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## Race to Property: Racial Distortions of Property Law, 1634 to Today

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# RACE TO PROPERTY: RACIAL DISTORTIONS OF PROPERTY LAW, 1634 TO TODAY

Bethany R. Berger \*

*Race shaped property law for everyone in the United States, and we are all the poorer for it. This transformation began in the colonial era, when demands for Indian land annexation and a slave-based economy created new legal innovations in recording, foreclosure, and commodification of property. It continued in the antebellum era, when these same processes elevated nationalized property transactions over other rights; and gained new tactics after the end of slavery through the early twentieth century, when the pursuit of racial hierarchy expanded private owners' rights to exclude and tied occupation of physical space to status. The influence of race on property became even more insidious in the modern era. As twentieth century courts and legislatures incrementally outlawed de jure discrimination, a new regime took its place. This hidden Jim Crow first transformed home finance and zoning to make residence in exclusionary enclaves central to family wealth, and then tied public goods like schools, recreation, transportation, and welfare to residence in those fragmented communities.*

*These racial projects deeply scarred how property is acquired, regulated, and distributed regardless of race. They have made our cities poorer, our homes more expensive and less secure from foreclosure, our public goods less public, and our social safety net less safe. They have lengthened our commutes, privatized our pools, and impoverished our schools. They have undermined the income mobility that was once America's pride.*

*Opponents of reform often invoke property rights to support their claims. The history presented in this Article, however, shows that many of the rules of our system were significantly about race, not property. They were not designed—as property norms dictate—to enhance security, abundance, and distribution of resources. Instead, in part, their purpose was to exclude, dispossess, and dominate racial groups. Reform, therefore, does not undermine property. Rather, in many cases, it achieves what justifies the property system in the first place.*

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## INTRODUCTION

I live in Hartford, Connecticut. My house was built in 1910, when Hartford could still lay claim to being “the richest city in the United States.”<sup>1</sup> It was within walking distance of the homes of Mark Twain and Harriet Beecher Stowe; Wallace Stevens (who wrote poems in his head as he walked to his job as an insurance executive) would soon buy a house nearby.<sup>2</sup> A “city of parks,” Hartford had five major parks designed by Frederick Law Olmstead and many smaller ones, and was

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1. Charles H. Clark, *The Charter Oak City*, 13 SCRIBNER’S MONTHLY 1, 2 (1876); Otis Skinner, *Save Twain Home, Urges Otis Skinner: Should Be Easy for Richest City Per Capita in This Country*, HARTFORD COURANT, Apr. 23, 1920, at 6; see also JACK DOUGHERTY ET AL., *The Richest City in the Nation*, in ON THE LINE: HOW SCHOOLING, HOUSING, AND CIVIL RIGHTS SHAPED HARTFORD AND ITS SUBURBS (2022) (ebook), <https://ontheline.trincoll.edu/richest.html> [<https://perma.cc/BZ34-GQC4>] (discussing Clark’s claim and its contrast with Hartford today).

2. Jeff Gordinier, *For Wallace Stevens, Hartford as Muse*, N.Y. TIMES (Feb. 23, 2012), <https://www.nytimes.com/2012/02/26/travel/for-the-poet-wallace-stevens-hartford-was-an-unlikely-muse.html> [<https://perma.cc/8BX2-HE9P>].

a national model for public recreation.<sup>3</sup> Hartford's public schools were the finest in the state, drawing children from the suburbs for a modest fee.<sup>4</sup>

Today, Hartford is better known as a symbol of urban decline;<sup>5</sup> parents face arrest for enrolling their children outside their district;<sup>6</sup> and the amenities at suburban public parks have outstripped those in Hartford. This transformation is linked to twentieth century shifts in property law—in real estate financing, zoning, and ties between residence and access to public goods—designed to separate people by race.<sup>7</sup> But the impact of race on property law is far older and deeper. In the first centuries of colonization, efforts to acquire Indigenous land and enslaved people inspired innovations in recording and foreclosure.<sup>8</sup> In the nineteenth century, constitutional decisions elevated private ownership and retracted judicial review to avoid challenging segregation, enslavement, and dispossession.<sup>9</sup> In the wake of the Civil War, state laws and decisions eliminated innkeeper obligations to customers and public rights to roam to reinscribe racial hierarchy.<sup>10</sup> Throughout U.S. history, efforts to deny government aid to immigrants and people of color shaped welfare law, leaving the United States with a system far less generous and effective than that in other wealthy nations.<sup>11</sup> In these and other ways, racial projects transformed the race-neutral property laws we all live under today.

3. *Hartford a City of Beautiful Parks*, 12 AUTO. TOPICS ILLUSTRATED 1266, 1266 (Aug. 4, 1906); Robert Wheelwright, *Notes: Small Parks*, 9 LANDSCAPE ARCHITECTURE MAG. 152, 152–53 (1919); *Hartford: A City of Parks*, ELIZABETH PARK CONSERVANCY, <https://www.elizabethparkct.org/about-the-park/hartford-a-city-of-parks#:~:text=At%20the%20end%20of%20the,people%20resided%20in%20the%20city> [<https://perma.cc/UJ5S-QSR9>] (last visited July 17, 2022).

4. DOUGHERTY, *supra* note 1.

5. I say “symbol” because, while Hartford has its problems, it is a great place to live and repeatedly scores highly on national “best of” lists. *See, e.g.*, Andrew De Rosa, New Haven, *Hartford Among Top Places to Retire, According to U.S. News & World Report*, CT INSIDER (Oct. 19, 2021, 4:09 AM), <https://www.ctinsider.com/news/article/New-Haven-Hartford-among-top-places-to-retire-16544914.php> [<https://perma.cc/5UQJ-QD6L>] (listing Hartford 36<sup>th</sup> out of 150 places to retire); Jessika Harkay, *Greater Hartford Ranks Among Top Third in Best Places to Live According to U.S. News*, HARTFORD COURANT (July 14, 2021, 11:43 AM), <https://www.courant.com/breaking-news/hc-br-hartford-53-best-city-to-live-in-usa-20210714-v7b4ntw3vnggzawbrkhug5gquy-story.html> [<https://perma.cc/72Q3-DCDD>] (noting greater Hartford ranked 53 out of 150 cities). Despite this, Hartford frequently is featured in dismissive articles like this: Derek Thompson, *What on Earth is Wrong with Connecticut*, THE ATLANTIC (July 5, 2017), <https://www.theatlantic.com/business/archive/2017/07/connecticut-tax-inequality-cities/532623/> [<https://perma.cc/DR8J-URG3>] (citing Hartford as emblematic of Connecticut's “city problem”).

6. *See* Stephanie Reitz, *School Residency Arrests Raise Fairness Questions*, NBC CONN. (May 10, 2011), <https://www.nbcconnecticut.com/news/local/school-residency-arrests-raise-fairness-questions/1884038/> [<https://perma.cc/JWK3-7QXN>].

7. *See infra* Part III.

8. *See infra* Part I.

9. *See infra* Section I.B.

10. *See infra* Part II.

11. *See infra* Sections I.B.2, III.C.

This Article traces this transformation. Many excellent works have already shown how rules and practices inscribed racial hierarchy in access to and ownership of land and wealth. Scholars have examined this process in banking,<sup>12</sup> finance,<sup>13</sup> estate assessment,<sup>14</sup> descent and inheritance,<sup>15</sup> taxation,<sup>16</sup> welfare,<sup>17</sup> zoning,<sup>18</sup> and in the very right to own or rent land.<sup>19</sup> The racist distribution of property is so extreme that Cheryl Harris, in a seminal 1993 article, argued that Whiteness is itself a form of property.<sup>20</sup>

This Article is indebted to this work but does something different. Its contribution is to show how race fundamentally transformed the way property is acquired, regulated, and distributed regardless of race.<sup>21</sup> This transformation began

12. See, e.g., MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 2 (2017).

13. See, e.g., KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT, HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* 4 (2019).

14. See Thomas W. Mitchell et al, *Forced Sale Risk: Class, Race, and the 'Double Discount,'* 37 FLA. ST. L. REV. 589, 589, 610 (2010) (discussing lower valuation of land in eminent domain and partition).

15. See, e.g., Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 221 (1999).

16. See, e.g., DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* 11, 22 (2021).

17. See, e.g., CYBELLE FOX, *THREE WORLDS OF RELIEF: RACE, IMMIGRATION, AND THE AMERICAN WELFARE STATE FROM THE PROGRESSIVE ERA TO THE NEW DEAL* 13 (2011) (discussing how welfare was distributed differently to Whites, Blacks, and Latinos).

18. See, e.g., RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, at vii (2017); Robin A. Lenhardt, *Moore v. City of East Cleveland*, in *CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW* 492–513 (Bennett Capers, Devon W. Carbado, R. A. Lenhardt & Angela Onwuachi-Willig eds., 2022).

19. See Rose Villazor-Cruz, *Rediscovering Oyama v. California: At The Intersection Of Property, Race, And Citizenship*, 87 WASH. UNIV. L. REV. 979, 981, 1042 (2010) (discussing limitations on non-white immigrants owning and renting land); Robert A. Williams Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing The White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 256 (“As infidels, heathens, and savages, [tribal nations] were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations”) (citation and internal quotation omitted).

20. Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1713 (1993).

21. This argument is related to scholarship positing links between slavery and the origins of capitalism that began with Trinidadian historian and politician Eric Williams (see ERIC WILLIAMS, *CAPITALISM AND SLAVERY*, at xvii (1944)), was developed by Cedric Robinson (see CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (1983)), and continues in recent historical work. See e.g., EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM*, at xix (2014) (arguing that the slave economy shaped American capitalism); Harvey R. Neptune, *Throwin' Scholarly Shade: Eric Williams in the New Histories of Capitalism and Slavery*, 39 J. EARLY REPUBLIC 299, 303 (2019) (discussing this scholarship). But it differs in its focus on law rather than economics. It also shares arguments with Brenna Bhandar's work, although Bhandar does not focus on the United States, or the broader impact of specific legal doctrines,

in the colonial era, when the logic of Indian land annexation and a slave-based economy shaped the recording, security, and commodification of property; continued in the antebellum era, when these same processes elevated property and contracts regarding property over other rights; and gained new tactics after the end of slavery through the early twentieth century, when the pursuit of racial hierarchy expanded private owners' rights to exclude and tied occupation of physical space to status.<sup>22</sup> The influence of race on property is even more insidious in the modern era. As twentieth century courts and legislatures incrementally outlawed de jure discrimination, a new regime took its place. This hidden Jim Crow reshaped the physical landscape, transformed public services like schools, recreation, transportation, and welfare, and helped create the inequalities that plague the United States today.<sup>23</sup>

This Article also differs from other work by arguing that these flaws are inconsistent with the norms of property itself.<sup>24</sup> Property, like race, is a social creation,<sup>25</sup> an agreement by society to enforce owners' authority over others' use of their property.<sup>26</sup> Thus, as Morris Cohen wrote, "dominion over things is also

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focusing instead on how concepts of law and property developed to dispossess colonized peoples. BRENNA BHANDAR COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP 3–4 (2018). Important work by K-Sue Park examines the impact of colonization and slavery on property law, but works more to bring laws and ideology of colonization and slavery into the standard property curriculum than to show the ways particular non-racial laws reflect that racial history. K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1137 (2022) [hereinafter Park, *The History Wars and Property Law*] (advocating for "undoing the erasure of conquest and slavery from the canon" which "alters our understanding of the principles for which various topics stand"). While other works have shown that racial projects influenced individual legal doctrines (and I discuss these below), no one has synthesized these to show the pervasive transformation of our current property regime.

22. See *infra* Sections III.A–C.

23. See *id.*

24. See, e.g., Kali Murray, *Dispossession at the Center in Property Law*, 2 SAVANNAH L. REV. 201, 210 (2015); Sherally Munshi, *Dispossession: An American Property Law Tradition*, 110 GEO. L. J. (forthcoming 2022) (arguing that "[r]acialized dispossession describes what has long been the normative object of American Property law"); see also Park, *The History Wars and Property Law*, *supra* note 21, at 1067 (suggesting that understanding the impact of colonization and slavery reveals an enhanced "understanding of dynamics of the property system as a whole"). Some, but not all, work. An important thread of current property scholarship seeks to recover the progressive norms inherent in property itself. See, e.g., HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY, at xi (2021) (examining and arguing for recovery of the liberal pillars of property law); Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009) (discussing values promoted by property); Anna di Robilant, *Populist Property Law*, CONN. L. REV. 933, 992 (2017) (discussing history of populist property movements as a model for shifting "the focus of property law back to the need to expand access....").

25. See, e.g., JEREMY BENTHAM, THEORY OF LEGISLATION 111 (Etienne Dumont ed., Richard Hildreth trans., London, Trübner 1864) ("[T]here is no such thing as natural property, and it is entirely the work of law.").

26. Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 12 (1927).

imperium over our fellow human beings.”<sup>27</sup> Foundational philosophers of modern democracy supported this seemingly illiberal dominion to achieve equality, autonomy, and plenty. Jeremy Bentham, for example, insisted that the goals of any property system are “subsistence, abundance, security, and equality.”<sup>28</sup> Although security took priority, this was because—when properly limited—it was the surest way to achieve the other goals.<sup>29</sup> Relatively equal distribution, Bentham argued, would increase both abundance and utility, both because of diminishing marginal utility of wealth,<sup>30</sup> and because both opulence and poverty deadened industry and innovation.<sup>31</sup> Adam Smith agreed, declaring that “a small proprietor . . . is generally of all improvers the most industrious, the most intelligent, and the most successful.”<sup>32</sup> Both vast wealth and oppressive poverty, he argued, undermined the incentive and capacity that made property an engine for national wealth.<sup>33</sup> John Locke, meanwhile, emphasized individual interests in property to oppose the hereditary rights of kings, but noted that labor only created private property “at least where there is enough, and as good, left in common for others.”<sup>34</sup>

The liberatory and egalitarian potential of property was even more important for the founders of the United States. America was a “land of liberty” significantly because one could acquire and use land freed from England’s historic, status-based property laws.<sup>35</sup> Protection for and alienability of property were crucial, but so was preventing undue concentration of wealth.<sup>36</sup> Revolutionary philosopher Thomas Paine advocated for distribution of funds financed by an estate tax to compensate for the “natural inheritance” lost through “the introduction of a system of landed property.”<sup>37</sup> Committed Republican Thomas Jefferson insisted that “legislators cannot invent too many devices for subdividing property” and that “[w]henever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right.”<sup>38</sup> John Adams, whom the Heritage Foundation declared “America’s original

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27. *Id.* at 13 (emphasis omitted).

28. Bentham, *supra* note 25, at 96–97.

29. *Id.* at 101, 120–23 (arguing that security led to abundance and equality).

30. *Id.* at 103–04.

31. *Id.* at 123.

32. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 370 (J. Dent & Sons 1914).

33. *Id.* at 343–45.

34. JOHN LOCKE, TWO TREATISES ON GOVERNMENT Ch.5, § 27 (1690)

35. *See, e.g.*, Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 398–400 (2006) (discussing laws keeping land and status within families in England); ERIC FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 51 (2007) (“When early Americans talked about their nation as a land of liberty,” they illustrated the point with the right of citizens to “hunt on open lands everywhere” while in England one needed land and wealth to hunt).

36. GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 35–37 (1997) (discussing the tension).

37. THOMAS PAINE, AGRARIAN JUSTICE (1795), *reprinted in* THOMAS PAINE READER 471, 478 (Michael Foot & Isaac Kramnick eds., 1987).

38. Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), *in* 8 THE PAPERS OF THOMAS JEFFERSON 681, 681–82 (Julian P. Boyd ed., 1953).

conservative,”<sup>39</sup> insisted that because “the balance of power in society, accompanies the balance of property in land,” the “only possible way” to preserve “equal liberty and public virtue” was to ensure division and distribution of small parcels of land.<sup>40</sup> Even James Madison, a vehement opponent of laws undermining property, saw the “different and unequal distribution of property” as a threat to democracy,<sup>41</sup> and counted Americans’ widespread access to property “among the happiest contrasts in their situation to that of the old world.”<sup>42</sup> Emphasis on the wide distribution of property and equal access to wealth remains a key part of the American self-image as a “land of opportunity.”<sup>43</sup>

Yet the United States today has the most wealth inequality and the least income mobility of almost any wealthy nation.<sup>44</sup> Our households have among the highest rates of indebtedness in the world,<sup>45</sup> and our social safety net is radically less generous than those of other Western democracies.<sup>46</sup> Our schools are worse,<sup>47</sup> our

39. Richard Samuelson, *John Adams: America's Original Conservative*, THE HERITAGE FOUNDATION (Apr. 20, 2020), <https://www.heritage.org/american-founders/report/john-adams-americas-original-conservative> [<https://perma.cc/4KEZ-E2XL>].

40. ALEXANDER, *supra* note 36, at 37.

41. THE FEDERALIST NO. 10, at 44 (James Madison) (Garry Wills ed., 1982).

42. James Madison, *Note to His Speech on the Right of Suffrage* (1821), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, 440, 443 (1894).

43. See Joseph E. Stieglitz, *Equal Opportunity, Our National Myth*, N.Y. TIMES (Feb. 16, 2013), <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2013/02/16/equal-opportunity-our-national-myth/> [<https://perma.cc/3SWV-8ZHA>].

44. Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, 27 J. ECON. PERSPS. 79, 82 fig.1 (2013) (showing the United States with the most income inequality and almost the least income mobility among the United Kingdom, Italy, France, Japan, Australia, New Zealand, Canada, Germany, Norway, Denmark, Finland, Sweden, and Canada).

45. Carlotta Balestra & Richard Tonkin, *Inequalities in Household Wealth across OECD Countries: Evidence from the OECD Wealth Distribution Database* 40 tbl.4.1 (Org. for Econ. Coop. And Dev., Working Paper No. 88, 2018), [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=SDD/DOC\(2018\)1&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=SDD/DOC(2018)1&docLanguage=En) [<https://perma.cc/AY2S-U3YB>] (showing US with second highest rate of indebted households among 28 OECD countries, and one of the highest rates of households with debt exceeding 75% of their assets).

46. Alberto Alesina & Edward L. Glaeser, *Why Are Welfare States in the US and Europe So Different?*, 2 HORIZONS STRATÉGIQUES 51, 52 (2006), <https://www.cairn.info/revue-horizons-strategiques-2006-2-page-51.htm> [<https://perma.cc/GS3H-7K43>]; Michael Ettlinger, Jordan Hensley & Julia Vieira, *Government Spending Across the World: How the United States Compares*, NATIONAL ISSUE BRIEF, no. 144 (Carsey Sch. of Pub. Pol’y, Durham, N.H.) (2019) at 5, <https://scholars.unh.edu/carsey/379> [<https://perma.cc/A2RY-V4SM>]. Interestingly, many of the other countries with comparably high household debt, like Norway, Denmark, and the Netherlands have among the most generous welfare systems. Balestra & Tonkin, *supra* note 45, at 40 tbl.4.1.

47. Jill Barshay, *What 2018 PISA International Rankings Tell Us About U.S. Schools*, HECHERLING REP. (Dec. 16, 2019), <https://hechingerreport.org/what-2018-pisa-international-rankings-tell-us-about-u-s-schools/> [<https://perma.cc/4HSM-BDFN>].



commutes are longer,<sup>48</sup> and our public recreation is less public.<sup>49</sup> We are a country founded—in part—to achieve wider access to property, yet property here is less accessible than almost anywhere else.

Racial transformations of property are part of the reason why. Time and again desires to dispossess, exclude, or dominate racialized groups altered the way that property is transferred, regulated, and distributed. These transformations created a system that facilitates easy dispossession and consolidation, disfavors redistribution, provision of public goods, and protections from market forces; and limits government authority to regulate property in the common interest. While these changes have the most devastating impacts on people of color and lower-income people of all races, almost everyone suffers from the results. They contribute to the “daily anxiety about just trying to stay ahead in America” of the White middle class,<sup>50</sup> the reversal of upward mobility that was America’s claim to fame, and the affordable housing crisis plaguing families and economies.

In studying racial transformations of general property laws, this Article leaves out much in the study of race and property. Laws that only apply to a racialized group (like the radical weakening of Fifth Amendment protections for tribal property,<sup>51</sup> or the many state laws barring Asian immigrants from owning property until the mid-twentieth century<sup>52</sup>) are only mentioned to the extent they shape general property doctrine. Similarly, this Article does not catalogue the vast array of extralegal deprivations of property, like the White violence that destroyed the Odawe and Ojibwe village of Burt Lake, Michigan,<sup>53</sup> the Chinatown of Tacoma,

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48. Compare Christopher Ingraham, *Nine Days on the Road. Average Commute Times Reach a New Record Last Year*, WASH. POST (Oct. 7, 2019, 6:00 AM), <https://www.washingtonpost.com/business/2019/10/07/nine-days-road-average-commute-time-reached-new-record-last-year/> [<https://perma.cc/M25L-X945>] (noting new record of 27 minutes each way in 2018), with *Majority Commuted Less than 30 Minutes in 2019*, EUROSTAT (Oct. 21, 2020) (noting working people in the EU had an average commuting time of 25 minutes per day) <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20201021-2> [<https://perma.cc/7E2X-USDV>].

49. See, e.g., John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 769–77 (2011) (discussing the ways Scotland and England have formalized recreational access to rural land); Hugh Millward, *Countryside Recreational Access in West Europe and Anglo-America: a Comparison of Supply*, 7 GREAT LAKES GEOGRAPHER, no. 1, 2000, at 38, 50 (finding Western Europe had more recreational access to the countryside than the United States).

50. SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM*, at xvii–xviii (2005).

51. See, e.g., *Tee-Hit-Ton v. United States*, 348 U.S. 272, 278–79 (1955) (holding Fifth Amendment did not protect tribal property from U.S. acquisition unless the U.S. first acknowledged the property right).

52. See *Oyama v. California*, 332 U.S. 633, 644 (1948) (holding such laws were unconstitutional to the extent that they prevented a minor American citizen from holding property).

53. Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21, 24–28 (2005)

Washington,<sup>54</sup> and the Black Greenwood neighborhood of Tulsa, Oklahoma,<sup>55</sup> or the widespread modern discrimination against Black and Latino renters.<sup>56</sup> At the same time, this Article covers laws that affect property in many ways, ranging from recording acts to government wealth transfers. It also defines racial transformations relatively broadly, including all legal changes designed in part to increase or preserve White wealth by dispossessing, controlling, or excluding racialized groups, whether or not motivated by racial bigotry.

Part I examines transformations of the colonial and antebellum eras, designed to protect a national economy driven by debt to distant financiers and built on acquiring Indian land and working it with enslaved labor. Part II considers the period from the Civil War to the early twentieth century, which altered the understanding of private place and public power to reinscribe racial hierarchy, cabin the potential radicalism of the Reconstruction Amendments, and expand federal territorial authority. Part III turns to the twentieth century, which transformed homeownership, privatized public goods, and constricted public obligations in reaction to geographic movement of people of color and debates over race relations.

The Conclusion uses this history to argue for the restoration of the liberatory and egalitarian potential of property in the United States. Today, both policymakers and courts invoke property rights to attack efforts at reform. The history recounted here, however, shows that the origins of many modern property rules had more to do with racial domination than property norms. What is more, these rules undermine property itself, by undermining the security, accessibility, and abundance that justify property in the first place. Reform, therefore, is not about undermining property, but about achieving its goals.

## **I. COLONIAL AND ANTEBELLUM TRANSFORMATION: FINANCING DISPOSSESSION, ELEVATING OWNERSHIP, UNDERMINING DISTRIBUTION**

Racial relationships began shaping property doctrine in America before there was a United States. From the beginning, the colonial project rested on claiming land owned by Indigenous peoples and securing unfree, and increasingly Black, labor to work it. Dependent on far-off financing, this project could not be derailed by Black or Indian humanity or on-the-ground justice but required translating property into abstractions the funders could understand and rely upon. In the colonial period, these demands created two lasting innovations in property law: widespread land recording and easy foreclosure for debts.

After the American Revolution, Indigenous dispossession and enslaved cultivation became nation-building projects. Funding their expansion nationalized

54. BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE CHINESE IN AMERICA I* (2018).

55. ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION* 44 (2002).

56. Jerusalem Demsas, *Black and Hispanic Renters Experience Discrimination in Almost Every Major American City*, *VOX* (Dec. 7, 2021, 8:30 AM), <https://www.vox.com/22815563/rental-housing-market-racism-discrimination> [<https://perma.cc/X9HN-NBYW>].

as well, as Northeastern financiers increasingly took the place of English ones. The Supreme Court transformed constitutional and common law in response, elevating property and contract rights to immunize speculation in land from claims of corruption, state power, and even human rights. At the same time, hyper-local systems of poor relief contributed to the othering and exclusion that continues to plague U.S. welfare law.

Note the way that race works in this transformation. Tribal nations and African people were the sources of property—tribal people through their land and Africans through their bodies—and the legal system shifted to protect and exploit those sources. The foreign poor created demands on property, and the system shifted to limit those demands. Ideas about racial and ethnic difference either justified or blinded decision-makers to the injustice of the results. The justifications then reinforce reliance on difference, while the blindness undermines the protections of the property system as a whole.

### A. Colonial Innovations

The American economy was, from the first, a global capitalist project in which the value of tribal lands, enslaved human beings, and the goods they produced were translated into equivalent units of value for lenders overseas or in far-off colonies.<sup>57</sup> This translation led directly to two colonial innovations in property law: title recording and easy foreclosure.

Public registration of deeds was a colonial innovation designed to facilitate annexation of Native land and finance acquisition of slaves. Despite the fame of the eleventh-century Domesday Book—created to allow another conqueror to consolidate authority over land—England did not institute widespread land recording until the early twentieth century.<sup>58</sup> Lack of recording may have been more workable there given relatively stable land ownership.<sup>59</sup> But the New World was all about land transfers, and all land rights originated with Indians. Fraudulent and duplicative claims of transfers from Indians were widespread, and tribal backlash could threaten the new communities.<sup>60</sup>

In March 1634, in its first elected legislative session, the Massachusetts General Court ordered that “noe [sic] person whatsoever shall buy any land of any Indian without leave from the Court.”<sup>61</sup> The next month the court enforced the rule by ordering all towns to keep a record of all land transfers, providing the transcripts

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57. CLAIRE PRIEST, *CREDIT NATION: PROPERTY LAWS & INSTITUTIONS IN EARLY AMERICA* 23 (2021) [hereinafter *PRIEST, CREDIT NATION*]; see also BHANDAR, *supra* note 21.

58. Jean Howell, *Deeds Registration in England: a Complete Failure?*, 58 *CAMBRIDGE L.J.* 366, 371–76 (1999) (describing failure of efforts to establish registries of deeds outside Yorkshire and Middlesex until the Land Reform Act of 1925).

59. English proponents, however, had long complained of fraud and uncertainty in land transfers and mortgages. *Id.* at 371–72.

60. See, e.g., Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 *CONN. L. REV.* 1055, 1075 (1995) (discussing how fraudulent and oppressive Indian land transactions threatened British colonization in the French and Indian War).

61. 1 [1629–1641] *RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY OF NEW ENGLAND* 112 (Nathaniel Shurtleff ed., 1853).

to the court.<sup>62</sup> In the words of one early collection of deeds, “From these small beginnings has come our modern system of registration. It was not copied from the laws of the mother country as such a system was unknown in England, but was originated to meet a new need.”<sup>63</sup>

The Virginia colony followed suit in 1642.<sup>64</sup> The Virginia law did not mention Indian land sales, instead emphasizing the need to prevent debtors from selling their land without the knowledge of creditors.<sup>65</sup> Over the next century, each American colony instituted a public registry of title.<sup>66</sup> By creating a public record of property transactions, these registries encouraged loans secured by land and slaves, oiling the debt system that was “slavery’s invisible engine.”<sup>67</sup>

Prioritizing the recorded deed over other evidence of land sales also facilitated Indigenous possession. Indigenous people had many ways of recording their transactions with the newcomers, including maps, bark carvings, wampum belts, and oral memory so accurate it astounded their English partners.<sup>68</sup> But by claiming that only written deeds recorded in their courts governed, colonists could control and manipulate the record.<sup>69</sup> In 1736, for example, in the midst of protracted litigation over land with the Mohegan Tribe, Connecticut “recorded” for the first time a 1640 deed in which the Mohegan sachem Uncas apparently granted the colony all of his lands.<sup>70</sup> Despite the timing and other inconsistencies in the deed, the Royal Privy Council ruled for Connecticut.<sup>71</sup> These and similar manipulations of the record to secure English claims cast new light on praise, like that of Zephaniah Swift in his 1795 Treatise on Connecticut law, that registries of deeds “shew to every person that is pleased to enquire, in whom is vested legal title to the lands, and that he can purchase with safety.”<sup>72</sup>

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62. *Id.* at 116; INDIAN DEEDS OF HAMPDEN COUNTY 7 (Harry Andrew Wright ed., 1905).

63. INDIAN DEEDS OF HAMPDEN COUNTY, *supra* note 62, at 7.

64. William Waller Hening, *Against Fraudulent Deeds*, in THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, 417–18 (1809).

65. *Id.*

66. PRIEST, CREDIT NATION, *supra* note 57, at 45.

67. *Id.* at 45, 43 (quoting Bonnie Martin’s findings that enslaved human beings were used as collateral for two-thirds of the dollars loaned).

68. LISA TANYA BROOKS, THE COMMON POT: THE RECOVERY OF NATIVE SPACE IN THE NORTHEAST 8–13 (2008); COLIN G. CALLOWAY, PEN AND INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY 35–36 (2013).

69. See BROOKS, *supra* note 68, at 79, 237; CALLOWAY, *supra* note 68, at 36–37.

70. See AMY E. DEN OUDEN, BEYOND CONQUEST: NATIVE PEOPLES AND THE STRUGGLE FOR HISTORY IN NEW ENGLAND 109 (2005).

71. Craig Yirush, *Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704–1773*, 29 LAW & HIST. REV. 333, 365 (2011).

72. PRIEST, CREDIT NATION, *supra* note 57, at 47 (quoting Swift).

Indigenous dispossession and human bondage also drove legal innovations that made property more vulnerable to creditors.<sup>73</sup> In England, creditors could not seize land to pay unsecured debt, and expensive and complicated judicial requirements made it hard to seize even for mortgage default.<sup>74</sup> But in the 1600s, Professor K-Sue Park has shown, New England colonies permitted creditors to seize Indigenous land to recover on their unsecured monetary debts.<sup>75</sup> Colonists would transfer Native peoples' goods on credit and then quickly seize vast swaths of their land as payment.<sup>76</sup> By the end of the century, foreclosure as a remedy for unsecured monetary debts was firmly in place.<sup>77</sup>

While Professor Park's study focuses on 1600s New England, Professor Claire Priest focuses on the slave-based economies of the South and West Indies. These colonies retained English protections for land and debtors for a longer time, Priest argues, because plantation owners could borrow by promising the profits from their cash crops.<sup>78</sup> But pressure from English creditors that financed colonial expansion eroded these protections.<sup>79</sup> First, Negro slaves were declared "chattel," meaning they had the same status as personal property and could be seized as payment for debts.<sup>80</sup> Then, because slaves were not valuable enough without the land to go with them, the Crown mandated seizure of land as well, and colonial governments quickly followed suit.<sup>81</sup>

The plantation system doomed another protection against foreclosure, the English entail. Although Thomas Jefferson trumpeted the end of the entail in Virginia as the triumph of republicanism over feudalism, Professor Priest reveals that it instead served the needs of plantation holders in a slave economy.<sup>82</sup> By entailing land to the next generation, landowners could prevent creditors from seizing it.<sup>83</sup> As chattel property, however, enslaved people could not be entailed. Because plantations had little value without slaves to work it, the entail lost its value to the wealthy. Small and subsistence farmers, however, could use the entail to

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73. See K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 *LAW & SOC. INQUIRY* 1006, 1009 (2016) [hereinafter Park, *Money*]; Claire Priest, *The End of Entail: Information, Institutions, Slavery in the American Revolutionary Period*, 33 *LAW & HIST. REV.* 277, 280 (2015) [hereinafter Priest, *End of Entail*].

74. Park, *Money*, *supra* note 73, at 1010–12.

75. *Id.* at 1012–13.

76. *Id.* at 1024–28.

77. *Id.* at 1012 (setting forth laws).

78. Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 *HARV. L. REV.* 385, 417–18 (2006).

79. *Id.* at 389 (discussing pressure to permit creditors to seize land).

80. Priest, *End of Entail*, *supra* note 73, at 300–01.

81. *Id.*

82. *Id.* at 279–80.

83. *Id.* at 280.

prevent foreclosure.<sup>84</sup> By ending the entail, therefore, Southern colonies facilitated the land consolidation the plantation system encouraged.<sup>85</sup>

As the end of the entail suggests, property innovations that facilitated acquiring Indigenous land and Black slaves soon impacted White colonists as well. By the time America declared its independence, historian Bruce Mann writes, “[d]ebt was an inescapable fact of life,” in a moral system that “presupposed the dependence of debtors and the omnipotence and inherent justness of creditors.”<sup>86</sup> Although “debt and insolvency were the antithesis of republican independence . . . they pervaded all reaches of American society.”<sup>87</sup> The primacy of registries of deeds, meanwhile, might create security for creditors and purchasers, but it also might dispossess White owners through what Indigenous people decried as “pen-and-ink witchcraft,”<sup>88</sup> written words that did not represent the agreement of the parties.

### ***B. Antebellum Embrace: Elevating Ownership; Undermining Distribution***

Independence freed American property law from royal pressure, but pressure to build a national economy took its place. Speculation in land still claimed by Indigenous peoples was central to that economy, with George Washington, Ben Franklin, Thomas Paine, James Wilson, and many others invested in the business. Slavery, of course, was central as well, driving farming in the South and manufacturing, finance, and export in the North. Section One discusses how the Supreme Court distorted state power, constitutional authority, and even judicial review to protect these national economic engines in ways that continue to shape the law. Even as the economy nationalized, distribution to those in need remained distinctly local, based on legal residence in a district. Section Two discusses how this local distribution tied need to otherness—particularly immigrant status and racial difference—in ways reflected in the modern welfare system.

#### *1. Elevating Ownership*

The Supreme Court repeatedly limited scrutiny of injustice in cases involving acquisition of Indigenous land and slavery in the antebellum era. Sometimes the Court invoked the Constitution, sometimes international law, and sometimes just the “actual state of things” to do so.<sup>89</sup> Whatever their rationale, these cases elevated national commerce over the morality and even reality of the transactions they upheld.

The Supreme Court first struck down a state law on constitutional grounds to protect the interests of land speculators in *Fletcher v. Peck*. The case involved the 1795 Yazoo Purchase, 35 million acres Georgia sold in what later became parts of

84. *Id.* at 307–308, 311, 313–14 (discussing factors encouraging land consolidation).

85. *Id.* at 313–14. Notably Northern colonies, less enmeshed in plantation slavery, did not abolish the entail. *Id.* at 303–04.

86. BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 3 (2009).

87. *Id.* at 5.

88. CALLOWAY, *supra* note 68, at 36.

89. *Johnson v. M'Intosh*, 21 U.S. 543, 591 (1823).

Mississippi and Alabama.<sup>90</sup> Advertisers promoted the land as an “immense opening for the African trade,” arguing that “supposing each person only to purchase one negro,” and grow indigo, tobacco, or sugar with his labor, “the next year he can buy two, and so be increasing on.”<sup>91</sup> The land was still owned by tribal nations, so private encroachment violated federal law and could have threatened the fledgling nation with tribal warfare.<sup>92</sup> Georgia’s own claims to the land were fleeting—when it sold the land, Georgia’s western border stretched to the Mississippi River, but all other Eastern states had already ceded their lands west of the Appalachians, and everyone knew Georgia would soon do so.<sup>93</sup> To accomplish this legally dubious purchase, the Georgia-Mississippi Land Company bribed the Georgia legislature with “satchels of money.”<sup>94</sup> Georgians voted the legislators out of office, and the reconfigured legislature voided the illegal grant the following year.<sup>95</sup> But the land titles had already been sold to the Boston-based New England-Mississippi Land Company, which sold stocks in the speculative investment throughout the Northeast.<sup>96</sup>

When Congress failed to resolve the dispute, the investors concocted a feigned case and brought their claims to the Supreme Court. Today, Chief Justice Marshall would have recused himself from the dispute: his father-in-law and brother were among the major speculators in the Yazoo purchase.<sup>97</sup> Nevertheless, Marshall authored the unanimous opinion holding that Georgia’s reversal of the grant violated the Contracts Clause.<sup>98</sup>

The *Fletcher* opinion placed corrupt property deals under constitutional protection. Although the corruption involved in the Yazoo sale was well known,<sup>99</sup> the Court invalidated the Georgia legislation for the sake of the “innocent” purchasers—those who had invested in the stock of this wild speculation.<sup>100</sup> Marshall refused to even interrogate the legislative corruption, suggesting that potentially “impure motives” by the legislature should not influence judicial review.<sup>101</sup> The decision was hugely influential, cementing a vision of property and contract over other legal principles, and unleashing the power of large land

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90. BAPTIST, *supra* note 21, at 20.

91. *Id.*

92. See *Fletcher v. Peck*, 10 U.S. 87, 141–43 (1810) (noting that land was still subject to Indian title); Maggie Blackhawk, *Federal Indian Law as Public Law Paradigm*, 132 HARV. L. REV. 1787, 1817 (2019) (noting importance of Indian affairs in dispute).

93. BAPTIST, *supra* note 21, at 19.

94. *Id.* at 20.

95. *Id.* at 21.

96. *Id.*

97. See R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 306 (2007); see also *id.* at 300 (discussing similar conflicts in *Huidethop’s Lessee*, which upheld the rights of speculators over settlers).

98. Because the Takings Clause did not apply to state governments at the time, the Court relied on the Contracts Clause to resolve property rights issues in the antebellum era. *Id.* at 324.

99. *Id.* at 307 (noting that shortly after the sale it was discovered that all but one of the legislators voting for it had been bribed).

100. *Fletcher v. Peck*, 10 U.S. 87, 132–33.

101. *Id.* at 130.

speculators to dominate land policy in early America.<sup>102</sup> The relative immunity of legislative motive from judicial inquiry remains today and has proved an important shield for racist legislation like that in *Palmer v. Thompson*<sup>103</sup> and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.<sup>104</sup>

The Chief Justice cemented the protection of property over other rights in two cases more clearly about slavery and Indian land: *Johnson v. M'Intosh*<sup>105</sup> and *The Antelope*.<sup>106</sup> *Johnson* was a dispute between White land claimants over their rights to purchase land from tribal nations.<sup>107</sup> The plaintiffs, Johnson and Graham, were beneficiaries of land speculators who had purchased huge tracts of land from tribal nations with slim claims to it in 1773 and 1775.<sup>108</sup> The defendant, M'Intosh, had received his land grant from the United States after it acquired millions of acres in the same area in an even more abusive 1803 treaty.<sup>109</sup> As in *Fletcher v. Peck*, the speculators had lobbied every possible forum to secure their interests, and failed.<sup>110</sup> As in *Fletcher*, the case appears to have been a feigned dispute, as the parties' lands did not overlap.<sup>111</sup> The private purchases also clearly violated the British Royal Proclamation of 1763 when they were made, and federal and state law after.<sup>112</sup> But rather than relying on the clear statutory law, the Chief Justice issued a lengthy opinion that at once critiqued the violation of tribal property rights and upheld it in the name of a fictional international consensus.<sup>113</sup>

*Johnson* held that European nations had agreed that "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."<sup>114</sup> Marshall recognized that this doctrine was inconsistent with international justice: "Humanity," had established a "general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest."<sup>115</sup> But Marshall fabricated an image of Indians as "fierce savages" whose subsistence was "drawn chiefly from the forest" rather than farming as an excuse

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102. See also NEWMYER, MARSHALL, *supra* note 97, at 306 (calling *Fletcher* a "formidable obstacle to state interference with private property").

103. *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

104. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977).

105. *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

106. *The Antelope*, 23 U.S. 66 (1825).

107. *Johnson*, 21 U.S. at 560–61 (describing history of claims).

108. Eric Kades, *Law and History in the Great Case of Johnson v. M'Intosh*, 19 LAW & HIST. REV. 67, 82–85 (2001).

109. *Id.*

110. *Id.* at 77.

111. *Id.* at 99.

112. *Id.* at 85–89.

113. *Johnson v. M'Intosh*, 21 U.S. 543 (1823)

114. *Id.* at 587.

115. *Id.* at 589.



for departing from humanity's rule for them.<sup>116</sup> More important, he wrote, "the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question."<sup>117</sup> Therefore, Marshall concluded:

However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.<sup>118</sup>

In other words, the national need to keep taking Indian land justified violating the laws of humanity to do it. Although scholars have extensively examined *Johnson's* impact on tribal nations,<sup>119</sup> they have not focused on its broader lesson: where governmental rules for property diverge from moral rules, the government rules would prevail.

The Chief Justice reinforced this principle two years later in *The Antelope*,<sup>120</sup> the first case directly confronting the legal grounding for slavery.<sup>121</sup> The *Antelope* was a privateer ship captured off the Florida coast by the U.S. Revenue Cutter Service.<sup>122</sup> When captured, it held Africans seized from slave trading ships from the United States, Spain, and Portugal.<sup>123</sup> The Vice Consuls of Spain and Portugal claimed the kidnapped Africans as property of their nationals.<sup>124</sup> United States Attorney General William Wirt, along with Francis Scott Key, argued that because the United States had outlawed the international slave trade in 1808, and the trade itself violated international law, all of the Africans must be released.<sup>125</sup> An 1822 circuit court decision by Justice Story, the scholar of the Court, had adopted this argument, finding that although many nations had permitted the African slave trade and some still did, "no practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct principle, whenever both nations by their public acts recede from

116. *Id.* at 590. Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of their Property Rights*, 77 N.C. L. REV. 637, 651–53 (1999) (discussing how Marshall's description ignored extensive farming because it was the responsibility of Indian women).

117. *Johnson*, 21 U.S. at 572.

118. *Id.* at 591–92.

119. See, e.g., Robert A. Williams, Jr., *The Hard Trail of Decolonizing the White Man's Jurisprudence*, 1986 WISC. L. REV. 219, 256.

120. *The Antelope*, 23 U.S. 66 (1825).

121. See *id.* at 120 (noting that this was the first time that the status of people aboard a slave ship from a country that had not outlawed the slave trade was before the Supreme Court); JONATHAN M. BRYANT, *DARK PLACES OF THE EARTH: THE VOYAGE OF THE SLAVE SHIP ANTELOPE*, at xviii–xix (2015) (describing the foundation *The Antelope* laid for later slavery cases).

122. *Antelope*, 23 U.S. at 68.

123. *Id.* at 67–68.

124. *Id.*

125. BRYANT, *supra* note 121, at xi–xiii (2015) (summarizing arguments of Key and Wirt); *Antelope*, 23 U.S. at 70–78 (summarizing Key's oral argument).

such practice.”<sup>126</sup> But in *The Antelope*, Chief Justice Marshall rejected the reasoning of his protégé.

The Court called the case one “in which the sacred rights of liberty and of property come in conflict with each other,” and declared “that [slavery] is contrary to the law of nature will scarcely be denied.”<sup>127</sup> But the “Christian and civilized nations of the world” had long engaged in the trade, which “claimed all the sanction which could be derived from long usage, and general acquiescence.”<sup>128</sup> Although the slave trade might violate justice, “the state of things which is thus produced by general consent, cannot be pronounced unlawful.”<sup>129</sup> Therefore, only the Africans originally taken from the American vessel should be released, and those from the Spanish and Portuguese vessels returned to those who could prove their ownership.<sup>130</sup>

Justice Story was a firm and consistent opponent of slavery, but he too transformed property law to protect it. Story believed slavery was immoral, but he thought it should and would die a peaceable and gradual death.<sup>131</sup> He also fervently opposed abolitionism, believing it threatened the Union and the Constitution.<sup>132</sup> In 1842, this belief led him to three decisions that undermined efforts to insert democracy and justice into the property system.

First, *Prigg v. Pennsylvania* held unconstitutional a Pennsylvania statute designed to prevent kidnapping free Black people to transport them into slavery.<sup>133</sup> Edmund Prigg had seized Margaret Morgan and her children from Pennsylvania and brought them to Maryland, alleging that Morgan was a runaway.<sup>134</sup> Although Morgan and her children had strong claims to freedom,<sup>135</sup> the Court ruled that any state law process interfering with seizure of people alleged to be slaves was unconstitutional under the Fugitive Slave Clause.<sup>136</sup> The “security of this species of property in all the slave-holding states,” Justice Story wrote, was “so fundamental” that without the Clause “the Union could not have been formed.”<sup>137</sup> Preserving property in slaves and unity with states that embraced it, in other words, was more important than either Black people’s freedom from arbitrary seizure or the right of free states to protect them.

126. United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (1822).

127. *Antelope*, 23 U.S. at 114, 120.

128. *Id.* at 114–15.

129. *Id.* at 121.

130. *Id.* at 132–33.

131. R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 337–38 (1985) [hereinafter NEWMYER, STORY].

132. *Id.* at 343.

133. *Prigg v. Pennsylvania*, 41 U.S. 539, 550, 674 (1842); Alexandra Lahav & R. Kent Newmyer, *The Law Wars in Massachusetts, 1830-1860: How a Band of Upstart Radical Lawyers Defeated the Forces of Law and Order and Struck a Blow for Freedom and Equality Under Law*, 58 AM. J. LEG. HIST. 326, 334–35 (2018).

134. *Prigg*, 41 U.S. at 539.

135. Paul Finkelman, *Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 244, 274–76 (1994).

136. *Prigg*, 41 U.S. at 612.

137. *Id.*

Riding circuit in Rhode Island that year, Justice Story further limited the popular will in order to protect existing property relations. The “Dorr Rebellion” was a movement to amend Rhode Island’s Constitution to eliminate property qualifications for the vote.<sup>138</sup> Although the dispute might seem far from the slavery question, Story understood (and despised) it through that lens. For him, the rebels were “indistinguishable from abolitionists . . . who presumed to claim sovereignty in the name of the revolution.”<sup>139</sup> When the rebels sued in federal court alleging that Rhode Island had committed trespass by invading and damaging a reformer’s home under guise of martial law, Story upheld both the martial law and the damage to property in exercising it.<sup>140</sup>

*Swift v. Tyson*<sup>141</sup> is Justice Story’s second-most infamous 1842 opinion. *Swift*, later overruled by *Erie Railroad v. Tompkins*,<sup>142</sup> held that federal courts sitting in diversity should apply the “general commercial law” rather than individual state decisions.<sup>143</sup> In *Swift* that meant that fraud was not a defense to the validity of a bill of exchange, a written promise to pay that could be exchanged like money. The case was not directly about either slavery or Indian land. But the decision meant that New York courts had to enforce bills arising from a fraudulent scheme to speculate in Maine lands recently appropriated from tribal peoples.<sup>144</sup> Like *Prigg* and *Fletcher*, in other words, *Swift* undermined state efforts to prevent fraud in property transactions to preserve an increasingly fragile national unity.

Among antebellum decisions, *Dred Scott v. Sanford*<sup>145</sup> has of course come under most fire for its elevation of slavery and property rights over other rights. Chief Justice Roger Taney’s 1857 decision held first, that because the founders had regarded Black people as “articles of merchandise” they could not have imagined even free African Americans as citizens of the United States, and second, that the constitutional right to property prohibited Congress from banning slavery in a territory so as to affect the status of enslaved people brought there.<sup>146</sup> But while Taney embraced the racism and disregard of human rights in American slavery in a way that Marshall and Story never did, their decisions created the legal groundwork for *Dred Scott*. In cases like *Fletcher*, *Johnson*, *Antelope*, *Prigg*, and *Swift*, they elevated a nationalized property system over other claims to justice, law, and morality. Although only *Fletcher* and *Johnson* are still good law, the presumption that maintaining fluid interstate transactions is more important than ensuring justice in those transactions remains.

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138. NEWMYER, STORY, *supra* note 131, at 345.

139. *Id.* at 344.

140. *Id.* at 348.

141. *Swift v. Tyson*, 41 U.S. 1 (1842).

142. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 89–90 (1938).

143. *Swift*, 41 U.S. at 18–19.

144. NEWMYER, STORY, *supra* note 131, at 337 (describing scheme); see *Penobscot Nation v. Frey*, 3 F.4th 484, 509–10 (1<sup>st</sup> Cir. 2021) (Barron, J. concurring) (summarizing Maine’s illegal expropriation of Native lands in 1833).

145. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

146. *Id.* at 411–12; 452.

## 2. *Limiting Distribution*

The antebellum period also laid the foundations for the racialization, fragmentation, and impoverishment of the American welfare state. Poor relief in colonial and early America was the responsibility of the smallest units of local government, towns in the North and parishes in the South.<sup>147</sup> But local governments were only responsible for the needs of their legal residents; those who lacked such legal settlement were the responsibility of the states.<sup>148</sup> It was in local interests to prevent legal residence of those likely to need support, and in state interests to prevent their migration to the state at all.

This allocation was modeled on the English system, but in England the desire to keep new poor people out balanced against, first, desires to keep a captive labor force in and second, concerns about the evils of vagrancy.<sup>149</sup> English poor laws, therefore, combined efforts to prevent new settlements of those in need with efforts to prevent the poor from leaving places where their labor was needed.<sup>150</sup> (When poor people got too troublesome, England could also transport such “waste people” to America and other colonies.<sup>151</sup>) In colonial and early America, in contrast, burgeoning immigration as well as enslaved African Americans reduced the kinds of labor shortages seen in England, so desires for poor workers did not mediate desires to exclude poor dependents.

As legal historian Kunal Parker has examined, the result was to render the poor “foreign,” undeserving of inclusion in the community.<sup>152</sup> Local poor relief officials were the first to define territorial access and citizenship, doing so almost a century before the federal government began to regulate immigration.<sup>153</sup> Those not entitled to legal settlement were “warned out”; but in practice they were rarely physically excluded, remaining instead as “internal foreigners,” present but without full community membership.<sup>154</sup> This internal foreignness was not tied to alienage: most of those warned out or excluded were native-born and from neighboring towns within the state.<sup>155</sup> Rather, foreignness came from susceptibility to poverty itself:

147. JAMILA MICHENER, *FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS* 34 (2018).

148. Kunal M. Parker, *Citizenship and Immigration Law, 1800-1924*, in 2 *CAMBRIDGE HISTORY OF LAW IN AMERICA* 168, 173–74, 181–82 (Michael Grossberg & Christopher Tomlins eds., 2014).

149. See William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 *AKRON L. REV.* 73, 88–89, 98–99, 103–04 (1996).

150. *Id.*

151. See NANCY ISENBURG, *WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA* 22 (2016).

152. See Parker, *supra* note 148, at 169–70; see also HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* 6–7 (2017) (“Originating from the poor law, state immigration policy developed in tandem with other public policies for poverty regulation that made paupers social outcasts.”).

153. Parker, *supra* note 148, at 173, 186.

154. *Id.* at 174–75, 183.

155. *Id.* at 175.

legal settlement turned on whether one had paid taxes,<sup>156</sup> had a formal employment contract,<sup>157</sup> owned real estate, or had become a public charge within six years of moving.<sup>158</sup>

As the antebellum period progressed, this effort borrowed from and exacerbated racial and ethnic exclusion. As slaves, Black people were the fiscal responsibility of their enslavers, but as free people, they might become the responsibility of the local government or the state.<sup>159</sup> Northern states therefore sought to prevent legal settlement by free Black people.<sup>160</sup> Connecticut's infamous 1833 law requiring Prudence Crandall to shut down her school for free Black girls, for example, targeted only schools that educated Black people "not inhabitants of this state."<sup>161</sup> Similarly, Massachusetts officials sought to enforce anti-miscegenation laws because by declaring interracial marriages void they could avoid according poor relief to spouses from other towns.<sup>162</sup>

Struggles over poor relief for impoverished Irish immigrants, meanwhile, shaped Massachusetts and New York laws restricting immigration.<sup>163</sup> Viewing the newcomers as "leeches" on public funds, and fueled by anti-Irish and anti-Catholic nativism, Massachusetts originated the first U.S. deportation policy, forcibly excluding 50,000 people—including some ethnic Irish U.S. citizens—from its shores.<sup>164</sup>

This history is seared into the DNA of U.S. welfare policy. At its core is the effort to declare that people in need of support are not part of the community. In hundreds of cases, towns litigated against each other over where the poor had legal residence.<sup>165</sup> When they could afford to, both states and towns physically returned

156. *Overseers of Amenia v. Overseers of Stanford*, 6 Johns. 92, 92 (N.Y. 1810) (approving removal of a widow and her children because her deceased husband had paid his assessment by working on the public roads rather than paying taxes).

157. *Lewistown Borough Overseers v. Granville Tp. Overseers*, 5 Pa. 283, 283 (1847) (denying settlement to an unmarried woman because, although she worked as a servant, she did not have a formal employment contract).

158. Title 53: Inhabitants, *reprinted in* PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 317–19 (1835).

159. Parker, *supra* note 148, at 175–76.

160. *Id.* at 176–78.

161. *Crandall v. State*, 10 Conn. 339, 339, 341 (1834).

162. *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157, 158 (1819); Amber Moulton, *THE FIGHT FOR INTERRACIAL MARRIAGE IN MASSACHUSETTS* 36, 40–41 (2011) (discussing cases in Massachusetts and increasing hostility to support of interracial children in Philadelphia).

163. Parker, *supra* note 148, at 182–184; *see also* HIROTA, *supra* note 152, at 10, 13–14 (arguing that the origins of U.S. immigration control lie in economic and cultural nativism against the Irish, and that the poverty of Irish immigrants was central to this concern).

164. HIROTA, *supra* note 152, at 2–3.

165. There are 522 cases before 1860 in Westlaw's state cases database that include the words "settlement" and "poor" and have in their titles either overseers or inhabitants (as towns enforcing poor laws called themselves). While a few of these include suits between individuals and the towns, the overwhelming majority involve towns suing towns.

paupers rather than paying for their support.<sup>166</sup> This competition to exclude encouraged a legacy of fragmentation rather than coordination of support. While the United Kingdom began to institute a uniform welfare system in 1834 in part to prevent “perpetual shifting” from parish to parish,<sup>167</sup> the United States would not do the same for another century.<sup>168</sup> In the interim, states developed divergent welfare systems shaped by beliefs about whether the poor were worthy of inclusion, that increasingly turned upon perception of the race of welfare recipients.<sup>169</sup>

## II. POST-CIVIL WAR TRANSFORMATION: EXPANDING EXCLUSION; CONTRACTING REVIEW & REGULATION

The Reconstruction Amendments sought to dismantle racial barriers and expand federal power against states. But over the next decades, courts and legislators narrowed their power to accomplish these goals. Property was at the heart of this development, as both private and public law doctrines shifted to increase the private rights of property owners and decrease the authority of the state. At the same time, the Court limited constitutional review over government actions affecting racialized groups considered outside the polity—Indigenous peoples, Asian immigrants, and residents of island territories—leaving those groups and their property vulnerable to federal whims.

Some of the transformations of this era, like expansions of private exclusion, expressly sought to restore antebellum racial hierarchy.<sup>170</sup> Others, like judicial limitations on constitutional authority, also reflect desires to restore unity with states committed to racial hierarchy.<sup>171</sup> By validating racial separation, both developments created new links between space, status, and physical exclusion with devastating implications for modern America.<sup>172</sup> Still, others deployed race to accomplish new goals of territorial exclusion and expansion, helping construct the vast discretionary power that still characterizes foreign affairs.

### A. Expanding Private Exclusion

Racial projects radically expanded the right to exclude after the Civil War.

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166. Parker, *supra* note 148, at 174–75.

167. SIDNEY & BEATRICE WEBB, ENGLISH POOR LAW POLICY 1–2 (1910).

168. FOX, *supra* note 17, at 3–4.

169. Northeastern states, for example, where the poor were largely European immigrants, provided far more generous benefits than Southern and Southwestern states, where the poor were more often Black or Mexican. *Id.* at 51–52. This resulting geographic inequality affected all poor people. By 1929, for example, the average monthly grant for White single mothers ranged from \$4.33 in Arkansas to \$69.31 in Massachusetts. MICHENER, *supra* note 147, at 36.

170. *Infra*, Section II.A.

171. *Infra*, Section II.B.

172. Barbara Y. Welke, *Beyond Plessy: Space, Status, and Race in the Era of Jim Crow*, 2000 UTAH L. REV. 267, 269 (arguing that “Jim Crow was modern in . . . its use of space to mark status”).

One prong of this development concerned exclusion from businesses open to the public.<sup>173</sup> In the antebellum period, the states followed the English common law doctrine that common carriers were obliged to serve all who acted civilly on the premises.<sup>174</sup> This doctrine arguably applied not just to places of public accommodation, like railways and inns, but to all businesses that held themselves out as open to the public.<sup>175</sup> Although many common carriers excluded African Americans as a matter of practice, the first cases held that these exclusions were inconsistent with the common law,<sup>176</sup> and in the first years after the Civil War, 24 states enacted statutes affirming the right to be served regardless of race.<sup>177</sup>

But the common law eroded with the end of Reconstruction. Some states ended businesses' obligation to serve in reaction to the Civil Rights Act of 1875, which banned racial discrimination in places of public accommodation.<sup>178</sup> A month after the statute's passage, Tennessee enacted a statute declaring, "[t]he rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement is abrogated," and no owner was under obligation to admit "any person whom he shall for any reason whatever choose not to entertain."<sup>179</sup> The same year, a Delaware statute stipulated that "[n]o keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers . . . shall be obliged," to serve "persons whose reception or entertainment . . . would be offensive to the major part of his customers and would injure his business."<sup>180</sup> Other jurisdictions narrowed the right to enter by judicial decisions. Courts in Massachusetts and Iowa, for example, held for the first time that the right of accommodation did not apply to places of amusement in cases involving Black patrons.<sup>181</sup>

While "separate but equal" measures reduced the need for explicit rejections of the common law rule, *Brown v. Board of Education*<sup>182</sup> in 1954, and sit-ins by civil rights activists triggered a new wave of exclusion statutes. In 1954,

173. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1388–1405 (1996).

174. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 464–65 (New York, O. Halsted 1827) (explaining that innkeepers "are bound to do what is required of them in the course of their employment . . . and if they refuse without some just ground, they are liable to an action."); see also *id.* at 445, 499 (including common carriers, innkeepers, farriers, porters, and ferrymen in this rule); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (noting that public accommodations statutes "but codify the common-law innkeeper rule which long predated the Thirteenth Amendment.").

175. Singer, *supra* note 173, at 1292–93.

176. *State v. Kimber*, 3 Ohio Dec. Reprint 197 (Ct. C.P. 1859) (holding train conductor liable for assault and battery for evicting mulatto woman from trolley car).

177. Singer, *supra* note 173, at 1359–62, 1374.

178. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

179. THE CODE OF TENNESSEE: BEING A COMPILATION OF THE STATUTE LAWS OF THE STATE OF TENNESSEE, OF A GENERAL NATURE, IN FORCE JUNE 1, 1884, at 399 (W. A. Milliken & John J. Vertrees, eds., 1884) (codified at TENN. CODE ANN. §§ 62-7-109, 62-7-110).

180. 15 Del. Laws 322 (1875) (codified at DEL. CODE ANN. tit. 24, § 1501).

181. *Bowlin v. Lyon*, 25 N.W. 766, 768 (Iowa 1885); *McCrea v. Marsh*, 78 Mass. (12 Gray) 211, 211, 213 (1858).

182. *Brown v. Board of Education*, 347 U.S. 483 (1954).

Louisiana repealed its Reconstruction Era act that prohibited refusals to admit anyone in a public inn, hotel, or public resort, and conditioned business licenses on providing service regardless of race.<sup>183</sup> In 1956, a Mississippi statute authorized “any public business . . . of any kind whatsoever . . . to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve,” authorizing a fine or imprisonment for those that refused to leave.<sup>184</sup> Arkansas enacted virtually the same provision in 1959, repealing it only in 2005.<sup>185</sup>

Less well known is the role of race in expanding the right of landowners to exclude the public from unfenced land. Until the mid-nineteenth century, the public had the right to hunt, forage, and graze livestock on unfenced land throughout the United States.<sup>186</sup> Because most land was unfenced, that meant “[a] full right to exclude was thus the exception for private lands, not the norm.”<sup>187</sup> In rejecting a trespass claim against a hunter, for example, South Carolina’s high court opined that it “never yet entered the mind of any man” that the right to hunt on unfenced lands could “be defeated at the mere will and caprice of an individual.”<sup>188</sup> Nor could landowners bring trespass claims against owners of cattle that damaged their property unless the landowner had been judged to have a “good and sufficient” fence to keep them out.<sup>189</sup>

Many Southern states went even further, making landowners liable for damages to livestock that wandered onto their unfenced land.<sup>190</sup> On the eve of the Civil War, several courts indignantly rejected railroads’ claims that they should not be liable for killing livestock when the animals were trespassing on another’s land.<sup>191</sup> In 1860, for example, the Georgia Supreme Court rejected the trespass defense:

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183. Harold J. Brouillette & Charles A. Reynard, *Index-Digest of Acts of the 1954 Louisiana Legislature*, 15 LA. L. REV. 103, 129 (1954).

184. 1956 Miss. Laws 307–08 (codified at MISS. CODE ANN. § 97-23-17).

185. See 2005 Ark. Acts 423 (repealing ARK. CODE ANN. § 4-70-101).

186. FREYFOGLE, *supra* note 35, at 29–31.

187. *Id.* at 30.

188. *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244, 352–53 (1818).

189. See, e.g., ACTS AND LAWS OF HIS MAJESTY’S PROVINCE OF NEW HAMPSHIRE 122 (Portsmouth, NH, Daniel & Robert Fowle 1771); SAMUEL NEVILLE, ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY 209 (New Jersey, William Bradford 1752); see also *Studwell v. Ritch*, 14 Conn. 292, 295 (1841) (rejecting trespass claim for damage done by cattle); *Kerwhaker v. Cleveland, Columbus & Cincinnati R.R. Co.*, 3 Ohio St. 172, 200 (1854) (rejecting damage claim against a stock owner for allowing livestock to run upon railroad tracks).

190. See, e.g., COMPLETE REVISAL OF ALL THE ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA, NOW IN FORCE AND USE 500 (New Bern, NC, James Davis 1773); W. RIND, ET AL., ACTS OF ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA 308–09 (Williamsburg, VA, William Hunter 1752).

191. See, e.g., *Nashville & Chattanooga R.R. Co. v. Peacock*, 25 Ala. 229, 232 (1854) (Alabama laws “show conclusively that the unenclosed lands of this State are to be treated as common pasture for the cattle and stock of every citizen.”); *Vicksburg & Jackson R.R. Co. v. Patton*, 31 Miss. 156, 184–85 (1856) (holding cattle on unfenced lands to be trespassers would be “repugnant to the custom and understanding of the people”).



[It] would require a revolution in our people's habits of thought and action. A man could not walk across his neighbor's unenclosed land, nor allow his horse, or his hog, or his cow, to range in the woods nor to graze on the old fields, or the 'wire grass,' without subjecting himself to damages for a trespass. Our whole people, with their present habits, would be converted into a set of trespassers. We do not think that such is the Law.<sup>192</sup>

With Emancipation, however, the open range clashed with elite White interests. Plantation owners needed Black labor to work their fields, and they didn't want to pay much for it.<sup>193</sup> They complained that Black workers, able to support themselves by hunting, grazing a few livestock, and foraging in the open range, were unwilling to work year-round for low wages.<sup>194</sup> What followed were multiple measures reducing the right to enter and expanding the right to exclude.

Between 1865 and 1866, Louisiana, Georgia, South Carolina, North Carolina, and Alabama enacted their first general statutes criminalizing trespass on enclosed or unenclosed lands.<sup>195</sup> In the years following the end of Reconstruction, Texas, Mississippi, and Tennessee forbade hunting on unenclosed lands on which landowners had posted signs denying permission.<sup>196</sup> Mississippi, Georgia, Tennessee, and Alabama also enacted statutes criminalizing hunting unfenced land that applied only in majority-Black counties, leaving hunting in majority-White counties untouched.<sup>197</sup> Virginia, meanwhile, gave local governments authority to enact their own laws banning hunting on unfenced lands; only counties with large Black populations did so.<sup>198</sup>

The closing of the unfenced range to grazing was slower because low- and middle-income Whites fiercely resisted it.<sup>199</sup> But Alabama, South Carolina, Mississippi, Arkansas, and Virginia began closing the open range immediately after the Civil War, starting with majority-Black counties.<sup>200</sup> In Georgia, White and Black voters successfully resisted initial attempts to close the range; by 1889, however, Georgia had closed the range throughout its Black Belt, leaving it open in all but three majority-White counties.<sup>201</sup> Tennessee did not move to close the range until 1895, but when it did, it targeted counties with large Black populations.<sup>202</sup>

Race was not the only cause of expansions of the right to exclude. Over the nineteenth century, the range closed in the North and Midwest too, and this change likely owed more to a combination of railroad interests, farming interests, and

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192. Macon & W. R.R. Co. v. Lester, 30 Ga. 911, 914 (1860).

193. Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 LAW & HIS. REV. 351, 356 (2015).

194. *Id.* at 357–58.

195. *Id.* at 361.

196. *Id.* at 362.

197. *Id.* at 363–64.

198. *Id.* at 364.

199. *Id.* at 368.

200. *Id.* at 370–72, 375–76.

201. *Id.* at 373.

202. *Id.* at 375.

reduced fencing costs than to race.<sup>203</sup> But when you see a “No Trespassing” sign on open rural land or a “We Reserve the Right to Refuse Service to Anyone” sign on a business, you may be seeing the manifestation of our racial history.

### ***B. Shrinking the Public Sphere***

While state common law shrank the obligations of private landowners, the Supreme Court immunized states and private owners from federal regulation.

In the antebellum era, physical segregation was inconvenient in the South, where most African Americans lived and worked alongside White enslavers.<sup>204</sup> In the immediate postwar period, therefore, transportation, restaurants, and recreation were integrated far more than they soon would be.<sup>205</sup> Segregation was more “deeply-rooted and pervasive” in the North, although several states enacted laws mandating integration of schools and transportation after the War.<sup>206</sup> But, as Frederick Douglass and other civil rights leaders reported, African Americans were still barred from the best hotels and better-paid professions in New York and elsewhere.<sup>207</sup> When Kate Brown, for example, who managed the “ladies retiring room” at the U.S. Senate, refused to leave the ladies car of the train from Alexandria to D.C., a railway guard beat her so harshly that she never fully recovered.<sup>208</sup>

During early Reconstruction, correcting such exclusions seemed to be part of the public role. Kate Brown sued the railway for damages, alleging her exclusion violated the railroad’s 1863 charter providing that “no person shall be excluded from the cars on account of color.”<sup>209</sup> The railroad objected that they were not excluding her, just requiring segregation, but the Supreme Court disagreed.<sup>210</sup> The Court held that the charter targeted “discrimination in the use of the cars on account of color . . . and not the fact that the colored race could not ride in the cars at all.”<sup>211</sup> Two years later, the assault on Brown helped motivate Congress to finally pass the Civil Rights Act of 1875.<sup>212</sup> The Act declared that “it is essential to just government we recognize the equality of all men before the law,” and guaranteed all persons “the full and equal enjoyment of the accommodations, advantages, facilities, and

203. See FREYFOGLE, *supra* note 35, at 44–45.

204. See W.E.B. DUBOIS, *SOULS OF BLACK FOLK* 183 (1903); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 12 (3d ed. 2002).

205. See WOODWARD, *supra* note 204, at 32–37.

206. James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. AM. HIST. 493, 494–95 (1965).

207. *Id.* at 494.

208. Kate Masur, *Patronage and Protest in Kate Brown’s Washington*, 99 J. AM. HIST. 1047, 1053, 1061–62 (2013); see also MARTHA S. JONES, *VANGUARD* 111–12 (2020) (describing the “terror of the ladies’ car” faced by prominent African American women).

209. *Railroad Co. v. Brown*, 84 U.S. 445, 446, 448 (1873).

210. *Id.* at 448, 452.

211. *Id.* at 452–53.

212. The assault was repeatedly discussed in Congress at the time. See ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS’ DEBATES; THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS* 281–84 293–94 (1967) (reprinting debates discussing the assault and proposing measures to prevent segregation in rail). Republicans worked to protect Brown’s job after the assault disabled her. Masur, *supra* note 208, at 1047 (discussing the protection of her job until 1880).

privileges of inns, public conveyances on land or water, theaters, and other places of public amusement.”<sup>213</sup>

By the time Congress passed the Act, however, the *Slaughter-House Cases*<sup>214</sup> had already thrown its constitutionality into question.<sup>215</sup> At first glance, the cases appear to concern property but not race. New Orleans had butchers challenge a proto-zoning law that required all livestock to be kept at the Crescent City Live-Stock Landing and Slaughter-House Company south of the city.<sup>216</sup> The ordinance responded to a tremendous public health problem and incidentally addressed a racial one. Formerly, stockyards and slaughterhouses existed alongside residences, hospitals, and schools, and butchers dumped carcasses and offal into the Mississippi River, polluting the water supply and causing repeat cholera outbreaks.<sup>217</sup> Centralizing operations ended these outbreaks, and, by mandating that facilities be open to all, ended the racist exclusion of Black butchers from the trade.<sup>218</sup>

White butchers, however, challenged centralization of their business, arguing that the Privileges and Immunities Clause of the Fourteenth Amendment made all state limitations on labor or trade unconstitutional. The Court could easily have upheld the law without accepting this radical conclusion.<sup>219</sup> Nevertheless, in deciding against the butchers, the majority eviscerated the power of the Fourteenth Amendment. The majority opinion first rendered the Privileges and Immunities Clause of the Fourteenth Amendment virtually toothless, declaring that it included only “those which belong to citizens of the States as such, and that they are left to the State governments for security and protection.”<sup>220</sup> The Court then sought to undermine the Amendment’s ability to reach non-racial claims, declaring, “We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.”<sup>221</sup> Scholars agree that both holdings were inconsistent with the intent of the Amendment’s framers, and that Justice Miller, who wrote the opinion, would have been aware of this intent.<sup>222</sup>

While not facially about race, *Slaughter-House* was very much a reaction to and retrenchment from Reconstruction. Decided in the wake of the Economic Panic of 1873 and the Democrats’ return to control of Congress,<sup>223</sup> the opinion

213. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 335–36 (1875).

214. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

215. McPherson, *supra* note 206, at 504.

216. *Slaughter-House*, 83 U.S. at 39–40.

217. PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 55 (2011).

218. *Id.* at 55–56.

219. The majority opinion itself noted that “it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation.” *Slaughter-House*, 83 U.S. at 61–62.

220. *Id.* at 78; see Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994) (discussing scholarly consensus).

221. *Slaughter-House*, 83 U.S. at 81.

222. See Aynes, *supra* note 220, at 627, 647–50.

223. Brandwein, *supra* note 217, at 6–9.

explicitly reined in Reconstruction's expansion of federal power to further equality. A more expansive reading of the Fourteenth Amendment would, the Court wrote, "fetter and degrade the State governments by subjecting them to the control of Congress" and "radically change[] the whole theory of the relations of the State and Federal governments to each other."<sup>224</sup> The Court therefore chose a more narrow—if less textually and historically accurate—reading.<sup>225</sup> The result both encouraged federal retreat from protection of Black Americans and limited federal power to protect them, or anyone else, from state injustice.

In 1883, *The Civil Rights Cases*<sup>226</sup> extended the emasculation of federal power. Like *The Slaughter-House Cases*, *The Civil Rights Cases* involved property rights, but this time the right to enter instead of the right to use. The consolidated cases concerned not just access to physical property but also the benefits of wealth, challenging exclusions from the dress circle of Maguire's theater in San Francisco, the Grand Opera House in New York, and the ladies' car of the Memphis & Charleston Railroad Company.<sup>227</sup>

The Court responded by holding the Civil Rights Act of 1875 unconstitutional.<sup>228</sup> First, the Court held the equal protection mandate of the Fourteenth Amendment prohibited only action by state officials.<sup>229</sup> Second, Section Five, authorizing Congress to enforce the amendment, permitted only legislation addressing state action.<sup>230</sup> This state action limitation continues to hobble the Fourteenth Amendment, undermining public interests in everything from lunch counters,<sup>231</sup> to public parks,<sup>232</sup> to domestic violence.<sup>233</sup>

The Court held that the statute could not rest on the Thirteenth Amendment either. Even admitting the possibility that antebellum exclusions of African Americans from inns and public transport were intended to prevent slave escapes, the Court held that "[m]ere discriminations on account of race or color were not regarded as badges of slavery."<sup>234</sup> In willful elision of increasing race-based violence and oppression, Justice Field's opinion for the Court even suggested that it

224. *Slaughter-House*, 83 U.S. at 78.

225. *See id.*

226. 109 U.S. 3 (1883).

227. *Id.* at 4.

228. *Id.* at 26.

229. *Id.* at 10–11.

230. *Id.* at 13–14. Although the Civil Rights Act of 1866 did not refer to state action, the Court read the requirement into that statute too. *Id.* at 16–17; *see also* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (overruling limitation).

231. *See* Christopher Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 767, 770–72 (2010) (describing the doctrine as the key challenge of those challenging racial exclusions from lunch counters).

232. *Evans v. Abney*, 396 U.S. 435, 444 (1970) (holding state action requirement required public park to revert to the donor's family once a racist restriction on its use could no longer be enforced).

233. *United States v. Morrison*, 529 U.S. 598, 625–26, 627 (2000) (holding the Fourteenth Amendment did not give Congress authority to prohibit private violence against women).

234. *Civil Rights Cases*, 109 U.S. at 21–22, 25.

might be time that African Americans “cease[d] to be the special favorite of the laws.”<sup>235</sup> Field had passionately dissented in *The Slaughter-House Cases*. With respect to White butchers’ freedom of property and trade, he had argued that to deny any citizen “equality in these rights and privileges with others, was, to the extent of the denial, subjecting him to an involuntary servitude.”<sup>236</sup> When faced with Black equality, however, his interpretation of the Thirteenth Amendment was far different.

*Plessy v. Ferguson* drew the noose around the Reconstruction Amendments even tighter.<sup>237</sup> *The Slaughter-House Cases* read the Privileges and Immunities Clause out of the Fourteenth Amendment and held that the Amendment only concerned race. *The Civil Rights Cases* held that even as to race, the Amendment only reached state action. Now in *Plessy*, the Court held that the Fourteenth Amendment did not reach even a state statute requiring racial segregation.<sup>238</sup> The decision upheld a Louisiana statute requiring separate cars for Whites and Blacks, holding that the Amendment “could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.”<sup>239</sup> Nothing about denying such “social equality,” the Court continued, “stamps the colored race with a badge of inferiority,” unless it “chooses to put that construction on it.”<sup>240</sup> In any case, social equality could not come from law but only the “natural affinities . . . and a voluntary consent of individuals.”<sup>241</sup>

Ironically, by the time the Court decided *Plessy*, it had begun using the Fourteenth Amendment to strike down state laws that interfered with laissez-faire economics.<sup>242</sup> Indeed, some of the few constitutional victories for racial equality in this period came from appeals to free use of property. In 1886, *Yick Wo v. Hopkins* struck down a San Francisco law that required a special license to operate a wooden laundry under the Fourteenth Amendment.<sup>243</sup> The plaintiffs showed that there was no difference between the 80 businesses granted such licenses and the 200 denied them, except that the owners of the latter were Chinese.<sup>244</sup> The decision established the important principles that first, the Fourteenth Amendment protected all persons, not merely citizens, and second, that facially neutral provisions are unconstitutional if discriminatorily or arbitrarily applied.<sup>245</sup> In 1917, *Buchanan v. Warley* held that municipal laws mandating racial segregation violated the Fourteenth Amendment by denying “the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white

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235. *Id.* at 25.

236. *The Slaughter-House Cases*, 83 U.S. 36, 91–92 (1872).

237. 163 U.S. 537 (1896).

238. *Id.* at 543–48.

239. *Id.* at 544.

240. *Id.* at 551.

241. *Id.*

242. See Derrick Bell, *White Superiority in America: Its Legal Legacy, its Economic Costs*, 33 VILL. L. REV. 767, 775 (1988) (noting irony).

243. 118 U.S. 356, 374 (1886).

244. *Id.*

245. *Id.* at 369–72.

person.”<sup>246</sup> Even before *Buchanan*, several lower courts had held such racial zoning laws unconstitutional.<sup>247</sup>

But other attempts to invoke rights of property and contract to achieve racial equality were unsuccessful. In 1923, the Court upheld a series of California laws targeting Japanese immigrants that prohibited noncitizens from owning or leasing land unless they had declared their intent to become citizens (which Asians, as non-Whites, could not do).<sup>248</sup> In 1926, the Court dismissed a challenge to enforcement of a racially restrictive covenant as “entirely lacking in substance or color of merit.”<sup>249</sup>

Even as the Court immunized state and private authority from federal control, it also expanded federal power over people and property belonging to tribal nations, immigrant groups, and island territories. In 1886, in *United States v. Kagama*, the Court held that the Constitution did not give Congress authority to create federal jurisdiction over crimes between Indians on reservations.<sup>250</sup> Nevertheless, the Court found the territorial sovereignty of the United States and the “weakness and helplessness” of the Indians granted Congress power to enact the law.<sup>251</sup> The Court expanded this power in 1903 in *Lone Wolf v. Hitchcock*,<sup>252</sup> holding that Congress could unilaterally abrogate treaties with tribal nations to parcel out their lands.<sup>253</sup> Not only did Congress have “full administrative power . . . over Indian tribal property,” but whether it had appropriately exercised that power was a political question not subject to judicial review.<sup>254</sup>

Nor did property rights restrain Congress’s powers to enact racist immigration laws. *Chae Chan Ping v. United States* considered exclusion of a man who had lived in the United States since 1875 and who, before returning to China for a visit in 1887, obtained a U.S. Customs certificate guaranteeing his return under U.S. law and treaties with China.<sup>255</sup> While he was on his journey back, Congress

246. 245 U.S. 60, 81 (1917).

247. See *In re Lee Sing*, 43 F. 359, 360 (C.C.N.D. Cal. 1890) (invalidating a San Francisco law restricting ethnic Chinese to one area of town); Rachel Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 539–41 (2006) (discussing cases in the 1900s invalidating municipal laws requiring Blacks and Whites to live in separate districts).

248. E.g., *Frick v. Webb*, 263 U.S. 326, 331–34 (1923) (upholding bar on land ownership by corporations or other business organizations with majority of shares owned by “aliens ineligible to citizenship”); *Porterfield v. Webb*, 263 U.S. 225, 231–33 (1923) (upholding constitutionality of California’s 1920 Alien Land Law); *Terrace v. Thompson*, 263 U.S. 197, 211, 216–17 (1923) (upholding validity of Washington’s 1921 Alien Land Law).

249. *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926).

250. *United States v. Kagama*, 118 U.S. 375, 378 (1886).

251. *Id.* at 379–384.

252. 187 U.S. 553, 566 (1903) (citing *Chae Chan Ping v. United States*); see also *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306–08 (1902) (holding that the United States had “full control” over tribal property).

253. *Lone Wolf*, 187 U.S. at 556.

254. *Id.* at 568.

255. *Chae Chan Ping v. United States*, 130 U.S. 581, 582 (1889).

revoked the validity of such certificates.<sup>256</sup> As part of its opinion asserting a sweeping power in the United States to exclude “foreigners of a different race” considered “dangerous to its peace and security,” the Court held that the certificate promising return was not a protected property right but was a license “held at the will of the government, revocable at any time, at its pleasure.”<sup>257</sup> When the 1892 Geary Act authorized seizure and deportation of legal immigrants of Chinese descent if they lacked a certificate of residence,<sup>258</sup> the Court upheld the law over passionate dissents that deportation of individuals from a country “where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary, kind” was unconstitutional.<sup>259</sup>

The Court deployed the same combination of racism and territorial sovereignty in colonization of the “island territories,” like Puerto Rico, the Philippines, and Hawaii.<sup>260</sup> In a series of cases in the early 1900s, the Supreme Court held that whatever constitutional rights individuals possessed on the mainland, the power to acquire territory by treaty implied the power to “prescribe upon what terms the United States will receive its inhabitants.”<sup>261</sup> This included denying citizenship to avoid the “grave questions” that “arise from differences of race, habits, laws, and customs of the people . . .”<sup>262</sup> If the United States “acquire[s] territory peopled by savages,” moreover, it could choose to apply only those constitutional protections “as are applicable to the situation.”<sup>263</sup>

Some of the principles these cases established are no more, and others still impact primarily non-White peoples. But two sets of principles have a lasting impact on general property law. The first set encompasses the state action doctrine and the broader sense of property ownership as a shield against regulation in the public interest.<sup>264</sup> The second is the expansive power to ignore property rights in the context of immigration and border control. Today, for example, citizens and noncitizens traveling between countries may have their cell phones and computers seized and

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256. *Id.* at 599.

257. *Id.* at 606, 609.

258. Geary Act, ch. 60, 27 Stat. 25 (1892).

259. *Fong Yue Ting v. United States*, 149 U.S. 698, 749 (1893) (Field, J. dissenting); *Id.* at 739–40 (Brewer, J. dissenting).

260. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 237–41 (2002).

261. See *Downes v. Bidwell*, 182 U.S. 244, 279, 282 (1901) (concerning Puerto Rico).

262. *Id.* at 282.

263. *Dorr v. United States*, 195 U.S. 138, 143, 148 (1904) (holding right to a jury trial was not applicable to the Philippines).

264. See Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503–05 (1985) (noting persistence of state action doctrine and discussing its incoherence).

searched with few protections.<sup>265</sup> Both doctrines originated in these deeply racialized precedents.

### III. TWENTIETH CENTURY TRANSFORMATION: SPACE, WEALTH, AND OPPORTUNITY

As the twentieth century dismantled de jure discrimination, a new, more hidden Jim Crow emerged to replace it. In housing, discriminatory federal financing policies impoverished cities, made housing a primary source of wealth, and encouraged exclusionary zoning to protect and increase that wealth. In public services and infrastructure, racially driven policies—from protections on local control and financing of schools, to defunding and privatizing recreational services, to emphasizing automobiles over public transportation—left our country a patchwork of local fiefdoms where wealth governs opportunity and access. Finally, campaigns targeting welfare recipients of color contracted the availability of income support for all, leaving the United States with the least generous welfare state in the developed world. Together these developments helped drive the affordable housing, income mobility, and public health crises we suffer under today.

#### A. *Starving Cities, Segregating Suburbs*

The twentieth century transformed the legal meaning of home and residence. New, racially dubious, waves of immigrants from Southern and Eastern Europe crowded America's cities.<sup>266</sup> They were soon joined by the first of the millions of Southern Blacks who would eventually make the Great Migration to the North.<sup>267</sup> The federal government met these demographic changes by encouraging zoning that used race-neutral economic divisions to maintain and enhance racial segregation.<sup>268</sup> It solidified these divisions during the Great Depression by creating new home financing available only in White neighborhoods and requiring racially restrictive covenants for the flood of new subdivisions built during and after World War II. These developments made home value the major source of middle-class wealth and inculcated the belief that keeping poorer, darker residents out was the only way to protect it. The result is not just segregation, but a crisis of affordability that undermines our economy and impoverishes all Americans.

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265. Laura K. Donahue, *Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches*, 128 YALE L.J. FORUM 961, 961–62, 988 (2019) (noting searches of 30,000 electronic devices at the border in 2017 and tracing origins of expansive power to Chinese Exclusion cases).

266. Kenneth Stahl, *The Suburb as Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1201 (2008). The poor housing conditions they lived in were a major concern for the new urban planners. See, e.g., BETTER HOMES MANUAL at 660 (Blanche Halbert ed. 1931) (“Most Negro families, a majority of the foreign-born, and millions of native white Americans live in homes which hurt them physically and psychically”).

267. See ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* 8–11 (2010).

268. See Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 376–77 (2015) (noting that “[b]efore 1900, urban [B]lacks were no more segregated than other newly arriving ethnic groups” but that explicit legal tools supplemented the extralegal violence that created segregation).



Widespread zoning began after the U.S. Department of Commerce, under the guidance of then-Secretary of Commerce Herbert Hoover, promulgated a Standard State Zoning Enabling Act in 1922.<sup>269</sup> The Act was created and adopted in a nation enmeshed in racial projects. The Klan was resurrected in 1915 and had five million members by the mid-1920s.<sup>270</sup> President Woodrow Wilson screened *Birth of a Nation* in the White House and imposed new requirements excluding Black people from Civil Service jobs. Congress, meanwhile, banned immigration by almost all Asians in 1917;<sup>271</sup> created national origin quotas to limit immigration from Southern and Eastern Europe in 1924;<sup>272</sup> and, in the same year, created the Border Patrol, primarily to exclude Mexican immigrants.<sup>273</sup>

Zoning was partly a racial project as well.<sup>274</sup> Secretary Hoover described single-family homes as “expressions of racial longing” and served as President of a public-private “Better Homes in America” project to encourage their spread.<sup>275</sup> The project’s “Better Homes Manual” emphasized the need to create environments to nurture “children of the best heredity” and “racial progress,”<sup>276</sup> and advised homebuyers to use “[r]estricted residential districts . . . as protection against persons with whom your family won’t care to associate.”<sup>277</sup> The Manual also recommended limiting “socially inferior types of dwellings,” such as duplexes and apartment buildings, to “certain specified sections,” noting that such dwellings “can underlive the one-family house and drive it out, just as Oriental labor can underlive and drive out white labor.”<sup>278</sup>

Separating single-family and “socially inferior” multi-unit dwellings was a legally dubious innovation. The first comprehensive zoning law, Los Angeles’s 1908 ordinance, did not distinguish between kinds of residences, but separated them

269. Ruth Knack, Stuart Meck & Israel Stollman, *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, LAND USE L. & ZONING DIG., Feb. 1996, at 5 (describing creation and promulgation).

270. WOODWARD, *supra* note 204, at 115.

271. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 876; *see also* Immigration Act of 1921, ch. 8, § 2(a)(6), 42 Stat. 5, 5 (referring to the prohibited region as “the so-called Asiatic barred zone”).

272. Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, 159.

273. LAURA E. GÓMEZ, *INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM* 28 (2020).

274. It was of course not only, or even primarily, a racial project. It also responded to technological developments: pollution from industrialization; construction advances that enabled taller, denser housing; and automobiles that allowed some parts of the population to escape them. It also responded to other ideological concerns, like individualism and consumerism. *See* Stahl, *supra* note 266, at 1199. But racial ideology, as discussed further below, powerfully shaped the form it took in the United States.

275. Rothstein, *supra* note 18, at 60–61 (noting that Vice President Calvin Coolidge was Chair of the Advisory Council). For more on the elevation of the single-family home in the suburb as the (White) American ideal, *see* Priya S. Gupta, *Governing the Single-Family House: A (Brief) History*, 37 U. HAW. L. REV. 187 (2015).

276. BETTER HOMES MANUAL, *supra* note 266, at ix, 171.

277. *Id.* at 94.

278. *Id.* at 655.

all from industrial, farm, and other uses.<sup>279</sup> New York's pioneering 1916 zoning resolution did not either.<sup>280</sup> In 1919, the Minnesota Supreme Court held that one of the first ordinances adopting this distinction was unconstitutional.<sup>281</sup> Noting that "[s]ome from choice and some from necessity seek apartments," the court held that an "apartment building does not affect the public health or public safety or general well-being so that it may be prohibited in the exercise of the police power."<sup>282</sup>

Cleveland and its suburbs, however, embraced different zones for different residences in order to divide communities by race, ethnicity, and class. Cleveland had become known as the "Promised Land" for Black migrants fleeing the South,<sup>283</sup> and Cleveland elites wanted to control the movement of both Black people and Eastern European Jews to the suburbs.<sup>284</sup> With assistance from leading planner Robert Whitten (who served on Hoover's Commission, and would soon help Atlanta draft a zoning plan that separated Black and White "in the interest of public peace, order and security"<sup>285</sup>), Cleveland and its suburbs adopted districts separating single-family from other housing.<sup>286</sup> In 1920, an Ohio trial court upheld East Cleveland's "emergency ordinance" restricting apartments buildings, taking "judicial notice" that "the apartment house, or tenement, in a section of private residences is a nuisance."<sup>287</sup>

The Supreme Court embraced this perspective. In 1924, a federal district court held the zoning ordinance of another Cleveland suburb, the Village of Euclid, unconstitutional.<sup>288</sup> Focusing on the ordinance's segregation of single-family homes and apartments, the district court found that the goal of the ordinance was to "classify the population and segregate them according to their income or situation in life."<sup>289</sup> The court reasoned that if the racial zoning scheme in *Buchanan v. Warley* was unconstitutional, the Euclid ordinance must be unconstitutional as well.<sup>290</sup>

The Supreme Court set the district court straight. The Court, which at the time regularly invalidated Progressive Era labor laws as interfering with contract

279. Los Angeles, Ordinance No. 17,135 (Sept. 16, 1908).

280. The law did, however, create height and area zones believed to encourage multi- or single-family development. See City of New York, Building Zone Resolution (July 25, 1916), <https://www1.nyc.gov/assets/planning/download/pdf/about/city-planning-history/zr1916.pdf> [<https://perma.cc/RU6X-7FCX>].

281. State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 174 N.W. 885, 887–88 (Minn. 1919).

282. *Id.* at 886.

283. WILKERSON, *supra* note 267, at 266.

284. LeeAnn Lands, THE CULTURE OF PROPERTY RACE, CLASS, AND HOUSING LANDSCAPES IN ATLANTA, 1880-1950, at 143 (2009).

285. ROBERT H. WHITTEN, THE ATLANTA ZONE PLAN: REPORT OUTLINING A TENTATIVE ZONE PLAN FOR ATLANTA 10 (1922).

286. ROBERT H. WHITTEN & FRANK R. WALKER, THE CLEVELAND ZONE PLAN 4 (1921)

287. Ohio ex rel. Morris v. Osborn, 22 Nisi Prius Rep. 549, 550, 554 (Ohio Ct. C.P. 1920).

288. Ambler Realty Co. v. Vill. of Euclid, Ohio, 297 F. 307, 317 (N.D. Ohio 1924).

289. *Id.* at 316.

290. *Id.* at 312–13.

rights, was happy to uphold this interference with property rights.<sup>291</sup> Admitting that the restriction of apartment buildings was the most challenging part of the ordinance, the Court proclaimed that “very often the apartment is a mere parasite,” monopolizing the air and sunlight of a residential district, “depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally . . . its desirability as a place of detached residences [is] utterly destroyed.”<sup>292</sup>

The Great Depression put economic segregation and emphasis on single-family homes into hyperdrive. Before that point, the typical loan period for a mortgage was only five to seven years, and the maximum loan was only 50% of the property’s value.<sup>293</sup> With such requirements, few could afford a home loan before middle age, and even then, annual mortgage payments were large and punishing.<sup>294</sup> With the economic collapse of the Depression, half of all mortgages fell into default.<sup>295</sup> In response, Congress created the Federal Housing Administration (“FHA”) to guarantee approved mortgages, and required states to authorize 30-year, 20% down mortgages to make the mortgages easier to repay.<sup>296</sup> These measures made secure homeownership available to millions more Americans and transformed it into an important vehicle for family savings.<sup>297</sup> But to get these new lower-cost mortgages, owners had to qualify under federal guidelines, which forbade lending in areas with both African Americans and Whites, and discouraged lending in areas with rental housing and significant immigrant populations.<sup>298</sup>

The FHA explicitly encouraged racially restrictive covenants to maintain racial homogeneity. Neighbors and developers had begun using covenants to prevent owners from selling or renting to people of a particular race or religion at the beginning of the twentieth century.<sup>299</sup> Although such covenants were dubious under both property and constitutional law, courts readily upheld them.<sup>300</sup> The FHA turned these largely private efforts into government policy. In its 1938 underwriting manual, the FHA emphasized the desirability of “deed restrictions” to prevent “adverse influences” such as “inharmonious racial groups.”<sup>301</sup> Subdivisions in

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291. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (“[I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”).

292. *Id.* at 394.

293. See Adam Gordon, Note, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 *YALE L.J.* 186, 191 (2005).

294. *Id.* at 192.

295. *Id.*

296. *Id.* at 193.

297. *Id.* at 194.

298. *Id.* at 207–08.

299. RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 3 (2013)

300. *Id.*

301. FED. HOUS. ADMIN., *UNDERWRITING MANUAL* §§ 934–35 (1938), <https://www.huduser.gov/portal/sites/default/files/pdf/Federal-Housing-Administration-Underwriting-Manual.pdf> [<https://perma.cc/Q7TJ-HVGV>].

particular would “not qualify for mortgage insurance” unless, among other things, they had “restrictive covenants applying to all lots in the subdivision” including “prohibition of occupancy of properties except by the race for which they are intended.”<sup>302</sup> Developers needed government-insured loans to finance the explosion of single-family residential subdivisions in the wake of World War II, and willingly complied.<sup>303</sup> The covenants were so widespread that by the time the Supreme Court considered their constitutionality in 1948 in *Shelley v. Kraemer*, three of the Court’s nine justices recused themselves, likely because their own homes were subject to racist covenants.<sup>304</sup> After *Shelley*, the FHA continued to encourage and enforce racially restrictive covenants<sup>305</sup> and did not ban guaranteeing loans on racially restricted properties until 1962.<sup>306</sup> Even then, the covenants remained on the books, discouraging sales to Black Americans in the suburbs for decades.<sup>307</sup>

By 1968, when the Fair Housing Act prohibited private discrimination in housing, these policies had created deep-rooted patterns of segregation. Cities had lost generations of access to favorable home financing, resulting in housing deterioration and loss of their middle-class populations.<sup>308</sup> Use of the term “inner city,” formerly an occasional reference to the most established part of an urban area, skyrocketed between the 1930s and 1970 as a shorthand for urban crime and poverty.<sup>309</sup>

Ironically, as federal housing policy encouraged White families to leave cities for the suburbs, the federal Relocation Policy encouraged Native American families to leave rural reservations for these increasingly troubled cities.<sup>310</sup> Promising jobs and opportunity, the Bureau of Indian Affairs bought Native people one-way bus tickets to cities across the United States.<sup>311</sup> By 1970, half of all Native

302. *Id.* at §§ 978, 980(3)(g).

303. BROOKS & ROSE, *supra* note 299, at 154.

304. *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (noting Justices Jackson, Reed, and Rutledge did not participate in the case); JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 69 (2011). This persistence continues: Chief Justice William Rehnquist’s 1986 confirmation hearings were troubled, but not undermined, by the revelation that his home was subject to a racially restrictive covenant. Al Kamen & Howard Kurtz, *Rehnquist Told in 1974 of Restriction in Deed*, WASH. POST (Aug. 6, 1986), <https://www.washingtonpost.com/archive/politics/1986/08/06/rehnquist-told-in-1974-of-restriction-in-deed/06e595e0-ec19-41cc-bb55-e5c3a0b76b76/> [https://perma.cc/4R9B-MSHD]; CASHIN, *supra* note 50, at 111.

305. *E.g.*, ROTHSTEIN, *supra* note 18, at 66–67 (describing an incident in 1958 in which, after a White schoolteacher in Berkeley rented his home to a Black schoolteacher, the FHA told the owner he would be blacklisted for future FHA loans).

306. Gordon, *supra* note 293, at 217.

307. BROOKS & ROSE, *supra* note 299, at 3.

308. *See* Gordon, *supra* note 293, at 209, 213–16 (discussing this effect in St. Louis, Missouri and New Haven, Connecticut).

309. GOOGLE BOOKS NGRAM VIEWER, <http://books.google.com/ngrams> (search “inner city” in search bar) (last visited Aug. 24, 2022).

310. *See* Max Nesterak, *Uprooted: The 1950’s Plan to Erase Indian Country*, APM REPORTS (Nov. 1, 2019), <https://www.apmreports.org/episode/2019/11/01/uprooted-the-1950s-plan-to-erase-indian-country> [https://perma.cc/L4Z6-QPG2].

311. *Id.*

people lived in urban centers, far from the reservations that had sustained them.<sup>312</sup> Rather than finding opportunity, many joined the ranks of the urban poor.<sup>313</sup>

African American families, meanwhile, had lost generations of wealth-building because they were denied access to low-cost home loans and rising-value suburban neighborhoods.<sup>314</sup> Even after formal discrimination was outlawed, those who could afford homes in wealthier suburbs faced determined resistance, creating added financial and psychic costs to homeownership.<sup>315</sup>

But for White families, homeownership had become a powerful way to build wealth. With the expansion of access to mortgages, home prices in the United States—and across the world—tripled in real terms between the 1930s and the 2010s,<sup>316</sup> so that homes became most families' greatest asset.<sup>317</sup> One would expect increased supply in response to price increases, but after 1960, the construction of new housing plummeted.<sup>318</sup> A dearth of usable land constrains new housing in some countries, but residential spaces in the United States are among the least dense on earth. The seven least dense cities in the world are in the United States,<sup>319</sup> while North American suburbs contain, on average, ten times fewer residents per acre than European suburbs.<sup>320</sup> In the United States, continually tightening municipal restrictions on land use—primarily zoning—are key to explaining the gap between housing demand and supply.<sup>321</sup>

Municipalities created zoning restrictions against the backdrop of this racial shaping of homeownership and to protect the wealth this history enabled. Homebuyers, municipalities, and banks had been told for years that the only way to protect property value was to exclude multifamily dwellings and the “inharmonious

312. *Id.*

313. *Id.*

314. Gordon, *supra* note 293, at 219.

315. See CASHIN, *supra* note 50, at 33–38, 130 (discussing continuing discrimination in housing markets and choice of Black middle-class families to live in largely Black suburb that “doesn’t require any conscious effort to exist”).

316. Katarina Knoll, Moritz Schularick & Thomas Steger, *No Price Like Home: Global House Prices, 1870-2012*, 107(2) AM. ECON. REV. 331, 332, 334–35 (2017) (showing increase in home prices in the United States and other industrialized countries).

317. See *How Housing Became the World’s Biggest Asset Class*, THE ECONOMIST (Jan. 16, 2020) <https://www.economist.com/special-report/2020/01/16/how-housing-became-the-worlds-biggest-asset-class> [<https://perma.cc/B7UW-7L4Q>].

318. *Id.*

319. TODD LITMAN, VICTORIA TRANSPORT POL’Y INST., ANALYSIS OF PUBLIC POLICIES THAT UNINTENTIONALLY ENCOURAGE AND SUBSIDIZE URBAN SPRAWL IN THE NEW CLIMATE ECONOMY-CITIES: SPRAWL SUBSIDY REPORT 15 (2015), <https://newclimateeconomy.report/workingpapers/wp-content/uploads/sites/5/2016/04/public-policies-encourage-sprawl-nce-report.pdf> [<https://perma.cc/5K88-CK2W>].

320. *Id.* at 22.

321. See Kyle F. Herkenhoff, Lee E. Hohanian & Edward C. Prescott, *Tarnishing the Golden and Empire States: Land-use Restrictions and the U.S. Economic Slowdown*, 93 J. MONETARY ECON. 89 (2018) (estimating the housing-supply distortions caused by land use restrictions).

influences” they brought. This message, although false when delivered,<sup>322</sup> had created its own evidence in the decline of cities starved of favorable financing and hollowed out by White flight.<sup>323</sup> Fervent defenses of “local control” and “property values” arose to resist denser housing.<sup>324</sup> Therefore even as demand for housing rose, land use restrictions tightened progressively between 1950 and today.<sup>325</sup>

Given persistent racial wealth gaps,<sup>326</sup> mandating single-family homes on ever-larger lots zoned out most Black and Latino buyers. But when litigants challenged the racial segregation these policies created, the Supreme Court, relying in part on our old friend *Fletcher v. Peck*,<sup>327</sup> declared that proof of discriminatory intent was necessary to establish a constitutional violation.<sup>328</sup> Although the Fair Housing Act prohibited measures with a disparate impact as well, the U.S. Department of Housing and Urban Development did not enact regulations to implement the disparate impact standard until 2013,<sup>329</sup> and the Supreme Court only upheld disparate impact in 2015.<sup>330</sup> The Trump Administration also immediately tried to undermine the decision with regulations that made it virtually impossible to win a disparate impact lawsuit.<sup>331</sup> President Trump made the motivation for the regulations clear by informing “all of the people living their Suburban Lifestyle Dream that you will no longer be bothered or financially hurt by having low-income housing built in your neighborhood.”<sup>332</sup>

As Professor Keeanga-Yahmatta Taylor examines in her searing book *Race for Profit*, post-Civil Rights Era federal home financing and construction exacerbated this process.<sup>333</sup> By the late 1960s, industry heads agreed with Black civil rights organizers that the nation had to address the decline of cities and lack of

322. See ROTHSTEIN, *supra* note 18, at 93–95 (citing studies showing that because Black families, who had limited options for housing, were often willing to spend more to get it, property values were often higher in mixed-race neighborhoods).

323. TAYLOR, *supra* note 13, at 30–32.

324. *Id.* at 114, 141 (describing assertions by municipal governments and Nixon administration’s embrace of them).

325. Herkenhoff, et al., *supra* note 321, at 98 (showing increasing land-use distortions from 1950 to 2014).

326. See Moritz Kuhn, Moritz Schularick & Ulrike I. Steins, *Income and Wealth Inequality in America, 1949-2016*, 128 J. OF POL. ECON. 3469 (2020).

327. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977).

328. *Id.* at 264–65 (reversing decision that refusal to rezone a parcel to allow a mixed-income housing development in a town at which 27 of the 64,000 residents were Black violated equal protection).

329. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

330. *Tex. Dept. of Hous. & Cmty. Affs. v. Inclusive Cmty. Project*, 576 U.S. 519, 539–40 (2015) (holding that the Fair Housing Act prohibited actions with an unjustified disparate impact).

331. See *Mass. Fair Hous. Ctr. v. U.S. Dept. Hous. & Urb. Dev.*, 496 F. Supp. 3d 600, 612 (D. Mass. Oct. 25, 2020) (enjoining new rule which “risks effectively neutering disparate impact liability” and whose “perplexing defenses achieve the opposite of clarity”).

332. Donald J. Trump (@therealdonaldtrump), TWITTER (July 29, 2020, 12:19 PM) <https://www.thetrumparchive.com> [<https://perma.cc/7HFB-DQ7X>].

333. See TAYLOR, *supra* note 13.

integrated housing opportunities in suburbs.<sup>334</sup> The 1968 Fair Housing Act<sup>335</sup> and 1964 Civil Rights Act<sup>336</sup> created tools to challenge suburban exclusionary zoning. But the Nixon Administration, which came to power by stoking racial resentment in the White “silent majority,” reversed attempts to use these tools.<sup>337</sup> Instead, it funneled federal financial support into private banking and construction, with little government regulation or oversight. Mortgage brokers and owners of dilapidated inner-city homes profited by selling them to struggling Black families with federally guaranteed loans.<sup>338</sup> In what Professor Taylor calls “predatory inclusion,” they targeted those who were most desperate and least able to pay, knowing that the United States would pay when they defaulted.<sup>339</sup> The result further undermined urban housing, confirmed public assumptions that African Americans were poor credit risks, and planted the seeds for the subprime crisis that devastated the American economy in 2008.<sup>340</sup>

The impact of these policies goes far beyond race. As a result of municipal efforts to increase property values and preserve the “Suburban Lifestyle Dream,” most residential land in the United States is restricted to single-family ownership, and municipalities regularly increase the minimum lot size for new housing.<sup>341</sup> Cities, meanwhile, the engines of economic and cultural innovation, fell into decline, and “inner city” came to signify threat rather than vitality.<sup>342</sup> While a handful of urban centers have become unaffordable to all but a few, most cities have experienced White flight, near or actual bankruptcy, and “slum clearance,” and many are still places of low opportunity and high unemployment. The affordability and mobility crises plaguing Americans today lie in part at the door of our racist land use and finance policies, and our existing zoning, covenant, and home finance laws developed to protect them.

### ***B. Privatizing Public Goods and Infrastructure***

Racial relationships also scarred modern infrastructure and services, leaving them unable to meet modern challenges. Over the twentieth century, access

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334. *Id.* at 108–12.

335. 42 U.S.C. § 3604 (prohibiting actions that have the effect of discriminating in housing on the basis of race).

336. 42 U.S.C. § 2000d (prohibiting discrimination by any program or activity receiving federal assistance);

337. *See* TAYLOR, *supra* note 13, at 15 (describing Nixon administration’s reversal of HUD Secretary George Romney’s efforts to use these tools).

338. *Id.* at 4–6.

339. *Id.* at 17–19.

340. *See id.* at 23, 261–62.

341. *See* Emily Badger & Quoc Trung Bui, *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html> [<https://perma.cc/5JC3-262M>] (noting that 75% of all land in the United States is restricted to single-family zoning).

342. *See, e.g.*, Shiva Kooragayala, *The Problem with Talking About “Inner Cities,”* URBAN INSTITUTE: ELECTION BLOG (Nov. 3, 2016), <https://www.urban.org/2016-analysis/problem-talking-about-inner-cities> [<https://perma.cc/5P7K-4777>] (discussing how “inner city” became shorthand for central cities, the people that lived there, and urban decay in the 1960s and 1970s).

to what had been public goods became increasingly linked to residence and property ownership. The highest profile battles concern schools, where emphasis on local provision and private choice undermined commitment to public services and segmented access to educational opportunity. A similar process shaped recreational services, as beaches, pools, and amusement parks were privatized or defunded. Race also shaped our transportation infrastructure, as throughout the twentieth century, decision-makers starved public and regional transportation in favor of highways and parking for passenger vehicles. The America of today—the most sprawling nation in the world, with fragmented suburbs and languishing urban and rural areas—reflects the impact of these choices.

### 1. Education

Schools are the best-known example of the privatization and fragmentation of services. As education scholar Derek Black has examined, the Founders believed public provision of schooling was key to democracy and required a fraction of new public lands to be set aside to fund education.<sup>343</sup> This commitment increased—as a formal matter—immediately after the Civil War, when all states adopted educational guarantees in their constitutions.<sup>344</sup> But states backed away from these commitments in response to desegregation orders. Virginia shut down its public schools in counties required to desegregate, repealed its compulsory attendance laws, and funneled state and local dollars into new private schools created to educate White students.<sup>345</sup> Louisiana authorized municipalities to close public schools subject to desegregation orders and reconstitute them as segregated private schools with public support.<sup>346</sup> School districts also initiated “freedom of choice” plans under which White parents could avoid integrated schools and cluster in all-White ones.<sup>347</sup>

Although courts invalidated the most blatant of these efforts in the 1960s, the new “segregation academies” flourished, drawing virtually all White students from public schools in some districts.<sup>348</sup> Private school enrollment increased ten-fold in the South between 1964 and 1969, even as it decreased nationwide.<sup>349</sup> Although founded in reaction to desegregation and busing, many of the new schools were Christian and gained support as a reaction against secular education.<sup>350</sup> While still strongest in the South, Protestant Christian academies have spread across the country. Nationally, enrollment in private Christian schools multiplied ten-fold between 1965 and 1985, even as enrollment in Catholic schools declined.<sup>351</sup>

343. DEREK BLACK, *SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY* 19–21 (2020).

344. *Id.* at 21.

345. *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 221–25 (1964) (describing and invalidating scheme).

346. *Id.* at 231–32 (describing invalidating of scheme).

347. Note, *Segregation Academies and State Action*, 82 *YALE L. J.* 1436, 1439 (1973); *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430, 441 (1968) (invalidating Virginia’s freedom of choice plan).

348. *Segregation Academies*, *supra* note 347, at 1440–42.

349. John Jeffrey & James E. Ryan, *A Political History of the Establishment Clause*, 100 *MICH. L. REV.* 279, 332 (2001).

350. *Id.* at 334–37.

351. *Id.* at 336.



Equally significant was the departure of White families from urban school districts. Until the twentieth century, cities had the best school systems, and suburban residents encouraged annexation and regional education agreements.<sup>352</sup> But with the federal financing of White suburbs and increasing impoverishment of cities, White families left cities for the suburbs.<sup>353</sup> Urban school populations became dominated by lower-income people of color. Governments, meanwhile, tightened and restricted school attendance zones.<sup>354</sup>

The Supreme Court blessed this fragmentation of services. The Court initially rejected efforts to allow residence and school choice to undermine integration,<sup>355</sup> and demanded “root and branch” integration efforts even in Northern school districts that had never required segregation by statute.<sup>356</sup> But President Nixon required his appointees to the Supreme Court to oppose integration and busing.<sup>357</sup> His appointees would change the tide of integration.

The new justices gained their first victory in *San Antonio Independent School District v. Rodriguez*, a class action by Mexican-American families challenging Texas’s reliance on local property taxes to finance local school districts.<sup>358</sup> The Court acknowledged that the system resulted in “substantial disparities”: a wealthy school district whose population was 80% White, it noted, received almost twice the per-pupil funding of the plaintiffs’ district, whose population was 90% Mexican American and 6% Black.<sup>359</sup> Nevertheless it reversed the lower court’s finding that the system was unconstitutional. The Court held first, that the Constitution did not render wealth discrimination suspect; second, that education was not a fundamental constitutional right; and finally, that the need for local control of education justified the inequality the system produced.<sup>360</sup>

*Milliken v. Bradley*<sup>361</sup> amplified local control as a shield against educational equality. In *Milliken*, the Black plaintiffs proved that the city and state had deliberately segregated Detroit schools.<sup>362</sup> The lower courts ordered the state and school districts to develop a metropolitan integration plan because they agreed that the Detroit metropolitan area was headed toward “an all black school system immediately surrounded by practically all white suburban school systems.”<sup>363</sup> The

352. Orfield, *supra* note 268, at 379 (discussing national trends); DOUGHERTY ET AL., *supra* note 1, at 32–33 (discussing Hartford area).

353. Orfield, *supra* note 268, at 436–37.

354. *Id.* at 379; DOUGHERTY ET AL., *supra* note 1, at 37.

355. See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971); *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972); *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430 (1968).

356. *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 201–03 (1973).

357. Orfield, *supra* note 268, at 384–85. As Nixon told his Attorney General, “I want you to have a specific talk with whatever man we consider and I have to have an absolute commitment from him on busing and integration. I really have to. All right?” *Id.* at 384.

358. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

359. *Id.* at 11–12.

360. *Id.* at 25, 37, 50.

361. *Milliken v. Bradley*, 418 U.S. 717 (1974).

362. *Id.* at 725–28, 728 n. 7.

363. *Id.* at 736 (quoting *Bradley v. Milliken*, 484 F.2d 215, 248 (6th Cir. 1973)).

Supreme Court reversed. The Court held that unless the suburban boundaries had been drawn to achieve school segregation, the remedy must involve Detroit and her students alone.<sup>364</sup> Any other result would violate the “deeply rooted” tradition of “local control over the operation of schools,” which was “essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”<sup>365</sup>

Some jurisdictions continued interdistrict desegregation measures after *Milliken*, but the Supreme Court eventually stopped that too. First, in the 1990s, the Court invoked local control to hold that desegregation orders must end once continuing racial separation was no longer the result of the original government-mandated discrimination.<sup>366</sup> Then, in 2007, the Supreme Court abandoned its commitment to local control in the name of race-blindness.<sup>367</sup> *Parents Involved in Community Schools* held that Seattle and Louisville’s voluntary, community-supported programs considering racial integration as one factor in school assignment were unconstitutional unless they were narrowly tailored to achieve a compelling interest.<sup>368</sup>

The result was to stop progress on integration of Black students and undermine some of the progress that had occurred.<sup>369</sup> In the Northeast, which was not the target of most early desegregation suits, segregation has actually increased since 1968, and was the worst in the nation by 2005.<sup>370</sup> Latino students, who were just beginning to bring successful desegregation claims in the 1970s, are far more segregated than they were in 1968 everywhere in the country.<sup>371</sup>

But the results affect everyone, regardless of race. Tying school attendance to residence and residence to wealth created a vicious cycle in which as neighborhoods become more affordable, wealthier families leave for more exclusive school districts.<sup>372</sup> In Detroit, for example, as residents fled to inner-ring suburbs, wealthier families left for more exclusive ones; several inner-ring school districts now experience the extreme segregation and poor test scores Detroit saw decades

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364. *Id.* at 746–47.

365. *Id.* at 741–42, 747–48.

366. *Freeman v. Pitts*, 503 U.S. 467, 488–89 (1992); *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 250 (1991) (holding segregation orders should be lifted if the “vestiges of de jure segregation had been eliminated as far as practicable”).

367. *See generally* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

368. *Id.* at 720–22. Although four justices would have invalidated the plans altogether, Justice Kennedy, the deciding vote, opined that integration could be a compelling interest, but the districts had the burden of showing their plans were narrowly tailored to achieve it. *See id.* at 784–85.

369. *Orfield*, *supra* note 268, at 422–23.

370. *Id.* at 422.

371. *Id.* at 423.

372. *Id.* at 434–46 (describing how diversification of suburbs continually encourages white flight and impoverishment of inner ring suburbs); *CASHIN*, *supra* note 50, at xvii–xviii (describing how failures of integration contributes to anxiety of all in America to get and stay ahead).

earlier.<sup>373</sup> The same process is affecting inner-ring suburbs across the country.<sup>374</sup> Although the impacts are obviously most devastating for lower-income people, even the wealthy experience higher home prices, longer commutes, and the negative economic impact of blighted urban cores.

The rare exceptions are in the 15 areas that maintained metropolitan integration plans despite *Milliken*. As neighborhoods across the country became more segregated, these communities integrated, with one, the Raleigh-Durham area, experiencing “reverse white flight.”<sup>375</sup> The differences between the trajectory of the Detroit metropolitan area and Jefferson County (the metropolitan area that includes Louisville, Kentucky) are particularly striking. In Jefferson County, courts ordered interdistrict integration before *Milliken* and maintained it afterward.<sup>376</sup> As Detroit’s urban population plummeted by two-thirds and the Detroit metropolitan population stagnated,<sup>377</sup> Louisville’s population grew by 7% and its metropolitan area grew by 20%.<sup>378</sup> Most Black students attend schools that are racially balanced, under a plan with the support of 90% of metro Louisville parents.<sup>379</sup> By delinking neighborhood and school attendance, Louisville escaped some of the decline faced by the rest of the United States.

This decline, and the narrative that fueled it, has also undermined support for public education writ large. What began as racist efforts to escape integrated schools morphed into drops in funding and attendance, resulting in struggling schools and parents of all races seeking alternatives.<sup>380</sup> The result has not been greater support for public schools, but efforts to privatize education altogether by shifting resources to vouchers and charter schools.<sup>381</sup> Although cast as a new civil rights issue, this movement is closely tied to a state’s percentage of non-White residents.<sup>382</sup> “[S]tates with the highest percentages of minorities have twice the level of privatization as predominantly white states,” Derek Black reports, with particularly strong support in Southeastern states with the greatest desegregation battles.<sup>383</sup> Our racial battles have transformed a public good into private property, and we are all poorer for it.

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373. Orfield, *supra* note 268, at 371, 456.

374. *Id.* at 434–46; CASHIN, *supra* note 50, at xvii–xviii (describing how failures of integration contributes to anxiety of all in America to get and stay ahead).

375. Orfield, *supra* note 268, at 439–40.

376. *Id.* at 441–47 (describing community support for interdistrict plan).

377. Louis Aguilar, *Detroit Population Continues to Decline, According to Census Estimate*, BRIDGE MICHIGAN (May 21, 2020), <https://www.bridgemi.com/urban-affairs/detroit-population-continues-decline-according-census-estimate>

[<https://perma.cc/9HCA-ZFA8>]; Orfield, *supra* note 268, at 451 (on metropolitan population).

378. Orfield, *supra* note 268, at 451.

379. *Id.* at 445, 449.

380. BLACK, *supra* note 343, at 22–25.

381. *Id.*

382. *Id.* 226–27.

383. *Id.* at 227.

## 2. Recreation

Recreational facilities suffered the same fragmentation and privatization as public schools. From the end of the nineteenth century through the 1940s, the number of pools, parks, and other recreational facilities proliferated across the country. These facilities became great mixing grounds, where people met across lines of class, gender, and, at least initially in the North, race. With the Great Migration and the spread of Jim Crow, however, racial barriers hardened.<sup>384</sup> People of color fought back, eventually winning legal victories. In response, municipalities stopped supporting public recreation, and private entities privatized their facilities or closed them down altogether.

The best-known battles concern swimming pools. Progressive Era reformers built numerous pools in the low-income parts of cities; although initially segregated by gender and class, low-income Black and White people swam together.<sup>385</sup> The pool-building boom intensified between the 1920s and 1940s. Cities built thousands of elaborate “resort pools” across the country, and tens of millions of Americans swam in them each year.<sup>386</sup>

But as gender and class separation broke down, racial separation increased. By 1928, a survey by pioneering Black sociologist Forrester Washington revealed, out of 37 Northern cities with swimming pools, only 3 had no segregation, 29 had “some segregation” (such as Black-only days), and 5 either had separate facilities or no pools for Blacks at all.<sup>387</sup> (Washington found no integrated pools in the South.)<sup>388</sup> Racial restrictions only increased over the period, to the point where, when Black people tried to use formally integrated pools, Whites “quite literally beat blacks out of the water.”<sup>389</sup>

When Black litigants won access to swimming pools in the Civil Rights Era, cities shut down their pools altogether.<sup>390</sup> In *Palmer v. Thompson*, the Supreme Court approved this process.<sup>391</sup> After Jackson, Mississippi was ordered to desegregate its five swimming pools (four White, one Black), parks, golf courses, and zoo, it decided to close all its public pools, turning two over to non-profits that would operate them on a segregated basis.<sup>392</sup> In 1971, the Supreme Court upheld the closures. “[N]either the Fourteenth Amendment nor any Act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools,” the Court declared; because the city had denied public pools to

384. See Forrester B. Washington, *Recreational Facilities for the Negro*, 140 ANN. AM. ACAD. POL. & SOCIAL SCI. 272, 278 (1928) (describing “[a]ll over the North . . . a growing tendency” to discriminate in leisure facilities).

385. JEFF WILTSE, *CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA* 1–3 (2007).

386. *Id.* at 5.

387. Washington, *supra* note 384, at 274; see also VICTORIA WOLCOTT, *RACE, RIOTS AND ROLLERCOASTERS* 16–17 (2012).

388. Washington, *supra* note 384, at 274.

389. WILTSE, *supra* note 385, at 4.

390. WOLCOTT, *supra* note 387, at 199–200.

391. See *Palmer v. Thompson*, 403 U.S. 217 (1971).

392. *Id.* at 219, 222.

everyone, White and Black, its actions were unimpeachable.<sup>393</sup> The Court also rejected petitioners' argument that the pool closures were unconstitutionally motivated by desire to prevent integration: "[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it. The pitfalls of such analysis were set forth clearly in the landmark opinion of Mr. Chief Justice Marshall in *Fletcher v. Peck*...."<sup>394</sup>

After the 1950s, swimming pools privatized. Those who could built private pools or swam at private clubs.<sup>395</sup> Cities stopped building, maintaining, and even operating urban pools.<sup>396</sup> A short-lived urban pool-building spree began in the late 1960s in response to hundreds of urban uprisings, most in the heat of the summer.<sup>397</sup> The new pools did not resemble the resort pools of the pre-war era; many were "mini-pools" (small pop-ups for children); larger ones were austere concrete constructions, without attached lounging areas.<sup>398</sup> Faced with declining tax revenues, cities failed to maintain their remaining pools, closing most of them after the 1980s.<sup>399</sup> Pittsburgh, for example, had fewer public pools in 2004 than it had in 1925.<sup>400</sup>

Beaches also privatized over this period, although the racial dynamics were more subtle.<sup>401</sup> In the early twentieth century, African Americans owned millions of acres of land on the coasts and barrier islands of the South.<sup>402</sup> Black and White people mingled in raucous seaside towns,<sup>403</sup> and Black owners built popular segregated resorts.<sup>404</sup> But as Americans began flocking to beaches in the 1920s, White developers saw an opportunity in the coastal South. Over the course of the twentieth century, speculators displaced Black landowners through inflated property tax assessments, forced auction sales, and sometimes by simply burning down Black homes and resorts.<sup>405</sup> The coast filled with vacation homes, hotels, and gated condominiums, with beach access blocked by walls, fences, and other barriers.<sup>406</sup>

While the North lacked the tradition of Black coastal landownership, beaches were segregated and then privatized there as well. Forrester Washington's

393. *Id.* at 220.

394. *Id.* at 224.

395. WILTSE, *supra* note 385, at 182.

396. *Id.* at 181–82.

397. *Id.* at 185–86.

398. *Id.* at 187–90.

399. *Id.* at 189–93.

400. *Id.* at 193.

401. See generally ANDREW W. KAHRL, FREE THE BEACHES: THE STORY OF NED COLL AND THE BATTLE FOR AMERICA'S MOST EXCLUSIVE SHORELINE (2018) (discussing privatization of Connecticut beaches); ANDREW W. KAHRL, THE LAND WAS OURS: HOW BLACK BEACHES BECAME WHITE WEALTH IN THE COASTAL SOUTH (2013) [hereinafter KAHRL, THE LAND WAS OURS] (discussing privatization of the coastal South).

402. KAHRL, THE LAND WAS OURS, *supra* note 401, at 4, 6–7.

403. *Id.* at 7–8.

404. Washington, *supra* note 384, at 280.

405. Andrew W. Kahrl, *The Sunbelt's Sandy Foundation: Coastal Development and the Making of the Modern South*, SOUTHERN CULTURES, Fall 2014, at 29–30, 37–38.

406. *Id.* at 30.

1928 survey found no fully integrated beaches in the North.<sup>407</sup> As historian Andrew Kahrl recounts, in Connecticut, White communities fought to privatize beaches, forming exclusive “beach associations” to restrict access to themselves.<sup>408</sup> By the late 1960s, “all but seven of Connecticut’s 253 miles of coastline . . . were in private hands or effectively limited to residents of coastal towns.”<sup>409</sup> When reformers tried to bring Black children on day trips to the beaches, towns resisted with demands for “physical examination[s],” litigation, tighter residential restrictions, and ever higher fees.<sup>410</sup> Communities turned down hundreds of thousands of dollars in state and federal aid—aid that might have addressed rapid erosion and pollution—for fear it would add to arguments for beach access.<sup>411</sup>

Similar privatization took place across the country. By 1962, only 2% of the coastal Atlantic and Gulf of Mexico appropriate for recreation was in federal or state ownership and open to the public.<sup>412</sup> Privatization has continued since then. Between 2004 and 2011, 112 additional public beaches closed or were transferred to private hands.<sup>413</sup> The walls and jetties constructed to maintain exclusivity, meanwhile, threaten the beaches themselves by accelerating erosion of the lands their owners seek to protect.<sup>414</sup>

Other recreation sites, like amusement parks, golf courses, and parks, became privatized as well. Access to amusement parks was particularly contested. In the late nineteenth century, amusement parks sprang up at the end of trolley lines throughout the country.<sup>415</sup> These parks were emblems of a new consumerist American society, places where people enjoyed leisure time together.<sup>416</sup> By 1928, however, of the 33 Northern cities with amusement parks in Washington’s survey, only a third were integrated, most had “some segregation,” and three were White only.<sup>417</sup> Eighteen Northern states had enacted statutes forbidding discrimination in entertainment places after the Supreme Court struck down the 1875 Civil Right Act.<sup>418</sup> To circumvent these, owners transformed amusement parks into private “clubs” not subject to the law.<sup>419</sup> The “Whites Only” signs of the South, historian Victoria Wolcott writes, became the “Members Only” signs of the North.<sup>420</sup>

407. Washington, *supra* note 384, at 274.

408. Andrew W. Kahrl, *Fear of an Open Beach: Public Rights and Private Interests in 1970s Coastal Connecticut*, 102 J. AM HIST. 433, 436–37 (2015).

409. *Id.* at 441.

410. *Id.* at 450–51, 454.

411. *Id.* at 456–57.

412. *Id.* at 446.

413. *Id.* at 461.

414. *Id.* at 436.

415. WOLCOTT, *supra* note 387, at 14.

416. *See id.*

417. Washington, *supra* note 384, at 276.

418. WOLCOTT, *supra* note 387, at 15.

419. *Id.* at 19.

420. *Id.*

Parks in Southern states tried the same tactic in the Civil Rights Era, but the 1964 Civil Rights Act limited their success.<sup>421</sup> It was more successful to simply make the parks inaccessible. After the 1960s, park owners built fences and required fees simply to enter; others let urban parks deteriorate and close, building new theme parks in places accessible only by private car.<sup>422</sup> Such theme parks could attract suburban White families and exclude low-income urban residents without ever referring to race.

### 3. Transportation

Our racial choices also privatized transportation in the United States, driving investment in highways and individual automobiles over public transport and walkable neighborhoods.

As early as the 1930s, Robert Moses, “America’s greatest builder,”<sup>423</sup> vetoed railroad lines to his parks and made parkway bridges too low to permit buses to keep out “common people,” particularly “Negroes” who he considered inherently “dirty.”<sup>424</sup> In metropolitan Atlanta in the 1940s, transit companies refused to run lines to Black suburban enclaves in hopes of forcing them to remain in cities.<sup>425</sup>

Racial projects in transportation went into hyperdrive after Congress passed the Interstate Highway Act in 1956.<sup>426</sup> (Ironically, this was the same year the Supreme Court affirmed that segregation of public transportation is unconstitutional.<sup>427</sup>) The Act’s proponents—including Moses—sold it as a way to bulldoze “undesirable” communities, and local officials embraced it as a way to “get rid of the local ‘n—rtown.’”<sup>428</sup> James Baldwin soon redubbed “urban renewal” “Negro removal.”<sup>429</sup> Highways also decimated Latinx, Chinese, Italian, Native

421. *Id.* at 197–99 (discussing disputes over what counted as a place of entertainment or private club under 24 U.S.C. § 2000a).

422. *Id.* at 206–08, 219–24 (describing privatization of amusement parks and rise of the theme park).

423. ROBERT CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 10 (1975).

424. *Id.* at 318–19. Although Sidney Shapiro, Moses’ chief engineer, reported this decision to Caro, modern scholars have challenged the accuracy of Shapiro’s account. Glenn Kessler, Robert Moses and *Saga of the Racist Parkway Bridges*, WASH. POST (Nov. 10, 2021), <https://www.washingtonpost.com/politics/2021/11/10/robert-moses-saga-racist-parkway-bridges/> [<https://perma.cc/LB6D-Z4BH>]. More recent measurements of the bridges, however, confirm that they are lower than others built at the same time. *Id.*

425. KEVIN KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATIVISM* 111 (2005).

426. Deborah Archer, *White Men’s Roads Through Black Men’s Homes*, 73 VAND. L. REV. 1259, 1264–66 (2020).

427. *See generally* Gayle v. Browder, 352 U.S. 903 (1956), *aff’g* Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956).

428. Archer, *supra* note 426, at 1275, 1278.

429. CONVERSATIONS WITH JAMES BALDWIN 42 (Fred L. Stanley & Louis B. Pratt eds. 1989) (reprinting 1963 interview).

American,<sup>430</sup> and Polish neighborhoods,<sup>431</sup> often cutting the heart out of already struggling cities.

Highway expansion came at the expense of public transit. In part, this was the result of the zoning choices discussed earlier, as ever-expanding single-family lots made automobile dependence almost inevitable.<sup>432</sup> Whites with access to cars also began leaving mass transit, sometimes in response to integration mandates.<sup>433</sup> Funding choices exacerbated the trend. Although European countries began substantial subsidies for mass transit in the 1920s, the United States did not do so until the 1970s, when a vicious cycle of declining ridership and services had left many transit companies at or near bankruptcy.<sup>434</sup> Even once we began subsidizing mass transit, 80% of surface transportation funding continued to go to highways, with only 20% to public transportation.<sup>435</sup>

Sometimes choices to fund highways over public transit reflect explicit racial bias. In the 1970s, for example, Maryland canceled planned rail lines connecting Baltimore to the suburbs after protests that they would allow inner-city Black residents to “steal residents’ TVs and return to their ghettos,” and in the 1990s that they would bring “the wrong element” to the suburbs.<sup>436</sup> More recent funding choices lack such smoking guns, but clearly prioritize needs of wealthier, whiter, suburban residents over poorer, darker, urban ones.<sup>437</sup> In 2015, for example, Maryland abandoned plans to build an east–west line connecting underserved parts of Baltimore to public transit, despite years of planning and 900 million in committed federal funds.<sup>438</sup> Although the governor cited budgetary reasons for the choice, the money earmarked for the line was transferred to a new road and bridge project overwhelmingly benefiting White residents.<sup>439</sup>

430. Archer, *supra* note 426, at 1265 n.19.

431. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 119–20 (2006).

432. Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin* 19 (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3472145](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3472145) (“When lots are 20K (1/2 acre) or more, dependence on automobiles typically is total.”).

433. See KRUSE, *supra* note 425, at 116–17 (discussing drop in white ridership in metro-Atlanta).

434. See John Pucher, *Public Transportation*, in THE GEOGRAPHY OF URBAN TRANSPORTATION 199, 204, 220 (Susan Hanson & Genevieve Giuliano eds., 3d ed. 2004).

435. Robert Bullard, *Urban Equity: Considerations of Race and the Road Towards Equitable Allocation of Municipal Services*, 31 FORDHAM URB. L.J. 1183, 1186 (2004).

436. See Complaint at 11–13, *Balt. Reg’l Initiative Developing Genuine Equality v. Maryland, U.S. Dep’t. Transp. Off. C.R.* (2015), <https://www.naacpldf.org/wp-content/uploads/Baltimore-Red-Line-Complaint.pdf> [<https://perma.cc/QAE5-UZMA>] (recounting history).

437. See Bullard, *supra* note 435, at 1194–95 (describing 1994 complaint against Macon, Georgia, which spent \$33 million on roads and \$1 million on public transit, when Blacks comprised 90% of public transit users and were four times more likely not to own cars).

438. Complaint, *supra* note 436, at 5–7.

439. *Id.* at 7–8.



Although these choices have the greatest impacts on people of color, they affect all Americans. Highways have divided our center cities, preventing the economic and cultural commerce that sustains them.<sup>440</sup> American commute times have steadily grown, reaching an average of almost an hour per day in 2018,<sup>441</sup> more than twice the 25 minutes per day average in EU countries.<sup>442</sup> Rural communities have suffered as well. Faced with declining train ridership, the federal government amended federal laws that required railroads and interstate busses to serve less-populated areas.<sup>443</sup> The result is growing geographic inequality, not only between cities and suburbs, but between suburban and rural areas, and between more rural and more urban states.<sup>444</sup>

### C. Weakening Welfare

Over the course of the twentieth century, government became an increasingly important source of property, through government employment, granting of franchises and licenses, and—key to this section—through expansion of public assistance.<sup>445</sup> As discussed above,<sup>446</sup> efforts of local and state governments to limit responsibility for newcomers contributed to exclusion and delayed centralization of American relief programs. The Great Depression, however, created political will for the Social Security Act of 1935 (“SSA”) and a guarantee of income support as a matter of right.<sup>447</sup> But states and the federal government quickly clashed over benefits, particularly for American Indians, Black Americans, and Latino immigrants. These clashes contributed to political movement against federal overreach even before the desegregation battles of the 1950s. Over the next decades, they also produced a welfare system providing ever smaller benefits subject to ever more state discretion.

Race colored the SSA’s benefits from the start. The SSA created two tiers of aid: more generous, federally administered pensions for workers and their dependents; and stingier, locally administered, and more stigmatized, assistance based on need.<sup>448</sup> Agricultural and domestic workers were excluded from eligibility for pensions; as a result the SSA excluded almost half of all workers in the United States, 62% of Black workers, and 61% of Mexicans.<sup>449</sup> This excluded 43% of

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440. Adam A. Millsap, *Is it Time to Take Highways Out of Cities?*, FORBES (Nov. 21, 2019, 9:43 AM), <https://www.forbes.com/sites/adammillsap/2019/11/21/is-it-time-to-take-highways-out-of-cities/?sh=73316121a046> [https://perma.cc/BRA2-2YWZ] (discussing costs of highways to cities).

441. Ingraham, *supra* note 48 (noting new record of 27 minutes each way in 2018).

442. EUROSTAT, *supra* note 48 (noting that working people in the EU had an average commuting time of 25 minutes per day).

443. Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L. J. 1763, 1789–90 (2021)

444. *Id.* at 1771–72.

445. Charles A. Reich, *The New Property*, 73 YALE L. J. 733, 734–37 (1964).

446. *Infra* Part II.

447. KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972, at 3–4, 10 (2016).

448. *Id.* at 9.

449. FOX, *supra* note 17, at 250, 252.

Native-born Whites as well.<sup>450</sup> Indeed, poor Southern Whites lobbied for inclusion, which was supported by three-quarters of Americans across the country.<sup>451</sup> Public opinion, however, was not powerful enough to overcome opposition by Southern and Southwestern agricultural interests who opposed benefits for their largely Black and Latino workers.<sup>452</sup>

Racialized agricultural interests also defeated a requirement that welfare benefits provide “a reasonable subsistence compatible with decency and health.”<sup>453</sup> Virginia Senator Harry Byrd led the opposition to the measure, testifying that “nearly all of the Southern members of both committees” objected that requiring minimum standards would allow the federal government to dictate state affairs.<sup>454</sup> Senator Byrd is infamous today for his call for “massive resistance” to school desegregation,<sup>455</sup> but his position in the SSA debates presaged that opposition by more than two decades. Edwin Witte, director of the committee that proposed the SSA, agreed that Southern states wanted to preserve their right to discriminate against Black recipients, but noted that congressmen from other regions with “unpopular racial or cultural minorities [also] wanted to have their states free to treat them more or less as they wished.”<sup>456</sup>

As legal historian Karen Tani has examined, state resistance to federal oversight continued to plague the program. Early federal administrators had characterized public assistance as a right, resisted efforts by states to impose “suitable home” requirements on recipients of Aid to Dependent Children benefits,<sup>457</sup> and forced Arizona to rescind its exclusion of American Indians from Old Age Assistance coverage.<sup>458</sup> But in the 1950s, states began to push back hard, denouncing administrators for usurping local control, spreading socialism, and encouraging welfare fraud.<sup>459</sup>

Resistance targeted the Aid to Dependent Children program, which often supported divorced or never-married mothers.<sup>460</sup> States imposed new requirements to police recipients’ sexuality and child-bearing.<sup>461</sup> Although ostensibly applying to all recipients, many of these measures targeted Black women.<sup>462</sup> Ironically for a program founded in efforts to ensure that mothers of young children did not have to work outside the home,<sup>463</sup> states attacked Black women for trying to stay home with

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450. *Id.* at 252.

451. *Id.* at 255.

452. *Id.* at 254–56.

453. *Id.* at 253–54.

454. *Id.* at 254.

455. Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1128 (2014).

456. FOX, *supra* note 17, at 254.

457. TANI, *supra* note 447, at 203.

458. *Id.* at 24, 203, 141–49.

459. *Id.* at 155.

460. *Id.* at 159.

461. *Id.* at 205–07.

462. *Id.* at 207.

463. See GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917–1942*, at 11–12 (2018).

their children. A Missouri legislator, for example, condemned a woman who “quit a job as a maid because she could earn more from the state for her six children.”<sup>464</sup>

After federal administrators shut down expressly discriminatory measures in the 1940s, Northern states pioneered new racially coded resistance.<sup>465</sup> They argued that federal overreach required them to support “chiselers and loafers,” “illegitimate children,” and “freeload[ing]” newcomers.<sup>466</sup> Southern states built on these Northern attacks,<sup>467</sup> often tying their resistance to other antidiscrimination pressures. In 1960, for example, Louisiana terminated benefits for thousands of Black children as one of several laws in a “segregation package” designed to resist federal orders and punish civil rights activists.<sup>468</sup>

Recipients organized and, with the help of civil rights groups and legal services lawyers, fought back.<sup>469</sup> These efforts won several victories in the 1960s. President Lyndon Johnson, for example, declared the “War on Poverty,” including expansion of federal benefits, a central plank of his Great Society policy.<sup>470</sup> The Social Security Act of 1965 created the Medicare and Medicaid programs.<sup>471</sup>

Welfare recipients also won victories in the Supreme Court. In 1968, *King v. Smith* invalidated an Alabama provision terminating benefits for any mother who “cohabited” with an “able-bodied” man.<sup>472</sup> (The district court had also held the requirement unconstitutional, finding that it arbitrarily denied assistance to needy children,<sup>473</sup> but the Supreme Court did not decide the constitutional issue, basing its ruling solely on the Social Security Act.<sup>474</sup>) Even more significant was *Goldberg v. Kelly*, which held that Aid to Families with Dependent Children (“AFDC”) benefits were a property interest requiring a pre-deprivation hearing to terminate.<sup>475</sup>

The 1970s brought retreat from these victories. In *Wyman v. James*, the Nixon-reconfigured Court created a Fourth Amendment exception for welfare recipients, holding that the state could require home inspections as a condition of benefits.<sup>476</sup> *Wyman* involved a visit with written notice by a social worker with no law enforcement function.<sup>477</sup> Since then, however, courts have built on *Wyman* to uphold unannounced home inspections by criminal fraud investigators, drug tests,

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464. TANI, *supra* note 447, at 207.

465. *Id.* at 1–2, 160 (discussing resistance in Indiana and Newburgh, New York).

466. *Id.* (quoting Mayor of Newburgh and op-eds in Indiana newspapers).

467. *Id.* at 160.

468. *Id.* at 212.

469. *Id.* at 212–14.

470. *Id.* at 248.

471. See MICHENER, *supra* note 147, at 40–43 (describing history of programs).

472. *King v. Smith*, 392 U.S. 309, 311–13 (1968).

473. *Smith v. King*, 277 F. Supp. 31, 41 (M.D. Ala. 1967).

474. *King*, 392 U.S. at 313. Justice Douglas concurred to say the Court should have affirmed on the constitutional issue as well. *Id.* at 334.

475. See *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970).

476. *Wyman v. James*, 400 U.S. 309, 326 (1971).

477. *Id.* at 320–23.

and other measures that Professor Kaaryn Gustafson calls “the criminalization of poverty.”<sup>478</sup>

The period also saw the defeat of the last serious attempt to create uniform federal support for families.<sup>479</sup> Nixon’s proposed Family Assistance Program would have created a nationwide minimum grant for families that did not turn on a father’s absence from the home, and it shifted administrative responsibility from the states to the federal government.<sup>480</sup> Not an embrace of Johnson’s War on Poverty, the program reacted to concern that AFDC encouraged Black people to leave the South for more generous Northern states, resentment by poor Whites who felt left out of Great Society programs, and desire to reduce administrative costs and streamline welfare programs.<sup>481</sup> The proposal was rejected. Instead, Congress tightened work requirements for AFDC recipients and bundled other need-based programs (Old Age Assistance, Aid for the Blind, and Aid for the Permanently and Totally Disabled) into a federally-administered Supplemental Security Income program.<sup>482</sup> The symbolism was clear: AFDC, now thoroughly linked in the public imagination with women of color, remained subject to inconsistent and stigmatizing state regulation, while benefits for the “deserving poor” were provided uniformly by the federal government.

Racialized attacks on support for the poor increased in the next decades. In the 1980s, President Ronald Reagan made the imagined “welfare queen”—Black, unmarried, and using her illegitimate children to live in luxury on welfare payments—the central figure in his campaign against welfare.<sup>483</sup> But it took President Bill Clinton to enact the most significant retreat from welfare as it was conceived in 1935. The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) sought to “end welfare as we know it.”<sup>484</sup> PRWORA substantially expanded state discretion for welfare for poor families (renamed Temporary Assistance for Needy Families, or TANF), created lifetime caps of five years on receipt of welfare, required mothers to work to receive benefits, authorized states to cap welfare payments at a certain number of children, and provided states with financial incentives to remove families from welfare rolls.<sup>485</sup> The law responded to allegations that welfare caused “illegitimacy, the disintegration of the family, weakening of the work ethic, and crippling

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478. See Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009).

479. TANI, *supra* note 447, at 271.

480. *Id.* at 271–72.

481. *Id.* at 399 n.102.

482. *Id.* at 273.

483. KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 35 (2011).

484. President Clinton, *1995 State of The Union Address*, WASH. POST, (Jan. 24, 1995), <http://www.washingtonpost.com/wp-srv/politics/special/states/docs/sou95.htm> [<https://perma.cc/C6DP-2D4V>].

485. See GUSTAFSON, *supra* note 483, at 44–47.

dependency.”<sup>486</sup> If unchecked, pundits warned, these pathologies (already associated with Black families) would taint a “Coming White Underclass” as well.<sup>487</sup>

The PRWORA also cemented anti-immigrant exclusions from welfare benefits. The 1935 Social Security Act had not generally excluded noncitizens from coverage,<sup>488</sup> and inclusion of noncitizens drove opposition to welfare. In 1971, the Supreme Court found that Arizona and Pennsylvania measures excluding immigrants from benefits violated equal protection.<sup>489</sup> The Court did not, however, opine on whether *Congress* could enact such a restriction.<sup>490</sup> Congress responded in 1972, requiring immigrants to have five years of permanent legal residency to be eligible for Medicare and Medicaid.<sup>491</sup> In 1976, the Supreme Court upheld the restrictions.<sup>492</sup>

This limited exclusion from public benefits did not satisfy anti-immigrant forces. In the early 1990s, a “new nativism,” focusing particularly on Mexican and other Latino immigrants, swept the country.<sup>493</sup> Beginning with California’s Proposition 187, states and municipalities proposed hundreds of laws withholding a variety of government services from undocumented immigrants.<sup>494</sup> When courts held these laws violated federal requirements,<sup>495</sup> their proponents turned to Congress. In PRWORA, Congress denied undocumented immigrants almost all benefits and required legal residents to live in the United States for at least five years to be eligible for services.<sup>496</sup>

Two decades after PRWORA’s passage, the law has accomplished few of its goals. Millions more people live in poverty, including in “extreme poverty” of less than two dollars a day.<sup>497</sup> Adjusted for inflation, federal and state spending on

486. Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1672 (2005) (quoting a 1995 statement by Senator Kay Bailey Hutchinson).

487. Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14.

488. FOX, *supra* note 17, at 6–7.

489. *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

490. *Id.* at 382 n.14.

491. Social Security Amendments of 1972, Pub. L. No. 92-603, §§ 137, 1818, 1836, 86 Stat. 1329, 1330, 1372, 1374–75; Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395, 402 (1986) (discussing history of restrictions).

492. *Mathews v. Diaz*, 426 U.S. 67, 69 (1976).

493. Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139, 1167–68.

494. K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1924 (2019).

495. *Id.*

496. See Julia Field Constich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the Contract with America Congress*, 90 KY. L.J. 1043, 1052–57 (2001) (discussing provisions, including exceptions for refugees and certain services, and modification to prevent full application to those arriving before 1996).

497. Andrew Flowers, *Most Welfare Dollars Don’t Go Directly to Poor People Anymore*, FIVETHIRTYEIGHT, (Aug. 25, 2016, 7:00 AM), <https://fivethirtyeight.com/features/most-welfare-dollars-dont-go-directly-to-poor-people-anymore/> [https://perma.cc/XU3E-THSU].

TANF has declined only slightly since 1996.<sup>498</sup> But where in 1996 most funds went to cash payments for recipients, as of 2014 only 26% did.<sup>499</sup> States use their discretion to spend TANF dollars on many programs rather than recipients' financial needs.<sup>500</sup> This runs counter to an increasing body of research showing that direct cash payments are the most effective support for families in poverty.<sup>501</sup> Families that do receive cash payments receive less: by 2020, benefits for a parent with three children in most states were 20% lower than they were in 1996 and were not enough to pay average rent on a two-bedroom apartment in any state.<sup>502</sup>

The system is also deeply fragmented. Monthly grants for a family of four range from a low of \$170 per month in Mississippi to a high of \$1,086 per month in New Hampshire.<sup>503</sup> Benefit levels reflect a state's racial demographics and history. Fifty-five percent of Black children live in states where benefit levels are below 20% of the poverty line, compared to 41% of Latino children and 40% of White children.<sup>504</sup> Monthly grants in all states in the South and Southwest except New Mexico are less than 20% of the federal poverty level.<sup>505</sup>

Race was thus a prominent factor in creating a welfare state in which "dependency is anathema and dependencies abound."<sup>506</sup> It contributed to a system of property redistribution radically less generous and effective than those of other wealthy countries.<sup>507</sup> It encouraged our modern discourse of distrust of expertise and the federal government.<sup>508</sup> Indeed, political scientist Jamila Michener argues, it has fragmented our nation itself, as unequal provision of minimum support across states marks "an uneven democracy where citizenship is differentiated across space."<sup>509</sup>

498. *Id.*

499. Liz Schott, LaDonna Pavetti & Ife Floyd, *How States Use Federal and State Funds Under the TANF Block Grant*, CTR. ON BUDGET & POL'Y PRIORITIES 2 (Oct. 15, 2015), <https://www.cbpp.org/research/family-income-support/how-states-use-federal-and-state-funds-under-the-tanf-block-grant> [<https://perma.cc/3FYQ-HWSN>].

500. *Id.* (breaking down spending).

501. Charles Kenny, *Give Poor People Cash*, THE ATLANTIC (Sept. 25, 2015), <https://www.theatlantic.com/international/archive/2015/09/welfare-reform-direct-cash-poor/407236/> [<https://perma.cc/G2DP-3GFU>] (summarizing research).

502. Ali Safawi & Ife Floyd, *TANF Benefits Still Too Low to Help Families, Especially Black Families, Avoid Increased Hardship*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 8, 2020).

503. *Id.*

504. *Id.* at Table 6B. Although federal poverty levels do not account for regional differences in costs of living, area fair market rents reflect similar discrepancies: 49% of Black children live in states where benefits cover less than a third of fair market rent for the area, compared to 38% of Latino children, and 29% of White children. *Id.*

505. *Id.* at Fig.4.

506. TANI, *supra* note 447, at 21.

507. See Alesina & Glaeser, *supra* note 46 (finding that western European countries spend far more on redistributive schemes, and identifying racial heterogeneity and lack of proportional representation as the causes).

508. TANI, *supra* note 447, at 4–5.

509. MICHENER, *supra* note 147, at 169.

## CONCLUSION

So, here we are. Our racial projects have changed the meaning, shape, and distribution of property in the United States. They have made our cities poorer, our homes more expensive and less secure from foreclosure, our public goods less public, and our social safety net less safe. They have lengthened our commutes, privatized our pools, and impoverished our schools. They have undermined the income mobility that was once America's pride. They have also reduced governmental power to address these conditions, elevating private property and local control as a constitutional shield against reform.

The process was far from monolithic. The Fourteenth Amendment expanded constitutional protection for equality and due process. Congress protected equal property rights in numerous statutes, from the Civil Rights Act of 1866 to the Fair Housing Act of 1968 and beyond, and expanded distribution of property in landmark statutes like the Social Security Acts of 1935 and 1965, and the Affordable Care Act of 2010. The Supreme Court has provided precedents that affirm access to property and reject takings claims against redistributive measures. But each advance was met by a retrenchment that maintained and even exacerbated the flaws in our property system.

The current moment provides some reason for hope and some reason for despair. Like the political sea change after the Great Depression, the devastation of the COVID-19 pandemic created popular will for redistribution. The 2021 relief package, for example, included child tax credits that—had they been continued—would have slashed child poverty and increased income mobility.<sup>510</sup> Although the housing and social welfare funding unleashed by the New Deal built in devastating racial limitations on property, the contemporary moment includes a new reckoning with racial inequality. Even before the killings of Breonna Taylor, Ahmaud Arbery, and George Floyd and the resulting protests, policymakers had increased attention to race and zoning reform.<sup>511</sup> There may finally be an opportunity to create a more just property system without allowing racism to destroy it.<sup>512</sup>

But that moment is fast passing, and assertions of property rights are key to the backlash. In *Cedar Point Nursery v. Hassid*, the reconfigured Supreme Court

510. Christopher Pulliam & Richard V. Reeves, *New Child Tax Credit Could Slash Child Poverty Now and Boost Social Mobility Later*, BROOKINGS INST.: UP FRONT (March 11, 2021), <https://www.brookings.edu/blog/up-front/2021/03/11/new-child-tax-credit-could-slash-poverty-now-and-boost-social-mobility-later/> [<https://perma.cc/B2NV-73P4>].

511. See Jeff Andrews, *Cory Booker and Elizabeth Warren Want to Force Cities to Adopt YIMBY Policies. Can They?*, CURBED (July 22, 2019, 1:00 PM) <https://archive.curbed.com/2019/7/22/20699372/yimby-cory-booker-elizabeth-warren-election-2020> [<https://perma.cc/9WVP-T7BQ>] (discussing zoning reform proposals of presidential candidates); see also Lisa Prevost, *A Push for Zoning Reform in Connecticut*, N.Y. TIMES (Feb. 26, 2021), <https://www.nytimes.com/2021/02/26/realestate/connecticut-zoning-reform.html> [<https://perma.cc/7T57-EF3J>] (discussing proposals in Connecticut and other states).

512. But see SHERYLL CASHIN, *WHITE SPACE, BLACK HOOD 4* (2021) (“Each time the United States seems to dismantle a peculiar Black-subordinating institution, it constructs a new one and attendant myths to justify it.”).

issued a takings decision involving migrant farmworkers' rights that may undermine much of the regulatory state.<sup>513</sup> Mark and Patricia McCloskey, who brandished guns at peaceful Black Lives Matter protesters in the name of property protection,<sup>514</sup> won a slot at the 2020 GOP convention to argue that Democrats "want to abolish the suburbs altogether by ending single-family home zoning," bringing "crime, lawlessness and low-quality apartments into thriving suburban neighborhoods."<sup>515</sup> Property remains the politically acceptable way to justify inequality.

This Article shows that many of the rules of our system were really about race, not property. They were not designed, as property norms dictate, to enhance security, abundance, and distribution of resources. Instead, in part, their purpose was to exclude, dispossess, and dominate racial groups. Although their blatant racism is now illegal, the laws and distribution patterns remain, making property less secure, efficient, and accessible for everyone in America.

What is the way out of this dilemma? There is no simple solution, and this Article does not attempt one. Public title records, for example, may have originated in Indigenous dispossession and human bondage, but today they help protect security in land more than they undermine it. Rather than destroying such systems, we should restore and expand protections for owners against the kinds of "pen and ink witchcraft" once practiced by U.S. treaty negotiators and practiced today by mortgage lenders. Rights to exclude, similarly, provide essential protection for owners from governmental and private abuse, but must be tailored to those virtues, rather than used as an excuse for domination. A more general recommendation is that we should restore measures that increase access to property, such as restoring cash benefits as the primary form of welfare distribution and breaking down barriers to moving into different municipalities and school systems.

Reform, therefore, is not about undermining property, but achieving its goals. We can use this moment to break down the barriers to denser, more affordable housing, equitable distribution of public goods, and access to secure ownership and opportunity across all segments of society. If we do so, we will not just lessen America's continuing racial inequality. We will begin to break the shackles that undermine property's liberatory and democratic potential for all.

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513. See *Cedar Point v. Hassid*, 141 S. Ct. 2063, 2072 (2021); see also *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (invoking right to exclude to vacate eviction moratorium).

514. See Tony Messenger, Opinion, *This Wasn't the First Time the McCloskeys Pulled a Gun to Protect Property, Lawsuit Says*, ST. LOUIS POST-DISPATCH (Jul 2, 2020), [https://www.stltoday.com/news/local/columns/tony-messenger/messenger-this-wasn-t-the-first-time-the-mccloskeys-pulled-a-gun-to-protect-property/article\\_fc2a31b1-5f7b-55d5-83e3-8b3ca1211c7c.html](https://www.stltoday.com/news/local/columns/tony-messenger/messenger-this-wasn-t-the-first-time-the-mccloskeys-pulled-a-gun-to-protect-property/article_fc2a31b1-5f7b-55d5-83e3-8b3ca1211c7c.html) [<https://perma.cc/A8VZ-3U4J>] (discussing Mark McCloskey's frequent weaponizing of property law).

515. Jim Salter, *The McCloskeys Defend Show of Weapons in Republican National Convention Speech*, ST. LOUIS POST DISPATCH (Aug 24, 2020), [https://www.stltoday.com/news/local/crime-and-courts/the-mccloskeys-defend-show-of-weapons-in-republican-national-convention-speech/article\\_8f0beaf4-b42b-5e79-ba4c-01ae38442263.html](https://www.stltoday.com/news/local/crime-and-courts/the-mccloskeys-defend-show-of-weapons-in-republican-national-convention-speech/article_8f0beaf4-b42b-5e79-ba4c-01ae38442263.html) [<https://perma.cc/CT7R-LMZ8>].



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