

Holding Local Governments Accountable for Environmental Discrimination: the Promise of California Government Code § 65008

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Local governments play a crucial role in distributing environmental harms and benefits—and all too often, they disproportionately impose environmental burdens on low-income neighborhoods and neighborhoods of color. The concentration of toxic uses and environmental risks in these communities poses a serious threat to residents' health and safety. Concern about these disproportionate impacts has ignited a vibrant environmental justice movement in communities across the nation, but advocates have struggled to find adequate legal tools to protect their communities.

This Comment examines the potential for a little-used anti-discrimination statute in California's Planning and Land Use Title (Government Code section 65008) to allow environmental justice claims against local governments. The statute renders null and void any action that denies enjoyment of residence, landownership, or other interest in land to individuals on the basis of race and other characteristics—including low-income status. The statute also forbids discrimination against the same classes in the enactment or administration of ordinances.

The inclusion of socioeconomic class as a protected characteristic offers an important opportunity for racial justice advocates to capture the full range of disadvantages that burden many communities of color. Together with the use of the disparate impact standard, the statute accommodates robust theories of discrimination necessary to confront the nature of racial disadvantage that drives environmental discrimination.

A close reading of the terms of section 65008 highlights its availability for environmental justice claims against local governments. Reading the term "enjoyment of residence" in light of the common law doctrines of constructive eviction, the implied warranty of habitability, and nuisance, I conclude that

section 65008 renders null and void local government actions that interfere with residents’ health and safety interests on a discriminatory basis. The second provision, barring discrimination in the enactment or administration of ordinances, has an even broader reach, potentially covering a host of local government actions relevant to the allocation of environmental harms and benefits. Finally, I argue that the statute’s protections apply to existing communities, but recommend clarifying language that would remove some confusion created by inelegant drafting.

This explication of section 65008 illustrates some of the crucial elements of a model environmental justice statute: the ability to capture structural and implicit discrimination that underpin spatial inequality; protection of ongoing residential interests connected with health and safety and not simply access to housing; and coverage of the full range of local government powers that may be implicated in regulating and distributing environmental harms. A statute with these elements promises to represent a breakthrough in environmental justice litigation.

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INTRODUCTION

Hidden in plain sight in the California Government Code is an almost entirely unexplored opportunity to bring civil rights claims challenging local government actions that impose disproportionate environmental burdens or other harm on low-income neighborhoods of color. That opportunity is contained in the capacious—if in places inelegant—language of Government Code section 65008, which prohibits local governments from discriminating against the residence interests of protected classes in the exercise of their

planning and land use powers, as well as in the enactment and administration of ordinances.

Section 65008 operates on a robust theory of discrimination that fills in some of the crucial holes that have stymied civil rights and environmental justice suits in the past. Significantly, the statute prohibits discrimination not only on the basis of race, but also on the basis of income.¹ A cause of action based on socioeconomic discrimination offers advocates a tool that can both capture a broad net of discrimination and supplement race-based claims to capture some of the structural forces that contribute to modern racial disadvantage.² Additionally, the legislative history of the statute and existing, albeit thin, case law both call for application of a disparate impact standard of discrimination rather than requiring proof of discriminatory intent.³ As civil rights advocates have long argued, the disparate impact standard is important because it appropriately accounts for the opaque operation of bias in modern society without relinquishing the urgent need to redress racial injustice.⁴

As detailed in this Comment, section 65008's expansive language is also well suited to advance environmental justice claims. The statute protects residential interests that, read in the context of common law doctrines like nuisance and the implied warranty of habitability, capture significant health and safety concerns associated with housing.⁵ Furthermore, by reaching the full breadth of local government planning and land use powers, as well as ordinance-making and enforcement powers, section 65008 offers communities a powerful legal tool to challenge common problems like the siting of toxic uses in low-income communities or communities of color; land use planning that denies neighborhood access to environmental goods like parks, public transit, and sanitation infrastructure; and unequal enforcement of environmental protections in underserved neighborhoods.

These substantial protections are set out in two principal subsections of the statute. Subsection (a) provides that any action by a local government agency "pursuant to" the Planning and Land Use Title "is null and void if it denies to any individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use in this state because of" a list of prohibited reasons, including race, lawful occupation, age, and a host of other

1. CAL. GOV'T CODE § 65008 (West 2013). Subsection (a)(3), for example, bars discrimination based on the "intended occupancy of any residential development by persons or families of very low, low, moderate, or middle income."

2. *See infra* Part I.

3. *See id.*

4. *See, e.g.,* Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175 (2008) (discussing research on implicit bias and arguing that "in light of what modern science tells us about discrimination, requiring 'proof of intent' is both outdated and largely ineffective in supporting our efforts to advance racial equality and remedy the continuing harms caused by racism").

5. *See infra* Part II.

protected characteristics cross-referenced from other California statutes.⁶ Significantly, subsection (a)(3) adds “[t]he intended occupancy of any residential development by persons or families of very low, low, moderate, or middle income” to the list of prohibited bases of discrimination, thus reaching discrimination on the basis of socioeconomic class. The second subsection barring discrimination in local government actions, subsection (b)(1), provides that “[n]o city, county, city and county, or other local governmental agency shall, in the enactment or administration of ordinances pursuant to any law, including [the Planning and Land Use] title, prohibit or discriminate against any residential development or emergency shelter” for a list of prohibited reasons, covering the same bases of discrimination as subsection (a).

Despite the breadth of its plain language, section 65008 has seen very little use, and even less judicial explication, in nearly forty years of existence. Only five cases have yielded published opinions construing or applying section 65008, and all have dealt with access to housing (rather than, for example, quality of housing or neighborhood conditions).⁷ Even on this limited record, section 65008 has proven effective in challenging local government discrimination. Section 65008 was used successfully in *Bruce v. City of Alameda* in 1985 to block the enforcement of a voter initiative purporting to restrict the construction of publicly subsidized rental units for a period of five years.⁸ Holding that “locally unrestricted development of low cost housing is a matter of vital state concern,” the *Bruce* court found that section 65008 overrode Alameda’s charter city status, and thus nullified the initiative.⁹ Three years later, in *Keith v. Volpe*, the Ninth Circuit affirmed a section 65008 ruling in favor of low-income families who had been displaced by highway construction and sued the City of Hawthorne for denying approval of an affordable housing development and refusing to provide any other replacement housing.¹⁰ Significantly, as discussed in more detail below, the court in *Keith* held that the proper standard for proving discrimination under section 65008 was disparate impact rather than discriminatory intent.¹¹ The court also applied what appeared to be a disparate impact standard a few years later in *Building Industry Ass’n of San Diego v. City of Oceanside* to invalidate an initiative imposing an annual growth cap because it resulted in a “drastic reduction in the supply of more affordable housing”—without inquiry into the intent or purpose

6. § 65008(a)(1)(A) (cross-referencing §§ 12955, 12926, 12926.1, and 12955.2).

7. *Bruce v. City of Alameda*, 212 Cal. Rptr. 304 (Ct. App. 1985); *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988); *Bldg. Indus. Ass’n of San Diego v. City of Oceanside*, 33 Cal. Rptr. 2d 137 (Ct. App. 1994); *Gibson v. County of Riverside*, 132 F.3d 1311 (9th Cir. 1997); *Shea Homes Ltd. P’ship v. County of Alameda*, 2 Cal. Rptr. 3d 739 (Ct. App. 2003).

8. *Bruce*, 212 Cal. Rptr. at 306–07.

9. *Id.*

10. *Keith*, 858 F.2d at 485.

11. *Id.*

of the initiative.¹² Similarly, a 2003 case examining the legality of a growth boundary initiative in Alameda County ultimately upheld the initiative from a section 65008 challenge, reasoning that none of the measure's provisions "discriminate or may be implied to have a discriminatory effect."¹³ In *Gibson v. County of Riverside*, an age and family-status discrimination claim under section 65008 was brought to challenge county land use ordinances that restricted residence in certain areas to seniors above a given age.¹⁴ In the end, the district court did not determine whether section 65008 would invalidate the age restriction, relying on other civil rights laws to invalidate the ordinance. However, on appeal, the Ninth Circuit did reach a technical holding that when section 65008 renders an ordinance null and void, it does not effect a repeal but simply renders that ordinance without effect.¹⁵

This limited case history has left many of the core terms of section 65008 uninterpreted, obscuring the potential scope of the statute and allowing its sometimes-cluttered drafting to deter meaningful analysis. This Comment takes up that challenge, analyzing the plain language, legislative history, and legal context of section 65008 to propose a reading of the statute that would reach a broad net of local government actions that not only impede access to housing, but also impose disproportionate environmental burdens (or other harms) on low-income communities and communities of color.

In today's landscape of increasingly opaque discrimination and increasingly narrow civil rights claims, section 65008 is well worth the attention. The barriers in current federal law to successful environmental justice claims against local governments are varied. Discrimination claims challenging actions by public bodies directly under the federal Equal Protection Clause must show intentional discrimination on the basis of race, setting a standard that neither reflects modern discrimination and structural dynamics of racial disadvantage nor acknowledges pervasive unequal treatment on the basis of socioeconomic class.¹⁶ Title VI of the Civil Rights Act of 1964 attaches federal anti-discrimination protection to certain funding streams used by local government agencies by prohibiting disparate racial impact in funded programs or activities.¹⁷ However, those regulations, which might have been used to bring court challenges to permits for polluting facilities or discrimination in the use of federal transportation funding, have been held to not create a private

12. 33 Cal. Rptr. 2d at 143.

13. *Shea Homes Ltd. P'ship v. Cnty. of Alameda*, 2 Cal. Rptr. 3d 739, 752 (Ct. App. 2003).

14. *Gibson v. Cnty. of Riverside*, 132 F.3d 1311 (9th Cir. 1997); *Gibson v. Cnty. of Riverside*, 181 F. Supp. 2d 1057 (C.D. Cal. 2002).

15. *Gibson*, 132 F.3d at 1313.

16. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (applying the *Washington v. Davis* requirement of discriminatory purpose to a local government's denial of an application for rezoning).

17. *See e.g., 40 C.F.R. §§ 7.30, 7.35(b)* (2013) (prohibiting disparate impact in the administration of programs assisted by the EPA).

right of action.¹⁸ The Federal Fair Housing Act (FHA), which protects against discrimination making housing “unavailable” and against discrimination in the “terms, conditions, or privileges of sale or rental of a dwelling,” does permit claims based on disparate impact.¹⁹ However, the FHA has been limited in its ability to reach environmental factors affecting housing.²⁰ Although the Ninth Circuit recognized claims regarding racial discrimination in the provision of municipal services like sanitation infrastructure and police enforcement in *Committee Concerning Community Improvement v. City of Modesto*,²¹ it is not yet clear whether such post-acquisition protection²² will extend to siting decisions and regulatory actions by local governments.²³ Even in municipal services discrimination cases under the FHA, a racially disparate impact is often difficult to prove because there may not be similarly situated low-income communities that are predominantly white *and* better served.²⁴

With limited opportunities to bring environmental justice claims under federal law, opportunities within state law are increasingly important. In this context, section 65008 can serve as an important model for advocates and legislators outside of California looking to extend civil rights law to challenge instances of local government environmental discrimination. Within California, section 65008 offers an opportunity to address some of the barriers environmental justice advocates have encountered in other state law causes of action. At first glance, the California Fair Employment & Housing Act (FEHA)

18. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001); *see also* *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003) (holding that the Department of Transportation’s disparate impact regulation could not be enforced through a § 1983 suit because “an agency regulation cannot create individual rights enforceable through § 1983”).

19. *See* *Town of Huntington v. N.A.A.C.P.*, 488 U.S. 15 (1988); *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988).

20. *See* Colin Crawford, *Other Civil Rights Titles*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES & PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 67, 73–74 (Michael Gerard & Sheila Foster eds., 2d ed. 2008).

21. 583 F.3d 690, 714–15 (9th Cir. 2009) (allowing FHA claim with regard to discrimination in the provision of police services, but disallowing a claim with regard to sewer services for lack of sufficient proof of racial disparities).

22. By “post-acquisition protection,” I mean protection from discrimination for residents after they have already gained access to housing. The nature and reach of post-acquisition claims under the FHA is hotly contested. *See infra* note 149.

23. *Cf.* *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (rejecting FHA claim related to the siting of a highway in plaintiff’s neighborhood as “too remotely related to the housing interests that are protected by the Fair Housing Act”); *Cox v. City of Dallas*, 430 F.3d 734, 742–43 (5th Cir. 2005) (holding that ineffective city enforcement of zoning laws at an illegal dumpsite in a black neighborhood did not violate the FHA). The *Modesto* court declined to follow *Cox* with regard to the viability of post-acquisition claims relating to habitability, but it remains unknown how far into environmental habitability issues the *Modesto* rule will extend. *See* 583 F.3d at 713.

24. *See Modesto*, 583 F.3d at 706–07 (discussing the lack of sewer access and racial make-up in different unincorporated communities around Modesto, concluding that there was not sufficient evidence to show race discrimination despite the significant minority population of the neighborhoods lacking those services).

seems a promising possibility for environmental justice claims.²⁵ As with the federal FHA, discrimination claims under FEHA are provable under a disparate impact standard (although, also like the FHA, socioeconomic class is omitted as a protected characteristic).²⁶ FEHA goes beyond the FHA in specifically barring discrimination “through public or private land use practices . . . because of race, color” and other protected characteristics.²⁷ The provision explains, “[d]iscrimination includes, but is not limited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law . . . that make housing opportunities unavailable.”²⁸

Relying on those last four words, a California appellate court recently rejected the use of FEHA to challenge land use authorizations that impose disparate environmental impacts on protected classes in *El Pueblo Para el Aire y Agua Limpio v. Kings County Board of Supervisors*.²⁹ The plaintiffs in *El Pueblo* challenged a conditional use permit allowing a significant expansion of a hazardous waste facility located near Kettleman City and Avenal, two low-income, predominantly Latino communities in the Central Valley.³⁰ Plaintiffs raised concerns regarding the expansion’s cumulative impact in light of a number of preexisting local environmental threats and a recent rash of unexplained birth defects in Kettleman City.³¹ The court rejected the FEHA claim, interpreting the text of the statute to cover only land use actions or practices that “make housing unavailable.”³² In doing so, the court rejected the possibility of *any* habitability claim, writing, “[a]n action taken by an agency that is alleged to have adversely impacted intangible habitability interests and property values does not make dwellings ‘unavailable’ within the meaning of [FEHA].”³³

25. See CAL. GOV’T CODE § 12955 (West 2013).

26. *Id.* § 12955.8(b) (“Proof of a violation causing a discriminatory effect is shown if an act or failure to act that is otherwise covered by this part, and that has the effect, regardless of intent, of unlawfully discriminating on the basis of race, [and other protected characteristics].”); *Sisemore v. Master Fin., Inc.*, 60 Cal. Rptr. 3d 719, 745–46 (Ct. App. 2007) (applying section 12955.8 to FEHA housing discrimination claims). The omission of socioeconomic class is apparent from the plain text of the statute. § 12955.

27. *Id.* § 12955(l).

28. *Id.*

29. No. F062297, 2012 WL 2559652 (Ct. App. July 3, 2012) (unpublished), *review denied* (Sept. 12, 2012). That the case is unpublished is good news for advocates who believe there is still room to be made in FEHA for environmental justice claims. The appellate decision remains a striking example, however, of the potential limiting language in FEHA, illustrating the challenges environmental justice advocates have already encountered in using FEHA to challenge land use practices that have a disparate impact on communities of color. *El Pueblo* also provides a useful fact pattern for this paper because plaintiffs also brought a section 65008 claim, though they declined to appeal the issue after losing the claim in trial court based on an exhaustion of remedies problem.

30. *Id.* at *1–2.

31. *Id.* at *7, *9.

32. *Id.* at *27–28.

33. *Id.* at *27.

A broader conceptualization of local government discrimination affecting the housing interests of communities of color is therefore needed. This Comment identifies California Government Code section 65008 as a model for a state civil rights statute that takes both a more comprehensive view of discrimination and a broader view of how environmental burdens can interfere with the housing interests of protected communities. Part II discusses the robust discrimination theories available under section 65008, focusing on the unusual inclusion of socioeconomic class as a protected characteristic and the applicability of the disparate impact standard. Part III describes the causes of action that may arise under section 65008 and argues that the broad scope of local government actions subject to the provision together with the framing of the interests protected by it provide an excellent opportunity for environmental justice advocates to challenge a host of zoning, siting, law enforcement, and even financing issues that affect low-income communities of color. Part III also argues that under the plain language of the statute, the protections of section 65008 apply to existing communities.

I. ROBUST THEORIES OF DISCRIMINATION UNDER SECTION 65008:
INCOME DISCRIMINATION AND THE DISPARATE IMPACT
STANDARD

One of the most significant contributions that section 65008 can make to civil rights and environmental justice litigation is the opening it provides for an unusually comprehensive theory of discrimination. By prohibiting discrimination on the basis not only of race but also of class, section 65008 is a practical tool for addressing the intertwined nature of race and income inequality, and for challenging local government actions that harm low-income communities, regardless of whether race-specific harms can be proven. Additionally, the application of the disparate impact standard of proof to both race and income discrimination allows advocates to challenge policies that harm communities without disentangling the complicated motivations of public bodies.

A. *The Need for Litigation Tools That Address Structural Racial Inequality*

Far from minimizing the significance of race in the unequal distribution of environmental harms or public goods, the income discrimination claim available under section 65008 can be a crucial tool for advancing racial justice. Together with the disparate impact standard, protection against income-based discrimination offers a needed means of addressing the embedded and structural nature of modern racial inequality. Grappling with the structural nature of racial disadvantage is particularly important in spatial contexts like housing and environmental justice, because discriminatory patterns of investment, land use planning, and political boundary-drawing have a long arc. Disparities in neighborhood conditions resulting from historical racial

discrimination are perpetuated by their own significant consequences on household wealth; neighborhood, social, and environmental risks; and by the reality of continuing discrimination.³⁴ In this shameful cycle, socioeconomic inequality is not only the consequence of structural racism; it is also one of the linchpins of ongoing inequality and an independent—and typically legal—basis for discrimination. A civil rights statute that recognizes income discrimination in addition to race discrimination, and which allows both to be proven by a policy's impact on communities rather than the opaque intentions of policymakers, therefore provides a significant opportunity to begin to dismantle the racial inequality that has been wrought into the landscape of American neighborhoods.

As racial and environmental justice advocates have long emphasized, racial disadvantage is the product not only of individual acts of racial animus, but also of implicit bias and pervasive structural forces that act to favor those who already hold racial and socioeconomic privilege.³⁵ Briefly sketched, the structural forces perpetuating racial disadvantage can be traced to the economic injury and residential segregation that racial discrimination has inflicted on communities of color. The history of racist government housing policy, ranging from *de jure* segregation and discriminatory local government policies on up to federal promotion of racially restrictive covenants and discriminatory lending practices, is well documented.³⁶ Rampant private discrimination in credit and housing markets further entrenched segregation.³⁷ In addition to the lasting dignitary harms of exclusion and prejudice, these policies inflicted dramatic *economic* injuries on communities of color: exclusion from economic and educational opportunities, the concentration of poverty, and the undermining of minority wealth accumulation through increased costs of property ownership and reduced appreciation in minority neighborhoods.³⁸ The economic harm of segregation, combined with employment discrimination and other factors, locked in a profound racial wealth gap.³⁹

34. See generally Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994) (offering a lucid and seminal description of these dynamics).

35. See, e.g., Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 791–93 (1998); Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct, and Affirmative Action*, 82 B.U. L. REV. 1089 (2002).

36. For a summary, see Ford, *supra* note 34, at 1847–49.

37. While private racism in the financial industry was and remains significant in its own right, see Gary Dymski, *What Has Never Happened Before and Is Happening Again: Development and Discrimination in the San Joaquin Valley*, 13 ASIAN AM. L.J. 169 (2006), discrimination in private credit markets was also the product of lenders conforming to federal standards during the era of explicit race discrimination in federal policy. Ford, *supra* note 34, at 1848.

38. For a description of these dynamics, see Ford, *supra* note 34, at 1847–49.

39. The persistence and exacerbation of this wealth gap is demonstrated in a recent widely reported study. THOMAS SHAPIRO ET AL., INST. ON ASSETS & SOC. POLICY, THE ROOTS OF THE

These economic injuries have been reinforced—and indeed re-inflicted—by racial and economic dynamics in the decades since explicit race discrimination was excised from government policy. As a result, American communities continue to be marked by racial segregation and neighborhoods of concentrated racialized poverty.⁴⁰ Racial discrimination, of course, has played a significant continuing role in modern segregation. A national housing study by the U.S. Department of Housing and Urban Development in 2000 documented racial discrimination in real estate and rental offices, finding that people of color were denied information about units, steered toward neighborhoods of color, and offered inferior financial terms in housing transactions.⁴¹ In recent years, discrimination in credit markets has been dramatically unmasked by the foreclosure crisis, which revealed widespread targeting of homeowners of color for subprime mortgages, often on “predatory” terms.⁴² Even among individuals who consciously reject racist beliefs, implicit bias and forms of aversive racism continue to shape perceptions of neighborhoods of color as more dangerous, disordered, and undesirable than objective evidence would support—undoubtedly influencing decisions about residence, investment, and even land use policy.⁴³

Despite the continued relevance of race, racial discrimination has become increasingly more difficult to prove in court. Reflecting a societal perception that racism is receding, the U.S. Supreme Court has adopted “restrictive legal standards to send the message that discrimination is now the exception rather than the rule.”⁴⁴ The most significant restrictive standard is the intent doctrine,

WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE (2013), available at <http://iasp.brandeis.edu/pdfs/Autor/shapiro-thomas-m/racialwealthgapbrief.pdf>.

40. Michelle Wilde Anderson & Victoria C. Plaut, *Implicit Bias and the Resilience of Spatial Colorlines*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 25, 27 (Justin Levinson & Robert Smith eds., 2012).

41. *See id.* at 29.

42. *Id.* at 29–30; *see also* Benjamin Howell, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CALIF. L. REV. 101, 103–04 (2006) (discussing discriminatory subprime lending that is “geographically concentrated in the same minority neighborhoods once denied access to banks and excluded from federal homeownership programs because of their racial composition”); Dymski, *supra* note 37 (documenting present-day racial disadvantage in the home purchase loan market in the San Joaquin Valley); Andrew Martin, *Judge Allows Redlining Suits to Proceed*, N.Y. TIMES, May 5, 2011, <http://www.nytimes.com/2011/05/06/business/06redlining.html> (reporting on the ongoing litigation against Wells Fargo’s alleged discriminatory targeting of African American homeowners for subprime loans in Memphis and Baltimore).

43. Anderson & Plaut, *supra* note 40, at 31–36 (defining implicit bias to include cognitive associations that may be projected onto housing and neighborhood quality, and reviewing studies showing that neighborhoods depicted as black triggered more negative evaluations of housing opportunities and higher willingness to site a chemical plant in the neighborhood); *see also* John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1077, 1091 (1998) (discussing modern “aversive” racism, which appears not as “overt hatred or hostility” but rather in more “mundane feelings of discomfort, uneasiness, disgust, or fear”).

44. Calmore, *supra* note 43, at 1074, 1085 (regarding the perception that “racism is receding from the national ethos,” and regarding the use of restrictive legal standards) (quoting Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 350 (1997)).

which civil rights advocates describe as “not only outdated, but almost entirely ineffective in addressing racial discrimination or inequality” in light of implicit bias and structural racism.⁴⁵ Even where a disparate impact standard is used, as for example in the FHA, courts may still accept sufficient race-neutral rationales for the uneven impact, or may even require some evidence of racially discriminatory intent as one of the factors in proving discriminatory effect.⁴⁶

Race discrimination claims may not be the only line of attack on the problem, however. Economics and income status have also played a significant role in perpetuating underinvestment in neighborhoods and communities of color. As Richard Thompson Ford argues in his seminal article, *The Boundaries of Race: Political Geography in Legal Analysis*, even if racism were somehow fully eliminated, inequalities that harm neighborhoods of color would continue, perpetuated by their own economic dimensions.⁴⁷ Through the mechanism of private and collective economic decisions deriving from the unequal status of different neighborhoods, the spatial patterns of underinvestment, unequal opportunity, and political disempowerment that are associated with segregation will continue to place disproportionate burdens on communities of color if left unchecked.⁴⁸

In a political context where the mainstream claims colorblindness, socioeconomic inequality has come both to serve as the scapegoat for ongoing racial harms, and to place those harms seemingly beyond the reach of governmental remediation—since the United States imagines itself as an economically open and devotedly capitalist society. Michelle Wilde Anderson has traced this phenomenon with particular attention to underserved low-income communities of color on the urban fringe,⁴⁹ which were recently termed “disadvantaged unincorporated communit[ies]” by California statute.⁵⁰ Many of these communities, afflicted to this day by a lack of basic municipal services like sewage and water, have their roots in histories of racial exclusion and segregation. As Anderson writes,

Courts at all levels have demonstrated this skepticism toward race discrimination claims. *See, e.g.,* *Darensburg v. Metro. Transp. Comm’n*, 636 F.3d 511, 523–24 (9th Cir. 2011) (Noonan, J., concurring) (arguing that twentieth century racial categories are “hopelessly outdated” and asserting that “[t]he notion of a Bay Area board bent on racist goals is a specter that only desperate litigation could entertain”).

45. Paterson et al., *supra* note 4, at 1181.

46. *See* Anderson & Plaut, *supra* note 40, at 41 & n.67 (discussing the high bar set for proving discriminatory impact) (citing *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) and *R.J. Invs., L.L.C. v. Bd. of Cnty. Comm’rs for Queen Anne’s Cnty.*, 414 Fed. App’x. 551, 554 (4th Cir. 2011)).

47. Ford, *supra* note 34, at 1849–52.

48. *Id.*

49. *See generally* Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095 (2008); Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931 (2010).

50. CAL. GOV’T CODE § 65302.10 (West 2013) (originally added by Senate Bill 244 in 2011).

[T]he grounds for excluding unincorporated urban areas [traveled] an axis from race to class to transform spatial exile under segregation into a rational, seemingly unavoidable economic reality. As memories of these communities' origins atrophy, and as the costs of redress rise with worsening decay, what was once an expressly racial system has become a matter of plainspoken, race-neutral financing constraints.⁵¹

American law has reflected this attitude of inevitability around income and economic status, largely placing wealth discrimination beyond the reach of the Fourteenth Amendment,⁵² and omitting socioeconomic class as a protected characteristic in statutory law.⁵³

Socioeconomic status, however, is hardly a neutral fact pertinent only to the amoral workings of the market or the unfortunate constraints faced by local government. Instead, it has historically served as an independent basis for societal discrimination and exclusion. A few examples from California serve to illustrate the long and continuing history of income discrimination: In the 1930s, state politics convulsed with prejudice against refugees fleeing the Dust Bowl and the Great Depression, prompting exclusionary efforts ranging from campaigns to prevent the payment of relief aid to migrants to a bizarre "bum blockade" by Los Angeles police set up at entry points on the state's border (disturbingly foreshadowing vigilante violence and militarization along the U.S.-Mexico border).⁵⁴ Less than a generation later, California voters passed a state constitutional amendment requiring federally subsidized housing projects

51. Anderson, *Mapped Out of Local Democracy*, *supra* note 49, at 933–34.

52. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (declining to find a violation of the Fourteenth Amendment based on alleged inequality in education across communities of different incomes); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 468 (1988) ("This Court has determined that classifications based on wealth are not automatically suspect.")

53. See, e.g., Fair Housing Act, 42 U.S.C. § 3604 (2006); California Fair Employment and Housing Act, CAL. GOV'T CODE § 12955 (West 2013).

54. WALTER STEIN, CALIFORNIA AND THE DUST BOWL MIGRATION 73–74, 98–99 (1973). Responses to the "Okie" influx, as described by Stein, illustrate the complex relationship between income and race discrimination. Stein argues that the Okies provoked such political reaction in part because as white families they made the injustice suffered by agricultural labor socially visible for the first time. See *id.* at 32, 44. As Stein writes,

The Okies posed a problem that the social system had to resolve: they were white, old-stock Americans, but they were also field labor. California's towns faced the choice of responding to the Okies in racial or economic terms. The future unfolding of the migrant problem hinged upon whether the Okie's whiteness or his role as field worker took priority in the perception of the Californians.

Id. at 59. Their role as field workers won out to a significant extent, resulting in the racialization of white migrants, as reflected in the words of a contemporary sociologist: "The new migration elicits reactions of a somewhat ethnocentric nature, which attribute distinct physical and moral characteristics to the new native whites. These formerly were made to apply only to races. 'Okies,' 'Arkies' and 'Texies' have taken the place of 'Chinks,' and 'Dagos' in rural terminology." *Id.* at 60. Whiteness, unsurprisingly, retained enduring capital when the furor over Okies' presence began to subside and communities became accustomed to the government-sponsored labor camps: "Since the Okies were white beneath the grime, the camps made it possible for them literally to scrub off the badge of their inferiority." *Id.* at 184.

to be approved by a majority of local voters.⁵⁵ These attitudes have not significantly abated. In the spring of 2012, when George Lucas announced plans to sell a parcel of land in professedly liberal Marin County to a developer who would bring in low-income housing, he touched off a firestorm that led some of his well-heeled neighbors to go on record denouncing the plans as “inciting class warfare”—as if enabling low-income households to move into the community was an act of aggression.⁵⁶

Race, of course, lurks in the background of income discrimination. Efforts to block affordable housing in particular are widely interpreted as driven in part by racial prejudice against the likely inhabitants. The use of income as a proxy for race is simply another way in which race and class are tightly intertwined. Litigating a claim of income discrimination need not discard the reality of racism and racial disadvantage; rather, recognizing income discrimination can help to capture the full dimension of disadvantage faced by low-income communities of color. While attacking income discrimination will never capture the breadth of sociological forces that make up the structure of racial disadvantage in our society, it nonetheless captures a significant mechanism by which racial injustice is inflicted and perpetuated, and coincides with one of the most significant dimensions of the injury resulting from structural racial disadvantage. Section 65008, by offering an income discrimination claim in addition to race, thus provides advocates the opportunity to capture forms of racial injustice that would be more difficult to prove under traditional race discrimination theories.

B. *Protection Against Income Discrimination in Section 65008*

The 1971 passage of Assembly Bill (AB) 2946, adding section 65008 to the California Government Code, came as part of a national wave of state-level efforts to limit local governments’ parochial use of their planning and zoning powers to discriminate against low-income and minority populations. The legislation was enacted four years before the famous 1975 *Mt. Laurel* decision, in which the New Jersey Supreme Court held that zoning regulations must serve the public welfare of the state rather than the private interests of those within city borders, thus invalidating exclusionary zoning practices designed to keep out low-income households.⁵⁷ On the heels of that groundbreaking decision, the California Supreme Court in 1976 adopted a version of the *Mt. Laurel* standard for the validity of local ordinances in *Associated Home*

55. CAL. CONST. art. XXXIV, upheld under the Federal Constitution in *James v. Valtierra*, 402 U.S. 137 (1971). The Supreme Court turned aside the Equal Protection challenge in part because the provision did not facially target racial groups. 402 U.S. at 141.

56. Norimitsu Onishi, *Lucas and Rich Neighbors Agree to Disagree: Part II*, N.Y. TIMES, May 21, 2012, at A13.

57. *S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp.*, 336 A.2d 713 (N.J. 1975).

Builders of the Greater East Bay v. City of Livermore.⁵⁸ The California legislature also joined other states in adopting the “fair share” doctrine coming out of the *Mt. Laurel* case, requiring localities to include provision of low-income housing sufficient to meet their Regional Housing Needs Allocation in the Housing Elements of each General Plan.⁵⁹ While the U.S. Supreme Court disavowed its ability to touch the discriminatory impact of disparities created by local government boundaries,⁶⁰ including income-based disparities,⁶¹ the California Supreme Court in *Serrano v. Priest* allowed a state constitutional income discrimination claim to break through school district boundaries in order to challenge the discriminatory effect on low-income districts from funding disparities in the state’s education system.⁶²

Each of these state efforts to limit parochial discrimination and inequality at the level of local government focused on socioeconomic class as a significant piece of the discriminatory edifice. Government Code section 65008 was no exception. The 1971 bill, as initially introduced, protected individuals and groups of individuals against actions by local governments that might deny them enjoyment of property interests “because of economic, religious or ethnic reasons.”⁶³ Although the word “economic” had been stripped from the bill by the time it reached the Senate, the staff analysis of the Senate Local Government Committee reflected a continuing motivation to address discrimination encompassing both race and class. The document noted that “reference [had] been made” to a Utah Law Review article by Donald Hagman asserting that “. . . planning and controls and related public powers have often been used to exclude, separate, and remove minorities *and the poor* from places

58. 557 P.2d 473, 487 (Cal. 1976). The California Supreme Court rejected the city’s welfare as the measure for the validity of an ordinance, holding instead that “the proper constitutional test is one which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects.” *Id.* The court was careful to distinguish the growth control measure that it refused to strike down from an exclusionary land use ordinance disproportionately impacting “racial minorities *and the poor*,” (emphasis added) which “on that account should be subject to strict judicial scrutiny.” *Id.* at 601.

59. See CAL. GOV’T CODE §§ 65583, 65584, 65913.1 (West 2013). The first version of the fair share legislative scheme in California was adopted in Stats. 1980, ch. 1143.

60. *Milliken v. Bradley*, 418 U.S. 717 (1974).

61. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973). Justifying its refusal to find a violation of the Equal Protection Clause based on educational disparities across districts of different income levels, the Supreme Court asserted deference to state legislatures on “conferring on political subdivisions the power to tax local property to supply revenues for local interests” and cited a variety of local autonomy themes, such as local control and the legitimacy of the local provision of services, as a rational basis sufficient to sustain the funding scheme. *Id.* at 40, 49–50, 54–55.

62. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), *aff’d*, 557 P.2d 929 (Cal. 1976) (reaffirmed in 1976, despite *Rodriguez*).

63. Assemb. B. 2946, 1971 Leg., Reg. Sess. (Cal. 1971). All cited legislative documents were retrieved from the California State Archives and are on file with the author.

occupied by middle and upper class whites.”⁶⁴ The 1971 bill passed without explicit income-based protections.

Language expressly protecting against discrimination based on socioeconomic class was added in 1980 with the passage of AB 2804.⁶⁵ That bill specified that cities and counties are prohibited from discriminating against a residential development “because such development is intended for occupancy by persons and families of low and moderate income” or of “middle income.”⁶⁶ The legislative history of AB 2804 reveals an added punch to the prohibition based on income discrimination: it cannot be excused with reference to a local government’s fiscal needs. Staff analysis for the Assembly Ways and Means Committee contextualized the added protections against discrimination based on socioeconomic class with reference to fiscalization of residential zoning by local governments:

Since the adoption of Proposition 13,⁶⁷ and with Proposition 9 pending,⁶⁸ some local governments have been reluctant to provide for low, moderate, or middle income housing. According to Housing and Community Development Analysis, some cities and counties have preferred to zone only for upper income housing to maximize their property tax revenues lost from Proposition 13.⁶⁹

The Department of Housing and Community Development echoed this concern in recommending the bill for the Governor’s signature.⁷⁰ In other words, the bill was demonstrably intended to counteract fiscally driven discrimination by handing advocates a significant weapon with which to counter local government rationalizations of policies that have a discriminatory impact.

64. STAFF OF S. LOCAL GOV’T COMM., ANALYSIS ON ASSEMB. B. 2946, 1971 Leg., Reg. Sess. (Cal. 1971) (quoting Donald Hagman, *Urban Planning and Development—Race and Poverty—Past, Present and Future*, 1971 UTAH L. REV. 46, 46 (1971)) (emphasis added).

65. 1980 Cal. Stat. 989, 989–90.

66. “Very low income” was added as a protected category in 2006. 2006 Cal. Stat. 4823; see CAL. GOV’T CODE § 65008(a)(3) (West 2013) (showing current formulation). Elsewhere the section cross-references those income categories to California Health and Safety Code section 50093, incorporating the following standards: “very low income” means financially eligible for Section 8 (see § 50105); “low income” means eligible for certain state financial assistance provided to occupants of state financed housing (see § 50093), and “moderate income” sets a ceiling at 120 percent of area media income (§ 50093). CAL. HEALTH & SAFETY CODE § 50093 (West 2013). “Middle income” is defined in section 65008(c) to mean “persons and families whose income does not exceed 150 percent of the median income for the county in which the persons or families reside.” CAL. GOV’T CODE § 65008(c). The formulation of the class as based on “intended occupancy” is discussed in more detail below.

67. Proposition 13, adopted in 1978, severely restricted property tax receipts by amending the California Constitution to taxation rates of 1 percent of the value of the property at the time of purchase or completion of construction with a very limited allowance for inflation. See CAL. CONST. art. XIII A (footnote not in original).

68. Proposition 9 (on the ballot in 1980), which would have reduced the state income tax, was defeated (footnote not in original).

69. STAFF OF ASSEMB., WAYS & MEANS COMM., ANALYSIS ON AB 2804, at 2 (Cal. undated).

70. DEP’T OF HOUS. & CMTY. DEV., ENROLLED BILL REPORT FOR AB 2804, at 2 (Cal. 1980).

C. The Disparate Impact Standard

Both legislative history and the few published cases applying section 65008 support the use of a disparate impact standard in proving discrimination. As discussed above, in a world where a discriminatory intent standard is both more and more difficult to meet and unable to capture implicit and structural forms of racial and class bias, the availability of a disparate impact standard is crucial to meaningful anti-discrimination claims.⁷¹

Beginning in 1971 with the original passage of AB 2946, the legislative history of section 65008 explicitly embraces a disparate impact standard. Staff analysis for the Assembly Urban Development and Housing Committee describes AB 2946 as specifying that zoning and planning practices with an exclusionary effect “be they intentional or unintentional, are null and void.”⁷² This language would mandate a robust version of disparate impact analysis—the question is not whether the impact is so great, and so without alternative justification, as to betray prejudice.⁷³ Rather, the simple discriminatory effect, even if unintentional, is sufficient to invalidate the act.

The text of the statute is not so explicit. Subsection (a) provides “[a]ny action pursuant to this title . . . is null and void if it denies to any individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use in this state *because of* any of the following reasons” — going on to list protected characteristics.⁷⁴ The term “because of” does not explicitly require proof of intent; in fact, the same formulation has been construed to accommodate a disparate impact standard under the FHA.⁷⁵ Similarly, subsection (b)(1) of section 65008 provides that no local government “shall, in the enactment or administration of ordinances pursuant to any law, including this title, prohibit or discriminate against any residential development

71. See Paterson et al., *supra* note 4, at 1196.

72. STAFF OF ASSEMB. COMM. ON URBAN DEV. & HOUS., ANALYSIS ON AB 2946 (Cal. 1971).

73. *Cf. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (considering as factors in the disparate impact test the following: evidence of discriminatory intent; “defendant’s interest in taking the action complained of”; and whether the plaintiff is seeking to affirmatively compel the provision of housing or merely to prevent a restraint on market provision of housing); 42 U.S.C. § 2000e-2(k)(1)(A)–(B) (2006) (articulating Title VII’s burden-shifting test for disparate impact, which allows an employer to rebut a preliminary showing of disparate impact by articulating a legitimate business necessity, which can only be refuted by a showing of a less discriminatory alternative).

74. CAL. GOV’T CODE § 65008(a) (West 2013) (emphasis added).

75. *Keith v. Volpe*, 618 F. Supp. 1132, 1147–48, 1158 (C.D. Cal. 1985), *aff’d*, 858 F.2d 467, 485 (9th Cir. 1988) (discussing FHA language and citing cases across circuits applying a disparate impact standard and concluding that the similar language in section 65008 should be interpreted consistently with the FHA); 858 F.2d at 485 (“The California provision appears to serve the same purpose and contains similar language to the federal Fair Housing Act. Both 42 U.S.C. § 3604 and [section] 65008(a) use the phrase ‘because of race’ in describing the prohibited type of housing discrimination. Therefore, it is reasonable to conclude that the proof necessary to establish race discrimination under both statutes is the same.”).

or emergency shelter for any of the following reasons” (listing protected characteristics).⁷⁶

Without textual guidance as to the standard of proof for discrimination, courts applying section 65008 have applied an apparent discriminatory impact standard, though without stopping to declare it by name. In *Building Industry Ass’n v. City of Oceanside*, the California Court of Appeal reversed a trial court’s finding that a growth-control initiative did not violate the income discrimination prohibition in section 65008, observing that the trial court “disregarded its own factual findings that affordable housing had taken a dramatic decline since the effective date of [the challenged initiative].”⁷⁷ Discriminatory intent was neither proven nor required in that case—rather, it was enough that the initiative, despite provisions exempting certain affordable housing units from the annual growth cap, had resulted in a “drastic reduction in the supply of more affordable housing.”⁷⁸ Despite relying on a shallower analysis, and requiring less proof, the court in *Shea Homes Ltd. Partnership v. County of Alameda* also appeared to apply a disparate impact standard in holding that an anti-sprawl initiative was valid under section 65008 because none of the measure’s provisions “discriminate or may be implied to have a discriminatory effect.”⁷⁹

The case that has provided the most thorough analysis of the standard of proof for discrimination under section 65008 to date is *Keith v. Volpe*, a case decided under federal pendent jurisdiction.⁸⁰ Noting that the California Supreme Court had not yet decided a case involving section 65008 (and nearly thirty years later, it still hasn’t), the district court in *Keith* turned to equal protection cases under the California Constitution to derive a discriminatory effect standard—rather than discriminatory intent—for both race and income discrimination under section 65008.⁸¹ Buttressing its adoption of the California constitutional standard for showing discrimination, the district court reasoned that the legislature “undoubtedly intended to provide greater protection against discrimination in housing than the constitutional guarantees,” and so would not have required more stringent proof for statutory protections against discrimination.⁸² Additionally, with regard to race, the district court noted that section 65008’s language “because of race” matched the language in the FHA, which only required proof of discriminatory effect.⁸³ With regard to income,

76. Gov’t § 65008(b)(1) (emphasis added).

77. 33 Cal. Rptr. 2d 137, 154 (Ct. App. 1994).

78. *Id.* at 143.

79. 2 Cal. Rptr. 3d 739 (Ct. App. 2003).

80. *See* 618 F. Supp. at 1132.

81. *Id.* at 1157–58 (citing, *inter alia*, *Crawford v. Bd. of Educ.*, 551 P.2d 28 (Cal. 1976); *S.F. Unified Sch. Dist. v. Johnson*, 479 P.2d 669 (Cal. 1971)).

82. 618 F. Supp. at 1158.

83. *Id.* On appeal, the Ninth Circuit affirmed this reasoning, noting that “[t]he California provision appears to serve the same purpose and contains similar language to the federal Fair Housing Act.” *Keith v. Volpe*, 858 F.2d 467, 485 (9th Cir. 1988).

the district court referred to the California Supreme Court's holding in *Serrano v. Priest* that "de facto discrimination on the basis of wealth is sufficient to prove a constitutional violation,"⁸⁴ and adopted a standard of proof of discriminatory effect for violations of the prohibition on income discrimination in section 65008.⁸⁵ The Ninth Circuit affirmed the district court's holding and reasoning as to both the race and income claims.⁸⁶

The *Keith* court's thoughtful reasoning together with the *Oceanside* and *Shea Homes* cases evaluating proof of discrimination with regard to the effect of the challenged policies provide a strong basis for the application of a disparate impact standard. The legislative history supports this conclusion—and in fact calls for application of a disparate impact standard not as a permitted means of ascertaining intent, but as the imposition of liability on the basis of effect alone.

II. ENVIRONMENTAL JUSTICE CLAIMS UNDER SECTION 65008

The field of local government action covered by section 65008—that is, actions pursuant to planning and land use powers, and the enactment and administration of ordinances—encompasses powers critical to the allocation of environmental benefits and burdens across communities. However, because there are so few published cases examining the scope of section 65008, and because most cases raising income discrimination claims under the section relate to barriers to the construction of new affordable housing, the potential of section 65008 to reach discriminatory actions relating to environmental benefits and burdens has not yet been explored by any judicial decision or academic article.⁸⁷

Discrimination against low-income communities and communities of color is hardly confined to the exclusion of affordable housing. National evidence shows that locally undesirable land uses are over-concentrated in communities of color, betraying a pattern of siting and land use decisions with

84. 618 F. Supp. at 1158–59 (citing *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), *accord* 557 P.2d 929 (Cal. 1976)).

85. *Id.* The Ninth Circuit also affirmed this holding on appeal: "[I]t seems reasonable to assume that, because discriminatory intent is unnecessary under the constitutional standard, California courts would hold that such a showing is also unnecessary to prove [a statutory income discrimination claim]." 858 F.2d at 485.

86. *Id.*

87. As summarized in the introduction, the principal section 65008 cases to date include *Building Industry Ass'n of San Diego v. City of Oceanside*, 33 Cal. Rptr. 2d 137 (Ct. App. 1994) (concerning a growth-control measure which reduced the construction of affordable housing); *Shea Homes Ltd. Partnership v. Alameda*, 2 Cal. Rptr. 3d 739 (Ct. App. 2003) (concerning an anti-sprawl measure in Alameda County which, among other things, canceled development plans for a significant piece of land north of Livermore); *Bruce v. City of Alameda*, 212 Cal. Rptr. 304 (Ct. App. 1985) (striking down a measure in the charter city of Alameda which would have required majority voter approval of any new subsidized housing); and *Keith*, 858 F.2d at 467 (finding that the City of Hawthorne's actions in conditioning and denying two proposed affordable housing projects had a discriminatory effect based on income).

racialized impacts.⁸⁸ Urban fringe communities with serious service deficits, including insufficient access to potable water and reliance on aging and inadequate sewer systems, are disproportionately low-income and of color.⁸⁹ There is also evidence of racial disparities in access to environmental goods like parks.⁹⁰ Transit equity advocates have struggled against planning that privileges rail service for whiter, wealthier commuters over bus service that services primarily low-income workers of color.⁹¹

One instructive example can be found in *El Pueblo*, the case in which a low-income, predominantly Latino farmworker community in the Central Valley brought suit to challenge the expansion of a nearby hazardous waste dump.⁹² In their pleadings, plaintiffs highlighted the devastating environmental burden imposed on the community. Plaintiffs contended that, in a context of preexisting exposure to pesticides, contaminated groundwater, and serious air quality concerns, the hazardous dump expansion would impose significant additional impacts, including increased ozone and particulate matter emissions, and an unavoidable risk of cancer at the property boundary of the dump.⁹³ Plaintiffs reported a cluster of babies born with birth defects, including cleft palate, which is linked in numerous studies to one of the materials accepted at the hazardous waste dump: polychlorinated biphenyls, or PCBs.⁹⁴ Plaintiffs also alleged that the Latino, Spanish-speaking residents were excluded from the decision-making process, pointing to unrepresentative appointments to the statutorily mandated Local Assessment Committee, the failure to translate materials into Spanish, and the failure to hold meetings in or near the communities.⁹⁵

88. Anderson & Plaut, *supra* note 40, at 28; *see also* Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 3 (1998) (reporting the results of a study showing disproportionate industrial and other non-residential land uses in census tracts where people of color live).

89. Anderson, *Cities Inside Out*, *supra* note 49, at 1106–12; *see also* VICTOR RUBIN ET AL., UNINCORPORATED COMMUNITIES IN THE SAN JOAQUIN VALLEY: NEW RESPONSES TO POVERTY, INEQUITY, AND A SYSTEM OF UNRESPONSIVE GOVERNANCE (2007), *available at* http://www.pprac.org/projects/fair_housing_commission/los_angeles/Colonias_CRLA_%20PolicyLink%20Framing%20Paper.pdf (describing conditions in low-income unincorporated communities in the San Joaquin Valley).

90. Anderson & Plaut, *supra* note 40, at 28.

91. Richard Marcantonio, *Just Transportation Planning: Lessons from California*, 186 PROGRESSIVE PLANNING 4, 4–7 (2011) (describing advocacy by the Bus Riders' Union in Los Angeles to oppose a plan to raise funds on predominantly low-income bus riders in order to finance a rail line that would benefit wealthier, whiter communities, and current patterns of transit disparities in the Bay Area).

92. *See El Pueblo Para el Aire y Agua Limpio v. Bd. of Supervisors*, No. F062297, 2012 WL 2559652 (Ct. App. July 3, 2012) (unpublished), *review denied* (Sept. 12, 2012) (discussed in the Introduction, *supra*, with reference to the FEHA holding).

93. Verified Second Amended Petition for Writ of Mandate & Complaint for Declaratory & Injunctive Relief at 5–7, *El Pueblo*, No. F062297, 2012 WL 2559652 (on file with the author).

94. *Id.* at 4, 9, 18.

95. *Id.* at 10, 16.

The *El Pueblo* plaintiffs raised a section 65008 claim in their second amended complaint. Contesting the applicability of the statute, Chemical Waste Management (the real party in interest) argued, “[p]etitioners admit the case history of Government Code section 65008 directly involves housing and cite to no contrary authority indicating that this section applies to the approval of a [conditional use permit] for a landfill.”⁹⁶ Plaintiffs, in fact, had cited to the plain language of the statute; they had also noted, correctly, that none of the cases brought under the statute restricted section 65008 to housing approvals and denials.⁹⁷ Ultimately, the trial court did not reach the merits of the section 65008 claim, dismissing it instead on procedural grounds.⁹⁸

This Part shows why the interpretation put forward by Chemical Waste Management is wrong. I analyze the terms used in the statute to explore its potential scope, concluding that section 65008 protects habitability interests in housing (rather than covering only housing approvals and denials), and applies to local government actions that can play a key role in allocating environmental burdens and benefits. I focus on two causes of action: subsection (a), which invalidates local government acts taken pursuant to the Planning and Land Use Title where those acts discriminate in the enjoyment of residence; and subsection (b)(1), which forbids discrimination toward a residential development in the enactment or administration of ordinances.⁹⁹ Both causes of action are broad enough to encompass local government actions with a discriminatory environmental impact on neighborhoods and communities. This Part concludes by grappling with a challenge posed by the wording of section 65008, arguing that under the plain language of the statute, its protections apply to existing communities, and proposing clarifications that the legislature could adopt to remove any doubt on that score.

A. Section 65008(a): “Enjoyment of Residence”

In sweeping language, subsection (a) declares “null and void” any action by a local government agency pursuant to the Planning and Land Use Title¹⁰⁰ that “denies to any individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use in this state” on a

96. Real Party in Interest’s Reply in Support of Demurrer & Motion to Strike of Verified Second Amended Petition for Writ of Mandate, Fifth Through Seventh Causes of Action at 9–10, *El Pueblo*, No. F062297, 2012 WL 2559652.

97. Petitioners’ Opposition to Demurrer & Motion to Strike of Real Party in Interest to Verified Second Amended Petition for Writ of Mandate Fifth Through Seventh Causes of Action at 13, *El Pueblo*, No. F062297, 2012 WL 2559652.

98. *See id.* at 19.

99. A third cause of action, contained in subsection (d), forbids local governments from “impos[ing] different requirements” on residential developments that receive a form of public financing or whose intended occupants fall into the protected classes listed in earlier provisions, as compared to the requirements imposed on residential developments generally. CAL. GOV’T CODE § 65008(d)(1), (2) (West 2013).

100. *Id.* § 65000.

discriminatory basis.¹⁰¹ Among prohibited bases of discrimination are race and color,¹⁰² as well as “[t]he intended occupancy of any residential development by persons or families of very low, low, moderate, or middle income.”¹⁰³

The use of the term “enjoyment of residence” provides a significant hook for environmental justice claims. First, an individual’s residence interests continue after the initial acquisition of housing, meaning that local government planning and land use actions that impact existing neighborhoods may form the basis for a claim under subsection (a).¹⁰⁴ Second, the content of residence interests has been well developed in the common law doctrines of constructive eviction, the implied warranty of habitability, and nuisance. The term “enjoyment of residence” naturally draws on those well-developed bodies of law, which articulate a plaintiff’s right to housing standards that do not threaten his or her health and safety—whether against a landlord or against a neighboring land use. Subsection (a) applies that right against a local government agency’s discriminatory exercise of the powers granted by the Planning and Land Use Title, barring actions that disproportionately harm the health and safety interests of low-income communities and communities of color.

1. *Constructive Eviction and Habitability*

In prohibiting actions that “deny” the “enjoyment of residence,” section 65008 mirrors the conceptual common law doctrine of constructive eviction, which is triggered when a landlord’s action or omission effectively denies the tenant “quiet enjoyment” of the leased premises. Because constructive eviction coincides with the breach of the implied warranty of habitability in residential leases, common law doctrine on habitability standards provide a well-developed measure for the scope of “enjoyment of residence” protected by

101. *Id.* § 65008(a). The prohibited bases are cross-referenced with the Fair Employment and Housing Act. *See* §§ 12955, 12926. Section 65008 references section 12955(a) and (d), which prohibit discrimination in housing by private actors on the basis of “sex, gender, gender identity, gender expression, sexual orientation, color, race, religion, ancestry, national origin, familial status, marital status, disability, genetic information, source of income,” or any other basis prohibited by the Unruh Civil Rights Act. *See id.* § 12955(d).

102. *Id.* § 12955(a), (d).

103. *Id.* § 65008(a)(3). Section 65008(a), as applied to income, reads, in pertinent part: “Any action pursuant to this title by any city, county, city and county, or other local government agency in this state is null and void if it denies to any individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use in this state because of any of the following reasons: . . . (3) The intended occupancy of any residential development by persons or families of very low, low, moderate, or middle income.” *Id.*

104. The same can be said for the remaining interests covered by section 65008(a): an individual’s landownership, tenancy, “or other land use” may all occur after housing or land is initially acquired. Framing the protected interests in this way strongly suggests that section 65008’s protections are continuous—that is, co-extensive in time with the interests themselves. I focus on “enjoyment of residence” because it provides the strongest basis for capturing the health and safety interests of low-income communities and communities of color.

subsection (a).¹⁰⁵ Drawing from these two well-developed bodies of law, subsection (a) can be understood to render null and void any local government action pursuant to its planning and land use powers that substantially interferes, on a discriminatory basis, with residential health and safety interests.

Constructive eviction, or the breach of the covenant of quiet enjoyment, is found where a landlord substantially interferes with a tenant's "right to use and enjoy the premises for the purposes contemplated by the tenancy."¹⁰⁶ Where the purpose of a lease is residential, the California Supreme Court has recognized that habitability is the core interest at stake.¹⁰⁷ The implied warranty of habitability imposes on a landlord the duty to maintain residential premises fit for living.¹⁰⁸ Thus, these two doctrines are closely interwoven, and in a residential context, actions under both arise from the same material harm: the failure of a landlord to maintain premises fit for human occupation.¹⁰⁹

A review of California law on habitability provides a more definite shape to the concept, revealing that it encompasses the residence interests of safety, sanitation, and basic services connected with housing.¹¹⁰ As shorthand, California habitability standards for the purposes of landlord-tenant law are linked to substantial compliance with "applicable building and housing code standards which *materially affect health and safety*."¹¹¹

Drawing on this well-established legal framework, the "enjoyment of residence" protected by subsection (a) should be understood to encompass health, safety, sanitation, and basic services connected with housing. These standards are as vital and relevant in the context of local government planning and land use as they are in the landlord-tenant context. Residential health and safety interests articulated in habitability law can be mapped onto the larger public health and environmental degradation concerns at the heart of many

105. See *Green v. Superior Court*, 517 P.2d 1168 (Cal. 1974) (adopting an implied warranty of habitability for residential leases in California).

106. *Andrews v. Mobile Aire Estates*, 22 Cal. Rptr. 3d 832, 838 (Ct. App. 2005).

107. *Green*, 517 P.2d at 1180–81 ("the habitability of the dwelling unit has become the very essence of the residential lease").

108. *Id.* at 1175.

109. See *Stoiber v. Honeychuck*, 162 Cal. Rptr. 194 (Ct. App. 1980) (Plaintiff could pursue both claims of constructive eviction and breach of implied warranty of habitability where defects included sewage leaking from bathroom plumbing, defective and dangerous electrical wiring, and structural defects in the walls, flooring, and ceiling, among others.).

110. See *Green*, 517 P.2d at 1172 ("When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.") (quoting *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970)) (internal quotation marks omitted).

111. *Id.* at 1183 (emphasis added). See also CAL. CIV. CODE § 1941.1 (West 2013) (discussing, *inter alia*, waterproofing, plumbing, water supply, heating, electrical service, and sanitary grounds for establishing untenable dwellings); CAL. HEALTH & SAFETY CODE § 17920.3 (West 2013) (a building is substandard if dwelling units suffer from specified conditions "to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants thereof"); *id.* § 17920.10 (concerning lead hazards).

planning, zoning, and siting policies that impact the residents of socioeconomically vulnerable communities.¹¹² This parallel extends into the unequal provision of municipal services: while leaking sewage may form the basis for claiming a breach of the implied warranty of habitability,¹¹³ the same factual sanitation threat is present where communities without sewer service face septic systems backing up into their homes or leaking onto the lawns on which their children play.¹¹⁴ Following this framework, local government planning and land use actions can be understood to “deny” the “enjoyment of residence” in a discriminatory manner when they disproportionately impose health and safety threats onto low-income neighborhoods and neighborhoods of color.

When the standard is framed in terms of threats to health and safety, it is clear that residents need not abandon their homes before a subsection (a) claim is ripe. One of the insights in the law of habitability is that the warranty of habitability must be inalienable—that is, incapable of being sold or waived—in order to meaningfully protect tenants against potential exploitation.¹¹⁵ Inalienability identifies and protects the core dignity interests inherent in housing within a context that Margaret Jane Radin describes as “contested incomplete commodification,” where the market forces in housing are constrained by regulations designed to control price in favor of low-income groups and require a level of quality consistent with the personhood of the occupants.¹¹⁶ California planning law, which seeks to constrain and marshal market forces to ensure the provision of affordable housing, represents such a context of contested incomplete commodification. In this context, and in light of the dignity interests fundamental to anti-discrimination law, equal access to healthy and safe neighborhoods, as protected by subsection (a), should not be considered waivable.

In other words, the cognizance of exploitation and preexisting vulnerability in habitability law militates *against* using the constructive eviction parallel to require plaintiffs to vacate their homes before bringing a claim for discriminatory denial of enjoyment of residence, as some federal

112. Concern about health and safety impacts of disproportionate environmental burdens is at the very heart of the environmental justice movement. For a review of the disproportionate exposure to environmental hazards faced by low-income communities and communities of color, see Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 630 & nn.30–31 (1992).

113. See, e.g., *Stoiber*, 162 Cal. Rptr. at 196–97 (describing sewage leaking from bathroom plumbing); HEALTH & SAFETY § 17920.3(a)(14) (defining inadequate sanitation to include lack of connection to a required sewage system).

114. See, e.g., Bernice Young, *Neglected for Decades, Unincorporated Communities Lack Basic Public Services*, CAL. WATCH (Apr. 6, 2012), <http://californiawatch.org/health-and-welfare/neglected-decades-unincorporated-communities-lack-basic-public-services-15635>; Richard Mills, *The Central Valley Islands*, 2 CAL. N. 20 (2011).

115. See, e.g., Shi-Ling Hsu, *A Two-Dimensional Framework for Analyzing Property Rights Regimes*, 36 U.C. DAVIS L. REV. 813, 871 (2003).

116. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1857 (1987).

courts have done under the FHA.¹¹⁷ Such a requirement would render subsection (a) protections for low-income communities illusory. As Luke Cole observed: “Poor people and people of color also have the fewest resources with which to deal with environmental harms. They have the least mobility, both in terms of employment and residence, and thus, even in the face of toxic exposure, they usually cannot find new jobs or homes.”¹¹⁸

2. “*Enjoyment of Residence*” and Nuisance Law

A second doctrine that offers insights into subsection (a)’s protection of the “enjoyment of residence” is the common law tort of nuisance. In particular, nuisance law offers guidance on how contextual factors that render a use locally harmful can and should be integrated into the analysis. Additionally, a review of the barriers to applying nuisance law to environmental justice cases highlights why a statute turning on local government discrimination, like section 65008, represents a significant and needed legal innovation.

The law of nuisance recognizes the same core set of residence interests as habitability cases: health, safety, and decent living conditions. California statute defines nuisances to include, in pertinent part, “anything which is injurious to health” or “indecent or offensive to the senses” “so as to interfere with the comfortable enjoyment of life or property.”¹¹⁹ Importantly, “nuisance law takes into account the location, character, and habits of the particular community when determining the significance of the harm.”¹²⁰ Importing this contextualized approach to subsection (a) claims would allow courts to consider two recurring themes in environmental justice: the ways in which the socioeconomic vulnerability of residents may magnify the threat posed by an environmental burden, and the common situation where preexisting environmental contamination in the community renders the challenged act a cumulative, and much more dangerous, harm.¹²¹ Applying this approach will also make subsection (a) more effective: bringing socioeconomic vulnerability and cumulative environmental impacts into the analysis will allow for a more realistic discussion of health and safety threats caused by local government actions.

117. Bloch v. Frischholz, 587 F.3d 771, 778 (7th Cir. 2009).

118. Cole, *supra* note 112, at 630.

119. CAL. CIV. CODE § 3479 (West 2013).

120. Serena M. Williams, *The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases*, 19 WM. & MARY ENVTL. L. & POL’Y REV. 223, 240 (1995).

121. For important work in this area, see the Environmental Justice Screening Method (EJSM) proposed in MANUEL PASTOR ET AL., AIR POLLUTION AND ENVIRONMENTAL JUSTICE: INTEGRATING INDICATORS OF CUMULATIVE IMPACT AND SOCIO-ECONOMIC VULNERABILITY INTO REGULATORY DECISION-MAKING (2010), available at <http://www.arb.ca.gov/research/apr/past/04-308.pdf>. The proposed EJSM incorporates measurements of “ambient criteria air pollution exposure, cancer and respiratory hazards associated with modeled air toxics estimates, social vulnerability, and a proximity score.” *Id.* at 14.

By offering a tool to hold local governments accountable, subsection (a) overcomes one of the most significant barriers that frustrates efforts to use nuisance claims as vehicles for addressing environmental injustice. Nationally, the viability of nuisance claims as a tool of environmental justice has been limited by the role of environmental statutes in sorting out permissible and impermissible environmental impacts, supplanting common law claims.¹²² In California, further statutory limitations have narrowed plaintiffs' ability to challenge noxious uses expressly authorized by law¹²³ or specifically provided for in local zoning ordinances.¹²⁴ Implicit in each of these protections is the assumption—unfortunately erroneous—that public processes allowing a given use, whether in the regulatory, statutory, or zoning context, will always sufficiently and neutrally guard the interests of the impacted public.

An anti-discrimination provision like section 65008 allows plaintiffs a means to strip judicially accorded deference from a government process that would otherwise legitimate noxious uses, such as the operation of a duly permitted hazardous waste facility. Nuisance law hinges on an assessment of reasonable externalities, or a balancing of the social utility of the challenged activity against the gravity of the harm imposed.¹²⁵ It may well be that the legislature, in expressly authorizing certain activities with localized environmental impacts, determined that the costs of those activities are reasonable ones to impose in the abstract.¹²⁶ In an environmental justice action under section 65008, however, the harm arising from the nature of the activity and its deleterious impacts on its neighbors is aggravated by the discriminatory

122. Sten-Erik Hoidal, *Returning to the Roots of Environmental Justice: Lessons from the Inequitable Distribution of Municipal Services*, 88 MINN. L. REV. 193, 203 (2003).

123. CIV. § 3482. However, the California Supreme Court has “consistently applied a narrow construction to Civil Code section 3482.” *Greater Westchester Homeowners Ass’n v. City of Los Angeles*, 603 P.2d 1329, 1336 (Cal. 1979). It applies only in cases where the nuisance is “exactly what was lawfully authorized” or “the inescapable result of the authorized act.” *Jacobs Farm/Del Cabo, Inc. v. W. Farm Serv., Inc.*, 119 Cal. Rptr. 3d 529, 550 (Ct. App. 2010). *Compare* *Farmers Ins. Exch. v. State*, 221 Cal. Rptr. 225 (Ct. App. 1985) (state not liable for nuisance based on harm to car paint resulting from aerial spraying during medfly infestation where the medfly infestation itself was statutorily declared a public nuisance and spraying was expressly an authorized abatement), *with Jacobs Farm*, 119 Cal. Rptr. 3d at 529 (allowing nuisance liability where pesticide drift contaminated neighboring organic crops; liability was not impeded by extensive pesticide regulation and defendant’s compliance with relevant permits).

124. CAL. CIV. PROC. CODE § 731a (West 2013) (prohibiting injunctive relief against a reasonable and necessary operation of a use consistent with zoning for certain commercial, manufacturing, or airport uses; providing that such a use shall not be deemed a nuisance absent evidence of “unnecessary and injurious” modes of operation; excepting uses such as refineries, canneries, and fertilizing plants which “produce offensive odors”). This section has also been held to shelter uses that, though inconsistent with zoning provisions, operate under a conditional use permit. *Wheeler v. Gregg*, 203 P.2d 37, 51 (Cal. Ct. App. 1949).

125. *See, e.g., Cnty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Ct. App. 2006).

126. *See* CIV. § 3482. Again, this provision is narrowly construed. A finding of statutory authorization “requires a particularized assessment of each authorizing statute in relation to the act which constitutes the nuisance.” *Varjabedian v. City of Madera*, 572 P.2d 43, 47 n.6 (Cal. 1977).

action of a local government that disproportionately imposes those impacts on groups identified by race or income level. The inherent unreasonableness of that discrimination logically should strip the nuisance of protections normally accorded to public decision making. Similarly, whereas by statute in California zoning decisions may serve to limit nuisance liability for certain industrial and commercial activities, section 65008 gives plaintiffs precisely the right to challenge zoning actions which, on a discriminatory basis, deny them enjoyment of residence.¹²⁷ In this light, subsection (a) can be read as a statutory complement to nuisance law: although the provisions discussed above make it difficult to bring a nuisance claim directly against a local government or a duly permitted entity, section 65008 extends the logic of nuisance to allow claims against local governments when they unreasonably expose low-income communities and communities of color to environmental harm.

B. What Local Government Actions Are Covered?

One barrier that environmental justice advocates have encountered in using subsection (a) is the argument, raised by real party in interest Chemical Waste Management in *El Pueblo*, that the provision bars discrimination by local governments only in acts or decisions “directly involving housing.”¹²⁸ This argument, already in sharp tension with the provision’s reach encompassing “any act” under the Planning and Land Use Title, also fails to adequately comprehend the interests expressly protected by the provision: an individual’s or group of individuals’ “enjoyment of residence.”¹²⁹

Drawing on the law of constructive eviction, the implied warranty of habitability, and nuisance adds significant depth to the meaning of the phrase “enjoyment of residence, landownership, tenancy, or any other land use.”¹³⁰ These areas of law highlight the bundle of interests inherent in residence: safe, sanitary conditions; access to basic services; fundamental dignitary protections; and empowerment vis-a-vis neighboring land uses to the extent that those uses unreasonably interfere with a community’s enjoyment of residence. Application of subsection (a)’s anti-discrimination protections to the full set of planning, zoning, and land use decisions that carry the potential to impact these interests necessarily requires a broader net than local government acts “directly involving housing.”¹³¹

127. See CIV. PROC. § 731a; CAL. GOV’T CODE § 65008(a) (West 2013).

128. For example, Chemical Waste Management raised this argument in litigation challenging the approval by Kings County of an expansion to the hazardous waste facility neighboring the low-income, predominantly Latino unincorporated community of Kettleman City. See Real Party in Interest’s Reply, *supra* note 96, at 9–10.

129. See GOV’T § 65008(a).

130. See *id.*

131. Cf. Real Party in Interest’s Reply, *supra* note 96, at 9–10.

For example, the issuance of conditional use permits, a critical step in the siting process for many polluting facilities, is an act pursuant to the Zoning and Land Use Title.¹³² Thus, a low-income community of color could use subsection (a) to block a conditional use permit that allows the expansion of a hazardous waste facility where the expansion would pose a threat to the safety and health of the community, if that impact could be shown to have a disproportionate effect by income, race, or both. Siting cases regarding major transportation infrastructure projects that displace or impose health and safety threats on low-income communities may find traction in section 65008 where those projects are included in Regional Transportation Plans created pursuant to Government Code section 65080. Another class of cases under subsection (a) might challenge so-called “expulsive zoning,” where industrial and commercial zoning in low-income neighborhoods of color is used to gradually force out these communities.¹³³ A modern day example of expulsive zoning may be found in the recent action by the City of Tulare to pre-zone a low-income incorporated community in its sphere of influence as “light industrial” (pursuant to its powers under Government Code section 65859).¹³⁴

Policies set out in a General Plan adopted pursuant to Government Code section 65350 could also have the effect of locking in health and safety threats from insufficient infrastructure that disproportionately impact the enjoyment of residence of low-income communities of color. The 1971 Tulare County General Plan—still the governing planning document for the county—established an explicit policy of “withholding majority public facilities such as sewer and water systems” from communities already lacking those services so that they would “enter a process of long term, natural decline.”¹³⁵ The lack of waste water infrastructure in low-income communities, declared the intentional policy of Tulare County, exposes residents to public health threats closely matching the traditional concerns of habitability and nuisance law, which consistently holds that exposure to raw sewage violates residence interests.¹³⁶

In a less extreme example, a county may adopt the policy that it will not assist any unincorporated community with the costs of providing water and wastewater services, requiring instead that neighborhoods form assessment

132. GOV'T § 65901(a).

133. Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 762–63 (1993).

134. See JONATHAN LONDON ET AL., UC DAVIS CTR. FOR REG'L CHANGE, LAND OF RISK, LAND OF OPPORTUNITY 17 (2011), available at <http://regionalchange.ucdavis.edu/ourwork/publications/cevasjv/full-report-land-of-risk-land-of-opportunity/view>.

135. Anderson, *Cities Inside Out*, supra note 49, at 1148 n.182 (quoting COUNTY OF TULARE GENERAL PLAN 2-1 (1971)).

136. See, e.g., *Mulloy v. Sharp Park Sanitary Dist.*, 330 P.2d 441 (Cal. Ct. App. 1958) (nuisance found where obstruction of sanitary district's manhole resulted in flooding of home with sewer water and debris); *Stoiber v. Honeychuck*, 162 Cal. Rptr. 194 (Ct. App. 1980) (sewage leaking from bathroom plumbing was among the facts constituting supporting claims of constructive eviction and implied warranty of habitability).

districts and raise the funds internally. This apparently neutral policy will disproportionately burden older unincorporated communities, which also tend to be lower-income. Built before sewer installation was required, and often depending on individual wells, these communities face much higher costs to gain access to sewer systems and potable water, and at the same time, have fewer resources with which to meet those costs.

Unfortunately, the issue of municipal services points to a weakness in section 65008(a). Few local governments will so explicitly adopt an affirmative policy of disinvestment as did the County of Tulare, and not many more will include in their general plans an official policy against providing financial support for sewer and water in unincorporated communities. However, the remedy built into subsection (a)—rendering the discriminatory act null and void—only protects against affirmative acts. One remedy for the oversight would be an amendment of subsection (a) to allow courts to provide, in cases where a discriminatory omission is found, appropriate equitable relief that would rectify the omission. The oversight also raises the importance of finding space in the section’s more general anti-discrimination provision, subsection (b), to challenge discriminatory neglect.

1. *Section 65008(b)(1): “Enactment or Administration of Ordinances”*

The second cause of action under section 65008 prohibits local government discrimination, including on the basis of race and income, against “any residential development or emergency shelter” in the “enactment or administration of ordinances pursuant to any law,” including, but not limited to, the Planning and Land Use Title.¹³⁷ This cause of action is even broader than the first—and substantially more straightforward. Although specific harms impeding the construction of a residential development or shelter are expressly mentioned in the subsections beneath section 65008(b), the reach of the provision goes much further: *any* discrimination in a local government’s enactment or administration of an ordinance that impacts a residential development is prohibited.¹³⁸ The specific protection of “residential developments” anchors the protection to the geographic space connected with

137. See GOV’T § 65008(b)(1). Subsection (b)(1) reads, in pertinent part, “No city county, city and county, or other local governmental agency shall, in the enactment or administration of ordinances pursuant to any law, including this title, prohibit or discriminate against any residential development or emergency shelter for any of the following reasons: . . . (C) Because the development or shelter is intended for occupancy by persons and families of very low, low, or moderate income, as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income.” *Id.*

138. Subsection (b)(2) prohibits the discriminatory “denial or conditioning” of a residential development based on its method of financing or intended occupancy by low-income residents. *Id.* § 65008(b)(2). Subsection (b)(3) prohibits a local government from “disapprov[ing] a housing project or condition[ing] approval of a housing development project in a manner that renders the project infeasible” on a discriminatory basis pursuant to section 65589.5(d). *Id.* § 65008(b)(3); see also *id.* § 65589.5(d) (requiring certain findings before a local agency can disapprove a housing development project for very low-, low-, or moderate-income households).

housing, and protects community members in their role as residents. As discussed in more depth below, “residential development” is defined in section 65008 to simply refer to single family or multifamily residences—it is not restricted to housing proposed for or going through the development process.

Local government actions that can be described as the enactment or administration of an ordinance cover an exceptionally broad field. The potential scope of local government ordinances is as broad as the police powers, so long as they do not conflict with general laws.¹³⁹ Zoning, of course, is entirely accomplished through ordinances.¹⁴⁰ Conditional use permits may not be granted unless the zoning ordinance establishes the necessary authority and criteria.¹⁴¹ An ordinance may be social regulation analogous to state criminal law,¹⁴² authorization of a redevelopment agency¹⁴³ (at least until recently),¹⁴⁴ or something as particular as a sewer use ordinance making a local government agency eligible to receive funding from the Clean Water State Revolving Fund.¹⁴⁵ City bond issues, such as those which might provide funding for water works, sewers, and street work¹⁴⁶ are submitted to the electorate by ordinance.¹⁴⁷ Over-policing of poor neighborhoods may be discrimination in the administration of city ordinances that create misdemeanors like loitering and disorderly conduct.

Nor must the discrimination have any particular *kind* of impact under subsection (b)(1), opening the door to a broader range of claims. Significantly, this would allow the *El Pueblo* plaintiffs to challenge the procedural bias that disproportionately excluded residents of the predominantly Latino, low-income communities, such as bias in appointments to the Local Advisory Committee, lack of translation of informational materials, or the decision to hold the meetings at a time and place inaccessible to working class residents of the community. Additionally, subsection (b)(1) would allow the plaintiffs to

139. CAL. CONST. art. XXXIV, § 7 (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”).

140. See CAL. PUB. RES. CODE § 30122 (West 2013) (defining zoning ordinance); GOV’T § 65850 (setting out the scope of zoning powers).

141. *Id.* § 65901(a) (“The board of zoning adjustment or zoning administrator shall hear and decide applications for conditional uses or other permits when the zoning ordinance provides therefor and establishes criteria for determining those matters.”).

142. See *id.* § 36900 (providing that violation of an ordinance is a misdemeanor or infraction that may be prosecuted by city authorities); *id.* § 25132 (similar provision for county ordinances).

143. CAL. HEALTH & SAFETY CODE §§ 33101–33103 (West 2013).

144. The passage of AB 1X 26 in 2011 effectively ended redevelopment in California. See *id.* §§ 34170–34191. The California Supreme Court invalidated a companion bill, AB 1X 27, which would have allowed redevelopment agencies to continue to operate contingent on payments to the state. *Cal. Redevelopment Ass’n v. Matosantos*, 267 P.3d 580, 603 (Cal. 2011).

145. See STATE WATER RES. CONTROL BD., POLICY FOR IMPLEMENTING THE CLEAN WATER STATE REVOLVING FUND FOR CONSTRUCTION OF WASTEWATER TREATMENT FACILITIES 12–14 (2009), available at http://www.waterboards.ca.gov/board/decisions/adopted_orders/resolutions/2009/031709_12_finalcwsrfpolicy_exhibit%20c_with%20cover.pdf.

146. See GOV’T § 43601.

147. *Id.* § 43608.

challenge the substantive impacts of the expansion by alleging discrimination, whether or not intentional, in the administration of the zoning ordinance that establishes the authority and criteria for issuing conditional use permits.¹⁴⁸

By its plain terms, subsection (b)(1) is thus extraordinarily broad. Advocates should carefully examine the local government actions that are having a discriminatory effect on their communities to see whether those actions may be linked back to an ordinance. If so, section subsection (b)(1) may provide them relief.

2. *Applicability of Section 65008 to Existing Communities*

Unfortunately, the way the statute is drafted may lead to some confusion about whether its anti-discrimination protections apply to existing residences, neighborhoods, and communities, or only to proposed or other potential housing at risk of being blocked by exclusionary practices. The use of terms like “residential development” or “intended occupants” might prompt defendants to argue that section 65008’s protections only apply during the development process—much like arguments made in some circuits that the FHA only protects buyers or renters at the moment of acquisition, or from actual or constructive eviction.¹⁴⁹

This reading, however, is unjustifiably narrow in light of the plain language of the statute. The provisions in subsection (a) prohibit discrimination in *any act* under the Planning and Land Use Title that “denies enjoyment of residence, tenancy, or other land use in this state” to any individual or group of individuals on a discriminatory basis. Nothing in that expansive language even suggests that the protection ends as soon as the individuals take up residence. Rather, as discussed above, in specifically protecting the “enjoyment of residence” the statute expressly contemplates a time frame extending beyond initial housing acquisition to the habitability interests inherent in continuing residence.¹⁵⁰ If the legislature had wished to protect only the ability to acquire housing, it could simply have used the term “acquisition of residence” instead of “enjoyment of residence.”¹⁵¹

Likewise, although subsection (b)(1) prohibits discrimination against “any residential development,” which could arguably be read to refer to proposed or potential new housing developments, that term is defined in the statute simply to mean “a single-family residence or a multifamily residence, including

148. *See id.* § 65901(a).

149. *See, e.g.,* Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n, 388 F.3d 327, 329 (7th Cir. 2004); Cox v. City of Dallas, 430 F.3d 734, 741 (5th Cir. 2005); Jersey Heights Neighborhood Ass’n v. Glendening, 174 F.3d 180, 192 (4th Cir. 1999); Tenafly Eruv Ass’n v. Borough of Tenafly, 309 F.3d 144, 156 (3d Cir. 2002); Clifton Terrace Assocs., Ltd. v. United Techs. Corp., 929 F.2d 714, 719 (D.C. Cir. 1991). *But see* Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713 (9th Cir. 2009) (holding that “FHA reaches post-acquisition discrimination”).

150. *See* Gov’t § 65008(a).

151. *Cf. id.*

manufactured homes.”¹⁵² Notably, that definition says nothing to signify that only residences not yet built are entitled to protection, and it does not use the language “housing development project,” which is used elsewhere in the statute to describe proposed new housing at risk of disapproval or adverse conditioning.¹⁵³ Additionally, section 65008 is not the only place that California law uses a term like “residential development” to encompass existing housing. Government Code section 65583 requires that the housing element’s assessment of housing needs including “an analysis of opportunities for energy conservation with respect to housing development,” including opportunities for weatherization and energy efficiency improvements in housing rehabilitation projects.

In subsection (a), and throughout the statute, income-based protections are phrased in terms of the “intended occupancy” of “residential development” by low-income persons and families.¹⁵⁴ The phrase “intended occupancy” in this formulation is neither elegant, nor, in context of the section overall, especially clear. Other protected characteristics under subsection (a), such as race, religion, and family status, are not couched in reference to “intended occupancy” or “residential development.” Without clearer demarcation between distinct causes of action, it would be strange for the legislature to provide protection against discrimination based on race, age, sexuality, marital and family status, or lawful occupation to current residents, but to provide protection against income discrimination only for prospective residents. No reason is apparent—much less provided—for singling out income discrimination for lesser protection, particularly where from the beginning the

152. While the bare definition of “residential development” as a single family residence or a multifamily residence—both phrased in the singular—invokes an individual-rights framework, this does not preclude the possibility of neighborhood- or community-based claims. The Federal Fair Housing Act is similarly phrased in terms of individual rights (e.g., “it shall be unlawful . . . to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling”), but courts have recognized community- and neighborhood-based claims regarding discrimination in the provision of municipal services. *See, e.g., Comm. Concerning Cmty. Improvement*, 583 F.3d 690 at 713.

153. *See* GOV’T § 65008(b)(3); *see also id.* § 65589.5(d). Granted, the drafting of the statute could have been cleaner: there is clear tension between “residential development,” which suggests a collection of units potentially throughout multiple buildings and parcels, the singular “residence,” and the plural “manufactured homes.” The definition of residential development was introduced in 1986 as part of AB 1995. That bill, authored by Assembly Member Maxine Waters, originally added “residence” to the list of structures protected for discrimination (i.e., discrimination against “any residence, residential development, or emergency shelter” would be prohibited by the law). *See* AMENDMENTS TO ASSEMBLY BILL NO. 1995, AS AMENDED IN SENATE JULY 15, 1985., S. 1985-51588, at 1 (Cal. 1985). An analysis for the Senate Housing and Urban Affairs Committee questioned the distinction between a residence and a residential development, and suggested using the terms “single-family residence” and “multifamily residence” instead. S. HOUS. & URBAN AFFAIRS COMM., ANALYSIS OF AB 1995 AS AMENDED 3/31/1986, at 1 (Cal. 1986). Thereafter, the definition of residential development as “single family residence or multifamily residence” was inserted into the bill and passed into law. 1986 Cal. Stat. 2153–54. The term “manufactured homes,” which is cross-referenced with Health and Safety Code section 18007, was added in 1994. 1994 Cal. Stat. 4504–05.

154. *See* GOV’T § 65008(a)(3), (b)(1)(C).

legislative history recognizes that racial and ethnic exclusion is often effected through income-based restrictions.¹⁵⁵ Moreover, the equivalency implied between “owners and intended occupants” in subsection (b)(1) would make a restrictive definition of “intended occupants” even more anomalous: the legislature could not have intended to so casually establish protections for owners from local government actions that affect existing communities while affording protection only to renters with regard to government actions that affect the construction of new housing developments.¹⁵⁶ Instead, the use of the term “intended occupants” appears to be a clumsy effort to bridge the distance between the protected structures (i.e., “residential development or emergency shelter”) against which a local government may not discriminate, and the protected classes (defined by race, income, etc.) whose identity is the prohibited basis of discrimination.¹⁵⁷

Arguing that section 65008 bars discrimination against current occupants is not meant to deny that government actions impeding the construction of affordable housing developments are also a major target of section 65008. The legislative history is replete with discussions of exclusionary zoning or other actions prohibiting the construction of affordable housing.¹⁵⁸ Subsection (h) declares that “discriminatory practices that inhibit the development of housing for persons and families of very low, low, moderate, and middle incomes, or emergency shelters for the homeless, are a matter of statewide concern.”¹⁵⁹

The statute also contains specific protections against discrimination in the context of planned, proposed, or other potential future housing—such as where affordable housing is frustrated by exclusionary zoning codes or blocked by denial of development permits. Subsection (b)(2) prohibits the discriminatory “denial or conditioning” of a residential development based on its method of financing or its intended occupancy by low-income residents.¹⁶⁰ Subsection (b)(3) prohibits a local government from, on a discriminatory basis, “disapprov[ing] a housing project or condition[ing] approval of a housing development project in a manner that renders the project infeasible.”¹⁶¹ Subsection (d) prohibits local governments from “imposing different requirements” on residential developments that are publicly financed or whose intended occupants belong to a protected class than those requirements

155. See STAFF OF S. LOCAL GOV'T COMM., *supra* note 64.

156. See GOV'T § 65008(b)(1).

157. See *id.*

158. For example, the staff analysis for the Assembly Urban Development and Housing Committee of the bill creating section 65008 explained, “A serious shortage of low and moderate income housing presently exists in California. In some cases, the construction of such housing is intentionally or unintentionally prohibited by cities and counties.” ASSEMB. URBAN DEV. & HOUS. COMM., STAFF ANALYSIS ON AB 2946, at 1 (Cal. 1971).

159. GOV'T § 65008(h) (added by Stats. 1980 ch. 477).

160. *Id.* § 65008(b)(2).

161. *Id.* § 65008(b)(3).

“imposed on developments generally.”¹⁶² If anything, however, these detailed, extensive provisions demonstrate that the legislature knows how to craft strong anti-discrimination provisions specifically protecting new affordable housing developments, and that it has in fact already done so.

While the few published cases regarding income discrimination claims under section 65008 all happen to concern local government actions impeding new low- or moderate-income housing,¹⁶³ none of these cases *restrict* the statute to local government decisions regarding new housing construction, nor would they have any reason to do so. The most natural reading of section 65008 casts its various protections as complementary: while some provisions specifically prohibit certain local government actions that inhibit the creation of affordable housing, other provisions bar discrimination in the broader set of local government actions that affect the housing-related and other land use interests of low-income communities, communities of color, and other protected groups.

Without a strong basis in text, legislative history, or case law for limiting section 65008 to the acquisition or development of housing, courts should not exclude existing communities from the statute’s protections. Discrimination, after all, has never been restricted to simply trying to keep people out. The long history of both racial and socioeconomic discrimination in California has led to the creation of race- and income-identified spaces—whether neighborhoods within cities or unincorporated communities on county land—that have historically suffered underinvestment and over-concentration of environmental harms.¹⁶⁴ These low-income communities of color continue to be the targets of discriminatory neglect, discriminatory zoning and siting, and unequal service provision and regulatory enforcement.¹⁶⁵ The degradation of these spaces,

162. *Id.* § 65008(d).

163. The court in *Bruce v. City of Alameda* invalidated an initiative by voters in a charter city to require voter approval of any subsidized rental housing units, finding that “locally unrestricted development of low cost housing is a matter of vital state concern.” 212 Cal. Rptr. 304, 306 (Ct. App. 1985). *Building Industry Ass’n of San Diego v. City of Oceanside* found that a growth-control initiative which resulted in a decline in the construction of affordable housing violated section 65008’s income discrimination provision. 33 Cal. Rptr. 2d 137, 154 (Ct. App. 1994). Likewise, the Ninth Circuit in *Keith v. Volpe* upheld a finding that a City’s denial and conditioning of proposed affordable housing projects slated to provide replenishment housing for low-income residents displaced by a highway violated the protections of section 65008. 858 F.2d 467, 485 (9th Cir. 1988).

164. See generally Anderson, *Cities Inside Out*, *supra* note 49; Sarah Ramirez & Don Villarejo, *Poverty, Housing, and the Rural Slum: Policies and the Production of Inequities, Past and Present*, 102 AM. J. PUB. HEALTH 1664 (2012).

165. Earlimart, California provides one example. Devra Weber describes how rural San Joaquin Valley communities like Earlimart became identified as “Okie” towns after an influx of Dust Bowl migrants. DEVRA WEBER, DARK SWEAT, WHITE GOLD: CALIFORNIA FARM WORKERS, COTTON, AND THE NEW DEAL 143–44 (1994). In modern times, this now predominantly Latino community has struggled to achieve adequate protections from the threat of pesticide drift. The insensitivity and disregard implicit in such a failure to protect was put on dramatic display after one drift incident, when “[d]espite the cold November night and the pleas for privacy, residents were ordered to disrobe and be sprayed down by high-pressure fire department hoses.” London, *supra* note 134, at 7.

whether motivated by racial animus or simply enabled by the entire edifice of inequality in our society that disadvantages people of color and the poor, should be understood to be part and parcel of the segregation harms that have been so prominently targeted under the state's extensive affordable housing regime.¹⁶⁶ As California courts have recognized, the very same problems that motivate calls for increased construction of affordable housing also lead to the perpetuation of substandard housing and residential conditions in low-income communities of color.¹⁶⁷

Many of these vectors of degradation—insufficient service delivery, lack of investment, and industrial siting and zoning, to name a few—are linked to local government actions pursuant to the Planning and Land Use Title, or in the enactment and administration of ordinances. By its terms, section 65008 broadly covers that entire ground; discriminatory treatment of existing residential communities should, then, be prohibited by the statute.

While the current statutory language supports an interpretation that protects existing communities, the legislature could resolve some of the ambiguities discussed above by clarifying the definition of protected classes under section 65008. First, the definition of “residential development” as “a single family or multifamily residence” could be amended to include language like the following: “and existing neighborhoods, including disadvantaged unincorporated communities as defined in Government Code section 65302.10.”¹⁶⁸ Second, the phrase “intended occupants” should be replaced with “current or intended occupants” in order to clarify that current tenants are entitled to the same measure of protection against discrimination as the statute explicitly grants current owners. Finally, legislative findings and declarations could be added to reaffirm the intent to reach local government actions with regard to the services and environmental conditions impacting a residential development, neighborhood, or community.

CONCLUSION

The battle for equal treatment of low-income communities and communities of color has significant front lines in planning, zoning, and other

166. See Ford, *supra* note 34, at 1847–49.

167. See, e.g., Green v. Superior Court, 517 P.2d 1168, 1173–74 (Cal. 1974) (discussing the shortage of affordable housing in the state, and observing that “the scarcity of adequate housing has limited further the adequacy of the tenant’s right to inspect the premises; even when defects are apparent the low-income tenant frequently has no realistic alternative but to accept such housing with the expectation that the landlord will make the necessary repairs.”).

168. The Government Code defines a disadvantaged unincorporated community as “a fringe, island, or legacy community in which the median household income is 80 percent or less than the statewide median household income.” CAL. GOV’T CODE § 65302.10 (West 2013). A fringe community is inhabited unincorporated territory within a city’s sphere of influence; an island community is surrounded or substantially surrounded by a city or cities; and a legacy community is “a geographically isolated community that is inhabited and has existed for at least fifty years.” *Id.*

local government actions. The existence of income- and race-identified space has led to patterns of disinvestment, environmental degradation, and mistreatment along a spectrum ranging from neglect to discriminatory enforcement of ordinances. At the same time, environmental justice lawyers have struggled with limitations in constitutional and housing rights law, which prevent relief despite the widespread pattern of environmental burdens being imposed on low-income communities and communities of color.

California's Government Code section 65008 can serve as a much-needed vehicle for environmental justice claims in California—and a model statute for other states looking to strengthen civil rights protections against local government discrimination in the imposition of environmental harm. The provision brings together the core elements needed for an environmental justice claim. First, the provision allows robust theories of discrimination that are capable of capturing the embedded nature of racial and social disadvantage that has quite literally marked the landscape of American neighborhoods, exposing low-income communities and communities of color to disproportionate environmental harm. The availability of a disparate impact standard of proof and the possibility of raising discrimination on the basis of socioeconomic class in addition to race provide an important model for other states in this regard. Second, section 65008(a) protects community-level health and safety interests inherent in housing, reaching the heart of environmental justice concerns. By extending protection beyond the initial acquisition of housing residence interests like health and safety, the statute affirms the civil rights of existing communities. Finally, the statute applies to local governments, critical mediators in the distribution of environmental harms, and explicitly covers both the full suite of their planning and land use powers and their actions in enacting and administering ordinances. With a tool as powerful as section 65008, environmental justice advocates can open up a new frontier of civil rights litigation to protect low-income communities and communities of color from toxic contamination and other environmental harms that have for far too long escaped meaningful legal redress.

