UC Law Journal

Volume 75 | Issue 6 Article 3

8-2024

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Gabriel J. Chin

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Gabriel J. Chin, *Black Equal Citizenship and Residential Segregation in the Supreme Court's Race Jurisprudence*, 75 HASTINGS L.J. 1581 (2024).
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Essays

Black Equal Citizenship and Residential Segregation in the Supreme Court's Race Jurisprudence

GABRIEL J. CHIN[†]

[†] Edward L. Barrett Jr. Chair and Martin Luther King Jr. Professor of Law, UC Davis School of Law. Thanks to the editors of the University of California Law Journal, Professor Ming Hsu Chen, and the other participants at the conference at which this paper was presented.

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INTRODUCTION

Geography, it has been said, is destiny.[1] Arranging for a disfavored minority to reside in a geographically distinct area facilitates discrimination and oppression in ways that would be difficult or impossible in communities where that minority lived amongst the majority: Political gerrymandering,[2] unfair taxation,[3] hostile legislation,[4] unequal law enforcement, inferior educational opportunities, deprivation of useful public services and access to employment, and infliction of "disamenities," undesirable land uses are all easier if minorities are concentrated. Compared to other racial and ethnic groups, African Americans now do disproportionately live in segregated enclaves, and suffer the consequences of that separation.[5] African Americans as a group have lower incomes, wealth, and educational attainment, and are more likely to be convicted of crimes or imprisoned than members of other groups. The Kerner Commission Report, issued in 1968 at the height of the Civil Rights movement, outlined many of these disparities.[6] Half a century later, African Americans' income and educational attainment has increased in real terms—but so has that of other groups. Accordingly, significant disparities between African Americans and others persist.[7]

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1. *See, e.g.*, Peter J. Hammer, *Detroit 1967 and Today: Spatial Racism and Ongoing Cycles of Oppression*, 18 J. L. SOC'Y 227, 227 (2018).

2. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960).

3. ANDREW W. KAHRL, THE BLACK TAX: 150 YEARS OF THEFT, EXPLOITATION, AND DISPOSSESSION IN AMERICA (2024) ("In New York City, assessments in predominantly Black and poor Red Hook were 82.4 percent of full market value, while those in the whiter, and wealthier, neighborhood of Brooklyn Heights were 11.8 percent. That meant that a person living in a $20,000 home in Red Hook paid the same amount of taxes as a person living in a $139,000 home in Brookyn Heights. . . . The story was the same in cities across the US.")

4. *See, e.g.*, Jew Ho v. Williamson, 103 F. 10, 23 (C.C.N.D. Cal. 1900) (enjoining discriminatory quarantine; "the operation of the quarantine is such as to run along in the rear of certain houses, and that certain houses are excluded, while others are included" to include Chinese people and exclude others); *In re* Kit, 45 F. 793, 794 (C.C.N.D. Cal. 1890) (upholding prohibition on gambling applicable exclusively to the "Chinese Quarter": "Although the limits, as defined, are generally designated and known as the 'Chinese quarter,' yet the fact is that white men as well as Chinese live and own property within these limits. Moreover, any person, without regard to his residence, race, or color, found visiting any gambling place therein, is liable to arrest and punishment.").

5. *See* STEPHEN MENENDIAN, SAMIR GAMBHIR & ARTHUR GALES, TWENTY-FIRST CENTURY RACIAL RESIDENTIAL SEGREGATION IN THE UNITED STATES (2021) https://belonging.berkeley.edu/roots-structural-racism. For an example of a judicial opinion following this reasoning, see Leaders of a Beautiful Struggle v. Baltimore Police Dep't, 2 F.4th 330, 349 (4th Cir. 2021) (Gregory C.J., concurring) ("Segregation effectively plundered Baltimore's Black neighborhoods—transferring wealth, public resources, and investment to their white counterparts—and the consequences persist today. . . . So it is no coincidence that gun violence mostly occurs in the portions of the city that never recovered from state-sanctioned expropriation. Absent reinvestment, cycles of poverty and crime have proliferated." (internal citations omitted)).

6. NAT'L ADVISORY COMM. ON CIVIL DISORDERS, REPORT ON THE CAUSES, EVENTS, AND AFTERMATHS OF THE CIVIL DISORDERS OF 1967 (1968), https://belonging.berkeley.edu/sites/default/files/kerner_commission_full_report.pdf?file=1&force=1.

7. HEALING OUR DIVIDED SOCIETY: INVESTING IN AMERICA FIFTY YEARS AFTER THE KERNER REPORT (Fred Harris & Alan Curtis, eds. 2018); JANELLE JONES, JOHN SCHMITT & VALERIE WILSON, 50 YEARS AFTER

If it is assumed that Framers of Reconstruction after the Civil War intended to create genuine equality for the newly freed formerly enslaved persons, then one might imagine that contemporary segregation of Black Americans is a legal problem, at least to the extent that it is worth asking whether that segregation is the product of unlawful discrimination in violation of the constitutional and statutory civil rights Congress created. But the Court has been remarkably uncurious about that issue. Generally, the justices of the Court addressing the issue have assumed that current residential segregation—and its segregative effects on education, employment, and other domains of life—have been the result of neutral economic pressures and voluntary choice not compelled by law. This is, of course, a conceivable empirical possibility. But given the importance of racial justice in the Constitution, and as a matter of social policy, the Court should grapple more frankly with the history, and make more informed judgments about whether the current situation is just something that happened because of free choice, or is the consequence of unlawful discrimination.

Part I of this Essay briefly outlines some of the Supreme Court jurisprudence on the nature of residential segregation, explaining that for the past fifty years, many justices have decided cases based on the assumption that housing patterns in the United States are explained by free choice. Part II challenges the Court's assumptions, outlining some of the many forms of public and private housing discrimination which are now understood to violate the Constitution and civil rights laws which have been explored in detail by recent scholarship. It proposes that discrimination was widespread, persistent and intense. This history raises substantial doubt that the free choice hypothesis can be correct, at least not without much more substantial engagement with the existence and operation of the techniques of discrimination deployed against African Americans.

I. SEGREGATION IS VOLUNTARY?

The Court and its members frequently contend or hypothesize that racial disparities are the product of free, private, and lawful market choices. Illustrating the interconnection between residence and other forms of opportunity, the issue often arises in the context of school desegregation cases. A 1976 opinion by Justice Powell, joined by Chief Justice Burger and then-Justice Rehnquist outlined the prevailing theory of residential segregation:

> The principal cause of racial and ethnic imbalance in urban public schools across the country North and South is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities.

THE KERNER COMMISSION, ECON. POL'Y INST. (2018), https://www.epi.org/publication/50-years-after-the-kerner-commission; Stephen Menendian & Richard Rothstein, with Nirali Ber, *The Road Not Taken: Housing and Criminal Justice 50 Years After the Kerner Commission Report* (2019), https://haasinstitute.berkeley.edu/sites/default/files/haas_institute_road_not_taken_kerner_publish_may_2019.pdf.

> For example, discrimination in housing whether public or private cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns The tendency of citizens of common national or ethnic origins to form homogeneous residential patterns in our cities is a familiar demographic characteristic of this country.[8]

The modern Court has also been unwilling to assume that current segregation is the product of illegal action: "The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations. 'Where resegregation is a product not of state action but of private choices, it does not have constitutional implications.'"[9]

Similarly, Justice Thomas agreed that "[a]lthough presently observed racial imbalance might result from past de jure segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices."[10] With regard to education and employment, as well as housing, the Court has hypothesized that racial disparities may be the result of free choice rather than unlawful discrimination.[11]

Preliminarily, a troubling feature of this body of jurisprudence is that it fails to account for the fact that the Court has held that the Civil Rights Act of 1866 applies to private discrimination on the basis of race—it is not limited to state

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8. Austin Indep. Sch. Dist. v. United States, 429 U.S. 990, 994 & n.5 (1976) (Powell J., concurring). *See also* Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424, 435–36 (1976) ("The fact that black student enrollment at 5 out of 32 of the regular Pasadena schools came to exceed 50% during the 4-year period from 1970 to 1974 apparently resulted from people randomly moving into, out of, and around the PUSD area. This quite normal pattern of human migration resulted in some changes in the demography of Pasadena's residential patterns, with resultant shifts in the racial makeup of some of the schools."); Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 512 (1979) (Rehnquist J., dissenting) ("Virtually every urban area in this country has racially and ethnically identifiable neighborhoods, doubtless resulting from a mélange of past happenings prompted by economic considerations, private discrimination, discriminatory school assignments, or a desire to reside near people of one's own race or ethnic background.").

9. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 736 (2007) (plurality) (citations omitted). *See also* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN), 572 U.S. 291, 321–22 (2014) (Scalia J., concurring) (quoting Freeman v. Pitts, 503 U.S. 467, 495–96 (1992)).

10. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 750 (2007) (Thomas J. concurring) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25–26 (1971); Missouri v. Jenkins, 515 U.S. 70, 116 (1995) (Thomas, J., concurring)).

11. In the business context, the Court held:

> It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as "identified discrimination" would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).

With regard to education, the Court explained: "There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion).

action or action under the color of law. In *Jones v. Alfred H. Mayer Co.*,[12] the Court explained:

> In this case we are called upon to determine the scope and constitutionality of an Act of Congress, 42 U.S.C. § 1982, which provides that:
>
> > "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." . . .
>
> We hold that § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.[13]

Presumably, when the Court asserts that state action is necessary for discrimination to be illegal or unconstitutional, the Court is using shorthand, and recognizes the authority of law to remedy all illegal discrimination even if it does not come at the hands of the state.[14] Presumably, that is, private choice is only constitutionally irrelevant when that private choice does not violate the law.

II. THE SYSTEM OF HOUSING SEGREGATION

There is a major exception to the Court's agnosticism about the causes of contemporary segregation. In *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*,[15] the Court, 5–4, upheld HUD regulations which prohibited policies having a disparate impact on the basis of race. The majority, of whom two remain on the Court as of the date of this publication, offered a history of housing in the United States which, apparently, tried to cover some of the high points of methods of housing segregation:

> *De jure* residential segregation by race was declared unconstitutional almost a century ago, but its vestiges remain today, intertwined with the country's economic and social life. Some segregated housing patterns can be traced to conditions that arose in the mid-20th century. Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities. This often left minority families concentrated in the center of the Nation's cities. During this time, various practices were followed, sometimes with governmental support, to encourage and maintain the separation of the races: Racially restrictive covenants

12. 392 U.S. 409 (1968).

13. *Id.* at 412–13. *See also id.* at 436 ("In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.") *Jones* was upheld in *Runyon v. McCrary*, 427 U.S. 160, 175 (1976), and applied to employment in *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975). *See also* Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 768 (2019).

14. *Cf.* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 207 (2023) ("[O]ur precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute.")

15. 576 U.S. 519 (2015) (internal citations omitted).

> prevented the conveyance of property to minorities; steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas. By the 1960's, these policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs.[16]

There is reason to be grateful to the Court for a tentative foray into this history, and perhaps the Court should not be faulted for not delving more deeply, because the case did not call for a comprehensive analysis of housing discrimination. Even so, the story the Court tells here is as revealing for what it omits as for what it articulates. In other contexts, the Court is capable of examining the "totality of the circumstances" and recognizes its duty to do so.[17] Indeed, its primary method of constitutional interpretation is originalism, which, if done honestly and carefully, seems to require a comprehensive examination of various historical questions.

Residential segregation by race was accomplished through a remarkable variety of techniques.[18] What follows is a preliminary effort to draw on the work of other scholars to offer a framework for a "totality of the circumstances" analysis, identifying some of the major techniques of housing discrimination in the United States. In this Essay, I draw inspiration as well as information from other scholars, notably Richard Rothstein.[19]

A. Racial Zoning

As the Court noted in *Texas Department of Housing*, an early method of segregation was racial zoning.[20] Municipalities adopted ordinances providing that a Black person could not buy property in a neighborhood where whites were the majority, and vice versa. Observing that the Civil Rights Act of 1866 provided 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," the Supreme Court unanimously struck down such a Louisville, Kentucky ordinance in *Buchanan v. Warley* in 1917.[21]

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16. *Id.* at 528–29.

17. D.C. v. Wesby, 583 U.S. 48, 60–61 (2018) (Fourth Amendment); United States v. Arvizu, 534 U.S. 266, 274–75 (2002) (Fourth Amendment); Thornburg v. Gingles, 478 U.S. 30, 79 (1986) (Voting Rights Act).

18. Charles Abrams, Forbidden Neighbors: a Study of Prejudice in Housing (1971); 1 Davis McEntire, Residence and Race: Final and Comprehensive Report to the Commission on Race and Housing (1960), https://archive.org/details/residenceracefin0000mcen/page/n439/mode/2up.

19, Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated (2017).

20. 576 U.S. at 528–29.

21. 245 U.S. 60, 78 (1917).

Notwithstanding *Buchanan*, racial zoning remained a functional tool for the next three decades.[22] One could argue that they were seeking workarounds,[23] as parties have the right to do, or one could call it a "pattern of legislative disregard for judicial holdings."[24] Whatever one's view, for decades, jurisdictions enacted and enforced variations of the law which apparently had been struck down in *Buchanan*.

In 1927, the U.S. Supreme Court reversed a Louisiana decision upholding a similar ordinance prohibiting occupancy by incongruous races, rather than ownership per se.[25] In 1930, the Court affirmed a decision of the Fourth Circuit invalidating a Richmond ordinance which tied the right to live in a neighborhood to the anti-miscegenation law, barring residence in a neighborhood in which one was prohibited from marrying the majority of the residents.[26] In 1935, the Oklahoma Supreme Court, reversing the lower court, invalidated an ordinance enacted in 1933.[27] In 1940, the North Carolina Supreme Court struck down a 1930 ordinance of Winston-Salem.[28] A related phenomenon was municipalities suing individuals who moved into racially incongruous neighborhoods on the ground that their residence created a "racial nuisance."[29]

Apparently the last reported racial zoning case was a 1950 Fifth Circuit decision striking down an ordinance of Birmingham, Alabama first enacted in 1926, one judge dissenting.[30] Unlike some earlier ordinances, segregation was imposed as part of a comprehensive zoning plan which included non-racial restrictions, but that distinction did not save it, nor did the asserted emergency situation. The City claimed in its certiorari petition that "Whites and negroes in Birmingham have abided by the classifications established by the zoning board for more than twenty years."[31]

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22. *See* Jade A. Craig, *"Pigs in the Parlor": The Legacy of Racial Zoning and the Challenge of Affirmatively Furthering Fair Housing in the South*, 40 MISS. C. L. REV. 5 (2022).

23. Davison M. Douglas, *Contract Rights and Civil Rights*, 100 MICH. L. REV. 1541, 1563 n.67 (2002).

24. R. O. Joe Cassity, Jr., *Residential Segregation Law on the Southwestern Frontier: 1889-1939*, 31 S.U. L. REV. 167, 180 (2004). *See also* ROTHSTEIN, *supra* note 19, at 46 ("Many border and Southern cities ignored the *Buchanan* decision.")

25. Tyler v. Harmon, 104 So. 200, 206 (La. 1925), *adhered to*, 107 So. 704 (La. 1926), *rev'd per curiam*, 273 U.S. 668 (1927).

26. City of Richmond v. Deans, 37 F.2d 712, 713 (4th Cir.), *aff'd per curiam*, 281 U.S. 70 (1930).

27. Allen v. Oklahoma City, 52 P.2d 1054, 1058.

28. Clinard v. City of Winston-Salem, 6 S.E.2d 867, 868 (N.C. 1940).

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

30. Monk v. City of Birmingham, 87 F. Supp. 538, 538 (N.D. Ala. 1949) (enjoining ordinance), *aff'd*, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. 940 (1951). The trial judge noted that he had previously declared the ordinances unconstitutional, but the earlier case was not a class action. 87 F. Supp. at 541.

31. Certiorari petition in City of Birmingham v. Monk, No. 673, Oct. Term, 1950, at 5, 341 U.S. 940 (1951). *See generally* Walker Mason Beauchamp, *The Legacy of Racial Zoning in Birmingham, Alabama*, 48 CUMB. L. REV. 359, 375 (2018).

Newspapers report arrests for wrongful racial occupancy long after *Buchanan v. Warley*.[32] In 2004, the *Palm Beach Post* reported that only in 1960 was the West Palm Beach segregation ordinance repealed and Black people allowed to live outside the segregated zone.[33] And as recently as 2024, the City of Boynton Beach, Florida, announced it was repealing a segregation ordinance which was still on the books.[34] It is clear that the courts did not strike down all of the ordinances, and just because they were unconstitutional according to the Supreme Court did not mean they went unenforced by local authorities.

B. RESTRICTIVE COVENANTS

The Supreme Court's first ineffective reiteration of the invalidity of racial zoning came in 1927.[35] This date was notable, because two decisions the previous year had opened the door to alternative methods of discrimination. One decision, *Village of Euclid v. Ambler Realty*,[36] upheld the general principle of zoning, with consequences noted below. In the other, *Corrigan v. Buckley*,[37] the Supreme Court seemed to uphold the use of "private" racially restrictive covenants.[38] Until 1948, courts universally held that *Corrigan* "must be taken as finally settling that question" of whether such covenants were valid under the U.S. Constitution.[39] Until *Shelley v. Kraemer*[40] invalidated judicial enforcement

32. *Segregation Case Set for Thursday*, SHAWNEE EVENING STAR (Okla), Aug. 27, 1941, at 1; *Two Fined under Segregation Act*, MADISONVILLE MESSENGER (Ky.), Feb. 11, 1941, at 1; *Floyd Wins, Charge Dismissed*, BLACK DISPATCH, June 20, 1919, at 1 (noting court decision that Oklahoma City segregation law was valid, but not violated by defendant on facts).

33. Jane Musgrave, *Push Begins to Free Area Held Hostage by Crime*, PALM BEACH POST, Dec. 8, 2004, at 8A ("Once the only place by law that blacks could live in West Palm Beach, the [Northwest Neighborhood] began a sharp decline in 1960 when a 31-year-old segregation ordinance was repealed and those who could afford to leave packed up and left.").

34. James Coleman, *Boynton Beach will Repeal Outdated Segregationist Ordinances Created in 1924*, PALM BEACH POST (Feb. 20, 2024), https://archive.is/TNKY5. *See also* Melissa Jacobs, *Segregation Law Taken off the Books*, MIAMI HERALD, July 25, 2006, at 8 (repeal by 4–1 vote of 1928 South Miami ordinance); AP, *Lubbock Repeals Segregation Ordinance*, AUSTIN AM.-STATESMAN, April 27, 2006, at B3 (noting repeal of 1923 ordinance); *Pendleton Council Repeals Segregation Ordinance*, CHARLOTTE OBSERVER, Nov. 5, 2003, at 2Y (noting repeal of 1913 ordinance).

35. Tyler v. Harmon, 104 So. 200, 206 (La. 1925), *adhered to*, 107 So. 704 (La. 1926), *rev'd per curiam*, 273 U.S. 668 (1927).

36. 297 F. 307, 313 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

37. 271 U.S. 323 (1926).

38. *See generally* RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS (2013); CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959).

39. Doherty v. Rice, 3 N.W.2d 734, 737 (Wisc. 1942). *See also* Ridgway v. Cockburn, 296 N.Y.S. 936, 942 (Sup. Ct. 1937) ("It is sufficient to say that the United States Supreme Court has held that a covenant of this precise character violated no constitutional right.").

40. 334 U.S. 1 (1948).

of racially restrictive covenants,[41] it appears that no state court or legislature invalidated them based on their own law or public policy.[42]

The premise of restrictive covenants was that they did not implicate federal law because they were mere private agreements devoid of state action. That idea was rejected as a legal matter in *Jones v. Alfred H. Mayer & Co.*[43]—private discrimination has also been illegal since 1866.[44] It was also untrue factually. As is now well known, the Federal Housing Administration "strongly encouraged private racially restrictive covenants to maintain the racial homogeneity of neighborhoods."[45] In Baltimore, after its segregation ordinance was invalidated, "[t]he Committee on Segregation undertook to encourage neighbors, government officials, and real estate agents to use restrictive covenants, peer

41. The state action did not occur only through judicial enforcement. There was also state action by in the form of states, counties, and cities recording and disseminating discriminatory covenants. 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?*, 22 CONN. PUB. INT. L.J. 126, 143 (2023). There is no right to have the state assist in private agreements by recording or disseminating documents containing them; many now prohibit recording of discriminatory covenants. *See, e.g.*, CAL. GOV'T CODE § 12956.3(b)(4) (directing that a county clerk has a duty to "[r]edact unlawfully restrictive covenants in the records of the respective county recorder's office, subject to county counsel approval, by rerecording a copy of the original document with the unlawfully restrictive language redacted"); IDAHO CODE ANN. § 55-820 ("No deed recorded on or after July 1, 2022, shall contain a reference to a restrictive covenant prohibited by section 55-616(1), Idaho Code. A county clerk may refuse to accept any deed submitted for recordation that references any such restrictive covenant."); MO. ANN. STAT. § 442.403(3) ("A recorder of deeds may refuse to accept any deed submitted for recording that references the specific portion of any such restrictive covenant."); N.J. STAT. ANN. § 46:15-16 ("A county clerk or a register of deeds and mortgages shall refuse to accept any deed submitted for recordation that references the specific portion of any such restrictive covenant."); VT. STAT. ANN. tit. 27, § 546(a) ("A deed, mortgage, plat, or other recorded device recorded on or after July 1, 2022 shall not contain a covenant, easement, or any other restrictive or reversionary interest purporting to restrict the ownership or use of real property on the basis of race or religion.").

42. C. T. Foster, *Restrictive Covenants, Conditions, or Agreements in Respect of Real Property Discriminating Against Persons on Account of Race, Color, or Religion*, 3 A.L.R.2d 466 (Originally published in 1949) ("[P]rior to *Shelley v. Kraemer* (US), it was rather uniformly considered, among the jurisdictions in which the questions came before the court, that privately created covenants or conditions restricting land against occupancy and use by persons of certain races, or by non-Caucasians in general were generally valid and enforceable."). As late as 1961, the Washington Supreme Court invalidated, 4–3, a state statute prohibiting some housing discrimination. O'Meara v. Washington State Bd. Against Discrimination, 365 P.2d 1 (Wash. 1961), *cert. denied*, 369 U.S. 839 (1962) (noting that Chief Justice Warren and Justice Stewart would grant certiorari). Indeed, it would be difficult to discern why restrictive covenants would be repugnant to state policy in states tolerating other forms of segregation, such as school segregation.

43. 392 U.S. 409 (1968).

44. *Id.* at 436 ("In light of the concerns that led Congress to adopt it and the contents of the debates that proceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.")
[citation requested].

45. United States v. City of Parma, Ohio, 494 F. Supp. 1049, 1058 (N.D. Ohio 1980), *aff'd*, 661 F.2d 562 (6th Cir. 1981). *See* Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001) ("[A] challenged activity may be state action when it results from the State's exercise of "coercive power," when the State provides "significant encouragement, either overt or covert," or when a private actor operates as a "willful participant in joint activity with the State or its agents.") (citations omitted).

pressure, harassment, and suasion to promote de facto segregation."[46] In Pasadena, the city attorney inserted restrictive covenants into all property coming into the municipality's hands.[47] In Richmond, the city attorney informed the community of the availability and utility of restrictive covenants.[48] In Culver City, California, during World War II, the city attorney instructed Air Raid Wardens to circulate restrictive covenant forms to homeowners as they performed their duties.[49]

C. DISCRIMINATORY ZONING

The leading U.S. Supreme Court case on zoning is *Village of Euclid v. Ambler Realty Co*.[50] In that case, the district court initially struck down the zoning ordinance, notwithstanding its recognition of the problem of land use: "[t]he blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance."[51] While the district court concluded that property rights trumped admitted harms of unregulated real estate, the Supreme Court disagreed and recognized the governmental power to restrict use.[52]

Many scholars have written that municipalities used their power to regulate land to exclude Black residents and other non-Whites.[53] Zoning has been called "a pillar of residential racial segregation;"[54] "[t]he variety of land use policies and devices which are adaptable for this purpose is almost infinite."[55] Intentionally discriminatory but facially neutral zoning techniques might be divided into three categories: "exclusionary zoning," designed to keep

46. Garrett Power, Meade v. Dennistone*: The NAACP's Test Case to ". . . Sue Jim Crow Out of Maryland with the Fourteenth Amendment"*, 63 MD. L. REV. 773, 792 (2004). The Committee was appointed by the Mayor and headed by the City Solicitor. Richard Rothstein, *From Ferguson to Baltimore: The Fruits of Government-Sponsored Segregation*, J. AFFORDABLE HOUS. & COMM. DEV. L., 2015, at 205, 206.

47. *Restrictive Covenants used to "Lily-White" City*, ALA. TRIB., Sept. 20, 1946, at 2.

48. *Cary Asserts Segregation May Be Accomplished by Covenant*, RICHMOND TIMES-DISPATCH, May 21, 1929, at 22.

49. ROTHSTEIN, *supra* note 19, at 82.

50. 272 U.S. 365.

51. Ambler Realty Co. v. Vill. of Euclid, Ohio, 297 F. 307, 313 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

52. *Euclid*, 272 U.S. at 395.

53. As Professor Florence Roisman wrote, an early, important figure in the development of zoning noted that "racial hatred played no small part in bringing to the front some of the early districting ordinances which were sustained by the United States Supreme Court, thus giving us our first important zoning decisions." Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 94 n.152 (2001) (quoting W.L. Pollard, *Outline of the Law of Zoning in the United States*, ANNALS AM. ACAD. POL. & SOC. SCI., May 1931, at 17).

54. Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. REV. 1140, 1166 (2019).

55. § 61:6. *Subsequent history—The subterfuges*, 2 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW § 61:6 (Rev. Ed.).

undesirable races out of "White" neighborhoods;[56] "expulsive zoning," designed to make life unpleasant for residents of a neighborhood the powers that be would like to ethnically cleanse by allowing, at least temporarily, commercial, industrial or polluting uses; and "disamenity zoning" where people of color are awarded a disproportionate number of undesirable land uses such as toxic waste dumps.[57]

One unfortunate historical fact is that in addition to promoting the use of racially restrictive covenants, the federal government also encouraged local zoning by drafting and disseminating a Standard State Zoning Enabling Act ("SZEA"). "By the middle of the twentieth century, every state had enacted state legislation that tracked very closely with the SZEA."[58]

In order to circumvent the *Buchanan* holding, the SZEA did not make explicit reference to the creation of racially segregated residential neighborhoods as a reason for the federal government's advocacy for zoning. However, the lifelong works of the outspoken segregationists who comprised the Advisory Committee indicated that racial segregation was indeed a priority.[59] "[L]ocal governments routinely used and still use discretionary land use decisions to favor whiter single-family neighborhoods and disfavor less restrictively zoned neighborhoods where more People of Color live."[60]

Related to zoning is the power of condemnation. Municipalities could use that power to prevent integration, as Deerfield, Illinois, did; when landowners planned to build an integrated development, suddenly the land was needed for a

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56. An editorial in *The Recorder*, "the Official Organ of the Courts," praised zoning and encouraged the use of restrictive covenants, noting the problems that had previously arisen in San Francisco: "In other blocks landowners have not been above renting property to Chinese laundries, or to Japanese for residence purposes, thus appreciating their own rentals but depreciating the value of adjoining properties. It is to prevent this destruction of established values and to discourage the invasion of residence localities by business that zoning ordinances have been adopted in many cities. Editorial, *City Zoning Ordinances*, RECORDER, Mar. 14, 2023, at 6.

57. Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of* Euclid, *in* ZONING AND THE AMERICAN DREAM 101, 105 (Charles M. Haar & Jerold S. Kayden eds., 1989); Christopher Silver, *The Racial Origins of Zoning in American Cities*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY 23–42 (Manning Thomas, June & Marsha Ritzdorf eds., 1997); Andrew H. Whittemore, *The Experience of Racial and Ethnic Minorities with Zoning in the United States*, 32 J. PLAN. LITERATURE, No. 1, 16–27 (2017) https://doi.org/10.1177/0885412216683671.

58. Michael Allan Wolf, *A Common Law of Zoning*, 61 ARIZ. L. REV. 771, 787 (2019).

59. Michael Kim, Note, *Exclusionary Economic Zoning: How the United States Government Circumvented Prohibitions on Racial Zoning Through the Standard State Zoning Enabling Act*, 48 J. LEGIS. 124, 133 (2021).

60. Sarah J. Adams-Schoen, *The White Supremacist Structure of American Zoning Law*, 88 BROOK. L. REV. 1225, 1269 (2023). *See also* FINAL REPORT, CALIFORNIA TASK FORCE TO STUDY AND DEVELOP REPARATION PROPOSALS FOR AFRICAN AMERICANS 205 ("In 1953, when the Ford Motor Company moved its plant to Milpitas, California, and the labor union tried to build housing for its African American workers, the city rezoned the site for industrial use.").

park.[61] State and federal litigation was unsuccessful.[62] Richard Rothstein reports that "[c]ondemnations of property and manipulations of zoning designations to prevent African Americans from building occurred almost routinely in the 1950s and 1960s."[63]

Another way municipalities imposed segregation through direct action was in their own housing projects. As one article explained in 1948, "racial segregation exists through government action in public housing today. There are many more federally-aided locally-administered projects restricted to one race than open to both."[64] Finally, as Professor Andrew Kahrl recently recounted in *The Black Tax*,[65] there is a long history of discriminatory real estate taxation which has often led to dispossession:

> From the late nineteenth century to today, local tax assessors have consistently overtaxed the lands that Black people own and the neighborhoods where they live. For all the taxes they have paid, Black Americans have struggled to receive anything close to their fair share of the public goods and services that local governments provided. And when they failed to pay on time, African Americans were—and continue to be—subjected to the harshest consequences and most predatory features of tax delinquency laws that, in most states, permit local governments to sell liens on tax-delinquent properties to private investors who can then saddle delinquent taxpayers with crippling debts and, should they fail to pay, take their property.[66]

D. SEGREGATION WALLS AND OTHER PHYSICAL BARRIERS

Another technique promoted by the federal government was physical separation of Whites from "undesirable" races and uses.

The Federal Housing Administration, which insured private mortgage loans, promulgated an Underwriting Manual outlining conditions and criteria for the loans it would guarantee.[67] The Manual prescribed a set of methods to reduce the possibility of "invasion" by reducing the mobility of undesirable uses and racial groups. In a section innocuously titled "natural Physical Protection," the manual recommended a variety of ways that "natural or artificial barriers" could

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61. HARRY M. ROSEN & DAVID H. ROSEN, BUT NOT NEXT DOOR: AN ACCOUNT OF THE DEERFIELD CASE AND INTEGRATION (1962), https://archive.org/details/butnotnextdoor0000rose.

62. Deerfield Park Dist. v. Progress Dev. Corp., 186 N.E.2d 360, 362 (Ill. 1962) ("The evidence clearly shows parks are needed in Deerfield and that the land condemned is appropriate for that purpose."); Progress Dev. Corp. v. Mitchell, 219 F. Supp. 156, 160 (N.D. Ill. 1963) (holding that the state court finding was collateral estoppel).

63. ROTHSTEIN, *supra* note 19, at 125.

64. Isaac N. Groner & David M. Helfeld, *Race Discrimination in Housing*, 57 YALE L.J. 426, 436 (1948). *See also* Editors, Note, *Racial Discrimination in Housing*, 107 U. PA. L. REV. 515 (1959).

65. KAHRL, *supra* note 3.

66. *Id.* at 3–4.

67. Jon C. Dubin, *From Junkyards to Gentrification: Explicating A Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 752 (1993); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1310 (1995).

protect desirable neighborhoods from "the infiltration of business and industrial uses, lower class occupancy, and inharmonious racial groups." If the area did not afford natural geographic protection, such as "hills, ravines, and other peculiarities of topography," the FHA recommended that a "high speed traffic artery or a wide street parkway may prevent the expansion" of undesirable entities into adjacent areas. The FHA thus gave federal sponsorship to the notion of living "on the wrong side of the tracks."[68]

Scholar and artist Chat Travieso has identified a number of segregation walls erected in Detroit, Miami, Fort Worth, Arlington, New Haven, and Baltimore, among other U.S. cities.[69]

An "undesirable" neighborhood could be condemned and paved over rather than blocked off. Professor Deborah Archer explains that as a result of the massive mid-twentieth century highway building program:

> The neighborhoods destroyed and families displaced were overwhelmingly Black and poor. This was by design. Transportation policy in the 1950s and 1960s was crafted to reinforce racial and class inequalities and divisions. Alfred Johnson, executive director of the American Association of State Highway Officials at the time the Interstate Highway Act was passed, recalled that "some city officials expressed the view in the mid-1950s that the urban Interstates would give them a good opportunity to get rid of the local 'n*****town.'[70]

E. RACIAL VIOLENCE

In its 1950 certiorari petition seeking to save its segregation ordinance, the City of Birmingham, Alabama, frankly admitted that its citizens' violence was out of control. It alleged that "when attempts have been made by members of one race to enter for purposes of a permanent residence into an area commonly recognized as set aside for members of the other race, violence, disturbances of the peace, destruction of property and life has resulted almost without exception."[71] Indeed, thirty-six hours after Ms. Mary Monk persuaded the Fifth Circuit to invalidate Birmingham's racial zoning ordinance, a bomb exploded in her house.[72]

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68. John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 L. & SOC. INQUIRY 399, 409 (2007).

69. Chat Travieso, *A Nation of Walls: The Overlooked History of Race Barriers in the United States*, PLACES J. (Sept. 2020), https://doi.org/10.22269/200922; Chat Travieso, *Concrete Terror: Race Barriers and Vigilantism in the United States*, 33 MAS CONTEXT 236 (2021), https://archive.is/Yat02.

70. Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1274–75 (2020). *See also, e.g.*, Editorial, *The Fort Smith Slum Clearance Ouster*, BLACK DISPATCH, Aug. 30, 1941, at 4 ("Nothing happening over the nation today carries a threat to ruin urban Negro life more than the arbitrary attempt in certain sections to oust Negroes from their homes. Such a program is being put into effect in many cities by local United States Housing Authorities.").

71. Petition for Writ of Certiorari, City of Birmingham v. Monk, No. 673, Oct. Term, 1950, at 4, 341 U.S. 940 (1951).

72. *Bigots Blast $18,000 Home in Birmingham; Group Offers Reward*, MINNEAPOLIS SPOKESMAN, Dec. 29, 1950, at 1.

Professor Jeannine Bell has written about the violence many non-White families faced when challenging residential segregation.[73] Police and prosecutors did not contribute to a solution to the problem. As is recounted in Kevin Boyle's National Book Award-winning *Arc of Justice*, Black families who exercised their constitutional right of self-defense to protect their constitutional right to property could find themselves charged with crimes if they resisted hostile mobs.[74] Richard Rothstein explained that "[d]uring much of the twentieth century, police tolerance and promotion of cross-burnings, vandalism, arson and other violent acts to maintain residential segregation was systematic and nationwide."[75]

F. Federal Financing

The federal government was involved in financing segregated homeownership in several ways. During the New Deal era, the Home Owners Loan Corporation offered loans to distressed homeowners. It created color-coded maps, with areas where African Americans resided outlined in red; this was the origin of the term "redlining." According to Richard Rothstein, "[a]lthough the HOLC did not always decline to rescue homeowners in neighborhoods colored red on its maps (i.e., redlined neighborhoods), the maps had a huge impact and put the federal government on record as judging that African Americans, simply because of their race, were poor risks."[76]

Perhaps more important than its direct lending were the federal government's loan guarantee programs. The FHA and VA were and are major guarantors of loans; because repayment is guaranteed by the government, such loans are readily available. Both the FHA and the VA used a discriminatory underwriting manual to evaluate the properties.[77] Developers could also have projects preapproved, which would after the development was completed, purchasers could get guaranteed loans without an additional appraisal. However, preapproval required "a commitment not to sell to African Americans."[78]

73. JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING (2013).

74. KEVIN BOYLE, ARC OF JUSTICE: A SAGA OF RACE, CIVIL RIGHTS, AND MURDER IN THE JAZZ AGE (2004).

75. ROTHSTEIN, *supra* note 19, at 143.

76. *Id.* at 64.

77. *Id.* at 65–70.

78. *Id.* at 71.

G. DEVELOPERS, REALTORS, AND BANKERS

Developers,[79] realtors,[80] and bankers[81] also participated in the system. Developers and developers were not passive participants in a segregated system imposed on them; instead, they sued to challenge civil rights measures.[82]

Realtors also supported segregation as a matter of policy. As one court explained:

> [U]ntil 1950, the National Association of Real Estate Boards (NAREB) counseled its members to maintain segregated neighborhoods in the interest of maintaining property values. The Code of Ethics of the NAREB provided until then that:
>
> > "A REALTOR SHOULD NEVER BE INSTRUMENTAL IN INTRODUCING INTO A NEIGHBORHOOD A CHARACTER OF PROPERTY OR OCCUPANCY, MEMBERS OF ANY RACE OR NATIONALITY, OR ANY INDIVIDUALS WHOSE PRESENCE WILL CLEARLY BE DETRIMENTAL TO PROPERTY VALUES IN THAT NEIGHBORHOOD."[83]

Real estate agents breaking racial taboos could find themselves subject to license discipline.[84]

79. PAIGE GLOTZER, HOW THE SUBURBS WERE SEGREGATED: DEVELOPERS AND THE BUSINESS OF EXCLUSIONARY HOUSING, 1890-1960 (2020).

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

81. KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019).

82. *See, e.g.*, Colorado Anti-Discrimination Comm'n v. Case, 380 P.2d 34 (Colo. 1962) (realtors); Chicago Real Est. Bd. v. City of Chicago, 224 N.E.2d 793 (Ill. 1967) (realtors); Levitt & Sons, Inc. v. Div. Against Discrimination in State Dep't of Ed., 158 A.2d 177, 179 (N.J. 1960) (developers); New Jersey Home Builders Ass'n v. Div. on C.R. in Dep't of Ed. of State, 195 A.2d 318 (N.J. Ch. Div. 1963) (developers), *aff'd sub nom*, David v. Vesta Co., 212 A.2d 345 (N.J. 1965).

83. Zuch v. Hussey, 394 F. Supp. 1028, 1057 n.12 (E.D. Mich. 1975), *aff'd and remanded sub nom*. Zuch v. John H. Hussey Co., 547 F.2d 1168 (6th Cir. 1977).

84. *See* MacGregor v. Fla. Real Est. Comm'n, 99 So. 2d 709, 710 (Fla. 1958) ("Count 1, briefly, charged appellant with having accepted a listing from one Allard to negotiate the sale of property belonging to Allard, the listing having been restricted to the sale of such property to Christians only, and that appellant knowingly negotiated a sale of such property to a Jewish person not a Christian, and misrepresented to the said Allard that the purchaser was in fact a Christian and not of the Jewish faith, in order to obtain Allard's approval of the sale."); Bernstein v. Real Est. Comm'n of Md., 156 A.2d 657, 659 (Md. 1959) ("In their petitions for judicial review by the lower court, the brokers contended, among other things, that the complaints constituted an unlawful conspiracy against the civil rights of themselves and their customers in that, in substance, they were charged with 'block-busting' and that the complaints were intended to prevent Negroes from purchasing and occupying homes of their own selection in violation of constitutional guarantees."); Beddoe v. Southeast Realty Bd., Civil No. $6C 1050, Calif. Super. Ct., Los Angeles, Dec. 1955, 2 Civ. Lib. Docket 27, 81, 3 Civ. Lib. Docket 62 (discussed in *Suit Against Realty Unit Charges Discrimination*, S. GATE PRESS (CA)., Mar. 14, 1956, at 1 (allegedly dismissed from the realty board for selling home in white neighborhood to "Mexican family."). Times have changed; a recent article in the national Association of Realtors magazine outlines some of the history of the organization's former support for segregation. Brennon Thompson, Truth and Reconciliation, REALTOR MAG. (Dec 20, 2023), https://archive.is/Z8J92

CONCLUSION

A comprehensive accounting of the connection between law and race in the United States would require attention to, among other things, the anti-Asian alien land laws,[85] Native American dispossession,[86] African American farmers,[87] and the rights of holders of Mexican land grants.[88] Residential segregation of African Americans is a major part of the story, but only a part. The foregoing, of course, only scratches the surface of the history of residential segregation of African Americans. Perhaps it is sufficient to underscore the irony of a Supreme Court which is increasingly skeptical about racial remedies, even as historical and legal research shows more and more how the United States was shaped by race law. And perhaps it is enough to suggest a few implications for consideration by the Court.

First, there appears to have been a national commitment to segregation across time and space. Second, segregation was achieved by coordination and cooperation among levels of government and between public and private actors. For example, the federal government promoted local zoning, states authorized it, and cities implemented it. The federal government promoted restrictive covenants, every state court which considered them approved them in principle, local governments encouraged them, and private individuals implemented them. It was, as can be seen by local histories of segregation,[89] a system in the sense that jurisdictions employed one technique after another and there appear to be no significant actors in the system who were neutral or opposed discrimination, except, of course, African Americans themselves, and their non-white allies.

Many members of the Court with various perspectives have joined opinions suggesting that the nation's racial attitudes have changed, and the law must change to reflect current realities.[90] While there is strong reason to question

85. Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 B.U. L. REV. 1271, 1291–96 (2020) (discussing anti-Asian alien land laws).

86. Justin Farrell, Paul Berne Burow, Kathryn McConnell, Jude Bayham, Kyle Whyte & Gal Koss, *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America,* 374 SCIENCE 578 (2021), DOI:10.1126/science.abe4943.

87. Angela P. Harris, *(Re)Integrating Spaces: The Color of Farming*, 2 SAVANNAH L. REV. 157 (2015) Angela Harris, Black Farmers ***; PETE DANIEL, DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS (2013).

88. U.S. GEN. ACCT. OFF., TREATY OF GUADALUPE HIDALGO: FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO (June 2004), https://www.gao.gov/assets/gao-04-59.pdf.

89. Florence Wagman Roisman, *Structural Racism in Housing in Indianapolis*, 18 IND. HEALTH L. REV. 355, 358 (2021); Teron McGrew, *The History of Residential Segregation in the United States, Title VIII, and the Homeownership Remedy*, 77 AM. J. ECON. & SOCIO., No. 3-4 1013–48 (2018) (focusing on Oakland); Raymond A. Mohl, *Whitening Miami: Race, Housing and Government Policy in Twentieth-Century Dade County*, 79 FLA. HIST. Q., No. 3 319 (2000); *Local Histories of Segregation*, https://belonging.berkeley.edu/local-histories-segregation

90. Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 557 (2013) ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701,

whether the playing field is level even now with regard to the rental, purchase, and sale of real estate,[91] undoubtedly there is some truth to the idea that today is not 1950.

And yet the Court has also said that "when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts."[92] Has the hurt and injury been redressed? Certainly, only a small fraction of illegal segregation was uncovered and challenged during the Jim Crow era. In the cases where plaintiffs won, judgments offered limited relief. Most successful lawsuits seem to have resulted in injunctive or declaratory relief, invalidating particular restrictions or ordinances going forward. But there do not seem to have been substantial monetary damages awards to those harmed by restrictive covenants, racial zoning, or other discrimination. Nor are there many cases involving unwinding of the effects of facially neutral zoning plans which resulted in segregation.

Justices of the Court are, perhaps less than other people, entitled to indulge their intuitions and casual impressions when deciding cases of great import to the nation. Instead, they should ask and explore hard questions to ensure that to the extent possible their decisions rest on reality rather than wishful thinking or folk wisdom. The justices should ask themselves questions like these when exploring whether current conditions and current disparities are the product of prior, illegal discrimination which has never been remedied.

First, are the academic claims that there was a widespread system of residential segregation, facilitated or tolerated by ever level of government, true, or have they been refuted by other evidence or scholarship, or are they intrinsically unpersuasive?

Second, if here was a system, how comprehensive was it? Were there many or any places in the United States where: (a) courts refused to enforce racially restrictive covenants; (b) racial zoning was prohibited by state law; (c) there was a policy against using facially neutral zoning for discriminatory purposes; or (d)

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868 (2007) (Breyer J., dissenting) ("The President of the United States dispatched the 101st Airborne Division to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. See Cooper v. Aaron, 358 U.S. 1 (1958). Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it."); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 472 (1979) (Stewart J., concurring in the result and dissenting) ("Much has changed in 25 years, in the Nation at large and in Dayton and Columbus in particular. Minds have changed with respect to racial relationships. Perhaps more importantly, generations have changed. The prejudices of the school boards of 1954 (and earlier) cannot realistically be assumed to haunt the school boards of today.").

91. *See, e.g.*, Peter Christensen & Christopher Timmins, *Sorting or Steering: The Effects of Housing Discrimination on Neighborhood Choice*, 130 J. POL. ECON., No. 8 2110-2163 (2022), https://www.nber.org/papers/w24826; KAHRL, *supra* note 3, at 13 ("By the most conservative estimate . . . every Black person in America today pays an extra $100 in property taxes annually" because of overassessment) (citing paper published as Carlos F. Avenancio-León & Troup Howard, *The Assessment Gap: Racial Inequalities in Property Taxation*, 137 Q. J. ECON., No. 3 1383 (2022), https://doi.org/10.1093/qje/qjac009).

92. Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN), 572 U.S. 291, 313 (2014) (plurality).

by law or policy, facially neutral laws were audited, without the spur of a lawsuit, to ensure they were not motivated by a discriminatory purpose?

Third, were there any places in the United States where, when highways were built or "blighted" areas cleared, the interests of people of color were fully and fairly taken into account, without lawsuit or protest?

Fourth, is there evidence that in some segregated localities, provision of education, other services, or enforcement of the law was separate but actually equal?

Without some evidence of jurisdictions which did not practice segregation in some form, it is difficult to assume that there were many areas where Black people would not be subject to discrimination. And without some evidence of efforts to undo or eliminate the effects of illegal segregation, it is hard to contend that the present degree of segregation is the result of free choice.

It also must be noted that discrimination against people of color is matched by race-based gifts of land to White citizens and immigrants through the direct loans and loan guarantees described above, and other programs.[93] Just as segregation can promote discrimination, it can also promote advantage, if the "White" areas are those with jobs, desirable amenities and public services, and well-funded and maintained schools. As a result of housing segregation's allocation of advantages and disadvantages, there is scholarly evidence that the effects of discrimination have reverberated through time, at least with respect to Black disadvantage.[94]

This gives rise to a fifth and final question: Is the Court aware of any group in the modern history of the world that has been the subject of extensive, prolonged and successful oppression, but through "neutral" means, without social restructuring, has more or less "caught up" with the majority in the areas of lifespan, income, and education? For this to happen, African Americans would not merely have to progress, from a starting point of much less material advantage, but would have to progress at a rate faster than other groups which have been advantaged, or disadvantaged less. Instead of being regular people, each African American would have to be a star to develop their human capital at a greater rate than other people—is this a realistic expectation? Has it ever happened before? If unprecedented, then there is reason to doubt that it will happen now.

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93. *See* Chin, *supra* note 85, at 1296–99.

94. Daniel Aaronson, Jacob Faber, Daniel Hartley, Bhashkar Mazumder & Patrick Sharkey, *The Long-Run Effects of the 1930s HOLC "Redlining" Maps on Place-Based Measures of Economic Opportunity and Socioeconomic Success*, 86 REGIONAL SCI. & URBAN ECON. (2021), https://doi.org/10.1016/j.regsciurbeco.2020.103622. *See also* Florencia Torche, *Analyses of Intergenerational Mobility: An Interdisciplinary Review*, 657 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (2015), https://doi.org/10.1177/0002716214547476.

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