



1-1-1997

# Race and Property Values in Entrenched Segregation

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## Recommended Citation

52 U. Miami L. Rev. 1051

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# Race and Property Values in Entrenched Segregation

MARGALYNNE ARMSTRONG\*

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## I. INTRODUCTION

An examination of residential segregation thirty years after the passage of the Fair Housing Act (the “FHA”)<sup>1</sup> reveals a complex picture of stark facts and difficult questions, interspersed with incremental successes. Difficult questions and bleak facts seem to predominate when contemplating the interaction of race and residence. Why do African-Americans continue to experience disproportionately high levels of residential segregation? Why do the “tipping” phenomenon and its resultant resegregation continue,<sup>2</sup> despite FHA prohibitions?<sup>3</sup> The discouraging facts that serve to perpetuate residential segregation are epitomized by the results of two studies of America’s ten largest cities. These studies present a desolate statistic: “69 percent of minority apartment-seekers who look at four different units will be subjected to discrimination at

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1. 42 U.S.C. §§ 3601-19, 3631 (1994 & Supp. I 1995). The Fair Housing Act was originally enacted as Title VIII of the Civil Rights Act of 1968, and was augmented by the Fair Housing Amendments Act of 1988, Pub. I. No. 100-430, 102 Stat. 1619.

2. “Tipping” refers to the resegregation that occurs when white residents flee an integrated area because the percentage of non-white residents has reached a level deemed unacceptable to the whites. White demand for housing in such areas evaporates and the outgoing residents are replaced by minorities. See Rodney A. Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs That Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891, 893-95; Richard H. Sander, *Housing Segregation and Housing Integration: The Diverging Paths of Urban America*, 12, 13 (52 U. MIAMI L. REV. \_\_ (1998)). Although estimates vary, one expert has opined that tipping occurs when a neighborhood’s African American population reaches somewhere between 10% and 20%. See *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1099 (2d Cir. 1988).

3. 42 U.S.C. § 3604(a) makes it unlawful “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, familial status, or national origin.”

least once."<sup>4</sup> In addition, despite industry-wide education about the provisions of Title VIII,<sup>5</sup> many real estate professionals continue to steer African-American home-seekers away from predominantly white neighborhoods.<sup>6</sup>

Even the FHA's successes are hard won and double-edged. Millions of dollars in damages and settlements are awarded to discrimination plaintiffs, mostly on an individual basis. Although Title VIII is finally providing substantial monetary remedies,<sup>7</sup> the frequency of complaints and awards indicate that extensive housing discrimination still occurs. Although fewer and fewer communities contain no African-American inhabitants,<sup>8</sup> blacks are continually under represented in many areas where they would otherwise dwell if residence correlated to income and if race were not a factor.<sup>9</sup> Even though individual access has clearly increased, the 1990 census reported that nine million African-Americans resided in neighborhoods that were at least 90 percent black and that 68 percent of whites lived in virtually all-white neighborhoods.<sup>10</sup> Granted that *many* factors contribute to what Nancy Denton and Douglas Massey have evocatively termed "American Apartheid,"<sup>11</sup> one important piece of this complicated puzzle is the fact that many white realtors, home-sellers and home-seekers continue to make excuses to and decisions that avoid integrating. One of the most commonly asserted, longstanding, and deeply-entrenched excuses is that African-

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4. Ed Sacks, *Breaking Down Barriers*, CHI. SUN-TIMES, Dec. 21, 1997, Sunday Homelife, at 1.

5. See generally Veronica M. Reed, *Fair Housing Enforcement: Is the Current System Adequate?*, in RESIDENTIAL APARTHEID: THE AMERICAN LEGACY, Robert D. Bullard et al. eds., (1994).

6. See JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION § 406 (2d ed. 1995).

7. Substantial damages in title VIII cases are a fairly recent phenomenon. Until the Fair Housing Act was amended in 1988, housing discrimination judgments often under-compensated the plaintiffs. See Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 Temp. L. Rev., 909, 922-24 (1991). More than \$5.7 million in monetary awards and legal fees were assessed in 1997 against individuals, companies, and municipalities in housing discrimination cases. See Sacks, *supra* note 4. Because many fair housing settlements prohibit the plaintiff from disclosing the terms of the settlement, discrimination awards are presumably higher than the reported figure.

8. See J. Linn Allen, *Race Remains Housing's Main Dividing Line, Limited Options Still a Reality for Many*, CHI. TRIB., Feb. 22, 1998, at C1; see also RICHARD SANDER ET AL., CITY AND COUNTY OF LOS ANGELES, FAIR HOUSING IN LOS ANGELES COUNTY: AN ASSESSMENT OF PROGRESS AND CHALLENGES 1970-1995, at 5 (July 1996).

9. See Allen, *supra* note 8.

10. See Julian Bond, *Historical Perspectives on Fair Housing*, 29 J. MARSHALL L. REV. 315, 323 (1996).

11. See generally NANCY A. DENTON & DOUGLAS S. MASSEY, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

American land ownership or possession causes property values to decline.

Many Americans share a strongly-held, but essentially irrational, belief that the dark skin color of an occupant can cause real property values to depreciate, or at least fail to appreciate.<sup>12</sup> Racial valuation and devaluation of property<sup>13</sup> is undoubtedly tied to powerful beliefs. Although these convictions may not be accurate, they shape the reality in which we live. This irrational proposition creates and maintains a shameful reality that black-owned real property appreciates at lower rates than comparable property owned by whites and thus becomes less valuable than it would be if the owner were white.<sup>14</sup> But, of course, any skin-color-related decrease in value is attributable to decreased white demand rather than to actions attributable to the black landowners.

The perception that blacks devalue property has the additional pernicious effect of undermining the ability of the FHA to achieve its goals of "truly integrated and balanced living patterns."<sup>15</sup> For thirty years, significant sectors of society have effectively resisted the mandates of Title VIII. Such intransigence raises another set of difficult questions about the power of positive law to change hearts and minds and about the limited ability of the law to enlighten a benighted citizenry.

## II. PREVAILING PERCEPTIONS

Although property professors teach about the reification of real property interests,<sup>16</sup> the underlying property itself is a concrete, inanimate thing that has physical existence and tangible characteristics. The characteristics of a given parcel of land are not determined by its ownership, that is, the identity of the property's owner at any given moment does not change the property's physical characteristics. Logically, the identity of the property's owner should not affect the property's market value. But logic flies out the window when real property belongs to African-Americans.

This phenomenon is illustrated in the book *Rage of a Privileged*

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12. This belief apparently crosses racial lines and operates among non-white groups, as well as among some African-Americans. Cf. Keith Aoki, *Direct Democracy, Racial Group Agency, local Government Law, and Residential Racial Segregation: Some Reflections on Radical and Plural Democracy*, 33 CAL. W.L. REV. 185, 198-201 (1997); see also Sander, *supra* note 2, at 65.

13. If devaluation is associated with black ownership, then white ownership results in a comparatively higher property valuation. See discussion comparing appreciation of white owned to black-owned property, *infra* notes 48 & 49.

14. See discussion *infra* notes 48 & 49.

15. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale)).

16. See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 207 (3d ed. 1993).

*Class.* Ellis Cose describes the experience of Joseph Boyce, an African-American journalist who sought an assessment of his home:

Because Time Inc. (his employer), has a policy of buying transferred employee's current homes at 105 percent of appraised value, it was in his interest to get a high appraisal. The first appraisal on his four-bedroom house came in significantly lower than expected, and Boyce . . . wondered whether his race was blinding the realtors to its true value, so he summoned another team of realtors. On the appointed day, he moved out and had his white secretary move in. She replaced the photographs of his beaming family with hers, and when the appraiser arrived she waltzed around the house as if she had lived there all her life. The result was an appraised value nearly 15 percent above the prior assessment.<sup>17</sup>

This passage illustrates the irrationality of white perceptions about the effect of black ownership on property values. It was completely against the self-interests of the realtors to undervalue the property. Not only would their commissions be based on the lower figure; in addition, undervaluing property makes one's services less attractive to potential customers. Also, the purchaser of the property, Boyce's employer, certainly knew Boyce's race and was committed to purchasing the property at the reasonable appraised value. Any subsequent purchaser would be buying from a white-identified corporation, rather than from a black home seller. The previous occupant's race would likely be unknown to a future purchaser. All of the consequences of undervaluation were detrimental to the appraisers self interest, nonetheless negative societal attitudes about black ownership were applied to depress the property's market value.

The link between race and property devaluation is longstanding and deeply embedded in the fabric of American real estate transactions. Luigi Laurenti documented the evolution of theories about race and property values that appeared in real estate industry literature from the 1920s through the 1950s. Commenting on articles by "real estate and finance spokesmen, land economists and others," Laurenti noted that "most of their conclusions [were] unaccompanied by supporting evidence, although such evidence may have been observed by the writers."<sup>18</sup> The 1920s and 1930s saw flat statements such as, "It is a matter of common observation that the purchase of property by certain racial types is very likely to diminish the value of other property in the section,"<sup>19</sup> and, "Neighborhoods populated by white persons have been invaded by colored families, and often aristocratic residential districts

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17. ELLIS COSE, *RAGE OF A PRIVILEGED CLASS* 43 (1993).

18. LUIGI LAURENTI, *PROPERTY VALUES AND RACE* 8 (1960).

19. *Id.* at 9 (citing ERNEST M. FISHER, *PRINCIPLES OF REAL ESTATE PRACTICE* (1923)).

have suffered tremendous lessening of property values because of the appearance of a Negro resident."<sup>20</sup>

Laurenti found that later writings on real estate and race became somewhat more sophisticated, as they considered the impact of factors such as socioeconomic status and the condition of the neighborhood prior to non-white entry.<sup>21</sup> Nonetheless, as the following illustrative statements indicate, "blackness" was linked to property devaluation:

[F]amilies in any particular class, who rise in economic status move to a better district. If they have a degree of inferiority they damage that community, displace the occupying class, and lower values . . . . Most of the variations and differences between people are slight and value declines, therefore are gradual. But there is one difference in people, namely race, which can result in a very rapid decline.<sup>22</sup>

Another commentator wrote:

It [the effect of Negroes on property values] has a most important bearing on future developments in our housing program. Appraisers are interested in the problem from many angles. In addition, they desire the problem to be considered objectively from one specific point; i.e., does Negro occupancy have a tendency to blight only the area where it occurs, or does it blight the surrounding white area, with a corresponding decrease in valuation and loss of tenants . . . ?<sup>23</sup>

Laurenti noted that, by the 1950s, there was considerable debate about the effects of black purchasing on property values. Professional appraiser George Beehler presented an analysis of price behavior upon the in-migration of black occupants. Beehler predicted "(1) an initial period of price stagnation followed by (2) continued stagnation or slight price declines, but eventually reaching (3) a period of higher prices." Beehler concluded that neighborhood values would continue to increase.<sup>24</sup> In contrast another appraiser, Oscar Stern, believed that although pent-up demand for black-occupied housing would cause a temporary price increase when formerly all-white housing became available, ultimately the value in black neighborhoods could be sustained but would not increase.<sup>25</sup> Despite the divergence in the predictions of Beehler and Stern, they shared the opinion that, regardless of the value of homes in neighborhoods where African-Americans moved in, the incoming purchasers in those neighborhoods would not be white.

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20. STANLEY L. McMICHAEL & ROBERT F. BINGHAM, *CITY GROWTH AND VALUES* (1923).

21. See LAURENTI, *supra* note 18, at 9.

22. *Id.* at 9-10, (citing FREDERICK M. BABCOCK, *VALUATION OF REAL ESTATE* (1932)).

23. *Id.* at 10-11 (citing Elsie Smith Parker, *Both Sides of the Color Line*, in *THE APPRAISER JOURNAL* XI no. 3 263 (July 1943)).

24. *Id.* at 13.

25. See *id.* at 14.

Beliefs about race and property values, whether or not based on factual evidence, became reality through a number of mechanisms. These beliefs appeared in the real estate industry's professional literature and became the industry's standard through its professional code. For example, article 34 of the 1934 Code of Ethics of the National Association of Real Estate Boards (now the National Association of Realtors) read: "A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individual whose presence will clearly be detrimental to property values in that neighborhood."<sup>26</sup>

A manual for real estate appraisers provided more specific directions about race and property values. The widely-used *McMichael's Appraising Manual*<sup>27</sup> included an ethnic and racial ranking scale developed by University of Chicago economist Homer Hoyt, where predictably, "Negroes" and "Mexicans" received the lowest rankings. The industry continued to use racial rankings until 1977, when the Justice Department sued appraisers and lenders to discontinue this practice. As a defense, the appraisers asserted that the First Amendment protected the continued use of these standards.<sup>28</sup>

The federal government provided another mechanism for the real estate industry which helped ensure that blacks would bear the burden of whites' beliefs that non-white races devalued property. The Home

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26. Joe R. Feagin, *A House is Not a Home: White Racism and U.S. Housing Practices*, in *RESIDENTIAL APARTHEID: THE AMERICAN LEGACY* 28 (Robert D. Bullard et al. eds., 1994).

27. See STANLEY L. McMICHAEL, *McMICHAEL'S APPRAISING MANUAL* 159-60 (4th ed. 1951). McMichael described this ranking as follows:

Homer Hoyt, in his excellent book, *One Hundred Years of Land Values in Chicago*, reports the results of a comprehensive survey of the infiltration of foreigners into that city, stating that the effect of racial and national movements upon Chicago land values was that certain racial groups, because of their lower economic status and standards of living, paid less rent themselves and caused a greater physical deterioration of property than groups higher in the social and economic scale . . . Land values, according to Mr. Hoyt, in areas occupied by such classes are, therefore, invariably low.

The classification that follows may be scientifically misleading from a standpoint of inherent racial characteristics, but Mr. Hoyt avers that it registers an opinion or prejudice that is reflected in land values. Likewise it represents the ranking of races and nationalities with respect to the beneficial effect on land values. Those nationalities and races having the most favorable influence come first in the list and those exerting detrimental effects come last: 1. English, Germans, Scotch, Irish and Scandinavians, 2. North Italians, 3. Bohemians or Czechs, 4. Poles, 5. Lithuanians, 6. Greeks, 7. Russians, Jews (lower class), 8. South Italians, 9. Negroes, 10. Mexicans. No mention of Japanese and Chinese was made in the above classification, probably because there were not very large groups of Asians in Chicago at the time the survey was made.

*Id.*

28. See Bond, *supra* note 10, at 322.

Owners' Loan Corporation (the "HOLC"), a federal program designed to grant low interest loans to urban mortgagees in danger of default, initiated the practice of "redlining."<sup>29</sup> Specifically, the HOLC used rating procedures that "systematically undervalued older central city neighborhoods that were racially or ethnically mixed. . . Black areas were invariably rated as fourth [the lowest] grade and redlined."<sup>30</sup> From the 1930s until the 1950s, several Federal Housing Authority policies tied valuation concerns to racial discrimination. Federal mortgage insurance underwriters were instructed to reject or give poor ratings to loan applications from neighborhoods inhabited by inharmonious racial or ethnic groups.<sup>31</sup> Until 1950, two years after *Shelley v. Kraemer*<sup>32</sup> determined their enforcement unconstitutional, the FHA recommended the use of racially restrictive covenants to protect the value of property purchased with federally-funded or federally-insured loans.<sup>33</sup> These loans fueled modern suburbanization and the "evolution of overwhelmingly White suburbs surrounding increasingly black cities."<sup>34</sup>

The perceptions of real estate professionals concerning the devaluing effects of black participation in the real estate market not only included stereotypes about the impact on land values, but also concerns about personal financial involvement. A 1969 study of the real estate industry showed continuing industry perceptions that African-American ownership undermined the "economic gain to be realized from the primary control of land and property . . . White brokers ha[d] often been convinced that once property passed into black or other minority control, there [was] little or no future possibility of profit for whites from the property."<sup>35</sup> More recently, a 1989 study of the real estate industry "found that in addition to their own prejudices, real estate agents may discriminate against black home-seekers to avoid losing white customers and the potential income source they represent."<sup>36</sup> Black devaluation becomes paradigmatic for these real estate practitioners, creating barriers to black participation in the real estate market at every step of the way.

These various perceptions on the part of real estate industry professionals tend to reinforce the racial biases of white buyers and sellers. For example, racial biases remain powerful, and realtors are likely to

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29. See DENTON & MASSEY, *supra* note 11, at 51.

30. *Id.* at 51-52.

31. See Armstrong, *supra* note 7, at 920.

32. 334 U.S. 1 (1948).

33. See DENTON & MASSEY, *supra* note 11, at 54.

34. DAVID RUSK, CITIES WITHOUT SUBURBS 29 (1993).

35. Feagin, *supra* note 26, at 29.

36. Reed, *supra* note 5, at 229.

encounter prejudiced customers.<sup>37</sup> Conversely, buyers and sellers tend to look to realtors as professionals, endowed with expertise and wisdom. A California study released in 1996 revealed that “[r]acial prejudice, particularly against blacks, remains the greatest cause of housing segregation in Los Angeles County—more powerful than costs or the desire to live among similar people.”<sup>38</sup> Yet because blatant biases garner social disapproval, buyers seek ways to deny their bigotry. Real estate professionals should work to debunk, rather than affirm, these prejudices. Instead, the real estate industry has long supplied a mechanism for concealing bias by disseminating and perpetuating the “popular wisdom” that black ownership degrades property values. Concern about property values provides a rationalization that is almost impenetrable due to the great legal and social deference accorded to economic concerns.

The view that the presence of African-Americans lowers property values has been used not only to mask bias, but also to attack analyses concluding that entrenched segregation is a structural problem, rather than the cumulative effect of individual wrongdoing. Professor John Calmore noted that the right-wing critique of the Massey and Denton *American Apartheid* analysis locates itself squarely in the bunker of property values. Calmore’s article *Racialized Space and the Culture of Segregation* also addressed Nathan Glazer’s criticism that “liberal researchers ‘were never quite honest about the effects of an increase in black population on property values’” and Glazer’s contention that property value concerns are justified by reference to increased crime and the decline in schools and services in black or transitional areas.<sup>39</sup> Of course, Glazer’s criticism ignores the withdrawal of financial resources and infrastructure from the urban areas where blacks remained and the redirection of these resources to the suburbs where the white population fled.<sup>40</sup>

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37. See e.g. *supra* note 4.

38. Larry Gordon, *Prejudice Called Main Cause of Housing Segregation; Study: Angelenos Have Become More Open to Diverse Neighborhoods, but Evidence of Racial Hierarchy is Found*, L.A. TIMES, Dec. 23, 1996, at B1.

39. See John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair,”* 143 U. PA. L. REV. 1233, 1240-41 (1995) (quoting Nathan Glazer, *A Tale of Two Cities*, NEW REPUBLIC, Aug. 2, 1993 at 40).

40. See Robert W. Collin & Robin A. Morris, *Racial Inequality in American Cities: An Interdisciplinary Critique*, 11 NAT’L BLACK L.J. 177, 180 (1989); see also Lawrence F. Keller, *Race and the American City: Living the American Dilemma*, in *THE METROPOLIS IN BLACK AND WHITE: PLACE, POWER AND POLARIZATION* 336, 348 (George C. Galster & Edward W. Hill eds., (1992)).

## III. THE CONVERGENCE OF ILLOGIC AND REALITY

It is true that the race of a property owner often affects the market value of the land. But “[i]t is generally recognized that white demand is the single most important factor necessary to maintain the stability of racially mixed areas.”<sup>41</sup> The vast majority of homes sold by African-Americans are purchased by other African-Americans.<sup>42</sup> As Laurenti noted: “[d]iscussions of race and property values usually assume that the demand for housing in a racially mixed neighborhood must come entirely or almost entirely from nonwhites, that few, if any whites will consider buying property in such areas . . . (and it has doubtless been largely true in the past).”<sup>43</sup> White refusal to purchase property in locations where there are significant numbers of African-Americans means that the pool of potential buyers decreases, cutting the number of potential competing bidders for the property, resulting in lower purchase prices for black-owned property.<sup>44</sup> Thus, declines in value or appreciation are directly traceable to a decrease in white demand. Decreased white presence often results in reduced public services and the type of conditions that Glazer decries. Furthermore, white homeowners in racially transitory neighborhoods sometimes cut back on property maintenance and improvements.<sup>45</sup>

The conventional wisdom about race and property values conveniently omits the role of white market abandonment and resource withdrawal. White perceptions that black ownership adversely affects property values thus becomes a self-fulfilling prophecy that, even today, continues to harm African-Americans as both purchasers and owners of real property. “Blacks . . . pay a disproportionate amount of their income for housing, are limited in the amount of equity accumulation and live in the poor quality residential environments.”<sup>46</sup>

A 1989 *Money* magazine study concluded that “[s]egregation deters even middle-class blacks from building wealth in an elemental way: it stifles the appreciation of the homes.”<sup>47</sup> The *Money* researchers found a consistent pattern of significantly lower appreciation in black neighbor-

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41. CHESTER RAPKIN & WILLIAM G. GRIGSBY, *THE DEMAND FOR HOUSING IN RACIALLY MIXED AREAS* 52 (1960).

42. See Ankur J. Goel, *Maintaining Integration Against Minority Interests: An Anti-Subjugation Theory for Equality in Housing*, 22 *URB. LAW.* 369, 402-03 (1990).

43. LAURENTI, *supra* note 18, at 56.

44. See Walter L. Updegrave, *Race and Money*, *MONEY*, Dec. 1989, at 152.

45. See George C. Galster, *The Case for Racial Integration*, in *THE METROPOLIS IN BLACK AND WHITE: PLACE, POWER AND POLARIZATION* 270, 274-75 (George C. Galster & Edward W. Hell eds. 1992); see also LAURENTI, *supra* note 18, at 232-36.

46. J. Eugene Grigsby II, *African American Mobility and Residential Quality in Los Angeles*, in *RESIDENTIAL APARTHEID: THE AMERICAN LEGACY* 122 (Robert D. Bullard et al. eds., 1994).

47. Updegrave, *supra* note 44.

hoods than in comparable white neighborhoods. A comparison of a neighborhood that was 83% black with an 83% white neighborhood located two-and-a-half miles away, revealed an average appreciation of 8% in the black area while home values appreciated by 99% in the white area.<sup>48</sup>

In *Black Wealth/White Wealth*, Melvin Oliver and Thomas Shapiro compared the appreciation rates of property owned by blacks and with comparable property owned by whites. In general, they observed that homes of similar design, size and appearance cost more in white communities than in black or integrated communities. More specific comparisons revealed that, between 1967 and 1977, whites enjoyed a 325% appreciation in property values, while similarly-situated blacks experienced a 175% appreciation, and that for homes purchased between 1978 and 1988, property values increased 122% for white owners and 79% for black homeowners.<sup>49</sup>

These findings and the figures from the *Money* study underscore both the ridiculousness and inequity of white attitudes about black-owned property. Because black ownership does not actually alter the features of real property, appreciation of the property can and does occur. But its growth is limited by white market evaporation in conjunction with other discriminatory factors, such as lending discrimination and decreased public services. Irrational racist beliefs suppress the worth of black-owned property more than any characteristics or actions of the black owners themselves. A final irony is found in this dynamic. Although a black owner's race may cause *her* disadvantage in the form of lower appreciation, the sales price received by her white neighbors who leave the area because they fear lower property values is frequently higher than it would have been before black entry because pent-up demand by black purchasers, particularly in tight housing markets, temporarily, at least, raises values.<sup>50</sup>

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48. *See id.*

49. *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 147-51 (1995).

50. *See* LAURENTI, *supra* note 18, at 48-49. This phenomenon was noted by the dissenting justice in *Mays v. Burgess*, a case that upheld the enforcement of a racially discriminatory racial covenant. Justice Edgerton wrote:

All of the property in the 2200 block is now more valuable for sale to Negroes than to white persons . . . Real estate dealers testified that the houses in this block are worth about \$7500 for sale to white purchasers and about \$10,000 for sale to colored purchasers . . . Performance of the restrictive agreement, instead of maintaining the value of property in the 2200 block, will actually depress it.

147 F.2d 869, 874 (D.C. Cir. 1945) (Edgerton, J., dissenting).

## IV. PROPERTY VALUE AND ANTI-DISCRIMINATION LAW

Given the current conservatism of many federal courts, judges today would likely not find decisions based on property value concerns problematic, even when these decisions are intended to obscure racial biases.<sup>51</sup> Legal approval of behaviors that “maximize value” will inevitably conflict with imposing limitations on the ability to use biased views of property as a justification for discrimination.<sup>52</sup> Laissez faire economic analysis has again become central in taking<sup>53</sup> and rent control<sup>54</sup> cases.

For the most part, traditional legal analysis imposes significant barriers to dismantling discriminatory zoning laws that are rationalized as protecting property values. Early cases challenging racially-biased regulations helped recast overtly racist restrictions on property ownership as more subtle regulations premised on the economic interests of landowners. An example can be found in *Buchanan v. Warley*,<sup>55</sup> in which the U.S. Supreme Court struck down the use of zoning ordinances that explicitly restricted neighborhood residency on the basis of race, relying not on the denial of equal protection to African-Americans, but rather on a deprivation of the white plaintiff’s due process rights.<sup>56</sup> The *Buchanan* Court accepted the city’s assertions that black neighbors cause property values to decline, but rejected race-based depreciation as an irrational

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51. Property values reflect the vested economic interests of the landowner. A number of decisions, issued by both state and federal courts, have found that economic considerations can be used to justify exclusion of the poor, even when the impact is borne primarily by racial minorities. See Margalynne Armstrong, *Privilege in Residential Housing*, in *PRIVILEGE REVEALED: HOW INVISIBLE PRIVILEGE UNDERMINES AMERICA* 43, 53-62 (1996).

52. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (4th ed. 1992); see also Judge Posner’s analysis of takings valuation in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 466 (7th Cir. 1988).

53. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (using heightened scrutiny to overturn municipally-imposed limits on development).

54. See, e.g., *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 741-45 (7th Cir. 1987) (Posner, J., concurring) (incorporating extensive “law and economics” analysis).

55. 245 U.S. 60 (1917).

56. See *id.* The Court framed the issue:

In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?

*Id.* at 78. The Court then held,

We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand.

*Id.* at 82; see also Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 *CATH. U. L. REV.* 59, 70-77 (1993).

justification because "property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results."<sup>57</sup> By basing its decision on the rights of whites to buy and sell property instead of the equal protection interests of blacks, the Supreme Court left the door open for facially neutral but racially motivated zoning laws that cite preservation of property values as their goal.<sup>58</sup>

More recently, use of the equal protection clause to challenge discriminatory zoning practices was limited by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Corp.*, in which the Court reinforced the discriminatory purpose requirement for equal protection plaintiffs.<sup>59</sup> The district Court in *Arlington Heights* relied directly on property value concerns in holding that no equal protection violation had occurred. The trial court found that "[t]he weight of the evidence proved that the defendants were motivated . . . by a legitimate desire to protect property values and the integrity of the Village's zoning plan."<sup>60</sup>

It appears that the FHA provides more protection against discriminatory zoning measures than does the federal constitution, so long as discriminatory impact remains recognized as a violation of Title VIII. In *Huntington Branch, NAACP v. Town of Huntington*, the Second Circuit

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57. 245 U.S. at 82.

58. See Janai S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 UCLA L. REV. 1689, 1698 (1996). As one student commentator noted:

The prohibition of blatantly race-based regulations provided the impetus to draft more cleverly fashioned, racially motivated regulations. Most of these new "neutral" regulations were allegedly purported to champion property and home ownership rights. Eventually, these rights were deemed worthy of exclusive protection. Regulations enacted to maintain the character of a neighborhood that [was] already segregated are perfect examples of this phenomenon.

*Id.* (citations omitted).

59. 429 U.S. 252 (1977).

60. *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 373 F. Supp. 208, 211 (N.D. Ill. 1974). The Court specifically noted that:

[T]he evidence shows that a multi-family development would seriously damage the value of the surrounding single-family homes and that its presence in the area is strongly opposed by large groups of citizens of the village. Their motive may well be opposition to minority or low-income groups, at least in part, but the circumstantial evidence does not warrant the conclusion that this motivated the defendants.

*Id.*; see also *Hope, Inc. v. County of DuPage*, 738 F.2d 797 (7th Cir. 1984), in which the Seventh Circuit reversed a district court decree finding that DuPage County had "knowingly and intelligently pursued housing policies and practices which were intended to and effectively [did] exclude [ ] persons of low and moderate income and racial minorities from residing in the County." *Id.* at 798-99 (alterations in original). In an apparent attempt to support its determination that the plaintiffs lacked standing to bring their claim, the appellate court noted that "under Illinois law, conserving the value of property throughout the county is a legitimate zoning concern." *Id.* at 802 n.2.

applied a discriminatory effects test whereby "a prima facie case is established by showing that the challenged practice of the defendant 'actually or predictably results in racial discrimination.'"<sup>61</sup> Under this test, once discriminatory impact is shown, the defendant may still be able to escape liability by showing a legitimate business purpose.<sup>62</sup> If the Court accepted the purpose of protection or stabilization of property values, discriminatory impact analysis would lead to a finding of no unlawful discrimination, as the district court concluded in *Arlington Heights*.

Although the FHA has been invoked with some success in discriminatory zoning cases, it is probably incapable of resolving the underappreciation dilemma that affects individual black homeowners. In addition, although the FHA makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race,"<sup>63</sup> there is no prohibition on refusing to purchase from a person because of race. Finally, although our legal tradition permits forced sales of property for public purposes under eminent domain, compulsory purchases are prohibitively problematic, except in cases of property torts, such as nuisance.<sup>64</sup> The problem of white withdrawal from the market due to property owned by African-Americans and the resulting intransigence of residential segregation reflects fear, ignorance, and bad faith involving social, psychological, and economic factors. The past thirty years show us that law acting alone cannot eliminate segregation. Expanded integration and African-American market equality will require interdisciplinary strategies that include, but go beyond, simply legal solutions.

## V. CONCLUSION

Beliefs that property ownership by African-Americans somehow intrinsically causes land to lose value are clearly not rooted in logic but, nonetheless, have real-life impact. Residential segregation continues to be a fact of life for many Americans, and black home purchasers are still likely to encounter discrimination when buying a home. After becoming

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61. 844 F.2d 926, 934 (2d Cir. 1988).

62. *See id.* at 936.

63. 42 U.S.C. § 3604(b) (1994).

64. *See, e.g.,* *Boomer v. Atlantic Cement Co., Inc.*, 257 N.E.2d 870 (N.Y. 1970). A judgment for permanent nuisance damages was described by the court as "'servitude on land' of plaintiffs imposed by defendant's nuisance." *Id.* at 875. Even the *Boomer* court stopped short of compulsion, however, giving the defendants the option of purchasing the servitude to avoid issuing an injunction to discontinue the nuisance. *See id.*; *see also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

homeowners, African-Americans are unlikely to experience the same levels of appreciation in property values that they would if they were white. Finally, when the time comes to sell their homes, African-Americans often face a less competitive market for their homes because the pool of potential purchasers has few, if any, whites.

Solutions to these problems require a multi-pronged attack. The first strategy should be a preventative one. It is necessary to foster integration by preventing the creation of new segregated enclaves. This is an area in which the existing law can be an effective tool. The FHA should be vigorously enforced and any discrimination on the part of developers and real estate agents eliminated. Fair housing enforcement efforts should call for realtors and developers to reach out to African-American purchasers with advertising and affirmative marketing. Enforcement of prohibitions against the racial steering of blacks away from predominately white neighborhood, must be vigorous. By integrating new developments with *multiple* families of color, the environment will be more welcoming to black home seekers. Black homeowners in stable integrated neighborhoods will have access to a more comprehensive pool of buyers than if their homes were in exclusively black neighborhoods.

A second approach is to stop the steering of whites. Realtors must abandon the idea that black middle-class suburbs are inevitably uninteresting to white purchasers. Some of the housing opportunities in these suburbs present excellent values, giving the purchaser more house for the money.<sup>65</sup> This strategy requires the real estate industry to portray predominantly black areas in a positive light, which could begin to reverse the industry's negative relationship with black communities. Enhancing the market for homes that are currently owned by blacks will increase the property appreciation and decrease wealth disparity between otherwise comparable black and white homeowners.

Finally, it is important to greatly improve conditions in currently hypersegregated urban neighborhoods. Following John Calmore's model of spatial equality (which has sometimes been mischaracterized as completely separatist), our society should direct attractive resources to improve the poorest of the nation's black segregated communities as a "prelude to broad-scale integration."<sup>66</sup> Modern, environmentally sound, sustainable urban planning should be targeted at our cities' most depressed areas. Planners should determine what facilities and features

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65. See Mark Curmutte, *Kennedy Heights, Where Integration is a Way of Life*, CIN. ENQUIRER, Jan. 19, 1998, at C1.

66. John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1492 (1993).

people seek in the cities of the twenty-first century and make affirmative decisions to site those facilities in African-American neighborhoods, bolstering them with superior infrastructure. In addition to making long-needed improvements in the lives of poor African-Americans, this is another strategy aimed at changing the minds of those who now invariably link black neighborhoods with decay and decline. Instead, black neighborhoods can be reconfigured to attract positive interest and serve as models to be replicated, rather than avoided. Environmental and racial coalitions should work together to achieve multiple goals of improving spatial conditions in black neighborhoods and beginning the needed widespread transition to sustainable cities. Because communities of color are currently found in some of the most environmentally degraded neighborhoods in this country,<sup>67</sup> environmentalist-minority coalitions already exist. Creating new issues for coalition work can bring the members of these groups closer together and form new bases for communities. Hopefully, some day such communities will incorporate residential integration, achieving the FHA's most elusive goal.

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67. See generally Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.*, 619 (1992).

