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Authors

Collins, Robert W.
Morris, Robin A.

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RACIAL INEQUALITY IN AMERICAN CITIES: AN INTERDISCIPLINARY CRITIQUE

Robert W. Collin*
and
Robin A. Morris**

I. INTRODUCTION	177
A. Brief History of Law and Race in American Cities	177
B. The Racial Importance of Cities	178
II. RESIDENTIAL RACIAL SEGREGATION	179
A. Population Distribution and Trends	179
B. Housing and its Relationship to Other Urban Problems	181
C. The Judicial Quandary	186
III. EARLY URBAN EMPLOYMENT PREFERENCES	190
IV. AFFIRMATIVE ACTION IN THE URBAN CONTEXT	192
A. Costs	192
B. <i>Washington v. Davis</i>	193
C. Problems of Proof	193
D. The Judicial Quandary Revisited	194
V. A RECOMMENDATION	195
VI. CONCLUSION	196

I. INTRODUCTION

A. *A Brief History of Law and Race in American Cities*

Since the thirteenth amendment, which abolished slavery, Blacks have been struggling for equal opportunity.¹ The year after that amendment, Congress passed the Civil Rights Act of 1866.² This act provided that:

All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by the white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

In 1868 these provisions were strengthened by the adoption of the fourteenth amendment to the United States Constitution. This amendment made all people born or naturalized in the United States citizens and specifically provided that: "No State shall . . . deny to any person within its jurisdiction the

* Assistant Professor Planning University of Virginia, School of Architecture, Division of Urban and Environmental Planning. Juris Doctor—Albany Law School, Master of Urban Planning—Columbia University, Masters of Social Work—Columbia University, Masters of Law—University of Missouri

** Associate Professor of Law, Tulane Law School. B.A.—The Colorado College; J.D.—Arizona State University

1. U.S. CONST. amend. XIII. See also Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019 (1969).

2. 42 U.S.C. §§ 1981, 1982 (1982).

equal protection of the laws."³ In the first case interpreting the fourteenth amendment, the United States Supreme Court held that *only* state discrimination was covered.⁴ This allowed private entities to practice private discrimination, which was commonly done through judicially enforced restrictive covenants in real estate. In a government with a history of little public intervention in housing or social welfare most urban social amenities were provided by private initiative and the only state action found to contribute to this type of segregation was judicial enforcement of these covenants.⁵ Whole blocks of cities excluded Blacks by law if Whites predominated on that particular block until 1917. It was then that the Court held that a White landowner's due process rights were breached by these ordinances⁶ but it was not until 1948, a mere forty years ago, that judicially enforced racial covenants were declared violative of the fourteenth amendment. In the landmark case of *Shelley v. Kramer*,⁷ the Court held that judicial enforcement constituted "state action". It was not until June 17, 1968 that the Court held that the long somnolent Civil Rights Act of 1866 forbade private housing discrimination.⁸ In 1976, the Court found that the Department of Housing and Urban Development (HUD) had violated the United States Constitution in acquiescing to Chicago's discriminatory selection of sites for public housing,⁹ beginning the judicial attack on government policies which constituted and maintained racially segregated living conditions in our cities.

B. *The Racial Importance of Cities*

Since the Civil War, strong economic, political, and social forces have operated together so that the majority of Blacks now dwell in urban areas which are predominantly Black. Rural Blacks from the South migrated to Northern central cities while Whites migrated to the suburbs.¹⁰ In addition to the large numbers of Black migrants, other low-income immigrant groups competed for low-income housing, thereby increasing demand. Racial prejudice, housing discrimination, exclusionary zoning, and federal and state housing policies all combined to create increased demand for urban housing.

Cities have two major characteristics, housing and employment. The other response cities have made to ethnic concentration is to experiment with employment preferences to counteract earlier employment practices which fa-

3. U.S. CONST. amend. XIV.

4. Civil Rights Cases, 109 U.S. 3 (1883).

5. It was not until the Great Depression that the federal government intervened in social welfare at all. It was the threat of social unrest that prompted this action. Blacks were seldom, if ever, included in these programs. During this time approximately one-half of all home mortgages were in default; foreclosures were around 1,000 per working day (in 1932); and new mortgage lending and new homebuilding almost stopped. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOUSING IN THE SEVENTIES: A REPORT OF THE NATIONAL HOUSING POLICY REVIEW 7 (1974). Since the public role in racial equality in cities was minimal, racism proceeded without much resistance. See *infra* text accompanying notes 29-37.

6. *Buchanan v. Warley*, 245 U.S. 60 (1917).

7. 334 U.S. 1 (1948).

8. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); see Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer, Co.*, 55 VA. L. REV. 272 (1969); Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME L. REV. 199 (1978).

9. *Hills v. Gautreaux*, 425 U.S. 284 (1976). See generally R. BINGHAM, PUBLIC HOUSING AND URBAN RENEWAL: AN ANALYSIS OF FEDERAL-LOCAL RELATIONS (1975).

10. See R. CLOWARD AND F. PIVEN, REGULATING THE POOR 222-225 (1971).

vored White city dwellers. Cities voluntarily undertook these preferences decades before any legislative or constitutional challenges to these earlier employment preferences were somewhat successful. This has, to some extent, limited cities to affirmative action remedies, which have not been effective.

Overall, there has been much legal activity to redress the harm and problem of race discrimination in American cities. Affirmative action remedies can take the form of set-asides for minority owned businesses and employment preferences in city agencies.¹¹ Other social changes that combat racial discrimination include voting rights, school desegregation and the appointment of minorities to positions in city government. It is only appropriate that our urban areas become the focal point of this particular social change as Blacks constitute a large part of that population.¹² The density of urban populations helps prevent urban problems from being kept from public view. Also all cities, suburban and urban, serve important political roles. Recently the Supreme Court has given much deference to community self-determination.¹³ However, it is still an open question as to whether the law and our legal forums are still advancing the rights of Black Americans.¹⁴ This Article will focus on housing and employment activities of cities that bear on racial equality.

II. RESIDENTIAL RACIAL SEGREGATION

A. *Population Distribution and Trends*

People live, work and play in cities. Cities are not always the densely populated urban areas that come to mind, but can be low-density, spread out, suburban areas.¹⁵ What these two types of areas share is that people make their homes there. Employment opportunities, educational opportunities, and respective social perceptions of people, regardless of color, are affected by the location of their homes.

11. For an excellent discussion of these issues see M. DAVID GELFAND, *FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT* §§ 2-2(A)(3) to 2-2(A)(7) (1984).

12. See generally U.S. BUREAU OF THE CENSUS, 1983, *CENSUS OF POPULATION 1980, General Population Characteristics*, U.S. SUMMARY 1-19.

13. Gelfand, *The Constitutional Position of American Local Government: Retrospect for the Burger Court and Prospect for the Rehnquist Court*, 14 *HASTINGS CONST. L.Q.* 635, 636 (1987). Examples of court decisions that defer to the decision-making power of the municipality as it relates to race include *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (racial impact of a municipal at-large election system held insufficient to establish fourteenth or fifteenth amendment violations; purposeful discrimination must be proven); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (racial exclusionary effects of zoning decisions held insufficient to establish an equal protection violation; purposeful discrimination, based largely upon the procedural history of the zoning enactment must be proven); *Milliken v. Bradley*, 418 U.S. 717 (1974) (district court went beyond its authority in ordering a city-wide, interdistrict desegregation plan without proof that the school districts being consolidated had themselves violated the Constitution).

14. See SWINTON, *ECONOMIC STATUS OF BLACKS 1986*, in *THE STATE OF BLACK AMERICA* 49 (1987). The median family income of Blacks in 1984 was \$15,432. This reflects a rise from the 1982 recession but in constant dollars is almost \$1,500 less than in 1970 and \$50 less than in 1980 at the start of the Reagan administration. See J. JACON, *OVERVIEW OF BLACK AMERICANS IN 1985*, at 3 (J. Williams ed. 1986). Over 40% of Black families are now headed by females. Over 50% are poor. See J. LADNER, *TEENAGE PREGNANCY: THE IMPLICATIONS FOR BLACK AMERICANS* (J. Williams ed. 1986). See also Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 *HOW. L.J.* 547 (1979).

15. See Daye, *The Race, Class and Housing Conundrum: A Rationale and Proposal for a Legislative Policy Suburban Inclusion*, 9 *N.C. CENT. L.J.* 37 (1977).

Cities, in themselves, are very difficult to study because they do not lend themselves to current methods of analyses. As noted by one researcher:

[R]esearch is confounded by the infinitely various fragmentation of the city, by the intense complexity of its behavior patterns, and by the emergency of its highly apparent problems with housing, poverty, education, transportation, racial hostility, governance, population, and crime.¹⁶

Residential racial segregation is one of the outstanding and most studied characteristics of American cities.

The recent shift of manufacturing, office employment and residential development from inner cities to suburban cities has caused large economic and social disparities. The main disparity is that the inner cities have absorbed and retained the lower income minority population while suburban cities have taken in the White population.¹⁷ This departure of industry and jobs has left inner city urban areas without employment opportunities for low income residents, a minority labor force with less marketable skills and a community without an adequate tax base to provide municipal services. The overall quality of life deteriorates affecting housing most seriously. The remaining housing in our cities tends to be older, of low quality, and in worse neighborhoods.¹⁸ This, in turn, has prompted financial institutions to divest in the area of urban housing stock which exacerbates the decline in the quality of urban life.¹⁹

The Black population outside of the central cities of urban areas increased by 2.8 million between 1970 and 1980. Significantly, these residents are clustered outside the inner cities of a few large cities. The developing patterns of racial and residential distribution duplicate the traditional patterns of racial segregation of the central city.²⁰ Despite this Black exodus from the central city, Black populations have continued to increase in percentage in American central cities.²¹ Homeownership, a traditional goal of most Americans, is hardly possible in the inner city even though most Americans who have managed to develop net worth in the past four decades have done so through home ownership.²² However, since the property values of inner city neighborhoods are not increasing as much as other neighborhoods, the incentive to make home improvements is low.²³ Home ownership, as it represents security of tenure, would also represent a strong inroad toward racial equality.

However, the segregated nature of housing in the American city is largely responsible for the current status of other aspects of our urban form. As one

16. B. HARRISON, *URBAN ECONOMIC DEVELOPMENT: SUBURBANIZATION, MINORITY OPPORTUNITY, AND THE CONDITION OF THE CENTRAL CITY* xiii (1974).

17. *The Central City Problem and Urban Renewal Policy: A study prepared by the Congressional Research Service, Library of Congress, for the Subcommittee on Housing and Urban Officers Committee on Banking, Housing and Urban Affairs, U.S. Senate* 3 (1973).

18. See G. STERNLIEB & R. BURCHELL, *RESIDENTIAL ABANDONMENT—THE TENANT LANDLORD REVISITED* (1973).

19. See Comment, *Property Abandonment in Detroit*, 20 WAYNE L. REV. 845 (1974).

20. Y. RABIN, *SUBURBAN RACIAL SEGREGATION AND THE SEGREGATIVE ACTIONS OF GOVERNMENT: TWO ASPECTS OF METROPOLITAN POPULATION DISTRIBUTION, IN A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES*, 31-53 (1984).

21. L. Long & D. De Ore, *The Suburbanization of Blacks*, AM. DEMOGRAPHICS 5-18 (1981).

22. W. GROHAM & N. GLAZER, *THE URBAN PREDICAMENT* 30-31 (1976).

23. *Id.* See also Silverman, *Homeownership for the Poor: Subsidies and Racial Segregation*, 48 N.Y.U. L. REV. 72 (1973); Stegman, *Low-Income Ownership: Exploitation and Opportunity*, 50 J. URB. L. 371 (1973).

commentator noted, "[this process of racial segregation] . . . has created major distortions in the patterns of metropolitan growth, and bears a major responsibility for a surprisingly long list of ills."²⁴

B. *Housing and Its Relationship to Other Urban Problems*

Some of these distortions include segregated public schools and separation from employment opportunities. It should surprise no one that all leading studies of metropolitan housing have named racial discrimination as a major cause of segregation.²⁵ Since non-minorities tend to make up the bulk of urban society in terms of those who rule, legislate, judge, administer, and police, it is important that they be aware of the racial impact of their decisions. Racial discrimination has prejudiced these public officials in ways that prevent racial equality from becoming a reality.²⁶

Many studies have proven the racially discriminatory effect of some government practices. For example, the enforcement of racially restrictive covenants, racially discriminatory site selection and tenant distribution procedures of local public housing authorities, the implementation of urban renewal programs, and exclusionary zoning ordinances are just a few of these practices. Although many of these practices have ostensibly been discontinued, these discriminatory governmental acts created irreversible conditions that have a momentum of their own. Also, while the impact of a single discriminatory governmental action may have negligible effects on the immediate residential pattern,²⁷ the cumulative effect of such practices are not only substantial, but may mutually reinforce each other.²⁸ These pervasive and extensive governmental actions are major factors in the racial inequality of American cities.

Many times these programs have been developed and implemented with

24. Kain, *Housing Segregation, Black Employment and Metropolitan Decentralization: A Retrospective View* in PATTERNS OF RACIAL DISCRIMINATION (G. von Furstenburg, B. Harrison & A. Horowitz eds. 1974).

25. One commentator presents the discrimination-segregation relationship as follows:

[The evidence] overwhelmingly supports the proposition that racial discrimination is a powerful force in urban housing markets. Only a theory that involves discrimination can explain why blacks are concentrated in a central ghetto, why blacks pay more for comparable housing than whites in the same submarkets, why prices of equivalent housing are higher in the ghetto than the white interior, and why blacks consume less housing and are much less likely to be homeowners than whites with the same characteristics. This evidence of discrimination, based on recent data, makes a convincing case for government intervention in the housing market.

J. Yinger, *Prejudice and Discrimination in Urban Housing*, in CURRENT ISSUES IN URBAN ECONOMICS 459 (P. Mieszowski & M. Straszheim eds. 1979).

26. Separation based on race is a concept that still permeates American society. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (Virginia statute prohibiting marriage between Blacks and Whites declared invalid). See also Collin & Hemmons, *Equal Protection Problems with Welfare Fraud Prosecution*, 23 LOY. L. REV. 17 (1977). The implementation of welfare fraud definitions are selectively enforced so that Black women are held to a much rigid standard of liability. See *Kelly v. Robinson*, 479 U.S. 36 (1986) (obligation imposed as a condition of welfare fraud obligation is a nondischargable debt). Justice Marshall's dissent is of particular interest.

27. See D. Foley, *Institutional and Contextual Factors Affecting the Housing Choices of Minority Residents*, in SEGREGATION IN RESIDENTIAL AREAS 85-147 (A. Hawley & V. Rock eds. 1973); J. FEAGIN & C. FEAGIN, *DISCRIMINATION AMERICAN STYLE: INSTITUTIONAL RACISM AND SEXISM* (1978).

28. For a study of race and property values see L. LAURENTI, *PROPERTY VALUES AND RACE: STUDIES IN SEVEN CITIES* (1960) (in which the author concludes that the entry of Blacks into a community either had no effect nor increased property values).

money and direction from the state and federal governments.²⁹ Most of the federal institutions developed during the 1930's included the Federal Housing Administration (FHA), the Federal Savings and Loan Insurance Corporation, and the Federal National Mortgage Association (FNMA). These institutions gave a decisive push to the large-scale development of single-family homes and still exert power over housing credit markets. One federal institution of tremendous importance in influencing patterns of urban growth and residential segregation was the Veterans Administration (VA). After World War II, the VA guaranteed home loans for veterans. The VA housing program was established by the Servicemen's Readjustment Act of 1944 and is the biggest program ever enacted for any single target group.³⁰ Between the VA and FHA programs new housing production increased from 140,000 units in 1944 to almost 2 million in 1950. However the largest federal housing "program" is the federal income tax law which allows a homeowner to deduct interest payments and property taxes from income. This not only tends to benefit high income property owners, but also creates a huge incentive for the construction of low-density, single family homes.³¹ This incentive is stronger for more costly housing because high-income families obtain more of a deduction than low-income families. This costs the United States government approximately \$39 billion dollars a year in foregone revenues which is more than any other federal expenditure for housing. These federal programs have generally facilitated low down-payments, long-term loans, and preferential tax treatment for ownership of single-family homes. Because single-family homes require more land, and this land is generally not available in the inner city, the net effect of this federal intervention in housing has been to "suburbanize" America.

The administration of these programs, especially mortgage insurance and loan programs, have created the current infra-structure of racial inequality in American cities. The FHA Underwriting Manual, in use from 1935 to 1950, explicitly discouraged "the infiltration of inharmonious racial and national groups", "a lower class of inhabitants" and the "presence of incompatible racial elements" in new housing.³² Both zoning and racial covenants were put forth as good devices to exclude Blacks. The FHA prepared a model restrictive covenant and left blank spaces for the excluded races and religions which were filled in by the builder.³³ These policies flowered in the first five years

29. These practices include, but are not limited to clearance and elimination of minority residential areas, changing or failing to change municipal or school boundaries, development or physical barriers to the growth of minority areas, judicially enforced racially-restricted covenants, discriminatory relocation practices, discriminatory site selection and tenant assignment policies, exclusion of public and subsidized housing, discriminatory provision of municipal services, and exclusionary zoning.

For example, in the *Mount Laurel* case, *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151 (1975), *appeal dismissed* 423 U.S. 808 (1975), the housing of a Black, low-income community was designated in the zoning ordinance as a prior non-conforming use. This allowed the municipality to refuse permits for the replacement and rehabilitation of housing in this community. Since then a methodical process of inspections, condemnations, and demolitions has eroded the Black community.

30. U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, *HOUSING IN THE SEVENTIES: A REPORT OF THE NATIONAL HOUSING POLICY REVIEW* 10 (1974).

31. See Gurko, *Federal Income Taxes and Urban Sprawl*, 48 DEN. L.J. 329 (1972).

32. A REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS, *TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING* 39, 40 (1975).

33. *Id.* at 40.

following World War II when about 900,000 FHA housing units were produced.³⁴ Even after these practices were discontinued, it was questionable if these federal programs ever made integration as much a goal as racial segregation had been. The United States Commission on Civil Rights reported:

As late as 1959, it was estimated that less than two percent of the FHA insured housing built in the post-war housing boom, had been made available to minorities. The intent to promote minority housing opportunities was not matched by action to prevent builders and owners who participated in federally sponsored programs from behaving much as they had in the past.³⁵

Local government agencies such as planning departments, highway departments, housing authorities, redevelopment authorities, and the legal staffs of cities not only helped to implement racist policies, they almost never had integration as a goal.³⁶ From the civil unrest of the Great Depression emerged the first federal program created to *finance* housing construction for low-income families. The Housing Act of 1937³⁷ established the United States Housing Authority which gave financial assistance to local government organizations. Usually these organizations were local housing authorities (LHAs) which constructed and managed low-income housing. When the legislation was first enacted the separate-but-equal doctrine of *Plessy v. Ferguson*³⁸ was law. Therefore, local housing authorities did not encourage or even consider racial integration. In fact, they usually selected separate locations for units to be occupied by different races. Once the site was selected, subsequent sites were located near sites occupied by similar races. Sometimes LHAs equally created segregated residential patterns. When the separate-but-equal doctrine was struck down in *Brown v. Board of Education*,³⁹ LHAs still continued their racist practices.⁴⁰ President Kennedy issued a Presidential Executive Order on Equal Opportunity in Housing in 1962 which stated that tenants in federally assisted housing projects could not be selected on a racial basis.⁴¹ This order was interpreted narrowly by the Federal Public Housing Administration which limited its effect to public housing furnished after the date of the order and applied it only to tenant selection. Site selection and one-and-two family owner-occupied units were not covered by the order until 1969.⁴² Local governments have been a major factor in creating the segregation infrastructure that fosters racism in our cities today.⁴³

34. *Shelley v. Kramer*, 334 U.S. 1 (1948).

35. See *supra* note 32, at 40.

36. See Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Race Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978); Abascal, *Municipal Services and Equal Protection: Variation on a Theme by Griffin v. Illinois*, 20 HASTINGS L.J. 1367 (1969).

37. The Housing Act of 1937, ch 896, § 3, 50 Stat. 888 (1937) (codified in various sections of 42 U.S.C. (1970)).

38. 163 U.S. 537 (1896).

39. 347 U.S. 483, 495 (1954).

40. See Comment, *The Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing*, 64 MICH. L. REV. 871 (1966).

41. Exec. Order No. 11,063, 3 C.F.R. 656 (1958-1963 Compilation) (1964).

42. A REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING, (1975).

43. These practices by local government continue. See *Burney v. Housing Authority of Beaver*, 551 F. Supp. 946 (W.D. Pa. 1982) (race used as basis of integration; Whites given preference in public housing).

As racially segregative public housing is, it is the only program for housing low and moderate income groups. Even these programs are being eliminated under the Reagan administration.⁴⁴ Privatization of public housing represents a policy initiative which will have a net effect of increasing residential racial segregation.

The first significant step to privatize the public housing stock came in the Housing and Urban-Rural Recovery Act of 1983 which rewrote the law affecting the demolition and sale of public housing, thereby making it easier to reduce the federal government's existing stock. Authorized by the 1983 Act, HUD can approve the sale of public housing for any one of three reasons: 1) changes in the surrounding area make project operation infeasible; 2) sale of the project makes more efficient and effective use of the public project; or 3) any other factors HUD determines are in the best interest of the tenants. In addition, the 1983 Act requires replacement housing for those tenants displaced by the sale of public housing.⁴⁵

Since 1983, three other HUD procedures have been aimed at reducing the public housing stock. First, HUD has provided modernization funds only to those projects with 20 years or more viability. Second, the Kemp-Symms "Urban Homestead Act" of 1984 proposed allowing tenant associations to buy public housing units for no more than 25% of their market value. Such programs have been inspired by British-style ownership programs, with tenant management as the intermediate stage, to turn public housing tenants into homeowners.⁴⁶ Third, in June of 1985, HUD undertook a demonstration program of 1,300 units to examine the feasibility of selling public housing units.⁴⁷

This push for privatization comes in the face of an affordability crisis in American housing. To begin with, the total production of affordable housing has plummeted since the early years of the Reagan administration. According to a National Association of Housing Redevelopment Officials (NAHRO) study in 1985, HUD rental housing starts declined from 129,400 units in 1981 to 30,400 units in 1984 (the percentage of new public construction has dropped from 46% of the total HUD Assistance units in 1981 to 17% in 1987).⁴⁸

Such cutbacks of housing starts have put tremendous pressure on existing public housing facilities. In 1985, four-fifths of the poor in need of public housing assistance did not receive any such assistance.⁴⁹ According to the NAHRO in 1986, the ratio of demand in public housing units to available supply is approximately 40 to 1.⁵⁰ In some cities the waiting list exceeds 25

44. Nenzo, *Reagan's '88 Budget: Dismantling HUD*, J. OF HOUSING 103 (1987) (HUD's budget has decreased by \$23,121 billion since 1981). See also Morganthau, *The Housing Crunch*, Newsweek, Jan. 4, 1988 at 18.

45. Connerly, *What Should Be Done with the Public Housing Program*, 52 J. OF AM. PLANNERS 148 (1986). See also T. Miller & M. Depallo, *Desegregating Public Housing: Effective Stranger*, 43 J. OF HOUSING 9-18 (1986); HOUSING DESEGREGATION AND FEDERAL POLICY (J. Goering ed. 1986).

46. Silver, *Selling Public Housing: The Methods and Motivations*, 47 J. OF HOUSING 213 (November 1985).

47. See Connerly *supra* note 45, at 142, 149.

48. Walker, *Development in Nonprofit Production of Low-Income Housing*, 20 CLEARINGHOUSE REV. 1227 (1987).

49. Comment, *The Nonprofit Corporation and Community Development in Bedford Stuyvesant*, 42 WASH. & LEE L. REV. 1259, 1277 (1985).

50. Matulef, *This is Public Housing*, 44 J. OF HOUSING 179 (1987).

years.⁵¹ To complicate matters, contracts for subsidized private housing units are soon to expire. The end result is that more and more developers will continue to convert low-income units into more expensive units.⁵²

The most significant difference between the British public housing markets and the United States is in size. In 1979, 33% of the British households lived in public housing, compared with 1.3% of American families.⁵³ This suggests that British public housing incomes are much closer to the national median income. Consequently, British tenants are more capable of buying their homes from the government than American public housing tenants.⁵⁴ British public housing is also in better condition and consists of more houses than high-rise flats (less than 20% consists of flats).⁵⁵ In summary, both the size and condition of Britain's public housing stock and its demographic characteristics make a more appropriate environment for privatization of public housing. Another significant difference between the British and American experience with public housing is the lack of racial stigma attached to public housing as a result of the comparative lack of state sponsored discrimination and comparatively homogeneous ethnic population.

Although it appears that Britain has been extremely successful, in-depth analysis suggests that the privatization of public housing could have grave consequences for Britain. Jay Howenstine's article in *Urban Law and Policy* considers the negative implications of such a program.⁵⁶ Based on his analysis of Great Britain's privatization policy, Howenstine suggests five negative aspects with regard to selling off public housing stock. The first negative aspect is that since the level of household income is the dominate factor in promoting the sale of public housing, there is considerable doubt about both the capacity and the willingness of very low-income families to buy public housing. Those who are least capable of buying the units will continue their dependency on the public sector. Secondly, few non-workers have the capacity to buy public housing and maintain it. Thirdly, in Great Britain the conversion of apartment buildings into ownership has been limited because of administrative and management complexities. Fourthly, there is a danger of tenants over-committing themselves in purchasing public housing. The fifth negative aspect of selling public housing is the problem of equity.⁵⁷ Tenants who are given the opportunity to buy the limited public housing units raise the question of equity to those who have not been able to obtain assistance. Is it fair to not allow these families the same opportunities of current tenants? Howenstine's analysis suggests that even though Great Britain is a more conducive environment for a privatization policy than the United States, there have been serious flaws in the program. Consequently, the United States, whose environment is less

51. See *Sell by Jan 89*, 294 THE ECONOMIST 44 (1985). See also J. Walker, *Privatization of Housing Programs: Policy and Implications*, 43 J. OF HOUSING 241 (1986).

52. Bratt, *Controversy and Contributions: A Public Housing Critique*, 42 J. OF HOUSING, 165 (1985).

53. See *supra* note 48, at 244.

54. *Id.*

55. Howenstine, *Selling Public Housing to Individuals and Cooperatives: Lessons from Experience*, 7 URBAN L. AND POL'Y 1, 25 (1985). See *supra* note 46, at 214.

56. Howenstine, at 25.

57. *Id.* at 25.

suitable for such a privatization program, should not continue to sell the public its housing.

Such criticisms of an American version of this program have not been exclusively from abroad. Among the groups which oppose the sale of public housing in the United States are NAHRO, the Council of Larger Public Housing Authorities (CLPHA), the National Housing Law Foundation, and even HUD itself.⁵⁸ At best, privatization of public housing will segregate the urban housing stock to pre-*Shelly v. Kramer* levels.

Housing discrimination has many impacts at all levels of both individual and community existence. As noted by the United States Civil Rights Commission:

A host of other social problems stems at least in part, from discrimination in housing. Residential segregation has contributed to inequality in job opportunities, racially impacted and differentially endowed schools, greater tax burdens in central cities to support higher social service costs, and a distorted pattern of urban growth.⁵⁹

Thus, racial segregation and concomitantly, racial inequality, continue to be major characteristics of American cities.⁶⁰ To imply that private market discrimination is the only significant cause of this characteristic is to support a myopic view of reality whereby decision-makers can deny public accountability. It denies the important role of these public agencies in shaping urban policy. It also provides a basis for denying equitable outcomes in our judicial forums.⁶¹

C. *The Judicial Quandary*

Legal remedies in the area of race discrimination have chiefly been equitable remedies, focusing on restoring victims of unlawful discrimination to their rightful position not by awarding them compensatory, money damages

58. *Id.* at 25. See also Morganthau, *The Housing Crunch*, NEWSWEEK 18, Jan. 4, 1988, at 18 for a discussion of bleak prospects for housing the poor, intentional destruction of public housing projects, and the current political status of HUD.

59. U.S. COMMISSION ON CIVIL RIGHTS, *Federal Civil Rights Enforcement Efforts* 155 (1971).

60. The exclusion of families with children is discrimination against them and is often a smokescreen for racial discrimination. Blacks, and especially Black females, make up a large portion of renter families and are particularly affected by exclusionary practices. See Morales, *Use of the Fair Housing Act to Redress Housing Discrimination Against Families with Children*, 17 CLEARINGHOUSE REV. 736 (1983). See also Schober, *Exclusion of Families with Children from Housing*, 18 J. OF L. REFORM 1122 (1985); Comment, *Why Johnny Can't Rent: An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing*, 94 HARV. L. REV. 1829 (1981); *America's Hidden Poor*, U.S. NEWS AND WORLD REPORT 18, Jan. 11, 1988.

61. See Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974). The Reagan administration has both reduced the government's role in civil rights and reversed policies which have been proved effective in promoting equal opportunity for minorities and women. J. PALMER & I. SAWHILL, *OVERVIEW IN THE REAGAN RECORD: AN ASSESSMENT OF AMERICA'S CHANGING DOMESTIC PRACTICES* 206 (1984).

To implement these policies the U.S. Justice Department has tried to dismantle efforts toward desegregation as evidenced by its intervention in lawsuits. They enter these lawsuits on the behalf of the municipality or public agency defendants who are usually trying to evade the obligations of court dictated desegregation plans. Sometimes, the Justice Department has even begun litigation to halt the implementation of voluntary desegregation plans. See also TITLE VIII LEGAL PROCEDURE MANUAL, U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, *AN ANALYSIS OF REMEDIES OBTAINED THROUGH LITIGATION OF FAIR HOUSING CASES: TITLE VIII AND THE CIVIL RIGHTS ACT OF 1866*.

but by requiring instead the wrongdoer to undo the present day effects or the wrongful discrimination or repair the present day injury to the victims.

While our federal courts have the power to order monetary and equitable relief, in electing the equitable remedy⁶² the issue has become the extent to which courts are willing to grant restorative and reparative equitable relief. In developing guidelines for the great amount of discretion committed to judges in the remedial portions of race discrimination cases, two distinctly different standards of relief have emerged with radical significance in terms of the ultimate aspiration of racial equality. One tradition is to restore the victim, in a strict and narrowly interpreted sense, to the position he would have occupied but for the racial discrimination. This standard treats the remedy like a damage award in that courts insist on certainty, specificity and a level of causation that is not common to the other tradition of equitable relief—equitable discretion to achieve a stated remedial goal.⁶³ In the context of school desegregation cases, these standards have crystallized into a whole new limiting doctrine superimposed over the equitable power to achieve and pursue a goal. After *Milliken v. Bradley (II)*⁶⁴ the federal courts were firmly committed to the former of equitable principles that placed real limitations on the ability of federal courts to pursue a goal beyond the framework of the individualized interests of the litigants such as racial equality. *Milliken II* said the equitable principles required American federal courts to

focus upon three factors . . . first . . . the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. . . . Second the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible “to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.” . . . Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs. . . .⁶⁵

Milliken was a case testing the willingness of the federal courts in Michigan to undo a history of unlawful school desegregation by crossing into suburban school districts. The Court held such relief improper without considering the effect that school segregation may have had on housing patterns.

This rationale contrasts sharply with the earlier case of *Swann v. Charlotte-Mecklenburg Board of Education*.⁶⁶ In that case, former Chief Justice Burger delivered the opinion of the Court affirmed a wide variety of controversial remedial techniques. Applying the traditional principle mandate that the Court has the power to “do equity”, Burger held that moulding each decree flexibly and practically so as to remove obstacles in making school systems conform to the of *Brown v. Board of Education*.⁶⁷ The *Milliken II* doctrine has characterized the U.S. Supreme Court’s approach to remedies for racial

62. See O. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978). Oddly enough the question of irreparable injury does not get significant discussion in civil rights cases.

63. The two cases representing the poles on the continuum *Winston Research Corp. v. Minnesota Mining & Mfg. Co.*, 350 F.2d 134 (9th Cir. 1965) (injunction restoring plaintiff strictly to its rightful position subject of scrutiny of remoteness, speculation, etc.) and *Bailey v. Proctor*, 160 F.2d 78 (1st Cir.) *cert. denied*, 331 U.S. 834 (1947) (injunction used to reform an ongoing institution).

64. 433 U.S. 267 (1977).

65. *Id.* at 280 (emphasis in original).

66. 402 U.S. 1 (1971).

67. 347 U.S. 483 (1954).

segregation in housing and employment rather than the broader-gauged approach of *Swann*.

In considering existing housing segregation as the product of years of segregationist housing policies, can courts applying this standard hope to undo or repair those patterns discussed above by considering what housing patterns would have looked like in the absence of these urban housing policies?⁶⁸ How could courts applying this standard consider the effect on housing patterns of the higher socioeconomic status of Whites brought about by generations of discrimination in education and equal employment? Surely, a federal court applying the more limited standard of *Milliken II* would be unlikely to ever reach such concerns, or abandon them as over compensatory, remote and uncertain, not proximately caused by the unlawful segregation or opposed by local authorities. And yet the goal of equality cannot be reached without full consideration of these factors which continue to perpetuate inequality into the living and working conditions in our cities.

Decisions on the appropriate remedies for housing discrimination reveal the effects of the limiting remedial approach of *Milliken II* courts. In *Hills v. Gautreaux*,⁶⁹ a case involving the Chicago Housing Authority's racially discriminatory public housing program, the United States Supreme Court pays lip service to both guidelines for the court's equitable discretion, but makes clear in its reasoning that there are very definite limits that courts observe in pursuing a remedial goal, and that the goal is not necessarily related to the objective of equality. In that case, the Chicago Housing Authority was found to have selected sites for family public housing deliberately placed within the Black ghetto areas of Chicago. They further deliberately avoided placing Black families within White neighborhoods in violation of federal statutes and the fourteenth amendment. The Court made clear that it would consider broader based remedies involving Chicago suburbs so long as the relief did not involve coercion of uninvolved governmental units. It cited with approval the use of housing market areas which were used in planning by the Department of Housing and Urban Development which extended beyond city limits into the metropolitan area. Thus *Hills* allowed the Court wider reach in its remedial scope that appears at first blush under *Milliken II* but limits are imposed that would not necessarily be mandated by the other tradition of equitable discretion mandating flexibility, effectiveness, practicality and reasonableness.⁷⁰ Moreover, broader based procedural reforms seem unlikely in the face of decisions like *Warth v. Seldin*,⁷¹ discouraging challenges to other racially exclusionary practices on the grounds of standing.

In American federal courts after the *Milliken II* decision, it seems that the courts have struggled more with the problem of sorting out the rules of American constitutional law regarding supremacy, comity and separation of powers to limit equitable relief than with the struggle of obtaining equal living

68. In his dissent Justice Powell states, "Because the causes of segregation in residential housing are usually beyond judicial correction, wider solutions that will be acceptable to concerned parents must be sought by legislators and executive officials." *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437, 451 n.18 (1980) (Powell, J. dissenting).

69. 425 U.S. 284 (1976).

70. See *Bailey v. Proctor*, 160 F.2d 78, (1st Cir. 1947) and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

71. 422 U.S. 490 (1975).

and working conditions for the victims of discrimination. Let us assume that equal opportunity at work and in housing would be the position advocated by minority ethnic groups. Our courts have taken to heart commentary arguing peculiarly American reasons for not giving the victims full relief in undoing the effects of the wrong done to them. Under our American constitutional concept of separation of powers, it has been argued that judges may not act as the administrative or executive branch in effecting change, even when that branch of government fails to act according to its constitutional duty to undo unlawful discrimination.⁷² Other commentators argue that when judges coerce the expenditure of money by ordering activity that will cost communities money, they have unconstitutionally usurped the legislative function.⁷³ Nevertheless, there exists side-by-side with these principles of limitation, the ancient equitable power to do what is right and just beyond mere declaration of rights, especially when others charged with responsibility fail to undo the consequences of harm.⁷⁴ Why have our courts decided to do less than they might and developed this limiting approach to relief in cases involving racial discrimination? As then Chief Counsel for the plaintiffs in *Brown v. Board of Education*, Thurgood Marshall asked in oral argument, "Why of all the multitudinous groups of people in this country [do] you have to single out Negroes and give them this separate treatment?"⁷⁵

What emerges from the debate over limitations is that there is a concession implicit in the decisions of our courts after *Milliken II* to give something less than full relief, even though our very rule of law does not demand it. In the words of Judge Leon Higginbotham:

[H]owever tightly woven into the history of their country is the legalization of black suppression, many Americans still find it too traumatic to study the true story of racism as it has existed under their 'rule of law.' For many, the primary conclusion of the National Commission on Civil Disorders is still too painful to hear: 'What white Americans have never fully understood — but what the Negro can never forget — is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.'⁷⁶

In limiting responsibility for undoing the policies and laws that made racial inequality a fact of our daily lives, we have also allowed the law to construct a doctrine of limitations that evades responsibility for giving full relief and participating in the cure. Judge Higginbotham goes on to point out the ominous consequences of our failure to give remedial meaning to our findings of legal responsibility for racist law and policy:

The poisonous legacy of legalized oppression based upon the matter of color can never be adequately purged from our society if we act as if slave laws had never existed.⁷⁷

So long as the focus of the remedial question is how to narrow and limit

72. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

73. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978).

74. Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903 (1976).

75. L. HIGGINBOTHAM, IN THE MATTER OF COLOR 3 (1978) (quoting T. Marshall, oral argument before the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

76. HIGGINBOTHAM at 11 (citing *Report of the National Advisory Commission on Civil Disorders* (Washington, D.C.: U.S.G.P.O., 1968 p.1)).

77. *Id.* at 391.

relief rather than how to give full and fair relief, considerations of local prejudices and money will remain and not the true remedial goal in this area. That is not to suggest that these are irrelevant, but they are, however, ancillary to the question of what equality is and what is relief that will restore equity.

III. EARLY EMPLOYMENT PREFERENCES

Many cities have attempted to address the problem of racism by promoting equal opportunity in employment opportunities. As Blacks constituted a large portion of the urban population, these employment preferences were seen as one way to achieve urban racial equality.

In the case of *United Building & Construction Trades Council v. Mayor of Camden*,⁷⁸ the city required contractors and subcontractors working on city construction projects to have Camden residents comprise at least 40% of the work force. The city adopted the ordinance as part of a statewide affirmative action plan. The Supreme Court rejected the preference because it violated the privileges and immunities clause of the United States Constitution.⁷⁹ This clause ensures that states will not impose burdens upon individuals of other states engaged in trade or commerce. Early Supreme Court decisions rarely invalidated ordinances and statutes with this consideration in mind. These early decisions were confusing until the case of *Toomer v. Witsell*.⁸⁰ This case developed a two pronged test to determine constitutional validity. The first prong of the test asked whether the out of state citizens constituted a particular source of evil at which the statute is aimed. The second prong examined whether the state demonstrated that a reasonable relationship existed between the danger presented to non-citizens and the severe discrimination placed upon them. The Supreme Court relied on *Toomer* in the *Camden* decision.

Employment preferences have also been challenged on commerce clause grounds. The commerce clause of the federal constitution applies only to a state's regulatory powers. Cities are generally considered creatures of the state so that when a city passes a city ordinance with an employment preference it cannot do so in a regulatory manner. In the Supreme Court case of *White v. Massachusetts Council of Construction Employers, Inc.*,⁸¹ an employment preference was upheld because the city acted as a market participator, not regulator. When a state or local government enters the market as a participant, it is not subject to the restraints of the commerce clause.⁸² In *White*, Boston had expended only its own funds in entering into construction contracts for public projects and was therefore deemed a market participant. However, even if Boston's program⁸³ had a significant impact on specialized construction firms

78. 465 U.S. 208 (1984).

79. "The Citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. CONST. art. IV, § 2.

80. 334 U.S. 385 (1948).

81. 460 U.S. 204 (1983).

82. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). See also *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (invalidating resident-hiring preference for employment related to development of state revenue); *Austin v. New Hampshire*, 420 U.S. 656 (1975) (invalidating a tax which applied only to commuters on privileges and immunities grounds).

83. The executive order provides:

"On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft

employing out-of-state residents, this was not relevant in the determination of whether the city is a market regulator or participator. Impact on out-of-state residents is relevant only after it is determined that the city is regulating the market. Also, Boston's program applied to projects partially funded by federal grants.⁸⁴ This too was permissible because the regulations governing these grants "affirmatively sanctioned" Boston's employer preference program.⁸⁵

In employment remedies, one might ask what a remedial commitment to the objective of equality would mean. In his seminal article on unconscious racism,⁸⁶ Professor Charles Lawrence gives us an idea of what public sector employment might look like in the absence of a history of racial discrimination, and it is his picture that suggests how much must be undone to restore the victims to their rightful position. In reckoning with the effects of unconscious racism, we must consider not only intentional, "invidious" racism, but also how employment structures create, maintain and condone inequality and the presumption of inferiority. For example, an employment structure which employs Blacks and other minorities in domestic maintenance labor while denying responsibility to employ these same groups in policymaking roles with authority over Whites sends a clear message that Blacks are still not considered capable of the kind of administrative, executive skill necessary to run its public institutions although they can do traditionally Black labor, like cleaning.⁸⁷ In concept, the idea of affirmative action remedies is to commit those in authority to undo the structure that maintains and condones such a message. And yet, once again, the plethora of limiting remedial doctrines surrounding public employment and affirmative action programs to eliminate racial inequality in public employment make clear that the focus of our remedial concern has been how to limit what can be done, and not how to accomplish equality. For example, although the law permits state and local governments to voluntarily enter into affirmative action plans even in the absence of intentional segregation, we have limited the reach of those plans with laws designed to protect the interests of those who have not been victimized by any wrong doing.⁸⁸ These limitations are not necessary in terms of the history of remedial powers inherited from English common law, nor are they mandated in a strict sense by any other statutory or constitutional construction. But they appear to be part of the prudential concerns of federal courts about how to

basis shall be performed, in accordance with the contract documents established herewith, as follows: (a) at least 50% by bona fide Boston Residents; (b) at least 25% by minorities; (c) at least 10% by women."

White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 205 (1983) n.1 (quoting 1979 executive order issued by the Mayor of Boston).

84. In 1980, of approximately \$483 million expended on construction in the City of Boston, some \$54 million, or 11%, was spent on projects to which the executive order applied. Of this latter amount, approximately \$34 million represented projects being funded in part through federal Urban Development Action Grants (UDAG's). *White v. Massachusetts Council of Constr. Employers, Inc.*, 400 U.S. 204, 206 n.2 (1983).

85. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 212-213, nn.8-9 (1983).

86. Lawrence, *The Id, the Ego and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

87. For an example drawn from private industry, consider the frank comments of Al Campanis, former manager of the Los Angeles Dodgers on Black athletes abilities to manage private baseball teams. N.Y. Times, Dec. 18, 1987, § C, at 1, col. 1. Mr. Campanis said that Blacks lack the "necessities" to be managers and front office executives.

88. *Local No. 93 v. City of Cleveland*, 478 U.S. 501.

accomplish social change of this magnitude using the courts and their enforcement powers of contempt to accomplish the goal of equality. To the extent that they vindicate controversial rights, the institutional integrity of the courts themselves has been called into question. Perhaps this fear motivates the search for limitations and accounts for the focus of courts on limits and not on goals.

In stating what the effect on the civil rights injunction has been on the relationship between legal rights and remedies, Professor Owen Fiss notes that "courts have a unique capacity to create the terms of their own legitimacy."⁸⁹ He gives *Brown v. Board of Education*⁹⁰ as an example of how morality shaped that decision and subsequently the machinery of our Constitutional system then allowed that very morality to shape our social conscience.⁹¹ To the extent that we have reason to claim some success in desegregation of our society in the years since *Brown*, we may well attribute it to the way in which that declaration of rights has articulated and shaped a morality based not only upon desegregating our society, but also a belief and commitment to equality. This changed social morality is the base which we now have to move forward on, nevertheless, the profound ways in which the civil rights injunctions have affected the law has left in its wake a new doctrine of disfavoring the traditional breadth and scope of equity, to "do equity" or to obtain the ultimate goal of undoing and preventing harm caused by wrongdoing. Many important battles were won in the trenches of the courtroom, but equality has not been reached because it really was not the goal. The courts have devised prudential doctrines to avoid this confrontation.

IV. AFFIRMATIVE ACTION

If a municipality's goal is to increase minority hiring, the path of least resistance is through the development and implementation of an affirmative action plan.

A. Costs

Affirmative action has several costs that create resistance to its success as a policy, and some costs that affect the mechanisms of work that also are impediments to its implementation.⁹²

1. Affirmative action increases recruiting costs in terms of time and institutional resources because it requires different, expanded search and recruitment activities.

2. It introduces additional or alternative criteria for evaluating workers and requires expanded grievance and appeals procedures for those who feel that they have been dealt with unfairly, for minorities and non-minorities alike. It thereby increases the costs of terminating non-productive employees.

3. It increases costs in institutional time because successful implementation of affirmative action may require extensive retooling, and changes in hab-

89. O. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978).

90. 347 U.S. 483 (1954).

91. *See supra* note 9.

92. Exum, Menges, Watkins & Berglund, *Making It at the Top: Women and Minority Faculty in the Academic Labor Market*, 27 AM. BEHAV. SCI. 304, 307 (1984).

its and traditions, and learning new ways of evaluating workers and measuring merit.

4. Affirmative action may displace qualified non-minorities who would do more to advance the causes of minority workers, especially in those jobs which are not the location for affirmative action employees. In private industry, public relations, Equal Employment Opportunity Commission compliance, and human resources are where minorities are placed⁹³ and the public sector often mimicks this pattern.

Racial equality overall does not seem to be a concern of the Reagan administration. Many companies report that inspections by the Office of Federal Compliance Programs, a major enforcement arm for anti-discrimination regulations, are far less frequent than in previous administrations. The reasons for the varying efficiency and equity are two, somewhat dichotomous, concerns for affirmative action. Equity is in low demand now and minorities are feeling the impact. This is why costs are taking on greater importance in framing affirmative action policies at the municipal level, aside from important legal considerations.

B. *Washington v. Davis*

In *Washington v. Davis*,⁹⁴ the now well established doctrine was created that requires plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration. There the Court upheld a police department's use of a written qualifying test that Blacks failed at four times the rate of Whites.⁹⁵ However, this disproportionate impact can not alone trigger strict scrutiny of a facially neutral employment test.⁹⁶ Discriminatory purpose or intent by the public employer must now be proven.⁹⁷

C. *Problems of Proof*

The critics advance two main arguments with respect to this burden of proof.⁹⁸ A motive centered principle of racial discrimination places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute. Improper motives are easy to camouflage. This behavior results from the interaction of a multitude of reasons. Governmental officials are always able to argue that racially neutral motives produced their action. Also, there may be more than one decision-maker involved, amplifying these problems of

93. E. Jones, *Black Managers: The Dream Deferred*, HAR. BUS. REV. 83 (May-June 1986). Deutsch, *The Axe Falls on Equal Opportunity*, N.Y. Times, Jan. 4, 1987, at 1.

94. 426 U.S. 229 (1976).

95. *Id.* at 237.

96. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). The Civil Rights Act of 1964 provides for a more liberal standard of discriminatory impact. See *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

97. *Davis* was brought under the equal protection element of the due process clause of the fifth amendment, not the equal protection clause. However, later cases have incorporated the *Davis* standard in challenges under the equal protection clause. See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

98. See Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977).

proof.⁹⁹

This criticism contends that the injury of racial discrimination exists regardless of the decision-maker's motives. Proponents of this view argue that racially disproportionate harm should trigger heightened judicial scrutiny without regard to motive. Supporters of the intent requirement feel it is absolutely necessary. They stress the four main arguments that were used in *Davis*:

1. A standard that would subject all governmental action with a racially disparate impact to strict judicial scrutiny would cost too much, restricting lawful legislative decision-making and threatening many of the existing tax, welfare, public service, regulatory, and licensing statutes.

2. A disproportionate impact standard would make faultless people bear the cost of remedying a harm in which they played no part. This was one of the main considerations in the recent Supreme Court case of *Wygant v. Jackson Board of Education*.¹⁰⁰

3. An impact test would be inconsistent with the equal protection doctrine because the judicial decision-maker would have to explicitly weigh race.

4. It would be improper for the judiciary to embrace the remedy of racially disproportionate impact of otherwise neutral governmental actions at the expense of additional legitimate social interests.¹⁰¹

D. *The Judicial Quandary Revisited*

The judiciary has not yet established the law regarding race-conscious affirmative action programs adopted by cities. Some basic issues have been addressed and these cases give some guidance. The Court has ruled that both 42 U.S.C. Section 1981 and Title VII apply to racially based employment discrimination against Whites as well as Blacks.¹⁰² The equal protection clause also protects Whites against racial discrimination by municipalities.¹⁰³ However, an affirmative action program adopted by a city to remedy past discrimination can sometimes satisfy these constitutional standards.

A race-conscious affirmative action plan is constitutional when "qualified persons make findings of past discrimination."¹⁰⁴ The Court has ruled that Congress can be such a "qualified person," by passing a statute that requires special treatment for minority-owned businesses in order to avoid perpetuation of prior discrimination.¹⁰⁵ Also, appropriate administrative findings of

99. Lawrence, *The Id., The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987).

100. 476 U.S. 267 (1986).

101. Since proof of racial discrimination is difficult to prove in facially neutral programs, most housing programs encounter this difficulty. This is especially true in the enforcement of housing codes. See Mandelker, Gibb, & Kolis, *Differential Enforcement of Housing Codes-The Constitutional Dimension*, 55 U. DE. J. URB. L. 517 (1978).

102. See, e.g., *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Local 28 of the Sheet Metal Worker's Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986).

103. See, e.g., *Regents of University of California v. Bakke*, 438 U.S. 265 (1976).

104. *Valentine v. Smith*, 654 F.2d 503, 508 (8th Cir. 1981) (upholding affirmative action hiring program adopted by state university in response to earlier HEW and district court findings of past discrimination).

105. *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Here the Court relaxed the level of scrutiny employed by the majority in *Bakke* and upheld a provision of the Public Works Employment Act of 1977. 42 U.S.C. § 6705(f)(2)(Supp. II 1978). The Act required that, absent an administrative waiver, 10% of the funds it granted to finance local public works projects be expended to buy supplies

discrimination can be the basis for affirmative action programs.¹⁰⁶

Nonetheless, there remains some doubt about the type of voluntary affirmative action programs can be adopted by cities without a congressional, judicial or administrative finding of past discrimination. As Professor M. David Gelfand succinctly notes:

Thus, while properly delimited affirmative action employment programs have generally received favorable judicial responses, there remains little consensus on the underlying political or legal doctrines and rationales. Under these circumstances, the law of affirmative action is likely to remain somewhat volatile.¹⁰⁷

Municipal decision-makers tend to be adverse to risk and cost.¹⁰⁸ "Volatile" law makes at best volatile programs which are avoided by cities on grounds of cost, risk, and political popularity.

V. A RECOMMENDATION

The problem of achieving true racial equality in American housing and employment has to date caused much expense and time for our legal forums, with very little result. The problem lies in the superficial way in which our administrative,¹⁰⁹ judicial, and legislative branches of government perceive race discrimination. Standing requirements for individuals and for class actions, the single issue focus of our courts, and the expense of litigation all serve to narrow the window of access of Black Americans to our judiciary.¹¹⁰

There is another way to think about racial discrimination in a manner that more accurately reveals both its sources and the nature of injury it causes.¹¹¹ Most efforts to explain the constitutional significance of dispropor-

or services from minority-owned business. Chief Justice Burger announced the judgment of the Court that the provision did not violate the equal protection component of the Due Process Clause. In his accompanying plurality opinion, he stressed Congress' broad remedial and spending powers, the vigilant yet flexible administration of the program, the program's limited extent and duration, and the relatively light "burden" shouldered by non-minority firms as a result of the program. There was little agreement on the standard of review.

106. See *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (upholding redistricting plan to maintain Black representation in state legislature, on ground that it did no more than Attorney General was authorized to do under the 1965 Voting Rights Act).

107. Gelfand, *supra* note 11, at 76.

108. See R. NATHAN & F. DOOLITTLE, *THE CONSEQUENCES OF THE CUTS: THE EFFECTS OF THE REAGAN DOMESTIC PROGRAM ON STATE AND LOCAL GOVERNMENTS* (1983).

109. President Kennedy promulgated Executive Order 11063 in 1962. This order banned discrimination in housing owned, operated or assisted by the federal government. It was applied prospectively and excluded one and two family owner-occupied homes. It did not, by its language apply to privately developed units. This Order was effectively shepherded into the Civil Rights Act of 1964 and brought to bear on public accommodations, employment, and all federally funded programs. See 42 U.S.C. § 2000d-1 (1982).

110. See generally E. LIEBOW, *TALLY'S CORNER: A STUDY OF NEGRO STREETCORNER MEN* (1967); G. SHUTTLES, *THE SOCIAL ORDER OF THE SLUM: ETHNICITY AND TERRITORY IN THE INNER CITY* (1968); W. WHYTE, *STREET CORNER SOCIETY: THE SOCIAL STRUCTURE OF AN ITALIAN SLUM* (2nd ed. 1955). One commentator states that "[p]roblems of political equality and equality of opportunity presented little analytical difficulty, but those of economic equality and equality of condition-when requiring more than minimum rationality-again raised questions regarding the institutional competency of the courts." See Burger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection*, 48 MONT. L. REV. 587, 589 (1983); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

111. Lawrence, *supra* note 99, at 320. See also GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS* (1964).

tionate impact and governmental motive in cases alleging racial discrimination treat these categories as mutually exclusive. Courts treat facially neutral actions as either intentional and unconstitutional, or unintentional and constitutionally discriminatory. This is a false dichotomy,¹¹² and the failure of the law to recognize this perpetuates the weak and ineffective policy of affirmative action we now must watch flounder.

We are part of a common historical and cultural heritage in which unequal relations between the races is the norm.¹¹³ This shared heritage causes us to share many ideas, attitudes, and beliefs that in turn develop into prejudices and stereotypes.¹¹⁴ However, most are not cognizant of our racism. Most of the behavior that results in racial discrimination is impelled by unconscious racial discrimination. Demanding proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race contingent ignores much of what we know about how we think.¹¹⁵ It also overlooks the irrationality of racism as well as the infra-structure of American race relations.¹¹⁶

There should be a new test to trigger judicial recognition of race-based behavior. It suggests a relationship between unconscious racism and the existence of cultural symbols that give racial meaning.¹¹⁷ It suggests that the cultural meaning of a claimed discriminatory act is good evidence of a collective unconscious.¹¹⁸ This test would evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance.¹¹⁹ Such a finding would also constitute a finding regarding the beliefs and motivations of the governmental actors. The actors themselves are part of the culture and presumably have not acted without being influenced by racial considerations, even if they are not conscious of it.¹²⁰

VI. CONCLUSION

The episode of racial segregation in American law has confronted our courts in a graphic way with the problem of using the law as the vehicle for social change through the granting of reformative remedies. Once, having voiced the conviction that racial inequality was inappropriate in policy guidelines for our public institutions, courts as champions of the disfavored minority, found their own authority and legitimacy implicated in the struggle with a society ordered to undo what it had done predicated on that conviction.

As the law stands now, the costs of affirmative action will allow our cities

112. Lawrence, *supra* note 99, at 321.

113. *Id.* at 322. Another approach with the promise of more significant, wide-gauged impact is the idea that Whites as well as Blacks, are entitled to the benefits of integrated society and have standing to sue for deprivation of integration. See *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 210 (1972).

114. Lawrence *supra* note 99, at 322. See also Crosby, *The Denial of Personal Discrimination*, 27 AMERICAN BEHAVIORAL SCIENTIST 371 (1984).

115. Lawrence, *supra* note 99, at 323.

116. Indeed, one author remembers vigorous debate with economists involved in considering racial discrimination in the granting of credit where the very existence of intentional racism was questioned as an irrational, non-profit maximizing behavior.

117. Lawrence, *supra* note 99, at 324.

118. *Id.*

119. *Id.*

120. *Id.*

to target positions of little security and importance to minorities. What kind of housing would they live in? What kind of quality of life could a Black person expect in an American city? Racial discrimination in housing is still extensive. In 1978, the National Committee Against Discrimination in Housing conducted a large study which indicated that a Black family seeking rental housing had a 72 percent chance of encountering discrimination, and had a 50 percent chance of encountering discrimination when buying a house.¹²¹ Cities and their practices are free to ignore racial inequalities within their borders. For this to change as a policy it must first change in the law, and the law must begin to reflect the reality of our society. That reality is one that includes judicial recognition of the effects of unconscious racial discrimination and the sad inadequacy of current legal solutions to racial inequality.

121. Sloane, *Fair Housing: Law Versus Reality*, 43 J. OF HOUSING 63, 64 (March/April 1986).