

Globalization and the Reproduction of Hierarchy

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Over the past decade, the federal government has increasingly taken steps to lift barriers to trade and financial flows into and out of the United States. This liberalization of U.S. economic barriers has been mirrored by similar efforts of governments around the world. These steps, together with gains in technology, have ushered in an era of "globalization."¹ The global liberalization of economic flows, according to classical economic theory, should maximize the efficient allocation of world resources and generate benefits for all. Even if globalization brings increased aggregate gains, however, it is not clear that the distribution of those gains accords with social justice. Without intervention, globalization may instead lead to increased socioeconomic inequality and economic volatility.²

One troubling aspect of globalization is that it may tend to concentrate costs on populations that are already socioeconomically disadvantaged. Globalization is reorganizing industrialized economies into hierarchies in which income is increasingly related to skill level. At the same time, long-existing barriers to entry into high-skill occupations have not subsided, and arguably continue to strengthen. Racial minorities disproportionately occupy the low-skilled ranks of the workforce. Consequently, their impoverishment may be disproportionately likely to remain entrenched, even as the globalization-driven economy booms. This disproportionate vulnerability arises from socioeconomic dynamics not just of race

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¹ See *infra* Part II (defining globalization). See generally International Monetary Fund, World Economic Outlook 1997: Globalization: Opportunities and Challenges (1997) [hereinafter IMF Survey]; United Nations Development Programme, 1999 Human Development Report: Globalization with a Human Face, available in <<http://www.undp.org/hydr/report.html>> [hereinafter Human Development Report].

² See Chantal Thomas, Fast-Track Trade Legislation: A Case Study of the Law and Politics of Globalization (unpublished manuscript, on file with author).

but also of income and geographical space. Together, these dynamics disproportionately relegate racial minorities to impoverished neighborhoods in inner cities.³

This Article warns against the temptation among policymakers to view the costs of adjustment to the new globalized economy as natural and inevitable. Many of these costs, particularly in the case of inner-city racial minorities, derive from a socioeconomic hierarchy that lawmakers have helped to create and maintain. Thus, this Article looks at the impact of globalization on racial minorities. In doing so, it responds to two central inquiries of the LatCrit IV Conference. The first inquiry searches for connections that link Latina/o communities to other racial minorities. While the particular dynamics described in this Article differ across groups, the general dynamic of disproportionate vulnerability affects African Americans, Latina/os, and other racial minorities. A second inquiry of LatCrit IV looks beyond conventional boundaries of civil rights discourse, as does this Article by looking at contemporary economic realities for racial minority groups.

If "laissez-faire" policy accompanied and justified the harsher results of the early Industrial Age,⁴ it may well reemerge to accompany and justify those brought on by the rise of the Information Age.⁵ The policy implications of such latter-day laissez-fairism would be that government should not "intervene" to prevent the casualties of globalization, even if those casualties occur dispropor-

³ For discussions of the intersection of racial, geographic, and class segregation, see Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699 (1993), 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 (1995), and Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

⁴ In its worse forms, such policy condones Social Darwinism, a theory whose purpose is to "justify social inequality," by explaining it as a product of "survival of the fittest" (a term coined by Social Darwinist Herbert Spencer). See SARAH BLAFFER HARDY, *THE WOMAN THAT NEVER EVOLVED* 12-13 (1981); see also RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (1992); Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827 n.233 (1999); Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421 (1999).

⁵ Most commentators agree that "globalization" was triggered in significant part by developments in transportation and communications technology that allowed both production and products to be dispersed over ever-wider areas. See *infra* notes 158-59. The cultural effects of this were memorably foreseen by Marshall McLuhan in his prediction of a "global village." See MARSHALL McLUHAN, *UNDERSTANDING MEDIA, THE EXTENSIONS OF MAN* (1964).

tionately within certain socioeconomic groups, because such casualties are the result of an economic "evolution" that is both natural and necessary.⁶ Classical and neoclassical proponents of the market tend to portray certain economic processes — industrialization in the old days, globalization in the new — as independent of government. President Clinton's statement that the "technology revolution and globalization are not policy choices, they are facts" is a good example of the view of globalization as an autonomous phenomenon.⁷ From this perspective, such economic processes are also said to be "necessary" aspects of economic progress despite the costs they impose. According to this view, the best course for government is to allow these costs because of the long-term benefits of the process.⁸ Contrary to this perspective, in his famous dissent to *Lochner v. New York*, Oliver Wendell Holmes criticized the Supreme Court's attempts to portray an "unregulated" market and its outcomes as natural and inevitable.⁹ After a century of realist and critical legal theory following from Holmes' early insights,¹⁰

⁶ For an account of the relationship between classical economics and evolutionary theory in the law, see Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645 (1985). Hovenkamp explained:

The earliest Darwinians who called themselves "sociologists," particularly Herbert Spencer and William Graham Sumner, were thoroughgoing economic determinists. For this reason they believed that social science must merely describe the world, using Darwin's economic theory of natural selection to discover the natural rules of resource allocation in human society, but remaining powerless to change these fundamental laws. These evolutionary social scientists were called Social Darwinists. *They influenced American jurisprudence greatly, particularly the constitutionalization of the unregulated market today known by the name of "substantive due process," or "liberty of contract."*

Id. at 654 (emphasis added).

⁷ *A Closer Look at Globalization*, 144 CONG. REC. E1660-01, E1660 (daily ed. Sept. 9, 1998) (remarks of Rep. Lee H. Hamilton of Indiana).

⁸ This sort of discussion has been common among government decisionmakers faced with choices whether to facilitate globalization. See, e.g., *Trade Barriers Would Hamper U.S. Competitiveness in Information Technology*, 138 CONG. REC. E2473-01, E2473 (daily ed. Aug. 12, 1992) (remarks of Rep. William L. Dickinson of Alabama) ("While free market policies may cause some short-term pain — a shakeout in some industries — they ultimately promote higher living standards and global prosperity."); *How Change Affects Government*, 137 CONG. REC. E1742-02, E1743 (daily ed. May 14, 1991) (remarks of Rep. Newt Gingrich of Georgia) (commenting that "[a]dvocates of free markets, limited government, low taxes, and deregulation [who] are ideally positioned" to lead government reform of globalization). The latent contradiction between a view that naturalizes market activity yet understands law and policy as critical to fostering it is frequently overlooked.

⁹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes J., dissenting). Holmes wrote, "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.* As Hovenkamp remarked, Holmes's *Lochner* dissent: "[S]tanding alone, however, does not

critical legal theory following from Holmes' early insights,¹⁰ such a portrayal should not be revived.

This Article demonstrates that legal rules, and therefore legal decisionmakers, are deeply and directly implicated both in economic globalization and in the distribution of benefits and costs that globalization creates. The premises of the argument are straightforward. First, legal rules have facilitated economic globalization.¹¹ Second, legal rules have helped to construct the socioeconomic hierarchy that is the field on which economic globalization occurs. The lower rungs of this hierarchy are disproportionately occupied by poor urban minorities.¹² Third, economic globalization may exacerbate this hierarchy.¹³ If legal rules helped to produce economic globalization, and legal rules helped to produce a socioeconomic hierarchy, and economic globalization exacerbates this hierarchy, then legal rules, and legal decisionmakers, are partially accountable for this result and the harms it imposes on poor urban minorities.

This Article mounts evidence supporting each of the premises leading to this conclusion. Part I of this Article will show how federal, state, and local law and policy created preexisting conditions of vulnerability among racial minority groups, segregating them disproportionately into impoverished inner cities.¹⁴ Part II describes globalization and the law and policy creating it. Part III discusses the effect of globalization on poor urban minorities given their pre-existing vulnerability.

If logic compels the conclusion that legal rules are partially responsible for creating this problem, justice compels holding lawmakers accountable for resolving it. There is no question of

make a particularly convincing case that Holmes was not a Social Darwinist. He was a complex man, and it is certainly plausible that he believed in Social Darwinism, but believed even more in judicial restraint." Hovenkamp, *supra* note 6, at 654-63 (discussing Holmes's approach to jurisprudence).

¹⁰ See Brian Bix, *Positively Positivism*, 85 VA. L. REV. 889, 893 (1999) (reviewing ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998)) (observing that legal realists were "inspired by the moral and legal skepticism of Oliver Wendell Holmes, Jr." and citing Holmes's *Lochner* dissent as one of his most influential writings for realists).

¹¹ See *infra* Part II.

¹² See *infra* Part I.

¹³ See *infra* Part III.

¹⁴ The focus of this Article is on federal law and policy for two reasons: first, because it is simply more accessible and manageable than a state or local survey, although the relationship between federal, state and local law and policy is discussed, and second, because it matches the focus on federal law and policy fostering globalization in Part II.

whether the government should intervene to reduce the problematic impact of globalization on certain populations, because, as Parts I and II show, government has always and already been involved. Consequently, there is only the question of what kind of intervention is most just. Part IV offers some prescriptions for American law and policy in the globalization era.

Before continuing, I note that this Article accepts for present purposes, and despite continuing disagreement, that globalization brings increased economic gains to the United States economy as a whole,¹⁵ and consequently that facilitating globalization may represent a more viable policy alternative in the long-term than resisting it. Even if this is true, however, history and justice require that specific measures are taken to ensure that racial minorities are not disproportionately barred receipt of the dividends that globalization may bring. This Article can therefore be placed in the structuralist tradition, which posits that — in contrast to the highly flexible and fluid economy in the liberal hypothesis — the economy is, in fact, susceptible to inequalitarian rigidities. This Article concludes by advocating law and policy for the reform of such rigidities.

I. CONDITIONS PREEXISTING GLOBALIZATION

Over the last century, a variety of federal, state, and local laws have entrenched social inequality between whites and minority populations in the United States. Such laws have rendered minorities as a whole worse equipped than whites to benefit from the particular gains brought about by globalization. Part I.A. describes the law and policy of suburbanization — arguably the key factor in the deterioration of inner cities. Part I.B. describes law and policy that more directly created or facilitated racial segregation. Part I.C. briefly lists other areas of law and policy that played a role in the

¹⁵ Elsewhere, I do take up more intensively the question of the desirability of globalization per se. See Thomas, *supra* note 2. The thesis of this Article builds on the premise that the gains from trade are not evenly distributed, which follows fairly straightforwardly from basic microeconomics. The debate over the extent to which such inequality is just, or the extent to which egalitarian economic outcomes are just, is eternal and intractable, and this Article does not attempt to resolve such questions. The argument is much more limited: that where certain groups are structurally positioned to consistently bear the adverse impact of liberalization, and *where that position is a result of government law and policy*, justice requires the government to take steps to correct this structural disadvantage.

deterioration of the inner cities into separate and unequal communities.

A. *Suburbanization: "Incidental" Racial and Economic Segregation*

"Starting in 1945, one of the Great Migrations of American history took place": this was the migration of the middle classes away from city centers after World War II.¹⁶ From 1950 to 1980, the United States national population grew by fifty percent, but the populations of the northeastern and midwestern city centers declined, by percentages from ten to over fifty percent.¹⁷ While Western and Southern greater metropolitan areas were more likely to grow over this period, they did so in a pattern of "sprawl" replicating the suburban growth in the Northeast and Midwest.¹⁸

In her exhaustive analysis of the modern city, Saskia Sassen observes that, on one hand, suburbanization signaled progress because it was "associated with the expansion of a middle class and understood as an increase in the quality of life associated with economic development." If the suburbs signaled prosperity, however, "the inner city became an increasingly powerful image . . . to describe central areas where low-income residents, unable to afford a house in the suburbs, were left behind."¹⁹

Whites were disproportionately large participants in the exodus from the city. During the same era that New York City's overall population declined by eleven percent, for example, its racial composition went from ninety-four percent white in 1940 to forty-nine percent white in 1985.²⁰ Similar transformations occurred in cities all across the nation.²¹ Left behind were racial minorities

¹⁶ RAY SUAREZ, *THE OLD NEIGHBORHOOD: WHAT WE LOST IN THE GREAT SUBURBAN MIGRATION: 1966-1999*, at 2 (1999).

¹⁷ See U.S. Bureau of the Census, Current Population Reports, Series P25-311, P25-802, P25-1045, P25-1126, and PPL-91, available in <<http://www.census.gov/statab/freq/98s0002.txt>> (on file with author) (summarizing census information). For data on city centers, see SUAREZ, *supra* note 16, at 4-7. Suarez noted that New York's population declined by 11%, Chicago's by 17%, Baltimore's by 17%, Philadelphia's by 19%, Washington, D.C.'s by 20%, Cleveland's by 37%, Detroit's by 40%. See *id.*

¹⁸ See William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 68 (1999).

¹⁹ SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, AND TOKYO* 253 (1991).

²⁰ See *id.* at 250.

²¹ The declines in the percentages of urban populations that were white in Chicago, Philadelphia, Los Angeles, Washington, Baltimore, Houston, San Diego, and San Jose from 1950 to 1990 were respectively 85% to 45%, 81% to 53%, 89% to 52%, 64% to 29%, 76% to 39%, 78% to 52%, 92% to 67% and 96% to 62%. See SUAREZ, *supra* note 16, at 10-11.

comprised of African Americans, many of them relatively recent arrivals into city centers from their own migrations out of the southern United States; and, increasingly over the postwar era, of African, Asian, Caribbean, Latina/o, and Middle Eastern populations resulting from immigration into the United States. Suburbanization thus split the socioeconomic fortunes of middle-class, previously urban whites on the one hand, and poorer, urban minorities on the other. Once created, the rift continued to deepen over the length of the postwar era.

In part, suburbanization resulted from a popular desire to leave the crowded city behind and stake out new territory.²² Keith Aoki has recounted that this desire was, in turn, driven partially by aesthetic and moral preferences for the town life ideal, and partially by concern about unhealthful living conditions in parts of the city.²³ The move to the suburbs also resonated with the geographical expansionism so closely identified with American culture.²⁴ Yet to view suburbanization as a cultural phenomenon unaided by law would be deeply erroneous. Throughout the twentieth century, law and policy encouraged and at times literally subsidized suburbanization — and therefore segregation.

This section focuses on federal law and policy that indirectly exacerbated racial segregation by promoting suburbanization.²⁵ In the twentieth century and particularly in the postwar era, the federal government undertook many initiatives intended to increase home ownership. The home ownership agenda was shaped in part by alarm at population growth in the cities and a perceived need to control the problems that would arise from increased population density. A strong social consensus also endorsed home ownership

²² See, e.g., ROBERT FISHMAN, *BOURGEOIS UTOPIAS* (1987).

²³ Aoki, *supra* note 3, at 707-11 (describing rise of pastoral aesthetic that implied that "the city is bad for you"); see also *id.* at 711-18 (describing nineteenth-century tenement conditions that gave rise to description of urban life as "drab, squalid and dreary").

²⁴ See, e.g., G. SCOTT THOMAS, *THE UNITED STATES OF SUBURBIA* (1998).

²⁵ This Article does not look at law explicitly establishing segregation, such as the "Jim Crow" legislation of the South. Rather, the Article focuses on law and policy regulating urban areas primarily in the northern and western United States. This focus is for two reasons. First, the Article looks at the effects of globalization on inner cities, and these effects are primarily in the traditional industrial centers. Second, the Article seeks to show how law and policy can entrench dynamics of socioeconomic subordination and vulnerability among urban minorities. For evidence of such entrenchment, one need not look to the early and explicit permission and enforcement of segregation and discrimination against racial minorities. Rather, one need only look to the laws in place after racial minorities had been explicitly granted equal citizenship.

as inherently desirable and therefore a worthy end of government action. As one commentator remarked, "[h]ome ownership is the American dream."²⁶

Most important of all was the goal of economic growth. Increased home ownership could stimulate national economic growth and development through new construction and increased investment. Economic growth resulting from massive new home ownership would be relatively evenly distributed, and would encourage saving and investment across a broad swath of the population. These seemingly admirable goals, however, had disastrous consequences for inner cities.

First, and least objectionably, federal tax law promoted economic growth through home ownership and therefore incidentally promoted segregation even though there was no explicit preference for non-urban areas. At a second level, federal lending, housing and transportation law and policy did target areas outside cities, and therefore more directly facilitated racial segregation. In both these instances, increased racial segregation was not the express goal of federal law and policy; given the strong connection between race and economic status, however, it was a predictable result of policies that drew the middle classes out of the city.

1. Incidental Promotion of Suburbanization

A cornerstone of federal home ownership policy was the federal income tax deduction for interest on home mortgages — in the aggregate, a massive tax subsidy for homeowners.²⁷ Despite the relatively broad group of beneficiaries of the federal income tax deduction among the middle and upper classes, the deduction has necessarily also reinforced economic divisions between these and the lower classes.²⁸ The deduction "much more heavily subsidizes

²⁶ Julia P. Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 TUL. L. REV. 373, 374 & n.1 (1994). For a wonderful discussion of the historical and aesthetic dimensions of this phenomenon, see Aoki, *supra* note 3.

²⁷ See DANIEL Q. POSIN, *FEDERAL INCOME TAXATION OF INDIVIDUALS* 457 (3d ed. 1993). Posin earlier introduced the home mortgage interest deduction with this colloquy: "There is a major housing program going to be proposed by the President. . . . [H]ere's how it will work. It's going to be massive. It's going to come to about a total of \$89 billion a year. This is big time." *Id.* at 457.

²⁸ Posin continued: "Here's some other facts about [the federal income tax deduction for home mortgage interest]. Fifty-six percent of this, or \$50 billion, is going to go to the richest 20 percent of Americans. The poorest 20% will get \$15 billion." *Id.* at 453.

the well-to-do than the poor," since the more valuable the home, the larger the amount deducted.²⁹ It also multiplies the income differential between those that are able to buy homes, and those that are not and must pay all of their money over into rent. The threshold difference of being able to make a down payment and obtain financing increases over time through the appreciation of real estate assets, and through the income refunded under the tax deduction.³⁰

The home mortgage interest deduction not only increased class divisions but also accelerated movement of the middle class away from the city. The increased demand for residences for sale as opposed to residences for rent translated into a demand for construction of new property. New property development occurred overwhelmingly outside the city.³¹

In establishing a subsidy for homeowners, federal tax law did not explicitly seek to concentrate new economic growth outside cities, nor did it explicitly seek to create geographical barriers between whites and racial minorities that would both reflect and entrench segregation along race and class lines. Yet that is precisely what it did.³² By helping to engender the suburbanization of the middle classes and failing to correct associated racial disparity, federal tax law helped to concentrate minorities in the inner cities and to set the stage for a downward spiral of urban poverty that would play itself out over the next several decades.

2. Direct Promotion of Suburbanization

While the tax law discussed above caused suburbanization only incidentally, federal loan and housing regulations directly promoted it. In the area of federal lending law, for example, federal

²⁹ *Id.* at 458 ("All of this can be summarized in one succinct piece of tax advice: If you are rich, buy a big house.").

³⁰ In addition to lacking the income necessary to afford a down payment and mortgage, this initial difference can be exacerbated by information disparities and discrimination in lending. See *infra* Part I.B.

³¹ One might argue that suburbanization was a natural outcome of the increased demand for homes, because property in the city tended to be rental. Yet rental property can easily be converted into property to be owned, as was shown by the large-scale conversions of this kind in the 1980s in many cities. In the postwar period, however, much of the new demand was not for converted rentals but rather for new homes.

³² See Shelby Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 *FORDHAM URB. L.J.* 69, 84 (1998) ("Although not their stated intentions, various federal tax measures have operated since the mid-1940s to shape a particular housing pattern.").

appraisal standards applied by the federal Home Owners Loan Corporation "systematically favored suburban neighbourhoods over those in the central city."³³ Probably the most influential loan regulations, however, were the preferences incorporated by the Federal Housing Administration (FHA) into its mortgage insurance program.³⁴ The FHA program allowed lenders to "originate home loans free from the risk of loss."³⁵ Intended to benefit "first home buyers or purchasers of relatively inexpensive homes,"³⁶ the FHA program constituted "one of the most important federal programs of the past century."³⁷

Michael Schill and Susan Wachter have argued that the FHA mortgage insurance program also played a role in the deterioration of inner cities.³⁸ For example, the agency's "guidelines disfavored 'crowded neighbourhoods' and 'older properties,' both of which were much more prevalent in cities than in the newly forming suburbs."³⁹ This "bias of the [FHA] program toward lending in the suburbs, as compared to the cities, encouraged middle-class households to leave the city and exacerbated the income and fiscal disparities between urban and suburban municipalities."⁴⁰ The

³³ Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1309 (1995). The Home Owners Loan Corporation was created in 1933. See Home Owners' Loan Act of 1933, Pub. L. No. 73-43, ch. 64, 48 Stat. 128, 129-32, *repealed by* Housing Amendments of 1953, Pub. L. No. 83-94, ch. 21(a), 67 Stat. 121, 126.

One of the most important contributions of the HOLC was the uniformity it promoted among financial institutions engaged in residential lending. In addition to introducing the fixed-rate, self-amortizing long-term mortgage loan, the HOLC also created uniform appraisal standards through the country. . . . Areas with even relatively small black populations were usually given the lowest rating"

Schill & Wachter, *supra*, at 1309.

³⁴ See 12 U.S.C. § 1709(a) (1994).

³⁵ Schill & Wachter, *supra* note 33, at 1309. More specifically, a "lender who holds an FHA insured loan may assign the loan to FHA if the borrower defaults and may receive payment equal to the principal outstanding on the loan, plus unpaid interest." Brian Meltzer, *Institutional Financing: Home Loans in the 1980s*, 65 CHI. BAR REC. 84, 85 (1983).

³⁶ See Meltzer, *supra* note 35, at 85.

³⁷ Schill & Wachter, *supra* note 33, at 1309.

³⁸ See *id.*

³⁹ *Id.*; see also Kenneth T. Jackson, *Race, Ethnicity and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration*, 6 J. URB. HIST. 419, 435 (1980) ("[P]rospective buyers could avoid many of these [difficulties] . . . by locating in peripheral sections").

⁴⁰ Schill & Wachter, *supra* note 33, at 1311.

FHA program exacerbated segregation along economic and racial lines in housing markets.⁴¹

In addition to law and policy relating to home ownership, the federal government encouraged suburbanization through its massive transportation project of building a national highway system, deemed by some "the nation's most extensive and expensive continuing public works program."⁴² In 1956, pursuant to a committee appointed by President Eisenhower (and chaired by a General Motors executive), Congress mandated the construction of an interstate highway system stretching more than 40,000 miles.⁴³ The interstate highway system continues to rely on a web of federal, state and local governmental support.⁴⁴ According to one estimate, the highway system is only sixty percent "self-financed" through tolls and gas taxes, with the additional forty percent provided through government subsidy.⁴⁵

Like tax and lending policy, federal transportation policy supporting highway subsidization aspired to worthy goals. "Governmental expenditure on . . . highways had the well-intended objective of connecting the country and facilitating commerce through a system of national highways. More roads meant more jobs in construction and maintenance, more business along highways, more personal convenience, and an easier delivery of freight."⁴⁶

And yet, the highway system created universally recognized costs for cities.⁴⁷ Highways encouraged residential exodus to the suburbs by making it easier for city workers to commute into cities.⁴⁸ Highways also reduced the "relative advantage of a central city location"

⁴¹ See Roberta Achtenberg, *Shaping American Communities: Segregation, Housing and the Urban Poor*, 143 U. PA. L. REV. 1191, 1193 (1995). Achtenberg was then Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development.

⁴² Ronald C. Peterson & Robert M. Kennan, Jr., *The Federal-Aid Highway Program*, 2 ENVTL. L. REP. 50001 (1972).

⁴³ See Michael E. Lewyn, *The Urban Crisis: Made in Washington*, 4 J.L. & POL'Y 513, 540 (1996). The involvement of General Motors was not seen as a conflict of interest, given the conventional wisdom at the time that "What is good for General Motors is good for the country." See Linda A. Mabry, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEO. L.J. 563, 596 & n.126 (1999) (discussing origins of this phrase).

⁴⁴ See Buzbee, *supra* note 18, at 68; Lewyn, *supra* note 43, at 542.

⁴⁵ See Lewyn, *supra* note 43, at 540.

⁴⁶ Green, *supra* note 32, at 83.

⁴⁷ See, e.g., Buzbee, *supra* note 18, at 6869; Green, *supra* note 32, at 84.

⁴⁸ See Lewyn, *supra* note 43, at 542.

and contributed to the relocation of "wholesale trade, trucking, and warehousing outside the city."⁴⁹

Federal tax, loan, housing, and transportation regulations entrenched geographic and economic mechanics of racial segregation by encouraging middle-class families and white-collar industries to move into the suburbs. In effect, suburbanization deepened racial segregation. None of these policies were explicitly designed to reinforce racial segregation. Yet the "housing and finance subsidies which favored the suburban, white middle class tilted the playing field against the central cities and older areas of the nation."⁵⁰ In doing so, they helped to skew the capacity of poor urban minorities not just to thrive in then-existing conditions, but also to be able to adjust positively to change, including changes wrought by economic globalization.

B. *Intentional Racial Segregation*

By realigning economic classes along geographical divides, federal tax, housing and transportation policy also reinforced racial segregation. The federal government was also implicated by varying degrees in explicit racial segregation. First, the federal government in certain cases allowed nonstate actors and state and local governments to pursue racial segregation in housing and lending. Second, there was some explicit racialism in the federal housing policies that helped shaped today's metropolitan areas.

1. Federal Noninterference in Racial Segregation by Local Governments

Racial Segregation in Public Housing. Federal housing regulations encouraged the concentration of public housing in the inner city. Public housing regulations allowed local governments to keep federally funded housing away from white, middle-class areas and to concentrate it in already poor and predominantly minority areas. Given that disproportionately large numbers of those eligible for public housing were racial minorities, this decision cemented seg-

⁴⁹ SASSEN, *supra* note 19, at 202.

⁵⁰ Christian C. Day, *Resisting Serfdom: Making the Market Work in a Great Republic*, 25 IND. L. REV. 799, 814 (1991).

regation for them and reinforced it for the larger communities out of which and into which they were directed by local governments.⁵¹

Several components of federal housing law and policy combined to allow segregation by local governments. First, the Housing Act of 1937 established that "[i]t is the policy of the United States to . . . vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs."⁵² Under this "local control" policy, local government had virtually free rein to relegate "undesirable" public housing residents to already "undesirable" areas.⁵³ In many cases this federal lenience allowed local decisionmakers to create city slums. The federal government was therefore complicit with racial segregation by local housing agencies.⁵⁴ In New York, for example, "power broker" Robert Moses energetically pursued segregation in public housing.⁵⁵ In Chicago, the local housing authority's persistent racial discrimination caused Dr. Martin Luther King, Jr. and other civil rights activists to lead "open housing protests" in the 1960s.⁵⁶

Second, the Housing Act contained an "equivalent elimination requirement"⁵⁷ that required that one unit of "substandard" housing be eliminated for every unit of public housing built. Because most suburbs had little substandard housing, this requirement rendered them ineligible for public housing construction.⁵⁸ Finally, segregation became acute in 1949 with more stringent income limitations in public housing.⁵⁹ (These income restrictions

⁵¹ See generally Schill & Wachter, *supra* note 33.

⁵² Housing Act of 1937, 42 U.S.C. § 1437 (1994). The Housing Act codified a 1935 federal court case requiring that federally funded housing be built in partnership with local government.

⁵³ See *United States v. Certain Lands in City of Louisville, Jefferson County, Ky.*, 78 F.2d 684, 686 (6th Cir. 1935) (holding that federal power of eminent domain cannot justify construction of low-income housing because such activity does not constitute sufficient "public use" of land).

⁵⁴ See Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty*, 143 U. PA. L. REV. 1351, 1358 & n.23 (1995).

⁵⁵ See ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1974).

⁵⁶ See Janet K. Levit, *Rewriting Beginnings: The Lessons of Gautreaux*, 28 J. MARSHALL L. REV. 57, 63 (1994).

⁵⁷ Housing Act of 1937, § 10(a), 50 Stat. 891-92 (1937) (current version at 42 U.S.C. § 1437 (1994)).

⁵⁸ Schill & Wachter, *supra* note 33, at 1292.

⁵⁹ *Id.* at 1294.

continue in present day regulations).⁶⁰ The result of all of these components of federal housing law and policy was a deeply entrenched dynamic of segregation of public housing.

Thus, by 1962, "eighty percent of federally supported developments were completely segregated."⁶¹ In the 1960s, reformers attempted to put an end to the federal government's reinforcement of segregation through its housing and home-ownership policies. Litigation arising from the Chicago open housing protests found HUD's complicity with local discrimination unconstitutional.⁶² The Fair Housing Act of 1968 required the Department of Housing and Urban Development (HUD) to take into account the segregative effects of locating housing.⁶³ HUD regulations now provide that a project should generally not further racial concentration.⁶⁴ Although some courts have attempted to enforce these reforms strictly,⁶⁵ most courts deferred to HUD site selection.⁶⁶ The result of such deference, according to some, is that HUD site selection continues to exacerbate race and class divisions.⁶⁷ Even assuming

⁶⁰ *Id.* at 1314-16.

⁶¹ See David W. Price, Note, *Causation of Public Housing Segregation: HUD Authorization of Applicant Choice in Tenant Selection and Assignment Plans*, 10 B.C. THIRD WORLD L.J. 121, 122 (1990).

⁶² See generally Levit, *supra* note 56; Alexander Polikoff, *Gautreaux And Institutional Litigation*, 64 CHI.-KENT L. REV. 451 (1988).

⁶³ This interpretation has been given to section 3608 of the Fair Housing Act, which requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title." Fair Housing Act of 1968, 42 U.S.C. § 3608 (e)(5) (1994).

⁶⁴ The Code of Federal Regulations provides that a HUD project must not be located in an area of:

(1) minority concentration unless (i) sufficient, comparable opportunities exists for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot otherwise be feasibly met in that housing market area; or (2) a racially mixed area if the project will cause a significant increase in the proportion of minority to nonminority residents in the area.

24 C.F.R. § 891.125(b) (1999).

⁶⁵ For example, *Shannon v. HUD*, held that HUD had violated section 3608 when it decided to support a public housing project but did not consider that "the location of this type of project on the site chosen will have the effect of increasing the already high concentration of low income black residents." 436 F.2d 809, 812 (3d Cir. 1970).

⁶⁶ See, e.g., *Faymor Dev. Co. v. King*, 446 U.S. 905 (1980).

⁶⁷ See Sam Brownback, *Resolving HUD's Existing Problems Should Take Precedence over Implementing New Policies*, 16 ST. LOUIS U. PUB. L. REV. 235, 238 (1997) ("[HUD housing] projects invariably are difficult to manage and maintain, tend to segregate families by race, education and income, and isolate the poor in some of the worst neighborhoods in any

HUD site selection since 1968 has been ideal, the deeper problem is that the patterns of racial and economic segregation along city-suburb lines had already been drawn by the time the HUD stopped purposely reinforcing them.

Discrimination Through Exclusionary Zoning. According to Richard Ford, "[e]xclusionary zoning is a generic term for zoning restrictions that effectively exclude a particular class of persons from a locality by restricting the land uses those persons are likely to require."⁶⁸ The Supreme Court has struck down both explicitly racial exclusionary zoning and state enforcement of racially restrictive covenants as violative of the Fourteenth Amendment of the federal Constitution.⁶⁹ However, the Court has upheld local governments' right to exclusionary zoning mechanisms with racially discriminatory effects, such as prohibitions of multifamily housing that exclude lower-income and public housing.⁷⁰ Richard Schwemm has observed that "[t]he Court's deferential attitude towards municipal zoning decisions that raise only economic issues has continued to the present day."⁷¹

city."); Price, *supra* note 61, at 122-23 (charging that "little has changed" in public housing either in the level of segregation in public housing or in HUD's willingness to combat it, and quoting a HUD official's admission that HUD was "deeply involved in the creation of the ghetto system, and it has never committed itself to any remedial action").

⁶⁸ Ford, *supra* note 3, at 1870.

⁶⁹ Section 1 of the Fourteenth Amendment provides that "no State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court struck down explicitly racial exclusionary zoning in *Buchanan v. Warley*. See 245 U.S. 60, 74-82 (1917) (holding that Louisville, Kentucky municipal ordinance restricting property sales on basis of race within designated areas violated Fourteenth Amendment's protection of "property from invasion by states without due process of law"). The Court held that state enforcement of racially restrictive property covenants violated the Fourteenth Amendment in *Shelley v. Kraemer*. See 334 U.S. 1 (1948).

⁷⁰ In *Euclid v. Ambler Realty Co.*, the Supreme Court upheld a zoning ordinance that prohibited multi-family housing. See 272 U.S. 365 (1926). In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Court held that a zoning ordinance prohibiting multifamily housing was not unconstitutional state action, because "official action will not be held unconstitutional [under the Fourteenth Amendment] solely because it results in racially disproportionate impact" and "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. 252, 264-65 (1977). Richard Ford has argued that the intuitive validity of such zoning mechanisms stems from reifications of local government space that allow local governments to flout responsibility for their part in ensuring racial justice. See generally Ford, *supra* note 3.

⁷¹ ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 17 n.17 (1983) (citing *Agins v. City of Tiberon*, 447 U.S. 255 (1980)).

2. Federal Noninterference with Racial Segregation by Nonstate Actors

A considerable body of legislation, regulation and case law has developed to combat discrimination in lending and housing, both of which critically affect the concentration of racial minority groups in the inner city. Despite this, however, discrimination has persisted.⁷² Some commentators believe this persistence is at least partially attributable to wrong-headed legal approaches to discrimination.⁷³

Failure to Correct Discrimination in Home Sales. Racial discrimination in home sales exacerbated the dynamics of racial segregation described in Part I.A. The racial segregation that arose incidentally as a result of economic disparities between whites and non-whites was secured and reinforced by intentional racial discrimination. Intentional racial discrimination further concentrated racial minorities in inner cities by impeding those proportionately few minorities that wanted and were financially able to leave the inner city from doing so. Federal law and policy is deeply implicated in the question of racial discrimination in home sales.

Congress and the courts have become gradually more willing to prohibit racial discrimination in real estate transactions. Courts have applied the Thirteenth Amendment⁷⁴ of the federal Constitution to prohibit racially driven refusals to sell or rent to or negotiate with black home seekers;⁷⁵ discriminatory terms, conditions or services in property sales or services;⁷⁶ and "racial steering," or "di-

⁷² See *infra* notes 85-95.

⁷³ See Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 MICH. L. REV. 527, 532 (1993) (arguing that "instead of addressing the mortgage-lending discrimination problem directly and comprehensively, Congress has taken a piecemeal and incomplete approach that generally has failed to bring the mortgage-lending industry into equal access compliance").

⁷⁴ Section 1 of the Thirteenth Amendment provides that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. Congress enacted the Civil Rights Act of 1866, to reinforce the Thirteenth Amendment. See 42 U.S.C. § 1982 (1994) (providing that "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property").

⁷⁵ See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 409, 413 (1968); *Newbern v. Lake Lorelei, Inc.*, 308 F. Supp. 407 (S.D. Ohio 1968).

⁷⁶ See *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973); *Sullivan*, 396 U.S. at 229; *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974), *cert. denied*, 419 U.S. 1070 (1974).

recting prospective home buyers interested in equivalent properties to different areas according to their race."⁷⁷

Established a century later, the Fair Housing Act of 1968 ("1968 Act") strengthens the prohibition against racial discrimination in housing.⁷⁸ Courts applied the 1968 Act to outlaw racially motivated refusals to sell, rent or negotiate regarding property,⁷⁹ or otherwise make property unavailable.⁸⁰ Courts have generally agreed that a *prima facie* case for violation can be made by showing discriminatory effect only, without any showing of discriminatory intent.⁸¹

Despite the range of anti-discrimination law described above, in 1995 a federal official conceded federal fair-housing law to be "weak and inadequate." Another lamented that the federal government had been "deeply involved in the creation of the ghetto system, and it has never committed itself to any remedial action".⁸²

One difficulty is that the coverage of the law is incomplete. The Act exempts from its antidiscrimination provisions "single-family houses sold or rented by the owner without the use of a real estate agent or discriminatory advertising"; as well as "units in dwellings where the owner lives that are occupied by no more than four families."⁸³ Moreover, enforcement of the fair-housing laws has proved to be very difficult because it depends almost entirely on individual lawsuits. "Although the 1968 Fair Housing act outlawed discrimination on the basis of race in housing-market transactions,

⁷⁷ See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 94 (1979).

⁷⁸ Title VIII of the Civil Rights Act of 1968, is the most important provision, "prohibiting the refusal to sell or rent, or negotiate therefore, on the basis of race, color, religion, sex or national origin." 42 U.S.C. 3604(a) (1994).

⁷⁹ This prohibition affects explicit refusals. See *United States v. Hughes Mem'l Home*, 396 F. Supp. 544, 547-48 (W.D. Va. 1975); *United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776, 779-80 (N.D. Miss. 1972). The prohibition also affects refusals through avoidance and delay. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 207-08 (1972); *United States v. Pelzer Realty Co., Inc.*, 484 F.2d 438, 442, 446 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (prohibiting "grudging" sales techniques "not consistent with common sense and ordinary business practices").

⁸⁰ *United States v. Youritan Constr. Co.*, 370 F. Supp. 643 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975). This includes a ban on "racial steering." See *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975); *Johnson v. Jerry Pals Real Estate*, 485 F. Supp. 399 (E.D. Va. 1974); *United States v. Henshaw Bros., Inc.*, 401 F. Supp. 399 (E.D. Va. 1974).

⁸¹ SCHWEMM, *supra* note 71, at 58-62, 404 (1983).

⁸² Price, *supra* note 61, at 122-23.

⁸³ SCHWEMM, *supra* note 71, at 48 (citing 42 U.S.C. §§ 3603(b)(1), 3603(b)(2), 3607 (1994)). The Act applies to dwellings owned or operated by the Federal Government; provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, and; insured, guaranteed, or otherwise secured by the credit of the Federal Government. See 42 U.S.C. § 3603(a)(1) (1994).

it placed most of the burden for recognizing and combating illegal discrimination on the victims themselves."⁸⁴

Failure to Correct Discrimination in Lending. Controversy continues to surround the question whether the federal government prevents discriminatory and racially segregative lending by private institutions. Discrimination in lending solidifies geographical segregation along racial lines and concentrates poverty in the inner city by hindering those who are otherwise qualified to purchase new homes or otherwise invest in housing from doing so. Such discrimination both reduces minority influx into new homes in the suburbs and prevents redevelopment of existing housing stock in cities.

Several federal statutes prohibit "redlining," the practice by which lenders deem borrowers from certain neighborhoods unfit for normal loans on the basis of the racial composition of those neighborhoods.⁸⁵ The Community Reinvestment Act of 1977 ("CRA")⁸⁶ moved beyond merely prohibiting discrimination and affirmatively required financial institutions to ensure that they are providing adequate services to minority neighborhoods.⁸⁷ The enforcement mechanism for the CRA was to be the power of federal agencies regulating financial institutions to disapprove proposals by those institutions for bank charters, mergers, deposit insurance and investment in other financial institutions.⁸⁸

Unfortunately, enforcement of both the antidiscrimination and the "affirmative action" federal lending regulations has been lim-

⁸⁴ Achtenberg, *supra* note 41, at 1194.

⁸⁵ SCHWEMM, *supra* note 71, at 187. Section 3605 of Title VIII of the Civil Rights Act of 1968 prohibits discrimination by a financial institution on the basis of race, color, religion, sex or national origin. See 42 U.S.C. § 3605 (1994); see also *Harper v. Union Savs. Ass'n*, 429 F. Supp. 1254, 1257 (N.D. Ohio 1977) (prohibiting discrimination in form of mortgage foreclosure policies that are stricter for minority than white homeowners); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (S.D. Ohio 1976) (prohibiting racial discrimination in financial assistance for purchasing, constructing or maintaining dwelling, or in fixing terms or conditions of financial assistance). The Equal Credit Opportunity Act and the Home Mortgage Disclosure Act of 1975, reinforce this prohibition. See generally *Home Mortgage Disclosure Act*, 12 U.S.C. §§ 2801-2811 (1994); *Equal Credit Opportunity Act*, 15 U.S.C. §§ 1691-1691e (1994).

⁸⁶ 12 U.S.C. §§ 2901-2905 (1994).

⁸⁷ The CRA requires "each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions." 12 U.S.C. § 2901(b) (1994).

⁸⁸ Schill & Wachter, *supra* note 33, at 1319, (citing 12 U.S.C. §§ 2902-2903).

ited.⁸⁹ Enforcement of the antidiscrimination statutes proved difficult because discrimination in lending was hard to prove empirically.⁹⁰ Given that racial minorities were also often poor and unfamiliar to lending officers, it was difficult to show that racial disparities in lending did not reflect prudent lending policy based on race-neutral criteria. Inadequate enforcement for many years plagued the CRA as well. CRA enforcement consisted of reporting requirements that were criticized by industry as burdensome and by activists as ineffective.⁹¹

In the early 1990s, however, two influential empirical studies found that race did significantly affect likelihood of obtaining home ownership financial assistance, even controlling for disparities in non-racial criteria variables that would create racial disparities in lending.⁹² It cannot be said that the federal government turned a blind eye to the problem. Yet, the 1990s reports showed that race (even controlling for associated factors that might affect lending outcomes, such as income level) still significantly affects lending policy.⁹³ Anthony Taibi has argued that federal lending law has failed because it has overlooked existing structural inequalities and therefore perpetuates economic and racial segregation.⁹⁴ Taibi concluded that neither the "equality paradigm" nor the "affirmative action paradigm" in current federal law can ad-

⁸⁹ See A. Brooke Overby, *The Community Reinvestment Act Reconsidered*, 143 U. PA. L. REV. 1431, 1448-49 (1995).

⁹⁰ See *id.*

⁹¹ See generally *id.* at 1458-1569.

⁹² See Glenn B. Canner, *Home Mortgage Disclosure Act: Expanded Data on Residential Lending*, 77 FED. RES. BULL. 859 (1991) (commenting that blacks and Latinas/os were rejected 33.9% and 21.4% for home buying loans, as opposed to 14.4% for whites); see also Alicia H. Munnell et al., *Mortgage Lending in Boston: Interpreting HMDA Data* (Federal Reserve Bank of Boston Working Paper No. 92-7, 1992) (noting that blacks and Hispanics are 56% more likely than whites to be rejected).

⁹³ Following these studies, the federal government made several attempts to strengthen the CRA substantively and enforce it more vigorously. See Schill & Wachter, *supra* note 33, at 1320. In 1995 CRA regulations were approved that marked a turn away from "the efforts/process-based enforcement standard that had been in effect since 1978," and a turn towards "actual results, including loans, investments, and services to an institution's 'assessment area.'" Overby, *supra* note 89, at 1469. The objections surrounding the CRA, however, have not subsided. Many argue that apparent redlining includes lending decisions with discriminatory effect but based on "rational" factors, and that the CRA tries to solve "the problems of inadequate housing, urban decay, and violence that have become issues of national importance" by "compel[ling] suboptimal lending patterns" in a way which makes it "fundamentally flawed . . . anachronistic and ultimately self-defeating." *Id.* at 1435-36.

⁹⁴ See Anthony Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1467-71 (1994).

dress the "structural disinvestment" that plagues inner cities, because neither paradigm recognizes the systematic market failure that drives such disinvestment. Taibi's argument mirrors a theme of this Article: without concerted correction, structural inequality persists in liberalized market conditions.⁹⁵

3. Promotion of Segregation on the Basis of Race

In addition to acting as an unintentional engine of racial segregation, federal law and policy at times facilitated intentional racial segregation by local authorities. At other times federal authorities have actually promoted racial exclusion.

The term racial redlining discussed above with respect to non-state actors, at least according to some commentators, originated with federal governmental practices.⁹⁶ Early versions of the Federal Housing Administration's underwriting manual, for example, "warned against making loans in areas with 'inharmonious racial groups'"⁹⁷ in order to prevent "instability and a decline in values."⁹⁸ Until 1950, the Federal Housing Administration and Veterans Administration mortgage insurance programs not only permitted, but actually recommended racially restrictive property covenants.⁹⁹ Thus, early "racially discriminatory underwriting practices engaged in by the FHA promoted racial segregation in American cities and contributed to the creation of urban ghettos."¹⁰⁰

In 1962 President Kennedy directed the federal government to prevent discrimination in the use, rental or sale of all residential

⁹⁵ See *infra* Part IV. This argument is an oft recurring, if seldom-heeded, theme of critical theory. See generally Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1999) (observing postcolonial development theory and American critical race theory both sought to show how dominant legal systems perpetuate structural inequality between dominant and subordinate groups in system).

⁹⁶ See Schill & Wachter, *supra* note 33, at 1310 n.101 ("Redlining obtains its name from the practice of FHA underwriters' circling in red areas of the city that were bad credit risks.") (quoting NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 101 (1969)).

⁹⁷ *Id.* at 1310 (quoting Gary Orfield, *Federal Policy, Local Power and Metropolitan Segregation*, 89 POL. SCI. Q. 777, 786 (1975) (quoting FHA Underwriting Manual)).

⁹⁸ DENNIS R. JUDD, *THE POLITICS OF AMERICAN CITIES: PRIVATE POWER AND PUBLIC POLICY* 281 (1979) (quoting FHA Underwriting Manual).

⁹⁹ See Schill & Wachter, *supra* note 33, at 1310; see also MARK I. GELFAND, *A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933-1965*, at 217 (1975) (observing that "FHA virtually made [racially restrictive covenants] mandatory"); U.S. DEP'T OF HOUS. & URB. DEV., *EQUAL OPPORTUNITY IN HOUSING* ¶ 2301, at 2320 (1973).

¹⁰⁰ Schill & Wachter, *supra* note 33, at 1311.

property that it financed, operated or owned,¹⁰¹ and his order was later reinforced by the Civil Rights Act of 1964.¹⁰² These remedies, however, were prospective and not retrospective. That is, they prohibited the creation of racially segregated public housing facilities but did nothing to redress the segregation that already existed. Some have even argued that "[t]he federal government intentionally established the public housing program on a de jure racially segregated basis."¹⁰³

In sum, a number of regulatory structures in the postwar period directly or indirectly fuelled the exodus of the middle classes from the suburbs. Because the middle classes were predominantly white, this created not only economic but racial segregation between the cities and suburbs. The racial aspects of suburbanization were not entirely secondary. Early federal housing and lending policies purposely entrenched this racial dynamic. Also damaging was an absence of effective federal policies designed to correct discrimination not only by private actors but also by state and local governments. Although courts attempted to eliminate overt racial restrictions, government did very little to break the link between economic and racial status, so that despite antidiscrimination law racial segregation remained deeply entrenched.¹⁰⁴

The above discussions shed light on a grimly comprehensive set of interlocking dynamics that tie together racial, economic and geographical segregation. Historical conditions produced socio-economic inequality between whites and racial minorities. Federal law and policy intended to spur economic growth exacerbated these inequalities by placing white middle-class families in suburbs and poor minority families in the inner city. In addition to acting as an unintentional engine of racial segregation, federal law and policy at times facilitated intentional racial segregation by local

¹⁰¹ See Exec. Order No. 11063, 27 Fed. Reg. 11,527 (1962) (amended by Exec. Order No. 12,259, 46 Fed. Reg. 1253 (1980)).

¹⁰² 42 U.S.C. § 2000d (1994). The most famous fair-housing litigation arising from the 1964 Civil Rights Act was *Gautreaux v. Romney*, which held that racially segregated public housing maintained by the Chicago Housing Authority violated the Act. 448 F.2d 731 (7th Cir. 1971).

¹⁰³ See Roisman, *supra* note 54, at 1357 (citing *Gautreaux v. Romney*, 448 F.2d 731, 739 (7th Cir. 1971) (finding that HUD intentionally created racial segregation in Chicago public housing); see also *Young v. Pierce*, 628 F. Supp. 1037, 1043-51 (E.D. Tex. 1985) (describing activities of HUD related to creation and entrenchment of racial segregation).

¹⁰⁴ DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

state and nonstate actors; at other times federal authorities explicitly promoted racial exclusion. Against these formidable structural dynamics, federal antidiscrimination law has proved relatively ineffectual in undoing segregation.

C. *Deterioration of City Infrastructure*

The hierarchy of race, income and geography created in part by the law and policy described in Parts I.A. and I.B. renders urban poor minorities disproportionately vulnerable to adverse effects of globalization. This section indicates additional contours of this hierarchy and the vulnerability it creates.

With the middle class leaving in record proportions from the cities during the postwar period, urban areas deteriorated. While the causes were complex and manifold, legal rules played a role in facilitating the progression of urban malaise. First, federal jurisprudence allowed state and local governments to maintain disparities in spending on infrastructure and public services, including education and police protection. Second, disparities in lending inhibited business and residential development.

1. The Deterioration of Urban Infrastructure and Public Services

Suburbanization led to severe deterioration of the housing stock, infrastructure, and educational systems and economies of inner cities. Because of the jurisdictional separation of cities from suburbs, the tax base that could sustain basic infrastructure and public services crumbled in many cities as the middle classes left for the suburbs.¹⁰⁵ This has often been seen as a natural, if unfortunate, result of such jurisdictional divisions. That perception, however, uncritically accepts the legal separation of the city and suburban tax bases. Richard Ford has shown how courts have reinforced the power of local governments to define their tax bases and revenue distribution as they see fit, even though local governments are mere subdivisions of states and have no special constitutional right to self-determination. In this way, courts have reinforced territorial demarcations and dismissed their effect of entrenching racial segregation.¹⁰⁶

¹⁰⁵ See *infra* for a discussion of local government law and its role in creating this effect.

¹⁰⁶ Ford, *supra* note 3.

The jurisdictional and distributional divisions entrench inequality in basic public goods provided to urban as opposed to suburban populations. Inner cities often suffer from disproportionately low state funds to maintain infrastructure in comparison to suburbs.¹⁰⁷ With respect to other public services, perhaps the most prominent example is education. *Milliken v. Bradley* held, for example, that courts could not order desegregation school busing between Detroit schools and Detroit's predominantly white suburban school districts.¹⁰⁸ Further entrenching this disparate relationship between suburban and city schools, *San Antonio Independent School District v. Rodriguez* held that a school-financing system could maintain large disparities in tax-burden/expenditure ratios among districts without violating the Equal Protection Clause.¹⁰⁹ These decisions have played a role in what one commentator has called the federal government's "quiet abandonment" of the goal of desegregating the public schools.¹¹⁰

These dynamics have allowed the gap between suburban and inner-city schools to grow over the years, to the point where the deplorable conditions of many urban school systems are well-known. "[S]chools in impoverished areas tend to have much lower test scores, higher dropout rates, fewer students in demanding classes, less well-prepared teachers, and a low percentage of students who will eventually finish college."¹¹¹ Public schools attended predominantly by children who are racial minorities are sixteen times more likely to be in areas of concentrated poverty than those schools that are not predominantly attended by racial minorities.

Education systems in suburbs also often benefit disproportionately from state spending. In New York, for example, state spending on education outside New York City is higher per child than within the city. At the same time that little has been done to ad-

¹⁰⁷ See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 131-32 (1985).

¹⁰⁸ See 418 U.S. 717 (1974); see also Ford, *supra* note 3, at 1875.

¹⁰⁹ See 411 U.S. 1 (1973); see also Ford, *supra* note 3, at 1876.

¹¹⁰ See Larry Tye, *U.S. Sounds Retreat in School Integration: America's Schools in New Segregation*, BOSTON GLOBE, Jan. 5, 1992, available in 1992 WL 4158916.

¹¹¹ Dash T. Douglas, *A House Divided: The Social and Economic Underdevelopment of America's Inner Cities*, 10 U. FLA. J.L. & PUB. POL'Y 369, 384 (1999) (citing MILTON S. EISENHOWER FOUNDATION, THE MILLENNIUM BREACH 10 (1998)).

dress these inequalities, courts have rolled back affirmative action at the postsecondary level.¹¹²

2. Deterioration of Business and Housing Development

Business faces a number of obstacles if it wants to put down roots and thrive in the inner city. First, capital formation in depressed urban communities remains disproportionately low. As Part I.B. indicated, capital lending to minorities is lower than for whites. While some of this disparity may be explainable on race-neutral grounds, some of it is not.¹¹³ Second, the human capital so crucial both to entrepreneurship and to a productive work force is eroded in the inner city by poverty and inferior education. Third, the deterioration of infrastructure and public services make business prospects in the inner city even more unappealing.

The early bias of federal home ownership programs led to an "unavailability of mortgage capital for purposes of home improvement or home purchase in inner-city neighbourhoods [that] may have contributed to the disinvestment in housing and decline in property values experienced by most American cities in the second half of the twentieth century."¹¹⁴ Even now, homeowner lending to minorities is lower than to similarly situated whites, despite the federal prohibition of racially segregative lending.¹¹⁵ Redlining has

¹¹² For a discussion of inequitable school funding in New York City, see COMMUNITY SERVICE SOCIETY OF NEW YORK, *SEPARATE, UNEQUAL, AND INADEQUATE: EDUCATIONAL OPPORTUNITIES & OUTCOMES IN NEW YORK CITY PUBLIC SCHOOLS* (1995). For a discussion of affirmative action, see Kimberlé Crenshaw, *Playing Race Cards: Constructing a Pro-Active Defense of Affirmative Action*, 16 NAT'L BLACK L.J. 196, 196-97 (1999-2000). While the Supreme Court allowed race to be taken into consideration as one of many factors in determining admissions in post-secondary institutions, states such as California and Texas have disallowed any such considerations in admissions to their state university systems. Texas is a partial exception to this description in the sense that Texas has pursued relatively aggressive redistributive educational spending policies, has actively and explicitly focused on improving minority performance on standardized tests, and has established a policy under which state universities now admit all Texas high school graduates in the top 10% of their classes.

¹¹³ See Schill & Wachter, *supra* note 33, at 1311.

¹¹⁴ *Id.*

¹¹⁵ Section 3605 of Title VIII of the Civil Rights Act of 1968 prohibits a financial institution from denying financial assistance for purchasing, constructing or maintaining a dwelling, or in fixing the terms or conditions of the financial assistance, because of race, color, religion, sex or national origin. See 42 U.S.C. § 3605 (1994). Section 3605 also prohibits redlining, see *Laufman v. Oakley Building & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976), which is "the practice of identifying certain neighbourhoods as unfit for normal housing loans on the basis of their racial makeup or some other prohibited ground." SCHWEMM, *supra* note 71, at 187. In addition, section 3605 prohibits discrimination in the form of mortgage foreclosure policies more aggressive for minority than white homeowners. See

made it difficult to obtain loans for renovation or redevelopment. Privately owned housing stock further deteriorated as inner-city landlords became increasingly absentee, and expectations of declining property values led to declining maintenance. As for public housing, "[i]nefficient management and systematic under-maintenance . . . contributed to [its] ghettoization."¹¹⁶ All of these dynamics have caused privately owned housing stock in many urban minority neighborhoods to deteriorate over the postwar era.¹¹⁷

Other Causes of Inner-City Economic Depression. At the same time that the physical infrastructure and capital stock of the inner city deteriorated, suburbanization moved management-level corporate jobs out of the city. Proximity to skilled workers, better infrastructure, and even tax breaks¹¹⁸ encouraged this trend; as manufacturing relocated,¹¹⁹ there was little to impede it. In New York, for example, the "massive decline in manufacturing" was accompanied by a "massive loss of headquarters and hence of office jobs."¹²⁰ Thus, cities have become increasingly irrelevant to traditional industrial production, as the manufacturing sector has left cities and the management has moved out to the suburbs.

With low levels of capitalization and deteriorating infrastructure and public services, the economic stimulus to the inner city that might have come from new business or home development replacing the proprietors and homeowners that left did not occur. The rest of the story is not hard to imagine. Decreased employment opportunities further weakened the socioeconomic system left behind. Not surprisingly, the concentration of poverty was not attractive to entrepreneurs. Crime resulting from this concentration further hastened the departure of business and relatively mobile families out of the cities. These factors all conspired to create what Douglas and Massey famously called "American Apartheid."¹²¹

Harper v. Union Savs. Ass'n, 429 F. Supp. 1254, 1257-58 (N.D. Ohio 1977) (construing section 3605).

¹¹⁶ Schill & Wachter, *supra* note 33, at 1296-97 (citation omitted). "According to a recent report prepared for the national Commission on Severely Distressed Public Housing, the amount needed to modernize existing public housing ranges from \$14.5 billion to \$29.2 billion." *Id.*

¹¹⁷ See *infra* notes 217-26 for a discussion of gentrification.

¹¹⁸ See MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH 16 (1995).

¹¹⁹ See *infra* Parts II and III.

¹²⁰ SASSEN, *supra* note 19, at 200.

¹²¹ See MASSEY & DENTON, *supra* note 104.