

(UN)EQUAL PROTECTION FOR THE POOR: EXCLUSIONARY ZONING AND THE NEED FOR STRICTER SCRUTINY

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INTRODUCTION

The possession of property, owned or leased, is more than an issue of shelter—it is a defining element of our lives.¹ Property ownership influences the way we feel about ourselves as well as how we are perceived by those around us.² Even more significantly, how and where we live affects our ability to access other goods equally.³ In this way, property divides us into a world of haves and have-nots, determining people's social position on the basis of a single factor.

Property ownership also has obvious implications on an individual's ability to be part of a physical community. Communities are the places where people come together and also where they frequently conflict. Within communities, people live in close proximity to, learn from, and interact daily with one another. Decisions about where, who, and what to live near are often based on stereotypes. These choices, which can lead to communities segregated by race or class or

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¹ See MICHELLE MILLER-ADAMS, *OWNING UP: POVERTY, ASSETS, AND THE AMERICAN DREAM* 23 (2002) ("Most Americans say that owning a home helps them make a better life for their children And homes represent an asset that can be borrowed against to finance an education, start a business, or cushion a family from economic crisis.").

² One of the most illustrative examples of this phenomenon comes from an examination of the effects of home ownership on the self-concept of lower-income rural women. One interviewee explained:

I guess the biggest thing is that it made me feel like I had achieved something. From the time that I moved out of mom and dad's, this was the first time I had been out on my own and taking care of my kids by myself. Knowing that I could take care of them and me and give them a nice place to live made me feel real good. [I] was on my own and knew that I could make it. I didn't have to depend on my parents or a husband

Now I don't have to, and even if I don't have a man, I know I'll be okay.

Nicole D. Breazeale, *Enabling Low-Income, Rural People in Appalachia to Buy Their Own Homes and Secure Quality Housing: The Effects of Tenure, Housing Quality, and Action on Feelings of Self-Worth and Self-Competence* 43 (2002) (unpublished M.A. thesis, University of Kentucky) (on file with author).

³ See CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* 7 (1996) ("Housing discrimination is an especially urgent social problem not only in and of itself but also because it is an underlying cause of other pressing ills in American society.").

both, reverberate through nearly every facet of American life. In this way "[r]acial isolation practically ensures . . . inequalities in education, employment, culture, personal networks, freedom from crime, and the many other opportunities, amenities and freedoms that are related to location. The interaction of classism and racism makes racial isolation in neighborhoods . . . both socially destructive and difficult to remedy."⁴ While some people have little to no choice about where to live, those with greater flexibility will frequently either make consciously race-based decisions or else view segregation as irrelevant.⁵ Generally, "the bases of exclusion tend to reflect selfishness, wealth, or ethnicity rather than a unique preference for particular local public goods or an idiosyncratic, but benign, lifestyle."⁶

Communities, then, become representative of the biases and prejudices people continue to hold. Moreover, because these are private, personal decisions, this is not treated as discrimination.⁷ Communities are generally free to preserve the rights of property above the rights of individuals. Indeed, this self-selection has become a defining element of what it means to be part of a community—"[o]ne of the salient characteristics of community life is the capacity to exclude along lines that are selected by the community itself."⁸ The gulf between cities and suburbs rests on divisions of race and class and choices about who is or is not an appropriate neighbor. Suburban residents in particular "have been very ready to do whatever has seemed necessary, including spending large sums of their own money, to keep the disadvantaged at bay, to make them forbidden neighbors."⁹ This self-perpetuated isolation, in turn, leads to less interaction with—and therefore the ability to ignore or overlook—major social issues and problems. While there is "hope that interracial contacts will reduce racial conflict and discrimination,"¹⁰ the reality is that those who can will typically opt to surround themselves with neighbors who reflect their own race, social class, status, and background.¹¹ The result is even greater divisions between urban and

⁴ Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 303 (2002).

⁵ See, e.g., Clayton P. Gillette, *Mediating Institutions: Beyond the Public/Private Distinction: Courts, Covenants and Communities*, 61 U. CHI. L. REV. 1375, 1376 (1994) ("[C]ritiques of localism . . . view the pursuit of a common vision of the good life as inherently exclusionary.").

⁶ *Id.*

⁷ See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) (holding that preserving the peace and comfort of a community is a valid, reasonable legislative classification).

⁸ Gillette, *supra* note 5, at 1380.

⁹ DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* 6 (1995).

¹⁰ W. DENNIS KEATING, *THE SUBURBAN RACIAL DILEMMA: HOUSING AND NEIGHBORHOODS* 7 (1994).

¹¹ See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 64 (1986). The *Thornburg* Court stated:

suburban communities. "Since not all individuals can live where they prefer, decentralization for the select few will encourage them to seek isolation from the fiscal and physical burdens of urban life instead of working for the improvement of the larger community."¹²

Legal scholars and social scientists have written volumes on the impact of race and class on communities and the problems of white flight, gated communities, and suburban sprawl.¹³ All of these issues are connected to the essential question of whether it is constitutional to preclude certain individuals from living in a particular community on the basis of characteristics such as race and class. If community is as essential to our civic and political life as many social theorists say,¹⁴ then exclusive communities continue to perpetuate blatant social segregation in a way that has been ruled unconstitutional in nearly every other public setting.

Part I of this Comment examines some of the legal and social science arguments for the value of diversity in community settings, and the significance of membership to individual and community success. In addition, Part I explains the practice of exclusionary zoning and its discriminatory effect. In Part II, I consider the Supreme Court's holdings on zoning as well as the situation in Mount Laurel, New Jersey, created by exclusionary zoning practices. I argue that state courts are not a proper forum for addressing the harm of legally enforced segregation. Finally, in Part III, I offer an argument that exclusionary zoning should be held unconstitutional because of the state's involvement in discrimination. In conclusion, I propose an expansion of the Equal Protection Clause to reflect the growing correlation between racism and classism in America.

[M]embers of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth Where such characteristics are shared, race or ethnic group not only denotes color or place of origin, it also functions as a shorthand notation for common social and economic characteristics.

Id.

¹² Gillette, *supra* note 5, at 1376.

¹³ See, e.g., RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* 320 (2002) ("[O]ur society is divided along class lines—divides that are being etched ever more deeply into the American economic landscape as a result of growing geographic segmentation. In every region across the country, cities and suburbs are increasingly balkanized into communities of haves and have-nots.").

¹⁴ See, e.g., ROBERT O. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (examining social capital, or the value of social networks and reciprocal relationships to the success and vitality of community). See also FLORIDA, *supra* note 13, at 324:

Strong communities, not any institutions within them, are the key to social cohesion. As group attachments break down, the community itself must be the social matrix that holds us together With everything else in flux—companies, careers, even families—our communities are often the only real constants in the social equation.

I. WHY PLACE MATTERS

A. *Diversity is an Essential Element of Quality of Life*

Academics have been trying for years to quantify the significance of place, and to determine how people make choices about where to live. Jane Jacobs has asserted that "[a] city's very wholeness in bringing together people with communities of interest is one of its greatest assets, possibly the greatest."¹⁵ Richard Florida has created a methodology to quantify what he calls "quality of place." This analysis considers the extent to which a city has the characteristics and amenities valued by people with options about where to live.¹⁶ One of the most important elements of "quality of place," he found, was diversity.¹⁷ Most people want to live places where they will have access to a wide variety of experiences and amenities. Florida's research shows that "regional economic growth is powered by creative people, who prefer places that are diverse, tolerant and open to new ideas. Diversity increases the odds that a place will attract different types of creative people with different skill sets and ideas."¹⁸ Regional economic success is directly connected to the quality of communities, with special emphasis on three factors: technology, talent, and tolerance.¹⁹ As Florida discovered, "Each is a necessary but by itself insufficient condition: To attract creative people, generate innovation and stimulate economic growth, a place must have all three."²⁰

If we can improve the dynamics within communities, building more diverse and vibrant spaces for people to live and work, then arguably we will be much closer to having a more inclusive society. The Supreme Court acknowledged this in 1954 in *Berman v. Parker*:

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

... The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the

¹⁵ JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 119 (1961).

¹⁶ FLORIDA, *supra* note 13, at 231-32.

¹⁷ *Id.* at 233 ("Successful places do not provide just one thing; rather they provide a range of quality of place options for different kinds of people at different stages in the life course.")

¹⁸ *Id.* at 249.

¹⁹ *Id.*

²⁰ *Id.*

community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.²¹

Cities "trapped by their past" that "don't get it" will not only become less desirable places to live, but will also fail in a highly competitive, modern economy.²² Conversely, "diverse and open communities have compelling competitive advantages in stimulating creativity, generating innovations and increasing wealth and economic growth. The key is . . . building social cohesion in an era defined by diversity, high rates of mobility, weak ties and contingent commitments."²³

Like Florida, Jacobs claims that both socially and economically, cities depend on diversity and its effects.²⁴ Jacobs argues that fears of mixed uses and diversity mistakenly prompted cities to fight against diversity. "These beliefs help shape city zoning regulations They stand in the way of planning that could deliberately encourage spontaneous diversity by providing the conditions necessary to its growth."²⁵

B. The Discriminatory Nature of Exclusionary Zoning and Its Development

The work of Florida, Jacobs, and others²⁶ sharply contrasts with the trend in modern zoning regulations, which in many cities is centered on keeping people out rather than allowing them in.²⁷ This divisiveness at the community level represents the social issues and problems that continue to plague our country. "Discrimination and exclusion from land violate the nation's professed beliefs in social responsibility. Making affordable housing . . . a reality in the lives of minorities is thus a battle to define the character of a society"²⁸

Professor and legal scholar Margaret Radin characterizes property as personhood, suggesting that certain kinds of real property become part of our identity because of their intrinsic value to us.²⁹ If property

²¹ *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (citation omitted).

²² See FLORIDA, *supra* note 13, at 302-03.

²³ *Id.* at 323.

²⁴ See JACOBS, *supra* note 15, at 14 (discussing "the need of cities for a most intricate and close-grained diversity of uses that give each other constant mutual support, both economically and socially").

²⁵ *Id.* at 222.

²⁶ Another particularly relevant example of this is the New Urbanist movement, which explicitly denounces the income segregation of communities and of neighborhoods within communities. See, e.g., ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000).

²⁷ See JACOBS, *supra* note 15, at 408 ("The ruthless, oversimplified, pseudo-city planning and pseudo-city design we get today is a form of 'unbuilding' cities.").

²⁸ HAAR, *supra* note 3, at 10.

²⁹ See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) ("[To be a person] an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights.").

is so essential to self-definition, then excluding people from property ownership is the equivalent of denying them both an identity and any significant membership in American society. The legal connection between property ownership and the right to vote, for example, was assumed for years.³⁰ This reiterates the fundamental point that property ownership defines a person's value and determines place in American society. Exclusionary zoning presents a legal mechanism to affirm this conclusion and make discrimination acceptable.

Zoning emerged in the early twentieth century as a way for conservative, middle-class property owners to protect their current and future land interests.³¹ Zoning laws went further than restrictive covenants. Beyond making private land use restrictions legally enforceable, zoning represented a new form of lawmaking specifically intended to protect private property rights. The original and modern rationale for zoning is the same: to restrict the private property rights of some landowners in order to secure the private property rights of others.³² Today, however, the choices about whose rights are restricted often have a discriminatory purpose.

Exclusionary zoning is the use of a local zoning ordinance to promote housing segregation.³³ Specific practices can include limitations on nonresidential uses or types of housing, restrictions on maximum building or number of occupants, or requirements for minimum lot sizes, building setbacks, or floor areas.³⁴ "[E]xclusionary zoning has the effect, and often the purpose, of increasing housing costs, which inevitably reduces the number of affordable units for low-income persons."³⁵ Essentially, this means exclusionary zoning is a form of legally enforced segregation based on "reasonable"³⁶ justifications for maintaining the particular character-

³⁰ The Supreme Court has only begun recently to consistently hold that property ownership is not an appropriate requirement. See, e.g., *Salier Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (holding that apportioning votes on the basis of land ownership in local general elections passed a rational basis test and creating an exception to the one-person, one-vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964)).

³¹ Harvey M. Jacobs, *The Impact of State Property Rights Laws: Those Laws and My Land*, LAND USE LAW & ZONING DIG., Mar. 1998, at 3-8, <http://www.planning.org/LULZD/propertyrights.htm>.

³² *Id.*

³³ Schuck, *supra* note 4, at 309 (describing the forms and effects of exclusionary zoning practices).

³⁴ *Id.*

³⁵ *Id.*

³⁶ The standard for evaluating legislation of this kind, which does not trigger strict or even intermediate scrutiny if the justification is not race, gender, alienage, or national origin, is merely whether the classification is reasonably connected to the achievement of some legitimate governmental interest. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classifi-

istics of a given community. Race and class, if not explicit or if under the guise of another, more legitimate reason, can be used as acceptable bases for exclusion through zoning ordinances. While exclusionary zoning policies are not obviously proof of racism, this is frequently both their ultimate purpose and effect.³⁷ Thus, in many suburban communities, "[l]aw has become a surrogate for physical walls."³⁸

C. *The Intersection of Race and Class in the Context of Property Ownership*

Communities are important, in part, because of the great significance of property to American life. What does it mean to have property? To not have it? Perhaps even more crucial is what lies between: substandard housing,³⁹ or the people Curtis Berger refers to as the "pre-homeless."⁴⁰ In 1999, the average cost of renting a house was \$580 per month.⁴¹ Over fourteen million U.S. households spend more than half their income on housing.⁴² Three out of ten households have trouble affording their housing.⁴³ Over nine million households are in living situations classified as overcrowded or physically inadequate.⁴⁴ Households with one person employed full-time at minimum wage cannot afford to rent a one-bedroom apartment anywhere in the U.S.⁴⁵ There is a severe housing shortage among the lowest wage earners, where the demand exceeds the supply by two million.⁴⁶

It is also important to consider the strong correlation between race and class in property ownership. Those who cannot afford adequate housing, or any housing at all, are disproportionately members of disadvantaged minority groups. In 2001, the homeless population was estimated at 50% African-American, 35% White, 12% Hispanic,

cation drawn by the statute is rationally related to a legitimate state interest."). The low standard of this rational basis test means that nearly any proffered reason will be found acceptable.

³⁷ See HAAR, *supra* note 3, at 5 (explaining that minorities are substantially excluded from suburban communities through the employment of discriminatory home ownership practices).

³⁸ *Id.* at 8.

³⁹ See Curtis Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 MIAMI L. REV. 315, 316 (1990-91) ("While concern for the homeless is both fashionable and correct, to direct our attention only toward the homeless leaves untouched, and may draw attention from, a systematically far deeper national dilemma—that of housing indigency.").

⁴⁰ *Id.* at 321 (borrowing a term used by Professor Stephen Wizner to describe low-income households teetering on the edge of homelessness).

⁴¹ *Id.*

⁴² JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING* 25 (2003).

⁴³ *Id.*

⁴⁴ *Id.* at 26.

⁴⁵ *Id.* at 27.

⁴⁶ *Id.*

2% Native American, and 1% Asian.⁴⁷ In contrast, the 2000 census showed that the U.S. population overall is 12.5% Hispanic and 12.1% African-American.⁴⁸ Caucasians, on the other hand, represent 69.1% of the overall U.S. population.⁴⁹ According to the Department of Housing and Urban Development, in 2000, the Caucasian home ownership rate was 73.8% while the total minority homeownership rate was only 48.1%.⁵⁰

Issues of race in America are intricately connected to those of class. When people make decisions about whom to include or exclude, race and class may trigger equal fears about a possible disintegration of community life. This means that "[d]istinguishing racism from classism is no easy matter. Racial isolation in neighborhoods is over-determined. With race and income highly correlated, minorities and the poor are often the same people and thus the targets of both racism and classism."⁵¹ Most zoning decisions, which stem from the government, are made by a predominantly homogenous group of individuals⁵² and have significant racial undertones (if not overtones).⁵³ In this way, "rights in property are contingent on, intertwined with, and conflated with race."⁵⁴

II. EXCLUSIONARY ZONING IN THE COURTS

A. *Zoning in the Supreme Court*

While the U.S. Supreme Court has explored a number of related issues (poverty as a suspect classification, the fundamental right to housing, the extent of liberties included under the Fourteenth Amendment, etc.), it has never specifically ruled on the constitutionality of exclusionary zoning that has a classist or racist purpose. Before moving to the argument that the Court can and should find it

⁴⁷ U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 2001, at ii (Dec. 2001).

⁴⁸ 2000 U.S. Census Data, <http://www.census.gov> (last visited Oct. 14, 2003).

⁴⁹ *Id.*

⁵⁰ *Model Local Strategies Help Low-Income, Minority, and Immigrant Households Become Homeowners*, 6 URBAN RESEARCH MONITOR (U.S. Dep't of Hous. and Urban Dev./Office of Policy Dev. and Research, Wash., D.C.), http://www.huduser.org/periodicals/urm/urm_09_2001/urm.html (Sept./Oct. 2001).

⁵¹ Schuck, *supra* note 4, at 302.

⁵² See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1721 (1993) ("Possession—the act necessary to lay the basis for rights in property—was defined to include only the cultural practices of whites. This definition laid the foundation for the idea that whiteness—that which whites alone possess—is valuable and is property.").

⁵³ *Id.* at 1791 ("[The concept of whiteness as property] has thwarted not only conceptions of racial justice but also conceptions of property that embrace more equitable possibilities.").

⁵⁴ *Id.* at 1714.

unconstitutional, I will first examine the case law that supports this conclusion.

In its earliest affirmation of exclusionary zoning, the Court held in *Village of Euclid v. Ambler Realty Co.* that it was permissible for a city to zone out apartment buildings and other industrial uses in favor of preserving peace and comfort in a given community.⁵⁵ The Court commented on the substantial community interest of keeping residential areas free of "disturbing noises," "increased traffic," the dangers of "moving and parked automobiles," and "depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities."⁵⁶ Without any further analysis of the effect that this would have on community membership, the Court found these interests sufficiently compelling to warrant the exclusion.⁵⁷ *Euclid* clarified that creating gated communities was acceptable and that at least some forms of exclusionary zoning would be viewed as valid, reasonable legislative classifications.

In *Warth v. Seldin*, the Supreme Court had its first opportunity to rule on exclusionary zoning practices explicitly based on race or class.⁵⁸ The plaintiffs, primarily a group of lower-income individuals who had been prevented from residing in the town, claimed that the zoning ordinances effectively excluded persons of low and moderate income, in contravention of their constitutional rights and in violation of 42 U.S.C. §§ 1981, 1982, and 1983.⁵⁹ The ordinance allocated 98% of the town's vacant land to single-family detached housing.⁶⁰ Additionally, requirements relating to lot size, setback, floor area, and habitable space increased the cost of single-family housing beyond the means of persons of low and moderate income.⁶¹ Furthermore, the town allocated only 0.3% of the land available for residential construction to multifamily structures (apartments, townhouses, and the like), and even on this limited space, housing for low- and moderate-income persons was not economically feasible because of low density and other requirements.⁶² Petitioners alleged that the town and its officials had made "practically and economically impossible the construction of sufficient numbers of low and moderate income . . . housing."⁶³ Finally, petitioners argued that "the town's zoning practices also had the effect of excluding persons of minority

⁵⁵ 272 U.S. 365 (1926).

⁵⁶ *Id.* at 394.

⁵⁷ *Id.*

⁵⁸ 422 U.S. 490 (1975).

⁵⁹ *Id.* at 493.

⁶⁰ *Id.* at 495.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 496 (citation omitted).

racial and ethnic groups, since most such persons have only low or moderate incomes."⁶⁴

Instead of dealing with the substantive issues at hand, the Court held that the plaintiffs had no standing to challenge zoning regulations.⁶⁵ *Warth v. Seldin* demonstrated, in part, that the entry barriers to federal litigation on exclusionary zoning matters are quite high. These barriers generally convince litigants to bring their claims in state courts and to base their arguments on state constitutional rights.⁶⁶ The issue of standing made central by *Warth* continues to pose problems for plaintiffs seeking to challenge exclusionary zoning practices under federal law.⁶⁷ Standing rests on whether the plaintiff has "alleged such a personal stake in the outcome of the controversy"⁶⁸ as to warrant his or her invocation of federal court jurisdiction and justify the exercise of the court's remedial powers on his or her behalf.⁶⁹ A federal court's jurisdiction can be invoked only when a plaintiff has suffered "some threatened or actual injury resulting from the putatively illegal action."⁷⁰

In response to the question of whether any constitutional or statutory provision granted these plaintiffs a right to judicial relief, the Court stated, "[N]one of these petitioners has a present interest in any Penfield property; none is himself subject to the ordinance's strictures; and none has ever been denied a variance or permit by respondent officials."⁷¹ A thwarted desire to live in a particular community, even if this desire stemmed from proximity to work, family, or an interest in living in a better neighborhood, was found to be too indirect an injury to support an actionable causal relationship.⁷² Because the plaintiffs could not prove that the housing would meet their needs, they had no basis for challenging their exclusion from this particular community.⁷³ The Court did clarify, however, that this holding only applied to the specific facts at hand.⁷⁴

Because of the fundamental importance of property ownership, a denial of the choice of where to possess property creates a substantial

⁶⁴ *Id.*

⁶⁵ *Id.* at 504.

⁶⁶ Harold McDougall, *From Litigation to Legislation in Exclusionary Zoning*, 22 HARV. C.R.-C.L. L. REV. 623, 624 (1987).

⁶⁷ *Id.*

⁶⁸ *Warth*, 422 U.S. at 498 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

⁶⁹ *Id.* at 498-99.

⁷⁰ *Id.* at 499 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

⁷¹ *Id.* at 504.

⁷² *Id.* at 503-07.

⁷³ *Id.* at 506 & n.16.

⁷⁴ See *id.* at 508 ("We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention.").

injury. The definition of injury used in evaluating standing for cases of this kind should include emotional harm.⁷⁵ Since "[h]ousing is among Americans' most important sources of enjoyment, security, and emotional well-being,"⁷⁶ unfair and/or overly restrictive limitations on people's ability to access adequate housing affect every aspect of their lives. Having the ability to decide where to live is central to obtaining future opportunities—better schools, more employment possibilities, and a higher quality of life.⁷⁷ Moreover, zoning restrictions harm entire communities by preventing them from experiencing the diversity that is essential to life in America.⁷⁸ Economic injury should not be the only kind of injury sufficient to support a plaintiff's standing.⁷⁹ As the dissent in *Warth* acknowledges, "A clean, safe, and well-heated home is not enough for some people. Some want to live where the neighbors are congenial and have social and political outlooks similar to their own."⁸⁰ People's sense of comfort and stability should be as critical as their physical security, for it is as determinative of their future potential.⁸¹

An additional problem in current zoning jurisprudence is the tremendous deference given to local governments in the area of property law. "Of all the powers held by the local sovereign, that of land-use control is deemed most sacred by its citizens. Property law has always been regarded as the province of local government, and interference in the daily zoning of land kindles towering passions"⁸² While local governments may be the most efficient entity to oversee land-use and property allocations, they also generally

⁷⁵ See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376-378 (1982) (holding that under the liberal federal pleading standard, plaintiffs had standing for emotional and/or economic injury, including "the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices") (citation omitted).

⁷⁶ Schuck, *supra* note 4, at 291.

⁷⁷ *Id.* at 303. See also *Thornburg v. Gingles*, 478 U.S. 30, 64 (1986) ("The opportunity to achieve high employment status and income, for example, is often influenced by the presence or absence of racial or ethnic discrimination.").

⁷⁸ See *Havens Realty*, 455 U.S. at 376-378 (holding that injury caused by the denial of the benefits of living in an integrated community could suffice for standing and remanding claims to the district court for further determination of the extent of plaintiffs' injury).

⁷⁹ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262-63 (1977) ("It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing.").

⁸⁰ *Warth v. Seldin*, 422 U.S. 490, 518 (1975).

⁸¹ This correlation is acknowledged by conservatives and liberals alike. See, e.g., Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 38 (1990) ("[T]he problem of poor people is that, in a real way, they have no will of their own They lack some minimal stake in society sufficient to connect their own personal interests with that of the larger public interest.").

⁸² HAAR, *supra* note 3, at 30.

represent a narrow set of interests.⁸³ The current residents of a given community make zoning decisions, which means there is no voice for those who have been or would like to become residents.⁸⁴ In this way, towns are free to perpetuate communities that represent not America as a whole, but their own particular version of what constitutes an appropriate community. This is in direct contrast to constitutional protection for freedom of association⁸⁵ and guarantees of equal protection under the law.⁸⁶ Zoning has become a constitutionally acceptable form of segregation and overt discrimination against the poor and racial and ethnic minorities.⁸⁷ Zoning laws condone people choosing among and judging others on the basis of characteristics that have been deemed invidious in other realms of law.⁸⁸

B. Zoning at the State Level: The Story of Mount Laurel, New Jersey

Mount Laurel, New Jersey, has become the unfortunate model for exclusionary zoning, demonstrating exactly what happens when supposedly neutral restrictions function as sieves, sorting out those who will continue to be granted status as community members and those who will not. Mount Laurel, originally a small agricultural town situated a convenient distance from the major industrial centers of Camden, New Jersey, and Philadelphia, Pennsylvania, grew exponentially as conditions in the cities worsened.⁸⁹ In the 1960s and 1970s, outsiders from the cities flocked to Mount Laurel, due in part to the construction of major highways and roadways leading through or near

⁸³ See KIRP ET AL., *supra* note 9, at 7 ("[T]he rules of government and a rigged private market have greatly eased the way for white and middle-class families while shutting the door on minorities.").

⁸⁴ *Id.* at 8.

⁸⁵ See U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

⁸⁶ See U.S. CONST. amend. XIV, § 1:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

⁸⁷ See, e.g., KIRP ET AL., *supra* note 9, at 8 ("Zoning has been the chief instrument by which suburbs have held themselves apart from the poor . . .").

⁸⁸ Perhaps the closest analogy is to school desegregation, where courts and the public have vehemently declared that separate is not equal. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that "separate educational facilities are inherently unequal"). Shutting school doors on minority children is now against the law, but enacting barriers preventing families from moving into the neighborhoods where those schools are located is not.

⁸⁹ See *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 718 (N.J. 1975) ("*Mount Laurel I*") (providing a factual and historical overview of the circumstances surrounding the case).

the township.⁹⁰ Those with the money to purchase land and homes, and the means to commute to and from jobs located outside the town's limits, became the self-selected residents of burgeoning Mount Laurel.

These population changes led to explicit zoning ordinances that helped the new white, middle- to upper-class residents of Mount Laurel feel protected from the urban blight, poverty, crime, and racial conflicts they had left behind in nearby cities.⁹¹ Yet the issue was not merely the theoretical exclusion of minorities and the poor. Mount Laurel already had a significant, long-standing population of lower-class and minority residents who suffered directly because of the decisions of their newer, wealthier neighbors.⁹² Ironically, Mount Laurel, once a haven for freed slaves given the first land of their own by Quakers,⁹³ came to represent some of the most contentious intersections of race and class that still divide America.

When lawyers entered the scene, they found that many African-American families had resorted to living in renovated chicken coops and shacks.⁹⁴ Community reaction, however, was that "[t]hese families needed housing, not lawsuits."⁹⁵ The mayor of Mount Laurel had told members of a mainly African-American congregation, "If you people can't afford to live in our town, then you'll just have to leave."⁹⁶ Increasingly, the town leaders created a vision that did not include any poor or non-white individuals and used zoning to achieve this end. Residents found themselves being forced out, regardless of how long they had lived in Mount Laurel or their level of investment in the community. Because of the deeply rooted values of property ownership and, in particular, the power of alienation, it was difficult to see how the situation in Mount Laurel could change. Indeed, without the intervention of the courts, it is hard to imagine that conditions today would be any different.⁹⁷

⁹⁰ *Id.*

⁹¹ See KIRP ET AL., *supra* note 9, at 47 ("From the outset, zoning in Mount Laurel was a way to exclude people regarded by the residents as undesirable.").

⁹² *Id.* at 41-42.

⁹³ *Id.*

⁹⁴ *Id.* at 42-44.

⁹⁵ *Id.* at 56.

⁹⁶ *Id.* at 2.

⁹⁷

It must be noted that even after legal mandates, the process of change in Mount Laurel has been slow and far from smooth. Litigation has continued to this day because of the difficulty of enforcing the *Mount Laurel* rulings and the town's persistence in trying to find ways around following the letter of the law imposed by the *Mount Laurel* decisions. See *Fair Share Hous. Ctr., Inc. v. Township of Cherry Hill*, 802 A.2d 512 (N.J. 2002); *S. Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983); *Toll Bros., Inc. v. Township of W. Windsor*, 756 A.2d 1056 (N.J. Super. Ct. App. Div. 2000). See also McDougall, *supra* note 66, at 629, which states:

C. Mount Laurel I

In the first case challenging Mount Laurel's zoning practices, the New Jersey Supreme Court found that the policies in use violated the state constitution.⁹⁸ For the purposes of New Jersey's equal protection clause, the poor are considered a protected class.⁹⁹ The court also found a substantive due process violation for the guarantee of housing as a fundamental right.¹⁰⁰ In now famous language, the court wrote:

We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.¹⁰¹

The first *Mount Laurel* case ("*Mount Laurel I*") clarified that it was not constitutionally acceptable for cities to deny access to an entire class of people and that local governments had a responsibility to ensure that this did not happen.¹⁰² However true the language of the *Mount Laurel I* opinion rang, the lasting trouble was with enforcement and how to reconcile long-standing biases, tensions, and divisions.¹⁰³ The court's finding that every municipality has an obligation to provide a "reasonable opportunity for an appropriate variety and choice of housing"¹⁰⁴ and "may not adopt regulations or policies which thwart or preclude that opportunity,"¹⁰⁵ did not solve any of the existing

Mount Laurel I was largely a theoretical decision providing rights without addressing the more complex issue of remedies. The facially simple remedy suggested by the holding . . . required exceedingly technical and esoteric information, thus making it easy for proponents of exclusionary zoning to tie up a court proceeding in argument over details.

⁹⁸ *Mount Laurel I*, 336 A.2d 713, 734 (N.J. 1975).

⁹⁹ *Id.* at 731.

¹⁰⁰ *Id.* at 724.

¹⁰¹ *Id.*

¹⁰² *Id.* at 727 ("It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation.").

¹⁰³ Schuck, *supra* note 4, at 368:

A court demanding the implementation of a diversity ideal that a neighborhood's residents do not share, and will strenuously resist, cannot conscript the housing market to do its bidding as it might be able to conscript a public bureaucracy A court that mandates this diversity over such resistance is bound to impair its legitimacy and effectiveness.

¹⁰⁴ *Mount Laurel I*, 336 A.2d at 728.

¹⁰⁵ *Id.*

problems. Moreover, the decision focused largely on the "adverse effects on general welfare, not on its racially discriminatory effects,"¹⁰⁶ perhaps burying the intended message.

The *Mount Laurel* cases were unique because first lawyers and then judges intervened in decisions normally left to local governments.¹⁰⁷ The courts stepped in to decide a question of priorities and determined that a person's fundamental interest in making choices about where and with whom to live had to be limited for the greater good of all people.¹⁰⁸ "What makes the Mount Laurel dilemma so poignant is that the court's crafting of one principle—the ideal of equality of opportunity regardless of race, ethnicity, or income—clashed with another highly valued article of faith: people's deeply rooted belief in their right to defend bastions against would-be invaders."¹⁰⁹ This clash, however, was especially complicated because it meant that legal mandates were not strong enough to change attitudes and behaviors based on firmly held beliefs.

D. Mount Laurel II and the Aftermath

Because *Mount Laurel I* did not have the intended effect of actually persuading officials or residents to change their ways, the township found alternatives to maneuver around meeting its obligation to provide housing for lower-income people.¹¹⁰ While the message of *Mount Laurel I* was clear, the court had not been explicit about what would constitute a "fair share"¹¹¹ of the duty to assume part of the regional burden and provide land designated for housing lower-income individuals. Two years later, the court clarified its intent in *Mount Laurel II*. In strong language once again, the court held:

The basis for the constitutional obligation is simple: the State controls the use of land, *all* of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else.

¹⁰⁶ Schuck, *supra* note 4, at 310.

¹⁰⁷ HAAR, *supra* note 3, at 3-4.

¹⁰⁸ See, e.g., HAAR, *supra* note 3, at 10 ("The Mount Laurel Doctrine recognizes that in the current urban-suburban setting, the search for freedom and equality is still tied to land, that the age-old connection continues, in the modern version of suburbia, to be vital and indispensable. Mount Laurel's rules govern entry to that land.").

¹⁰⁹ *Id.* at 9.

¹¹⁰ See *S. Burlington Co. NAACP v. Township of Mount Laurel*, 456 A.2d 390, 410 (N.J. 1983) ("*Mount Laurel II*") ("We have learned from experience, however, that unless a strong judicial hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials and appeals.").

¹¹¹ This concept is dealt with in more detail in *Oakwood at Madison, Inc. v. Township of Madison*, 371 A.2d 1192, 1200-01 (N.J. 1977), which explained that fair share obligations need not be precise or based on a particular judicial formula in order to be fair, and which left discretion to the local authorities.

The government that controls this land represents everyone. While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality, to which this control over land has been constitutionally delegated.¹¹²

Mount Laurel II denounced developing municipalities for passing blatantly exclusionary zoning laws intended to disproportionately affect lower-income people and criticized the state legislature for failing to protect the constitutional rights of all citizens.¹¹³ After commenting that *Mount Laurel I* had had no demonstrable effect on the township and its practices whatsoever, the court proceeded to discard most of the general language from *Mount Laurel I* in favor of highly specific rules that municipalities and lower courts would have to follow in order to meet their burden.¹¹⁴ This time, the court mandated that in addition to eliminating excessive zoning, subdivision restrictions, and other measures limiting the construction of affordable housing, "[a]ffirmative governmental devices should be used . . . including lower-income density bonuses and mandatory set-asides. Furthermore, the municipality should cooperate with the developer's attempts to obtain federal subsidies."¹¹⁵ Rather than merely allowing for the construction of low- and moderate-income housing, this decision held that municipalities must proactively encourage it.

Mount Laurel II also urged the state to get involved, which it did several years later by passing its own Fair Housing Act¹¹⁶ and creating the Council on Affordable Housing for the purposes of assigning and reviewing municipalities' fair shares.¹¹⁷ Even these measures have had limited success. In a 1997 study, only 7% of the lower-income households questioned reported having moved from the cities to the suburbs in the aftermath of the *Mount Laurel* decisions.¹¹⁸ Sixty-six percent of those who moved were Caucasian, 23% were African-American, 2% were Latino, and 9% classified themselves as other.¹¹⁹ Additionally, 21% of the suburban African-American households surveyed made the reverse move, from suburbs to cities.¹²⁰ While migration totals overall are disappointingly low, the *Mount Laurel* decisions may, if anything, have had the effect of increasing residential segrega-

¹¹² *Mount Laurel II*, 456 A.2d at 415.

¹¹³ Schuck, *supra* note 4, at 310-11 (citing *Mount Laurel II*, 456 A.2d at 410).

¹¹⁴ *Id.* at 311.

¹¹⁵ *Mount Laurel II*, 456 A.2d at 419.

¹¹⁶ Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to 52:27D-329 (West 2001).

¹¹⁷ *See id.* §§ 52:27D-305 to 52:27D-307 (establishing the Council and describing its duties).

¹¹⁸ Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1296 (1997).

¹¹⁹ *Id.*

¹²⁰ *Id.*

tion by race.¹²¹ The decisions seem to have encouraged more whites (albeit lower-income whites) to move to the suburbs.

While the situation in Mount Laurel is perhaps the best known and most litigated example of exclusionary zoning, other courts and legislatures have struggled with similar questions.¹²² In Pennsylvania, courts have held that exclusionary zoning is impermissible when it restricts reasonable growth and interferes with the rights of landowners to alienate their property.¹²³ California courts have recognized that zoning decisions cannot be left to the "exclusive control of self-interested municipalities"¹²⁴ and have adopted a more regional approach. The essential problem everywhere remains the same: how to control discrimination and segregation in communities without federal constitutional authority prohibiting tactics like exclusionary zoning.

E. Why Remedies in State Court Are Not Sufficient

The outcome of the *Mount Laurel* cases demonstrates exactly why remedies in state court are not a sufficient method for prohibiting exclusionary zoning. Using the state constitution as authority for the holding that suburbs have an obligation to make it realistic for those in poverty to find housing has only perpetuated, rather than challenged, the discriminatory nature of these practices. As important as the *Mount Laurel* decisions are,¹²⁵ they have not been taken seriously enough, and enforcement measures by state courts have failed to adequately protect the interests of those being harmed by their continued exclusion. While the cases and decisions have received plenty of attention,¹²⁶ issues of accountability and implementation have limited the results of the litigation. Many are skeptical that any court

¹²¹ See *id.*

¹²² See Schuck, *supra* note 4, at 318-19 ("Other states have attacked exclusionary zoning in a variety of ways, yet they too have had little effect.").

¹²³ See, e.g., *Surrick v. Zoning Hearing Bd. of Upper Providence*, 382 A.2d 105 (Pa. 1978).

¹²⁴ McDougall, *supra* note 66, at 635.

¹²⁵ See, e.g., HAAR, *supra* note 3, at 10 ("In a society dedicated to equality of opportunity, the *Mount Laurel* decisions must be understood as among the most significant judicial decisions of our time."). See also KIRP ET AL., *supra* note 9, at 9 ("What the New Jersey judges said in their *Mount Laurel* opinions about the obligation of suburbs to make it 'realistically possible' for poor families to find homes there represents the most important zoning decision since the U.S. Supreme Court ruled, nearly three-quarters of a century earlier, that zoning itself was constitutional.").

¹²⁶ See, e.g., Angela Coulombis, "Mount Laurel" Decision Getting Another Look, PHILA. INQUIRER, May 28, 2002, at A1; Anthony DePalma, *Mt. Laurel: New Path to Old Goal*, N.Y. TIMES, Jan. 30, 1983, § 11, at 1; Jan Hefler, *For Suburban Poor, Few Welcome Mats*, PHILA. INQUIRER, Aug. 5, 2002, at B9; Andrew Jacobs, *Justices Pondering Old Barriers in Housing*, N.Y. TIMES, Nov. 28, 2001, at D5.

decision could change this.¹²⁷ However, a reinterpretation of what the federal Constitution already protects might make more of a difference. For example, a holding by the Supreme Court that local ordinances enforced by state actors that limit and/or exclude lower-income residents violate the Fourteenth Amendment could have a broader impact and result in significant social and policy changes.¹²⁸ Indeed, this could be the only measure, short of federal legislation, that would change the way race and poverty are treated in the context of property ownership and community membership.¹²⁹

III. AN EQUAL PROTECTION ARGUMENT FOR FINDING EXCLUSIONARY ZONING UNCONSTITUTIONAL

A. *The Equal Protection Clause, Race, and Poverty*

To find a violation of the Equal Protection Clause of the Fourteenth Amendment, one must demonstrate a substantial disparity between the government's treatment of similarly situated individuals or the government's denial of a fundamental right to a particular group

¹²⁷ See KEATING, *supra* note 10, at 242 ("Barring the advent of a much different national administration, one determined to attack suburban residential segregation in the courts as violative of federal fair housing law, it is most unlikely that the courts can be a vehicle for systematically addressing suburban integration problems."); *id.* at 4 ("Litigation against selected suburbs accused of exclusionary practices has not had the intended effect of persuading other suburbs to adopt affirmative policies to avoid similar legal problems or of leading to federal or statewide legislative action to mandate affirmative fair housing policies."); Schuck, *supra* note 4, at 309:

[M]ost Americans do not regard classist exclusions, as distinguished from racist ones, as a social problem. They do not think it unjust if people live only in communities that they can afford. Second, the law permits communities to pursue a variety of legitimate purposes (e.g., limiting pollution or congestion) through zoning techniques that sometimes have intended or unintended exclusionary effects. This means that even in a community that bars zoning for classist purposes, an effective legal challenge must show that the community's facially neutral, ostensibly legitimate purposes are in fact a pretext for a classist one.

¹²⁸ This is, of course, a point that many more skeptical of the Supreme Court's power would dispute. See, e.g., Peter Edelman, *Responding to the Wake-Up Call: A New Agenda for Poverty Lawyers*, 24 N.Y.U. REV. L. & SOC. CHANGE 547, 549 (1998) ("Going to court and invoking the Constitution to bring about basic change for the poor is a non-starter. . . . That a single Supreme Court ruling nine to zero can establish racial or economic justice as the law of the land is a romanticized picture of litigation."). While law may not be the only answer for social change in this area, it is indisputably part of the solution.

¹²⁹ See, e.g., KEATING, *supra* note 10, at 221:

In a nondiscriminatory society, race-conscious policies would not be necessary to promote greater racial harmony and neighborhood racial diversity and to reduce racial discrimination in housing. However . . . there continues to be considerable racial separatism and housing discrimination in the United States, despite the passage of national, state, and local fair housing legislation.

See also Schuck, *supra* note 4, at 289 ("Using the law to promote diversity in residential communities is probably more difficult than promoting it in any other public policy domain.").

of individuals as members of a class.¹³⁰ To trigger strict scrutiny and warrant an extremely close look at the government's proffered reasons for the classification, there has to be a restriction of choice by a state actor on the basis of a protected characteristic.¹³¹ To date, race is the only classification that triggers strict scrutiny.¹³² Because of the strong correlation between race and poverty in America,¹³³ it is time to start viewing class-based restrictions as discriminatory and contrary to the purpose of protecting individuals' liberty and freedom of choice.¹³⁴ Equal protection is not limited in the Constitution solely to race,¹³⁵ and it is critical to recognize the interconnected nature of prejudice.¹³⁶ Local governments are not a sufficient safeguard against the explicitly racist and classist decisions made in the context of hous-

¹³⁰ See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

¹³¹ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

¹³² Gender still triggers only intermediate scrutiny, where the classification must serve "important governmental objectives" and the means employed are "substantially related to the achievement of those objectives." *United States v. Morrison*, 529 U.S. 598, 620 (2000). Gender and race both warrant a higher level of scrutiny than a mere rational basis test because they are immutable characteristics. In turn, the Court has recognized the need for special protection for individuals in these groups. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

¹³³ See Schuck, *supra* note 4, at 301-02:

Classism explains much residential segregation. Indeed, the distinction between racism and classism is pivotal Although racism is categorically illegal in all but the most private contexts, the law bars classism only when it works to deny voting rights, access to the courts, legal counsel in serious criminal cases, and a few other basic incidents of common citizenship. In all other respects, the law protects, or even permits, classism.

¹³⁴ See, e.g., Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 21 (1969):

For if money is power, then a class deliberately defined so as to include everyone who has less wealth or income than any person outside it may certainly be deemed, as racial minorities are by many observers deemed, to be especially susceptible to abuse by majoritarian process; and classification of "the poor" as such may, like classification of racial minorities as such, be popularly understood as a badge of inferiority. Especially is this so in light of the extreme difficulty of imagining proper governmental objectives which require for their achievement the explicit carving out, for relatively disadvantageous treatment, of a class defined by relative paucity of wealth or income.

¹³⁵ The relevant section of the Fourteenth Amendment provides merely that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹³⁶ See *James v. Valtierra*, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting). While the majority held that wealth classifications alone do not trigger strict scrutiny, the dissent by Justice Marshall, joined by Justices Blackmun and Brennan, argued, "It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect." *Id.*

ing; indeed, by refusing to intervene in "local" matters, states are both perpetuating and enabling constitutional violations.¹³⁷

When the Constitution is interpreted so as to allow the state to exclude a group of people on the basis of their economic status, something is wrong. When wealth-based exclusions disproportionately harm racial minorities, then something is very wrong indeed. Class discrimination is functioning as a pretext for race discrimination. Because it is constitutionally permissible to exclude people based on class, it has become constitutionally acceptable to also exclude racial minorities who also happen to be members of a lower socioeconomic class. Yet, without the pretext of class, these same actions would be clearly unconstitutional. Racism in this way is hiding beneath the significantly less-suspect guise of classism. To address this inequality, a discriminatory intent to classify on the basis of class that results in a significant exclusion of members of minority populations must be held unconstitutional. In order to warrant the level of scrutiny needed to prevent further discrimination of this kind, socioeconomic status must be granted at least the status of a quasi-suspect trait. As it stands, "[I]f a group of poor people mounted a federal constitutional assault on restrictive zoning ordinances by alleging discrimination . . . solely on the basis of economic status, their claim would be held to lie outside the refuge of strict scrutiny, and the garden-variety rational basis test would apply."¹³⁸

To understand the problem with this, consider the following hypothetical situation. A group of neighbors decide that in order to preserve the safety, comfort, and quality of life in their community, they wish to enact an ordinance that allows only members of their particular racial group to live within the town's borders. As legitimate reasons for enacting the ordinance, the group offers statistics showing a correlation between crime and racial strife and point to the harmony that children and adults in the community currently enjoy. The town's zoning board, all current residents of the community who benefit from the status quo, passes the ordinance. Because race is the explicit purpose and effect of this ordinance, as long as state action could be demonstrated in either the enactment or enforcement, this would be a clear violation of the Equal Protection Clause.¹³⁹ Yet if

¹³⁷ The federal government has acknowledged the need for broader protections for racial and ethnic minorities and has attempted to address it through legislation. One source of authority comes from 42 U.S.C. § 1982 (2002): "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."

¹³⁸ HAAR, *supra* note 3, at 23.

¹³⁹ See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). See also *Buchanan v. Warley*, 245 U.S. 60 (1917) (holding that ordinances

we altered the circumstances only slightly and based the explicit exclusion on wealth and not race, even a result that effectively prevented minorities from residing in that community would be held constitutional.

In the United States today many lower-income individuals do not have the right to claim community membership. But constitutionally, racial and ethnic minorities do have a claim against exclusion from a community by a state actor on the basis of their race. Should the explicit mention of race distinguish an ordinance that has the clear purpose and effect of excluding members of disadvantaged racial and ethnic groups from one that couches this in less specific language? Must the racially discriminatory purpose and effect be explicitly stated or is the effect, together with a clear analysis of the nature of the deprivation, enough? Restrictions based on class that result in discrimination against those of both a disadvantaged class and race should be suspect enough to trigger strict scrutiny.¹⁴⁰

Despite the fact that the Supreme Court has grown increasingly conservative over the last few decades, social and cultural changes may force the Court to readdress these questions in the near future. In particular, the growing income gaps and pervasive economic-based inequalities in our society present compelling reasons for reconsideration of the legal status of the poor in America. Even without designating that social class itself warrants strict scrutiny, purposefully class-based restrictions that produce racially discriminatory effects should justify a hybrid form of strict scrutiny, or at least the kind of intermediate scrutiny triggered by gender as a quasi-suspect trait.

B. Reexamining the Equal Protection Clause and Its Interpretation by the Modern Court

Although there is no direct constitutional support for a right to live in the community of one's choice, there are a number of related liberties and interpretations of the Constitution that can support this conclusion. The Court has, in the past, recognized that class functions do discriminate in a manner similar to race: "Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."¹⁴¹ Thus, employing a higher level of scrutiny when evaluat-

preventing the sale of residential property based on the race of the buyer and the racial composition of the block are unconstitutional).

¹⁴⁰ See, e.g., *James v. Valtierra*, 402 U.S. at 144-45 (Marshall, J., dissenting) ("It is rather an explicit classification on the basis of poverty—a suspect classification which demands exacting judicial scrutiny . . .").

¹⁴¹ *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944), for the proposition that lines drawn on the basis of race are disfavored).

ing instances where regulations produce high correlations of discrimination against both lower-income individuals and members of racial minority groups would not be entirely radical. Historically, the Court has also suggested that the notion of liberty may have to expand in order to protect the rights of individuals against infringement by the state:

In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . . ?¹⁴²

While cases in the 1970s held that those living in poverty are not a protected class¹⁴³ and that a fundamental right to property or adequate shelter is not guaranteed by the Constitution,¹⁴⁴ the nature of property rights and the appropriate level of scrutiny have not been decided by the Supreme Court. For the Equal Protection Clause to control, either the fundamental rights strand or the suspect class strand would have to apply to exclusionary zoning.

Since the suggestion in the 1970s that the Court was considering the expansion of the Equal Protection Clause, there has been very little litigation on this point. *San Antonio Independent School District v. Rodriguez* clarified that the class of people living in poverty is not currently recognized under the Equal Protection Clause,¹⁴⁵ directly contradicting the decision six years earlier in *Harper v. Virginia Board of Elections* holding wealth to be a suspect classification.¹⁴⁶ In *Lindsey v. Normet*, the Court rejected an argument that there is a fundamental right to shelter and home ownership and held that social importance is not the critical determinant for subjecting state legislation to strict scrutiny:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality Absent constitutional mandate, the assurance of adequate

¹⁴² *Lochner v. New York*, 198 U.S. 45, 56 (1905).

¹⁴³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19 (1973) (concluding that lower courts have not satisfactorily justified subjecting wealth discrimination to strict judicial scrutiny).

¹⁴⁴ *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (finding no constitutional right to occupy rental property without payment of rent and no constitutional guarantee of housing of a certain quality).

¹⁴⁵ *Rodriguez*, 411 U.S. at 19.

¹⁴⁶ *Harper*, 383 U.S. at 668.

housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.¹⁴⁷

Similarly, in *Village of Arlington Heights*,¹⁴⁸ a contractor tried to purchase land for building racially integrated low- and moderate-income housing, and applied to rezone fifteen acres from single-family to multifamily dwellings.¹⁴⁹ The village denied his request and the contractor sued, claiming the denial was "racially discriminatory."¹⁵⁰ The Court found a discriminatory impact but not purpose.¹⁵¹ Likewise, in *Village of Belle Terre v. Boraas*, petitioners challenged a New York village ordinance that restricted land use to single-family dwellings and defined "family" very narrowly.¹⁵² A group of students attending a nearby university challenged their right to live together in one dwelling.¹⁵³ The Court ruled against them, citing an interest in preserving the character of the community.¹⁵⁴ The dissent raised the important point that "[t]here [was] not a shred of evidence in the record indicating that if Belle Terre permitted a limited number of unrelated persons to live together, the residential, familial character of the community would be fundamentally affected."¹⁵⁵ The Court's reliance on finding a legitimate purpose for exclusionary zoning practices falters in these cases, but is not totally destroyed. The dissent in *Belle Terre* argued that the guarantee of liberty in the First and Fourteenth Amendments should protect an individual's freedom to choose his or her associates¹⁵⁶ and to "establish a home."¹⁵⁷

More recently, the Court has suggested that the test of whether the government is infringing on the rights of individuals should rest

¹⁴⁷ *Lindsey*, 405 U.S. at 74.

¹⁴⁸ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

¹⁴⁹ *Id.* at 254.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 270-71.

¹⁵² *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The ordinance "restricted land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple-family dwellings," defining "family" as "one or more persons related by blood, adoption, or marriage, living . . . together as a single housekeeping unit . . ." *Id.* at 2.

¹⁵³ *Id.* at 2-3.

¹⁵⁴ *Id.* at 9.

¹⁵⁵ *Id.* at 20 (Marshall, J., dissenting).

¹⁵⁶ *Id.* at 15 (Marshall, J., dissenting) ("Our decisions establish that the First and Fourteenth Amendments protect the freedom to choose one's associates."). See also *NAACP v. Button*, 371 U.S. 415, 430 (1963) ("[W]e have affirmed the right 'to engage in association for the advancement of beliefs and ideas.'" (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958))).

¹⁵⁷ *Vill. of Belle Terre*, 416 U.S. at 15 (Marshall, J., dissenting). See also *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) ("[T]he right 'to . . . establish a home . . . [is] an essential part of the liberty guaranteed by the Fourteenth Amendment.'" (citation omitted)); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home . . .").

on "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."¹⁵⁸ If, in the case of zoning, we consider that the state is acting through local zoning boards through its grant of power and discretion, then the state should be held responsible for infringing upon the rights of individuals.

C. Resolving the Requirement of State Action in Disparity of Treatment

Because the protection provided by the Fourteenth Amendment is specifically limited to state action, it is necessary in any Equal Protection claim to assert that harm has been done by a party granted its authority by the state.¹⁵⁹ This means the state itself must participate in either the implementation or the enforcement of discriminatory measures.¹⁶⁰ Land use is generally governed by state law and zoning is specifically delegated to local control.¹⁶¹ However, the Court has also ruled that "the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."¹⁶² Decisions made by local zoning boards affect the public at large. Furthermore, property rights emerge from the state; therefore, the individuals entrusted with the power to delegate how much and by whom property shall be used are acting under the authority of the state.¹⁶³ A state that assigns control over land-use decisions to local officials cannot escape from state action merely because another body, to which it has passed its direct authority, has perpetrated the discrimination.

Alternatively, to find state action, one could argue that state courts that enforce explicitly discriminatory local zoning laws are functioning as state actors in upholding policies with a discriminatory purpose

¹⁵⁸ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

¹⁵⁹ *See Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

¹⁶⁰ *See The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment creates no protection against merely private conduct, no matter how discriminatory or wrongful).

¹⁶¹ *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 ("[The village's local] governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined . . . that the course of . . . development shall proceed within definitely fixed lines.").

¹⁶² *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

¹⁶³ This situation can be analogized to the holding that state political parties, which were given authority by the state, functioned sufficiently as government actors to be viewed as state actors and therefore were within the scope of the Fourteenth Amendment. *See, e.g., Nixon v. Condon*, 286 U.S. 73 (1932) (holding that the Texas Democratic Party's resolution excluding African-Americans qualified as a state action and thus was in violation of the Fourteenth Amendment).

and effect, as was done successfully in *Shelley v. Kraemer*.¹⁶⁴ The Court in *Shelley v. Kraemer* held:

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.¹⁶⁵

While there is still no basis for finding a private decision to exclude nonwhites from a particular neighborhood discriminatory, state action enabling or enforcing these measures does come under the purview of the Fourteenth Amendment. When zoning boards, given authority by the state, approve of a deprivation that not only infringes on individual liberty, but also is based on a clear discriminatory intent, this qualifies as state action.

Past Supreme Court interpretations of the Fourteenth Amendment used language such as "State laws and acts done under State authority"; "State laws, or State action of some kind"; "such laws as the States may adopt or enforce"; and "such acts and proceedings as the States may commit or take."¹⁶⁶ These phrases are not a rigid definition of what constitutes state action; instead, state action would include laws adopted by officials granted the power to act with the state's authority.¹⁶⁷ Indeed, *Reitman v. Mulkey* clarified that there is no single test for when state involvement rises to the level of state action; instead, this is a case-by-case determination based on particular facts and circumstances.¹⁶⁸ *Burton v. Wilmington Parking Authority* offers one of the most expansive interpretations of state action, holding that racial discrimination by a tenant in a state-owned building sufficed as state action.¹⁶⁹ What is obvious and remains unchanging in the Court's opinions is that "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities."¹⁷⁰

¹⁶⁴ *Shelley*, 334 U.S. at 1 ("The actions of state courts and judicial officers in their official capacities are actions of the states within the meaning of the Fourteenth Amendment In granting judicial enforcement of such private agreements in these cases, the states acted to deny petitioners the equal protection of the laws" (citation omitted)).

¹⁶⁵ *Id.* at 10.

¹⁶⁶ The Civil Rights Cases, 109 U.S. 3, 13, 14 (1883).

¹⁶⁷ See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding that significant state involvement in private discrimination could amount to unconstitutional state action).

¹⁶⁸ *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967).

¹⁶⁹ *Burton*, 365 U.S. at 726.

¹⁷⁰ *Shelley*, 334 U.S. at 22.

D. *The Case for Finding a Fundamental Right to Shelter*

A major argument against any sort of extraordinary constitutional protection for the poor or guarantee of shelter is that the Constitution does not provide for these entitlements.¹⁷¹ However, the Constitution does provide for other entitlements, such as the right to work, the right to vote, and the right to an education.¹⁷² One argument is that these entitlements differ in their effects on individuals.

Why has our political system balked at expressly recognizing "a right to shelter," "a right to a minimum income," and other similar rights, when for more than a century it has guaranteed self-ownership of labor and a right to schooling? . . . The proposed entitlements tend to discourage work, while the existing entitlements tend to encourage it.¹⁷³

A lack of appropriate housing, which often leads to a substandard education, level of civic participation, and ability to maintain a job, also tends to discourage an individual from working. If the aim is really to help build a more productive citizenry and further a sense of individual responsibility, the benefits of property ownership and community membership can be as valuable as anything else. Denying people shelter or community membership on the rationale that these amenities will discourage them from self-help is a fundamental misconception about poverty. Moreover, it completely disregards the sense of alienation that comes from being pushed out into ghettos and other undesirable places to live—or having one's shelter completely taken away.¹⁷⁴

Additionally, because housing is fundamental to meaningful and productive participation in any kind of public life, "[a]ffordable shelter must be seen as a fundamental right, as part of that entitlement to an adequate standard of living that every humane society—certainly one as fortunate as our own—should wish to assure every one of its residents."¹⁷⁵ Whether one believes that the Constitution implicitly holds a right to shelter in its mention of liberties and privileges of citizenship or that Congress should enact a constitutional right to shelter,¹⁷⁶ both support the notion that class-based discrimination is inherently contrary to American ideals of freedom and inclusion.

¹⁷¹ See, e.g., Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17, 32-34 (1992).

¹⁷² *Id.* at 30-32.

¹⁷³ *Id.* at 32.

¹⁷⁴ See Berger, *supra* note 39, at 335 ("Homelessness will not begin to recede until our government, the President and the Congress, look beyond the immediate crisis to the systemic problems that have produced and will prolong it. To solve those problems, we must once again regard affordable housing as everyone's right.").

¹⁷⁵ *Id.* at 324-25.

¹⁷⁶ See Ellickson, *supra* note 171, at 20 (referring to Curtis Berger's belief that Congress should create a right to shelter).

CONCLUSION

Because of the high correlation between having a lower socioeconomic status and being a racial or ethnic minority in American society, zoning ordinances that exclude lower-income people result in intentional exclusion of minorities. This should be an explicit violation of the Equal Protection Clause—it is time to expand the scope of racial classifications. Otherwise, the effect of exclusionary zoning is state-enforced segregation, which has been deemed unconstitutional in every other context.¹⁷⁷ The value of property and significance of community to one's opportunities should make it more, not less, important that federal authority govern discriminatory state action in this area. The Constitution can and should be interpreted to protect against exactly the kinds of violations that are passing under the guise of exclusionary zoning.¹⁷⁸ Moreover, even from an entitlements perspective, property is so fundamental that without it, people cannot be expected to participate effectively.¹⁷⁹ In condoning zoning practices that have the purpose and effect of discriminating against individuals on the basis of their socioeconomic status, the state is sponsoring discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Poverty produces many forms of inequality and injustice; it should not result in total exclusion from a society based

¹⁷⁷ For a look at the somewhat erratic decisions by the Court dealing with discrimination in the context of communities, see Gillette, *supra* note 5, at 1377, who notes, "Our ambivalence toward communities is apparent in an inconsistent and often disconnected series of constitutional law decisions that sometimes allow, and sometimes prohibit, majority interference with the practices and preferences of discrete ways of life."

¹⁷⁸ See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966):

Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.

See also Berger, *supra* note 39, at 334 ("In the United States, we have neither embraced a domestic constitutional right to housing . . . nor do we now profess that our citizens have 'the fundamental right, regardless of economic circumstances, to enjoy adequate shelter at reasonable costs' . . .").

¹⁷⁹ See Amar, *supra* note 81, at 37:

[A] minimal entitlement to property is so important, so constitutive, and so essential for both individual and collective self-governance that to provide each citizen with that minimal amount of property, the government may legitimately redistribute property from other citizens who have far more than their minimal share. But wait—there's more. The notion of minimal entitlements is not simply constitutive, it is constitutional—not just constitutionally permissible, meaning that the government *may* distribute or redistribute to insure every citizen a minimal stake in society, but constitutionally obligatory. The government *must* do so. The Constitution does not enact Mr. Herbert Spencer's *Social Statics*, but it does enact Mr. Thaddeus Stevens's forty acres and a mule.

on principles of freedom and liberty, nor should it serve as a justification for America to remain separated by race and ethnicity.