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# THE RACE, CLASS AND HOUSING CONUNDRUM: A RATIONALE AND PROPOSAL FOR A LEGISLATIVE POLICY OF SUBURBAN INCLUSION

CHARLES E. DAYE\*

[The Federal Government] will carry out . . . programs in a way that will be as helpful as possible to communities which are receptive to the expansion of housing opportunities for all of our people.

[T]he infinitely varied individual questions that arise as . . . thousands of local governments hammer out their individual local land use policies are not appropriate for Federal determination . . . neither would it be wise to allow a situation to develop in which [local land use policies] have to be hammered out in the courts.<sup>1</sup>

## I. MAGNITUDES AND TRENDS: A CONUNDRUM REVEALED

### A. *A Disappearing Deferred Dream*<sup>2</sup>

For decades disadvantaged Americans, black and white, abandoned rural areas and underdeveloped regions of the nation. Impelled by a

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1. Nixon, Federal Housing Policies Relative to Equal Opportunity, 7 WEEKLY COMP. OF PRES. DOC. 892, 901 and 904 (June 14, 1971). This statement is perhaps a classic example of the contradictions one encounters in the traditional explication of national housing policies. This article examines the contradictions and questions the basic assumptions that underlie America's housing policies.

2. This subtopic is inspired by Langston Hughes' famous poem entitled "Harlem." The poignance of the topic may be increased by quoting the poem:

"What happens to a dream deferred?

Does it dry up

like a raisin in the sun?

Or fester like a sore—

And then run?

Does it stink like rotten meat?

Or crust and sugar over—

Like a syrupy sweet?

Maybe it just sags

Like a heavy load.

Or does it *explode*?"

Reprinted from Hughes, *SELECTED POEMS* 268 (Alfred A. Knopf, New York, 1959).

The inspiration of the poem is not unique to the author. After the inspiration occurred, I occa-

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dream of improving their circumstances, and drawn by a vision of opportunities in cities, poor Americans, black and white, "invaded"<sup>3</sup> cities. Like a parched desert traveller's hallucinatory view of a cool oasis in the distance, in current times the vision of opportunities in America's cities is fast disappearing. Thus does a dream become a nightmare.

Poor rural people moved in a general migratory pattern largely to northeastern and midwestern cities.<sup>4</sup> In the last two decades, however, a second vast migration has taken place. Middle and upper income people, predominantly white, have moved to the suburbs and exurbs, and, in the process, "abandoned" central cities.<sup>5</sup> Businesses and government agencies have left and continue to leave central cities for outer locations at an accelerated pace. A metropolitan configuration has developed with increasingly black and poor cities, surrounded by prosperous, white suburbs and exurbs.<sup>6</sup>

Major cities are uttering fiscal cries, perhaps gasps, of distress—caught in a dilemma of shrinking fiscal bases and increased demands for services in a time of escalating costs.<sup>7</sup> They are losing jobs in record numbers in the blue collar and semi-skilled categories to suburbs, exurbs, and the "sunbelt" area of the nation.<sup>8</sup> Unemployment is high generally, is chronic for blacks, and is a disaster for young blacks.<sup>9</sup>

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sioned to come across, S. KAPLAN, *THE DREAM DEFERRED: PEOPLE, POLITICS AND PLANNING IN SUBURBIA*, (The Seabury Press, New York, 1976). The same poem apparently inspired Kaplan's title.

3. This is a harsh sounding term which does not necessarily connote an unfavorable view of the newcomers, but describes a phenomenon recognized in sociological literature. *E.g.*, R. MORRIS, *URBAN SOCIOLOGY*, 70, 101-02, 109-12 (Praeger, New York 1968); A. BOSKOFF, *THE SOCIOLOGY OF URBAN REGIONS* 96 (Appleton-Century-Crofts, New York 1970); N. GIST & S. FAVA, *URBAN SOCIETY* 107, 155-75, 191-92 (Thomas Y. Crowell Company, New York 1964); J. PALEN, *THE URBAN WORLD* 75 (McGraw-Hill, New York 1975); R. PARK, *HUMAN COMMUNITIES* 148-49 (The Free Press, New York 1952).

4. J. HEILBRUN, *URBAN ECONOMICS AND PUBLIC POLICY* 184 (St. Martin's Press, New York 1974) [hereinafter HEILBRUN]; Grodzins, *The Crisis of the Inner City*, in *URBAN CRISIS IN MODERN AMERICA* 66 (R. Branyon & L. Larsen eds. 1971) [Hereinafter *URBAN CRISIS*]. See generally B. HARRISON, *URBAN ECONOMIC DEVELOPMENT: SUBURBANIZATION, MINORITY OPPORTUNITY AND THE CONDITION OF THE CENTRAL CITY* 63-75 (Urban Inst., Wash. D.C. 1974) [Hereinafter HARRISON].

5. Grodzins, *supra* note 4 in *URBAN CRISIS*, at 67; HARRISON, *supra* note 4, at 77-78; Duncan & Reiss, *Suburban Growth Patterns*, in *URBAN CRISIS* 29; HEILBRUN, *supra* note 4, at 30-31, 184-85.

6. Grodzins, *supra* note 4 in *URBAN CRISIS*, at 70; See generally, HEILBRUN, *supra* note 4, at 40-44, 184-85, 190; M. DANIELSON, *THE POLITICS OF EXCLUSION* (Columbia University Press, New York 1976) [Hereinafter DANIELSON].

7. HEILBRUN, *supra* note 4, at 322-27; See generally, U.S. COMM. ON CIVIL RIGHTS, *EQUAL OPPORTUNITY IN SUBURBIA* (1974), [Hereinafter *EQUAL OPPORTUNITY*].

8. *EQUAL OPPORTUNITY*, *supra* note 7, at 11; DANIELSON, *supra* note 6, at 23, 141-48.

9. See REPORT, NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 126 (1968) [Hereinafter REPORT]. Though it is somewhat dated the picture painted by the Commission remains accurate. For example Bureau of Labor Statistics data shows 43.3% black teenagers (aged 16-19) in urban areas unemployed. U.S. Bureau of Labor Statistics, Special Labor Reports, No. 199, "Employ-

Neighborhoods deteriorated as reinvestment ceased<sup>10</sup> leaving empty boarded buildings which stand as mocking monuments of housing abandonment, business withdrawal, and core city deterioration.

City problems, indeed, constitute a catalogue of ills which cannot possibly be attributed to any single cause. Nor can any solution addressed to a single factor reverse the trend.

There is, however, an overwhelming irony that the "better life" has always eluded the poor and the black, as masses. When they predominated in rural areas, the good life was "The City." When they got there, the good life was "The Suburb." To that place neither poor nor black can go.<sup>11</sup> Either there are no homes that they can afford,<sup>12</sup> or they are barred in other ingenious and devious ways<sup>13</sup> through use of various sorts of local land use controls.<sup>14</sup>

It would probably not be an overstatement to say that a battle is being waged on two fronts: the "saving" of the American cities<sup>15</sup> and the "opening" of the American suburbs.<sup>16</sup> Joining the battle on the latter front, this article poses two questions: Are suburban actions which exclude poor and black people tolerable in light of the broader,

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ment and Unemployment in 1976" (1977). See also U.S. Bureau of Census, Current Population Reports, Series P-60, No. 107, (1977).

10. EQUAL OPPORTUNITY, *supra* note 7, at 9. See also REPORT, *supra* note 9, at 220; and Whitman, *Federal Housing Assistance and the Poor: Old Problems and New Directions*, 9 Urb. Law. 1 (1977).

11. EQUAL OPPORTUNITY, *supra* note 7, at 4-7. See generally, DANIELSON, *supra* note 6. Of course, the statement is not intended to imply that no blacks or poor reside in the suburbs, but merely that generally the picture is one of exclusion. Indeed the U.S. Civil Rights Commission in its report, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING (1975) [Hereinafter TWENTY YEARS] while finding that "a small but significant number of blacks" moved to the suburbs in the decades between 1954 and 1974 continued by noting that: "[B]lacks have located through a pattern that primarily establishes or reinforces pockets of minority population. Only a small number of blacks has moved into predominantly white neighborhoods." *Id.* at 134. See also H. ROSE, BLACK SUBURBANIZATION, (Ballinger Publishing Co., Cambridge, Mass. 1976).

12. See e.g., EQUAL OPPORTUNITY, *supra* note 7.

13. Grodzins, *supra* note 4 in URBAN CRISIS, at 67; HEILBRUN, *supra* note 4, at 308. See also NAT'L COMM. AGAINST DISCRIMINATION IN HOUSING AND URBAN LAND INSTITUTE, FAIR HOUSING AND EXCLUSIONARY LAND USE 57 (1974) [Hereinafter FAIR HOUSING], listing some twenty-four practices which can lead to exclusionary results.

14. The phrase "land use controls" in this article is used as a general descriptive phrase to include all powers exercised by local government which can be used to control the placement of housing or the utilization of land. For purposes of the discussion the phrase "land use controls" includes zoning, growth limitations, referenda, building moratoria, refusals to issue building permits or provide services, refusals to rezone, prohibitions on dwelling types, square footage requirements, developer fees, and developmental timing controls. The list of such powers is practically endless.

15. For example, proponents of "saving" the cities are seeking targeted federal aid for "distressed" cities as part of the housing legislation for fiscal 1978, see 5 BNA, HOUS. & DEV. REP., *Current Developments* 304 (September 19, 1977), and are pushing for new urban policy initiatives. See, Community Development Services, Inc., 77 Housing Affairs Letter, No. 4, p. 1 (November 4, 1977).

16. See DANIELSON, *supra* note 6, chs. 7-11; EQUAL OPPORTUNITY, *supra* note 7, at 51-70; FAIR HOUSING, *supra* note 13, at 7ff.

longterm national interest? Assuming they are not, what should be done about them?

The problems are extremely complex and highly sensitive. Central cities' problems, suburban sprawl and rural development are related—indeed the relationship is symbiotic.<sup>17</sup> Fundamental values are in apparent conflict: the tradition of local land use autonomy versus the national interests; and free association versus a curtailed associational freedom. Yet, *if* the problems are to be addressed at all meaningfully, something has got to yield!

Local autonomy as an important value is not to be minimized, especially in an age of massive governmental bureaucracies and diminished efficacy of individual political effort as the relevant political apparatus becomes larger.<sup>18</sup> But, I will attempt to show that suburban local governmental units may, and do, undermine national objectives, for example, by refusing to engage in federally supported lower income housing programs and, by excluding black people and poor people, thereby exacerbating already tragic metropolitan ills.

The freedom to associate is, of course, highly important. The associational issue may be posed as, "Whether the members of the affluent white majority should be denied freedom to associate exclusively with like persons, when by definition in so doing the black and the poor are necessarily excluded?" Few, if any, persons would deny that somewhere a line must be drawn on the mixing impulse. Presumably also, even poor people and black people have associational freedoms which ought to be recognized. Traditionally, it may be thought that "public" and "private" lines may be drawn.<sup>19</sup>

17. TWENTY YEARS, *supra* note 11, at 1-13; REPORT, *supra* note 9, at 115-21.

18. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 405 (1977). See also Tucker, *Inside Ghetto Walls*, *supra* note 4 in URBAN CRISIS, at 174-76.

19. The distinction between "public" and "private" action is essentially the "state action" problem which arises under the Fourteenth Amendment to the U.S. Constitution. As an example of the analysis of the state action problem in general see *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). In the particular context of resistance to federal housing programs, see e.g., *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied* 401 U.S. 1010 (1971); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970). In the case of the homogeneous, affluent, white suburban community the distinction between public and private impulses becomes blurred to the point of virtual extinction. Officials are known, are close to the voters (in smaller areas particularly), and are likely to personally share the interests of the residents. See e.g., Ellickson, *supra* note 18.

Nevertheless it is necessary to distinguish, even in a discussion of suburban exclusion, between conduct of a landowner who desires to select his neighbors by purchasing, for example, a large tract of land and controlling who lives next to him and at what proximity. However, if a landowner does not, for whatever reason, do that, but instead makes the local government a surrogate to carry out his desires, his conduct is no longer private. At the instant the government carries out his desires the conduct becomes public. Even in making this analysis one must yet recognize the dimension that necessarily implicates "associational" issues. Cf. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

Legislative recognition of the interest in associational freedom (perhaps mixed with individual

Adherence to the tradition of local autonomy<sup>20</sup> and unrestrained associational freedom in the context of suburban exclusion works to embarrass the national effort. Having historically been left virtually unrestrained,<sup>21</sup> "devotion to democracy"<sup>22</sup> in the suburbs now accomplishes, in official ways, a result not merely local or private, but fraught with serious national and public implications.

It would appear to be self-evident that politically a nation balkanized along class and race lines cannot be optimally as healthy as it would be without such divisions. Socially, and perhaps morally, it is at least unfair, if not inhumane, for one generation, whether by action or inaction, to leave avoidable divisions, mistrusts, suspicions, estrangements and hatreds as legacies to generations unborn and, by hypothesis, innocent. It may be that selfish motivation, if rational, can produce responses with altruistic and selfless dimensions. Even selfish parents, if rational, would not purposely and knowingly burden their children and grandchildren with debilitating divisions among people, if they could avoid doing so. Such divisions will inevitably create pervasive antagonisms and political stresses with which future generations must contend. Presently sufficiently intractable, the divisions will be even more so, as they have longer to become ingrained facts of life and to gnaw away at the nation's soul.<sup>23</sup> These observations are deemed sufficiently credible to warrant a sense of national urgency calling for emergency action.<sup>24</sup>

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privacy interests) can also be found in the 1964 Civil Rights Act's exemption of "private clubs" from the prohibitions on discrimination contained in the act, 42 U.S.C.A. § 2000a(e) (1974) (prohibiting discrimination in public accommodations), and in the 1968 Civil Rights Act's exemption, *inter alia*, of single family homes in certain circumstances and four unit or less dwellings when the owner resides in one of the units (the "Mrs. Murphy" exemption), 42 U.S.C.A. § 3603 (1973), as well as private clubs. 42 U.S.C.A. § 3607 (1973). *But see* 42 U.S.C.A. § 1982 (1866) as interpreted to bar even private discrimination in certain circumstances, particularly the sale of housing. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

20. See text accompanying notes 79-101 *infra*.

21. *Id.*

22. This is a phrase used by the Court in *James v. Valtierra*, 402 U.S. 137, 141 (1971). In that case, plaintiffs were challenging a referendum procedure which required an affirmative vote of a majority of the qualified electors before any "low rent housing project" could be financed in whole or in part by the federal or state governments. The Court's full statement was, "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination or prejudice." *Id.* See also *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976).

23. See EQUAL OPPORTUNITY, *supra* note 7, at 14-15; REPORT, *supra* note 9, at 220-21.

24. See REPORT, *supra* note 9, at 1, 220. This National Commission concluded: "Our nation is moving toward two societies, one black, one white—separate and unequal." *Id.* at 1. It also spoke of the risk of "the permanent establishment of two societies: one predominantly white and located in the suburbs, in smaller cities, and in outlying areas, and one largely Negro located in central cities." *Id.* at 220.

Although it might be suggested that the trend of white out-migration is starting to show limited signs of a partial reversal in that some middle-income whites are returning to central city areas, see, e.g., U.S. NEWS & WORLD REPORT, August 8, 1977, at 69-71, current data does not suggest the quite massive reversal that would be required. Ironically the return of the white middle class

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The thesis of this article is that America has no complete or consistent overall national housing policy, and in particular, no complete or consistent national policy regarding suburban exclusion or inclusion by race and economic class. Fragments of policy, often contradictory, can be found in scattered parts of housing and community development legislation and other related laws. But nowhere in all the national housing legislation or the housing related civil rights legislation can there be found a specific, clear, consistent, straightforward, or practically enforceable, inclusionary policy.

Several lower federal courts,<sup>25</sup> and at least one courageous state court of last resort,<sup>26</sup> have been attempting to develop and enforce piecemeal nonexclusionary policies. Such attempts have not proved effective as a general remedy. One of the more important reasons is that court resolutions necessarily take place both in the context of legislative policies which are contradictory, incomplete and ambiguous, and of administrative implementational systems which are complex, cumbersome and confusing.<sup>27</sup>

On the few occasions it has spoken on the subject, the United States Supreme Court has taken a constitutional approach to the problem of suburban exclusion which is lacking in practical utility and has never addressed the inclusion issue as it can be differentiated from exclusion. Moreover, it seems probable that the issues will not be resolved on constitutional grounds in a manner that will lead to suburban inclusion. And I believe that, if decided under current constitutional precepts, the issues are likely to be resolved in a fashion that will make suburban inclusion litigation practically impossible to maintain successfully.<sup>28</sup> In my view, such a resolution would not advance the longterm political, social and economic interests of the nation. It must be pointed out, however, that the problems presented by existing federal housing and development legislation would prevent even a willing judiciary from developing effective, practically useful doctrines or enforcement

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may well compound the problem of the central city poor by pushing them out, by causing higher price demands. *Id.* See also an editorial in the New York Times, July 1, 1977 entitled "When City Revival Drives Out the Poor." Rather than lessening the need to open up the suburbs, there is strong indication that the efforts should be intensified, precisely *because* of the reversal of the white out-migration phenomenon. Moreover events are in too early a stage to permit a final conclusion about its dimensions.

25. *E.g.*, *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Kennedy Park Homes Ass'n Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972).

26. *Southern Burlington Co. NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed*, 423 U.S. 808 (1975). *Cf.* *Golden v. Planning Board of Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

27. See Part I-C *infra*.

28. See Part I-B *infra*.

tools.<sup>29</sup>

My conclusion is that judicial unwillingness to extend constitutional decision-making to command suburban inclusion, when combined with the lack of a clear legislative mandate in doctrine and enforcement tools portends ultimate ill for longterm national interests. Therefore in this article, I will attempt to demonstrate that it is up to Congress to enunciate a clear, consistent, national policy mandating suburban inclusion, and to provide effective tools for judicial enforcement of that policy. I will also append a draft of a statute which if enacted would accomplish these purposes.

First, the direction of the current Supreme Court will be examined. Arguments will be advanced that the Court's direction is wrong in the sense of being unwise as national housing policy, but that a change in direction under the present Court majority seems unlikely because the needed change would require the Court to adopt a controversial social theory as a predicate for constitutional policy-making. Next, current legislative policies will be analyzed. This analysis will show that the legislative policies are so unclear that the present Court which is headed in the "wrong" direction under the Constitution, is not likely to impart to the ambiguous legislative command of the housing and related laws the same controversial social theory the Court is unwilling to adopt for constitutional purposes. Finally, the analysis will demonstrate that even if the doctrine (either constitutional or statutory) existed to command suburban inclusion, the available judicially developed and statutorily provided enforcement tools would not permit the judiciary to grant remedies that would be effective in mandating suburban inclusion.

Thus, *unless* the nation can afford to wait for a Supreme Court majority willing to mandate suburban inclusion, which cannot practically be assured or predicted and *unless* effective judicial remedies are devised promptly, which is most unlikely, the Congress must respond with clear legislative policies which mandate suburban inclusion, and must provide practical and effective tools to enforce the mandate. If Congress fails or refuses to do so the problem inevitably will worsen.

## B. *Constitutional Litigation: A Foreclosing of Relief*

### 1. Prolegomenon

There is, of course, no Federal constitutional provision which speaks directly to the issue of suburban exclusion or inclusion by race or economic class. The presumptive starting point for analysis of general suburban exclusion along race or economic class lines would seem to

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29. See text accompanying notes 220-39 *infra*.



be the Fourteenth Amendment as interpreted by *Brown v. Board of Education*,<sup>30</sup> although, as discussed later, other constitutional bases for striking down facial invidious classifications by race may be available<sup>31</sup> or may be developable.<sup>32</sup> But does *Brown* say anything applicable to the suburban exclusion problem? Whatever the premise of *Brown*'s result,<sup>33</sup> its holding is that "[I]n the field of *public education* the doctrine of 'separate but equal' has no place."<sup>34</sup> The Court did not explain the logic that applies *Brown* to fields other than public education.<sup>35</sup> But, even assuming the applicability of its holding to facial invidious classifications by race, making all such classifications unconstitutional, the problem of suburban exclusion generally does not involve facial invidious classifications by race or class.<sup>36</sup> In any event, a preclusion of such classifications for exclusion purposes might not be the same as mandating inclusion in the housing area by race and economic class. There is a rather significant gap between *prohibiting exclusion* because of race, or, even, class, and *requiring* inclusion on these bases.<sup>37</sup>

At the height of the reign of the doctrine of "separate but equal"<sup>38</sup> an ordinance limiting sale/purchase rights of landowners by a racial classification appearing on the face of the ordinance was held, in *Buchanan v. Warley*,<sup>39</sup> to violate a landowner's due process rights. Nine years later the Court, using a due process analytical approach, provided the rationale for assessing the validity of "comprehensive" zoning controls<sup>40</sup> in the well-known *Euclid v. Ambler*<sup>41</sup> decision. Due process as a peg for mandating suburban inclusion, however, appears rather un-

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30. 347 U.S. 483 (1954).

31. See text accompanying notes 74-100 *infra*.

32. See text accompanying notes 150-52 *infra*.

33. See D. BELL, RACE, RACISM AND AMERICAN LAW 452-55 (Little, Brown & Co. 1973).

34. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (emphasis added).

35. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22 (1959). Nor, in my judgment has the Court explained the rationale of *Brown* subsequent to Professor Wechsler's criticisms.

36. For a discussion of a representative problem of land use controls, see text accompanying notes 46-48 *infra*. See also note 14 *supra*.

37. See text accompanying notes 216-17 *infra*.

38. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

39. 245 U.S. 60 (1917). The Court described the ordinance as follows:

By the first section of the ordinance it is made unlawful for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by white people than are occupied as residences, places of abode, or places of public assembly by colored people.

Section 2 provides that it shall be unlawful for any white person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block on which a greater number of houses are occupied as residences, places of abode or places of public assembly by colored people than are occupied as residences, places of abode or places of public assembly by white people. *Id.* at 70-71.

40. For a discussion of the distinctions between various types of zoning, see generally D.

promising. It is highly unlikely that due process of any non-substantive variety could be fashioned to address the suburban exclusion/inclusion problem. Essentially "the process" is not the heart of the problem. The problem inheres in the consequences of a process which all would, presumably, concede to meet the procedural interest in fundamental fairness.<sup>42</sup> Even a "substantive" due process would be problematic. There may not exist a judicially recognizable interest on the part of persons excluded by local land use restrictions,<sup>43</sup> and the content of such due process would require cloaking a controversial social policy in constitutional garb.<sup>44</sup>

## 2. The Dominant Constitutional Lines

Equal protection and due process, nevertheless, seem to be the two dominant constitutional lines for dealing with problems of local land use controls and the exclusion/inclusion problem.<sup>45</sup> Over a half century after the initial application of the due process clause to the land use problem and after a quarter century following the application of the equal protection clause to that problem, the Supreme Court merged the two heretofore separate approaches to land use problems. The two separate, but similar, doctrinal approaches reached a point of confluence in *Village of Arlington Heights v. Metropolitan Development Corporation*.<sup>46</sup>

*Arlington* involved a suit by a housing development corporation (Metropolitan Housing Development Corporation, hereinafter "MHDC"), and others, against the Village of Arlington Heights, which refused to rezone a tract of land to permit the building of housing using federal financial assistance. MHDC claimed the refusal to rezone violated the equal protection clause of the Fourteenth Amendment be-

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HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 28-32, 41-52 (West 1971) [Hereinafter HAGMAN]. See text accompanying notes 83-93 *infra*.

41. 272 U.S. 365 (1926).

42. The issue of procedural fairness is separable entirely from the issue of whether even a fair procedure produces an exclusionary result. Where procedural issues existed they could, of course, be adjudicated.

43. See text accompanying notes 121-122 *infra*.

44. Cf. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.").

45. This is simply an observation based on the number of cases in the Supreme Court which have touched on land use issues. The more significant cases will be discussed under the present topic of this article. Other theories or constitutional bases have been suggested however. See text accompanying notes 151-154 *infra*.

46. 429 U.S. 252 (1977). As will be more fully developed, the treatment of cases under the equal protection and due process clauses seems to have developed along two separate lines. *Arlington's* analysis of the discrimination issue for purposes of the Fourteenth Amendment reflects the same analytical insensitivity to the impact and inherent tendencies of zoning that the Court first evidenced in zoning cases arising under the due process clause. Thus the confluence between the lines in terms of analytical approach.

cause the refusal to rezone had a racially discriminatory effect. The Court acknowledged this, recognizing that "[t]he impact of the Village's decision does arguably bear more heavily on racial minorities,<sup>47</sup> but held nevertheless that proof of a "discriminatory purpose" was necessary to establish a *constitutional* violation.<sup>48</sup>

Based on the state of the development of due process and equal protection as the lines came to merge in *Arlington* it can be seen that constitutional litigation does not offer ready solutions to the problem of suburban exclusion. There are two general approaches in explication of this view. One is that *Arlington* represents an unworkable approach to the issue *qua* the issue of controlling suburban impulses to exclude since applying the *Arlington* analysis will preclude reaching the bulk of suburban behavior which is likely to result in exclusion by race. That conclusion is demonstrable. The second is that *Arlington* is inconsistent either with the Court's equal protection line of cases on local land use control or with the due process line of cases dealing with local land use control, or both. Analysis will show, however, that *Arlington* is not necessarily inconsistent with the equal protection line of cases dealing with racial discrimination or with the due process line of Supreme Court cases dealing with control of local land use. But, conversely, it is demonstrable that *Arlington* was *not* precedentially compelled.<sup>49</sup>

*Arlington* is seen by the Supreme Court as based on *Washington v. Davis*,<sup>50</sup> in which the Court held that an employment test neutral on its face could not be found discriminatory, for *constitutional* purposes, merely by showing that the test disqualified a disproportionate number of minorities. It announced a constitutional test for proving invidious discrimination which requires a showing of "discriminatory purpose."<sup>51</sup> This was a giant step backwards in the employment discrimi-

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47. *Id.* at 269.

48. *Id.* at 270.

49. There is no doubt but that *Arlington* is properly regarded as a serious setback to advocates of a constitutional remedy to suburban exclusion. Also *Arlington* may be seen as mocking the result of *Hills v. Gautreaux*, 425 U.S. 284 (1976). In *Gautreaux* the Court sanctioned the placement of public housing in the suburbs of Chicago as a remedy for public housing segregation in the City of Chicago which segregation was created by actions of the City of Chicago with funds provided by the U.S. Department of Housing and Urban Development. *Arlington* involved a village which is a suburb of Chicago and is within the metropolitan housing area. If all, or any significant number of such suburbs are zoned similar to Arlington Heights, and refuse to cooperate with the Chicago Housing Authority, or refuse to participate in other federally-aided housing programs, patently the *Gautreaux* remedy will be a "cruel hoax", similar to that spoken of by Professor Berger. See Berger, *Homeownership for Lower Income Families: The 1968 Act's "Cruel Hoax"*, 2 CONN. L. REV. 30 (1969). The reason will be that the promise held out by *Gautreaux* will be impossible to realize. In that sense we will have the "illusion" which Professor McGee convincingly demonstrates. See, McGee, *Illusion and Contradiction in the Quest for a Desegregated Metropolis*, 1976 U. ILL. L.F. 948.

50. 426 U.S. 229 (1976).

51. *Id.* at 240. That "purpose", according to the Court, may be shown by "systematic" in-

nation area, especially when *Washington v. Davis* is juxtaposed with *Griggs v. Duke Power Co.*<sup>52</sup> *Griggs* held that regardless of the absence of an intent to discriminate, a test which operated to disqualify a disproportionate number of minorities was prohibited under Title VII of the Civil Rights Act of 1964, unless the test was demonstrably a reasonable measure of job related performance.<sup>53</sup> The foundation of *Griggs* is Congressional policy; of *Washington v. Davis*, the equal protection clause of the Constitution. I turn now to an analysis of Supreme Court doctrine based on equal protection and due process to outline the limits of their utility for solving the suburban exclusion problem.

### (a) Equal Protection

Analysis of racial discrimination cases under the equal protection clause reveals that before *Washington v. Davis* the Court had not rendered a specific decision on the threshold standards of proof for showing racial discrimination, and that not until *Arlington* was the threshold standards issue presented in the zoning or local land use context.

The question of threshold standards does not arise when the challenged action makes an explicit racial classification. Thus in *Brown v. Board of Education* and its progeny the Court was never called on to determine thresholds of proof because the classifications at issue were facial. The issue in *Brown*-type cases was whether the classifications were prohibited. Indeed, in this light the difference between *Brown* and *Plessey v. Ferguson*<sup>54</sup> is simply that *Brown* prohibited classifications *Plessey* permitted, at least as long as there existed "equality" between the classified groups.<sup>55</sup>

The only post-*Brown* education case to present the thresholds question was *Keyes v. School District No. 1*,<sup>56</sup> in which the Court avoided the issue. Because of findings of *de jure* discriminatory acts the Court was not required to rule, and has never ruled, on whether *de facto* school segregation violates the Fourteenth Amendment.<sup>57</sup> The Court

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vidiously discriminatory conduct, *id.* at 241, or "intent" to discriminate, *id.* at 240, or proof that action "bears more heavily on one race than another" in circumstances where the burden placed on the disadvantaged group "is very difficult to explain on nonracial grounds" which will permit an inference of "an invidious discriminatory purpose." *Id.* at 242.

52. 401 U.S. 424 (1971).

53. *Id.* at 436.

54. 163 U.S. 537 (1896).

55. It may be rightly pointed out that the Court took a flight from reality to suppose that separate between blacks and supremacy-minded whites who imposed the separation could ever be equal. At least history clearly belies the Court's judgment. See generally, R. KLUGER, *SIMPLE JUSTICE* (Alfred A. Knopf, New York 1976).

56. 413 U.S. 189 (1973).

57. This is simply another way of asking the question whether there is a constitutional right to a non-segregated education, or merely to an education not purposely caused to be segregated by the state or its agents. Put in this light one can see the parallel between the two prongs of that

differentiated *de jure* from *de facto* segregation by stating that *de jure* discrimination requires intent or purpose to segregate,<sup>58</sup> but that as for *de facto* segregation discriminatory intent or purpose is unproven.

The first case I have found in which the Court struck down a municipal ordinance as *violating the equal protection clause* because of racial classifications is *Yick Wo v. Hopkins*.<sup>59</sup> In *Yick Wo* the Court held that an ordinance neutral on its face could be applied in a manner which violated the equal protection clause. The ordinance in question regulated the operation of laundries, and required owners of any laundry not located in a brick structure to apply to the local government<sup>60</sup> for a permit to operate. After enactment of the ordinance, no Chinese person who applied for a permit was issued one, but all white persons who applied, save one, were granted permits. The Court held that Chinese incarcerated for violating the ordinance by operating laundries without permits must be discharged from custody.

Since the ordinance was facially neutral (i.e. unlike the laws struck down in *Brown* it did not within its very terms create racial classifications), a question is raised as to whether only the action taken under the ordinance was unconstitutional or whether by reason of that action, the ordinance itself was invalid. Analysis shows clearly the latter. The Chinese were ordered discharged. No injunction was sought or granted requiring henceforth that the ordinance be equally and non-discriminatorily applied. Accordingly, *Yick Wo* was not a case in which a law was merely invalid *as applied*, but one in which the law itself was held unconstitutional because its application clearly evinced discriminatory intent.<sup>61</sup>

The Court was not called on to address the question of discrimination thresholds, however, because the fact of the purposeful discrimina-

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inquiry and the *Griggs* versus *Washington v. Davis* results. *Griggs* finds that there exists a statutory right in blacks not to be disproportionately disqualified by a test which is not shown to be job related. *Washington v. Davis*, however, finds no such right under the Constitution, but merely a more limited right not to be disqualified by a test purposely designed to disqualify blacks. Thus there is no Constitutional right to a job related test. Similarly, up to the present time, the Court has refused to enunciate a right to a non-segregated education. Cf. *Milliken v. Bradley*, 418 U.S. 717 (1974).

58. 413 U.S. at 205, 208.

59. 118 U.S. 356 (1886).

60. "Local government" is here used as a generic description of governing local governmental bodies. In *Yick Wo* the local governmental body was called the Board of Supervisors of the City of San Francisco.

61. It might be pointed out that since the ordinance was facially neutral and was merely applied in a way that resulted in the denial of permits to Chinese persons the case arguably is one in which an "effects test" was in fact applied. However, since the Court in *Washington v. Davis* denied that it had "embraced" an effects test, see text accompanying note 137 *infra*, for analytical purposes and to avoid charging the court with a lack of candor, I have chosen to give *Yick Wo* an interpretation that avoids raising an issue of the Court's candor.

tory application of the law was admitted.<sup>62</sup> The analytical methodology of the Court was, in effect, to impute an intent to discriminate to the ordinance, i.e. to treat the post-enactment invidious application as demonstrating the law's invidious intent.

Discussing how the facially neutral ordinance could be found "inoperative and void" the Court reasoned:

This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass on the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to *warrant and require the conclusion*, that, whatever may have been the intent of the ordinances as adopted, *they are applied by the public authorities charged with their administration*, and thus representing the State itself, *with a mind so unequal and oppressive as to amount to a practical denial by the State of . . . equal protection of the laws*. . . Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.<sup>63</sup>

Given the absence of any reason to justify the admitted discrimination in application, the ordinance could not stand. Without such justification the ordinance was clearly beyond all thresholds that might be examined to determine whether prohibited discrimination was present.

There was a hiatus of over eighty years before the next decision in the equal protection line of cases dealing with local land use issues. This case, *Hunter v. Erickson*,<sup>64</sup> involved the validity of a provision of a local government's charter which required that any ordinance regulating real property transactions on the basis of race, color, religion, national origin or ancestry be submitted to a referendum before the ordinance could become effective. Any such existing ordinance was repealed until approved in a referendum.<sup>65</sup> The Court declared the charter provision invalid because it classified ordinances on racial grounds, and thus disadvantaged those who would benefit from ordinances prohibiting the discrimination. Since the charter provision, as

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62. 118 U.S. at 374.

63. *Id.* at 373-74 (emphasis added).

64. 393 U.S. 385 (1969).

65. *Id.* at 387.

thus interpreted, contained a facial classification, the question of discrimination thresholds was not presented.

*James v. Valtierra*<sup>66</sup> came next. In upholding a mandatory referendum requirement for any "low rent housing project,"<sup>67</sup> the Court emphasized that the referendum requirement contained no facial classification touching upon race, and noted without elaboration that "[T]he record here [will] not support any claim that a law seemingly neutral on its face is *in fact* aimed at a racial minority."<sup>68</sup>

Finally there is *Arlington*.<sup>69</sup> It is instructive to observe that of the four directly traceable equal protection, land use and racial discrimination cases, the two in which violations of the constitution have been found are facial classifications: explicit classifications in the case of *Hunter*,<sup>70</sup> and action tantamount to such a classification, or perhaps analytically a "constructive" classification, in *Yick Wo*.<sup>71</sup> Since *Brown*<sup>72</sup> and its progeny deal only with facial or *de jure* classifications

66. 402 U.S. 137 (1971).

67. The referendum provision required a favorable majority vote of the qualified electors before any "low rent housing project" could be developed, constructed, or acquired in any city, town, or county. It defined "low rent housing project" as any dwellings "for persons of low income financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance. . . ." It defined "persons of low income" as any "persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding." *Id.* at 139, n.2.

That this provision evidenced an animus against poor persons is too clear for dispute. That the Court treated it as evidencing "devotion to democracy", *supra* note 22, betrays a marked insensitivity to the realities involved. That so vicious a provision was treated as something benign and harmless should shock the conscience of a fair-minded sensitive person.

68. 402 U.S. at 141 (emphasis added). Given the Court's reasoning, it is unclear whether it would have made any difference if the occupants of low rent housing consisted of a substantial number of persons of a racial minority, and that such persons would have been excluded by the operation of the referendum provision, at least so long as the exclusion was not as total as that in *Yick Wo*. See text accompanying notes 59-63 *supra*. After *Arlington*, see text accompanying notes 143-146 *infra*, presumably the exclusion of a substantial number of minority persons would not make out a Constitutional violation, so long as some reasons could be advanced which could justify the challenged conduct on non-racial grounds.

In *Valtierra* the Court accepted the highly speculative argument that the referendum gave local people "a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues," 402 U.S. at 143. While the statement may have been accurate as for public housing, see 42 U.S.C.A. § 1410(h) (1969) as amended 42 U.S.C.A. § 1437d(d) (Supp. 1977), it clearly was not necessarily accurate as to other programs. See, e.g., 12 U.S.C.A. § 1715z-1 (1969) as amended 12 U.S.C.A. § 1715z-1 (Supp. 1977). At all events, the statement ignores the question of whether any expenditures required for services to low rent housing would be significantly greater than those for private housing which was not subject to the referendum requirement. Cf. R. MACE & W. WICKER, DO SINGLE FAMILY HOMES PAY THEIR WAY? A COMPARATIVE ANALYSIS OF COSTS AND REVENUES FOR PUBLIC SERVICES, (Urban Land Institute, Wash. D.C., 1968) (Research Monograph No. 15).

69. 429 U.S. 252 (1977).

70. 393 U.S. 385 (1969).

71. 118 U.S. 356 (1886).

72. 347 U.S. 483 (1954).

by race (at least with the *Keyes*<sup>73</sup> refusal to address the *de facto* issue), it appears rather plain that the Supreme Court has not engaged in expansive constitutional policy-making in approaching the question of what constitutes prohibited racial discrimination by local land use action under the equal protection clause.

### (b) Due Process

Analysis of due process cases dealing with local land use issues similarly yields the conclusion that the Supreme Court has not engaged in expansive policy-making. *Buchanan v. Warley*, briefly discussed earlier as a case in the due process line,<sup>74</sup> can be analyzed as something other than a due process case, notwithstanding that its rationale is stated by the Court to be due process. Recall that in *Buchanan*, the ordinance, in effect, restricted sale/purchase rights by racial classifications. The Court held, at the instance of a white suitor, that the ordinance was invalid because it restricted the sale of city lots between black and white persons to lots on blocks in which each respective race occupied the greater number of residences. A white seller of a lot sued a black purchaser for specific performance of a contract which was conditioned on the purchaser's being able to occupy the lot in question as a residence. The purchaser pleaded the ordinance as a defense alleging that he was black, and that whites occupied the majority of residences on the block. The seller countered that the ordinance was invalid. The Court agreed, holding that it violated the seller's due process right to alienate his property.

*Buchanan*, in the hey-day of *Plessey*,<sup>75</sup> was clearly a difficult case,<sup>76</sup> and required a more substantial rationale<sup>77</sup> than it appears the Court would have thought necessary post-*Brown*.<sup>78</sup> This conclusion suggests a reinterpretation of *Buchanan* to the equal protection line of prohibited facial classifications assumed to be prohibited by *Brown*.<sup>79</sup> However, the opinion in *Buchanan* remains pertinent to this discussion because the Court went out of its way to pay homage to local land use

73. 413 U.S. 189 (1973).

74. See note 39 *supra* and accompanying text.

75. 163 U.S. 537 (1896).

76. It had some of the earmarks of "friendly litigation." For example the seller permitted the buyer to insert a clause making the sale conditional upon the buyer's right to occupy the premises as a personal residence. 245 U.S. at 60-70. Nevertheless, after argument of the case, the Court restored the case to the docket, and it was reargued. *Id.* at 60.

77. A good deal of the Court's discussion of the Fourteenth Amendment and the provisions of the statute now codified as 42 U.S.C.A. § 1982 in the opinion, in light of the Court's final rationale on due process grounds, is clearly dictum.

78. See Pollock, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PENN. L. REV. 1, 10 (1959).

79. See text accompanying notes 30-36 *supra*.



authority: "The authority of the State [acting through a local government] to pass laws [ordinances] in the exercise of the police power . . . is very broad. . . ." <sup>80</sup>

The Court in its first view of comprehensive zoning,<sup>81</sup> in *Euclid v. Ambler*,<sup>82</sup> clearly affirmed that it was not inclined, in general, to conduct searching examinations of local land use controls—a view it had intimated in *Buchanan*. In *Euclid* a landowner sued to enjoin enforcement of a comprehensive ordinance imposing certain restrictions on the use of his land.<sup>83</sup> He claimed violations of the equal protection and due process clauses. The Court rejected the claims altogether, holding that the general restrictions on uses were not unreasonable or confiscatory. The Court's discussion does not delineate any differences between the equal protection and due process analyses. Perhaps this is because a mere regulatory classification pursuant to the police power requires no more in the way of justification under the equal protection test than the due process test for determining whether a land use restriction is permissible.<sup>84</sup> More likely, however, the Court's framing of the issue in terms of the landowner's "right of property"<sup>85</sup> protected under the due process clause reveals the true basis of the Court's decision, with the equal protection allegation treated *sub silentio* or ignored.<sup>86</sup>

80. 245 U.S. at 74.

81. See generally, HAGMAN § 28, *supra* note 40.

82. 272 U.S. 365 (1926).

83. Essentially, the landowner claimed that the usage limitations imposed by the ordinance on his lands diminished their marketability for industrial and commercial purposes and thus reduced their value substantially.

84. Generally speaking, due process challenges to zoning assert improper use of the police power. To succeed it must be shown that the challenged action bears no substantial relation to the public health, safety, morals or general welfare. This is, of course, the *Euclid* standard. 272 U.S. at 395. Under the equal protection clause a mere regulatory classification will be sustained against attack if the classification bears a rational relationship to any permissible state objective, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961). Analytically the two standards seem to amount to the same thing.

85. 272 U.S. at 386.

86. The District Court's decision which was reversed had not relied on the equal protection clause. *Ambler Realty Co. v. Village of Euclid*, 297 F. 307 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

In the context of a discussion of suburban exclusion the lower court's insightful analysis of the object of the ordinance is pregnant with poignance:

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. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service. Aside from contributing to these results and furthering such class tenden-

As if to presage an analysis that would be adopted by *Arlington*<sup>87</sup> over fifty years later for the equal protection line of cases in the land use area,<sup>88</sup> the Court in *Euclid* found the landowner's allegations that a 69-acre tract was reduced in value from \$10,000 per acre to \$2,500 per acre so analytically inconsequential as to necessitate no explicit balancing.<sup>89</sup> Also the Court betrayed acute insensitivity to the exclusionary and segregative impacts land use ordinances, by definition, are designed to have, with particular reference to multifamily development. On this latter point the Court opined:

With particular reference to apartment houses, it is pointed out that the 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 unobjectionable but highly desirable, come very near to being nuisances.<sup>90</sup>

Given this rather unsympathetic due process analysis, it seems clear that a fundamental shift in the Court's thinking would be required to permit the Court to undertake a doctrinally developmental role leading to constitutional doctrines upon which to mandate an inclusionary suburbia. The Court's later pronouncements in the due process line are far from that.

*Euclid*, as noted, involved a broadside challenge to the ordinance on its face, and the Court did not reach the question of any discrete applications of the ordinance to the landowner. In short order *Nectow v.*

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cies, the ordinance has also an esthetic purpose; that is to say, to make this village develop into a city along lines now conceived by the village council to be attractive and beautiful. 297 F. at 316.

87. 429 U.S. 252 (1977).

88. *Id.* at 269.

89. 272 U.S. at 384.

90. *Id.* at 394-95.

*City of Cambridge*<sup>91</sup> presented the issue of particular applications. Here, the Court, paying homage to the principles of a limited judicial role under the due process clause, stated that the local zoning ordinance restrictions would be upheld unless it could be demonstrated that the restrictions had "no foundation in reason" and constituted "a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."<sup>92</sup> Recognizing that the restrictions placed on the land in question were *not* indispensable to the general plan of the ordinance, the Court nevertheless thought it would not be warranted in striking down the ordinance on that basis. But based on the special master's additional findings that the restrictions also did *not* promote the health, safety, convenience and general welfare of the city's inhabitants, *and* that the invasion upon the landowner's interest was "serious and highly injurious" the restrictions were held to violate the landowner's due process rights.<sup>93</sup>

Although the Court considered other due process cases in the following four decades,<sup>94</sup> the next case to raise significant new issues was *Village of Belle Terre v. Boraas*.<sup>95</sup> The case is difficult to classify as in the equal protection or due process line. The Court's rationale is obscure. Analytically, the case raised issues of due process rights of a landowner, and in part was treated as such by the Court, although the interests of the landowner's tenants arguably presented equal protection issues. *Belle Terre* is discussed here in the due process line for two principal reasons. First, because major reliance is placed on the review doctrine announced in *Euclid*, and second, because the Court in a subsequent case appears to treat it as a due process case.<sup>96</sup>

The Village adopted an ordinance restricting land uses to one-family dwellings, and defined family, with an exception not pertinent to this

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91. 277 U.S. 183 (1928).

92. *Id.* at 187-88.

93. *Id.* at 188.

94. *Zahn v. Board of Public Works*, 274 U.S. 325 (1926) (Residential use zoning ordinance upheld; no showing of clearly "unreasonable, arbitrary, or unequal exercise of power."); *Gorieb v. Fox*, 274 U.S. 603 (1926) (Building line ordinance upheld; the Court found that the ordinance bore some relation to the public welfare and was not clearly arbitrary or unreasonable.); *Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928) (Permit to expand old folks home denied when builder did not get written consent of nearby property owners as required by city ordinance. Held that the power to grant a permit was arbitrary and bore no substantial relation to the public health, safety, morals, or general welfare, and was therefore in violation of due process.); *Standard Oil Co. v. Marysville*, 279 U.S. 582 (1928) (Ordinance required gas storage tanks to be buried underground. Held that the ordinance was a valid exercise of the police power in the interest of public safety, despite hardship to complainant.); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (Ordinance passed making continuation of sand and gravel pit mining operation unfeasible. Held that the ordinance was a reasonable exercise of the state's police power in the interest of public safety).

95. 416 U.S. 1 (1975).

96. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

discussion, to prohibit persons not related by blood, adoption or marriage from living and cooking together as a single unit. The owner of a dwelling occupied by several tenants who were unrelated, together with the tenants in that dwelling, sought to have the ordinance declared invalid.

Purporting to apply *Euclid's* principles, the Court upheld the ordinance as a permissible use of the municipality's police power, presumably because the Court thought the restrictions did have a rational relationship to permissible objectives.<sup>97</sup>

Recently, in *Moore v. City of East Cleveland*,<sup>98</sup> the Court in a plurality opinion,<sup>99</sup> struck down an ordinance which defined family in a more restrictive way than that of the Village of Belle Terre.<sup>100</sup> The landowner lived with her son and two grandsons. One grandson did not fall within the ordinance's definition of "family" and thus the landowner was in violation of the ordinance. Looking to both *Euclid* and *Belle Terre*, the Court held that the ordinance was not entitled to the usual measure of deference accorded to state legislation because it intruded into freedom of personal choice in matters of family life which the Court saw as protected "liberty" under the due process clause. It should be noted that, not unlike *Buchanan v. Warley*, the ordinance's classifications were facial, thus admitting no doubt as to either its impact or purpose.

Thus the due process cases governing review of municipal land use ordinances impose, at best, a relaxed standard, becoming a bit more stringent in only two instances: (1) when the challenged restriction in the Court's view fails to promote something so ambiguous as the "public, health, safety, convenience or general welfare" and is highly injurious to a concrete interest of a landowner, and (2) when the challenged restriction appears on the face of the ordinance and intrudes upon a discrete interest the Court finds to be independently protected under some constitutional provision.

### 3. Other Role Restriction Cases: The Routes Not Taken

Analysis of the equal protection and due process lines more than suggests that the Court had no tradition of, nor familiar doctrine for,

97. 416 U.S. at 7, 8.

98. 431 U.S. 494 (1977). Between *Belle Terre* and *Moore* the Court decided *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), but it adds nothing to the analysis.

99. The Court's opinion was joined by four justices, with Mr. Justice Stevens concurring in the judgment on separate grounds. Four justices dissented.

100. 431 U.S. at 496, n.2 for the terms of the ordinance. For our purposes suffice it to say that the ordinance limited occupancy of dwelling units to members of a "family" and contained various definitions of family none of which permitted a woman to live with her son, and two grandsons, if one grandson was not the child of the son living with her!

confronting the propositions it would have had to embrace to sustain the claim of discrimination advanced in *Arlington*.<sup>101</sup> Against a severely restrained review tendency, clearly established in both the equal protection and the due process precedents, it is lamentable, but surely not surprising, that the Court was unwilling to devise the tools necessary to mandate inclusionary policies or at least prohibit exclusionary ones. But consistent with its reluctance to devise tools to mandate inclusion, it also can be observed that on several occasions the Court adopted restrictive doctrines which effectively foreclosed any opportunity for a doctrinally developmental role for the Court.

In the 1960's under the Warren Court it might have been argued that housing was a "fundamental right" in the constitutional sense. As such state or local conduct (including ordinances) impinging on housing interests,<sup>102</sup> under traditional analysis, would be called on to meet a more exacting "scrutiny," and to be justified by a showing of "compelling reasons." Then, in instances of ordinances with impacts bearing more heavily on persons by reason of their housing need or housing status, cases like *Arlington*, *Valtierra* and others<sup>103</sup> would have been subject to a different analytical approach not permitting the Court's attitude of "abdication and abstention"<sup>104</sup> otherwise evidenced in the Court's examination of local land use controls.

The entreaty to recognize housing as a fundamental right in the constitutional sense was emphatically declined by the Burger Court in *Lindsey v. Normet*:<sup>105</sup> "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to

101. Though not noted in the *Arlington* case (an equal protection case) presumably because the due process and equal protection decisional lines were not seen as merging, Mr. Justice Stevens noted in the *Moore* case (a due process case) that there was a sparseness of Supreme Court precedent on zoning issues: "The case-by-case development of the constitutional limits on the zoning power has not . . . taken place in this Court." *Id.* at 1944 (Stevens, J. concurring in the judgment).

102. For example, provisions like those in *Valtierra*, see note 67 *supra*.

103. *E.g. Belle Terre*, 416 U.S. 1 (1975), and *Moore*, 431 U.S. 494 (1977).

104. This is the apt description of the Court's attitude in McGee, *Illusion and Contradiction in the Quest for a Desegregated Metropolis*, 1976 U. ILL. L.F. 948.

105. 405 U.S. 56 (1972). The Plaintiffs challenged the State of Oregon's Forcible Entry and Detainer statute under the equal protection clause. That statute, *inter alia*, provided expedited procedures to landlords seeking to evict tenants and limited the triable issues to whether the grounds asserted for eviction in the landlord's complaint were true. Thus it did not permit tenants to assert any affirmative defenses in the landlord's action for possession. The Plaintiffs who were tenants urged that housing was a "fundamental right" for constitutional purposes and the state's singling out of landlord-tenant actions for treatment different from other actions had to be justified under the "compelling interest" test rather than the "rational basis" test. The Court held that housing was not a fundamental right.

dwellings of a particular quality. . . ."<sup>106</sup> In this cryptic and overly simplistic view the Court made a sharp turn to the restrictive route. The broad overtones of the Court's statements, of course, are indisputable. These overtones, however, do not rationalize a result which weighs burdens affecting housing needs on the same analytical scale as a law imposing a special tax on stores that give trading stamps.<sup>107</sup> Moreover, *Lindsey* did not, as the Court implied, involve the claim of a constitutional "right of access to dwellings."<sup>108</sup>

Perhaps a less mechanical equal protection analysis ought to have been developed, thus relieving the Court of the perceived, but unarticulated, dilemma of choosing between a "mere rationality" or "compelling justifications" standard.<sup>109</sup> Housing burdens may well need to be subjected to something more than laissez-faire review without going all the way to strict scrutiny. The traditional mere rationality standard would sustain all but the most outrageous classifications, while the traditional strict scrutiny standard would strike down virtually all classifications.<sup>110</sup>

This observation is not meant to suggest that results would have come easy regardless of the test employed.<sup>111</sup> There may indeed have been found a principled difference between the forcible entry and detainer statute of the State of Oregon involved in *Lindsey v. Normet* and the exclusionary land use controls in cases like *Arlington*, permitting the Court to uphold the former but not the latter. As the Court noted in *Lindsey v. Normet* the Oregon law there involved applied to all tenants: "Rich and poor, commercial and noncommercial."<sup>112</sup> Restrictive land use controls are quite different, at least the case of those that exclude the entire class of lower-income housing consumer, or the entire range of federal programs designed, by definition, to aid lower income persons to secure decent, safe and sanitary housing.

The restrictive route in view, the Court set out to pursue it, and did. In *Lindsey v. Normet* the Court had obliquely noted that the range of interests deemed constitutionally fundamental might not be subject to evolution,<sup>113</sup> but that, unlike certain constitutional protections,<sup>114</sup> fun-

106. *Id.* at 74.

107. *See* *Rast v. Van Deman & Lewis*, 240 U.S. 342 (1916). *See generally*, *McGowan v. Maryland*, 366 U.S. 420 (1961).

108. *See* note 105 *supra*.

109. *See generally*, Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

110. *Cf. id.* at 19.

111. *See id.*

112. 405 U.S. at 56.

113. *See* text accompanying note 106 *supra*.

114. *E.g.* due process, *Moore v. City of East Cleveland*, 431 U.S. at 499 citing approvingly Mr. Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) in which he said the content of due process was referenced to the tradition of the country and concluded: "that tradition is a

damental rights, purportedly, were bound to a literal interpretation of the Constitution's text. In short order, that intimation was clearly stated in *San Antonio School District v. Rodriguez*.<sup>115</sup> The Court held that fundamental rights for purposes of the equal protection clause are not deduced from "comparisons of the relative societal significance" of the interest asserted, but must be "a right . . . explicitly or implicitly guaranteed by the Constitution."<sup>116</sup> Discovering what is "implicitly" guaranteed by the Constitution hardly promises to constitute a more precise limitation on the Court's judgmental choices, necessary to every judicial decision, than would be the much maligned notion that under an evolving standard the Court could "pick out particular human activities, characterize them as 'fundamental,' and give them added protection."<sup>117</sup> It is doubtful that the Court's "tied-to-the-Constitution" standard is any more promising as a control on judicial judgments than the one rejected. Moreover, the literalistic approach restricts the scope of relevant inquiry to a particular Justice's interpretation of what is "implicitly" protected by the Constitution—a matter not subject to empirical constraint. The Court's approach does not promise greater success in the concededly praiseworthy pursuit of principled decisionmaking standards. Regrettably, it acutely restricts relevant decisional factors since it excludes all those considerations which might be instructive, but which are founded upon society's contemporary values.

In addition to rigidifying<sup>118</sup> the equal protection analysis, *Rodriguez* went a further distance down the restrictive route. It established that only distinctions based on impecuniness and, apparently, resulting in total deprivation of a benefit triggered the "suspect classification" test, but that graduated economic status distinctions, presumably without regard to the magnitude or relative degree of deprivation attendant to them, do not trigger rigorous scrutiny.<sup>119</sup>

Thus, what *Valtierra*, on analysis, had suggested,<sup>120</sup> *Rodriguez* confirmed: governmental actions which impact more heavily on a relatively deprived economic class do not require more than a rational basis in justification. This confirmation, thus, had implications for *Arlington*-type cases, and foretold the likely futility of seeking to invalidate, on constitutional grounds, ordinances which by their operation

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living thing;" and the prohibition on cruel and unusual punishment, *Furman v. Georgia*, 408 U.S. 238 (1972) ("evolving standards of decency").

115. 411 U.S. 1 (1972).

116. *Id.* at 33.

117. *See Shapiro v. Thompson*, 394 U.S. 618, 642 (1969).

118. This is the characterization Mr. Justice Marshall put on the Court's approach. 411 U.S. at 98 (Marshall, J. dissenting).

119. *Id.* at 18-29.

120. 402 U.S. 137 (1971).

would exclude the lower economic class unable to afford, for example, single family homes in localities restricted to single family homes, or unable to demand available housing without the benefit of housing subsidies (in some form) in localities that refused to participate in federal programs of housing assistance.

Having established a doctrinal predilection to a restrictive course, the Court next set about closing its doors to a large part of the class of persons who might seek to enter the adjudicational portal. That case was *Warth v. Seldin*<sup>121</sup> in which the Court held that none of several classes of plaintiffs had standing to complain of alleged purposeful exclusion by economic class—a class in which racial minorities were disproportionately represented. As to persons who alleged their effective exclusion by the conduct complained of the Court found no “injury in fact,” apparently because these persons could not show that a decision in their favor would produce housing for them. An association of builders was denied standing because the Court found that it suffered no injury to itself by the conduct complained of, although it had sought and been denied permits to build houses in the cost range the individual plaintiffs sought to have constructed. The Court’s door closing efforts prompted Justice Brennan, joined by Justices Marshall and White to say: “In effect, the Court tells the low-income-minority and building company plaintiffs they will not be permitted to prove what they have alleged—that they could and would build and live in the town if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit.”<sup>122</sup>

#### 4. A Critical Constitutional Synthesis

Finally, *Washington v. Davis*<sup>123</sup> further restricted the scope of equal protection, and the Court’s potential role in the suburban exclusion area, by adopting a purpose or intent threshold for determining discrimination. In so doing, the Court disapproved lower Court cases which, it conceded, “impressively demonstrate that there is another side to the issue”<sup>124</sup> and, in exclusive reliance on cases which did not present discrimination threshold issues, disapproved an “effects” test.

In the cases, to be discussed, upon which *Washington v. Davis* relies, all the Court had decided was that the threshold for discrimination had been crossed in instances where the evidence showed “intent,” or “pur-

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121. 422 U.S. 490 (1975).

122. *Id.* at 523.

123. *Supra* note 50.

124. *Id.* at 245.



pose and effect."<sup>125</sup> However, not until *Washington v. Davis* was the Court called on to demarcate the minimum threshold showing required. Thus, the Court could have consistently held that a showing of a racially disproportionate impact established the minimum requirement for a prima facie violation of the equal protection clause. Mr. Justice White's opinion, which purports to demonstrate the contrary, will not withstand analysis.

The reference to the cases dealing with the exclusion of blacks from juries<sup>126</sup> is not apt. The substance of the constitutional right in the jury cases is a right in a black person (and others) not to be tried by a jury from which blacks have been purposefully or deliberately excluded, but there is no right to a jury containing blacks in a particular case.<sup>127</sup> The very referent in jury cases for determining whether purposeful exclusion has occurred is the population of the relevant geographic unit from which the jury is drawn.<sup>128</sup> Accordingly, it may be assumed that blacks in random proportion to their eligibility in the population will be called for jury duty. Any particular person would thus have a chance in a particular case of a jury including all relevant groups in the population.<sup>129</sup>

Accordingly, there is no way an effects test could ever arise in the jury cases. *A fortiori* such a test could not have been precluded by the jury cases. The jury cases therefore, in searching for evidence to show purposeful or systematic exclusion, can hardly be authority for mandating an intent or purpose test when the issue is whether the imposition of burdens on blacks in employment or housing violates the equal protection clause.

Of course, a jury selection method which would have the effect of excluding blacks would be probative, perhaps, as to whether the purpose for adopting the selection method was to exclude blacks. But there could be no issue as to whether a constitutional violation was made out by the effect alone in light of the nature of the constitutional right in the jury cases.

At least the jury cases did not compel the view that purpose or intent is required to make out a violation when the measure of the injury is the effect the challenged action has. Thus in exclusionary zoning cases it is possible that there could be a constitutional violation when no intent to exclude is present. A constitutional injury in the jury cases is

125. See text accompanying notes 126-136 *infra*.

126. See cases cited by the Court, 426 U.S. at 241, 242.

127. *Swain v. Alabama*, 380 U.S. 202, 203-04 (1965).

128. *Strauder v. West Virginia*, 100 U.S. 303, 308-09 (1879).

129. Distinguish the question of what degree of disparity between representation on juries and representation in the relevant population it is necessary to show to prove purposeful or deliberate exclusion of persons from jury service.

not possible without intent or purpose to exclude, because only purposeful exclusion is subject to the constitutional prohibition.

The school desegregation cases, apart from *Keyes*, simply do not raise the issue of discrimination thresholds, as discussed earlier.<sup>130</sup> It is therefore very difficult to see how they could do any more than confirm that the issue was open. It is true that in *Keyes* the Court pointed out that *de jure* segregation requires purpose or intent.<sup>131</sup> But finding *de jure* segregation present, the Court had no occasion to consider *de facto* segregation which would have involved discrimination thresholds.<sup>132</sup>

One of the voting boundaries cases, *Gomillion v. Lightfoot*,<sup>133</sup> clearly raised no issue of discrimination thresholds. As to *Gomillion*, Mr. Justice Stevens rightly pointed out in *Washington v. Davis* that with facts showing disproportion as dramatic as was present there, it really would make no difference what the standard for discrimination thresholds was.<sup>134</sup> This analysis means that the facts so clearly established intent or purpose that the threshold was clearly crossed and did not need to be developed. This being so, the cases are hardly authority for much more than the proposition that when intent or purpose to discriminate is shown a *prima facie* case of an equal protection violation is made out. It does not necessarily follow that failure to show intent or purpose cannot make out a case. Thus the cases relied upon cannot be authority for requiring purpose or intent to establish a *prima facie* violation.

That leaves *Wright v. Rockefeller*.<sup>135</sup> Arguably, in *Wright*, the facts made out simply did not show that the claimed irregularities resulted other than fortuitously and thus were so far short of any minimum

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130. See text accompanying notes 54-58 *supra*.

131. 413 U.S. at 205, 208.

132. *Id.* at 206-07.

133. 364 U.S. 339 (1960). In *Gomillion* Plaintiffs claimed that the Alabama State Legislature had reshaped a city's boundaries so as to eliminate 99% of its black voters. The Supreme Court reversed the District Court's dismissal, finding that the allegations, if proven, would establish the Act's "inevitable effect" of depriving blacks of their municipal franchise on account of race, contrary to the Fifteenth Amendment. The Court held that a state's power to alter its political subdivisions is not insulated from federal judicial review when that State power is being used as an instrument to circumvent Fifteenth Amendment voting rights through affirmative legislative action.

134. 413 U.S. at 254 (Stevens, J. concurring). The same was true of *Yick Wo* which he also pointed out. *Id.* It can be argued that like *Yick Wo* and in contradiction to the Court's statement that it had not embraced an "effects test," *Gomillion* analytically does employ an "effects" test. See note 61 *supra*.

135. 376 U.S. 52 (1964). In *Wright* the District Court sustained the New York State Legislature's reapportionment of four congressional districts which diminished black and Puerto Rican voting strength in three districts by concentrating it in the fourth. The Supreme Court affirmed, holding that where there are several plausible conflicting inferences, evidence of racial considerations cannot be elevated to *prima facie* proof that the Legislature was either motivated by racial considerations or in fact drew the districts on racial lines. What must be shown is that such a change is the "product of a state contrivance to segregate."

threshold which might be established that the determination of where the threshold lay could be avoided.<sup>136</sup> Moreover, the drawing of lines in *Wright* did not place burdens on anyone nor remove anyone from participation, as it did in *Gomillion*, nor restrict privileges, as the challenged action did in *Yick Wo*. The lines simply changed the district in which voting participation would take place, but did not affect the right to participate. It is at least difficult to maintain that *Wright* compels the proposition that action which *does* impose burdens (like zoning which precludes housing for lower economic classes) or which *does* impose restrictions (like zoning or land use controls with racially discriminatory effects) will be sustained so long as the restrictions or burdens are not imposed with a racial purpose or intent.

The *Washington v. Davis* analysis is inadequate from several perspectives. It purports to demonstrate that the result was precedentially compelled. But the force of the cases relied on was considerably less than that. Indeed the Court initially stated: "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially discriminatory impact."<sup>137</sup> That the Court had not "embraced" an effects test, when it was unnecessary to address that issue directly in prior cases, did not justify the Court's failure to analyze independently the issue of whether an "effects" or the more restrictive "intent or purpose" test best effectuated the "central purpose"<sup>138</sup> of the equal protection clause. The cases plainly had never settled the issue of whether a state's knowing use of official criteria which would inevitably produce adverse consequences to an identified population segment constituted a violation of equal protection.

The second inadequacy of the intent test is the Court's failure to analyze the consequences of its "intent or purpose" test for suburban exclusion issues in light of the relevant history of the "central purpose" of the equal protection clause. While such an analysis might not have proved dispositive in either direction,<sup>139</sup> the Court, nevertheless, ought to have undertaken a more critical approach in its decision,<sup>140</sup> espe-

136. This is exactly the reverse of *Yick Wo* and *Gomillion*.

137. 413 U.S. at 239.

138. *Id.*

139. *Cf. Slaughter-House Cases*, 83 U.S. 36 (1872); *Buchanan v. Warley*, 245 U.S. 60, 75 (1917).

140. The Court's analysis is highly one-sided. The Court speculates, in a rather abstract manner, as to the potentially far reaching consequences of an effects test. 413 U.S. at 247, 248. It does not even engage in speculation as to the potentially "far reaching" consequences of its intent and purpose test.

Suffice it to say that the numerous lower courts employing an effects test had not been swayed by the "parade of horrors," *id.* at 244, n.12, that the Court worries over. *Id.* at 247-48.

On its facts *Washington v. Davis* could have had very little impact outside the plaintiffs involved and some number, perhaps, similarly situated. Initiated in 1970, the *Washington v. Davis* plain-

cially since, as previously noted,<sup>141</sup> it recognized that there was an impressive demonstration that there existed "another side to the issue."

The third inadequacy of the intent test is that the Court underestimates the difficulty of ascertaining the intent or purpose of official action. This determination deals with the subjective area of motivation, and will, presumably, require ascertaining that the "bad" motivation in fact influenced the official action. This determination will render all but the most egregious non-facial classification cases extremely difficult to prove. The risks of failure of proof will be borne by litigants challenging sophisticated and subtle official action with discriminatory effects. The Supreme Court, having restricted the Constitution to comparatively easy cases, is not going to have a positive role in suburban exclusion cases.

The fourth problem presented by the subjective intent test relates to the standard of proof for using objective criteria to raise inferences of subjective motive. The Court in *Washington v. Davis* recognized this point: "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant [objective?] facts, including the fact, if it is true, that the law bears more heavily on one race than another."<sup>142</sup> In *Arlington* the Court either missed this point, or applied it in a way that makes it meaningless. Having reviewed the evidence, the Court admitted that "[t]he impact of the Village's decision does arguably fall more heavily on racial minorities."<sup>143</sup> Going on to cite, *inter alia*, the Village's commitment to single family homes as its dominant residential land use; the rejection of the rezoning request "according to the usual procedures"; and "statements" of the decisionmakers which focused "almost exclusively on the zoning aspects" of the request,<sup>144</sup> the Court held that the plaintiffs "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision."<sup>145</sup>

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tiffs were not covered by the 1972 amendments to Title VII of the 1964 Civil Rights Act, which brought public employment under its coverage. 42 U.S.C. § 2000e-16 (Supp. II, 1972), *amending* 42 U.S.C. § 2000e (1964).

141. 426 U.S. at 245.

142. 413 U.S. at 242.

143. 429 U.S. at 266.

144. *Id.* at 269-70.

145. *Id.* at 270. In a footnote, the Court's further explication of the holding is even more troublesome. The Court explained that even if "discrimination" had been shown to be "a motivating factor," that would only have shifted the burden to the Village to prove that the same decision would have resulted even had the impermissible purpose not been considered. In theory that is perhaps sound causation law. *E.g. Tennessee Trailways, Inc. v. Ervin*, 222 Tenn. 523, 438 S.W.2d 733 (1969) (Driving in excess of lawful speed limit is not cause-in-fact of accident when accident would have occurred even if defendant had not been speeding). But separating out causes in the subjective intent area of the motivation of a local government is quite unlike an automobile case, and the Court should recognize the practically insurmountable barrier the "causation" test will be in the realm of suburban exclusion litigation. There will likely be multiple

Unusualness of procedures may be revealing of motive; the contrary, however, does not necessarily follow. The expectation that statements of decisionmakers would reveal racially discriminatory motive in a case of sophisticated, subtle official action to any significant degree, is so unrealistic as to warrant no further comment. To turn a case on such an expectation, or to premise results on the dunderheadedness of local officials hardly makes for a sound constitutional approach.

That leaves the commitment to single family land uses to be considered. It must be emphasized that generally the law does not countenance failures of proof of intent, simply because of a plaintiff's inability to demonstrate subjective intent. In other areas the rule has been developed that a person intends the natural and probable consequences of his conscious conduct.<sup>146</sup> If constitutional litigation requires a different rule for proving intent, the Court at least should recognize an obligation to explain why. The Court did not do that in either *Washington v. Davis* or *Arlington*.

The fifth significant problem with the intent test is that as applied in *Arlington* it flies in the face of common sense and documented empirical facts. The existence of racial discrimination in suburban housing is so well-documented<sup>147</sup> that the Court would probably be justified in taking judicial notice of that general phenomenon.<sup>148</sup> Given that generally in the law a person is presumed to intend the natural and probable consequences of his conduct, and given that the natural and probable, indeed the inevitable, consequence of restrictive zoning and land use is to effect the exclusion of black persons and lower-income classes, the reasoning of the *Arlington* decision is unconvincing, and the result borders on the incredible.<sup>149</sup>

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motivation in every case of land use actions challenged as discriminatory. The multiple motivation problem will likely preclude any realistic attempt to isolate the impact of the improper motivation.

146. *E.g.*, J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 189 (1940) (criminal intent); W. PROSSER, THE LAW OF TORTS, 31-32 (4th ed. 1971) (tortious intent); N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 228 (1963) (labor law); *Monroe v. Pope*, 365 U.S. 167, 187 (1961) (civil rights statute).

147. Official government reports, *e.g.*, U.S. CIVIL RIGHTS COMMISSION, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING (1975) and EQUAL OPPORTUNITY IN SUBURBIA (1974); REPORT, NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 115-20 (1968) and scholarly discussion, *see generally* Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1 (1976), of the phenomenon surely attests its well-known and well-documented character.

148. *See generally*, C. MCCORMICK, EVIDENCE § 331 (2d ed. 1972). This observation is not intended to suggest that judicial notice should be taken of general discrimination to make out a case of discrimination in a particular case. Rather that the Court should not have ignored the general problem in formulating *and applying* rules governing proof of discrimination in land use cases challenging land use practices as exclusionary along racial lines.

149. One is inclined to observe that everybody would understand that more likely than not the Arlingtons of this country intended by their land use practices to exclude black and poor people, except the Supreme Court! In a different context the Court itself has stated: "All others see and

In attempting to round out a discussion of the litigation potential of constitutional doctrine, whether against a backdrop of doctrines as they have been developed or as they might have been, selected other issues and problems ought to be touched upon.

Even if *Arlington* had gone the other way, the equal protection analysis would still have reached only racial classifications as a meaningful doctrinal tool to deal with suburban exclusion.<sup>150</sup> The consequence would be that, presumably the exclusion of poor persons, as distinguished from racial minorities, from suburbia, in itself, would not raise a significant constitutional issue. True, the interests of poor white persons might be caught up in the remedial sweep of racial exclusion litigation. Poor white persons would then get incidental, but not direct relief. In truth, the possibility of blacks having rights poor white persons do not have, cannot sit well doctrinally, and would surely exacerbate already existing ill-will between blacks and whites.

Whether the "right to travel" doctrine, which some commentators see as developing,<sup>151</sup> would prove effective, if developed, is doubtful. That doctrine contains procedural snares, and is not doctrinally tailored to address the suburban exclusion problem.<sup>152</sup>

Other doctrines, developed exclusively in the land use control area, are in an ascent stage at best.<sup>153</sup> Often the cases arise in disparate state forums, and raise state law issues under varieties of state statutes and doctrines, with the prospect of non-uniformity of method and result. Zoning cases which address the suburban exclusion issue do so frequently at the instance of parties whose interests do not coincide with those of suburban inclusion advocates, and infrequently in the context of federal housing and development policies and programs.<sup>154</sup> In any

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understand this. How can we properly shut our minds to it?" *The Child Labor Tax Case*, 259 U.S. 20, 37 (1922). To reach the *Arlington* result the Court had to adopt the following syllogism:

- (1) Arlington adopted a restrictive land use practice.
- (2) Restrictive land use practices have an inevitable tendency to exclude black and poor people.
- (3) In adopting a restrictive land use practice Arlington did not intend to exclude black and poor people.

The working out of this syllogism in a way that avoids the exclusion of black and poor people is the lynchpin of the proposal made in Part II *infra*.

150. The principal reason is that relative wealth classifications do not trigger strict scrutiny, see text accompanying notes 118-120 *supra*.

151. *E.g.* Comment, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612 (1972); Comment, *Travel: The Evolution of a Penumbra Right*, 5 ST. MARY'S L.J. 84 (1973); Note, *Freedom of Travel and Exclusionary Land Use Regulations*, 84 YALE L.J. 1564 (1975).

152. See *Construction Indus. Ass'n v. Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (discussing problems of jurisdiction, jurisdictional amount and standing of parties to raise particular issues or represent particular interests).

153. See generally, Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1.

154. See *e.g.*, *Golden v. Planning Bd. of Ramapd*, 30 N.Y.2d 359, 285 N.E.2d 291 (1972);

event the problem is national in scope and effect. It demands national answers.

Thus, even if the Court were to adopt a broader view of the constitutional predicate, it must be acknowledged that the constitutional analysis would not be perfectly suited to addressing the suburban inclusion problem in its broader contexts.

### *C. The Problem of National Legislative Policy: Tentative, Conflicting and Absent*

#### 1. Overview of Statutory Dimensions

To look at America's national housing policy is to see a crazy quilt. It has patches that neither fit nor match, is frayed all around the edges, and has big holes throughout. Such a quilt could hardly provide warmth or comfort. Similarly, one could not reasonably expect pursuit of America's housing policy to yield "a decent home in a suitable living environment for all American families."<sup>155</sup> This phrase—more than a quarter century old—is bold in its promise, yet feeble in its product. The confused origins of our housing policy, the conflicts that pervade it, and the ineffectiveness of the methods and tools for implementing it have been analyzed elsewhere.<sup>156</sup>

Before going to a discussion of the specific legislative guidance and clarification needed, it is necessary to examine two legislative areas which might be thought relevant to the suburban exclusion/inclusion problem. These statutory areas are the relevant civil rights and housing laws. This examination will outline the failure of these laws to mandate an effective prohibition of suburban exclusion, as well as their failure to mandate an effective prohibition of suburban exclusion, as well as their failure to mandate suburban inclusion. I will also examine the failure of current laws to provide adequate, or even practically useful, enforcement tools.

#### 2. The Civil Rights Legislation: Of Gaps and Uncertainties

In *Arlington*, after finding that no constitutional provision was violated by the land use practices challenged as racially exclusionary, the Supreme Court remanded the case to the circuit court for a determination of whether Title VIII of the Civil Rights Act of 1968<sup>157</sup> was

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Concord Twp. Appeal, 439 Pa. 466, 268 A.2d 765 (1970); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1972).

155. The goal Congress set in 1949. 42 U.S.C.A. § 1441 (1969).

156. See generally Daye, *Role of the Judiciary in Community Development and Housing: A Suggested Analytical Method*, 52 J. URB. L. 689, 693-99 (1975).

157. 42 U.S.C.A. §§ 3601 et seq. (1973).

violated.<sup>158</sup> Since the Supreme Court held that purpose or intent to discriminate is required to show a constitutional violation and that the facts, as the Court viewed the evidence, would not support a finding of purpose or intent, for constitutional purposes, two issues remain for the circuit court. One is whether assuming "intent or purpose" is required by Title VIII, a finding of such may be predicated upon evidence which is insufficient to support such a finding under the equal protection clause. The other issue is whether Title VIII dispenses with a need to show purpose or intent, and permits violations to be shown in certain circumstances, by "discriminatory effect" or "disproportionate impact."<sup>159</sup>

The basic provision of Title VIII dealing with the sale or rental of housing is § 804.<sup>160</sup> Subsection (a) of § 804, which seems most pertinent to the suburban exclusion issue, if any part of § 804 may be thought to be applicable, provides, with non-material exceptions, that: "[I]t shall be unlawful—(a) to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex or national origin."<sup>161</sup>

This provision appears to apply to a housing provider. Generally local governments are not builders or developers of housing of any kind. Accordingly, the language of § 804(a) which makes unlawful actions which "otherwise make unavailable" dwellings to persons because of their race, seems to be the only provision of § 804 which would be applicable to local suburban governments in suits claiming exclusionary land use practices. It takes a bit of interpreting to reach suburban exclusion under § 804(a), however, because the language speaking of a refusal to "sell or rent" after bona fide offers, and refusal "to negotiate" for sale or rental, can only apply to an entity which directly provides housing. Thus the *ejusdem generis* maxim of statutory construction would at least suggest as not unreasonable an interpretation of the catchall phrase—"otherwise make unavailable or deny"—as being limited to subject matter of the same genus as to "sell or rent."<sup>162</sup> Of course maxims are hardly dispositive, and cannot be used to thwart "the obvious purpose of legislation."<sup>163</sup> Whether applicability to sub-

158. 429 U.S. at 271.

159. Put differently, the issue is whether Title VIII creates the same differential test for housing discrimination when juxtaposed with the equal protection clause, as Title VII, 42 U.S.C.A. §§ 2000e et seq. (1974), creates in the employment discrimination area vis-a-vis the equal protection clause. Compare *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) with *Washington v. Davis*, 426 U.S. 229 (1976).

160. 42 U.S.C.A. § 3604 (1973).

161. *Id.* § 3604(2).

162. See e.g., *United States v. Alpers*, 338 U.S. 680, 682 (1950).

163. See e.g., *Gooch v. United States*, 297 U.S. 124 (1936).



urban local government land use practices is "an obvious purpose" of § 804, or Title VIII in whole, is a matter to be inquired into at a later point.<sup>164</sup>

The other arguably relevant provision of Title VIII is § 817,<sup>165</sup> which, in pertinent part, provides that:

"It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by [Title VIII]."<sup>166</sup>

The terms "coerce", "intimidate" or "threaten" connote active conduct, apparently directed toward a specific individual, of an unfriendly or belligerent nature. It would take a stretch of the common understanding of these terms to make them applicable to a suburban local government's adoption of land use controls which, by their operation, exclude a class of persons, but no particularly specified individual, because of race. A reasonable argument could be made that such controls would "interfere" with the exercise of fair housing rights if they precluded housing that would be available to racial minorities, but since "interfere" is one term of four descriptive terms prohibiting certain conduct, the *ejusdem generis* problem arises again. Does "interfere" prohibit conduct of the same genus as "coerce", "intimidate," and "threaten"? Without attempting a definitive answer, it is sufficient to point out, that the applicability of Title VIII's most pertinent provisions to suburban exclusion is far from indisputable.

But even assuming a Title VIII prohibition of exclusionary practices, would that constitute a mandate for a court's requiring inclusionary practices? At a bare minimum it must be noted, for example, that an injunction requiring the issuance of a building permit for a particular development would not be the same thing as a general requirement compelling the local government to make a reasonable provision for housing which would be available to members of racial minorities.<sup>167</sup>

This last point calls attention to another provision of Title VIII which authorizes the United States' Attorney General to sue to enjoin "a pattern or practice" of resistance to the full enjoyment of rights granted by Title VIII.<sup>168</sup> This provision, assuming the applicability of Title VIII to suburban exclusion,<sup>169</sup> authorizes a civil action seeking such relief as the Attorney General deems necessary "to insure the full enjoyment of the rights granted" under Title VIII.<sup>170</sup> Arguably, as a

164. See text accompanying notes 176-185 *infra*.

165. 42 U.S.C.A. § 3617 (1973).

166. *Id.*

167. Compare discussion of the proposed act in text accompanying notes 264-267 *infra*.

168. 42 U.S.C.A. § 3613 (1973).

169. See text accompanying notes 176-185 *infra*.

170. See text accompanying notes 171-175 *infra*.

remedy to an adjudicated pattern or practice in violation of Title VIII, an order could be formulated under § 813 requiring a plan for housing which would be available to persons injured by the violation. That is theoretically an available course, which is not to say either that the Attorney General would seek such relief, or that a court would be compelled to grant it, or, if not compelled, would be disposed to do so.

There are numerous shortcomings, however, given even the most expansive interpretations of the scope of Title VIII, and its remedial possibilities. Damages to the aggrieved party would be next to no remedy at all,<sup>171</sup> particularly if the aggrieved party is the person excluded by the land use practice. Indeed that person, as a particular individual, may be unidentified and unidentifiable. The group injured, if it be identifiable in general, may not be identifiable for the purpose of awarding damages, and moreover, the nature of the injury is not readily susceptible of quantification. In suburban exclusion litigation, therefore, damages may be so speculative in their very nature that few, if any courts would find proof of damages acceptable in the vast majority of cases.

Injunctions, especially those by federal courts against political action locally mandated, create their own problems of enforcement and supervision. In most instances broad based judicial relief has not proved effective against broad based housing discrimination problems.<sup>172</sup> There are few reasons to be optimistic, and many reasons to be doubtful, about the prospects of judicial relief for suburban exclusion.<sup>173</sup> The primary problem is that injunctive relief, with merely the prospect of contempt citations as enforcement sanctions, provides minimal incentive to good faith compliance, (particularly when local political pressure is in the opposite direction), but maximum incentive to foot-dragging and dilatory tactics. Courts are likely to get embroiled in specifying compliance details and in implementing relief on a continuing basis. These are tasks Courts are not effectively organized to handle.<sup>174</sup>

Frequently suburban exclusion works to exclude on the basis of both race and economic class. Even expansively interpreted and applied Title VIII would reach economic exclusion only to the extent that mi-

171. *But see*, Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977).

172. *See generally*, Ronfeldt & Clifford, *Judicial Enforcement of the Housing and Urban Development Acts*, 21 HASTINGS L.J. 317 (1970); Comment, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief*, 122 U. PA. L. REV. 1330 (1974); Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760 (1976).

173. *See generally*, McGee, *Illusion and Contradiction in the Quest for a Desegregated Metropolis*, 1976 U. ILL. L.F. 984.

174. *See generally*, Daye, *Role of the Judiciary in Community Development and Housing: A Suggested Analytical Method*, 52 J. URB. L. 689, 716-45 (1975).

norities are over-represented in the lower economic group. Clearly Title VIII provides no remedy to general exclusion along economic lines, and to that extent, at best, would be only a piecemeal solution to the problem of suburban exclusion. Moreover, such a remedy would not address suburban inclusion to the extent that inclusion is broader than non-exclusion.<sup>175</sup>

Still unresolved, however, is the extent to which Title VIII (a) applies to suburban exclusion because of race or (b) requires a less difficult threshold for showing discrimination than the equal protection clause as interpreted in *Arlington*.

A search of the legislative history does not disclose any specific intention on the part of Congress, in enacting Title VIII, to address land use actions by suburban local governments.<sup>176</sup> Representative McCulloch, a supporter of the open housing provisions and a member of the National Advisory Commission on Civil Disorders noted a statement in the Report of the Commission that:

Discrimination prevents access to many non-slum areas, particularly the suburbs, where good housing exists. In addition, by creating a 'back pressure' in the racial ghettos, it makes it possible for landlords to break up apartments for denser occupancy, and keeps prices and rents of deteriorated ghetto housing higher than they would be in a truly free market.<sup>177</sup>

Textually this statement was clearly a reference to private discrimination in the housing market affecting blacks *with* the economic wherewithal to purchase *existing* housing. The comment does not address the unavailability of housing within the reach of economically disadvantaged persons which is *caused by* land use restrictions.<sup>178</sup> This inconclusive bit of legislative history comes as close as any known which might reveal that Congress intended to speak to suburban exclusion.

In the Senate where the open housing legislation originated, the late Senator Robert Kennedy, speaking of the need for open housing legislation said:

175. See text accompanying notes 216-217 *infra*.

176. Title VIII of the 1968 Civil Rights Act does not have the usual legislative history—report of committees in the Senate and the House, nor a Conference Committee Report—because of the procedural quirks accompanying its enactment. See generally 2 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES 1629 (1970) [Hereinafter SCHWARTZ].

177. *Id.* at 1784.

178. The quoted statement follows a discussion of the inability of blacks in poverty to pay for suitable housing, and is contained in a paragraph which distinguishes between economic inability to purchase housing and inability from racial discrimination. (It may be noted that the quote contains certain non-substantive variances from the statement in the Commission's Official report. Compare, REPORT, *supra* note 9, at 259. Nevertheless, in the case of exclusionary land use practices it is note generally possible to separate racial and economic exclusion, because in large measure the racial effects arise out of economic impacts. Racial discrimination remains important in segregated housing patterns, however. Comment, *The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act*, 1969 DUKE L.J. 733, 736 (1969).

It is easy enough to recognize [the] need for more housing, particularly for low- and middle-income earners. The 5.7 million units of substandard housing which now scar our land; the growing blight of slums in our largest cities, unfit for human habitation; these are tangible signs of crisis.

Yet what of those who have the power to escape? What of those who have finally overcome the barriers of race and now earn enough money to afford decent housing? The Civil Rights Commission found last year:

"Even Negroes who can afford the housing in (the suburbs) have been excluded by the racially discriminatory practices not only of property owners themselves, but also of real estate brokers, builders, and the home finance industry."

These practices are as direct as a flat refusal to show property to a Negro, and as insidious as the ploys of "not available" and "just rented" which always afflict a buyer of the wrong race.

Negroes invariably find properties overpriced or unavailable for inspection, or, if they manage to overcome these barriers, they find hostility from brokers, rejection from financiers, and resentment from prospective neighbors.<sup>179</sup>

Senator Kennedy's statement is as expansive as any which research has revealed. He referred to four instances of discrimination in the suburbs—that by private property owners, real estate brokers, builders, and the home finance industry. Conspicuous in its absence is any reference to exclusionary zoning as an instance of suburban discrimination.

Congress in considering the open housing legislation was consumed with the issues of undue restriction on rights of private property owners to alienate their property,<sup>180</sup> the exclusion of Mrs. Murphy's rental housing,<sup>181</sup> anti-riot legislation,<sup>182</sup> a filibuster in the Senate,<sup>183</sup> and procedural objections in the House.<sup>184</sup> Thus the very real likelihood is that the full Congress never gave real consideration to the issue of exclusionary zoning when it was enacting Title VIII.<sup>185</sup>

179. SCHWARTZ, *supra* note 176, at 1679.

180. *See id.* at 1682-90.; 1709-16; 1757-61 and 1780-81.

181. *Id.* at 1692, 1741-44.

182. *Id.* at 1668-70; 1674-76, 1697-1709.

183. *Id.* at 1754-57.

184. *Id.* at 1770-85, 1792-98.

185. Nineteen sixty-eight was not the first time Congress considered open housing legislation. In 1966 the House passed a Civil Rights Act with many features of the 1968 Act. The Senate did not pass the 1966 Act. *Id.* at 1630. In 1967 a subcommittee of the Senate Committee on Banking and Currency held hearings on several housing related proposals. Dubofsky, *Fair Housing: A Legislative History and Perspective*, 8 WASHBURN L.J. 149, 150 (1969). These hearings were attended by Senator Proxmire, among others. However, the subcommittee did not report out any bill. *Id.* However, at the hearings Senator Proxmire raised the question of exclusionary zoning. *Hearings on S. 1358, S. 2114, and S. 2280 Relating to Civil Rights and Housing Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Finance, 90th Cong.,*

But the mere fact that Congress did not address the specific problem, insofar as legislative history is instructive, does not mean that later manifestations of the same sorts of problems Congress did address are necessarily unreachable by the legislation. Problems, though not specifically identified, may nevertheless be within the ambit of the statute if they fall within the language Congress employed, create the same conditions Congress was attempting to alleviate, and are within generic classes similar to those Congress specifically defined. Suburban exclusion presumably *could* be interpreted to fall within the broad outlines of such remedial legislation and as falling within the spirit of the legislation.

It may reasonably be argued, broadly, that the enactment of land use controls which have the effect of precluding all types of housing which would be occupied by a significant number of members of racial minorities thus maintaining a virtually all-white suburb, could be thought to be action which "otherwise make[s] unavailable or den[ies] a dwelling to any person because of race," or as action which "interferes" with persons in the enjoyment of equal housing opportunity.<sup>186</sup>

Getting over that hurdle would raise another one. Is action which has "the effect" of excluding minorities within the prohibitions of Title VIII? The language of the act—"because of race"—is probably not dispositive, and the legislative history, as discussed above, is not revealing on the issue.

The third problem is determining the evidentiary standard necessary to prove a case, under whatever test is applicable. Does a *prima facie* case which shows either "effects" or "intent or purpose" (whichever is applicable) shift the burden, and require the municipality to come forward with justification? If so, must the justification show compelling circumstances, or meet some less rigorous standard? These questions are not answered by the terms of the Act or its history.

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1st Sess. (1967). Senator Proxmire worried over "a successful attempt on the part of suburbs to exclude minority groups and poor people, zoning ordinances of various kinds and various other restrictions." He then expressed interest in a provision that would prohibit federal grants or loans administered by the Department of Housing and Urban Development from going to "any jurisdiction within which an adequate amount of decent housing" is not available for low-and-moderate income persons "by reason of restrictions in zoning ordinances or building codes or other factors." *Id.* at 73. Although Senator Proxmire continued to press various witnesses about his proposal during the hearings, *id.* at 74, 176, 178, 217, 364, 390-91, as noted, no bill was reported out. Dubofsky, *supra*.

Senator Proxmire's awareness of exclusionary zoning issues was probably greater than that of the Congress at large. Indeed his discussion anticipated the leading legal literature on the subject by almost two years. *E.g.*, Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 Stan. L. Rev. 767 (1969); Alois, Goldberg, & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1 U. Toledo L. Rev. 65 (1969).

Moreover there is some indication at least that some members of Congress have doubts about whether Title VIII reaches suburban exclusionary zoning. See note 255 *infra*.

186. See text accompanying notes 160-175 *supra*.

In sum, for private parties to have the best chance of prevailing under Title VIII in a case of suburban exclusion, the following interpretations would be necessary:

- (1) discriminatory suburban local land use practices are covered by the prohibitions of the Act,
- (2) land use practices are discriminatory if they have the effect of excluding minorities, or alternatively, disproportionately exclude or burden minorities, and
- (3) proof of discriminatory effects or disproportionate impact shifts the burden to the municipality to demonstrate that its actions were necessary to promote a compelling (and permissible) interest.

This interpretation of Title VIII was very nearly reached by the Eighth Circuit in *United States v. City of Black Jack*,<sup>187</sup> in which the United States Attorney General sued the City alleging that its land use actions violated Title VIII. It does not readily appear that the interpretation of § 3604(a)<sup>188</sup> or § 3617<sup>189</sup> would vary depending on whether the plaintiff were a private person or the Government, although under § 3613 the Attorney General is specifically authorized to bring an action to enforce the provisions of Title VIII.<sup>190</sup> The complaint alleged that the City of Black Jack had denied housing on the basis of race and had interfered with the exercise of equal housing opportunity by adopting an ordinance which by prohibiting the construction of any new multi-family dwellings, thereby precluded the construction of a low-to-moderate income townhouse complex of 108 units which would be occupied, at least in part, by blacks. But the facts clearly showed action directed toward a *specific* project, *after* it was well into the planning stages, and a *change* under the ordinance from a multifamily site to a classification which prohibited any such dwellings. The facts revealed a highly suspicious chain of events: After the sponsors of the development had selected a site suitably zoned in an unincorporated area of St. Louis County, and were issued a "feasibility letter" which made federal funding available, residents of the area started a successful drive to incorporate the area as a municipality. Shortly after incorporation the municipality enacted the zoning ordinance.

Although the court purported to place its decision on more expansive grounds, it must be noted that the government claimed that the ordinance had been enacted "for the purpose of excluding blacks" and the court agreed that there was "evidence in the record to sport that contention."<sup>191</sup> Since the Supreme Court declined to review the case,<sup>192</sup>

187. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

188. 42 U.S.C.A. § 3604(a)(1973).

189. *Id.* § 3617.

190. *Id.* § 3613.

191. 508 F.2d at 1185 n. 3.

192. 422 U.S. 1042 (1975).

the issues it decided are open at the ultimate level.<sup>193</sup> Moreover, the decision appears to have been decided on grounds broader than required. This diminishes the force of the opinion, since in strict terms, the broader rationale of the decision is dictum. Other factors also diminish the strength of *Black Jack*.

The *Black Jack* court appears to reason by analogy to the Supreme Court's interpretation of Title VII's employment provisions in *Griggs v. Duke Power*<sup>194</sup> to find an equal scope for Title VIII. Title VIII may well be as broad as Title VII, but the two acts were enacted at different times by different Congresses.<sup>195</sup> That the later act is as broad as the earlier one does not seem automatically to follow. Nor does the *Black Jack* court explain its reasoning with the fullness that would give its conclusion the persuasive force it might otherwise have.

At the crucial point of its decision dealing with whether Title VIII permits an "effects" test or requires a showing of "purpose or intent", the *Black Jack* court, as a substitute for independent reasoning, relies on lower court cases as authority for an "effects" test. Perhaps this is justifiable since an "impressive number" of lower courts had reached that conclusion.<sup>196</sup> But exactly this same situation had obtained with respect to discrimination thresholds under the equal protection clause, and the Supreme Court, in a footnote,<sup>197</sup> dispatched those decisions (including three of the six cases relied upon in *Black Jack*)<sup>198</sup> as incorrect. However, disapproval of the cases insofar as they held that an "effects" test was the constitutional touchstone does not necessarily mean that their application of the test as a matter of statutory interpretation is equally invalid.

Having surmounted two of the three Title VIII hurdles, the *Black Jack* court addressed the evidentiary standard required for the municipality to justify governmental actions shown to have an exclusionary effect. Again without independent analysis, the court holds that in justification the city must demonstrate that its conduct "was necessary to

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193. The denial of certiorari does not imply approval. A good exemplar in support of that statement is the rather summary footnote disapproval of *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) *cert. denied*, 401 U.S. 1010 (1971) by the Court in *Washington v. Davis* 426 U.S. 229, 244 n.12 (1976), along with other cases in which certiorari had not been sought, without noting any differences in the weight of the cases disapproved.

194. 401 U.S. 424 (1971).

195. Title VII was enacted as part of the Civil Rights Act of 1964 by the 88th Congress, while Title VIII was part of the 1968 Civil Rights Act enacted by the 90th Congress.

196. See cases cited in *Washington v. Davis*, 426 U.S. 229, 244, n. 12 (1976).

197. *Id.*

198. The discredited three are *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972) (en banc); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) *cert. denied*, 401 U.S. 1010 (1971) and *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968).

promote a compelling governmental interest."<sup>199</sup> In a footnote the *Black Jack* court noted that the "compelling interest" standard was that applied in constitutional equal protection cases, but stated that once a *prima facie* case of racially discriminatory effects was made out, "[i]t became proper to apply" the same test.<sup>200</sup> That is hardly persuasive reasoning.<sup>201</sup>

Nevertheless, as persuasively pointed out by Professor McGee, the Supreme Court may be giving a more generous and expansive interpretation to statutes bearing on racial discrimination than it is willing to give the Constitution.<sup>202</sup> In support of this observation, one might contrast the statutory approach of the Court in Title VII cases as evidenced by *Griggs* with the constitutional approach in *Washington v. Davis*. It is possible that *Black Jack* may be vindicated when the Supreme Court reaches the issues. But based on the language and the legislative history of Title VIII, it cannot be concluded that the *Black Jack* Court's vindication is anything like assured.

In *Arlington*, on remand,<sup>203</sup> the Seventh Circuit had to determine whether in the absence of proof of intent to discriminate for constitutional purposes, plaintiffs could nevertheless make out a case that Village's refusal to rezone violated Title VIII. That court held that "if there is no land other than plaintiff's property within Arlington Heights which is both properly zoned and suitable for federally subsidized low-cost housing, the Village's refusal to rezone constituted a violation of section 3604(a)."<sup>204</sup> It, in turn, remanded for a determination of whether alternative suitable sites existed, and held that the burden of proof on that issue was on the Village.<sup>205</sup>

To reach the conclusion that a refusal to rezone would violate Title VIII if no other suitable sites existed, the opinion meandered through a confusing and complex chain of reasoning that left significant problems unresolved. First, the Court reaffirmed its earlier finding that the refusal to rezone "had a greater impact on black people than on white

199. 508 F.2d at 1185.

200. *Id.* at n.4.

201. One question might be raised at this point. We now understand that the equal protection clause requires the "purpose or intent" test. Justifications (at least in the case of race), presumably, would have to demonstrate compelling interests. "Purpose" and "intent" are at the rigorous end of the proof spectrum. An "effects" test would appear to be toward the opposite end of that spectrum. Should the justification standard move along the spectrum to the same point? If this is so, a compelling interest test for justification purposes when the effects test is applicable is not at the same point on the rigorousness spectrum.

202. McGee, *Illusion and Contradiction in the Quest for a Desegregated Metropolis*, 1976 U. ILL. L.F. 948, 995-97, citing *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

203. 558 F.2d 1283 (7th Cir. 1977).

204. *Id.* at 1294.

205. *Id.*



people.”<sup>206</sup> This finding was premised on the court’s statement that “a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing.”<sup>207</sup> As will be discussed shortly, at a later point in its analysis, the court, apparently, became confused about its statement.

Second, the court addressed the question of whether a refusal to rezone constituted action, under § 3604(a), which made a dwelling “unavailable because of race.” The Court concluded that Title VIII should be broadly construed, by analogy to the Supreme Court’s interpretation of Title VII in *Griggs v. Luke Power Co.*,<sup>208</sup> and that so interpreted, Title VIII could reach a refusal to rezone, because the “natural and foreseeable consequence of failure to rezone was to adversely affect black people seeking low-cost housing and to perpetuate segregation in Arlington Heights.”<sup>209</sup>

Next, the court rejected plaintiff’s argument that the showing of a racially discriminatory effect necessarily established a violation of § 3604(a). It held, instead, that the determination of whether a discriminatory effect violated § 3604(a) required an analysis of four factors: (1) the strength of the showing of discriminatory effect, (2) whether some evidence of discriminatory intent was present, (3) the interest of the Village in taking the action, and (4) the nature of the relief sought.<sup>210</sup>

Having already held that a racially discriminatory effect was created by the refusal to rezone, it is not at all clear what function an analysis of the “strength of the showing of discriminatory effect” serves. The analysis additionally breaks down elsewhere. The Court found that there are “two kinds of racially discriminatory effects which a racially neutral decision about housing can produce”: first, a greater adverse impact on one racial group than another, or second, the perpetuation of segregation which would prevent interracial association.<sup>211</sup>

The court found the evidence of the first to be “relatively weak,” and then in what appears to be a contradiction of its original reason for finding discriminatory effect for purposes of Title VIII, the court stated:

It is true that the Village’s refusal to rezone had an adverse impact on a significantly greater percentage of the nonwhite people in the Chicago area than of the white people in that area. But it is also true that the class disadvantaged by the Village’s action was not predominantly nonwhite, because sixty percent of the people in the Chicago area eligi-

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206. *Id.* at 1288.

207. *Id.*

208. *Id.* at 1288-89.

209. *Id.* at 1288.

210. *Id.* at 1290.

211. *Id.*

ble for federal housing subsidization in 1970 were white.<sup>212</sup>

This statement is difficult to reconcile with the earlier finding that “a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing.” It is probable that the court meant to conclude that a greater *percentage*, not number, of blacks than whites would be affected. Indeed that seems to be the only way to reconcile the statements.

Respecting the second way an effect can come about, *i.e.*, whether the refusal would perpetuate segregation in Arlington Heights, the court found the record unclear. Since the record did not reveal whether other suitable sites existed, the court remanded the case for consideration of that factual question.<sup>213</sup>

Since the showing of disproportionate impact was “relatively weak” and since no finding could be made on the perpetuation of segregation, the Court’s finding that a discriminatory effect was shown for purposes of a Title VIII violation originally is hard to understand.

Next, the court discounted the importance of whether some evidence of intent to discriminate existed, noting that, by hypothesis, the evidence was insufficient to support a finding of intent. And the court noted that the problems of relying on “partial evidence of intent” were as troublesome as requiring proof of intent to make out a Title VIII violation, which the court had already rejected as being an inappropriate Title VIII standard.<sup>214</sup>

Respecting the interest of the Village in refusing to rezone, the court rendered the unhelpful conclusion that the power to zone was within the Village’s authority and that generally, municipalities are accorded wide latitude in zoning.<sup>215</sup>

Finally the court addressed the nature of relief sought. Here the court concluded that:

The courts ought to be more reluctant to grant relief when the plaintiff seeks to compel the defendant to construct integrated housing or take affirmative steps to ensure that integrated housing is built than when the plaintiff is attempting to build integrated housing on his own land and merely seeks to enjoin the defendant from interfering with that construction. To require a defendant to appropriate money, utilize his land for a particular purpose, or take other affirmative steps toward integrated housing is a massive judicial intrusion on private autonomy. By contrast, the courts are far more willing to prohibit even nonintentional action by the state which interferes with an individual’s

212. *Id.* at 1291.

213. *Id.* at 1291, 1294.

214. *Id.* at 1292.

215. *Id.* at 1293.

plan to use his own land to provide integrated housing.<sup>216</sup>

The court appears to be on defensible ground to the extent that it suggests that the granting of equitable relief after a violation is found is a matter of discretion, and that in its exercise the court may consider equitable factors and fashion relief accordingly.<sup>217</sup> But the suggestion that the nature of the relief requested is even relevant to whether a statute has been violated is novel. The court appears to be badly confused in suggesting that the determination of whether Title VIII has been violated by the conduct challenged is a matter addressed to the court's discretion. Clearly the court was concerned about plaintiff's argument that once a racially discriminatory effect is shown, a violation of § 804(a) is necessarily established. On this the court said:

We decline to extend the reach of the Fair Housing Act this far . . . [W]e refuse to conclude that every action which produces discriminatory effects is illegal. Such a per se rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases . . . *Rather, the courts must use their discretion in deciding whether, given the particular circumstances of each case, relief should be granted under the statute.*<sup>218</sup>

But the step between the reach of the Act and the relief awarded is too big a step. The step the court makes is that the courts should not find that every discriminatory effect is prohibited by the Act, *because* courts should use their discretion in granting relief. The step the court missed or confused apparently was that not every discriminatory effect violates the Act because Congress did not intend such a conclusion, but surely not because courts have discretion whether to find a violation of the statute.

The more appropriate analysis would seem to be that if Congress could not have intended all discriminatory effects to violate the Act, it must be that some reasons could justify such effects consistently with Congressional intent. Upon such an analysis, a court could conclude that a showing of discriminatory effects would make out a *prima facie* violation, but that a *prima facie* case could then be rebutted by a showing of reasons Congress contemplated in justification of the effects.

Such an analysis would parallel the analysis of Title VII, as to which disproportionate racial impact in the employment testing area will make out a *prima facie* case, which may be rebutted by showing that the test is job related.<sup>219</sup>

216. *Id.*

217. See generally, Daye, *Role of the Judiciary in Community Development and Housing: A Suggested Analytical Method*, 52 J. URB. L. 689 (1975).

218. 558 F.2d at 1290. (emphasis added).

219. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434-36 (1971).

Other problems with the court's analysis include its failure to take into account very real timing problems as to the alternative sites. Must such sites be reasonably available, at comparable prices, from owners willing to sell, for the plaintiff's purposes, on plaintiff's timetable? There may be a wide gap between theoretically available and practically available suitable alternative sites in view of the plaintiff's situation.

Given the vicissitudinal starts and stops of federal funding, long delays may surely render cases moot—a matter the plaintiffs must contend with on remand—and thus a powerful incentive is created for municipal foot dragging and obstruction. The court's approach is likely to create substantial obstacles for those proposing housing in suburban areas even if the court's analysis ultimately prevails. Given the deficiencies discussed, the prospect is considerably less than bright that the court of appeals's opinion will prove to be the aid suburban inclusion advocates both seek and desperately need.

### 3. The Housing Acts: Confusion in Evolution

In discussing housing policy, I have stated elsewhere that: "[S]omething of a contradiction has been created. On the one hand, numerous and substantial federal requirements and limitations exist . . . which necessarily mandate significant federal control and policing. On the other hand, the achievement of . . . goals in terms of initiative and operational implementation has been thrust on local and state governments."<sup>220</sup> The problems courts encounter under the housing laws in dealing with issues of suburban exclusion are currently demonstrated by the recent case of *City of Hartford v. Town of Glastonbury*.<sup>221</sup> The dispute arose under the Housing and Community Development Act of 1974 (the "HCD Act") and presents a perfect example of the urban crisis battle because it touches on the issue of "opening up the suburbs" through utilization of the housing acts.

The City of Hartford, several city officials of Hartford, and lower-income individuals residing in Hartford sued the Department of Housing and Urban Development ("HUD"). The plaintiffs sought to enjoin HUD from releasing to certain suburban jurisdictions in the Hartford metropolitan area any community development revenue sharing funds for 1975 under the HCD Act. Plaintiffs complained that HUD's determination to waive the requirement of the submission of "expected to reside" (ETR) figures as part of the suburbs' applications for community development funds was illegal. The district court is-

220. See Daye, *supra* note 217, at 698.

221. 561 F.2d 1032 (2d Cir. 1976).

sued the injunction.<sup>222</sup> A Second Circuit panel affirmed,<sup>223</sup> but on rehearing *en banc* the panel was reversed with five judges joining in an opinion directing dismissal of the complaint, with a sixth judge concurring in result, and four judges dissenting.<sup>224</sup>

The decision directing dismissal was based on the plaintiffs' lack of standing, but demonstrably the rationale of the decision goes to the very heart of housing policies. An examination of the majority, concurring and dissenting opinions is instructive about how unclear and inadequate legislative guidance invites confusion. The case demonstrates additionally that such inadequate guidance also invited administrative indecision, or perhaps, bungling. A brief discussion of the HCD Act, and an analysis of the policy evolution the Act brought about, may aid putting the *Hartford* conflict in its proper context.

In the HCD Act Congress made several findings directly related to suburban exclusion problems, and inferentially based the declaration of the Act's purposes on its findings. Congress found, among other things, that critical social and economic problems arose from "the concentration of persons of lower income in central cities,"<sup>225</sup> and that the welfare of the nation and the well-being of its citizens require systematic and sustained action by Federal, State and local governments "to improve the living environment of low- and moderate-income families. . . ."<sup>226</sup> Congress did not stop at that, however, but went on to add that one of its specific objectives in providing community development money to local governments was the "reduction of the isolation of income groups within communities and geographical areas . . . through the spatial deconcentration of housing opportunities for persons of lower income. . . ."<sup>227</sup> The HCD Act, according to Congress, was also enacted to "further the development of a *national* policy" by creating a system of federal aid which "encourages community development activities which are consistent with comprehensive local and areawide development planning; further achievement of the national housing goal . . .; and fosters the undertaking of housing and community development activities in a coordinated and mutually supportive manner."<sup>228</sup>

While expanding on its enunciated goals, Congress reiterated its long-standing allegiance to the notion that local responsibility must be

222. *Sub nom.*, City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976).

223. Apparently the panel's disposition is unreported.

224. 561 F.2d 1032 (2d Cir. 1976).

225. 42 U.S.C.A. § 5301(a)(1) (1977).

226. *Id.* § 5301(b)(1).

227. *Id.* § 5301(c)(6)(emphasis added).

228. *Id.* § 5301(d)(2)-(4)(emphasis added).

paramount for the implementation of the goals stated,<sup>229</sup> but at the same time restricted the federal capacity to implement the national goals outlined. One of the reasons for the restrictions was an attempt to reduce federal "red tape" by simplifying the funding procedures.<sup>230</sup> But in simplifying the procedures Congress reduced HUD's control by providing for automatic approval of timely applications if not disapproved within seventy-five days of receipt,<sup>231</sup> and specifying strict criteria upon which any disapproval could be based.<sup>232</sup> The inference is fairly clear that these restrictions on HUD reflected as much Congressional frustration with HUD's administration of the housing laws as it did any Congressional conception founded in housing and development policy. Probably consistently with Congressional intent,<sup>233</sup> HUD by regulation specified that the direct provision of housing—the funding of new construction or the provision of rent supplements and the like—with community development block grant funds was prohibited.<sup>234</sup>

Nevertheless, in its application for community development block grant funds, an applicant was required to submit a housing assistance plan (HAP).<sup>235</sup> In its HAP, in turn, an applicant, which could only be a local government, was required to (1) accurately survey the condition of housing and assess the housing needs of lower-income persons residing in or expected to reside in the applicant community, (2) specify a realistic annual goal for the number of units to be assisted and (3) indicate the general locations of proposed housing in the applicant community for lower-income persons, with the objectives, *inter alia*, of promoting greater choice of housing opportunities for low-income persons, and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons.<sup>236</sup>

Funding for housing to be assisted would not come from the money being applied for, but from other programs, under other statutes, utilizing different procedures. The major reliance to meet the housing needs stated in the HAP probably was to be placed on a program en-

229. S. REP. NO. 93-693, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4324.

230. *Id.*; CONF. REP. NO. 93-1279, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4449.

231. 42 U.S.C.A. § 5304(f) (1977).

232. *Id.* § 5304(c). (Application must be approved unless "plainly inconsistent" with "significant facts and data generally available," unless activities proposed are "plainly inappropriate" to meeting specified needs, or unless it does not comply with some provision of the HCD Act or proposes ineligible activities).

233. *See id.* § 5305. (listing in considerable detail eligible activities but not listing new housing construction or cash assistance for housing).

234. 24 C.F.R. § 570.201(f) and (g) (1976).

235. 42 U.S.C.A. § 5304(a)(4) (1977).

236. *Id.*

acted as part of the HCD Act, known as Section 8.<sup>237</sup> There was, however, for the first time, in the HCD Act a direct linkage, though somewhat tenuous, between federal community development assistance and federal housing assistance, in that the HAP's would guide HUD in funding most of the housing programs and, HUD was required to inform the local governments of applications for housing assistance funds proposing housing in its locality.<sup>238</sup>

To recapitulate: Congress announced national goals and objectives in the very vaguest of terms—the “reduction of isolation of income groups”, avoiding “undue” concentration of assisted persons, and “spatial deconcentration of housing opportunities.” A *national* policy was to be “furthered”. Congress wanted to “foster” housing and development activities in a “mutually supportive manner.” Simultaneously, Congress reduced the federal capacity to effect its goals and objectives, while purporting to increase the responsibility of local governments. Congress required an application for community development funds from a locality to specify a “realistic annual goal” of housing to be assisted. HUD prohibited use of community development funds for direct housing assistance. Moreover, local governments are not in the business of supplying housing—a fact of which Congress presumably was aware.

In the HCD Act Congress laid down mandates which are ambiguous, yet grandiose; which evidence a need for tighter federal control, yet purport to enhance local authority and flexibility; and which set national policy objectives, yet purport to restrict HUD's role and authority. Federal housing policy, therefore, attempts to go in two opposite directions simultaneously: toward nationally mandated objectives *and* toward greater local authority. At least as to the issue of suburban exclusion these policies cannot co-exist. Congress simply cannot straddle these two horses because they do not run in the same direction.

This was the wonderful world of sad confusion that the Second Circuit was called upon to enter in the *Hartford* litigation. Treading into that litigation the Court held that Hartford, its local officials, and low-income persons living in the City of Hartford—in short, all the interests and people who might have any real concern about HUD's enforcement of the HCD Act's requirements related to suburban exclusion—did not have standing to litigate whether HUD was violating the HCD Act in a manner that destroyed the suburban inclusion objective!

The gravamen of the plaintiffs' complaint was that HUD violated the HCD Act in failing to disapprove applications from several subur-

237. 42 U.S.C.A. § 1437f (Supp. 1977) enacted as part of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, tit. II, § 201(a), 88 Stat. 662 (93d Cong. 2d Sess. 1974).

238. 42 U.S.C.A. § 1439 (Supp. 1977).

ban towns in the Hartford metropolitan area. Plaintiffs relied on section 5304(a)(4)(A)<sup>239</sup> which states that no grant of community development funds may be made unless the applicant “submits a housing assistance plan which . . . accurately surveys the condition of the housing stock in the community and assesses the housing assistance needs of lower income persons . . . residing in or *expected to reside* in the community.”<sup>240</sup> HUD determined to waive the requirement that the applications of the suburban towns contain an assessment of the needs of persons “expected to reside” (ETR) in the community for the 1975 funding year. Plaintiffs claimed that HUD had no authority to make any such waiver.

In dismissing the complaint, five judges opined that the *expected to reside* figure was to be “merely an educated guess”, that “it became clear that accurate predictions of the future would not be easy to make”,<sup>241</sup> and that even if higher ETR figures influenced HUD’s allocation of housing assistance funds, no additional housing funds could be obtained, because no additional housing funds were available.<sup>242</sup> They believed that for these reasons the absence of ETR figures likely had no effect on the interests of the plaintiffs,<sup>243</sup> and that it was doubtful whether enjoining HUD from releasing the funds would redress plaintiffs’ alleged injury.<sup>244</sup>

The dissenters found that Hartford was an American central city within the meaning of the HCD Act, and that as such, the Act, in general, was designed to assist Hartford,<sup>245</sup> that the significance of the requirement of ETR figures was in its “carrot and stick” approach to meeting needs of persons of lower income,<sup>246</sup> that the absence of ETR figures in the applications of the suburban towns “significantly reduced the likelihood that any deconcentration beneficial to Hartford” would occur,<sup>247</sup> and thus that preventing HUD’s alleged violation of the HCD Act would be of sufficient interest and benefit to Hartford to permit it to challenge the violation.<sup>248</sup>

Judge Kaufman, concurring to make a majority, lamented that the laws the court was being called on to interpret, including the housing laws at issue, could be compared to “King Minos’s labyrinth in ancient Crete” and he purportedly refused to intimate any view on “the general

239. 42 U.S.C.A. § 5304(a)(4)(A) (1977).

240. 561 F.2d at 1033, 1035.

241. *Id.* at 1049.

242. *Id.* at 1050.

243. *Id.* at 1051.

244. *Id.* at 1052.

245. *Id.* at 1055.

246. *Id.* at 1056.

247. *Id.* at 1057.

248. *Id.* at 1058.



legislative pattern" of the HCD Act.<sup>249</sup> But he noted that the majority characterized the ETR figures "as merely a small part of a very large application," while the dissenters found the ETR figures to be "the lynchpin of the statutory scheme, and the principal means by which the legislative objective of spatial deconcentration of low-income housing may be achieved."<sup>250</sup>

There is no suggestion that the district court judge and the ten judges of the Court of Appeals are not in every way conscientious, sensible, and reasonable people. Five of the judges came down squarely on one side of the issue of the significance of an integral part of the national housing legislation. Five came down squarely on the other. The eleventh judge made an unveiled indictment of Congress for failing to make clear what the legislative command was on an issue as fundamental as the relevance of the national "Housing and Community Development Act of 1974" to so critical an issue as suburban inclusion.

Congress, not the courts, must bear the responsibility for what Judge Oakes, in dissent, misapprehended as a situation in which the judicial process went awry. Judge Oakes thought: "The anomalies in this case might cause a lay observer to question the rationality of the judicial process."<sup>251</sup> He was correct in his assessment of the ridiculousness of a result in which, the *only* interests or persons directly affected by a clear violation of one of the few clear legislative commands in the HCD Act could not get into court to challenge that violation. He was clearly wrong, however, to lay the fault with the judiciary. Congress, in the contradictions, confusions, and complexities that it has enshrined as "national housing policy"—which can only be so described in a euphemistic fit—invited the resulting mess. Congress can do better and should.

## II. A PROPOSAL FOR LEGISLATION: TOWARD EFFECTIVE DOCTRINE AND ENFORCEMENT TOOLS

In the foregoing discussion, I have attempted to show the inadequacy of both present constitutional and statutory doctrines, and the inadequacy of the tools for enforcing either a prohibition of exclusion or for mandating inclusion. The present discussion is directed to identifying the statutory provisions that would be necessary to correct the legislative inadequacies with respect to suburban exclusion/inclusion which are found in both doctrine and remedies. In the appendix a proposed statute is set forth as the legislative vehicle for correcting the inadequacies. An attempt will be made to identify the framework in which a

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249. *Id.* at 1052.

250. *Id.*

251. *Id.* at 1054.

statute such as the one proposed should be considered—the premises and constraints affecting housing and development policies; and to outline specific problems to which provisions of the proposed statute are addressed—the elements of an adequate statute and the rationale underlying particular elements.

#### A. *Premises and Constraints*

Any statute dealing with suburban exclusion/inclusion issues, of course, ought to be precisely drawn and should be facially as revealing of Congressional purpose as words can possibly make it. But such a statute, if it is to be effective, cannot be subordinated to either the tradition of local land use autonomy or the desire for unrestricted freedom of individuals to associate. In recognition of the importance of these interests they are subordinated only to the limited extent clearly necessary.

If the ending of suburban exclusion and the mandating of suburban inclusion are to be made an enforceable and meaningful national housing policy, not merely those federal agencies dealing with housing, but the entire federal apparatus ought to act to further that policy, at least to the extent that the funds of every agency should be provided only when they can be provided consistently with, and in furtherance of, the national housing policies.<sup>252</sup>

To mandate a policy without providing tools to the agencies and courts to effectuate that policy would be a hollow, perhaps a cruel, gesture. Accordingly, a statute, to be regarded as adequate, would have to specify precisely what it was designed to do, provide clear commands to agencies and courts, specify the standards by which to determine its reach, and provide enforcement tools by which its purposes would most likely be realized. The overriding problem to which the statute would be addressed is governmental action in the land use area which excludes a disproportionate number of racial minorities and persons of the lower economic classes from living within its boundaries. It is that narrow problem the act should be designed to address.

The problem involves exclusion as a nationwide concept, but it appears that a prohibition in nationwide terms would be unworkable. Criteria for determining whether exclusion has occurred must be referenced, therefore, to some practically workable geographic standard. In an attempt to maximize housing locational choices but not dictate them, the standard ought to be tied to general locational choices the population has already expressed. Thus the geographic area in which exclusion is measured should, on the one hand, be small enough to be

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252. Cf. Proposal of Senator Proxmire as early as 1966, discussed in note 185 *supra*.

workable and, on the other hand, large enough to effectuate the goal of placing a meaningful prohibition on exclusion. The statute, therefore, would appropriately define the geographic area as the metropolitan area or housing market area, and the definition of these terms must be workable. Workability would be enhanced if the geographic areas would be those areas as to which data is most likely to be already generally available, areas which represent functional geographic units, and areas which are tied to concepts employed by housing and planning professionals.<sup>253</sup>

Finally to make a prohibition on exclusion something more than an empty promise, the means must be made available for providing housing which would bring about an end to exclusion, and if, or when, local governmental action fails to do that the national government must be authorized to act to achieve the national policy. But in recognition of deep rooted traditions of local autonomy in the land use area, the opportunity for local governments to act should be substantial. Only when local governments clearly fail should the more intrusive options be pursued. When events make it clear, however, that without direct federal action the national policies will fail of achievement, the capacity of the federal government should equal the need for action.

## B. *Elements of an Adequate Statute*

### 1. The Policies of Prohibiting Exclusion and Mandating Inclusion

The first problem is to define the problem addressed. That problem is exclusionary land use practices. But what is a land use practice? And when is it exclusionary? A narrow definition of land use practice would invite artful or devious devices to avoid the statute. The proposed statute would prevent evasive strategies by laying down an encompassing definition of "land use practice."<sup>254</sup> Its definition includes any "restrictions, regulations or controls" on the usage of real property, and goes on to specify several examples. Then it contains an inclusive phrase "any and all qualitatively similar" kinds of local conduct.

Secondly, "land use practice" should be defined to include any conduct "directly related" to any restriction, regulation, or control on the usage of real property. The definition then lists several specific examples such as limitations on residential construction, limitations on sewer hookups, and concludes with a catchall phrase covering "qualitatively similar" conduct.<sup>255</sup>

253. See *Hills v. Gautreaux*, 425 U.S. 284 (1976) for a discussion of these geographic concepts.

254. Proposed "One America Act," Appendix § 3(a)(i) [Hereinafter Appendix].

255. Appendix § 3(a)(ii).

The definition should be broad enough to make clear that evasive conduct will prove unsuccessful. Where evasive conduct takes place, courts will not have to hesitate while guessing at the application of the statute. Accordingly the impulses to adopt evasive devices, as well as the delays incident to extensive litigation, would be minimized under the proposed statute.

The next step is to define land use practices which constitute the evil to which the statute is directed. The evil is an "exclusionary" land use practice. Such a practice should be defined as any practice which results in or causes the exclusion of a "disproportionate number of persons of any racial group, ethnic group of any national origin, or income group from residing within the geographic or political jurisdiction of the local governmental body" engaging in the land use practice.<sup>256</sup>

The proposed definition has four features. First, it is limited to the narrow problem of the exclusion, by land use practices, along racial or economic lines. An argument can be made for addressing age, sex, religion, household status (e.g. unmarried female-headed households) and the like. However, in my judgment, exclusionary zoning on the basis of these characteristics does not, at the present time, implicate the serious national concerns of racial and economic exclusion.

Second, the definition is designed to cover instances in which a governmental body's capacity to engage in a land use practice extends beyond its geographic jurisdiction, such as in an extra-territorial planning district. Thus the act would include not merely a local government's geographic jurisdiction, but also its "political" jurisdiction.<sup>257</sup>

Third, the definition contains a provision which effects a "fair share" analysis for determining whether a land use practice is exclusionary. It accomplishes this by defining an "exclusionary land practice" as one which excludes a "disproportionate number" of persons of a racial or income group. In turn, it defines "disproportionate" and "number of persons" on the basis of comparing the ratios of the proportions of persons residing within the governmental body's jurisdiction and the persons residing in the larger geographic area that includes the governmental body.<sup>258</sup>

256. Appendix § 3(b). Compare H.R. 3504, 95th Cong., 1st Sess. This is a bill introduced on February 16, 1977 by Representatives Edwards and Drinan. Section 206(g) of H.R. 3504 would amend the 1968 Civil Right Act by adding to § 804, 42 U.S.C.A. § 3604 (1977), a subsection (g) which would make unlawful the exercise of any governmental powers with respect to "planning, zoning, subdivision controls, building codes or permits or other matters affecting land use or development, to exclude low- or moderate-income housing because of the eligibility of such housing for governmental assistance, or because of the race, color, national origin, or economic status of the prospective occupants of such housing."

257. Appendix § 3(b)(i).

258. Appendix §§ 3(b)(ii) and (iii).

Fourth, it sets up a presumption of an exclusionary practice, if the ratio of the number of minorities or low-income persons residing in the governmental body is below by fifty percent the ratio of minorities or low-income persons in the larger geographic area of which the governmental body is a part.<sup>259</sup>

The prohibition on exclusionary land use practices should be strong and extensive.<sup>260</sup> To avoid any problem of interpreting the extent to which the act is designed to reach such practices, the proposed act makes clear that all the power Congress possesses under the Constitution is exercised. The sole issue of determining the extent of the prohibition which could ever be raised would be whether under any provision of the Constitution Congress has the power to act. If it possesses the power to prohibit the exclusionary practice in question in any case, the act would make clear that it is prohibited.

The proposed statute would prohibit acts which have "the effect" of excluding persons by defining as exclusionary an act which "results in, or causes" exclusion.<sup>261</sup> Any requirement that a showing be made of a "purpose or intent" to discriminate or exclude a class or persons in a class would be unworkable and unrealistic. It would be unworkable in the sense that proving purpose or intent is so difficult that a large portion of instances in which such exclusion in fact takes place would be unprovable and thus would admit of no remedy. It would be unrealistic in the sense that the purpose or intent with which exclusionary conduct takes place is irrelevant to the question of whether there is exclusion. For purposes of the statute, conduct which may not be motivated by an exclusionary intent, if it is effective at excluding, would constitute the evil. Conversely, conduct wholly ineffective at achieving exclusion need not be proscribed by the statute for the simple reason that bad motivation to engage in conduct would injure no one if the motivation produced no exclusionary act in fact.

As an overall matter, a standard that would necessitate looking for purpose or intent would simply encourage, indeed invite, artful devices to conceal it. A search for intent in this area would involve courts in the morass of separating out good motive from bad motive, when indeed motive is irrelevant to the purposes of a statute mandating an inclusionary society.

Consistently with its objective of making the least intrusion upon private individual rights of association, the act would be addressed to governmental, not private, conduct.<sup>262</sup> It would, however, reach devices

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259. Appendix § 3(b)(iii). *See also* Appendix § 3(b)(iv).

260. Appendix § 4.

261. Appendix § 3(b)(i).

262. Read Appendix § 3(b)(i) with Appendix § 4.

by which private persons or entities undertake functions which would be traditionally carried out by governmental bodies. In conjunction with the proposed statute's concern with land use practices, however, it would not reach even private entities which carried out traditional governmental functions which are not included in the definition of "land use practice." For example, the operation of schools, operation of fire departments and the collection of garbage might be regarded as functions traditionally carried out by governmental bodies. If undertaken by private entities such activities would cause private entities to fall within the definition of "governmental body." Falling within the definition of "governmental body," however, would not be within the statute's coverage unless the governmental body *also* engaged in a "land use practice." This is so because the definition of land use practice does not include operation of a school, fire department or garbage collection services.<sup>263</sup>

Conversely, if a private entity determined dwelling square footage requirements or issued building permits it should be covered because it would be performing a function traditionally regarded as governmental and one that is included in the definition of land use practice. Thus, divestiture of land use functions by a governmental body and transferance of the power, for example, to an association of homeowners or a private club should not take the activity out of the act's coverage. Similarly, the creation by the state of special sewerage treatment districts should not take such districts out of the act's coverage since the provision of sewerage services is traditionally a governmental function and would be defined as a land use practice under the act.

In this connection attention should be called to those provisions of the proposed act requiring a "land use practice".<sup>264</sup> The basic prohibition speaks of a "land use practice" and other provisions apply only to governmental bodies which "engage in" a land use practice.<sup>265</sup>

While the prohibition on exclusionary land use practices might be absolute, the ultimate sanction probably should not be absolute. The difficulty inheres in the impracticability of devising a sanction which is absolute, and of devising a reasonable means for enforcing any such sanction, short of calling up federal troops, which would probably create a situation worse than the problem of exclusionary zoning. Moreover, the specter of "forced housing," as the shibboleth goes, is probably not worth fueling anymore than is minimally required to effect the purposes of the statute. The premise of the administrative enforcement provision on non-exclusionary land use practices in the

263. Appendix § 3(a)(i) and (ii).

264. Appendix § 4.

265. Appendix §§ 3(b)(i), 5, 6(b), and 7(b).

proposed act<sup>266</sup> is that in the vast majority of instances federal funding would constitute a sufficient "carrot" that using the "stick" would not be necessary. At a minimum, since federal funds are pervasive in the lives of governmental bodies, the potential loss of such funds would spur a wide measure of desirable conduct.

Fundamentally, the point is that the federal government should not provide funding to a governmental body that takes actions which undermine an objective—non-exclusionary housing—which is perhaps the lynchpin of school desegregation, improved job opportunities and an improved living environment for black and lower economic families. All federal funds should, at a minimum, be conditioned on the governmental recipient's forbearance of any conduct which is at odds with so basic a policy. Accordingly, all federal funds should be conditioned on the effectuation of that basic policy.<sup>267</sup> Indeed, apart from national defense concerns, it is difficult to see that there is any policy the federal government can undertake which is not related to the achievement of the goal articulated as "a decent home in a suitable living environment." To the extent that the goal is unrealized all other domestic policies cannot produce maximum benefit.

A prohibition of exclusionary land use practices would not necessarily result in making housing available, nor in correcting the continuing effects of prior exclusionary practices. But, since local governmental bodies are rarely involved in the direct provision of housing, the most that can be required of them is that in their land use plans they make provision for inclusionary housing.<sup>268</sup>

The absence of inclusionary housing appears to result from two separate phenomena. One is that local governments engage in land use actions which exclude persons who have the financial resources to demand housing in the private housing market. A prohibition of the exclusion, if effective, would be beneficial to upper income persons excluded. If the governmental body did not cease its exclusion, provide remedies for any continuing effects of the prior exclusion, and adopt a plan for including the fair share of excluded persons within its jurisdiction it would be ineligible to receive any federal funds.<sup>269</sup>

With respect to those persons who could not demand housing on the private market without financial assistance, the prohibition would be of no benefit. If that were the end of the act, it likely would fall far, far short of its purpose. To prevent that, and to effect inclusionary objectives in instances where inclusion is not likely to occur without housing

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266. Appendix § 5.

267. Appendix § 5(a).

268. Appendix § 5(c)(ii).

269. Appendix § 5(c).

assistance of some kind, the act should make the federal government the "houser of last resort."<sup>270</sup> As such the federal government would make funds available to meet the housing assistance needs of persons with lower-incomes.<sup>271</sup>

The funds would be made available for housing assistance within the area of jurisdiction of the governmental body.<sup>272</sup> At that juncture, in an attempt to maximize the land use prerogatives of local government consistently with the purpose of the act, the local governmental body should be given ample opportunity to employ the funds in any way it saw fit to meet the needs of the lower income persons.<sup>273</sup> However, if it failed to do so after a reasonable interval, the federal government should be empowered to make the housing available, consistently with sound planning concepts, but without regard to the local land use practices of the governmental body.<sup>274</sup>

## 2. The Tools of Policy Enforcement

Perhaps it is in the area of enforcement mechanisms that present doctrines and legislation are most seriously deficient. The proposed act would go a long way toward remedying those deficiencies.

In the administration of its provisions relating to federal financial assistance, the proposed act would lodge a power to determine the eligibility of a governmental body for federal funds in the Secretary of the Department of Housing and Urban Development.<sup>275</sup> It would lay precise criteria by which the determination would be made. Generally speaking, all local governments are engaged in some kind of land use practice, as that term would be defined in the proposed act. The key provision would require a presumption that a land use practice resulted in exclusion if the ratio of the proportion of minorities and low-income persons residing in the jurisdiction of a governmental body is fifty percent, or more, lower than the ratio of the proportion of that group in the metropolitan or housing market area within which the local government is located.<sup>276</sup> In cases where the proportion is only ten percent or less below the larger area's a determination of ineligibility would not be made.<sup>277</sup> In cases where the proportion falls between forty-nine and eleven percent below the larger area's proportion the Secretary would

270. Appendix § 8. CONF. REP. NO. 93-1279, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4499.

271. Appendix § 8(a).

272. Appendix § 8(c).

273. Appendix § 8(c)(iii) and (iv).

274. Appendix § 8(c)(v), (vi) and (vii).

275. Appendix § 6(a).

276. Appendix § 6(b).

277. Appendix § 6(b)(ii).



be required to consider all factors bearing on the exclusion issue known, as well as the ratio of proportions and the effects and tendencies of any land use practices.<sup>278</sup>

Following a determination of ineligibility, the governmental body could become eligible by showing that it made provision for a reasonable proportion of housing for minorities and low-income persons,<sup>279</sup> that the state had prohibited exclusionary land use practices, or<sup>280</sup> that it had ceased its exclusionary housing practices and taken effective ameliorative steps.<sup>281</sup>

The proposed provisions would encourage states to exercise greater control over their political jurisdictions, since enactment of an adequate state statute would make every governmental body in the state eligible for federal financial assistance. Similarly, a finding of eligibility would not preclude future federal financial assistance if adequate correctional measures were taken by the local government. This would, therefore, encourage local governments to correct their practices. Finally, the proposed statute, by laying down clear criteria for determining eligibility, would put local governments on notice of what is required and avoid as far as practicable the risks of differential treatment, or arbitrary determinations by the Secretary. At the same time, a clear statement of the Act's inclusionary thrust would be made, thus avoiding the need for a large bureaucracy to make the eligibility decision.<sup>282</sup>

A comprehensive act should also be enforceable at the instance of private persons or governmental entities that are affected by any violation of act. The provisions on private enforcement, to avoid severe inadequacies in present doctrines and legislation, should specify who can sue, as well as the standard for determining whether exclusion had taken place. Key provisions of the proposed act address these problems.

The proposed act would permit any person, as well as any governmental body in which reside a disproportionate number of persons of any identifiable group or class, to sue in the United States District Courts without meeting any jurisdictional limit based on the amount in controversy.<sup>283</sup> However, suit could be brought against another local governmental body only if that body were located in the same metropolitan or housing market area as the plaintiff. Since the standard for determining whether exclusion has occurred is referenced to functional

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278. *Id.*

279. Appendix § 6(c)(ii).

280. Appendix § 6(c)(i) referring to Appendix § 5(c).

281. Appendix § 6(c)(ii).

282. Appendix § 6(b).

283. Appendix § 7(a).

geographic units, suits against local governments should be similarly limited.

As to whether exclusion has taken place, the proposed act would provide that a *prima facie* case may be made by (1) a statistical showing that minorities or low-income persons are under-represented in the jurisdiction of a governmental body engaging in a land use practice<sup>284</sup> or that the land use practice had exclusionary tendencies or effects.<sup>285</sup> After a *prima facie* showing, the act would shift the burden of proof to the governmental body to rebut the *prima facie* case.<sup>286</sup> Rebuttal could be shown on the same grounds an administrative rebuttal could be made<sup>287</sup> as well as one additional ground. The additional ground would permit rebuttal upon a showing that the land use practice had no effect and no tendency to exclude any specified group or class.<sup>288</sup>

The last rebuttal ground would be included in the private action section but not the administrative conditioning section, based on two considerations. In using national funds the government may set requirements and conditions which tend to effectuate national policies. Short of constitutional invalidity, the standards by which the national government judges whether national policies are being effected may be as strict as desirable, since the government is not required to make funds available to local governments unless those governments clearly pursue national objectives. The second consideration is that apart from the inducement to achieve inclusion which conditioning funds would create, the act would be directed to prohibiting exclusion, but not to mandating inclusion. Accordingly, in private actions in courts the issue will be whether local land use practices are exclusionary. By hypothesis such practices could not be regarded as exclusionary if they could be shown to have no effect on exclusion and no tendency to exclude. At bottom, these provisions would be based on a judgment that as a matter of national policy a local government should not be required to do more than avoid exclusionary practices if it is willing to forego all federal financial assistance. But note that it might not be able to avoid all federally assisted housing, if it were part of a metropolitan area or housing market area in which a need for housing assistance existed.<sup>289</sup> On the other hand, if a local government could prove that it did not exclude it would not be liable under the private remedies provisions of the proposed act. And if it did not receive any federal funds and was not in a metropolitan area or housing market area in

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284. Appendix § 7(b)(i).

285. Appendix § 7(b)(ii).

286. Appendix § 7(c).

287. Appendix § 7(c)(i).

288. Appendix § 7(c)(ii).

289. Appendix § 8.

which persons needed housing assistance it would have no inclusionary duties under the act.

Upon failure of a local government to rebut a *prima facie* case of exclusion in a private action, the court would grant any effective remedy within its statutory or equitable power<sup>290</sup> to end the exclusion and to ameliorate its effects.<sup>291</sup>

Finally, standing under the act would be expanded to the minimum required by the Article III limitation of jurisdiction to "cases" and "controversies," and the "injury in fact" and "benefits" test gloss on the standing question<sup>292</sup> would be specified as any "injury" which is not "completely conjectural" and any "benefit" which is not "completely speculative."<sup>293</sup> The intent of those provisions would be to avoid the closing of the courthouse doors except when the person suing had no interest to be protected under the act *and* would derive no benefit from a successful suit.

Since the issues would be narrowed and the determination of those issues would be made under criteria specified under the act, it would seem proper to permit a wide range of potential plaintiffs to seek to enforce the national policies of the act. The reason courts restrict standing seems at least in part to be to avoid getting into open-ended law suits with unclear or indeterminable decisional benchmarks. The act would avoid any need to be concerned about such possibilities.

### III. POSTSCRIPT

If enacted the proposed statute, of course, would not cure all the ills affecting America. Recognizing the nature of the political process and understanding the nature of the congressional legislative process, I understand fully that the statute, as proposed, most likely could not be enacted in the current times. Nevertheless, it does, in the context of the discussion that preceded it, point up the dimensions of the solution needed in light of the magnitude of the problems the nation faces.

Legislative action such as the statute proposed, if combined with thrusts to revitalize America's central cities, would provide the vehicle for America to seize the opportunity to become, indeed, one nation. That opportunity may not exist much longer. The only thing that would make so bold an effort worth undertaking is the extremely high stake each of us has in the unfinished evolution of America from a society that has held out the promise of being just and decent to a society that keeps that promise.

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290. See Appendix § 4.

291. Appendix § 7(f).

292. See text accompanying note 121 and notes 239-49 *supra*.

293. Appendix § 7(e). See also Appendix § 7(a).

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### APPENDIX

#### The One America Act

Section 1. *Findings* [omitted]

Section 2. *Purposes* [omitted]

Section 3. *Definitions*—

(a) Land use practice—

“Land use practice” includes—

(i) any and all restrictions, regulations, or controls on the usage of real property, for residential purposes, including zoning, lot size requirements, dwelling square footage requirements, set-back requirements, density requirements, platting, land use plans, watershed regulations, subdivision regulations, flood plain regulations, comprehensive plans, official maps, and any qualitatively similar acts, rules, regulations, laws, ordinances, programs, plans, or practices, and

(ii) any and all acts, rules, regulations, laws, ordinances, programs, plans, practices, or activities directly related to any land use restriction, regulation, or control on the usage of real property, for residential purposes, including any referendum requirement, limitation on residential construction, limitation on the issuance of building permits, limitation on sewer or water hookups, limitation on the provision of any service furnished by a governmental body or with the permission of a governmental body, or furnished within the jurisdiction of a governmental body by or with the permission of another governmental body or a state, the conditioning of any permission to build any dwelling unit upon the availability of any service furnished by or with the permission of a governmental body, by or with the permission of another governmental body or a state, or by the builder of any dwelling unit, and any qualitatively similar act, rule, regulation, law, ordinance, program, plan, practice, or activity.

(b) Exclusionary land use practice—

(i) An “exclusionary land use practice” is any land use practice of a governmental body which results in, or causes, the exclusion of a disproportionate number of persons of any racial group, ethnic group, group of any national origin, or income group from residing within the geographic or political jurisdiction of that governmental body.

(ii) The “number of persons” of any race, ethnic group, national origin, or income group shall be determined by comparing the ratios of (A) the number of persons of that race, ethnic group, national origin, or income group and the total number of persons residing in the metropolitan area or housing market area, as applicable, with (B) the number of persons of that race, ethnic group, national origin, or income group and the total number of persons residing within the geographic or political jurisdiction of a governmental body.

(iii) A "disproportionate number of persons" shall be deemed to have been excluded by any land use practice when the ratio of the number of persons of any race, ethnic group, national origin, or income group residing within the geographic or political jurisdiction of a governmental body is below, by fifty percentum (50%), or more, the ratio of such persons residing in the metropolitan area or housing market area, as applicable, in which that governmental body is included.

(iv) A "proportionate number of persons" shall be deemed to exist when the ratio of the number of persons of any race, ethnic group, national origin, or income group residing within the geographic or political jurisdiction of a governmental body or the number of dwelling units available for occupancy by such persons equals or is within ten percentum (10%) of equaling the ratio of such persons residing in the metropolitan area of housing market area, as applicable, in which that governmental body is included.

(v) "Income group" means persons whose individual income, or who are members of a household whose income, places a person or household within *either* that group of persons whose income equals or is below the poverty line established by the United States government, or that group of persons whose income equals or is less than eighty percentum (80%) of the median income for the metropolitan area, or housing market area, as applicable, in which that person, or the household of which that person is a member, resides.

(c) Inclusionary land use plan—

An "inclusionary land use plan" is a plan submitted by a governmental body to, and approved by, the Secretary.

(d) Federal financial assistance—

"Federal financial assistance" means any monetary assistance provided by the United States government or any agency thereof to a governmental body for any governmental activity, plan, or program including all grants, loans, contracts of insurance or guaranty, matching grants, or funding of any kind for any governmental purpose or for any proprietary purpose carried out by a governmental body.

(e) Governmental body—

"Governmental body" means the District of Columbia, any political subdivision of any state, and any entity which is a public body corporate and politic authorized by a state to exist or created by a state, and any entity which carries out functions traditionally carried out by public bodies.

(f) Metropolitan area—

A "metropolitan area" is any area defined as a standard metropolitan statistical area by the Office of Management and Budget, and any other urbanized area not included within a standard metropolitan statistical area, which is determined by the Secretary to be a metropolitan area.

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(g) Housing market area—

A “housing market area” is any geographic area not within a metropolitan area, in which comparable housing units are in competition based on working, commuting and residential patterns, and any area within which residences and jobs are customarily regarded as within commuting distances from home to work, as shall be determined by the Secretary.

(h) Secretary—

The “Secretary” means the Secretary of the Department of Housing and Urban Development.

(i) Assisted housing unit—

“Assisted housing unit” means any dwelling unit for which federal assistance is provided in whole or in part, or any person determined to be eligible for assistance for housing purposes, under any program of the federal government.

**Section 4. *Exclusionary land use practices prohibited*—** All exclusionary land use practices are prohibited to the maximum extent Congress has the power to do so under any provision, clause, or amendment of the Constitution.

**Section 5. *Federal financial assistance prohibited*—** (a) No governmental body that is engaged in any land use practice which receives federal financial assistance shall engage in any exclusionary land use practice.

(b) Every agency of the United States government is prohibited from granting any federal financial assistance directly or through any state to a governmental body which engages in any exclusionary land use practice, or to any governmental body which is in whole or in part subject to the jurisdiction of any other governmental body or a state which engages in any exclusionary land use practice within the geographic jurisdiction of the governmental body which would be granted federal financial assistance, except as authorized in subsection (c) of this section.

(c) No agency of the United States government may provide federal financial assistance to any governmental body which on August 22, 1974 was engaged in any exclusionary land use practice, or which at any time after the effective date of this act has engaged in any exclusionary land use practice, unless

(i) the governmental body which would be granted federal financial assistance is located within a state which by statute prohibits exclusionary land use practices within that state in terms substantively identical to the terms of this act and which statute provides remedies to exclusionary land use practices substantively and procedurally identical to those specified in section 7 of this act, or

(ii) the governmental body which is to receive federal financial assistance

(A) has ceased to engage in any exclusionary land use practice, or in the case of another governmental body or a state, such other governmental body or state, has ceased to engage in any exclusionary land use practice within the geographic jurisdiction of the governmental body which would be granted federal financial assistance,

- (B) has undertaken to remove any continuing effects on any person of the exclusionary land use practice, and
- (C) has submitted an inclusionary land use plan which plan has been approved by the Secretary.

Section 6. *Administrative provisions*— (a) Certifying eligibility for federal financial assistance—

The Secretary shall be responsible for certifying, for purposes of Section 5 of this act, whether a governmental body is eligible to receive federal financial assistance, and upon request of any agency of the United States government, shall certify whether the governmental body is eligible to receive federal financial assistance, and such certification shall be binding on the requesting agency.

(b) Presumptions and method for certifying eligibility—

For the purpose of making the certification of eligibility under this act

(i) in the case of a governmental body which is engaged, or on or after August 22, 1974 has engaged, in any land use practice, or of a governmental body which is in whole or in part subject to the jurisdiction of any other governmental body or a state which, within the geographic jurisdiction of the governmental body, has engaged in a land use practice, the Secretary shall presume that the governmental body has engaged in an exclusionary land use practice when a disproportionate number of persons would be deemed to have been excluded under section 3(b)(iii) based on the most recent data available to the Secretary at the time the certification is made, or,

(ii) in the case of a governmental body which has not engaged in a land use practice at any time specified under subsection (b)(i) of this section, or in the case of a governmental body from which a disproportionate number of persons would not be deemed to have been excluded under section 3(b)(iii), but within which a proportionate number of persons under section 3(b)(iv) does not reside, the Secretary shall make the certification based on the most recent data available to the Secretary at the time the certification is made, *provided*, that the Secretary shall consider the ratio of the proportions determined under section 3(b)(iii) and shall evaluate any exclusionary effects of any land use practice engaged in at any time, the continuing effects of such land use practice, any exclusionary tendencies of such land use practice, as well as any other relevant factors of which the Secretary has knowledge.

(c) Rebutting a determination of ineligibility—

Any governmental body determined to be ineligible may rebut such finding by

- (i) meeting the provisions of section 5(c) of this act, or
- (ii) presenting evidence satisfactory to the Secretary that neither it has engaged in any exclusionary land use practice, nor has any governmental body or state engaged in any exclusionary land use practice within its geographic jurisdiction in that in engaging in any land use practice, provision was made for the number of housing units which would be occupied by a proportionate number of persons within its geographic jurisdiction.

(d) Elements of an inclusionary land use plan—

The Secretary shall not approve any land use plan as an inclusionary land use plan unless the plan makes provisions for the numbers of housing units which would be occupied by a proportionate number of persons.

Section 7. *Remedial provisions*— (a) Private actions authorized—

Any person who is a member of a group or class specified in Section 3(b)(i) of this act, and any governmental body within the political or geographic jurisdiction of which reside a number of persons which exceeds a proportionate number of persons by ten percentum (10%) or more, may sue any other person, any governmental body or any agency of the United States government, to enforce any provision of this act in the United States District Court, without regard to the amount in controversy, *provided*

(i) that in the case of suit brought against a governmental body, suit may be brought only if the person or governmental body bringing the suit resides or is located within the same metropolitan area or housing market area, as applicable, as the governmental body being sued, and (ii) that in the case of suit brought against a person as an official of a governmental body, suit may be brought only if the person or governmental body bringing the suit resides or is located within the same metropolitan area or housing market area, as applicable, as the governmental body of which the person being sued is an official.

(b) Prima facie evidence of exclusionary land use practice—

A prima facie case of an exclusionary land use practice may be made against a governmental body upon proof

(i) that a disproportionate number of persons would be deemed to have been excluded under section 3(b)(iii) of this act, or

(ii) that any land use practice engaged in by, or within the geographic jurisdiction of, a governmental body had either an exclusionary effect, or a natural tendency to exclude any person who is a member of a group specified in section 3(b)(i).

(c) Rebutting a prima facie case—

A prima facie case of an exclusionary land use practice may be rebutted only by a showing by a preponderance of the evidence, with the burden of proof being on the governmental body against which a prima facie case is made, that

(i) the governmental body clearly satisfies the provisions of section 5(c), or section 6(c)(ii) of this act, or

(ii) the land use practice of the governmental body clearly had no effect of excluding, and clearly has no tendency, direct or indirect, to exclude, any person specified in section 3(b)(i) of this act.

(d) Secretary may be made a party—

The Secretary may be made a party

(i) to any action in which there is drawn into question the Secretary's compliance with any provision of this act, or

(ii) to any action not specified in subsection (i) of this section in which there is drawn into question any provision of this act, and if made a party, the Secretary shall provide to the court and to the other parties to the action



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any relevant information the Secretary may have regarding any issue raised under this act.

(e) Standing—

In any action in which there exists a case or controversy under Article III of the Constitution, any person who suffers injury directly or indirectly so long as the injury is not completely conjectural, or who would benefit directly or indirectly so long as the benefit is not completely speculative, shall have standing to sue to determine whether any governmental body is eligible to receive federal financial assistance, whether the Secretary is complying with any provision of this act, or to determine whether any provision of this act is being violated.

(f) Judicial remedies—

Upon a determination that any provision of this act has been violated the court shall grant that remedy, so long as the remedy is within its statutory power under this act or its general equitable power, which will most effectively result in enforcing the provisions of this act.

Section 8. *Federal government as houser of last resort*— (a) Houser of last resort—

To the extent of authorizations and appropriations, the federal government, acting through the Secretary, shall be the houser of last resort, and shall make available housing for any person who does not live in a decent home in a suitable living environment, as determined by the Secretary.

(b) Studies and reports—

The Secretary shall make appropriate studies to determine, under criteria to be developed by the Secretary, the extent to which any person does not live in a decent home in a suitable living environment, and shall, at least annually, issue a report, on a state-by-state basis, to the President and the Congress, which contains the results and findings of such studies, which report shall contain an evaluation of the extent to which any person is not living in a decent home in a suitable environment by reason of

(i) any exclusionary land use practice,

(ii) the unavailability of sufficient authorizations or appropriations by the Congress,

(iii) any rescission, impoundment or refusal to authorize the spending of funds appropriated by the Congress, and

(iv) any inadequacy in any legislation passed by Congress which would further the ends of this act.

(c) Studies of and funding to meet housing assistance needs—

(i) The Secretary shall make appropriate studies to determine, under criteria to be developed by the Secretary, the housing assistance needs of any person specified in Section 3(b) in each metropolitan area or housing market area, as applicable.

(ii) Based upon the studies required under subsection (i) of this section, but not later than eighteen (18) months after the effective date of this act, the Secretary shall notify every Governmental body that engages in a land use practice within the metropolitan area or housing market area, as applicable, to which the study relates of

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- (A) the housing assistance needs of any person specified in section 3(b) of this act who resides within that metropolitan area or housing market area, as applicable, and the number of assisted housing units needed,
  - (B) the number of assisted housing units available to any person specified in section 3(b) which are needed in the political or geographic jurisdiction of the governmental body to which the notice is sent to bring the number of units occupied by such persons up to an amount which equals the proportion of such persons who reside in the metropolitan area or housing market area, as applicable, to which the study relates.
- (iii) Any governmental body notified under subsection (c)(ii) of this section, if the number of units stated under subsection (c)(ii)(B) of this section is more than two percentum (2%) of the existing housing units within the political or geographic jurisdiction of that governmental body, shall be notified that it has ninety (90) days to prepare an inclusionary land use plan, except that in the Secretary's discretion the period may be extended for an additional period not to exceed ninety (90) days.
- (iv) Upon receipt and approval of an inclusionary land use plan under subsection (c)(iii) of this section, the secretary shall, to the extent of funds authorized and appropriated for housing assistance under any federal housing program, make available, for the area within the political or geographic jurisdiction of the governmental body submitting the plan, funds for housing assistance sufficient to assist the number of housing units determined under subsection (c)(ii)(B) of this section.
- (v) After an interval of at least twelve (12), but not more than eighteen (18) months, the Secretary shall ascertain whether the housing units for which funds were made available under subsection (c)(iv) are occupied or available for occupancy, or subject to construction contracts, and
- (A) if such housing units are not occupied or available for occupancy, but are subject to construction contracts, the Secretary may extend the period for making units available for occupancy for a period not to exceed six (6) months beyond eighteen (18) months from the date housing assistance funds were made available, or
  - (B) if such housing units are not occupied, available for occupancy or subject to construction contracts, within twenty-four (24) months from the date housing assistance funds were made available the Secretary shall notify the governmental body for which funds for housing assistance were made available that the Secretary may take such action as is authorized under subsection (c)(vi) of this section.
- (vi) In the case of a governmental body which fails to submit an inclusionary land use plan under subsection (c)(iii) of this section, after notice under subsection (c)(ii), or in the case of any governmental body notified under subsection (c)(v)(B), the Secretary may take such action as is necessary and appropriate to make the housing units available which were determined under subsection (c)(ii) of this section.

(vii) In making units available under subsection (c)(vi) of this section, the Secretary may consider any reasons justifying a failure to submit an inclusionary land use plan or the delay on the part of the governmental body in making housing units available and if the circumstances, as determined by the Secretary, warrant, may provide a further period to the governmental body to make the housing units available, but such additional period shall not extend beyond thirty (30) months from the date funds were first made available under subsection (c)(iv); and in any event at the expiration of a period of thirty six (36) months, the Secretary shall take such action as is necessary and appropriate to make housing available under subsection (c)(vi); and in so doing may disregard any land use practice of any governmental body, *provided* that the Secretary's actions shall not be inconsistent with sound housing planning; and *provided further* that any governmental service shall be extended to housing made available by the Secretary on the exact terms and conditions that such service is made available by the governmental body to other residential users.

**Section 9. *The Secretary is authorized to issue rules and regulations***—The Secretary is authorized to issue rules and regulations, not inconsistent with this act, which are reasonable and necessary to accomplish the purposes of this act.