); they did not prove that their plight was the result of defendant town's actions; and they had not shown that they would be able to buy or rent hous-

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[234] 422 U.S. 490 (1975).

[235] Note, *Standing to Challenge Exclusionary Zoning Ordinances*, 89 HARV. L. REV. 189 (1975).

[236] Powell, Burger, Blackmun (who had not yet migrated to his later centrist position), Rehnquist, and Stewart. White, though usually voting with this bloc, dissented in this case.

ing in Penfield if the courts granted the injunction. To reach this result, Powell had to resort to Catch-22 reasoning: petitioners did not have a "present interest" in any Penfield property, so they could not be harmed by Penfield's actions. Powell was saying in effect: you can challenge Penfield's zoning only when you acquire property (by purchase or lease) in Penfield, which Penfield's zoning makes it impossible for you to do.[237] As for the Rochester taxpayers, their injury was "conjectural" and they were in reality trying to enforce the rights of third parties. The activist groups failed to show injury to their members and thus were also in the position of representing the interests of third parties. The builders failed to demonstrate that they had any current projects underway in Penfield that would be thwarted by restrictive zoning, and a failed effort three years earlier was water over the dam by then. A frustrated Brennan could only splutter that the majority "tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional," a result that can "be explained only by an indefensible hostility to the claim on the merits."[238] "Today's decision will be read as revealing hostility to breaking down even unconstitutional zoning barriers," he warned.[239]

There was another source for the conservatives' reluctance to take up challenges to exclusionary zoning: a strongly-felt need for federal courts to defer to local governments in all matters pertaining to zoning. Powell noted in a footnote[240] that "zoning laws . . . are peculiarly within the province of state and local legislative authorities." Dissatisfied petitioners "need not overlook the availability of the

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[237] Or as Justice Brennan put it in dissent, petitioners are thrown out "because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit." 422 U.S. at 523.

[238] *Id.* at 520.

[239] *Id.* at 528.

[240] *Id.* at 508 n.18.

normal democratic process," another Catch-22 since none of the petitioners lived in Penfield and were therefore in no position to influence the actions of local officials. Moreover, as noted above, the "normal democratic process" was responsible for popular referenda that squelched the possibility of building affordable housing in the suburbs. But as Lawrence Sager noted at the time,[241] this judicial hands-off attitude, read in conjunction with *Eastlake v. Forest City Enterprises*[242] decided the next year, meant that all zoning decisions, including those that manifestly excluded the poor and minorities (and were meant to do so), lay beyond the ken of the federal courts. Those who suffered from this form of structural racism could not hope for relief under the federal Constitution, enforced by federal judges. Strict standing requirements, rigorously enforced, shut the courthouse doors to those seeking to challenge zoning decisions driven by a desire to keep out The Other.

After *Warth*, those who wanted to challenge exclusionary zoning were remitted to the state courts, where they sometimes fared better. But obstinate local resistance, as in Mount Laurel and Westchester County,[243] demonstrate how Sisyphean the task remains.

F. Disparate Impact and Discriminatory Intent

Structural racism works in the following way. A policy such as residential racial segregation is originally implemented through traditional racist means. The successive activities noted earlier in this

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[241] Lawrence G. *Sager, Insular Majorities Unabated: Warth v. Seldin and Eastlake v. Forest City Enterprises Inc.*, 91 HARV. L. REV. 1373 (1978).

[242] 426 U.S. 668 (1976); *see supra* note 207. *Forest City Enterprises* reinforced the Supreme Court's acquiescence in – if not affirmation of – local referenda, even when these were apparently driven by majoritarian racism.

[243] The story of Westchester County is recapped in an editorial, *Westchester's Tortured Road*, N.Y. TIMES, June 12, 2015, http://www.nytimes.com/2015/06/13/opinion/westchesters-tortured-road.html?_r=0.

paper – segregation ordinances, racial covenants, HOLC and FHA exclusionary mandates – were all examples of overt, deliberate racial discrimination and exclusion, explicitly adopted to preserve white neighborhoods and to exclude African-Americans and other people of color from them. By mid-century, American society came to repudiate such explicit racist behavior, but by that time, the harm had been done. The nation's cities were thoroughly segregated; the dissimilarity index[244] everywhere stood near or over 90. Once put in place so effectively, the malignant effects of racism no longer needed explicit intent to keep them going. They continued and expanded by a kind of automaticity. White suburbs were bounded at first by such invisible walls, and today increasingly by physical ones: gated communities. A ghetto was, and was meant to be, difficult to escape. Traditional racist behaviors such as redlining and overt discrimination in rental housing continue to occur, of course; racism does not die out overnight. But traditional deliberate racism is no longer necessary to perpetuate segregation and differential privilege/disadvantage. Translated into legal terms, deliberate intent no longer matters, no matter how obvious, massive, and continuing the effects of earlier racism were. Structural racism now does the work of earlier Klan-type racism.

The key legal concept at play here is disparate impact. As the copious sociological and legal studies of the last forty years[245] have demonstrated, discriminatory intent is almost irrelevant for purposes of detecting, describing, and proving structural forms of racism. It is the effects, the outcome, that matter. That sociological understanding has not informed legal reasoning on the United States

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[244] *See supra* note 20 and surrounding text.
[245] *See supra* note 7.

Supreme Court. Yet if we are ever to use the law to combat the foremost form of racism prevalent in the United States today, we must treat effects as actionable. Otherwise, structural racism will continue racial inequality into perpetuity, being all the more powerful for being invisible to those who do not want to see it.

The 1976 case of *Washington v. Davis* erected a huge roadblock in the way of efforts to overcome racism. African-American applicants for the Washington D.C. police academy failed exams that tested their verbal abilities in numbers disproportionate to white applicants, and they raised both a constitutional and a statutory challenge to the test, based on its disparate impact. A divided Court rejected the challenge in an opinion by Justice White.[246] He introduced "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." "We have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." He layered this doctrinal distinction atop the cruder dichotomy between de jure (that is, intentional) and de facto discrimination, the latter being defined by effects, not intent. Facial neutrality became an almost-conclusive assurance that an invidious discriminatory motive was not lurking behind a statute "neutral on its face." White did concede that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another," but that only slightly mitigated the damage done by the

[246] Washington v. Davis, 426 U.S. 229, 240, 242 (1976). Justices Stevens and Stewart concurred in separate opinions; Justices Brennan and Marshall dissented on the statutory claim and did not address the constitutional question.

requirement of intent. The consequence of White's *Washington v. Davis* opinion was that a disparate effect, standing alone, would not sustain a constitutional claim under the Equal Protection clause. The consequences for issues involving racial justice, including housing segregation, have been far-reaching and destructive.

The Court returned to the purpose/effect distinction in *Arlington Heights v. Metropolitan Housing Corp.* (1977),[247] and reaffirmed that racially disproportionate impact alone will not support a challenge to exclusionary zoning. But Justice Powell relaxed the rigidity of *Warth v. Seldin* somewhat by several concessions that lowered the *Davis* bar in exclusionary zoning cases. He permitted a showing of disparate impact, but only where it evinces a "clear pattern" of behavior from which discriminatory intent may be inferred. In addition to a showing of impact, petitioners could demonstrate a "historical background," a "specific sequence of events," especially if there was a "departure from [the] normal procedural sequence," or a legislative history suggestive of improper motive. But even such a showing would do no more than shift the burden of proof to the respondent, which could still salvage the zoning by demonstrating that it would have reached the same zoning decision even without racist motivation.

The Court's requirement for a showing of intentional discrimination quickly became impossibly stringent. In *Personnel Administrator v. Feeney* (1979),[248] Justice Stewart required "that the decisionmaker, in this case a state legislature, [have] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Three years later,

[247] 429 U.S. 252 (1977).
[248] 442 U.S. 256, 279 (1979).

in *McCleskey v. Kemp* (1987),[249] Justice Powell insisted that the defendant in a capital sentencing appeal must "prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect" and that "that the decisionmakers in his case acted with discriminatory purpose."

Such a standard is impossible to meet, effectively foreclosing any possibility of demonstrating structural racism in the only way that it can be shown, through its impact in American society. Moreover, in *McCleskey*, Powell rejected a conclusive statistical showing that Georgia prosecutors sought and juries imposed the death penalty disproportionately on the basis of the victim's race. This was a major setback for the use of quantitative methods in social science, a principal source of evidence and proof of structural racism.

Doctrinal developments in the related domain of employment discrimination are suggestive about the possibility for using disparate impact as the metric for measuring discrimination in housing. White's *Washington v. Davis* opinion addressed the constitutional claim. Earlier, though, the Court accepted evidence of impact to sustain *statutory* claims based on Title VII of the 1964 Civil Rights Act.[250] In *Griggs v. Duke Power Co.* (1971),[251] the Court unanimously sustained the disparate-impact provisions of Title VII: "the Act proscribes not only overt [i.e., intentional] discrimination but also practices that are fair in form, but discriminatory in operation."[252]

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[249] 481 U.S. 279, 298, 292 (1982) (ital. in orig.)

[250] "Sec. 703. (a) It shall be an unlawful employment practice for an employer—
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[251] 401 U.S. 424, 431 (1971).

[252] Chief Justice Burger's phrasing echoes Justice Stanley Matthews's assertion in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886): "Though the law itself be fair on

Yet five years later, the Court rejected disparate impact for *constitutional* claims in *Washington v. Davis*. The difference in results is justified by Congress's extraordinary remedial powers under section 5 of the Fourteenth Amendment.[253] But to judges unsympathetic to a broad reading of section 5,[254] this doctrinal incongruence is bothersome. In his concurrence in *Ricci v. DeStefano* (2009),[255] Justice Antonin Scalia broadly hinted that disparate impact interpretation of any sort, statutory or constitutional, may be incompatible with the Equal Protection Clause: the decision in that case "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" Were the Court to take up Scalia's invitation, disparate impact analysis might be doomed, and with it, any hope that legal actors could take any actions at all to remedy structural racism.

The evil day Scalia foretold soon arrived as the conservative bloc of the Roberts Court seemed avid to annihilate disparate impact analysis in all its forms. For decades, federal, state, and local governments, in collusion with private-sector institutions like banks and insurance companies (in their capacity as investors), have adopted stratagems to assure that public and low-income housing will be

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its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." Unlike the *Washington v. Davis* line of cases, though, *Yick Wo* involved discriminatory administration of a facially neutral ordinance, not disparate impact.

[253] U.S. CONST. amend. XIV, § 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[254] As in Boerne v. Flores, 521 U.S. 507 (1997).

[255] 557 U.S. 557, 594 (2009).

sited in black residential areas, assuring the permanence of segregated urban housing.[256] Coteries of developers, lending institutions, and insurance companies pursued litigation opportunities seeking to get a case up to the Supreme Court that would achieve Scalia's goal. After twice being disappointed when fair-housing supporters settled litigation rather than run the risk of having the Court repudiate the disparate impact principle,[257] fair housing's enemies found their opportunity in a case challenging Texas's policies on siting low-income housing.

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* (2015),[258] petitioners alleged that Texas agencies allocated most low-income housing tax credits to developers who proposed to create housing in neighborhoods that were already predominantly black, thereby perpetuating segregation. They contended that this disparate impact sufficed to show a violation of the Fair Housing Act.

This statutory disparate impact claim survived the gauntlet of the Court's s hostility, but only by the narrowest of margins. Justice Anthony Kennedy, writing for the 5-member majority, held that the Fair Housing Act of 1968, along with Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act of 1967, prohibited policies that had a disparate impact on racial minorities. So for the

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[256] This history is surveyed in Brief of Housing Scholars as Amici Curiae Supporting Respondent in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project Inc.* (No. 13-1371), which may be found at http://www.epi.org/files/2015/ICP-Disparate-Imp-Brief-12-14.pdf (last visited April 26, 2017).

[257] Magner v. Gallagher, No. 10-1032, in 2012 and Mount Holly v. Mount Holly Gardens Citizens in Action, No. 11-1507, in 2013.

[258] 135 S. Ct. 2507, 2522 (2015).

time being, disparate impact analysis survives as a way of challenging structural racism in both housing and employment. Kennedy also went a bit further, affirming the legitimacy of efforts to "counteract unconscious prejudices," thereby allowing some scope for considering the role of unconscious bias in decisions that had discriminatory effects.[259]

But Kennedy's concession to the reality of structural racism was grudging and stinting. He warned that analyses based on statistical disparities raise "serious constitutional questions." He went on to specify fifteen doubts, reservations, qualifications, limitations, and warnings that will cramp reliance on disparate-impact approaches to statutory interpretation.[260] Finally, he made no concessions at all

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[259] The Court thus for the first time affirmed the insights of Charles R. Lawrence's influential article, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); *see also* Lawrence, *Unconscious Racism Revisited: Reflections on the Impact and Origins of The Id, the Ego, and Equal Protection*, 40 CONN. L. REV. 931, (2008).

[260] These are:

1. Disparate impact analysis must be "consistent with statutory purpose." 135 S. Ct. at 2518.
2. Both public and private decision makers must be free to "to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system." *Id.*
3. Courts must determine that there is "an available alternative . . . practice that has less disparate impact." *Id.*
4. Courts must "give housing authorities and private developers leeway to state and explain the valid interest served by their policies." *Id.* at 2522.
5. "Entrepreneurs must be given latitude to consider market factors." *Id.* at 2523.
6. Zoning authorities must respect "subjective" factors "such as preserving historic architecture." *Id.*
7. A "disparate impact claim must fail" if it cannot meet a "robust causality requirement." *Id.*
8. "Numerical quotas" are always forbidden. *Id.*
9. Plaintiff must make "out a prima facie case . . . at the pleading stage." *Id.*

to the claim that disparate-effects analysis should guide constitutional analysis, thus continuing structural racism's insulation from equal-protection constitutional attacks.

Kennedy's heavily qualified majority opinion was still too much for the dissenting conservative bloc. In a lengthy and tightly-reasoned opinion for all four dissenters,[261] Justice Samuel Alito insisted that Congress had not authorized disparate-impact interpretations of the Fair Housing Act either in 1968 or in subsequent amendments. Justice Clarence Thomas, writing for himself, demanded that *Griggs*, the fountainhead of disparate-impact analysis in the Supreme Court, be overruled or at least narrowly confined. He condemned the agency from which he was appointed to the federal courts, the Equal Employment Opportunity Commission, for promoting disparate-impact reasoning.

So, little thanks to Justice Kennedy's unenthusiastic affirmation of disparate-impact statutory analysis, it still remains possible to consider structural racism in legal interpretation, though not (yet) at the constitutional level. But the Supreme Court's repeated refusals to take it into account in other areas, particularly affirmative action, leave the Justices unwilling to confront the real-life problems facing African-Americans today in most social domains. This is all the more troubling because in the area of residential segregation, the problem

10. Plaintiff must show a "causal connection" between governmental policy and the disparate impact complained of. *Id.* at 2524.
11. "Disparate-impact liability" may not be "so expansive as to inject racial considerations into every housing decision." *Id.*
12. Courts must be vigilant to reject "abusive disparate-impact claims." *Id.*
13. "Governmental entities . . . must not be prevented from achieving legitimate objectives." *Id.*
14. "Remedial orders must be consistent with the Constitution." *Id.*
15. Courts must try to "eliminate racial disparities through race-neutral means." *Id.*

[261] Himself, Chief Justice Roberts, and Justices Thomas and Scalia.

was created and enabled in the first place by law and the actions of the states and the federal government.

Conclusion

During the Civil Rights Era (1954-1970), the Court took up housing issues with an intuitive sense of the structural issues involved, and managed a measure of realism in its response to the varied problems that both overt and structural racism caused for African Americans in the housing market. Indeed, some of its early decisions in this period were progressive, advancing public law further than white Americans of the time were prepared to go. After 1970, though, the Court lapsed into a reliance on formalism and on facial neutrality that led it to ignore, evade, or even protect problems caused by residential segregation. In the first Redemption of the late nineteenth century, the Court sanctioned overt racism. Now in the second Redemption, the Court ignores its successor, structural racism. Why does it do so?

Two explanations go some way toward explaining the Court's refusal to acknowledge the reality of structural racism: one is sociological, and the other doctrinal. *Sociology*: For nearly a half-century, sociologists and other social scientists have demonstrated the force of structural racism in the workings of American society.[262] Why does the Supreme Court ignore this social reality and the scholarship that describes it? Several reasons, some of them speculative, relating to the use of social science evidence in appellate judging suggest themselves. With some justification, judges are reluctant to found legal doctrines and outcomes on sociological theory or research. Justice Felix Frankfurter spoke for them: "the Constitution

[262] *See supra* note 6.

does not require legislatures to reflect sociological insight, or shifting social standards."[263] In the hands of judges who are not trained in its disciplines, reliance on social science can be problematic. Judges may not be able to evaluate the validity of the findings, or distinguish sound from dubious work, especially quantitative or empirical work that relies heavily on statistics.[264] Acceptance of those findings may erode over time, the classic example being Dr. Kenneth B. Clark's research noted in footnote 11 of *Brown v. Board of Education I* (1954).[265] Social science evidence often does not make it through judicial filters of individual bias or professional culture. It requires open-mindedness to innovative thinking that is sometimes incompatible with the judicial temperament. In individual cases, social science findings conflict with a personal and/or judicial agenda, as in the case of Justice Lewis Powell, whose 1971 memorandum to the U.S. Chamber of Commerce, "Attack of American Free Enterprise System,"[266] should cast doubt on his opinions involving any social-science-based challenges to business enterprises. Innate judicial conservatism of the sort expressed in Justice White's majority opinion in *Bowers v. Hardwick* (1986)[267] may be resistant to social science ideas that challenge the doctrinal status quo.

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[263] Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (dictum).

[264] The best example is Justice Lewis Powell's rejection of the statistical evidence produced by Prof. David Baldus concerning racial discrimination in the incidence of the death penalty in *McCleskey v. Kemp*, 481 U.S. 279 (1987). Even Justice Powell later came to regret his opinion: Adam Liptak, *New Look at Death Sentences and Race*, N.Y. TIMES, April 29, 2008.

[265] 347 U.S. 483, 494 (1954).

[266] Reproduced at http://reclaimdemocracy.org/powell_memo_lewis/ (last visited April 27, 2017).

[267] 478 U.S. 186, 194 (1986): "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it

A different White opinion furnishes yet another reason why the Court resists social science findings. He concluded his *Washington v. Davis* (1976) opinion[268] with this justification for refusing to give conclusive weight to disparate impact: such a rule "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." Therein lies the supreme irony of the Court's disdain for considering structural racism: to explain why the Court may not consider structure, White resorted to a structural explanation. We may not take structural explanations for disparate impact into account because to do so would have structural consequences. So the Court is not blind to structure after all: its eyes are opened to structure when the privilege of "the more affluent white" is threatened.

Doctrinal: Doctrine, and its foundations in something referred to here as metadoctrine, also deter judges from incorporating social-science findings into their opinions. Metadoctrine may be defined as the values and/or public policy that give meaning and direction to formal legal doctrine. It is the animating force of law. The Court explicitly or implicitly chooses from an array of policy choices in formulating its interpretations of constitutional text. Understood in that sense, the currently dominant metadoctrine of equal protection, originally identified by the first Justice John Marshall Harlan in his *Plessy* dissent, is colorblindness.[269] Harlan wrote: "But in view of the constitution, in the eye of the law, there is in this country no superior,

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deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."

[268] 426 U.S. 229, 248 (1976); *see supra* note 246.

[269] Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." But this claim of colorblindness must be read in its own context. His statement in the sentence immediately preceding this colorblind quotation affirmed white supremacy: "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty." Thus the oft-overlooked paradox of the colorblind Constitution: Harlan condemned the subjugation of black Americans by segregation and merely-pretextual equality on the assumption that white supremacy was both right and perpetual, and did not need segregation to sustain it.

The modern Court, and particularly Justice Thomas, rips Harlan's statement about colorblindness out of its context (both textual and social). (It may be doubted that Justice Thomas really believes that "the white race [is] the dominant race in this country, and so . . . it will continue to be for all time.").[270] This approach elevates colorblindness to a level of other-worldly abstraction stripped of time or place, and then re-imposes it in the present as a ban on all forms of affirmative action or race-conscious policy-making. Criticizing Justice Stephen Breyer's position dissenting in *Parents Involved in Community Schools v. Seattle School District* (2007),[271] Justice Thomas refers to Breyer's "rejection of the colorblind Constitution." "But I am quite comfortable in the company I keep. My view of the Constitution is

[270] *Id*.
[271] 551 U.S. 701 (2007).

Justice Harlan's view in *Plessy*: "Our Constitution is color-blind. . . ."[272] This smug, acontextual reinterpretation of colorblindness has been so often and so convincingly refuted that to do so again here would be redundant.[273]

The Rehnquist/Roberts Court's embrace of the Thomas version of colorblindness has led it directly into the cul-de-sac of the anticlassification principle. A court that rejects nearly all classifications based on race condemns itself to its own version of colorblindness, where it is incapable of seeing the disparities in life-outcomes between whites and people of color or of realizing that these invidious differences are structural and can be eliminated. As a result, the Court's doctrinal commitments since 1970 have locked it into an inability (or unwillingness) to recognize structural racism.

There was an ambiguity in the core meaning of *Brown v. Board of Education I* (1954), unnoted at the time. In striking down state-imposed school segregation, what exactly did the Supreme Court prohibit? Did it say that states may not act in ways that debase the status and opportunities of a racially-defined group of people?[274] Or did it simply say that states may never classify people by race?[275] The former reading, which is known as the anti-subordination principle, would prohibit states from adopting policies that have the effect of

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[272] *Id.* at 772.

[273] To cite only a few of these refutations: David A. Strauss, *The Myth of Colorblindness*; Gotanda, *Our Constitution Is Color-Blind*; KULL, THE COLOR-BLIND CONSTITUTION; KOUSSER, COLORBLIND INJUSTICE; Kang & Lane, *Seeing through Colorblindness*; BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLORBLIND SOCIETY (all *supra* note 7).

[274] Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107 (1976).

[275] Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 8 (2004).

diminishing the life chances of a racial group or demoting their status in society by imposing invidious consequences on them. This reading would enable the Court to strike down state initiatives, or even possibly state inaction, that resulted in privileging whites or limiting opportunities of blacks. Its focus is the impact of state actions (or inactions) on groups.[276] Antisubordination is historically contextual, deriving its meaning from the lived experience of African Americans.

The second understanding, called the anti-classification principle, enables judges indifferent or hostile to programs like affirmative action that ameliorate adversities for people of color to strike them down if they were based on explicit racial categories. Anticlassification, as its principal proponent Justice Thomas has insisted, exalts the individual, and repudiates group remedies: "government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."[277] It rests on a formal and ahistorical understanding of race, treating it as an abstract category. Anticlassification has swept the field in judicial interpretation: all the major Roberts Court decisions involving race reaffirm it.[278] A majority of the Justices have embraced the anticlassification principle as their definitive understanding of the meaning of equal protection.

In *Board of Regents v. Bakke* (1978), Justice Powell dismissed "societal discrimination" as "an amorphous concept of injury that may be

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[276] Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Reva Siegel, *Discrimination in the Eyes of the Law: How 'Color Blindness' Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000).

[277] Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J. concurring).

[278] Culminating in Parents Involved in Community Schools v. Seattle School District, 551 U.S. 701 (2007).

ageless in its reach into the past."[279] This is as close as the Court has ever come to recognizing the reality of structural racism,[280] but the vague and ambiguous notion of societal discrimination is something far different from the sociological reality of systemic disadvantage documented by social scientists. Nevertheless, the Court has repeatedly reaffirmed its refusal to recognize structural racism by repeating its mantra that "societal discrimination" cannot be actionable in *Wygant v. Jackson Board of Education* (1986),[281] *Richmond v. Croson* (1989),[282] and *Parents Involved in Community Schools v. Seattle School District* (2007).[283] In the domain of housing, the Court seems content to follow the lead of Justice Thomas, who claims that "the continuing 'racial isolation' of schools after *de jure* segregation has ended may well reflect voluntary housing choices or other private decisions."[284] He repeated the point in *Parents Involved* (2007),[285] contending that while racial imbalance in urban schools "might result from past *de jure* segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices." Given the history recounted above of federally-enforced housing segregation, to paraphrase Justice Ginsburg in another context,[286]

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[279] 438 U.S. 265, 307 (1978).

[280] A Westlaw search conducted on Nov. 11, 2016, revealed that neither the phrase "structural racism," nor its cognates "aversive racism," "structural discrimination," or "systemic racism," has ever appeared in the opinions of any Justice of the United States Supreme Court. The phrase "institutional racism" appears only once, in an opinion by Justice Thomas, where he dismisses it as a fantasy of "conspiracy theorist[s]": Grutter v. Bollinger, 539 U.S. 306, 377 (2003) (Thomas, J. concurring).

[281] 476 U.S. 267, 276 (1986).

[282] 488 U.S. 469, 471, 473, 497, 499 (1989).

[283] 551 U.S. 701, 755 (2007).

[284] Missouri v. Jenkins, 515 U.S. 70, 116 (1995) (Thomas, J. concurring).

[285] Parents Involved in Community Schools v. Seattle School District, 551 U.S. 701, 750 (2007).

[286] Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J. dissenting).

only an ostrich could regard residence in impoverished, crime-ridden inner-city neighborhoods as voluntary. By maintaining such pretenses, the Court continues to shut its eyes to the reality and the effects of residential segregation and thus to perpetuate structural racism into the indefinite future.