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The Metamorphoses of Racial Discrimination in American Real Estate

Stevie J. Swanson†

Introduction

Many students come to law school hoping to obtain the skills to make the world a better place. Figuring out the best way to effectuate positive change begins with understanding the past. It is impossible to fully comprehend the present racial disparities in American real estate without clarity about past injustices. This Article focuses on aspects of real estate discrimination not fully explored in traditional law school property courses. It examines these forms of discrimination in greater depth than the classroom allows and brings them out of the darkness of our turbulent past and into the light of the present day. It illuminates the continued presence of real estate discrimination in the United States and exposes some of its current forms.

Traditional property courses in law school teach students about topics like zoning, land sale transfers, real estate brokers, and mortgages. Attempting to stay on schedule, explore everything on the syllabus, and cover the copious amounts of material necessary for practice and the bar exam, first-year property courses fail to delve deeply into the history surrounding the cases and statutes. Highly controversial topics are often covered in a matter-of-fact manner that focuses on memorization and application of the black letter law. Students frequently complete these courses unaware of the nefarious role government and the law plays in perpetuating racial discrimination, inequality, and lack of access to opportunity. Students are also often ignorant of the "badges and incidents of

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slavery" that still permeate land ownership in the United States.[1] This Article focuses on four major types of discrimination in real estate and exposes their continued existence, and in some cases, their covert metamorphoses.

The Article begins in Part I with an introduction to present-day inequalities before discussing them in Part II through health, education, public services, and labor mobility. Then, it examines the current wealth gap between Black and white Americans.[2] It also looks at the disparity between Black and white homeownership rates in the United States.[3] Finally, it compares statistical data on business ownership gaps between Black and white Americans.[4]

The Article then explores various types of real estate discrimination, beginning with zoning in Part III. It discusses the illegality of race-based zoning with the Supreme Court's decision in *Buchanan v. Warley*.[5] It explains numerous ways that local governments circumvented the *Buchanan* prohibition on race-based zoning while achieving the same objectives. Then, it explores the concepts of expulsive zoning, environmental racism, and exclusionary zoning that evolved post-*Buchanan*. Exclusionary zoning often manifests as a type of economic zoning that regulates based upon requirements for single-family residential use, minimum lot size, and minimum square footage requirements.[6] Environmental racism involves zoning in a manner that industrial uses are placed in minority neighborhoods and people of color are exposed to pollution.[7] Expulsive zoning encompasses environmental racism. Expulsive zoning involves the displacement of Black

1. *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883) (coining the term "badges and incidents of slavery").

2. Benjamin Harris & Sydney Schreiner Wertz, *Racial Differences in Economic Security: The Racial Wealth Gap*, U.S. DEP'T OF TREASURY (Sept. 15, 2022), https://home.treasury.gov/news/featured-stories/racial-differences-economic-security-racial-wealth-gap [https://perma.cc/ZD7R-MBE8].

3. *More Americans Own Their Homes, but Black-White Homeownership Rate Gap is Biggest in a Decade, NAR Report Finds*, NAT'L ASS'N OF REALTORS (Mar. 2, 2023), https://www.nar.realtor/newsroom/more-americans-own-their-homes-but-black-white-homeownership-rate-gap-is-biggest-in-a-decade-nar [https://perma.cc/6MP5-5XPJ].

4. Lynda Lee, *Who Owns America's Businesses?*, U.S. CENSUS BUREAU (Jan. 4, 2023), https://www.census.gov/library/stories/2023/01/who-owns-americas-businesses.html [https://perma.cc/C3NR-LJHT].

5. 245 U.S. 60 (1917).

6. Richard D. Kahlenburg, *An Economic Fair Housing Act*, CENTURY FOUND. (Aug. 3, 2017), https://tcf.org/content/report/economic-fair-housing-act/ [https://perma.cc/ARW9-77WL].

7. Allison Shertzer, Tate Twinam & Randall P. Walsh, *Race, Ethnicity, and Discriminatory Zoning*, 8 AM. ECON. J.: APPLIED ECON., 217, 218, 242–43 (2014).

communities for highway expansion, industry, business, and urban renewal, primarily through the mechanism of eminent domain.[8] This Article will examine the continued detrimental effect of historic zoning discrimination, addressing the reality that "[n]eighborhoods zoned only for single-family homes are whiter, wealthier, and better educated. There's less pollution. Kids there have safer places to play and will later go on to make more money than kids who grew up in other neighborhoods."[9]

From zoning, the Article moves to a brief discussion of racially restrictive covenants and their unenforceability after the 1948 decision of the Supreme Court in *Shelley v. Kraemer* in Part IV.[10] It exposes the governmental insistence on the use of racially restrictive covenants for those who sought to secure desirable Fair Housing Act (FHA)-backed mortgages.[11] The Article discusses the fact that hundreds of thousands of racially restrictive covenants were recorded post-*Shelley*.[12] It ties the impact of those covenants to present-day inequities. It also explores attempts by state legislatures to contend with racially restrictive covenants on land records in the modern era.[13]

From racially restrictive covenants, the Article will move to a discussion of race nuisance in Part V. The race nuisance cases involve Black enterprises being declared a nuisance by the courts.[14] Often, when the nuisance was abated, the business was either altered to terminate the nuisance or shut down.[15] Examples of common law nuisances include noise, dust, smoke, fumes, odors, vibrations, and vermin.[16] Race nuisance cases are a noteworthy

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8. ANTERO PIETILA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY 232 (2010).

9. Andrew Lee, *The Hidden Link Between Zoning and Racial Inequality*, ANTI-RACISM DAILY (Mar. 23, 2022), https://the-ard.com/2022/03/23/the-hidden-link-between-exclusionary-zoning-and-racial-inequality/ [https://perma.cc/52QT-TVF8].

10. 334 U.S. 1 (1948).

11. RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 9 (2013).

12. GENE SLATER, FREEDOM TO DISCRIMINATE: HOW REALTORS CONSPIRED TO SEGREGATE HOUSING AND DIVIDE AMERICA 161 (2021).

13. Stevie J. Swanson, *Indignity Perpetuated: Race-Based Housing Post-Reconstruction to the Fair Housing Act's Impact on the Digital Age: Where Do We Go From Here?*, 23 CONN. PUB. INT. L.J. 127, 153–58 (2023).

14. *See* Rachel Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 520–29 (2006) (exploring cases where nuisance claims were made against Black establishments with mixed results).

15. *Id.* at 527–28 (discussing injunctive relief granted in two cases against Black-owned saloons that limited their hours of operation).

16. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 413–14 (3rd ed. 2000).

aspect of history, despite not being the most pervasive of the real estate discrimination tactics discussed in this Article.[17] This Article will explore how race nuisance cases impacted real estate discrimination involving Black businesses, hospitals, funeral homes, and churches.[18] It will then bring race nuisance into the modern era, by examining programs like the Los Angeles Citywide Nuisance Abatement Program (CNAP), which allows the City Attorney to file civil injunctions against owners of "nuisance" properties.[19]

The final form of real estate discrimination discussed will be a lesser-known type called racial reverters in Part VI. When land is transferred, sometimes the grantor conveys less than all of their rights. If the grantor conditions land ownership "so long as" the grantee fulfills a condition, or reserves the right to take back the land if the grantee violates the terms, the grantor has retained a possibility of reverter in the case of a fee simple determinable, or a right of entry, in the case of a fee simple subject to condition subsequent.[20] This Article will illustrate examples of racial reverter clauses in deeds, wills, and trusts, like the one requiring a park which had been conveyed through defeasible fee to the Charlotte Park Commission to be maintained "for use by the white race only . . . ."[21]

I. Why Are We Still Talking About Real Estate Discrimination Now?

The "concentrations and traditions" that real estate discrimination in the United States created "linger on."[22] Real estate discrimination appeared (and often still appears) in a plethora of ways, including race-based expulsive and exclusionary zoning, racially restrictive covenants, race nuisance cases, and

17. Godsil, *supra* note 14, at 544 (suggesting possible explanations for why race nuisance cases had limited success during Jim Crow, including segregationists' acknowledgment that Black businesses had to exist somewhere in order for segregation to continue).

18. *See, e.g.*, Fox v. Corbit, 137 Tenn. 466 (1916) (saloon); Giles v. Rawlings, 148 Ga. 575 (1918) (hospital); Qualls v. Memphis, 15 Tenn. App. 575 (1932) (funeral home); Morrison v. Rawlinson, 193 S.C. 25 (1940) (church).

19. Terra Graziani, Joel Montano, Ananya Roy & Pamela Stephens, *Property, Personhood, and Police: The Making of Race and Space Through Nuisance Law*, 54 ANTIPODE 439 440, 440 (2021).

20. Swanson, *supra* note 13, at 159 n.246.

21. JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 284 (1959) (quoting Charlotte Park & Recreation Comm'n v. Barringer, 88 S.E2d 114 (N.C. 1955), *cert. denied*, 350 U.S. 983 (1956)).

22. *Id*. at 276.

racial reverters, to name just a few. The impact of real estate discrimination on Black Americans is pervasive, rooted in a history of parasitic, toxic, and government-endorsed discriminatory actions.

Real estate discrimination was parasitic because while it severely limited the options Black people had for where they could live, it also prevented them from having the opportunity to receive FHA-insured loans.[23] Black families were forced into substandard housing for which they paid exorbitant prices.[24]

Real estate discrimination was toxic because industry and manufacturing were purposefully located in Black neighborhoods and residents were subject to pollution.[25] The copious rat bites and deaths from lead poisoning created toxic environments for Black Americans too.[26] Importantly, real estate discrimination was government-endorsed, from the local government-sanctioned race-based zoning ordinances of the early 1900s to the expulsive and exclusionary zoning of the more recent era.[27] The government (through the FHA) made sure that white people could obtain mortgages with low interest rates, long fixed-rate terms, and minimal down payments while they systematically denied the same benefits to Black people.[28] The government even used eminent domain to split Black neighborhoods in two to create highway systems to transport white families away from the inner cities and out to the suburbs,[29] where they could use their affordable mortgages to build large homes.

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23. *Id*. at 300–02.

24. *Id.*

25. U.S. COMM'N ON C.R., NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 13–16 (Oct. 2003), https://www.usccr.gov/files/pubs/envjust/ej0104.pdf [https://perma.cc/CMN3-FVSG] (providing a brief overview of environmental racism in the United States).

26. KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 28 (2019) ("A report produced about the causes of riots in Philadelphia in the summer of 1964 found that . . . children living in 'Negro slums' experienced 80 percent of lead poisoning deaths and 100 percent of rat bites.").

27. Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, *in* ZONING AND THE AMERICAN DREAM 101, 101–02 (Charles M. Haar & Jerold S. Kayden eds., 1989).

28. RICHARD ROTHSTEIN, THE COLOR OF LAW 64–65 (2017).

29. *Id*. at 129 (referencing a report from the New Jersey State Attorney General's office that described the construction of an interstate highway as having the dual purpose of "eliminating" Black and Puerto Rican "ghetto areas" and "building highways that benefit white suburbanites, facilitating their movement from the suburbs to work and back").

As the Supreme Court stated in the eminent domain case *Berman v. Parker* in 1954:

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[30]

Berman displaced Black Americans in the name of blight removal. There were no comparable efforts in 1954 to apply this concept of public welfare to predominantly white neighborhoods.

II. Ramifications of Real Estate Discrimination

In 1877, federal troops withdrew from the South.[31] One hundred years later, in 1977, racially restrictive covenants were still being used by the real estate industry (until users were sued by the Justice Department).[32] Over 150 years of discrimination in real estate stains the American landscape. It impacts where one's children attend school, their exposure to crime and policing, and even the types of stores they can access.[33]

A. Education

One of the ramifications of real estate discrimination is lack of access to quality educational opportunities.[34] Real estate discrimination "thwarts the opportunity of low wage and working-class families to attend high-performing schools" because public school students are often assigned to the schools in the neighborhoods where they live.[35] Making reference to Ferguson, Missouri (where no elementary school is less than 75% Black), Richard Rothstein noted that "educational performance in such racially isolated settings is inadequate."[36] Segregated housing leads

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30. 348 U.S. 26, 33 (1954) (internal citation omitted).

31. ROTHSTEIN, *supra* note 28, at 39.

32. Kimberly Quick, *Exclusionary Zoning Continues Racial Segregation's Ugly Work*, CENTURY FOUND. (Aug. 4, 2017), https://tcf.org/content/commentary/exclusionary-zoning-continues-racial-segregations-ugly-work [https://perma.cc/4KF5-N9QA].

33. Lance Freeman, *Build Race Equity into Rezoning Decisions*, BROOKINGS (Jul. 13, 2021), https://www.brookings.edu/blog/how-we-rise/2021/07/13/build-race-equity-into-rezoning-decisions/ [https://perma.cc/MJ4Q-8ZTS].

34. Quick, *supra* note 32.

35. Richard D. Kahlenburg, *Housing and Educational Inequality: The Case of Long Island*, CENTURY FOUND. (June 1, 2023), https://tcf.org/content/report/housing-and-educational-inequality-the-case-of-long-island/ [https://perma.cc/L39Z-FSCY].

36. *Id.*; Richard Rothstein, *The Making of Ferguson: Public Policies at the Root*

to segregated education.[37] Lack of funding in economically distressed racially homogenous neighborhoods leads to a lack of educational opportunity for the children in that neighborhood.

B. *Public Services*

Lack of access to adequate housing also frequently leads to lack of access to public services. For example, Black residents of Apopka, Florida, sued the City alleging that they were deprived of the right to equal municipal services including paving and street maintenance, storm water drainage, water distribution systems, sewage facilities, and adequate parks and recreation.[38] This deprivation is directly tied to real estate discrimination as Apopka enacted a racial zoning ordinance in 1937 (twenty years after this was outlawed by the Supreme Court), relegating Black people to living only on the south side of the railroad tracks.[39] The racialized zoning ordinance was not repealed until 1968.[40] The impact of this race-based zoning is significant as 312 of the 368 Black families living in Apopka at the time of the case were still residing in the area previously zoned for Black residents.[41] Ultimately, the plaintiffs were successful in alleging inadequate services in the provision of street paving, storm water drainage, and water distribution systems.[42]

Black neighborhoods are sometimes plagued by unpaved streets and inadequate public improvements.[43] Local governments have under-invested in poor, marginalized neighborhoods.[44] Neighborhoods of color have had less access to "water provision, sewage and garbage removal, street cleaning, street lighting, street paving, [and] police protection . . . ."[45] Inadequate public services

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of Its Troubles, ECON. POL'Y INST. (Oct. 15, 2014) at 31, https://files.epi.org/2014/making-of-ferguson-final.pdf [https://perma.cc/G8UF-S4EV] ("[S]chool desegregation requires housing desegregation.").

37. *Id*. at 31; Kahlenburg, *supra* note 35.

38. Dowdell v. City of Apopka, 511 F. Supp. 1375, 1377 (M.D. Fla. 1981).

39. *Id*. at 1378; *see also* Buchanan v. Warley, 245 U.S. 60, 82 (1917) (outlawing racial zoning ordinances).

40. *Dowdell*, 511 F. Supp. at 1378.

41. *Id*. at 1377.

42. *Id*. at 1382–84.

43. PIETILA, *supra* note 8, at 232–33.

44. Yonah Freemark, *The Role of Race in Zoning: A History & Policy Review*, URB. INST. 16 (Sept. 16, 2021), https://www.urban.org/sites/default/files/publication/104794/the-role-of-race-in-zoning-a-history-policy-review_1.pdf [https://perma.cc/M4WQ-9ACU].

45. ROSE HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS 10 (1969).

added further insult to the injury of real estate discrimination because not only were Black families crowded into inadequate housing and isolated from resources and opportunities, but they were also ignored (in the provision of public services) by the governments that forced them there.

C. Health

As Kwame Ture and Charles V. Hamilton wrote in 1967, "In America we judge by American standards, and by this yardstick we find that the [B]lack man lives in incredibly inadequate housing, shabby shelters that are dangerous to mental and physical health and to life itself."[46] Because of real estate discrimination, Black children are more likely to have asthma and to die from it.[47] Black children's increased risk results from living near polluting factories and in rental housing with mold and other risk factors.[48]

High blood pressure and increased risk of heart disease are also tied to discriminatory housing policies.[49] A dearth of fruits and vegetables, an overabundance of easily accessible fast food options, lesser access to public transportation, and a lack of health insurance all contribute to a higher incidence of serious health problems in Black Americans.[50]

Black Americans are often subject to more types of health risks than white Americans due to being forced into inadequate and substandard housing. A disproportionate amount of rat bites and lead poisoning deaths have affected Black families living in slum conditions.[51] A study done to ascertain the cause of the 1964 Philadelphia riots showed that 100% of all rat bites and 80% of lead poisoning deaths were suffered by Black children.[52] As Justice

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46. KWAME TURE & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 155 (1967) (published as Stokely Carmichael & Charles V. Hamilton).

47. Kat Stafford, *Chapter 2: Black Children Are More Likely to Have Asthma. A Lot Comes Down to Where They Live*, AP NEWS (May 23, 2023), https://projects.apnews.com/features/2023/from-birth-to-death/black-children-asthma-investigation.html [https://perma.cc/6WFX-P4NM].

48. *Id.*

49. Kat Stafford, *Chapter 4: High Blood Pressure Plagues Many Black Americans. Combined with COVID It Is Catastrophic*, AP NEWS (May 23, 2023), https://projects.apnews.com/features/2023/from-birth-to-death/high-blood-pressure-covid-racism.html [https://perma.cc/U68C-9LMP].

50. *Id.*

51. TAYLOR, *supra* note 26, at 28.

52. *Id.* at 28; *see also* HELPER, *supra* note 45, at 4 (describing how news of Black children dying from rat bites in overcrowded neighborhoods could motivate civic action).

Ketanji Brown Jackson noted in her dissent in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, when Black children are tested for lead, their blood lead levels test at twice the rate of their white counterparts.[53]

Toxic effects of pollution disproportionately impact the Black community because of racialized zoning policies that forced Black people into cohabitation with factories.[54] According to Barry Hill, a former director at the Office of Environmental Justice at the United States Environmental Protection Agency, "minorities and low-income communities are disproportionately exposed to environmental harms and risks."[55] In the United States, race is the strongest predictor of exposure to environmental hazards.[56] Black neighborhoods were often zoned to permit industry.[57] Yale Rabin uses the term "expulsive zoning" to describe "the intrusion into [B]lack neighborhoods of disruptive incompatible uses that have diminished the quality and undermined the stability of those neighborhoods."[58] For example, the more predominantly Black a community in the southeastern United States is, the more likely it is that the community is situated near a hazardous waste site.[59]

One final health impact of real estate discrimination is the presence of heat islands. Heat islands are often low-income, predominantly marginalized, urban neighborhoods that experience significantly higher temperatures because of "fewer trees and more concrete buildings and parking lots."[60] Heat islands are a modern challenge to Black neighborhoods because increased temperatures are linked to negative impacts on short-term cognitive performance, stamina, and working memory.[61]

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53. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 395 (2023) (Jackson, J., dissenting) (citing ROTHSTEIN, *supra* note 28, at 230).

54. U.S. COMM'N ON C.R., *supra* note 25, at 15.

55. *Id.* at 14 n.8 (quoting Barry Hill, Dir., Off. of Env't Just., U.S. Env't Prot. Agency, February Hearing Testimony).

56. *Id.*

57. ROTHSTEIN, *supra* note 28, at 50.

58. Rabin, *supra* note 27, at 101.

59. Robert W. Collin & Robin Morris Collin, *Urban Environmentalism and Race*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY 220, 221 (June Manning Thomas & Marsha Ritzdorf eds., 1997).

60. Cecilia Rouse, Jared Bernstein, Helen Knudsen & Jeffery Zhang, *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, WHITE HOUSE: COUNCIL OF ECON. ADVISERS BLOG (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market [https://perma.cc/R9JD-JXCM].

61. *Id.*

D. Wealth

Real estate discrimination has severely impeded access to home ownership for Black Americans. Home ownership is often the best way to increase wealth and build financial equity.[62] Housing is important for economic well-being and wealth accumulation because homeownership has traditionally "been the best way to build household wealth and also to qualify for better housing, establishing credit worthiness and building financial equity."[63] The homeownership gap between white and Black Americans is 30%.[64] The homeownership gap between Black and white Americans is not improving—it was the same in 2020 as it was in 1970.[65] This gap is a testament to the persistence of real estate discrimination in the United States.

The endurance of real estate discrimination is to blame for these sobering statistics. The National Association of Realtors (NAR) reported in 2023 that Black Americans continue to see higher denial rates for home loans, refinancing, and loans for home improvement.[66] Twenty-four percent of Black homebuyers surveyed by the NAR experienced discrimination in the home buying process.[67] Black Americans not only have a more difficult time buying homes, but the homes that they are able to buy do not appreciate in value as quickly.[68] Families of color receive less quality for their housing dollars than do white families.[69] Thirty-nine percent of Black Americans surveyed reported discrimination

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62. Richard McGahey, *Zoning, Housing Regulation, and America's Racial Inequality*, FORBES (June 30, 2021), https://www.forbes.com/sites/richardmcgahey/2021/06/30/zoning-housing-regulation-and-americas-racial-inequality/?sh=2d773fb47d86 [https://perma.cc/MGD8-UM6N].

63. *Id.*

64. Alexander Hermann, *In Nearly Every State, People of Color Are Less Likely to Own Homes Compared to White Households*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV.: HOUSING PERSPECTIVES (Feb. 8, 2023), https://www.jchs.harvard.edu/blog/nearly-every-state-people-color-are-less-likely-own-homes-compared-white-households [https://perma.cc/6X5K-PH2U] (showing that, while 71.7% of white households owned their homes in the period from 2015 to 2019, only 41.7% of Black households were homeowners during the same period); *see also Racial Differences in Economic Security: Housing*, U.S. DEPT. OF TREASURY (Nov. 4, 2022), https://home.treasury.gov/news/featured-stories/racial-differences-in-economic-security-housing [https://perma.cc/5WCA-Y89D] (reaching the same conclusion).

65. *Id.*

66. NAT'L ASS'N OF REALTORS, *supra* note 3.

67. *Id.*

68. Harris & Wertz, *supra* note 2.

69. HELPER, *supra* note 45, at 6.

in the home appraisal process.[70] Black Americans also have consistently higher rates of foreclosure than white Americans.[71]

There is a strong correlation between homeownership and wealth accumulation. "[White people] are much more likely to inherit wealth than [Black people], and much of that inherited wealth comes from housing equity."[72] In 2016, the median wealth for Black households in the United States was $17,100, and the median wealth for white households was $171,000.[73] In addition to having lower wealth accumulation, Black households are more likely than white households to have zero net worth or to be in debt.[74] In 2016, almost 20% of Black households had negative net wealth, compared to 9% of white households.[75] Negative net wealth impacts both physical and mental health.[76]

Lack of wealth is exacerbated by high housing costs. Low-cost rental units decreased by four million units from 2011 to 2017.[77] Cost burdens are defined as the share of U.S. households paying more than 30% of their incomes for housing.[78] The cost burden share for Black renters in 2017 was nearly 55%.[79] The impact of this cost burden is catastrophic. In 2017, severely cost burdened Black families with children spent 35% less on food, 46% less on clothes, and 75% less on healthcare than those without housing cost burdens.[80] Housing inadequacies are impacting the health, nutrition, and comfort of Black families at a dramatic level.

Things are not looking up. Nationally, only thirty-seven rental homes are available for every one hundred extremely low-income

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70. NAT'L ASS'N OF REALTORS, *supra* note 3.

71. Harris & Wertz, *supra* note 2.

72. McGahey, *supra* note 62 (citing Darrick Hamilton & William Darity, Jr., *Can 'Baby Bonds' Eliminate the Racial Wealth Gap in Putative Post-Racial America?*, 37 REV. BLACK POL. ECON. 207, 213 (2010)).

73. Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed Since the Great Recession, by Race, Ethnicity and Income*, PEW RESCH. CTR (Nov. 1, 2017), https://www.pewresearch.org/short-reads/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/ [https://perma.cc/KR7K-LZWZ].

74. *Id.*

75. Harris & Wertz, *supra* note 2.

76. *Id.*

77. JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 4 (2019), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf [https://perma.cc/89E6-AE6C].

78. *Id.*

79. *Id.* at 32.

80. *Id.* at 33.

renters.[81] Affordable options are dwindling. The number of landlords participating in the United States Department of Housing and Urban Development's Housing Choice Voucher Program is decreasing.[82] Real estate discrimination manifests in more people of color renting and struggling to afford their rent.[83] Struggling to afford rent, in turn, is linked to "instability, eviction, . . . homelessness, . . . food insecurity, poor health, lower academic achievement, and lower economic mobility."[84] If something does not change, achieving racial wealth convergence in the United States will be impossible.[85]

E. Labor Mobility

Real estate discrimination, combined with racialized migration patterns like "white flight" after the Great Migration in the Twentieth Century, have led to Black households being concentrated in certain areas—particularly the inner city and predominantly Black suburbs.[86] Housing limits access to opportunities like jobs.[87] Housing supply issues "also limit labor mobility, because workers cannot afford to move to higher productivity cities that have high housing prices."[88] Housing discrimination is all-encompassing because it contains a population

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81. *Racial Disparities Among Extremely Low-Income Renters*, NAT'L LOW INCOME HOUS. COAL. (Apr. 15, 2019), https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters [https://perma.cc/U3PX-HABB] (quoting NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES (2019), https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2019.pdf [https://perma.cc/9YU7-F8HR]).

82. Demetria Lester, *Housing Choice Vouchers Examined by Race*, MREPORT (Nov. 23, 2022), https://themreport.com/news/data/11-23-2022/housing-choice-vouchers [https://perma.cc/N3AC-HLMQ].

83. *Racial Inequities in Housing Fact Sheet*, OPPORTUNITY STARTS AT HOME, https://www.opportunityhome.org/resources/racial-equity-housing/ [https://perma.cc/J225-BAUH] (citing *Sectors: Housing Influences Outcomes Across Many Sectors and the Research Shows It,* OPPORTUNITY STARTS AT HOME, https://www.opportunityhome.org/related-sectors/ [https://perma.cc/4XSV-YSRN]).

84. *Id.*

85. Harris & Wertz, *supra* note 2; *see also* Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020*, at 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30101, 2022), https://www.nber.org/system/files/working_papers/w30101/w30101.pdf [https://perma.cc/P7GN-7U3P] ("Should existing differences in wealth-accumulating conditions persist, racial wealth convergence will not only stop altogether, but will even reverse course.").

86. Christine Leibbrand, Catherine Massey, J. Trent Alexander, Katie R. Genadek & Stewart Tolnay, *The Great Migration and Residential Segregation in American Cities during the Twentieth Century*, 44 SOC. SCI. HIST. 19, 22–25 (2020).

87. Freemark, *supra* note 44, at 29.

88. Rouse et al., *supra* note 60, at 3.

in a certain geographic area and denies that population access to jobs, parks, grocery stores, clean air, and clean water.[89] Without the ability to relocate to a higher-paying job, upward mobility is a nearly insurmountable challenge.

F. Business Ownership

Real estate discrimination most often focuses on housing, but it also extends to Black-owned businesses. Later, this Article will expand the discussion by looking at race nuisance cases and their potential impact on Black-owned businesses. According to the United States Census Bureau, Black-owned businesses make up fewer than 150,000 of 5.8 million total businesses, or 2.44% of all businesses across all sectors of the economy.[90] Racial discrimination and white insecurities have stunted the growth of Black-owned businesses in America. In the 1921 Tulsa Race Massacre, a white mob, jealous of Black success, decimated Black Wall Street (a thirty-five-block stretch in the Greenwood neighborhood of Tulsa, Oklahoma) in less than twenty-four hours.[91] Real estate discrimination continues to impact nearly all aspects of the lives of Black Americans.

III. Race-Based Zoning

Racial separation and exclusion have been central to land use regulation since the 1880s.[92] The first race-based zoning ordinance was enacted in Baltimore in 1910 and was quickly followed by similar ordinances in cities such as Richmond, Birmingham, Atlanta, Louisville, St. Louis, New Orleans, Indianapolis, and Dallas.[93] In 1917, the United States Supreme Court struck down race-based zoning ordinances in *Buchanan v. Warley*.[94] While the motivation of the Court seemed more about protecting the white property owner's right to "acquire, use and dispose" of his property, the zoning ordinance from Louisville violated the Due Process

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89. *Racial Inequities in Housing Fact Sheet*, *supra* note 83.

90. Lee, *supra* note 4.

91. Yuliya Parshina-Kottas, Anjali Singhvi, Audra D.S. Burch, Troy Griggs, Mika Gröndahl, Lingdong Huang, Tim Wallace, Jeremy White & Josh Williams, *What the Tulsa Race Massacre Destroyed*, N.Y. TIMES (May 24, 2021), https://www.nytimes.com/interactive/2021/05/24/us/tulsa-race-massacre.html [https://perma.cc/2J4L-4A2N].

92. Joe R. Feagin, *Arenas of Conflict: Zoning and Land Use Reform in Critical Political-Economic Perspective*, *in* ZONING AND THE AMERICAN DREAM 73, 84 (Charles M. Haar & Jerold S. Kayden eds., 1989).

93. RABIN, *supra* note 27, at 106.

94. 245 U.S. 60 (1917).

Clause of the Fourteenth Amendment and thus could not stand.[95] Race-based zoning did not stop after *Buchanan*.[96] The city of Apopka, Florida, for example, passed a race-based zoning ordinance in 1937—a full two decades after this was prohibited by the Supreme Court ruling in *Buchanan*.[97] Apopka's race-based zoning ordinance was not repealed until 1968.[98] Birmingham, Alabama's race-based zoning was enforced until 1950.[99] West Palm Beach, Florida, adopted its race-based zoning ordinance more than a decade after *Buchanan* (in 1929), and it was maintained until 1960.[100] Kansas City, Missouri, and Norfolk, Virginia, designated African American areas in official planning documents to guide spot zoning until 1987.[101]

Race-based zoning actively enforced segregation and land use patterns in many United States cities for more than a half-century after its judicial demise. Its impact can still be felt today. "Zoning reflects the insidious and pervasive racism that permeates the fabric of political and social policies and is a constant factor in American history."[102] Eventually the use of racially explicit terms faded from favor, but the sentiments behind race-based zoning still permeated local governments.

A. Stated Purposes for Zoning

In 1926, the Supreme Court finally had occasion to consider the constitutionality of zoning in *Village of Euclid v. Ambler Realty Co.*[103] The Village of Euclid created a zoning ordinance which separated property uses into six different use districts.[104] Euclid's zoning ordinance stated that nothing but single family residential dwellings were allowed in the U-1 District.[105] This meant that not only businesses and factories were excluded from being by the single family homes, but also two-family dwellings (duplexes or

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95. *Id*. at 74, 82.
96. Michael H. Wilson, *The Racist History of Zoning Laws*, FOUND. FOR ECON. EDUC. (May 21, 2019), https://fee.org/articles/the-racist-history-of-zoning-laws/ [https://perma.cc/HW5U-VDHW].
97. Dowdell v. City of Apopka, 511 F. Supp. 1375 (M.D. Fla. 1981).
98. *Id*.
99. GREENBERG, *supra* note 21, at 278.
100. ROTHSTEIN, *supra* note 28, at 47.
101. *Id*. at 48.
102. William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in* Euclid v. Ambler, *in* ZONING AND THE AMERICAN DREAM 31, 41 (Charles M. Haar & Jerold S. Kayden eds., 1989).
103. 272 U.S. 365 (1926).
104. *Id.* at 380.
105. *Id*. at 380–81.

townhomes), as they were zoned U-2.[106] Similarly, no multi-family dwellings (apartments) were allowed in the U-1 or U-2 Districts.[107]

The Court rationalized that it was appropriate to keep the single-family detached homes separated from the other types of housing because the apartment house was "a mere parasite."[108] The Court also stated that apartment houses were very nearly nuisances.[109] The Court found that "a nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[110] It is not that apartment houses do not have a place, but that place is not in close proximity to single-family (i.e., white) homes. The Court upheld this part of the ordinance because separating single-family homes from everything else "increase[d] the safety and security of home life, greatly tend[ed] to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease[d] noise and other conditions which produce or intensify nervous disorders, preserve[d] a more favorable environment in which to rear children, etc."[111] The separation of single-family residential homes from all other types of housing was a thinly veiled mechanism for maintaining housing segregation after *Buchanan*. So, while the Court held in *Euclid* that zoning was constitutional unless it was found to be "arbitrary and unreasonable," what it really meant was that those trying to keep white homes separate from Black dwelling places had the full power and authority of the Supreme Court behind them.[112]

States grant local governments the ability to zone.[113] This ability stems from the police powers (health, safety, and welfare).[114] Looking at previous exercises of the police power, zoning does not always appear nefarious and biased on its face. James and Nancy Duncan, in their book *Landscapes of Privilege*, highlight some of the seemingly benign aspects of zoning like preventing nuisances,

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106. *Id*.
107. *Id*.
108. *Id*. at 394.
109. *Id*. at 395.
110. *Id*. at 388.
111. *Id*. at 394.
112. *Id*. at 395, 397.
113. *See* JAMES S. DUNCAN & NANCY G. DUNCAN, LANDSCAPES OF PRIVILEGE: THE POLITICS OF AESTHETIC IN AN AMERICAN SUBURB 100 (2004), http://ndl.ethernet.edu.et/bitstream/123456789/17232/1/James%20S.Duncan_2004.pdf [https://perma.cc/C5ZE-22FQ] ("Planning and land-use controls . . . are the responsibility of local government.").
114. *Id*.

promoting health and welfare, fire safety, clearing the way for water and sewer facilities, and provision of schools and parks.[115] They also discuss zoning used to protect the character of neighborhoods and preserve property values.[116] Maintaining the character of the neighborhood and protection of property values have historically been code for safeguarding racial segregation in housing.[117] Zoning has become a device for "excluding the undesirable."[118]

Post-*Buchanan*, new types of zoning ordinances evolved that were exclusionary and expulsive. These forms of zoning maintained segregation without using taboo racialized language. Richard Rothstein describes the two new faces of zoning in his book *The Color of Law*. Rothstein writes, "[o]ne face, developed in part to evade a prohibition on racially explicit zoning, attempted to keep African Americans out of white neighborhoods by making it difficult for lower-income families, large numbers of whom were African Americans, to live in expensive white neighborhoods."[119] This type, of course, is exclusionary zoning and it will be explored later in this Article after expulsive zoning.

B. Expulsive Zoning

The second face of zoning, Rothstein writes, "attempted to protect white neighborhoods from deterioration by ensuring that few industrial or environmentally unsafe businesses could locate in them."[120] The second face Rothstein references is expulsive zoning. Expulsive zoning encompasses both placement of industrial uses in Black communities (to protect and preserve white ones) as well as the use of industry to expel Black residents altogether.[121] Referencing the decision in *Euclid*, Yale Rabin writes that "the intrusion of nonresidential uses into residential areas was sufficiently detrimental to the welfare of those areas and their residents to warrant their legal exclusion."[122] Zoning has not protected everyone. Black neighborhoods have been zoned disproportionately for manufacturing.[123] Local governments have

115. *Id*. at 100–01.
116. *Id*. at 101.
117. *Id*. at 100–01.
118. Rabin, *supra* note 27, at 105.
119. ROTHSTEIN, *supra* note 28, at 56–57.
120. *Id*. at 57.
121. *See* Rabin, *supra* note 27, at 102.
122. Rabin, *supra* note 27, at 101–02.
123. Shertzer et al., *supra* note 7, at 26; *see also* Tate Twinam, *The Long-Run Impact of Zoning: Institutional hysteresis and Durable Capital in Seattle, 1920-2015*, 73 REG'L SCI. & URB. ECON. 155, 162 (2018).

used the power of zoning to place commercial and industrial uses in areas where Black families reside.[124] As Justice Jackson recently noted in a dissent, the government also facilitated "the disproportionate location of toxic-waste facilities in Black communities . . . ."[125] Industrial zoning and toxic waste zoning were used to turn Black communities into slums.[126]

White residents were diabolically savvy to avoid placing industry in their residential midst. As Yale Rabin notes, "the intrusion into Black neighborhoods of disruptive incompatible uses" has "diminished the quality and undermined the stability of those neighborhoods."[127] Zoning that puts industrial uses in Black communities degrades residential property values and exposes residents to health hazards.[128] The United States Commission on Civil Rights has found that "exposure to waste facilities, landfills, lead-based paint, and other pollutants has an adverse impact on human health."[129] Communities of color who house "these facilities report increased rates of asthma, cancer, delayed cognitive development, and other illnesses."[130] Zoning for industry and toxic waste in marginalized and low-income communities causes these communities to decline.[131] The more industry in the neighborhood, the lower the property values become.[132] This leads to the eventual displacement of community members and the neighborhood becoming less desirable.[133] Because property values decline, industry finds those neighborhood even more desirable because it is cheaper for factories to locate in Black neighborhoods.[134] The people left in these neighborhoods face nearly worthless property and a litany of health problems.[135]

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124. Jade A. Craig, *"Pigs in the Parlor": The Legacy of Racial Zoning and the Challenge of Affirmatively Furthering Fair Housing in the South*, RACE, RACISM & L. (Nov. 18, 2022), https://racism.org/articles/basic-needs/propertyland/301-housing/10908-pigs-in [https://perma.cc/9TFL-X7EZ].

125. Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll., 600 U.S. 181, 294 (2023) (Jackson, J., dissenting).

126. ROTHSTEIN, *supra* note 28, at 54.

127. Rabin, *supra* note 27, at 101.

128. *See* Andrew H. Whittemore, *Racial and Class Bias in Zoning: Rezoning Involving Heavy Commercial and Industrial Land Use in Durham (NC), 1945-2014*, 83 J. AM. PLAN. ASS'N 235 (2017).

129. U.S. COMM'N ON C.R., *supra* note 25, at 20.

130. *Id.*

131. *Id.* at 15.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

Cities who placed industry in residential Black neighborhoods purposefully created blight and pollution to simultaneously protect their own health and property values while poisoning and expelling Black residents.[136] Expulsive zoning also increased segregation and overcrowding.[137] Black families expelled by the intrusion of industry had few options for relocation.[138] Race-based zoning, racially restrictive covenants, and prevalent animosity towards Black people severely limited their relocation destinations.[139] Thousands of Black people were displaced through expulsive zoning.[140] In Jackson, Tennessee, alone, urban renewal projects aimed at bringing more business and industry to South Jackson displaced more than 2,600 Black residents, about one-fifth of the city's Black population.[141] As Rabin notes, the blight and "disruptive effects of expulsive zoning grow, rather than diminish, with the passage of time."[142] It is a current practice, not just a vestige of past discrimination.[143]

C. Eminent Domain

Though obviously not a type of zoning, eminent domain is related to the concept of expulsive zoning because it involves government-induced forced relocation of Black Americans.[144] Sometimes land was condemned for municipal use (taken by eminent domain) once Black people moved into the area.[145] The use of eminent domain in the 1950s and 1960s was promoted to clear 'slums' and remove blight.[146] Blight was "a disease that threatened to turn healthy areas into slums."[147] Leaving blight unchecked was

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136. *Id.*

137. Rabin, *supra* note 27, at 102.

138. *Id.* at 107–08.

139. *Id.*

140. *See id.* at 108–18.

141. *Id.* at 113.

142. *Id.* at 118.

143. *Id.*

144. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 6–13 (2003) (explaining the use of eminent domain as a means to "relocate minority populations" by "selecting racially changing neighborhoods as blighted areas").

145. GREENBERG, *supra* note 21, at 278–79.

146. *See* Pritchett, *supra* note 144, at 29 ("Renewal advocates argued that . . . [e]minent domain powers and government subsidy were needed because 'most blighted properties are valued at far more than their real worth—and at more than private enterprise could afford to pay a development agency for them.'" (quoting MEL SCOTT, METROPOLITAN LOS ANGELES 95 (1950))).

147. *Id.* at 3.

dangerous to cities, the argument went.[148] Blight had to be removed because blighted property was "on its way to becoming a slum."[149] Government officials advanced that urban renewal, through blight removal and slum clearance, was necessary to stop neighborhood deterioration.[150] Though blight was a seemingly race-neutral term, it was "infused with racial and ethnic prejudice."[151] Ernest Burgess argued in 1925 that the "inva[sion]" by immigrant communities and communities of color into an area sped up the "'junking' process in the area of deterioration."[152] City governments were able to capitalize on fear of slums (and fear of marginalized residents) to utilize eminent domain to forcibly eject unwanted residents in the name of blight removal and beautification of cities.[153]

Berman v. Parker quantified blight removal and slum clearance as "public welfare" that justified use of the Fifth Amendment power of eminent domain.[154] According to the Court, the evils of blight were so prolific that a more Hobbesian application of eminent domain was necessary.[155] As the Court found in *Berman*:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.[156]

The Court makes it sound like eradication of substandard housing will save the nation from relegation to subhuman status (i.e., cattle). In truth, racist zoning laws, racially restrictive covenants, and landlords charging exorbitant rent are to blame for the blight.[157] Those who received the Fifth Amendment guarantee

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148. *Id.*

149. *Id.* at 18 (quoting MABEL WALKER, URBAN BLIGHT AND SLUMS 4 (1938)).

150. Pritchett, *supra* note 144, at 19.

151. *Id.* at 6.

152. *Id.* at 17 (quoting Ernest Burgess, *The Growth of the City: An Introduction to a Research Project*, *in* THE CITY 47, 58 (Robert E. Park et al. eds., 1925)).

153. *See generally* GREENBERG, *supra* note 21, at 293 (reporting that 90% of families displaced into public housing and 60% of families to be displaced by urban renewal were non-white as of June 30, 1956).

154. 348 U.S. 26, 33 (1954).

155. Ngoc Nguyen, *Thomas Hobbes: Politics, Philosophy and Ideas*, COLLECTOR (Jan. 13, 2022), https://www.thecollector.com/thomas-hobbes-lifes-work/ [https://perma.cc/4CFV-BWYM] (noting that Hobbesian ideas about the state of nature justified "wide-ranging government powers" to protect people from others' harm).

156. *Berman*, 348 U.S. at 32–33.

157. For a discussion of race-based zoning, see *supra* Part III. See *infra* Part IV

of "just compensation"[158] were not the Black inhabitants of "[m]iserable and disreputable housing."[159] As Justice Clarence Thomas noted in his dissent to *Kelo v. City of New London*, "Over 97 percent of the individuals forcibly removed from their homes by the 'slum-clearance' project upheld by this Court in *Berman* were [B]lack."[160] Throughout the nation, landlords forced Black residents to pay higher rent for inferior housing stock.[161] As early as 1914, in Baltimore, Maryland, Black-occupied properties were condemned and Black residents, as renters, "had no say."[162] In other places, Black renters lived in crumbling dwellings owned by white landlords.[163]

Urban renewal, facilitated through eminent domain, "prioritized destruction over construction."[164] From 1949 to 1965, urban renewal displaced approximately one million people.[165] The displacement of Black people was so disproportionate that urban renewal had the nickname "Negro Removal."[166] The goal of urban renewal was often the "creation or preservation of a White, middle-class neighborhood."[167] As attorney and author Jack Greenberg aptly put it in 1959, "that which is forbidden by zoning ordinance and covenant cases may be achieved by even more direct governmental action."[168]

Urban renewal intensified segregation and decreased housing options for Black families in the United States.[169] Due to the

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for a discussion about racially restrictive covenants.

158. U.S. CONST. amend. V.

159. *Berman*, 348 U.S. at 32. *See* Pritchett, *supra* note 144, at 4 ("Property *owners* in blighted areas were due government-determined fair value for their holdings . . . .") (emphasis added); *see also* PIETILA, *supra* note 8, at 232 (noting that evicted Black people in Baltimore County "received no relocation compensation" when displaced by expulsive zoning).

160. 545 U.S. 469, 522 (2005) (Thomas, J., dissenting).

161. ELIZABETH A. HERBIN-TRIANT, THREATENING PROPERTY: RACE, CLASS, AND CAMPAIGNS TO LEGISLATE JIM CROW NEIGHBORHOODS 15 (2019).

162. PIETILA, *supra* note 8, at 52.

163. *See supra* Part III.

164. TAYLOR, *supra* note 26, at 255.

165. EDWARD D. GOETZ, NEW DEAL RUINS: RACE, ECONOMIC JUSTICE, & PUBLIC HOUSING POLICY 112 (2013).

166. *Id.; see also* Sigmund C. Shipp, *Winning Some Battles But Losing the War? Blacks and Urban Renewal in Greensboro, NC, 1953-1965*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY 188 (June Manning Thomas & Marsha Ritzdorf eds., 1997) ("Researchers . . . suggested that the entire [urban renewal] program could be referred to as 'Negro removal' or 'Negro clearance.'").

167. Shipp, *supra* note 166, at 188.

168. GREENBERG, *supra* note 21, at 294.

169. *See id.* (noting that redevelopers "almost always" relocated Black residents to "overcrowded and slum-like" sections of the city or public housing, which also

vestiges of racialized zoning and racially restrictive covenants, redlining, and the unavailability of traditional mortgage financing options,[170] Black families were often concentrated as renters in substandard housing owned by white landlords.[171] As slum clearance, blight removal, and urban renewal transformed neighborhoods into safe, shiny, and new uses (for white residents), Black communities were not invited to share in the sparkle.

One remarkably effective slum clearance tool, referenced briefly above, was the Interstate Highway System's construction.[172] Rothstein noted that highway routes were designed with local, state, and federal participation to destroy Black communities.[173] Justice Jackson, in her dissent to *Students for Fair Admissions,* referenced the "deliberate action of governments at all levels in designing interstate highways to bisect and segregate Black urban communities."[174]

Black people were uprooted, scattered away from their churches, businesses, and community support systems, left with little to no relocation assistance, and higher housing costs in their new residences.[175] After the conclusion of *Nashville I-40 Steering Committee v. Ellington,* a case allowing highway I-40 to slice through Nashville, Tennessee's Black community,[176] it was revealed that government officials redirected the original plan for the highway's path to assure that it cut through the center of the Black community.[177] Raymond Mohl noted that, in Nashville, highway I-40 "dead-ended fifty local streets, disrupted traffic flow . . . separated children from their playgrounds and schools, parishioners from their churches, and businesses from their customers."[178]

The need to vacate in the name of eminent domain and highway expansion necessitated forced relocation of Black

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intensified segregation *de facto*); Pritchett, *supra* note 144, at 4.

170. For a discussion of race-based zoning, see *supra* Part III. See *infra* Part IV for a discussion about racially restrictive covenants.

171. *See supra* Part III.

172. David Karas, *Highway to Inequity: The Disparate Impact of the Interstate Highway System on Poor and Minority Communities in American Cities*, 7 NEW VISIONS FOR PUB. AFFAIRS 9, 14 (2015).

173. ROTHSTEIN, *supra* note 28, at 127.

174. Students for Fair Admissions, Inc., v. President & Fellows of Harv. Coll., 600 U.S. 181, 393 (2023) (Jackson, J., dissenting).

175. *See supra* Part III.

176. Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967).

177. Karas, *supra* note 172, at 12.

178. Raymond A. Mohl, *Citizen Activism and Freeway Revolts in Memphis and Nashville: The Road to Litigation*, 40 J. URB. HIST. 870, 880 (2014).

households.[179] It was difficult to procure housing since areas where Blacks were encouraged to live were scarce.[180] They were often forced to go from bad to worse areas as their "new" housing options were even more expensive than their previous "blighted" ones.[181] One example of increased housing costs for relocated Black people from Chicago (for non-whites earning less than $3000/year) shows that rent before slum clearance was 35% of median income before relocation and 46% of income after forced relocation.[182] When the Interstate Highway System was enacted in 1956, there was no relocation assistance available for those whose homes were destroyed to build the highways.[183] In fact, the Eisenhower Administration warned that relocation assistance would "run up costs" since an estimated 100,000 people would likely be evicted per year to build the highways.[184] The Federal requirement of new housing for Americans displaced by highway construction was not set until 1965, when the highway system's construction was essentially finished.[185] It was incredibly difficult to secure "safe and sanitary housing to replace what had been taken through eminent domain."[186] Moving was and is expensive and inconvenient.[187] It involves time-off from work to secure new housing, pack, and unpack belongings. It requires establishing new transportation routes, securing new childcare, and registering children in school. Rarely, if ever, were Black communities compensated for these expenses and lost wages.[188] Relocation costs, coupled with lost time and

179. *See* Roger Biles, *Expressways Before the Interstates: The Case of Detroit, 1945–1956*, 40 J. URB. HIST. 843, 850 (2014) (noting that site selection for expressways invariably uprooted less affluent neighborhoods while leaving middle-class enclaves unharmed); Karas, *supra* note 172, at 13–14 (describing the general consensus among scholars of United States transportation history that the Interstate Highway System had an adverse impact on minority communities, and Black neighborhoods in particular).

180. *See supra* Part III.D. and accompanying notes.

181. *Id.*

182. Taylor, *supra* note 26, at 41.

183. ROTHSTEIN, *supra* note 28, at 131.

184. *Id.*

185. *Id.*

186. Karas, *supra* note 172, at 14.

187. Move, Inc., *Moving Cost Calculator*, MOVING.COM, https://www.moving.com/movers/moving-cost-calculator.asp [https://perma.cc/EXA7-PGRR] ("The average cost of a local move is $1,250. The average cost of a long-distance move is $4,890 (distance of 1,000 miles."). When the author moved from Minnesota to Tennessee in 2021, the cost was over $14,000 to relocate her two-person household.

188. Federal relocation assistance was not available until passage of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91–646, 84 Stat. 1894 (1970). The Act provides no compensation for lost wages. *Id.*; *See*

wages from moving, disruption to their sense of community, and increased costs of obtaining alternative housing surely exacerbated the financial and emotional challenges facing Black people in America.

In a 1962 article from The Saturday Evening Post, a block-buster[189] describes the challenges faced by Black people who were finally able to become homeowners (after paying more than double for a home than the whites who fled from the integrated block had paid).[190] Due to the exorbitant housing costs and interest rates in the installment land contracts offered blockbusters offered, Black people were forced to "overcrowd and overuse their buildings by renting out part of them, or to skimp on maintenance, starting the neighborhood on the way to blight."[191] This was a self-perpetuating cycle of degradation, despair, and poverty not caused by Black people, but often attributed to them.

In the first part of the twentieth century, Black people were only allowed to live in certain areas.[192] They often were forced to rent from slumlords who did not maintain rentals.[193] They could not access traditional mortgages due to FHA policies and redlining.[194] When homes finally became available to purchase (often through blockbusting), predatory blockbusters financed the properties in such a way that it was impossible to remain current on payments if only one family occupied the home.[195] Overcrowding and lack of extra resources for maintenance and improvements led whites to argue that Black owned and occupied properties were blighted.[196] Once blighted, the neighborhood became ripe for condemnation and

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also Peter M. de Petra, *Compensation for Moving Expenses of Personal Property in Eminent Domain Proceedings*, 20 HASTINGS L.J. 749, 749 (1968) (noting the rule that expenses incurred for moving from condemned properties are not compensable as a governmental taking).

189. Block-busters were real estate agents and developers who exploited white communities' racial fears to buy out white-owned real property at depressed prices, and sell the same properties to Black buyers at inflated prices. Block-busters sometimes locked Black buyers into installment land contracts that withheld title to the property until the loan was fully paid. *See* Norris Vitchek, *Confessions of a Block-Buster*, SATURDAY EVENING POST, Jul. 1962, at 15, 15 https://www.saturdayeveningpost.com/wp-content/uploads/satevepost/Confessions-of-a-Block-Buster.pdf [https://perma.cc/5VYD-H767].

190. *Id.* at 17–18.

191. *Id.* at 18.

192. *See supra* Part III.

193. *Id.*

194. *See supra* notes 28–29 and accompanying text.

195. *See* Vitchek, *supra* note 189, at 18.

196. *Id.*

urban renewal.[197] Forced relocation followed, and the cycle started all over again.

Eminent domain for slum clearance and urban renewal purposes has slowed.[198] After the Kelo decision in 2005 traumatized white Americans by making them feel as though they were subject to having their property stripped from them for "economic development" reasons, the public use started to contract after years of expansion.[199] President George W. Bush issued an Executive Order: Protecting the Property Rights of the American People, on June 23, 2006.[200] The Executive Order limited instances where the Federal Government could take property through eminent domain to takings which benefitted the general public and were not "merely for the purpose of advancing the economic interest of private parties."[201] The Institute for Justice notes that since the *Kelo* decision forty-seven states "have strengthened their protections against eminent domain abuse."[202] Post-*Kelo*, states have also established "additional criteria for designating blighted areas subject to eminent domain."[203] Recently, the Supreme Court of Iowa embraced Justice O'Connor's dissent in *Kelo*, rather than the majority opinion.[204] Some cities are contemplating razing urban stretches of the highway system that have historically torn through communities.[205] The impact that this might have on communities has yet to be fully explored.

In at least one instance, property taken through eminent domain was returned to the heirs of the family it was taken from.[206] In 1924, local government took Bruce's Beach, a popular beachfront resort in Los Angeles County, California, from African Americans

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197. *See supra* notes 146–53 and accompanying text.

198. *See* sources cited *infra* notes 203, 204.

199. Ilya Solmin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2109– 10 (2009) ("In two national surveys conducted in the fall of 2005, 81% and 95% of respondents were opposed to *Kelo* . . . .*Kelo* was opposed by . . . 82% of whites . . . .A 2006 Saint Index survey found that 71% of respondents supported reform laws intended to ban "the taking of private property for private development" projects, and 43% supported such laws 'strongly.'").

200. Exec. Order No. 13,406, 3 C.F.R. § 13406 (2006).

201. *Id.*

202. *Eminent Domain: IJ Defends Homes and Businesses from Government Land Grabs*, INST. FOR JUST. https://ij.org/issues/private-property/eminent-domain/ [https://perma.cc/7H4R-ZCFT].

203. ALFRED BROPHY & ALBERTO LOPEZ & KALI MURRAY, INTEGRATING SPACES: PROPERTY LAW & RACE 184 (2011).

204. Puntenney v. Iowa Utils. Bd., 928 N.W.2d 829, 848–49 (2019).

205. Karas, *supra* note 172, at 17.

206. *See infra* note 208.

Willa and Charles Bruce through eminent domain.[207] In 2021, the Governor of California signed a bill that would allow the beach to be transferred to Willa and Charles Bruce's descendants.[208] The family has decided to sell it back to LA County for twenty million dollars.[209] While this is encouraging and provides hope for similar initiatives across the country, there is much left undone.

D. Exclusionary Zoning

The final type of zoning that this article will examine is exclusionary zoning. Exclusionary zoning "exploded" after the Fair Housing Act outlawed explicit racial exclusion.[210] The trial judge from *Euclid v. Ambler Realty* noted that zoning's true purpose was "to classify the population and segregate them according to their income or situations in life."[211] Exclusionary zoning in a suburban setting often includes prohibitions on multi-family units and mobile homes.[212] Neighborhoods with more Black residents are more likely to be zoned for higher density buildings, "suggesting that volume restrictions may have been used as an early form of exclusionary zoning."[213] Most exclusionary zoning is focused on the type of housing that can be built in a certain area.[214] Examples of exclusionary zoning include limits on the height of buildings, minimum lot size requirements, prohibitions on multi-family

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207. Rosanna Xia, *Manhattan Beach was once home to Black beachgoers, but the city ran them out. Now it faces a reckoning*, L.A. TIMES (Aug. 2, 2020), https://www.latimes.com/california/story/2020-08-02/bruces-beach-manhattan-beach [https://perma.cc/E8HX-7TDL].

208. Bill Chappell, *The Black Family who won the return of Bruce's Beach will sell it back to LA County*, HEALTH NEWS FLA. (Jan. 4, 2023), https://health.wusf.usf.edu/2023-01-04/the-black-family-who-won-the-return-of-bruces-beach-will-sell-it-back-to-la-county [https://perma.cc/GQ28-66LN].

209. *Id.*

210. Lee, *supra* note 9.

211. James W. Ely, Jr., *Reflections on "*Buchanan v. Warley*," Property Rights, and Race*, 51 VAND. L. REV. 953, 958 (1998) (quoting Ambler Realty Co. v. Village of Euclid, 272 U.S. 365 (1926)).

212. Joe R. Feagin, *Arenas of Conflict: Zoning and Land Use Reform in Critical Political-Economic Perspective*, *in* ZONING AND THE AMERICAN DREAM 84, 84 (Charles M. Haar & Jerold S. Kayden eds., 1989).

213. Shertzer et al., *supra* note 7, at 244.

214. *See* Rouse et. al., *supra* note 60; Elliot Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, CENTURY FOUND. (June 23, 2016), https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty/ [https://perma.cc/9FNQ-T9BT] ("Traditionally, exclusionary zoning policies have . . . single residence per lot requirements, minimum square footage requirements, and costly building codes. Together, these requirements make it difficult to build multi-family rental units that would allow lower-income residents to live in wealthy suburban developments with access to quality schools and employment.").

homes, preference for single-family-owner-occupied-detached homes, minimum set-back requirements, and minimum square footage requirements.[215]

Exclusionary zoning appears to be race-neutral, as there is no explicit reference to race; however, "zoning masquerading as an economic measure" has been used for a century to achieve segregation.[216] A New York Court of Appeals case has held that "[t]he primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's available land."[217] A New York Supreme Court, Appellate Division, case has held that a "municipality may not legitimately exercise its zoning power to effectuate socioeconomic or racial discrimination."[218] At a state level, a zoning ordinance will be invalidated if "it was enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect."[219] In New York at least, "a municipality may not zone to exclude persons having a need for housing within its boundaries or region."[220]

At a federal level, the prevailing test comes from *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, which held that zoning is not "unconstitutional solely because it results in a racially disproportionate impact."[221] The Supreme Court found in *Village of Arlington Heights* that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[222] Proof of racially discriminatory intent is hard to come by; as the U.S. Court of Appeals for the Tenth Circuit noted in *Dailey v. Lawton*, "[i]f proof of a civil rights violation depends upon an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection."[223]

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215. Rouse et al., *supra* note 60.

216. ROTHSTEIN, *supra* note 28, at 52.

217. Berenson v. New Castle, 341 N.E.2d 236, 241 (N.Y. 1975).

218. Continental Bldg. Co. v. Town of N. Salem, 625 N.Y.S2d 700, 702–03 (1995) (quoting Suffolk Hous. Servs. v. Town of Brookhaven, 511 N.E.2d 67, 69 (N.Y. 1987)).

219. *Id.* at 703 (quoting Robert E. Kurzius, Inc. v. Inc. Vill. of Upper Brookville, 414 N.E.2d 680 (N.Y. 1980)).

220. *Id.* (citing *Berenson v.* Town *of New Castle, 341 N.E.2d 236 (N.Y. 1975); Matter of Golden v. Planning Bd. of* Town *of Ramapo,* 285 N.E.2d 291 (N.Y. 1972)).

221. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

222. *Id.*

223. Dailey v. Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970) (citing Shelley v. Kraemer, 334 U.S. 1 (1948); Reitman v. Mulkey, 387 U.S. 369 (1967)).

E. Zoning: Where are we now?

Unfortunately, the past zoning discrimination's ramifications still linger. As President Obama stated in 2015, racial segregation has been replaced by class segregation.[224] Class-based, or economically exclusionary, zoning has essentially the same result as racialized zoning.[225] To be clear, economically based segregation is not by choice, it is socially engineered.[226] While there is much work still to be done, many jurisdictions are enacting laws to rectify past zoning discrimination.[227]

One state that has enacted zoning reform is Massachusetts. In 2021, Massachusetts passed a zoning act to permit multi-family zoning "as of right" and to require "reasonable levels of multi-family housing development near MBTA stations."[228] MBTA stations are Massachusetts Bay Transportation Authority stations such as commuter rail stations, subway stations, ferry terminals, and bus stations.[229] The law also requires each MBTA community to have at

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224. Juliet Eilperin & Michelle Boorstein, *In frank language, Obama addresses poverty's roots*, WASH. POST (May 12, 2015), https://www.washingtonpost.com/local/in-frank-language-obama-addresses-povertys-roots/2015/05/12/5acfa3fc-f8dd-11e4-a13c-193b1241d51a_story.html [https://perma.cc/NY5A-WE4S].

225. Kahlenburg, *supra* note 6.

226. *Id.*

227. Angela Ruggiero, *Berkeley to end single-family residential zoning, citing racist ties*, MERCURY NEWS (Feb. 24, 2021), https://www.mercurynews.com/2021/02/24/berkeley-to-end-single-family-residential-zoning-citing-racist-ties/ [https://perma.cc/JW9S-7GZD] ("Vice Mayor Lori Droste, who introduced the legislation, said although the current Berkeley City Council is not responsible for the history of racial segregation in the city's zoning codes, 'we do have the ability to remedy it.'"); Everton Bailey Jr., *Portland changes zoning rules to allow duplexes, triplexes, fourplexes in areas previously reserved for single-family homes*, OREGONIAN (Aug. 13, 2020), https://www.oregonlive.com/portland/2020/08/portland-changes-zoning-code-to-allow-duplexes-triplexes-fourplexes-in-areas-previously-reserved-for-single-family-homes.html [https://perma.cc/VZF6-Y87F] ("The three council members who voted to enact the new policy said it will help begin repairing the damage caused by zoning rules that contributed to racial discrimination and segregation in Portland and wide disparities in homeownership rates and wealth attainment."); Sarah Mervosh, *Minneapolis, Tackling Housing Crisis and Inequity, Votes to End Single-Family Zoning*, N.Y. TIMES (Dec. 13, 2018), https://www.nytimes.com/2018/12/13/us/minneapolis-single-family-zoning.html [https://perma.cc/STD2-6JYS].

228. *AG Campbell Issues Advisory on Requirements of MBTA Communities Zoning Law*, COMMONW. OF MASS. (Mar. 15, 2023), https://www.mass.gov/news/ag-campbell-issues-advisory-on-requirements-of-mbta-communities-zoning-law [https://perma.cc/92Z5-W7DY].

229. *Multi-Family Zoning Requirement for MBTA Communities*, COMMONW. OF MASS., https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities [https://perma.cc/EJN8-Z5L2].

least one zoning district of reasonable size that has no age restrictions and is suitable for families with children located within a half mile of an MBTA station.[230] MBTA communities are essentially those communities serviced by the MBTA, though Boston, which MBTA services, is exempt from complying with this section of the zoning act.[231] There are 177 MBTA communities subject to this provision of the zoning act.[232]

Unfortunately, though this act is thoughtfully drafted to increase multi-family housing opportunities in close proximity to transportation stations, there seem to be jurisdictions disinterested in compliance with the act.[233] As evidence of lack of compliance, the Massachusetts Attorney General, Andrea Joy Campbell, issued an advisory on March 15, 2023 to clarify that "covered communities cannot opt out of or avoid their obligations by choosing to forego state funding" and that "[f]ailure to comply may result in civil enforcement action or liability under federal and state fair housing laws."[234] The fact that the Attorney General of the state had to nudge MBTA communities to comply, by reminding them of the penalties for non-compliance, illustrates that little progress was made in the two years since zoning reform. Another challenge is that it does not reach the entire state, the city of Boston, or even all parts of the MBTA communities (the act requires at least "one district of reasonable size within the community" to comply with the act).[235] The ramifications of discriminatory zoning have not escaped Boston. Why has Boston escaped the reach of zoning reform?

California also instituted zoning reform. The California HOME Act took effect January 1, 2022.[236] The HOME Act made it

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230. *Id.*

231. *Id.* ("While served by the MBTA, Boston is exempted from the Zoning Act, including section 3A.").

232. *Id.*

233. *See* Press Release, Milton Neighbors for Responsible Zoning, Statement on Successful Signature Drive (Dec. 21, 2023) (announcing that a petition challenging the city's designation as a rapid transit community gathered 3,000 signatures); Andrew Brinker, *Most Towns Are Going Along with the State's New Multifamily Housing Law. Not Middleborough.*, BOSTON.COM (Feb. 14, 2023), https://www.boston.com/real-estate/the-boston-globe/2023/02/14/multifamily-housing-law-middleborough/ [https://perma.cc/K6S2-B757].

234. Press Release, Andrea Joy Campbell, Att'y Gen., State of Mass., AG Campbell Issues Advisory on Requirements of MBTA Communities Zoning Law (Mar. 15, 2023).

235. *Multi-Family Zoning Requirement for MBTA Communities*, *supra* note 229.

236. David Garcia & Muhammad Alameldin, *California's HOME Act Turns One: Data and Insights from the First Year of Senate Bill 9*, UC BERKELEY (Jan. 18, 2023), https://ternercenter.berkeley.edu/research-and-policy/sb-9-turns-one-applications/ [https://perma.cc/H9JA-Z7XP].

possible for a homeowner to split their lot and build up to four homes on a single-family parcel.[237] The great news about this zoning reform is that it is a state-wide act; the bad news is that its impact has been limited in its first year as few have taken advantage of it.[238]

As of 2019, Oregon has initiated zoning reforms as well.[239] Under the new zoning law, every city in the Portland area, or cities having a population higher than 10,000, must allow duplexes on any lot where single-family homes are permitted.[240] Additionally, all cities with populations of 25,000 or more will also have to allow triplexes and fourplexes on any lots that would have been approved for a single-family home.[241]

In December of 2018, the Minneapolis City Council upzoned the city such that duplexes and triplexes were now allowed on what had been single-family lots (70% of the city had been single-family residential use only).[242] The other reforms included were the elimination of off-street minimum parking requirements; the possibility of more housing density near transit stops; the provision for inclusionary zoning that required 10% of new apartments to be set aside for moderate income households; and an increase in the affordable housing fund from $15 million to $40 million to combat homelessness and provide relief for low income renters.[243]

These measures appear to have helped thwart rent increases. The cost of rent has grown a mere 1% since 2017 in Minneapolis, compared with a 31% increase in the United States overall during that period.[244] Unfortunately, not as much progress has been made with homeownership. Comparing homeownership rates between Black and white households, the Twin Cities (Minneapolis and St. Paul) had the highest disparity in homeownership rates of any similarly sized metro area in the United States in 2021.[245]

237. *Id.*

238. *Id.*

239. Julia Shumway, *White House: Oregon single-family zoning law could be model for nation*, OR. CAP. CHRON. (Oct. 29, 2021), https://oregoncapitalchronicle.com/2021/10/29/white-house-oregon-single-family-zoning-law-could-be-model-for-nation/ [https://perma.cc/77T7-G7SK].

240. *Id.*

241. *Id.*

242. Kahlenburg, supra note 6.

243. *Id.*

244. Mark Niquette & Augusta Saraiva, *First American city to tame inflation owes success to affordable housing*, SEATTLE TIMES (Aug. 10, 2023), https://www.seattletimes.com/business/first-american-city-to-tame-inflation-owes-success-to-affordable-housing [https://perma.cc/9NG2-CWNT].

245. *Id.*

Some municipalities are seeking zoning reform through the use of an "equity analysis" rather than an outright change to zoning codes. In New York City (NYC), for example, Local Law 78 of 2021 requires certain public and private applications to the NYC Department of City Planning to require a racial equity report to "assess how a proposed project relates to the City's goals of promoting fair and equitable housing and access to economic opportunities."[246] Among other things, the racial equity reports must detail the affordability of rents or prices of residential units and whether residents will have access to jobs.[247]

Seattle conducted a 2035 Equity Analysis evaluating four potential growth alternatives.[248] It found that communities of color face the greatest risk of displacement and that marginalized communities have less access to opportunity.[249] In order for new growth to build strong people and communities, the Equity Analysis suggests advancing economic opportunity and mobility; promoting transportation and connectivity; preventing residential, commercial and cultural displacement; building on local cultural assets; developing healthy and safe neighborhoods for all; and creating equitable access to all neighborhoods.[250]

Other suggestions for rectifying zoning discrimination include political changes at the local level. For example, having greater African American representation on the Atlanta City Council led to more equitable treatment for African Americans in the zoning arena.[251] Others suggest disposition of public land, increased density bonuses for developers, and elimination of parking requirements.[252]

President Biden has repeatedly tried to facilitate substantive and meaningful housing reforms. In 2021, the White House announced ambitious plans for zoning reform and proposed billions of dollars in competitive grants to incentivize exclusionary zoning

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246. Cozen O'Connor, *NYC Agencies Provide Preliminary Guidance for Compliance with City Council Mandated Racial Equity Report Requirements*, JDSUPRA (May 18, 2022), https://www.jdsupra.com/legalnews/nyc-agencies-provide-preliminary-4243772/ [https://perma.cc/4NUJ-CXF2].

247. *Id.*

248. *Seattle 2035 Equity Analysis*, CITY OF SEATTLE, https://www.seattle.gov/Documents/Departments/OPCD/ONgoingInitiatives/SeattlesComprehensivePlan/2035EquityAnalysisSummary.pdf [https://perma.cc/HV6P-MTL7].

249. *Id.*

250. *Id.*

251. Whittemore, *supra* note 128, at 238.

252. Freemark, *supra* note 44, at 36.

reforms.[253] In 2022, the Biden Administration proposed a $10 billion grant program that would reward states and localities for removing barriers to housing development.[254] The good news is that the spending package Congress passed in December 2022 included the first competitive grant program for zoning reform.[255] It was called a Yes In My Backyard (YIMBY) Grant.[256] Unfortunately, it was for $85 million which is a very small fraction of the $10 billion Biden was hoping for.[257] The President's Budget for fiscal year 2024 requests the same $85 million for "grants to identify and remove barriers to affordable housing."[258]

While more money could always be allocated, and more states and localities could always affirmatively act to facilitate zoning reforms, these are significant steps in the right direction. Obviously, there is much to be done to achieve equity and remediate past injustices, but acknowledgement of past injustice and movement toward solutions are some measure of progress.

IV. Racially Restrictive Covenants

Racially restrictive covenants have been around in the United States for over 100 years.[259] Richard Rothstein noted that as early as the 1800s, deeds in Massachusetts forbade resale to Black people or natives of Ireland.[260] During the period from 1910 to 1917, such covenants were not the preferred form of racial segregation in housing because race-based zoning was legal.[261] As previously noted, the Supreme Court outlawed race-based zoning with *Buchanan v. Warley* in 1917.[262]

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253. Rouse et al., *supra* note 60.

254. Rachel M. Cohen, *The Big, Neglected Problem That Should be Biden's Top Priority*, VOX (Mar. 1, 2023), https://www.vox.com/policy/23595421/biden-affordable-housing-shortage-supply [https://perma.cc/N37M-FRLY].

255. *Id.*

256. *Id.*

257. *Id.*

258. *FY24 Budget Chart for Selected Federal Housing Programs*, NAT'L LOW INCOME HOUS. COAL. (July 11, 2023), https://nlihc.org/sites/default/files/House_HUD-USDA_Budget-Chart_FY24.pdf [https://perma.cc/E6LM-YY4N].

259. ROTHSTEIN, *supra* note 28, at 78.

260. *Id.*

261. *See, e.g.*, Rigsby, *supra* note 214 ("Prior to the Supreme Court's *Buchanan v. Warley* decision in 1917, city zoning ordinances across the country legally forbade minorities from occupying blocks where the majority of residents were white."); Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1983) (discussing facially racial zoning ordinances in Baltimore in 1910).

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

In 1926, the Supreme Court held in *Corrigan v. Buckley* that "[i]ndividual invasion of individual rights is not the subject-matter of the [Fourteenth] Amendment."[263] This meant that racially restrictive covenants were not within the purview of the Fourteenth Amendment and that they would be upheld by the courts. After *Corrigan*, private individuals, real estate professionals, banks, developers, and even the Federal Housing Administration strongly encouraged the use of racially restrictive covenants to increase or preserve property values.[264]

The legal enforceability of race-based covenants ended with the Supreme Court's decision in *Shelley v. Kraemer* in 1948.[265] The Court in *Shelley* did not hold that racially restrictive covenants were illegal, they simply forbade their enforcement through state action.[266] Unfortunately, from 1948 to 1968 (when the Fair Housing Act was passed), "hundreds of thousands" of new racially restrictive covenants were recorded to signal racially hostile attitudes.[267]

In private agreements, penalties for violating racially restrictive covenants were often steep fines.[268] Racially restrictive covenants often automatically renewed until a majority vote of lot owners chose to abandon the covenants.[269] Sometimes the fines for violating racially restrictive covenants even exceeded the value of the home at issue.[270] In 1953, Olive Barrows, a white woman from California, sued Leola Jackson, another white woman, for $11,600 in damages for breaching a racially restrictive covenant in their neighborhood.[271] The Court held that it would "not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity . . . ."[272] The fact that five years after the Supreme Court's decision in *Shelley*, it still had to clarify that

263. Corrigan v. Buckley, 271 U.S. 323, 330 (1926).

264. Swanson, *supra* note 13, at 132–33.

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

266. *Id.* at 38–39.

267. SLATER, *supra* note 12, at 161.

268. *See* Catherine Silva, *Racial Restrictive Covenants History*, UNIV. OF WASH. (2008), https://depts.washington.edu/civilr/covenants_report.htm [https://perma.cc/UD4V-W2KE] ("If an owner violated the restriction, they could be sued and held financially liable. Because of this legal obligation, racial restrictions were rarely contested, which is the key reason why they were so effective.").

269. ROTHSTEIN, *supra* note 28, at 90 (noting that in a subdivision called Westlake, fines for violating racially restrictive covenants could total $16,000 where homes were valued at $15,000).

270. *Id.*

271. Barrows v. Jackson, 346 U.S. 249 (1953).

272. *Id.* at 258.

money damages for breach of a racially restrictive covenant were unavailable, speaks to the pervasive nature of race-based covenants in the United States during that era.

In 1968, in the wake of Dr. Martin Luther King, Jr.'s assassination, Congress passed the Fair Housing Act and finally made racially restrictive covenants illegal to create.[273] Section 3604(a) of the Fair Housing Act makes it illegal to deny housing to anyone on the basis of race.[274] To deny refers to "any conduct which makes housing unavailable, as well as all practices that have the effect of denying dwellings on prohibited grounds, and that in any way impede, delay, or discourage a prospective buyer or renter."[275] While racially restrictive covenants clearly denied housing to protected classes, in violation of the Fair Housing Act, they remained a strong signal to outsiders about local racial attitudes.[276] Many white people, deprived of the legality of drafting racially restrictive covenants, enforced housing segregation through violence.[277]

It took time for the nation to figure out how to respond to the Fair Housing Act as it related to race-based covenants. In November 1969, the Department of Justice sent letters to the presidents of the eighteen major title companies in the United States advising them that re-printing race-based covenants in their title policies was a violation of Section 3604(c) of the Fair Housing Act.[278] In 1972, the Court of Appeals for the District of Columbia Circuit enjoined the recorder of deeds from accepting race-based covenants for recordation and prevented the recorder from providing copies of

273. DeNeen L. Brown, *The Fair Housing Act Was Languishing in Congress. Then Martin Luther King Jr. Was Killed*, WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/04/11/the-fair-housing-act-was-languishing-in-congress-then-martin-luther-king-jr-was-killed/ [https://perma.cc/TUQ4-5KWF].

274. 42 U.S.C. § 3604(a).

275. US Dept. of Hous. v. Wagner, HUDALJ No. 05-90-0775-1 (June 22, 1991), https://www.hud.gov/sites/documents/HUD_05-90-0775-1.PDF [https://perma.cc/9TGV-FHXP] (citing U.S. v. Youritan Constr. Co., 370 F. Supp. 643, 648 (N.D. Cal. 1973)).

276. *See* BROOKS & ROSE, *supra* note 11, at 6 ("The fact that racial covenants continued to be written after *Shelley* suggests that . . . a major function of racial covenants was to allow white neighbors to identify themselves as allies in a preference for segregation . . . .")

277. *See* Jeannie Bell, *The Fair Housing Act and Extralegal Terror*, 41 IND. L. REV. 537, 542 (2008) (noting, for example, white resistance in Illinois in the 1950s that included "confrontations, protesting, picketing, in addition to violent attacks.").

278. Letter from Jerris Leonard, Former U.S. Assistant Att'y Gen., Dep't Just., to Herman Berniker, President, Title Guarantee Co. (Nov. 26, 1969) (on file with Lincoln Memorial Duncan Sch. of L. Libr.).

instruments containing racially restrictive covenants unless they were stamped with a notice stating that the "restrictive covenants found therein are null and void."[279] Unfortunately, the legal advancements to end segregation did not end violence against Black people who moved into white neighborhoods. As Stephen Meyer noted, violence occurred through "thousands of small acts of terrorism."[280] It "persisted throughout the century, [with] the most vicious and extensive violence occurring in the North during the two decades following World War II."[281] Rubinowitz and Perry further argue that the "housing-related crimes that Meyer describes as continuing into the 1960s [actually] persisted through the rest of the century and beyond . . . ."[282] Black people were discouraged from residing in white neighborhoods through a variety of means. Disruption of water and sewer services, threats, acts of vandalism, cross burnings, arson, and physical violence were all used to perpetuate residential segregation in the United States.[283] Racially restrictive covenants continued to be used by the real estate industry until 1977, when it was sued by the Justice Department.[284]

Race-based Covenants Now

People are divided on how to handle race-based covenants that remain on the public record. Some feel that the offensive language should be removed.[285] Others feel that removal would only stymie efforts at restitution.[286] In a 2018 Sixth Circuit Court of Appeals case, *Mason v. Adams County Recorder*, an African American man

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279. Mayers v. Ridley, 465 F.2d 630, 631 (D.C. Cir., 1972).

280. STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 6 (2000).

281. *Id.*

282. Leonard Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. OF CRIM. L. & CRIMINOLOGY 335, 340 (2001).

283. Farrell Evans, *How Neighborhoods Used Restrictive Covenants to Block Nonwhite Families*, HIST. CHANNEL (Dec. 15, 2022), https://www.history.com/news/racially-restrictive-housing-covenants [https://perma.cc/GQ9Q-VLS5].

284. Quick, *supra* note 32.

285. *See* Cheryl W. Thompson, Cristina Kim, Natalie Moore, Roxana Popescu & Corinne Ruff, *Racial Covenants, a Relic of the Past, Are Still on the Books Across the Country*, NPR (Nov. 17, 2021), https://www.npr.org/2021/11/17/1049052531/racial-covenants-housing-discrimination [https://perma.cc/9Q4L-3JAY] (discussing the efforts of various homeowners who found racially restrictive covenants to remove the language).

286. Nick Watt & Jack Hannah, *Racist Language Is Still Woven into Home Deeds Across America. Erasing It Isn't Easy, and Some Don't Want To*, CNN (Feb. 15, 2020), https://www.cnn.com/2020/02/15/us/racist-deeds-covenants/index.html [https://perma.cc/5WNG-J53F].

sued all eighty-eight Ohio county recorder's offices seeking an injunction to force them to stop printing and publishing documents with race-based covenants in them.[287] Mr. Mason also sought injunctions to remove all documents with racially restrictive covenants from view and to permit the inspection and redaction of such documents.[288] Mr. Mason lost due to lack of standing.[289]

Individual suits are costly and time consuming. Recognizing this, some state legislatures have begun to address racially restrictive covenants through statutory reform. These reforms generally take four main approaches: notification, repudiation, modification, and redaction.[290]

Notification statutes take the least obtrusive approach and simply post a notice, whether in a statute, on the wall of the public records office, or as a disclaimer on a website, that states that the land records may contain racially restrictive covenants that are null and void and legally unenforceable.[291] Florida has a statute with a notification provision.[292]

Repudiation takes it a step further than notification because it attaches the notification about the illegality and unenforceability of the discriminatory statement directly to the offending document.[293] The Indiana Code includes a repudiation provision.[294]

Modification removes the offensive language from the property owner's deed.[295] This approach is the second most comprehensive of the four reforms. Texas has adopted modification.[296]

Finally, the most far-reaching reform is redaction. Redaction removes all discriminatory language related to the race-based covenant from the land records.[297] The original deeds containing the repugnant language are typically stored in an archival facility and

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287. Mason v. Adams Co. Recorder, 901 F.3d 753, 755 (6th Cir. 2018).

288. *Id.*

289. *Id.* at 757.

290. *Housing Discrimination, Addressing Illegal Covenants in Historic Land Records*, AM. LAND TITLE ASS'N, https://www.alta.org/media/pdf/advocacy/housing-discrimination-addressing-illegal-covenants-in-historic-land-records.pdf [https://perma.cc/76SN-Q6A2].

291. Swanson, *supra* note 13, at 154.

292. FLA. STAT. § 712.065(1) (2022).

293. *Housing Discrimination, Addressing Illegal Covenants in Historic Land Records*, *supra* note 290.

294. IND. CODE § 32-21-15 (2021).

295. Swanson, *supra* note 13, at 156.

296. S. 30, 87th R.S. ch. 532 § .0261(b) (codified as Tex. Prop. Code Ann. § 5.0261 (2021)).

297. *Housing Discrimination, Addressing Illegal Covenants in Historic Land Records*, *supra* note 290.

are no longer part of the chain of title to the property.[298] The State of Washington has codified redaction.[299] Washington's move toward redaction has not been without controversy. In the Washington Supreme Court case, *In re Lots 1 & 2*, the Court was tasked with determining whether the public records office had a duty to remove void provisions from the record.[300] Before the Washington Supreme Court made its determination, the Washington Legislature amended the prior statute to clarify that there was such a duty on the part of the public records offices.[301] Not all states have taken action to adopt one of the four types of reform.[302] As more states move towards reform, the visual and psychological impact of racially restrictive covenants may decrease, but the economic effects will linger on.

V. Race Nuisance

A hybrid type of real estate discrimination was the race nuisance case, sometimes referred to as "judicial zoning."[303] In race nuisance cases, Black property owners were sued by white (in nearly all instances) property owners alleging that the Black-owned and/or Black-operated property was a nuisance.[304] The race nuisance cases discussed here began at the end of legal racialized zoning and extended into the 1950s.[305] These cases involved a dance hall, a hospital, and a church that were each either owned or operated by Black individuals.[306] During this era, many establishments "obsessed over preserving the 'racial purity'" and excluded Black patrons.[307] Since Black people were unable to relax

298. Swanson, *supra* note 13, at 157.

299. WASH. REV. CODE. ANN. § 49.60.227 (West 2022).

300. *In re* That Portion of Lots 1 & 2, 199 Wash. 2d 389, 391, 394 (2022).

301. *Id.* at 399–400.

302. *See* Amanda Holpuch, *Illinois Homeowners Can Now Remove Racist Clauses from Their Property Deeds*, N.Y. TIMES (Jan. 20, 2022), https://www.nytimes.com/2022/01/20/us/illinois-housing-deed-racism.html [https://perma.cc/MCM3-BGV2] (noting that by 2022, only fourteen states have passed laws removing or modifying racially restrictive language in property covenants).

303. BROPHY ET AL., *supra* note 203, at 63.

304. Not all white plaintiffs were successful in race nuisance cases. *See* Thoenebe v. Mosby, 101 A. 98 (Pa. 1917) (finding a black dance hall was not a nuisance in Pennsylvania). Godsil posits that the race nuisance cases where white plaintiffs lost might have been instances where a small number of white landowners "were sacrificed for the preservation of racial segregation." Godsil, *supra* note 14, at 509.

305. *See infra* notes 309–21 and accompanying text.

306. *Id.*

307. Amy Leigh Wilson, *A Unifying Anthem or Path to Degradation: The Jazz Influence in American Property Law*, 55 ALA. L. REV. 425, 431 (2004) (arguing that

at a dancehall, seek medical attention, or worship with white people in most places, it was necessary for Black-owned or operated establishments to exist. Race-based zoning and racially restrictive covenants made it very challenging for Black-owned businesses, or establishments catering to Black patrons, to find operating locations.[308] When a location was finally secured, race nuisance cases were an impediment to their continued existence.

In *Fox v. Corbitt*, the owner of a grocery store in Nashville sued the Black owner of a saloon alleging that large crowds of Black individuals "of low order" were assembled in and around the saloon who were "drunk, boisterous, and quarrelsome."[309] The Tennessee Supreme Court upheld the lower court's determination that the saloon was an abatable nuisance and supported damages based upon the depreciation in value of the grocer's property because of the nuisance.[310] Having been unable to prevent the land next-door to his grocery store from being owned and operated by Black people, Fox was successful at decreasing the value and productivity of the Black-owned land through his nuisance claim.[311] While preventing nuisance is generally a race-neutral endeavor, the Court here made sure to reference that the saloon was frequented by Black patrons of a "low order."[312] This area of the law is sometimes called "judicial zoning" because the courts accomplish what municipalities (after *Buchanan*) often cannot—zoning by race.[313]

In *Giles v. Rawlings*, a homeowner sued a Black hospital praying for relief from the "kind and character of diseases," "obnoxious" odor, careless dress, and noise "whether from the effects of being treated" or the "nature" of the Black patients.[314] The Supreme Court of Georgia reversed the lower court's denial of an injunction to abate the nuisance and remanded it to the lower court

after the 1920s the Jazz Age furthered integration because of the popularity of Black musicians and dancers).

308. *See generally* Wilson, *supra* note 307.

309. Fox v. Corbitt, 194 S.W. 88, 88 (Tenn. 1916); *see also* Green v. State ex rel. Chatham, 56 So.2d 12 (Miss. 1952) (holding that a Black dance hall with a juke box was a nuisance); Trueheart v. Parker, 257 S.W. 640, 641 (Tex. Civ. App. 1923) ("To those that business or pleasure had lured to the dance, it was a terpsichorean dream of pleasure, while to the unfortunate denizens of the homes near by it was a terrible nightmare, and while the dancers chased the fleeting hours with flying feet to the sensuous strains of dance hall music, the residents tossed upon sleepless beds.").

310. *Fox*, 194 S.W. at 89.

311. *Id.*

312. *Id.* at 88.

313. BROPHY ET AL., *supra* note 203, at 63.

314. Giles v. Rawlings, 97 S.E. 521, 521–22 (1918).

for reconsideration.[315] The action of the Court here created the opportunity for the lower court to shut down the hospital if it determined that it was a nuisance. It is noteworthy that on the same property as the Black hospital there was a larger white hospital.[316] Interestingly, the larger white hospital was not alleged a nuisance by the neighbor, but the smaller Black one was. It is likely that the white hospital had far better facilities and treatment for its patients (which made it less of a problem), but it is just as likely that the homeowner was unwilling to live in close proximity to Black people. This racial animus is supported by the fact that the homeowner complained of the noise from automobiles used to haul away the dead from the Black hospital.[317] Instead of having compassion for the large number of dead people coming from the Black hospital, the homebuyer was annoyed enough by the sound of the vehicles used to dispose of their dead bodies that he filed a lawsuit to shut down the entire hospital.

In *Morison v. Rawlinson*, white residents petitioned the city council to have a Black church declared a nuisance.[318] The city council adopted a resolution that declared the church a public nuisance.[319] The Supreme Court of South Carolina held that the church services constituted a public nuisance.[320] It found that the noise of the church service, "with its unending repetition, accompanied by breaches of the peace, tends to shatter the nervous system and impair the health of those subjected to it . . . ."[321] It shocks the conscience that a southern city would impede its Black residents' ability to worship, given that but for the Trans-Atlantic Slave Trade most descendants of Africans in the United States would likely not have converted to Christianity. The use of race nuisance cases was one of many mechanisms working in tandem to discriminate in access to housing. As discussed previously, sometimes the discrimination came directly from the government, and other times it was achieved through the private sector.

315. *Id.*
316. *Id.* at 521.
317. *Id.* at 576.
318. Morison v. Rawlinson, 7 S.E.2d 635 (S.C. 1940).
319. *Id.* at 637.
320. *Id.* at 638.
321. *Id.*

Modern Day Race Nuisance

Henderson and Jefferson-Jones examine the modern phenomena of "#LivingWhileBlack."[322] Much like the race nuisance cases, "#LivingWhileBlack" incidents focus on the performance of particular activities by Black individuals that result in the involvement of law enforcement and security.[323] It is not the activities Black individuals engage in that are the problem; it is the fact that Black individuals are engaged in the activities. "#LivingWhileBlack" incidents stem from benign activities like shopping, driving, birdwatching, and jogging.[324] Much like worshipping at church, dancing at a nightclub, and visiting a hospital while ill are all generally acceptable activities, "#LivingWhileBlack" focuses on how the very presence of Black people may constitute a nuisance.[325] The link between the modern phenomenon of white 911 callers seeking to displace Black people from shared spaces and historic race nuisance cases is strong. As Henderson and Jefferson-Jones note, "callers in #LivingWhileBlack incidents have consistently leveraged property concepts of entitlement and belonging to advocate for the physical ouster of Black people from shared spaces."[326]

Sometimes, the modern-day equivalents of the race nuisance cases are seen through anti-loitering protocols.[327] In the twenty-first century, nuisance has also been used to target sex work, drug transactions, the gathering of individuals, and 911 calls by victims of domestic violence.[328] As previously mentioned, the Citywide Nuisance Abatement Program (CNAP) from Los Angeles allows the city attorney to file civil injunctions against owners of "nuisance" properties.[329] The theory behind CNAP is that "controlling and revitalising the physical environment reduces crime."[330] Of the 121 CNAP injunctions filed between 2010 and 2018, 80% of the lawsuits were in census tracts that are 75% Black and Latino.[331] This

322. Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. UNIV. L. REV. 863 (2020).

323. Lolita Buckner Inniss, *Race, Space, and Surveillance: A Response to #LivingWhileBlack: Blackness as Nuisance*, 69 AM. L. REV. F. 213 (2020).

324. *Id.* at 214–17.

325. *Id.* at 218.

326. Henderson & Jefferson-Jones, *supra* note 322, at 872.

327. Godsil, *supra* note 14, at 554.

328. GRAZIANI ET AL., *supra* note 19, at 442.

329. *Id.*

330. *Id.* at 444.

331. *Id.*

indicates that nuisance law is still being used to complicate land access for minorities in the present.

In another dramatic nuisance reduction strategy, a California city created a special police unit to target Black households suspected of using Section 8 vouchers.[332] In response to an increase in the number of Section 8 families in Antioch, California, Antioch residents formed a citizens' organization to try to reduce the number of families using Section 8 vouchers in the city.[333] Private citizens submitted complaints to this special police unit and the officers took drastic measures, including searching the homes of Black women and using any evidence found to submit complaints to the county housing authority to try to get their Section 8 vouchers revoked.[334] Similar techniques were used in Lancaster and Palmdale, two other California cities.[335]

Minorities targeted by this harassment filed suits against Lancaster, Palmdale, and Antioch.[336] All three settled, with the parties in the Antioch case agreeing to more transparency on the part of the city, not to focus CNAP initiatives on Black recipients of Section 8 vouchers, and damages (in the amount of $180,000 to be split between the five plaintiffs) and attorneys' fees (another $180,000).[337] In the Lancaster and Palmdale case settlement, the Housing Authority of Los Angeles County agreed to pay nearly $2 million to the parties that were discriminated against.[338] The Lancaster and Palmdale cases were particularly egregious because once a (white) resident filed a complaint, a Black or Latino household was "aggressively investigated" for "largely noncriminal activity" with the goal of having their Section 8 vouchers revoked by asserting "evidence of lease violations."[339] White residents and groups persuaded legislative bodies to pass nuisance ordinances to

332. Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1544 (2012).

333. *Id.*

334. *Id.* at 1545.

335. *Id.*

336. Cmty. Action League v. City of Palmdale, No. 11-4817, 2012 U.S. Dist. Lexis 189977 (C.D. Cal. Feb. 1, 2012); Williams v. City of Antioch, No. 08-2301, 2012 U.S. Dist. Lexis 49096 (N.D. Cal. Mar. 8, 2012).

337. *Williams*, 2012 U.S. Dist. Lexis 49096, at *6.

338. *LA County Housing Agency, Palmdale, Lancaster Settle Section 8 Discrimination Case*, AP (July 20, 2015), https://www.cbsnews.com/losangeles/news/la-county-housing-authority-agrees-to-2m-settlement-in-section-8-discrimination-lawsuit/ [https://perma.cc/9EJW-VHPS].

339. Ocen, *supra* note 332, at 1568.

effectively excluded Black Section 8 voucher recipients.[340] This is reminiscent of nuisance cases from nearly a century ago that impacted Black-owned businesses and churches. Now, just as then, white people are weaponizing the law to remove unwanted Black people from spaces that white people prefer to remain homogenous. The weapon of choice, in these cases, was nuisance law. While there appears to be a shift from using nuisance against Black-owned businesses historically, to targeting Black households in residential settings in the present, Black people are still disproportionately impacted by nuisance actions based upon race.[341] Hopefully, increased federal resources aimed at fair housing will continue to stand up to discrimination as it occurs. This is definitely some progress, but real movement toward eradicating real estate discrimination requires reenforced infrastructure and legislation to preempt using nuisance law as a tool for race-based exclusion.

V. Racial Reverters

The final type of historic real estate discrimination to be explored is the racial reverter. Racial reverters are unique because they effectuate racial discrimination without judicial enforcement.[342] Racial reverters most often take the form of fee simple determinables.[343] A fee simple determinable is a conveyance created with the key words "so long as," "while," "during," or "until."[344] The future interest accompanying the fee simple determinable is the possibility of reverter.[345] Its purpose is to "revest title in the grantor upon the occurrence of a named event."[346] The named event, in the case of racial reverters, was typically the use of the property by anyone other than "members of the White Race."[347] The future interest accompanying the fee simple determinable is the possibility of reverter. The possibility of reverter operates automatically, is not a restraint on alienation, and is not within the scope of the Rule Against Perpetuities.[348] The fee

340. *Id.* at 1576–79.

341. *See generally* Henderson & Jefferson-Jones, *supra* note 322; Ocen, *supra* note 332.

342. BROOKS & ROSE, *supra* note 11, at 179.

343. Peter H. Gerns, *Constitutional Law—Equal Protection—Use of Fee Simple Determinable to Enforce Racial Restrictive Provisions*, 34 N.C. L. REV. 113 (1955).

344. Swanson, *supra* note 15, at 158–59 n.246.

345. *Id.* at 158.

346. Gerns, *supra* note 343, at 116.

347. Hermitage Methodist Homes of Va., Inc. v. Dominion Trust Co., 387 S.E.2d 740, 741 (Va. 1990).

348. BROOKS & ROSE, *supra* note 11, at 73–78, 179.

simple determinable thus creates a fairly effective mechanism for infecting land transactions with the poison of racial discrimination.

One of the more famous post-*Shelley* cases involving a racial reverter stemmed from a series of 1929 deeds conveying land to the city of Charlotte, North Carolina, for use as parks, playgrounds, and golf courses "to be used and enjoyed by persons of the white race only."[349] The North Carolina Supreme Court held in 1955 that the use of the golf course by non-white persons would trigger the possibility of reverter, and the property would revert back to the grantors or their heirs.[350] They further elaborated that the "operation of this reversion provision is not by any judicial enforcement by the State Courts of North Carolina," that *Shelley* "has no application," and appellants' rights were not violated under the Fourteenth Amendment to the U.S. Constitution.[351] The Supreme Court's refusal to review the case suggested that racial reverters might be viable mechanisms for preserving segregation.[352]

The Supreme Court finally had the occasion to take this issue up in 1970 with *Evans v. Abney*.[353] In 1911, Senator A.O. Bacon conveyed property, through his will, in trust to the City of Macon to be used as a public park "for the exclusive use of the white people of that city."[354] In a prior case, *Evans v. Newton*, the Court had held that "continued operation of Baconsfield as a segregated park was unconstitutional."[355] This necessitated the Supreme Court of Georgia's determination on the applicability of *cy pres* to reform the conveyance to keep it from failing.[356]

Cy pres means "as near as possible."[357] When a charitable trust becomes impossible to fulfill, *cy pres* can be used to reform the trust while attempting to conform as nearly as possible to the grantor's intent.[358] The Court noted that "since racial separation was found to be an inseparable part of the testator's intent, the Georgia courts held that the State's *cy pres* doctrine could not be used to alter the

349. Charlotte Park and Recreation Comm'n v. Barringer, 88 S.E.2d 114, 122 (N.C. 1955) *cert. denied*, 350 U.S. 983 (1956).

350. *Id.* at 124–25.

351. *Id.* at 123.

352. BROOKS & ROSE, *supra* note 11, at 180.

353. Evans v. Abney, 396 U.S. 435, 436 (1970).

354. *Id.*

355. *Id.* at 440 (citing Evans v. Newton, 382 U.S. 296 (1966)).

356. *Id.*

357. *Cy Press: Charitable Trusts*, CORNELL L. SCH. (Aug. 2022), https://www.law.cornell.edu/wex/cy_pres_charitable_trusts [https://perma.cc/HET2-V2C5].

358. *Id.*

will to permit racial integration."[359] *Cy pres* could not be used because the separation of the races was "an inseparable part" of the grantor's intent.[360] When trusts cannot be reformed through *cy pres*, under Georgia law, a resulting trust is created in favor of the grantor, testator, or their heirs.[361] This resulting trust caused the park to revert to Senator Bacon's heirs (rather than a possibility of reverter—as seen in the *Charlotte Park* case).[362]

When the State of Georgia declined to use *cy pres* to reform the trust, it failed, and the U.S. Supreme Court held that the termination of the trust, and resulting closure of the park to everyone, presented "no violation of constitutionally protected rights."[363] In fact, the Court asserted that closure of the park eliminated all discrimination against Black people because "termination of the park was a loss shared equally" by white and Black citizens of Macon.[364] The Supreme Court failed to take into account the fifty-five odd years that white people had exclusive use of the park before *Newton* in their calculation of equal loss.[365]

Racial Reverters Now

What is the current status of the law regarding racial reverters? In response to *Abney*, in 1971, scholar Lawrence Casazza wrote that it seemed unlikely that the Court would extend *Shelley* to possibilities of reverter.[366] Casazza further stated that "[i]t would seem that the few private racial restrictions which are given effect 'automatically,' by the operation of law, will not be struck down as involving state action violative of the Equal Protection Clause."[367] So far, Casazza has been right. The Supreme Court has not revisited this issue since 1970.[368]

359. *Abney*, 396 U.S. at 442.

360. *Id.*

361. *Id.* at 442–43.

362. *Id.*

363. *Id.* at 444.

364. *Id.* at 445.

365. *Newton*, 382 U.S. 296.

366. Lawrence J. Casazza, *Constitutional Law – Estates – Reversion of the Res of a Charitable Trust Which Failed Because It Necessitated Racially Discriminatory State Action Is Not Violative of the XIVth Amendment Where the Reversion Is by Operation of State Law, and Due to the State Court's Refusal to Apply the Doctrine of Cy. Pres.*, 2 LOY. U. CHI. L. J. 390, 399 (1971).

367. *Id.*

368. Michael Klarman, *An Interpretive History of Equal Protection*, 90 MICH. L. REV. 213, 293 (1991) (describing how *Abney* and a later case *Moose Lodge No. 107 v. Irvis* represent the entirety of the Burger Court's decisions on state action and equal protection, with *Moose Lodge* relating instead to granting of liquor licenses instead

Are there other tools for combatting racial reverters? Yes, but maybe not where one would expect. When contemplating statutes that fight discrimination in real property, the Fair Housing Act is usually at the forefront. It prohibits, among other things, discrimination in the sale or rental of real property on the basis of race, et cetera.[369] It does not prohibit discrimination in use.[370] Imagine a scenario where "Racist Grandpa" decides to leave property to "Friend" in his will, so long as it is only occupied by members of the white race. Implicit in this conveyance is a possibility of reverter that will automatically be triggered if Friend allows use of the property by a non-white individual. The Fair Housing Act will not prevent the application of the possibility of reverter to dispossess the non-white user of the property of the land.

What about 42 U.S.C. Section 1982? Will it prevent the possibility of reverter from conveying the land back to Racist Grandpa's heirs? This code section originated in the Civil Rights Act of 1866, and the Supreme Court relied on it in *Jones v. Alfred H. Mayer Company*.[371] Section 1982 states that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[372] This code section appears to have the same limitations as the Fair Housing Act, though an argument could potentially be made that "hold" is analogous to use. Worth noting is that the Supreme Court did not mention either section 1982 or the Fair Housing Act in its consideration of *Abney*.[373]

In *Charlotte Park and Recreation Commission v. Barringer*, the Supreme Court of North Carolina held that upholding the racial reverter did not violate the appellants' rights under Sections 1981 and 1983.[374] Section 1981 states that all persons shall have "the same right in every State and Territory to . . . the full and equal benefit of all laws and proceedings for the security of persons and

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of *Abney*'s focus on racial reverters).

369. 42 U.S.C. § 3604.

370. *Id.*

371. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

372. 42 U.S.C. § 1982.

373. *Abney*, 396 U.S. at 447 (summarizing the Court's analysis of the various arguments by petitioners and applicable law, where the Court analyses the Fourteenth Amendment and the *cy pres* doctrine without mention of Section 1982 or the Fair Housing Act).

374. Charlotte Park and Recreation Comm'n v. Barringer, 88 S.E.2d 114, 123 (N.C. 1955).

property as is enjoyed by white citizens . . . ."[375] Section 1983 states that every person who subjects a citizen of the United States to the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . . for redress . . . ."[376] The combination of the lack of discussion of Section 1982 by the Supreme Court in *Abney* and the explicit statement that Sections 1981 and 1983 were not violated in *Charlotte Park and Recreation* makes it seem unlikely that a Section 1982 argument is likely to prevail against a racial reverter.

What recourse is there? Surely jurisprudence is not stagnated by Senator Bacon's 1911 will. Fear not, some state statutes are efficiently solving the problem of racial reverters. Take, for example, a Tennessee statute which states that "[e]very condition, restriction, or prohibition, including a right of entry or possibility of reverter, that directly or indirectly limits the use or occupancy of real property on the basis of race . . . is void . . . ."[377] Arkansas, Hawaii, Idaho, Illinois, Massachusetts, Michigan, New Hampshire, New Jersey, and Washington join Tennessee as states with similar codifications against racial reverters.[378] Many of the statutes not only explicitly state that insertion of these provisions into land conveyancing documents is impermissible but also state that honoring, or attempting to honor, racial reverters is disallowed.[379]

In states without statutes prohibiting racial reverters, their use depends upon the grantees' willingness to relinquish possession.[380] While the possibility of reverter transfers the title to the property back to the grantor (or their heirs) by operation of law and without state action,[381] this assumes the grantee's peaceful relinquishment.[382] A scholar, Peter Gerns, aptly noted in 1955, if the grantee refuses to vacate the premises, the grantor would have

375. 42 U.S.C. § 1981.

376. 42 U.S.C. § 1983.

377. TENN. CODE ANN. § 4-21-604 (1984).

378. *See* ARK. CODE ANN. § 16-123-206 (2023); HAW. REV. STAT. ANN. § 515-6 (LexisNexis 2023); IDAHO CODE § 55-616 (2023); 775 ILL. COMP. STAT. 5/3-105 (LexisNexis 2023); MASS. ANN. LAWS CH. 184, § 23B (LexisNexis 2023); MICH. COMP. LAWS SERV. § 37.2505 (LexisNexis 2023); N.H. REV. STAT. ANN. § 354-A:13 (LexisNexis 2023); N.J. STAT. ANN. § 46:3-23 (West 2023); WASH. REV. CODE ANN. § 49.60.224 (LexisNexis 2023).

379. TENN. CODE ANN. § 4-21-604 (2023); N.H. REV. STAT. ANN. § 354-A:13 (LexisNexis 2023); ARK. CODE ANN. § 16-123-206 (2023); MICH. COMP. LAWS SERV. § 37.2505 (LexisNexis 2023); IDAHO CODE § 55-616 (2023); WASH. REV. CODE ANN. § 49.60.224 (LexisNexis 2023). This list is not exhaustive.

380. Gerns, *supra* note 343, at 117.

381. Casazza, *supra* note 366, at 399.

382. Gerns, *supra* note 343, at 117.

to bring an action in ejectment to regain possession of the premises and that might very well constitute state action (under a *Shelley* lens).[383] Gerns also noted that this action in ejectment might be akin to removing an adverse possessor and might not violate the grantee's constitutional rights.[384] A lot has changed since Gerns made this assertion in 1955. Today, it is likely that court involvement in regaining possession would likely constitute the requisite state action under *Shelley*.

Current title insurance industry practices provide some clarity on how to deal with racial reverters in real estate transactions. A sample ALTA Loan Policy of Title Insurance from 2021 states that discriminatory covenants are illegal and unenforceable at law.[385] Title companies perform searches of the real property records to determine whether or not to issue owner's policies and lender's policies of title insurance.[386] In those searches, they find both racially restrictive covenants and racial reverters.[387] Standard practice is to treat discriminatory covenants as encompassing racial reverters and any other race-based exclusion.[388]

While a majority of states have not yet codified a ban on the creation of racial reverters, or a ban on honoring, or attempting to honor them, there is progress. These mechanisms are being used less in the twenty-first century, as racial animus wanes and the desire for complex land transfer mechanisms declines. Additionally, real estate developers have used them infrequently in the years following the 1950s.[389] Banks were disinclined to extend loans where racial reverters were present out of fear of the possibility of reverter and the potential for automatic reversion back to the grantor.[390] Cautious optimism is the best path regarding racial reverters. The precedent, *Abney*, is still viable for virulent hatred to prevail, assuming the state declines to reform through *cy pres* and has no statute to prevent creation or honoring of racial reverters.

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383. *Id.* at 117.

384. *Id.*

385. *ALTA Loan Policy 2021 v. 1.00*, AM. LAND TITLE ASS'N (2021), https://www.alta.org/policy-forms/ [https://perma.cc/QU8Y-WCP4] (ALTA Loan Policy of Title Insurance, Schedule B, Exceptions from Coverage).

386. James Chen, *Title Search: What It Is, How It's Done, and Title Insurance*, INVESTOPEDIA (Apr. 7, 2023), https://www.investopedia.com/terms/t/titlesearch.asp [https://perma.cc/JZ7B-PS24].

387. Interview with Erica McClure, Esq., V.P. of Commercial, Melrose Title Company (July 14, 2023).

388. *Id.*

389. BROOKS & ROSE, *supra* note 11, at 180.

390. *Id.*

Conclusion

The ramifications and inequities of centuries of real estate discrimination in this country continue to tarnish the progress being made. How can this be rectified and redressed? Dr. Martin Luther King, Jr. once wrote,

> We need a powerful sense of determination to banish the ugly blemish of racism scarring the image of America. We can, of course, try to temporize, negotiate small, inadequate changes and prolong the timetable of freedom in the hope that the narcotics of delay will dull the pain of progress. We can try, but we shall certainly fail. The shape of the world will not permit us the luxury of gradualism and procrastination. Not only is it immoral. It will not work . . . . It will not work because it retards the progress . . . of the nation as a whole.[391]

As Dr. King predicted sixty years ago, gradualism and procrastination have not worked to eradicate racism, or, as this article argues, real estate discrimination in the United States. As previously highlighted, substantial progress has been made to eradicate racial zoning, race-based covenants, race nuisance, and racial reverters. Some areas have seen more progress than others, and more must be done. Malcom X once said that "[l]and is the basis of all independence; [l]and is the basis of freedom, justice, and equality."[392]

If land creates independence, then more pathways to homeownership need to be created. The Joint Center for Housing Studies of Harvard University acknowledges that "affordable housing is in short supply."[393] Local, state, and federal governments need to actively support the eradication of real estate discrimination and support land (and wealth) redistribution. At the federal level, Congress needs to pass bills like House Resolution 3507, introduced May 18, 2023, which would discourage discriminatory land use policies and remove barriers to affordable housing.[394] Some of the ways House Resolution 3507 could more equitably distribute access to "freedom, justice, and equality" would be through expanding high-density and multifamily housing, reducing minimum lot sizes, creating transit-oriented development zones, eliminating or reducing minimum square footage

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391. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 140–41 (1963).

392. Malcom X, *Message to the Grass Roots Delivered at the Northern Negro Grass Roots Leadership Conference in Detroit (Nov. 10, 1963)*, *reprinted in* MALCOLM X SPEAKS 9 (George Breitman, ed., 1990).

393. JOINT CTR. FOR HOUS. STUD., *supra* note 77, at 33.

394. Yes in My Backyard Act, H.R. 3507, 118th Cong. (2023) (introduced May 18, 2023).

requirements, and donating vacant land for affordable housing projects.[395] If passed, House Resolution 3507 has the power to right many wrongs. Sadly, LexisNexis gives the bill a "low chance to pass next stage."[396]

At a local level, reparations are starting to gain some traction. Scholars from the National Bureau of Economic Research conclude that reparations "lead to immediate reductions in racial wealth inequality."[397] Reparations can take many forms such as direct payments and land-based wealth distribution.[398] The city of St. Paul, Minnesota, is experimenting with reparations.[399] Through its "Inheritance Fund," qualifying descendants of the historic African American "Rondo" neighborhood (decimated when the city plowed through it to construct Interstate 94) can receive up to $110,000 in downpayment assistance or up $80,000 in the Homeowner Rehab Program.[400] While this has the potential to effectuate massive and immediate positive change for St. Paul's Black residents, the City of St. Paul has closed applications "following a high volume of applications."[401] The city notes that all previously submitted applications will be processed during this pause.[402] Hopefully, this valuable resource will open up again soon.

Whatever the efforts to remedy real estate discrimination and achieve equity, the processes will take acknowledgment of past—and present—injustices, time, perseverance, and patience. These are not problems that can be solved quickly. This nation took centuries to create the problems that it faces, and it will take substantial effort and cooperation to rectify the harms. As Dr. King once noted about the complex plight of Black people in the United States, "[w]e will make progress if we accept the fact that four hundred years of sinning cannot be canceled out in four minutes of

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395. *Id.*

396. *118 Legislative Outlook H.R. 3507*, LEXISNEXIS, https://plus.lexis.com/api/permalink/5ae48aa2-8689-4fd4-8d38-edac6683c5fb/?context=1530671 [https://perma.cc/JXS5-HK8K].

397. Derenoncourt et al., *supra* note 85, at 4.

398. Danielle Russell, *The Power of Land: Race, Equity, and Justice*, OPENLANDS (June 18, 2020), https://openlands.org/2020/06/18/the-power-of-land-race-equity-and-justice/ [https://perma.cc/X65C-8Q22].

399. *Downpayment Assistance Program*, STPAUL.GOV, https://www.stpaul.gov/departments/planning-and-economic-development/housing/downpayment-assistance-program [https://perma.cc/Y7LV-3ZUQ].

400. *Id.*

401. *Id.*

402. *Id.*

atonement."[403] We must continue to make steadfast progress through muti-faceted approaches at all levels of government if we are to reverse the centuries of health, wealth, and equity lost through real estate discrimination.

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403. KING, *supra* note 391, at 130.