EXCLUSIONARY ECONOMIC ZONING: HOW THE UNITED STATES GOVERNMENT CIRCUMVENTED PROHIBITIONS ON RACIAL ZONING THROUGH THE STANDARD STATE ZONING ENABLING ACT

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INTRODUCTION

On May 25, 2020, George Floyd—a forty-six-year-old black man—was killed at the hands of the police in Minneapolis, Minnesota.[1] While Floyd was lying face down exclaiming that he could not breathe, an officer knelt on Floyd's neck for eight minutes and forty-six seconds. During the final minutes, Floyd was motionless. Floyd's killing caused the United States to erupt in protest and triggered a renewed discussion about systemic racism in the country. Systemic racism refers to the way in which racism is embedded in our everyday life, manifesting itself within our societal institutions. Kwame Ture and Charles V. Hamilton[2] defined the phrase as follows:

> When a black family moves into a home in a white neighborhood and is stoned, burned or routed out, they are victims of an overt act of individual racism which many people will condemn . . . . But it is institutional racism that keeps black people locked in dilapidated slum tenements, subject to the daily prey of exploitative slumlords, merchants, loan sharks and discriminatory real estate agents. The society either pretends it does not know of this latter situation, or is in fact incapable of doing anything meaningful about it.[3]

The central contention of the theory of systemic racism is that the racist institutions of our past have prominent and long-lasting effects that are reflected in the equitable outcomes of racial groups today.

1. *See* Evan Hill, et al., *How George Floyd Was Killed in Police* Custody, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html (last visited Dec. 4, 2021).

2. Kwame Ture and Charles V. Hamilton were both influential activists and leaders that contributed to the Civil Rights Movement in the United States. Ture was one of the original Freedom Riders and later became a strong proponent of the global Pan-Africanism movement. Hamilton is the W. S. Sayre Professor Emeritus of Government and Political Science at Columbia University.

3. KWAME TURE & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 4 (1967). The concept of institutional or systemic racism is a politically controversial topic, with some commentators even expressing the view that it does not exist at all.

An area of life in which disparate racial outcomes are highly evident is housing. The type of community in which a family resides has a profound influence on the health, safety, and education of the following generation. Accordingly, racist housing policies can be used to suppress minority communities in a cycle of violence and poverty for generations to come. Many—perhaps even most—people in the United States believe that the residential segregation seen in every major metropolitan area of the United States is a phenomenon that occurred de facto, or in other words, not officially sanctioned by law. However, this cannot be further from the truth. The fact of the matter is that residential segregation has occurred de jure, backed by countless government policy mandates aimed at separating people of color from white people. Examples of racist housing policy were abundant throughout the Jim Crow era of United States history. For instance, "redlining," a term coined from the color-coded credit risk maps used by lenders, refers to the practice of denying credit to certain geographic areas because of race.[4] Although the practice was made unlawful by the Fair Housing Act of 1968, this lack of traditional sources of financing for black families contributed to the segregation of communities which persists to this day.[5]

Other segregationist efforts included affirmative government actions such as the implementation of zoning regulations. Many zoning ordinances promulgated during the Jim Crow era either were explicitly or implicitly intended to prevent integration and remove minority families from white communities. In 1908, the Los Angeles City Council passed the first municipal zoning ordinance in the United States, establishing residential and industrial districts.[6] Shortly after, in 1910, Baltimore was the first city to adopt an explicit racial zoning ordinance, prohibiting blacks from buying houses on majority white-owned blocks, and vice versa.[7] In the following years, many Southern and border cities followed Baltimore's lead and administered zoning ordinances that were based explicitly upon race.[8]

In 1917, the United States Supreme Court overturned a racial zoning ordinance in Louisville, Kentucky. In *Buchanan v. Warley*, the Court held that zoning ordinances based on race were an unconstitutional violation of the Fourteenth Amendment right to contract, as they interfered with the right of a property owner to sell to whomever he pleases.[9] This decision led to various local government entities

4. Benjamin Howell, Note, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CAL. L. REV. 101, 107 (2006).

5. *See* Tracy Jan, *Redlining was banned 50 years ago. It's still hurting minorities today.* WASH. POST. (Mar. 28, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/ (last visited Dec. 4, 2021).

6. Christopher Silver, *The Racial Origins of Zoning in American Cities*, *IN URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS* 23 (June Manning Thomas & Marsha Ritzdorf, eds., 1997).

7. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 44 (2017).

8. *Id.* at 45.

9. *See* Buchanan v. Warley, 245 U.S. 60, 82 (1917) ("We think that this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand.").

trying to find various legal "loopholes" in order to essentially attain the effects of racial zoning without explicitly referring to race.[10] Enamored with the idea that economic zoning measures that did not explicitly refer to race would remain sustainable under *Buchanan*, the federal government became involved as well. In 1921, then Secretary of Commerce Herbert Hoover organized an Advisory Committee on Zoning with the purpose of developing a manual explaining why every municipality should adopt their own zoning ordinance.[11] That manual, which eventually came to be known as a Standard State Zoning Enabling Act ("SZEA"), was mass distributed to local municipalities nationwide.

This Note will argue that the SZEA was a concerted effort by federal government officials to effectively achieve racial segregation by circumventing *Buchanan*'s prohibition on explicit racial zoning ordinances through economic zoning measures. Further, the Note will argue that the government's goal was effectively realized with the seminal decision of *Village of Euclid v. Ambler Realty Co.*, a decision marred with fundamentally racist underpinnings. Lastly, this Note will argue that America needs a new civil rights campaign to combat the lingering effects of government-sponsored segregation. Part I will provide an overview of the early history of racial zoning ordinances in the United States leading to *Buchanan*. Part II will be centered around the aftermath of *Buchanan* and how segregationist government officials used the SZEA as a strategy to promote economic zoning measures to local municipalities. Part III will examine the long-term impacts of such economic zoning regulations and explore remedies to desegregate affected neighborhoods that remain racially segregated to the present day.

I. THE LEAD UP TO *BUCHANAN*

In 1886, the Supreme Court handed down a seemingly groundbreaking opinion in *Yick Wo v. Hopkins*.[12] The facts of the case were simple. The City of San Francisco enacted an ordinance that outlawed owners of laundries located in buildings not made of brick or stone from operating without first obtaining a permit.[13] The ordinance, however, was selectively enforced against people of Chinese descent.[14] All permit applications from persons of Chinese origin were denied, while every application from persons of Caucasian origin, with a single exception, was granted.[15] The plaintiff, Yick Wo, was a laundry operator of Chinese descent whose application for a permit was rejected.[16] He was subsequently imprisoned and filed a

10. *See* ROTHSTEIN, *supra* note 7, at 46–48.

11. *Id.* at 51.

12. 118 U.S. 356 (1886).

13. *Yick Wo*, 118 U.S. at 368.

14. *Id.* at 374.

15. *Id.* ("No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on . . . their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted.").

16. *Id.*

petition for a writ of error which eventually reached the United States Supreme Court.[17] The Supreme Court held that a law, otherwise neutral on its face, that was administered in a discriminatory fashion was a denial of the equal protection of the laws and thus a violation of the Fourteenth Amendment to the United States Constitution.[18]

Although *Yick Wo* was a monumental decision, it unfortunately served only as a modest precursor to post-Jim Crow Supreme Court jurisprudence. The case had little application in the decades immediately following the decision, with prominent commentators even expressing the opinion that there are "no reported federal or state cases since 1886 that ha[ve] dismissed a criminal prosecution on the ground that the prosecutor acted for racial reasons."[19] In fact, the effort by government officials to control where people lived and worked on the basis of race was only beginning; it was only ten years later when the Supreme Court held in *Plessy v. Ferguson*[20] that racially segregated facilities, as long as the qualities were equal, did not violate the Fourteenth Amendment to the United States Constitution.

The Supreme Court's "separate but equal" holding in *Plessy* was met by a revitalization of Jim Crow laws across the country. Simultaneously, the turn of the twentieth century was met with the rise of a segregationist Progressive agenda. Woodrow Wilson became President of Princeton University, where he rejected all black applicants, and went on to become the President of the United States, where he re-segregated the federal government.[21] In particular, "Progressives introduced the ideas of scientific management to government . . . and applied that to land-use planning, an idea they borrowed from Europe."[22] Additionally, "Progressives viewed segregation as a vital aspect of social reform,"[23] as it enabled them to confine society's underlying problems to within the borders of the "source of contagion," which they believed to be the black slums.[24]

The City of Baltimore was no different. In 1910, Baltimore enacted the first explicitly racial zoning ordinance of the United States. The ordinance required the following:

17. *Id.* at 365.

18. *Id.* at 374.

19. *See* Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359, 1361 (2008) (quoting DAVID COLE, NO EQUAL JUSTICE 159 (1999)); Chin, *supra*, at 361, n.12 (compiling statements from renowned scholars such as Owen M. Fiss, Randall Kennedy, and James Vorenberg who all claim that they could not find any cases after *Yick Wo* in which a criminal prosecution was discriminated on the basis that the prosecutor acted with racial biases).

20. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896).

21. Garrett Power, *Eugenics, Jim Crow, and Baltimore's Best*, 49 MD. BAR J. 4, 7 (2016).

22. Michael H. Wilson, *The Racist History of Zoning Laws*, FOUND. ECON. EDUC. (May 21, 2019), https://fee.org/articles/the-racist-history-of-zoning-laws/ (last visited Oct. 11, 2020).

23. Power, *supra* note 21, at 10.

24. *See* Garrett Power, *Apartheid Baltimore Style: the Residential Segregation Ordinances of 1910–1913*, 42 MD. L. REV. 289, 301 (1983) (elaborating on why the Progressive Movement viewed racial segregation as an integral part of their mission and explaining that the theory of Social Darwinism motivated white reformers to establish a premise of black inferiority and subsequently blame African Americans for the social problems that plagued their communities, aptly referring to this practice as "victim blaming").

> 1. That no negro may take up his residence in a block within the city limits of Baltimore wherein more than half the residents are white.
>
> 2. That no white person may take up his residence in such a block wherein more than half the residents are negroes.
>
> 3. That whenever building is commenced in a new city block the builder or contractor must specify in his application for a permit for which race the proposed house or houses are intended.[25]

The ordinance was the brainchild of Milton Dashiel, a local Baltimore attorney. According to Dashiel, the ordinance was needed to prevent "negro[s] . . . who have risen somewhat above their fellows . . . [from] get[ting] as close to the company of white people as circumstances will permit them."[26] This ordinance was introduced to the City Council by Councilman Samuel West, and after a lengthy consideration process, was signed into law by Mayor J. Barry Mahool.[27] Mayor Mahool, a nationally recognized star of the Progressive movement, threw his unequivocal support behind the city's efforts to achieve racial segregation.[28] Like many of his colleagues, Mayor Mahool took the position that "Blacks should be quarantined in isolated slums in order to reduce the incidents of civil disturbance, to prevent the spread of communicable disease . . . and to protect property values among the White majority."[29]

Although the de jure segregation imposed by the ordinance appeared to satisfy the "separate but equal" constitutional requirement set out in *Plessy*,[30] enforcement proved to be much more practically challenging than what was anticipated. In addition to the inevitable black opposition, property owners in mixed districts with a black minority expressed concerns that they would no longer be able to rent out their properties to black tenants.[31] There were instances where white homeowners would move out while their house was being repaired and could not move back in because the block was now majority black.[32] Further, it was unclear whether a black person would be allowed to move into a block that was evenly divided between white and black.[33] Legal challenges to the ordinance were swiftly brought and the ordinance was subsequently declared ineffective and void by the Supreme Bench of Baltimore for being "inaccurately drawn."[34]

25. *Baltimore Tries Drastic Plan of Race Segregation; Strange Situation Which Led the Oriole City to Adopt the Most Pronounced "Jim Crow" Measure on Record*, N.Y. TIMES (Dec. 25, 1910), https://www.nytimes.com/1910/12/25/archives/baltimore-tries-drastic-plan-of-race-segregation-strange-situation.html (last visited Nov. 29, 2020).

26. *See* ROTHSTEIN, *supra* note 7, at 44.

27. Power, *supra* note 24, at 299–300.

28. SILVER, *supra* note 6, at 3.

29. *Id.* at 3–4.

30. Power, *supra* note 23.

31. Power, *supra* note 23, at 302.

32. ROTHSTEIN, *supra* note 7, at 44.

33. *Id.*

34. Power, *supra* note 23, at 303. Surprisingly (or perhaps not surprisingly at all), "inaccurately drawn" did not refer to the practical difficulties the ordinance created. Although there is no published opinion, the

Rather than being discouraged by the Supreme Bench's holding, supporters of the segregation ordinance were "undaunted," invigorated even, in their quest to achieve racial segregation.[35] Councilman West turned to William Marbury, one of the nation's leading lawyers and a devoted eugenicist who spent "his professional life in active opposition to the integration of African-Americans into full citizenship and participation in Baltimore life."[36] In order to address the complaints made by property owners, Marbury revised the ordinance to exclude "mixed" blocks from the segregation requirement.[37] The amended version was then signed into law in 1911, leaving the City's integrated districts unaffected.[38]

Other municipalities took note of Baltimore's pioneering ordinance and followed suit, modifying Baltimore's template and enacting their own racial zoning laws. Notable cities include Richmond and Norfolk, Virginia; Atlanta, Georgia; Charleston, South Carolina; Asheville and Winston-Salem, North Carolina; Dallas, Texas; Birmingham, Alabama; Dade County, Florida; Oklahoma City, Oklahoma; New Orleans, Louisiana; St. Louis, Missouri; and Louisville, Kentucky.[39] Racial zoning, however, was not limited to Southern and border cities. Met with waves of African Americans relocating northward as part of the first Great Migration, select Northern cities, such as Chicago, also experimented with the practice.[40] As these ordinances continued to proliferate throughout the country, they were met with numerous legal challenges. Many of these ordinances, however, received approval from the highest courts of their respective state. Richmond's racial zoning ordinance was sustained by the Virginia Supreme Court in 1915, and Atlanta's ordinance was similarly sustained by the Georgia Supreme Court in 1917.[41] However, this trend quickly faded later in the year when the United States Supreme Court outlawed a Louisville city ordinance in the seminal case of *Buchanan v. Warley*.

II. BUCHANAN V. WARLEY

A. Buchanan v. Warley

Buchanan involved a Louisville ordinance titled:

defect was presumably in the ordinance's title, which was overly nondescriptive in violation of the Baltimore City Charter. *Id.*

35. *Id.* at 304.

36. Power, *supra* note 23, at 7–8.

37. Power, *supra* note 23, at 304.

38. *Id.*

39. *See* ROTHSTEIN, *supra* note 7, at 45; *See also* SILVER, *supra* note 6, at 4. Both sources list various cities which enacted racial zoning ordinances following Baltimore. Some of these cities acted with haste and enacted explicitly racial zoning ordinances. Others, in the wake of the Supreme Court's holding in *Buchanan v. Warley*, discussed at *infra* note 42, implemented economic zoning measures designed to achieve the same result.

40. *See* SILVER, *supra* note 6, at 2.

41. *Id.* at 4, 6. *See also* Hopkins v. City of Richmond, 86 S.E. 139 (Va. 1915) (affirming the legality of Richmond's racial-zoning ordinance); *see also* Harden v. City of Atlanta, 93 S.E. 401 (Ga. 1917) (affirming the legality of Atlanta's racial-zoning ordinance).

> An ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively.[42]

The first and second sections of the ordinance explicitly "prevent[ed] the occupancy of a lot in the City of Louisville by a person of color in a block where the greater number of residences are occupied by white persons; where such a majority exists colored persons [were] excluded."[43] Plaintiff was a white real estate agent, Buchanan, who contracted to sell property on a majority white block to a black NAACP lawyer, Warley.[44] The purchase offer was stated as follows:

> It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property *unless I have the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence*.[45]

When Warley refused to complete the transaction on the grounds that the ordinance forbade him from doing so, Buchanan petitioned the trial court for specific performance.[46] The lower courts denied Buchanan's request based solely on the effect of the ordinance in question.[47] The United States Supreme Court noted that "[b]ut for the ordinance the state courts would have enforced the contract."[48]

Considering that "[t]his interdiction is based wholly upon color; simply that and nothing more," the Supreme Court struck down the ordinance as an unconstitutional violation of the Fourteenth Amendment to the United States Constitution.[49] The Court first observed that the ordinance was sought to be "justified under the authority of the State to exercise its police power" in the promotion of public health, safety, and welfare by preventing race conflicts.[50] Although the Court acknowledged that the states' police power has been interpreted to be very broad, it held that an exercise of that police power cannot "run[] counter to the limitations of the Federal Constitution."[51] The Court went on to account for the fact that "the Fourteenth Amendment was designed to assure to the colored race the enjoyment of all the civil

42. Buchanan v. Warley, 245 U.S. 60, 70 (1917).
43. *Id.* at 73.
44. *Id.* at 72–73.
45. *Id.* at 69–70. (emphasis added)
46. *Id.* at 70.
47. *Id.* at 73.
48. *Id.*
49. *Id.* at 73, 82.
50. *Id.* at 73–74.
51. *Id.* at 74.

rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government . . . whenever [enjoyment is] denied by the states."[52] Therefore, the Court held that the ordinance in question deprived people of color of the fundamental rights in property (to buy and sell private property from/to whomever they please) that were enjoyed by white people.[53]

The Court distinguished this case from *Plessy* on the grounds that the zoning ordinance in question was separate, *but not* equal, as per the standard required in order to comply with the Fourteenth Amendment.[54] The Court first considered that in *Plessy*, there was no attempt to deprive the plaintiff of color of his right to ride the method of transportation at issue.[55] In fact "[i]n each instance, the complaining person was afforded the opportunity . . . [or] the thing of whatever nature to which in the particular case he was entitled," and the separate "classification of accommodations was permitted upon the basis of equality for both races."[56] This was not the case in regard to the Louisville city ordinance, the Court contended, as the law explicitly deprived persons of color of their fundamental rights to property.[57]

Distinguished commentator Richard Rothstein has criticized the Court's reasoning behind the *Buchanan* decision, observing that the "majority was enamored of the idea that the central purpose of the Fourteenth Amendment was not to protect the rights of freed slaves but a business rule: 'freedom of contract.'"[58] Professor Garrett Power makes the case that *Buchanan* was actually a controversy that was manufactured by the NAACP.[59] He notes that in the 1905 case of *Lochner v. New York*, the Supreme Court had held that a New York statute which limited the hours bakers were permitted to work to ten a day violated the employer's Fourteenth Amendment right to contract.[60] The litigation strategy behind *Buchanan*, he argues, was to convince the Court to once again embrace this "economic laissez-faire" credo and "protect Buchanan's constitutional right to engage in the real estate business without meddlesome interference from the City of Louisville (and thereby incidentally . . . protect blacks from residential housing segregation)."[61] Regardless of the Court's reasoning supporting the opinion, *Buchanan* remains a pathbreaking decision that held unlawful zoning ordinances that explicitly segregate people based on race.

52. *Id.* at 77.

53. *Id.* at 82.

54. *Id.* at 81.

55. *Id.* at 79. Plessy v. Ferguson dealt with a Louisiana law that mandated separate railway cars for white and African American persons. The Court in that case goes to great lengths to avoid application of the Fourteenth Amendment's Equal Protection and Due Process Clauses. The Court reasons that the Amendment could not have possibly "been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either," and that "[l]aws . . . requiring . . . their separation . . . in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other." Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

56. Buchanan v. Warley, 245 U.S. 60, 79–80 (1917).

57. *Id.* at 82.

58. *See* ROTHSTEIN, *supra* note 7, at 45.

59. *See* Power, *supra* note 23, at 312.

60. *Id.*

61. *Id.*

B. Circumventing the Buchanan Holding: the SZEA and Euclid

In the aftermath of *Buchanan*, state and local governments hurriedly prepared subtler measures attempting to achieve racial segregation without violating the law of the 1917 Supreme Court decision.[62] Unlike many of the pre-*Buchanan* ordinances, these new efforts engaged professional planners and created comprehensive zoning schemes which would indirectly create a legal form of residential segregation.[63] Although the *Buchanan* decision undermined the use of zoning ordinances to explicitly segregate residential spaces according to race, it did nothing to prohibit "the use of the planning process in the service of apartheid."[64] Therefore, segregationists attempted to "fashion a legally defensible racial zoning system in tandem with comprehensive city planning."[65]

This post-*Buchanan* attack on integrated housing generally took the form of a class-based economic zoning system. Frequently, such ordinances were designed to "maintain the character of a neighborhood"[66]—a phrase that was clearly motivated by a desire to maintain the neighborhood's racial demographics. Land use regulations were used to establish a minimum price for housing that would effectively exclude low and middle-class households from certain neighborhoods.[67] One of the first municipalities to "link racial exclusion to neighborhood preservation" was Charleston, South Carolina.[68] At the request of the Society for the Preservation of Old Dwellings, the City of Charleston hired a planner named Morris Knowles to prepare a zoning ordinance "sensitive to the unique heritage of Charleston."[69] In the name of protecting the designated historic district, Knowles drafted a plan that included segregated residential districts for black and white people.[70] Although the explicit racial labels were omitted from the final version of the plan, local testimony demonstrates that removal of black residents from the historic area was an implicitly desired goal of the zoning ordinance.[71]

Given the increased utilization of comprehensive economic planning schemes by the states to achieve the objective of racial segregation, the United States federal government eventually became enthusiastically involved in the process as well. In 1921, the Warren G. Harding Administration directed then-Secretary of Commerce

62. *See* SILVER, *supra* note 6, at 7.

63. *See id.*

64. *Id.*

65. *Id.* at 8.

66. Frank Aloi & Arthur Abba Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, URB. L. ANN. 9, 11 (1971). The authors note that typical devices used to achieve this objective include minimum lot size requirements, minimum building size requirements, frontage requirements, exclusion of mobile homes, bedroom restrictions, land improvement requirements, minimum floor space requirements, living density requirements, prohibition of multiple-family dwellings, and various provisions in building codes. *Id.*

67. *Id.* at 14.

68. SILVER, *supra* note 6, at 9–10.

69. *Id.* at 9.

70. *Id.*

71. *Id.* at 9–10.

Herbert Hoover to organize an Advisory Committee on Zoning.[72] The purpose of that committee was to develop a manual in order to convince all local municipalities to adopt zoning ordinances.[73] The end product enacted in 1922 was the Standard State Zoning Enabling Act ("SZEA"): a model zoning law that was distributed to thousands of local governments nationwide.[74] In order to circumvent the *Buchanan* holding, the SZEA did not make explicit reference to the creation of racially segregated residential neighborhoods as a reason for the federal government's advocacy for zoning.[75] However, the lifelong works of the outspoken segregationists who comprised the Advisory Committee indicated that racial segregation was indeed a priority.[76]

The most influential Advisory Committee member was Frederick Law Olmsted, Jr., a former president of the American Society of Landscape Architects and the American City Planning Institute.[77] Although Olmsted has left a brilliant legacy as the "father of American landscape architecture" as well as the mastermind behind the design of New York City's Central Park, he also directed the federal government to build more than 100,000 units of segregated housing for defense plant workers during World War I.[78] He was a devoted segregationist who believed that "'in any housing developments which are to succeed, . . . racial divisions . . . have to be taken into account. . . . [If] you try to force the mingling of people who are not yet ready to mingle, and don't want to mingle,' a development cannot succeed economically."[79]

Other members included Morris Knowles, the author of Charleston, South Carolina's racial historic preservation zoning scheme and Lawrence Veiller, a progressive tenement reformer and prominent eugenicist.[80] Alfred Bettman, the Director of the National Conference on City Planning, was also a member of the

72. ROTHSTEIN, *supra* note 7, at 51.

73. *See id.*

74. *See id. See also* DEP'T OF COM., ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT: UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1926), Washington: U.S. Government Printing Office [*hereinafter* "Revised SZEA Text"]. The SZEA consisted of nine total sections. Most notably, the first section included a grant of power, the second section included a provision that the local legislature can divide its territory into districts, and the third section included a statement of purpose for the enacted zoning regulations.

75. ROTHSTEIN, *supra* note 7, at 51.

76. *Id. See also* Revised SZEA Text, *supra* note 74. The Advisory Committee appointed by Secretary of Commerce Herbert Hoover was comprised of Charles B. Ball, the Secretary-Treasurer of the City Planning Division of the American Society of Civil Engineers; Edward M. Bassett, Counsel to the Zoning Committee of New York; Alfred Bettman, Director of the National Conference on City Planning; Irving B. Hiett, Ex-President of the National Association of Real Estate Boards; John Ihlder, Manager of the Civic Development Department of the Chamber of Commerce of the United States; Morris Knowles, Member of the Chamber of Commerce of the United States and Chairman of the City Planning Division of the American Society of Civil Engineers; Nelson P. Lewis, Member of the National Conference on City Planning and Past President of the American City Planning Institute; J. Horace McFarland, Ex-President of the American Civic Association, Frederick Law Olmsted, Ex-President of the American Society of Landscape Architects and Ex-President of the American City Planning Institute; and Lawrence Veiller, Secretary and Director of the National Housing Association. *Id.*

77. ROTHSTEIN, *supra* note 7, at 51.

78. *Id.*

79. *Id.*

80. *Lawrence Veiller: Progressive Tenement Reformer and Eugenicist*, HIST. NEWS NETWORK: LIBERTY AND POWER (June 28, 2014), https://historynewsnetwork.org/blog/153403.

Advisory Committee.[81] As part of a mission to help establish planning commissions in municipalities throughout the nation, he once explained that land use planning was necessary to "maintain the nation and the race."[82] Advisory Committee members such as Irving B. Hiett who also held leadership positions in the National Associations of Real Estate Boards also reinforced the Advisory Committee's "segregationist consensus."[83] In 1924, the Association buttressed the SZEA with a code of ethics which stated that "a realtor should never be instrumental in introducing into a neighborhood . . . members of any race or nationality . . . whose presence will clearly be detrimental to property values in that neighborhood."[84]

The goals that the SZEA set out to achieve were successfully accomplished. More than 55,000 copies of the first edition were published and sold, and by 1926, nineteen states had enacted enabling acts based on the SZEA model.[85] The Advisory Committee had achieved its goal of legitimizing comprehensive economic zoning measures across the United States. At the same time, a new and discreet form of discrimination had emerged to the forefront of the municipal governments' arsenals. Class-based zoning schemes were more difficult to oppose than explicitly racial pre-*Buchanan* ordinances and much easier to administer without attracting the ire of the public. Even in the present day it almost feels right to say that the government should be able to segregate affluent areas and usages from more impoverished ones. However, classism and racism are often "so intertwined"[86] that in many cases it is almost impossible to distinguish a municipality's true motives as racial discrimination. Indeed, in the case of the SZEA, courts turned a blind eye to an unconstitutional violation of rights that has lingering effects to this day.

As Secretary of Commerce Herbert Hoover and his Advisory Committee used the SZEA to promote the establishment of municipal zoning regulations across the country, legal challenges to the practice were burgeoning in the lower courts. Those challenges culminated in the 1926 Supreme Court case of *Village of Euclid v. Ambler Realty Co.*, which validated the SZEA authors' premise that economic zoning ordinances that do not explicitly refer to racial segregation would be legally sustainable.[87] The case originated from a comprehensive zoning ordinance promulgated by the Village of Euclid which divided the village into "six classes of use districts, denominated U-1 to U-6 . . . three classes of height districts, denominated H-1 to H-3 . . . and four classes of area districts, denominated A-1 to A-4. . . ."[88] Ambler Realty owned a sixty-eight-acre tract of land situated on the west side of the village.[89] As a result of the newly enacted ordinance, Ambler Realty was restricted from the types of uses it could participate in on its property—most notably

81. Revised SZEA Text, *supra* note 74.
82. ROTHSTEIN, *supra* note 7, at 51–52.
83. *Id.* at 52.
84. *Id.*
85. *See* Revised SZEA Text, *supra* note 74.
86. ROTHSTEIN, *supra* note 7, at 53.
87. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
88. *Id.* at 380.
89. *Id.* at 379.

industrial uses.[90] Ambler Realty sought an injunction against enforcement of the Village's ordinance, claiming that it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the federal Constitution as well as various provisions of the Constitution of the State of Ohio.[91] Specifically, Ambler Realty argued that the use restrictions imposed by the ordinance significantly reduced the value of its land, deterred potential buyers, and had the effect of diverting investment and development to other areas.[92]

Although the Supreme Court upheld the validity of comprehensive zoning ordinances in *Euclid*, Judge Westenhaver of the District Court for the Northern District of Ohio "prophetically identified the problem[,]" saying:[93]

> [I]t is . . . apparent that the next step in the exercise of this police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants. The blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance. . . . The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.[94]

Unable to "pretend ignorance of [the ordinance's] true racial purpose,"[95] Judge Westenhaver, relying heavily on *Buchanan v. Warley*, enjoined enforcement of the ordinance and held it to be unconstitutional and void.[96]

In overruling the district court decision on appeal, Justice Sutherland authored a seminal opinion, holding that zoning ordinances can only be held unconstitutional if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[97] The central thrust of the Court's opinion reflected the argument in defense of the practice of zoning put forward by one Alfred Bettman, who strategically filed an amicus curiae brief to the litigation.[98]

90. *Id*. at 382. Ambler Realty's tract of land fell within U-2, U-3, and U-6 use districts. *Id.* The first 620 feet of the tract excluded apartment houses, hotels, churches, schools, other public and semipublic buildings, and other uses enumerated in U-3 to U-6 districts as permitted uses. *Id.* The next 130 feet excluded industries, theaters, bank, shops, and other uses set forth in U-4 to U-6 as permitted uses. *Id.*

91. *Id*. at 384.

92. *Id.* at 384–85.

93. Aloi & Goldberg, *supra* note 66, at 10.

94. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 313, 316 (N.D. Ohio 1924).

95. ROTHSTEIN, *supra* note 7, at 53.

96. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926).

97. *Id.* at 395.

98. *See generally* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); *see also* Brief on Behalf of the National Conference on City Planning, the Ohio State Conference on City Planning, the National Housing Association, and the Massachusetts Federation of Town Planning Boards as Amici Curiae Supporting

Bettman posited, in a section of his brief titled "Analogies with Other Types of Regulations of Property," that "[z]oning is simply a modern mode or application to modern urban conditions of recognized and sanctioned methods of regulating property."[99] He then argued that the most apt comparison was the common law of nuisance, and that since prevention of nuisances is a constitutional authority possessed by local legislatures, that authority should extend to zoning as well:[100]

> What, for example, is the relationship of zoning to the law of nuisances? The term "nuisance" is usually applied to those developments which are offensive in the most crude and obvious way. . . . A slaughterhouse or foundry next door to a residence, throwing its odors or clanging noises into that residence over an intervening space of a few feet, is a nuisance. . . . The philosophy underlying the above illustration is nothing more or less than the old adage that a man shall not so use his property as to injure another; and the precept, that a man may not send noise or odor or other disturbing substances or vibration into or onto his neighbor's property. . . . The zoning ordinance, by segregating the industrial districts from the residential districts, aims to produce. . .the segregation of the noises and odors and turmoils necessarily incident to the operation of industry from those sections of the city in which the homes of the people are or may be appropriately located. The mode of regulation may be new; but the purpose and the fundamental justification are the same.[101]

Bettman then went on to juxtapose the "negative" effects of apartment buildings on the typical American family with the "positive" effects of single family homes, invoking a moral dichotomy to justify the implementation of single family zones. He wrote:

> [T]he man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet, is . . . motivated . . . by the assumption that his children are likely to grow mentally, physically and morally more healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted and slum-like district. This assumption is indubitably correct. The researches of physicians and public health students have demonstrated the importance of our physical environment as a factor in our physical health, mental sanity and moral strength. . . . The comparative health statistics of the planned and unplanned communities . . . tend to show

Appellants, at 23, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (No. 665) [hereinafter Bettman Amicus Brief].

99. Bettman Amicus Brief; *see also* Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 611 (2001) (citing Bettman Amicus Brief).

100. Chused, *supra* note 99, at 611–12.

101. *Id.*; Bettman Amicus Brief, *supra* note 99, at 23–24.

> more favorable results in the former than in the latter. Disorderliness in the environment has as detrimental an effect upon health and character as disorderliness within the house itself.[102]

Bettman warned the Court that fundamental American moral values were at stake, and that land use regulations were the only protection.[103]

Bettman's fearmongering tactics were a success. Justice Sutherland was fully convinced by Bettman's imagery, and wrote a majority opinion that adopted much of Bettman's language:

> [T]he development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often *the apartment house is a mere parasite,* constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, 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. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, *come very near to being nuisances.*[104]

The *Euclid* decision marked the success of the Advisory Committee's efforts. The opinion rubber-stamped comprehensive zoning schemes and allowed for municipalities to implement exclusionary measures as long as they did not overtly refer to race. In doing so, the Court exhibited a break from its previous jurisprudence which rejected "regulations that restricted what an owner could do with his property."[105] The Court also used code-words to "call[] forth the most negative, stereotypical imagery"[106] of multi-family housing units, fully embracing classism in

102. Bettman Amicus Brief, *supra* note 99, at 29–30.

103. Chused, *supra* note 99, at 613.

104. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394–95 (1926) (emphasis added).

105. ROTHSTEIN, *supra* note 7, at 52. *Euclid* is notable in that a highly conservative bench of Supreme Court justices approved the legitimacy of zoning as a regulatory device despite their prominent objections to government regulation. *Id.*

106. Chused, *supra* note 99, at 613.

the name of American upper-class "morals." Despite these connotations, *Euclid* is a decision that is often looked at with rose-tinted glasses. It is reflected upon by planners, developers, government officials, and professors as "constructing the contours of contemporary land use law."[107] However, the truth of the matter is that the decision bears an ugly, racist history and has contributed to the residential segregation we still see in every major metropolitan area in the United States to the present day.

III. REMEDIES TO RIGHT OUR WRONGS: DESEGREGATION AND REPARATIONS

Residential segregation is unique in that desegregation is impossible to achieve overnight. Even though fifty years have passed since the passage of the 1968 Fair Housing Act,[108] black-white residential segregation remains high in the United States. According to an analysis of data distributed by the United States Census Bureau for the years 2013–17, the dissimilarity index between blacks and whites was 0.526 for the median metropolitan area—meaning that 52.6 percent of blacks or whites would have to move to achieve full racial integration.[109] This residential segregation, as explained in the previous sections, was not de facto—it is the result of full-fledged government intervention. These de jure racial and economic zoning measures are contrary to the doctrine of *Buchanan* and are thus unconstitutional violations of the rights of black persons throughout the country. "[W]here there is a legal right, there is also a legal remedy."[110] Since segregation was government-backed, desegregation must be as well. We need aggressive, affirmative policy mandates aimed towards desegregating the populace and reparations for the opportunity gap that was created over the years.[111] This Part will explore those possible remedies.

107. *Id.* at 597.

108. The Fair Housing Act was enacted in 1968 as a response to the assassination of Dr. Martin Luther King. Timothy M. Smyth, et al., *The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients*, 23 J. AFFORDABLE HOUSING & CMTY. DEV. L. 2, 231–258 (2015). As originally written, the statute prohibited discrimination on the grounds of race, color, religion, and national origin, with the goal of rectifying past and present practices of housing discrimination. *See Id.* at 231–258.

109. Kimberly Quick & Richard D. Kahlenberg, *Attacking the Black-White Opportunity Gap That Comes from Residential Segregation*, CENTURY FOUND. (June 25, 2019) https://tcf.org/content/report/attacking-black-white-opportunity-gap-comes-residential-segregation/?agreed=1#easy-footnote-bottom-2. *See also About Dissimilarity Indices*, CENSUSSCOPE, https://www.censusscope.org/about_dissimilarity.html (last visited Nov. 29, 2021) ("The dissimilarity index varies between 0 and 100, and measures the percentage of one group that would have to move across neighborhoods to be distributed the same way as the second group. . . .A dissimilarity index of 0 indicates conditions of total integration under which both groups are distributed in the same proportions across all neighborhoods. A dissimilarity index of 100 indicates conditions of total segregation such that the members of one group are located in completely different neighborhoods than the second group. Neither extreme value is generally seen in most cities and metropolitan areas. Rather the value typically lies somewhere in-between 0 and 100.").

110. Marbury v. Madison, 5 U.S. 137, 162 (1803).

111. *See* Quick & Kahlenberg, *supra* note 109 ("Black-white residential segregation is a major source of unequal opportunity for African Americans: among other things, it perpetuates an enormous wealth gap and excludes black students from many high-performing schools. . . . Because the federal, state and local policy

A. Promoting Inclusionary Zoning: New Jersey's Mount Laurel Doctrine and Massachusetts's "Anti-Snob" Zoning Law

One remedy is to prohibit exclusionary zoning ordinances and require inclusionary zoning ordinances—as demonstrated by New Jersey's Mount Laurel Doctrine. This doctrine stems from the 1975 New Jersey Supreme Court case *Southern Burlington County, N.A.A.C.P. v. Township of Mount Laurel.* In that case, the N.A.A.C.P. sued to invalidate a restrictive zoning ordinance promulgated by the Township of Mount Laurel on the grounds that it effectively prevented low- and moderate-income residents from living in the municipality, thus violating the Substantive Due Process and Equal Protection Clauses of the New Jersey State Constitution.[112] The ordinance in question reserved 29.2% of the township for industrial use and restricted residential development to "single-family, detached dwellings, one house per lot."[113]

In striking down the ordinance as a violation of the state Constitution, the New Jersey Supreme Court noted that "Mount Laurel 'has acted affirmatively to control development and to attract a selective type of growth' and that 'through its zoning ordinances has exhibited economic discrimination in that the poor have been deprived of adequate housing. . . .'"[114] The court held as follows:

> [T]he presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.[115]

The court reasoned that all local zoning regulations, as they derive from the state's police power, must "serve the welfare of the state's citizens beyond the borders of the particular municipality" when they have a "substantial external impact."[116] Like any exercise of police power, the regulation "must promote public health, safety, morals, or the general welfare."[117] For the court, it was "plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local

arenas were the laboratory for engineering black-white residential segregation, that is where people must work to help undo it.").

112. S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel, 336 A.2d 713, 716, 725 (1975).

113. *Id.* at 719.

114. *Id.* at 723. (The Court further noted that the Township's objective was to take advantage of a New Jersey tax structure and suppress local property taxes, and that "the policy was carried out without regard for non-fiscal considerations with respect to People, either within or without its boundaries.").

115. *Id.* at 728.

116. *Id.* at 726.

117. *Id.* at 725.

land use regulation."[118] Since the need for such sufficient housing is so significant, townships like Mount Laurel, said the court, must consider housing needs for citizens located outside the municipalities' borders.[119]

On appeal from several Mount Laurel cases in 1983, the New Jersey Supreme Court was able to reaffirm the decision laid out in *Southern Burlington County* and provide more guidance on the Mount Laurel Doctrine.[120] According to the New Jersey Supreme Court, court-mandated responses included a builder's remedy (which would force the municipality to allow certain construction) and inclusionary zoning devices—such as density bonuses to encourage below-market housing set-asides.[121] By providing doctrinal clarification, the court streamlined future Mount Laurel cases and made litigation more effective.

A similar remedy to the Mount Laurel Doctrine is the Massachusetts Comprehensive Permit Act: Chapter 40B, also known as the "Anti-Snob" Zoning Act.[122] This legislation was enacted in 1969 to help address the shortage of affordable housing in the state and is aimed to reduce unnecessary barriers to affordable housing development.[123] The Act allows affordable housing developers to override certain municipal zoning laws and requires "local Zoning Boards of Appeals to approve affordable housing developments under flexible rules."[124] Specifically, in municipalities where less than ten percent of housing is legally qualified as affordable, developers can circumvent density requirements "if at least 20–25% of the units have long-term affordability restrictions."[125] In the decade since 2010 when fifty-eight percent of voters voted for the continuation of the statute, the law has been responsible for "58,000 homes for seniors, the disabled, and working families" and "80% of all new affordable housing possible in Massachusetts suburbs."[126]

B. Land Banking through Tax Foreclosures

Exclusionary zoning ordinances that segregate affluent areas and uses from the less fortunate lead to destitute neighborhoods filled with vacant properties. Vacant properties invite natural wear and tear as well as vandalism, causing devastating effects to the real estate value of the surrounding community, eventually resulting in

118. *Id.* at 727.

119. *Id.* at 728.

120. S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel, 456 A.2d 390 (1983). The New Jersey Supreme Court set up a special court system to allow expedited and simplified Mount Laurel Litigation, substantially increase the effectiveness of the judicial remedy, and to ensure municipal compliance with the constitutional obligation of providing affordable housing needs to the greater region. *Id.* at 439–440.

121. *Id.* at 445–48, 452–53.

122. MASS. GEN. LAWS ch. 40B, §§ 20-23 (1969).

123. *Id.*

124. *Chapter 40 B Planning and Information*, MASS.GOV, https://www.mass.gov/chapter-40-b-planning-and-information (last visited Nov. 29, 2021).

125. *Id.*

126. Planning Office for Urban Affairs, *Chapter 40B & Chapter 40R*, ARCHDIOCESE OF BOSTON, https://poua.org/housing-advocacy/chapter (last visited Jan. 15, 2021).

a vicious cycle of poverty for the residents.[127] Repairs on such properties could easily exceed the resulting value of the house—and even if an investor were willing to make the repairs, he or she may be confronted with obscurities such as a fragmented title[128] or an inability to secure a private mortgage.[129]

A powerful remedy that can revitalize a blighted neighborhood and bring racial justice to its occupants is land banking through tax foreclosure. Since most vacant properties are behind on their property taxes, a local government can foreclose on the unpaid debt and acquire the title to the property. Payment of property taxes is a "fundamental and universally applicable obligation of property ownership."[130] Because a delinquent taxpayer "does not expect to be able to escape the consequences of delinquency, the prospect of tax foreclosure does not threaten the security of tenure of property owners generally," making it a highly effective method of reconstructing a fragmented title.[131] The tax foreclosure method also gives the municipality the advantage of sidestepping the use of its eminent domain power to transfer vacant properties to private developers—an exercise of power which has become very controversial after the 2005 Supreme Court decision of *Kelo v. New London*.[132]

The concept of land banking is "nothing more than the acquisition of vacant properties for subsequent return to productive use."[133] Once the tax delinquent properties are foreclosed upon, a local government-sponsored land bank will hold onto the titles and facilitate investment coordination with private developers.[134] This mechanism streamlines the investment process since private developers can simply bargain with the true owner who is looking to make a sale instead of having to track down all of the lienholders to the property.[135] By implementing a land banking through tax foreclosure scheme, local governments can strive to reverse the effects

127. James J. Kelly, Jr., *A Continuum in Remedies: Reconnecting Vacant Houses to the Market*, 33 ST. LOUIS U. PUB. L. REV. 109, 114 (2013) ("[T]he presence of vacant houses reduces the resale value of complaint houses within a block or two by at least 1.3% per vacant house.").

128. *Id.* at 120 ("When legal ownership of a property is in limbo, even cost-effective investments and maintenance will fall between the cracks.").

129. *Id.* at 116.

130. *Id.* at 130.

131. *Id.*

132. Kelo v. City of New London, 545 U.S. 469 (2005). This controversial case involved the City of New London using its eminent domain power to seize private property and sell it to the Pfizer corporation, which intended to develop the land for corporate use. The City argued that the purpose of the eminent domain exercise was to spur economic growth by creating new jobs and increasing tax revenues. Plaintiff Kelo, a New London resident who had her property seized, argued that the City's purpose violated the "Public Use" requirement of the Fifth Amendment to the federal Constitution. In holding for the City, the Supreme Court explained that a local government may validly exercise its eminent domain authority to take private property and distribute it to private developers without violating the "Public Use" requirement, so long as the overarching purpose is to promote public welfare. The Court added that nothing precluded the states from placing further restrictions on its eminent domain power through interpreting or amending the state Constitution. In the aftermath of Kelo, several states voiced disagreement to the decision and quickly implemented additional restrictions on their eminent domain power. *See also* ILYA SOMIN, THE GRASPING HAND: "KELO V. CITY OF NEW LONDON" AND THE LIMITS OF EMINENT DOMAIN 181–92 (2016).

133. Kelly, *supra* note 116, at 130.

134. *Id.*

135. *Id.* at 120.

of past exclusionary zoning ordinances and promote the process of community restoration and the achievement of racial justice.[136]

C. Political Remedies: Tightening the Fair Housing Act and Other Fixes

In his book, *The Color of Law*, Richard Rothstein argues that America needs a new civil rights movement to undo the damage done by a century of government-backed residential segregation.[137] Rothstein asserts the importance of awareness and advocacy, contending that only once the nation develops a "shared understanding of our common history will it be practical to consider steps we could take to fulfill our obligations."[138] Specifically, he argues that American citizens cannot "continue to accept the myth of *de facto* segregation."[139] Modern American history textbooks must portray an accurate account of government-backed segregation, instead of the passive, inaccurate, one sentence explanation contained in most textbooks today.[140] Policymakers and the public must "acknowledge that the federal, state, and local governments segregated our metropolitan areas," and "open [their] minds to considering how those same federal, state, and local governments might adopt equally aggressive policies to desegregate."[141]

One policy area where public advocacy is especially important is the Affirmatively Furthering Fair Housing obligation of the Fair Housing Act. Although the Fair Housing Act makes it unlawful to "otherwise make unavailable or deny a dwelling to any person because of race,"[142] it also charges the Department of Housing and Urban Development ("HUD") to "affirmatively further" its goals of ending residential segregation—an obligation which HUD then extends to participating jurisdictions.[143] The Obama administration attempted to satisfy this obligation in 2015 by promulgating a rule which required HUD funding recipients to create a

136. *Id.* at 130–131.

137. ROTHSTEIN, *supra* note 7, at 198.

138. *Id.*

139. *Id.*

140. *See id.* at 199 ("One of the most commonly used American history textbooks is *The Americans: Reconstruction to the 21st Century*. . . . The 2012 edition has this to say about residential segregation in the North: 'African Americans found themselves forced into segregated neighborhoods.' That's it. One passive voice sentence. No suggestion of who might have done the forcing or how it was implemented.").

141. *Id.* at 198.

142. 42 U.S.C. § 3604(a) (2012). In *Texas Department of Housing and Community Affairs v. Inclusive Community's Project, Inc*., 576 U.S. 519 (2015), the Supreme Court held that Fair Housing Act claims may be brought on a "disparate impact" theory, meaning that the actor is not necessarily required to act with discriminatory intent to violate the statute. In an opinion authored by Justice Kennedy, the Court explained that the disparate impact theory was consistent with both the Act's language and the congressional purpose behind the Act—eliminating discriminatory practices. That decision began to pave the way for a new species of litigation and may be a promising tool to use for attacking exclusionary zoning ordinances that do not explicitly display discriminatory intent. *See generally* Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015).

143. James J. Kelly, Jr., *Affirmatively Furthering Neighborhood Choice: Vacant Property Strategies and Fair Housing*, 46 U. MEM. L. REV. 1009, 1016 (citing 42 U.S.C. §§ 3601–3619 (2012)).

comprehensive Assessment of Fair Housing ("AFH") for HUD review.[144] The Trump administration completed removal of the AFH rule in 2020.[145]

Repealing regulations on municipalities' obligation to affirmatively further fair housing is not the direction in which the United States should be headed. Although the Trump administration reasoned that its policy would return power to localities, the truth is that localities have been actively impeding fair housing for the majority of American history. While there are certainly areas in our economy that may benefit from deregulation, decades of racial injustice caused by the absence of regulations in the housing industry signal that deregulation in the area of housing should be approached with extreme caution. As explained above, the residential segregation we see in American cities today is a result of a century of concerted government effort. Because of this, government must be actively involved in reversing the process, and more burdens should be placed on municipalities to affirmatively further fair housing.

CONCLUSION

In sum, American metropolitan areas remain segregated in the present day due to decades of racist housing policies that were actively pushed by all levels of government. This mission of residential segregation started with local governments enacting zoning ordinances that explicitly preventing white people and people of color from living or purchasing property on the same block. When the Supreme Court struck down explicit racial zoning ordinances in the case of *Buchanan v. Warley*, local governments began to rely on comprehensive city planning and economic zoning ordinances to achieve the same result of residential segregation. The federal government became involved when Secretary of Commerce Herbert Hoover's Advisory Committee on Zoning published the Standard State Zoning Enabling Act—a model comprehensive zoning law that was circulated to thousands of municipalities countrywide. This approach proved to be a success, with numerous localities enacting enabling statutes based on the model law within a couple years of its release. Economic zoning measures then went on to receive the blessing of the nation's highest court in the case of *Village of Euclid v. Ambler Realty Company*.— a decision that many view with high esteem but is actually tainted with racist undertones.

A century later, effects of government-sponsored segregation are still widespread in the United States. To counter and reverse the consequences of decades of government-sponsored segregation, the United States needs a new civil rights campaign to take affirmative and aggressive action towards integrating our cities. We must aggressively advocate for housing policy reform. We must require states and municipalities to adopt inclusionary zoning measures, like those seen in states like Massachusetts and New Jersey. We must encourage land banking and coordinated community investment to restore neighborhoods that have become

144. *Id.* at 1018–19 (2016).

145. *Secretary Carson Terminates 2015 AFFH Rule*, U.S. DEP'T OF HOUS. AND URB. DEV. (July 23, 2020), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_109.

poverty-stricken as a result of many of these exclusionary zoning ordinances. We must tighten up federal legislation and administrative regulations that follow so that municipalities will have to take responsibility for their share of fair housing. Lastly, we must better educate our youth so that our children do not grow up thinking that the segregated cities that they grow up in are products of natural migration. History has shown that passively waiting for a gradual change towards integration is not—and will never be—enough. De jure segregation can only be rectified through de jure integration, and a great deal remains to be done.