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INTRODUCTION

When I began this research project in the summer of 2021, those who lived in the predominantly Black[1] neighborhood where I grew up[2]—Portland, Oregon's Cully neighborhood—experienced a catastrophic and unprecedented heat wave at temperatures as much as 25°F higher than those who lived in Portland's restrictive, amenity rich single-family neighborhoods.[3] Cully is one of the most racially and ethnically

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[1] In this article, I used the term "Black" rather than "African American" in recognition of the broader inclusivity of the term Black. Anthony V. Alfieri & Angela Onwuachi-Willig, *Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1558 n.5 (2013) (explaining that "Black" includes Black Americans, permanent residents and other Black noncitizens in the United States, and Black immigrants from the Caribbean and other regions outside Africa). I capitalized "Black" in recognition that the term describes a specific racialized cultural group. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) ("Blacks, like Asians [and] Latinos . . . constitute a specific cultural group and, as such, require denotation as a proper noun."). I also altered quotations to substitute the terms "Black," "People of Color," and "Asian," for pejorative, stereotype reinforcing terms whenever doing so did not change the meaning of the quoted text.

[2] I did not experience this neighborhood as a Person of Color but rather as a white, cisgender queer girl growing up in a family living below the poverty line.

[3] *See* Sarah Kaplan, *Heat Waves Are Dangerous. Isolation and Inequality Make Them Deadly*, WASH. POST (July 21, 2021, 8:00 AM), https://www.washingtonpost.com/climate-environment/2021/07/21/heat-wave-death-portland/; Jackson Voelkel et al., *Assessing Vulnerability to Urban Heat: A Study of Disproportionate Heat Exposure and Access to Refuge by Socio-Demographic Status in Portland, Oregon*, 15 INT'L J. ENV'T RSCH. & PUB. HEALTH 640 (2018).

diverse neighborhoods in Oregon.[4] Despite being home to higher concentrations of families than Portland generally,[5] Cully has fewer paved roads, sidewalks, and recreational spaces,[6] and more polluted land and air.[7]

In Eugene, Oregon, where I currently live, an environmental justice investigation found that 99.9 percent of toxic air emissions occur in just one of the city's zip codes—a zip code that is less white and less restrictively zoned than other residential areas of the city.[8] Residents in this zip code experience higher rates of asthma and other respiratory diseases, absences from school and work,[9] incidents of COVID-19 related hospitalization and death, and are more vulnerable to toxic wildfire smoke.[10]

That these environmental burdens fall more heavily on Portland and Eugene's communities of color is neither a historical accident nor the result merely of market dynamics and individual preferences.[11] Scholars have amassed substantial evidence of the correlation between the notoriously white supremacist nature of federal housing programs of the 1920s to the 1960s—including, for example the Homeowners Loan Corporations' actuarial risk mapping known as "redlining"—and

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[4] RICARDO BAÑUELOS ET AL., PORTLAND STATE UNIV., NOT IN CULLY: ANTI-DISPLACEMENT STRATEGIES FOR THE CULLY NEIGHBORHOOD 1 (2013) [hereinafter NOT IN CULLY BACKGROUND DOCUMENT] (identifying Cully neighborhood as the most diverse neighborhood in the city of Portland and the state of Oregon based on USA Today's 2010 Diversity Index).

[5] *Id.*

[6] *Id.* at 1.

[7] *See* EARTH JUST., OWENS-BROCKWAY: AN ENVIRONMENTAL JUSTICE PROBLEM IN PORTLAND 3–4, https://earthjustice.org/wp-content/uploads/2021.09.23_portland_air_pollution.pdf [https://perma.cc/Q35C-MJ2W] (regarding air pollution); *Six Years Later, Cully Park is Much More Than a Dream*, N.W.W. HEALTH FOUND.,., https://www.northwesthealth.org/news/six-years-later-cully-park-is-much-more-than-a-dream [https://perma.cc/R85G-PXYQ] (regarding "brownfields," or postindustrial, contaminated land).

[8] *See* ALISON GUZMAN & LISA ARKIN, ENVIRONMENTAL JUSTICE IN WEST EUGENE: FAMILIES, HEALTH AND AIR POLLUTION 2011–2012 16–29 (2013).

[9] *Id.*

[10] Adam Duvernay, *Lane County Residents Warned to Avoid Unhealthy Air by Staying Indoors*, REG.-GUARD (Oct. 15, 2022, 10:52 AM), https://www.registerguard.com/story/news/2022/10/15/lane-county-residents-unhealthy-air-quality-indoors-wildfire-smoke/69565411007/; Aimee Green & Mark Friesen, *See Which Oregon ZIP Codes Are Hammered Hardest by Coronavirus During Record Omicron Surge*, OREGONLIVE (last updated Jan. 8, 2022, 8:44 AM), https://www.oregonlive.com/data/2022/01/see-which-oregon-zip-codes-are-hammered-hardest-by-coronavirus-during-record-omicron-surge.html.

[11] *See generally* 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. COLL. L. REV. 5, 37–47 (2022) (discussing theoretical and empirical evidence refuting notion that individual preference is the primary cause of racialized geographies and resulting environmental racism).

the disparate allocation of environmental burdens to communities of color and very low income communities.[12] These and other scholars also provide ample evidence that a unique feature of American zoning law,[13] a strict residential use taxonomy that privileges "single family" homes over "multifamily" homes, has had the effect of economically and racially segregating US cities.[14] Critical legal geography scholar Elise Boddie's theory of racialized territoriality identifies laws that enforce geographic separation, including facially neutral zoning laws, as integral to the perpetuation of "racial hierarchy."[15] Sheryll Cashin and Dorceta Taylor, both of whom have written extensively on race and class segregation in US cities, also identify American zoning law as among the laws and government policies that shaped and perpetuate racialized spatial boundaries.[16] Moreover, a relatively small but compelling body of urban planning and sociology scholarship provides

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[12] *See, e.g.*, Michelle Adams, *Separate and (Un)equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 425 (1996); Kristen B. Crossney & David W. Bartelt, *The Legacy of the Home Owners' Loan Corporation*, 16 HOUS. POL'Y DEBATE 547, 548 (2005); DORCETA E. TAYLOR, TOXIC COMMUNITIES: ENVIRONMENTAL RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY (2014); Sheila R. Foster, *Vulnerability, Equality and Environmental Justice: The Potential and Limits of Law*, *in* THE ROUTLEDGE HANDBOOK OF ENVIRONMENTAL JUSTICE (2017); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); Todd M. Michney & LaDale Winling, *New Perspectives on New Deal Housing Policy: Explicating and Mapping HOLC Loans to African Americans*, 46 J. URB. HIST. 150 (2020); Jason Richardson et al., *Redlining and Neighborhood Health*, NAT'L CMTY. REINVESTMENT COAL. (2020), https://ncrc.org/holc-health/ [https://perma.cc/369D-VF55]; BRUCE MITCHELL & JUAN FRANCO, NCRC RESEARCH, HOLC "REDLINING" MAPS: THE PERSISTENT STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY, https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf [https://perma.cc/3RRU-4UWA].

[13] Comparative urbanism scholar Sonia Hirt reports that the regulatory preference for the single-family home "is an international rarity, historically and today." SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 7 (2014).

[14] *See infra* Part IV; *see also, e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1 (1998); Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS'N 125 (2000) (reporting results of a study contending that certain types of zoning have exclusionary effects on Black people and other racial minorities, funneling these communities into high density, urban neighborhoods); RICHARD H. SANDER ET AL., MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 1–4, 8–9 (2020).

[15] Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 420–21 (2010); *see also infra* Part IV.

[16] *See, e.g.*, SHERYLL CASHIN, WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY 5 (2022); TAYLOR, *supra* note 12; *see also* Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan Americ*a, 86 CORNELL L. REV. 729, 769 (2001) (discussing facially neutral zoning laws or "fiscal zoning" as a driver of racial segregation).

compelling evidence that early twentieth century lawyers, planners, and real estate professionals developed American zoning law's residential use taxonomy specifically to entrench a separate and unequal dual housing system.[17]

This residential use taxonomy, which established a hierarchy of residential uses with the detached single-family home at its apex, was the defining feature of American zoning law at its inception and it remains so today.[18] Zoning codes in US municipalities typically include one or more "single-family" district that limits the primary use of each buildable lot within its boundaries to a single, detached dwelling, built on site and occupied by a single "family" or "household unit."[19] These features distinguish zoning in US cities from zoning elsewhere in the world.[20] The provision of a regulatory preference for the single-family residence has been identified as the primary purpose of zoning in US cities,[21] the source of more controversy than any other aspect of American zoning law,[22] and a key feature of the dual housing system that Cashin so aptly identifies as a system of "American residential caste."[23]

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[17] *See, e.g.*, 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); MARC WEISS, THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING (1987); HIRT, *supra* note 13; JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES (2018); *see also* Michael C. Lens, *Zoning, Land Use, and the Reproduction of Urban Inequality*, 48 ANN. REV. SOCIOL. 421, 425 (2022) (arguing for a sociological research agenda on zoning and observing that "[a]partment bans in the form of single-family zoning get more attention in planning history and research").

[18] *See* 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 10:1 (4th ed.) (recognizing the "primary purpose" of early and current zoning in US cities is "to protect single-family residential use[,] . . . considered to be the best and most important use to which property could be put," from other incompatible land uses); BABCOCK, THE ZONING GAME 6 (1979) ("The primary, if not the exclusive, purpose [of zoning] in the 1920's was to protect the single-family district and that objective is foremost four decades later."); Burch & Ryals, *Land Use Controls: Requiem for Zoning and Other Musings on the Year 1982*, 15 URB. LAW. 879, 880 (1983) (characterizing the single-family district as "the hallmark of modern American land use control").

[19] 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 23:1 (4th ed.). Many of these ordinances define family to include only persons related by blood, marriage, or adoption. *Id.*

[20] *See* Sonia Hirt, *Split Apart: How Regulations Designated Populations to Different Parts of the City*, *in* ONE HUNDRED YEARS OF ZONING AND THE FUTURE OF CITIES 3, 14 (Amnon Lehavi ed., 2018).

[21] *See infra* note 14 (citing sources).

[22] Edward Zeigler, Jr., *The Twilight of Single-Family Zoning*, 3 UCLA J. ENVT'L L. & POL'Y 161, 163 n.7 (1983); *see also, e.g.*, Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CAL. L. REV. 1055, 1058 (2019) (labeling single-family districts "zoning's original sin").

[23] CASHIN, *supra* note 11, at 6.

And yet, examination of the development of this residential use taxonomy is largely missing from analyses of American zoning law's historical development[24]—notwithstanding its ubiquity, controversy, and well-documented exclusionary effects.[25] The origin story of American zoning tends to focus on three key events. The first is New York City's adoption of citywide zoning in 1916, which is often characterized as the first comprehensive zoning adopted in the United States.[26] The second is the Department of Commerce's development of a model state zoning enabling statute, the Standard State Zoning Enabling Act (SZEA), first published in 1923.[27] The third is *Village of Euclid v. Ambler Realty*,[28] the seminal case in which the US Supreme Court approved of comprehensive zoning with separate, exclusively single- and two-family residential districts as a legitimate police power function.[29] Euclid's zoning ordinance is almost universally[30] described as having been patterned on New York City's 1916 Zoning Resolution.[31] But New York City's

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[24] *See* Allison Shertzer et al., *Race, Ethnicity, and Discriminatory Zoning*, 8 AM. ECON. J.: APPLIED ECONS. 217, 217 (2016) ("[L]ittle is systematically known about the origin and evolution of zoning and its relationship to neighborhood demographics, both in terms of consequences and causes."); Silver, *supra* note 12, at 22 (observing that insufficient attention has been paid "to important racial zoning initiatives after 1917"); *but see* WEISS, *supra* note 12 (explicating racial motives underlying development of residential use taxonomy by California "community builders"); Richard H. Chused, Euclid's *Historical Imagery*, 51 CASE W. RES. L. REV. 597, 613 (2001) ("Zoning rules, like many of the other moral reforms of the late nineteenth and early twentieth centuries, were designed to significantly reduce the likelihood that middle-and upper-class children would come into contact with poor, immigrant, or black culture.").

[25] *See infra* notes 18 and 20–22 and accompanying text; *supra* Part IV.

[26] *See infra* Section II.A.

[27] *See infra* Section II.C.

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

[29] *See infra* Section III.A.

[30] Westlaw identifies over four thousand secondary sources that cite *Euclid*, including more than three thousand law review articles. Among these four thousand-plus secondary sources, I could find only two that recognize Euclid's residential use classifications and zones exemplified California's contributions to American zoning law. *See* Sidney F. Ansbacher et al., *Florida's Downtowns Are Free to Grow Local Broccoli . . . and Chickens (Sometimes)*, 11 FLA. A&M U. L. REV. 1, 29 (2015); Sidney F. Ansbacher & Michael T. Olexa, *Florida Nuisance Law and Urban Agriculture*, 89 FLA. B.J. 28 (2015); *see also* Sara Zeimer, *Exclusionary Zoning, School Segregation, and Housing Segregation: An Investigation into A Modern Desegregation Case and Solutions to Housing Segregation*, 48 HASTINGS CONST. L.Q. 205, 208 (2020) (not discussing *Euclid*, but tracing the roots of both "modern zoning" and expressly racial zoning to Berkeley and the Bay Area), citing ELI MOORE, NICOLE MONTOJO & NICOLE MAURI, RACE ROOTS AND PLACE: A HISTORY OF RACIALLY EXCLUSIONARY HOUSING IN THE SAN FRANCISCO BAY AREA 29, HAAS INST. FOR A FAIR AND INCLUSIVE SOC'Y (2019). A review of the dozens of books about the *Euclid* case is beyond the scope of this article.

[31] *See, e.g.*, Garrett Power, *The Advent of Zoning*, 4 PLAN. PERSPECTIVES 4–5 (1989) (characterizing Euclid's ordinance as essentially superimposing New York City's Zoning Resolution on the Village). Power is in very good company. *See, e.g.*, FRED BOSSELMAN ET AL., THE TAKINGS ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF

Zoning Resolution followed the German and English models of zoning by recognizing only one category of residential use.[32] This oversight obscures the fact that Euclid's ordinance, like most zoning ordinances adopted after 1916, was an amalgam of New York City's Zoning Resolution and Berkeley, California's zoning ordinance. Adopted a few months before New York City's Zoning Resolution, Berkeley's ordinance featured a single-family district, a single- and two-family district, and an apartment district that provided a spatial buffer zone between single- and two-family districts and commercial and industrial districts[33]—just like the zoning ordinance at issue in *Euclid*.[34]

California's early twentieth century urban reformers devised the concept of a land use district in which only so-called single-family homes were permitted, combined with other cost enhancing regulatory restrictions such as relatively large minimum lot sizes, to use economic class as a proxy for race and thereby "protect" "high class" neighborhoods from "invasion" by People of Color.[35] They structured Berkley's zoning code and map to maintain the exclusivity of these neighborhoods for white residents through the use of physical buffers between restrictively regulated single-family districts and areas where noxious land uses such as cement plants and rail yards were permitted.[36] In undesirable areas of the city where more People of Color lived, they also allowed smaller, less restrictively regulated single-family residences, duplexes, and multifamily residences as well as land uses that would be akin to nuisances if located in "high class" neighborhoods. This strategy was

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LAND USE CONTROL (1973) (noting that Euclid ordinance was patterned on New York City's Zoning Resolution and was typical of ordinances enacted throughout the period); BABCOCK, *supra* note 18 (same); Genna L. Sinel, *New Density and Shrink-Wrapped Streets: Contextual Zoning Policy in New York City*, 11 NYU J.L. & LIBERTY 510, 514 & 514 n.7 (2017) (suggesting same); Donald J. Smythe, *The Power to Exclude and the Power to Expel*, 66 CLEV. ST. L. REV. 367, 390 (2018) (same).

[32] *See* Sonia Hirt, *The Rules of Residential Segregation: US Housing Taxonomies and Their Precedents*, 30 PLANNING PERSPECTIVES 367, 375–77 (2015).

[33] *See infra* Section II.B. – C (describing Berkeley's ordinance).

[34] *See infra* Section III.A. (describing Euclid's ordinance). *See* 1 AM. LAW ZONING § 9:1 (5th ed. May 2023 update) (noting Euclid ordinance was typical of ordinances enacted throughout the period).

[35] *See infra* Section II.B.1; *see also* Sonia Hirt, *The Rules of Residential Segregation: US Housing Taxonomies and Their Precedents*, 30 PLAN. PERSPECTIVES 367, 377–78 (2015) (identifying earliest adopters of separate residential use classifications as Utica and Syracuse, New York, Minneapolis, Michigan, and Berkeley, California, and earliest adopter of single-family district as Berkeley). This is not to say that the European models and New York City's code were inclusionary; rather, they used other regulatory mechanisms, including, for example height regulations, to exclude apartments and other land uses from neighborhoods consisting predominantly of single-family homes. *See infra* Section II.A.

[36] *See infra* Section II.B.1.

referred to as "overzoning,"[37] but may be more aptly characterized as "expulsive zoning."[38] This chapter of the origin story of American zoning is almost universally omitted from land use law texts and discussions of racially discriminatory zoning.[39]

Also largely absent from the historical narrative of American zoning law—and the pre-Civil Rights Act of 1964 period generally—is the federal government's widespread promotion of facially neutral comprehensive zoning as an integral part of its twentieth century agenda to develop and entrench a separate and unequal dual housing system. Scholars, advocacy organizations, and the media have shed considerable light on the Federal Housing Administration and Homeowners Loan Corporation's use of race based underwriting policies and "whites only" federal programs designed to promote ownership of single-family homes.[40] Much less is known about the federal government's recognition of facially neutral zoning—featuring Berkeley's residential use taxonomy—as an essential foundation for the success of these notorious federal programs and its massive multi-agency effort to promote zoning to states and cities throughout the United States for this purpose.[41]

I suggest here that, by incorporating these neglected attributes of American zoning's origin story into the robust literature examining the racial segregation of US cities, exclusionary zoning, and environmental justice, what will emerge is an understanding that American zoning law is one of the most enduring white supremacist legal devices of the Jim Crow era.[42] These attributes of American zoning law, and the

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[37] *See infra* Section II.B.2.

[38] Rabin, *supra* note 17, at 107107.

[39] *See infra* Sections II.A.–B.

[40] *See, e.g.*, *supra* note 12; *see also* Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. BLACK STUD. 646, 647 (2013) (highlighting the role of state legislatures in preventing Black individuals from owning land); Brandi T. Summers, *What Black America Knows About Quarantine*, N.Y. TIMES (May 15, 2020), https://www.nytimes.com/2020/05/15/opinion/sunday/coronavirus-ahmaud-arbery-race.html ("The American state has restricted [B]lack people's mobility at least since the time of slavery. These regulations included convict leasing, Black Codes, loitering laws, redlining, [express] racial zoning, . . . and increased surveillance.").

[41] *See infra* Section III.B.; *but see* ROTHSTEIN, *supra* note 12, at 51–52 (discussing racist motivations underlying US Department of Commerce's promulgation of Standard Zoning Enabling Act).

[42] I use the term "Jim Crow era" to refer to the period from the end of the Civil War to approximately 1954, when the Supreme Court decided *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954), and the term "Jim Crow" to refer to laws enacted and applied to perpetuate racial caste through segregation, including facially race-based laws generally associated with southern resistance to Reconstruction and facially race-neutral, but nevertheless race-based, laws adopted throughout the nation to prevent or slow racial

Supreme Court's equal protection and substantive due process jurisprudence that essentially rubber-stamped its barely veiled white supremacist purposes, drove the racial segregation of most US cities, chronic underinvestment in neighborhoods of color, and overinvestment in predominantly white neighborhoods, resulting in multigenerational harms.[43] Because residential segregation contributes to racial wealth gaps[44] and enables the disparate allocation of environmental and climate-related burdens to communities of color,[45] failing to grapple with the white supremacist organizing logic of American zoning's residential use taxonomy undermines efforts to increase housing justice, environmental justice, and climate justice reforms.[46] The need for these interventions grows more urgent as renters face a tsunami of evictions,[47] rising housing costs continue to outpace income,[48] and cities face increasingly intense and frequent floods, heat waves, droughts, and encroaching wildfires.[49]

This article proceeds in four parts. Parts I and II trace the geographic arc of racial zoning in the United States from its nineteenth century California origins[50] to its rapid proliferation in cities of the Jim Crow South,[51] and back to the American West.[52] In the context of this history, Parts I and II assert that the Supreme Court's response to single-purpose racial zoning of the nineteenth and early twentieth centuries paved the way for Berkeley's adoption of a regulatory mechanism that could overcome the spatial, temporal, and enforcement limitations of racially restrictive covenants and withstand judicial scrutiny

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integration. *See* Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L. REV. 1002, 1032 (2019) (book review) (noting that explicitly race-based laws represented a fraction of the laws enforcing racial segregation).

[43] *See infra* Part IV.

[44] *See* Alana Semuels, *Segregation Has Gotten Worse, Not Better, and It's Fueling the Wealth Gap Between Black and White Americans*, TIME (June 19, 2020, 8:53 AM), https://time.com/5855900/segregation-wealth-gap/ [https://perma.cc/9XUJ-EHR5]; SANDER ET AL., *supra* note 14, at 3; *see also infra* Section IV.A.

[45] *See* TAYLOR, *supra* 16, at 186 (citing studies); *see, e.g.*, Jeremy S. Hoffman et al., *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, 8 CLIMATE 12 (2020); *see also infra* Section IV.A.

[46] *See infra* Section IV.B.

[47] JOINT CTR. FOR HOUS. STUD. HARV. UNIV., THE STATE OF THE NATION'S HOUSING 2022 8–11, 38–39 (2022), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2022.pdf [https://perma.cc/4Q5P-LA6V].

[48] Ashley Gromis et al., *Estimating Eviction Prevalence Across the United States*, 119 PROC. NAT'L ACAD. SCIS. 1, 3 (2022).

[49] Shi-Ling Hsu, *Catastrophic Inequality in a Climate-Changed Future*, *in* 52 ENV'T L. REP. 10211, 10236 (2022).

[50] *See infra* Section I.A.

[51] *See infra* Section I.B.

[52] *See infra* notes 261–265 and 269–276 and accompanying text; *see infra* Part II.

under the Fourteenth Amendment.[53] Part II concludes with a review of primary historic and secondary sources that suggest facially neutral comprehensive zoning featuring Berkeley's strict residential use taxonomy was integral to the federal executive branch's racial segregation programs.[54]

Part III builds on this interrogation of the federal government's role in the development and proliferation of zoning as a means to racially segregate US cities, beginning with an analysis of the Supreme Court's application of a minimum rationality standard of review in the seminal *Euclid v. Ambler Realty* opinion.[55] In Part III, I argue that *Euclid's* minimum rationality standard greenlit widespread adoption of the barely veiled racial zoning promoted nationally by prominent zoning advocates and white supremacists.[56] This allowed facially neutral zoning to become a lynchpin of the federal government's massive racial segregation campaign[57] and contributed to the current judicial approach to Fourteenth Amendment challenges to zoning and other facially neutral laws that create and enforce racial and ethnic boundaries.[58] This is an approach consistent with the Court's pronouncement in *Barbier v. Connolly* that the Fourteenth Amendment is not "designed to interfere with" the police power.[59]

Part IV begins by reviewing some of the abundant empirical evidence demonstrating that the strict residential use taxonomy and related land use regulations successfully segregated most US cities by race[60] and continue to operate to hoard local amenities like open space and access to public services to whiter neighborhoods while concentrating

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[53] *See infra* Sections I.A.–C. and II.B.

[54] *See infra* Section II.C.

[55] *See infra* Part III.

[56] *See infra* Section III.A.

[57] *See infra* Section III.A.

[58] *See infra* Sections III.B.–C.

[59] Barbier v. Connolly, 113 U.S. 27, 31 (1884).

[60] Houston is the only major city in the United States without a zoning ordinance. Although detailed examination of Houston is beyond the scope of this article, the city appears to have established and maintained racial segregation through the adoption of "a collection of mechanisms that serve zoning-type functions," including through public promotion and enforcement of racial deed restrictions in the first half of the nineteenth century followed by facially neutral deed restrictions that contained cost-enhancing attributes similar to regulatory requirements in single-family zones. Edwin Buitelaar, *Zoning, More Than Just a Tool: Explaining Houston's Regulatory Practice*, 17 EUROPEAN PLAN. STUD. 1049, 1049 (2009). The city promotes the use of deed restrictions to protect neighborhood "character" and has a Deed Restriction Enforcement Team and Deed Restriction Hotline to address the issue of piecemeal private enforcement. *About Deed Restrictions*, CITY OF HOUS., http://www.houstontx.gov/planning/Neighborhood/deed_restr.html; *see* Legal Dep't, *Deed Restrictions*, CITY OF HOUS. (2023), https://www.houstontx.gov/legal/deed.html [https://perma.cc/U8PG-TYYW].

undesirable and hazardous land uses in or near neighborhoods where more People of Color live—including Portland's Cully neighborhood and Eugene's Bethel neighborhood.[61] Finally, Part IV concludes with suggestions for reform.[62]

I. JIM CROW ZONING AND ITS WESTERN PRECURSOR

Some of the earliest local zoning laws in the United States were single purpose ordinances adopted to geographically separate white homes and businesses from those owned or occupied by People of Color. Some commentators identify Baltimore, Maryland's 1911 racial segregation ordinance as the first enactment of racial "zoning" in the United States.[63] While Baltimore's ordinance does appear to be the earliest example of a municipal racial segregation ordinance designed to satisfy the Supreme Court's separate but equal test, the earliest racial segregation ordinance appears to have been the Bingham Ordinance,[64] which prohibited Chinese people and people of Chinese descent from living or doing business within the County of San Francisco except in a small district "prescribed for their location."[65] The Bingham Ordinance was one of many local regulations adopted by cities throughout the American West as part of a widespread and notorious campaign of racial harassment and exclusion.[66] Many of these regulations resembled zoning in that they designated locations within the

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[61] *See infra* Section IV.A.

[62] *See infra* Section IV.B.

[63] Baltimore passed the first iteration of its segregation ordinance in 1910. After a trial court voided this first attempt, Baltimore promptly passed a second and third iteration in April and May 1911, respectively. *See infra* notes 149–153 and accompanying text. The May 1911 ordinance, which served as a template for racial zoning ordinances of the period, was ultimately invalidated by Maryland's highest court. *See infra* Section I.B.

[64] The Bingham Ordinance is the earliest ordinance that I have found that mandated the geographic separation of homes or businesses based on race or ethnicity. *See infra* notes 73–80 and accompanying text.

[65] *In re* Lee Sing, 43 F. 359, 359–60 (C.C.N.D. Cal. 1890) (quoting the ordinance at issue, Ord. No. 2190). The racial exclusion and segregation ordinances that proliferated in California in the 1880s expressly and implicitly targeted US citizens of Chinese descent and Chinese nationals. Beginning in the 1890s, cities throughout the American West enlarged their discriminatory focus to include people from Japan, the Philippines, Korea, India, and other Asian countries. Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882-1924*, 21 J. AM. ETHNIC HIST. 36, 44 (2002); *see also infra* note 219 (discussing cycle of enticement of new immigrant laborers to demonization and expulsion).

[66] *See* Robert L. Tsai, *Racial Purges*, 118 MICH. L. REV. 1127, 1128, 1132–33 (2020) (discussing judicial knowledge of municipalities' use of laundry and other local ordinances to purge Chinese people from California).

municipal boundary where certain land users or land uses were permitted or prohibited.[67]

Thirty years later, on the other side of the country, cities of the antebellum South and border states were reacting to the first waves of the Great Migration by devising a legal mechanism to enforce racial segregation that could pass muster under the Supreme Court's separate but equal test[68]—a feat the western exclusion ordinances had not achieved.[69] The new Jim Crow mechanism was quickly adopted by cities throughout the South and southeastern United States.[70]

A. Chinese Exclusion Ordinances of the American West

San Francisco adopted the Bingham Ordinance in 1880 following California's delegation of police power authority to its consolidated cities and counties.[71] This zoning-like ordinance created a small district, which it designated the "Chinese" district, and prohibited people of Chinese descent from residing or doing business anywhere else in the County of San Francisco.[72] Enforcement of the ordinance would have forcibly displaced a large, established community of first- and second-generation Chinese immigrants, many of whom were US citizens.[73] In declaring the Bingham Ordinance void, a district court found that:

> [The ordinance was intended to] forcibly drive out a whole community of twenty-odd thousand people, old and young, male and female, citizens of the United States, born on the soil, and foreigners of the Chinese race, moral and immoral, good, bad, and indifferent, and without respect to circumstances or conditions, from a whole section of the city which they have inhabited, and in which they have carried on all kinds of business appropriate to a city, mercantile, manufacturing, and otherwise, for more than 40 years.[74]

Although San Francisco failed in this attempt to use its police power to racially segregate the county, San Francisco and local governments throughout the American West found they could achieve similar results with facially race neutral

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[67] *See infra* notes 72–78 and accompanying text.

[68] *See infra* Section I.B.

[69] *See infra* notes 72–66 and accompanying text.

[70] *See infra* notes 169–171 and accompanying text.

[71] CAL. CONST. art. XI, § 11 (1879) (providing that "[a]ny county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws").

[72] *In re* Lee Sing, 43 F. 359, 359–61 (C.C.N.D. Cal. 1890).

[73] *Id.* at 361.

[74] *Id.*

ordinances that targeted laundry businesses,[75] the vast majority of which were owned and operated by people of Chinese descent.[76] The laundry regulations took various forms. Some, like the Bingham Ordinance, resembled zoning in that they relegated laundry businesses to a prescribed district[77]—which, in the case of Stockton, California, consisted entirely of unbuildable marshlands.[78] Others regulated the days and hours of operation of laundry businesses, required permits for their establishment and continued operation, or imposed special taxes on the businesses.[79] Violation of the laundry ordinances, like violation of the Bingham Ordinance and other residential segregation ordinances of the American West, was a crime punishable by a fine, imprisonment, or both.[80]

Most courts had little difficulty concluding that the facially neutral laundry ordinances did not run afoul of any state or federal constitutional guarantees[81]—notwithstanding their obvious racially discriminatory purpose.[82] In *Barbier v. Connolly* and *Soon Hing v. Crowley*, the Supreme Court validated a judicial approach to the Fourteenth Amendment that rendered irrelevant evidence that a facially neutral police power

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[75] *See* David E. Bernstein, Lochner*, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 231 (1999).

[76] Joan S. Wang, *Race, Gender, and Laundry Work: The Roles of Chinese Laundrymen and American Women in the United States, 1850-1950*, 24 J. AM. ETHNIC HIST. 58, 61 (2004); *see generally* PAUL SIU ET AL., THE CHINESE LAUNDRYMAN: A STUDY OF SOCIAL ISOLATION (J. Tchen ed., 1987) (discussing the lives and work of Chinese laundry workers in America); BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA (2018); Paul Ong, *An Ethnic Trade: The Chinese Laundries in Early California*, 8 J. ETHNIC STUD. 95 (1981). In the early twentieth century, Los Angeles employed the same technique to harass and expel US citizens of Japanese descent and Japanese nationals from its borders. *See infra* Section II.B.

[77] *See, e.g.*, *In re* Hang Kie, 69 Cal. 149–50 (1886) (City of Modesto ordinance that prohibited operation of laundry in city except within small district); *In re* Sam Kee, 31 F. 680 (9th Cir. 1887) (City of Napa ordinance substantively similar to Modesto ordinance); *In re* Hong Wah, 82 F. 623, 624 (N.D. Cal. 1897) (City of San Mateo ordinance substantively similar to Modesto ordinance).

[78] *In re* Tie Loy (The Stockton Laundry Case), 26 F. 611 (C.C.D. Cal. 1886) (City of Stockton ordinance substantively similar to Modesto ordinance).

[79] *See, e.g.*, Case of Yick Wo, 68 Cal. 294 (1885), *overruled by* Yick Wo v. Hopkins, 118 U.S. 356 (1886); *Ex parte* Moynier, 65 Cal. 33, 34–35 (1884) (San Francisco order No. 1,719, approved June 25, 1883, prohibited operation of public laundries between ten o'clock in the evening and six o'clock in the morning as well as on Sundays and required certificates from the health officer board of fire wardens); *see generally* Bernstein, *supra* note 75, at 231–68 (classifying anti-Chinese laundry laws of the American West as licensing legislation, maximum hours laws, zoning ordinances, and taxation).

[80] *See, e.g.*, ordinances at issue in cases cited in *supra* notes 75 and 77–79.

[81] *See, e.g.*, Barbier v. Connolly, 113 U.S. 27, 34 (1884); Soon Hing v. Crowley, 113 U.S. 703, 711 (1885); *Ex parte* Moynier, 65 Cal. 33, 36 (1884) (holding ordinance regulating hours of operation and requiring certificates from health officer board and fire warden valid under police power).

[82] *Id.*

ordinance had a racially discriminatory purpose. Both cases involved ordinances adopted by San Francisco County that imposed licensing and inspection procedures on laundry businesses in wooden buildings located within designated areas of the City of San Francisco and prohibited washing and ironing of clothes between ten o'clock at night and six in the morning.[83]

Writing for the Court in both cases, Justice Field dismissed the relevance of a discriminatory legislative motive, opining in *Soon Hing* that "even if the motives of the [County Board of Supervisors] were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned."[84] In other words, whether or not the government's intended purpose was to exclude and oppress on the basis of race, the ordinances were valid police power regulations because they applied on their face to all laundry businesses, and the prohibition against nighttime operation of laundries in certain areas of the city bore a reasonable relationship to reducing the risk of fire and disease associated with operating open flame laundries in wooden structures.[85] Having narrowed the frame to nullify evidence of the laws' racially discriminatory purpose, the Court concluded in both cases that the ordinances satisfied constitutional muster because they were generally applicable and met the low bar of being rationally related to public health, safety, or morals.

As many US law students learn, the Supreme Court revisited the constitutionality of a San Francisco County laundry ordinance two years later in *Yick Wo v. Hopkins*.[86] The petitioners, Yick Wo and Wo Lee, were Chinese nationals fined and imprisoned for operating laundries without a valid permit.[87] Both operated their laundry businesses for many years,[88] but, when their permits expired, the county denied their renewal applications notwithstanding that water and fire inspectors certified both businesses as sanitary and safe.[89] The government admitted the county denied the renewal permits of two hundred

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[83] *Barbier*, 113 U.S. at 30; *Soon Hing*, 113 U.S. at 707–08.

[84] *Soon Hing*, 113 U.S. at 711.

[85] *Id.* at 711 (holding that ordinance was valid exercise of police power); *Barbier*, 113 U.S. at 30, 32 (same).

[86] Yick Wo v. Hopkins, 118 U.S. 356, 366 (1886).

[87] *Id.* at 357–58.

[88] Wo Lee had operated his business for twenty-five years and Yick Wo had operated his for twenty-two years. Brief for Defendant and Respondent, *Yick Wo*, 118 U.S. 356 (Nos. 1280 & 1281), 1885 WL 18153, at *1.

[89] *Yick Wo*, 118 U.S. at 358.

other Chinese launderers while granting renewal permits for all but one white launderer.[90]

Distinguishing *Barbier* and *Soon Hing*, the *Yick Wo* Court found evidence of the county's racially discriminatory purpose relevant to the petitioners' equal protection claims. Unlike the ordinances at issue in *Barbier* and *Soon Hing*, which regulated hours of operation,[91] the ordinance at issue in *Yick Wo* conditioned permit issuance on the consent of the County Board of Supervisors and placed no limits on the Board's authority to withhold consent.[92] Because Yick Wo and Wo Lee both obtained the necessary health and safety certificates and the record contained no evidence of a reason for the disparate enforcement of the ordinance "except hostility to the race and nationality to which the petitioners belong[ed]," the Court concluded that the denial of the petitioners' permits constituted unlawful discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.[93]

But the Court did not frame the *Yick Wo* holding in terms of a right to be free from racially discriminatory state action.[94] The bulk of the opinion is dedicated to the Court's disapproval of the ordinance's attempt to delegate to a municipal board unlimited authority to grant or deny a license to carry on a business—a feature that the Court noted renders any ordinance facially invalid,[95] presumably in violation of the Due Process Clause prohibition against arbitrary governmental restrictions on private property.[96] But, after roundly condemning the ordinance as arbitrary, the Court concluded that, even if the ordinance were "fair on its face, and impartial in appearance,"[97] the record revealed only one basis for the board's denial of Yick Wo and Wo Lee's licenses: racial animus.[98] Thus, as applied to

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[90] *Id.* at 359.

[91] *Id.* at 367 (discussing Barbier v. Connolly, 113 U.S. 27 (1884), and Soon Hing v. Crowley, 113 U.S. 703 (1885)).

[92] *Id.* at 366–67.

[93] *Id.* at 374.

[94] *See* Gabriel Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359, 1386–87 (2008); Thomas W. Joo, Yick Wo *Re-Revisited: Nonblack Nonwhites and Fourteenth Amendment History*, 2008 U. ILL. L. REV. 1427, 1433 (2008).

[95] *See Yick Wo*, 118 U.S. at 372–73.

[96] SANDER ET AL., *supra* note 14, at 25. Although the opinion condemns a hypothetical ordinance on apparent due process grounds, the Court did not expressly invalidate the ordinance on due process grounds. *See* Joo, *supra* note 94, at 1433 (making similar argument); Richard S. Kay, *The Equal Protection Clause in the Supreme Court 1873-1903*, 29 BUFF. L. REV. 667, 694 (1980) (arguing that *Yick Wo* rested primarily on facial invalidity analysis and secondarily on discriminatory enforcement).

[97] *Yick Wo*, 118 U.S. at 373–74.

[98] *Id.* at 374.

Yick Wo and Wo Lee, the ordinance violated the equal protection guarantees of the Fourteenth Amendment.[99]

In this way, *Yick Wo* left open the possibility that a facially valid police power regulation could be enforced against one class for valid police power reasons. Moreover, *Yick Wo* left intact *Barbier* and *Soon Hing*'s conclusions that evidence of racially discriminatory intent is essentially irrelevant to the validity of police power legislation that is facially race neutral and rationally related to the public welfare. Indeed, well into the twentieth century, courts relied on *Barbier* and *Soon Hing* for the proposition that the motives for legislative action lay beyond judicial review[100]—a principle that continued to constrain judicial review of facially neutral laws that create and enforce racial and ethnic boundaries even after the Court recognized the legal relevance of racially discriminatory motive.[101]

Moreover, *Yick Wo* reinforced the judicial fiction underlying the Court's racist intent-blind approach in *Barbier* and *Soon Hing*. Unlike in those cases, the Court noted, in the case of Yick Wo and Wo Lee, that it did not need to guess how a municipal board might exercise its discretion because the record showed that the board denied the permits solely on the basis of race and not on the basis of safety or sanitation concerns.[102] The implicit suggestion that the Court could do no more than speculate how the ordinances in *Barbier* and *Soon Hing* would be enforced ignored overwhelming evidence to the contrary.

The facts within the Justices' cognizance amply demonstrated that the police power justifications for the laundry

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[99] *Id.* 118 U.S. at 373–74.

[100] *See, e.g.*, *Ex parte* Fiske, 13 P. 310, 311–12 (Cal. 1887) (concluding that *Yick Wo* did not abrogate *Soon Hing*); *Ex parte* San Chung, 105 P. 609, 611 (Cal. Ct. App. 1909) (rejecting constitutional challenge to anti-Chinese laundry ordinance and relying on *Barbier* for proposition that court "must judge of the purpose of the ordinance by what appears upon its face"); Williams v. Arkansas, 217 U.S. 79, 90 (1910) (relying on and quoting *Barbier* for the proposition that "[i]t is settled that legislation which, 'in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment'") (citation omitted); Douglas v. City Council of Greenville, 75 S.E. 687, 688 (S.C. 1912) (citing *Soon Hing* for the proposition that the court "cannot inquire into the motives which induce legislative action"); Yee Gee v. City of San Francisco, 235 F. 757, 762 (N.D. Cal. 1916) (relying on *Soon Hing* to reject discriminatory motive argument regarding San Francisco ordinance regulating hours of operation of laundry business).

[101] *See infra* Section III.C. (tracing the racist-intent blind approach to Fourteenth Amendment challenge in *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974), and *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), to Supreme Court's treatment of anti-Chinese laundry ordinances in *Soon Hing*, *Barbier*, and *Yick Wo*); *compare* Lochner v. New York, 198 U.S. 45, 64 (1905) (finding a maximum-hours law applicable to bakers was not rationally related to the public welfare and was passed for "other motives").

[102] *Yick Wo*, 118 U.S. at 373–74.

ordinances were mere pretexts for racial discrimination. The lower court in one of the two cases overruled by *Yick Wo* recognized that the purpose of the ordinance was to purge San Francisco of its Chinese residents, writing:

> That [the ordinance] does mean prohibition, as to the Chinese, it seems to us must be apparent to every citizen of San Francisco who has been here long enough to be familiar with the course of an active and aggressive branch of public opinion and of public notorious events.[103] Can a court be blind to what must be necessarily known to every intelligent person in the state?[104]

Judge Sawyer's observation that "every intelligent person in the state" knew the purpose of the laundry ordinances was to exclude Chinese people is consistent with the historic record.[105] Contemporaneous newspaper articles clearly depict the laws and their enforcement as mechanisms to harass and ultimately expel Chinese people from San Francisco.[106] Governments at all levels in California passed laws that expressly and implicitly targeted citizens and residents of Chinese descent.[107] These lawmaking bodies not only made no attempt to hide the discriminatory purposes of these laws, but also publicly proclaimed their racial animus.[108]

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[103] *In re* Wo Lee, 26 F. at 475 (C.C.D. Cal. 1886) (citation omitted). "Public notorious events" appears to be a reference to massacres, forced expulsions, and other brutal crimes committed against Chinese people during the period. *See generally* The Honorable Denny Chin & Kathy Hirata Chin, *"Kung Flu": A History of Hostility and Violence Against Asian Americans*, 90 FORDHAM L. REV. 1889, 1896–1908 (2022) (discussing the Los Angeles Massacre of 1871, Rock Springs, Wyoming Massacre of 1885, the forcible expulsion of Chinese residents from Eureka, California in 1885, and from Seattle, Washington Territory in 1886). Chin and Chin further observed that "[t]here were many incidents of mob violence in the latter part of the nineteenth century . . . . [when] anti-Asian American sentiment permeated many areas of civic life—from the populace to the legislatures to the court system." *Id.* at 1896; *see also* Greg Nokes, *Chinese Massacre at Deep Creek*, OR. ENCYCLOPEDIA (Mar. 23, 2022), https://www.oregonencyclopedia.org/articles/chinese_massacre_at_deep_creek/#.YwlrxC2B1-U [https://perma.cc/LN35-665C] (regarding 1887 massacre of thirty Chinese miners in Hells Canyon, Washington Territory).

[104] *Wo Lee*, 26 F. at 475, *rev'd*, *Yick Wo*, 118 U.S. at 374.

[105] *See generally* LEW-WILLIAMS, *supra* note 76; Ong, *supra* note 76.

[106] *See* CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 32–35 (1955). Note that, although Abrams went against contemporary mainstream views by fiercely criticizing the social harms of expulsive and segregationist housing policies, he employed dehumanizing and oppressive language throughout his critique.

[107] *See, e.g.*, *infra* note 112 (citing sources discussing state and local laws targeting Chinese labors). National hostility against people of Chinese descent was exemplified by passage of the Chinese Exclusion Act of May 6, 1882, 22 Stat. 58.

[108] For example, an 1885 report of a special committee of the San Francisco Board of Supervisors referred to Chinese people as less worthy than vagrant dogs, characterizing them as "seek[ing] to overrun our country and blast American welfare and progress with their miserable, contaminating presence." REPORT OF THE SPECIAL COMM. OF THE BOARD OF SUPERVISORS OF SAN FRANCISCO ON THE CONDITION OF THE

Justice Stephen Field, who authored the *Barbier* and *Soon Hing* opinions in 1884 and 1885, respectively, was aware of San Francisco's campaign to oppress its Chinese residents and its use of facially neutral regulations for this purpose.[109] While riding circuit in California in the late 1870s and early 1880s,[110] Justice Field acknowledged that the federal district court was "aware of the general feeling—amounting to positive hostility—prevailing in California against the Chinese, which would prevent their further immigration hither, and expel from the state those already here."[111] In the 1879 case *Ho Ah Kow v. Nunan*, Justice Field rejected as pretextual the sanitation purposes of an ordinance that directed the Sheriff to cut the hair of all men confined to the county jail on misdemeanor convictions to "a uniform length of one inch."[112] The Board of Supervisors adopted the forced shearing provisions to target Chinese men living in San Francisco, most of whom kept their hair in a long braid or queue, the loss of which "was a mark of disgrace [that would result in], many Chinese believed, misfortune and suffering after death."[113] In finding that the purpose of the

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CHINESE QUARTER AND THE CHINESE IN SAN FRANCISCO 43 (1885). A state legislative committee produced a report in 1885 that also fanned hatred and bias against Chinese people. *See generally id.*

[109] Ho Ah Kow v. Nunan, 12 F. Cas. 252, 253 (C.C.D. Cal. 1879); *In re* Quong Woo, 13 F. 229, 230 (C.C.D. Cal. 1882) (invalidating ordinance that made business license contingent on recommendation of twelve taxpaying citizens from the block where a laundry was proposed).

[110] "Riding circuit" refers to the practice of Supreme Court justices serving on federal circuit court panels pursuant to the Judiciary Act of 1789, which did not provide for separate circuit court judges. Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1757 (2002-2003).

[111] *Ho Ah Kow*, 12 F. Cas. at 256.

[112] *Id.* At 253. Ho Ah Kow sued San Francisco Sheriff Nunan after the Sheriff sheared Ho's hair, forcibly removing the long braid, or "queue," Ho wore down his back. Ho had been convicted of violating the state's Cubic Air Law, which was modeled on a San Francisco law that also targeted Chinese people by criminalizing residing in crowded spaces. Chin & Chin, *supra* note 103, at 1891–92. The Cubic Air Law was fueled by the leadership of the Anti-Coolie Association, an organization opposed to the use of Chinese labor, which it portrayed as an existential threat to white workers, a sentiment that politicians seized on to rally support. *Id.* at 1893 (referring to the reelection campaign of the first governor of California, John Bigler, elected in 1851); Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1251 (2005); Joshua S. Yang, *The Anti-Chinese Cubic Air Ordinance*, 99 AM. J. PUB. HEALTH 440 (2009); MAE NGAI, THE CHINESE QUESTION: THE GOLD RUSHES AND GLOBAL POLITICS 87 (2021) ("Bigler's success in tarring the Chinese as a 'coolie race' gave California politicians a convenient trope that could be trotted out whenever conditions called for a racial scapegoat."); *see also* Lin Sing v. Washburn, 20 Cal. 534, 535, 579-80 (1862) (invalidating California statute entitled "an act to protect free white labor against competition with Chinese coolie labor, and to discourage the Immigration of the Chinese into the State of California").

[113] Chin & Chin, *supra* note 103, at 1944 n. 156 (quoting *The Tale of a Chinaman*, N.Y. TIMES, July 16, 1879, at 4 ("It is nowhere denied that the so-called 'cubic air ordinance' was enacted for the sole purpose of harrying and disconcerting the gregarious Chinese.").

ordinance was to increase the severity of punishment for Chinese men by requiring the forcible removal of their queues upon incarceration for even simple misdemeanors,[114] Justice Field wrote an impassioned plea for judicial scrutiny of pretextual police power regulations:

> [W]e cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly.[115]

Justice Field therefore reasoned that, by increasing criminal penalties for Chinese people only, the ordinance denied Ho Ah Kow equal protection of the law and constituted an invalid attempt by the county board to amend the state penal code.[116]

Three years later, Justice Field recognized again the courts' role in scrutinizing pretextual police power justifications[117]—this time, in the context of yet another facially neutral San Francisco laundry ordinance.[118] He wrote that the power to pass laws is "a public trust" that states vest in municipalities, and the validity of those laws hinges on them being "not oppressive nor unequal nor unjust in their operation."[119] Ordering the release of a Chinese national convicted of violating the ordinance, Justice Field called the assertion that "the business of a laundry—that is, of washing clothes for hire—is against good morals or dangerous to the public safety," a "miserable pretense,"[120] and "absurd."[121] Any

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[114] *Ho Ah Kow*, 12 F. Cas. at 254–55.

[115] *Id.* at 253.

[116] *Id.* The Honorable Denny Chin and Kathy Hirata Chin recently described the significance of Ho Ah Kow's lawsuit as follows:

> Long before civil rights suits for damages became popular, a Chinese laborer had the audacity to sue a government official . . . for money damages. Moreover, his efforts led to a ruling, some seven years before the U.S. Supreme Court's decision in *Yick Wo v. Hopkins*, that the Equal Protection Clause applied not just to citizens but also to noncitizens, including the Chinese. And, significantly, the Court held also that even a facially neutral ordinance, if unfairly applied, could violate the Constitution.

Chin & Chin, *supra* note 103, at 1916–17 (citations omitted).

[117] *In re* Quong Woo, 13 F. 229 (C.C.D. Cal. 1882).

[118] The ordinance made licenses to operate laundry businesses contingent on the recommendation of twelve taxpaying citizens from the block where a laundry was proposed. *See id.* at 233.

[119] *Id.* at 232.

[120] *Id.* at 233.

[121] *Id.* at 231.

purported health and safety rationale was suspiciously overbroad because the ordinance, among other things, applied to all structures regardless of construction, and was duplicative and unnecessarily intrusive given that county supervisors already had the authority to order the alteration or removal of unsafe structures or business operations.[122]

Ultimately, by reinforcing the racially discriminatory intent-blind approach of *Barbier* and *Soon Hing*, the *Yick Wo* Court greenlit the continued use of facially neutral police power regulations to target racial minorities with impunity. Rather than putting a stop to western municipalities' use of purported police power regulations to harass and expel Asian and Asian American residents, the *Laundry Cases*, including *Yick Wo*, provided a blueprint for crafting segregation ordinances and other police power regulations targeting racial minorities that could withstand constitutional review. Los Angeles and Berkeley, among other cities, followed this blueprint when they adopted some of the first comprehensive zoning ordinances in the United States.[123] Los Angeles's 1909 ordinance, for example, zoned as residential parts of the city containing approximately 110 existing laundries operated by people of Chinese and Japanese descent.[124] The code made continued operation of laundry businesses in residential zones a crime subject to fines and jail time.[125] The twentieth century leaders of the California zoning movement spoke openly about the racially discriminatory purpose of these regulations, saying, for example: "The fight against the Chinese wash-house laid the basis for districting laws in this State,"[126] and "[w]e are ahead of most states in our court decisions, maybe because we have been at . . . [zoning] longer, thanks to the persistent proclivity of ' . . . '[Chinese people] to clean our garments in our midst."[127]

B. The Great Migration and the Rise of Jim Crow Zoning

In the early twentieth century, the population of the urban South boomed as southern cities became industrial

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[122] *Id.*

[123] *See infra* Section II.A. (discussing first wave of comprehensive zoning ordinances in US cities).

[124] HIRT, *supra* note 13, at 14–15.

[125] *See* NEW YORK HEIGHTS OF BUILDINGS COMM'N REPORT (2013); *see also* HIRT, *supra* note 13, at 14–15 (discussing same).

[126] Duncan McDuffie, *City Planning in Berkeley*, 4 BERKELEY CIVIC BULL. 106, 115 (Mar. 15, 1916).

[127] Frank V. Cornish, *The Legal Status of Zone Ordinances*, 3 BERKELEY CIVIC BULL. 173, 175 (May 18, 1915) (epithet omitted).

centers and Black families moved from rural areas to cities.[128] By 1910, the Black population in southern urban areas was more than triple what it was during the Civil War.[129] Most of this early wave of Great Migrants moved into predominantly Black urban neighborhoods.[130] But, as housing in Black neighborhoods became increasingly scarce, some Black households moved to homes outside Black neighborhoods.[131]

In May of 1910, William Ashbie Hawkins, a prominent Black attorney and counsel to the Baltimore branch of the National Association for the Advancement of Colored People (NAACP), bought a home in a prestigious white neighborhood in Baltimore, Maryland,[132] which had one of the largest Black urban populations in the United States.[133] One month later, in June of 1910, Hawkins' lessee, George McMechen, also a prominent Black attorney, moved into the home with his wife Anna. Three other Black families soon moved onto the same block.[134]

In Baltimore and elsewhere, white segregationists responded to these and other perceived "invasions"[135] with intimidation, violence, widespread use of racially restrictive deed covenants[136] and other formal and informal private

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[128] SANDER ET AL., *supra* note 14, at 24.

[129] *Id.* at 26.

[130] *Id.* at 24–25; *see also* Emily Lieb, *The "Baltimore Idea" and the Cities It Built*, 25 S. CULTURES 104, 106–08 (2019) (identifying pre-1910 segregationist strategies related to geographic location of Jim Crow public schools).

[131] SANDER ET AL., *supra* note 14, at 24–25.

[132] *Baltimore's Pursuit of Fair Housing: A Brief History*, MD. CTR. FOR HIST. & CULTURE, https://www.mdhistory.org/baltimores-pursuit-of-fair-housing-a-brief-history/ [https://perma.cc/B7CV-YC7C]; *W. Ashbie Hawkins*, MD. STATE ARCHIVES, https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/012400/012415/html/12415bio.html [https://perma.cc/X3QK-BAJD]; Lieb, *supra* note 130, at 108.

[133] SANDER ET AL., *supra* note 14, at 27–28 (reporting that Baltimore was the sixth-largest city in the United States and had the fourth-largest Black population, which accounted for approximately 15 percent of Baltimore's residents).

[134] TAYLOR, *supra* note 12, at 156.

[135] *Residents Are Aroused*, BALT. SUN, Sept. 26, 1910, at 4; Lieb, *supra* note 130, at 106–08 (identifying school board proposals to site segregated public schools for Black children in or near white neighborhoods as impetus for Baltimore racial segregation ordinance that was first proposed in 1907); *Along the Color Line*, 1 CRISIS, 1, 6 (Nov. 1910) (discussing proposed segregation ordinance in Baltimore and "invasion" of Black property owners and proposed siting of parks and boulevards in Kansas City, Kansas, to "cut off threatened . . . invasion" by Black people); DAVID DELANEY, RACE, PLACE & THE LAW: 1836–1948 12 (1998). In an address to members of Realtor Exchange of Louisville on November 14, 1914, W.D. Binford proposed that Louisville adopt a racial segregation ordinance like Baltimore's ordinance to stave off the "invasion" of Black "mercenaries" into white neighborhoods. *Id.*

[136] ABRAMS, *supra* note 106, at 26 (discussing use of racially restrictive deed covenants, "gentlemen's understandings to maintain white supremacy and purity in neighborhoods," Ku Klux Klan-based "neighborhood improvement associations," and violence); Carol M. Rose, *Property Law and Inequality: Lessons from Racially Restrictive Covenants*, 117 NW. U. L. REV. 225, 229 (2022) ("Racial covenants had existed in scattered

agreements,[137] and formation of neighborhood associations to enforce those agreements and lobby for segregation laws.[138] Although many of the Baltimore segregationists may not have owned property near the Hawkins' home or elsewhere,[139] they stoked fears that neighborhood integration would decrease the market value of white-owned property while mandatory segregation would "permanently fix the value of real estate" and "remove a large percentage of the risk now involved in investing in Baltimore property."[140] Baltimore segregationists powerfully wielded a "mythology of segregation economics"[141] for more than a decade to prevent public schools for Black children from being sited in or near white neighborhoods.[142] Although at least some of them understood their proposed ordinance would negatively affect the market for homes on white blocks,[143] they nevertheless

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properties in the nineteenth century, but after about 1910, they became increasingly prevalent in cities and suburban areas all across the country."). Restrictive covenants are restrictions on the use of property that are added to the title of the property as part of private property transactions. *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding racial covenants, which restrict the race of purchasers or occupants of the property, unenforceable under the Equal Protection Clause of the Fourteenth Amendment).

[137] *See* SANDER ET AL., *supra* note 14, at 28; ABRAMS, *supra* note 106, at 26 (discussing use of racially restrictive deed covenants, "gentlemen's understandings to maintain white supremacy and purity in neighborhoods," Ku Klux Klan-based "neighborhood improvement associations," and violence); Carol M. Rose, *Property Law and Inequality: Lessons from Racially Restrictive Covenants*, 117 NW. U. L. REV. 225, 229 (2022) ("Racial covenants had existed in scattered properties in the nineteenth century, but after about 1910, they became increasingly prevalent in cities and suburban areas all across the country.").

[138] *See* Lieb, *supra* note 130, at 108 (discussing neighborhood improvement association formed to support Baltimore segregation ordinance).

[139] *See* W. Ashbie Hawkins, *A Year of Segregation in Baltimore*, 3 CRISIS 27, 28 (Nov. 1911) (describing proponents of racial segregation ordinance as "obscure personages" and "half-grown and badly raised young men," the majority of whom "didn't own the property they occupied or any other.").

[140] *Residents Are Aroused*, *supra* note 135, at 4. This opinion piece, which was published the day the City Council was scheduled to consider the segregation ordinance, also claimed riots would ensue if the Council failed to adopt the ordinance. *Id.*

[141] Lieb, *supra* note 131, at 110. The segregationists claimed the availability of homes for sale on the same block as the Hawkins house illustrated the dire economic effect of an inevitable "invasion" of white neighborhoods by Black residents. *Residents Are Aroused*, *supra* note 140, at 4. Hawkins observed, however, that extension of cable car lines precipitated the "opening and development of large suburban tracts for residential purposes by the middle class of whites," which "threw great blocks of handsome houses on the market" that "had to be disposed of to anybody, and often on any terms." Hawkins, *supra* note 139, at 27.

[142] Lieb, *supra* note 131, at 106–08.

[143] *Residents Are Aroused*, *supra* note 140, at 4 (suggesting neighborhood residents support the segregation ordinance because they are concerned with neighborhood welfare as opposed to property owners whose interest is purely economic and observing that property owners rent or sell to willing Black buyers when it is in their economic interest to do so); *see also* Lieb, *supra* note 131, at 111–12 (discussing how the Baltimore segregation ordinance placed downward pressure on the prices of homes on white blocks and upward pressure on the prices of homes on Black and mixed blocks).

capitalized on this mythology to garner political support for the segregation ordinance they had been demanding since 1907.[144]

At the turn of the twentieth century, citywide zoning as a legal means to control the geographic location of land uses did not exist in the United States.[145] But judicial responses to segregationist legal mechanisms—including Jim Crow laws of the Deep South[146] and western' efforts to segregate and exclude Asian Americans—provided valuable lessons for those attempting to craft racial segregation ordinances that could withstand court challenges. Key among these lessons were that segregation of the races for the prevention of nuisances and preservation of peace was a legitimate exercise of the police power that could survive an equal protection challenge if members of the regulated racial caste had access to some version of the regulated object—be it a theater, railcar, school, or college.[147]

Equipped with this knowledge,[148] Baltimore reacted to the white outcry against integration by passing an ordinance in December 1910 that prohibited Black people from residing on blocks where more than half of the homes were occupied by white residents, and vice versa, and required developers of new residences to specify in their permit applications the race of the intended occupants.[149] The ordinance subjected violators to a one hundred dollar fine and imprisonment up to a year.[150] After a

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[144] Lieb, *supra* note 131, at 106–08.

[145] In the late nineteenth century, Boston, New York City, Washington, DC, and a few other northeastern and western cities adopted zoning-like ordinances that were limited in scale or purpose. *See* MASS. GEN. LAWS ch 452, § 1 (1898) (limiting building heights in Boston); N.Y. Laws ch 454, § 1 (1885) (limiting height of residential buildings in New York City); An Act to Regulate Height of Buildings in the District of Columbia, ch. 322, 30 Stat. 922 (1899); *see also* Hirt, *supra* note 20, at 5.

[146] Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105, MICH. L. REV. 505, 539 (2006); C. VANN WOODARD, THE STRANGE CAREER OF JIM CROW 100, 101 (1974).

[147] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896), *abrogated by* Brown v. Bd. of Ed., 347 U.S. 483 (1954); Berea College v. Kentucky, 211 U.S. 45 (1908).

[148] *See Residents Are Aroused*, *supra* note 140, at 4 (quoting an attorney stating that the ordinance would survive a court challenge in part because "[t]he extent of legislation under the provisions of police power have [sic] never been definitely defined," Black residents in white neighborhoods constitute a nuisance, and including a prohibition against white migration into Black neighborhoods will satisfy the Fifteenth Amendment by making the ordinance non-discriminatory).

[149] BALTIMORE, MD., ORD. 610 (Dec. 19, 1910); *see also* Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1983) (discussing historical context of Baltimore segregation ordinances); TAYLOR, *supra* note 12, at 156 (same); Silver, *supra* note 17, at 6 (same); Gretchen Boger, *The Meaning of Neighborhood in the Modern City: Baltimore's Residential Segregation Ordinances, 1910-1913*, 35 J. URB. HIST. 236 (2009) (same); Brent M. Rubin, Note, *Buchanan v. Warley and the Limits of Substantive Due Process as Antidiscrimination Law*, 92 TEX. L. REV. 477, 516 (2013) (same).

[150] BALTIMORE, MD., ORD. 610 (Dec. 19, 1910).

trial court promptly voided the ordinance "on a technicality,"[151] Baltimore adopted two amended versions in rapid succession.[152] The third iteration of Baltimore's segregation ordinance, signed into law on May 15, 1911, fixed the technical defect, added an exemption for existing "mixed" blocks, and prohibited the establishment of Black schools and churches on white blocks, and vice versa.[153]

Baltimore's segregation ordinance, like other Jim Crow laws adopted throughout the period, included race neutral purposes that courts had approved of as falling squarely within the scope of the police power, including, for example, "preserving peace," "preventing conflict," and "promoting the general welfare of the city."[154] Unsurprisingly given the Supreme Court's embrace of white supremacism, many of the cities adopting racial segregation ordinances made no attempt to hide the white supremacist purposes of the laws, which included the maintenance of "racial purity" and prevention of "the deterioration of property owned and occupied by white people."[155]

Although these white supremacist purposes were not spelled out on the face of Baltimore's ordinance, Baltimore Mayor J. Barry Mahool explained that the city adopted the "so-called segregation ordinance" after Black residents "began to have a desire to push up into the neighborhood of the [w]hite resident[s]."[156] Mahool explained that Black people "should be quarantined in isolated slums in order to reduce the incidents of civil disturbance, to prevent the spread of communicable disease into the nearby [w]hite neighborhoods, and to protect property values among the [w]hite majority."[157] Thus, although the Supreme Court and lower courts routinely characterized as nondiscriminatory Jim Crow laws that imposed reciprocal prohibitions or obligations on People of Color and white people, "every intelligent person"[158] knew the actual purpose of

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[151] Hawkins, *supra* note 139, at 29; *see also Opinion*, 1 CRISIS 1, 13 (Mar. 1911) (quoting newspaper article reporting that court voided the 1910 ordinance for "improper framing"); Power, *supra* note 138, at 303–04 (1983) (suggesting court invalidated ordinance because it violated city charter provision requiring descriptive titles).

[152] BALTIMORE, MD., ORD. 654 (Apr. 7, 1911); BALTIMORE, MD., ORD. 692 (May 15, 1911); *see also* Hawkins, *supra* note 139, at 30 (providing contemporaneous description of the three iterations of the segregation ordinance and their context).

[153] TAYLOR, *supra* note 12, at 157.

[154] *See, e.g.*, BALTIMORE, MD., ORD. 692 (May 15, 1911); Buchanan v. Warley, 245 U.S. 60, 73–74 (1917) (describing legislative justification of Louisville ordinance).

[155] *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 73–74 (1917) (describing legislative justification of Louisville ordinance).

[156] TAYLOR, *supra* note 12, at 156.

[157] *Id.* at 157.

[158] I borrow this phrase from Judge Sawyer's hyperbolic observation in *Wo Lee. In re* Wo Lee, 26 F. 471, 475 (C.C.D. Cal.), *rev'd sub nom.* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Baltimore's Jim Crow zoning was to privilege white people and their property through entrenchment of a racial caste system.

Two years after Baltimore adopted its third iteration of the segregation ordinance, William Ashbie Hawkins, the same prominent Black attorney who had purchased a house in an upper-class white neighborhood, represented John Gurry after he was indicted for residing on a white block in violation of the ordinance.[159] Gurry lost at trial and appealed to the Court of Appeals of Maryland, arguing that the ordinance was in conflict with the city charter and an invalid exercise of the police power.[160] The Court of Appeals of Maryland recognized the basic principles that the exercise of the police power must not be "so arbitrary and oppressive" that it "amount[s] to the invasion of a person's constitutional rights,"[161] and that it "must not be unreasonable, but must be enacted in good faith, for the promotion of the public good, and not for the oppression or annoyance of a particular class."[162] But rather than finding the city acted *ultra vires*—that is, beyond the scope of its police power authority—when it enacted an ordinance for the oppression of a particular class, the Maryland court ignored the obvious discriminatory purpose of the ordinance and applied a reasonableness standard that sanctioned the legislated racial oppression. Relying on *Plessy v. Ferguson*, the court found racial segregation consistent with "established usages, customs, and traditions of the people" and "the promotion of their comfort, and the preservation of the public peace and good order."[163]

Relying on this lax reasonableness standard and the separate but equal doctrine embraced by the Supreme Court in *Plessy* and other cases, the Maryland court suggested that Baltimore's segregation ordinance also passed muster under the Equal Protection Clause.[164] The court reasoned that, because the ordinance imposed identical reciprocal prohibitions on white and Black households, the ordinance was analogous to laws that required separation of the races in railroad cars—laws "uniformly held" to be nondiscriminatory "when the same accommodations were provided for each race."[165] Although the court recognized the ordinance would not impose equal burdens

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[159] TAYLOR, *supra* note 12, at 158.

[160] State v. Gurry, 88 A. 546, 540 (1913).

[161] *Id.* at 551.

[162] *Id.* (citing Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Ed., 347 U.S. 483 (1954)).

[163] *Plessy*, 163 U.S. at 550.

[164] *Gurry*, 88 A. at 551–52.

[165] *Id.* at 552.

on the races because white people owned "the great bulk of property in Baltimore City," the only burden the court appeared to appreciate was the one on property owners' ability to sell or rent their properties—a burden the court observed fell disproportionately on white people and did not factor into its short equal protection analysis.[166]

However, the Maryland Court of Appeals ultimately ruled that the ordinance violated state constitutional guarantees because it could apply retroactively to prohibit existing property owners from moving into their properties. The court therefore concluded that, as broad as the state legislature's delegation of police powers to cities was, it did not include the right to deprive property owners of vested property rights.[167] Baltimore adopted a fourth iteration of its segregation ordinance in 1913, amended to avoid retroactive application.[168]

Baltimore's ordinance appears to have served as a template for the Jim Crow zoning that subsequently swept the South and border states. Within six years of Baltimore's adoption of the first Jim Crow zoning ordinance, more than a dozen US cities enacted similar racial segregation ordinances.[169] The state of Virginia even went so far as to pass a law requiring cities to segregate their residential blocks by race.[170] Scholars have found the rapid adoption by more than a dozen cities of a Baltimore-style racial segregation ordinance notable, both because racial zoning spread more rapidly than other types of Jim Crow legislation and because US cities were not yet familiar with the concept of zoning.[171]

The highest courts of Virginia, Kentucky, and Georgia rejected arguments that racial segregation ordinances unreasonably interfered with vested property rights, finding that the ordinances' provisions for mixed blocks and prospective-

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[166] *Id.* at 551–52.

[167] *Id.* at 552–53.

[168] BALTIMORE, MD., ORD. 339 (Sept. 25, 1913), *declared void by* Jackson v. State (Md. Ct. App. 1918).

[169] These included Asheville, Greensboro, and Winston, North Carolina; Ashland, Norfolk, Portsmouth, Richmond, and Roanoke, Virginia; Atlanta and Savannah, Georgia; Birmingham, Alabama; Charleston, South Carolina; Dallas, Texas; Jacksonville, Florida; Louisville, Kentucky; Memphis and Nashville, Tennessee; New Orleans, Louisiana; and St. Louis, Missouri. *See* SANDER ET AL., *supra* note 14, at 30–31 (identifying population demographics of numerous cities with segregation ordinances); *see also* State v. Darnell, 81 S.E. 338 (N.C. 1914) (regarding Winston segregation ordinance); Silver, *supra* note 17, at 22 (discussing segregation ordinances adopted in Portsmouth and Roanoke, Virginia, and elsewhere); TAYLOR, *supra* note 12, at 168–69 (discussing New Orleans segregation ordinances of 1912 and 1924).

[170] SANDER ET AL., *supra* note 14, at 31.

[171] *Id.* at 30.

only application distinguished them from the 1911 iteration of the Baltimore ordinance invalidated in *Gurry*.[172]

C. Buchanan v. Warley

By 1913, the NAACP recognized that Jim Crow zoning was quickly dominating the South and would soon spread to northern cities.[173] After Louisville adopted a racial segregation ordinance in December 1913, local NAACP leader William Warley organized support and funding for a legal challenge.[174] The fledgling national organization brought the case in Kentucky with the intention that the NAACP would lose in state court, appeal to the Supreme Court, and, with the issue framed primarily in terms of a constraint on property rights, obtain a favorable ruling to stop the spread of racial zoning before it became entrenched.[175]

To frame the issue for a court that embraced racial segregation and was more apt to disapprove of regulations that burdened property rights, the NAACP found a white plaintiff, Charles Buchanan, to sue William Warley, a Black man, for specific performance of a contract to purchase the plaintiff's land.[176] Warley's offer to purchase the land from Buchanan, which Buchanan accepted, included a proviso releasing Warley from performance if state or local law prohibited him from residing at the property.[177] Warley then invoked the proviso in response to Buchanan' request for specific performance, contending that, because he was a Black man and the property was located on a majority white block, the Louisville ordinance prohibited him from occupying a home on Buchanan's lot.[178] Buchanan then countered that, because the ordinance was invalid under the Privileges and Immunities, Equal Protection, and Due Process Clause of the Fourteenth Amendment, Warley did not have a defense to Buchanan's action for specific performance.[179]

The NAACP's gambit worked. Predictably, Buchanan lost in the trial court and the Kentucky Court of Appeals

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[172] Hopkins v. City of Richmond, 86 S.E. 139, 144, 148 (Va. 1915); Harris v. City of Louisville, 177 S.W. 472, 474 (Ky. 1915), *rev'd sub nom.* Buchanan v. Warley, 245 U.S. 60 (1917); Harden v. City of Atlanta, 93 S.E. 401 (Ga. 1917).

[173] SANDER ET AL., *supra* note 14, at 32–33; *see also infra* section I.D. (discussing Northern and Western whites' appetite for Jim Crow zoning).

[174] SANDER ET AL., *supra* note 14, at 33.

[175] *Id.*

[176] *Id.*

[177] Buchanan v. Warley, 245 U.S. 60, 69–70 (1917).

[178] *Id.* at 70.

[179] *Id.*

unanimously affirmed in *Harris v. City of Louisville*,[180] an opinion that combined Buchanan's case with that of another NAACP client, Arthur Harris, the first Black person convicted of violating Louisville's segregation ordinance.[181] The *Harris* opinion explicitly embraced white supremacism and eugenics as legitimate public welfare objectives, following the reasoning embraced by many white legal scholars of that period.[182] The state's highest court found that Louisville's racial segregation ordinance was consistent with the public policy of the state, as demonstrated by several Kentucky statutes requiring racial segregation of various public and private spaces.[183] Additionally, because the Louisville ordinance did not prevent preexisting property owners from occupying their properties, the ordinance protected vested property rights, unlike ordinances invalidated by other state courts.[184] Finally, as the vast majority of contemporaneous legal scholars[185] and other state courts did,[186] the *Harris* court analogized city-mandated segregation of residential areas to state-mandated segregation of private schools, which both the Kentucky Court of Appeals and the Supreme Court validated in *Berea College v. Commonwealth*.[187] Having lost in the state courts, Buchanan sought review by the Supreme Court.

Adopting the NAACP's framing of the issue, the Supreme Court described the case as involving "the civil right of a white

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[180] Harris v. City of Louisville, 177 S.W. 472, 477 (Ky. Ct. App. 1915), *rev'd sub nom.* Buchanan v. Warley, 245 U.S. 60 (1917).

[181] Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. SO. HIST. 179, 185–86 (1968).

[182] *See, e.g.*, Warren B. Hunting, *The Constitutionality of Race Distinctions and the Baltimore Negro Segregation Ordinance*, 11 COLUM. L. REV. 24, 31–32 (1911); James F. Minor, *Constitutionality of Segregation Ordinances*, 18 VA. L. REG. 561, 572 (1912); T. B. Benson, *Segregation Ordinances*, 1 VA. L. REG., N.S. 330, 330, 354 (1915); G.H.K., *Constitutional Law—Segregation Ordinance*, 63 U. PA. L. REV. 895, 897 (1915); *see also* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 84 (2011) ("[P]re-*Buchanan* law review commentary . . . universally argued that residential segregation laws were constitutional."); Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 366–67 (2011) (citing *Buchanan*-era law review articles, the vast majority of which argued residential segregation was constitutional).

[183] *Harris*, 177 S.W. at 476–77.

[184] *Id.* at 474–75 (distinguishing State v. Gurry, 88 A. 546 (Md. App. Ct. 1913) (ordinance contained no exceptions for existing property owners), and State v. Darnell, 81 S.E. 338 (N.C. 1914)). Note that the *Darnell* court held the City of Winston lacked authority to pass the ordinance based on the state's narrow Dillon's Rule interpretation of delegations of police powers. *Darnell*, 81 S.E. at 338–39. The court did not comment on whether the Winston ordinance contained a grandfather clause. *See id.* at 338–40.

[185] *See supra* note 182 and accompanying text.

[186] *See, e.g.*, Hopkins v. City of Richmond, 86 S.E. 139, 145 (Va. 1915); Harris v. City of Louisville, 177 S.W. 472, 477 (Ky. 1915), *rev'd sub nom.* Buchanan v. Warley, 245 U.S. 60 (1917).

[187] *Harris*, 177 S.W. at 477.

man to dispose of his property if he saw fit to do so to a person of color," and of "a person of color" "to make such disposition to a white person."[188] The Court recognized the longstanding principles that "dominion over property springing from ownership is not absolute [or] unqualified" and "[t]he disposition . . . of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare."[189] The Court also reiterated that separation of the races was a legitimate police power objective, and that segregation was compatible with "equal protection of the laws."[190] As such, the Court reiterated that a state or one of its municipalities could lawfully racially segregate public conveyances[191] and public and private schools,[192] and require private railways to provide "equal but separate" coaches for white passengers and passengers of color.[193]

But the Court parted ways with Kentucky's highest court and the bulk of contemporary legal commentary as to whether the Louisville ordinance was analogous to the segregation laws it upheld in *Berea College* and *Plessy*. The Court began by rejecting characterization of the Louisville ordinance as a racial segregation ordinance, stating somewhat inexplicably that "[t]he case presented does not deal with an attempt to prohibit the amalgamation of the races."[194]

The Court then disagreed with the Kentucky court's assessment of the Louisville ordinance as being no more burdensome on private property rights than Kentucky's ban on integrated private colleges.[195] Distinguishing the state segregation law it upheld in *Berea College* as merely a permissible limitation on the privilege of state incorporation,[196] the Court found that Louisville's ordinance, in stark contrast, had the effect of restraining the transfer of private property based solely on the race of the purchaser.[197] Based on this characterization, the Court arguably dodged the equal protection question and instead grounded its decision in the Fourteenth Amendment prohibition on state interference with

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[188] Buchanan v. Warley, 245 U.S. 60, 81 (1917).

[189] *Id.* at 74.

[190] *Id.* at 72, 75, 77, 78.

[191] *Id.* at 81.

[192] *Id.* at 79 (citing Berea College v. Kentucky, 211 U.S. 45 (1908)).

[193] *Id.* (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

[194] *Id.* at 81.

[195] Harris v. City of Louisville, 177 S.W. 472, 476–77 (1915), *rev'd sub nom.* Buchanan v. Warley, 245 U.S. 60 (1917); Buchanan v. Warley, 245 U.S. 60, 82 (1917).

[196] *Buchanan*, 245 U.S. at 79.

[197] *Id.* at 78–79.

private property rights without due process of law.[198] I say "arguably" here because the Court relied on the text and purpose of the Equal Protection Clause and the Civil Rights Act of 1866, which codified Equal Protection Clause guarantees, to support its conclusion that burdening alienability based solely on the race of the potential occupant of a home burdened the plaintiff's vested property rights without due process of law.

Had the Court applied the standard of review from *Plessy* to its assessment of whether the ordinance violated Buchanan's due process rights, the Louisville ordinance likely would have survived review.[199] But, because Louisville's ordinance substantially burdened a fundamental property right, the Court subjected the ordinance to strict scrutiny, finding that it was both under- and over-inclusive in terms of its objectives of avoiding racial conflict, preventing miscegenation, and preserving property values in white neighborhoods[200]—objectives the Supreme Court reiterated were legitimate police power objectives.[201] Given these infirmities, the Court held that the ordinance's restraint on alienation based on race alone was not a legitimate exercise of the state's police power.[202]

D. Northern and Western Whites' Appetite for Jim Crow Zoning

The challenge to Louisville's racial segregation ordinance worked. Although some cities retained their segregation ordinances for decades,[203] and at least six cities adopted segregation ordinances post-*Buchanan*,[204] the Court's ruling

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[198] *Id.* at 82.

[199] *See* Plessy v. Ferguson, 163 U.S. 537, 500–51(1896) (concluding racial segregation bore rational relationship to "established usages, customs, and traditions of the people" and "the promotion of their comfort, and the preservation of the public peace and good order").

[200] *Buchanan*, 245 U.S. at 81–82.

[201] *See* Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 370–71 (2011) (discussing *Buchanan* Court's "considerable scrutiny" of racial segregationist objectives and citing cases in which same objectives were "rubberstamp[ed]"). *But see* A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 120–22 (1996) (asserting that courts overturned racial segregation ordinances solely out of concern for white property owners).

[202] *Buchanan*, 245 U.S. at 82.

[203] TAYLOR, *supra* note 12, at 168–82.

[204] *Id.* (discussing post-*Buchanan* racial segregation ordinances adopted in Birmingham, Dallas, Indianapolis, and New Orleans); ROTHSTEIN, *supra* note 12, at 46–48 (discussing post-*Buchanan* racial segregation ordinances adopted in Atlanta, Indianapolis, New Orleans, and Apopka and West Palm Beach, Florida, and use of race-based city planning documents to guide discretionary zoning decisions in other cities).

achieved the NAACP's desired effect of preventing the adoption of express Jim Crow zoning in cities throughout the United States.[205]

Dominant narratives of law and planning scholarship, however, perpetuate a misperception that racial zoning was an aberrant "manifestation of the backward South."[206] These narratives tend to treat the common political geography of cities that adopted Jim Crow zoning—their location in the antebellum South and border states—as causal while neglecting another significant common feature. Pre-*Buchanan*, every US city with a rapidly growing Black population constituting 15 percent or more of the city's population had some form of Jim Crow zoning, except New Orleans, which adopted Jim Crow zoning in 1921,[207] and Washington, DC, which was controlled by Congress.[208] Historians identify the large scale migration of formerly enslaved Black people from the rural South to southern and border state cities, and its attendant threat to the exclusivity of white neighborhoods, as a catalyst for "efforts to rigidly limit [B]lack residential patterns."[209]

This response to the migration of Black people was not limited to the Deep South. Christopher Silver and other urban planning scholars report that political elites in northern cities like Chicago and Philadelphia, both with rapidly expanding Black populations, also embraced express racial zoning.[210] In the pre- and post-*Buchanan* period, prominent northern planners and real estate professionals promoted comprehensive zoning and widespread adoption of racially restrictive covenants as means to preserve and develop whites-only neighborhoods.[211] Post-*Buchanan*, New Orleans and other cities hired northern reformers to consult on race-based comprehensive planning and

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[205] SANDER ET AL., *supra* note 14, at 32–33.

[206] Silver, *supra* note 17, at 23 (offering a similar critique).

[207] New Orleans considered Jim Crow zoning pre-*Buchanan* but did not adopt it until 1921 following Louisiana's enactment of a zoning enabling act. Silver, *supra* note 17, at 30.

[208] *See* SANDER ET AL., *supra* note 14, at 30–31 (reporting on size and proportion of cities' Black populations in 1910).

[209] Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#livingwhileblack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 898 n.203 (2020); *see also* CASHIN, *supra* note 16, at 5; SANDER ET AL., *supra* note 14, at 28.

[210] *See* Silver, *supra* note 17, at 23; *see also* Power, *supra* note 138, at 295–96; ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960 (1983); JOHN F. BAUMAN, HOUSING, RACE AND RENEWAL: URBAN PLANNING IN PHILADELPHIA, 1920-1974 (1987); ALLEN H. SPEAR, BLACK CHICAGO: THE MAKING OF A GHETTO, 1890-1920 (1967); WILLIAM M. TUTTLE, JR., RACE RIOT: CHICAGO IN THE RED SUMMER OF 1919 (1974).

[211] *See infra* Section II.A.

zoning that could withstand constitutional scrutiny.[212] These northern reformers produced plans, maps, data, and draft ordinances to restrict Black people to certain districts and protect white landowners from, for example, "manufacturing plants and [corner] grocery stores which tend to spring up promiscuously about the city."[213]

On the national, state, and local scale, racial segregationist government policies and regulations proliferated throughout the United States in the period preceding and following *Buchanan*. Many cities adopted laws and policies that stopped short of restricting alienation on the basis of race but nevertheless forcibly dispossessed and displaced People of Color, including annexations, urban renewal projects, and underinvestment in public infrastructure and public services.[214] Illustrative of this, Charleston, South Carolina, under the guidance of Morris Knowles, a prominent planning consultant from Pittsburgh, adopted the nation's first ordinance to expressly protect a designated historic district, which at the time was home to "several thousand Black residents."[215] While the race neutral text of the ordinance appeared to comply with *Buchanan*, the city's draft general plan, also prepared by Knowles, designated the district as an area that would become a white residential district.[216] New York urban planner and lawyer Robert Whitten promoted a similar strategy for circumventing *Buchanan* in Atlanta, Georgia, which also adopted a zoning ordinance that used the race neutral codes "R1" and "R2" as substitutes for racial designations expressly outlined in the city's draft comprehensive plan.[217] Although Knowles and Whitten promoted these attempted *Buchanan* workarounds in southern cities, the use of citywide plans and

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[212] *See* Silver, *supra* note 17, at 28–31 (reporting on Atlanta, Birmingham, Charleston, New Orleans, Roanoke, and Venice, Florida, hiring northern planning consultants to devise legally defensible racial zoning systems).

[213] *Id.* at 29. Birmingham hired Boston landscape architect, Warren Manning, as a planning consultant leading up to adoption of its City Plan of Birmingham in 1919 and racial zoning ordinance in 1925. *Id.*; *see also* Monk v. City of Birmingham, 87 F. Supp. 538, 544 (N.D. Ala. 1949), *aff'd*, 185 F.2d 859 (5th Cir. 1950) (invalidating Birmingham's 1944 racial segregation ordinance).

[214] *See* CASHIN, *supra* note 16, at 113, 118–26 (discussing "slum clearance" and disinvestment in public infrastructure and services in Black neighborhoods); TROUNSTINE, *supra* note 17, at 5–7, 98–120 (discussing slum clearance, urban renewal, and disinvestment in Black neighborhoods); TAYLOR, *supra* note 12, at 149 (discussing annexations).

[215] Silver, *supra* note 17, at 34–35.

[216] *Id.*

[217] LEEANN LANDS, CULTURE OF PROPERTY: RACE, CLASS, AND HOUSING LANDSCAPES IN ATLANTA, 1880-1950, 145 (2009).

zoning to control perceived "nuisance populations" became an established practice in cities throughout the United States.[218]

The history of the American West likewise suggests that cities there would have adopted express racial zoning but for the *Buchanan* Court striking down Louisville's ordinance as an unconstitutional exercise of its police power. California cities attempted to adopt express racial zoning targeting Chinese people and people of Chinese descent in the late nineteenth and early twentieth centuries, and western states and cities continued throughout much of the twentieth century to adopt laws designed to harass and expel each successive wave of immigrants initially enticed to fill labor shortages and drive down labor costs.[219]

Moreover, many western cities run by unabashed white supremacists did not need to adopt Baltimore-style racial zoning ordinances because the cities already prohibited People of Color from owning real property in the city or, in some cases, from remaining in the city after sunset.[220] These laws effectively forced communities of color to establish neighborhoods outside municipal boundaries.[221] Eugene, Oregon, for example, prohibited Black people from owning property within the city until 1957, the year Oregon passed its first fair housing law.[222] Other examples of citywide exclusion of People of Color could be found in California, Colorado, Montana, Wyoming, and other western states.[223]

The fictional narrative that equates "racial zoning" with the Jim Crow era residential segregation ordinances adopted by Baltimore, Louisville, and other southern cities[224] renders opaque important events in the development of racial zoning in the United States—events that did not begin in the anti-

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[218] *Id.* at 145.

[219] *See* ABRAMS, *supra* note 101, at 29–55 (describing cycle of governmental enticement, immigration and migration, white violence, and government-backed exclusion and expulsion, and beginning in 1850 with Chinese laborers, followed by Japanese farm workers, Black laborers from the South, Mexican laborers, and Caribbean laborers).

[220] *See* Brian J. Connolly, *Promise Unfulfilled? Zoning, Disparate Impact, and Affirmatively Furthering Fair Housing*, 48 URB. LAW. 785, 789–94 (2016) (discussing sundown ordinances and other racially discriminatory land use laws and policies).

[221] *Id.*

[222] *See* League of Women Voters of Portland, A Study of Awareness of the Oregon Fair Housing Law and a Sampling of Attitudes Toward Integrated Neighborhood Living (May 1961); ORE. REV. STAT. § 659.032, c. 725, § 2 (1957), *repealed by* c. 584, § 4 (1959).

[223] ABRAMS, *supra* note 106, at 52 (reporting that Imperial Valley, California, instructed real estate agents that, to "protect[ ] property values against depreciation," "[c]are should be taken not to get people of the African, Mexican, Chinese or other similar races in this quarter" and Valley of the South Platte, Colorado, likewise excluded "Mexicans" from residing in the town).

[224] *See infra* Section I.B.

Reformation South or end in 1917 with the Supreme Court's rejection of Louisville's racial zoning ordinance.[225] The implicit and explicit perpetuation of this fictional narrative contributes to the continued failure to recognize the white supremacist structure of American zoning law.

II. THE SINGLE-FAMILY–MULTIFAMILY TAXONOMY AS JIM CROW ZONING BY PROXY

Around the time Jim Crow zoning was rapidly proliferating in US cities with proportionally large Black populations, other major US cities were experimenting with a new (to the United States) mechanism for controlling growth and shaping urban development. Some of the earliest proponents of comprehensive planning and zoning in the United States advocated for zoning "as a means of improving the blighted physical environment in which people lived and worked."[226] Others, like California real estate developer and attorney Charles H. Cheney, claimed—apparently disingenuously[227]—that "one of the prime objects of the recent city planning and zoning regulations" was "[t]o remove the social barriers in cities and to give the poor man, and particularly the foreign-born worker an equal opportunity to live and raise his family."[228] But by the time Los Angeles, Berkeley, and New York City adopted the first citywide zoning codes in the United States,[229] exclusion of "undesirables" eclipsed the egalitarian interests of some early reformers.[230]

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[225] *See infra* Section I.C. (discussing Buchanan v. Warley, 245 U.S. 60 (1917)) and II.A. (discussing pre- and post-*Buchanan* development of facially neutral zoning laws to "protect" white neighborhoods from "invasion," overcome limitations of racially restrictive covenants, and withstand constitutional scrutiny).

[226] Rabin, *supra* note 17, at 103–05 (discussing reformer and planner Benjamin Marsh); William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in* Euclid v. Ambler, *in* ZONING AND THE AMERICAN DREAM, *supra* note 17, at 44–45 ("[T]he concept of an efficient social organization based on an ideal of service was the source of the city planning movement. . . . The original agenda of the planning conferences (to solve the problems of urban congestion and improve living conditions in cities) was ephemeral.").

[227] Cheney championed racially restrictive covenants and zoning as legal mechanisms to exclude Black and immigrant households from what he referred to as "high class" neighborhoods. *See infra* Sections II.B.1. and 2.

[228] Randle, *supra* note 226, at 42.

[229] Berkeley, Calif., City Ord. No. 452 N.S., Mar. 10, 1916.

[230] Los Angeles adopted a zoning ordinance in 1909 that carved the city into industrial and residential use districts. Laundries and brick kilns, among other uses, were classified as industrial uses and were prohibited in residential districts. M. CHRISTINE BOYER, DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING 94 (1983); *see also supra* notes 76, and 123–127 and accompanying text

This is not to say racism, xenophobia, anti-Semitism, and economic elitism became the only motivations driving America's burgeoning zoning movement. Twentieth century urban reformers continued to view comprehensive planning and zoning as integral to addressing significant public health, traffic congestion, overcrowding, and noise problems plaguing cities.[231] Many envisioned comprehensive planning, implemented through a citywide zoning ordinance, as the means to create well-ordered, prosperous, and efficient cities.[232] But the historical record, as well as the text and organization of the zoning codes that emerged from the movement, demonstrates that two primary objectives of American zoning were the insulation of exclusive single-family neighborhoods from intrusion by undesirables and the sequestering of those undesirables either into small ghettos within the city or outside the city's boundaries.[233]

Northeastern urban reformers and the so-called "community builders"[234] of California played prominent roles in the next chapter of racist zoning in the United States. New York

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(discussing racial animus as motivation for zoning areas with Asian-owned laundries exclusively residential); *infra* Sections II.A.–B. (discussing motivations for New York City and Berkeley ordinances); MICHAEL ALLAN WOLF, THE ZONING OF AMERICA 83–84, 138–43 (Peter Charles Hoffer et al. eds., 2008) (discussing exclusion of "undesirables," antisemitism, and racism as motivations for zoning).

[231] Michael Allan Wolf, *Zoning Reformed*, 70 U. KAN. L. REV. 171, 179–81 (2021) (discussing emergence of zoning in the context of the 1918 pandemic and major natural disasters); 1 AM. LAW. ZONING § 7:6 (5th ed. Dec. 2022 update); John R. Nolan, Golden *and Its Emanations: The Surprising Origins of Smart Growth*, 23 PACE ENVT'L L. REV. 757, 795–96 (2006); Fred P. Bosselman, *The Commodification of 'Nature's Metropolis': The Historical Context of Illinois' Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527, 555–71 (1992); *see also* U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 3 (2d ed. 1926) [hereinafter SZEA] (requiring zoning be designed to, among other things, lessen street congestion, provide adequate light and air, prevent overcrowding, conserve the economic value of buildings, and ensure adequate provision of public infrastructure like streets and sewers).

[232] Charles M. Haar & Michael Allan Wolf, *Planning and Law: Shaping the Legal Environment of Land Development and Preservation*, 40 ENV'TL L. REV. 10419, 10420–21 (2010); *see* Eric R. Claeys, Euclid *Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 754–55 (2004) (citing early twentieth century planning documents).

[233] *See* BABCOCK, *supra* note 18, at 3 ("The insulation of the single-family detached dwelling was the primary objective of the early zoning ordinances."); Wolf, *supra* note 231, at 178 ("[P]rotection of the residents in (and values of) single-family housing from less desirable neighbors [was a] prominent . . . factor contributing to the development and popularity of zoning."); *infra* Sections II.A.–C.

[234] "In the hyperbolic lexicon of real estate, a 'community builder' is a developer who not only subdivides a substantial tract of suburban land but also builds and sells the houses on that land." Robert Fishman, *The Rise of the Community Builders: The American Real Estate Industry and Urban Land Planning by Marc A. Weiss*, 94 AM. HIST. REV. 538, 538 (1989) (book review). Although community builders are typically credited with facilitating the post-World War II heyday of residential development, their influence traces back to the development of western cities in the period leading up to and following World War I. *See supra* Section II.B.

City's urban reformers sought to exclude immigrant laborers from the Fifth Avenue shopping district.[235] But, apparently concerned that outright prohibition of manufacturing uses from commercial districts would not withstand judicial review, they used building height regulations to achieve their xenophobic objectives.[236] Berkeley's political elites also used facially neutral zoning regulations to achieve discriminatory objectives, but they were bolder than their New York contemporaries. They crafted a zoning ordinance to "protect" new and existing white neighborhoods from "invasion" by People of Color by establishing a district exclusively for single-family homes and subjecting homes in that district to costly design standards.[237] At the same time, they designed the zoning code and map to concentrate undesirable land uses, including industrial uses, in parts of the city where People of Color lived.[238]

On both coasts, zoning's proponents worked with all levels of government to promote zoning.[239] In 1924, the US Department of Commerce published the first print edition of a model zoning enabling statute that delegated broad police power authority to local governments.[240] Under Herbert Hoover's leadership, Federal Housing Authority staffers travelled the country promoting comprehensive zoning, including the designation of residential zones for exclusively single-family detached homes.[241]

A. The Well Documented Xenophobic Roots of New York City's 1916 "Zoning Resolution"

New York City is generally regarded as the first city in the United States to adopt comprehensive zoning.[242] The City's

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[235] *See supra* Section II.A.

[236] *Id.*

[237] Mark A. Weiss, *Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley*, 3 BERKELEY PLAN. J. 7, 8–11, 16 (1986); *see also supra* Section II.B.1.

[238] *See supra* Section II.B.2.

[239] *See supra* sections II.A.–C.

[240] *See supra* Section II.C.

[241] *See supra* Section II.C.

[242] Kenneth A. Stahl, *The Suburb As A Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1237 (2008); *see, e.g.*, James Metzenbaum, *The History of Zoning—A Thumbnail Sketch*, 9 W. RSRV. L. REV. 36, 39 (1957); Norman Marcus, Esq., *New York City Zoning—1961-1991: Turning Back the Clock—but With an Up-to-the-Minute Social Agenda*, 19 FORDHAM URB. L.J. 707, 707 (1992) (referring to NYC's 1916 Zoning Resolution as "the first zoning regulation in the United States"); 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 61:3 (4th ed.) (referring to NYC's 1916 Zoning Resolution as "first zoning ordinance in the nation"); City Planning History, NYC PLAN., https://www.nyc.gov/site/planning/about/city-

1916 Zoning Resolution has been the focus of dozens of scholarly articles. Land use law scholarship since at least 1961 has examined and critiqued the classist and xenophobic values at play in the development and design of the Zoning Resolution, which responded in large measure to a conflict between Fifth Avenue retailers and the garment factories that supplied them.[243] As land use law scholar Patricia Salkin chronicles:

> These local merchants had what they believed to be a serious problem—one which affected their welfare, although not so much their health or safety—these merchants were losing business. During the early twentieth century, clothing factories were located as close to [their] main buyers (i.e., merchants) as possible to reduce [transportation] costs . . . . When the factories let out for the day (or during lunch time) factory workers would leave their factory [and enter the streets] . . . . The merchants believed that keeping these factories—and factory workers—so close to the[ir] stores was "distasteful, unaesthetic, and unconducive to the image that merchants were attempting to foster." . . . Eventually, in 1907, the Fifth Avenue Association—made up of these merchants—was formed to address the factory problem.[244]

The prospect of comprehensive planning and zoning as a means of controlling land uses also appealed to the Association because the garment manufacturing businesses were outbidding them on Fifth Avenue real estate.[245] Planning and zoning also represented a shift in local power from the political machine that dominated city politics and often sided with the garment industry, to mostly elitist urban reformers who were attentive to the Association's concerns.[246]

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planning-history.page [https://perma.cc/9TTS-UMCT] (referring to the City's "adoption of the country's first Zoning Resolution in 1916"); Donald J. Smythe, *The Power to Exclude and the Power to Expel*, 66 CLEV. ST. L. REV. 367, 388 (2018) (same). *But see* Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre- Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 371 (1994) (noting difficulty of identifying "first" zoning law and recognizing Los Angeles 1909 ordinance as first code to divide a US municipality into use districts); 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, 23 (2022) (recognizing Los Angeles's 1909 zoning ordinance as first in the nation to divide city into use districts and positing that New York City's 1916 ordinance is credited as the first comprehensive zoning ordinance adopted in the United States because it was more comprehensive than Los Angeles's ordinance).

[243] *See, e.g.*, JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961).

[244] Patricia E. Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 J. MARSHALL L. REV. 253, 264 (2012) (quoting STANISLAW J. MAKIELSKI, JR., THE POLITICS OF ZONING: THE NEW YORK EXPERIENCE 11–12 (1966)).

[245] Power, *supra* note 31, at 3.

[246] *Id.*; *see also* REPORT OF THE HEIGHTS OF BUILDINGS COMMISSION TO THE COMMITTEE ON THE HEIGHT, SIZE, AND ARRANGEMENT OF BUILDINGS OF THE BOARD OF ESTIMATE AND APPORTIONMENT OF THE CITY OF NEW YORK 220 (1913) [hereinafter

Within five years, the Association was working with the city's new Commission on Building Districts and Restrictions (the Commission) to promote zoning as a means of addressing the "image" problem caused by the presence of immigrant garment workers in luxury shopping areas.[247] The Commission considered establishing separate commercial and manufacturing districts,[248] but feared outright exclusion of manufacturing uses from the commercial district risked invalidation by the courts.[249] Height regulations provided a safer bet. City codes limited building heights since at least the late 1800s,[250] and the Supreme Court had already validated building height restrictions.[251] Thus, in 1913 the Association began working with the newly established Heights of Buildings Commission, which responded to the Association's concerns by recommending that buildings in the Fifth Avenue District be no taller than 125 feet, a limitation that discouraged the construction of garment lofts.[252]

In addition to implementing the Commission's recommended height limitation through the establishment of bulk restrictions, the Zoning Resolution also established use districts and administrative standards.[253] The Zoning Resolution established three cumulative use districts: (1) a residential district, which permitted only residential uses; (2) a business district, which permitted commercial uses and residential uses; and (3) an unrestricted district, which permitted manufacturing uses, commercial uses, residential uses, and any other use not expressly prohibited.[254] This combination of broad use categories with

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REPORT OF THE HEIGHTS OF BUILDINGS COMMISSION] (describing the need for height standards to exclude loft manufacturing businesses "crowded with their hundreds and thousands of garment workers and operators who swarm down upon [Fifth] [A]venue").

[247] Salkin, *supra* note 244, at 264; Jerry Frug, *The Geography of Community*, 48 Stan. L. Rev. 1047, 1082 (1996).

[248] REPORT OF THE HEIGHTS OF BUILDINGS COMMISSION, *supra* note 246, at 270; *see also* Marc A. Weiss, *Skyscraper Zoning: New York's Pioneering Role*, 58 J. AM. PLAN. ASS'N 201, 202 (1992).

[249] Weiss, *supra* note 248, at 202.

[250] *Id.* at 206–07.

[251] *See* Welch v. Swasey, 214 U.S. 91, 107 (1909) (concluding variable height limitations for commercial and residential zones did not take property without justification or violate equal protection guarantees).

[252] REPORT OF THE HEIGHTS OF BUILDINGS COMMISSION, *supra* note 246, at 270; *see also* Weiss, *supra* note 248, at 202; Salkin, *supra* note 244, at 264.

[253] Salkin, *supra* note 244, at 265.

[254] N.Y.C., N.Y., Board of Estimate & Apportionment, Building Zone Resolution (July 25, 1916) §§ 2–5 [hereinafter Building Zone Resolution]; *see also* Salkin, *supra* note 244, at 265. Some city land was also set aside as "undetermined." *Id.*

detailed bulk and area regulations was modeled on codes adopted in German cities beginning in the late nineteenth century.[255]

The city did not adopt separate residential use districts to segregate single-family detached residences from other forms of housing.[256] But the city and its urban reformers nevertheless catered to the anti-immigrant, anti-Black, and anti-poor interests of the city's suburbanites.[257] The Zoning Resolution achieved this through the layering of the residential use district restrictions and the bulk and area district restrictions, which in combination had the effect of excluding apartment buildings and tenements from suburban neighborhoods.[258]

B. California's "Community Builders"

On the other side of the country, political elites in California championed comprehensive zoning as a legally defensible means to ensure geographic separation of economically affluent white people of northern European descent from People of Color and first- and second-generation immigrants from southern and eastern Europe. Initially, the so-called community builders wanted to zone only the "high class" neighborhoods, seeing no need to extend zoning's protection of property values and neighborhood "character" to places where People of Color, recent immigrants, and impoverished whites lived.[259] But they were ultimately persuaded that citywide zoning, akin to the model adopted in late nineteenth century German cities, was more legally palatable and had the advantage of driving People of Color out of high-value land areas and containing them in low-value areas with or adjacent to other undesirable or noxious land uses.[260]

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[255] *See* Power, *supra* note 31, at 3 (discussing German zoning's influence on Edward M. Bassett, who helped draft New York City's Zoning Resolution and became a lifelong champion of zoning). The record of New York City's first planning process also reveals the influence of German zoning on the city. *See, e.g.*, Frank Backus Williams, *The German Zone Building Regulations, Appendix III*, *in* REPORT OF THE HEIGHTS OF BUILDINGS COMMISSION, *supra* note 246; *see also* Frederick C. Howe, *The Municipal Real Estate Policies of German Cities*, *in* PROCEEDINGS OF THE THIRD NATIONAL CONFERENCE ON CITY PLANNING (1911).

[256] Building Zone Resolution, *supra* note 254, § 2.

[257] E. M. BASSETT, ZONING: THE LAW, ADMINISTRATION AND COURT DECISIONS DURING THE FIRST TWENTY YEARS 24–25 (1974).

[258] *Id.*

[259] *See infra* Section II.B.2.

[260] *See infra* Section II.A.2.

1. The Exclusive Single-Family Zone as Response to the Limits of Racially Restrictive Covenants and the Police Power

In the 1910s, prominent community builder Duncan McDuffie was instrumental in the creation of a city planning commission and adoption of a zoning ordinance in Berkeley.[261] McDuffie was president of Northern California's largest real estate brokerage and development corporation and a leader of the Berkeley Realty Board. His company, Mason-McDuffie, developed three major residential subdivisions in Berkeley, each consisting primarily of single-family detached homes encumbered by racially restrictive covenants.[262] In a speech to the Berkeley City Club in 1916, McDuffie extolled the virtues of deed restrictions and zoning: "through the use of proper restrictions . . . it is possible absolutely to determine in advance the development and character of an entire residence district"[263] and avoid "the evils of uncontrolled development."[264] He saw "[t]he adoption of a district or zone system by Berkeley" as necessary to "give property outside of restricted sections . . . the protection now enjoyed by a few districts alone and [to] . . . prevent deterioration" and "assist in stabilizing values."[265]

McDuffie may have been especially keen on the city adopting a legal mechanism that could control land uses outside deed restricted areas because the upscale Claremont neighborhood—a deed restricted Mason-McDuffie subdivision—was bordered on the west by Elmwood Park—an older subdivision with deed restrictions on the verge of expiring—and on the south by a residential area that lacked restrictions.[266] The Civic Art Commission, with McDuffie as its president, ultimately issued a report recommending that the City Council zone the area containing these subdivisions exclusively for single-family residential use, in part because restrictive covenants were "too short" and "in many cases [were] about to

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[261] Marc A. Weiss, *Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley*, 3 BERKELEY PLAN. J. 7, 12–13 (1986).

[262] *Id.*

[263] Duncan McDuffie, *City Planning in Berkeley*, 4 BERKELEY CIVIC BULL. 1, 106, (Mar. 15, 1916).

[264] *Id.* at 115–16.

[265] *Id.* at 117; *see also* Duncan McDuffie, *A Practical Application of the Zone Ordinance*, 4 BERKELEY CIVIC BULL. 1, 10–17 (July 13, 1916).

[266] Weiss, *supra* note 237, at 16.

expire, thus endangering the values of the neighborhood."[267] Subsequently, the first zoned district created in Berkeley applied to Elmwood Park and allowed only single-family residential use.[268]

Another key figure in the development of Berkeley's code, Charles Cheney, also blamed recent immigrants, people of Asian descent, and Black people for "deterioration and great economic loss" in residential districts without zoning restrictions or restrictive covenants.[269] Cheney championed the use of racially restrictive covenants to "protect[]" "high class residence[s]."[270] But Cheney also warned that restrictive covenants alone were insufficient to ensure the exclusivity of existing and new white residential areas.[271] As Cheney's business partner Frederick Law Olmstead, Jr.,[272] lamented, the private agreements were subject to challenges that they unlawfully restricted alienation; as restraints on alienation of real property, many courts would only enforce covenants of limited duration, while other courts would not enforce them at all, and, absent enforcement by the homeowners themselves, covenants could become obsolete.[273]

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[267] WERNER HEGEMANN, REPORT ON A CITY PLAN FOR THE MUNICIPALITIES OF OAKLAND AND BERKELEY 14, 99, 137–39 (1915), https://archive.org/details/reportoncityplan00hegerich/page/n3/mode/2up [https://perma.cc/L5W5-M7L2] (proposing minimum lot size and setback restrictions for "high class residence districts" in the east, a system of parks to screen residential districts in east from industrial districts, and separate residential districts for private residences, apartments and tenement houses; promoting city planning, districting, and restrictive covenants to protect single-family residence districts for upper, middle and lower classes from "invasion" by tenements, "which produce crime, prevent the development of a healthy population, and create perverts"); Werner Hegemann worked closely with Baltimore in the period preceding its adoption of racial zoning, as well as with New York City, Philadelphia, Oakland and Berkeley. Frederic C. Howe, *Preface to the Report of Werner Hegemann*, HEGEMANN, REPORT ON A CITY PLAN FOR THE MUNICIPALITIES OF OAKLAND AND BERKELEY.

[268] Weiss, *supra* note 237, at 18.

[269] Lewis P. Hobart & Charles H. Cheney, *Why Bad Housing Costs and Better Housing Pays*, 42 W. ARCHITECT & ENG'R 96, 99–100 (1915) (reprint of a portion of *Better Housing in California*, a report to the Commission of Immigration and Housing of California (1915)).

[270] Charles Henry Cheney, *The Necessity for a Zone Ordinance in Berkeley*, 3 BERKELEY CIVIC BULL. 1, 165 (May 18, 1915).

[271] *See* ROBERT M. FOGELSON, BOURGEOIS NIGHTMARES: SUBURBIA, 1870–1930, 15–18 (2005) (discussing Cheney's partnership on the development of the Palos Verdes Estate subdivision, which Lewis claimed would bring together "the cream of the manhood and womanhood of the greatest nation . . . , the Caucasian race and the American nation") (internal quotation marks omitted).

[272] Olmstead's role in transforming American land use law extended well beyond his business partnership with Cheney. Olmsted was a landscape architect, Harvard professor of landscape architecture, first president of the American City Planning Institute, conservationist, and champion of the establishment of the national parks system. *See generally* Susan L. Klaus, *All in the Family: The Olmsted Office and the Business of Landscape Architecture*, 16 LANDSCAPE J. 80, 81, 87, 92–94 (1997); Charles E. Beveridge, *Olmsted and Yosemite*, 5 SITELINES 1, 6–8 (2009).

[273] Frederick Law Olmstead, Jr., *Deed Restrictions that Affect Houses in Planned Neighborhoods*, 88 ARCHITECTURAL REC. 32, 34–35 (1940).

Thus, in addition to promoting the use of racially restrictive covenants and the establishment of homeowners associations to "conscientious[ly]" enforce them,[274] McDuffie, Cheney, and other "community builders" devised and promoted a zoning code that designated areas of the city where each relatively large lot could be developed with only one home, occupied by only one family, and surrounded on all sides by a yard.[275] The idea was that by designating districts where only one, relatively expensive type of residence could be developed on each lot, and where lots had to meet minimum size standards, the cost of housing and land in these districts would make the districts off limits to the vast majority of People of Color. Writing about the deed restrictions of the Palos Verdes Estates subdivision that Cheney designed with Olmstead, Jr., Cheney extolled the use of racially restrictive covenants combined with restrictions on the layout of lots and buildings—that is, restrictions typical of zoning ordinances—as exclusionary devises:

> The type of protective restrictions and the high class scheme of layout which we have provided tends to guide and automatically regulate the class of citizens who are settling here. The [deed] restrictions prohibit occupation of land by [Black people and people of Asian descent]. The minimum cost of house restrictions tends to group the people of more or less like income together as far as it is reasonable and advisable to do so.[276]

The first zoning code of Portland, Oregon, is illustrative of this covert form of racially restrictive zoning. Drafted by Cheney and approved by voters in 1924, Portland's first code included two residential zones: Zone I for single-family dwellings and Zone II for multifamily dwellings. The code designated fifteen "highest quality" neighborhoods as Zone I and the rest as Zone II.[277] Separate zones for single-family and multifamily

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[274] *See, e.g.*, FOGELSON, *supra* note 271, at 17–18 (discussing reason for establishing Palos Verdes Estate Homeowners Association); Jesse Barber, *Berkeley Zoning Has Served For Many Decades to Separate the Poor From the Rich and Whites From People of Color*, BERKELEYSIDE (Mar. 12, 2019, 11:34 AM), https://www.berkeleyside.org/2019/03/12/berkeley-zoning-has-served-for-many-decades-to-separate-the-poor-from-the-rich-and-whites-from-people-of-color [https://perma.cc/8EA3-HMWP] (discussing 1912 pamphlet that assured potential buyers that a new residential development in Berkeley was a good investment because, among other things, deed restrictions "make it the 'cream' of North Berkeley with 'No [Asian or Black people]'").

[275] Barber, *supra* note 274, at 4. Charles Henry Cheney, *Districting Progress and Procedure in California*, PROCS. NINTH NAT'L CONFERENCE ON CITY PLAN. 186–87 (1917).

[276] Weiss, *supra* note 227, at 21 n.6 (quoting Robert Fogelson, *The Fragmented Metropolis: Los Angeles, 1850-1930* 324 (1967) (emphasis added).

[277] CITY OF PORTLAND, BUREAU OF PLAN. & SUSTAINABILITY, HISTORICAL CONTEXT OF RACIST PLANNING: A HISTORY OF HOW PLANNING SEGREGATED PORTLAND 5 (2019), https://www.portland.gov/bps/documents/historical-context-racist-planning-summary-powerpoint-presentation/download. [https://perma.cc/U654-ED44]

dwellings were first proposed to the Portland Planning Commission in a "Report on City Planning and Housing Survey" authored by Cheney.[278] The City adopted the zoning designations knowing the Portland Realty Board's ethical rules prohibited agents from selling property in a white neighborhood—i.e., property in Zone I—to Black people or people of Asian descent.[279] At the time Portland adopted its first zoning code, city officials were unabashed supporters of the Oregon chapter of the Ku Klux Klan.[280] Although Oregon had the largest state KKK chapter west of the Rocky Mountains,[281] the domination of white supremacism in Oregon politics of the 1920s reflected a larger scale post-Reconstruction shift in northern liberal values toward social acceptance of white supremacism.

The influence of the California "community builders" was not limited to the West Coast. Cheney was a frequent presenter at the National Conference on City Planning and a member of the Committee on Zones and Districts of the San Francisco City Planning Section, a subgroup of the highly influential private men's club, the Commonwealth Club.[282] Committee members consisted "of realtors, builders, architects, engineers, and lawyers."[283] The same real estate boards that mandated racial segregation through their ethics rules were key players in this and other organizations promoting zoning.[284] The Committee advocated for zoning to prevent "intrusion" into "residence districts" of "'undesirable' uses," which the Committee characterized as industrial and manufacturing uses and "apartment houses."[285] The Commonwealth Club documented instances of these "intrusions"[286] and successfully used its study to lobby California to adopt zoning enabling legislation,[287] which

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[278] CHARLES CHENEY, REPORT ON CITY PLANNING AND HOUSING SURVEY (on file with author).

[279] CITY OF PORTLAND, *supra* note 277, at 6.

[280] Historical photographs show Portland officials and dignitaries posing with members of the Ku Klux Klan. 1921 OrHi 54338 (showing Portland Mayor George Baker, US Attorney Lester Humphrey, and Portland Police Chief Leon Jenkins posing with Klan members).

[281] *See* ABRAMS, *supra* note 106, at 13.

[282] *See, e.g.*, Cheney, *supra* note 275, at 190–92. The Commonwealth Club did not allow women members until 1971. *See* ONLINE ARCHIVE OF CALIFORNIA, REGISTER OF THE COMMONWEALTH CLUB OF CALIFORNIA RECORDS (1903-2012), *Historical Note* (2009), https://oac.cdlib.org/findaid/ark:/13030/kt3g5032c1/entire_text/.

[283] Marc Weiss, *The Real Estate Industry and the Politics of Zoning in San Francisco, 1914–1928*, 3 PLAN. PERSPECTIVES 311, 312 (1988).

[284] *Id.* at 312.

[285] *Id.* at 313.

[286] CITY PLAN. SECTION, COMMONWEALTH CLUB, STUDY OF ZONING OR DISTRICTING (1917) (on file with author).

[287] California Zoning Act of 1917, 1917 Cal. Stat. ch. 734.

was drafted by members of the Club's City Planning Section, including Charles Cheney.[288]

Within five years of New York City and Berkeley's adoption of comprehensive zoning codes in 1916, "roughly twenty states had authorized some or all municipalities to pass comprehensive zoning ordinances."[289] Slowly at first, citywide facially neutral zoning spread to more cities, many of which adopted codes that combined Berkeley's innovative single-family residential zone with the more traditional New York approach to create exclusively single-family zones with detailed bulk and area restrictions.[290] In the vernacular of zoning law, these codes designated single-family residential use "as the principal and primary use[]" in one or more districts.[291] All other land uses were prohibited in the district except "accessory" uses (e.g., garden sheds)[292] and "conditional" uses (e.g., parks).[293]

2. Expulsive Zoning and the Entrenchment of Environmental Racism

The new zoning codes also incorporated an oppressive mechanism that the California community builders referred to as "overzoning," a regulatory approach that land use law scholar Yale Rabin has more aptly termed "expulsive zoning."[294] Expulsive zoning regulations permit "the intrusion into Black neighborhoods of disruptive incompatible uses that diminish the quality and undermine the stability of those neighborhoods."[295] Often, it is not apparent from the text of a zoning code whether a municipality's zoning scheme protects white neighborhoods from intense and noxious uses and permits those uses near neighborhoods primarily or disproportionately occupied by

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[288] Weiss, *supra* note 283, at 313.

[289] Salkin, *supra* note 244, at 265 (quoting WOLF, *supra* note 230, at 29 (2008)).

[290] Weiss, *supra* note 237, at 8, 11.

[291] PACE UNIV. SCH. OF L.: LAND USE L. CTR., BEGINNERS GUIDE TO LAND USE 6, https://law.pace.edu/sites/default/files/LULC/LandUsePrimer.pdf [https://perma.cc/AQQ6-FWFB].

[292] *Id.* at 6–7. Uses that are "accessory" to the principal use are also permitted as-of-right on a lot containing the principle permitted use if they are customarily found in association with the principal use and are subordinate and incidental to the principal use (e.g., a detached garage on residentially-zoned lot that contains a home). *Id.*

[293] "The special use permit is a flexible zoning device which expressly allows a use under specified circumstances. The municipality may impose conditions upon that use." John R. Nolon, *Shattering the Myth of Municipal Impotence: The Authority of Local Government to Create Affordable Housing*, 17 FORDHAM URB. L.J. 383, 392 (1989). Thus a "conditional" or "special use" in a single-family residential district is a use the zoning code has identified as generally harmonious with single-family residential use such as a church or daycare.

[294] Weiss, *supra* note 17, at 101–06; Rabin, *supra* note 226, at 102, 107.

[295] Rabin, *supra* note 226, at 102.

People of Color. This is because zoning law is not limited to textual regulations, but also includes the imposition of those regulations on a map that has the force of law.[296] This feature of zoning law allowed Berkeley city officials to protect existing "high class" neighborhoods and desirable undeveloped areas by zoning them for exclusively single-family use.[297] In existing middle-income residential areas, Berkeley's code allowed a range of land uses deemed compatible with residential use, including "higher value multifamily apartment buildings, hotels, stores, [and] offices," and prohibited industrial and other uses deemed incompatible with residential use.[298]

Berkeley and other early adopters of comprehensive zoning did not use zoning to protect the property values or residential character of low-income neighborhoods disproportionately occupied by People of Color and recent immigrants.[299] Initially, influential figures in the California zoning movement rallied against regulating these areas; Cheney initially proposed to zone single-family neighborhoods only, leaving other neighborhoods unregulated.[300] But Berkeley ultimately opted to zone as industrial low-income neighborhoods disproportionately occupied by People of Color to attract higher value industrial land users and "protect" industrial plants from nearby residents' complaints and nuisance allegations.[301] Consistent with the lack of protection for neighborhoods disproportionately occupied by People of Color, zoning codes and zoning maps also often limited multifamily housing and less restrictively regulated single-family housing to zones that either permitted industrial uses or were adjacent to zones that permitted those uses, a pattern that continues today.[302]

Another way Berkeley and other early adopters of zoning in the United States protected single-family zones from

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[296] 1 AM. L. ZONING § 5:2 (5th ed. Dec. 2022 update).

[297] *See* Weiss, *supra* note 237, at 11, 22 n.11.

[298] *Id.* at 11. Weiss reports that greater protection for single-family residences extended to middle-income neighborhoods in the 1930s, following the collapse of the 1920s real estate bubble and the creation of the whites only Federal Housing Administration's mortgage insurance program. *Id.*

[299] Weiss, *supra* note 237, at 9, 11. Urban history scholar Barbara Flint's study of St. Louis observed a similar pattern there. *See id.* (reporting that St. Louis City Planning Commission found that "multiple-family houses and other uses did not impair the value" of property in neighborhoods consisting of "homes of low value, even though they were single-family homes" (quoting Barbara J. Flint, Zoning and Residential Segregation: A Social and Physical History 1910–1940 (1977) at 215 (Ph.D. dissertation, Department of History, University of Chicago)).

[300] *Id.* at 9–11.

[301] *Id.* at 11; *see also* Arnold, *supra* note 14, at 119 (observing same pattern elsewhere).

[302] *See* Charles Lord & Keaton Norquist, *Cities as Emergent Systems: Race as a Rule in Organized Complexity*, 40 ENV'T L. 551, 557–58 (2010).

undesirable land uses was by creating geographic buffers between the favored zones and areas containing industrial and other undesirable land uses.[303] Buffers included (and continue to include) physical features like thoroughfares, rivers, railroad tracks, and other physical dividing lines.[304] Multifamily zones and less restrictively regulated single-family zones also served (and continue to serve) as buffers between noxious land uses and favored single-family zones.[305] Environmental justice scholar Tony Arnold reported in his extensive 1998 study that "[t]he most frequent type of buffer between single-family residential areas and industrial or commercial areas is medium- or high-density residential uses."[306] Arnold characterizes this use of buffer zones as "perhaps one of the major reasons why low-income and minority neighborhoods have so much industrial and commercial zoning: the multifamily housing, where many low-income and minority people live, is purposefully placed near the industrial and commercial uses to create a buffer that protects high-income, white, single-family neighborhoods."[307]

Data also suggests that local 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. Charles Lord and Keaton Norquist's review of conditional-use decisions in Baltimore found that:

> [I]n each decade from 1940 to 2000, the Zoning Board of Appeals and the City Council approved conditional uses such that African-American neighborhoods hosted significantly higher numbers of disamenities than did white neighborhoods . . . . [R]ace was the critical causal factor in the siting patterns. Nothing in the zoning code or the decisional records illustrated overt racism in the land-use process in Baltimore over the period from 1940 to 2000.[308]

Lord and Norquist's findings are consistent with a significant body of research demonstrating that locally undesirable land uses—such as noxious industrial polluters and solid or

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[303] Weiss, *supra* note 237, at 11–12; Arnold, *supra* note 14, at 119.

[304] Emily Badger & Darla Cameron, *How Railroads, Highways and Other Man-Made Lines Racially Divide America's Cities*, WASH. POST (July 16, 2015, 7:29 AM), https://www.washingtonpost.com/news/wonk/wp/2015/07/16/how-railroads-highways-and-other-man-made-lines-racially-divide-americas-cities/.

[305] Arnold, *supra* note 14, at 119; Lord & Norquist, *supra* note 302, at 559.

[306] Arnold, *supra* note 14, at 119.

[307] *Id.*

[308] Lord & Norquist, *supra* note 302, at 554 (footnotes omitted); *see also* Arnold, *supra* note 14, at 114–15 (discussing conditional use permits and environmental racism).

hazardous waste landfills—are disproportionately concentrated in areas inhabited by People of Color.[309]

Ultimately, these various strategies to protect white neighborhoods and white industry dehumanized the People of Color who lived in low-income neighborhoods and provided an effective *Buchanan* workaround.[310] Berkeley's code treated detached single-family residences and denser, less expensive forms of housing as separate land uses. Berkeley, New York City, and other early adopters of zoning essentially deemed denser forms of housing nuisances or near nuisances in high income white neighborhoods. Following the German model, these facially neutral zoning codes segregated cities according to the compatibility of the various urban land uses. But, when it came to housing, rather than approaching the question of land use compatibility by looking to the primary use of various residential structures—i.e., as homes for individuals and families—the compatibility question instead focused on numerous factors that served as a proxy for race, immigration and socioeconomic status. These factors included: the size and shape of buildings and their effect on adjacent properties' access to air or light; how densely the buildings were occupied and resultant noise and traffic;[311] contrasts between pastoral myths[312] and "urban jungle" tropes—tropes that equated denser urban residential areas with proportionally larger Black and Asian populations with disease, filth, immorality, crime, and even pedophilia;[313] and characterizations of apartment dwelling as incompatible with patriotism.[314] In this way, McDuffie, Cheney, and other early proponents of exclusive single-family districts created a facially

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[309] Lord & Norquist, *supra* note 302, at 558 & n.47 (citing more than two dozen studies spanning more than fifty years); *see also* BENJAMIN A. GOLDMAN, NOT JUST PROSPERITY: ACHIEVING SUSTAINABILITY WITH ENVIRONMENTAL JUSTICE 3–19 (1993) (cataloguing empirical studies).

[310] Michael Manville et al., *It's Time to End Single-Family Zoning*, 86 J. AM. PLAN. ASS'N 106, 107 (2020).

[311] Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1667 (2021) ("Old justifications related to fire hazards were repurposed, now related not to shoddy construction, but to density itself: apartments were 'subject to accidents arising-from the carelessness of any one of a great number of people and not apt to be detected by any systematic watchfulness.' Noise and traffic would be generated not by the clamor of overcrowding, but rather by 'increased deliveries' from 'autos, taxies, milk wagons, coal wagons,' and so on." (footnotes omitted)).

[312] *See* RAYMOND WILLIAMS, THE COUNTRY AND THE CITY 43 (1973) (referring to "a myth functioning as a memory" of a simpler time that contrasts the urban as industrial, disordered and unsafe against the rural as residential, ordered and peaceful).

[313] ROBERT FISHMAN, BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA xi (1987); *see, e.g.*, Hobart & Cheney, *supra* note 269, at 96–97 (characterizing recent immigrants and their immediate descendants as ignorant, standardless, and immoral).

[314] *See, e.g.*, City of Jackson v. McPherson, 138 So. 604, 605 (Miss. 1932) (en banc).

neutral legal mechanism for ensuring racial and economic segregation of the "communities" they were building.

C. Zoning and the Single-Family–Multifamily Taxonomy Integral to Federal Segregation Programs

Power players from New York City, Ohio, and California worked with states and the federal government to overcome a potential roadblock to the new legal mechanism: the possible invalidation of detailed, citywide restrictions on property usage as *ultra vires*. A decade before Alfred Bettman wrote an amicus brief that many credit with enabling a Lochnerian Supreme Court to embrace zoning in *Euclid v. Ambler Realty*,[315] Bettman was drafting and promoting zoning enabling acts, including Ohio's 1915 enabling act.[316] Cheney and other community builders influential in California politics helped draft and promote the California Zoning Act of 1917.[317] Bettman and Cheney were both leaders in the National Conference on City Planning, through which they preached the necessity of zoning enabling acts to a national audience of urban reformers and developers.

Around the same time, the new Warren Harding administration began "spread[ing] the idea of locally-controlled zoning throughout the nation."[318] In 1921, President Harding's new Secretary of Commerce, Herbert Hoover, created the Division of Building and Housing within the National Bureau of Standards and instructed its new director to consult with experts in the housing field to promote zoning to "protect homeowners from commercial and industrial intrusion[]."[319] Hoover also created an Advisory Committee on Zoning to draft a model state zoning enabling statute.[320] The nine committee members included Frederick L. Olmsted, Jr., Edward M. Bassett, Alfred Bettman, and Morris Knowles.[321] The committee drafted and the Department of Commerce published the

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[315] *See, e.g.*, Chused, *supra* note 24, at 611 (crediting Bettman's analogy to nuisance law for Court's holding); Eric R. Claeys, Euclid *Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 763 (2004) ("In many respects, the Supreme Court's opinion follows the more incrementalist approach Bettman charted in his amicus brief."); Brady, *supra* note 311, at 1670 ("Justice Sutherland relied extensively on Bettman's analogy . . . [to] 'the common law of nuisances.'" (quoting Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926))).

[316] Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, LAND USE L., Feb. 1996, at 6.

[317] *See supra* notes 282–288 and accompanying text (discussing Cheney's role in the passage of the California Zoning Act).

[318] Frug, *supra* note 247, at 1081.

[319] Knack et al., *supra* note 316, at 3.

[320] *Id.*

[321] *Id.* at 4.

Standard State Zoning Enabling Act.[322] After several revisions, the Federal Government Printing Office published the first print edition in May 1924 and a revised print edition in 1926.[323] Concerned that cities were adopting zoning without engaging in sufficient—or any—comprehensive planning, the advisory committee also promulgated a model planning enabling act in 1928, the Standard City Planning Enabling Act.[324]

Bassett and "other drafters of the [SZEA predicted that] the principal focus of" zoning in American cities would be "protecting single-family . . . districts."[325] To facilitate this, the SZEA delegated to municipalities the power to designate use districts "and within such districts . . . regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land."[326] The SZEA also expressly delegated to cities the authority to impose the kinds of standards Cheney and Olmstead suggested could be used to ensure the racial exclusivity of white neighborhoods, including the authority to regulate the percentage of a lot available for development, the minimum size of yards, and the density of the population.[327] The SZEA explanatory notes advised that limiting the density of population is "highly desirable"[328] and the model act required zoning codes to be "designed to lessen congestion in the street; . . . to prevent the overcrowding of land; [and] to avoid undue concentration of population."[329] The notes cautioned that state enabling acts should use the phrase "limiting density of population," and not "limit[ing] the number of people to the acre[]" because an acreage-based limit "is only *one* method of limiting density of population."[330] Instead, the notes suggested "[i]t may be more desirable to limit the number of families to the

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[322] *Id.*

[323] U.S. DEP'T OF COMMERCE, A' STANDARD STATE ZONING ENABLING ACT ('1924); U.S. DEP'T OF COMMERCE, A' STANDARD STATE ZONING ENABLING ACT (1926) [hereinafter SZEA]. The Department of Commerce released "several thousand" copies of an earlier version in September 1922. Knack et al., *supra* note 316, at 5.

[324] John R. Nolon, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351, 358, 360–61 (1993) (linking failure of many cities to engage in meaningful planning before adopting a zoning code in part to the Hoover commission's promulgation of the zoning enabling act years before the planning enabling act and observing that basing a legislatively enacted zoning code on an administratively adopted plan provides some "a degree of immunization" from "short-term political considerations").

[325] Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1258–59 (2008).

[326] SZEA, *supra* note 323, § 2 (internal footnote omitted).

[327] *Id.* § 1.

[328] *Id.* § 1 n.12.

[329] *Id.* § 3.

[330] *Id.* § 5 n.12.

acre or the number of families to a given house, etc . . . . It is believed that, with proper restrictions, this provision will make possible the creation of one-family residence districts."[331]

By the mid-1920s, more than nineteen out of the forty-eight states that then made up the United States had zoning enabling statutes based on the federal model,[332] and more than five hundred cities had zoning codes.[333] By 1931, every state authorized zoning and more than one thousand cities had zoning codes.[334]

With the collapse of the real estate market in 1929, the federal government began exerting considerable leverage on cities to adopt zoning ordinances that included restrictively regulated single-family residential districts separated from residential areas where People of Color lived by a physical feature or buffer zone.[335] The leverage came in the form of three federal programs created by the Roosevelt administration, aimed at addressing the nation's housing crisis: the Home Owners' Loan Corporation (HOLC) established in 1933, the Federal Housing Administration (FHA) established in 1937, and the Veterans Administration (VA) established in 1944.[336] The Federal Home Loan Bank Board established HOLC to help homeowners with delinquent mortgages avoid foreclosure, which HOLC accomplished by allowing homeowners in default to remortgage their properties with a new federally guaranteed mortgage instrument.[337] This instrument had a low fixed rate, allowed for uniform payments spread over fifteen years (as opposed to five years), and allowed homeowners to accrue equity while paying their loans.[338] To qualify for the federally guaranteed mortgage, homes had to meet HOLC creditworthiness standards based on, among other things, whether the home was in a white, restrictively zoned

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[331] *Id.*

[332] EDWARD PINTO, A SHORT HISTORY OF ZONING IN THE UNITED STATES AND AN INTRODUCTION TO LIGHT-TOUCH DENSITY, AEI HOUSING CENTER 4 (2020)

[333] 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:2 (4th ed.).

[334] *Id.*; *see also* Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPP. L. REV. 719, 727 (2023) (reporting that all states delegate the power to zone through an enabling act modeled on the SZEA).

[335] *See supra* notes 303–307 and accompanying text (discussing buffer zones as racial segregationist devices).

[336] Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact Upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131, 180 (2008).

[337] *Home Owners Loan Corporation (HOLC)*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/economics/encyclopedias-almanacs-transcripts-and-maps/home-owners-loan-corporation-holc [https://perma.cc/YU66-WGQH].

[338] *Id.*; KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 196–97 (1985).

neighborhood physically separated from neighborhoods where People of Color lived.[339]

The influence of HOLC's racist standards spread beyond the HOLC program for mortgages in default, ultimately exerting its greatest influence on the underwriting practices of the FHA and VA, both of which insured residential mortgage loans made by private banks.[340] FHA-insured mortgages brought homeownership within reach for millions of Americans by extending the payment period out thirty years, "decreas[ing] . . . down payment[s] to 10 percent," and allowing homeowners to acquire equity while repaying their loans.[341] But, like the HOLC, the FHA embraced its role as protector of white neighborhoods, not only by adopting HOLC underwriting practices,[342] but also by deploying FHA agents to the field to promote planning and zoning.[343] The Director of the Land Planning Division of the FHA, Seward Mott, observed in 1940 that these agents travelled the country giving thousands of presentations on the virtues of planning and zoning:[344]

> During the early years of [the FHA] planning program a great amount of educational work was necessary with real-estate developers, builders, and bankers. Subdivision and planning conferences were held *in every important city in the United States*. Illustrated talks were given, demonstrating the advantages of good neighborhood planning. . . . Every year *thousands of individual conferences are held* with subdivision developers.[345]

The FHA did not limit its promotion of zoning to "educational work." Director Mott leveraged the unprecedented buyer-friendly terms of FHA backed mortgages to promote widespread adoption of zoning. In the popular *Architectural Record* trade magazine, Mott warned that, "In some communities no loans are accepted due to lack of zoning or to poor administration of existing zoning ordinances as it is felt that the risk of neighborhood breakdown is too great and the security is not considered sound."[346] Mott's reasoning reflected the HOLC and FHA's racist underwriting practices, albeit in veiled race neutral language:

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[339] *See* Seward H. Mott, *The Benefits of Controlled Neighborhood Planning*, ARCHITECTURAL REC., Nov. 1940, at 36.

[340] Nier III, *supra* note 336.

[341] *Id.* at 180–81.

[342] *Id.* at 180.

[343] Mott, *supra* note 339, at 36–37.

[344] *See id.*

[345] *Id.* at 36 (emphasis added).

[346] *See id.*

> [T]hrough the intelligent use of these various planning techniques [protective covenants and zoning], good residential neighborhoods can be created and . . . in no other way can effective results be secured. The community as a whole benefits from this sort of inclusive and ordered planning because a neighborhood is like a barrel of apples—one bad apple will ruin the whole barrelful.[347]

With respect to the leverage attributable to FHA financing standards, Mott observed in 1940 that "approximately 45 [percent] of all new home construction in the United States [was pursuant to an] FHA finance plan . . . [and] developers [of subdivisions financed through other sources still] 'find it desirable to have their subdivisions qualified for FHA loans.'"[348]

III. THE SUPREME COURT AS ENABLER OF JIM CROW ZONING BY PROXY

Although comprehensive zoning was by no means an American invention, the highly preferential regulatory treatment of single-family homes coupled with treatment of multifamily residences as undesirable land uses certainly was.[349] As this uniquely American form of zoning spread throughout US cities in the early twentieth century, many feared the mechanism went too far in restricting private uses of property. The new citywide zoning codes prohibited many landowners from developing their property as intended, created a strict hierarchy of land uses, and dictated the height of structures, the purposes for which structures could be used, the size of yards, and more.[350] Surely the same court that rejected Louisville's racial segregation ordinance on the grounds that it placed too great a burden on private property rights would find such detailed, citywide restrictions on uses of private property exceeded the implied limits on government.

But, in 1926, the Court blessed the new regulatory mechanism, finding that Ambler Realty failed to prove the Village of Euclid's zoning ordinance did not substantially advance the public welfare.[351] In validating Euclid's zoning ordinance as a legitimate exercise of the police power, the Court applied a standard of review that has come to be recognized as

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[347] *Id.*

[348] *Id.*

[349] Comparative urbanism scholar Sonia Hirt's historical survey of municipal laws mandating socio-spatial segregation provides compelling evidence that legally mandated separation by residence type (closely correlated to economic status and race) was unique to early American zoning law. HIRT, *supra* note 20, at 16–21.

[350] *See supra* Section II.A.

[351] *See infra* Section III.A, III.C.

allowing local governments nearly unfettered discretion to regulate the uses of property within their boundaries.[352] Justice Sutherland's Euclid opinion also took pains to articulate a police power justification for single-family zoning, notwithstanding the fact that the validity of single-family zoning was not at issue.[353]

What began as a trickle became a fast-moving current. Spurred by *Euclid*, the SZEA, and FHA staffers, states throughout the nation adopted zoning enabling legislation that mirrored the federal model, and thousands of cities adopted comprehensive zoning codes. Each of these zoning codes restricted large swaths of land to a single, preferred form of housing and relegated multifamily housing and less restrictively regulated single-family housing to districts that included land uses the Supreme Court, zoning proponents, and local officials throughout the country characterized as incompatible with family life.[354]

A. The Village of Euclid's Robert Whitten-Inspired Code Provides a Test Case for Jim Crow Zoning by Proxy

When the Village of Euclid incorporated in 1903, it was a bourgeois suburb about twelve miles east of Cleveland.[355] Euclid Avenue, which ran through the Village of Euclid and continued all the way to Cleveland, was hailed "America's most beautiful street."[356] By 1920, however, many of Euclid Avenue's mansions had given way to empty lots, gas stations, funeral parlors, and apartment buildings.[357] Among the residents of Euclid Avenue's many great mansions was James Metzenbaum, a name familiar to many American land use lawyers.[358] Metzenbaum drafted the zoning ordinance that the Village adopted in 1922 and eventually represented the Village before the Supreme Court in

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[352] *See infra* Section III.C.

[353] *See infra* Section III.C.

[354] *See infra* Sections III.A.–III.C; *see also supra* Part II.

[355] Power, *supra* note 31, at 4; *Distance from Cleveland, OH to Euclid, OH*, DISTANCE BETWEEN CITIES, https://www.distance-cities.com/distance-cleveland-oh-to-euclid-oh [https://perma.cc/A3YN-8928].

[356] Power, *supra* note 31, at 4.

[357] Laura DeMarco, *Cleveland in the 1920s: Great Progress, Great Change and a Roaring Good Time (Vintage Photos)*, CLEVELAND.COM (Feb. 16, 2020, 5:00 AM), https://www.cleveland.com/life-and-culture/j66j-2020/02/33b3ee22dc9390/cleveland-in-the-1920s-great-progress-great-change-and-a-roaring-good-time-vintage-photos.html [https://perma.cc/W79S-8PL6].

[358] Steven Miller, *Comments of a Former Mayor at the Monument Dedication for* Euclid v. Ambler Realty, LAW PROFESSOR BLOGS: LAND USE PROF. BLOG (June 10, 2016), https://lawprofessors.typepad.com/land_use/2016/06/comments-of-a-former-mayor-at-the-monument-dedication-for-euclid-v-ambler-realty-.html [https://perma.cc/G94G-4KEC].

Village of Euclid v. Ambler Realty,[359] the seminal zoning case taught in land use and property law classes throughout the United States.

Euclid's zoning ordinance is often described as having been closely modeled on New York City's 1916 Zoning Resolution.[360] While it is true Euclid's ordinance regulated land uses, structure heights, and structure bulk (i.e., the area of the lot the structure can occupy) with use, height, and area districts,[361] the ordinance more closely resembled the codes of other Cleveland suburbs than it did New York City's Zoning Resolution.[362] Those codes were drafted by the planning consultant and outspoken white supremacist Robert H. Whitten.[363] As World War I wound down and formerly enslaved people began migrating to Cleveland,[364] the city and its surrounding suburbs experienced a housing shortage, pressure from apartment developers,[365] and increased efforts by white segregationists to prevent Black people from moving into white neighborhoods.[366] Several Cleveland suburbs hired Whitten to draft their zoning ordinances.[367] Whitten, who was working for the City of Cleveland as a city planning consultant, was nationally regarded as a zoning expert, in addition to being an advocate for the use of zoning as a means to racially segregate neighborhoods.[368] Today, Whitten may be best known for Atlanta's 1922 plan and zoning ordinance, which, notwithstanding *Buchanan v. Warley*, designated segregated residential areas as "R1 or white," "R2 or [Black]," and "R3 or

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[359] Chused, *supra* note 24, at 603; Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 367–79 (1926).

[360] *See supra* Section II.A.

[361] *Vill. of Euclid*, 272 U.S. at 379–81.

[362] Robert H. Whitten, *Zoning and Living Conditions*, *in* THIRTEENTH NATIONAL CONFERENCE ON CITY PLANNING 22–23 (1921) (describing his Cleveland Heights plan and ordinance as preserving city as a place of "high class" residence through use of separate districts for single-family homes, two-family homes, and apartments, and limiting amount of land zoned for two-family homes and apartments); Randle, *supra* note 226, at 39; *see infra* note 375 (regarding use of separate residential districts for single-family, two-family, and more than two-family residences combined with bulk and area regulations in other Whitten plans).

[363] *See infra* notes 369–374 and accompanying text.

[364] *See* Kimberley L. Phillips, *"But It Is a Fine Place to Make Money": Migration and African-American Families in Cleveland, 1915-1929*, 30 J. SOC. HIST. 393, 393 (1996) (reporting that Cleveland was a primary destination for Black migrants between 1910 and 1930).

[365] Randle, *supra* note 226, at 39.

[366] *See id.* at 42 (describing daily incidents of violence and intimidation against Black families who moved to Cleveland Heights, the suburb where the district court judge who presided over *Euclid v. Ambler Realty Co.* lived); TAYLOR, *supra* note 12, at 179 (discussing the Great Migration, housing shortages, and white price gouging and violence in northern cities including Cleveland).

[367] Randle, *supra* note 226, at 39.

[368] *Id.* at 39, 42–43.

undetermined race."[369] Whitten characterized Black families living in white neighborhoods as "inappropriate [land] uses" that threaten the value of neighborhoods,[370] and claimed racial segregationist zoning was both "a common sense method of dealing with facts as they are"[371] and "essential in the interest of the public peace, order and security."[372] Like Charles Cheney, Whitten claimed zoning was necessary to "preserve" "high-class" residential areas,[373] prevent "social and civil loss," "preserve the morale of the neighborhood," and "protect the homes of people."[374]

Whitten's plans did not expressly divide Cleveland, its suburbs, or other northern cities by race. Rather, he incorporated the approach Cheney took in Berkeley's 1916 code of establishing separate residential districts for single-family and multifamily residences.[375] He overlayed on these use districts various bulk and area district regulations that restricted, among other things, minimum lot size, the percentage of a lot that could be occupied by its primary structure, the number of families per acre, and building height.[376] In this way, Whitten's plans combined key attributes of Berkeley's and New York City's 1916 codes. The combined effect, as applied to his planning maps of Cleveland, East

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[369] CITY OF ATLANTA PLAN. COMM'N, THE ATLANTA ZONE PLAN 10 (1922) [hereinafter ATLANTA ZONE PLAN], https://hdl.handle.net/2027/osu.32435003851870 [https://perma.cc/83FX-5XYP].

[370] *Id.*

[371] Randle, *supra* note 226, at 43 (quoting Robert H. Whitten, *Social Aspect of Zoning*, 48 SURVEY 418–19 (1922).

[372] ATLANTA ZONE PLAN, *supra* note 369, at 10.

[373] Whitten, *supra* note 362, at 25.

[374] *Id.*

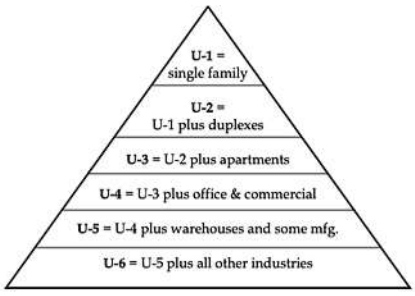
[375] Some of Whitten's plans created two residential districts, with one district for one- and two-unit dwellings and another for dwellings with three or more units. *See, e.g.*, ATLANTA ZONE PLAN, *supra* note 369, at 10; Robert H. Whitten & Frank R. Walker, THE CLEVELAND ZONE PLAN: REPORT TO THE CITY PLAN COMMISSION OUTLINING A TENTATIVE ZONE PLAN FOR CLEVELAND 10 (1921) [hereinafter CLEVELAND ZONE PLAN]; Morris v. East Cleveland, 31 Ohio Dec. 197, 198 (Com. Pl. 1920) (describing East Cleveland zoning ordinance). Others created three separate districts, with one district for one-unit dwellings, one district for two-unit dwellings, and another for dwellings with three or more units. *See, e.g.*, ROBERT H. WHITTEN, WEST HARTFORD ZONING: REPORT TO THE ZONING COMMISSION ON THE ZONING OF WEST HARTFORD 10 (1294) [hereinafter WEST HARTFORD ZONING REPORT]. Regardless, the Whitten plans and planning maps effectively limited most residential land to expensive single-unit dwellings through a combination of separate residential use districts and bulk and area regulations. *See* JACK DOUGHERTY AND CONTRIBUTORS, ON THE LINE: HOW SCHOOLING, HOUSING, AND CIVIL RIGHTS SHAPED HARTFORD AND ITS SUBURBS 97–101 (2022) (comparing West Hartford, Cleveland, and Atlanta plans). For updates to the open-source book *On the Line*, visit OnTheLine.trincoll.edu.

[376] *See, e.g.*, CLEVELAND ZONE PLAN, *supra* note 375, at 11–12 (minimum of five-thousand square feet of land per family in A-1 zones); ATLANTA ZONE PLAN, *supra* note 369, at 12 (same); WEST HARTFORD ZONING REPORT, *supra* note 375, at 10 (minimum of nine-thousand square feet of land per family).

Cleveland, Lakewood, and Cleveland Heights—among other cities[377]—had the intended effect of limiting the vast majority of residential land to single-family homes or, in some cases, single family homes and duplexes, and allowing residences with three or more units in small, often undesirable locations only.[378] As Cheney had done in Berkeley, Whitten also used multifamily and residential districts with less restrictive bulk and area regulations as buffers between single family neighborhoods and undesirable areas.[379]

Metzenbaum, who considered Whitten "a significant influence on his . . . career in Ohio,"[380] incorporated these elements into Euclid's code.[381] Thus, rather than regulating residential use as a single broad class of land uses, as New York City had done, Euclid's code contained three separate residential districts, with one solely devoted to detached single-family homes, one that allowed duplexes and single-family homes, and one that allowed both of these residence types as well as residences with three or more units.[382] Euclid's 1922 zoning map designated these districts "U1 single family," "U2 two family," and "U3 apartment house." As illustrated in Figure 1, Euclid's zoning code and map created a hierarchy of land uses with U-1 designating areas reserved for single-family homes as the most protected land in the Village, and U-6 designating the least protected land, where industrial uses were permitted in addition to all the uses permitted in U-1 through U-5.[383]

Figure 1: Euclid's Cumulative Use Districts



[377] *See supra* note 375 and accompanying text; *see also* Randle, *supra* note 226, at 42 (quoting contemporary source describing Whitten as "perhaps the most influential zoning advisor in the United States").

[378] *See supra* note 375 (citing and discussing Whitten plans).

[379] *See* M. NOLAN GRAY, ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT 39 (2022).

[380] Randle, *supra* note 226, at 38.

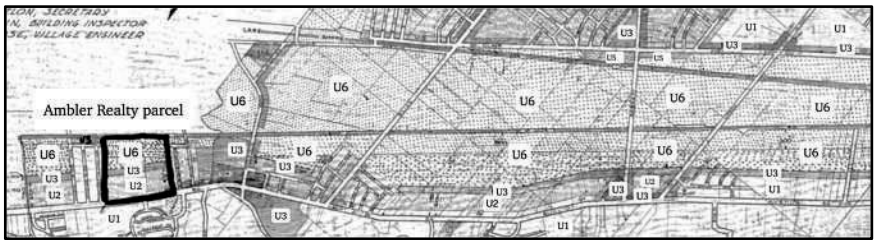
[381] *See infra* Figures 1 and 2 and notes 382–384 and accompanying text.

[382] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 379–82 (1926).

[383] *Id.* at 379–82.

As illustrated by Figure 2 below, Euclid's zoning map also privileged detached, more restrictively regulated single-family neighborhoods by using the apartment district as a buffer between single-family districts and industrial districts,[384] apparently drawing on the influence of Cheney and Whitten.[385]

Figure 2: Portion of Village of Euclid Zoning Map (1922)[386]



In stark contrast to the process championed by prominent urban reformers, Euclid's ordinance was not premised on city planning principles: "The Village had never taken a foresighted look at its future. Studies had not been undertaken as to the rate of population growth, nor as to the demand for parks and schools. Choices had not been made as to placement and size of new highways and sewer lines."[387] Instead, it appears Metzenbaum essentially superimposed the code from another Cleveland suburb onto the Village map.[388] Even Metzenbaum later admitted that he personally believed the zoning ordinance was arbitrary.[389]

Nearly a decade before Euclid adopted its zoning ordinance, the Ambler Realty Company purchased a parcel, as illustrated in Figures 2 and 3, which consisted of a sixty-eight acre tract of vacant land fronting Euclid Avenue to the south and bounded by the Nickel Plate Railroad to the north.[390] Ambler Realty purchased the then-unregulated tract of land intending

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[384] *See* CITY OF EUCLID, ZONING MAP—EUCLID VILLAGE (1922) [HEREINAFTER 1922 ZONING MAP], https://irp.cdn-website.com/83d949c5/files/uploaded/1922%20Zoning%20Map.pdf [https://perma.cc/S7V3-SGB6] (showing narrow strips of U3 districts between U6 and U1 districts); Donald J. Smythe, *The Power to Exclude and the Power to Expel*, 66 CLEV. ST. L. REV. 367, 393 n.207 (2018) ("Euclid's 1922 zoning map shows most of the land zoned U3 to allow apartment houses is adjacent to land zoned U6 to allow some of the heaviest types of industrial uses.").

[385] *See supra* notes 303–307 and 379 and accompanying text.

[386] The author modified the image to identify the Ambler Realty parcel and highlight areas zoned U-1, U-2, U-3, and U-6. The source of the image is a copy of Euclid's 1922 Zoning Map on the City of Euclid's website. *See* 1922 ZONING MAP, *supra* note 384.

[387] Power, *supra* note 31, at 4.

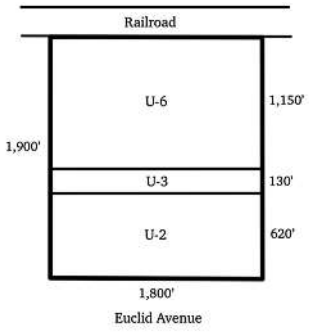
[388] *Id.*

[389] Randle, *supra* note 226, at 48.

[390] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 379 (1926).

to develop it for business and industrial uses.[391] But the new zoning ordinance divided the tract into three slices. The fifteen hundred feet adjacent to the railroad was in the U-6 district, which allowed industrial uses plus uses higher up on the zoning hierarchy.[392] The next 130 feet was in the U-3 district, which allowed commercial uses, hotels, apartment buildings, and the uses permitted in U-1 and U-2 districts.[393] The 620 feet adjacent to Euclid Avenue was in the U-2 district, which meant the only permitted uses were detached single-family homes and duplexes.[394] In this way, the zoning of Ambler's parcel exemplified the use of a narrow U-3 zone as a buffer between more restrictively regulated residential zones and areas zoned for industrial development.[395] Not only did the U-3 Apartment zone buffer the U-2 Two-Family zone from potentially noxious industrial uses, the U-2 zone provided a buffer between the Industrial and Apartment zones to the north and a U-1 zoned area immediately south of Euclid Avenue.

Figure 3: Ambler Realty Tract[396]



Ambler Realty sued the Village, alleging that the zoning ordinance deprived Euclid landowners of their property without due process of law in violation of the Fourteenth Amendment, and was therefore facially void as an invalid exercise of the police power.[397] Ambler Realty argued that, rather than reasonably furthering the public welfare, as the ordinance needed to in

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391 *See id.* at 384.

392 *Id.* at 381–82.

393 *Id.* at 382.

394 *Id.* at 380–82.

395 All land adjacent to Ambler Realty's parcel on the south was zoned U-1 except a small parcel that consisted of a cemetery and was, accordingly, zoned U-6.

396 The author based this illustration on a similar illustration in JOHN R. NOLON ET AL., LAND USE AND SUSTAINABLE DEVELOPMENT LAW: CASES AND MATERIALS 55 (9th ed. 2017).

397 Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 310–12 (1924).

order to satisfy the Due Process Clause, the restrictions were both overbearing and arbitrary.[398]

B. From the Laundry Cases *to* Euclid *and Beyond, the Supreme Court Validates Willful Blindness to Race-Based Spatial Control of Wealth and Power*

The facts looked bad for the Village and for zoning generally. The Supreme Court had announced in the 1887 case *Mugler v. Kansas* that courts have a duty to scrutinize the substantive reasonableness of regulations that interfere with private property rights,[399] as the *Buchanan* Court did when confronted with Louisville's racial zoning ordinance.[400] Police power regulations lacking a "real or substantial" relationship to protection of public health, safety, or welfare exceed the constitutional limits of legislative authority and thereby constrain life, liberty, or property without due process of law.[401]

Moreover, the Court repeatedly grounded the validity of police power regulations limiting uses of private property in the common law of nuisance.[402] But the developmental restrictions on Ambler Realty' and other Euclid landowners' vested property rights appeared to have no justification beyond vague public welfare claims. Unregulated development in the Village had not led to the crowded and unsanitary conditions experienced in the nation's largest urban areas, conditions that contributed to outbreaks of H1N1, cholera, typhoid, and yellow fever.[403] The Village had no clear health or safety basis for prohibiting commercial development on the main thoroughfare; nor could the Village seriously contend that commercial and industrial

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[398] *See id.* at 384–85, 387, 389.

[399] Mugler v. Kansas, 123 U.S. 623, 661 (1887) (holding prohibition statute that prohibited a brewery owner from using property for its only profitable purpose did not deprive property owner of property without due process of law); *see also* Robert A. Williams, Jr., *Euclid's Lochnerian Legacy*, *in* ZONING AND THE AMERICAN DREAM, *supra* note 17, at 281–82.

[400] *See supra* Section I.C.

[401] *Mugler*, 123 U.S. at 661.

[402] *See, e.g.*, Reinman v. City of Little Rock, 237 U.S. 171, 176 (1915) ("[I]t is clearly within the police power of the State to regulate the business [livery stables] and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment."); Hadacheck v. Sebastian, 239 U.S. 394, 410–11 (1915) (same with respect to brick manufacturing businesses).

[403] *See "Destroyer and Teacher": Managing the Masses During the 1918-1919 Influenza Pandemic*, 125 PUB. HEALTH REPS. 48, 52 (2010); *see* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

development along a street dotted with gas stations, funeral parlors, industry, and vacant lots constituted a nuisance.[404]

Euclid's thin health and safety justifications appeared especially problematic when contrasted with the significant diminution of property values caused by the ordinance. In 1922, the same year Euclid adopted its zoning ordinance, the Supreme Court reasoned in *Pennsylvania Coal Co. v. Mahon* that a state statute "stretched" the police power "too far" when it limited coal mining to protect surface structures and public infrastructure from subsidence, announcing that "a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end."[405] The Court found that the Pennsylvania statute had the effect of rendering valueless a coal company's subsurface support estate,[406] which the coal company retained when it sold its surface estate to a private buyer.[407] Thus, notwithstanding the statute's clear public health and safety justifications (preventing homes, businesses, parks, and roads from collapsing into sink holes),[408] the Court concluded that the statute exceeded due process limitations on governmental authority to interfere with private property rights.[409]

Although Euclid's zoning ordinance did not destroy Ambler Realty's entire estate in land, the regulations had the effect of destroying the speculation value of the fifty-four acres of Ambler Realty's property that fell within the new U-2 and U-3 districts, the uncontested estimated value of which decreased from $10,000 per acre to $2,500 per acre.[410] As was common in eighteenth and early nineteenth century America, Ambler Realty purchased the property for its speculation value,[411] which in this case was the anticipated increase in the value of the unimproved land as nearby Cincinnati grew.[412] Ambler Realty argued that the ordinance was merely an attempt "to preserve a rural character in portions of the Village which, under the

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[404] *See Vill. of Euclid*, 272 U.S. at 395; *see supra* note 357 and accompanying text.

[405] Pa. Coal Co. v. Mahon, 260 U.S. 393, 413, 415, 418 (1922).

[406] Pennsylvania recognizes three distinct estates in land: the surface estate, the subsurface or mineral estate, and subsurface support estate. The coal company had title to the two subsurface estates and Mahon had title to the surface estate. *Id.*

[407] Susan Manges McMichael, Mahon *Revisited:* Keystone Bituminous Coal Ass'n v. Debenedictis*, 480 U.S. 470 (1987)*, 29 NAT. RES. J. 1067, 1070 (1989).

[408] *Mahon*, at 421–22 (Brandeis, J., dissenting).

[409] *Id.* at 415–16.

[410] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926).

[411] Edward L. Glaeser, A Nation of Gamblers: Real Estate Speculation and American History 2 (Nat'l Bureau of Econ. Rsch., Working Paper 18825) (2013), https://www.nber.org/system/files/working_papers/w18825/w18825.pdf [https://perma.cc/T2FT-V6US].

[412] *Vill. of Euclid*, 272 U.S. at 384.

operation of natural economic laws, would be devoted most profitably to industrial undertakings."[413] Thus, just as Pennsylvania's statute made "it commercially impracticable to mine certain coal" and had "very nearly the same effect for constitutional purposes as appropriating or destroying" the land,[414] Ambler argued the Euclid ordinance had the effect of appropriating or destroying that which made its property valuable—the ability to develop the land for industrial uses.[415]

Moreover, as Professor Maureen Brady recently noted, not only was *Euclid* "decided in the heyday of the Supreme Court's '*Lochner* era,'" the opinion "was authored by Justice Sutherland, colloquially known as one of the 'Four Horsemen' 'fanatically devoted to property rights and callously indifferent to the commonwealth.'"[416] Just three years before authoring the *Euclid* opinion, Justice Sutherland wrote for the majority in *Adkins v. Children's Hospital*[417] validating a federal minimum wage statute "in the face of the [substantive due process] guaranties of the Fifth Amendment" would widen the police power "to a great and dangerous degree."[418] Invoking *Mahon*, Sutherland admonished that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[419] Nowhere in *Adkins* did the Court ask whether the public welfare justification for the statute was "fairly debatable;" nor did *Adkins* require the aggrieved party to show that the statute bore no substantial relation to the public welfare. Rather, although nominally applying a presumption of validity and rational basis standard of review, Sutherland's *Adkins* opinion subjected the Washington, DC minimum wage statute to the exacting scrutiny the *Lochner* era Court often applied to public welfare regulations of economic activities.[420] Chief Justice Taft's majority opinion in *Charles Wolff*

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[413] *Id.* at 371 (argument for appellee); Garrett Power, *Advocates at Cross-Purposes: The Briefs on Behalf of Zoning in the Supreme Court*, 1997 J. SUP. CT. HIST. 79 (1997).

[414] Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

[415] *See* Power, *supra* note 31, at 4.

[416] Brady, *supra* note 311, at 1670 (citations omitted); *see also* Barry Cushman, Essay, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 566 (1997).

[417] Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[418] Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 560–61 (1937).

[419] *Id.* at 552 (quotation marks and citation omitted).

[420] *See id.* at 544 ("The statute here in question has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity, and that determination must be given great weight. . . . [E]very possible presumption is in favor of the validity of an act of Congress until overcome beyond

Packing Co., which was also issued in the Court's 1923 term, did not even pretend to defer to a state legislature's police power authority when it construed the due process guarantee against arbitrary and unreasonable deprivations of economic rights as placing on the legislature the burden of justifying restraints on contracts: "[Restraints on the freedom of contract] must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances."[421] Given this prelude, it would seem a near certainty that, faced with Euclid's hastily devised zoning ordinance, the decimated speculation value of large tracts of private property, and the lack of a nuisance justification for the restrictions on private property,[422] the Court would invalidate the new citywide (or village wide) land use controls.

But the Supreme Court's approach to state laws prohibiting or requiring racial segregation reveals a Court more concerned with allowing racial segregation than with consistent application of constitutional doctrine.[423] Illustrative of this, in *Hall v. De Cuir*, the Court leaned heavily on indirect burdens on interstate commerce to invalidate a statutory integration requirement applicable to riverboats traveling in Louisiana.[424] Yet, just a few years later, in *Louisville, New Orleans and Texas Railway Co. v. Mississippi*, the Court simply ignored the applicability of a Mississippi statute to interstate carriers to validate a railcar segregation law.[425] In *Hall*, the Court was faced with the question of whether a Louisiana statute implementing the Thirteenth Amendment impermissibly restricted interstate commerce by requiring integration of all riverboats traveling in Louisiana, regardless of their port of origin.[426] Answering in the

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rational doubt."); *id.* at 544–58 (disagreeing with legislative determination of public purpose and subjecting the statute to means-ends review); *see also, e.g.*, Charles Wolff Packing Co. v. Ct. of Indus. Rels., 262 U.S. 522, 544 (1923) (invalidating Kansas compulsory labor arbitration statute).

[421] *Charles Wolff Packing Co*., 262 U.S. at 534.

[422] Brady, *supra* note 311, at 1671.

[423] *See* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 463–65 (1982) (discussing approval of racial segregation as unifying principle that explains contradictory results in Hall v. De Cuir, 95 U.S. 485 (1878), and Louisville, New Orleans & Tex. Ry. Co. v. Mississippi, 133 U.S. 587 (1890)); Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 FLA. L. REV. 1401, 1447 (2015) ("Restrictive single-family ordinances and the judicial decisions that uphold them, from *Belle Terre* on down, are marked in their lack of analytical rigor. In addition to their reflexive invocation of the police power and their heavy reliance on stereotypes, they are filled with value judgments masquerading as facts.").

[424] Hall v. De Cuir, 95 U.S. 485 (1878).

[425] Louisville, New Orleans & Tex. Ry. Co. v. Mississippi, 133 U.S. 587 (1890).

[426] *Hall*, 95 U.S. at 488.

affirmative, the Court reasoned that requiring interstate carriers that segregated their riverboats outside Louisiana waters to allow passengers of color to move freely about the riverboats while in Louisiana waters impermissibly burdened interstate commerce.[427] Twelve years later, the Court took up a nearly identical, albeit converse, question of whether a Mississippi statute could require railroad companies traveling within the state to use separate railcars or partitions to racially segregate passengers.[428] Concluding that the statute was a permissible regulation of intrastate commerce, the Court distinguished *Hall* by deferring to the Louisiana Supreme Court's interpretation of the statute as applicable to interstate carriers, although the plaintiff was a Black person travelling entirely intrastate.[429] The Court then observed that the Mississippi statute, which by its terms applied to all railroad companies traveling in the state, was limited in scope to intrastate travel—notwithstanding the obvious interstate nature of all rail travel, the greater burden on interstate companies to providing separate passenger railcars or partitions, and the criminal conviction of an interstate carrier for violating the statute.[430]

In hindsight, the convoluted logic of *Texas Railway* is unsurprising, given the Court's ultra-deference to a state racial segregation law six years later in *Plessy v. Ferguson*.[431] There, in addition to emphasizing the familiar standards applicable to state and local police power legislation—broad legislative discretion and judicial deference to legislative enactments—the Court cabined the role of the judiciary with respect to conflicts between police power legislation and the Fourteenth Amendment.[432] According to the Court, statutory racial classifications met the reasonableness standard applicable to substantive due process challenges when they were enacted "with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good

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[427] *Id.* at 488–90.

[428] Louisville, New Orleans & Tex. Ry. Co., 133 U.S. at 590–92.

[429] *Id.* at 591 ("All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the State is no invasion of the powers given to Congress by the commerce clause.").

[430] *Id.* at 594 (Harlan, J., dissenting).

[431] Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896), *abrogated by* Brown v. Bd. of Ed., 347 U.S. 483 (1954).

[432] *Id.* at 550.

order."[433] To counter the dissent's suggestion that this deferential standard would allow for too much "mischief," the Court pointed to the usual requirement that "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[434] But rather than examining whether the law was enacted to oppress a particular class, the *Plessy* Court ignored the obvious racial animus underlying the segregation law. As Justice Harlan complained in the dissent:

> Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by [Black people], as to exclude [People of Color] from coaches occupied by or assigned to white persons. . . . The thing to accomplish was, under the guise of giving equal accommodation for [white and Black people], to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. . . . What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that [citizens of color] are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.[435]

Of course, *Plessy* was not the first time the Court applied a deferential standard of review to Fourteenth Amendment challenges of police power regulations while ignoring their obvious racially discriminatory purposes.[436] Leaning into the separation of powers norms underlying deference to police power regulations, Justice Field explained in *Barbier v. Connolly* that "neither the [Fourteenth Amendment]—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."[437] On this basis, the Court in *Barbier* in 1884 and *Soon Hing* in 1885 ignored the notorious and well documented governmental campaign that "every intelligent person" knew included the passage of both race-based and facially neutral ordinances deliberately targeting Chinese and Chinese American residents

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[433] *Id.*

[434] *Id.*

[435] *Id.* at 557–60 (Harlan, J., dissenting).

[436] *See, e.g.*, Barbier v. Connolly, 113 U.S. 27, 31–32 (1884); Soon Hing v. Crowley, 113 U.S. 703, 710–11 (1885); *see also Plessy*, 163 U.S. at 550.

[437] *Barbier*, 113 U.S. at 31 (1884).

of San Francisco.[438] Moreover, the Court in the *Laundry Cases* not only ignored the obvious racial animus underlying the ordinances but also announced that evidence of a racially discriminatory purpose is not enough to demonstrate a regulation is an invalid exercise of the police power "unless in its enforcement [the regulation] is made to operate only against the class mentioned."[439]

Justice Southerland's opinion in *Euclid* doubled down on the racial purpose blindness approach of the *Laundry Cases* and *Plessy*, announcing: "If the [facial] validity of the legislative classification for zoning purposes [is] fairly debatable, the legislative judgment must be allowed to control."[440] The Court acknowledged the general principle that police power regulations "must find their justification in some aspect of the police power, asserted for the public welfare,"[441] but explained that a court could not find a zoning ordinance unconstitutional on its face unless the aggrieved party proves that its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[442] Lamenting what amounted to a minimal rationality standard, prominent real estate attorney and housing advocate Arthur Brooks summed up Euclid's permissive approach as follows: "What stands out, in retrospect, is the absence in the [*Euclid*] opinion of any cogent rationale, other than the elusive test of reasonableness, for delimiting the scope of the police power. . . . a power unlimited in theory, [and] impenetrably defended by a near conclusive presumption of validity."[443]

One might say the chasm between the seminal cases of this era could not be wider. On the one hand, *Euclid's* fairly debatable standard and, on the other, the "solemn duty" to look behind the pretext of police power regulations announced in *Mugler*[444] and the admonition in *Mahon* that a restriction, "though imposed for a public purpose," is not lawful "unless the restriction is an appropriate means to the public end."[445] But the

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[438] *In re* Wo Lee, 26 F. 471, 474–75 (C.C.D. Cal. 1886), *overruled by* Yick Wo v. Hopkins, 118 U.S. 356 (1886); *see also supra* notes 100–122 (discussing the Court's blindness to obvious racially discriminatory purposes of laundry regulations).

[439] Soon Hing v. Crowley, 113 U.S. 703, 711 (1885).

[440] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (citations omitted).

[441] *Id.* at 387.

[442] *Id.* at 395.

[443] Arthur V.N. Brooks, *The Office File Box—Emanations from the Battlefield*, *in* ZONING AND THE AMERICAN DREAM, *supra* note 17, at 22.

[444] Mugler v. Kansas, 123 U.S. 623, 661 (1887).

[445] Pa. Coal Co. v. Mahon, 260 U.S. 393, 418 (1922). This chasm was much wider, however, when the restricted fundamental right was noneconomic. *See, e.g.*, Buck

chasm has, in fact, widened since the Sutherland Court validated Euclid's citywide restrictions on the development of apartments. As Justice Sutherland himself observed in *Adkins*, "[a] wrong decision does not end with itself."[446] Although some courts subject local zoning decisions to intermediate scrutiny consistent with *Euclid's* nominal requirement that the zoning ordinance bear a "substantial" relation to the public welfare, *Euclid* has come to stand for a minimal rationality standard combined with a strong presumption of validity.[447] Although less than two years after *Euclid* the Supreme Court applied a less deferential standard of review in a Fourteenth Amendment challenge to zoning as applied to a particular landowner's parcel,[448] state and federal courts tended to apply *Euclid's* near conclusive presumption of validity and minimum rationality standard to as-applied challenges to zoning.[449] Moreover, many courts extended *Euclid's* minimum rationality standard to as-applied challenges without regard to whether the zoning action being challenged was legislative or administrative.[450]

Even more concerning when considered within American zoning law's barely veiled white supremacist skew, are decisions by the lower courts that apply even more deferential standards to as-applied substantive due process claims involving administrative zoning actions.[451] The Third Circuit reasoned that

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v. Bell, 274 U.S. 200, 207 (1927) (upholding against due process and equal protection challenges a state statute that allowed compulsory sterilization of a woman committed to psychiatric institution at the sole discretion of the institution's superintendent in part because the Court has "seen more than once that the public welfare may call upon the best citizens for their lives" and "[i]t would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices.").

[446] Adkins v. Children's Hosp., 261 U.S. 525, 560–61 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[447] *See* Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 730–31 (2008) (concluding that the *Euclid* test, "[i]n practice . . . grants great deference to legislative judgments because the link between the means and the purpose of the legislation is satisfied by any conceivable rational basis, regardless of whether it was the actual basis of the legislative action").

[448] Nectow v. City of Cambridge, 277 U.S. 183 (1928) (holding that the ordinance would be upheld as applicable to the plaintiff's land "if it tends to promote the health, safety, convenience, and general welfare of the inhabitants").

[449] *See* Ostrow, *supra* note 447, at 757–58 (concluding that most state and federal courts have applied *Euclid's* highly deferential standard to facial and as-applied zoning challenges).

[450] *See id.* at 730–31.

[451] *See* 1 LAND USE LAW § 2.39 (6th ed. 2022); *see, e.g.*, UA Theatre Circuit v. Twp. of Warrington, 316 F.3d 392, 400–02 (3d Cir. 2003) (applying a "shocks the conscience" standard); Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104–05 (8th Cir. 1992) (same); Klen v. City of Loveland, 661 F.3d 498 (10th Cir. 2011) (same); EJS Props., LLC v. City of Toledo, 698 F.3d 845, 851, 862 (6th Cir. 2012) (holding that denial of rezoning because plaintiff refused to give large donation to local retirement fund did not shock the conscience).

a "shocks the conscience" standard, which encompasses "only the most egregious official conduct,"[452] is appropriate because "[l]and-use decisions are matters of local concern and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives."[453] The Eight Circuit, in a case that held allegations that a city arbitrarily applied a zoning ordinance were insufficient to state a substantive due process claim, observed that the court's "decision would be the same even if the City had knowingly enforced the invalid zoning ordinance in bad faith."[454] Cataloguing the various approaches the federal circuits take to substantive due process challenges to zoning decisions, the Sixth Circuit concluded both that the circuits are "deeply divided concerning the theories to be employed in federal court cases challenging zoning" and that many circuits are outright hostile to such claims[455]—notwithstanding that "it is well established that the substantive due process right exists" in the zoning context.[456]

C. From Euclid *to* Village of Belle Terre *and Beyond, the Supreme Court Validates Single-Family Residences as the Apex Land Use*

That one of the Four Horsemen of the *Lochner*-era Court would essentially write a blank check to governmental prohibition of lawful uses of private property to achieve social welfare objectives makes sense, however, when *Euclid* is understood as a test case for barely veiled, facially neutral racial zoning, it is difficult to find true rationale. Ultimately, Sutherland's opinion concluded that Ambler Realty failed to show that the regulatory separation of land uses lacked a substantial relationship to the public welfare and, therefore, the regulation was not *ultra vires*.[457] In reaching this conclusion, the Court characterized apartment buildings in neighborhoods of single-family homes as akin to "a pig in the parlor instead of the barnyard"[458]—a reference to a centuries' old line of nuisance

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[452] *UA Theatre Circuit*, 316 F.3d at 400.

[453] *Id.* at 402. The court relied on and quoted *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), in which the Court observed that "the core of the concept" of due process is "protection against arbitrary action" and that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.* at 845-46 (citation omitted).

[454] Chesterfield Dev. Corp., 963 F.2d at 1104–05.

[455] Pearson v. City of Grand Blanc, 961 F.2d 1211, 1214, 1217–19 (6th Cir. 1992).

[456] *Id.* at 1220.

[457] *Euclid*, 272 U.S. at 395.

[458] *Id.* at 388.

cases.[459] The Court's reasoning resounded in racist tropes that pathologize Black spaces as urban, dirty, crime ridden, and impoverished,[460] tropes that together form a powerful American myth that equates urban slums with Blackness, dehumanizes those who live in cities and multifamily housing, and casts Black families as both separate from, and an existential threat to, the American family. The Court echoed language from Whitten's Atlanta Zone Plan when it justified prohibition of apartments in U-1 and U-2 zones, which made up the majority of Euclid's residentially zoned land, referring to apartments as a "threat" and a "mere parasite" that could "destroy" neighborhoods of single-family homes, and deprive children of safety, quiet, and space to play[461]—as if children did not live in apartments.

> [In a section of private homes,] very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.[462]

In guiding Justice Sutherland to embrace an analogy to the law of nuisance but not the law itself, attorney and champion of the planning and zoning movement Alfred Bettman understood that nuisance law presented a double-edged sword. On the one hand, the law of nuisance provided a justification for restricting even vested property interests; on the other hand, nuisance law

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[459] *See, e.g.*, William Aldred's Case, 77 Eng. Rep. 816 (K.B. 1610) (holding a pigsty located near a home constitutes a nuisance).

[460] *See* Bryan Adamson, *Thugs, Crooks, and Rebellious Negroes: Racist and Racialized Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 HARV. J. RACIAL & ETHNIC JUST. 189 (2016).

[461] *Euclid*, 272 U.S. at 388; ATLANTA ZONE PLAN, *supra* note 369, at 3–6. Whitten's other plans also used this language to promote comprehensive zoning. *See, e.g.*, CLEVELAND ZONE PLAN, *supra* note 375, at 4–6, 8; WEST HARTFORD ZONING REPORT, *supra* note 375, at 6; *see also* Morris v. City of E. Cleveland, 31 Ohio Dec. 197, 209 (Com. Pl. 1920) (upholding the Whitten-drafted East Cleveland zoning code and reasoning "that it is within the police power of a city to preserve districts against the apartment; that the greater the proportion of private homes in a city, preferably occupied by the owners, the better the city, in health, morals, peace and welfare.").

[462] *Euclid*, 272 U.S. at 394.

did not provide a basis for protecting single-family homes from apartments.[463] As Professor Maureen Brady explains, progressive reformers and the courts recast multifamily residences as akin to nuisances to justify restricting them under the police power.[464] But Bettman and ultimately Justice Sutherland's loose analogy to nuisance law served to obscure the reality that attempts to classify multifamily residences as nuisances found little support in nuisance doctrine.[465]

Recognizing this, Bettman invited the Court to free zoning from the constraints of nuisance law[466]—an invitation the Court accepted when it approved of Euclid's zoning ordinance despite the fact that "some industries of an innocent character might fall within the proscribed class."[467] Notwithstanding this break from nuisance law, the Court found that apartment buildings in neighborhoods of "detached residences," which "in a different environment" may "be not only entirely unobjectionable but highly desirable, come very near to being nuisances."[468] Thus, the Court concluded that the existential harms the apartment building posed to residential neighborhoods provided "sufficiently cogent [reasons] to preclude us from saying . . . that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[469]

By regulating and separating *structures*—single-family dwellings, two-family dwellings, and apartments—the Euclid code dehumanized the people who called the structures home, allowing the Court to avoid labeling the lower income, disproportionately Black individuals and families who lived in apartments "mere parasites" that, in residential neighborhoods, are nearly "nuisances." The notion of apartments invading and destroying single-family neighborhoods was grounded in the segregationist discourse of the era, which equated apartments with "race suicide."[470] The theory of race suicide, which numerous Progressives including Theodore Roosevelt espoused, held that the

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[463] Brady, *supra* note 311, at 1671.

[464] *Id.*

[465] *Id.* at 1644.

[466] Commentary, Village of Euclid v. Ambler*: The Bettman Amicus Brief*, 58 PLAN. & ENV'T L. 3, 7 (2006).

[467] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926).

[468] *Id.* at 394–95.

[469] *Id.*

[470] State *ex rel.* Morris v. City of East Cleveland, 31 Ohio Dec. 98, 109, 114 (1919), *aff'd on rehearing*, 31 Ohio Dec. 197 (1920) (upholding the Whitten-drafted zoning code that excluded apartments from single-family areas and reasoning that apartments were "chambers of noise and horrors" that they constituted "a national menace" and threatened "race suicide").

"native" white race was going extinct because wealthier, white families were having fewer children, some white women were having children with immigrants and People of Color, and immigrants and People of Color were having more children.[471] In this context, Justice Sutherland's observations about apartments conveyed a clear message that protection of white neighborhoods from invasion by immigrants and People of Color was a legitimate objective of the police power and places where immigrants and People of Color lived did not count as neighborhoods with a residential character worthy of protection.[472] This reasoning mirrored points Whitten made in his facially racially segregationist *Atlanta Zone Plan* and points the California "community builders" made when they promoted the single-family residential zone as a tool to protect "high class" neighborhoods from invasion by People of Color while zoning areas where People of Color lived for industrial land uses to protect industrial landowners from nuisance complaints by their residential neighbors.[473] Of course, the Sutherland Court's embrace of racist tropes to cast protection of single-family neighborhoods from invasion by apartments as within the scope of the police power is not surprising given the Court's consistent endorsement of racial segregation as a legitimate police power objective.[474]

Almost fifty years passed before the Supreme Court significantly addressed zoning again in the 1974 case *Village of Belle Terre v. Boraas*.[475] There, the Court again relied on the dehumanization of people who could not afford to own single-family detached homes to uphold a zoning law that essentially prohibited low income people from residing anywhere in the municipality.[476] Not only was the entire residential area of the Village zoned solely for single-family detached residences, but the zoning ordinance also narrowly defined "family" as "one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit and expressly exclude[ed]" multifamily residences from the definition of "lodging."[477] As it

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[471] Brady, *supra* note 311, at 1641–42; Jane Kuenz, *American Racial Discourse, 1900-1930: Schuyler's "Black No More,"* 30 NOVEL: A FORUM ON FICTION 170, 177 (1997).

[472] *See* Chused, *supra* note 24, at 611–14 (discussing use of racist tropes and code words, or "'politely' ugly discourse," in Alfred Bettman's amicus brief and Justice Sutherland's opinion, which drew heavily from Bettman's brief).

[473] *See supra* text accompanying notes 257–264; *supra* Sections II.A.–B.

[474] *See supra* section III.B. (discussing cases); Chused, *supra* note 24, at 607–09 (discussing *Euclid* within the context of the Supreme Courts' solidification of Jim Crow and validation of racist immigration quota system).

[475] Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[476] *Id.* at 9.

[477] *Id.* at 1.

had in *Euclid*, the *Belle Terre* Court found that the municipality's zoning law furthered a legitimate public welfare interest. In doing so, the Court expressly invoked a pastoral myth while implicitly invoking racist and classist fears of those who live in apartment buildings. Waxing poetic, Justice Douglas cited *Euclid* for the proposition that "[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[478]

Again, the Court applied "a near conclusive presumption of validity" and ignored any racially discriminatory intent to uphold the purported police power restriction on private property, assembly, and privacy rights.[479] In his dissent, Justice Marshall illustrated the disconnect between the Village's definition of "family" and the purported objectives of limiting density and congestion, noting that the definition of family as "related" persons allows "an extended family of a dozen or more . . . in a small bungalow, [while] three elderly and retired persons could not occupy the large manor house next door."[480] By essentially rubber-stamping a law that narrowly defined the class of people who could live in the municipality, the Court found that the presence in a home of people not related by blood, adoption, or marriage was sufficiently incompatible with "family" and "youth values" to justify their exclusion from the municipality.[481] The clear implication was that the American family with a legitimate public welfare interest in enjoying "[a] quiet place where yards are wide, people few, and motor vehicles restricted"[482] expressly and implicitly excluded families living in poverty and families of color, many of which included functional families not related by blood, marriage, or official adoption and, by economic necessity, households that accepted paying lodgers.[483]

Although the Court qualified its holding in *Belle Terre* three years later in *Moore v. City of East Cleveland*, *Moore* left

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[478] *Id.* at 9.

[479] Brooks, *supra* note 443, at 22.

[480] *Vill. of Belle Terre*, 416 U.S. at 19 (Marshall, J., dissenting); *see* Sara C. Bronin, *Zoning for Families*, 95 IND. L.J. 1, 6 (2020) (noting that local codes typically exclude Justice Marshall's hypothetical family of a dozen or more extended relatives by limiting families to a single "housekeeping" or "household" unit, which generally requires sharing meals and a household budget).

[481] *Vill. of Belle Terre*, 416 U.S. at 1.

[482] *Id.* at 3.

[483] Solangel Maldonado, *Sharing a House but not a Household: Extended Families and Exclusionary Zoning Forty Years After* Moore, 85 FORDHAM L. REV. 2641, 2652–53. Maldonado also reports that "although racial minorities are more likely to live with extended family members, the majority do not."

intact the doctrinally corrupt reasoning of *Belle Terre* that subjected governmental intrusion into intimate associational choices to mere rational basis scrutiny.[484] *Moore* involved a local housing code provision that restricted the number of related individuals who could live together and had the effect of subjecting Inez Moore to criminal sanctions because she lived with her son and two grandchildren who were cousins and not brothers.[485] The Court could not reach a majority in the case; but, the Justice Powell plurality opinion concluded that the housing code implicated the Fourteenth Amendment's substantive due process right to "freedom of personal choice in matters of marriage and family life" and therefore heightened scrutiny applied.[486] As in *Belle Terre*, the restriction on who could cohabitate did little to address legitimate public welfare objectives like preventing overcrowding or traffic congestion,[487] and consequently failed to survive review under the heightened standard.[488] Because *Moore* left *Belle Terre* intact, local governments are left with nearly unfettered discretion to prohibit cohabitation of people unrelated by blood, marriage or adoption; but they may limit cohabitation of related people only when doing so is the least intrusive means to achieve a compelling government interest.

Because the college student plaintiffs in *Belle Terre* were white and Inez Moore's family was Black,[489] some may infer that the divergent outcomes in the cases were animated at least in part by the Court's recognition of the racial animus underlying many restrictions on the residents of single-family housing. Such an assumption, however, is wholly at odds with another 1977 opinion of the Court that held that a nearly entirely white suburb of Chicago's refusal to rezone to allow construction of a federally subsidized multifamily housing project was not racially discriminatory.[490] The plaintiff housing developer in *Village of*

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[484] For a rigorous examination of *Belle Terre* and *Moore*, see Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 FLA. L. REV. 1401 (2015), in which Oliveri asserts that *Moore* only superficially advanced associational rights because it failed to recognize that heightened scrutiny is appropriate when government restricts intimate association by limiting right to choose household companions; *see also* Maldonado, *supra* note 483; Bronin, *supra* note 480.

[485] Moore v. City of East Cleveland, 431 U.S. 494, 498–99 (1977).

[486] *Id.* at 499 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) and citing cases).

[487] *Id.* at 499–500

[488] *Id.* at 505–06.

[489] *See* Boraas v. Vill. of Belle Terre, 367 F. Supp. 136, 147–48 (E.D.N.Y. 1972); Frederick E. Dashiell, *The Right to Family Life:* Moore v. City of East Cleveland, 6 NAT'L BLACK L.J. 288, 289 (1979).

[490] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 258 (1977).

Arlington Heights had applied to rezone a fifteen-acre parcel from single-family to multiple-family so that it could build 190 units "for low and moderate income tenants."[491] By denying the rezoning, the Village effectively prevented the development of affordable housing anywhere in the Village, a strategy that contributed to its ability to keep its population nearly entirely white.[492] Reversing the district court, the Seventh Circuit held that the "ultimate effect" of the rezoning denial was racially discriminatory in violation of the Black, low-income plaintiffs' equal protection rights.[493] But the Supreme Court required evidence of discriminatory intent rather than discriminatory effect as the basis for an equal protection challenge to zoning based on racial discrimination.[494] The Court recognized that significantly fewer People of Color lived in the Village than the surrounding region, the vast majority of the Village was zoned for single-family dwellings, testimony in the record of the rezoning proceeding "might" have revealed racist opposition to the multifamily development, and the Village limited multifamily dwellings to areas that served "primarily . . . as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts."[495]

Notwithstanding this direct evidence of discriminatory impact and, in my opinion, clear circumstantial evidence of discriminatory intent, the Court held that the plaintiffs did not meet their burden of showing that the rezoning decision was based in whole or in part on racial discrimination.[496] The Court treated as racially neutral both single-family zoning and the expulsive tactic of using multifamily zones as buffers between whiter neighborhoods and manufacturing and commercial zones deemed incompatible with residential use and family life. Only by ignoring these legal mechanisms' discriminatory purpose and effect, could the Court find that the Village's consistent restriction of most of its residential land to single-family dwellings and its consistent application of its buffer policy provided evidence that the rezoning denial was *not*

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[491] *Id.* at 254.

[492] *Id.*

[493] Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 517 F.2d 409, 414 (7th Cir. 1975).

[494] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

[495] *Id.* at 268–70.

[496] *Id.* at 269–71; *see also id.* at 255–56 (recognizing that discriminatory intent need not be the sole motivation to subject the decision to scrutiny under the Equal Protection Clause).

discriminatory, reasoning that the rezoning denial was consistent with these other zoning practices.[497]

The Supreme Court has not ruled on a Fourteenth Amendment challenge to zoning since *Belle Terre*, *Moore* and *Village of Arlington Heights*. Its Nineteenth and Twentieth Century approach to substantive due process and equal protection claims, as well as the lower federal courts' application of even higher levels of deference to zoning decisions, allows nearly all US cities to continue to enforce racial boundaries, hoard wealth to whiter, more restrictively zoned neighborhoods, and concentrate undesirable land uses and poverty in lower income neighborhoods, with little to no constitutional recourse for those who reside there.

IV. CONFRONTING THE PERSISTENT LEGACY OF JIM CROW ZONING BY PROXY

In the following Part, I briefly engage with some of the robust literature documenting the extent of segregation in US cities, zoning law's role in segregating US cities by race and ethnicity, and segregation's role in driving poverty and racial subjugation. I then turn to potential reform. I provide a brief evaluation of strategies for amending American zoning law to decrease its contribution to racially oppressive housing patterns and markets. Ultimately, however, I assert that reform must begin in the law school classroom.

A. Facially Race Neutral Zoning Was—and Remains—One of the Most Powerful Racial Segregationist Legal Devices of the Jim Crow Era

In nearly all US cities, most of the residential land area is zoned for detached residences occupied by a single household unit,[498] which in many cities must be comprised of individuals related by blood, marriage, or adoption.[499] Comparative urbanism scholar Sonia Hirt provides evidence that this strict

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[497] *Id.* at 269–71.

[498] Alexander, *supra* note 112, at 1257 n.137 ("[98] percent of all cities with populations greater than ten thousand, and nearly ninety percent of suburban municipalities with populations larger than five thousand have adopted some form of zoning."); Amanda C. Micklow & Mildred E. Warner, *Not Your Mother's Suburb: Remaking Communities for a More Diverse Population*, 46 URB. L. 729, 730 (2014) (reporting that "70 [percent] of suburban housing is single-family").

[499] Bronin, *supra* note 480; Tim Iglesias, *Defining "Family" for Zoning: Contemporary Policy Challenges, Legal Limits and Options*, 37 ZONING & PLAN. L. REPS. 1 (2014).

separation of single-unit housing and multi-unit housing is, although an "international rarity," so "ubiquitous . . . in the United States"[500] that the defining feature of American zoning law is an "omnipresent district dedicated exclusively to single-family housing."[501] At the same time, other forms of housing tend to be sequestered to significantly smaller land areas and clustered with or near intense and disfavored land uses that local planning commissions, legislative bodies, and courts still characterize as incompatible with family life.[502]

Scholar-activist Jessica Trounstine's 2020 study provides empirical evidence of the contribution of facially neutral land use regulations to racial segregation in US cities.[503] In his 2000 study, Rolf Pendall also found that low density residential zoning has a historic and current correlation to racial exclusion.[504] Pendall and Douglas Massey's 2009 study similarly found that "[a]t any point in time from 1990 to 2000, inter-metropolitan variation in Black-White segregation . . . was strongly predicted by a metropolitan area's relative openness to housing construction, as embodied in maximum zoning rules—the greater the allowable density, the lower the level of racial segregation."[505]

Reflecting the anti-Black racism that animated the proliferation of American zoning law's residential use taxonomy and related regulations, local government law scholar Jerry Frug reported in 1996 that:

> African Americans are segregated today in a manner that no other minority in the United States is now or has ever been segregated . . . . Eighty percent of African Americans in major American cities would have to move to produce an evenly integrated metropolitan area. And this "hypersegregation," to use Massey and Denton's term, is not simply a central city phenomenon: black suburbs . . . are as segregated as "inner cities."[506]

Although the percentage of Black people living in highly segregated neighborhoods has decreased since the 1990s,

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[500] HIRT, *supra* note 13, at 7 (parenthetical alteration in original). Hirt also reports that the regulatory preference for the single-family home "is an international rarity, historically and today." *Id.*

[501] *Id.*

[502] Maldonado, *supra* note 483, at 2647 n.48 ("In many suburbs, African Americans and Latinos are clustered in a few blocks and the rest of the town is white.").

[503] Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 444 (2020); SANDER ET AL., *supra* note 14, at 2–4.

[504] Pendall, *supra* note 14, at 139–40; SANDER ET AL., *supra* note 14, at 2–4 (discussing measures of racial segregation and outcomes in US cities).

[505] Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 801 (2009).

[506] Frug, *supra* note 247, at 1065.

significantly larger proportions of Black people still live in highly segregated neighborhoods.[507]

These and other studies also provide compelling evidence that American zoning law continues to maintain the exclusivity and financial stability of single-family neighborhoods by shifting the enormous costs of undesirable land uses to those who reside in less exclusive, amenity poor neighborhoods.[508] Richard Sander, Yana Kucheva, and Jonathan Zasloff's interdisciplinary analysis of segregation data found that, "on almost any measure one can pick, outcomes for [Black people] are unambiguously worse—often dramatically worse—in . . . highly segregated areas."[509] Sander, Kucheva and Zasloff's study showed significantly larger "black/white gap[s]" in highly segregated urban areas as compared to moderately segregated urban areas in unemployment rates, median income, proximity to jobs, quality of available public services, and "the 'ultimate' outcome—death rates."[510]

At the same time that this dual neighborhood system places many of the costs of undesirable land uses on those who can least afford them, it also places downward pressure on the property values of land in multifamily districts and other less restrictively regulated neighborhoods while placing upward pressure on rental prices—a process that entrenches poverty and facilitates ghettoization, followed by gentrification and displacement.[511] The real income of renters decreases and many homeowners in these less restrictively zoned neighborhoods find themselves underwater on their mortgages.[512] Penalties for violating local building codes or failing to pay rent on time, which in some jurisdictions include criminal sanctions,[513]

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[507] *See* SANDER ET AL., *supra* note 14, at 3.

[508] TROUNSTINE, *supra* note 17, at 444; Julia Mizutani, Note, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENV'T L. REV. 363, 364 (2019) ("The distribution of landfills, incinerators, power plants, toxic waste, and air pollution is highly correlated with the geographic distribution of minorities, especially poor minorities.").

[509] SANDER ET AL., *supra* note 14, at 3.

[510] *Id.* at 2–4, 335–44 (presenting data and citing studies that support conclusion that higher levels of segregation is a key driver of these and other outcomes).

[511] Rothwell & Massey, *supra* note 505, at 801 (citing studies and concluding "restrictive density zoning produces higher housing prices in White areas and limits opportunities for people with modest incomes to leave segregated areas, a perspective in accordance with a great deal of research showing that zoning increases housing prices").

[512] *Id.*; Melvin E. Thomas et al., *Separate and Unequal: The Impact of Socioeconomic Status, Segregation, and the Great Recession on Racial Disparities in Housing Values*, 4 SOCIO. RACE & ETHNICITY 233 (2017).

[513] *See* Donald E. Campbell, *Forty (Plus) years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. L. REV. 793, 801 (2013)

exacerbate the economic squeeze, increasing housing insecurity and leaving residents with even fewer resources to pay for groceries or health care. As property values fall, both racial stereotype based and property tax based justifications for investing fewer public funds in these neighborhoods are reinforced. Local schools receive even less funding, sidewalks and streets receive even less maintenance, and playgrounds are not built or maintained.[514]

This cycle of burden shifting and wealth deprivation compliments the segregationist effect of American residential zoning law by further decreasing the ability of residents in multifamily and less exclusive single-family neighborhoods to amass the capital and credit necessary to move to higher opportunity and higher amenity neighborhoods.[515]

By shifting the enormous costs of undesirable land uses to those who reside in less exclusive neighborhoods, American zoning law also contributes to the financial stability and exclusivity of single-family neighborhoods.[516] This cost shifting increases economic wealth, educational attainment, job prospects, health benefits, and life expectancy for those who benefit from this system[517]—that is, those who can afford to reside in exclusive, amenity rich single-family residential neighborhoods. Many of these individuals also benefit from generational wealth accrued by parents and grandparents' ownership of homes in exclusive, amenity-rich single-family

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(discussing criminal enforcement of building code); Lynn Foster, *The Hands of the State: The Failure to Vacate Statute and Residential Tenants' Rights in Arkansas*, 36 U. ARK. L. REV. 1, 2–8 (2013) (discussing Arkansas's eviction statute that criminalizes failure to pay rent even when leasehold is uninhabitable).

514 ARAVIND BODDUPALLI & KIM RUEBEN, URBAN-BROOKINGS TAX POL'Y CTR, STATE AND LOCAL GOVERNMENT REVENUES AND RACIAL DISPARITIES (2021), https://www.urban.org/sites/default/files/publication/103784/state-and-local-government-revenues-and-racial-disparities.pdf [https://perma.cc/YAY3-VWD8]; *see also* Lionel Foster, *"The Black Butterfly": Racial Segregation and Investment Patterns in Baltimore*, URB. INST. (Feb. 5, 2019), https://apps.urban.org/features/baltimore-investment-flows/ [https://perma.cc/QU75-PNCF] (reporting that neighborhoods with fewer than 50 percent Black residents "receive nearly four times" more investment than neighborhoods with greater than 85 percent Black residents" and "[l]ow-poverty neighborhoods receive one and a half times the investment of high-poverty neighborhoods").

515 Thomas et al., *supra* note 512, at 240.

516 TROUNSTINE, *supra* note 17, at 444; Julia Mizutani, Note, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENV'T L. REV. 363, 364 (2019) (citing D.R. Wernette & L.A. Nieves, *Breathing Polluted Air*, 18 EPA J. 16, 16–17 (1992)) ("The distribution of landfills, incinerators, power plants, toxic waste, and air pollution is highly correlated with the geographic distribution of minorities, especially poor minorities.").

517 *See* Prottoy A. Akbar et al., *Racial Segregation in Housing Markets and the Erosion of Black Wealth* 4–6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25805, 2019); Raj Chetty et al., *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility* 44–45 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25147, 2018).

residential neighborhoods.[518] Family law scholar Solangel Maldonado compellingly describes the self-reinforcing, or as Daria Roithmayr puts it, "locked in,"[519] nature of this feature of American zoning law's residential use taxonomy, explaining:

> The bulk of desirable residential areas in many suburbs are zoned for single-family residences, thereby requiring that two-family residences be clustered into relatively few zones. . . . The clustering of two-family homes increases the likelihood of overcrowding, noise, lack of parking, criminal mischief, and other ills that have been cited as justifications for zoning regulations. Not only is the total area zoned for two-family homes small relative to the areas zoned for single-family homes, but in many towns . . . two-family zoning serves as a buffer between the pristine single-family residential districts and the noise and traffic of the commercial district . . . . The clustering and placement of two-family homes (adjacent to apartment buildings, commercial areas, and congestion) also decreases their value and potential for appreciation.[520]

This and other research provide compelling evidence that harms resulting from continued economic and racial segregation of neighborhoods are pervasive, multigenerational, and existential.[521] Melvin Thomas, Richard Moye, Loren Henderson, and Hayward Derrick Horton argue that their 2017 study and the dozens of research papers cited therein "highlight[] the fact that segregation continues to disadvantage African Americans . . . . [and] also provide[] additional empirical evidence that segregation continues to function as a structural factor that concentrates advantage in the housing market for whites (i.e., white privilege)."[522]

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[518] *See infra* note 521 and accompanying text.

[519] Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197, 197 (2004). Roithmayr explicates the locked-in nature of segregation but does not attribute segregation to zoning law. *Id.*

[520] Maldonado, *supra* note 483, at 2647–48 (footnotes omitted); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 258 (1977) (recognizing areas zoned for multifamily dwellings were "primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts").

[521] *See* Thomas et al., *supra* note 512, at 240 (discussing research and citing studies); Mahzarin R. Banaji et al., *Systemic Racism: Individuals and Interactions, Institutions and Society*, 6 COGNITIVE RSCH.: PRINCIPLES & IMPLICATIONS 1, 8 (2021) ("Because of racial residential segregation and the blocked mobility and spatial concentration of poverty it produces, neighborhoods have become the key nexus for the transmission of Black socioeconomic disadvantage over the life course and across the generations." (citation omitted)); *see generally* Robert B. Avery & Michael S. Rendall, *Lifetime Inheritances of Three Generations of Whites and Blacks*, 107 AM. J. SOCIO. 1300 (2002) (analyzing multi-generational effects of racial segregation); THOMAS LAVEIST ET AL., JOINT CTR. FOR POL. & ECON. STUD., SEGREGATED SPACE, RISKY PLACES: THE EFFECTS OF RACIAL SEGREGATION ON HEALTH INEQUALITIES, *Forward* (2002), https://www.nationalcollaborative.org/wp-content/uploads/2016/02/Segregated-Spaces.pdf [https://perma.cc/KW9S-P4BD] (examining "[t]he effects of place on health and health inequities").

[522] Thomas et al., *supra* note 512, at 240.

Recognizing that "scholars continue to grapple with the complex reasons why [white people] continue to locate themselves in predominately white areas," Thomas, Moye, Henderson and Horton find Elijah Anderson and Douglas Massey's "commonsense answer" compelling: "Segregation persists in the USA because [white people] benefit from it."[523] I reference the benefits many white people, including myself, enjoy from the burden shifting that American zoning law was designed to facilitate to tee up questions about structural remedies and reform, and not to suggest, as dominant post-1970s paradigms posited,[524] that the primary driver of racial segregation is simply the aggregate of individual white racism or preferences playing out in a neutral marketplace, sometimes characterized as "white flight." Rather, I urge that Anderson and Massey's point should be construed to mean that, to the extent white people continue to hold positions of power in government, neighborhood associations, and other institutional bodies that shape the structure of zoning law and how it is applied, the benefits white people receive from the current legal structure pose a significant obstacle to its reform. This is especially so where the facially neutral structure of the law and nearly a century of race-neutral—or, more accurately, racism-blind—commentary renders the racist structure invisible to those who benefit from it.

Moreover, although racial segregation is no longer an express justification for most zoning classifications, government officials, courts, and citizens continue to justify exclusively single-family detached residential zones with the coded narratives devised a century ago to inflame racist fears and render invisible the white supremacist objectives of American zoning law.[525] These narratives substituted residential building forms for people, attached race-based stereotypes to the various building forms, and condoned privileging white spaces and subjugating Black spaces.[526] They equated denser residential forms like apartment buildings to nuisances and "parasites" that, if introduced into single-family neighborhoods would spread, be a harbinger of crime, congestion, and disease,[527] deprive families of quiet, open

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[523] *Id.* (quoting ELIJAH ANDERSON & DOUGLAS MASSEY, PROBLEM OF THE CENTURY: RACIAL STRATIFICATION IN THE UNITED STATES 338 (2004)).

[524] SANDER ET AL., *supra* note 14, at 10–11 (discussing pre-2000 dominant paradigms).

[525] *See supra* notes 310–314 and accompanying text.

[526] *See supra* Part III.

[527] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 379–80, 394–95 (1926).; *see also supra* Section II.C. (discussing justifications for residential taxonomy and clustering multifamily residences with or adjacent to noxious land uses).

space, and fresh air, and ultimately destroy the residential character of the neighborhood.[528]

Local officials still use these narratives to reject applications to build multifamily and affordable housing in single-family districts. Single-family neighborhoods are protected as places "where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[529] These narratives are also implicit in local governmental decisions to allow undesirable land uses in denser residential districts—uses that local legislative bodies deem incompatible with single-family residential use.[530]

Ultimately, by segregating, racializing, and ghettoizing areas where People of Color live, and Black individuals and families in particular, American zoning law limits the ability of People of Color "to choose space and to move unimpeded through and across the local spaces of everyday life," actions that Elise Boddie aptly and powerfully characterizes as "basic components of freedom, social belonging, status, and dignity."[531] That these outcomes were intended to maintain white wealth and dominance, and have done so effectively for a century, underlies my assertion that facially race neutral comprehensive zoning was one of the most powerful and enduring racial segregationist legal devices of the Jim Crow era.

B. Equity Principles for Land Use Law Reform and an Urgent Call to Transform Land Use Law Pedagogy

Although robust assessment of current legal reforms and prescriptions for further reform are beyond the scope of this article—the primary goal of which is to contribute to a long-overdue transformation in how land use law scholarship and teaching *sees* race and racism. I offer the following land use equity principles here as a resource for land use and housing justice activists and a contribution to a growing anti-racist land use law research agenda:[532]

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[528] *See Euclid*, 272 U.S. at 394–95; *see also* Section III.C.

[529] Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

[530] *See* Lord & Norquist, *supra* note 302, at 557–58; Sarah J. Adams-Schoen & Edward J. Sullivan, *Middle Housing by Right: Lessons from an Early Adopter*, 37 J. LAND USE & ENV'T L. 189, 224–27 (2022) (examining public comments in residential zoning reform docket); *see also supra* notes 302–313 and accompanying text.

[531] Boddie, *supra* note 15, at 420.

[532] I developed these equity principles through my work on this project, research on local and statewide zoning reforms; consultation on Oregon's statewide zoning reforms and Eugene's code amendments; work with law students and student

(1) Reform of land use law alone, regardless of its robustness, will not be sufficient to address the inequities from a century of structural racism in land use law.

(2) Land use law reform must be grounded in an understanding of the historic and current relationship between land use regulations, racial and economic segregation, the spatial distribution and availability (or lack thereof) of affordable housing, and poverty.

(3) Equity-focused reform will fall short—and increase inequities—absent land use law and planning leadership and public participation that includes communities that have traditionally been excluded from and harmed by land use law processes. More effective, inclusive, and equitable reform processes will recognize the leadership and expertise of existing community coalitions, robust diversity in leadership, public engagement opportunities that are accessible to and respectful of People of Color, renters, single parents, religious minorities, people with disabilities, people living in poverty, and others who have traditionally been excluded—both intentionally and unintentionally—from land use planning and law reform processes.[533]

(4) Land use law reform requires a sustained effort to seek out and eliminate covert regulation of land *users* and the coded narratives that support the subjugation of lower-income communities and communities of color for the benefit of wealthier, whiter communities. This requires express

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fellows in my law school's Sustainable Land Use Program on land use equity and environmental justice; and presentations on this research to academics, students, planners, lawyers, state and local officials, and the public. *See, e.g.*, Adams-Schoen & Sullivan, *supra* note 530, at 189, 195–98 (discussing state and local reforms); Letter from Sustainable Land Use Project to Mayor Lucy Vinis & Eugene City Council (Apr. 11, 2022) (on file with author) (attaching SUSTAINABLE LAND USE PROJECT, MIDDLE HOUSING MISCONCEPTIONS, https://law.uoregon.edu/files/final_slup_white_paper_eugene_middle_housing.pdf [https://perma.cc/HFW9-EYC6].

[533] *See, e.g.,* NOT IN CULLY: ANTI-DISPLACEMENT STRATEGIES FOR THE CULLY NEIGHBORHOOD (June 2013) (presenting community-led strategies for preventing displacement of low-income Cully residents as investment comes into neighborhood); *see* Ellen Israel, *Struggling to Breathe: A Neighborhood's Fight for Healthier Air*, SCI. STORY, n.d., https://sciencestory.uoregon.edu/life-in-a-changing-landscape/air/struggling-to-breathe (reporting on successful and ongoing air quality improvement strategies of local environmental justice nonprofit Beyond Toxics and community organization Active Bethel Community); Adams-Schoen & Sullivan, *supra* note 530, at 227–29 (discussing more inclusive and representative public engagement processes implemented by Eugene during its implementation of Oregon's middle housing law).

recognition that land use decisions—historically and presently—that entrench or increase existing disparities do not protect all families, all residential areas, or the community as a whole. This also requires recognition that unchecked local discretion, subjective standards like neighborhood "character," and nontransparent discretionary procedures tend to entrench and increase racial and economic disparities.

(5) Dismantling the residential use taxonomy is a necessary step in the elimination of covert regulation of land *users*. A handful of states and local governments have begun to chip away at the single-family monopoly that characterizes most residentially zoned land in US cities.[534] Recognizing the intense pressure local governments face to retain exclusive single-family zoning, Oregon passed a statewide "middle housing" law in 2019 that required cities throughout the state to allow denser housing forms in single-family zoned areas and to amend many other local regulations that contribute to higher housing costs and longer development timelines.[535] The City of Minneapolis also eliminated single-family zoning through implementation of its Minneapolis 2040 Plan, adopted in 2019—although this reform has been stalled by a legal challenge.[536] By the end of 2021, single-family zoning was also essentially eliminated throughout most of California.[537]

(6) Elimination of single-family zoning is no panacea, and absent other reforms may increase inequities. Simply eliminating single-family zoning—that is, allowing other forms of housing in areas currently zoned for single-family—will do little to increase production of housing generally and

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[534] *See* Sarah J. Adams-Schoen & Edward J. Sullivan, *Reforming Restrictive Residential Zoning: Lessons from an Early Adopter*, 30 J. AFFORDABLE HOUS. & CMTY. DEV. L. 161, 166–67 (2021) (citing and discussing examples).

[535] Adams-Schoen & Sullivan, *supra* note 530, at 195–98. "Middle housing" refers to multi-unit or clustered housing similar in scale to single-family housing, including, for example, duplexes, triplexes, and townhouses. Oregon's new law defines middle housing as "duplexes[,] triplexes[,] quadplexes[,] cottage clusters[,] and townhouses." OR. REV. STAT. § 197.758(1)(b) (2023) (lettering omitted).

[536] *See id.* at 167.

[537] *See* California Dep't Hous. & Cmty. Dev., SB 9 Fact Sheet: On the Implementation of Senate Bill 9 (Chapter 162, Statutes of 2021) 1 (2022), https://www.hcd.ca.gov/docs/planning-and-community-development/sb9factsheet.pdf [https://perma.cc/22WZ-6WF4] (explaining that California S.B. 9 requires amendment to zoning codes that will "facilitate[ ] the creation of up to four housing units in the lot area typically used for one single-family home").

affordable housing specifically in amenity-rich neighborhoods. Even if other forms of housing were permitted as of right, many other restrictions in zoning codes limit development of smaller units, denser forms of housing, and affordable housing.[538] Additionally, even when residential zoning is comprehensively reformed to eliminate single-family zoning and the myriad land use regulations that limit the ability to develop other forms of housing, large swaths of residentially zoned land in US cities are burdened by restrictive covenants that limit the use of the lots to single-family homes.[539] Land availability and market dynamics also constrain the pace and scope of housing development such that reforms like those in Oregon and California will almost certainly not result in rapid transformation of existing single-family neighborhoods.[540] Moreover, as land use law scholar Steven Miller recently cautioned, elimination of single-family zoning, without other reforms, may disparately burden People of Color because redevelopment of single-family homes is more likely to occur in neighborhoods where more People of Color live than in exclusive, whiter neighborhoods where land values are higher relative to potential market growth.[541] Finally, although I assert that the residential use taxonomy is the clearest manifestation of American zoning law's racist structure, other aspects of American land use law also contribute to barrier maintenance, wealth hoarding to white people, burden shifting to People of Color, and reinforcement

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[538] *See* DOUGLAS S. MASSEY ET AL., CLIMBING MT. LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB 12–13, 19 (2013) (identifying density zoning regulations like minimum lot sizes as exerting strongest effect on housing cost and supply as compared to other regulations and as a powerful determinant of racial segregation); Adams-Schoen & Sullivan, *supra* note 530, at 205–07, 213–17 (analyzing Oregon's effort to eliminate land use regulations that impose unreasonable cost or delay on the production of middle housing, including, for example, regulations that require off-street parking, minimum lot sizes, minimum dwelling sizes, overly restrictive floor-area ratios and other buildable area restrictions, and density maximums); *see also* Sara C. Bronin, *Zoning by A Thousand Cuts*, 50 PEPP. L. REV. 719, 759–84 (2023) (evaluating empirical study of prevalence and effect of such land use regulations).

[539] *See* Steven R. Miller, *Prospects for a Unified Approach to Housing Affordability, Housing Equity, and Climate Change*, 46 VT. L. REV. 464, 482 (2022) (reporting that recent study "found that in some regions, such as the Mountain West, upwards of 86 [percent] of new home development was subject to [single-family use] restrictive covenants" and suggesting any state serious about eliminating single-family restrictions would declare these restrictive covenants against public policy and void).

[540] *See id.* at 481–82 (citing and discussing studies).

[541] *Id.* at 482. *But see* Adams-Schoen & Sullivan, *supra* note 530, at 241–44 (discussing provisions of Oregon reforms to aimed at equitably distributing middle housing throughout existing and new neighborhoods).

of racial caste.[542] Consequently, the racialized geographies of American cities extend beyond residential neighborhoods to business districts and other spaces.[543]

(7) Land use law reform must include transparent and iterative assessment of the reform itself and of local land use decisions implementing the reform, in addition to mechanisms for enforcement. Administrative and legislative land use decisions should engage with data on existing disparities (asking, for example, does the decision increase amenities in an already amenity-rich area or increase surface temperatures in a neighborhood with fewer street trees, open spaces or other amenities?). Environmental and climate justice reforms must engage with and include assessments of potential impacts on housing affordability and segregation.

(8) Land use planning and law scholarship and pedagogy must not continue to approach American zoning law as if it were race neutral or as if zoning law presumptively betters living conditions and land values for communities as a whole. Articles, texts and treatises often describe the advent of zoning in the United States, its early proponents, and the seminal *Euclid v. Ambler Realty* case, as well as the various players in the case, with reverence.[544] California's role in the development of American zoning law is almost universally omitted from scholarship and teaching. Discussions of post-*Buchanan* facially neutral zoning often suggest explicitly or implicitly that racist outcomes are aberrant, driven by personal preferences (de facto and not de jure),[545] or are the result of individual bad actors.[546] Similarly, the adoption of

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[542] *See generally supra* CASHIN, *supra* note 11.

[543] *See* Angela E. Addae, *The Perils of Urban Redevelopment for Black Business Districts*, 57 TULSA L. REV. 171, 177 (2021) ("As with residential properties, redlining and racially restrictive covenants confined Black organizations to areas designated for Black business occupancy.").

[544] *See* WOLF, *supra* note 230, at 176.

[545] *See generally* ROTHSTEIN, *supra* note 12 (critiquing failure to recognize racial segregation as *de jure*); *see, also, e.g.,* Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 528–29 (2015) (relying on de jure myth and failing to appreciate facially neutral, but nevertheless race-based zoning law as a key driver of racial segregation).

[546] An example of this is the failure to recognize Robert Whitten as one of the founders of American zoning law, and not simply an aberrant bad actor. *But see* Randle, *supra* note 226, at 42 (quoting contemporaneous source referring to Whitten as "perhaps the most influential zoning advisor in the United States"); WOLF, *supra* note 230, at 28–29, 32; *see also* ROTHSTEIN, *supra* note 12, at 51–52 (quoting prominent proponent of

state enabling acts mirroring the SZEA and the rapid proliferation of zoning codes in the 1920s and 1930s are often treated as spontaneous occurrences or as driven primarily by innovations in transportation or market dynamics devoid of any racialized context.[547] Zoning scholarship and textbooks tend not to mention the massive and coercive efforts of Herbert Hoover or federal agencies in promoting zoning to state and local governments as part of its campaign to promote white homeownership and maintain racial segregation. These omissions are powerful and, until they are corrected, will continue to undermine legal reform and other efforts to address the pervasive harms from America's dual housing system.

These omissions also make the law school classroom an even more isolating place for those who grew up in the multifamily housing Justice Sutherland labeled a "mere parasite," or in the lower-income neighborhoods zoned adjacent to industrial sites where zoning and other local government decisions place downward pressure on property values. To be true to aspirations to increase the diversity of the legal field, law teaching must recognize that many law students (and their future clients) know from experience that discussions in local government meetings about protecting neighborhoods as places for families clearly do not include their neighborhoods.

CONCLUSION

American zoning law is characterized by a ubiquitous dualism that creates separate and unequal neighborhoods delimited by race. The early twentieth century segregationists who conceived of single-family zoning as a mechanism to protect so-called high-quality neighborhoods from invasion by People of Color while allowing intense and noxious land uses where People of Color lived succeeded in constructing a legal mechanism that satisfied the Progressive Era Supreme Court's low bar for police power regulations with racial overtones. With significant support from the federal government, they ultimately succeeded in racially segregating American cities and enriching white property owners at the expense of People of Color and very low income white households.

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planning and zoning Alfred Bettman and his colleagues on the National Land Use Planning Committee as explaining that "[p]lanning (i.e., zoning) was necessary . . . to 'maintain the nation and the race'").

[547] *But see* WOLF, *supra* note 230, at 138.

American zoning's nearly ubiquitous and internationally aberrant zoning taxonomy and related regulations continue to achieve their original segregationist purposes. The same zoning regulations that helped create and maintain segregated residential neighborhoods in American cities in the 1910s through the 1960s endure today. City governments throughout the United States continue to disproportionately invest more in the development and maintenance of sidewalks, playgrounds, parks, open spaces, street trees, and other amenities in restrictively zoned, disproportionately white neighborhoods.[548] Areas zoned for multifamily residences continue to exist adjacent to zones that allow high-intensity land uses that local legislative bodies deem incompatible with the needs of families, including liquor stores and bars, and so-called adult uses like strip clubs, industrial polluters, landfills, and wrecking yards.[549]

Figure 4: Modeling of the Potential Emissions from the Owens-Brockway Facility in Portland's Cully Neighborhood

Illustrative of this, the Cully neighborhood where I grew up in the 1980s, shown on the aerial map in Figure 3, provided a "buffer" between rail yards, industrial plants, and a twenty-four acre landfill to the north, and exclusively single-family neighborhoods to the south. Oregon and the City of Portland—even with their robust embrace of zoning reform and elimination of single-family districts[550]—continued until June 2022 to allow an industrial polluter to release high quantities of particulate

[548] Andrew H. Whittemore, *The Experience of Racial and Ethnic Minorities with Zoning in the United States*, 32 J. PLAN. LITERATURE 16, 20–24 (2017).

[549] Shertzer et al., *supra* note 24, at 217, 218–20; Andrew H. Whittemore, *Racial and Class Bias in Zoning: Rezonings Involving Heavy Commercial and Industrial Land Use in Durham (NC), 1945–2014*, 83 J. AM. PLAN. ASS'N 235, 235–38 (2017).

[550] Adams-Schoen & Sullivan, *supra* note 529, at 167–69.

matter, nitrogen oxides, sulfur dioxide, arsenic, and lead into the air, water, and soil of the Cully neighborhood, notwithstanding the many families packed into the neighborhood's densely zoned residential districts.[551]

Across the political spectrum, many who reside in single-family residential districts resist efforts to allow other housing forms such as duplexes, triplexes or apartment buildings in their districts because they believe allowing multifamily residences in their neighborhood will increase traffic, congestion, noise, air pollution, and crime.[552] Some object that eliminating the single-family monopoly by, for example, allowing duplexes and triplexes in all residential zones, would place too great a burden on public schools, streets, and water and sewer infrastructure,[553] or would exacerbate urban environmental problems by increasing the amount of impermeable land and decreasing the number of trees in urban and suburban residential areas.[554] These objections often perpetuate an unspoken and unacknowledged privileging of disproportionately white, restrictively zoned neighborhoods over less restrictively zoned neighborhoods that are home to more People of Color where

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[551] EARTH JUST., *supra* note 7; Press Release, Earth Just., Portland Community Lands Long-Awaited Public Health Victory in Owens-Brockway Case (June 30, 2022), https://earthjustice.org/news/press/2022/portland-community-lands-long-awaited-public-health-victory-in-owens-brockway-case [https://perma.cc/8JE4-TVJQ].

[552] *See, e.g.*, Notice of Appeal at 3, *In re* Appeal by Seattle Coalition for Affordability, Livability, and Equity of City of Seattle Citywide Implementation of Mandatory Housing Affordability (MHA) Final Environmental Impact Statement (City Hearings Officer Nov. 27, 2017) (arguing that amending zoning code to increase housing density in neighborhoods throughout Seattle will "reduce access to light and air; increase traffic; exacerbate parking problems; reduce tree canopy; and otherwise reduce the livability of Seattle's neighborhoods[,] [making] . . . Seattle less attractive for development."); Erica C. Barnett, *Increased Density Riles Homeowners*, SEATTLE MET (Jan. 17, 2014, 5:44 PM), https://www.seattlemet.com/news-and-city-life/2014/01/petition-highlights-density-fears-january-2014 [https://perma.cc/B89T-6T7D]; *Remarks by President Trump on Rolling Back Regulations to Help All Americans*, WHITE HOUSE (July 16, 2020, 5:01 PM), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-rolling-back-regulations-help-americans/ [https://perma.cc/6LWX-L6GE] ("The Democrats in D.C. . . . want to . . . abolish our beautiful and successful suburbs . . . . They are absolutely determined to eliminate single-family zoning, destroy the value of houses and communities already built, just as they have in Minneapolis and other locations . . . . Your home will go down in value and crime rates will rapidly rise.").

[553] Gerritt Knaap & Nicholas Finio, *Though Rumors of Its Demise Might Be Exaggerated* . . ., 86 J. AM. PLAN. ASS'N 125, 126 (2020).

[554] *See* Kevin Le, *Tree Canopy Analysis Shows Tacoma Rezone Critics Exaggerate Concerns*, URBANIST (Jan. 12, 2022), https://www.theurbanist.org/2022/01/12/tree-canopy-analysis-shows-tacoma-rezone-critics-exaggerate-concerns/ (discussing objections to reform of restrictive single-family zoning); *see, e.g.*, CITY OF EUGENE, OR, MIDDLE HOUS. CODE AMENDS., TESTIMONY BATCH 9 (2021), https://www.eugene-or.gov/DocumentCenter/View/63924/Batch-9?bidId= [https://perma.cc/E435-ZDLT], (containing dozens of objections to reform of restrictive residential zoning based on concern for urban tree canopy),

schools and infrastructure are already taxed, surfaces are paved, air is polluted, and the tree canopy, if it exists at all, provides little shade on a 116°F day.

The failure to acknowledge the segregationist design and effect of restrictive residential zoning allows these and other objections to eclipse the urgent need for reform—a need that grows more urgent as cities face increasingly intense and frequent heat waves, droughts, wildfires, and other manifestations of the climate crisis. To the extent American zoning law can be reformed to value the lives of People of Color, courts, commentators, and activists must grapple with the law's white segregationist and ghettoizing structure.

Although I am not sure whether such reform is possible, I remain cautiously optimistic. Accordingly, I end with the following wise and hopeful words:

> Whiteness itself can be redefined—so that it gets equated with taking responsibility and growing up.
>
> None of this will be easy. It will take great effort from many white Americans, individually and collectively, over a period of years. Yet the only alternative is the perpetuation of white-body supremacy and a great deal of dirty pain for all.
>
> —Resmaa Menakem[555]

> Do not get lost in a sea of despair. Be hopeful, be optimistic. Our struggle is not the struggle of a day, a week, a month, or a year, it is the struggle of a lifetime.
>
> —John Lewis[556]

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[555] RESMAA MENAKEM, MY GRANDMOTHER'S HANDS: RACIALIZED TRAUMA AND THE PATHWAY TO MENDING OUR HEARTS AND BODIES 274 (2017).

[556] Congressman Colin Allred, *Allred Statement on the Passing of Congressman John Lewis*, U.S. CONGRESSMAN ALLRED (July 18, 2022), https://allred.house.gov/media/press-releases/allred-statement-passing-congressman-john-lewis [https://perma.cc/YQ89-W774].