Racial Dimensions of Property Value Protection Under the Fair Housing Act

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Nearly fifty years after the passage of the Fair Housing Act, race-based residential segregation remains remarkably persistent, as do significant racial disparities in economic well-being. This Comment argues that one contributing factor to the persistence of segregation is different access to legal protections for property value enjoyed by minority and white homeowners. Historically, local land use regulations like zoning effectively served as legally permissible "race-neutral" means of replacing expressly race-based means of keeping "undesirables" out of white middle-class neighborhoods. Congress enacted the Fair Housing Act in 1968 to counter this deeply entrenched form of discrimination and to help achieve "truly integrated and balanced living patterns." But in practice, many federal courts interpreting this civil rights statute have come to see themselves as the guardians of the property interests of middle-class and white families, overprotecting these families from perceived threats to property value caused by government efforts to promote integration. At the same time, these courts underprotect low-income and minority families from property value depreciation and displacement caused by "environmental segregation" and redevelopment. A closer look at the disparity in judicial treatment reveals a critical bias: an unquestioning acceptance of the assertion that the very presence of low-income and minority families can lead to the loss of property value. In order to move beyond the zero-sum game that pits the property interests of middle-class and white residents against those of low-income and minority residents, courts

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must end the legal double standard that allows the residual harms and unequal benefits of historical segregation to continue accruing to this day.

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INTRODUCTION

Tucked alongside a placid suburban two-lane road in Mount Holly, New Jersey, a small neighborhood called the Gardens is engaged in a legal battle for its survival. The Gardens was built in the 1950s as a development of 350 solid-brick, two-story attached homes to accommodate military personnel from

nearby Fort Dix.[1] The Federal Housing Authority bought and managed the development for a decade, and then sold the Gardens to a New York City-based realty corporation.[2] Shortly after this transfer, the township began citing the corporation for numerous code violations at the Gardens, but took few enforcement actions.[3] Conditions in the community began to deteriorate.[4] In the 1970s the realty company sold the properties to individual purchasers;[5] eventually the neighborhood became evenly divided between owner-occupants and renters from absentee landlords.[6]

By the early 2000s the Gardens was home to over one thousand people,[7] or more than 10 percent of Mount Holly's total population.[8] Approximately 46 percent of the Gardens' residents were African American and 29 percent Hispanic, in contrast to the predominantly non-Hispanic white population of Mount Holly as a whole.[9] The Gardens' residents, particularly the African Americans and Latinos, were also considerably poorer than most others in the fairly affluent town.[10]

As the Gardens physically and economically deteriorated over the years, residents worked to hold absentee landlords accountable for correcting code violations, and to leverage township resources to rehabilitate deteriorated buildings.[11] Their efforts met with tepid support from the township.[12] Instead of working with the Gardens community to hold these landlords accountable, city leaders decided to resolve the rise in crime and decline in property values in the

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1. NEW JERSEY DEP'T OF THE PUB. ADVOCATE, EVICTED FROM THE AMERICAN DREAM: THE REDEVELOPMENT OF MOUNT HOLLY GARDENS 2, 4 (Nov. 2008) [hereinafter EVICTED FROM THE AMERICAN DREAM].

2. *Id.* at 5.

3. *Id.*

4. *Id.*

5. *Id.*

6. Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly (*Mt. Holly II*), 658 F.3d 375, 378 (3d Cir. 2011).

7. *Id.*

8. Mount Holly's total population is 9,536. UNITED STATES CENSUS BUREAU, 2010 DEMOGRAPHIC PROFILE DATA: MOUNT HOLLY TOWNSHIP, BURLINGTON COUNTY, NEW JERSEY (2010).

9. *Mt. Holly II*, 658 F.3d at 378.

10. According to the New Jersey Public Advocate, nearly half of the residents of the Gardens earned less than $20,000 per year, while 90 percent earned less than $40,000. *See* EVICTED FROM THE AMERICAN DREAM, *supra* note 1, at 4; *see also Mt. Holly II*, 658 F.3d at 378 ("[A]lmost all of its residents earn less than 80% of the area's median income; with most earning much less. . . . Almost all of [the Gardens' African American and Hispanic] residents were classified as 'low income'; indeed, most were classified as having 'very low' or 'extremely low' incomes."). In 2010, the median household income for Mount Holly was $55,670. U.S. CENSUS BUREAU, 2007–2011 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES: MOUNT HOLLY TOWNSHIP, BURLINGTON COUNTY, NEW JERSEY (2012). This is just above the national median of $52,000. U.S. CENSUS BUREAU, MEDIAN HOUSEHOLD INCOME FOR STATES: 2007 AND 2008 AMERICAN COMMUNITY SURVEYS (2009), *available at* http://www.census.gov/prod/2009pubs/acsbr08-2.pdf.

11. EVICTED FROM THE AMERICAN DREAM, *supra* note 1, at 5.

12. *Id.*

community by eliminating the homes entirely, through a city-sponsored redevelopment plan.[13] In New Jersey, courts recognize redevelopment as an important governmental interest justifying the condemnation of property, because it "provides the means of removing the decadent effect of slums and blight on neighboring property values."[14] In 2002, the Mount Holly Township Council declared the Gardens "blighted"[15] and the following year called for its destruction and redevelopment as market-rate homes.[16] Between 2003 and 2008 the Council issued a succession of redevelopment plans calling for the condemnation of all of the 329 homes in the Gardens, to be replaced with up to 520 homes, 11 percent of which (fifty-six units) would be designated affordable, and 2 percent of which (eleven units) would be offered to existing residents.[17]

Over the protests of local residents, the township began to acquire and raze property in the Gardens, leaving behind a patchwork of freestanding homes in the midst of vacant lots, construction debris littering yards and sidewalks, noise, dust, and vibrations.[18] As these demolition activities progressed, many remaining residents accepted the township's offer to buy their homes at values that had been depressed as a result of the township's very act of targeting the community for redevelopment.[19] Thus, in its efforts to protect the property value of the predominantly white, middle-class neighborhoods surrounding the Gardens from the "decadent effect of slums and blight,"[20] the township of Mount Holly used its coercive power of redevelopment, driving down the value of property of that community's mostly

13. *See* Jan Hefler, *Conflicts Continue in Mount Holly Gardens Redevelopment*, PHILA. INQUIRER, Sept. 28, 2011, at B1.

14. *See* Wilson v. City of Long Branch, 142 A.2d 837, 842 (N.J. 1958).

15. EVICTED FROM THE AMERICAN DREAM, *supra* note 1, at 5.

16. *Mt. Holly II*, 658 F.3d 375, 379 (3d Cir. 2011).

17. *Id.* at 378–79.

18. *Id.* at 380.

19. In 2007, five years after the Gardens was declared blighted by the township, Mount Holly commissioned appraisals of the remaining homes and made offers to purchase those homes based on those appraised values. EVICTED FROM THE AMERICAN DREAM, *supra* note 1, at 9. The offers were roughly half of the selling price of homes just outside the Gardens. *Id.* (citing Appraisal from Todd & Black, Inc., Real Estate Appraisers & Consultants, to Kathleen Hoffman, Acting Mount Holly Township Manager, at 39 (June 29, 2007)). The commissioned appraiser critiqued a competing higher appraisal for failing to consider that the home was located in a redevelopment zone. *Id. See also Mt. Holly II*, 658 F.3d at 380 ("These conditions discouraged any attempt at rehabilitating the neighborhood and encouraged existing residents to sell their homes for less than they otherwise might have been worth."); Mt. Holly Citizens in Action, Inc. v. Twp. of Mount Holly (*Mt. Holly I*), No. 08–2584, 2011 WL 9405, at *7 n.15 (D.N.J. Jan. 3, 2011) *vacated* 658 F.3d 375 (3d Cir. 2011) (citing plaintiff's affidavits "claim[ing] that the Township's redevelopment activities lowered the property values of the remaining homes, and the Township took advantage of that situation by pressuring residents to sell their homes at deflated prices that did not represent fair market value").

20. *Mt Holly I*, 2011 WL 9405, at *5 (quoting Wilson v. City of Long Branch, 142 A.2d 837, 842 (N.J. 1958)).

African American and Latino residents, and ultimately forcing them out of the community.

After six years of fighting to protect their community from physical destruction, in 2008 twenty-three residents of the Gardens filed a lawsuit in federal court. They alleged, among other things, that the township's actions violated the Fair Housing Act,[21] which prohibits "mak[ing] unavailable or deny[ing] a dwelling to any person because of race."[22] The residents relied on a disparate impact theory (also known as discriminatory effects theory) available under the Fair Housing Act, which recognizes that even actions that are not intentionally motivated by racial animus can have the effect of unlawfully making housing unavailable to racial minorities. In condemning the current homes of minority plaintiffs, and replacing them almost exclusively with market-rate homes (very few of which would be offered to them on a priority basis), Mount Holly's redevelopment plan ultimately would replace nearly all the current residents of the Gardens with new, wealthier residents.[23]

The District Court of New Jersey granted the township's motion for summary judgment, finding that the Gardens' residents could not establish a prima facie case of discrimination under the Fair Housing Act.[24] The court added that even if the plaintiffs could have made a prima facie case, the township had a legitimate, nondiscriminatory reason for its actions: eliminating blight.[25] Although the definition of "blight" in New Jersey focuses on the effect of physically deteriorating property on surrounding neighborhoods,[26] the municipality's solution to blight in this case bypassed rehabilitating the physical buildings in favor of targeting the people inside of them for removal.

In 2011, the Third Circuit reversed, holding that the plaintiffs had established a prima facie case.[27] The court agreed that eliminating blight was a legitimate reason for the township's actions, but remanded for determination of

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21. *Mt. Holly II*, 658 F.3d at 380.

22. 42 U.S.C. § 3604(a) (2006).

23. *See, e.g.*, *Mt. Holly II*, 658 F.3d at 378–79 (discussing township's plan to destroy 329 low-income housing units and replace them with up to 520 houses, only 56 of which would be affordable, and 11 offered on a priority basis to displaced residents). The Township offered no more than $49,000 to buy the homes, and estimated the cost of a new home in the development would be between $200,000 and $275,000, translating to a monthly payment well above what residents were currently paying in rent or mortgage. *Id.* at 380.

24. *Mt. Holly I*, 2011 WL 9405, at *4.

25. *Id.* at *5 ("Community redevelopment is a modern facet of municipal government. Soundly planned redevelopment can make the difference between continued stagnation and decline and a resurgence of healthy growth. It provides the means of removing the decadent effect of slums and blight on neighboring property values, of opening up new areas for residence and industry.") (citation omitted); *see also id.* at *6 ("[Plaintiffs] have failed to offer sufficient evidence to rebut the Township's legitimate governmental purpose or demonstrate illegitimate discriminatory intent.").

26. "At its core, 'blight' includes deterioration or stagnation that has a decadent effect on surrounding property." Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 460 (N.J. 2007).

27. *Mt. Holly II*, 658 F.3d at 382.

whether there was a less discriminatory alternative to achieve this goal.[28] In 2012, the township of Mount Holly petitioned the Supreme Court to hear not only the substance of their claims, but to decide a long-settled question of whether the Fair Housing Act supports a disparate impact claim at all.[29] On June 17, 2013, the Court granted certiorari with respect to the question of whether disparate impact claims are cognizable under the Fair Housing Act, despite the unanimity among the ten out of eleven federal Circuit Courts of Appeal to have ruled on the issue that they are.[30]

A closer look at this current legal struggle in Mount Holly reveals the critical importance of the disparate impact theory of the Fair Housing Act in protecting the property rights of minority homeowners—in particular, the relatively underutilized analytical prong of seeking "less discriminatory alternatives." It also reveals the limitations of the Fair Housing Act in protecting the property rights of minority homeowners. Congress enacted the Fair Housing Act to overcome the scourge of racial discrimination that has long tainted American society, but the vision of racial equality in housing has been difficult to achieve.[31] The municipal actions challenged in *Mount Holly* reflect a long tradition of perceiving the very presence of racial minorities and low-income families as intrinsically harmful to the interests of middle-class whites, particularly to the value of their property.[32] This perception was used to legitimize government-sponsored segregation for decades.[33] While mid-century civil rights reforms formally ended this officially sanctioned discrimination, courts continued to legitimize the association of racial minorities and low-income residents with harm. The litigation in *Mt. Holly* illustrates the tensions

28. *Id.* at 386–87. The Third Circuit found that the lower court's search for illegitimate discriminatory intent was not required to assess the disparate impact claim. *See id.* at 384.

29. Petition for Writ of Certiorari, Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 2012 WL 2151511 (June 11, 2012) (No. 11–1507). One of the two questions presented was, "Are disparate impact claims cognizable under the Fair Housing Act?" *Id.* at i.

30. Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 133 S. Ct. 2824 (2013); *infra* note 275 (citing cases).

31. *See* Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1980–81 (2000) (describing the Fair Housing Act as primarily "alleviat[ing] the problem of 'concerted,' or 'centralized,' segregation, but . . . fail[ing] to remedy the problem of 'decentralized segregation'") (quoting David M. Cutler et al., *The Rise and Decline of the American Ghetto*, 107 J. POL. ECON. 455, 495 (1999)); john a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 606 (2008) (noting that the provisions of the Fair Housing Act had "not necessarily helped produce integrated neighborhoods or addressed segregated living patterns"); Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 800, 807 (2008) (summarizing evidence of the persistence of racial discrimination in the housing market and high levels of segregation in the largest metropolitan regions).

32. *See infra* Section II.B and text accompanying notes 289–309. Margalynne Armstrong provides a thoughtful framework for examining the relationship between ongoing segregation and the "commonly asserted, longstanding, and deeply-entrenched excuse[] that African-American land ownership or possession causes property values to decline." *See* Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051, 1052–53 (1998).

33. *See infra* Part I.C.3.

that emerge when trade-offs must be made, in municipal governance and in the courtroom, between competing claims to property value protection.[34] Specifically, the township of Mount Holly was able to leverage redevelopment law to protect the property value of its predominantly white, middle-class residents by sacrificing, through the very process of redevelopment, the property values of many of its low-income minority residents.

In this Comment, I argue that this tension often reflects a deeply rooted bias in favor of white homeowners, and that federal courts continue to act as the guardian of these homeowners' perceived property interests in keeping—or removing—racial minorities from their neighborhoods. In contrast, when minority plaintiffs seek to protect their home values from the kinds of threats typical in their communities (such as the harmful effects of noxious land use, or displacement by gentrification), these courts abdicate their responsibility to intervene in local decision making. This double standard reflects the slow pace of change in historically-rooted, racially biased local land use dynamics; it also is the outcome of excessive judicial deference to local decision making and of the increasingly unsupported presumption that low-income, racially diverse housing has an intrinsically harmful effect on property value.[35]

Part I of this Comment provides a brief historical overview of legal and political protections for property value that emerged in part as a covert replacement for overt forms of race-based residential segregation. The rhetoric of preserving the property value of single-family homes for middle class and wealthy families from the undesirable effects of multifamily homes for lower-income families emerged during the early part of the twentieth century as a race-neutral means of continuing racially motivated segregation. This Part summarizes the genesis of an ongoing pernicious cycle, whereby historic segregation "locked in"[36] depressed property values for minority families. Part I concludes by reviewing the origins and passage of the Fair Housing Act,

34. Many scholars have remarked on this trade-off between protection of the property interests of whites and the call of civil rights reforms to end discrimination, in the housing sector as well as more broadly. *See, e.g.*, Armstrong, *supra* note 32, at 1061 ("Legal approval of behaviors that 'maximize value' will inevitably conflict with imposing limitations on the ability to use biased views of property as a justification for discrimination."); Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1715 (1993) (describing "whiteness" as a form of property with vested interests and legal entitlements, and describing affirmative action as seeking to "de-legitimate the property interest in whiteness"); Wendell E. Pritchett, *Where Shall We Live? Class and the Limitations of Fair Housing Law*, 35 URB. LAW. 399, 401 (2003) (noting that "[i]n the postwar years, concerns over 'property values' vied with demands for equal treatment, a competition that continues to impede efforts to reverse decades of segregation"). This Comment builds on these observations to explore this trade-off in protecting property value under the Fair Housing Act.

35. *See infra* note 42 (citing studies demonstrating that affordable housing does not have a negative effect on neighboring property value).

36. *See* Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 742–48 (2000); *see also* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1852 (1994); *infra* Part I.C and note 76.

which was intended to counter the interaction between state action and the private sector that gave rise to egregious forms of housing discrimination.

Part II explores how these depressed property values for minority families have become a "race-neutral" justification for local land use and governance decisions that perpetuate segregation.[37] This Part examines two key facets of judicial interpretations of the Fair Housing Act that effectively place housing opportunity out of reach for many minority families, while continuing to protect the property interests of white families in keeping their neighborhoods exclusively or predominantly white.

The first of these pernicious interpretations is judicial inconsistency in determining threshold questions: who has standing and whose interests are protected by the Fair Housing Act? Specifically, in some instances courts have recognized that white plaintiffs have an interest protected by the Fair Housing Act in avoiding alleged harm to their property value caused by the construction of housing that could lead to an increase in minority population.[38] Yet, courts have arrived at the opposite conclusion in cases brought by minority plaintiffs challenging injury to property value caused by the construction or operation of environmentally harmful facilities.[39]

The second interpretation, exemplified by the district court's decision in *Mt. Holly*, surfaces when courts resolve fair housing challenges where predominantly white suburbs take actions that deny or reduce the availability of affordable housing units in which minority residents are more likely to live. In many of these challenges, courts accept the arguments offered by municipal defendants that they may refuse to accommodate affordable housing in order to preserve the property value of current residents.[40]

Because the value embedded in the homes of those current residents was created in part by de jure and de facto race-based residential segregation, this justification of preserving property value is tainted by historic racial discrimination. As a result, the advantages that accrued to white families because of a legacy of express racial discrimination continue to accrue—not simply due to the operation of the "free market" but also through judicial interventions that protect these advantages.

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37. Richard Thompson Ford describes the persistence of racial and economic segregation as the logical continuance of historic inequities in economic power, public services, and property value along racial lines. *See* Ford, *supra* note 36, at 1852 ("[E]ven in the absence of racism, race-neutral policy could be expected to entrench segregation and socio-economic stratification in a society with a history of racism.").

38. *See, e.g.*, Alschuler v. Dep't of Hous. & Urban Dev., 686 F.2d 472, 476 (7th Cir. 1982); *see infra* Section II.A.1.

39. For example, in 2005 the Fifth Circuit held that the failure of a city to address the operation of an illegal dump in an African-American neighborhood for more than twenty-five years did not comprise an actionable claim under the Fair Housing Act. *Cox v. City of Dallas*, 430 F.3d 734 (5th Cir. 2005).

40. *See infra* Part II.B

In both cases, the disparities in judicial treatment of claims for property value protections are largely enabled by a racially charged understanding of "blight." Courts are too easily swayed in many fair housing claims by the assertion that low-income residents and residents of multi-family housing are associated with crime, disorder, and blight, and will cause the property value of white and middle-class homeowners to depreciate.[41] There is considerable evidence that the construction of affordable, subsidized, or multifamily housing, which is disproportionately occupied by minority residents, in fact has no negative impact on neighboring property values.[42] Yet this assertion, historically constructed as a coded way to give voice to the belief that minority residents bring down property values, has taken on the weight of judicial presumption.

Part III of this Comment argues that, ultimately, in order to fully realize the Fair Housing Act's ambitious vision of equal housing opportunity, the presumption that low-income and minority families harm middle-class and white property values must be removed from the analysis of both the threshold and substantive elements of fair housing claims. In so doing, courts can enable progress by moving beyond the belief that fair housing challenges are essentially a zero-sum game in which minorities achieve property and housing rights only at the expense of the rights of white homeowners. While there is enormous potential inherent in the Fair Housing Act for achieving "win-win" solutions that share housing opportunity expansively across property owners, this potential has not yet been realized. At the very least, the Third Circuit's focus in *Mt. Holly* on whether the city could find a way to rehabilitate the Gardens that was less discriminatory than completely demolishing it and relocating the residents, points the way to the types of mutually beneficial solutions that are made possible by analyzing disparate impact claims in this manner. This in turn can free courts to shift their focus to whether the law can reach an ostensibly race-neutral underlying goal in a manner that requires less sacrifice by historically and economically marginalized groups.

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41. *See infra* Part II.B.

42. *See, e.g.*, Justin D. Cummins, *Housing Matters*: *Why Our Communities Must Have Affordable Housing*, 28 WM. MITCHELL L. REV. 197, 212 (2001) (collecting studies documenting that "affordable housing has little, if any, negative impact on surrounding property values"); ALEXANDRA DEGENOVA ET. AL., URBAN AND ENVTL. POL'Y & PLANNING, TUFTS UNIV., ON THE GROUND: 40B DEVELOPMENTS BEFORE AND AFTER (2009), *available at* http://www.chapa.org/pdf/Tufts40BStudy.pdf (reviewing affordable housing developments in Massachusetts and finding no impact on neighboring property value); Ingrid Gould Ellen et. al., *Does Federally Subsidized Rental Housing Depress Neighborhood Property Values?* 27–28 (NYU Law School, Law and Economics Research Paper No. 05-04, 2005), *available at* http://furmancenter.org/files/publications/fedrentalC_march05ffr.pdf (finding that federally subsidized rental housing did not have a negative long-term effect on nearby property values, and in two cases had a positive effect).

I.
THE HISTORICAL ASSOCIATION OF RACE, CLASS, AND PROPERTY VALUE

A. Local Government and De Jure Segregation

Given that the protection of property is a deeply rooted legal and political tradition, it is no surprise that the legal, social, and political framework for protecting property value has become an important means to uphold another characteristically American institution: racial discrimination. The history of housing and land use in the United States featured overtly race-based segregation for many decades.[43] During the Jim Crow Era of the late nineteenth and early twentieth centuries, segregation was an important mechanism for preferentially allocating public resources and opportunities for social and economic advancement to white families.[44] Residential segregation codified racial preferences through racial zoning[45] and racially restrictive covenants.[46]

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43. *See generally* JAMES A. KUSHNER, APARTHEID IN AMERICA: AN HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL SEGREGATION IN THE UNITED STATES (1980); *see also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993). Massey and Denton describe how residential segregation did not become a feature of the urban landscape in either the north or the south until about 1900. *Id.* at 17–26.

44. Robert Cooter, Daria Roithmayr, and others use the term "racial cartels" to describe the mechanism by which whites secured and protected economic, social, and political advantages over blacks during the Jim Crow era. *See* Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 153–54 (1994) ("In general, sustaining discriminatory norms requires the collusion of many people, which presupposes sanctions to enforce the discriminatory norms. Informal sanctions such as gossip, ostracism, and boycotts can operate spontaneously, especially when a culture stresses group solidarity. In the past, many Americans used informal sanctions to punish individuals who failed to keep the races separate or women 'in their place.' However, the informal sanctions were probably not enough to sustain segregation without being buttressed by formal laws.") (citing Jennifer Roback, *Racism as Rent Seeking*, 27 ECON. INQUIRY 661 (1989)); Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197, 204 (2004) ("During the Jim Crow era, white cartel organizations worked together to achieve a monopoly on access to good neighborhoods. These organizations used violence, harassment and coercion to monopolize the advantage of a 'good neighborhood'—i.e., having neighbors with more wealth, higher property values and a better tax base than in non-white neighborhoods. That neighborhood advantage now has become self-reinforcing, because of the relationships that link economic well-being with neighborhood racial composition."); *see also* Darrell A. H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of* Jones v. Alfred H. Mayer Co., 77 FORDHAM L. REV. 999, 1024 (2008) ("Groups, knitted together by ties of kinship, race, culture, or custom—and holding levers of power desired by other groups—agree formally or informally to minimize competition by these other groups. However, cartels are notoriously fragile—members are constantly lured by the promise of personal gain to 'defect' or 'cheat.' For that reason, governments, through coercive legislation, can prolong the life of the cartel by punishing those who would otherwise defect.").

45. *See* STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 20 (2000) (describing racial zoning laws enacted by cities throughout the nation between 1910 and 1916); Christopher Silver, *The Racial Origins of Zoning in American Cities*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY 23–39 (June Manning Thomas & Marsha Ritzdorf eds., 1997); *infra* note 54.

46. *See* KUSHNER, *supra* note 43, at 16–17.

The practice of zoning, "[i]n its most basic form . . . separates land areas into broad categories of land use—for example, residential, commercial, and industrial—with the assumption that separation of land uses promotes the public health and welfare of the population."[47] Los Angeles was the first major city to enact a municipal zoning ordinance in 1908,[48] designating three districts in the city as exclusively reserved for residential, industrial, and business use.[49] New York followed eight years later with the nation's first comprehensive, citywide zoning ordinance.[50]

Efforts to zone, such as the ordinance in Los Angeles, were ostensibly driven by public health concerns that emerged as cities rapidly developed with little regard for the consequences of locating industrial facilities in close proximity to homes.[51] Cities designed zoning ordinances to codify the common law of nuisance torts and "provid[e] comprehensive protection against threats to the residential environment in advance of their occurrence."[52] But an undercurrent of ethnic prejudice and racism also ran through these efforts to develop a more systematic approach to control urban land use.[53] Indeed, many municipalities experimented with enacting outright racial zoning ordinances to prohibit African Americans from living on the same block as whites.[54] These ordinances were justified as necessary to protect the property values of white residents as "deterioration . . . is sure to follow the occupancy of adjacent

47. Juliana Maantay, *Zoning, Equity, and Public Health*, 91 AM. J. PUB. HEALTH 1033, 1033 (2001).

48. *See* Silver, *supra* note 45, at 23.

49. *Ex parte* Throop, 145 P. 1029, 1029–30 (Cal. 1915).

50. *See* Raphael Fischler, *The Metropolitan Dimension of Early Zoning: Revisiting the 1916 New York City Ordinance*, 64 J. AM. PLANNING ASSOC. 170, 170 (1998); Maantay, *supra* note 47, at 1036. For an in-depth discussion of early zoning efforts, see Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-*Euclid *Debate over Zoning for Exclusively Private Residential Areas, 1916–1926*, 56 U. PITT. L. REV. 367, 370–75 (1994).

51. *See* Joseph Schilling & Leslie S. Linton, *The Public Health Roots of Zoning: In Search of Active Living's Legal Genealogy*, 28 AM. J. PREVENTATIVE MED. 96, 99 (2005); *see also* Sacoby Wilson et al., *How Planning and Zoning Contribute to Inequitable Development, Neighborhood Health, and Environmental Injustice*, 1 ENVTL. JUST. 211 (2008).

52. Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 746 (1993) (citing John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 32).

53. *See* Elizabeth Fee, *Public Health and the State: The United States*, *in* THE HISTORY OF PUBLIC HEALTH AND THE MODERN STATE 241 (Dorothy Porter ed., 1994) ("The push for public health on a national level was thus tacitly allied to concerns about the deterioration of the national 'stock' and the idea that biologically inferior immigrants were responsible for the growing statistics of disease, alcoholism, mental illness, urban violence and criminality."); Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of* Euclid, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 101, 105 (Charles M. Haar & Jerold S. Kayden eds., 1989) ("What began as a means of improving the blighted physical environment in which people lived and worked, was transformed into a device for protecting property values and excluding the undesirable.").

54. *See* Rabin, *supra* note 53, at 106 (noting that Baltimore, Richmond, Atlanta, Louisville, St. Louis, Indianapolis, and Dallas, among others, enacted racial zoning in the second decade of the twentieth century); *see also* Dubin, *supra* note 52, at 745.

premises by persons of color."[55] This theory that nonwhite families caused harm to property value thus provided a foundation on which to build and reinforce residential segregation in America.[56]

In the 1917 decision *Buchanan v. Warley*, the Supreme Court struck down racial zoning as unconstitutional.[57] Although this was an important constraint on local government's ability to promote residential segregation, the Court's reasoning limited the reach of *Buchanan*. The Court firmly grounded its decision in the conclusion that the Constitution's Due Process Clause protected "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color,"[58] and avoided directly discussing the right of the black home purchaser to live in a white neighborhood.[59]

Despite this Supreme Court decree, many cities continued engaging in racial zoning, with some ordinances surviving into the 1970s.[60] But other cities shifted to less visible means to accomplish the same ends.

B. From De Jure to De Facto Segregation: Euclid and Covert Racial Zoning

Instead of focusing directly on who should live in a particular zone, after *Buchanan* municipalities began to create distinctions within the broad category of the "residential" zone based on the density of housing. These cities refined the "residential" category of zoning ordinances to separate low-density, single-

55. *See* Buchanan v. Warley, 245 U.S. 60, 74 (1917).

56. *See, e.g.*, LUIGI LAURENTI, PROPERTY VALUES AND RACE: STUDIES IN SEVEN CITIES 9 (1960) ("Neighborhoods populated by white persons have been invaded by colored families, and often aristocratic residential districts have suffered tremendous lessening of property values because of the appearance of a Negro resident.") (quoting STANLEY L. MCMICHAEL & ROBERT F. BINGHAM, CITY GROWTH AND VALUES 370 (1923)); Kevin Fox Gotham, *Urban Space, Restrictive Covenants and the Origins of Racial Residential Segregation in a US City, 1900–50*, 24 INT'L J. URB. & REGIONAL RES. 616, 621 (2000) (summarizing early twentieth century literature by real estate associations and boards "endorsing the maintenance of racial homogeneity to protect property values and neighborhood stability").

57. *Buchanan*, 245 U.S. at 79 ("The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.").

58. *Id.* at 81. The Court did acknowledge that the ordinance also abridged the right of "a colored person to make such disposition to a white person," and concluded that "this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state." *Id.* at 81–82. Thus, the Court affirmed the individual right to engage in a particular property transaction in this case, but did not directly discuss the right of persons of color to actually live in neighborhoods designated as "white" by the city.

59. The Court acknowledged that "there exists a serious and difficult problem arising from a feeling of race hostility," which the law was designed to address, but concluded that "its solution cannot be promoted by depriving citizens of their constitutional rights and privileges." *Id.* at 80–81.

60. *See* Dubin, *supra* note 52, at 750 n.49 (noting that Miami *enacted* a racial zoning law in 1945, and citing cases documenting racial zoning that remained on the books in Dade City until 1975, and Apopka, Florida, until 1968); Rabin, *supra* note 53, at 106–07 (noting that New Orleans, Norfolk, Dallas, Indianapolis, Dade County and Birmingham engaged in racial zoning until as late as 1949). Birmingham's racial zoning ordinance was not struck down until 1949. Monk v. City of Birmingham, 87 F. Supp. 538, 544 (N.D. Ala. 1949), *decree aff'd*, 185 F.2d 859 (5th Cir. 1950).

family homes in which white residents were more likely to live, from the higher density, multifamily homes in which minority families were more likely to live. The original vision of zoning as a tool to provide comprehensive environmental and health protection became reserved for occupants of the most exclusive residential neighborhoods. In 1926, in *Village of Euclid v. Amber*, the Supreme Court upheld as a constitutionally permissible exercise of local police power what became known as Euclidean zoning: a form of nonracial municipal zoning that separates land uses based on the use type and density.[61] The decision codified the rationale of zoning proponents that separating land uses was necessary to protect property value,[62] and laid the legal foundation for a system that fulfilled much the same purpose as racial zoning.[63] Specifically, the Court validated the Village of Euclid's separation of residential districts into three subcategories: one for single-family dwellings, one for two-family dwellings, and one for apartment houses.[64] The Court found such separation justified by the tendency of apartment houses to act as nuisances:

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections *very often the apartment house is a mere parasite*, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, . . . detracting from . . . safety [of the streets] and depriving children of the privilege of quiet and open spaces for play . . . . Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.[65]

Although lacking any overt mention of race, Justice Sutherland's discussion is a thinly veiled, racialized justification for zoning.[66] It was one

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61. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

62. *See* Lees, *supra* note 50, at 404–05 (reviewing pre-*Euclid* state court decisions upholding zoning as a means of protecting property value).

63. *See, e.g.*, Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59, 82–83 (1993) ("Because direct exclusion of people would never receive judicial sanction, alternatives such as the popularization of home ownership and the preservation of property values were developed."). *See generally* Janai S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 UCLA L. REV. 1689, 1694–98 (1996).

64. *Euclid*, 272 U.S. at 380 ("U-1 is restricted to single family dwellings . . . ; U-2 is extended to include two-family dwellings; U-3 is further extended to include apartment houses . . . ."). The zoning plan for Euclid also included four other use categories, in increasing order of commercial and industrial industry. *Id.*

65. *Id.* at 394–95 (emphasis added).

66. *See* Richard H. Chused, Euclid's *Historical Imagery*, 51 CASE W. RES. L. REV. 597, 614 (2001) ("It was therefore possible, without ever mentioning race, immigration, or tenement houses, to call upon other code words that had the same impact.").

thing for the Court to find that a municipality could exercise its police power to require the separation of all residential homes from industrial facilities in order to protect the health and welfare of its citizens. But it was quite another for the Court to hold that separating single-family homes from apartment homes was a permissible exercise of police power. In order to do so, the Court needed to find a reason rooted in health and safety.[67]

The Court accomplished this by expressly equating apartment houses with nuisances. In doing so, the Court legitimized what would become a hierarchy in which the law views occupants of low-income housing as agents of harm rather than as people who reside in homes. Detached homes are not only the most highly prized in the hierarchy, but exclusively receive the highest "residential" zoning rank. The *Euclid* decision, with its embedded assumption that multi-family residential apartments bring, "as their necessary accompaniments," noise, traffic congestion, and reduced safety and playtime opportunity for (white) children,[68] laid a powerful foundation for white resistance to integration in the decades to come.

In validating a municipal land use scheme that separated single-family homes from two-family homes and apartment houses, *Euclid* upheld a framework that allowed privileged districts, which until the Court's decision in *Buchanan* just eight years earlier, had expressly excluded persons of color, to continue excluding "undesirable" people.[69] There is unmistakable overlap between the "parasites"[70] of apartment homes that municipalities sought to keep out of the most privileged residential district through their powers of zoning, and the racial minorities that municipalities had excluded from the most privileged, white districts through racial zoning.[71] With its exclusivist logic,

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67. *Id.* at 612. ("[B]arring apartment buildings from residential zones was thought by many to be the most troublesome feature of the typical planning ordinances. Responding to claims that such zoning tactics were merely aesthetic controls and therefore outside the police power, [an amicus brief filed by city planner Alfred Bettman] called upon telling imagery of middle and upper class men protecting their children from moral risk to justify single family residential zones . . . . "). The amicus brief filed by Alfred Bettman of the National Conference on City Planning argued that:

> [T]he man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet, is not motivated so much by considerations of taste or beauty as by the assumption that his children are likely to grow mentally, physically and morally more healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted and slum-like district.

Id. (citing Brief for the Nat'l Conference on City Planning, the Ohio State Conference on City Planning, the Nat'l Hous. Ass'n, and the Mass. Fed'n of Town Planning Bds. at 9, *Euclid*, 272 U.S. 365 (1926) (No. 665)).

68. *Euclid*, 272 U.S. at 394.

69. *See* James W. Ely, Jr., *Reflections on* Buchanan v. Warley, *Property Rights, and Race*, 51 VAND. L. REV. 953, 959 (1998) ("In practice, zoning was employed to protect the character of existing neighborhoods, to stabilize property values, and to keep out land uses or persons deemed undesirable.") (citing ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION 11–18 (1977)).

70. *Euclid*, 272 U.S. at 394.

71. As one critic put it:

Euclid paved a path for the co-location of lower-income housing, disproportionately occupied by families of color, with environmental hazards and systemic denial of municipal services.[72] Indeed, the court specifically cited the desire to enhance fire suppression in residential districts (defined as neighborhoods of detached, single-family homes), to "increase the safety and security of home life," and to "preserve a more favorable environment in which to rear children," as permissible rationales, within the local government's police power, for excluding apartment houses from "residential" neighborhoods.[73] The safety and security of home life and a favorable environment in which to rear children required the exclusion of apartment homes. *Euclid* supports the corollary implication that municipal resources to protect these interests are not as necessary for the residents of apartment dwellings, and could reasonably be decreased or provided in lower proportion.

When *Euclid* was decided in 1926, African Americans living in or moving to urban areas from the South were overwhelmingly restricted to apartments and excluded from single-family, detached housing through expressly race-based private sector mechanisms.[74] The effect was to replace formally race-based zoning with de facto race-based zoning, ensuring that white residents of single-family residential neighborhoods could continue to live in racially homogenous neighborhoods.

C. The Intersection of Private and Public Mechanisms to Sustain Residential Segregation

The practical impact of the Court's decision in *Euclid* was to prevent minorities from accessing the full range of municipal benefits accorded to the

> The basic purpose of suburban zoning was to keep Them where They belonged—Out. If They had already gotten In, then its purpose was to confine Them to limited areas. The exact identity of Them varied a bit around the country. Blacks, Latinos, and poor people always qualified. Catholics, Jews, and Orientals were targets in many places. The elderly also qualified, if they were candidates for public housing.

Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1083 (1996) (quoting FRANK J. POPPER, THE POLITICS OF LAND-USE REFORM 54 (1981)).

72. Although the ordinance in *Euclid* did not permit industrial or other noxious land uses in the U-3 district for apartment houses, other cities soon began permitting such hazardous land uses in these lower-ranked residential districts. *See* Rabin, *supra* note 53, at 101 (discussing the process of expulsive zoning, in which cities targeted black and immigrant neighborhoods for industrial and highway infrastructure development).

73. *See Euclid*, 272 U.S. at 394; *see also* Chused, *supra* note 66, at 613 ("Zoning rules, like many of the other moral reforms of the late nineteenth and early twentieth centuries, were designed to significantly reduce the likelihood that middle- and upper-class children would come into contact with poor, immigrant, or black culture.").

74. For example, in 1917, the Real Estate Board in Chicago "decided upon a policy toward the movement of Negroes to offset its effect on property values. The policy was to keep Negroes from moving into white residential areas haphazardly and to see to it that they filled a block solidly before being allowed to move into the next one." ROSE HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS 3–4 (1969) (citing minutes of regular monthly meetings of the Chicago Real Estate Board, April 4, 1917, in 25 Chicago Real Estate Board Bulletin 313-17 (April 1917)).

highest-ranked residential neighborhoods.[75] This was true not simply because minorities were overrepresented among the lower-income families who could not afford single-family homes, but also because of other public and private sector mechanisms that worked to exclude them from those neighborhoods.

As many scholars have discussed, public and private sector actions worked together in an interlocking and self-reinforcing manner to entrench residential segregation.[76] Black and other minority families could not move into neighborhoods zoned exclusively for single family detached homes for three interconnected reasons: (1) racially restrictive covenants between private citizens in these neighborhoods; (2) the refusal of the banking and realty industries to facilitate the required transactions; and (3) federal housing policy that actively discouraged such racial integration.[77] These mechanisms helped secure the advantages of suburban, single-family residential living for white families. At the same time, local zoning and federal infrastructure development allocated the environmental and other costs of this "good life" to minority neighborhoods by permitting the construction and operation of environmentally hazardous facilities, highways, and other infrastructure closer to these neighborhoods. The association between low-income and minority families with disorder and blight justified this disproportionate allocation of the benefits and the costs of "the good life" in suburban America.

1. De Facto Racial Zoning Through Private and Public Mechanisms

After the Court in *Buchanan v. Warley* struck down racial zoning, residents of many exclusively white neighborhoods entered into private

75. *See* Dubin, *supra* note 52, at 741 (describing the "largely unnoticed" legacy of *Euclid* in depriving minority communities "of the land use protection basic to Euclidean zoning principles").

76. *See generally* KUSHNER, *supra* note 43; MASSEY & DENTON, AMERICAN APARTHEID, *supra* note 43; Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 750–91 (1993). Daria Roithmayr adapted the term "lock-in" from the field of economics and antitrust law, where it is used to describe how early anticompetitive conduct by one entrant into an emerging market can become reinforced over time, permitting that actor to shape the conditions of the market to its own advantage, ultimately leading to a monopoly. Roithmayr, *Barriers to Entry*, *supra* note 36, at 742–48. Roithmayr developed a "lock-in" model of discrimination in which "a racial group's early monopoly advantage can become self-reinforcing and ultimately locked in." Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31, 33 (2003). She has since adapted this model specifically to residential segregation. *See* Roithmayr, *Locked in Segregation*, *supra* note 44, at 197 ("During the days of Jim Crow, white racial cartels (e.g., homeowners' associations and real estate boards) engaged in anti-competitive conduct to exclude blacks and monopolize access to good neighborhoods. That early neighborhood advantage has now become locked-in via certain self-reinforcing neighborhood effects, namely through public school finance and neighborhood job referral networks. Because the (white) 'rich get richer' in neighborhoods with good schools and good job networks, non-whites are relatively less able to move into more expensive white neighborhoods.").

77. MASSEY & DENTON, *supra* note 43, at 23.

covenants agreeing not to sell or rent their homes to nonwhites.[78] Courts honored these covenants[79] until 1948;[80] thereafter private citizens enforced segregation with outright acts of violence and intimidation, often with local police backing.[81]

The emerging real estate industry played a key role by introducing model racial covenants across the nation and strictly enforcing industry requirements that helped maintain the residential color line.[82] Realtors profited from these practices by stoking white fears of racial minorities to induce "panic selling" in racially transitional neighborhoods.[83] This process, known as "blockbusting," accelerated the pace of segregation.

The federal government also played an important role in maintaining segregation. As newly created federal agencies entered the housing field in the 1930s in response to the Great Depression, they freely pursued expressly race-based segregation policies for decades.[84] Federal agencies justified their

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78. KUSHNER, *supra* note 43 at 16–17; MEYER, *supra* note 45, at 46; Gotham, *supra* note 56, at 623.

79. The Supreme Court upheld racially restrictive covenants in 1926, reasoning that the Constitution did not "prohibit[] private individuals from entering into contracts respecting the control and disposition of their own property." Corrigan v. Buckley, 271 U.S. 323, 330 (1926).

80. The Supreme Court declared the judicial enforcement of racially restrictive covenants unconstitutional in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

81. Between 1908 and 1960, residents of exclusively white neighborhoods across the nation rioted and deployed other forms of mob violence and terror to physically prevent black families moving into "their" neighborhoods. *See* MEYER, *supra* note 45, at 38–39, 62–63; ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 372 (2010); Raymond A. Mohl, *The Second Ghetto and the "Infiltration Theory" in Urban Real Estate 1940–1960*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY, *supra* note 45, at 58, 62. *See generally* Jeannine Bell, *The Fair Housing Act and Extralegal Terror*, 41 IND. L. REV. 537, 538–41 (2008) (reviewing "extralegal anti-integrationist violence" prior to 1968).

82. *See* MEYER, *supra* note 45, at 7 (reviewing practices of the National Association of Real Estate Boards between 1913 and 1957 in "instruct[ing] its members not to contribute to residential race mixing"); Gotham, *supra* note 56, at 623 ("By 1920, it was unethical for real estate firms and land developers not to restrict certain ethnic and racial groups, especially blacks, to specific areas of [Kansas City] through the use and enforcement of racially restrictive covenants."); MASSEY & DENTON, AMERICAN APARTHEID, *supra* note 43, at 37. *See generally* HELPER, *supra* note 74.

83. Rose Helper, who conducted an exhaustive study of real estate brokers in the 1950s, summarized survey respondent's thoughts on "panic selling" thus:

> When Negroes approach a white area, some white owners put their property up for sale and some white tenants leave. As soon as Negroes enter, many houses are thrown on the market, and a panic often ensues, with people selling at whatever price they can get and leaving as soon as possible.

HELPER, *supra* note 74, at 18, 74, 299. Massey and Denton describe this process as far more deliberate, with real estate agents purchasing homes in transitional areas, renting them to black tenants, and then going "door to door warning white residents of the impending 'invasion' and offer[ing] to purchase or rent homes on generous terms." MASSEY & DENTON, *supra* note 43, at 38.

84. The federal government's role was initially to buy out mortgages defaulted on as a result of the economic collapse; it soon shifted strategies to focus on insuring privately provided mortgage. The Federal Housing Authority (FHA) developed an underwriting manual to provide guidance on which home loans it would insure, and which it considered too risky based on private market factors. Thus, the FHA's 1938 Underwriting Manual discouraged lending in neighborhoods with "inharmonious racial or nationality groups," and recommended the use of racially restrictive covenants. U.S. COMM'N

encouragement of racially restrictive covenants, and their refusal to insure or subsidize home mortgages in integrated neighborhoods, as market-based risk aversion: "[i]f a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial groups."[85] Federal and local public housing authorities across the nation also designed and operated public housing in a racially segregated manner.[86]

The post-World War II "white flight" from central cities to rapidly developing residential suburbs was enabled by federally subsidized home mortgages preferentially available in neighborhoods with "white-only" restrictive covenants.[87] The federal government also subsidized highway, energy, sewer, and utility infrastructure that made single-family home suburban development possible, all while denying black families access to these communities.[88] While the federal government played a key role in enabling white families to initially access the suburbs, local government ensured this life would be preserved and protected through Euclidean zoning. As municipalities reserved the best of environmental and health *protections* for families in neighborhoods exclusively zoned for single family homes, they allocated the environmental and health *costs* of the infrastructure necessary to support the "good life" to less desirable, and less fortunate, communities.

ON CIVIL RIGHTS, 1961 U.S. COMMISSION ON CIVIL RIGHTS REPORT: HOUSING 16 (1961) [hereinafter 1961 COMMISSION] (quoting Federal Housing Authority 1938 Underwriting Manual). Richard Rothstein describes the Federal Housing Authority's policy of refusing to insure mortgages in the developing suburbs of New York City and Long Island unless developers included racially restrictive deeds, and of denying mortgage guarantees to neighborhoods where children attended integrated schools. Richard Rothstein, *Public Housing: Government-Sponsored Segregation*, AM. PROSPECT (Oct. 11, 2012), https://prospect.org/article/public-housing-government-sponsored-segregation.

85. *See* 1961 COMMISSION, *supra* note 84, at 16.

86. *See, e.g.*, Walker v. City of Mesquite, 169 F.3d 973, 976 (5th Cir. 1999) ("Blacks were purposefully segregated [by the Dallas Housing Authority] for decades into either Section 8 housing in minority areas of Dallas or predominantly black housing projects in minority areas of Dallas."); Blackshear Residents Org. v. Hous. Auth. of Austin, 347 F. Supp. 1138, 1142 (W.D. Tex. 1971) (chronicling the City of Austin's decades-long administration of public housing "in accordance with an official Austin city plan adopted in 1928, that had as its purpose to encourage the settlement of Negroes in 'East Austin' and pursuant to . . . the Housing Authority's request to locate these 'three racial housing projects' on sites the Planning Commission found to be fitting to their racial character"); Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907, 908 (N.D. Ill. 1969) (finding the Chicago Housing Authority "intentionally chose sites for family public housing . . . for the purpose of maintaining existing patterns of residential separation of races in Chicago"); Hicks v. Weaver, 302 F. Supp. 619, 623 (E.D. La. 1969) (finding that the local housing authority "considered the racial concentration of the neighborhoods before it looked to any other factor governing the selection of sites. Its purpose in doing so was to maintain segregation in public housing in Bogalusa"); *see also* KUSHNER, *supra* note 43, at 37–44.

87. *See* KUSHNER, *supra* note 43, at 21–22.

88. KUSHNER, *supra* note 43, at 20–25; Yale Rabin, *The Persistence of Racial Isolation: The Role of Government Action and Inaction*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY, *supra* note 45, 93, 95–96; *see also* Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1849 (2004) (describing federal support for redlining and white suburbanization).

2. Environmental Segregation: Targeting Minority Neighborhoods for Environmental Hazards and Other "Undesirable" Land Uses

As a result of these public and private actions that mutually reinforced segregation, white families enjoyed preferential access to neighborhoods zoned by local municipalities exclusively for single-family homes. Black and other minority families were confined to neighborhoods that municipalities targeted for industrial and commercial development, exposing them to disproportionate levels of pollution and posing genuine threats to health and safety.[89] Public housing authorities often sited public housing in industrially zoned areas.[90] Thus, even as they complied with the letter of constitutional prohibitions on de jure residential segregation,[91] many municipalities encouraged de facto segregation by targeting African-American communities for rezoning as industrial,[92] providing inferior municipal services,[93] withholding municipal amenities such as parks and swimming pools,[94] engaging in regressive property

89. *See* Maantay, *supra* note 47, at 1033–41. Jon Dubin describes how the rhetoric of "separate but equal" that prevailed during the Jim Crow era not only placed "a badge of inferiority on the black race, it provided license to devalue black interests as well." Dubin, *supra* note 52, at 758–59 (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).

90. *See, e.g.*, Maantay, *supra* note 47, at 1037 ("Large-scale public housing projects, urban renewal areas, and highway projects were often located in or near industrial areas [in New York City], furthering the downward spiral of neglect and decline.").

91. Many towns did not even do this. *See, e.g.*, Ammons v. Dade City, Fla., 594 F. Supp. 1274, 1281 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986) ("Beginning in 1948, the City played a more active role in developing a segregated black community by specifically setting aside on the 'other side of the tracks,' land for a negro subdivision.").

92. *See* Maantay, *supra* note 47, at 1037; Rabin, *supra* note 53, at 101; *see also* KUSHNER, *supra* note 43, at 13–14 (describing municipal and federal use of redevelopment and public works funds to destroy integrated neighborhoods, displacing minority residents into racially concentrated communities). As the president of the National Association of Real Estate Boards explained in 1935, "In the average American city, under city planning and zoning ordinances, many times as much property as can ever be used has been allocated for apartments, business, manufacturing and industrial purposes, crowding out and destroying home neighborhoods. The result has been what we know as blight." W. Phillip Shatts, *The Relation of Zoning to Land Values*, *in* URBAN BLIGHT AND SLUMS: ECONOMIC AND LEGAL FACTORS IN THEIR ORIGIN, RECLAMATION, AND PREVENTION 162, 164 (Mabel L. Walker ed., 1938). David Dante Troutt contrasts early zoning efforts for residential white communities, designed to promote access to economic opportunity and to create "metamarkets" of consumption, with zoning for central city neighborhoods designed to create "antimarkets [as] places of negation where the rules and preferences of middle-class life are suspended or denied and the landscape has been systematically impoverished of the private and public resources that sustain economic stability and create wealth." David Dante Troutt, *Ghettoes Revisited: Antimarkets, Consumption, and Empowerment*, 66 BROOK. L. REV. 1, 4 (2000).

93. *See, e.g.*, Hawkins v. Town of Shaw, 437 F.2d 1286, 1288 (5th Cir. 1971), *aff'd on reh'g*, 461 F.2d 1171 (5th Cir. 1972) (holding that town's discriminatory failure, beginning in the 1950s, to provide street paving and street lighting, sanitary sewers, surface water drainage, water mains and fire hydrants to nearly all of the town's black residents, while it did so for nearly all of the town's white residents, violated the Fourteenth Amendment's Equal Protection Clause).

94. For example, during the 1930s the Commissioner of City Parks and Planning for New York City built 255 playgrounds in the city, only one of which was located in the historically black neighborhood of Harlem. *See* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 510 (1974).

tax assessment,[95] and targeting minority neighborhoods for public infrastructure, thereby displacing the residents.[96] These local land use decisions—which might be called "environmental segregation"—created tangible threats to property value and ensured that minority communities would be exposed to dangerous industrial land uses well into the twenty-first century.[97]

3. The Emergence of "Blight" Rhetoric to Justify Residential and Environmental Segregation

Both white resistance to integration and the targeting of minority neighborhoods for environmental hazards found support in the theory that minority residents caused declines in property values and contributed to disorder. Rooted in racial zoning efforts, this theory only gained strength throughout the first part of the twentieth century. There was in fact little evidence validating the theory that nonwhite families intrinsically caused property value to decline.[98] Contemporary observers noted, however, that racially prejudiced white homeowners sought to leave neighborhoods that they perceived were integrating, by engaging in "panic selling" at any cost, which in turn led to a reduction in home values.[99] Thus, although the hypothesis that minority residents depressed property values was entirely a self-fulfilling prophecy, the association nonetheless quickly took on the weight of legal presumption in cases upholding racially restrictive covenants.[100]

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95. *See* Dubin, *supra* note 52, at 761 (citing cases).

96. *See* KUSHNER, *supra* note 43, at 13–14 (documenting the "widespread use of public improvement projects, which destroy integrated neighborhoods and resettle displacees in a segregated pattern, compris[ing] both the traditional and [contemporary] policy of federal, state, and local agencies").

97. *See* ROBERT D. BULLARD ET. AL, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE AT TWENTY 1987–2007, 52 (2007) ("Host neighborhoods with commercial hazardous waste facilities are 56% people of color whereas non-host areas are 30% people of color.").

98. *See* LAURENTI, *supra* note 56, at 47 (concluding that "the entry of nonwhites into previously all-white neighborhoods was much more often associated with price improvement or stability than with price weakening"); 1961 COMMISSION, *supra* note 84, at 3 ("[T]here is considerable evidence that the standards of a neighborhood and the property values need not be depreciated by the presence of Negroes, [but] these fears by their own force can become self-fulfilling prophecies."); *see also* KUSHNER, *supra* note 43, at 20 n.46 (collecting studies).

99. *See* HOMER HOYT, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO, *in* URBAN BLIGHT AND SLUMS, *supra* note 92, at 13, 33 ("Part of the attitude reflected in lower land values [of property occupied by racial and ethnic minorities] is due entirely to racial prejudice, which may have no reasonable basis. Nevertheless, if the entrance of a colored family into a white neighborhood causes a general exodus of the white people, such dislikes are reflected in property values."). For a discussion of other mechanisms by which "[b]eliefs about race and property values, whether or not based on factual evidence, became reality," see Armstrong, *supra* note 32, at 1056–60.

100. *See, e.g.*, Burkhardt v. Lofton, 146 P.2d 720, 724 (Cal. Dist. Ct. App. 1944) ("Racial restrictions have been employed in the development of countless residential communities and have very generally been considered essential to the maintenance and stability of property values."). Notably, however, judges were far less sympathetic to the occasional cases brought by white plaintiffs attempting to prevent black families from moving nearby through the common law nuisance theory, as

Beginning in the mid-1930s, the concept of urban "blight" formalized and expanded this theory.[101] Wendell Pritchett details how urban reformers developed this language, imported from the study of plant diseases, to describe the decline in central urban residential communities.[102] According to these planners, "unguided urban growth" led to the incursion of industrial and commercial land uses in the residential neighborhoods surrounding central business districts.[103] The landlords of these increasingly dilapidated buildings subdivided them into smaller and smaller homes that they would then rent to "invading" ethnic and racial minorities, who were restricted by racial covenants from renting or buying homes in any other neighborhood.[104] The combination of the "indiscriminate" interspersing of industrial and residential land use and neighborhood overcrowding led to neighborhood conditions that drained city resources.[105] The metaphor of blight, which constantly threatened to spread malaise to neighboring districts, became an important tool used to justify the use of eminent domain proceedings to "cut out the whole cancer of dilapidated neighborhoods through post-World War II urban renewal projects.[106]

The Supreme Court soon endorsed this rhetoric,[107] just as it had in *Euclid*. In doing so, the Court once again validated a land use that disproportionately harmed racial minorities. In the 1954 case *Berman v. Parker*, the Supreme Court interpreted the "public use" requirement of the Takings Clause[108] to permit the demolition of minority neighborhoods in the name of eliminating blight.[109] Specifically, the Court found that the elimination of blight and beautification of communities was a permissible exercise of congressional

explored by Rachel Godsil. *See* Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 506–07 (2006).

101. *See generally* Shatts, *supra* note 92.

102. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 13–21 (2003).

103. *Id.* at 17 (citing MEL SCOTT, METROPOLITAN LOS ANGELES: ONE COMMUNITY 108 (1950)).

104. *Id.* at 16–17 (citing Ernest Burgess, *The Growth of the City: An Introduction to a Research Project*, *in* THE CITY 54 (Robert E. Park et al. eds., 1925)).

105. *Id.* at 17. (citing MEL SCOTT, METROPOLITAN LOS ANGELES: ONE COMMUNITY 108 (1950)).

106. *Id.* at 18 (quoting Joseph D. McGoldrick, *The Superblock Instead of Slums*, N.Y. TIMES MAG., Nov. 19, 1944, at 54–55); *see also* Edward Imperatore, Note, *Discriminatory Condemnations and the Fair Housing Act*, 96 GEO. L.J. 1027, 1030–33 (2008) (summarizing the origins of the term "blight" in the legal context).

107. *See* Berman v. Parker, 348 U.S. 26, 32–33 (1954) ("Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.").

108. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

109. *Berman*, 348 U.S. at 26.

authority, even if it required taking private land for such "public" purposes.[110] This paved the way for municipalities to use eminent domain, in the guise of "urban renewal," to eliminate black communities and replace them with highway infrastructure, public parks, sports stadiums, hospitals, universities, and higher-end residential communities.[111] These projects, which destroyed black communities and accelerated their economic decline, forged a lasting connection between racial and ethnic minorities and declining neighborhood quality in the minds of legislators and judges for decades to come. Even if the term "blight" was originally intended to refer to places, it inevitably became associated with people[112]—specifically, the African Americans and immigrants who were most likely to live in dilapidated neighborhoods as a result of private sector discrimination.[113]

By enshrining the rhetoric of blight removal as a valid exercise of the police power of government, and according it the highest level of judicial deference,[114] the Court in *Berman* secured the ground in which later resistance to integration could take root, as described in Part II below. The theory that the mere presence of minority and low-income families caused harm to property value never fully receded, and today plays a key role in justifying municipal and private actions that perpetuate segregation.[115] While this theory has been refined over time to emphasize economic rather than racial justifications, its initial design as a justification for racial discrimination continues to linger.

D. The Fair Housing Act as a Response to Segregation

Today, the Fair Housing Act stands as the primary federal response to the housing segregation that pervades American communities. By 1968 the egregious harms caused by racial segregation had risen to epic proportions. For

110. *Id.* at 33–34.

111. *See* KUSHNER, *supra* note 43, at 37–41; June Manning Thomas, *Model Cities Revisited: Issues of Race and Empowerment*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY, *supra* note 45, at 143–44. Many critics described the impact of urban renewal as "Negro removal." *See id.* at 144.

112. *See* Pritchett, *supra* note 102, at 6 ("Blight was a facially neutral term infused with racial and ethnic prejudice. While it purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods. . . . By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation.").

113. For example, the Washington D.C. neighborhood targeted for condemnation and eminent domain in *Berman* was 97.5 percent black. *Berman*, 348 U.S. at 30; Pritchett, *supra* note 102, at 44–45.

114. *Berman*, 348 U.S. at 32 (holding that "public use" for purposes of the Takings Clause was coterminous with the police power of legislatures to regulate "public safety, public health, morality, peace and quiet, law and order").

115. *See* Armstrong, *supra* note 32, at 1059 ("White perceptions that black ownership adversely affects property values thus becomes a self-fulfilling prophecy that, even today, continues to harm African-Americans as both purchasers and owners of real property.").

years black families who attempted to escape exploitative rents and living conditions by purchasing homes in white neighborhoods faced white mob violence and terror.[116] These race riots preceded the far better-known outbreaks of violence in overcrowded urban neighborhoods across the nation in the 1960s. In February 1968, the Kerner Commission issued its groundbreaking report warning that "[o]ur nation is moving toward two societies, one black, one white—separate and unequal. . . . Discrimination and segregation have long permeated much of American life; they now threaten the future of every American."[117]

In response to the Kerner Commission's scathing assessment, Congress enacted Title VIII of the Civil Rights Act of 1968, better known as the Fair Housing Act,[118] with the goal "to provide, within constitutional limitations, for fair housing throughout the United States."[119] The Fair Housing Act aimed to eliminate obstacles to housing opportunity posed by both the public and private sectors. Its hallmark provision makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race."[120] Early cases suggest that the phrase "otherwise make unavailable" in section 804(a) of the Fair Housing Act (42 U.S.C. § 3604(a)) should be understood to be "as broad as Congress could have made it and [as] reach[ing] every private and public practice that makes housing more difficult to obtain on prohibited grounds."[121] Claims brought under § 3604(a) include actions for racial steering,[122] exclusionary zoning,[123] redlining and discriminatory appraisals,[124] and a wide range of other practices that somehow make housing

116. *See* MEYER, *supra* note 45, at 115–32.

117. U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

118. Fair Housing Act, 42 U.S.C. §§ 3601 - 3619 (2006).

119. 42 U.S.C. § 3601.

120. 42 U.S.C. § 3604(a).

121. *See* United States v. Hous. Auth. of Chickasaw, 504 F. Supp. 716, 726 (S.D. Ala. 1980); *see also* Steptoe v. Beverly Area Planning Ass'n, 674 F. Supp. 1313, 1318 (N.D. Ill. 1987). ("[A]lthough section 3604(a) applies principally to the sale or rental of dwellings, it also encompasses a wide variety of discriminatory practices that affect detrimentally the availability of housing to minorities and thereby make housing more difficult to obtain.").

122. *See, e.g.*, City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086 (7th Cir. 1992) (holding that Title VIII prohibits real estate agents from "steering" prospective homebuyers to specific neighborhoods based on their race).

123. *See, e.g.*, Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) (finding municipalities' refusal to rezone tract of land to accommodate multifamily housing a potential Fair Housing Act violation); United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1184 (2d Cir. 1987) (holding city's "practice of confining subsidized housing to Southwest Yonkers[] had intentionally enhanced racial segregation in housing in Yonkers" in violation of Fair Housing Act). Exclusionary zoning refers to municipal practices that refuse to accommodate subsidized housing, multi-family housing, or other housing more likely to be occupied by people of modest means.

124. *See, e.g.*, Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489, 493 (S.D. Ohio 1976). Redlining refers to the practice by banks and other financial institutions of allocating different services and interest rates to particular neighborhoods on the basis of race. Discriminatory appraisals conducted by independent appraisers or those retained by banks or real estate agents estimate the value of homes

"unavailable" to people because of their membership in a protected category.[125] Section 3604(b) makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race."[126] Claims brought under § 3604(b) include actions for refusal to provide home insurance or charging different rates on the basis of race,[127] discriminatory eviction notices[128] and rental rates,[129] and sexual harassment of tenants.[130]

Lawmakers, acutely aware of the interaction between private sector discrimination and government action, structured the Fair Housing Act not merely to prohibit discrimination by the private sector, but to mandate that the government also act affirmatively against discrimination. Section 3608(d) mandates that "[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter."[131]

In response to the real estate industry's practice of inducing panic selling in racially transitioning neighborhoods, the statute's anti-blockbusting provision, § 3604(e), makes it unlawful, "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin."[132] As one court noted, "[t]he purpose of this section is to prevent individuals from preying upon the fears of property owners in racially transitional areas and thereby inducing the kind of panic selling which results in community instability."[133]

The Fair Housing Act, along with other government action aimed at ending discrimination in voting, employment, education, and access to public accommodations, was part of a sweeping set of legal and social reforms described as the "Second Reconstruction."[134] True to the principles of the

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differently based on the racial composition of the neighborhoods in which they are located, or based on the race of current occupants.

125. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 13.46 (2011) ("It is impossible to identify all of the discriminatory practices that might eventually be held to violate § 3604(a).").

126. 42 U.S.C. § 3604(b) (2006) (emphasis added).

127. *See* NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 297 (7th Cir. 1992).

128. *See* Betsey v. Turtle Creek Assocs., 736 F.2d 983 (4th Cir. 1984).

129. *See* Harris v. Itzhaki, 183 F.3d 1043, 1052–53 (9th Cir. 1999).

130. *See* DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996).

131. 42 U.S.C. § 3608(d).

132. 42 U.S.C. § 3604(e).

133. Zuch v. Hussey, 394 F. Supp. 1028, 1049 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977).

134. *See, e.g.*, Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1982–2001 (2000); Eric K. Yamamoto et al., *Dismantling*

original Reconstruction,[135] lawmakers predicated these reforms on a bold assertion of federal power. Legislative sponsors expressed their belief that the Act could help achieve "truly integrated and balanced living patterns."[136]

Yet success in attaining this goal has been modest, at best. In 2010, the "dissimilarity index"—a common measure of segregation that represents the percentage of people of a particular minority group who would have to move to other census tracts in order to have a perfectly integrated city—remained at an astonishing 65 percent,[137] compared with 83 percent in 1970.[138] Many scholars have explored a range of reasons to explain these disappointing results: Professor john a. powell attributes the tempered success of the Fair Housing Act in part to the orientation of the legislation toward overt and interpersonal bias rather than implicit and systemic bias.[139] Wendell Pritchett notes that targeting racial discrimination is insufficient to address the interaction between race and class in creating and maintaining segregation.[140] Others note that the

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Civil Rights: Multiracial Resistance and Reconstruction, 31 CUMB. L. REV. 523, 531 (2001) (describing civil rights legislation of the 1960s).

135. In 1976, Justice Rehnquist wrote,

> There can be no doubt that this line of cases [upholding Reconstruction legislation] has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers with the corresponding diminution of state sovereignty found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments.

Fitzpatrick v. Bitzer, 427 U.S. 445, 455–56 (1976).

136. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972); *see also* John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1070 (1998) (describing the Fair Housing Act as "not simply an equal-opportunity law, but . . . also [as] an open-society law"). *But see* Brian Patrick Larkin, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1627 (2007) (citing Congressional Record statements by Senator Mondale and his co-sponsor, Senator Brooke, that the Fair Housing Act was intended to be only a first step in moving the nation toward integration).

137. Craig Gurian, *New Maps Show Segregation Alive and Well*, REMAPPING DEBATE (April 20, 2011), http://www.remappingdebate.org/map-data-tool/new-maps-show-segregation-alive-and-well ("In 2000, approximately 69 percent of individuals who lived in the [metropolitan areas that had African American populations of at least 5 percent and overall population of 500,000 or more] were living in areas of high segregation between non-Latino African-Americans and non-Latino whites, as measured by a dissimilarity index of 60 or above. In 2010, that percentage was still approximately 65 percent.").

138. Douglas S. Massey & Nancy A. Denton, *Trends in the Residential Segregation of Blacks, Hispanics, and Asians: 1970–1980*, 52 AM. SOC. REV. 802, 803 (1987) (finding that the dissimilarity index for the twenty-nine largest metropolitan areas was at .831).

139. powell, *supra* note 31, at 612–15. powell explains that although the Fair Housing Act's "focus on anti-discrimination normative measures has served to increase the freedom of choice for homebuyers," it has not effectively addressed patterns of segregation in part because white homeowners tend to leave a community as soon as the population of African Americans reaches a particular "tipping point," and because "[e]xclusionary zoning and localism, combined with a lack of federal support and court support for metropolitan school desegregation have doomed the prospects of integrated metropolitan regions." *Id.*

140. Pritchett, *supra* note 34, at 469–70 (noting that while the Fair Housing Act had been relatively successful in addressing housing discrimination, "[h]ousing discrimination and racial

Act's primary focus on the transactional aspect of housing makes it poorly suited for rooting out pervasive and systematic patterns of segregation.[141]

Today, racial segregation in housing remains firmly entrenched in the United States. This lingering legacy reflects both the history of formal segregation, as seen through racial zoning and the association of minority residents with declines in property values, and continuing de facto segregation via public and private mechanisms with a racially discriminatory impact. While the enactment of the Fair Housing Act in the late 1960s sought to minimize this inequality, the effectiveness of the Act has been greatly hindered by courts' reluctance to intervene to unsettle the expectations of white property owners who continue enjoying the fruits of enhanced property values resulting from government-backed segregation.

II.
THE DOUBLE STANDARD OF JUDICIAL INTERVENTION TO PROTECT PROPERTY VALUE

The Fair Housing Act's limited success in ending racial segregation stems in part from the powerful judicial tendency to overprotect white and middle class interests in property value. Courts consistently find that while the Fair Housing Act was indeed designed to advance integration, it cannot be read to upend "settled expectations" of white homeowners to continue living in racially and economically homogenous communities.[142] Indeed, at times courts have

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segregation, while they are intimately related, are not the result of the same set of factors. Achieving racial integration would require an assessment of the interaction of race and class in the creation of American communities," in a manner that the Act was not designed to do); *see also* Turner, *supra* note 31, at 813 ("Today, neighborhoods that are predominantly white or predominantly minority tend to stay that way *not* because minorities are explicitly excluded from white neighborhoods. Instead, multiple factors combine to sustain segregation . . . . One of these factors is the disparity between whites and minorities in incomes and wealth.").

141. For example, Brian Patrick Larkin notes that the Fair Housing Act was primarily designed to remove obstacles to free housing choices for individuals, and that a "structural conflict appears to exist between the Fair Housing Act's dual goals of providing equal and free housing choice and attaining integrated living patterns." Larkin, *supra* note 136, at 1647. Larkin also argues that the FHA has not been successful in rooting out subtle forms of racially discriminatory steering. *Id.* at 1640–47.

142. The Supreme Court has discussed the concept that "settled expectations should not be lightly disrupted," in the context of the presumption against retroactive legislation. Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994). Cheryl Harris has used this term to describe how civil rights remedies have been limited by courts reluctant to disrupt the settled expectations of whites accustomed to the institutionalization of white privilege, describing this as judicial deference to a vested property interest in white status. *See* Harris, *supra* note 34, at 1767–68 ("[T]he parameters of appropriate remedies are not dictated by the scope of the injury to the subjugated, but by the extent of the infringement on settled expectations of whites. These limits to remediation are grounded in the perception that the existing order based on white privilege is not only just 'there,' but also is a property interest worthy of protection."). For an example of how this deference guided the Supreme Court's elimination of race-based remedial measures in education, see Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289–91 (1978). For a broader discussion of the way the Fourteenth Amendment "guarantee

found that this statute designed to *advance* integration itself may protect white homeowners' interest in *resisting* integration.[143] At the same time, many courts reject minority residents' claims that environmental segregation, developed and maintained by municipalities, violates the Fair Housing Act.[144]

As this Section demonstrates, courts privilege white and middle-class property value in several aspects of Fair Housing Act jurisprudence. First, courts have adopted inconsistent interpretations of the threshold requirements of Fair Housing Act claims. This inconsistency manifests as a bias to broadly construe the statute when considering whether it protects the property interests of white plaintiffs challenging the perceived harms of building subsidized, multiracial housing in or near their neighborhoods. In contrast, courts construe the statute more narrowly when considering whether it protects the property interests of minority plaintiffs challenging the actual harms of building or operating noxious environmental facilities. Second, courts have perpetuated the cycle of harm against minorities by too easily accepting as legitimate and nondiscriminatory the defense that predominantly white, middle-class or wealthy communities need not accept subsidized or integrated housing because of the harm it is presumed to pose to property value. Together, these judicial tendencies have prevented the Fair Housing Act from achieving its original objective of integrating American communities.

A. Threshold Inquiries: Whose Interests Does the Fair Housing Act Protect?

In order to cross the threshold of the courtroom to allege a viable claim under the Fair Housing Act, plaintiffs must show both that they have standing to bring their claim (primarily a constitutional inquiry) and that they have a viable cause of action (a statutory inquiry).

The first threshold inquiry for any plaintiff bringing a claim in federal court is whether she has standing under Article III of the Constitution.[145] Article III requires that a plaintiff demonstrate that they have suffered or are likely to suffer an "injury in fact," comprised of: 1) harm (having suffered genuine injury), 2) causation (harm was caused by or "fairly can be traced" to defendant's actions), and 3) redressability (that the injury is "likely to be redressed if requested relief is to be granted").[146] Additionally, federal courts may self-impose prudential limitations which "serve to limit the role of the courts in resolving public disputes."[147] The three prudential limitations most

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of 'equal protection' no longer promotes reform but rather protects the racial status quo," see Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1781 (2012).

143. *See* Alschuler v. Dep't of Hous. & Urban Dev., 686 F.2d 472, 479 (7th Cir. 1982); *infra* notes 181–92 and accompanying text.

144. *See* Cox v. City of Dallas, 430 F.3d 734, 742–43 (5th Cir. 2005); *infra* notes 237–48.

145. U.S. CONST. art. III, § 2, cl. 1 (extending judicial power to "Cases" and "Controversies").

146. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

147. Warth v. Seldin, 422 U.S. 490, 500 (1975).

typically invoked are: "[1] the general prohibition on a litigant's raising another person's legal rights, [2] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and [3] the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[148]

These limitations are rooted in a desire by the judiciary to not encroach into the realm of the other branches of government. Thus, Congress may declare through legislation an intent to abridge prudential limitations and "define standing as broadly as is permitted by Article III of the Constitution,"[149] so that the normal prudential rules that courts may impose to limit who can bring cases in federal court do not apply. Congress did precisely this with respect to the Fair Housing Act.[150]

As for Article III standing, although the doctrine has taken many confusing and contradictory turns on the question of whether standing must be assessed solely in terms of a tangible injury, in *Warth v. Seldin* the Supreme Court declared that the "actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[151] Thus, with a statute like the Fair Housing Act, which expressly confers a right to be free from discrimination, courts can determine what comprises an injury for purposes of Article III standing by looking to the statute.

In addition to demonstrating that they have Article III standing, plaintiffs must demonstrate that they have a cause of action under the Fair Housing Act by showing that they are entitled to sue in court (as opposed to bringing an administrative complaint, or having to rely entirely on administrative enforcement) under the statute. The Fair Housing Act creates an express cause of action[152] for any "aggrieved person," defined as "any person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."[153] In other words, under the Fair Housing Act, a plaintiff can show that she is entitled to sue in court by establishing that a discriminatory housing practice has caused her injury. The similarity of this language to that of the evolving doctrine of Article III "injury in fact" has led more than one court and

148. Allen v. Wright, 468 U.S. 737, 751 (1984).

149. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972).

150. *Id.*

151. *Warth*, 422 U.S. at 500.

152. The Fair Housing Act explains,

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

42 U.S.C. § 3613(a)(1)(A) (2006).

153. 42 U.S.C. § 3602(i).

commentators to conclude that the standing inquiry and the cause of action inquiry under the Fair Housing Act are one and the same.[154]

To put it another way, whether a plaintiff has a cause of action under a particular statute, as traditionally or theoretically understood, is purely a matter of statutory interpretation, and whether a plaintiff has Article III standing is a matter of constitutional analysis. However, because statutes can define what Article III "injury" means, in the context of the Fair Housing Act, the question of whether a plaintiff has standing to sue and whether a plaintiff has a cause of action can be resolved by answering the same question: Has the plaintiff been injured in some way by housing discrimination?

To complicate matters, the enforcement provision of the Fair Housing Act does not include actions brought pursuant to 42 U.S.C. § 3608, which requires federal agencies, including the Department of Housing and Urban Development (HUD), to "administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of this subchapter."[155] This is the provision that a wide range of plaintiffs have used to challenge HUD decisions related to the siting and/or subsidizing of affordable housing in particular communities.[156] Because the Fair Housing Act does not create a private cause of action to sue HUD for failing to meet its obligations under § 3608, plaintiffs must find another way into the courtroom if they wish to enforce this provision.[157]

That way is through the Administrative Procedures Act (APA), which entitles a person who is "adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . to judicial review thereof."[158] As shown in Section 1 below, this is often the mechanism by which white plaintiffs challenge the actions of HUD in supporting the construction of low-income housing or other integration efforts. Thus, because plaintiffs who sue HUD for failing to meet its affirmative obligations under § 3608 are technically stating a cause of action under the APA rather than the Fair Housing Act, a court may (some would say it must) impose the prudential requirements when evaluating standing.[159] For the Administrative Procedures Act, the prudential

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154. As the leading treatise on fair housing law explains: "As long as the Article III requirements are satisfied, the question of whether a particular plaintiff has standing under the Fair Housing Act . . . is essentially the same as whether that provision is interpreted to give that plaintiff a private right of action on the merits." *See* SCHWEMM, *supra* note 125, § 31:4.

155. 42 U.S.C. § 3608(d); *see also* § 3608(e)(5) (mandating that the Secretary of HUD "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter").

156. *See* SCHWEMM, *supra* note 125, § 21:3.

157. *See id.*, § 12B:7 ("[B]ecause the Fair Housing Act's enforcement provisions do not cover violations of § 3608, these cases have been brought pursuant to other authorizing statutes, usually the Administrative Procedure Act (APA)").

158. 5 U.S.C. § 702 (2006).

159. *See, e.g.*, Jorman v. Veterans Admin., 500 F. Supp. 460, 463 (N.D. Ill. 1980) (applying prudential standing requirements to a claim brought under 42 U.S.C. § 3608(c), and noting that

standing requirement that a complainant demonstrate that "the interest sought to be protected . . . is arguably within the *zone of interests* to be protected or regulated by the statute" is crucial.[160]

As Section 1 below demonstrates, some courts have interpreted the zone of interests protected by the Fair Housing Act to include the interest of white plaintiffs in keeping HUD-sponsored housing for racial minorities out of their communities. In contrast, as Section 2 describes, courts take a far narrower approach to determine whether a discriminatory housing practice has injured a minority plaintiff, entitling them to bring suit pursuant to 42 U.S.C. § 3613. This contrast illustrates how courts shrink or enlarge the door to the courtroom depending on the identity and asserted interest of the plaintiff.

1. Standing as a Selective Gatekeeper of Fair Housing Claims

The question of standing under the Fair Housing Act, which has been the target of much judicial and scholarly discussion,[161] was interpreted generously in the years following the statute's enactment. For example, in *Trafficante v. Metropolitan Life Insurance Company*, the Supreme Court upheld the theory of third-party standing in the context of housing discrimination, noting that the *current* residents of a predominantly white apartment complex had standing to sue under the Fair Housing Act to stop realtors from steering black *potential* residents away from their community.[162] The Court found that the defendants' alleged violation of another person's civil rights was sufficient to give the plaintiffs third-party standing.[163]

In upholding this theory of third-party standing, the Court drew on the Third Circuit's decision in *Shannon v. Department of Housing and Urban*

"[p]laintiffs concede that Count I, brought under 42 U.S.C. § 3608(c), is not subject to the liberal standing provisions of 42 U.S.C. §§ 3610(d) and 3612, and, therefore, *Bellwood* does not strictly apply").

160. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (emphasis added).

161. *See, e.g.*, Dash T. Douglas, *Standing on Shaky Ground: Standing Under the Fair Housing Act*, 34 AKRON L. REV. 613 (2001); Paul A. LeBel, *Standing After* Havens Realty*: A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013; Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547 (1995).

162. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972).

163. *Id.* at 208 (recognizing plaintiffs' injury of loss of "social benefits of living in an integrated community; . . . missed business and professional advantages which would have accrued if they had lived with members of minority groups; . . . [and] embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto.'"). Writing for the majority, Justice Douglas noted that "the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations." *Id.* at 209–10. Note that in the Title VII employment discrimination context, the Supreme Court has since declined to follow *Trafficante's* theory of third-party standing. *See* Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 869 (2011). *Thompson* does not disturb the continued applicability of *Trafficante*, which was a Title VIII housing discrimination case, to housing discrimination claims.

Development.[164] In *Shannon*, the Third Circuit addressed a claim challenging HUD's decision to subsidize an apartment development in the East Poplar neighborhood of Philadelphia, where many low-income black residents already lived. The City of Philadelphia had selected East Poplar for redevelopment to encourage owner-occupied housing when HUD approved a federally subsidized apartment complex for low- and moderate-income families within East Poplar.[165] The plaintiffs—"white and black residents (some homeowners and some tenants), businessmen in, and representatives of private civic organizations"[166]—argued that the project "[would] have the effect of increasing the already high concentration of low income black residents in the East Poplar Urban Renewal Area," and that HUD "did not consider [the project's] effect on racial concentration in that neighborhood or in the City of Philadelphia as a whole."[167] In doing so, they argued, HUD failed to provide for fair housing as required under § 3608, instead repeating a historical pattern of confining low-income housing to particular communities.[168]

Because the *Shannon* plaintiffs brought their claim under the Administrative Procedures Act, alleging that HUD failed to meet its statutory duty to affirmatively further the goals of the Fair Housing Act, they needed to satisfy certain threshold requirements. In particular, they needed to show that they were "sufficiently aggrieved by agency action for standing to sue"—that is, that their interests were within the zone of interests that Congress intended the statute to protect.[169]

The Third Circuit held that the plaintiffs' interest in challenging discriminatory site selection for the apartment complex was indeed within the zone of interests Congress intended to be protected by the Fair Housing Act.[170] The court relied on the "racial concentration" theory set forth by the plaintiffs—the idea that "concentration of low rent public housing can have adverse social, and hence planning, consequences."[171] The court observed that the HUD manual itself discouraged proposals to "locate housing only in areas of racial concentration."[172] The court thus concluded that "[i]ncrease or

164. *See Trafficante*, 409 U.S. at 211 (explaining that the citizen enforcement section of the Fair Housing Act "serves an important role . . . in protecting not only those against whom a discrimination is directed but also those whose complaint is that the manner of managing a housing project affects 'the very quality of their daily lives.'") (quoting Shannon v. U.S. Dept. of Hous. & Urban Dev., 436 F.2d 809, 818 (3d Cir. 1970)).

165. *Shannon*, 436 F.2d at 814.

166. *Id.* at 811.

167. *Id.* at 812.

168. *Id.* at 819.

169. *Id.* at 818.

170. *Id.* The court also found that the plaintiffs could establish Article III standing based on their alleged injury "that the concentration of lower income black residents in a . . . rent supplement project in their neighborhood will adversely affect not only their investments in homes and businesses, but even the very quality of their daily lives." *Id.*

171. *Id.* at 819–20.

172. *Id.*

maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy."[173] This in turn imposed on HUD a new affirmative duty to evaluate the impact of proposed public or subsidized housing on the "racial concentration" of neighborhoods.[174]

The *Shannon* court's direct association of the terms "racial concentration" and "urban blight," was unfortunate; however, its decision must be understood in factual and historical context. The *Shannon* plaintiffs were challenging a government decision that would continue the concentration of poverty and limit low-income families' geographic access to those neighborhoods that poor people and racial minorities were historically required to occupy.[175] Specifically, the Third Circuit's decision was expressly grounded in the acknowledgment that, historically, the government had played a critical role in contributing to racial segregation by pursuing policies designed to concentrate minority residents in specific areas. The court drew on the legacy of *Gautreaux v. Chicago Housing Authority*, a district court decision that struck down as unconstitutional the Chicago Housing Authority's actions in "intentionally cho[osing] sites for family public housing . . . for the purpose of maintaining existing patterns of residential separation of races in Chicago."[176] The *Shannon* court explained that the role that the Chicago Housing Authority had played in deliberately segregating public housing "would seem to have the same potential for perpetuating racial segregation as the low rent public housing program has had."[177]

In retrospect, the expansive nature of early Fair Housing Act standing jurisprudence, exemplified by *Shannon* and *Trafficante*, created fertile ground for the remedial civil rights measure to be co-opted by white plaintiffs seeking to keep racial and ethnic minorities out of their neighborhoods. For example, the use of the term "racial concentration"— rather than a less fraught term like "increased segregation"—has led many plaintiffs, and a few courts, to conclude that *Shannon* stands for the proposition that the very *presence* of any number of additional poor people and racial minorities in any community, including exclusively white communities, can cause harm.[178] This in turn has paved the

173. *Id.* at 821.

174. *Id.* ("[T]he Agency must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts.").

175. *Id.* at 820 ("Possibly before 1964 the administrators of the federal housing programs could, by concentrating on land use controls, building code enforcement, and physical conditions of buildings, remain blind to the very real effect that racial concentration has had in the development of urban blight.").

176. Gautreaux v. Chi. Hous. Auth., 296 F. Supp. 907, 908 (N.D. Ill. 1969).

177. *Shannon*, 436 F.2d at 820.

178. *See, e.g.*, Alschuler v. Dep't of Hous. & Urban Dev., 515 F. Supp. 1212, 1215–17 (N.D. Ill. 1981), *aff'd and remanded*, 686 F.2d 472 (7th Cir. 1982); *infra* notes 180–91 and accompanying text.

path for decisions recognizing white plaintiffs' standing in legal challenges to integration.[179] White and middle-income residents in a variety of neighborhoods seized this opportunity to challenge the siting of federally subsidized and public housing. Many were unsuccessful.[180]

However, in *Alschuler v. Department of Housing & Urban Development*, the Seventh Circuit did recognize the standing of such plaintiffs—members of an association of homeowners comprised of "generally upper middle and upper class families"—to challenge a proposal by HUD to subsidize the construction of low-income housing, several blocks from plaintiffs' single-family home neighborhood.[181] Fifty-eight out of sixty members of the association were white.[182] HUD had chosen their neighborhood for the rehabilitation of homes as publicly subsidized units because it was "in a relatively attractive area with several parks and playgrounds, good public transportation, and above average commercial and community services."[183]

The Seventh Circuit found that the interests of the members of the association were within the zone of interests protected by the Fair Housing Act. First, the court analyzed "[p]laintiffs' standing to claim, [under § 3608], that [the challenged apartment complex] would tip the racial balance of their neighborhood" by introducing minorities into the community.[184] To support this point, the court then cited *Trafficante* for the proposition that "even those who are not direct objects of discrimination have an interest in ensuring fair

179. Some circuits and decisions do adopt the racial concentration analysis of *Shannon* in its full context. *See, e.g.*, Jackson v. Okaloosa Cnty., Fla., 21 F.3d 1531, 1538 (11th Cir. 1994) (holding that plaintiff, an African-American resident of a "racially impacted area" (defined as having a minority population more than twice the countywide average) who was likely to move into newly constructed public housing had standing to challenge HUD's selection of her current neighborhood, rather than a non-racially-impacted neighborhood, to site the housing); Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1133–34 (2d Cir. 1973) ("The affirmative duty to consider the impact of publicly assisted housing programs on racial concentration and to act affirmatively to promote the policy of fair, integrated housing is not to be put aside whenever racial minorities are willing to accept segregated housing."); *see also Jackson*, 21 F.3d at 1534 n.1 (defining "racially impacted area").

180. *See, e.g.*, Bus. Ass'n of Univ. City v. Landrieu, 660 F.2d 867, 871 (3d Cir. 1981) (involving business associations challenging HUD-subsidized housing near University of Pennsylvania "and middle class community that lives adjacent to the University"); S. E. Chi. Comm'n v. Dep't of Hous. & Urban Dev., 488 F.2d 1119, 1121 (7th Cir. 1973) (involving residents of middle-class Chicago suburbs challenging selection of neighboring parcel of land for HUD-sponsored housing construction, "based on their fear that federal subsidization–which necessarily limited the prospective tenancy of the Lake Village project to persons of low income–would bring a number of poor blacks into the Kenwood area, upsetting the racial balance of that predominantly white area"); Twp. of S. Fayette v. Allegheny Cnty. Hous. Auth., 27 F. Supp. 2d 582, 587 (W.D. Pa. 1998), *aff'd*, 185 F.3d 863 (3d Cir. 1999) (involving a municipality challenging HUD's acquisition of nine townhomes scattered throughout South Fayette for use as single-family public housing units).

181. *Alschuler*, 515 F. Supp. at 1215–17.

182. *Id.* at 1217.

183. *Alschuler*, 686 F.2d 472, 475 (7th Cir. 1982).

184. *Id.* at 477. Section 3608 requires that HUD "administer the programs and activities relating to housing and urban development in a manner affirmatively to further" fair housing. 42 U.S.C. § 3608(e)(2)(5) (2006).

housing."[185] The court concluded that "[t]his generous view of the Act makes clear that plaintiffs are within the zone of interests to be protected."[186]

The *Alschuler* court also held that the plaintiffs' interests were within the "zone of interests to be protected by the regulation requiring HUD to avoid an undue concentration of assisted persons,"[187] concluding, without a hint of irony given plaintiffs' economic status as "generally upper middle and upper class families," that "persons residing in the target area have standing to assert their interest in maintaining an economically balanced neighborhood."[188]

Thus, by omitting the question of *whose* rights had been deprived, the Seventh Circuit in *Alschuler* twisted the holding in *Trafficante* that third-party standing can be based on the harm caused by the deprivation of black families' civil rights.[189] At the same time, by selectively ignoring the fact that the plaintiffs themselves did not live in an area of "racial concentration," as did the plaintiffs in *Shannon*, the court distorted the Third Circuit's rationale for this racial concentration theory.[190] As a result, it permitted the use of the very tool designed to end segregation to admit a group of almost exclusively white homeowners into the courtroom, under the shield of the Fair Housing Act, to argue for actions to defend and continue segregation.[191] Although most other courts addressing similar claims view this effort with far greater skepticism,[192] the logic deployed by the Seventh Circuit in *Alschuler* illustrates the ease with

185. *Alschuler*, 686 F.2d at 477 (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972)).

186. *Id.*

187. *Id.* at 479 (citing 24 C.F.R. § 881.206(c)).

188. The Court also found that plaintiffs had standing under Article III based on their alleged injury in fact:

> [T]hat HUD's approval of the Monterey project will cause substantial harm to their neighborhood by creating an imbalance in the minority and low-income population, breeding an increase in crime, and placing an added strain on community resources," and that "their property values and the 'special environmental, recreational, cultural, historical and aesthetic qualities of the Lake Michigan and Chicago Lakefront Protection District' will be adversely affected.

Id. at 476–79.

189. *Id.* The Seventh Circuit similarly analyzed standing to bring a claim under the Housing and Community Development Act of 1974 in *S.E. Lake View Neighbors v. Dep't of Hous. & Urban Dev.*, 685 F.2d 1027 (7th Cir. 1982). The court found that a neighborhood association in a highly congested urban community had sufficiently alleged injury of "increases in traffic and parking congestion, noise and air pollution, and population density and violent crime," resulting from HUD subsidies for a new housing development, and noting that "[e]ven allegations of a small increase in the already severe urban problems of the area satisfied the injury in fact test." *Id.* at 1034–35.

190. *Alschuler*, 686 F.2d at 477–78 ("This generous view of the Act makes clear that plaintiffs are within the zone of interests to be protected and therefore have standing under the APA to challenge HUD's decision . . . .") (citing Shannon v. U.S. Dept. of Hous. & Urban Dev., 436 F.2d 809, 817–18 (3d Cir. 1970)).

191. The court did rule against the plaintiffs on the merits, however, holding that they could not show that HUD's selection of their neighborhood was arbitrary or capricious, the standard of judicial review for agency actions challenged under the Administrative Procedures Act. *Id.* at 487.

192. *See* cases cited *supra* note 180.

which judges accept the theory that an increase in racial minorities can cause the kind of harm deserving of adjudication by a federal court.

The Seventh Circuit's sympathy for the property value interest of white plaintiffs is even clearer when compared to the parsimonious approach the Eleventh Circuit took to an analogous Fair Housing Act claim for minority plaintiffs alleging harm to property value. In *Nasser v. City of Homewood*, the Eleventh Circuit addressed a challenge by owners of land that had been recently annexed by the city of Homewood, Alabama, and subsequently rezoned from multifamily residential to single-family residential.[193] Whereas in *Alschuler* the plaintiffs were white homeowners challenging HUD's attempts to *bring* multifamily housing into their community,[194] in *Nasser* the plaintiffs were property owners challenging a local government decision to rezone their property in order to *prevent them from bringing* multifamily housing into their community.[195]

The plaintiffs in *Nasser* owned undeveloped property, zoned for multifamily housing, on unincorporated land just outside the city of Homewood.[196] In 1976 the owners entered into an agreement with a developer to explore the "possibility of having the said real property developed under some program supported by [HUD]."[197] After that particular development did not materialize, the City of Homewood annexed the entire property in 1979, and promptly rezoned it to permit only single-family residences.[198] The city's action effectively caused the value of the property to drop by more than half,[199] and the plaintiffs alleged that this diminution in property value comprised an injury-in-fact for purposes of bringing a Fair Housing Act claim.[200]

The Eleventh Circuit held that the plaintiffs were not "persons aggrieved" within the meaning of the Fair Housing Act, noting that "[t]heir interest in value of the property in no way implicates values protected by the Act."[201] The court expressly disavowed reading *Gladstone v. Village of Bellwood* as holding that "Congress intended to remove all prudential limitations from standing under the Fair Housing Act so that any party injured in some manner could sue to enforce the rights directly protected by the Act."[202] Instead, it concluded that

193. Nasser v. City of Homewood, 671 F.2d 432, 434 (11th Cir. 1982).
194. *Alschuler*, 515 F. Supp. at 1217 (N.D. Ill. 1981).
195. *Nasser*, 671 F.2d at 435.
196. *Id.* at 434.
197. *Id.* at 435.
198. *Id.* at 434.
199. This effect illustrates the tenuous nature of the claim that multifamily housing has a negative impact on property value. In this case, the change in zoning designation likely caused the property value to diminish, because land zoned for multifamily housing may be more valuable to a developer who can build and sell many more units of housing than she may be able to sell on land of comparable size limited to single-family residences with minimum lot sizes.
200. *Nasser*, 671 F.2d at 436–37.
201. *Id.* at 437.
202. *Id.*

"[t]here is no indication that the Court intended to extend standing, beyond the facts before it, to plaintiffs who show no more than an economic interest which is not somehow affected by a racial interest."[203]

There is thus a clear contrast between the approaches taken by the Seventh Circuit in *Alshuler* and the Eleventh Circuit in *Nasser*. The Seventh Circuit had no trouble recognizing that the "racial interest" affecting the *Alschuler* plaintiffs' economic interest in maintaining their property value was the "imbalance in the minority and low-income population, breeding an increase in crime, and placing an added strain on community resources."[204] Meanwhile, in *Nasser* the Eleventh Circuit could not imagine that the process of deliberately "upzoning" a tract of land to preclude the property owner from developing multifamily housing implicated any racial interests. Indeed, the court rejected the "implicit assumption" in the affidavits of plaintiffs' witnesses that "'low and moderate-income housing' is synonymous with housing for minorities protected by the Fair Housing Act."[205] Despite the fact that this association is embedded in a range of statutory, administrative, and judicial[206] decisions, and that the *Nasser* defendants did not dispute this assumption, the Eleventh Circuit independently concluded: "[w]e would not lightly, if at all, indulge such an assumption."[207]

In *James v. City of Dallas*, the Fifth Circuit took a similarly mean-spirited approach of manipulating standing analysis to bar from the courtroom minority plaintiffs seeking to halt the City of Dallas's practice of racially discriminatory housing demolition, and the use of racial classification in making those demolitions.[208] The court's analysis hinged on a remarkably narrow interpretation of the redressability prong of standing. The City of Dallas had used *overt* racial classification to target minority homeowners for "no-notice" demolition to correct housing code violations.[209] The plaintiffs alleged that this perpetuated racial segregation and depreciated the value of their property in violation of the Fair Housing Act,[210] and argued that they had standing to bring their claim because the "wide scale demolition marks the areas as slums, discourages public and private investment, and reduces the viability of the neighborhoods."[211] Yet the court held that the plaintiffs did not have standing

203. *Id.*

204. Alschuler v. Dep't of Hous. & Urban Dev., 686 F.2d 472, 476 (7th Cir. 1982).

205. *Nasser*, 671 F.2d at 435.

206. *Cf.* United States v. City of Black Jack, 508 F.2d 1179, 1182–83, 1188 (8th Cir. 1974) (finding city action in incorporating, then upzoning from multifamily to single-family, unincorporated land on city outskirts, upon learning of a proposal to build federally subsidized multifamily housing, violated Fair Housing Act).

207. *Nasser*, 671 F.2d at 435.

208. James v. City of Dallas, 254 F.3d 551, 558 (5th Cir. 2001).

209. *Id.* at 558–59.

210. *Id.* at 566.

211. Brief of Appellees at 28, *James*, 254 F.3d 551 (5th Cir. 2001) (No. 00-10556), 2000 WL 33980016 at *28.

to seek injunctive relief barring *future* demolitions of other people's homes in their neighborhoods, because they could not show how their injury of losing their homes, and experiencing ongoing devaluation of their property as a result of racially discriminatory demolitions could be redressed by a bar on future such demolitions.[212] The court additionally refused to enjoin the use of racial classifications in the selection of homes to be demolished, noting that an "alteration of the classification system may not have any impact on their property or their neighborhoods."[213]

The parsimonious analyses of standing to exclude the *Nasser* and *James* plaintiffs from the courtroom illustrate critiques voiced by many scholars that courts use standing to avoid confronting the challenges of civil rights litigation.[214] Although the doctrine of standing was first articulated in the 1930s,[215] its invocation to block any kind of litigation rose sharply following the passage of civil rights statutes and the brief revitalization of equal protection safeguards in the 1960s.[216] This phenomenon of utilizing standing requirements to reject legal claims of discrimination is reflected in the evolution of standing doctrine under the Fair Housing Act.[217] In light of early Fair Housing Act jurisprudence—with a characteristically expansive approach to conferring standing on a wide range of people harmed by racial discrimination—the manipulation of standing to permit white neighborhoods to invoke the protections of the Fair Housing Act to protect against the "harms" of racial integration is especially pernicious.

This phenomenon mirrors the pattern that has emerged for housing discrimination claims brought under the Equal Protection Clause. In those cases, white plaintiffs successfully co-opted a constitutional protection intended to protect the rights of racial minorities, in the wake of the Civil War and Emancipation, to successfully block remedial residential integration

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212. *James*, 254 F.3d at 567.

213. *Id.*

214. *See, e.g.*, Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) (arguing that standing doctrine has become a way to favor the powerful over the powerless); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1473 (1995) (arguing that the racially disparate impact of the Supreme Court's standing decisions suggests intentional discrimination).

215. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 225 (1988).

216. Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1923 (1986) (suggesting that "[t]he Burger Court responded to what it apparently perceived as a barrage of constitutional grievances by substantially tightening" the test for standing from a simple showing of "injury in fact" to a more demanding standard of a "distinct and palpable" injury) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)).

217. In *Warth v. Seldin*, the Supreme Court imposed nearly insurmountable obstacles for plaintiffs challenging exclusionary zoning in the absence of a specific developer proposing to build a specific housing development. 422 U.S. 490 (1975). Because developers are unlikely to invest the time and money into creating a development proposal for land that is not properly zoned, this means challenges to exclusionary zoning have been few and far between. *Id.*

measures.[218] In fact, the Fifth Circuit's standing analysis in *James* (which included an equal protection claim) reflects an egregious double standard in analyzing equal protection claims of white versus minority plaintiffs alleging housing discrimination that resulted in property value diminution. In *Walker v. City of Mesquite*, for example, the court concluded that white plaintiffs had standing to challenge the construction of public housing pursuant to a court-ordered remedial measure that used racial classification, but in *James v. City of Dallas* the court concluded that black plaintiffs did not have standing to challenge the City of Dallas's use of racial classification to target their homes for demolition.[219] The parallel judicial reluctance to view the Fair Housing Act as protecting minority homeowners from the harm to property value caused by noxious land uses further vitiates a tool intended to advance housing opportunity for racial minorities.

Early cases expansively interpreting standing under the Fair Housing Act suggest that the statute should be construed to cover a wide range of actions that maintain segregation. In fact, white plaintiffs have been able to capitalize on this generosity to allege that HUD actions to encourage racial integration are a form of discrimination against their interest in maintaining a predominantly white and/or middle-class neighborhood. At the same time, as the next section shows, minority plaintiffs have been far less successful at arguing that this broad statutory construction should include their claims that the Fair Housing Act protects against acts of environmental segregation.

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218. *See* Michelle Wilde Anderson, *Colorblind Segregation: Equal Protection as a Bar to Neighborhood Integration*, 92 CALIF. L. REV. 841, 844 (2004) (critiquing the Fifth Circuit's decision in *Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999), which upheld the Fourteenth Amendment equal protection claim of white homeowners near an area proposed for public housing as a result of a remedial housing desegregation order by the district court judge).

219. *Compare Walker*, 169 F.3d 978–80 (finding that white homeowners had standing under the equal protection clause to challenge the Dallas Housing Authority's construction of eighty units of public housing in their neighborhood, pursuant to a district court remedial order to build public housing in "predominantly white areas," because white homeowners had suffered a "stigmatizing injury" of racial classification as well as the imminent injury of "a decline in their property values and other problems involving crime, traffic, and diminished aesthetic values"), *with* James v. City of Dallas, 254 F.3d 551, 558, 566 (5th Cir. 2001) (finding that, although the defendant had used overt racial classification to target minority homeowners for "no-notice" demolition to correct housing code violations, the plaintiffs did not have standing to seek injunctive relief barring future demolitions in their neighborhoods, because their "precise injury" of losing their homes, and suffering from an ongoing devaluation of their property as a result of racially discriminatory demolitions could not be redressed by this judicial remedy). Remarkably, the Fifth Circuit in *James* further refused to enjoin the defendant's use of racial classifications in selecting homes for demolition because such relief would not "remedy the alleged ongoing economic effects of past racial discrimination on their particular properties." *Id.* at 567. The court acknowledged that in other contexts the use of any racial classifications alone comprised stigmatic injury sufficient to confer standing, but declined to hold that the plaintiffs had standing on this theory, because they failed to make that argument for themselves. *Id.* at 567 n.17 (citing *Walker*, 169 F.3d at 980).

2. Narrowing the Range of Protected Interests for Minority Plaintiffs

While white plaintiffs have had some success in gaining access to courtrooms to preserve the value of their property locked into place by a history of government-backed segregation, minority plaintiffs have been far less successful in defending the same interest in property from further diminishment by the same history of segregation. The broad, affirmatively worded policy of the Fair Housing Act "to provide . . . for fair housing throughout the United States"[220] highlights the statute's potential to proactively counter segregation. Indeed, courts have interpreted the law's key provision, § 3604—which prohibits actions that discriminate in the sale or rental of a dwelling, "or otherwise make unavailable or deny a dwelling to any person because of race," and which prohibits discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities therewith"—to cover a wide range of systemic and structural barriers to integration.[221] This construction of the Fair Housing Act to address structural as well as interpersonal barriers to integration is consistent with congressional intent to remedy the relegation of black families to overcrowded and under-resourced neighborhoods.

For example, one mechanism that helped reinforce the segregation created through public and private discrimination was what Yale Rabin calls "expulsive zoning."[222] Many municipalities made local land use planning decisions to not only "erect barriers to escape from the concentrated confinement of the inner city," but also to "permit—even promote—the intrusion into black neighborhoods of disruptive incompatible uses that have diminished the quality and undermined the stability of those neighborhoods."[223] If "the reach of the proposed [Fair Housing Act] was to replace the ghettos by truly integrated and balanced living patterns,"[224] then it should not have been too difficult to invoke the statute to challenge this kind of systemic housing and land use decision making that confined racial minorities to the same neighborhoods as environmental hazards. Indeed, the expansive readings of the Fair Housing Act in early judicial decisions—in particular, the emergence of the discriminatory effects theory—gave rise to optimism among legal scholars in the 1990s that the Fair Housing Act could be a viable means of addressing environmental injustice.[225]

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220. 42 U.S.C. § 3601 (2006).

221. *See supra* notes 120–28 and accompanying text.

222. Rabin, *supra* note 53, at 101.

223. *Id.*

224. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (internal quotations and citation omitted).

225. *See* Alice L. Brown & Kevin Lyskowski, *Environmental Justice and Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act)*, 14 VA. ENVTL. L.J. 741, 742–44 (1995) (noting the limitations of claims brought under the Constitution and environmental statutes, and describing procedural, jurisdictional, and substantive advantages of the Fair Housing Act); Luke W. Cole,

This optimism proved to be short-lived. In practice, courts have been unwilling or unable to see the invisible work of noxious land use decision making on segregation, refusing to construe the Fair Housing Act as protecting against the harms of environmental segregation.[226] Instead, courts have added an additional hurdle for plaintiffs to jump over, asking if a defendant's purported violation of the Fair Housing Act harmed the plaintiff in a manner intended to be prevented by the Fair Housing Act.[227] In particular, courts have interpreted the question of what it means to "make [housing] unavailable," with increasing narrowness.[228]

As a result, residents of low-income communities of color have been unsuccessful in their attempts to invoke the protections of the Fair Housing Act to challenge the construction of a polluting facility,[229] a sports venue,[230] or transportation infrastructure in or near their neighborhood, [231] or to challenge municipal neglect of city-owned land that diminished their property value.[232] In ruling that "section 3604(a) does not reach every event 'that might conceivably affect the availability of housing,'"[233] these decisions considerably constricted the expansive reading of the Fair Housing Act established by both the Supreme Court and the federal courts of appeal. In one case, the Fourth Circuit even

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Environmental Justice Litigation: Another Stone in David's Sling, 21 FORDHAM URB. L.J. 523, 534 (1994) (describing Title VIII as an "intriguing" possibility for environmental justice claims, because it does not require proof of intentional racial discrimination, it applies to local government zoning decisions, and defendant need not be recipient of federal funding to be subject to the statute); Terenia Urban Guill, *Environmental Justice Suits Under the Fair Housing Act*, 12 TUL. ENVTL. L.J. 189, 231–32 (1998) (arguing that the legislative intent of the Fair Housing Act supported "an expanded role for the [Act] in the future," such as accommodating "[e]nvironmental decisions with racially disparate impacts on the quality of housing").

226. *See, e.g.*, Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180 (4th Cir. 1999); S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486 (D.N.J. 2003); Laramore v. Ill. Sports Facilities Auth., 722 F. Supp. 443 (N.D. Ill. 1989).

227. *Cf.* Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 423 (4th Cir. 1984) (explaining § 3604 was not "designed to reach every discriminatory act that might conceivably affect the availability of housing").

228. *See, e.g.*, *Jersey Heights*, 174 F.3d at 192 (noting that § 3604(a) does not "reach[] every practice having the effect of making housing more difficult to obtain").

229. *See S. Camden*, 254 F. Supp. 2d at 502 (finding that New Jersey's "decision to grant air pollution permits to SLC which authorized the construction of the cement grinding facility had, at most, a remote impact on the availability of housing in the Waterfront South community").

230. *See Laramore*, 722 F. Supp. at 452 n.5 (rejecting claim that construction of a sports stadium in a historically black neighborhood had anything to do with "the *availability* of housing" protected by § 3604(a)) (internal citation omitted).

231. *See Jersey Heights*, 174 F.3d at 192 (holding that state agencies "did not 'make unavailable or deny a dwelling to any person' within the meaning of the Fair Housing Act. Although the Neighborhood Association claims that this provision reaches every practice having the effect of making housing more difficult to obtain, the text of the statute does not extend so far") (internal citation omitted).

232. *See* Southend Neighborhood Imp. Ass'n v. St. Clair Cnty., 743 F.2d 1207, 1210 (7th Cir. 1984).

233. *See Jersey Heights*, 174 F.3d at 192 (quoting Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 423 (4th Cir. 1984)).

ignored the Supreme Court's broad construction of the Fair Housing Act in favor of citing that Court's narrower interpretation of the Fourteenth Amendment as a reason to constrict the Fair Housing Act.[234]

Courts have affected the shift in the orientation of the Fair Housing Act from its broad vision of integration to a myopic focus on housing transactions in part by construing it to only apply to actions taken before or during acquisition of the property. The Seventh Circuit was the first to begin this narrowing of the Fair Housing Act. In *Southend Neighborhood Improvement Ass'n v. St. Clair County*, the court held that a city's failure to maintain city-owned property in an African American neighborhood, resulting in decreased property value for the plaintiffs, did not affect "the availability of housing in a manner implicating Section 3604(a) of the Fair Housing Act."[235] The court, observing that "[c]ourts have applied this subsection to actions having a direct impact on the ability of potential homebuyers or renters to locate in a particular area, and to indirectly related actions arising from efforts to secure housing," was reluctant to consider that this provision protected the plaintiffs' interest in the value of property they had already acquired.[236]

The Fifth Circuit followed suit in *Cox v. City of Dallas*, where it squarely held that "§ 3604(a) gives no right of action to current owners claiming that the value or 'habitability' of their property has decreased due to discrimination in the delivery of protective city services."[237] In *Cox*, the plaintiffs were African American residents of the neighborhood of Deepwood, which had transitioned from being mostly white to mostly African American between 1970 and 1980.[238] During that same decade, the city and state officials failed to stop illegal dumping at the site of a sand and gravel mining operation in the otherwise-residential community.[239] In 1982, the mining pit was acquired by a new owner, who sought and received a permit from the city to operate it as a solid waste landfill.[240] Neighboring residents began filing complaints with the city almost immediately, citing "massive illegal dumping," truck traffic, noise,

234. *Compare id.* at 193 ("The Supreme Court has cautioned against transforming into positive guarantees the language prohibiting discrimination in the Fourteenth Amendment. . . . We see no reason why this oft-repeated constitutional lesson should not apply to statutory construction as well."), *with* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (recognizing the reach of the Fair Housing Act to include "those whose complaint is that the manner of managing a housing project affects 'the very quality of their daily lives'") (citations omitted).

235. *Southend*, 743 F.2d at 1210 ("[T]he Section 3604(b) prohibition against discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling does not encompass the plaintiffs' allegations.").

236. *Id.*

237. Cox v. City of Dallas, 430 F.3d 734, 742–43 (5th Cir. 2005).

238. *Id.* at 736.

239. *Id.* at 736–37.

240. *Id.* at 736.

and air pollution. Nonetheless, the city declined to revoke the certificate of occupancy for the nonconforming use.[241]

For the next fifteen years, the city alternated between ignoring resident complaints and enforcing permit conditions against the owners.[242] Yet despite two fires on the landfill which burned for a total of ten months, one lawsuit against the owners with a judgment that went ignored, and numerous code enforcement actions, the city continued to renew the certificate of occupancy, and to renew subcontracts with waste disposal services which stated the use of the Deepwood facility as their disposal site.[243] Finally, after the landfill changed owners and became the subject of a massive police enforcement action and two court injunctions, the site was permanently enjoined from operation in 1997, and two of the owners were convicted of organized criminal activity in connection with its operation.[244]

After Deepwood residents brought suit against the city for failing to stop the illegal dumping and noxious operation at the landfill and continuing to issue permits for its operation, the Fifth Circuit affirmed the lower court's finding that the city's actions did not violate § 3604(a).[245] In doing so, the court rejected the plaintiffs' argument that "the dump makes it more difficult for them to sell their houses and lowers the value of their houses."[246] While the court agreed that "[t]he failure of the City to police the Deepwood landfill may have harmed the housing market, decreased home values, or adversely impacted homeowners' 'intangible interests,'" it nevertheless concluded that "such results do not make dwellings 'unavailable' within the meaning of the Act."[247] The court also held that the city's failure to stop years of illegal dumping did not fall within the scope of § 3604(b), noting that "[a]lthough the [Fair Housing Act] is meant to have a broad reach, unmooring the 'services' language from the 'sale or rental' language pushes the [Act] into a general anti-discrimination pose, creating rights for any discriminatory act which impacts property values—for example, for general inadequate police protection in a certain area."[248]

Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n presents another example of a court finding that the Fair Housing Act only applies in preacquisition claims.[249] In *Halprin*, the Seventh Circuit concluded that § 3604(a) had been designed only to address "the widespread practice of refusing

241. *Id.* at 737.
242. *Id.* at 737–39.
243. *Id.* at 737–38.
244. *Id.* at 738–39.
245. *Id.* at 740.
246. *Id.*
247. *Id.*
248. *Id.* at 746.
249. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327 (7th Cir. 2004).

to sell or rent homes in desirable residential areas to members of minority groups," and that it only applied to the "problem . . . of exclusion," not "expulsion."[250] The court held that the actions of a homeowners association that engaged in a campaign of religious harassment against the Jewish plaintiffs were not actionable under § 3604.[251]

Other courts have adopted the logic of *Cox* and *Halprin* that the Fair Housing Act does not apply to post-acquisition claims.[252] In the 2003 case *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, the District of New Jersey held that despite the "underlying policy behind Title VIII . . . to encourage the dispersion of urban ghettos and to create more integrated neighborhoods," the Act did not apply to that state's issuance of operating permits for a cement facility in Waterfront South, an African American and Latino neighborhood.[253] Waterfront South began experiencing a decline in the value of homes and an increase in the rates of asthma as the city of Camden increasingly targeted it for the construction of industrial facilities beginning in the 1990s.[254] The operation of the cement facility contributed to

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250. *Id.* at 329. The court's logic rested on the observation that segregation was so pervasive when the Fair Housing Act was passed that it was narrowly focused only on ending exclusion:

> [T]he problem of how [minority groups] were treated when they were included, that is, when they were allowed to own or rent homes in such areas, was not at the forefront of congressional thinking. *That* problem—the problem not of exclusion but of expulsion—would become acute only when the law forced unwanted associations that might provoke efforts at harassment, and so it would tend not to arise until the Act was enacted and enforced. There is nothing to suggest that Congress was trying to solve that future problem, an endeavor that would have required careful drafting in order to make sure that quarrels between neighbors did not become a routine basis for federal litigation.

Id. The plaintiffs in *Halprin* were religious rather than racial minorities.

251. *Id.*

252. *See, e.g.*, Steele v. City of Port Wentworth, No. CV405-135, 2008 WL 717813, at *12 (S.D. Ga. Mar. 17, 2008) (city's discriminatory refusal to provide water and sewer service to African American community not protected by the Fair Housing Act); Edwards v. Media Borough Council, 430 F. Supp. 2d 445, 451 (E.D. Pa. 2006) (dismissing, as outside the scope of the Fair Housing Act, complaint by an African American plaintiff challenging her municipality's refusal to grant a variance to build townhouses on her property, while granting such a variance to a neighboring white property owner); Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2006 WL 1450520, at *9 (N.D. Tex. May 24, 2006) ("Although discrimination in the provision of such services may diminish property values, such discrimination does not relate to the initial or other sale or rental of Plaintiffs' dwellings, and Plaintiffs have not claimed that such discrimination resulted in actual or constructive eviction from their homes. Those failings are fatal under *Cox*."). *But see Lopez*, 2006 WL 1450520, at *4 (denying City's motion to dismiss claim that the discriminatory failure to provide municipal services made "other plots of land in the Cadillac Heights neighborhood unavailable to third persons on the basis of race" in violation of § 3604(a)).

253. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 500 (D.N.J. 2003) (holding that "it is not true that the tentacles of Title VIII extend beyond the availability of housing or related services" and that "in granting SLC permits to operate a cement grinding facility, the NJDEP's actions at most had an indirect effect on the availability of housing in the Waterfront South community").

254. *See* Olga D. Pomar & Luke W. Cole, *Camden, New Jersey, and the Struggle for Environmental Justice*, 36 CLEARINGHOUSE REV. 94, 99–100 (2002).

air pollution to Waterfront South both directly[255] and through an increase in truck traffic.[256] Such air pollution is associated with increased asthma and other health problems.[257] Such adverse health and environmental impacts of a noxious facility on neighboring homes tends to have a depressive effect on housing value,[258] making it difficult for existing homeowners to sell at a high enough price to move to another location, or to leverage the value of their home to increase their net worth. Thus, by encouraging residential stagnation in historically segregated neighborhoods, these facilities ultimately act to perpetuate segregation.[259] However, as in *Cox*, the judge in *South Camden Citizens in Action* expressed a concern that if he "were to extend the scope of § 3604(a) beyond its plain language—to reach any official decision which has an indirect effect on the availability of housing—the effect would be . . . to 'warp the statute into a charter of plenary review.'"[260]

This narrow reading of § 3604(b) has been critiqued by scholars,[261] who note, among other critiques, that *Cox* and *Halprin* ignore the Supreme Court

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255. *See* PAUL LIOY ET AL., FINAL REPORT: CONTRIBUTION OF PARTICLE EMISSIONS FROM A CEMENT-RELATED FACILITY TO OUTDOOR DUST IN SURROUNDING COMMUNITY 13 (2009), *available at* http://www.state.nj.us/dep/dsr/cement-study/final-outdoor-dust.pdf (concluding that resuspended dust from the cement facility contributed between 4.9 percent and 22 percent of ambient particulate matter measured at nearby homes, and estimating the total contribution "probably on the order of 10 [percent]").

256. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446, 450 (D.N.J. 2001), *opinion modified and supplemented*, 145 F. Supp. 2d 505 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001) (noting that the facility would result in seventy-seven thousand diesel truck trips per year, contributing to an increase in ozone and fine particulate air pollution).

257. *See* Rob McConnell et al., *Childhood Incident Asthma and Traffic-Related Air Pollution at Home and School*, 118 ENVTL. HEALTH PERSP. 1021, 1021 (2010) (concluding "traffic-related pollution exposure at school and homes may both contribute to the development of asthma"); *Asthma Triggers: Gain Control*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, http://www.epa.gov/asthma/outdoorair.html ("[O]utdoor pollutants and pollen can aggravate the lungs, and can lead to chest pain, coughing, digestive problems, dizziness, fever, lethargy, sneezing, shortness of breath, throat irritation and watery eyes. Outdoor air pollution and pollen may also worsen chronic respiratory diseases, such as asthma.") (last visited July 8, 2013).

258. *See* James D. Burnell, *The Effect of Air Pollution on Residential Location Decisions in Metropolitan Areas*, 11(2) J. REGIONAL ANALYSIS & POL'Y 3, 3, 4, 12 (1981) (reviewing empirical studies and noting that the "majority" show that air pollution is inversely related to housing value, and concluding that "air pollution significantly affects residential location decisions," leading to outmigration from urban centers where pollution sources are most likely to be found).

259. *See generally* Dubin, *supra* note 52, at 764–68; Ford, *supra* note 36, at 1849–53.

260. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 502 (D.N.J. 2003) (quoting Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 192 (4th Cir. 1999)).

261. *See* Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 3 (2008) (arguing that "post-acquisition claims are . . . covered by the substantive provisions of the [Fair Housing Act]"); Benjamin A. Schepis, Comment, *Making the Fair Housing Act More Fair: Permitting Section 3604(b) to Provide Relief for Post-Occupancy Discrimination in the Provision of Municipal Services–A Historical View*, 41 U. TOL. L. REV. 411, 417–24 (2010) (summarizing legislative history of the Fair Housing Act and concluding that to "view the [Act] narrowly, or to disparage a broad reading of § 3604(b) as creating a 'general anti-discrimination' statute ignores this context and Congress's fundamental concerns with multiple

and federal courts of appeals' expansive interpretation of the Fair Housing Act.[262] Many other courts have rejected the idea that the Fair Housing Act must be limited to preacquisition transactions, as in the case of tenants of rental housing subject to racial or sexual harassment by landlords.[263] For example, in *Committee Concerning Community Improvement v. City of Modesto*, the Ninth Circuit reversed a district court's dismissal of the plaintiff's 3604(b) claim against the city of Modesto for inadequate provision of municipal services.[264] The court held that § 3604(b) does reach "post-acquisition" services, reasoning that

> limiting the [Fair Housing Act] to claims brought at the point of acquisition would limit the act from reaching a whole host of situations that, while perhaps not amounting to constructive eviction, would constitute discrimination in the enjoyment of residence in a dwelling or in the provision of services associated with that dwelling.[265]

The Ninth Circuit's reasoning in *City of Modesto* stands in contrast with the Fifth and Seventh Circuits' overwrought concerns that recognizing postacquisition claims might turn the Fair Housing Act into a "charter of plenary review"[266]—concerns that missed an important point about the Fair Housing Act: it was designed precisely to reach a wide range of actions and structures that Congress recognized contributed to segregation.[267] The Fifth and Seventh Circuits' refusal to move beyond a narrow orientation toward the availability of housing and to push the Fair Housing Act into a "general anti-discrimination pose" is difficult to reconcile with the Seventh Circuit's own decision in *Alschuler*, which accepted that the Fair Housing Act might stretch

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race-related issues at the time of its passage.") (citing Cox v. City of Dallas, 430 F.3d 734, 746 (5th Cir. 2005)); Robert G. Schwemm, Cox, Halprin, *and Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 794 (2008) (reviewing the language and legislative history of §§ 3604(a) and (b) of the Fair Housing Act and concluding "*Halprin* and *Cox* were wrong to interpret them not to apply in post-acquisition situations").

262. *See, e.g.*, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (recognizing the standing of "all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute"); *see also* Oliveri, *supra* note 261, at 23 ("*Halprin*'s crabbed view of the statute's language ignores the clear and long-standing Supreme Court directive set forth in *Trafficante* . . . .").

263. *See, e.g.*, Woodard v. Fanboy, L.L.C., 298 F.3d 1261, 1263–64, 1268 (11th Cir. 2002); N.D. Fair Housing Council, Inc. v. Allen, 319 F. Supp. 2d 972, 974–75, 980–81 (D.N.D. 2004).

264. Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 716 (9th Cir. 2009).

265. *Id.* at 714. The court held that only the plaintiffs' claim for inadequate law enforcement protection, and not for sewer services or bilingual services, had sufficient evidence of racial disparity to go forward. *Id.* at 714–15.

266. *See* Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 192 (4th Cir. 1999) ("Countless private and official decisions may affect housing in some remote and indirect manner, but the Fair Housing Act requires a closer causal link between housing and the disputed action. . . . To draw every outlying official decision into the orbit of section 3604(a) would be to warp that statute into a charter of plenary review.").

267. *See* Schepis, *supra* note 261, at 423–24; Schwemm, *supra* note 261, at 794.

so far as to encompass white plaintiffs' efforts to protect the existing value of their property from the actions of the federal government.[268]

In refusing to apply the Fair Housing Act to discriminatory allocations of services after minority owners have acquired property, courts have rejected an important principle underlying the statute. Limiting the scope of the Fair Housing Act to prohibiting discriminatory barriers to housing acquisition recasts the statute as a limited intervention into the processes of the housing market, rather than a robust effort to affirmatively create housing opportunity and achieve "truly integrated" communities.[269] Yale Rabin's observation that "expulsive zoning is not merely an historical remnant of a racially unenlightened past, but a current practice that continues to threaten, degrade, and destabilize black and other minority neighborhoods"[270] has been borne out by empirical studies documenting the persistence of zoning patterns that continue placing industrial land uses in minority residential neighborhoods.[271] Reading the Fair Housing Act to cover municipalities' actions that depress property value in minority neighborhoods, and thus perpetuate segregation, would be consistent with the statute's goal of ending the legacy of government-sponsored segregation.[272]

Plaintiffs have thus far been unsuccessful in invoking the Fair Housing Act to challenge the placement, expansion, or operation of environmental hazards on the grounds that it perpetuates segregation.[273] Although these plaintiffs can show injury—these hazards often have a tangible and significant negative impact on property value—courts have been reluctant to find that the Fair Housing Act was designed to protect plaintiffs against such injury. As the next Section shows, it is the history of placing such hazards disproportionately in minority communities that has led to an association between these communities and perceptions of disorder and blight. In contrast, when white plaintiffs invoke the Fair Housing Act to protect their property value, it is not to

268. Alschuler v. Dep't of Hous. & Urban Dev., 686 F.2d 472, 477–78 (7th Cir. 1982).

269. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972).

270. Rabin, *supra* note 53, at 118.

271. *See* Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 77 (1998) (documenting land use regulatory patterns in seven cities and concluding that "[l]ow-income, minority communities have a greater share not only of LULUs [locally unwanted land uses], but also of industrial and commercial zoning, than do high-income white communities").

272. *See* Mary Pennisi, Note, *A Herculean Leap for the Hard Case of Post-Acquisition Claims: Interpreting Fair Housing Act Section 3604(b) After* Modesto, 37 FORDHAM URB. L.J. 1083, 1145–46 (2010).

273. *See, e.g.*, S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 490 (D.N.J. 2003) (describing plaintiffs' neighborhood of Waterfront South as "an impoverished, minority community located in South Camden, which was already suffering from the cumulative environmental effects of the numerous industrial facilities situated in and around it); *id.* at 503 (rejecting plaintiffs' "perpetuation of segregation" claim under the Fair Housing Act); Laramore v. Ill. Sports Facilities Auth., 722 F. Supp. 443, 446 (N.D. Ill. 1989) (involving plaintiffs who alleged that "South Armour Square was selected because its residents were almost exclusively black").

challenge environmental hazards but rather to challenge governmental actions that place housing for low-income and minority residents in their neighborhoods. By relying on the same association between racial minorities, blight, and disorder, these plaintiffs are successful in at least getting their foot in the courtroom door, resulting in the expenditure of judicial resources and the evolution of fair housing doctrine that legitimizes continued segregation.

B. Historically Contingent Property Interests as a Legitimate, Nondiscriminatory Reason for Perpetuating Segregation

The Fair Housing Act's underprotection of black plaintiffs challenging the construction and expansion of environmental hazards stands in contrast with its overprotection of the property values of white defendants challenging the construction of low-income housing. This difference is evident in the deference courts accord to municipalities' assertions that protecting property value is a legitimate justification for opposing integration efforts.

In recognition of the racially exclusionary effect that zoning can have on communities, the Fair Housing Act has been successfully invoked to challenge what the Second and Seventh Circuits call "perpetuation of segregation."[274] These cases are brought under a disparate impact theory, premised on the notion that the Fair Housing Act, like Title VII (which bars discrimination in employment) "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[275] In evaluating disparate impact claims, many courts apply a burden-shifting framework.[276] The first step

274. *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937 (2d Cir. 1988), *aff'd in part* 488 U.S. 15 (1988); United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974).

275. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see also id.* at 430 ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."). While *Griggs* was decided in the context of employment discrimination, its development of a disparate impact theory has been imported into the Fair Housing Act context. Nearly every circuit court has interpreted the Fair Housing Act to create a disparate impact or discriminatory effects cause of action. *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49 (1st Cir. 2000); Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1250–51 (10th Cir. 1995); Jackson v. Okaloosa Cnty., 21 F.3d 1531, 1543 (11th Cir. 1994); *Huntington Branch, NAACP*, 844 F.2d at 935; Keith v. Volpe, 858 F.2d 467, 482 (9th Cir. 1988); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 986 (4th Cir. 1984); United States v. City of Parma, 661 F.2d 562, 574–75 (6th Cir. 1981); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977); *City of Black Jack*, 508 F.2d at 1184. Only the D.C. Circuit has declined to decide whether the Fair Housing Act permits a disparate impact cause of action. *See* Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dept. of Hous. & Urban Dev., 639 F.3d 1078, 1085 (D.C. Cir. 2011).

276. *See, e.g.*, *Rizzo*, 564 F.2d at 146; *City of Black Jack*, 508 F.2d at 1184. Not all courts use the burden shifting approach. Some use a "balancing test" to probe for circumstantial evidence of discriminatory intent when evaluating a disparate impact claim. *See Arlington Heights*, 558 F.2d at 1290 (7th Cir. 1977). The balancing test's factors are:

> (1) [H]ow strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard

is for a plaintiff to show that "the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect."[277] Once this prima facie case is established, the burden shifts back to the defendant to articulate some justification for its actions.[278]

Courts that use this burden-shifting approach to evaluate disparate impact claims apply varying degrees of scrutiny to a defendant's proffered justification for taking an action with discriminatory effect. The first federal court of appeals to endorse the theory applied an approach analogous to the strict scrutiny standard used in equal protection jurisprudence.[279] Other circuits apply a more permissive requirement that "a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."[280] The burden then shifts back to the plaintiffs to point to the availability of a less discriminatory alternative.[281] Still others look for a "legitimate, nondiscriminatory reason," using language from disparate treatment (or intentional discrimination) cases.[282]

In many perpetuation-of-segregation cases brought against municipal defendants, protecting the property value of current residents is often cited as a legitimate justification for zoning that has a discriminatory effect on racial minorities. Whether a court accepts this proffered justification depends in part on the level of scrutiny accorded to this defense.

> of *Washington v. Davis*; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Id.

277. *City of Black Jack*, 508 F.2d at 1184.

278. *Id.* at 1185 & n.4 ("Even though this case is based on a federal statute, rather than on the Fourteenth Amendment, we believe that, once the United States established a prima facie case of racial discrimination, it became proper to apply the compelling governmental interest requirement of the equal protection cases."); *Turtle Creek*, 736 F.2d at 988 ("[W]hen confronted with a showing of discriminatory impact, defendants must prove a business necessity sufficiently compelling to justify the challenged practice.").

279. *City of Black Jack*, 508 F.2d at 1185 & n.4.

280. *Rizzo*, 564 F.2d at 148–49 (finding that the "heavy burden" of the compelling interest analysis should be limited to purposeful discrimination claims); *accord* Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182, 1195 (9th Cir. 2006); Oti Kaga v. S.D. Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir. 2003); *Langlois*, 207 F.3d at 51; *Huntington Branch, NAACP*, 844 F.2d at 936.

281. *Rizzo*, 564 F.2d at 149 ("[T]he defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."); *see also id.* at 149 n.37 ("If the defendant does introduce evidence that no such alternative course of action can be adopted, the burden will once again shift to the plaintiff to demonstrate that other practices are available."); *accord* Gallagher v. Magner, 619 F.3d 823, 837 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012) ("As such, the burden falls back on [Plaintiffs] to offer a viable alternative that satisfies the [City's] legitimate policy objectives while reducing the . . . discriminatory impact of the City's code enforcement practices.") (internal quotations omitted).

282. *City of Fresno*, 433 F.3d at 1196.

The Eight Circuit applies a standard approaching strict scrutiny, while the Ninth Circuit applies a far more permissive standard. Under the compelling interest standard, the Eighth Circuit in *City of Black Jack* found that a municipality's "asserted justification of preventing devaluation of adjoining single-family homes" was unsupported, citing evidence that "apartment complexes in the St. Louis metropolitan area had not had such an effect on property values."[283] The court's requirement that the exclusionary ordinance must be shown to actually further the city's stated interest conforms with the higher scrutiny appropriate to discriminatory actions.[284]

In contrast, the Ninth Circuit, applying a "legitimate, nondiscriminatory" standard, has found that protecting property value is an acceptable reason for municipalities to oppose low-income housing, usually without closely scrutinizing the strength of the evidence. For example, in the 2006 the Ninth Circuit affirmed a jury verdict for the city of Fresno for its refusal to approve municipal bonds to support the construction of low-rent housing.[285] The court accepted as a legitimate, nondiscriminatory reason for the City's action the evidence that the low-income housing project "was opposed on account of the impact of a large rental unit on neighboring property values."[286]

Given the extensive evidence that low-income and affordable housing does not adversely affect neighborhood property values,[287] the *AHDC* court's failure to demand evidence of a decrease in property value amounts to recognizing that a form of self-imposed harm rooted in racial and economic prejudice can justify avoiding integration. The acceptance of the municipality's defense of preserving existing property values is especially troubling in light of emerging social science evidence that people subconsciously associate African Americans with crime and "disorder."[288]

This implicit association can be seen in the Sixth Circuit case *Joseph Skillken & Co. v. City of Toledo*, decided less than a decade after the passage of the Fair Housing Act, in which the court revitalized the exclusionary basis of Euclidean zoning.[289] The court reversed a lower court order mandating, as

283. *City of Black Jack*, 508 F.2d at 1187–88. Thus the city's action in rezoning a portion of its city to prohibit multifamily dwellings, shortly after a housing developer proposed building such housing, was held to violate the Fair Housing Act. *Id.* at 1188; *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) ("The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

284. For example, HUD recently issued a proposed rule for analyzing disparate impact claims under the Fair Housing Act that requires defendants to show that the discriminatory effect of their actions "[i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,482 (proposed February 15, 2013).

285. *City of Fresno*, 433 F.3d 1182.

286. *Id.* at 1196.

287. *See supra* note 42 and accompanying text.

288. *See infra* notes 326–29 and accompanying text.

289. Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), *vacated for reconsideration*, 429 U.S. 1068 (1977), *prior decision adhered to*, 558 F.2d 350 (6th Cir. 1977).

relief under the Fair Housing Act, that Toledo rezone an exclusive district of the city to accommodate low-income housing.[290] The Sixth Circuit found that the City Council members had a "rational basis" for their actions, including the fact that "[t]he proposed projects would not produce orderly development of the land to obtain harmonious and stable neighborhoods, and were not in the best interests of the public."[291] Judge Weick, as if channeling Justice Sutherland's *Euclid* opinion and Justice Douglas's *Berman* opinion, went on to declare:

> The time has not yet arrived for the courts to strike down state zoning laws which are neutral on their face and valid when passed, in order to permit the construction at public expense of large numbers of low cost public housing units in a neighborhood *where they do not belong*, and where the property owners, relying on the zoning laws, have spent large sums of money to build fine homes for the enjoyment of their families.[292]

The court concluded its analysis by decrying the reach of the district court's order to desegregate and submit a plan within ninety days, remarking that as a result of this order:

> Low cost public housing could move into the most exclusive neighborhoods in the metropolitan area and property values would be slaughtered. Innocent people who labored hard all of their lives and saved their money to purchase homes in nice residential neighborhoods, and who never discriminated against anyone, would be faced with a total change in their neighborhoods, with the values of their properties slashed.[293]

In fact, the time *had* already come, at least for other courts, to strike down "neutral" zoning laws to permit the construction of affordable housing.[294] As courts increasingly recognized challenges to exclusionary zoning, the passion with which Justice Weick decried the potential entry of public housing into "the most exclusive neighborhoods"[295] had to give way to a more progressive recognition that "zoning decisions which have a racially discriminatory effect

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290. *Id.* at 870, 872–73, 882.

291. *Id.* at 877. The Sixth Circuit, in a remarkable display of sympathy, also granted a motion to intervene in this case by the current residents of the white neighborhood on which the developer sought to build low-cost housing, noting that their interest, "on the ground that the projects would seriously depreciate the value of their homes," did not substantially overlap with the interest of the City. *Id.* at 873, 877. The appellate court reached this conclusion even though the lower court characterized the City's justification for the refusal to rezone as taken "on the grounds it was not beneficial for the neighborhood." Joseph Skillken & Co. v. City of Toledo, 380 F. Supp. 228, 235 (N.D. Ohio 1974), *rev'd*, 528 F.2d 867 (6th Cir. 1975).

292. *Joseph Skillken & Co.*, 528 F.2d at 881 (emphasis added).

293. *Id.* at 880–81.

294. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1188 (8th Cir. 1974) (enjoining enforcement of city ordinance prohibiting construction of federally subsidized multifamily housing).

295. *Joseph Skillken & Co.*, 528 F.2d at 881.

[can] violate the Fair Housing Act."[296] Perhaps catalyzed by the Supreme Court's declaration that "practices . . . neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory . . . practices,"[297] courts increasingly recognized zoning as one way that racial segregation had been historically maintained.[298]

Yet the court's underlying sympathy for keeping subsidized housing out of "nice residential neighborhoods . . . where they do not belong"[299] can still be seen in the way courts address municipal justifications for their exclusionary zoning. The ongoing presumption that higher-density, multi-family, and/or affordable housing will harm the property value of current residents must be understood as part of a continuous legacy of administrative, legislative and judicial preferencing of white, middle-class property interests.[300] This legacy began with racial zoning,[301] and although *Euclid* transformed the express nature of state-sponsored segregation into a more covert form,[302] this association of racial minorities with harm was solidified in cases upholding racially restrictive covenants until 1948.[303]

The association between racial minorities and property value depreciation was used to justify public and private sector actions to reinforce segregation in the early twentieth century.[304] There is ample evidence from both contemporary and modern day commentators that the language of blight and of protecting and enhancing property value was very much designed to further racial segregation.[305] Even after expressly race-based segregation became constitutionally impermissible,[306] the language of blight continued doing the same work, essentially just substituting "low income" for "racial minority." In the 1954 case *Berman v. Parker*, the Supreme Court upheld the use of eminent domain to demolish a neighborhood that was 98 percent black.[307] The decision further entrenched the belief that government actors were justified in

296. *See* United States v. City of Parma, 661 F.2d 562, 576 (6th Cir. 1981).

297. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

298. *See, e.g.*, Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1291 (7th Cir. 1977) (acknowledging that where "construction of low-cost housing was effectively precluded throughout the [overwhelmingly white] municipality or section of the municipality which was rigidly segregated," the effect of a municipal zoning decision to deny low-income housing "was to foreclose the possibility of ending racial segregation in housing within those municipalities").

299. *See Joseph Skillken & Co.*, 528 F.2d at 881.

300. *See supra* Part I.A.

301. *See supra* notes 54 and 60.

302. *See supra* Part I.B.

303. *See, e.g.*, Burkhardt v. Lofton, 146 P.2d 720, 724 (Cal. Dist. Ct. App. 1944) ("Racial restrictions have been employed in the development of countless residential communities and have very generally been considered essential to the maintenance and stability of property values.").

304. *See supra* notes 55–56 and accompanying text.

305. *See* Pritchett, *supra* note 102, at 16–18 (summarizing 1930s writings on blight, in which "racial minorities were central to the . . . understanding of urban change").

306. Buchanan v. Warley, 245 U.S. 60 (1917).

307. Berman v. Parker, 348 U.S. 26 (1954).

eliminating such "blighted" housing that may "be an ugly sore, a blight on the community which robs it of charm," and replacing it with a community that was "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[308] The historical context in which courts' discussion of blight arose demonstrates the ongoing judicial practice of accepting, without question, the assertion that the entry of new residents into a historically segregated community would harm the property value of current residents.[309]

In theory, claims of perpetuation of segregation under the Fair Housing Act should help break the self-reinforcing cycle of segregation. In practice, however, these claims have been only marginally successful in doing so where municipal defendants can, without robust evidence, invoke the belief that protecting existing property value requires rejecting low-income housing that minorities are likely to call home. What is needed is a more nuanced approach to resolving fair housing claims that moves beyond viewing the property interests of low-income families and minorities and those of higher-income white communities as invariably in tension with each other.

III.
TOWARD TRUE INTEGRATION: REVITALIZING THE REACH OF THE FAIR HOUSING ACT

The Fair Housing Act was passed with the simple goal of providing for fair housing throughout the United States.[310] Yet, over time, the law's reach has systemically narrowed and fallen short of this goal. One main reason for this is courts' privileging of white homeowners' interest in property value in the context of fair housing claims. This Section summarizes three explanations for this privileging: (1) dominant narratives that sympathetically cast middle-class white residents as entitled to continue enjoying their exclusive access to the most highly protected neighborhoods; (2) excessive judicial deference to local land use decisions; and (3) the lingering association of low-income and minority residents with disorder and harm. None of these factors is supported by the original intent and scope of the Fair Housing Act. The Section then returns to the Mount Holly litigation as an example of one possible approach to honoring that original intent of the law by arguing for a meaningful assessment of less discriminatory alternatives to actions that exclude or expel minorities.

308. *Id.* at 32–33.

309. Note, however, that federal courts may be more willing to defer to local government assertions of property value protection than state courts are. *See* 3 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 22:14 (5th ed.) (collecting state court cases demonstrating that "exclusionary controls based primarily on concerns about property values are often treated skeptically by the courts").

310. 42 U.S.C. § 3601 (2006).

A. Explanations for Privileging White Property Value

A combination of judicial bias and deference to local planning helps explain why courts prize the property value interests of white middle-class and wealthy plaintiffs and defendants alike. Judges, who are disproportionately white compared to the American population, may be more likely to identify with white plaintiffs.[311] A 1996 report by the Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System found that although examples of overt racial prejudice were few and far between, that racial "bias[,] which appear[s] to result from unintentional conduct or conduct resulting from a lack of awareness," remained.[312] The report additionally concluded that "the system is biased against economically disadvantaged individuals."[313] Michele Benedetto Neitz documents the extensive expression of implicit socioeconomic bias within the judiciary, concluding that "judges can and do favor wealthy litigants over those living in poverty, with significant negative consequences for low-income people."[314]

Such implicit racial and socioeconomic bias may explain different positions taken by judges depending on the race and alleged injury of the plaintiff in Fair Housing Claims. For example, the judge in *Affordable Housing Development Corp. v. City of Fresno* was willing to accept at face value and without evidence white defendants' assertions that low-income housing diminishes property value;[315] perhaps these claims were, to the judge, simply intuitive "common sense" and without any need for documentation. Likewise, such bias may help explain how Judge Jones of the Fifth Circuit could accept, in *Walker v. City of Mesquite*, the white plaintiffs' assertion that "quality of life and property values would be diminished by a next-door public housing or other HUD project," as sufficient to confer standing;[316] meanwhile, Judge King, also of the Fifth Circuit, could not envision how property value might continue to be harmed by the City of Dallas's racially discriminatory demolition of homes in the African-American plaintiffs' neighborhood.[317]

311. In 2009, 85 percent of all federal judges were white, 8 percent African American, and 5 percent Hispanic. RUSSELL WHEELER, BROOKINGS INST., THE CHANGING FACE OF THE FEDERAL JUDICIARY 1 (2009), *available at* http://www.brookings.edu/~/media/research/files/papers/2009/8/federal%20judiciary%20wheeler/08_federal_judiciary_wheeler.pdf. In contrast, in 2011, the United States population was approximately 78 percent white, 13 percent African American, and 17 percent Hispanic. *USA QuickFacts*, UNITED STATES CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/00000.html (last accessed July 8, 2013).

312. Ga. Supreme Court Comm'n on Racial and Ethnic Bias in the Court Sys., *Let Justice Be Done: Equally, Fairly, and Impartially*, 12 GA. ST. U. L. REV. 687, 700 (1996).

313. *Id.*

314. Michele Benedetto Neitz, Socioeconomic Bias in the Judiciary, at 1 (Aug. 2012) (unpublished paper), *available at* http://works.bepress.com/michele_benedettoneitz/1.

315. *See* Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182, 1196 (9th Cir. 2006).

316. Walker v. City of Mesquite, 169 F.3d 973, 980 (5th Cir. 1999); *see also supra* note 219 and accompanying text.

317. James v. City of Dallas, 254 F.3d 551, 566–67 (5th Cir. 2001).

Implicitly racialized and socioeconomically biased assumptions about the "real" causes of property value depreciation and about which communities were worthy of claiming judicial protection assuredly played a role in these decisions.

Sherrilyn Ifill describes how critical race and critical feminist scholarship have "unmasked the role of narratives in shaping law and legal analysis . . . [and] shown how racial and gender narratives undergird legal doctrine."[318] Ifill notes that these racial and gender narratives, "[o]ften masquerading as 'neutral principles,' . . . have informed and shaped the construction and interpretation of legal principles," and that by "legitimating one story over another, legal decision-makers . . . convey messages to the public that signal which values are worthy of receiving the law's imprimatur."[319] In Fair Housing Act cases, implicit racial and socioeconomic bias may cause judges to construct an ahistorical narrative that views the status quo of housing segregation as natural and entitled to continuity. Such a narrative encourages the conclusion that middle-class white residents are entitled to preserve their communities "as is," while diminishing the worth and credibility of antidiscrimination claims that draw on a narrative of historical unfairness.

Second, these challenges invoke local land use planning and governance, to which courts generally accord significant deference.[320] Because local governments are responsible for exercising general police power to protect "public health, safety, morals, or general welfare,"[321] municipalities' approaches to making decisions about land use are typically utilitarian in nature; decision makers respond to what they perceive to be the needs and desires of their own constituencies. Municipal governments, charged with managing local land use and economic and community development to benefit the broader constituency, often undervalue or sacrifice the needs and priorities of the smaller, lower-income communities that lack the political and economic

318. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 440 (2000) (citing CATHERINE A. MACKINNON, FEMINISM UNMODIFIED (1987); DEBORAH L. RHODE, JUSTICE & GENDER: SEX DISCRIMINATION AND THE LAW (1989)).

319. *Id.* at 440–42.

320. *See* 8A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25:302 (3d ed. 2012) ("[T]he judicial attitude is one of deference to municipal legislative determination of the necessity, scope and mode of zoning plans and laws, and one of strict observance of limitations on the judicial power to interfere with this exclusively governmental and legislative function."); Vill. of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) ("We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be reasonable, not arbitrary and bears a rational relationship to a (permissible) state objective.") (internal quotations and citations omitted); *cf.* Armstrong, *supra* note 32, at 1058 ("Concern about property values provides a rationalization that is almost impenetrable due to the great legal and social deference accorded to economic concerns.").

321. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

power to assert their priorities through local politics.[322] This conflict often surfaces in the context of housing and land use decision making, whose contours are shaped by the powerful inertial force of history. Decisions about where to place infrastructure and environmental hazards are performed as if on autopilot, routinely approved for the same low-income and minority neighborhoods that were first targeted for placement of these hazards by the underprotective framework of *Euclid*, and by government-sponsored urban renewal. Efforts under the Fair Housing Act to protect minority homeowners' property value challenge precisely that utilitarian approach to local planning; as a result, federal courts may be more reluctant to intervene.

In contrast, local government decisions about higher-value property, such as whether to permit zoning variances to accommodate multi-family housing, are driven by a historically rooted sense of entitlement and the importance of safeguarding long-settled expectations about property rights.[323] This dynamic illustrates the way unquestioning deference to local government actors and decision-making favors the continued concentration of privilege in the hands of the historically powerful. But federal statutes such as the Fair Housing Act, and the judiciary's role in safeguarding its civil rights guarantees, should serve as an egalitarian check on this dynamic. In *Arlington Heights*, when the Seventh Circuit approved a remedial consent decree under the Fair Housing Act providing for "site-specific relief" to remedy the discriminatory effect of exclusionary zoning through "site-specific relief," the court observed,

> Such relief ordinarily runs counter to local zoning or other local legislation, but given the national open housing policy established by Congress, acting under the Civil War Amendments, the state or local legislation must yield to the paramount national policy. The Supreme Court has left no doubt as to the outcome of such a conflict between local and national interests.[324]

Likewise, the Eighth Circuit observed that the "discretion of local zoning officials . . . must be curbed where 'the clear result of such discretion is the

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322. Richard Schragger explains this in part by observing that "decisions about who should be counted as a decisionmaker are often based on arguments about who has the most to lose. These kinds of arguments rarely favor the disenfranchised or the marginal; indeed, the disenfranchised and marginal are almost never considered members of any community." Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 445 (2001).

323. As Jerry Frug notes in summing up the role local governments play in managing local land use and economic development, "local zoning and redevelopment policies have been dominated for decades by a connection between the same two images: 'nice' neighborhoods, property values, and economic growth, on the one hand, and the exclusion of 'undesirables,' on the other." Frug, *supra* note 71, at 1088.

324. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 616 F.2d 1006, 1011 (7th Cir. 1980) (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455–56 (1976); *Developments in the Law: Zoning*, 91 HARV. L. REV. 1427, 1695–99 (1978)) (internal citations omitted). The Court has also recognized that enforcement of constitutional rights may likewise impose reasonable restrictions on local decision-making authority. *See* First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304, 321 (1987).

segregation of low-income Blacks from all White neighborhoods.'"[325] Thus, although courts interpreting the civil rights legislation of the Second Reconstruction recognized the intention of Congress to reset legal norms by reducing traditional deference to local decision making, the more recent tendency of courts is to regress to a historical, deferential norm—one that is strongly defined by racial preferences for white Americans.

A third reason courts find it easy to validate the concerns of white plaintiffs and defendants about their property value is because of the historical and implicit association of low-income and minority residents with disorder and blight. In a study on implicit bias, Michelle Anderson and Victoria Plaut reviewed several reports finding that—regardless of the actual levels of disorder or crime in a given neighborhood—study participants consistently ranked neighborhoods with higher levels of African American residents as more disorderly and prone to crime.[326] They also cited studies in which participants were shown images of homes and neighborhoods alike in every aspect except for the race of the people who were visible.[327] In one study, white participants who viewed videos with black residents evaluated the neighborhoods more negatively, "even though in all other aspects but race the neighborhoods were identical."[328] In another study, participants (of primarily white and Asian ethnicities) who were shown photos of a home for sale by a black family ranked the home more negatively, associated it with lower resident satisfaction, and described the surrounding neighborhood as less desirable than did the participants who viewed identical images with white residents.[329]

Acknowledging the tendency to associate minorities with the decline of property values, the Fair Housing Act contains measures to counter this association. The Act's anti-blockbusting provision makes it unlawful "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap,

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325. United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974).

326. Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 25 (Justin D. Levinson & Robert J. Smith eds., 2012) (citing, inter alia, Julie Berry Cullen & Steven D. Levitt, *Crime, Urban Flight, and the Consequences for Cities*, 81 REV. ECON. & STAT. 159 (1999); Robert J. Sampson & Stephen W. Raudenbusch, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows,"* 67 SOC. PSYCHOLOGY Q. 319 (2004)).

327. *Id.* at 34.

328. *Id.* (citing Maria Krysan et al., *Does Race Matter in Neighborhood Preferences? Results from a Video Experiment*, 115 AM. J. SOC. 527 (2009); Maria Krysan et al., *In the Eye of the Beholder*, 5 DU BOIS REV.: SOC. SCI. RES. ON RACE 5 (2008)).

329. *Id.* at 34–35 (citing Courtney M. Bonam et al., Devaluing Black Space: Black Locations as Targets of Housing and Environmental Discrimination (2011) (unpublished manuscript) (on file with authors)).

familial status, or national origin."[330] Courts recognize that this provision of the Fair Housing Act is intended to counter the actions of realtors and others to induce white families to leave a neighborhood by preying upon their racially embedded fears of "rising crime rates, overcrowded schools, declining property values, and a generally lower quality of life."[331]

Senator Edward Brooke, a co-sponsor of the Fair Housing Act, explained why this provision was needed by describing how blockbusting preyed on the unwarranted association of black Americans with property value depreciation:

> There are those who raise the specter of economic loss if fair housing laws open white communities to Negro families. In one study of 20 neighborhoods in San Francisco, Oakland, and Philadelphia, covering a period of 12 years, property values either remained stable or increased in 85 percent of the relevant cases. If there is any truth to this myth at all, it is rooted in the unequal access which Negroes have had to housing; this inequality has made possible the worst forms of price gouging on the one hand and blockbusting on the other.[332]

Just as *Euclid* helped maintain racial segregation by shifting from race-based exclusion into income-based exclusion, the nearly-identical transposition of words such as "crime" and "blight" used to oppose new housing illustrates how exclusionary policies continue, implicitly if not expressly, to invoke racial fears. As a Louisiana district court in 2009 recognized, "references to 'crime,' 'blight,' and 'quality of life' are . . . nothing more than camouflaged racial expressions."[333] Thus, although the Fair Housing Act specifically forbids actions that prey upon these racial stereotypes, the willingness of courts to accept precisely these fears as not only a legitimate justification for municipal and neighborhood opposition to integration, but also as an affirmative basis for invoking the protection of the Act to challenge integration undermines the broader purpose and potential of this important civil rights statute.

B. Looking for Less Discriminatory Alternatives

There are a variety of ways in which courts could engage in a more robust interpretation of the Fair Housing Act that is true to its anti-segregation roots.

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330. 42 U.S.C. § 3604(e) (2006).

331. *See* Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126, 135 (N.D. Ind. 1973), *aff'd*, 491 F.2d 161 (7th Cir. 1974).

332. 114 CONG. REC. 2279–80 (1968) (statement of Sen. Brooke).

333. Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 648 F. Supp. 2d 805, 812 (E.D. La. 2009) (internal quotations and citations omitted); *see also* Smith v. Town of Clarkton, 682 F.2d 1055, 1066 (4th Cir. 1982) (recounting concerns expressed at a public hearing that there was an "influx of 'undesirables,'" who "would 'dilute' the public schools" and pose a risk to "personal safety"); Doe v. Vill. of Mamaroneck, 462 F. Supp. 2d 520 (S.D.N.Y. 2006); Atkins v. Robinson, 545 F. Supp. 852, 871–72 (E.D. Va. 1982); *see also* Aoki, *supra* note 76, 788 ("Insofar as economic status tracked race, zoning regulations premised on ability to pay in reality also functioned to screen racial minorities from certain communities, with no overt statutory/regulatory evidence of overt racial animus.").

One way would be to apply a more stringent standard for examining a defendant's justification for its exclusionary zoning. Another would be by revitalizing the "less discriminatory alternatives" analysis.[334] Presently, once a plaintiff bringing a claim under the discriminatory effects theory establishes that a municipality has prima facie violated the Fair Housing Act, a court asks whether the municipality has a good reason for inadvertently harming minorities, and whether there were less discriminatory alternatives that would further that interest.[335] However, many housing discrimination decisions end their analysis at accepting the "legitimate" justification a municipality offers to explain its apparently discriminatory actions.[336] As a result, the exploration of the less discriminatory alternative prong is a relatively underdeveloped area of law in the fair housing context.[337] When the burden-shifting analysis of disparate impact claims stops at the inquiry of whether a justification is legitimate and nondiscriminatory, this perpetuates an impasse between the needs of minorities and the desires of white majorities.[338]

In *Mount Holly*, the Third Circuit stepped outside of this zero-sum framing by emphasizing that the court's role in evaluating disparate impact claims is not finished until it genuinely looks to see if a municipality could achieve its goals in a less discriminatory manner.[339] The court noted that "[i]n

334. *See* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977).

335. *See id.* ("The discretion of the district court in determining whether the defendant has carried its burden of establishing justification for acts resulting in discriminatory effects may be guided at the least by the following rough measures: a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.").

336. For example, in *Affordable Housing Development Corp. v. City of Fresno*, the Ninth Circuit did not apply the less discriminatory alternatives prong of the disparate impact analysis to the City of Fresno's decision to vote down public bonds required to finance the construction of low-income housing in the city, noting that the "City here was called upon to make an up or down vote on a single housing proposal. There were no alternatives at issue. We hold only . . . that if an elected representative authority declines to approve TEFRA housing bonds for a legitimate non-discriminatory reason, the defense is good." 433 F.3d 1182, 1195–96 (9th Cir. 2006).

337. *But see* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 939 (2d Cir. 1988), *aff'd in part* 488 U.S. 15 (1988) (noting that "'Plan-specific' problems [with particular low-income housing proposals] can be resolved by the less discriminatory alternative of requiring reasonable design modifications," and that the defendant's asserted aim of encouraging urban development could be met through less discriminatory alternatives of tax incentives and abatements in other parts of the town); Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526, 569 (N.D. Tex. 2000) (finding that "[e]ven if Sunnyvale had stated a legitimate justification for maintaining one acre zoning and banning apartments, the evidence shows that less discriminatory alternatives to these zoning and planning policies exist," including an alternative that included a wide mix of housing types and densities).

338. *See, e.g.*, Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375 (3d Cir. 2011).

339. *Id.* at 385 ("Once the Residents established a *prima facie* case of disparate impact, the District Court's inquiry must continue to determine whether a person is being deprived of his lawful rights because of his race. It must ask whether that Township's legitimate objectives could have been achieved in a less discriminatory way.").

this case, everyone agrees that alleviating blight is a legitimate interest" and focused instead on whether there was a less discriminatory alternative to resolving the problem of blight in the Gardens, particularly one without the "heavy-handed" approach of completely demolishing the neighborhood and displacing its minority residents.[340] By scrutinizing more carefully the question of whether the municipality's course of action is the least discriminatory, the Third Circuit re-framed this conflict to focus on finding a "win-win" solution in which the desires of the majority to eradicate blight could be met while permitting residents to remain in their community.[341] In other words, the court was willing to ask whether there was a more optimal tradeoff that maximized the gains for all involved, rather than protecting the property rights of the governing majority at the expense of the civil rights of the less powerful minority.

The decision also challenged the presumption that it is the residents themselves, rather than the dilapidated building conditions, that are the cause of blight. The defendant's argument that "demolition and replacement is the most effective and efficient approach to solving the neighborhood's problems"[342] strongly suggested the township's belief that perhaps the occupants of the homes, and not their physical condition, were the source of the problem. Rather than focusing on this coded association of low-income and minority communities with blight, the Third Circuit instead highlighted the role that dilapidated buildings play in creating blight, crediting the plaintiff's expert witness testimony that an alternative development plan centered on rehabilitation of the buildings was feasible.[343]

Thus, in reframing the relevant inquiry for disparate impact claims, the Third Circuit in *Mount Holly* proposed an attractive alternative to assuming that local land use decisions are a zero sum game. For decades the civil rights of minorities have been perceived by courts to come only at the expense of the historical entitlements vested in middle-class and white Americans. Yet, as the Supreme Court has described, the "language of the [Fair Housing] Act is broad and inclusive," actually protecting white Americans' enjoyment of "important benefits from interracial associations."[344] Indeed, as courts have repeatedly recognized, segregation harms not only minorities, but whites as well.[345]

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340. *Id.* at 385–86.

341. *Id.* at 386–87.

342. *Id.* at 387.

343. *Id.* at 386 ("[O]ne could credit the report of the Residents' planning expert, which stated that the 'blighted and unsafe' conditions could be remedied in a far less heavy-handed manner that would not entail the wholesale destruction and rebuilding of the neighborhood.").

344. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209–10 (1972).

345. *See* United States v. Sch. Dist. 151 of Cook Cnty., 301 F. Supp. 201, 206 (N.D. Ill. 1969), *modified*, 432 F.2d 1147 (7th Cir. 1970) ("[S]egregation harms the white as well as the black student. Just as racial isolation tends to cripple a black child by inducing a feeling of inferiority, it inflates the white child with a false belief in his superiority. These seeds of prejudice and animosity produce particularly noxious weeds when they are not planted adventitiously and merely permitted to sprout

The focus in the *Mount Holly* litigation on finding a less discriminatory alternative affirms the idea that overcoming segregation and achieving true economic and racial integration can have a positive impact on all communities. Of course, such an inquiry is only made possible by the interpretation of the Fair Housing Act as prohibiting actions that have a discriminatory effect, and not simply those actions that have a discriminatory intent. The Act, as currently interpreted by nearly all federal courts of appeal, requires local government and land use decision makers to thoughtfully consider the ways their "race-neutral" housing, redevelopment, and land use policies may inadvertently reduce housing opportunity for minorities. The search for less discriminatory alternatives, currently required by the burden-shifting framework of disparate impact claims, encourages these parties to give full and fair consideration to ways to achieve housing goals that meet the needs of all. By granting the Township of Mount Holly's petition for certiorari challenging this widely agreed-upon interpretation, the Supreme Court is likely signaling an interest in foreclosing even this potential. Without this theory, the powerful historical momentum of segregation, somewhat quelled for a period of 40 years following the Fair Housing Act, promises only to regather strength.

CONCLUSION

Historically, state-sponsored residential segregation was a key mechanism for enforcing white dominance in the United States. As official government-backed segregation was slowly eliminated in the first half of the twentieth century, these instruments were replaced with market-based approaches designed to preserve the racial hierarchy of wealth and privilege, without directly referencing race. One key tool for reinforcing housing segregation was the manipulation, by municipal governments, federal agencies, and courts at all levels, of the concept of property value to ensure that the rigid color lines constructed under Jim Crow law would remain undisturbed by advances in civil rights protections.

The Fair Housing Act was enacted with this reality in mind, designed to intervene and untangle a form of racism that had been fundamentally woven into the fabric of the "free market." Yet its ability to do so has been limited. One obstacle is the selective manner in which courts recognize property value as a legitimate interest to be protected by the law. As this Comment demonstrates, courts often act as the guardians of the vested property interests of white families against the artificial intervention of both federal (e.g., housing subsidies by the Department of Housing & Urban Development) and local (e.g., zoning amendments to accommodate low-income housing) actions to promote

but when they are nourished by the deliberate practice of segregation."); Hart v. Cmty. Sch. Bd. of Brooklyn, N.Y. Sch. Dist. No. 21, 383 F. Supp. 699, 731 (E.D.N.Y. 1974) *aff'd*, 512 F.2d 37 (2d Cir. 1975) ("[T]he negative impact of racially segregated schools is not confined exclusively to Black students. White children may also react to racial isolation in ways harmful to themselves.").

integration. At the same time, they preference "local governance" and free-market fatalism to parallel efforts by minority families to protect their property value against the equally artificial intervention of federal (e.g., construction of federal highways) and local (e.g., redevelopment that targets minority and low-income homes and communities for destruction as a result of blight) actions.

This differential access to the shelter of the law plays a small but significant role in perpetuating racial disparities in access to housing and, consequently, a wide range of economic and educational opportunities. Both of these tendencies have been enabled by the continued (albeit incorrect) presumption that the occupants of low-income housing—historically and to this day disproportionately people of color—harm the value of middle-class, wealthy, and white-owned homes. While this modern-day presumption is focused on economic and not racial classification, it is nonetheless an implicitly racialized one.

Yet the Fair Housing Act need not be read in such a confining and selective manner. By taking the same expansive approach to recognizing property value as a legally protectable interest with plaintiffs of color as they currently do with white plaintiffs, courts could ensure that civil rights statutes—designed as "open society" laws—reach their full potential to overcome residual structural forms of racial discrimination in the housing market.

In *Euclid* the Supreme Court decried the coming of apartment houses as "destroying the entire section [of town] for private house purposes."[346] As the Township of Mount Holly proceeds with literally destroying the entire neighborhood of low-income housing to accommodate housing for higher-income families, the physical, economic, and social well-being of lower-income neighborhoods and racial minorities in communities across the nation may hang in the balance. By foregoing the siege mentality that characterizes the attitude of many majority-white communities with respect to the presence of neighbors of color, and instead recognizing that the shelter of civil rights protections is far more generous, courts and municipalities have a crucial opportunity to help inch our nation toward the vision of equal housing opportunity.

346. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).