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"PIGS IN THE PARLOR": THE LEGACY OF RACIAL ZONING AND THE CHALLENGE OF AFFIRMATIVELY FURTHERING FAIR HOUSING IN THE SOUTH

Jade A. Craig
Nova Southeastern University Shepard Broad College of Law

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Jade A. Craig[*]

The Fair Housing Act of 1968 includes a provision that requires that the Secretary of Housing and Urban Development (HUD) administer the policies within the Act to "affirmatively further" fair housing. Scholars have largely derived their analysis from studying large urban areas and struggles to integrate the suburbs. The literature, however, has not focused on the impact of zoning and discriminatory land use policies within and around low-income rural and small communities or specifically in the southeastern United States. Scholars have also insufficiently considered the implications of these policies on the duty to "affirmatively further" fair housing.

Racial zoning was the preferred method of establishing residential segregation in the South in the early 20th century until the U.S. Supreme Court formally struck it down in 1917. This Article argues that racial zoning should be considered a logic and a metaphor rather than simply a historical moment in land use policy that has passed. The logic of racial zoning typifies anti-black land use policies that confine African Americans to particular areas, and this confinement facilitates the degradation of these areas. This Article contends that the logic of racial zoning creates black residential spaces and inscribes them with features that seek to render them undesirable. This process entrenches residential segregation by driving non-black residents away, just as rendering white space as desirable and exclusive protects housing inequity. The Article explicates the history of the racial zoning movement and the court cases that led to its demise. These cases, however, left the logic of racial zoning largely untouched. It then examines the legacy of racial zoning through three phenomena: (1) the designating of locations for black communities; (2) the lack of protective zoning given to black residential areas; and (3) the

[*] Assistant Professor of Law, Nova Southeastern University Shepard Broad College of Law. J.D., Columbia Law School. B.A., University of Virginia. In 2014, Mr. Craig was appointed by the Obama Administration to serve as Special Policy Advisor to the Office of Fair Housing and Equal Opportunity at the U.S. Department of Housing and Urban Development (HUD) under the leadership of Secretary Julián Castro. Mr. Craig would like to thank Olatunde Johnson, Michael Heller, Theodore M. Shaw, Diane Houk, and Fred Freiberg for helpful comments on earlier drafts of this Article prepared during his tenure as a law student.

disproportionate siting of LULUs in these areas. Finally, it asks whether the federal Fair Housing Act can remediate this legacy through policy or litigation. The Article argues that fair housing litigation has had limited success in undoing discrimination in land use protections that characterize the legacy of racial zoning. Instead, HUD's AFFH Rule may have a great impact in challenging jurisdictions to tackle community development issues in the context of fair housing. Its success in the South, however, is limited because its oversight mechanisms often overlook smaller, rural communities where anti-black land use policies and segregation patterns remain in place. Ultimately, fair housing in the South is not just about access to housing itself, but also about changing the context around it.

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I. INTRODUCTION

In *Village of Euclid, Ohio v. Ambler Realty Co.*,[1] the U.S. Supreme Court held that zoning was constitutional and fell within a local government's traditional police power. Justice Sutherland, writing for the majority, described zoning as a mechanism to control "the right thing in the wrong place, like a pig in the parlor instead of the barnyard."[2] This Article suggests that, within this metaphor, land use law has often regarded African Americans in particular as proverbial "pigs." African Americans were, metaphorically, "right things." Efforts to remove black people and their racialized cultural practices have avoided the presumption that black people do not have a right to exist. Indeed, the earliest cases in which white plaintiffs in southern and border U.S. states attempted to enjoin or remove blackness from their presence under the common law doctrine of nuisance generally failed.[3] Even today, in the firestorm of incidents known by the online handle #LivingWhileBlack, in which white individuals have enlisted law enforcement to remove blacks from their presence, the claim is generally not that the black individual is taking up space in a place where he does not have a legal right to be.[4] Instead, they are "the right thing[s] in the wrong place[s]."[5]

The racial zoning movement that began in early twentieth century America sought to place blacks "in the barnyard and out of the living room."[6] It was the South's version of "institutionalizing the common law

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[1] 272 U.S. 365 (1926).

[2] *Id.* at 388.

[3] *See* Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 505 (2006).

[4] Taja-Nia Y. Henderson & Jamila Jefferson-Jones note that "[w]hile several of the highly-publicized #LivingWhileBlack cases involve attempts to regulate Black occupancy in private space, [they] were unable to identify a single publicized instance in which the target of the law enforcement call lacked a legal right to occupy said space. [] In other words, while callers may have believed that they were 'securing' space by limiting access by trespassers, in each case [they] have identified, the target of the call had a right to be present." Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 870 n.29 (2020) (footnotes omitted).

[5] *See Euclid*, 272 U.S. at 388; *see also id.* (noting that while people in publicized #LivingWhileBlack cases attempted to regulate blacks' presence in private space, they were purportedly "'securing' space by limiting access by trespassers" rather than claiming that the black individual targeted did not have "a right to be present").

[6] *See* Charles Harr, *Preface*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP x (Charles M. Haar & Jerold S. Kayden eds., 1989) [hereinafter ZONING AND THE AMERICAN DREAM] ("By institutionalizing the common law of nuisance, zoning has kept Euclid author Justice Sutherland's pig in the barnyard and out of the living room.").

of nuisance."[7] The problem, however, is that African Americans are not pigs; they are people.[8] Under the logic of racial segregation, however, African Americans were treated as "subpersons," and zoning law governed them according to this cruel designation.[9] Racial zoning designated land for occupancy by black residents to the exclusion of occupancy anywhere outside of these defined areas in a given town or city. These areas became the "barnyards" to which cities relegated African Americans while traditional single-family, single-use residential districts—the "parlors" of both a racial zoning ordinance and the general zoning ordinances that followed—were reserved for wealthy or upper class whites.

City officials were indeed not good stewards of these barnyards. They often selected locations for black residential districts in the least desirable parts of urban areas. They provided these areas with the least amount of protection from commercial and industrial uses that were

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[7] *See id.*

[8] This underlying view of African Americans as non-persons comes across in the way that audiences responded to Lorraine Hansberry's groundbreaking play, *A Raisin in the Sun*. Multiple interviewers asked Hansberry to comment on the consistent refrain that the play was "not a Negro play at all, but a play about people." She consistently had to clarify this "misstatement" and explain that "Negroes" are people. *See* Mollie Godfrey, *Conversations with Lorraine Hansberry*, BOOKFORUM (Dec. 29, 2020), https://www.bookforum.com/culture/the-playwright-s-pan-african-sensibility-in-her-own-words-24317 (noting that Hansberry would explain "that her play was both 'a play about people' and 'a play about Negroes,' and to 'get to the universal you must pay very great attention to the specific'). Ironically, *A Raisin in the Sun* addresses housing discrimination and the ways in which it affects African Americans' sense of personhood and their access to opportunity. *See* LORRAINE HANSBERRY, A RAISIN IN THE SUN: A DRAMA IN THREE ACTS (1959).

[9] Philosopher Charles W. Mills develops this theory of the construction of nonwhites as "subpersons" under the Racial Contract, which he argues should replace the prevailing theory of the "social contract" as a realistic account of the structure of white settler colonial and post-colonial societies. *See* CHARLES W. MILLS, THE RACIAL CONTRACT (1997). Mills defines the Racial Contract this way:

> The Racial Contract is that set of formal or informal agreements or meta-agreements . . . between the members of one subset of humans, henceforth designated as ["white"], and coextensive . . . with the class of full persons, to categorize the remaining subset of humans as "nonwhite" and of a different and inferior moral status, *subpersons*, so that they have a subordinate civil standing in the white or white-ruled polities the whites either already inhabit or establish or in transactions as aliens with these polities . . . . [T]he purpose of the Contract is always the differential privileging of the whites as a group with respect to the nonwhites as a group, the exploitation of their bodies, land, and resources, and the denial of equal socioeconomic opportunities to them.

Id. at 11 (emphasis added).

inconsistent with a residential community. They then took advantage of the spatial segregation to locate locally undesirable land uses ("LULUs") in and around these communities. Over decades, these factors threatened to turn these communities into metaphorical pigsties—over the constant resistance of black residents who built their lives in them.

This Article argues that these practices serve to attach a racialized identity to space and render it "black" space. John Dubin has explicated the practice of failing to use zoning laws to protect black communities from harmful commercial and industrial uses.[10] Likewise, urban planning scholar Yale Rabin has characterized the practice of disproportionately filling areas in and around majority black communities with undesirable land uses as "expulsive zoning."[11] While the literature has often focused on efforts to maintain white spatial exclusivity and the privileging of white space,[12] the process of inscribing *black* residential areas with features that seek to render them undesirable spaces of disadvantage has received less attention. Just as city leaders selected locations for white communities in the most desirable sections of a city and used land use law to protect from undesirable land uses, they often assigned African Americans to the least desirable areas of town. They refused to protect black communities with zoning laws and made them available to host undesirable but necessary local land uses like landfills and factories, over and above their fair share and to the benefit of white communities.

The legacy of racial zoning is not merely a past-to-present link limited to those cities that once had racial zoning ordinances and the geography of segregation just in those cities today. Rather, the true legacy of racial zoning is two-fold. First, it is the logic that informed the reasons for their initial adoption and the ways in which this logic carried over into how cities implemented and enforced (or refused to enforce) general zoning ordinances after explicit racial zoning became impermissible. Second, racial zoning is a metaphor. One might think of today's hypersegregated majority-black communities (or communities of color more broadly) as areas that local governments have approached with a racial zoning logic. In other words, these neighborhoods have been "racially zoned" simply by

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[10] Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 742 (1993); *see also* Swati Prakash, Comment, *Racial Dimensions of Property Value Protection Under the Fair Housing Act*, 101 CAL. L. REV. 1437 (2013).

[11] Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM 103 (Charles M. Haar & Jerold S. Kayden eds., 1989).

[12] *See, e.g.*, Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401 (2010); Henderson & Jefferson-Jones, *supra* note 4, at 905; Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807 (2004).

another name[13] as a result of the enforcement or lack thereof of the traditional zoning regime.

This Article focuses on the South, where racial zoning became the predominant method for ensuring racial segregation in housing and excluding African Americans from white communities.[14] It is important to examine this region more closely for several reasons. Social scientists have acknowledged that racial segregation in housing that revolves around which groups live on high ground or low-lying areas likely takes place across the United States.[15] The South is unique, however, because of its history of slavery, the high population of African Americans, and the fraught political climate which is heavily polarized along racial lines.[16] Small towns and rural areas are also spaces that generally escape close study in fair housing legal scholarship.[17] While the U.S. Supreme Court struck down the practice of racial zoning in 1917 in *Buchanan v. Warley*,[18] the practice continued for many decades thereafter either directly or in thinly veiled forms at least in part because of the "historical durability and unique character of southern race relationships."[19]

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[13] This frame is not unlike the term "slavery by another name" that historian Douglas Blackmon used to describe the transition from slavery to convict leasing, in which black Americans in the South were arrested, wrongfully convicted of crimes, and sent to labor camps or to work on so-called contracts that they were forbidden to terminate for white landowners. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

[14] *See* Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1281 (2020) (describing the role of "the racial zoning laws that were rampant in the South" in building highways that served as racial boundary lines); DORCETA E. TAYLOR, TOXIC COMMUNITIES: ENVIRONMENTAL RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY 152 (2014) (noting that "Southern cities were the first to enact anti-Black zoning ordinances" and that "[a]round the time municipalities in the North were developing and passing zoning laws to protect property values and the aesthetic appeal of neighborhoods, southern city councils began passing ordinances to test their effectiveness at enforcing racial segregation"); Dubin, *supra* note 10, at 744 ("[W]hen legally enforced segregation approached its zenith, several southern and border cities enacted strict racial-zoning ordinances designating separate residential districts for whites and blacks.") (footnote omitted).

[15] *See* Jeff Ueland & Barney Warf, *Racialized Topographies: Altitude and Race in Southern Cities*, 96 GEOGRAPHICAL REV. 50, 53 (2006).

[16] *Id.*

[17] *See* Desiree C. Hensley, *Affirmatively Furthering Fair Housing in the Deep South: Obama's AFFH Rule Won't Make Rural America Less Segregated*, 26 VA. J. SOC. POL'Y & L. 92, 94 (2019) (noting that "fair housing legal scholarship focuses on urban, residential segregation").

[18] 245 U.S. 60 (1917).

[19] Ueland & Warf, *supra* note 15.

This Article treats racial zoning as more than a tragic moment in time that ended with the court decisions striking it down. Instead, it examines the legacy of racial zoning. This legacy includes the blueprint for racial segregation that these ordinances created and the segregated living patterns that remain as a result. It also includes the groundwork that these ordinances laid which informed land use policy toward black communities going forward even after high courts formally stripped local governments of the authority to pass such ordinances.

This focus on the South is important because space and racial hierarchy often interacted differently in this region than they did in other parts of the country. A twentieth century African American saying encapsulates the difference: "The South doesn't care how close a Negro gets, just so he doesn't get too high; the North doesn't care how high he gets, just so he doesn't get too close."[20] This folk wisdom draws on the experience of African American migrants who left racially zoned towns to find freedom in the North during the Great Migration and civil rights leaders who took the Southern organizing campaign northward. For northern U.S. cities, geographic separation between the races played a crucial role in excluding African Americans from the institutional forms of power and resources amassed by whites in majority-white areas. By contrast, African Americans and whites in the South historically lived in close proximity to one another.[21] Thus, the early efforts at establishing white supremacy and racial hierarchy began by designating space for blacks, sometimes with only railroad tracks as barriers (rather than the long highways that emerged shortly after the second wave of the Great Migration to the North).[22] This restricted space became the site of multiple markers

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[20] *See* Matthew Desmond, *Where Have All the Rioters Gone?*, THE ATLANTIC (Apr. 4, 2018), https://www.theatlantic.com/magazine/archive/2018/02/matthew-desmond-riots/552542/; *see also How Mayor Daley Outfoxed Martin Luther King*, NBC 5 CHICAGO (updated Jan. 16, 2012, 10:00 AM), https://www.nbcchicago.com/news/local/how-mayor-daley-outfoxed-martin-luther-king/1902225/ ("During the Civil Rights Movement, black leaders had a saying: 'In the South, the white man doesn't care how close you get, as long as you don't get too high. In the North, he doesn't care how high you get, as long as you don't get too close.'").

[21] *See, e.g.*, Anthony Chase, *In the Jungle of Cities*, 84 MICH. L. REV. 737, 755 n.46 (1986) (book review) (noting "the unusual proximity of very wealthy whites and very poor blacks in some parts of residential Miami" and history of "racially mixed neighborhood patterns"); David D. Troutt, *Katrina's Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1117 (2008) (noting that "'blacks' and 'whites' lived in much greater proximity to each other in the city for a longer period of time than in most American cities").

[22] *See, e.g.*, Baker v. City of Kissimmee, Fla., 645 F. Supp. 571, 574-75 (M.D. Fla. 1986) (describing the history of segregation along the lines provided by railroad tracks and noting that "[t]he City's largest black residential community is primarily located

of inferiority that reinforced the deprivation of access to institutions and resources allotted to whites under Jim Crow. This Articles focuses on three: (1) the location of black communities in the least desirable areas; (2) the refusal to provide protective zoning; and (3) the disproportionate siting of LULUs in or near African American neighborhoods.

Part II explicates the rise of the racial zoning movement and the court cases that led to its demise. The reasoning in these decisions establishes that racial justice was rarely even a consideration at all, much less a primary consideration, in striking down racial zoning ordinances. Courts instead focused on the unconstitutional limits placed on the transfer of private property between persons. Thus, the cases left the door open for jurisdictions to apply general zoning ordinances, which the Court upheld in *Euclid*, to achieve the segregative and racist objectives of the original racial zoning ordinances.

Part III examines the legacy of racial zoning through three phenomena: (1) the designating of locations for black communities; (2) the lack of protective zoning given to black residential areas; and (3) the disproportionate siting of LULUs in these areas. In each case, a barely broken line of racist policy decisions starts from racial zoning and continue to impact communities today. These repercussions go unaddressed in the focus on individual acts of housing discrimination under federal and state fair housing laws and debates about the construction of affordable housing. The legacy of racial zoning calls into question the focus on discrimination in access to housing rather than discrimination in remedying the quality and character of the community in which housing in majority-black communities is located. These phenomena are housing problems, not merely land use problems.

Finally, Part IV examines whether the federal Fair Housing Act (FHA) can remediate this legacy through policy or litigation. In other words, can the FHA treat these issues as housing law issues? The Article argues that the case law involving challenges to the discriminatory provision of municipal services under the Act exposes how courts narrowly confine the relationship between housing and its relationship to the discriminatory zoning and land use policies that characterize the legacy of racial zoning. I join the ranks of scholars who propose litigation strategies that attempt to broaden the reach of the FHA, but highlight the challenge that the precedent poses for the issues arising from the logic of racial zoning that still governs black residential areas today.

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literally 'on the other side of the railroad tracks'"); HORTENSE POWDERMAKER, AFTER FREEDOM: A CULTURAL STUDY IN THE DEEP SOUTH (1939) (describing separation of Mississippi town with the black section described as "Across the Tracks").

In light of these challenges, I turn toward the provision of the FHA which requires all recipients of federal funding to "affirmatively further" the goals of the FHA ("AFFH" or "affirmatively further fair housing") and the opportunities that it presents to engage with these limitations. I also examine the rule implementing the AFFH mandate that HUD adopted in 2015. I argue that the AFFH mandate and the Rule provides a necessary legal basis for requiring policy-based solutions to the legacy of racial zoning in the South. The process of implementing and overseeing the Rule in most parts of the South, however, fails to capture the contexts most in need of reform. I propose requiring a more focused examination of the relationship between racial and ethnic concentrations of poverty and historic discrimination in zoning and land use policy that challenges jurisdictions to adopt plans to use federal funding to remedy those disparities. The legacy of racial zoning calls for examining a method for denying equal housing opportunities to African Americans that predominated in a certain part of the United States and how it should inform the goals that cities set in their efforts to meet their fair housing obligations.

II. WHAT MAKES THE SOUTH UNIQUE—THE HISTORY AND STRUCTURE OF RESIDENTIAL SEGREGATION IN THE SOUTH

The historic black presence in the South and the recent population growth calls for an analysis of the differences between that region and the rest of the nation which might have influenced residential segregation and created barriers to fair housing.[23] Large metropolitan areas in the Northeast and the Midwest often have high rates of poverty in concentrated areas of black residents.[24] The South, however, presents a different pattern: the smallest metropolitan areas have the highest levels of ghetto poverty and the largest concentrations of poor people.[25] Public policy scholar Paul Jargowsky has surmised that the difference stems from "blacks' historical settlement patterns driven largely by agriculture" in the South, an explanation which takes into account regional and historical differences among cities and relies less on current demographic and economic factors.[26] Zoning and land use policies also informed these "settlement patterns" and

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[23] *See* Chris Kromm, *Black Belt Power: African-Americans come back South, change political landscape*, FACING SOUTH (Sept. 28, 2011) https://www.facingsouth.org/2011/09/black-power-african-americans-come-back-south-shake-up-southern-politics.html ("According to the U.S. Census, the South's share of the black population – 57 percent – is now the highest it's been since 1960.").

[24] *See* PAUL A. JARGOWSKY, POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY 76-77 (1997).

[25] *Id.*

[26] *Id.*

contributed to racialized poverty in small and mid-sized metropolitan areas. The construction of residential segregation in the South specifically relied heavily on land use law in the service of this effort.

A. The Development of Segregation in the South After the Civil War

After the Civil War, segregation occurred mainly through a series of customs and living patterns.[27] Many urban communities in the South were fairly integrated and did not have strict patterns of racial separation.[28] These patterns arguably mirrored life on plantations during the antebellum period; a white landowning family resided in the main house, but was constantly attended by slaves, often known as "house slaves."[29] By the same token, slaves lived in separate sections of the plantation, or "slave quarters," but these spaces were not forbidden to whites.[30] This intermingling, with a constant attention to hierarchy certainly on the part of slaves, was a longstanding feature of interracial relations in the South.

The end of Reconstruction led to profound social upheaval as white Southerners returned to power at the same time that the number of African Americans migrating from rural to urban areas in the South increased significantly.[31] Black populations in major Southern cities rose by ten to fifteen percent from 1860 to 1910.[32] In 1860, only three Southern cities—Jacksonville, Florida; Norfolk, Virginia; and Richmond, Virginia—had a

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[27] Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. S. HIST. 179, 179 (1968) ("Segregation by law, however, had been a somewhat less constant fact of life for Negroes immediately after the Civil War.").

[28] *See, e.g.*, JOHN H. BRACEY, JR., ET AL., THE RISE OF THE GHETTO (1971).

[29] *See* Nicholas Boston, *The Slave Experience: Living Conditions*, THIRTEEN, https://www.thirteen.org/wnet/slavery/experience/living/history2.html (last visited June 15, 2022).

[30] *See* SOLOMON NORTHUP, TWELVE YEARS A SLAVE (1853) (describing white slave owners' visits to slave quarters by slave owners to commit rape and appearance of poor whites in slave quarters); Robert Jones, Jr., THE PROPHETS (2021) (describing visits to slave quarters by white landowners).

[31] *See* TAYLOR, *supra* note 14, at 152-53 (describing the migration of African Americans from rural to urban areas of the South after the Civil War, a trend which precipitated the passage of anti-black racial-zoning ordinances); Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 25 (June Manning Thomas & Marsha Ritzdorf eds., 1997); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 41-44 (2017) (arguing that Southern cities enacted racial zoning ordinances because they already had large populations of black residents that they could not expel, unlike small towns in the Midwest and West that were driving out their African American residents from the 1890s through the 1930s)

[32] *See* TAYLOR, *supra* note 14, at 153-54.

black population that exceeded twenty-five percent.[33] By 1910, that number of cities had risen to ten.[34] The increase in the number of black residents alarmed whites in these cities.[35] A race riot broke out in Atlanta in 1906.[36] Several race riots and massacres of African American residents also broke out across the South in 1917 and 1921, including in Houston, Texas; Winston-Salem, North Carolina; Washington, D.C.; and Tulsa, Oklahoma.[37] By 1915, the Court of Appeals of Kentucky justified Louisville's racial zoning ordinance by pointing to the "gravity of the race problem as it exists in our country to-day" and "congested municipal conditions."[38] The interest of preventing racial conflict likewise shows up in other cases upholding racial zoning ordinances.[39]

White rage forged the development of segregation in fire. Alongside repression, segregationists also maintained racial hierarchy through exclusion. Under Jim Crow, the "assignment of legal meaning to determinable segments of the physical world . . . was often experienced as exclusion or denial."[40] Segregationists communicated this message in a variety of ways, including directly denying blacks certain facilities.[41] It began with the designation of certain spaces with racial identities, assigning white space and black space. These assignments developed to entail the

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[33] *Id.*

[34] *Id.*

[35] *Id.* at 153.

[36] *Id.*

[37] *Id.*

[38] Harris v. City of Louisville, 177 S.W. 472, 475 (Ky. 1915), *rev'd sub nom.* Buchanan v. Warley, 245 U.S. 60 (1917).

[39] *See, e.g.*, Harden v. City of Atlanta, 93 S.E. 401, 402-03 (Ga. 1917), *overruled by* Lee v. Warnock, 96 S.E. 385 (Ga. 1918); City of Dallas v. Liberty Annex Corp., 19 S.W.2d 845, 845 (Tex. Civ. App. 1929), *writ dismissed w.o.j.* (Nov. 20, 1929) (citing title of Dallas racial-zoning ordinance which describes it in part as "[a]n ordinance for preserving peace, preventing conflict and ill-feeling between the white and colored races . . . .").

[40] DAVID DELANEY, RACE, PLACE AND THE LAW: 1836-1948 96 (1998).

[41] *See, e.g.*, Kevin G. McQueeney, *More than Recreation: Black Parks and Playgrounds in Jim Crow New Orleans*, 60 LOUISIANA HISTORY: THE JOURNAL OF THE LOUISIANA HISTORICAL ASSOCIATION 437, 438-39 (2019) (arguing that African Americans created their own spaces after lobbying the government to build separate black parks and playgrounds failed and "saw the use of recreation space as a right denied"); *Racial History of American Swimming Pools* (interview between Rachel Martin & Dr. Jeff Wiltse), NPR (May 6, 2008, 7:00 AM), https://www.npr.org/2008/05/06/90213675/racial-history-of-american-swimming-pools (describing refusals to provide access to swimming pools during Jim Crow and its relationship to the fact that nearly 60 percent of African American children today cannot swim, according to a recent study).

duplication of spaces or the denial of access entirely.[42] In whatever way it was performed, "segregation entailed exclusion from white spaces."[43]

1. Background Conceptions of Blacks as Nuisances

"The idea of Black people being 'bothersome,' 'vexing,' 'annoying,' or 'harmful' to white people is one that has circulated since the antebellum period and has persisted well after."[44] Nuisance law, which was very elastic in early twentieth century America, became a predictable tool for eradicating the presence of black people in white neighborhoods.[45] Treatises described twenty-eight cases dating back to the late nineteenth century in which white plaintiffs brought cases arguing that courts should ban or remove their black neighbors as a matter of tort law under the nuisance doctrine; the majority of them were brought in the South.[46]

The legal definition of nuisance differs from the way in which people often understand the term socially.[47] Nonetheless, the social

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[42] Frances L. Edwards & Grayson Bennett Thompson, AIA, *The Legal Creation of Raced Space: The Subtle and Ongoing Discrimination Created Through Jim Crow Laws*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 145, 153 (2010) (noting that courts often required the duplication of space, including the creation of alternative schools for black children, to enforce the doctrine of separate but equal) (citing Tucker v. Blease, 81 S.E. 668, 674 (S.C. 1914)). Of course, in many cases, states denied facilities to blacks altogether rather than engage in duplication. *See, e.g.*, Note, *Statutory Discriminations Against Negroes with Reference to Pullman Cars*, 28 HARV. L. REV. 417, 419 (1915) (arguing that requiring a railroad to create duplicate Pullman porter accommodations for black railroad passengers may constitute a deprivation of property without due process of law); Rachel F. Moran, *Diversity, Distance, and the Delivery of Higher Education*, 59 OHIO ST. L.J. 775, 777 (1998) (observing that "[t]he investment in well-appointed residential campuses for white students, who then enjoyed access to distinguished faculty and a network of successful alumni, could not be duplicated for blacks in separate institutions" exemplified how "segregation both reflected and reinforced racial stratification").

[43] DELANEY, *supra* note 40, at 96-97.

[44] Lolita Buckner Inniss, *Race, Space, and Surveillance: A Response to #LivingWhileBlack: Blackness As Nuisance*, 69 AM. U.L. REV. F. 213, 220-21 (2020) (footnote omitted).

[45] Godsil, *supra* note 3, at 514.

[46] *See id.* at 506-07 ("Most of these 'race-nuisance' cases were brought in the South, including Louisiana, Mississippi, Texas, and Tennessee, but a few were brought in the North as well."). Interestingly, however, "the white plaintiffs lost" in most of these cases—a pattern that "casts substantial doubt on the background assumptions about the way law worked during the Jim Crow era, and thus provides a more textured understanding of that period." *Id*. at 505, 507.

[47] Inniss, *supra* note 44, at 219 (noting that "the word 'nuisance' has a significant non-legal valence that often colors the way in which it is understood in legal decisions. Nuisance in the lay sense refers to a person, thing, or circumstance that causes harm or injury or is unpleasant, obnoxious, or annoying").

definition relates to the legal context, as the non-legal meaning of a term informs the way in which legal actors analyze and apply the law.[48] This distinction is significant in the context of racial zoning as one considers that it is local government officials like city council members, executives, and planners—not necessarily lawyers or judges—who develop and enforce zoning ordinances and maps. These actors have a legal function, but their application of the law is not as technical as that of a court. As the use of nuisance law for managing incompatible land uses receded from the background in the wake of local governments' adoption of zoning ordinances, the underlying nuisance framework never truly disappeared.[49]

2. Race and the "Progressive Era"

As the country transitioned from the Gilded Age and into the Progressive Era during the first two decades of the twentieth century, "the popular horror of racial amalgamation reached its apogee."[50] Consistent with the political zeitgeist of the time, local government officials supported "social planning," and many in the South sought to extend the reach of government to implement "broader methods of social control than mere antimiscegenation statutes."[51]

This history provides the logical underpinning for the development of zoning ordinance as a method of instantiating racial hierarchy. During the same period, local governments also began to focus on preventing land use conflicts from taking place, replacing the resort to the common law doctrine of nuisance with proactive methods of policing land uses.[52] Local governments sought both the power "to eliminate negative dangerous or anti-social uses" and the "power affirmatively to select among admittedly harmless uses those which the political power deems the most popular and to prohibit all others."[53]

White segregationists employed pseudoscience to support claims of black inferiority and to defend racial segregation.[54] Whites began to conclude that there was a need to "segregate or quarantine a race liable to be a source of contamination and social danger to the white community, as

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[48] *Id.* at 219-20.

[49] *See* Godsil, *supra* note 12, at 1858-59.

[50] Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 Duke L.J. 624, 657 (1985).

[51] *Id.*

[52] *See* Godsil, *supra* note 12, at 1859.

[53] *See id.* (quoting Arthur V.N. Brooks, *The Office File Box-Emanations from the Battlefield*, in ZONING AND THE AMERICAN DREAM 14 (Charles M. Haar & Jerold S. Kayden eds., 1989)).

[54] Godsil, *supra* note 3, at 514.

it sank even deeper into the slough of disease, vice and criminality."[55] Equality concerns had very little influence on lawmaking in the Jim Crow South when it came to the interests of African Americans: "Jim Crow laws reflected a society that felt itself under no constraint to treat blacks equally, not even in the formal constraint of legal fiction."[56] Beginning as early as the 1910s, as cities codified nuisance law in zoning ordinances, an "undercurrent of ethnic prejudice and racism also ran through these efforts to develop a more systematic approach to control urban land use."[57]

"Residential segregation codified racial preferences through racial zoning."[58] From the early years in the development of segregation, it became clear to state actors that segregation had to go through a process one historian has referred to as "de jurification" for the system to sustain white supremacy and racial hierarchy.[59] Segregation required a transition from social custom into law.

III. THE RISE OF THE RACIAL ZONING MOVEMENT

The cases that involve challenges to the racial zoning movement that took place in the South display an underlying logic that would explain the legacies that it wrought, including the designation of the most undesirable areas of a jurisdiction for black residency; the failure to provide protective zoning; and the exploitation of that confinement of African Americans to steer undesirable land uses that degraded the community's property values at the expense of whites. The racial zoning movement is not a historical phase of American law that rose and fell. It is the beginning of a policy at the foundation of how land use law treats and fails to regulate in the interests of furthering equity in the quality of majority-black neighborhoods.

A. Early Racial Zoning Ordinances

Racial zoning ordinances would ensure that racial exclusion and white supremacy were written onto the land and would permanently shape access and power in the relationship between the races. Ultimately, "[s]egregation was constructed in order to reinforce relations of racial

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[55] GEORGE FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914 255 (1971).

[56] Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 474 (1982).

[57] Prakash, *supra* note 10, at 1447.

[58] *Id.* at 1446, 1446 n.45.

[59] *See* DELANEY, *supra* note 40, at 95.

domination and subordination."[60] White-controlled local governments in the South exploited land use laws to cultivate white spaces of power and to ensure the exclusion of blacks from these spaces. Land use controls could also craft the most ideal spatial circumstances for whites and the most disadvantageous for blacks—an assignment process that limited black access and structured racial inequality.

Racial zoning ordinances were one of the earliest formal land use controls that white Southerners developed to separate the races. Urban reformers and white politicians interested in ensuring black exclusion led a movement in the early twentieth century to urge local governments to pass zoning ordinances that assigned separate residential areas to whites and blacks, beginning with Baltimore in 1910 and spreading throughout the South and to the rest of the country.[61] In many localities, racial zoning ordinances were one of the first instruments used to legally organize separate spaces and lives for blacks and whites.

1. Baltimore: The Beginning

The road to Baltimore, Maryland, receiving the dubious distinction of becoming the first city to pass a residential segregation ordinance began with conceptions of blacks as nuisances.[62] Urban reformers and whites in Baltimore became concerned about the severe poverty and blight that they saw developing as black migration into the city increased.[63] Black poverty had come to resemble a physical nuisance. That concern led the city not to remedy the problem, but to avoid and exacerbate it by passing a law that restricted blacks to particular areas in 1910.

The segregation ordinance in Baltimore also developed as a direct response to prevent residential integration. During the summer of 1910, a prosperous black lawyer crossed a color line in northwest Baltimore when he moved from an affluent black section into a home in the fashionable white neighborhood in the city.[64] The move immediately provoked agitation, and his family faced harassment.[65] White Baltimore residents,

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[60] *Id.*

[61] *Id.* at 105-09; Silver, *supra* note 31, at 27; Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1983).

[62] Baltimore, Md., Ordinance 610 (Dec. 19, 1910).

[63] Power, *supra* note 61, at 290.

[64] *Id.* at 298. George W.F. McMechen purchased a house in what was considered by the Eutaw Place neighborhood, "one of the most fashionable residential sections of Baltimore." *Id.* (citations omitted). McMechen, a Yale Law School graduate and a practicing lawyer, moved with his wife and children from their former home, which was only ten blocks away. *Id.*

[65] Power, *supra* note 61, at 298.

and specifically residents of the black family's new street, held a mass meeting on July 5, 1910.[66] White residents prepared a petition requesting that the Mayor and City Council "take some measures to restrain the colored people from locating in a white community, and proscribe a limit beyond which it shall be unlawful for them to go . . . ."[67] A white lawyer decided to write a law designed to meet the protesters' demands to prevent the so-called "Negro invasion," and a city council member introduced the bill.[68] At the public hearings that followed, blacks were the main protestors.[69] Their challenge was to no avail; the city council passed the bill in December 1910.[70] The *Baltimore Sun* summarized the ordinance's provisions:

> That no negro can move into a block in which more than half of the residents are white. That no white person can move into a block in which more than half of the residents are colored. That a violator of the law is punishable by a fine of not more than $100 or imprisonment of from 30 days to 1 year, or both. That existing conditions shall not be disturbed. No white person will be compelled to move away from his house because the block in which he lives has more negroes than whites, and no negro can be forced to move from his house if his block has more whites than negroes. That no section of the city is exempted from the conditions of the ordinance. It applies to every house.[71]

The final version of the ordinance also prohibited blacks from using residences on white blocks for public assembly, and vice versa.[72]

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[66] *Id.*

[67] *Id*. (quoting Petition to the Mayor and City Council, Baltimore City Archives, Mahool Files, File 406 (July 5, 1910)).

[68] Power, *supra* note 61, at 299.

[69] *Id.*; Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. S. HIST. 179, 181 (1968). At the second ordinance hearing, two hundred people came out to protest the proposed ordinance, and most of them were African American. *Id.* The Baltimore *Afro-American*, a black-run newspaper, explained that blacks who protested the ordinance were not necessarily against it because they wanted to live in white neighborhoods, but because they believed that segregation in principle was un-American and "mischievous." *Id*. (quoting Baltimore *Afro-American*, Oct. 15, 1910).

[70] Power, *supra* note 61, at 299.

[71] *Id.* at 299-300 (quoting Baltimore *Sun*, Dec. 20, 1910, at 7, cols. 5-6).

[72] Baltimore had revised the law three times when it was struck down by the Maryland high court in State v. Gurry, 88 A. 546 (Md. 1913), and then revised it a fourth time to keep it in place.

Whites who challenged the black family's move into "their" neighborhood viewed blacks as a social nuisance. The pleading in the petition could have easily been against a toxic waste facility that had made plans to move next door. The fact that pressure for the racial zoning law could come to a head after *one* black man decided to move his family into a white neighborhood indicates the level of racial tension in the air at the time. The protests also illustrate the degree to which residential segregation and black exclusion were the result of specific policy choices by individuals and state actors. The segregation ordinance became a weapon that whites could marshal to exclude blacks, control their mobility and access to opportunity, and further the black disempowerment that was at the heart of white supremacy.

2. Beyond Baltimore

While the racial zoning movement eventually grew to become national in scope, it began and had its most wide-ranging impact in the South.[73] Racial zoning ordinances spread quickly with wide approval. Between 1910 and 1916, they were enacted in Baltimore; several cities in Virginia; Winston-Salem, North Carolina; Greenville, North Carolina; Atlanta; Louisville; St. Louis; Oklahoma City; and New Orleans.[74] The ordinances were very popular: St. Louis's ordinance, for example, was enacted by referendum by a margin of approximately three to one.[75] To be sure, the cities applied different methods to impose complete racial segregation in housing, including keeping each block exclusive to one race by prohibiting anyone of a different race from entering; dividing the municipality into distinct racial districts; or only allowing new individuals to move to a block if they shared the race of the majority of that block's current residents.[76] One city, New Orleans, required new residents of a particular race to obtain the consent of the current residents if the current

[73] Silver, *supra* note 31, at 23-39; Power, *supra* note 61, at 310-11. By 1913, several cities in Virginia, including Richmond, Norfolk, Portsmouth, Roanoke, and the town of Ashland, as well as Winston-Salem, North Carolina, Greenville, South Carolina, and Atlanta, Georgia, had enacted modified versions of Baltimore's residential segregation statute. Power, *supra* note 61, at 310 (citations omitted). Before *Buchanan* struck down explicit racial zoning in 1917, the racial-zoning ordinance had reached other cities, including Madisonville and Louisville, Kentucky, St. Louis, Oklahoma City, and New Orleans. *Id.*

[74] Power, *supra* note 61, at 310.

[75] *See* Godsil, *supra* note 3, at 539 (footnote omitted).

[76] *Id.*

residents were of a different race.[77] The objective, however, remained the same.

Louisville would become arguably the most notable convert to the movement to establish what one historian has called "municipal apartheid"[78] because its law led to the movement's formal end.

3. Lessons from the Rise of the Movement

Indeed, racial zoning ordinances were somewhat of a precursor to general zoning ordinances. Although Baltimore passed its racial zoning ordinance in 1910, New York City did not enact the nation's first comprehensive zoning ordinance until six years later in 1916.[79] In 1909, Los Angeles adopted regulations that divided the city into residential and industrial use districts, but it was not nearly as comprehensive as New York City's ordinance. "[T]hus, New York's ordinance is considered the landmark in land-use regulation."[80] To the extent that Los Angeles developed the earliest zoning scheme, the fact that one of the first responses to the concept was to create a system that divided cities into districts for separate racial groups indicates the consistent link between the use of zoning to segregate people in addition to types of land uses.

Prior to the Court's decision in *Buchanan*, at least one state, Virginia, began granting cities the power to pass racial zoning ordinances.[81] For their part, several cities in the southern and border states also passed residential segregation ordinances, without regard to whether their state legislatures had expressly authorized them to do so.[82] Several northern cities had considered adopting residential segregation laws as well, but instead violence became an important mechanism for enforcing racial

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[77] *Id.*

[78] DELANEY, *supra* note 40, at 4; *see also* A. Leon Higginbotham, Jr., et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763, 763 (1990) (discussing the Group Areas Act, South Africa's coordinate policy and one of the first measures passed under apartheid in 1950).

[79] *See* Godsil, *supra* note 12, at 1860, 1860 n.326.

[80] *Id.* 1860 n.326.

[81] *See* Va. Acts 1912, p. 330; *see also* Hopkins v. City of Richmond, 86 S.E. 139, 143 (Va. 1915), *overruled by* Irvine v. City of Clifton Forge, 97 S.E. 310 (Va. 1918) (explaining that "the Legislature of Virginia solemnly declared that the residences of white and colored citizens in close proximity to one another in the cities and towns throughout the state endangered the preservation of public morals, public health, and public order, and they proceeded to empower the cities and towns of the state to pass ordinances providing for separation of the races within their limits").

[82] *See* David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 798 (1998).

segregation, particularly after the Court struck down racial zoning in *Buchanan*.[83] Legal challenges to these explicit ordinances were met with mixed success.[84] Three states' courts that considered the question—Georgia, Maryland, and North Carolina—held that the racial zoning laws were unconstitutional.[85] The high courts in Virginia and Kentucky held that they were constitutional.[86]

The early cases reviewing racial zoning ordinances provide insight into why discriminatory land use policies based on racial zones remained in place long after the ordinances were struck down. First, the courts almost universally did not question the legality or morality of anti-black segregation in principle, likely a function of deciding the cases in the world after *Plessy v. Ferguson*,[87] in which the U.S. Supreme Court approved segregation itself in the doctrine of "separate but equal." In *State v. Gurry*,[88] the earliest case arising from a challenge to a racial zoning ordinance in the South, there was no question that segregation was legal. The Court of Appeals of Maryland held that the city government of Baltimore had the authority under its police powers "for the segregation of the white and colored races" without conflicting with the federal or state constitutions.[89] It refused to uphold the ordinance, however, because it failed to protect individuals who may have acquired a legal right to reside in a property at the time the city adopted the ordinance.[90] Even the North Carolina court in *State v. Darnell*, which gave the most full-throated condemnation that connected the ordinance to other forms of discrimination in striking it down, ruled that "[t]here is no question that legislation can control social rights by forbidding intermarriage of the races, and in requiring Jim Crow cars, and in similar matters."[91] Other courts that upheld racial zoning ordinances also approved the validity of segregation.[92]

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[83] *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 41 (1993); Bernstein, *supra* note 82, at 798, 798 n.3.

[84] *See* Bernstein, *supra* note 82, at 836.

[85] *Id.* at 836 n.192.

[86] *Id.*

[87] 163 U.S. 537 (1896).

[88] 88 A. 228, 228 (Md. 1913).

[89] *Id.*

[90] *Id.* at 228-29.

[91] 81 S.E. 338, 340 (N.C. 1914).

[92] *See* Hopkins v. City of Richmond, 86 S.E. 139, 141 (Va. 1915), *overruled by* Irvine v. City of Clifton Forge, 97 S.E. 310 (Va. 1918) (approving the racial zoning ordinances for the cities of Richmond and Ashland, Virginia). The court felt so strongly about the basis of the ordinance that it took "judicial notice of the fact that 'the preservation of public morals, public health, and public order in the cities and towns of this state is

When one court approached the question of whether the ordinance violated the Fourteenth Amendment, it took a very limited approach to interpreting the amendment.[93] The court reasoned that the amendment prohibited taking action that infringed upon the rights of "citizen[s] of the United States," but not citizens of their own state, relying on the cases that narrowed the reach of the Fourteenth Amendment, including the Slaughter House Cases.[94] The decline of the Fourteenth Amendment's importance in jurisprudence led to the elevation of explicitly racist policies like racial zoning without questioning their moral legitimacy.

Both the reach of a local government's police power and the limits on a city's ability to interfere with residents' property rights informed how the courts interpreted the problems with the racial zoning ordinances before them. Richard Thompson Ford illuminated "two contradictory conceptions of local political space" with which these courts struggled in their decisions: one that "regards local jurisdictions as geographically defined delegates of centralized power, administrative conveniences without autonomous political significance," while "[t]he other treats local jurisdictions as autonomous entities that deserve deference because they are manifestations of an unmediated democratic sovereignty."[95] According to Ford, "[t]he first account avoids examination of the potentially segregated character of local jurisdictions by denying them any legal significance; the second, by reference to their democratic origins, or by tacit analogy to private property rights, or both."[96] In both accounts, courts find a basis to ignore the legal implications of racial segregation and inequality.

The court in *State v. Darnell*[97] considered the state legislature's authority to limit the powers of cities with respect to the laws that they could enact. It held that the Winston, North Carolina, racial zoning ordinance expanded the power to regulate for the "general welfare" to an "extended and wholly unrestricted scope which we do not think the Legislature could have contemplated in using those words," particularly because the ordinance "establishe[d] a public policy which ha[d] hitherto been

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endangered by the residence of white and colored people in close proximity to one another.'" *Id.* at 144 (quoting Va. Acts 1912, p. 330).

[93] *Hopkins*, 86 S.E. at 145-48.

[94] *Id.* at 145 ("The Constitution forbids the abridging of the privileges of a citizen of the United States, but does not forbid the state from abridging the privileges of its own citizens.") (citing Slaughter House Cases, 83 U.S. 36 (1872) and United States v. Cruikshank, 92 U.S. 542 (1875), among others).

[95] Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1845-86 (1994).

[96] *Id.* at 1846.

[97] 81 S.E. 338 (N.C. 1914).

unknown in the legislation of our state."[98] Other states, however, granted broad discretion to local governments to make these prohibitions.[99] The court in *Darnell* essentially took the position that the ordinance was wrong because it extended beyond the city of Winston's delegated "centralized power," under Ford's framing.[100] It viewed the ordinance, however, as an overextension of the city's police powers and not a problem of race discrimination.[101]

The effect of racial zoning ordinances on private property rights also did not escape the courts that followed *State v. Gurry*. In nearly every case involving a challenge to a racial zoning ordinance during the movement's early years, courts emphasized the primacy of property rights and ruled that the racial zoning ordinance at issue should be overturned because the ordinance infringed on these rights.[102] The courts also refused to apply the ordinance to deprive a property owner who had a right of occupancy at the time the jurisdiction passed the ordinance.[103] The reasoning of the cases that strike down these ordinances and their focus on property rights and not on the moral depravity of racism exemplify Derrick Bell's assessment of the role of race in the courts during the Jim Crow era: "The courts, and along with them the rule of law, became not impartial arbiters of societal relations but instead the mirror and enforcer of property interests."[104]

The Kentucky Court of Appeals, however, was an important exception, as it expressed a willingness to sacrifice time-honored doctrines of property ownership in favor of state regulation of land—in this case, one that furthered the interests of rigid racial segregation and white supremacy.[105] It found that a property owner's nearly absolute right to

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[98] *Id.* at 339.

[99] *See Hopkins*, 86 S.E. at 143 (holding that "[t]he lawmaking power is the sole judge of when, if at all, it will enact public laws. And the full measure of discretion is conceded to the legislative body of the municipality as of the state.") (internal citations omitted).

[100] *See Darnell*, 81 S.E. at 340.

[101] *Id.*

[102] *See* Carey v. City of Atlanta, 84 S.E. 456, 459 (Ga. 1915) (striking down racial-zoning ordinance due to infringement on property rights, noting that the "right of disposing of property, the jus disponendi, has always been held one of the inalienable rights incident to the ownership of property, which no statute will be construed as having power to take away.") (citing *Darnell*, 81 S.E. 338).

[103] *See*, *e.g.*, *Hopkins*, 86 S.E. at 141 (approving the racial zoning ordinances for the cities of Richmond and Ashland, Virginia).

[104] DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 33 (2d ed. 1980).

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

dispose of his property as the owner saw fit had "little place in modern jurisprudence."[106] Instead, it reasoned:

> The advance of civilization and the consequent extension of governmental activities along lines having their objective in better living conditions, saner social conditions, and a higher standard of human character has resulted in a gradual lessening of the dominion of the individual over private property and a corresponding strengthening of the regulative power of the state in respect thereof, so that to-day all private property is held subject to the unchallenged right and power of the state to impose upon the use and enjoyment thereof such reasonable regulations as are deemed expedient for the public welfare.[107]

For one court at least, the dangers of state-imposed segregation that the racial zoning ordinances represented were apparent and served as a basis to overturn them.[108] In *Darnell*, the North Carolina Supreme Court took seriously the slippery slope that the ordinance implied:

> If the board of aldermen is thereby authorized to make this restriction, a bare majority of the board could, if they may "deem it wise and proper," require Republicans to live on certain streets, and Democrats on others, or that Protestants shall reside only in certain parts of the town, and Catholics in another, or that Germans or people of German descent should reside only where they were in the majority, and that Irish and those of Irish descent should dwell only in certain localities, designated for them by the arbitrary judgment and permission of a majority of the aldermen. They could apply the restriction as well to business occupations as to residences, and could prescribe the localities allotted to each class of people without reference to whether the majority already therein is of the proscribed race, nationality, or political or religious faith.[109]

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[106] *Id.*

[107] *Id.*

[108] State v. Darnell, 81 S.E. 338 (N.C. 1914).

[109] *Id.* at 339. The court's contemporaries in Kentucky, however, rejected this argument as "time-worn sophistry (always advanced when legislation of this character is being attacked)." *Harris*, 177 S.W. at 475.

The court also compared the ordinance to the policy of ethnic conflicts overseas.[110] It cited the "Irish Pale," a limit which prescribed where the "native Irish or Celtic population" could reside and noted that the policy had in part driven them to immigrate to America.[111] It also compared the ordinance to the policy in Russia of restricting Jews to "ghettoes" that remained in place and the resulting immigration of Jews to America in "vast numbers."[112]

The court, however, stopped short of connecting the harm that the policies visited upon the Irish and Jews, which they viewed as morally reprehensible,[113] to the immorality of applying the policy to African Americans. Instead, the court couched the problem within the economic interests of whites in maintaining their black labor force in the fact of efforts by labor agents to recruit them to leave the state.[114] The mass emigration of the Irish and Jews from Europe suggested that "the result of this policy might well be a large exodus and naturally of the most enterprising and thrifty element of the colored race, leaving the unthrifty and less desirable element in this state on the taxpayers."[115] Thus, the ordinance interfered with "a public policy of retaining the colored laborers in this state."[116]

Rachel Godsil has observed that the decision "sends more complex messages" despite the language's suggestion of "respect for the ideal of equal treatment."[117] Even the discussion of the exodus of Irish and Jews to America as a result of the restrictive policies in their home countries "evinces a more material reason for the court's vehement condemnation of racial zoning"[118]—namely, an analogy of the same flight taking place with respect to blacks leaving North Carolina.

It is not surprising, however, that this policy reason did not carry the day in preventing the adoption of other anti-black land use policies in later years. Derrick Bell's interest convergence thesis[119] would suggest that the

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[110] *Darnell*, 81 S.E. at 339.

[111] *Id.*

[112] *Id.*

[113] *See Id.* (lamenting the "continued disorder and unrest in that unhappy island" that the policy of restriction of movement based on ethnicity brought to Ireland).

[114] *See Id.* at 340. It is notable that North Carolina's high court decided the case in 1915, at the start of the first wave of the Great Migration during which thousands of African Americans left the South in the hope of finding freedom in the North. *See generally* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION (2011). Many of them were recruited by labor agents. *See id.*

[115] *Darnell*, 81 S.E. at 340.

[116] *Id.*

[117] Godsil, *supra* note 3, at 540.

[118] *Id.*

[119] Derrick Bell argued in one of his most famous writings that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the

court's decision striking down Winston-Salem's racial zoning ordinance provided a win for racial justice for blacks, including William Darnell, the "colored man" who moved into a house on the wrong street and brought the case appealing his conviction for this offense.[120] At the same time, it converged with the white economic interests in avoiding explicitly racist prohibitions that reminded black residents of the evils of the Jim Crow system under which they lived in order to quell unrest and retain access to black labor. Once it became clear that Southern elected officials could not stem the tide of black migrants taking their labor with them to other states, it was no longer in their interest to refrain from passing measures that would subject the remaining black population—whom it regarded as "unthrifty and less desirable"—to worse living conditions at the expense of whites.

4. *Buchanan v. Warley*

The racial zoning ordinance in Louisville was challenged all the way up to the U.S. Supreme Court in *Buchanan v. Warley* in 1917.[121] In the case, Charles Buchanan, a white realtor, entered into a contract to sell his property to William Warley, a black postal employee, but the contract included an escape clause that Warley would not be required to pay unless he was allowed by law to live on the property.[122] Buchanan sued Warley for specific performance, and Warley raised the racial zoning ordinance as a defense.[123] Warley argued that he could not perform on the contract because the property was in a whites-only zone and the ordinance prevented him from taking possession because he was black.[124] The Supreme Court

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interests of whites." Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

[120] *See Darnell*, 81 S.E. at 338.

[121] 245 U.S. 60 (1917).

[122] *Id.* at 69-73.

[123] *Id.*

[124] *Id.*; *see* DELANEY, *supra* note 40, at 114-15; Bernstein, *supra* note 82, at 839-42. *Buchanan v. Warley* is one of the NAACP's earliest examples of impact litigation. The Louisville chapter of the NAACP started in an effort to challenge the passage of the city's racial zoning law, and Warley was an active member. The NAACP represented Warley, the black defendant, in the case as part of a strategic assault against racial zoning policies. The NAACP viewed *Buchanan* as an ideal test case because it believed that the case was more likely to be successful if it argued that the ordinance violated the Fourteenth Amendment's Due Process Clause rather than the Equal Protection Clause. "[T]o put it baldly, the segregation movement would more likely be stopped if it were shown to compromise the property rights of whites than if it merely denied the civil rights of blacks." *See* DELANEY, *supra* note 40, at 115. Their estimation was correct, and the Court ruled in their favor on those grounds. The Court's opinion also indicates that using equal protection for blacks as a core argument would probably have failed.

ruled that the ordinance violated the Fourteenth Amendment, which includes the right to "acquire, enjoy, and dispose of . . . property," because it restricted the right of property owners to sell their property on the basis of race.[125] It also found that similar racial zoning ordinances extended beyond the scope of the police power by limiting property rights and were thus invalid.[126]

The Court's decision in *Buchanan* had profound social implications for defining "Jim Crow's legal limits."[127] W.E.B. DuBois, arguably the father of American sociology, credited *Buchanan* with "'the breaking of the backbone of segregation.'"[128] The late Judge Leon Higginbotham argued that "*Buchanan* was of profound importance in applying a brake to decelerate what would have been run-away racism in the United States"[129] Indeed, courts did summarily reject several iterations of zoning ordinances based on the authority in *Buchanan* alone shortly after it was decided.[130] The foundation of the reasoning in *Buchanan*, however, worked like a poison pill, limiting the anti-racist implications of the ruling from the start.

After the decision in *Buchanan*, the state court decisions reviewing racial zoning ordinances indicate that the courts were "willing to accept race as a ground to prevent property ownership and to distinguish the quality of race from ethnicity or party membership."[131] Race remained central in decision-making and lost none of its legitimacy. In short, discriminatory land use policies based on racial zoning continued after *Buchanan* because the ruling did not truly challenge the "architecture of segregation."[132]

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[125] *Buchanan*, 245 U.S. at 79-82.

[126] *Id.* at 81.

[127] Godsil, *supra* note 3, at 557. Godsil argues that, in the context of lawsuits to ban the presence of blacks in certain areas, "court decisions invalidating the property rights of black people on grounds that their presence was offensive could well have led to a juridical apartheid." *Id.* at 549.

[128] PHILIP S. FONER, W.E.B. DUBOIS SPEAKS: SPEECHES AND ADDRESSES 1890-1919 52 (1970).

[129] A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 126 (1996).

[130] *See, e.g.*, Jackson v. State, 103 A. 910 (Md. 1918) (striking down Baltimore's ordinance on the authority of *Buchanan* after the city's many revisions and defenses); Harmon v. Tyler, 273 U.S. 668 (1927) (striking down New Orleans's ordinance) (per curiam); City of Richmond v. Deans, 281 U.S. 704 (1930) (per curiam) (striking down new iteration of Richmond ordinance).

[131] Godsil, *supra* note 3, at 509.

[132] *Id.*

At its core, racial inequality is "the product of systematic past and current, formal and informal, mechanisms of racial subordination."[133] Racializing space was a critical part of this process in crafting the architecture of racial segregation and disadvantage. American law has long maintained "a pattern – a *custom* – of valorizing whiteness."[134] Property designated for the use of whites receives an inordinate amount of protection to the detriment of any property interest held by other populations.[135] In today's climate, individuals seeking to exclude African Americans from spaces that they have a legal right to occupy can abuse the historic and cultural coding of certain spaces, like elite universities, as white spaces to justify their demands for exclusion.[136] "When sites are racialized via racially exclusionary policies or practices, those sites communicate a cultural norm of racial hierarchy."[137]

The racializing of spaces as "black" and denigrating those spaces accordingly while at the same time valorizing white spaces also serves this interest in communicating racial hierarchy and white supremacy. One of the leading articles analyzing the historical significance of *Buchanan* suggests that the decision "limited the ability of whites to prevent African-Americans from moving into white neighborhoods, and discouraged whites from denying public services to African-American neighborhoods."[138] While *Buchanan* had some success in removing this explicit barrier to entry in a white neighborhood, local government land use policy after *Buchanan* belies the conclusion that the end of explicit racial zoning kept white city government leaders from denying public services to black neighborhoods. Litigation brought under the Fair Housing Act and other civil rights laws has involved several challenges to long-standing denials of the discriminatory provision of public services to black communities.[139] This

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[133] Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1753 (1993).

[134] *Id.* at 1728 (emphasis in original). Indeed, Derrick Bell takes this position further by describing this racist ideology not just a as "pattern" or a "custom," but as "an integral, permanent, and indestructible component of this society." Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571, 573 (1993).

[135] *See id*.; Prakash, *supra* note 10.

[136] Henderson & Jefferson-Jones, *supra* note 4, at 883; *see also* KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019) (detailing the power of adding "legal coding" to an asset to change its operation and give it wealth-generating potential).

[137] Henderson & Jefferson-Jones, *supra* note 4, at 883; *see also* Boddie, *supra* note 12, at 409.

[138] Bernstein, *supra* note 82, at 859.

[139] *See, e.g.*, Hawkins v. Town of Shaw, Miss., 437 F.2d 1286 (5th Cir. 1971), *aff'd on reh'g*, 461 F.2d 1171 (5th Cir. 1972) (finding that city government's practice of

practice degrades the property values and livability of the black communities that it harms, to the benefit of white taxpayers in other sections of the community who receive adequate services. It was also one of the earliest harbingers of the measures that local governments would take to engage in racial zoning by another name.

5. *Euclid* and Legitimizing the Goals of Racial Zoning

In 1926, the United States Supreme Court approved zoning land for different uses as a legitimate exercise of the police power by local governments—well after the heyday of the racial zoning ordinance movement in the 1910s.[140] In seeking to give guidance on when a zoning ordinance might be validly applied, the Court recommended consulting the maxim at the heart of the common law of nuisances: *sic utere tuo ut alienum non laedas*,[141] which is translated to mean, "use your own property so as not to injure that of another."[142] The Court placed a great deal of faith in the law of nuisances—a doctrine that was already firmly established and that most lawyers and public officials readily understood—as providing useful clues for determining if a zoning ordinance was valid in a given situation.[143] If a thing is a nuisance, it can be zoned apart from residential areas. "[T]he question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality."[144]

Justice Sutherland provided an analogy to indicate that a nuisance is not inherently bad, it may just have its own place: "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of

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providing inferior municipal services to black neighborhoods violated the Equal Protection Clause); Kennedy v. City of Zanesville, 505 F. Supp. 2d 456, 492-98 (S.D. Ohio 2007) (granting summary judgment on compensatory damages claims where black plaintiffs alleged that the city maintained "a policy, pattern, and practice of denying public water service to the individual [p]laintiffs during the last fifty years because they are African-American and/or because they reside in a predominantly African-American neighborhood"); Franks v. Ross, 313 F.3d 184, 194-96 (4th Cir. 2002) (upholding timeliness of § 1982 claim brought by residents of black town claiming that the county was siting an undesirable landfill nearby based on race); Southend Neighborhood Improvement Ass'n v. Cnt'y of St. Clair, 743 F.2d 1207, 1211-12 (7th Cir. 1984); Miller v. City of Dallas, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at *2 (N.D. Tex. Feb. 14, 2002).

[140] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[141] *Id.* at 387.

[142] 57 AM. JUR. 2D NEGLIGENCE § 89 (2010).

[143] *Euclid*, 272 U.S. at 387-88.

[144] *Id*. at 388.

the barnyard."[145] The Court affirmed this nuisance view of zoning, but did nothing to counter the idea of people being labeled as nuisances—namely, blacks affected by discriminatory racial zoning policies.[146]

The U.S. Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*[147] contributed to the enduring legacy of racial zoning in the jurisdictions that attempted to work around the court decisions striking down explicit racial zoning ordinances. Even though scholars have debated the array of motives that drove the early advocates for general zoning ordinances, it is clear that they sought to "keep incompatible uses separate."[148] As Florence Wagman Roisman has observed, "Euclidean zoning was developed as state and lower federal courts were invalidating explicit racial zoning; certainly, the timing of the development of 'Euclidean' zoning suggests that part of its purpose was to enable local jurisdictions to segregate residents on the basis of race as well as economics."[149] Advocates for explicit racial zoning often realized that

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[145] *Id*. The federal government extended this practice to treating black residents as nuisances to be avoided and kept out of white neighborhoods. *See* Ford, *supra* note 95, at 1848 ("The Federal Housing Administration, which insured private mortgages, advocated the use of zoning and deed restrictions to bar undesirable people and classified black neighbors as nuisances to be avoided along with 'stables' and 'pig pens'").

[146] The irony of the reference to nuisances as "pigs" is that Baltimore, the first city to pass a racial zoning ordinance, maintained a black community that it referred to as "Pigtown." Power, *supra* note 61, at 290. Between 1880 and 1900, Baltimore's black population increased by almost half, from 54,000 to 79,000. *See id.* Blacks arrived in Baltimore with little money and very few job opportunities. *Id.* Many of them rented small shacks, often with two families to a house, in order to pay the rent, creating Baltimore's first sizeable slum. *Id.* A news report from 1892 described the area in these terms:

> Open drains, great lots filled with high weeds, ashes and garbage accumulated in the alleyways, cellars filled with filthy black water, houses that are total strangers to the touch of whitewash or scrubbing brush, human bodies that have been strangers for months to soap and water, villainous looking negroes who loiter and sleep around the street corners and never work; vile and vicious women, with but a smock to cover their black nakedness, lounging in the doorways or squatting upon the steps, hurling foul epithets at every passerby; foul streets, foul people, in foul tenements filled with foul air; that's 'Pigtown.'

Id. (citing *Baltimore News*, Sept. 20, 1892, *quoted in* JAMES B. CROOKS, POLITICS & PROGRESS: THE RISE OF URBAN PROGRESSIVISM IN BALTIMORE, 1895 TO 1911 20 (1968)).

[147] 272 U.S. 365 (1926).

[148] *See* Godsil, *supra* note 12, at 1862 (quoting Harr, Preface to ZONING AND THE AMERICAN DREAM, *supra* note 6, at x).

[149] Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 93-94 (2001).

"[t]he defects of explicit racial segregation ordinances could be cured by employing use zoning to achieve the same result."[150]

The persistence of anti-black zoning and land use policies actually has its genesis in the decision that struck down explicit racial zoning and the decision that upheld facially neutral, general zoning ordinances. *Buchanan*'s failure to outlaw state-imposed racial segregation in housing left the door open for cities and towns to reproduce the same inequalities through different policies that would achieve the same policy goals of racial segregation and white supremacy.

While racial discrimination in housing nationally focused on private market forces and federal housing policy, the South faced these same challenges and placed more emphasis on the abuse of zoning and anti-black land use policies. Urban planning historians explain that the South's pattern developed differently as a result of lower residential density and wider spatial dispersion of black neighborhoods across the city.[151] Local governments have kept exclusionary zoning ordinances, land use regulations, and local investment strategies in their larger political repertoire to impede the full participation of rural minorities.[152] The legacy of racial zoning also indicates that these urban development policies limited access to housing, social mobility, and economic development for black communities.

Court challenges to policies in housing and public services that disadvantage African Americans testify to the legacy of racial discrimination in land use and the effect that it continues to have on black communities even after the end of legalized segregation in the South. As late as 1950, the Texas legislature conferred upon cities the power to separate residential areas on the basis of race; the law remained on the books until 1969.[153] More than forty years before the state legislature explicitly authorized municipalities to pass laws enforcing residential segregation, the charter for the city of Dallas expressly gave the city the power to require complete racial separation.[154] Although the United States Supreme Court struck down the use of segregation ordinances in 1917,[155]

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[150] *Id.* at 94.

[151] CHRISTOPHER SILVER & JOHN V. MOESER, THE SEPARATE CITY: BLACK COMMUNITIES IN THE URBAN SOUTH, 1940-1969 4 (1995).

[152] Daniel T. Lichter et al., *Municipal Underbounding: Annexation and Racial Exclusion in Small Southern Towns*, 72 RURAL SOCIOLOGY 47, 48 (2007).

[153] Tex. Rev. Civ. Stat. Ann. art. 1015b (repealed 1969).

[154] Walker v. U.S. Dep't of Hous. & Urban Dev., 734 F. Supp. 1289, 1294 n.18 (N.D. Tex. 1989). Section 321 of the 1907 Dallas City Charter allowed the city to "provide for the use of separate blocks for residences, places of abode, places of public amusement, churches, schools and places of assembly by members of white and colored races." *Id.*

[155] Buchanan v. Warley, 245 U.S. 60 (1917).

the city continued to enforce its race-restrictive laws[156] and did not repeal the ordinance until 1968. Twenty years later, the city admitted that its racial zoning laws "established 'racially segregated housing patterns [that] have not yet been fully eradicated,'" even though the city had stopped considering race in providing housing.[157] In Florida, an ordinance prohibiting racial "intermingling" dated back to 1914, but remained on the books until 1975, and the court recognized that the ordinance contributed to the pattern of blacks living on "the other side of the tracks."[158]

These residential patterns leave physical reminders of the legacy of Jim Crow and shape the context and limits of community development and affordable housing in the South. In the words of another historian, "the history of race relations in the United States has been the history of conflict over spatial relations. The geographies that we all live in tell the tale."[159] Various tools in the law of land use were appropriated and became part of the arsenal in the conflict that mostly white state actors in Southern cities have waged to maintain white supremacy.

IV. THE LEGACY OF RACIAL ZONING AND CONTEMPORARY CHALLENGES

Part IV lays out the effects of what I argue are the most problematic anti-black land use policies affecting access to integrated housing and social opportunity in the South today. Historians, urban planners, and legal scholars alike have found that "resourceful" local officials adapted the land use policies that follow to "pursue the same goals by less racially explicit

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[156] *See* City of Dallas v. Liberty Annex Corp., 19 S.W.2d 845 (Tex. Civ. App. 1929), *writ dismissed w.o.j.* (Nov. 20, 1929) (holding that the city's segregation ordinance violated the "due process of law" provisions in the state and federal constitutions and was unenforceable); Hous. Auth. of City of Dallas v. Higginbotham, 143 S.W.2d 95 (Tex. Civ. App. 1940) (upholding a restriction of housing projects to black residents because the city provided similar facilities for whites, and relying on the doctrine of separate but equal).

[157] *Walker*, 734 F. Supp. at 1291, 1294 n.18, 1314 (finding the city liable for conscious discrimination against minorities in assigning public housing and in placing black families receiving Section 8 in units and black neighborhoods that violated HUD standards).

[158] Ammons v. Dade City, 594 F. Supp. 1274, 1280-88 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986) (finding the city in violation of the Fourteenth Amendment for providing unequal municipal services to black neighborhoods and enjoining it from initiating any new services or building new improvements until it provided black neighborhoods with the same quality of public works services as enjoyed by white areas); *see also* Dowdell v. City of Apopka, 511 F. Supp. 1375, 1378 (M.D. Fla. 1981), *aff'd*, 698 F.2d 1181 (11th Cir. 1983) (holding that the city had provided municipal services but failed to adequately share revenues in a racially discriminatory manner, in violation of federal Civil Rights and Revenue Sharing Acts).

[159] DELANEY, *supra* note 40, at 9.

means."[160] "[U]rban planning—particularly through zoning, urban renewal, and public housing—has had a significant impact on where blacks could live and therefore on their freedom to live in decent neighborhoods with good public services."[161] Cities began taking a race-based approach to urban planning and used zoning as the primary regulatory tool in ways that were facially neutral, but discriminatory in practice.

The anti-black land use policies that developed during and after *Buchanan* reflected the same background principle expressed in racial zoning: blacks were considered nuisances that could be relegated to communities among other undesirable land uses and excluded from the larger social and economic structure of the towns and cities in which they lived. The legacy of racial zoning that follows *Buchanan* and *Euclid* revolves around a process of confinement and degradation. Cities used zoning laws to confine African Americans into certain areas. This confinement facilitated the degradation of these communities. This Article highlights three major policies: (1) the location of black communities in the least desirable areas, (2) the lack of protective zoning, and (3) the disproportionate siting of locally undesirable land uses (LULUs) in or near majority-black communities. These three policies came together to reinforce white supremacy by racializing black space, identifying it as degraded and unlivable.

A. The Location of Black Communities in the Least Desirable Areas

> *"It is quite simple. As soon as there is a group area then all your uncertainties are removed and that is, after all, the primary purpose of this Bill"* [requiring racial segregation in housing and the assignment of racial groups to particular districts].[162]

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[160] CHARLES M. HAAR & JEROLD S. KAYDEN, ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 103 (1989).

[161] CHARLES E. CONNERLY, "THE MOST SEGREGATED CITY IN AMERICA": CITY PLANNING AND CIVIL RIGHTS IN BIRMINGHAM, 1920-1980 1 (2005) (arguing that Birmingham provides a case study of a city in the South where white government officials used planning and zoning as a regulatory tool to control the city black access to opportunity); *see also* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996).

[162] *See* Sam Fulwood III, *The Costs of Segregation and the Benefits of the Fair Housing Act*, in THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT (Gregory D. Squires, ed. 2017) (citing MASSEY & DENTON, *supra* note 83, at 1 (quoting Theophilus E. Dönges)).

The logic that a former minister of the interior in apartheid South Africa provided in a legislative debate to justify the passage of that country's Group Areas Act of 1950 reflects the power of confinement in maintaining white supremacy and racial subordination. Cities used facially neutral zoning laws after *Euclid* in pernicious, race-conscious ways well into the mid-twentieth century.[163] These laws played a critical role in achieving the goal of excluding African Americans from white neighborhoods.[164] Just as important, however, is that zoning laws served to confine African Americans into their own separate neighborhoods. As Elise Boddie has argued, "[s]egregation further limited black mobility and spatialized racial power in public and private spaces."[165] This confinement facilitated the degradation of these spaces as part of a long-term project to racially code them as "black," in opposition to protected white space.

The legacy of racial zoning relied on the use of the power to draw legal boundaries as a means of creating these conditions of confinement. According to Richard Thompson Ford, "[l]egal boundaries are often ignored because they are imagined to be either the product of aggregated individual choices or the administratively necessary segmentation of

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[163] *See, e.g.*, Christopher Silver, *The Racial Origins of Zoning: Southern Cities from 1910-40*, 6 PLANNING PERSPECTIVE 197 (1991) (observing that cities continued to operate in practice, and it "was reinforced by a planning process that accepted the primacy of establishing a racially-bifurcated society"); ROTHSTEIN, *supra* note 31, at 46-48 (detailing the ways in which "[m]any border and southern cities ignored the *Buchanan* decision" and continued racist zoning practices); Prakash, *supra* note 10, at 1448 ("Despite this Supreme Court decree, many cities continued engaging in racial zoning, with some ordinances surviving into the 1970s."); Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM, *supra* note 11, at 106-07 (describing the history of ordinances in effect as late as 1949).

[164] *See* Bernstein, *supra* note 82, at 861 ("Whites eventually learned to use barriers other than explicit racial zoning to keep African-Americans out of their neighborhoods."); Walker Mason Beauchamp, *The Legacy of Racial Zoning in Birmingham, Alabama*, 48 CUMB. L. REV. 359, 367 (2018) ("American cities' utilization of zoning as a means of racial exclusion began as early as the late-nineteenth century . . . ."). Indeed, many courts and the literature recognize exclusion as a primary function of zoning today, central to keeping people of color out of white communities. *See, e.g.*, Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 539 (2015) (noting that the Fair Housing Act was enacted to end "unlawful practices [that] include *zoning laws* and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification") (emphasis added); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 780 (1969); Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM, *supra* note 11, at 105 ("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.").

[165] Boddie, *supra* note 12, at 428.

centralized governmental power."[166] In the context of racial zoning, the practice could escape notice because cities framed it within the context of their administrative obligations to regulate the use of land. As Rachel Godsil has observed, however: "Abstractly, at least, the question of who lives where is an issue of land use. Thus, land use law was utilized by whites to keep Blacks from having access to property in white neighborhoods."[167]

In addition to keeping blacks away from whites, land use law served to confine blacks to spaces into which local governments locked them. This confinement was essential to establishing racial disadvantage. As Ford has pointed out, "political geography—the position and function of jurisdictional and quasi-jurisdictional boundaries—helps to promote a racially separate and unequal distribution of political influence and economic resources."[168] While this premise deals with the boundaries of cities and towns rather than spaces within a city, like neighborhoods, it provides a crucial starting point for understanding the power in drawing lines to create racially identified space.

In many towns, the early racial zoning ordinances limited black residents to those locations that had already become mostly black. The ordinances generally barred white residents from moving onto blocks where black residents lived at the time the jurisdiction passed the ordinance and vice versa.[169] Later ordinances, however, sought to proactively assign blacks to particular spaces. For example, in 1926, the city of Birmingham, Alabama, adopted an ordinance that created specific residential districts designated for blacks and others designated for whites.[170] In *State v.*

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[166] Ford, *supra* note 95, at 1844.

[167] Godsil, *supra* note 12, at 1841.

[168] Ford, *supra* note 95, at 1844 (1994) (footnote omitted).

[169] Some ordinances differed as to whether the restriction applied to streets where all or some of the residents on a street were of a certain race. *See, e.g.*, State v. Gurry, 88 A. 546, 547 (M.D. 1913) (upholding Baltimore's ordinance that prohibited moving into a residence on a block that was occupied "in whole or in part" by persons of the opposite race as the individual charged); Carey v. City of Atlanta, 84 S.E. 456, 457 (Ga. 1915) (striking down ordinance with similar "in whole or in part" restriction); *cf.* State v. Darnell, 81 S.E. 338, 338 (N.C. 1914) (striking down Winston, North Carolina, ordinance that forbade occupying a "house upon any street or alley between two adjacent streets on which a greater number of houses were occupied as residences by" persons of the opposite race than are occupied by persons of the same race than the individual charged); Hopkins v. City of Richmond, 86 S.E. 139, 140-41 (Va. 1915), *overruled by* Irvine v. City of Clifton Forge, 97 S.E. 310 (Va. 1918) (upholding Richmond and Ashland, Virginia, ordinances that made it unlawful to "occupy as a residence or to establish and maintain as a place of public assembly, any house" on a street where the "greater number of houses" were occupied by persons of a different race than the individual charged).

[170] Monk v. City of Birmingham, 87 F. Supp. 538, 539 (N.D. Ala. 1949), *decree aff'd*, 185 F.2d 859 (5th Cir. 1950) (describing ordinance with section which provided that

Wilson, the Florida Supreme Court overturned the criminal convictions of an African American couple who moved into an area designated for whites on a map with boundaries that the Dade County, Florida, Board of Commissioners had drawn up under a racial zoning ordinance passed in 1945.[171] The court struck down the ordinance which sought to "segregate areas within which property could be occupied by negroes and not occupied by Caucasians, and vice versa" and provided for "boundaries . . . [that] shall constitute the dividing line between the White and Colored people" in the county outside of Miami.[172] Inside Miami, however, the city's racial zoning ordinance and policies limited black residents to Overtown—a neighborhood originally called "Colored Town"—and a small number of other racially segregated neighborhoods.[173]

Once a local government had established particular racial boundaries for blacks and whites, it could legislate around those boundaries to ensure the conditions of confinement remained in place.[174] In 1949, Birmingham amended its 1926 racial zoning ordinance and made it a misdemeanor "to move into, for the purpose of establishing a permanent residence, or having moved into, to continue to reside in an area in the City of Birmingham *generally and historically recognized* at the time as an area for occupancy by members of the colored race."[175] It assigned the same restriction to blacks on the same terms.[176] The codification of racial boundaries in the earlier ordinance more than twenty years before made these "generally and historically recognized" patterns possible.

The confinement of black residents into particular areas often included decisions to designate the most undesirable locations with built-in environmental risks and disadvantages for black occupancy. These residential conditions often began with explicit state action. For example, starting in the latter part of the nineteenth century, many African Americans in Washington, D.C., were relegated to living near the "dirty and polluted banks of the Anacostia River."[177] After World War II, the District of

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"no building or part thereof in certain residence districts shall be occupied or used by persons of the Negro Race" and a separate section that barred whites from occupying buildings in "certain other residence districts").

[171] *See* State v. Wilson, 25 So. 2d 860, 860 (Fla. 1946).

[172] *See id.* at 861.

[173] *See* Raymond A. Mohl, *Making the Second Ghetto in Metropolitan Miami, 1940-1960*, 21 J. URB. HIST. 395, 397-98 (1995).

[174] Bernstein, *supra* note 82, at 862 (noting that "racial zones dictated Birmingham's residential development patterns from 1926 to 1949"); *see also* Silver, *supra* note 163.

[175] *Monk*, 87 F. Supp. at 539 (emphasis added).

[176] *Id.*

[177] *See* Ueland & Warf, *supra* note 15**,** at 65.

Columbia government built a public housing project for black residents near this area, which reinforced racial segregation in the capital. During the same time period of the 1940s, the city of Dallas developed plans to locate a segregated African American community known as Cadillac Heights in an area that it knew was a floodplain.[178]

Urban geographers Jeff Ueland and Barney Warf have argued that "[t]he multiple, complex, contingent ways in which the literal shape of the urban physical topography reflects and sustains racialized social relationships have largely escaped serious scholarly scrutiny."[179] This landscape plays a critical role in understanding the legacy of racial zoning and the structure of confinement and degradation of black space that it facilitated.

Dating back to the rise of Jim Crow, black communities in the South "often found themselves consigned to the least desirable areas, many of which were swampy, mosquito infested, prone to smoke from fires, and frequented by floods" in part due to exclusionary zoning.[180] In their 2006 study of the relationship between race, residential segregation, and altitude in Southern cities, Ueland and Warf found that blacks lived at higher elevations in riverfront or coastal cities, and properties with views of rivers or coastlines were predominately white.[181] By contrast, in cities further inland and away from coastlines, African American communities were generally situated in low-lying areas, while whites occupied more desirable land at higher elevations.[182]

This pattern of limiting blacks to low-lying areas has dramatic effects in natural disasters. Environmental & Energy (E&E) News, a division of Politico, analyzed $31 billion in claims for flood damage paid by the U.S. Federal Emergency Management Agency's (FEMA) National Flood Insurance Program between January 2010 and August 2019 and the ZIP codes in which the flood damage occurred.[183] Nearly twenty percent of the claim dollars went to ZIP codes where at least one-quarter of the

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[178] Miller v. City of Dallas, No. CIV.A.3:98-CV-2955-D, 2002 WL 230834, at *4 (N.D. Tex. Feb. 14, 2002) (denying summary judgment in part because plaintiffs established that the city designated their majority-black community a "negro district" in the 1940s as part of its racial-zoning policy, in violation of *Buchanan*, and excluded the majority-black community from the levee system).

[179] Ueland & Warf, *supra* note 15**,** at 54.

[180] *Id.* at 56.

[181] *Id.* at 63.

[182] *Id.*

[183] Thomas Frank, *Flooding Disproportionately Harms Black Neighborhoods*, SCIENTIFIC AMERICAN (June 2, 2020), https://www.scientificamerican.com/article/flooding-disproportionately-harms-black-neighborhoods/.

residents are black.[184] These ZIP codes made up only thirteen percent of the U.S. population, which suggests that blacks were hit harder by flood-related disasters.[185]

The experience on the ground in places like New Orleans bears out these numbers. Commentators have explained that African Americans in New Orleans could not return to the city as quickly as whites because three quarters of homes owned or occupied by black residents in New Orleans suffered severe water damage compared to only half of the white homes.[186] "This flood damage is itself a legacy of racial discrimination and poverty, because, historically, higher income and overwhelmingly white residents occupied the higher ground in New Orleans."[187]

New Orleans after Hurricane Katrina reflects the present-day effect of racial zoning and the effect of the state's failure to provide protections against a natural disaster. It also reflects the power of place and a policy choice of either preserving the location of historically black communities that were deliberately placed on land filled with hazards. New Orleans enacted a racial zoning ordinance that the U.S. Supreme Court struck down in 1927.[188] Over time, however, many of New Orleans's racial patterns in housing have remained in place. New Orleans lies between the Mississippi River to the south and Lake Pontchartrain to the north, a formation that has earned it the nickname the "Crescent City."[189] Whites historically occupied the highest and best part of a natural levee, the land at the highest points above sea level. Black residents were limited to occupying the lowest lying land: "[B]lacks were pushed into the demiland on the inland margin of the natural levee, where drainage was bad, foundation material precarious, streets atrociously unmaintained, mosquitoes endemic and flooding a recurring hazard."[190] The area was interrupted by commercial zones along the Carondelet and New Basin canals, and later by the building of boulevards which attracted affluent whites. But by the mid-twentieth

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[184] *Id.*

[185] *Id.*

[186] *See* William P. Quigley, *Katrina Voting Wrongs: Aftermath of Hurricane and Weak Enforcement Dilute African American Voting Rights in New Orleans*, 14 WASH. & LEE J. C.R. & SOC. JUST. 49, 60 (2007); *see also* CRAIG E. COLTEN, AN UNNATURAL METROPOLIS: WRESTING NEW ORLEANS FROM NATURE 77-107 (2005) (emphasizing the inequity in housing distribution across flood plains around New Orleans).

[187] Quigley, *supra* note 186 (citations omitted).

[188] *See* Harmon v. Tyler, 273 U.S. 668 (1927).

[189] PEIRCE F. LEWIS, NEW ORLEANS: THE MAKING OF AN URBAN LANDSCAPE, Figure 3 (2003) (map of "New Orleans and vicinity, 2002").

[190] *Id.* at 52.

century, the area had become crowded, the formerly non-black sections filled up, and it merged into a larger ghetto.[191]

The Lower Ninth Ward, another one of the city's largest majority-black residential areas, is bordered by the Mississippi River to the south and the city's Industrial Canal to the west.[192] When Hurricane Katrina hit New Orleans in 2005, flooding from the river and the breaking of the Industrial Canal decimated the Lower Ninth Ward.[193] The location separated the area from the rest of New Orleans and made it a less than ideal location for rebuilding with affordable housing and economic development. The vulnerability of the land served as a nuisance to higher-income white New Orleans residents, and they located blacks within that area—reserving the best land for themselves.[194] According to historian Charles Connerly, "Birmingham was planned not only as an industrial city but also as a city

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[191] *Id.*

[192] *Id.* at Figure 4 (map of "Neighborhoods and landmarks of New Orleans, 2001"). Even during the era of massive "white flight" to the suburbs, the Lower Ninth Ward remained more than eighty-percent African American from 1970 to 2000, according to the U.S. Census Bureau of Housing.

[193] *See* Carlton Waterhouse, in HURRICANE KATRINA: AMERICA'S UNNATURAL DISASTER 156, 172-178 (Jeremy I. Levitt & Matthew C. Whitaker eds., 2009). Waterhouse argues that the isolation of these communities contributed to the political decision to leave them unprepared in the event of a major storm. *Id.* The New Orleans Levee Board ran the New Orleans Flood Protection System, which had oversight for the levee and barriers around the Lower Ninth Ward. *Id.* The board neglected to invest in shoring up the levee system around the Lower Ninth Ward in favor of pursuing other development projects, including parks, marinas, a dock, and a "cash strapped" airport. *Id.* at 172. The author also reports that the Army Corps of Engineers, a partner organization for the flood protection system, failed to follow standard operating procedure and Executive Order 12898, which requires that federal agencies including the Army Corps "identify and address disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations." *Id.* at 174. The Army Corps could have conducted an investigation based on the order and recognized the vulnerability of the Lower Ninth Ward and nearby areas, which were predominantly African American, poor, and very susceptible to suffer severe damage in the event of a Category 3 hurricane. *Id.* Another local levee board in nearby Jefferson Parish, a majority white community, took additional steps and spent $200,000 to enhance its levee system before the storm, despite the fact that the Army Corps did not provide the funding. *Id.* As a result, the area was largely protected, even against the storm's 145-mile-per-hour winds. *Id.* In the same way, the author contends that these mitigation efforts could have protected the heavily-populated New Orleans district, including the Lower Ninth Ward, even though financial difficulties prevented them from adding protection for the entire city. *Id.* at 174-75.

[194] Miller v. City of Dallas, No. CIV.A.3:98-CV-2955-D, 2002 WL 230834 (N.D. Tex. Feb. 14, 2002) (denying summary judgment in part because plaintiffs established that the city designated their majority-black community a "negro district" in the 1940s as part of its racial zoning policy, in violation of *Buchanan*, and excluded their majority black community from the levee system).

that relied heavily on black labor."[195] The city "forc[ed] black labor to live in the city's 'vacant spaces,' near creeks and railroads where whites did not wish to live," a set of conditions which ultimately set the stage for the civil rights struggle that took hold throughout the mid-twentieth century.[196] Likewise, Birmingham used federal highway construction funds to "relocate blacks to less desirable locations."[197] Interstate 59 divided the black community of Ensley from the white section known as Ensley Highlands, a name which suggests its elevated status in a region where blacks occupied low-lying sections of the inner city and whites increasingly moved to suburbs built in the "highlands."[198] In this way, local governments in the South used the power to control options for black residency to "force communities of color to bear a disproportionate share of environmental harms."[199]

Scholars often argue that whites' preference to live apart from blacks is one of driving forces for continued residential segregation.[200] Indeed, whites have avoided neighborhoods with large black populations because of negative perceptions of the neighborhoods, including fears of crime and the quality of high-minority schools.[201] These purported concerns, however, do not fully take into account the role of state action in shaping these choices.[202] State action also played a critical role in shaping

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[195] CONNERLY, *supra* note 161, at 10.

[196] *Id.*

[197] Ueland & Warf, *supra* note 15, at 68.

[198] *Id.*

[199] Archer, *supra* note 14, at 1302.

[200] *See, e.g.*, Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 133 (2012) (arguing that "many whites have a stronger preference than minorities for predominantly white neighborhoods as opposed to integrated neighborhoods, and the groups' respective willingness to pay more for houses in their preferred areas tends to perpetuate segregation"); Power, *supra* note 61, at 322–23 (1983) ("Residential housing in Baltimore remains by-in-large segregated. In part this segregation is a result of preference: Blacks and whites alike may prefer to live in their old neighborhoods that developed in the days of de facto segregation.").

[201] *See* Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1211-12 (2011); Deborah L. McKoy & Jeffrey M. Vincent, *Housing and Education: The Inextricable Link*, in SEGREGATION: THE RISING COSTS FOR AMERICA 125, 128 (James H. Carr & Nandinee K. Kutty eds., 2008) (noting a connection between school segregation and racial steering).

[202] *See, e.g.*, MASSEY & DENTON, *supra* note 83, at 77 ("Contemporary housing choices do not reflect preferences so much as they reflect a structural system that was built on racism."); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1388 (1997) ("As a matter of causation, one cannot neatly sever 'private choice' from government imposition, since government helped to create the context in which the private choices occur.").

these choices, down to the topographical location of black and white communities themselves. When it comes to whites moving into historically black neighborhoods, whites may also avoid these neighborhoods where they have developed in or near flood plains or low-lying areas. Location itself affects housing choices in ways that extend beyond simple preference. I argue that state-sanctioned decisions have partly created these conditions to reinforce the association between black space and disadvantage, a process that incentivizes segregation.

These circumstances also grew out of the types of land that white Southerners allowed blacks to occupy and on which they allowed blacks to build communities. In 1865, a group of freed slaves in North Carolina established the settlement of Freedom Hill, which is believed to be the oldest town chartered by freed slaves in the United States.[203] Freedom Hill was later incorporated as Princeville in honor of its founder in 1885.[204] The town was situated on marshes and swamp land along the Tar River in eastern North Carlina.[205] One historian describes Princeville as "an important case of historical environmental injustice because of the ways in which early Princeville settlers were forced to occupy the most vulnerable riparian landscape in the nineteenth century."[206] From 1865 to 1958, there were six documented floods of the Tar-Pimlico River basin.[207] A 2016 *New York Times* article explained that many of the town's 2,100 residents—ninety-six percent of whom were black—were considering whether to sell their land, which would devastate the town's tax base, because they were struggling to rebuild after constant flooding.[208] For Princeville's early black settlers, "[t]heir existence in this space was not a matter of chance or choice, but instead the discarded and unwanted space was what former slaveholders allowed them to occupy."[209]

The location of communities like Princeville challenges the assumption that "local governments are formed largely in response to local desires" and that "[s]uch boundary changes as do occur are often a result of

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[203] *See* Jess Bidgood, *A Wrenching Decision Where Black History and Floods Intertwine*, THE NEW YORK TIMES (Dec. 9, 2016), https://www.nytimes.com/2016/12/09/us/princeville-north-carolina-hurricane-matthew-floods-black-history.html?smid=url-share.

[204] Richard M. Mizelle, Jr., *Princeville and the Environmental Landscape of Race*, in OPEN RIVERS: RETHINKING THE MISSISSIPPI 18 (Spring 2016), https://openrivers.lib.umn.edu/wp-content/uploads/2016/08/openrivers_issue_2-2.pdf.

[205] *Id.*

[206] *Id.*

[207] *Id.* at 20.

[208] *See* Bidgood, *supra* note 203 ("A number of residents have expressed an interest in selling to FEMA, which would prevent anyone from building again on their flood-prone land and lead to a reduction in the town's tax base.").

[209] Mizelle, Jr., *supra* note 204 at 19.

local decisions."[210] While it may be true that "[o]nce created, they are rarely abolished, and their boundaries are only infrequently modified,"[211] these decisions are not always made by choice. Richard Thompson Ford has argued that:

> [T]he significance of racially identified political geography escapes the notice of judges, policymakers, and scholars because of two widely held yet contradictory misconceptions—one that assumes that political boundaries have no effect on the distribution of persons, political influence, or economic resources, and another that assumes that political boundaries define quasi-natural and prepolitical associations of individuals.[212]

Communities like Princeville became creatures of the state after their incorporation. Thus, white state officials during Jim Crow held a great deal of power regarding the approval of new boundaries, and their decisions were not devoid of considerations of race. They also must be considered in the context of the racial violence in the South that faced all-black towns, which existed precariously at the mercy of white-controlled local governments and white residents.[213] Thus, government at all levels recognized and preserved these boundaries.

Historical decisions in which local officials and landowners consigned black communities to certain spaces and why those spaces were chosen constitute a form of line drawing to create black spaces. Richard Ford has observed that "the law often tacitly seeks to justify local power and local boundaries by reference to geography itself—reflecting a view of

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[210] Richard Briffault, *Our Localism: Part I—the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 73 (1990).

[211] *Id.*

[212] Ford, *supra* note 95, at 1845.

[213] Even Princeville itself was no stranger to these harsh conditions, despite remaining in the space to which it was relegated. "Throughout the twentieth century, Princeville residents constantly dealt with racial attacks and intimidation, as well as economic social isolation from the state. Infrastructural neglect from state officials was consistent during the era of segregation and beyond." Mizelle, Jr., *supra* note 204, at 21; *see also* Jessica Glenza, *Rosewood massacre a harrowing tale of racism and the road toward reparations*, THE GUARDIAN (Jan. 3, 2016, 8:00 EST), https://www.theguardian.com/us-news/2016/jan/03/rosewood-florida-massacre-racial-violence-reparations (describing assault on all-black Florida town in 1923 where, as a result of a white mob from the surrounding county pursuing an unfounded allegation of rape by a black man against a white woman, "[t]he settlement itself was wiped off the map. Several buildings were set on fire just a few days after New Year's, and the mob wiped out the remainder of the town a few days later, torching 12 houses one by one.").

local political geography as natural and legitimating, or in other words, as opaque."[214] Like the process of restricting African American residents to certain areas, the power to draw lines in the management of a zoning scheme indeed gives local governments the ability to effectively establish the location of where a particular socioeconomic demographic of residents can live. For example, in the aftermath of the groundbreaking decisions in the cases involving the township of Mount Laurel, New Jersey, in which the New Jersey Supreme Court struck down the township's exclusionary zoning practices, the township defied the spirit of the court's ruling by rezoning three plots of land for low-income housing units, one of which was a wetland near an industrial park.[215] While this case is not in the context of the South, it shows how policy choices can affect implementation on the ground in ways that interfere with available remedies, even in the most progressive fair housing litigation.

Decisions about boundaries and where they exist are not arbitrary or simply a result of individual preferences. Boundaries and what local governments locate near or inside of them can reproduce, reify, and solidify exclusion and inclusion, disadvantage and advantage, on their own. "[C]ontemporary local government law perpetuates the historically imposed segregation of the races: local boundaries, once established, are difficult to alter . . . ."[216] The decision to drive black residents into particular separate areas ensures that racial stratification will take place, even in the absence of racism. "Spatially and racially defined communities perform the 'work' of segregation silently."[217] Consistent with the apartheid South African parliamentarian's argument about the benefits of "group areas" to the regime: "As soon as there is a group area then all your uncertainties are removed . . . ."[218] Racial segregation grows out of racially identified spaces.[219] "Residential segregation is self-perpetuating, for in segregated neighborhoods the damaging social consequences that follow from increased poverty are spatially concentrated, creating uniquely disadvantaged environments that become progressively isolated—geographically, socially, and economically—from the rest of society."[220]

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[214] Ford, *supra* note 95, at 1862.

[215] DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 85-88 (1995).

[216] Ford, *supra* note 95, at 1861.

[217] *Id.* at 1852.

[218] Fulwood III, *supra* note 162.

[219] Ford, *supra* note 95, at 1848 ("Both public and private actors laid the groundwork for the construction of racially identified spaces and, therefore, for racial segregation as well.")

[220] *Id.* at 1847-48 (quoting MASSEY & DENTON, *supra* note 83, at 2) (quotation marks and internal alterations omitted).

The literature on boundary making often focuses on lines between jurisdictions, creating separate towns, cities, and counties.[221] Zoning, however, also works to draw lines in similar ways and with similar effects. Thus, the power of line drawing does not simply come from the creation of jurisdictions. Racial zoning as a practice teaches us that even governmental decisions to draw lines to manage populations ***within*** cities reproduces similar kinds of inequality.

B. Failure to Provide Protective Zoning

It is important to frame the meaning of the location of a black community within the broader context of the significance of housing. "Housing denotes an enormously complicated idea. It refers to . . . a specific location in relation to work and services, neighbors and neighborhood, property rights and privacy provisions, income and investment opportunities . . . ."[222] As Rachel Godsil has pointed out: "Ideally, the comfort of our home extends beyond its walls to the neighborhood in which it is situated . . . . This ideal is not always realized."[223] Some homes are surrounded by landfills and incinerators.[224] Waste treatment plants that process millions of gallons of raw sewage invade certain communities and make neighborhoods stink of human excrement.[225] Factories are dumped near these same homes, and diesel trucks spewing fumes rumble through the streets at seven-minute increments.[226] These communities are all too often ones in which most residents are people of color.

In the late nineteenth and early twentieth centuries, courts and plaintiffs generally looked to the law of nuisance to address proximity to

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[221] *See, e.g.*, Briffault, *supra* note 210, 7 at 3-74 (discussing boundaries in the context of municipalities and noting that "[t]he law of local government formation is primarily about municipal incorporation"); Ford, *supra* note 95; Justin P. Steil, *Innovative Responses to Foreclosures: Paths to Neighborhood Stability and Housing Opportunity*, 1 COLUM. J. RACE & L. 63, 69 (2011) (arguing that early white suburban homebuyers created "collective identities [that] were reinforced further by the creation of local government boundaries (through processes of municipal incorporation or secession)").

[222] ROGER MONTGOMERY & DANIEL R. MANDELKER, HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 3 (2d ed. 1979).

[223] Godsil, *supra* note 12, at 1809.

[224] *See id.*

[225] *Id.*

[226] *Id.* at 1809-10. Godsil describes the predominantly black cities of Camden, New Jersey, and Chester, Pennsylvania. These descriptions, however, are not so strikingly different from the cities in the case studies discussed in this Article—an indication of the impact of the logic of racialized zoning even where racial isolation did not grow out of the context of racial zoning laws.

undesirable land uses near one's property before cities adopted zoning ordinances.[227] Indeed, several early cases in Southern and border states involved white plaintiffs who resorted to nuisance law to challenge the presence of blacks near their property as a nuisance and held nuisance law above these racially motivated arguments.[228] Courts frequently justified their decisions on race-neutral grounds, referring to an entitlement to the benefits of property ownership. For example, in 1886, the Supreme Court of West Virginia reinstated a lower court's injunction of a skating rink near a majority-black neighborhood of tenement houses, reasoning that "every person, whether white or colored, has the right not to be disturbed in his home. He has the right to rest and quiet, and not to be materially disturbed in his rest and enjoyment of home by loud noises."[229]

Zoning became an increasingly important part of protecting urban residential areas from factories and other types of industrial plants as industrialization thrived during this period.[230] As this economic sector grew, courts became more restrictive in applying the common law doctrine of nuisance.[231] Rather than changing or broadening the doctrine, however, they often refused to grant injunctive relief for prospective nuisances as a way of accommodating industrialization.[232] The policies that grew out of racial zoning ordinances, including the refusal to provide protective zoning to black communities, run contrary to the race neutrality applied under the law of nuisance. This set of decisions may indeed explain why racial zoning and the abuse of zoning powers in general became a favored method for setting up the structure for racial segregation and disadvantage in the South. After nuisance law failed to enforce their anti-black prejudice, would-be white plaintiffs had to take a different approach to achieve their objectives.

Localism accounts for the policies that sustained segregation after practices like explicit racial zoning were outlawed.[233] While some scholars have attributed the acceptance of racial segregation to non-racial local

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[227] *Id.* at 1859 ("Those focused on the inadequacy of the existing regime [of nuisance law] looked to local governments and their police power for a resolution.").

[228] Godsil, *supra* note 3, at 507; Henderson & Jefferson-Jones, *supra* note 4, at 897-98.

[229] Snyder v. Cabell, 1 S.E. 241, 251 (W. Va. 1886).

[230] *See* Godsil, *supra* note 3, at 515 (footnotes omitted).

[231] *See id.*

[232] *Id.*

[233] David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFF. L. REV. 5, 57 (2017); *see also* Troutt, *supra* note 21, at 1145-46.

government decision-making,[234] the record of Southern cities that applied racial zoning ordinances and race-based zoning policies decades after the practice was outlawed renders implausible the claim that segregation, at least in the South, grew out of decisions that took no account of race. Nonetheless, the demise of overt racial discrimination may have served Southern cities well as they joined cities around the country in justifying their systems of government in race-neutral terms.[235] The turn away from racially explicit policies also gave these city governments a veneer of legitimacy as the courts encased the "racially and economically segregated system of preferences" that they continued to operate.[236]

The history of general zoning ordinances betrays an underlying truth that may explain the persistence of policies that arose from the use of racial zoning ordinances. The zoning movement did not begin with an interest in protecting every residential property owner equally, and certainly not with protecting the interests of low-income African American residents.[237]

The interests of the wealthy mattered most to the early proponents of zoning.[238] Zoning pioneer Frank Williams wrote in 1922 that, in a traditional zoning scheme, "the better class residences are for the most part located remote from industry and not too near business, and workingmen's houses, in the neighborhood of their work or near transit lines that will bring

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[234] *See, e.g.*, GERALD E. FRUG, CITY MAKING: BUILDING CITIES WITHOUT BUILDING WALLS 77 (1999); Briffault, *supra* note 210, at 45-48; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 383-85 (1990).

[235] *See* Troutt, *supra* note 233, at 59 ("That the resulting system of preferences is race neutral by its terms makes it almost impossible to reform.").

[236] Troutt, *supra* note 233, at 59 ("Most importantly, the racially and economically segregated system of preferences was almost impervious to legal remedy. Racially neutral exercises of local control over community character and basic services consistently received judicial support under rational basis review.").

[237] Zoning is one of many systems that ostensibly serves all residents of a jurisdiction that adopts such an ordinance, but that was never intended to serve people of color in the same way as it serves whites. In his book *The Racial Contract*, philosopher Charles W. Mills explains that historical and contemporary reality expose the fact that the prevailing conception of the social contract, which is fundamental to the Western vision of a democratic order which distributes rights and liberties equally to all persons, is a myth. *See* MILLS, *supra* note 9. Instead, in the years since European expansion began in the 1400s, the world has operated under a "Racial Contract," in which the entitlement to natural freedom and equality has been restricted to white men. *See id.* at 16. Thus, the laws under which we live intentionally provide one set of protections to whites to which people of color have no intrinsic entitlement. In short, "when white folks say 'justice,' they mean 'just us.'" *Id.* at 1.

[238] Godsil, *supra* note 12, at 1860; *see also* Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59 (1993).

them cheaply and quickly to it."[239] Consistent with this vision, zoning has had the greatest success in protecting the single-family homes of affluent individuals from incompatible land uses.[240]

Richard Babcock argued in *The Zoning Game*, an influential study of zoning, that the reliance on cumulative zoning[241] in the early years of zoning's popularity resulted in the industrial zone becoming a "garbage pail" for all uses, including residences.[242] If a home was located in a garbage pail district, "the misguided or unfortunate person . . . had only himself to blame."[243] In a city that applied a racial zoning ordinance or policies that grew out of one, the assignment of a black racial district to an area shared with an industrial and commercial zone was not a matter of poor decision making. As Rachel Godsil has noted, "[l]like common law nuisance doctrine before it, rather than ameliorating the conditions faced by those worst off, zoning simply enshrined existing differences into law."[244]

Richard Ford has argued that "[t]he creation of racially identified political spaces [makes] possible a number of regulatory activities and private practices that would further entrench the segregation of the races."[245] Once race became attached to space, the language of race was no longer needed. Space took the place of race. Consequently, without expressly noting "race," many local governments used zoning to allow incompatible uses to intrude into black neighborhoods, subsequently obliterating the quality of life.[246] Rachel Godsil explained:

> Because other areas of the municipality generally prohibited such uses, industrial developers would locate in the black neighborhoods—bringing with them the noise, odors, and pollution that zoning was ostensibly intended to eliminate . . . . The combination of expulsive zoning and housing

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[239] Godsil, *supra* note 12, at 1860 (quoting FRANK B. WILLIAMS, THE LAW OF CITY PLANNING AND ZONING 199 (1922)).

[240] *See* Godsil, *supra* note 12, at 1860.

[241] Cumulative zoning is a "method of zoning in which any use permitted in a higher-use, less intensive zone is permissible in a lower-use, more intensive zone. For example, under this method, a house could be built in an industrial zone but a factory could not be built in a residential zone." *Zoning*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[242] RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 127 (1965).

[243] *Id.* at 128.

[244] Godsil, *supra* note 12, at 1863.

[245] Ford, *supra* note 95, at 1854.

[246] *See* Godsil, *supra* note 3, at 553; Godsil, *supra* note 12, at 1863; Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM, *supra* note 11, at 103; Dubin, *supra* note 10.

> discrimination led black communities in urban areas to become even more blighted and overcrowded.[247]

In the South, as in other parts of the country, cities often located industrial and commercial zones within black communities and used incompatible zoning near black areas in an effort to confine black residents to certain neighborhoods.[248] Jon Dubin has referred to this set of policy choices as a failure to provide "protective zoning."[249] Protective zoning involves a series of policy choices that conform to the rationale behind zoning: namely, that of insulating residential areas from commercial and industrial areas that diminish residential character and quality of life. Dubin refers to the intermingling of commercial and industrial uses with residential areas as "incompatible zoning."[250] In his view, "[r]esidents deprived of zoning protection are vulnerable to assaults on the safety, quality, and integrity of their communities ranging from dangerous and environmentally toxic hazards to more commonplace hazards, such as vile odors, loud noises, blighting appearances, and traffic congestion."[251] Dubin's use of the term "protective zoning" provides a language for the need to support residential zoning that insulates communities from heavy commercial and industrial uses; incompatible zoning describes the actual effect of that failure.

The lack of protective zoning disincentivizes the building of mixed-income housing in these communities—something that furthers segregation and violates a local government's duty to affirmatively further fair housing. It also tends to displace minority communities, a result known as "expulsive zoning."[252] This failure to offer the same protections to majority or all-black communities that grew out of confinement as a result of racial zoning and race-based planning policies suggests that some local governments have a long history of failing to recognize black communities as areas equally deserving of the city's zoning protections. For example, Atlanta's racial zoning ordinance confined black neighborhoods to areas classified as industrial.[253] The ordinance also assigned zones for black residents less land than zones designated for whites, which furthered the risk of

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[247] Godsil, *supra* note 3, at 553 (footnotes omitted).

[248] *See* Dubin, *supra* note 10, at 762-63.

[249] *Id.*

[250] *Id.*

[251] *Id.* at 742 (footnote omitted).

[252] *Id.* at 742-43 (citing Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM, *supra* note 11, at 101).

[253] Ronald H. Bayor, *Roads to Racial Segregation: Atlanta in the Twentieth Century*, 15 J. URB. HIST. 3, 4 (1988).

overcrowding.[254] In Birmingham in 1940, there were fifteen census tracts that were at least seventy-five percent black.[255] All but three included industrial and commercial zoning.[256] Three of the tracts, including the tract with the highest number of black residents, were not intended for residential use at all.[257] In these areas, black residents essentially lived on land that either included or was intended to be used for businesses and factories rather than homes.[258] However, in the twenty-six tracts that were majority white, industrial and commercial zones within or near residential communities were the exception rather than the norm.[259] Thus, the city's zoning map provided traditional zoning protections to white communities but did not provide these same protections to blacks.[260] Birmingham was not alone in policies that generally and plainly "classified white neighborhoods as residential and black neighborhoods as commercial or industrial."[261]

These policies brought incompatible uses into black neighborhoods and worked to "destroy the quality of life" in these areas.[262] Yet they were often intentional. As historian David Delaney has explained: "The long struggle against racial segregation demonstrates that the spatiality of racism was a central component of the social structure of racial hierarchy, that efforts to transform or maintain these relations entailed the reconfiguration or reinforcing of these geographies, and that participants were very much aware of this."[263]

A California court's decision from the 1940s—the heyday of many anti-black zoning practices which persisted after *Buchanan*—highlights the

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[254] *Id.*

[255] CONNERLY, *supra* note 161, at 56.

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.* at 57.

[260] In addition, the difference in quality of life for blacks and whites is also partly a result of state action. In 1933, twice as many community toilets belonged to blacks than whites (66.8% black vs. 33.2% white). Three times as many dwelling units, or homes, without bathing facilities (73.6% black vs. 26.4% white) or running water (72.5% black vs. 27.5% white) belonged to blacks than whites. Four times as many homes where kerosene instead of electric lights was used belonged to blacks (73.6% black vs. 26.4% white). *Id.* at 27, Table 1.2.

[261] Richard Rothstein, *The Making of Ferguson*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 165, 166 (2015) (describing St. Louis); *see also* Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM, *supra* note 11, at 101.

[262] *See* Godsil, *supra* note 12, at 1863 (citing Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM, *supra* note 11, at 101).

[263] DELANEY, *supra* note 40, at 7.

importance of "zoning equity" in low-income communities of color.[264] In *O'Rourke v. Teeters*, a black business owner challenged a zoning ordinance that did not allow him to operate a business that sold electric fixtures from his home.[265] In response to the argument that his shop would have been an incompatible commercial use in a residential area, he responded that the city had undermined its own policy when it allowed two pre-existing businesses on his block.[266] As it happens today in many black communities, this hodgepodge of uses did not comport with the usual zoning policy of separating uses and thus took away the community's residential character. After holding that the mere existence of these uses did not fully render a neighborhood non-residential, the court still overturned the lower court and affirmed the principle that proper residential zoning is a right:

> Any other conclusion would result in a situation where only those who have been so fortunate as to obtain enough worldly goods to enable them to erect their homes in districts beyond the possible approach of commercial enterprises could be protected in their residences from the encroachment of business, commercial, and manufacturing enterprises. It needs no argument to support the thesis that all classes of our citizens, rich and poor, of whatever race or creed, are entitled to the equal protection of our laws and the privilege of living in areas which have been properly zoned for residential purposes pursuant to the recommendation of a duly created planning commission.[267]

The heritage of racial zoning in the South places another layer of difficulty on affirming the right to residential zoning that the California court recognized above. Racial zoning often limited black communities to the worst-quality land within its borders. The chemical spill in the Birmingham, Alabama, section of Village Creek provides a classic example of black residents faced with encroaching industrial uses.

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[264] *See* O'Rourke v. Teeters, 146 P.2d 983 (Cal. Ct. App. 1944).

[265] *Id.* The court took judicial notice of the fact that the plaintiff and other property owners could not have acquired separate business property nearby because race-restrictive covenants barred blacks from purchasing or leasing them. *Id.* at 984.

[266] *O'Rourke*, 146 P.2d 984-85.

[267] *Id.* at 985.

1. Case Study: Birmingham, AL—Discriminatory Zoning and Industrial Pollution

In 1925, John Charles and Frederick Law Olmsted, Jr., drafted a visionary plan for a park in Birmingham that would incorporate Village Creek, a small body of water that runs through the city.[268] The Olmsted brothers, whose firm had designed New York City's Central Park, envisioned that Village Creek would be much like Boston's Riverway or Washington Park in Chicago.[269] However, Birmingham's racial zoning law passed the following year.[270] The land alongside the creek flooded often and was among the least desirable real estate for residences.[271] The city chose to zone it for black occupancy.[272] This zoning decision blocked the plan for the park, which could have played a valuable role in the city's economic and cultural development.[273] For cities like Birmingham in the South, racial zoning as a form of segregation led to overall underdevelopment for the city and region as a whole.[274]

The park could operate around the intermittent flooding better than a neighborhood with permanent residents.[275] As a result, many black neighborhoods struggled with flooding problems for decades.[276] It was not until the 1990s that the city, with the help of the federal government, began to undo the mistakes of the past and converted some of the substandard neighborhoods along Village Creek to park land.[277] The result of the federal government's intervention provides an example of how transformation can be made that both benefits black residents and furthers economic development for communities as a whole. An awareness of the historic role of discriminatory land use policies in limiting access to fair housing and a refocusing on urban development as part of enforcing the affirmative duty provision of the Fair Housing Act can make these kinds of opportunities more identifiable.

The failure to make full amends, however, affected residents who were left behind. In October 1997, a large fire consumed a downtown warehouse that contained heavy concentrations of hazardous chemicals.[278]

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[268] CONNERLY, *supra* note 161, 6-7.
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] *Id.*

Millions of gallons of the water used to douse the fire flooded the sewer system and washed into Village Creek, which was near the downtown area.[279] Initially, state and county officials denied that toxic chemicals had leaked from the warehouse.[280] The press then reported that nearly five-thousand gallons of a highly concentrated form of Dursban had been released into the water and air.[281]

Within the first few days of the start of the fire, residents living in the low-income, mainly African-American neighborhoods near Village Creek "reported smelling noxious fumes and experiencing a variety of physical symptoms including headaches and nausea."[282] Dead fish and other indications of serious environmental problems surfaced as well.[283] Government officials and lawyers from the Environmental Protection Agency (EPA), however, failed to act until the hazardous materials and damage began affecting higher-income white neighborhoods downstream.[284] "[Black residents] believed that the spill would have been taken more seriously if the damage had occurred in a better-off white neighborhood where residents were white."[285] It turned out to be true; a temporary filtration dam was built to protect those higher-income white areas from further pollution, but it failed.[286] Civil suits were also filed on behalf of those areas, raising concerns over property values and the damage to the water supply.[287]

However, as of the date of this Article more than twelve years later, little had been done to remedy the short and long-term consequences of the spill on residents of Village Creek. Public health officials made very little headway in determining the long-term consequences, despite receiving a number of reports of medical problems connected with the Dursban spill.[288] Apathy permeates the response to the Dursban spill on the physical and mental health of Village Creek residents.[289] Even blood samples taken from

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[279] *Id.*

[280] KEVIN FITZPATRICK & MARK LAGORY, UNHEALTHY CITIES: POVERTY, RACE, AND PLACE IN AMERICA 1 (2011).

[281] *Id.* at 2. Dursban is a low-level nerve agent that causes a broad range of very serious health problems. *Id.* The range of health risks resulting from Dursban includes "birth defects, chronic headaches and neuromuscular pain, short-term memory loss, nausea and vomiting, and breathing problems, to a condition known as multiple chemical sensitivity." *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *Id.* at 2-3.

[288] *Id.* at 3.

[289] *Id.*

the residents were lost, and few if any authorities were held accountable.[290] The dismissal fits the pattern for a community that has long suffered from environmental problems because of its location and the legacy of racism.[291] "Village Creek is a dumping ground for industrial waste . . . Residence [t]here is stressful and dangerous."[292] Racial zoning and the lack of protective zoning around Village Creek residents from the chemical plant indicate the result of conflating blacks with nuisances at two critical points in time: relegating blacks to the floodplain around the creek under Jim Crow and approving zoning measures that would allow the chemical plant to locate near the community.[293]

Cheryl Harris has argued that "[e]ven though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privilege, American law has recognized a property interest in whiteness."[294] Even after courts struck down many Southern cities' racial zoning ordinances, urban planners in cities like Birmingham still made decisions based on these maps and lines of demarcation.[295] Thus, city leaders still protected white residents' expectation for protective zoning in an unexplicit way even after the courts struck down explicit justifications. This confinement created "settled expectations" that whites refused to disturb because the power to exploit these conditions protected from the undesirable land uses that could be driven into black neighborhoods.[296] The

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[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] *See* Yale Rabin, *The Junkyard Nextdoor: Expulsive Zoning in Black Neighborhoods* 2 (Sept. 1, 1988) (cited in Dubin, *supra* note 10, at 742) ("Why is it that older black neighborhoods in many American cities are frequently interspersed with land-uses . . . which are intrusive, disruptive, even hazardous, and which degrade the residential environment? Is it because blacks were forced into these already hostile surroundings by the pressures of segregation? Or have these incompatible activities somehow intruded into established black residential neighborhoods isolated by segregation?").

[294] Harris, *supra* note 133, at 1714.

[295] *See* Archer, *supra* note 14, at 1283 (describing use of racial zoning lines to determine where to build Interstates 59 and 65 in Birmingham's black community); ROTHSTEIN, *supra* note 33, at 135 (noting that "[e]ven though courts had struck down an explicit Atlanta racial zoning ordinance in 1924, the segregation maps guided school closure and construction decisions by the Atlanta School Board for the next two decades").

[296] In another example of boundaries established by government that later become settled expectations, Deborah Archer described a 1960 report in which the Atlanta Bureau of Planning acknowledged that "approximately two to three years ago, there was an 'understanding' that the proposed route of [I-20] would be the boundary between the White and Negro communities." Archer, *supra* note 14, at 1285 (citing RONALD H. BAYOR, RACE AND THE SHAPING OF TWENTIETH-CENTURY ATLANTA 61 (1996)). Black developers sought permission from the city planning bureau to build low-to-moderate income housing south of I-20 in a white residential area. *Id.* The planning bureau refused. *Id.* It gave as a

protection of these "settled expectations" has also had the same durability. Privilege—particularly white racial privilege in this context—is a "modern characteristic of racial exclusion" and "the character of resistance to racial inclusion."[297] Many white individuals on the other side of the proverbial and literal tracks "want to keep the situation they bought, which they understand as access to middle-class opportunities" and may defend "a 'right' to accumulated privilege" that discounts the value of integration.[298] Racial zoning ordinances established for a community that "whiteness was the predicate for attaining a host of societal privileges, in both public and private spheres."[299] Protective zoning has continued to function as a "societal privilege" from which whites benefited, but which the local government denied blacks. Providing protective zoning to all communities would require a more equitable distribution of undesirable land uses within a region. The settled expectations that decades of unchecked anti-black land use policies have created make it difficult to redistribute these burdens through a process of public decision making.

C. Disproportionate Siting of Locally Undesirable Land Uses (LULUs)

Scientific research consistently demonstrates that "[e]nvironmental hazards are inequitably distributed in the United States with poor people and people of color bearing a greater share of the pollution than richer people and white people."[300] This racial disparity results from the extremely high levels of spatial segregation that African Americans experience.[301] The assignment of black residents to particular areas provided policymakers an opportunity to steer multiple undesirable land uses that other residents would protest into those areas. It provided a space in which the state had obtained complete control over the areas where the most politically disempowered members of the community could live that the siting of a LULU in those areas would have few, if any, political or economic consequences.

Environmental justice advocates have long argued that government officials and private corporations deliberately place undesirable land uses like waste facilities in minority neighborhoods, or at a minimum, they

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reason that it had "obligations to the Adamsville citizens to adhere to the expressway route boundary." *Id*.

[297] Troutt, *supra* note 233, at 53.

[298] *Id.*

[299] Harris, *supra* note 133, at 1745.

[300] *See* Godsil, *supra* note 12, at 1832-33 (quoting LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 10 (2001)).

[301] Godsil, *supra* note 12, at 1832-33.

choose sites for these facilities in ways that result in minority neighborhoods hosting a disproportionate share of these land uses.[302] Notably, multiple studies in the 1990s and the 2000s focusing on particular cities, counties, and regions in the South came to the same conclusion after analyzing the correlation between the location of LULUs and the demographics of neighborhoods that host them.[303]

Thus, it remains clear that "[r]ace continues to be a powerful and frequently used tool to sort physical space, guide public policy, and distribute public benefits and burdens."[304] Just as a number of local governments have historically assigned and confined black communities in undesirable areas, they have also disproportionately sited facilities that have produced harmful and lasting negative impacts within black communities. Indeed, from a race-neutral standpoint, it is difficult to determine a fair method of siting LULUs that does not overburden any one particular community or group.[305] The establishment of "group areas," under the logic of apartheid South Africa, makes the decision of where to locate undesirable land uses rather predictable. Racial zoning established decidedly "disfavored quarters," to borrow Sheryll Cashin's formulation of "favored quarters."[306] These areas became the locations toward which city

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[302] *See* Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 4 (1997); *see also* Robert D. Bullard, *The Threat of Environmental Racism*, 7 NAT. RESOURCES & ENV'T 23 (1993); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 628-30 (1992).

[303] *See, e.g.*, Been & Gupta, *supra* note 302, at 4-6, 5 n.14; FLORIDA ENVIRONMENTAL EQUITY AND JUSTICE COMMISSION, FINAL REPORT 9-36 (1996); JOINT LEGISLATIVE AUDIT AND REVIEW COMM'N OF THE VIRGINIA GEN. ASSEMBLY, SOLID WASTE FACILITY MANAGEMENT IN VIRGINIA: IMPACT ON MINORITY COMMUNITIES 32-40 (1995); E.B. Attah, *Demographics and Siting Issues in EPA Region IV*, in PROCEEDINGS OF THE CLARK ATLANTA UNIVERSITY AND ENVIRONMENTAL PROTECTION AGENCY REGION IV CONFERENCE ON ENVIRONMENTAL EQUITY 3-4 (B. Holmes ed., 1992); Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 SOC. INQUIRY 273 (1983); Philip H. Pollock, III & M. Elliot Vittes, *Who Bears the Burdens of Environmental Pollution? Race, Ethnicity, and Environmental Equity in Florida*, 76 SOC. SCI. Q. 294 (June 1995); Martin R. Brueggemann, *Environmental Racism in Our Backyard: Solid Waste Disposal in Holly Springs, North Carolina* (1993) (cited in Been & Gupta, *supra* note 302, at 5 n.14).

[304] Archer, *supra* note 14, at 1301 (citations omitted).

[305] *See generally* Vicki Been, *Conceptions of Fairness in Proposals for Facility Siting*, 5 MD. J. CONTEMP. LEGAL ISSUES 13 (1994) (evaluating various approaches to controlling the siting of LULUs and various theories of fairness that can be used to justify them).

[306] *See* Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000). The term "favored quarter" refers to the area that emerges as part of a consistent regional dynamic:

planners could direct the necessary but unpleasant facilities that make cities livable for the broader population, including landfills, factories, and electric plants. The sections of the city that take on the burden of living near these undesirable land uses "often subsidize and are negatively impacted by the growth of the favored quarter."[307] Many city officials have often avoided not-in-my-backyardism (NIMBYism) by applying what Robert Bullard calls the "place-in-blacks'-backyard (PIBBY) principle."[308] The legacy of racial zoning might well be referred to as rampant PIBBYism. Two common types of LULUs that have ignited the environmental justice movement are hazardous waste facilities and highways.

1. Hazardous Waste Facilities

Black communities are vulnerable to receiving a disproportionate share of LULUs because of the lack of protective zoning and their economically marginalized status. In *Dumping Dixie: Race, Class, and Environmental Quality*, environmental justice scholar and activist Robert Bullard profiles the impact of environmental exploitation on black communities in the South.[309] After the decline of de jure segregation, the South began to experience unprecedented economic growth.[310] Cities and states reached out to corporations and manufacturing plants and encouraged them to relocate in the South with many inducements, including fewer business regulations, low business taxes, and "an eager and docile labor force."[311] Localities competed to recruit clean industries, but some were forced to accept offers from dirty, high-pollution industries or no industry

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> In most American metropolitan regions there are high-growth, developing suburbs that typically represent about a quarter of the entire regional population but that also tend to capture the largest share of the region's public infrastructure investments and job growth. Yet, through retention of local powers, the favored quarter is able to avoid taking on any of the region's social service burdens. Marginalized populations, particularly the minority poor who are relegated to poverty-ridden, central city neighborhoods, are largely excluded from participating in the favored quarter's economic prosperity.

Id. at 1987 (citations omitted).

[307] Cashin, *supra* note 306, at 1987.

[308] ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 5 (3d ed. 1990).

[309] *See id.*

[310] *See id.* at 21.

[311] *See id.*

at all.[312] The South became known as the Sunbelt, but its majority-black counties were referred to as the "Black Belt."[313] High-skilled labor employers, including tech companies, sought out areas with an educated, mostly white labor force and avoided areas with a high percentage of "poor and unskilled blacks."[314] Majority-black areas also had to choose between dirty industry and no industry.[315]

In addition, the leaders in many black communities did not recognize the larger, long-term implications of locating industries that produce high pollution into their area. For many leaders, who were veterans of the Civil Rights Movement, unemployment and low-income housing were more important social issues than the environment.[316] Often, polluting industries settled in poor communities with little say from local leaders.[317] When dissent did arise, however, many black leaders maintained development as the priority, despite its consequences.[318] "Environmental risks were offered as unavoidable trade-offs for jobs and a broadened tax base in economically depressed communities. Jobs were real; environmental risks were unknown."[319] Companies with a long history of

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[312] *See id.* at 22.

[313] *Id.*; *see also* WILLIAM W. FALK & THOMAS A. LYSON, HIGH TECH, LOW TECH, NO TECH: RECENT INDUSTRIAL AND OCCUPATIONAL CHANGE IN THE SOUTH 55 (1988) (noting that high-tech industries have virtually ignored the Black Belt, and observing that it remains "largely mired in the backwater of the southern economy" as a result).

[314] BULLARD, *supra* note 308, at 25; *see also* Gurney Breckenfeld, *Refilling the Metropolitan Doughnut*, *in* THE RISE OF THE SUNBELT CITIES (David C. Perry & Alfred J. Watkins eds., 1977).

[315] Robert D. Bullard & Beverly Hendrix Wright, *Environmentalism and the Politics of Equity: Emergent Trends in the Black Community*, 12 MID-AM. REV. OF SOCIO. 21, 23 (1987) ("The promise of jobs and a broadened tax base in economically depressed communities are often seen as acceptable tradeoffs to potential health and environmental risks. This scenario has proven to be the rule in economically depressed and politically oppressed communities in this country (especially in the South) and their counterparts around the world (especially in the Third World)."). Bullard and Wright describe this false choice as "environmental blackmail," the equivalent of economic bondage. *Id.* (citing RICHARD KAZIS & RICHARD L. GROSSMAN, FEAR AT WORK: JOB BLACKMAIL, LABOR AND THE ENVIRONMENT (1983)). It is similar to the condition where workplace safety standards offer limited or no protection; if workers want to keep their jobs, they are sometimes forced to work under conditions that may be hazardous to their health. *Id.*

[316] *See* Bullard & Wright, *supra* note 315, at 22.

[317] *See id.* at 25.

[318] *See id.* at 22-23 ("Civil rights advocates and boosters of unrestrained business development were closely aligned on the issue of jobs. In their desperate attempt to improve the economic conditions of their constituents, many black civil rights, business, and political leaders directed their energies toward bringing jobs to their constituents. In many instances, this was achieved at great health risk to black workers and the surrounding communities.").

[319] BULLARD, *supra* note 308, at 27.

pollution took advantage of this position.[320] For many industrial firms, the black community was "a push-over lacking community organization, environmental consciousness, and with strong and blind pro-business politics."[321]

This pro-business mindset from city leaders and black community leaders has led to glaring siting disparities within and near-black residential areas in the South. In 1987, the United Church of Christ's Commission for Racial Justice (CRJ) conducted a nationwide analysis of the areas surrounding commercial hazardous-waste facilities.[322] The study identified a substantial correlation between the number of commercial hazardous waste facilities in a zip code and the percentage of minorities in the zip code's population.[323] "The percentage of minorities in areas with one operating facility was almost twice that of areas without facilities. As the number or noxiousness of facilities in a neighborhood increased, so did the percentage of minorities in that neighborhood."[324] CRJ conducted the study again in 1994 using 1990 census data, and it found the same result.[325] Many black communities, however, find that these environmental hazards cause more harm than good.

Law professor Vicki Been has provided a different account of the problem. Based on Been's analysis of studies from CRJ and others, she concluded that there was "absolutely no evidence that the siting process caused any current disproportion in the percentages of racial or ethnic minorities or the poor living in host neighborhoods."[326] According to Been,

> the research left open the possibility that the sites for the facilities originally were chosen in a manner that was neither intentionally discriminatory nor discriminatory in effect, but that market responses to the facilities led the host neighborhoods to become disproportionately populated by the poor, and by racial and ethnic minorities.[327]

She offered a theory to explain this possibility in which members of a community who perceived the facility as a nuisance would choose to leave

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[320] *See* Bullard & Wright, *supra* note 315, at 25.

[321] *Id.* (citation omitted).

[322] UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES 13-14 (1987).

[323] *Id.*

[324] Been & Gupta, *supra* note 302, at 5.

[325] *Id.* (citing BENJAMIN A. GOLDMAN & LAURA FITTON, TOXIC WASTES AND RACE REVISED 3 (1994)).

[326] Been & Gupta, *supra* note 302, at 6.

[327] *Id.*

if they could afford to do so.[328] The out-migration and the decrease in property values that the undesirable land use caused would lead individuals with limited housing choices because of racial discrimination in the housing market to move in.[329] Over time, the percentage of racial and ethnic minorities would increase to a higher percentage than it had been prior to the siting of the facility.[330]

The legacy of racial zoning, however, challenges this conclusion where local governments designated land in which African Americans could reside and limited their residential options to neighborhoods in these areas. Siting decisions made after these designations took place occurred in a context in which the demographics of the area had been set by law. Discrimination in the residential housing market, even after the fall of racial zoning ordinances, limited the mobility options of African Americans outside of these areas.[331] Consequently, the salience of out-migration lessened as the population that had the means to move and who could acquire housing outside of the designated black areas remained limited.[332] Likewise, the explanation of an increase in African Americans that takes place as a result of in-migration due to limited options fails to take into account a scenario in which African Americans are assigned to a particular community *by law* and local governments reproduce and fortify these policies and designations for an extended period of time.

The environmental justice literature has become increasingly complex in its examination of whether the disproportionate number of hazardous land uses in minority communities comes from intentional siting decisions or minority housing choices, and scholars have yet to reach a consensus on the matter.[333] Nonetheless, at least in the context of a city which had once adopted racial zoning policies, the theory that the neighborhood forced to endure one or more undesirable land uses is predominantly African American as a result of "market dynamics" becomes less compelling.

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[328] *Id.* at 6-7 (citing Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1388-90 (1994)).

[329] *Id.*

[330] *Id.*

[331] *See* Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM, *supra* note 11, at 102 ("Because it appears that such areas were mainly black, and because whites who may have been similarly displaced were not subject to racially determined limitations in seeking alternative housing, the adverse impacts of expulsive zoning on blacks were far more severe . . . ."); Godsil, *supra* note 3, at 553-54.

[332] *See id.*

[333] *See* DORCETA E. TAYLOR, TOXIC COMMUNITIES: ENVIRONMENTAL RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY 41 (2014).

The current environmental regulatory regime does little to undo these practices. Instead, it further entrenches the impact of these past decisions. Several environmental laws provide for the "grandfathering" of facilities that operated prior to the enactment of the law, protecting them from substantive regulation.[334] For example, the grandfathering provision in the Clean Air Act has had the most significant impact on black communities because the dirtiest facilities that emit the highest amounts of pollution were constructed prior to the 1970s, disproportionately in black communities.[335] To make matters worse, federal and state governments have yielded real authority over where third parties can site most polluting facilities to local governments.[336] This devolution of control has serious implications in a local government context where the spatial layout of racial demographics in the city grows out of a context of state-imposed racial segregation, and a void of public policy solutions to remedy this division remains. The opportunity for a local government to take advantage of these conditions is high.

Legal scholars have often focused on measures designed to keep low-income people of color out of higher-income, disproportionately white communities. It is important to frame undesirable land uses as tools that keep higher-income and disproportionately white individuals out of lower-income communities of color in order to perpetuate racial segregation. Lior Jacob Strahilevitz has analyzed "exclusionary amenities," or features of residential developments that are generally expensive and that only appeal to certain demographic groups.[337] Strahilevitz points toward club goods, such as residential elevators, concierges, and tennis courts, and local public goods as examples of exclusionary amenities.[338] The ability of a desirable club good or public good to deter unwanted potential residents—including poor people and people of color—from moving into a certain area can also apply in reverse. An undesirable land use as an "amenity" that local city planners and business interests can direct into a neighborhood deters high-income or white individuals from moving into that area. A tennis court may attract, while a factory can repel. The deployment of undesirable land uses to keep racial groups apart gives that use a segregative effect.

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[334] Godsil, *supra* note 12, at 1869; *see also* Heidi Gorovitz Robertson, *If Your Grandfather Could Pollute, So Can You: Environmental "Grandfather Clauses" and Their Role in Environmental Inequity*, 45 CATH. U. L. REV. 131, 134-35 (1995).

[335] *Id.*

[336] *See* Godsil, *supra* note 12, at 1869.

[337] Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006).

[338] *Id.* at 441.

2. Highways

Racial zoning and its aftermath constitute a form of contemporary structural inequality. The permanence of the location of black communities explicitly on the basis of race represents a vestige of overt racial discrimination. The facially colorblind policies that local governments applied in making zoning decisions and the disproportionate siting of LULUs in or near black communities have contributed to "the sedimentation of intergenerational privilege."[339] The aftermath of racial zoning involves a link between the logic of race-based decision making that characterized explicit racial zoning and forms of localism that "reproduce resource and residential segregation without using explicitly racial rules."[340]

For example, the location of Overtown, a neighborhood that grew out of Miami's racial zoning ordinance, made it possible to direct the building of Interstate 95 through the community.[341] The black community's designated location required it to shoulder the burden of a highway that filled the air with pollution and noise while protecting majority-white or higher income communities from the same.[342] In Birmingham, Alabama, city and state officials ensured that Interstate 59 would be built along 11th Avenue, on a route that matches the boundary for the black community under the city's racial zoning ordinance.[343] The city also built Interstate 65 along the lines of its racial zoning ordinance,[344] "creating a buffer between white and Black communities."[345] Sarah Schindler argues that "the built environment controls human behavior."[346] Buildings and uses within low-income communities of color certainly influence the behavior of individuals who examine the residential options that they have in a community and who explicitly choose not to reside in the area with these negative features of the built environment.[347] As

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[339] Troutt, *supra* note 233, at 77.

[340] *Id.*

[341] *See* Archer, *supra* note 14, at 1278-80 (discussing the development of Overtown and city leaders' use of the Interstate Highway Act "to seize Overtown and push out Black residents").

[342] *See* Archer, *supra* note 14, at 1280.

[343] *Id.* at 1281-83 (citing CONNERLY, *supra* note 161, at 104).

[344] *Id.*

[345] *Id.* at 1283; *see also* Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1939 (2015) (highlighting the ways in which techniques like the location of highways "can shape the demographics of a city and isolate a neighborhood from those surrounding it, often intentionally").

[346] Schindler, *supra* note 345, at 1947.

[347] *Id.*

Lawrence Lessig has observed, "[t]hat a highway divides two neighborhoods limits the extent to which the neighborhoods integrate . . . . [C]onstraints function in a way that shapes behavior. In this way, they too regulate."[348]

The exclusionary impact of structural devices like highways "cement racial inequality."[349] They can outlast current law, facilitate racial exclusion, and work around future laws that might otherwise facilitate integration.[350] In the same way, racial zoning ordinances functioned to create conditions of confinement that would outlast the legally permissible existence of the zoning ordinance. Architectural decisions, including where to build highways, have literally monumental staying power.[351] In the words of Robert Moses, a New York public official who advocated for the use of highways to form barriers to access for people of color, "It's very hard to tear down a bridge once it's up."[352] "While outdated laws are often overturned when the norms informing them have sufficiently evolved, our exclusionary built environment, which was created in the past, continues to regulate in the present."[353]

3. Redistributing the Burdens

The inertia that characterizes the legacy of racial zoning requires an interruption that exposes the longstanding policy choices that have led to directing undesirable land uses into or near formerly racially zoned black communities. The concept of a Pigovian tax may serve as a tangible response to this pattern. In her 1979 article, Michelle J. White analyzed several potential policies to limit the severity and spread of exclusionary zoning and growth controls that suburbs enact to the detriment of the broader metropolitan area.[354] While scholars have discussed applying this

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[348] Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999).

[349] Archer, *supra* note 14, at 1275.

[350] *See id.*

[351] Schindler, *supra* note 345, at 1942-43.

[352] *See* Archer, *supra* note 14, at 1275 (quoting Matthew Noah Smith, *Reliance Structures: How Urban Public Policy Shapes Human Agency*, in THE PALGRAVE HANDBOOK OF PHILOSOPHY AND PUBLIC POLICY 809, 812 (David Boonin ed., 2018)).

[353] Schindler, *supra* note 345, at 1941.

[354] Michelle J. White, *Suburban Growth Controls: Liability Rules and Pigovian Taxes*, 8 J. LEGAL STUD. 207, 209 (1979). Richard Ford has also applied the concept of Pigovian taxes to address higher-income communities' refusals to accept affordable housing developments and instead steer a disproportionate amount to other areas, including inner city areas in the region. *See* Ford, *supra* note 95, at 1902, 1902 n.190 (citing White, among others). Cities and private landowners have often treated affordable housing developments as nuisances. *See, e.g.*, Maureen E. Brady, *Turning Neighbors into*

remedy to zoning measures in one jurisdiction that affect neighboring jurisdictions, it may be appropriate to use if one considers the "favored quarter"[355] and the "disfavored quarter" in the context of neighborhoods within a particular city. Under this approach, undesirable land uses are the classic sorts of nuisances that indeed can cause air and/or water pollution and which have "negative external effects on other parties."[356] The only difference is that the producer of the nuisance is a local government rather than a private party.

One might frame a local government's approval of the siting of the undesirable land use in a majority-minority section of the city with a disproportionate number of LULUs already cited in it as the creation of a nuisance in itself, over and above the nuisances that already exist in the area. A standard economic remedy for nuisances is the Pigovian tax, which gives nuisance creators a choice between paying a tax per unit of nuisance or ceasing to create the nuisance.[357] The tax functions as a mechanism that encourages policymakers and stakeholders in the favored quarter to think twice before compounding the history of undesirable land use sitings in formerly racially zoned black communities.[358] The tax is intended to discourage disproportionate siting decisions by requiring the "favored quarter" to pay a price for it.[359] In this context, the tax may be a shift in the allocation of funding for improvements in the favored quarter to provide those resources to the former racially zoned black community to compensate for the additional burden of an undesirable land use.[360]

In some ways, mechanisms like a Pigovian tax which externalize the costs of undesirable land uses by more evenly distributing the burdens

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Nuisances, 134 HARV. L. REV. 1609, 1614 (2021) (describing efforts to use zoning and nuisance law to limit the building of multifamily housing since the early twentieth century). Indeed, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)—the Supreme Court decision upholding zoning as a legitimate use of a local government's regulatory powers—the majority suggested that an apartment in a single-family neighborhood was a "parasite" and "may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." *Id.* at 388, 394. This unfortunate parallel suggests that the application of a nuisance tax to a disproportionate siting of undesirable land uses—which are classic nuisances rather than racialized ones—may lead us down a useful path.

[355] *See* Cashin, *supra* note 306, at 1987.

[356] White, *supra* note 354, at 209.

[357] *Id.* at 209-10.

[358] *Id.*

[359] *Id.*

[360] This approach of assigning funds to a local government for a particular use as part of this regime is consistent with White's formulation of how the payment would be used: "[W]hile the damage awards under a community liability rule are paid to owners of vacant land, the Pigovian tax is paid to a higher level of government, presumably a regional or metropolitan body." *Id.* at 210.

associated with them can open the door to considering remedies that do not simply focus on redeveloping the racially zoned neighborhood on its own. Policymakers and advocates must place the racially zoned neighborhood within the broader context of the city and region within which it is located. Audrey McFarlane has critiqued the focus on development within urban policy geared toward addressing poverty in inner-city communities.[361] She argues that "economic development is not a neutral policy that government can advance without addressing significant structural issues that externally impact inner-city communities."[362] According to McFarlane, "rather than an exclusively localized approach, a dialectical perspective, one that understands a local community both as a totality in itself and as part of a larger totality, is called for."[363] Distributing the results of the costs that cities and regions have required these communities to bear can provide a remedy that benefits the racially zoned neighborhood, but also challenges the context which creates that neighborhood's structural disadvantages.

V. THE ROLE OF THE FAIR HOUSING ACT

The maintenance of a pattern in which African Americans disproportionately remain in the areas designated for them under racial zoning ordinances—despite the fact that the era of the direct application of the ordinances is long gone—is a "material manifestation"[364] of Derrick Bell's thesis regarding the "permanence of racism" in American society.[365] Like the interstate highways that soar over the black communities that they destroyed, the enduring pattern of African Americans locked in these communities where they still suffer from disinvestment and the vestiges of factories, landfills, and other uses incompatible with a livable residential area is a "physical realization of our racialized norms and values."[366]

The location of black communities, the lack of protective zoning, and the disproportionate siting of LULUs in low-income black communities—the three challenges identified above—are challenges tied to specific spaces. They result from the spatial limitations in which segregated cities confined black residents as a result of racial zoning ordinances and policies that flowed from them. The latter two issues related

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[361] *See* Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295 (1999).

[362] *Id.* at 299.

[363] *Id.* at 301.

[364] Archer, *supra* note 14, at 1267.

[365] *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992) (contending that racism is ingrained in American society).

[366] Archer, *supra* note 14, at 1267.

to zoning protections and land uses suggest that a nuisance law solution could remedy them. It has become clear, however, that "nuisance actions are no longer a reliable way to protect homes from noxious land uses."[367] The growth of land use and environmental regulations has become a reason upon which courts have relied to justify the refusal to grant injunctive relief or allow nuisance cases to survive motions to dismiss.[368] In theory, this web of rules should allow residents of affected communities to avoid the need for nuisance actions.[369] The laws that were designed to segregate conflicting uses and limit overall levels of air and water pollution should provide the protective zoning that these communities lack and manage the effects of undesirable land uses; yet they have failed at this task.[370]

The logic of racial zoning that often governs local government decision making about ways to externalize undesirable land uses away from majority white, high-opportunity communities will become increasingly unworkable. David Troutt has argued that threats to social equity, including racial re-segregation, threaten the sustainability of a region because "the costs of regional inequalities can no longer be contained in poorer areas, as burdens multiply with population trends."[371]

The legacy of racial zoning as outlined above calls into question the effectiveness of the legal tools available to remedy the effects of past discrimination and undo the ways in which the logic of racial zoning informed land use regulations and local government policies tend to respond to majority-black neighborhoods. This Part argues that the current understanding of the scope of the federal Fair Housing Act (FHA) and the problems to which it applies must broaden to encompass the effect of historical concentrations of black communities in the most undesirable land in the city due to its environmental risk and the cumulative effect of a failure to provide protective zoning and disproportionate siting of LULUs in these concentrated areas. These factors limit access to opportunity for black residents within individual towns and cities vis-a-vis white neighborhoods within the same town or city. They are housing issues—not just land use issues—and must be treated as such. They raise pressing fair housing implications because "environmental concerns mix with concerns about employment access and wealth maximization (property value) to limit opportunity."[372] While these conditions are not limited to formerly racially

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[367] Godsil, *supra* note 12, at 1810.

[368] *See id.*

[369] *See id.*

[370] *See, e.g.*, *id.* at 1811 (explaining that "these legislative and regulatory advances [addressing industrial pollution] have ignored some neighborhoods").

[371] Troutt, *supra* note 233, at 79.

[372] *Id.* at 101.

zoned cities in the South, they appear within the structure of residential segregation and disadvantage in Southern towns and cities more frequently as a result of the legacy and logic of racial zoning that continued in the application of general zoning ordinances for decades.[373] They also provide an often-ignored landscape in which to consider how effectively the Fair Housing Act can work in targeting another iteration of racialized disadvantage.

A. The Effectiveness of the Fair Housing Act

Scholars have argued that the FHA and Title VI of the Civil Rights Act of 1964[374]—two of the civil rights laws that most directly apply to challenging governmental and private market decisions that further racial disparities in housing and community development—have proven insufficient in remedying the structural racism.[375] These results, however, seem far from the ambitions of the FHA's original proponents. Congress clearly indicated in Title VIII of the Civil Rights Act of 1968, commonly referred to as the FHA, that the FHA's intention is "to provide, within constitutional limitations, for fair housing throughout the United States."[376] Broadly speaking, the FHA prohibits discrimination in the sale, rental, and financing of dwellings on the basis of race, color, religion, sex, familial status, national origin, and disability.[377] Courts have made clear, however, that the FHA "prohibits 'both direct discrimination and practices with

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[373] *See* Prakash, *supra* note 10, at 1449 (arguing that *Euclid* "codified the rationale of zoning proponents that separating land uses was necessary to protect property value, and laid the legal foundation for a system that fulfilled much the same purpose as racial zoning.") (footnotes omitted).

[374] Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in programs receiving federal financial assistance. 42 U.S.C. § § 2000d-2000d-7 (2012).

[375] *See* Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL'Y REV. 375, 384 (1988) ("[I]ndividual litigation victories rarely can address large-scale patterns and practices of discrimination."); *see also* John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1127 (1998) ("The rights-based strategy of fair housing, as enforced by HUD and in the courts, is an ideological victory that nonetheless has had insignificant effects in desegregating the metropolis and thereby improving the material life of the ghetto poor."); Archer, *supra* note 14, at 1305, 1305 n.275 (2020) (arguing that courts have primarily interpreted Title VI and Title VIII of the Civil Rights Act of 1964 "to apply to discriminatory decisions after they have been made, place the burden of proof on members of the impacted community rather than on government agencies, and are applied against a legal backdrop that focuses on intent and ignores structural and systemic concerns").

[376] 42 U.S.C. § 3601.

[377] 42 U.S.C. §§ 3604-3606 (2012).

significant discriminatory effects' on the availability of housing."[378] Several scholars have argued that fair housing law relies on two core themes, which David Troutt has described as "anti-discrimination and anti-segregation."[379] Olatunde Johnson addresses these two ideas in the context of rethinking the "overly narrow conceptions of the FHA's enforcement power."[380] The "public and private capacity to resolve discrimination claims" encompasses the anti-discrimination element of fair housing law.[381] The anti-discrimination aspect of fair housing law, however, became the dominant force through the 1970s to 1990s.[382] The focus on the individualized enforcement of anti-discrimination rights unnecessarily limits the tools available to achieve fair housing.[383]

The meaning of fair housing and its scope are long overdue for reconsideration. "'Fair housing' is a far more comprehensive term than commonly understood."[384] Indeed, the FHA actually expanded the right to equal housing opportunities already enshrined in 42 U.S.C. § 1982, one of the so-called Reconstruction Amendments.[385] As David Troutt has cogently stated in his leading article on the subject: "Since World War II, housing policy has been fundamentally concerned with economic

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[378] S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 499 (D.N.J. 2003) [hereinafter *SCCIA III*] (quoting Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1209 (7th Cir. 1994)); *see also* 42 U.S.C. § 3604(a).

[379] *See* Troutt, *supra* note 233, at 7. Robert Schwemm frames these two goals in terms of the remedies they sought. Robert G. Schwemm, Cox, Halprin, *and Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 718 (2008) ("The goal of the FHA was not merely to end housing discrimination based on race and national origin, but to replace the ghettos by truly integrated and balanced living patterns.") (citations omitted); *see also United States v. Starrett City Assocs*., 840 F.2d 1096, 1101 (2d Cir. 1988) ("Congress saw the antidiscrimination policy as the means to effect the antisegregation-integration policy.").

[380] Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1193 (2011).

[381] *Id.*

[382] *See* Troutt, *supra* note 233, at 7-8.

[383] *See* Johnson, *supra* note 380, at 1193-94.

[384] Troutt, *supra* note 233, at 7.

[385] Section 1 of the Civil Rights Act of 1866 provides: "All citizens of the United States shall have the same right, in every State and Territory, as it is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866) (later codified at 42 U.S.C. § 1982). In *Jones v. Alfred Mayer Co*., 392 U.S. 409 (1968)—a Supreme Court decision issued just before Congress passed the FHA—the Court distinguished the FHA from Section 1982. It described Section 1982 as a "general statute applicable only to racial discrimination in the rental and sale of property" and the FHA "a detailed housing law, *applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority*." *Id*. at 416-17 (emphasis added).

opportunity. In the twenty-first century, I argue, fair housing law is fundamentally about reducing economic *inequality*."[386] The prongs of anti-discrimination and anti-segregation go beyond a focus on housing alone.[387] Together, they "advance an interest in fair housing that encompasses virtually any institutional means that connects people's residential status to social and economic mobility."[388]

David Troutt argues that the scope of the FHA can and should be read to include issues beyond just housing, namely "because the anti-ghettoization/integration interests that were earlier understood to be at the heart of the Act's passage have had important, though limited, success across a changed landscape."[389] The evolution of the law governing urban development from the Housing Act of 1949 to the FHA of 1968 illustrates an increasingly more nuanced understanding of the causes of the deleterious conditions in majority-minority urban neighborhoods.[390] The Third Circuit's opinion in *Shannon v. U.S. Department of Housing & Urban Development* (HUD) compellingly describes this shift:

> In 1949 the Secretary, in examining whether a plan presented by a [Local Public Agency] included a workable program for community improvement, could not act unconstitutionally, but possibly could act neutrally on the issue of racial segregation. By 1964 he was directed, when considering whether a program of community development was workable, to look at the effects of local planning action and to prevent discrimination in housing resulting from such action. In 1968 he was directed to act affirmatively to achieve fair housing. Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.[391]

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[386] Troutt, *supra* note 233, at 6 (emphasis added).

[387] *Id.* at 13-14.

[388] *Id.* at 8.

[389] *Id.* at 14.

[390] *See id.* at 27; *see also* Shannon v. U.S. Dep't of Hous. & Urb. Dev., 436 F.2d 809, 816 (3d Cir. 1970) ("Read together, the Housing Act of 1949 and the Civil Rights Acts of 1964 and 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight.").

[391] *Shannon*, 436 F.2d at 816.

This discussion of a review of a HUD grantee's plan to determine whether it "included a workable program for community improvement" poses a unique scenario that is rather different from many cases under the FHA that seek anti-segregation reform. The court discusses "a program for community development" that requires HUD to consider "the effects of local planning action." Rather than focus on housing itself, it requires accountability for *community development*—the core focal point for legacy racial zoning practices. It describes a circumstance in which a local government could take any number of development-based approaches to develop a plan to implement solutions to the legacies of racial zoning described above. A local government may develop a plan designed to support individuals living in sections of cities previously designated for black residents (which may still remain predominantly black) that are in flood zones by moving to higher ground or remediating their properties to make them more resilient against flooding. Likewise, it may change its zoning designations to protect the residential character of majority-minority areas. It may also adopt a plan to incentivize owners of harmful land uses that have been located in historically black neighborhoods of the city to move to more suitable locations.

Yet the incidence of cases like these within the spectrum of systemic challenges to violations of the FHA is rare.[392] Indeed, many of the leading cases grow out of the urban-suburban context of the northern United States that dominates the literature.[393] Many of the most notable instances of

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[392] *See* Troutt, *supra* note 233, at 30-31. Troutt distinguishes "between cases brought to end discrimination in housing and cases brought to effectuate more systemic desegregation" and places them at different ends of a spectrum. *Id.* These ends of the spectrum fall within the "anti-discrimination" vs. "anti-segregation" framework. *Id.*

[393] Indeed, David Troutt suggests that there is an over-emphasis on the South in the context of understanding civil rights history. Troutt, *supra* note 233, at 16. "One problem with our collective grasp of the civil rights struggles of the 1960s, filtered as they are through the grain of black and white photographs and the imaginations of Hollywood writers, is that we tend to frame from the South." *Id.* He argues that "the story had moved North" as a result of the Great Migration out of African Americans out of the South during and around World Wars I and II. *Id.* According to Troutt, "the 'ghetto' was a northern city phenomenon, where the cumulative marginalizing effects of redlining, urban renewal, and public housing had become the singular experience of African American life and struggle." *Id.* While the conventional narrative of the Civil Rights Movement of the 1960s may revolve around events in the South, the story of housing segregation is not at the heart of this story at all, whether in the South or the North. Indeed, the FHA of 1968 is the last of the civil rights statutes passed in this era. It is also important to pull back the lens of "the story" of equal housing rights. Not all of the people "had moved North." Black people remained in the South. Their neighbors in the North did not create a "singular experience." The black Southern experience continues to present its own unique set of challenges. It deserves equal analysis and targeted attention. The myopic view of housing segregation

systemic FHA litigation do not involve challenges to spatial dimensions of segregation that more commonly exist outside of the South. The cases involving mobility for public housing residents often "span the entire history of the FHA and have come to crystalize the goals of anti-segregative systemic lawsuits."[394] In *Gautreaux v. Chicago Housing Authority*, the court ordered the Chicago Housing Authority to change its racially discriminatory tenant assignment and selection policies and instead place low-income families in high-opportunity and low-minority areas.[395] "As a matter of both fair housing law and policy, *Gautreaux* stands for the proposition that the benefit of fair housing entails mobility to areas of (suburban) high opportunity."[396] The emphasis here belongs on the remedy's "suburban" context.

Similarly, in *Thompson v. HUD*, which was filed more than twenty years after *Gautreaux*, the plaintiffs challenged the racial segregation that resulted in years of the city of Baltimore's discriminatory public housing siting policies.[397] They argued that HUD's "failure adequately to consider a regional approach to desegregation of public housing" violated the agency's obligation to administer its programs in a manner to affirmatively further fair housing policy.[398] The court determined that HUD was liable for "effectively wearing blinders" to options to desegregate that included a regional approach that encompassed surrounding higher-income, majority-white counties.[399] According to Troutt, "[t]he theory of fair housing in [*Thompson*] may be the most complete demonstration of systemic litigation in the anti-segregation vein."[400]

Several early cases brought under the FHA also include challenges to the efforts of suburbs to "maintain the ghetto on the other side of municipal boundaries."[401] For example, in *United States v. City of Parma*, HUD challenged an all-white Ohio suburb's policies aimed at keeping out low-income people of color by opposing all forms of public and affordable housing, enacting exclusionary zoning ordinances, rejecting a federally

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from the urban-suburban divide in the North figures heavily into the tendency to ignore the barriers to fair housing choice in other parts of the nation.

[394] Troutt, *supra* note 233, at 38.

[395] 304 F. Supp. 736 (N.D. Ill. 1969).

[396] Troutt, *supra* note 233, at 39.

[397] 348 F. Supp. 2d 398 (D. Md. 2005).

[398] *Id.* at 408 (citing 42 U.S.C. § 3608(e)(5)).

[399] *Id.* at 409.

[400] Troutt, *supra* note 233, at 39.

[401] *See* Troutt, *supra* note 233, at 37; *see also, e.g.*, *United States v. Black Jack*, 508 F.2d 1179, 1181 (8th Cir. 1974) (challenging exclusionary zoning ordinances passed by a nearly all-white suburb of St. Louis, Missouri, designed to prevent the construction of housing affordable to predominately black ghettoes in St. Louis); *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980).

subsidized low-income housing development, and refusing to comply with Community Development Block Grant (CDBG) requirements.[402] Still, the urban-suburban context remains a consistent setting in which advocates have attempted to leverage the FHA's power for systemic change.

While many leading FHA systemic cases involve challenges to suburbs' resistance to integration from people of color in the urban centers in their region, they are still instructive for imagining a broader set of facts that may include legacies of racial zoning. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the U.S. Supreme Court reaffirmed the principle that disparate impact claims are cognizable under the FHA.[403] The case focused on a tension between the federal Low-Income Housing Tax Credit program—which specifically provides for the construction of affordable housing in already low-income areas—and the FHA.[404] The Court held that the FHA's statutory objectives took priority.[405] The Court recognized and anticipated the artful way in which discrimination shape-shifts and the need to have a theory that was similarly flexible.[406] The Court stated, "[i]t permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[407]

The institutional forms of exclusion objected to in the urban-suburban cases also play out within sections of towns and cities as well. Of course, former racially zoned cities in the South and border states currently share the challenge of suburban sprawl with their large counterparts outside of the South.[408] Nonetheless, the long-standing effects of racial concentrations and the disproportionate allocation of burdens like LULUs

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[402] 494 F. Supp. at 1051-52.

[403] 576 U.S. 519 (2015).

[404] *See id*. at 525 (discussing 26 U.S.C. § 42(m)(1)(B)(ii)(III), (d)(5)(ii)(I)).

[405] *Id.* at 546-47.

[406] *See* Troutt, *supra* note 233, at 43.

[407] *Inclusive Cmtys. Project, Inc*., 576 U.S. at 540.

[408] Indeed, Atlanta and Dallas—two cities that had actual racial-zoning ordinances—are among the fastest-growing cities in the nation. *See* Zach Levitt & Jess Eng, *Where America's developed areas are growing: 'Way off into the horizon'*, WASH. POST (Aug. 11, 2021), https://www.washingtonpost.com/nation/interactive/2021/land-development-urban-growth-maps/. They are among the many American cities that struggle with sprawl and an increasing urban-suburban divide. *See id.*; *see also* Emily Badger, *What the rapidly urbanizing Southeast could look like come 2060*, WASH. POST (July 30, 2014, 3:27 PM), https://www.washingtonpost.com/news/wonk/wp/2014/07/30/what-the-rapidly-urbanizing-southeast-could-look-like-come-2060/ (describing the long-term consequences for sprawl in cities like Atlanta, Birmingham, and Miami, including its impact on social mobility).

to majority-black areas within specific sections of the city still remain.[409] Likewise, rural communities that strictly regulated where African Americans could live have similar structures.[410] Even outside of the urban-suburban context, majority-white sections within towns and cities also resist public or subsidized low-income housing developments.[411] These same cities also may disproportionately use CDBG funds to build new amenities in higher-income sections of the city while providing low-income sections within the same city less than their fair share of funding.[412] Litigants

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[409] *See* Linda Villarosa, *Pollution Is Killing Black Americans. This Community Fought Back.*, N.Y. TIMES MAG. (July 28, 2020), https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html (noting that "African-Americans are seventy-five percent more likely than others to live near facilities that produce hazardous waste").

[410] *See* TAYLOR, *supra* note 333, at 35-37 (discussing studies which found that hazardous waste landfills were disproportionately sited in low-income black communities across the South). Many of the towns which studies have found suffered from the disproportionate siting of LULUs are historically black towns that started as separate enclaves like Princeville, North Carolina, because of white restriction from residing safely in other areas. For example, Alsen, Louisiana, was the site of the fourth largest hazardous waste facility in the United States. *See, e.g.*, Robert B. Wiygul et al., *Environmental Justice in Rural Communities*, 96 W. VA. L. REV. 405, 411 n.16 (1994). The town is more than ninety-five percent black. *See id.* The town started as a settlement for freed slaves after the Civil War, and it was forced out of its original location when chemical plants started coming in. *See id.* at 441-42. Emelle, Alabama, is home to the nation's largest commercial hazardous waste landfill. *See* Bullard, *supra* note 303, at 25. Around the time of the siting, the town was more than ninety percent black in a county that was seventy-five percent black. *See id.* Before the Civil War, nearly half of Emelle's residents were slaves. *See* Kelly D. Alley et al., *The Historical Transformation of a Grassroots Environmental Group*, 54 HUMAN ORG, 410 (1995). Sharecropping kept black residents essentially bound to the land and in poverty. *See id.*

[411] *See, e.g.*, SHERYLL CASHIN, WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY 53-54 (2021) (describing the methods that white residents of Chicago neighborhoods used to keep blacks out of these areas and the city's decision to concentrate low-income black residents into a series of high-rise housing projects outside of the neighborhoods that intensely opposed them). The federal government also historically built racially segregated public housing complexes in separate areas or directed local governments to do the same, allegedly to reflect white preferences in the respective cities. *See* ROTHSTEIN, *supra* note 31, at 16-32.

[412] *See* Brett Theodos et al., *Taking Stock of the Community Development Block Grant*, URB. INST., 8 (Apr. 2017), https://www.urban.org/sites/default/files/publication/89551/cdbg_brief.pdf (noting, for example, that studies show higher-income neighborhoods in lower-income council districts in Los Angeles received more funds than lower-income neighborhoods in higher-income districts). There is no reliable data on how well jurisdictions direct funding to low- and moderate-income areas as required by the Housing and Community Development Act, which established the program. *See id.* at 9. There is also very little targeted spending on CDBG funds in the highest need areas, leaving open the possibility for unequal distributions of funds. *See id.*

challenging these long-standing policies would also be able to borrow the theory from *Thompson* that may allow them to overcome statute of limitations challenges.[413] Thus, the examples of systemic FHA cases can also inform viable strategies for challenge efforts to maintain majority-black ghettoes within cities, particularly those communities that began as a result of racial zoning and applications of general zoning ordinances that mirrored the same goals by another name.

1. Barriers to Litigating Legacy Claims Under the Fair Housing Act

Indeed, judicial remedies can work to "disrupt institutional arrangements" by challenging structures and institutional norms in government decision making.[414] The remedies available, however, in the context of the environmental results of racist location decisions for black communities, the failure to provide protective zoning, and the disproportionate siting of LULUs, are limited. Several courts have barred post-acquisition habitability claims in ways that can limit legal theories that involve neighborhood conditions.[415] The roadblocks that these cases have presented drive at the heart of the challenge with expanding the application of the FHA that the language of the statute itself presents. The Fifth Circuit's 2005 decision in *Cox v. City of Dallas*[416] provides an excellent example of the consequences of the FHA's limited reach in tackling the legacies of racial zoning in both the lack of protective zoning and disproportionate siting of LULUs.

2. Post-Acquisition Habitability Claims

Cox involved an illegal dump site in the predominantly black neighborhood of Deepwood in Dallas, Texas.[417] The City of Dallas annexed Deepwood in 1956, when it was a predominantly white neighborhood, and

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[413] *See* Troutt, *supra* note 233, at 41; Thompson v. HUD, 348 F. Supp. 2d 398, 426 (D. Md. 2005) (finding that proof of a past FHA violation "would be admissible to establish the fact of the past violation as an element of a 'dissipation of vestiges' claim.").

[414] Troutt, *supra* note 233, at 36 (citing United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985)).

[415] *See, e.g.*, Cox v. City of Dallas, 430 F.3d 734, 746 (5th Cir. 2005) (post-acquisition habitability not cognizable under § 3604(b)); Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 330 (7th Cir. 2004). *But see* Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713-15 (9th Cir. 2009) (concerning sewer services).

[416] 430 F.3d 734 (5th Cir. 2005).

[417] *Id.* at 736.

zoned it residential.[418] The City's lack of commitment to backing up the protection that a residential zoning designation should offer became clear in 1963, when the City authorized operation of a gravel pit at an eighty-five-acre site in the neighborhood.[419] After that point, the neighborhood changed to predominantly black during the 1970s.[420]

During this period of transition, the owner of the gravel pit replaced the gravel pit's contents with solid waste.[421] For over twenty-five years, illegal dumping occurred.[422] The individuals engaged in the dumping loaded the pit with uncovered solid waste, "including household waste, tires, demolition debris, insulation, asphalt shingles, abandoned automobiles, jugs and bottles labeled 'sulfuric acid' and 'nitric acid,' 55-gallon drums, and syringes."[423] In 1998, Deepwood residents who had purchased their homes between 1970 and 1978 filed two lawsuits against the City in federal court alleging civil rights and environmental law violations.[424] The civil rights claim included allegations of race discrimination and referred to "two sites located in . . . white neighborhoods where the City did remedy illegal dumping and/or illegal mining"[425] despite the city's failure to remedy the illegal dumping in Deepwood, which the court characterized as "inconsistent, inadequate, and largely ineffective,"[426] "erratic," and "ineffectual."[427] The plaintiffs claimed that this discrimination violated sections 3604(a)[428] and 3604(b)[429] of the FHA and

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[418] *Id.*

[419] *Id.*

[420] *Id.*

[421] *Id.*

[422] Cox v. City of Dallas, 256 F.3d 281, 284-85 (5th Cir. 2001).

[423] *Id.* at 285.

[424] Cox v. City of Dallas, No. Civ.A. 398CV1763BH, 2004 WL 370242, at *4 (N.D. Tex. Feb. 24, 2004), *aff'd sub nom.* Cox v. City of Dallas, 430 F.3d 734 (5th Cir. 2005) (describing procedural history of both suits). The court consolidated and later bifurcated the two sets of claims.

[425] *Cox*, 2004 WL 370242, at *4.

[426] Cox v. City of Dallas, No. Civ.A.3:98-CV-1763BH, 2004 WL 2108253, at *11 (N.D. Tex. Sept. 22, 2004), *aff'd sub nom.* Cox v. City of Dallas, 430 F.3d 734 (5th Cir. 2005).

[427] *Cox*, 430 F.3d at 737.

[428] Fair Housing Act § 804(a), 42 U.S.C. § 3604(a) (2000). This section of the FHA makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." *Id.*

[429] Fair Housing Act § 804(b), 42 U.S.C. § 3604(b) (2000). This section of the FHA makes it unlawful to "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

certain HUD regulations implementing the Act which prohibits "otherwise mak[ing] [housing] unavailable"[430] and "[r]efusing to provide municipal services."[431]

The district court granted summary judgment on the FHA claims.[432] It rejected the plaintiffs' section 3604(a) claim on the ground that this provision's ban of discriminatory practices that "make unavailable or deny" housing does not cover homeowners who seek to "protect intangible interests in already-owned property, such as habitability or value."[433] The section 3604(b) claim failed because the district court interpreted this provision to apply "only to discrimination in the provision of services that precludes the sale or rental of housing," and "[p]laintiffs have not alleged discrimination related to the acquisition of their homes."[434] Finally, the district court rejected the plaintiffs' claims based on HUD's regulations under Section 1983 for the same reasons.[435]

The Fifth Circuit agreed with this reasoning, but its opinion provides even greater insight regarding the court's response to the plaintiffs' ostensible ask for them to recognize a more robust understanding of the impact of the landfill on their housing rights in the neighborhood. The appeals court rejected the "make unavailable or deny" claim under section 3604(a), concluding that: "The failure of the City to police the Deepwood landfill may have harmed the housing market, decreased home values, or adversely impacted homeowners' 'intangible interests,' but such results do not make dwellings 'unavailable' within the meaning of the Act."[436] It also

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connection therewith, because of race, color, religion, sex, familial status, or national origin." *Id.*

[430] This provision of HUD regulations states: "It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to engage in any conduct relating to the provision of housing or of services and facilities in connection therewith that otherwise makes unavailable or denies dwellings to persons." 24 C.F.R. § 100.70(b).

[431] The regulation prohibits "[r]efusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.70(d)(4). The plaintiffs also brought claims for violations of the 1866 Civil Rights Act (specifically 42 U.S.C. § 1981), and the Equal Protection Clause of the Fourteenth Amendment (seeking relief under 42 U.S.C. § 1983). *Cox*, 430 F.3d at 736.

[432] *Cox*, 2004 WL 370242, at *14.

[433] *Id.* at *6 (citing *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984)).

[434] *Cox*, 2004 WL 370242, at *8.

[435] *Id.* at *9. The court also noted that there was no private right of action to enforce the regulations: "When regulations authoritatively construe a statute, it is 'meaningless to talk about a separate cause of action to enforce the regulations apart from the statute.'" *Id.* (quoting Alexander v. Sandoval, 532 U.S. 275, 284 (2001)).

[436] *Cox*, 430 F.3d at 740.

concluded that "the simple language of § 3604(a) does not apply to current homeowners whose complaint is that the value or 'habitability' of their houses has decreased because such a complaint is not about 'availability.'"[437] Judge Patrick Higginbotham, writing for the majority, recognized a potential claim for "constructive eviction" under section 3604(a) depending on the devastating effect the defendant's discrimination had on the homeowner.[438] The current owners in *Cox*, however, had no claim under section 3604(a) that "the value or 'habitability' of their property had decreased due to discrimination in the delivery of protective city services."[439]

The court also rejected the plaintiffs' section 3604(b) claim related to the refusal of municipal services.[440] The court doubted that the City's action constituted a "service" under the Act and held that § 3604(b) was inapplicable "because the service was not 'connected' to the sale or rental of a dwelling as the statute requires."[441] The court feared that accepting the plaintiffs' argument that section 3604(b) of the Act did not require "services" to be connected with the sale or rental of a housing unit would render the FHA a "general anti-discrimination [statute], creating rights for any discriminatory act which impacts property values—say, for generally inadequate police protection in a certain area."[442] Judge Higginbotham described the court as confining itself to the statute's terms.[443] He wrote that the FHA must "remain[] a housing statute . . . . That the corrosive bite of racial discrimination may soak into all facets of black lives cannot be gainsaid, but this statute targets only housing."[444] Thus, while section 3604(b) may be available to homeowners whose complaints deal with discrimination in the initial purchase of their homes or their actual or constructive eviction from their homes, section 3604(b) "does not aid plaintiffs, whose complaint is that the value or 'habitability' of their houses has decreased."[445]

To be sure, the dumping site in *Cox* involved the regulation of an illegal dumping site, and this Article focuses on discriminatory government action, like the siting of a legal dumping site in a black community. The Fifth Circuit's response to the theories presented, however, raise troubling questions about the reasoning that the courts may apply to legal theories

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[437] *Id.* at 741.
[438] *Id.* at 746.
[439] *Id.* at 742-43.
[440] *Id.* at 745.
[441] *Id.*
[442] *Id.* at 746.
[443] *Id.*
[444] *Id.*
[445] *Id.*

challenging the same types of governmental decisions because of the courts' understanding of the FHA's reach.

Cox involved the hallmarks associated with the legacy of racial zoning. It also arises out of a troubling, unbroken line between Dallas's racist land use policies, past and present. Dallas passed a racial zoning ordinance in 1916.[446] While its racial zoning was invalidated in 1927,[447] it remained on the books even after the decision. The case includes a neighborhood that was zoned residential, but the City still approved an industrial land use for a site in the area.[448] The plaintiffs also alleged that the LULU was allowed to persist in a residential area as it became increasingly African American, and that the City failed to remedy the illegal dumping as it had done in two white communities which faced the same problem.[449] Thus, the case presents a lack of both protective zoning and maintenance of a LULU in a majority-black community. Yet the theory that the plaintiffs tried to directly challenge the City's regulation of the site under the FHA failed.[450]

Fair housing litigation expert Robert Schwemm has argued that "a claim based on a municipality's provision of inferior services to homeowners in a minority neighborhood would presumably be more appropriate under § 3604(b), with a § 3604(a) claim arising in this situation only if the discrimination became so egregious that the plaintiffs' homes were made 'unavailable.'"[451] Courts have generally decided against plaintiff homeowners in cases involving the provision of municipal services under section 3604(a).[452] Section 3604(a) also may not reach local

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[446] *See* ROTHSTEIN, *supra* note 31, at 45; TAYLOR, *supra* note 333, at 169-70.

[447] *See* Dallas v. Liberty Annex Corp., 19 S.W.2d 845 (Tex. Civ. App. 1929), *writ dismissed w.o.j.* (Nov. 20, 1929) (holding that the city's segregation ordinance violated the "due process of law" provisions in the state and federal constitutions and was unenforceable).

[448] While Deepwood began as predominantly white when the City annexed it, it is not unlikely that the City made zoning decisions based on the fact that the neighborhood's demographics were slowly changed. Richard Rothstein describes how a St. Louis, Missouri, planning commission would sometimes "change an area's zoning from residential to industrial if African American families had begun to move into it." ROTHSTEIN, *supra* note 31, at 50. Other cities, like Kansas City, Missouri, and Norfolk, Virginia, designated African American areas in official planning documents and used this information to make spot zoning decisions until at least 1987. *See id.* at 48. A spot zoning decision would explain how the gravel pit made it into Deepwood in the first place.

[449] *Cox*, 430 F.3d at 736-37.

[450] *Id.* at 749-50.

[451] Schwemm, *supra* note 379, at 750 (analyzing 24 C.F.R. § 100.70(d)(4)).

[452] *See id.* at 751, 751 n.231 (collecting cases). Some notable cases that implicate the failure to provide protective zoning or the disproportionate siting of undesirable land uses include: Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 192-93 (4th Cir. 1999) (dismissing, based on *Southend* and other cases, black homeowners' §

government acts that make the experience of living in a neighborhood more difficult but that do not make housing "unavailable."[453] Likewise, section 3604(a) does not reach the issue of habitability *per se*.[454]

3. Discriminatory Municipal Services

Several claims under section 3604(b) have produced favorable results for plaintiffs challenging discrimination in municipal services.[455] While these cases suggest that discriminatory provision of municipal services generally falls under the FHA, the issue is about the kind and character of the services that the courts have found the FHA protects. For purposes of understanding the legacy of racial zoning, cases involving siting decisions for land uses that detrimentally affect the residential character of a neighborhood have often failed. For example, in *Jersey Heights Neighborhood Association v. Glendening*, the Fourth Circuit rejected a challenge brought by several black homeowners in a Maryland community to the siting of a new highway near their neighborhood.[456] The court refused to find that the highway was a "service" related to housing under the Act,

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3604(a) claim challenging the siting of a new highway near their neighborhood because the decision did not result in evictions or the denial of housing, and therefore did not make housing unavailable under § 3604(a)); Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2004 WL 2026804, at *2-3 (N.D. Tex. Sept. 9, 2004) (dismissing, based on *Southend*, black homeowners' § 3604(a) claim of discrimination in various municipal services); SCCIA III, 254 F. Supp. 2d 486, 500-02 (D.N.J. 2003) (dismissing, based on *Southend* and other cases, § 3604(a) claim by residents of minority neighborhood against governmental agency whose permitting of a nearby cement plant had only an indirect effect on availability of housing in plaintiffs' neighborhood); Miller v. City of Dallas, No. Civ.A. 3898-CV-2955-D, 2002 WL 230834, at *12-13 (N.D. Tex. Feb. 14, 2002) (rejecting, based on *Southend*, black homeowners' § 3604(a) claim alleging discrimination in various municipal services).

[453] *See, e.g.*, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 157 n.13 (3d Cir. 2002) (rejecting § 3604(a) claim by residents that the city's decision to remove Jewish religious symbols from its utility poles where the court reasoned that the conduct did not make housing "unavailable" to the plaintiffs and that section 3604(a) could not be stretched "to encompass actions that both (1) do not actually make it more difficult (as opposed to less desirable) to obtain housing and (2) do not directly regulate or zone housing or activities within the home" even if it may have made "their living in the Borough less desirable").

[454] *See* Clifton Terrace Assocs., Ltd. v. United Techs. Corp., 929 F.2d 714, 719-20 (D.C. Cir. 1991). The court in *Clifton Terrace* did, however, note that section 3604(a) may extend to sewer hook-ups and certain other "essential services relating to a dwelling . . . [that] might result in the denial of housing," but it cannot reach beyond issues of housing availability to those of habitability). *Id.*

[455] *See* Schwemm, *supra* note 379, at 753, 753 n.234 (collecting cases).

[456] 174 F.3d 180 (4th Cir. 1999).

describing the argument as a "strained interpretation of the word."[457] The court then cabined in the meaning of the term: "The Fair Housing Act's services provision simply requires that 'such things as garbage collection and other services of the kind usually provided by municipalities' not be denied on a discriminatory basis. It does not extend to every activity having any conceivable effect on neighborhood residents."[458]

Other courts deciding section 3604(b) claims related to local government functions not directly related to housing followed suit. For example, in 2003, a district court rejected a claim by residents of a black neighborhood against a governmental environmental protection agency that authorized the operation of a cement plant nearby, finding that section 3604(b) did not "extend[] to the decision of every governmental agency that may have an indirect impact on housing."[459] The court further determined, "[a]lthough the [New Jersey Department of Environmental Protection] clearly provides a number of valuable services to the citizens of the State of New Jersey by enacting regulations and overseeing their implementation, it does not follow that it provides specific residential services."[460] Those "specific residential services" would be "door-to-door ministrations such as those provided by police departments, fire departments, or other municipal units."[461] Likewise, a local government may also not be held liable under section 3604(b) based on a selection of a stadium site, despite the negative externalities that they can pose to minority communities.[462]

In short, discriminatory municipal services, particularly a local government's enforcement of its own zoning law, may be actionable as a "service" or "privilege" under section 3604(b) if the service was directed at the plaintiff's actual home.[463] For the sake of the lack of protective zoning and the disproportionate siting of LULUs, a potential plaintiff in a town caught in the legacy of racial zoning would be unlikely to succeed under section 3604(b) because she would be complaining about "defendants' enforcement actions directed at *other properties*."[464]

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[457] *Id.* at 193 (quoting Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 424 (4th Cir. 1984)).

[458] *Id.*

[459] SCCIA III, 254 F. Supp. 2d 486, 503 (D.N.J. 2003) (quoting *Jersey Heights*, 174 F.3d at 193)).

[460] *SCCIA III*, 254 F. Supp. 2d at 503.

[461] *Id.*

[462] *See* Laramore v. Illinois Sports Facilities Auth., 722 F. Supp. 443, 452 (N.D. Ill. 1989)

[463] *See* Schwemm, *supra* note 379, at 788, 788 n.402 (collecting cases alleging discriminatory enforcement of land use restrictions, building codes, and other municipal laws against Latino residents).

[464] *See* Schwemm, *supra* note 379, at 789 (emphasis added).

David Troutt has proposed theories that rely on "constructive denials of opportunity" under section 804(a) and discrimination in "the terms, conditions, or *privileges* of sale or rental of a dwelling, or in the *provision of services or facilities in connection* therewith" under section 804(b).[465] This approach, however, requires a court to follow a more expansive version of equity, which remains an uphill battle.

4. The Power of Fair Housing Policy

While systemic fair housing litigation can lead to victories against a specific policy or practice with segregative effects, the power of the accumulated public and private policies that shaped racial segregation in housing through U.S. society requires an affirmative obligation to promote integration as a matter of public policy and private practice.[466] Thus far, the best hope for implementing this effort is HUD's Affirmatively Furthering Fair Housing (AFFH) Rule.[467] HUD's regulation implementing the obligation to "affirmatively further" fair housing in the federal FHA provides a structure within which city leaders and stakeholders can specifically consider the aspects of the legacy of racial zoning outlined above and develop goals and strategies that specifically respond to them.

The AFFH provision has remained dormant for much of its history. After the federal government proved ineffective or ambivalent at enforcing AFFH,[468] only a handful of fair housing groups took advantage of the provision to challenge historic governmental decisions that promoted and reinforced racial segregation. The cases held that the federal government must take affirmative steps to remedy past discrimination.[469]

In 2015, HUD promulgated a rule designed to implement the "affirmatively further" provisions of the FHA, generally referred to as

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[465] *See* Troutt, *supra* note 233, at 96 (emphasis in original); *see also* Daniel Judt, *Stadiums Ruin Neighborhoods*, THE NATION (Sept. 3, 2015), https://www.thenation.com/article/archive/stadiums-ruin-neighborhoods/.

[466] *See* Troutt, *supra* note 233, at 45.

[467] *See* 42 U.S.C. § 3608 (2012); *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

[468] *See* CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS 102-06 (2006).

[469] *See* Florence W. Roisman, *Affirmatively Furthering Fair Housing In Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 364-65 (2007); Gautreaux v. Chicago Hous. Auth., 503 F. 2d 930, 931, 938-39 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976) (ordering HUD to issue a metropolitan-wide remedy for segregation).

"AFFH."[470] The adoption of the AFFH Rule is part of a "mild renaissance" of the anti-segregation objectives of fair housing law.[471] Prior to the promulgation of the AFFH Rule in 2015, HUD only tentatively enforced the AFFH obligation, if at all.[472] HUD has stated that the purpose of the Rule is to "provide access to effective planning approach to aid those program participants that wish to avail themselves of it in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination."[473] The Rule offers HUD's definition of what it means to affirmatively furthering fair housing:

> [A]ffirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.[474]

The Rule "requires recipients of HUD funds to engage in and document a data-driven, participatory, race-conscious planning process to promote residential integration, reduce housing disparities, and increase access to opportunity in racially or ethnically concentrated areas of

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[470] 42 U.S.C. § 3608 (2012); *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

[471] *See* Troutt, *supra* note 233, at 8.

[472] *See* Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163, 171-72 (2017). It should be noted that, in the early years after the passage of the FHA, HUD had a vigorous commitment to enforcing the AFFH mandate. *See* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 113 (2019). George Romney, who served as Secretary of HUD during the Nixon Administration, developed Open Communities, an effort designed to provide opportunities for low-income individuals to move to the suburbs. *See id.* HUD officials saw the program as "rooted in the new legal terrain established by the Fair Housing Act, which included the responsibility to administer programs in such a way as to pursue residential integration." *Id.* at 113-14. Nixon, however, faced intense opposition from white suburban voters who were part of the Republican Party's burgeoning political base, and he resisted Romney's efforts. *See id.* at 120-21. As a result, Romney resigned. *Id.* at 212. After that backlash, HUD apparently tolerated the political limits to enforcing the mandate. *See id.*

[473] 24 C.F.R. § 5.150 (2016).

[474] 24 C.F.R. § 5.151 (2016).

poverty."[475] The process requires HUD grantees, including municipalities and states, to conduct and submit to HUD an "Assessment of Fair Housing" (AFH).[476] The AFH uses data provided by HUD and local knowledge to identify fair housing issues, including patterns of segregation, racially or ethnically concentrated areas of poverty (R/ECAPs), and disproportionate housing needs.[477] The Rule also requires that "meaning community participation" must inform the AFH and that cities must identify "contributing factors" that cause the issues uncovered in the data and public deliberation.[478] Finally, HUD grantees must "[s]et goals for overcoming the effects of contributing factors . . . ."[479] Although the Rule focuses on fair housing planning, it provides HUD with the authority to use administrative enforcement mechanisms if grantees fail to comply, including cutting off funding under Title VI of the Civil Rights Act of 1964.[480]

The AFFH Rule is potentially a step in the right direction for rethinking the meaning of fair housing more broadly.[481] Indeed, it has "become central to reviving the anti-segregation interest in fair housing."[482] The AFFH mandate in the FHA grows out of the revolution of the Civil Rights Movement and the wave of laws that "prescrib[e] principles of 'antisubordination' or 'anti-humiliation,' which targets not only a *de jure* racial caste system, but also the broader set of social institutions, practices, and meanings that perpetuate material inequality between racial groups."[483] The AFFH Rule thus potentially serves as an underutilized policy tool for challenging the legacy of racist policies that followed from racial zoning ordinances and the logic that created these ordinances. Antidiscrimination

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[475] Emerson, *supra* note 472, at 164; *see also Restoring Affirmatively Furthering Fair Housing Definitions and Certifications*, 86 Fed. Reg. 30779 (June 10, 2021).

[476] 24 C.F.R. § 5.154 (2016).

[477] 24 C.F.R. § 5.154(d)(2) (2016).

[478] *See* 24 C.F.R. §§ 5.154(d)(3), 5.158 (2016).

[479] 24 C.F.R. §§ 5.154(d)(4)(iii).

[480] 42 U.S.C. § 2000d-1 (2012); *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,313 (July 16, 2015) (to be codified at 24 C.F.R. 5, 91, 92).

[481] *See* Emerson, *supra* note 472, at 167.

[482] Troutt, *supra* note 233, at 26; *see also* Johnson, *supra* note 380, at 1193-94 (suggesting that the AFFH mandate functions as "an additional mechanism for promoting fair housing" that "give[s] power to federal agencies to promote antidiscrimination *and* integration requirements") (emphasis added).

[483] Emerson, *supra* note 472, at 198 (quoting Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003); BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 150 (2014)); *see also* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation and Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 327 (1987).

law should accommodate claims arising from efforts to maintain white spatial exclusivity.[484] "Racial territoriality"—the idea that race is spatial and that physical space can have a racial identity[485]—may encompass the racial identification of white space as well as black space. While it is clear that federal civil rights laws should be used to block institutions that seek to reinscribe and protect the privileged nature of white space, the corollary for racialized black space is true. When expulsive zoning and the lack of protective zoning conspire to reinforce the historically denigrated nature of black space, either the Constitution's Equal Protection Clause or federal civil rights laws should provide causes of action for advocates of these communities to remove these inscribing features of racial denigration directed toward majority-black communities.

The architecture of the Rule embeds an increased emphasis on equity across various aspects of social and political life in ways that can target land use and planning policies that inscribe black spaces disproportionately with negative features like LULUs and little to no protection for their residential character. Intractable inequality, which has proven difficult to unravel even with systemic FHA cases, has led to the rise of regional or "metropolitan equity" as a framework from which advocates for greater opportunity can develop remedies.[486] According to David Troutt, "[m]etropolitan equity is the idea that all parts of a region are relevant to the distribution of opportunity in any part, and that remedies for expanding mobility can and should be assessed on an equitable basis."[487]

The AFH's requirement that jurisdictions analyze HUD-provided data to understand local fair housing issues is "a quintessential metropolitan equity inquiry" that functions as an "open-ended investigation" for HUD grantees.[488] "Fair housing and metropolitan equity share much in common, but they are not the same thing. They rest on different premises—the one on the presence of discrimination, the other with at least its legacy effects."[489] Metropolitan equity, however, is a "descriptive and remedial framework," but not necessarily a legal one.[490] The AFFH Rule, however, appears to embrace this multidisciplinary approach in ways that connect fair housing law to access to opportunity.

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[484] Boddie, *supra* note 12, at 403, 450, 462-63.
[485] *Id.* at 406.
[486] *See* Troutt, *supra* note 233, at 10-11.
[487] *Id.* at 11.
[488] *Id.* at 46-47.
[489] *Id.* at 11.
[490] *See id.* at 11, 13.

5. AFFH Rule—Broadening the Meaning of Fair Housing

As David Troutt has observed, "[u]nder the Assessment Tool . . . very little about community and regional planning is *not* also fair housing."[491] Under the Rule, a HUD grantee may use focus on a broad variety of strategies that go beyond just housing. For example, the Rule challenges jurisdictions to focus on "strategically enhancing access to opportunity, including through[] [t]argeted investment in neighborhood revitalization or stabilization" and "improving community assets such as quality schools, employment, and transportation" in addition to promoting greater housing choice and facilitating access to quality affordable housing.[492] Both the AFH and the *Guidebook* also speak to equitable development strategies across neighborhoods.[493]

This pivot toward metropolitan equity in fair housing law that the AFFH Rule reflects may lead to a road that directly confronts the limits of the current conception of the FHA's proper scope in ways that tackle the kinds of inequity that come from the way in which the legacies of racial zoning deprive people of opportunity in ways that extend beyond access to housing. "[T]he comprehensive goals of the AFFH process (racially balanced communities of opportunity) and expanded scope (a wide variety of institutions important to opportunity production) indicate a modernized view of inequality that is structural and complex."[494] Where the traditional focus areas of fair housing litigation end, this conception of the FHA's AFFH mandate may pick up to fulfill the statute's full potential, especially in hard to reach contexts.

The goals and recommendations in HUD's *Guidebook* focus on creating housing opportunities that will have a generally positive impact on people of color, given their demographic characteristics outside of race, and the creation and maintenance of affordable housing and related public services.[495] These aspects of the implementation of the mandate have

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[491] *Id.* at 46 (emphasis in original).

[492] *See* 24 C.F.R. § 5.150 (2016).

[493] *See Affirmatively Furthering Fair Housing Rule Guidebook*, HUD, at 12 (Dec. 31, 2015), https://www.hud.gov/sites/dfiles/FHEO/documents/AFFH-Rule-Guidebook.pdf [hereinafter "*Guidebook*"] (supporting "place-based and mobility strategies" including "[m]aking investments in segregated, high poverty neighborhoods that improve conditions and eliminate disparities in access to opportunity between residents of those neighborhoods and the rest of the jurisdiction and region").

[494] Troutt, *supra* note 233, at 47.

[495] For instance, the *Guidebook* offers examples that include a goal which provides:

> [T]o increase integration and overcome the disproportionate housing needs of a specified protected class, at least 10 percent of newly

received much attention.[496] While the availability of housing is crucial, the AFFH Rule and HUD's conception of the Rule's implementation in the *Guidebook* is notably even more expansive. The Rule defines fair housing issues to include matters that extend beyond providing housing itself. The Rule defines a "fair housing issue" broadly as "a condition in a program participant's geographic area of analysis that restricts fair housing choice or access to opportunity."[497] The Rule provides several examples of these "conditions," and only one example directly implicates the availability of housing: "disproportionate housing needs."[498] The other examples address issues of equity between communities, namely "ongoing local or regional segregation or lack of integration, racially or ethnically concentrated areas of poverty, [and] significant disparities in access to opportunity . . . ."[499] The examples also include "evidence of discrimination or violations of civil rights law or regulations related to housing."[500] It does not limit the laws at issue to the FHA; Congress has embedded the AFFH requirement in at least three other federal statutes.[501] These statutes include the Housing and Community Development Act, which provides funding for community development activities beyond the construction and maintenance of housing.[502]

Fair housing rights must include attention to the distribution of public resources to residential areas, including parks, libraries, or

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> developed housing units in the Pacific and Huron neighborhoods will be affordable to families with incomes at or below 50 percent of [Area Median Income], and at least another 10 percent of newly developed housing units in these neighborhoods will be affordable to families with incomes between 50 and 80 percent of AMI.

Guidebook, *supra* note 493, at 115-16. Another goal is to "preserve 100 units of current assisted housing . . . while investing in neighborhood schools to improve quality" in order to address disproportionate housing needs and promote access to opportunity for members of protected classes in gentrifying neighborhoods. *Id*. at 178.

[496] *See, e.g.*, Emerson, *supra* note 472, at 193-95.

[497] 24 C.F.R. § 5.152.

[498] *Id.*

[499] *Id.*

[500] *Id.*

[501] *See Restoring Affirmatively Furthering Fair Housing Definitions and Certifications*, 80 Fed. Reg. 30779, 30780 (June 10, 2021) ("Congress has repeatedly reinforced the AFFH mandate for funding recipients, embedding within the Housing and Community Development Act of 1974, the Cranston-Gonzalez National Affordable Housing Act of 1990, and the Quality Housing and Work Responsibility Act of 1998, the obligation that certain HUD program participants certify, as a condition of receiving Federal funds, that they will AFFH.") (citing 42 U.S.C. §§ 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16)).

[502] 42 U.S.C. § 5302.

educational facilities. It should certainly include attention to the tax incentives that government provides to attract retail to these communities as well. Public actors have the ability to shift the allocation of public resources and influence market priorities through several mechanisms. For example, public authorities can track levels of segregation and racial disparities in access to resources, including employment and transportation.[503]

6. Taking A Proactive Approach

Public actors also have a role to play in using their power to advance social justice. Just as zoning law set the framework for the degradation of black residential communities, zoning law plays a critical role in reversing the effects of past discrimination. Throughout American history, however, urban planners and local government officials have shown little interest in integrating a focus on racial justice or equality into their decisions about the development of the towns and cities they lead.[504] City planners and elected officials went out of their way to justify racial zoning ordinances and policy decisions that developed from relying on the boundaries that racial zoning ordinances had established.[505] These actors, however, have an inordinate amount of power to develop planning-based remedies that address the wrongs that previous planning decisions authorized or encouraged. "Few White planners have shown an immediate interest in improving the quality of life for Blacks through environmental policy initiatives."[506] Improving the spatial outcomes in historically black and hyper-racially segregated communities requires urban planners in particular to change their orientation and view of what it means to serve in this role. Scholars have agreed that "[t]he act of public works planning is an 'exercise of social, economic, and political power.'"[507] "[T]he role of the planner is that of social change agent. The social change agent is an advocate for a group that will benefit from the agent's involvement."[508]

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[503] Johnson, *supra* note 380, at 1230.

[504] *See* Archer, *supra* note 14, at 1300–01 (detailing contexts in which the salience of racism still shapes outcomes for people of color, including in housing, transportation policy, school discipline policies, and the criminal justice system).

[505] *See* Robert W. Collin, Timothy Beatley & William Harris, *Environmental Racism: A Challenge to Community Development*, 25 J. BLACK STUD. 354, 356 (1995).

[506] *Id.* at 359.

[507] Archer, *supra* note 14, at 1301 (quoting *id.* at 356) (internal alterations omitted).

[508] Collin, *supra* note 505, at 359; *see also* Rober Mier, *Some Observations on Race in Planning*, 60 J. AM. PLAN'G ASS'N 235, 236, 239 (1994) (emphasis omitted)

HUD's AFH can provide public actors and community advocates with the necessary data to make decisions that help to remediate the effects of the legacy of racialized zoning practices. The AFH process runs like a guided problem-solving exercise in which communities both identify their own specific challenges and develop their own tailored solutions. HUD has promulgated a *Guidebook* to help grantees develop their Assessments of Fair Housing.[509] The *Guidebook* includes descriptions of "fair housing issues" such as segregation, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, disparate housing needs, and enforcement capacity as well as descriptions of potential "contributing factors" related to these issues.[510] The contributing factors include environmental health hazards, inadequate public transit, zoning restrictions, and a lack of private investment.[511]

This open-ended approach makes space for the premise that jurisdictions and regions in the United States historically used different tools to entrench racial segregation and disadvantage. One set of solutions will not respond to the challenge facing every jurisdiction. This process presents an opportunity for cities in the South to examine their communities with a particular historical backdrop in mind that can inform more tailored solutions. As Blake Emerson has pointed out, "[t]he Rule goes to show that there is a wide variety of racially progressive policy that the federal government and state and local policymakers can conduct while remaining within the strictures of current doctrine."[512]

The analysis required by the AFFH Rule provides a mechanism to require local governments to take a more proactive approach to addressing fair housing and community development issues. With respect to proposed action that a government actor may take, some scholars have proposed requiring jurisdictions to prepare "racial equity impact studies" or complete similar audits to "unearth racial inequities before harm is inflicted on communities of color."[513] Racial equity impact studies/statements focus on

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("Race is a ubiquitous reality that must be acknowledged . . . if [planners] do not want simply to be the facilitators of social exclusion and economic isolation.").

[509] *Guidebook*, *supra* note 493.

[510] *Id.* at 56-106.

[511] *Id.* at 107-10, 157.

[512] Emerson, *supra* note 472, at 195.

[513] Archer, *supra* note 14, at 1321; *see also* William Kennedy, Gillian Sonnad & Sharon Hing, *Putting Race Back on the Table: Racial Impact Statements*, 47 CLEARINGHOUSE REV. 154 (2013); R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1527 (2011) (introducing race audits as a tool that "eschews a singular focus on intentional discrimination" and instead "seeks to uncover the specific structural mechanisms that create cumulative racial disadvantage across domains, time, and generations").

understanding the harm of a proposed project.[514] The AFFH provision, however, provides a future focus. The fact-finding process of the AFH can function as an audit of the current state of fair housing and development issues in a community. Jurisdictions must take steps to promote fair housing choice and residential integration, not just consider whether their proposed actions will impede these priorities. Thus, AFFH serves to inform public policy rather than purely create a protective mechanism. Nonetheless, jurisdictions and advocates should use racial impact studies/statements because they can support policy development, implementation, and decision-making as well as combat racial discrimination.[515] Local governments have also adopted ordinances requiring policymakers to assess the impact of a governmental decision on racial and ethnic groups. For example, in 1989, New York City modified its charter and adopted a requirement that assessed race to ensure that "undesirable facilities" did not overburden certain neighborhoods.[516] These statements, however, do not necessarily come with a mandate—namely, that policymakers must take or refrain from pursuing a proposal to the extent it would have a disproportionately negative impact on a racial or ethnic group.[517] Consequently, their impact in shaping government action or driving policy forward is limited.

7. Fair Housing Policy's Limits

Despite the virtues of the AFFH Rule, it has several structural limitations that could seriously impair its effectiveness in addressing the legacies of racial zoning in the South. As an initial matter, the scope of

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[514] *See* Archer, *supra* note 14, at 1321.

[515] *Id.* at 1322 ("Racial impact studies are intended to support the development of fair and equitable governmental action by analyzing how racial and ethnic groups will be differentially impacted by proposed governmental actions, policies, or practices."); Kennedy, et al., *supra* note 513, at 156 ("A racial impact statement can help reveal the situatedness of different communities and help in identifying targeted strategies which could be used to alleviate the disparities."); Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 16, 17, 20 (2009) (arguing that racial impact statements "offer one means by which policy makers can begin to engage in a proactive assessment of how to address" racial and ethnic disparities that result due to a complex combination of factors).

[516] *See* Lenhardt, *supra* note 513, at 1553.

[517] Archer, *supra* note 14, at 1329–30 (suggesting that racial equity impact study requirements *should* "require relevant agencies to take concrete steps to mitigate the negative impacts on marginalized communities of color identified through the study process, pursue structural changes and remedial actions necessary to advance systemic racial equality, and make reparations for decades of past harm . . . to *minimize* or avoid the enforceability problems of NEPA") (emphasis added).

HUD's *Guidebook* in its connection of fair housing to access to public services extends beyond the boundaries of the current case law applying the Act to mandate equitable provision of municipal services and amenities. Thus, it encourages jurisdictions to do what a plaintiff may not be able to compel them to do in litigation purely relying on the core requirements under the Act at Section 3604, as discussed above. Even as the AFFH Rule envisions increased reach for the FHA, the Rule lacks the kind of strong enforcement authority necessary to compel the redistribution of burdens in land use policy—a process that is critical to reframing black space, moving it from denigration to revitalization. From a policy standpoint, the structure for allocating funding under the CDBG program—the largest HUD program under which jurisdictions are required to comply with the AFFH mandate—does not capture the kind of racist land use policies in rural and small town communities, like many of those where de facto segregation and disadvantage remains most entrenched in the South.

8. Weak Enforcement Mechanisms

Despite its aspirational framework, the AFFH Rule remains limited in the way of traditional enforcement power.[518] It appears that "the AFFH rule contains everything necessary to a housing-based idea of equal access to opportunity except a reliable enforcement mechanism."[519] A more rigorous administrative enforcement regime led by HUD and an amendment to Section 3608 that included a private right of action to sue for a violation of the AFFH mandate would be the easiest route to more regional equity and inclusion.[520]

Nonetheless, the AFFH Rule also challenges advocates to think differently about the meaning of enforcement authority and consider non-traditional mechanisms for enforcement. The enforcement of the non-discrimination provisions of the FHA mostly take place through administrative and court litigation. The enforcement of the AFFH obligation largely relies on administrative powers, including stripping a jurisdiction of its funding through Title VI, a separate title in the Civil Rights Act of 1964. Olatunde Johnson has framed this dichotomy as a matter of the division of "private power" and "public power."[521] Johnson suggests that the enforcement of the AFFH mandate can create a systemic

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[518] *See* Troutt, *supra* note 233, at 14 ("Missing so far [from the AFFH rule] is the enforcement authority that would complement its remedial thrust and make it more than aspirational.").

[519] *Id.* at 49.

[520] *See id.* at 92-93.

[521] *See* Johnson, *supra* note 380, at 1224.

shift away from the lackluster record of using individualized antidiscrimination enforcement to achieve integration or remove barriers to housing choice and toward an effort to "harness[] a broad range of federal administrative tools including conditioned spending and formal and informal regulation to engage states and localities to promote fair housing."[522] This reliance on regulatory guidance, conditions on spending, and agency action to achieve compliance with furthering access to equal housing opportunities requires us to examine closely how well these mechanisms actually work on the ground in the places where housing discrimination and land use policies that have a disparate impact on people of color may fly under the radar. These places include much of the South, which has more rural communities than most regions of the United States.[523]

9. The AFFH Rule's Urban Bias

In the context of small towns and rural areas in the Deep South—the context in which the legacy of racial zoning may remain the strongest given the number of jurisdictions that actually enacted racial zoning laws in this region—it has been argued that the AFFH Rule will not reach these areas because HUD operates under an "urban bias" in its efforts to implement fair housing law.[524] University of Mississippi law professor Desiree Hensley argues that the problem starts with HUD's unit of analysis when it comes to the jurisdictions to which it provides funding and which it requires to engage in a fair housing analysis.[525]

According to HUD's interim final AFFH rule, "Congress has repeatedly confirmed its view that the AFFH mandate imposes affirmative obligations on HUD funding recipients[] [i]n three separate statutes post-dating the Fair Housing Act," including the Housing and Community Development Act of 1974 (HCDA).[526] The HCDA requires covered HUD

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[522] *Id.* at 1196.

[523] Only three of the twenty states with the largest urban populations are Southern states (Florida, Texas, and Virginia). *See, e.g*., Nathaniel Rakich, *How Urban Or Rural Is Your State? And What Does That Mean For The 2020 Election?*, FIVETHIRTYEIGHT (Apr. 14, 2020, 6:00 AM), https://fivethirtyeight.com/features/how-urban-or-rural-is-your-state-and-what-does-that-mean-for-the-2020-election/.

[524] *See, e.g.*, Hensley, *supra* note 17, at 94. Indeed, much of the fair housing literature has an urban bias as it focuses on housing inequality in inner-city and outer-ring urban-suburban divides, a structure that does not necessarily account for rural communities. *See, e.g.*, Troutt, *supra* note 233, at 60; Cashin, *supra* note 306, at 1990; McFarlane, *supra* note 361, at 335.

[525] Hensley, *supra* note 17, at 94-96.

[526] *Restoring Affirmatively Furthering Fair Housing Definitions and Certifications*, 86 Fed. Reg. 30779, 30781 (June 10, 2021).

participants to certify that they will affirmatively further fair housing as a condition for receiving funds.[527] Title I provides for the CDBG.[528]

Congress created the CDBG program in 1974 to provide grants to local jurisdictions to develop "viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income."[529] HUD issues CDBG grants to units of local governments and states (and their consortia); the former are cities in metropolitan areas with populations of over 50,000 and urban counties with more than 200,000 people (known as "entitlement areas"),[530] while smaller "non-entitlement" localities may receive funds indirectly through grants made to their states or as part of a consortium led by an entitlement area.[531] Jurisdictions can use CDBG funds for a broad variety of activities, many of which tie into remediating economically distressed areas of racially and ethnically concentrated areas of poverty.[532] Seventy percent of the funds go to entitlement jurisdictions while thirty percent go to non-entitlement jurisdictions based on an allocation formula.[533] In fiscal year 2021, Congress funded CDBG at $3.45 billion, an increase of $50 million from fiscal year 2020, giving it more grant funding than any other HUD community development program.[534]

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[527] *Id.* (citing 42 U.S.C. 5304(b)(2)).

[528] *See* 42 U.S.C. 5301 et seq.

[529] 42 U.S.C. § 5301(c).

[530] *Community Development Block Grants (CDBG) (Entitlement)*, HUD, https://www.hud.gov/hudprograms/entitlement (last visited May 29, 2022).

[531] *Community Development Block Grants (CDBG) (Non-Entitlement) for States and Small Cities*, HUD, https://www.hud.gov/hudprograms/nonentitlement (last visited May 29, 2022).

[532] The areas include, for example, "the acquisition of real property; rehabilitation of residential and nonresidential properties; provision of public facilities and improvements, such as water and sewer, streets, and neighborhood centers; public services; clearance; homeownership assistance; and assistance to for-profit businesses for economic development activities." *Community Development Block Grants (CDBG) (Entitlement)*, *supra* note 530; *Community Development Block Grants (CDBG) (Non-Entitlement) for States and Small Cities*, *supra* note 531.

[533] *See Community Development Block Grants (CDBG (Entitlement))*, *supra* note 530; *Community Development Block Grants (CDBG) (Non-Entitlement) for States and Small Cities*, *supra* note 531.

[534] Michael Matthews, *Support Local Development and Infrastructure Projects: The Community Development Block Grant (CDBG) Program*, NAT'L ASS'N OF COUNTIES (Jan. 12, 2022), https://www.naco.org/resources/support-local-development-and-infrastructure-projects-community-development-block-grant-1 (urging county government officials to advocate for increasing CDBG allocations); *HUD Announces $10.3 Billion In Grants For Housing and Community Development Activities Across U.S.*, HUD (May 17, 2022), https://www.hud.gov/press/press_releases_media_advisories/hud_no_22_097.

While urban cities (entitlement areas) receive HUD funding directly from their local jurisdiction, rural areas and small towns (non-entitlement areas) receive funds through their state.[535] The entire state is responsible for conducting the analysis rather than the local government that will make decisions about how to use HUD's grants.[536] This process presents both a policy problem and an enforcement problem. From a policy standpoint, these assessments fail to provide "granular enough information to identify where overt discrimination or disparate impact segregation is ongoing in small towns and rural areas."[537] For purposes of litigation, federal regulations require rural areas and small towns to make vague commitments as to the steps they intend to take to comply with the AFFH mandate.[538] As a result, holding them accountable becomes very difficult for several reasons.

First, for the time being, one of the most successful legal theories under which private parties have had a role in enforcing the AFFH mandate has come through the False Claims Act. In *United States ex. rel Anti-Discrimination Center of Metro N.Y., Inc. v. Westchester County*, the plaintiffs alleged that the county had violated the False Claims Act by certifying that it had met its duty to affirmatively further fair housing under the CDBG program when it made no consideration of racial impact in the administration of its federally assisted housing programs.[539] After the district court granted partial summary judgment in favor of the plaintiffs, the parties negotiated a settlement which required Westchester County to create more than $50 million worth of affordable housing in predominantly white areas of the county.[540] The decision was instrumental in giving meaning to the AFFH mandate that covers the administration of housing and urban development programs by federal agencies and their grantees.[541] It is a landmark ruling in the path toward moving beyond piecemeal antidiscirmination litigation.[542] As David Troutt has observed: "At its core, the *Westchester* case may be the closest thing to a private right of action under AFFH without suing HUD."[543]

With respect to non-entitlement areas, these jurisdictions fall under a state plan, which allows them to avoid a targeted analysis of their own communities and thus keep the certifications to generalized statements

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[535] Hensley, *supra* note 17, at 96.
[536] *Id.*
[537] *Id.*
[538] *Id.*
[539] 668 F. Supp. 2d 548 (S.D.N.Y. 2009).
[540] *See* Johnson, *supra* note 380, at 1217-18.
[541] *Id.* at 1215.
[542] *Id.* at 1215.
[543] Troutt, *supra* note 233, at 107 (2017).

which are hard to disprove.[544] Second, the indirect federal oversight also makes it difficult for HUD to capture non-compliance and enforce AFFH obligations directly on the relevant jurisdiction.[545] Finally, the results from an AFH may bolster the evidence available in litigation as courts can use statistical analyses of housing patterns to evaluate whether a jurisdiction has complied with the AFFH mandate.[546] These rural communities in non-entitlement areas do not have to complete their own specific AFH analysis.[547] Instead, the state level grantee completes the analysis, which can result in missing the granular ways in which racial segregation and disparities in housing and access to opportunity continue to run rampant in many smaller towns.[548]

The problem has an extensive effect. In 2016, for example, more than fifty percent of HUD grants were allocated to small towns and rural areas from which HUD does not require direct fair housing assessment or planning.[549] Except Virginia and Maryland, all of these states have census tracts that are disproportionately African American.[550] Using Mississippi as an example, Hensley suggests that under this structure, "HUD financially supports vast swaths of the state that may continue to engage in unassessed and unchecked behaviors and policies that are either intentionally discriminatory or have a discriminatory effect."[551] HUD is also particularly important in Mississippi because Mississippi is the only state in the nation that does not have its own law prohibiting housing discrimination.[552]

10. Mississippi—A Case Study of Rural Communities Falling Through the Cracks

Mississippi presents a variety of common types of non-entitlement jurisdictions in rural areas, all of which the AFFH Rule does not necessarily target because of the way in which HUD regulates compliance under this framework. Batesville is the seat of a county that has African Americans

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[544] Hensley, *supra* note 17, at 99, 121-23.

[545] *Id.*

[546] *See* Austin W. King, Note, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. REV. 2182, 2187 (2013).

[547] Hensley, *supra* note 17, at 99, 121-23.

[548] *Id.*

[549] *Id.* at 99.

[550] *Id.*

[551] *Id.* at 99-100.

[552] *See* Noah M. Kazis, *Fair Housing for A Non-Sexist City*, 134 HARV. L. REV. 1683, 1696 (2021) ("Every state but Mississippi has its own statute prohibiting housing discrimination, as do many local governments.").

and whites living disproportionately in different regions of the county.[553] Indianola is a majority-black town in the Mississippi Delta where whites and blacks live literally separated by railroad tracks.[554] As the white minority population has slowly moved out, black residents have moved across the tracks into formerly white neighborhoods.[555] Yet concentrated poverty on the opposite sides of the tracks still persists.[556] Oxford is a disproportionately white college town in which African Americans have lived in a specific section of town since the end of the Civil War, and there has been little encroachment into the city's white enclaves.[557]

Finally, Mississippi has one entitlement jurisdiction—Jackson, the state capital.[558] Outside of Jackson, however, are a series of towns in the non-entitlement areas. In a state with extremely high poverty rates, Madison, Mississippi, has a three percent poverty rate.[559] It has a homeownership rate of nearly one hundred percent—the only census tracts in the state that fit this description.[560] In a state with the largest percentage of African American residents of any other U.S. state at thirty-eight percent, Madison is about ten percent black and more than eighty-five percent white.[561] Madison has managed to maintain strong disincentives to building multifamily housing with an ordinance that requires landlords to place a $10,000 bond for *every* unit of apartment housing that they lease.[562] This ordinance, however, apparently has gone unchallenged by HUD and does not show up in previous fair housing analyses that Mississippi has submitted to HUD, despite the state's likely awareness of it.[563]

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[553] *See* Hensley, *supra* note 17, at 106-07.

[554] *Id.* at 111-13.

[555] *Id.* at 114.

[556] *Id.* at 115.

[557] *See id.* at 115-19, 119 n.82.

[558] *See id.* at 124.

[559] *Id.* at 127.

[560] *Id.* at 124.

[561] *Id.* at 127.

[562] *See id.* at 127-28 (footnote omitted) (It is common knowledge . . . that the City of Madison achieves these remarkable demographics through a strict ordinance that requires all landlords to post a $10,000 bond for each unit of housing offered for rent.").

[563] *See* Hensley, *supra* note 17, at 128. In 2011, a Madison municipal court convicted landlord Mike Crook of violating the ordinance when he failed to pay the $10,000 bond. Katie Eubanks, *Madison rental ordinance will stay much the same*, CLARION LEDGER (July 3, 2015, 4:36 PM), https://www.clarionledger.com/story/news/local/madison/2015/07/03/ms-supreme-court-says-madison-rental-ordinance-is-flawed/29664467/; *see also Crook v. City of Madison*, 168 So. 3d 930 (Miss. 2015). The Mississippi Supreme Court overturned his conviction based on the ordinance's failure to protect landlords and tenants against unreasonable searches, but the high court left the bond requirement in place, even though Crook argued in his briefs that the ordinance was designed to keep properties from being rented. *See id.*

Each of these towns presents a different way in which spatial segregation plays out in rural or small towns, particularly with the South's large black population and history of racial segregation. The differences in segregation also do not necessarily show up in the analysis of census tracts. Instead, they show up more readily in a microspatial analysis when one views population demographics at the census block level. The relevant HUD data covering these communities must encompass an analysis at this level of detail. Otherwise, policymakers and officials in charge of implementing the AFFH obligation can continue to ignore spatial patterns of segregation or they will remain undetected to those not on the ground.[564]

Jurisdictions must analyze data regarding its zoning decisions, including residential communities adjacent to industrial zones. This review should also include areas that suffer from cumulative zoning which disproportionately can affect minority communities given the lack of protective zoning which they have faced. Data regarding spot zoning and use variances from residential to industrial or commercial can also expose discriminatory patterns. Additionally, jurisdictions can benefit from understanding the location of industrial land uses in that community and observing whether there is a disproportionate overlap with the racial groups in the areas closest to or burdened by these land uses. In short, changing the structure of regulating conditioned spending to focus more on holding non-entitlement communities accountable and incorporating a process of analyzing data related to the legacies of racial zoning are critical to breaking through the intractable problem of racial segregation in the South.

11. AFFH's Reliance on Public Decision-Making

HUD's AFFH Rule has not relied on specific mandatory actions that all jurisdictions or even jurisdictions with certain types of fair housing issues must take. Instead, the AFH at the heart of the Rule is designed to make racial discrimination visible; it is explicitly race-conscious. This effort, however, may place the AFFH Rule at odds with "the emphasis of current equal protection law on making race seem less conspicuous and less visible in public policy."[565] Making racial discrimination visible is critical

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[564] *See* Hensley, *supra* note 17, at 128 ("State jurisdictions should be reporting specific, local impediments to fair housing with a high level of detail or assessing residential racial segregation at a microspatial level that accounts for the day-to-day, *de facto* segregation of small towns in non-entitlement areas.").

[565] Emerson, *supra* note 472, at 196. According to Emerson, the Court's jurisprudence has focused on "avoid[ing] forms of state action that heighten the salience of race in public consciousness. The [AFFH] Rule conflicts with this rationale by requiring an explicit reorientation of local housing policy around questions of the racial opportunity structure." *Id.*

to facilitating the process of turning policymakers' attention to the kinds of interventions that address the legacies of racial zoning and encompass place-based solutions. At the same time, highlighting the salience of race can also result in a power struggle between marginalized groups and communities that refuse to give up their racialized privilege.

The AFH pulls the role of public and private investment, which are a sine qua non of placemaking, out of the shadows where private investment masquerades as a purely market-driven process disconnected from race and public investment is framed as an issue of political will outside of policymakers' control. But the Court's equal protection jurisprudence, which cabins in the reach of the AFFH Rule, "urges that racial inclusion, equality, and diversity should be accomplished through indirect means that will not be appreciated by the affected public," even if it means that local governments must advance equality "'behind the back of consciousness.'"[566]

The drive toward what Blake Emerson has aptly called "the logic of concealment"[567] in equal protection law raises the question of from whom does the Court suggest state actors conceal the use of race as a policy consideration. Critical race theorists have long argued that one can achieve greater insight in understanding the law's impact by taking a view from the bottom.[568] Cheryl Harris argued in her seminal article, *Whiteness As Property*, that "[a]ffirmative action begins the essential work of rethinking rights, power, equality, race, and property from the perspective of those whose access to each of these has been limited by their oppression."[569] The AFFH mandate enshrines the principle of affirmative action front and center in the context of housing policy. The effort at concealing the role of race in formulating policy apparently aims to hide it from people in a position of privilege that supports their ignorance, namely white Americans. Indeed, the role of race in fashioning state policy has long been made very clear to African Americans driven into racially zoned districts in the most undesirable areas and afforded the least amount of protection and investment by their local government to which they paid taxes like every

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[566] *Id.* (quoting G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT 56 (A.V. Miller trans., 1977)).

[567] *See* Emerson, *supra* note 472, at 197.

[568] *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (arguing that "[l]ooking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice"); Harris, *supra* note 133, at 1779 (advocating for "Matsuda's suggestion of 'looking to the bottom' for a more humane and liberating view" of policies like affirmative action) (citing Matsuda).

[569] Harris, *supra* note 133, at 1779.

other resident. While the Court has sought to move the march toward equality to the background, the role of race in public decision-making has never occupied that space to the clear-eyed observer. The AFFH Rule "looks to the bottom" as it seeks to heighten public participation for historically marginalized groups in the urban planning process[570] and "focuses on transparent, inclusive, and evidence-based race-conscious policy."[571]

The AFFH Rule lays out a process in which stakeholders and city leaders can address these factors that reduce the livability of majority-black communities and develop strategies for remedying these barriers as a matter of policy. Blake Emerson has argued that the public participation requirement "does not merely mandate race-conscious policy, but requires a public participation process within the planning procedure that is itself race-conscious."[572] This opportunity is particularly compelling given "the formal requirements of the U.S. Supreme Court's current equal protection jurisprudence, which permits policymakers to consider racial effects in a general way, but disfavors explicit racial classifications."[573] Instead, the Rule's requirement that the jurisdiction reach out to historically excluded groups provides a unique chance for advocates to

> change the political status quo away from the current constellation of interests and power within the relevant jurisdiction. This requirement can serve to 'stack the deck' to the benefit of racial minorities and other groups who would otherwise not have an equal opportunity to influence the decision making process, owing to inequalities of access, resources, or the transaction costs of participation.[574]

This explicit effort to "stack the deck" predictably invites a confrontation from those that want the house of cards to come falling down. As discussed earlier, majority-white communities have benefited from the

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[570] *See* AFFH Fact Sheet: Community Participation and AFFH: Guidance for Consolidated Plan Program Participants, HUD (2015), https://www.hud.gov/sites/dfiles/FHEO/documents/AFFH-Fact-Sheet-Community-Participation-and-AFFH-Guidance-for-Consolidated-Plan-Program-Participants.pdf (requiring grantees to "conduct outreach to those populations who have historically experienced exclusion, including racial and ethnic minorities, limited English proficient (LEP) persons, and persons with disabilities" for active participation in the public decision making process).

[571] Emerson, *supra* note 472, at 210.

[572] *Id.* at 187.

[573] *Id.* at 165.

[574] *Id.* at 188.

lack of protective zoning in majority-black communities and the shifting of undesirable land uses away from their neighborhoods toward communities of color. These assignments have changed from overtly racist distributions of benefits into "patterns of entitlement that have been reestablished on nonracial terms."[575] The frustrating result, however, amounts to what Sheryll Cashin has called "opportunity hoarding" along racial lines—a deeply rooted sense of ownership that resists the framework that undergirds the anti-segregation goals of the FHA: a "reli[ance] upon past constructs of harm and liability to accurately portray and dismantle racially identifiable barriers to opportunity today."[576] A process of taking apart and exposing the original morally unsustainable basis for these privileges can create an urge to resist that blocks progress.

Deborah Archer has suggested that a racial equity impact statement requirement would provide policymakers with "access to the information they need to identify and implement goals and strategies that promote fairness and equity for marginalized communities" and "open up a community-wide conversation among various stakeholders about the reality of racial inequality in those communities and the structural conditions that are required to advance racial equity."[577] The objective of providing information to policymakers and facilitating conversations with community residents relies heavily on the assumption that policymakers make choices that disproportionately harm black communities because of a lack of information or disconnection with community residents. It does not necessarily take into account that policymakers often make decisions that may harm black communities or fail to remedy past harms because they take the path of least resistance by imposing public burdens on the communities with the least amount of power and resources to challenge the decisions in the political arena or the courts. The framework of relying on dialogue and input to elevate the goals of marginalized communities (often low-income African Americans, in the Southern context) does not engage with the need to provide a coercive mechanism that can dislodge entrenched privilege (often higher-income, disproportionately white homeowners). The AFFH Rule gives those at the bottom the chance to offer a carrot, but

[575] Troutt, *supra* note 233, at 54.

[576] *See* Troutt, *supra* note 233, at 54; *see also* SHERYLL CASHIN, WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY (2021) (describing how the government's deliberate creation of black ghettos as well as affluent white space led to an entrenched caste system at the heart of racial inequality in the United States).

[577] Archer, *supra* note 14, at 1327 (citation omitted).

there is no stick. And, as the adage goes, "you can lead a horse to water, but you can't make him drink."[578]

VI. CONCLUSION

Advocates of racial zoning in the early twentieth century used policy to promote white supremacy. They conceptualized blacks as nuisances meant to be managed. As a result, they decided to apply zoning to exclude blacks from white spaces to whatever extent they might be allowed. Racial zoning sought to contain and separate blacks as nuisances. After explicit racial zoning had fallen out of favor, governments zoned commercial and industrial uses within black residential areas. These zoning decisions reinforce the conception of blacks as nuisance. As a result, black communities bore the brunt of the downsides of the city's economic development. Essentially, governments loaded nuisances on top of each other—blacks, factories, and highways were all treated the same: "pigs in a parlor instead of the barnyard."[579] They served the interests of whites at certain times, but they were left sectioned off and separate from white lives because they were hazards or inconveniences. This approach led to the building of warehouses rather than communities—places with significant disincentives to affordable housing.

However, just as zoning was used to construct the problem, it can be used to remedy it. Inclusionary zoning and mixed-income housing can provide access to affordable homes both within and outside of current majority-black communities in the South. No longer must black residents remain the "pigs in the parlor"; the promise of zoning in *Euclid* to promote viable communities, even after decades of racist manipulation, can be a reality.

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[578] *See you can lead a horse to water, but you can't make him drink*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/you-can-lead-a-horse-to-water-but-you-can-t-make-him-drink (last visited July 1, 2022) ("saying used to emphasize that you can make it easy for someone to do something, but you cannot force them to do it").

[579] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).